Neutral Citation Number: [2026] EWCA Civ 248

Case No: CA 2024 002634

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(Tax and Chancery Chamber)
Mr Justice Trower and Judge Swami Raghavan
[2024] UKUT 00273 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 March 2026

Before:

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
SIR LAUNCELOT HENDERSON

- -

Between:

(1) MULLER UK AND IRELAND GROUP LLP **(2) MULLER DAIRY UK LIMITED** **(3) ROBERT WISEMAN AND SONS LIMITED** **(4) TM UK PRODUCTION LIMITED**	**Appellants**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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- -

Jonathan Peacock KC and Francis Fitzpatrick KC (instructed by **Ernst & Young LLP**) for the **Appellants**
Christopher Tidmarsh KC, Imran Afzal KC and Tomos Rees instructed by **The General Counsel and Solicitor for HMRC**) for the **Respondents**

Hearing date: 3 February 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Launcelot Henderson:

1. The second, third and fourth appellants are members of the Muller multinational corporate group which trades in dairy products. Each of them was incorporated, and is resident for tax purposes, in the UK. It is convenient to refer to them collectively as "the Corporate Members", because they own (in specified percentages) all the membership units in the first appellant ("the LLP") which is a limited liability partnership incorporated by them on 7 May 2013 under the Limited Liability Partnerships Act 2000.

2. On 1 July 2013, the Corporate Members transferred their respective trades, which they had previously carried on separately, together with certain assets to the LLP in return for the membership units in the LLP, pursuant to asset transfer agreements dated 28 June 2013. The assets transferred included various brands, licences and software, together with goodwill. It is common ground that the assets fall within the definition of "intangible fixed assets" (or "IFAs") in section 712 of the Corporation Tax Act 2009 ("CTA 2009"), and that the goodwill falls to be treated for Corporation Tax purposes in the same way as an IFA pursuant to section 715 of CTA 2009.

3. The transferred assets and goodwill (together "the Material Assets") were valued by Ernst & Young LLP in a report which was used to determine the values of the Material Assets acquired by the LLP, and the membership units in the LLP that each Corporate Member received in return for transferring the Material Assets which it owned. As a result, the second appellant ("MDUK") received 51.21% of the membership units in the LLP, the third appellant ("RWS") received 29.63% of the units, and the fourth appellant ("TMUK") received the remaining 19.16% of the units.

4. The Material Assets were recorded at their fair value in the accounts of the LLP, and they were then amortised over five years on a straight-line basis in those accounts. It is agreed that the relevant accounts were prepared in accordance with generally-accepted accounting principles ("GAAP"), that the values at which the Material Assets were initially recorded were their fair values at the time of acquisition by the LLP, and that the amortisation was appropriately and correctly calculated.

5. Against this background, in computing the profits of the LLP to be included in each Corporate Member's company tax return for the accounting periods ended 31 December 2013, 2014, 2015, 2016, 2017 and 2018, a deduction was taken for the amortisation of the Material Assets. However, this treatment was challenged by HMRC who opened enquiries into the relevant returns of the LLP and the Corporate Members on various dates between June 2015 and December 2018. Those enquiries were closed in January 2019, giving rise in due course to appeals by the LLP and the Corporate Members against the conclusions stated in, and the amendments made by, the relevant closure notices.

Legislation

6. The legislation with which we are mainly concerned is contained in Part 8 of CTA 2009, headed "Intangible Fixed Assets". As originally enacted, Part 8 had 18 Chapters and ran from sections 711 to 906. I will need to examine some of the provisions of Part 8 in detail, but before doing so I will refer to some of the key provisions relating to partnerships contained in Part 17 (sections 1256 to 1273, again

as originally enacted). CTA 2009 formed part of the Tax Law Rewrite Project, and was described in its long title as "An Act to restate, with minor changes, certain enactments relating to corporation tax; and for related purposes".

7. The basic provision governing the taxation of LLPs, which as a matter of general law have a separate corporate identity, is section 1273:

> "(1) For corporation tax purposes, if a limited liability partnership carries on a trade or business with a view to profit –
>
> (a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),
>
> (b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and
>
> (c) the property of the limited liability partnership is treated as held by the members as partnership property.
>
> References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade or business with a view to profit.
>
> (2) For all purposes, except as otherwise provided, in the Corporation Tax Acts –
>
> (a) references to a firm include a limited liability partnership to which subsection (1) applies,
>
> (b) references to members of a firm include members of such a limited liability partnership,
>
> (c) references to a company do not include such a limited liability partnership, and
>
> (d) references to members of a company do not include members of such a limited liability partnership."

8. Accordingly, the general effect of section 1273 is to "look through" the separate corporate identity of an LLP and to treat it as "transparent", in substantially the same way as a general partnership formed in England or Wales between individuals under the Partnership Act 1890 would be treated. This is the first of several substantial pieces of statutory deeming which we encounter in the present case.

9. But what if one or more of the members of an LLP is itself a company within the charge to corporation tax? That is the position of the Corporate Members of the LLP. The answer is provided by section 1259, which is headed "Calculation of firm's profits and losses":

> "(1) This section applies if a firm carries on a trade and any partner in the firm ("the partner") is a company within the charge to corporation tax.
>
> (2) For any accounting period of the firm, the amount of the profits of the trade ("the amount of the firm's profits") is taken to be the amount determined, in relation to the partner, in accordance with subsection (3) or (4).
>
> (3) If the partner is UK resident –
>
> (a) determine what would be the amount of the profits of the trade chargeable to corporation tax for that period if a UK resident company carried on the trade, and
>
> (b) take that to be the amount of the firm's profits.
>
> (4) If the partner is non-UK resident –
>
> (a) determine what would be the amount of the profits of the trade chargeable to corporation tax for that period if a non-UK resident company carried on the trade, and
>
> (b) take that to be the amount of the firm's profits.
>
> (5) The amount of any losses of the trade for an accounting period of the firm is calculated, in relation to the partner, in the same way as the amount of any profits.
>
> (6) …"

10. Since the trade of the LLP, which was transferred to it as a going concern by the Corporate Members on 1 July 2013, is deemed by section 1273 to be carried on in partnership by the Corporate Members, which are all UK-resident, it follows that the amount of the profits of the (notional) firm in relation to each of them is taken to be, for any accounting period, the amount determined under subsection (3)(a), namely "what *would b*e the amount of the profits of the trade chargeable to corporation tax for that period *if a UK company carried on the trade"*. It can be seen, therefore, that at this stage of the exercise a further important deeming provision is introduced, which requires us to calculate, in relation to each of the three Corporate Members, what the amount of the profits of the notional firm would be on the counter-factual assumption that the actual trade of the LLP were carried on by "a UK resident company". As I shall explain, it is the scope and effect of this further deeming provision which lies at the heart of the main dispute between the parties.

11. I would also note at this point that the relevant definition of "company" in the Corporation Tax Acts, for the periods in issue, is to be found, via a roundabout route which Mr Tidmarsh KC for HMRC helpfully took us through, in section 1121(1) of the Corporation Tax Act 2010 ("CTA 2010"):

> "In the Corporation Tax Acts "company" means any body corporate or unincorporated association, but does not include a partnership…".

The definition is thus much wider than the word "company", read in isolation, might suggest, and it includes (in particular) bodies corporate of all types and unincorporated associations.

12. I add a few words on terminology in relation to what I have called "deeming provisions". In their skeleton argument in support of the appeal, counsel for the appellants submitted that section 1259(3) is not a deeming provision, because it does not require one to deem the partnership to be a company. Instead, it is a statutory direction to compute the profits of the partnership on a particular basis. In his opening submissions to us, however, Mr Peacock KC rightly characterised this as "a slightly arid debate". He accepted that "deeming provision" is not a term of art, and that what matters is what the statute on its true construction requires. I agree, and wish to make it clear that when I use the term it is for convenience only, to refer to any statutory provision which requires an unreal or hypothetical state of affairs to be imagined. I will return later to the authorities on the interpretation of deeming provisions, but in my judgment section 1259(3) is a form of deeming provision because it requires a counter-factual assumption to be made, namely that the actual trade of the LLP is carried on by "a UK resident company". For similar reasons, I am content to refer to that hypothetical UK resident company as a "notional" company, as did the two Tribunals below, without in any way prejudging the crucial question of the extent to which the relevant deeming extends.

Part 8 of CTA 2009: the treatment of IFAs for the purposes of corporation tax

13. In what follows, references are (unless otherwise stated) to the provisions of Part 8 as originally enacted and in force during the relevant periods.

14. In general, Part 8 does not apply to partnerships or to LLPs treated as partnerships because (as I have explained) such bodies are treated as transparent, and not as an entity separate and distinct from the partners. However, section 1259 provides the machinery by which corporate members of a firm are to be taxed in relation to the firm's profits and losses: see [9] above, and the relevant statutory assumption in section 1259(3)(a) which brings in the notional UK resident company whose profits must be ascertained. It is in the context of this hypothetical exercise that the provisions of Part 8 are directly engaged as an integral and important part of the corporation tax code applicable to the notional company.

15. Chapter 3 of Part 8 makes provision for debits to be brought into account, so far as material, for writing down the capitalised cost of an IFA or goodwill on an accounting basis: see sections 726(1)(b) and 729. For present purposes, it is enough to quote section 729(1):

> "If in a period of account a loss is recognised in determining a company's profit or loss in respect of capitalised expenditure on an intangible fixed asset
>
> (a) by way of amortisation, or

> (b) …
>
> a corresponding debit must be brought into account for tax purposes."

16. As I have already recorded at [4] above, there is no dispute that losses in respect of the LLP's expenditure on the IFAs and goodwill transferred to it by the Corporate Members in 2013 were properly recognised in its accounts and correctly amortised over a period of five years. HMRC nevertheless challenge the availability of the corresponding amortisation debits in determining the profits of the notional company on the ground that the appellants cannot satisfy the gateway provision in section 882, which lays down a general rule that Part 8 applies only to IFAs of a company that (relevantly) are acquired by the company on or after 1 April 2002 "from a person who at the time of acquisition is not a related party in relation to the company".

17. Section 882 provides that:

> "(1) The general rule is that this Part applies only to intangible fixed assets of a company ("the company") that –
>
> (a) are created by the company on or after 1 April 2002,"
>
> (b) are acquired by the company on or after that date from a person who at the time of acquisition is not a related party in relation to the company, or
>
> (c) are acquired by the company on or after that date in case A, B or C from a person who at the time of acquisition is a related party in relation to the company."

18. The question of who is a "related party" for the purposes of section 882(1) is answered by section 835, which materially provides that:

> "(1) This section explains when a person ("A") is a "related party" in relation to a company ("B") for the purposes of this Part.
>
> (2) In a case where A is a company, A is a related party in relation to B if –
>
> (a) A has control of, or holds a major interest in, B, or
>
> (b) B has control of, or holds a major interest in, A.
>
> (3) In a case where A is a company, A is a related party in relation to B if A and B are both under the control of the same person…"

19. The meaning of "control" is in turn defined in section 836:

> "(1) For the purposes of this Chapter, in relation to a company, "control" means the power of a person to secure that the

> company's affairs are conducted in accordance with the person's wishes –
>
> (a) by means of the holding of shares or the possession of voting power in or in relation to the company or any other company, or
>
> (b) as a result of powers conferred by the articles of association or other document regulating the company or any other company.
>
> (2) Sections 838 to 840 (rights and powers to be taken into account) apply in relation to the determination for the purposes of this Chapter whether a person has control of a company."

20. Some preliminary points may be made about the general rule in section 882. First, the relevance of the date 1 April 2002 is that it was the commencement date of the comprehensive new regime introduced by section 84 of, and schedule 29 to, the Finance Act 2002 ("FA 2002") to reform the tax treatment of intellectual property and other intangible assets employed by a company as fixed capital items (as opposed to stock to be turned over) in its trade or business. The gateway provision with which we are now concerned was first enacted in paragraph 118 of schedule 29. The new regime was then substantially re-enacted in CTA 2009.

21. Secondly, the general structure of section 882 is that the new regime now contained in Part 8 of CTA 2009 applies only to IFAs of a company created or acquired on or after 1 April 2002 in one of the three ways specified in subsection (1). Those three ways are then explained in the remainder of section 882, read where necessary with ancillary provisions in the rest of Chapter 16. The first permitted method, creation by the company, is agreed to be irrelevant for present purposes. The other two permitted methods focus on the date of acquisition of the IFA, and whether or not the person from whom the IFA was acquired was at that time a "related party" as defined. If the acquisition was *not* from a related party, subsection (1)(b) applies and the gateway to Part 8 is open. If, on the other hand, the acquisition *was* from a related party, subsection (1)(c) applies and the gateway is closed *unless* one or more of Cases A, B and C are satisfied. It is common ground that none of those Cases applies, so the gateway is closed if on 1 July 2013, being the date when the Material Assets were acquired by the LLP in the real world, and also the date of any deemed acquisition by the notional company in the hypothetical world, the Corporate Members and the notional company were related parties.

22. Thirdly, it follows, by reason of this structure, that the test which the appellants need to satisfy, if they are to gain access to Part 8 and obtain relief for the relevant amortisation debits, is the negative test embodied in subsection (1)(b), namely that the acquisition of the Material Assets was from a person who was *not* at the date of acquisition a related party in relation to the notional company. It is also now common ground that the legal burden of proof on this issue rests, in the usual way, on the appellant taxpayers, although the contrary appeared to be suggested by a footnote in their skeleton argument which Mr Peacock KC wisely did not seek to support in his oral submissions when questioned on the point.

23. Fourthly, it seems to me reasonable to infer, at a fairly high level of generality, that the mischief which a gateway in these terms seeks to address is the possibility for manipulation of the new regime that might arise if IFAs were freely transferable between related parties otherwise than in one or more of the three limited scenarios contemplated by Cases A, B and C. It is also relevant to note here that Part 8 contains an express anti-avoidance provision, section 864, which states that:

> "(1) In determining whether a credit or a debit is to be brought into account under this Part and, if so, its amount, any tax avoidance arrangements are ignored.
>
> (2) Arrangements are "tax avoidance arrangements" for this purpose if their main object is to enable a company –
>
> (a) to obtain a debit under this Part to which it would not otherwise be entitled,
>
> (b) to obtain a debit under this Part which exceeds that to which it would otherwise be entitled,
>
> (c) to avoid having to bring a credit into account under this Part, or
>
> (d) to reduce the amount of any such credit."

"Arrangements" are then very broadly defined. We were informed by Mr Peacock KC, without contradiction, that HMRC had originally contemplated a challenge based on section 864 in the present case, but they abandoned it before the appeals reached the First-tier Tribunal ("FTT") having satisfied themselves that the arrangements were not a tax avoidance transaction.

The main issues

24. The first main issue dividing the parties arises from the legislation I have reviewed. It centres on the true scope of the deeming provision in section 1259(3)(a) of CTA 2009, which (as we have seen) requires determination of the amount of the profits of the trade carried on by the notional UK resident company in the relevant accounting periods after the transfer of the Material Assets to the LLP on 1 July 2013. If the Corporate Members are to be entitled to the amortisation debits which they wish to bring into account, they need to rely on the provisions of Part 8 of CTA 2009; but in order to do that, they need to show that access to Part 8 is not excluded by the general rule in section 882, on the basis that, in the deemed world, the Material Assets must be taken to have been acquired by the notional company from a related party, with the consequence that the negative test in section 882(1)(b) is not satisfied. In particular, this issue raises the question of how far, if at all, the relationship of ownership and control which admittedly exists as between the Corporate Members and the LLP in the real world must be taken to be replicated in the deemed world. In broad terms, it is now accepted by the appellants that if, in the deemed world, the ownership and control attributes of the parties in the real world are to be carried over and applied to the gateway provisions of section 882, then the "related party" test would be failed,

the gateway would be closed, Part 8 would not apply, and the appeals must be dismissed.

25. This issue was decided in favour of HMRC by both Tribunals. The decision of the Tax Chamber of the FTT ("the FTT Decision", Tribunal Judge Tony Beare sitting with Mr John Woodman) was released on 22 February 2023: see [2023] UKFTT 221 (TC), [2023] SFTD 751. The main discussion of this issue by the FTT is at [103] to [123] of the FTT Decision. On appeal to the Upper Tribunal ("UT"), the decision of Trower J sitting with Judge Swami Raghavan ("the UT Decision") was released on 6 September 2024: see [2024] UKUT 273 (TCC), [2024] STC 1705. The main part of their discussion of this issue is at [35] to [68].

26. Although this conclusion was sufficient to determine the appeals, each Tribunal went on to consider *obiter* HMRC's alternative case that in relation to accounting periods beginning on or after 25 November 2015 the "related party" condition was in any event not satisfied because of amendments extending the definition of that term introduced by the Finance Act 2016 ("FA 2016"). It will be convenient to explain the nature of the two further issues arising from the FA 2016 amendments after I have dealt with the main issue. At this stage, it is enough to say that each Tribunal also decided the two further issues in favour of HMRC.

27. The LLP and the Corporate Members now appeal to this court, with permission for a second appeal granted by the Court of Appeal.

The correct approach to the construction of statutory deeming provisions

28. It is common ground that authoritative guidance on the correct approach to the construction of statutory deeming provisions may be found in the decision of the Supreme Court in *Fowler v Revenue and Customs Commissioners* [2020] UKSC 22, [2020] 1 WLR 2227 ("*Fowler"*). As Lord Briggs JSC, with whom the other members of the court agreed, said at [27]:

> "There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory. The relevant dicta are mainly collected in a summary by Lord Walker of Gestingthorpe JSC in *DCC Holdings (UK) Ltd v Revenue and Customs Comrs* [2011] 1 WLR 44, paras 37-39, collected from *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, *Marshall v Kerr* [1995] 1 AC 148 and *Jenks v Dickinson* [1997] STC 853. They include the following guidance, which has remained consistent over many years:
>
> > (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.

> (2) For that purpose the court should ascertain, it if can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
>
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, 133:
>
> "The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.""

29. I emphasise in particular the first, second and fifth of the principles distilled by Lord Briggs from the "useful but not conclusive dicta" in reported authorities which provide guidance "which has remained consistent over many years".

Submissions of the appellants on the main issue

30. The appellants repeated before us, with some modifications, the submissions on the main issue which they had already advanced before both Tribunals.

31. As I have said, I do not accept their submission that section 1259(3) of CTA 2009 is not a form of deeming provision: see [12] above. But the appellants rightly emphasise that the only assumption expressly required by section 1259(3) is that the amount of the profits of the LLP chargeable to corporation tax is taken to be the amount that would be so chargeable for each relevant accounting period "if a UK company carried on the trade". In other words, it is a statutory direction to compute the profits of the firm on a particular basis, no more and no less. In particular, this direction does not require one to deem the partnership to be a company. Accordingly, it is said, one has to look at the nature and incidents of the trade in fact carried on by the LLP so as to compute the profits of the trade as if it were carried on by an unspecified UK resident company, but there is no requirement to import into that computation attributes of ownership and control which mirror those of the actual LLP.

32. The reason for section 1259, say the appellants, is that the computation of trading profits for corporation tax differs in some respects from the computation of profits for income tax. For example, corporation tax, which was introduced in 1965, has always

charged profits to tax by reference to accounting periods, which are different from the basis year periods used for income tax purposes. The residence of companies is also determined by different principles from the residence of individuals. Thus, section 1259 may require up to four separate calculations to be performed in calculating the profits and losses of a trade carried on by a firm with both corporate and individual members, depending on whether the partner in question is, or is not, a company and whether the partner is, or is not, UK resident.

33. The appellants accept, however, that the provisions of Part 8 of CTA 2009 do in principle apply to a computation of profits of the notional company under section 1259(3). Indeed, this is a crucial step if the Corporate Members are to be entitled to the amortisation debits which they seek. But in the absence of any attribution by Parliament to the notional company of characteristics of ownership and control which mirror those of the LLP, the appellants submit that the gateway condition for access to Part 8 in section 882 must inevitably be satisfied. The deemed acquisition of the Material Assets by the notional company in 2013 cannot have been from a related party, because it was an acquisition from an unspecified UK resident company, with the consequence that the negative condition in section 882(1)(b) applied and the gateway to Part 8 was open.

34. In his oral submissions to us, Mr Peacock KC did not shrink from the position that, if the appellants' submissions were correct, the negative condition of acquisition from a non-related party as at the date of acquisition would always be satisfied. The reason for this, he submitted, was that Parliament had not made express provision for the attribution of any real-world characteristics of ownership and control to the notional UK resident company, and nor could any such attribution be implied from the statutory context. He reminded us that our task is to construe the words that Parliament has actually used, and our duty is to give effect to those words if their meaning is clear and unambiguous and does not produce absurdity: see the well-known principles of statutory construction restated by the Supreme Court in *R(O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [29] to [31] per Lord Hodge DPSC, recently repeated and endorsed, again by the Supreme Court, in *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879, at [9].

35. Mr Peacock KC also pointed out that our decision on this issue might well have repercussions for other aspects of the post-2002 regime for the taxation of corporate IFAs, for example in relation to the provision made in section 775 for so-called tax-neutral transfers between companies in the same group, where membership of a group is largely defined by reference to share capital. He accepted that situations could arise where, in the context of a transfer by a company to a partnership composed of itself and another, it would not be possible to establish that the transfer was tax-neutral because it could not be shown that the notional UK resident company posited by section 1259(3) was in the same group as the transferor. Mr Peacock KC did not develop the point in any detail, but said that the appellants accepted the burden as well as the benefit of the argument they are advancing in the present case.

36. Finally, I should record that the appellants place some reliance upon observations made by the UT (Leech J and Judge Thomas Scott) in *BCM Cayman LP and another v Revenue and Customs Commissioners* [2022] UKUT 198 (TCC), [2022] STC 1586 ("*BCM Cayman"*) at [161]. The UT was there considering the scope and effect of the

statutory deeming provision in section 1259(4) of CTA 2009, i.e. the equivalent provision to the one with which we are concerned but where the corporate partner is *non-UK resident* and the amount of profits to be calculated is what it would be "*if a non-UK resident company carried on the trade*". In that closely analogous context, the UT held that the only assumption required for the purposes of section 1259(4) is that a non-UK resident company had carried on the trade, and that the assumption extended only to the calculation of profits for the purposes of section 1259 and had no other effect. The UT found support for this in the use of the indefinite article in the phrase "a non-UK resident company". The issue in that case, however, was far removed from the present case, and concerned the question whether a non-UK resident member of a UK trading partnership should be treated as carrying on the trade of the partnership for the purposes of the loan relationship code merely because the notional non-UK resident company posited by section 1299(4) is treated as carrying on the trade. The UT answered this question in the negative, but it was not concerned at all with the process of calculating the notional company's profits. I therefore agree with HMRC that the decision of the UT in *BCM Cayman* is of little assistance in the present case, and in any event it is not binding on us as a matter of precedent. It remains to add that this court upheld the decision of the UT in *BCM Cayman* but did not address section 1259: see [2023] EWCA Civ 1179, [2023] STC 1738.

Submissions of HMRC on the main issue

37. HMRC's oral submissions on this issue were presented by Mr Tidmarsh KC. The nub of HMRC's case is that the notional company assumed to exist by section 1259(3) must be deemed to have the same ownership characteristics as the firm in question (here, the LLP) for the purpose of determining whether the notional company was related to the Corporate Members who transferred the Material Assets to the LLP within the meaning of section 882 of CTA 2009.

38. HMRC stress the importance of the legislative purpose in approaching the question of statutory interpretation: see *Rossendale Borough Council v Hurstwood Properties (A) Limited* [2021] UKSC 16, [2022] AC 690 at [10] and *Fowler* at [27(1) and (2)]. HMRC agree with the appellants that the general purpose of section 1259 of CTA 2009 is to ensure that the profits of a partnership with a corporate member are calculated in accordance with corporation tax rules. In agreement with the UT, HMRC then identify the specific purpose as being to calculate the profits and losses of the firm: see the UT Decision at [39].

39. The next step in the argument is that Part 8 of CTA 2009 forms an important part of the computation process required by section 1259, and that section 882 provides a gateway for determining whether Part 8 applies in relation to IFAs created or acquired by a company on or after 1 April 2002. For the purposes of section 882, "the company" is the notional company posited by section 1259, and the effect of section 882(1)(b) is that it must be shown (by the appellant taxpayers, and not by HMRC) that the assets in question were acquired from a person who was not at the relevant time a related party.

40. In order to answer this question, it is necessary to attribute the ownership and control characteristics of the firm to the notional company, because if the notional company had no identifiable ownership or control characteristics, it would be impossible to

conclude whether it was or was not related to the transferor of the assets. In that case, Part 8 would always apply in computing the profits of the notional company because the section 882(1)(b) gateway would always be open. Parliament cannot have intended such an illogical result, particularly because section 882 is basically an anti-avoidance provision intended to disallow deductions engineered by transactions between companies under common control. In terms of the guidance in *Fowler*, it is, say HMRC, a necessary corollary of the deeming provision that the ownership and control characteristics of the firm are to be attributed to the notional company, both to allow the calculations to be carried out and to disallow deductions arising from transactions between entities under common control.

41. As to the question whether the Corporate Members were related parties in relation to each notional UK resident company posited by section 1259(2), it is clear (and is no longer disputed) that this test is satisfied if the company is taken to have the ownership and control characteristics of the LLP. The precise route by which this result is reached turns on the meaning of "control" in section 836 of CTA 2009 and the definition of "company" in section 1121 of CTA 2010. This was all helpfully explained by the UT in the UT Decision at [18] to [22], referring in turn to the FTT Decision at [79].

Discussion of the main issue

42. The point is ultimately a short question of statutory interpretation, which turns on the true scope of the deeming provision in section 1259(3)(a) of CTA 2009. The purpose of the deeming is to ascertain the amount of the firm's profits, i.e. the amount of the profits of the LLP to be divided between the three UK resident Corporate Members in accordance with their respective membership units in the LLP, on the assumption (or hypothesis) that the trade of the LLP were carried on by "a UK resident company". Making that assumption, the amount of the LLP's profits is taken to be the amount of the profits that would be chargeable to corporation tax of that notional UK resident company for the relevant accounting period of the LLP.

43. It is at once apparent that the computation of the notional profits of the notional company cannot be ascertained in a vacuum, because the trade with which section 1259 is primarily dealing is the actual trade of the LLP carried on through the agency of the Corporate Members which own and control it. The need to posit a notional trade arises only because each of the Corporate Members is itself a company within the charge to corporation tax: see section 1259(1). I therefore start with a strong predisposition not to interfere with the reality of the actual trade carried on by the LLP any further than is necessary to accommodate the hypothesis that its actual trade is carried on by a UK resident company instead of by the LLP. What I would expect to find is that all the factual details and circumstances of the LLP's real trade are to be taken into account for the purposes of producing a notional amount of profits chargeable to corporation tax, but that the statutory deeming should extend no further than that unless required by clear statutory language. What I would not expect to find is that the reality of the actual trade is to be disregarded or materially modified when applying the statutory hypothesis to the facts, again unless this is required by clear statutory language. Yet this appears to be precisely what the argument for the appellants invites us to do, when it comes to applying the provisions of Part 8 of CTA 2009 in the notional world to the transactions entered into between the Corporate Members and the LLP in 2013.

44. The forensic problem which confronts the appellants is that they have to rely on the applicability of Part 8 in the notional world posited by the deeming provision if they are to obtain the amortisation debits which they seek, but they can only do this by disregarding the relationship of ownership and control which existed in the real world between the LLP and the Corporate Members as at the date of the transfer of the Material Assets in 2013. It is not disputed that the existence of this real world relationship would have disqualified the Corporate Members from obtaining the debits if the deeming provision permitted account to be taken of the actual circumstances of the transfers, because the notional company and the Corporate Members would be related parties and the gateway of section 882 to Part 8 would be firmly closed.

45. How, then, do the appellants contend that this convenient result for them is achieved on the true construction of the deeming provision?

46. As refined by Mr Peacock KC in his skilful oral submissions, the key contention appears to be that the deeming provision should be read literally as requiring no assumptions to be made beyond the bare fact that the trade is carried on by an unspecified and anonymous UK resident company which has no "real world" characteristics beyond the bare minimum needed to enable a corporation tax computation of profits to be made. Thus, it is accepted that the computation requires the activities of the LLP to be replicated in the notional world, because otherwise there would be no foundation for any computation to be made of the profits derived from those activities during the relevant accounting periods. It is also accepted that the provisions of Part 8 must in principle be applied in relation to the 2013 transactions, because those transactions formed an integral part of the trade carried on in the real world, and they must therefore be mirrored appropriately in the notional world. However, it is argued, there is no warrant in the statutory language for attributing to the notional company in the context of Part 8 any characteristics beyond its status as a UK resident company which entered into the 2013 transactions on the relevant dates; and, in particular, there is no warrant for attributing to the notional company any of the ownership or control characteristics which applied to the relationship between the Corporate Partners and the LLP in the real world.

47. Accordingly, submit the appellants, although the application of Part 8 in the notional world must be considered, the result is that the gateway to Part 8 in section 882(1)(b) is satisfied. The IFAs must be taken to have been acquired by the notional company on or after 1 April 2002, from persons (the Corporate Partners) who at the time of acquisition in 2013 were not related parties in relation to the company. The reason why they were not related parties is that the limited scope of the deeming provision, properly construed, does not permit the attribution to the notional company of the real world characteristics of ownership and control which, if one were permitted to take them into account, would admittedly lead to the conclusion that the notional company and the Corporate Partners were related parties.

48. It is at this point, in my judgment, that the argument for the appellants breaks down. I can see no principled basis for construing the scope of the deeming provision so narrowly, when the purpose of the exercise mandated by the deeming is to produce a computation of trading profits for corporation tax purposes to be taken as a proxy for the actual profits of the LLP in ascertaining the taxable shares of the Corporate Partners under section 1259(3) of CTA 2009. For that purpose, Parliament must in

my view be taken to have intended that the real-world nature and circumstances of the LLP's trade should be replicated as far as possible in making the notional computation. That is in my judgment the natural import of the language of the deeming provision, read in its context and having regard to the applicable principles of partnership taxation. I can think of no sensible reason why Parliament should have wished to impose a narrower set of assumptions about the real world for the purposes of the notional computation, and Mr Peacock KC was unable to suggest any.

49. For the resolution of the present issue, however, it is unnecessary to go further than holding that, on its true construction, the deeming provision in section 1259(3) requires the notional UK resident company to have the ownership and control characteristics of the LLP at least for the purposes of applying section 882 of CTA 2009.

50. My conclusion is essentially the same as that reached by the UT in the carefully reasoned UT Decision. At [46], the UT commented as follows on the scope of the deeming:

> "The extent of deeming will be commensurate to the statutory purpose. As discussed, that purpose is calculation of the profits. Calculation in this context is not simply an exercise of identifying the arithmetic process to be applied to given amounts, but may also include rules as to what, or the extent to which, amounts are to be included within that process. Checking that the related party exception does not apply in order to know whether debits for amortisation of intangibles may be deducted is just as much a part of the calculation as the subtraction of the amortised amount in order to derive the profits figure from which the appellants' profit shares can be derived."

I agree.

51. The UT went on to say at [48], in a passage which encapsulates the core of their reasoning:

> "Reaching this view does not, as the appellants suggest amount to judicial legislation by reading in words which are not there. The legislative mandate is to calculate profits by reference to a UK-resident company carrying on the trade. As Mr Tidmarsh rightly pointed out, a literal reading of the provision, whose terms only require that the notional company is carrying on the trade would not imply that assets used in the trade were acquired in the same way and at the same time and from the same person as they were actually acquired by the partnership. To that extent the notional company mirrors reality for that purpose. Consistent with that and in order to make the calculation provisions work, it is, we consider necessary to attribute the ownership characteristics of the partnership (and the outcome on whether they result in the requisite control) to the ownership of the notional company. This does not mean

> making assumptions about every kind of attribute a company might have, for instance whether it is public or private; crucially it is only the characteristics necessary to calculate profits which require attribution."

Again, I agree.

52. I have also been much assisted by the full and detailed treatment of the issue in the FTT Decision, from which I quote the following at [112]:

> "The Appellants accept that the provisions in Part 8 of the CTA 2009 generally apply in carrying out the notional company calculation and that, in carrying out that calculation, it is necessary to look at the actual transactions entered into by the partnership. However, they claim that, because the notional company is just that – a generic company which is assumed for computational purposes only and not an actual company – the identity of the person or persons from whom the partnership acquired the relevant assets is somehow irrelevant. We disagree. We think that, in the same way that the actual transactions carried out by the partnership inform the notional company calculation, so too do the actual identity of the counterparties to those actual transactions, and for precisely the same reason. It is implicit in carrying out the notional company calculation that all of the actual facts and circumstances surrounding the transactions into which the partnership has entered are taken into account when the notional company calculation is carried out."

The FA 2016 issues

53. If the other members of the court agree, the conclusion which I have reached on the main issue is enough to dispose of the appeals in HMRC's favour. In common with the Tribunals below, however, I will go on to consider the two issues raised by section 52 of FA 2016 which enacted further provisions relating to Chapter 16 of Part 8 of CTA 2009 and the "related party" test. HMRC's oral arguments on this part of the case were presented by Mr Afzal KC.

54. Section 52 of FA 2016 provided, so far as material, as follows:

> "(1) Chapter 16 of Part 8 of CTA 2009 (pre-FA 2002 assets) is amended as follows.
>
> (2) In section 882 (application of Part 8 to assets created or acquired on or after 1 April 2002), after subsection (5) insert –
>
> "(5A) References in this section to one person being (or not being) a related party in relation to another person are to be read as including references to the participation condition being met (or, as the case may be, not met) as between those persons.

> (5B) References in subsection (5A) to a person include a firm in a case where, for section 1259 purposes, references in this section to a company are read as references to the firm.
>
> (5C) In subsection (5B) "section 1259 purposes" means the purposes of determining under section 1259 the amount of profits or losses to be allocated to a partner in a firm.
>
> (5D) Section 148 of TIOPA 2010 (when the participation condition is met) applies for the purposes of subsection (5A) as it applies for the purposes of section 147(1)(b) of TIOPA 2010."
>
> …
>
> (5) The amendments made by this section have effect in relation to accounting periods beginning on or after 25 November 2015.
>
> (6) For the purposes of subsection (5), an accounting period beginning before and ending on or after 25 November 2015 is to be treated as if so much of the accounting period as falls before that date, and so much of the accounting period as falls on or after that date, were separate accounting periods.
>
> (7) An apportionment for the purposes of subsection (6) must be made –
>
> (a) in accordance with section 1172 of CTA 2010 (time basis), or
>
> (b) if that method produces a result that is unjust or unreasonable, on a just and reasonable basis."

55. It can be seen, therefore, that section 52 amended section 882 of CTA 2009 (the gateway provision to Part 8) by the insertion of four new subsections 882(5A) to (5D) inclusive, and by enacting the commencement provisions contained in subsections (5) to (7). The first of the new subsections extended the definition of "related party" in section 882 so as to include cases where the "participation condition" is, or is not, met as between the relevant persons. The "participation condition" is then itself defined in the new subsection (5D) by reference to section 148 of the Taxation (International and Other Provisions) Act 2010 ("TIOPA 2010") which defined the term for the purposes of the basic transfer-pricing rule in Chapter 1 of Part 4 of TIOPA 2010. By virtue of section 147(1)(b), it is part of "the basic pre-condition" for application of the basic transfer-pricing rule in Chapter 1 that the "participation condition" in section 148 is met.

56. It is fortunately unnecessary for me to devote much more time to this particularly dense example of legislation by cross-reference, since it is common ground that, if the participation condition is relevantly engaged in the present case, the definition contained in section 148 was met. In very broad terms, the definition cast a wide net by reference to the criterion of whether one of the affected persons was at the relevant time "directly or indirectly participating in the management, control or capital" of the other, or whether the same person or persons was or were so participating in the management, control or capital of each of the affected persons. In the present case,

the reason why the participation condition would be met is that the same holding company, TM Dairy (UK Holding) Sarl, was directly or indirectly participating in the management, control or capital of each Corporate Member and the LLP: see the UT Decision at [71].

57. The appellants' acceptance of this analysis is, however, subject to the determination of two sub-issues in relation to section 52 of FA 2016:

(1) Can the amendments to section 882 made by section 52 apply where the assets in question (i.e. the Material Assets) were acquired by the LLP before the effective date of the amendments, which by virtue of subsections (5) to (7) was 25 November 2015? and

(2) Can an admitted error in the drafting of the amendments in the new subsection 882(5B) be corrected by the court, under the principles set out by the House of Lords in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 ("*Inco Europe*")?

58. As I have said, each sub-issue was decided in favour of HMRC by the FTT and the UT. In opposing the further appeal of the appellants to this court on those issues, HMRC rely on the reasoning of the two Tribunals and raise certain further points by way of a respondent's notice.

(1) The temporal effect of section 52 of FA 2016

59. The commencement provisions in section 52 provide that the amendments made by the section "have effect in relation to accounting periods beginning on or after 25 November 2015": section 52(5). This provision is then supplemented by subsections (6) and (7) which require the splitting of accounting periods which straddle that date, the evident purpose being to ensure that the amended version of section 882 will in all cases apply prospectively with effect from an accounting period beginning on 25 November 2015. This means that all taxpayers are placed on an equal footing from that date onwards. But section 52 does not explicitly have retrospective effect, in the sense that it does not purport to apply its provisions to any previous accounting periods when the unamended version of section 882 was still in force. The question therefore arises whether, in future accounting periods from 25 November 2015 onwards, section 882 is to apply in its amended, or its unamended, form in relation to IFAs which were originally acquired before that date. That was of course the position in relation to the Material Assets, which as a matter of historical fact were originally acquired by the LLP in 2013.

60. The appellants argue that the focus of section 882(1)(b) of CTA 2009 is explicitly on the relationship between the parties *at the time of the acquisition* in determining whether the parties were related, and that this temporal focus remained unchanged when the FA 2016 amendments came into force. Accordingly, if the Corporate Partners and the LLP were not related parties on the day before the FA 2016 amendments came into force, that remained the position on and after 25 November 2015 because the new wider test of relationship based on the participation condition being satisfied could not affect the position as it was on the date when the Material Assets were acquired by the LLP from the Corporate Partners in 2013. The key point is that the 2016 amendments did not alter the original time of acquisition, and they were not retrospective.

61. HMRC's main answer to this submission is that it fails to take proper account of the annual nature of corporation tax and the context in which the amortisation debits were claimed. It is common ground that corporation tax (like income tax) is an annual tax which must be reimposed by Parliament every year. The claims for the debits must therefore be tested in accordance with the law as it stands in the accounting period in which the debit arises. This means that the law on the acquisition of IFAs from related parties falls to be applied on a yearly basis to accounting periods beginning on or after 25 November 2015, and the law so applied must include the amendments made by FA 2016 whatever the original date of acquisition of the IFAs in question may have been.

62. HMRC adopt the reasoning of the UT on this issue in the UT Decision at [76], where it said:

> "In our view, the FTT reached the correct interpretation in holding as it did and for broadly the right reasons. The point that CT is an annual tax correctly retained focus on application of the law as amended. The FTT correctly identified that s52 was concerned with the conditions for eligibility of debits sought to be made in a given period. The question of acquisitions only arose once a debit in respect of which relief was sought was in contention. It did not make sense for the effective date to be the date of acquisition when acquisitions only became relevant when a debit was sought in the relevant accounting period. When the relief came to be applied, there would be no justification for applying the related party definition which applied at the time of acquisition, because CT was interested in the date of the debit sought to be given effect in order to determine the applicable law; it was not interested in the date of acquisition. In short, the framework of rules applicable to the relevant debits sought in any given year is to be assessed by reference to the law applicable in that year."

63. HMRC also submit that this interpretation is consistent with the principle that if an Act amends an earlier Act, the intention is usually to produce a revised text which may be construed as a whole: see *GDF Suez Teesside Ltd v Revenue and Customs Commissioners* [2018] EWCA Civ 2075, [2019] 1 All ER 528, [2018] STC 2113 at [87] where (with the agreement of Asplin LJ and Lord Kitchin) I discussed the relevant principle, referring to the 7th (2017) edition of *Bennion on Statutory Interpretation* at section 6.7 and the judgment of Hobhouse LJ in the Court of Appeal in the *Inco Europe* case, where he said ([1999] 1 WLR 270 at 272-273):

> "In general terms, it is undoubtedly correct that the effect of an amendment to a statute should be ascertained by construing the amended statute. Thus, what is to be looked at is the amended statute itself as if it were a free-standing piece of legislation and its meaning and effect ascertained by an examination of the language of that statute.
>
> However, in certain circumstances it may be necessary to look at the amending statute as well … The expression of the

> relevant parliamentary intention is the *amending* Act. It is the amending Act which is the operative provision and which alters the law from that which it had been before."

64. HMRC further seek to draw some support from the contrast between the commencement provisions of the amendments in section 52 of FA 2016 on the one hand, and the commencement provisions relating to amendments made by the following section, section 53, to section 845 of CTA 2009, on the other hand. Section 845 treats certain transfers of IFAs between a company and a related party as being made at market value. Section 53 then amends section 845 in a very similar way to section 52, by enacting six new subsections (4A) to (4F) to be inserted after section 845(4). The commencement provisions are then set out in subsections 53(2) and (3) as follows:

> "(2) The amendment made by this section applies in relation to a transfer which takes place on or after 25 November 2015, unless it takes place pursuant to an obligation, under a contract, that was unconditional before that date.
>
> (3) For the purposes of subsection (2), an obligation is "unconditional" if it may not be varied or extinguished by the exercise of a right (whether under the contract or otherwise)."

65. Section 53 therefore explicitly provides that its operative provisions shall apply only to transfers made on or after the 25 November commencement date, with an exception for transfers made pursuant to a previous unconditional contract. HMRC's point is that Parliament would have taken a similar approach in section 52, if it had intended to confine the scope of the section to the acquisition of assets after the commencement date.

66. The UT was not persuaded that commencement provisions in other sections were of assistance: see the UT Decision at [77]. I am inclined to agree with that assessment, because despite their structural similarity sections 52 and 53 were dealing with different aspects of the statutory code in Part 8 of CTA 2009, and only section 52 (which amended section 882) focussed on the date of acquisition of the assets. That apart, however, I find HMRC's submissions on this issue persuasive and I would accept them. The critical point, as I see it, is that after the commencement date of section 52 the law which has to be applied in answering the question whether the Material Assets were acquired from a person who was not at the time of the acquisition a related party must be answered by reference to the extended definition of a related party enacted by section 52, and not by reference to the law as it stood at the time of acquisition. This, in my view, is the natural meaning and effect of the new section 882(5A) which requires references in section 882 to one person being (or not being) a related party in relation to another person "to be read as including references to the participation condition being met … as between those persons". As from 25 November 2015, the amended section 882 is to be construed and applied as a whole in relation to all accounting periods starting on or after that date, including periods in which a deduction is claimed for debits under Part 8. Whether or not the Part 8 regime applies will be determined by reference to the amended provisions of section 882 in force during the relevant accounting period, not by reference to the historic

version of section 882 which was in force when the assets in question were first acquired.

67. For these reasons, I would in agreement with both Tribunals decide this issue in favour of HMRC.

(2) Can the drafting error in section 882(5B) be corrected by the court?

68. It is agreed that section 882(5B) is defectively drafted, and that if the error is not corrected the provision is ineffective. Subsection (5B) provides that:

> "References in subsection (5A) to a person include a firm in a case where, for section 1259 purposes, references in this section to a company are read as references to the firm."

"Section 1259 purposes" are then defined in subsection (5C) as meaning "the purposes of determining under section 1259 the amount of profits or losses to be allocated to a partner in a firm". The difficulty is that subsection (5B), read with the definition in (5C), does not accurately reflect the nature of the deeming required by section 1259, which (as we have seen) creates a statutory fiction by which the firm's profits are to be calculated on the assumption that the firm's trade was carried on by a notional UK resident company. In his oral submissions, Mr Peacock KC aptly described subsection (5B) as "an airshot" which "misdescribes or misunderstands" section 1259.

69. In *Inco Europe*, Lord Nicholls discussed the conditions which must be satisfied if the court is to be able to exercise its power "to correct obvious drafting errors" in a speech with which Lords Jauncey of Tullichettle, Steyn, Clyde and Millett agreed, at [2000] 1 WLR 586, 592-3. Lord Nicholls quoted with approval the comments of Professor Sir Rupert Cross in his work on *Statutory Interpretation* (3rd edition (1995)), at 103, where he explained that:

> "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."

70. Lord Nicholls continued:

> "This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have

> made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in *Jones v Wrotham Park Settled Estates* [1980] A.C. 74, 195-106.
>
> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd v Schindler* [1977] Ch 1, 18, Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation."

71. A good example of a tax case where the *Inco Europe* conditions were held by this court to be satisfied is *Pollen Estate Trustee Co Limited v Revenue and Customs Commissioners* [2013] EWCA Civ 753, [2013] 1 WLR 3785 ("*Pollen Estate*"). The issue in that case concerned the availability of charities relief from stamp duty land tax ("SDLT") under paragraph 1 of schedule 8 to the Finance Act 2004 where a charity participated in a purchase of land with a non-charity. Paragraph 1(1) of schedule 8 provided that "A land transaction is exempt from charge if the purchaser is a charity and the following conditions are met …". The effect of the decision of the UT in that case (Warren J and Judge Herrington) was that full relief from liability to pay SDLT on the purchase price was available if a charity acquired land in its sole name, or if a non-charity bought the property as bare trustee for the charity, but that no relief was available at all if the non-charity also had a beneficial interest in the property: see the judgment of Lewison LJ (with whom McFarlane and Laws LJJ agreed) at [1]. In allowing the appeals of the taxpayer charities, Lewison LJ held that the relief in paragraph 1(1) should be read in accordance with the *Inco Europe* principles as if it said "A land transaction is exempt from charge [*to the extent that*] the purchaser is a charity and the following conditions are met" : see his judgment at [47] to [49].

72. It was in that context that Lewison LJ said at [49]:

> "We are not parliamentary draftsmen; and it is sufficient that we can be confident of the gist or substance of the alteration, rather than its precise language. In substance what this means is that the exemption would apply as regards that proportion of the beneficial interest that is attributable to the undivided share held by the charity for qualifying charitable purposes. I do not see that this gives rise to any conceptual uncertainty or to any insuperable practical administrative problems. In my judgment this reading is necessary in order to give effect to what must have been Parliament's intention as regards the taxation of charities … Not to afford a charity relief in such circumstances would, in my judgment, be capricious."

73. Reverting to the present case, the UT was satisfied that the defective drafting of section 882(5B) could be remedied on *Inco Europe* principles, holding that:

> (1) Parliament's intention was to amend the concept of "related party" by reference to the "participation condition" to include firms in situations where section 1259 of CTA 2009 is relevant: see the UT Decision at [86] to [87];
>
> (2) the failure to give effect to that intention was "plainly inadvertent": *ibid,* [88]; and
>
> (3) the "clear gist" of the provision that Parliament would have made had the error been noticed is that, where section 1259 applies, references in section 882 to a company are to be read as if they were references to a firm: *ibid,* [89].

74. Further, although it was unnecessary to show the precise words that Parliament would have used, the UT found helpful, as do I, a formulation provided by Mr Tidmarsh KC as an illustration of how the misdescription of section 1259 may be corrected without difficulty:

> "References in subsection (5A) to a person include a firm, where for section 1259 purposes, [*a company is taken to be carrying on the trade of the firm and in such a case*] references in this section to a company are read as references to the firm."

See the UT Decision at [90].

75. The appellants raise various objections to this analysis in their grounds of appeal and their written submissions. They submit, in outline, that: (a) HMRC's suggested drafting is ineffective, because amending section 882 in this manner does not affect the notional UK resident company which is the "computation entity" and therefore the entity to be tested under the related party rule; (b) to remedy the perceived defect in section 52 of FA 2016, more extensive amendments would be necessary, for example to assign ownership/control attributes to the notional company; (c) this would be an inappropriate case to apply *Inco Europe*, as the legislation is complex and densely drafted; and (d) no weight should have been placed on *Pollen Estate*, because it was a highly unusual application of the *Inco Europe* principle in the context of an obvious policy failure.

76. I find these objections unconvincing. As to the first point, HMRC's suggested drafting means that, for the purposes of the extended related party test in subsection 882(5A), a "person" includes a "firm" if a company is taken to be carrying on the trade of the firm as provided by section 1259(3) of CTA 2009, and in such a case references in section 882 to a company are read as references to the firm. As the UT recognised at [91], that may not be the only way in which the drafting defect in subsection (5B) could be corrected, but HMRC's proposal seems to me to work and to make sense of the subsection.

77. As to the second point, I do not agree that any further amendment is necessary in the light of my decision on the main issue in the appeal.

78. As to the third point, I agree with HMRC that the drafting error is obvious and the solution adopted by the UT is straightforward and appropriate. The case is therefore a suitable one for application of the *Inco Europe* principles.

79. As to the fourth point, I again agree with HMRC that, although *Pollen Estate* obviously turned on its own facts, it provides a helpful illustration of the application of the *Inco Europe* principles in a fiscal context, as well as throwing some further light on the interpretation of the third condition.

80. Finally, HMRC submit in their respondent's notice that, although the UT found it possible at [85] of the UT Decision to discern the intended purpose of section 882(5B) of CTA 2009 without considering the explanatory notes to clause 48 of the Finance (No. 2) Bill 2016, those explanatory notes could have provided additional support for the UT's conclusion. In particular, the notes say in relation to the new section 882(5B) that it "applies section 882(5A) to a firm for the purposes of section 1259 of CTA 2009" and a background note says (at paragraph 13) that "HMRC has identified arrangements that use bodies such as partnerships or LLPs to transfer assets in ways that aim to bring the assets within the new rules without an effective change of economic ownership." HMRC confirmed in the course of the hearing before us that clause 48 of the Bill was not materially altered before its enactment as section 52 of FA 2016.

81. The point is in my judgment a peripheral one, and the use that may properly be made of explanatory notes is in any event limited since they are normally drafted by the government department which sponsors the legislation without any input from Parliamentary counsel. Nevertheless, I would accept that the passages which I have identified could legitimately have helped the UT to discern the mischief which the future section 52 was intended to remedy, although I would not for my part wish to criticise their decision not to take the explanatory notes into account.

82. For these reasons, I conclude that the UT was also right to decide this second sub-issue in favour of HMRC.

Overall conclusion

83. I would dismiss the appeal on all grounds.

Asplin LJ

84. I agree.

Lewison LJ:

85. I also agree.