Judgments

# Kwik-Fit Group Ltd and other companies v Revenue and Customs Commissioners

[2021] UKFTT 283 (TC)

**UK First-tier Tribunal (Tax)**

**Judge Jeanette Zaman and John Woodman**

**11 August 2021**

**Judgment**

**Ms Nicola Shaw QC and Mr Michael Jones QC, counsel, instructed by Baker & McKenzie LLP, for the Appellants**

**Ms Elizabeth Wilson QC and Mr Ronan Magee, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

**Introduction**

1. The Appellants – (1) Kwik-Fit Euro Limited ("KF Euro") (2) Kwik-Fit (GB) Limited ("KF GB") (3) Kwik-Fit Finance Limited ("KF Finance") (4) Stapleton's (Tyre Services) Limited ("Stapleton's") and (5) Kwik-Fit Group Limited ("KFG") – are all members of the Kwik-Fit group of companies (the "Kwik-Fit Group"), the business of which is principally concerned with the supply and fitting of automotive parts and the provision of MOT testing and car servicing.

2. In September and October 2013, following the acquisition of the Kwik-Fit Group by Itochu Corporation, a number of intra-group receivables that had been incurred by the Appellants in the course of their business activities were assigned to an intermediate holding company within the Kwik-Fit Group, Speedy 1 Limited ("Speedy 1"), and other debts were incurred by the Appellants. As part of the reorganisation, the interest rate charged on those loans was increased. Speedy 1 had a carried forward non-trading loan relationship deficit ("NTD") against which the interest on the intra-group loans owed to it could be set. As a result of this reorganisation, £48m of NTDs in Speedy 1 were used in two to three years rather than around 25 years (the estimate which had previously been made by the Group Tax Manager).

3. HMRC concluded that s441 Corporation Tax Act 2009 ("CTA 2009") applied to disallow debits arising to the Appellants for the payment of interest under the intra-group loan relationships in the accounting periods ended 31 March 2014, 2016 and 2016, the disallowance being capped at the amount of the carried forward NTDs used by Speedy 1. Specifically, where a debtor did not have a pre-existing loan relationship with Speedy 1, HMRC disallowed the whole of the interest debit. Where a debtor had a pre-existing loan relationship with Speedy 1, HMRC disallowed the interest debit to the extent that it had been increased

following the reorganisation. (There was only one loan to which this latter fact pattern applied.)

4. The Appellants appealed against the amendments made by the closure notices issued by HMRC. Shortly before the hearing, the Appellants withdrew their appeal in respect of the debits which had been claimed by KF GB and disallowed by HMRC in respect of the c.£40m loan note which had been issued by KF GB at step 4 of the reorganisation (the steps being set out in Appendix 1 hereto), but not in respect of other debits claimed by KF GB which had been disallowed.

5. The Appellants challenged the disallowance on what they described as two principal bases:

> (1) they were not party to the loan relationships for unallowable purposes. It was common ground that the original borrowing that gave rise to the receivables was for commercial purposes. The Appellants remained a party to those loan relationships as debtors for the same, commercial purposes, before, during and after the reorganisation. The loan which had been pushed-down had also been incurred for commercial purposes; and

> (2) even if the purposes of the Appellants in being a party to the loan relationships did include an “unallowable purpose”, the relevant debits would have arisen to the Appellants in any event, by virtue of the application of the transfer pricing rules. Accordingly, none of the relevant debits should be apportioned to the unallowable purpose.

6. We have concluded that the Appellants were party to all of the loan relationships in issue for an unallowable purpose. However, we have allowed the appeal in part as in respect of some of the loans which were assigned to Speedy 1 we have reached a different conclusion to HMRC as to the amount of the debits which should be apportioned to the unallowable purpose.

**Evidence**

7. We had a hearing bundle of 2827 pages, a bundle of authorities, skeleton arguments and steps plans. We were also provided at the beginning of the hearing with a statement of agreed facts and during the course of the hearing the parties handed up additional published guidance, being the guidance on the GAAR and extracts from HMRC's Corporate Finance Manual. The parties then provided us with an amended statement of agreed facts after the hearing.

8. We heard evidence from two witnesses on behalf of the Appellants, Kazushi Ogura and Glenn Andrews.

9. Mr Ogura is a director at Alta Forest Products LLC, which is part of the Itochu group. He had been a director of each of the Appellants from no later than July 2011 to March 2014, and had been a director of European Tyre Enterprise Ltd (“ETEL”), Speedy 1, Kwik-Fit Properties Ltd (“KF Properties”) and Kwik-Fit Holdings Ltd (“KF Holdings”) at that time. He had prepared a witness statement dated 27 March 2020. He was cross-examined by Ms Wilson. We found Mr Ogura to be a reliable and credible witness.

10. Mr Andrews had prepared a witness statement dated 30 March 2020. He is the Group Tax Manager for ETEL, and had been Group Tax Manager of the Kwik-Fit Group since 2003. He reported to Mr Ogura (and the other director of the Appellants), and had instructed PwC to advise on how to use of the losses within Speedy 1 and attended the meeting with HMRC in March 2013 to discuss the plan. We found Mr Andrews to be a reliable and credible witness.

**Facts**

11. The amended version of the statement of agreed facts is set out at Appendix 1 of this decision notice. The group structure chart set out at Appendix 2 forms part of that statement of agreed facts (although we have changed the defined terms used in that structure chart to reflect those we have used throughout this decision notice).

12. The agreed facts address some background to the Appellants, the opening of enquiries by HMRC, the existence of NTDs in Speedy 1, the details of the reorganisation which took place in September and October 2013, the Appellants' application for closure notices and the amendments made by the closure notices issued by HMRC.

13. We have made additional findings of fact below (and have made further findings of fact throughout).

14. The Kwik-Fit Group was founded in 1971. It was acquired by The Ford Motor Company in 1999, before being sold to CVC Capital Partners, a private equity company, in 2002. It was subsequently sold to PAI Partners, another private equity company, in 2005.

15. Various holding and financing companies were incorporated into the Kwik-Fit Group structure over time, including KF Holdings, KFG, KF Finance, and Speedy 1, the latter being incorporated as part of the acquisition by PAI Partners as a vehicle to acquire the shares in KFG, which was at that stage the holding company of the Kwik-Fit Group.

16. As a consequence of external borrowing used to fund the acquisitions mentioned above, the Kwik-Fit Group became highly leveraged. In particular, Speedy 1 borrowed from external lenders in order to acquire the Kwik-Fit Group, and as a result accumulated significant NTDs. Speedy 1 also accumulated NTDs in respect of shareholder and intra-group loans.

17. In March 2011, Itochu Corporation, the parent company of a Japanese group, agreed to acquire the Kwik-Fit Group, the acquisition being completed in June 2011 by ETEL acquiring the shares in Speedy 1. This acquisition resulted in the acceleration of NTDs arising in Speedy 1 as a consequence of the fact that, under the terms of the third-party lending that was in place at the time, the acquisition of the Kwik-Fit Group by a third party (in this case the Itochu Corporation) triggered a requirement for the debt to be fully repaid. This resulted in significant amounts of finance costs being debited to the income statement of Speedy 1 under UK GAAP (although some of those costs would have been debited in the normal course of events, irrespective of the acquisition by Itochu Corporation). These debits gave rise to further NTDs in Speedy 1. As at the end of its 2012 accounting period, Speedy 1's accumulated NTDs stood at £48m.

18. At the time of the acquisition of the Kwik-Fit Group by Itochu Corporation there was a large number of intra-group borrowings. These loans were undocumented, having arisen by way of intra-group balances, and resulted from a mixture of inter-company lending arising from (a) various group charges and re-charges and (b) some re-financing of external debt.

19. Although there was some utilisation of the NTDs by Speedy 1, the rate of use was relatively slow. Speedy 1 was generating minimal non-trading loan relationship income year on year, meaning that Mr Andrews estimated that it would take more than 25 years for the NTDs to be utilised.

20. In March 2012 Mr Andrews sought advice as to how the intra-group debt might be restructured so as to simplify it and allow the NTDs in Speedy 1 to be utilised more quickly. This advice was given first by Ernst & Young, who also acted as auditors to the Kwik-Fit Group. After the Kwik-Fit Group appointed PwC as auditors in place of Ernst & Young, Mr Andrews took advice from PwC.

21. On 15 March 2013 PwC produced a draft slide pack for the Kwik-Fit Group which set out the suggested steps for a reorganisation together with draft advice as to the UK and Japanese tax treatment of the reorganisation and a client engagement letter. A separate, shorter, version of that paper was then prepared dated 18 March 2013 which was sent to HMRC (the “March 2013 Paper”). That version set out the steps proposed at that time but did not include the draft tax advice or the engagement letter.

22. There was then a meeting with HMRC on 22 March 2013, attended by Dominic Bartley of HMRC (the Kwik-Fit Group's Customer Relationship Manager – their “CRM”), Mr Andrews and PwC. The meeting note prepared by Mr Bartley records that:

> (1) The meeting started at 11am and concluded at 11.55am.
>
> (2) The meeting had been “set to discuss the re-organisation of the intercompany loan balances in the Kwik-Fit Group and to give Speedy 1 Ltd the function of a subgroup treasury company”.
>
> (3) “DB said that he could only see what the impact of the changes would be, in terms of tax, when the Returns are submitted. GA appreciated that but was looking for some certainty that HMRC would find the changes acceptable. DB accepted this and would provide as much certainty as he is able and within the time limits required by Kwik-Fit.”
>
> (4) Mr Andrews and PwC took Mr Bartley through the steps plan, and gave him a note (which Mr Bartley then typed into his meeting note) showing the movements in the receivables.
>
> (5) Mr Bartley identified that issues that might need further consideration included whether any statutory clearances were needed, referring to a debt for equity swap at step 15, “and there was the question of interest”. PwC said they thought the interest would be in the region of “LIBOR + 3%” and Mr Bartley said he would discuss this with a transfer pricing expert.
>
> (6) PwC mentioned that the reorganisation would “have the benefit of the group being able to utilise losses that it had not been able to previously”.

23. That meeting note was not agreed with Mr Andrews or PwC – it was not seen by them at the time and a copy of it was sent to the Kwik-Fit Group upon request several years later. The only challenge to its accuracy was the reference to “LIBOR + 3%”. Ms Shaw submitted that the reference to 3% was a typo and that this should read “LIBOR + 5%”. There was a follow-up email from PwC to Mr Bartley on 6 June 2013 which referred to a discussion the previous day in which Mr Bartley had mentioned holding off on further discussions concerning an appropriate interest rate pending hearing further from Policy Division. PwC then say “you may recall in our above meeting we mentioned that the rates we are currently seeing in similar situations are in the area of LIBOR (6 month rate currently 0.41%) plus 5%” and asking whether Mr Bartley is able to confirm this rate to be acceptable.

24. We agree that it is more likely than not that the rate mentioned in the meeting was LIBOR + 5%. This is the amount which PwC described as having been given just a few weeks after the meeting, which was not identified by Mr Bartley as differing from that previously mentioned, and is that which continued to be referred to in correspondence (as well as being the rate actually used in due course).

25. On 7 June 2013 Mr Bartley wrote to Mr Andrews. He said he was “content with your proposals” and asked for details of the rate to be used. We infer that he had not seen the email from PwC which had been sent the previous day at this point.

26. On 12 June 2013 Mr Bartley wrote to PwC referring to the email of 6 June 2013 and saying he was “happy for the reorganisation of the intercompany balances to proceed as set out in the proposal document presented to me” and he was happy to confirm he was content with the interest rate suggested. We refer to these letters from Mr Bartley dated 7 June 2013 and 12 June 2013 as the “June 2013 Letters”.

27. PwC produced an updated version of their paper for the Kwik-Fit Group in August 2013 (the “August 2013 Paper”). That was a detailed paper, setting out the proposed steps and the tax consequences of each step. The August 2013 Paper was sent to the Appellants. It was not sent to HMRC.

28. The reorganisation was then implemented by the Kwik-Fit Group in September and October 2013. The steps which were taken are set out in Appendix 1 hereto. There had been further changes to the plan since that set out in the August 2013 Paper, notably the creation of new debts (as referred to at [2.4] in the statement of agreed facts) – these had not been envisaged in the August 2013 Paper.

29. As recorded in Appendix 1, following these steps, the interest rates on receivables held by Speedy 1 was either set at or increased to LIBOR + 5%. This included both receivables assigned to Speedy 1 and to the receivable which had already been owed by KFG to Speedy 1.

30. The interest rate on intra-group loans that were not involved in the reorganisation was not increased. Such loans included loans between other companies within the Kwik-Fit Group where Speedy 1 was not the creditor, and a loan of £57.6m owed by Speedy 1 to Detailagent (a subsidiary of KF Euro) (the “Detailagent Loan”).

31. As a consequence of the reorganisation, Speedy 1 received taxable interest under the loan relationships, against which were set its carried forward NTDs.

32. The opening of enquiries by HMRC is then detailed in Appendix 1, together with the applications made by the Appellants for the closure of those enquiries.

33. HMRC issued closure notices to the Appellants on 14 November 2018, and issued amendments on 16 November 2019. The disallowances made by HMRC are set out in Appendix 1 at [4.2].

34. The Appellants gave notice of appeal to the Tribunal against those amendments on 30 March 2019, having first requested an independent review of the decision by HMRC.

35. On 26 June 2021, in a response sent by Baker & McKenzie on behalf of the Appellants to HMRC's skeleton argument, the Appellants referred to the loan note of £40,003,955.49 issued by KF GB at step 4 of the reorganisation. They went on to say it is accepted that this loan was brought into existence during the course of the reorganisation and did not replace any other, pre-existing, intra-group loan, and KF GB no longer pursues the debits denied by HMRC in respect of that loan. KF GB has thus partially withdrawn its appeal in respect of the disallowance made by HMRC. However, the withdrawal is only in respect of this loan note issued by KF GB. HMRC has also disallowed debits in respect of loans which KF GB had owed to KF Properties and to KFG and which were assigned to Speedy 1 as part of the reorganisation. KF GB continues to pursue its appeal in respect of the debits disallowed on those loans.

**Relevant Law**

**Loan Relationships**

36. Part 5 of the CTA 2009 sets out how the profits and losses arising to a company from its loan relationships are brought into account for corporation tax purposes. The term “loan relationship” is defined in s302 CTA 2009, and it is common ground that the debts in issue gave rise to “loan relationships” as defined.

37. Chapter 3 of Part 5 of the CTA 2009 is concerned with the general rules as to the credits and debits to be brought into account. Various other chapters of Part 5 contain further rules about the credits and debits to be brought into account in particular situations and cases. One of those is Chapter 15 (Tax Avoidance).

38. Sections 441 and 442 within Chapter 15 are concerned with “Loan relationships for unallowable purposes”. At the material times those sections provided, so far as relevant, as follows:

> “441 Loan relationships for unallowable purposes
>
> (1) This section applies if in any accounting period a loan relationship of a company has an unallowable purpose.
>
> …
>
> (3) The company may not bring into account for that period for the purposes of this Part so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.
>
> …
>
> (6) For the meaning of “has an unallowable purpose” and “the unallowable purpose” in this section, see section 442.
>
> 442 Meaning of “unallowable purpose”
>
> (1) For the purposes of section 441 a loan relationship of a company has an unallowable

purpose in an accounting period if, at times during that period, the purposes for which the company—

(a) is a party to the relationship, or

(b) enters into transactions which are related transactions by reference to it,

include a purpose ("the unallowable purpose") which is not amongst the business or other commercial purposes of the company.

…

(3) Subsection (4) applies if a tax avoidance purpose is one of the purposes for which a company—

(a) is a party to a loan relationship at any time, or

(b) enters into a transaction which is a related transaction by reference to a loan relationship of the company.

(4) For the purposes of subsection (1) the tax avoidance purpose is only regarded as a business or other commercial purpose of the company if it is not—

(a) the main purpose for which the company is a party to the loan relationship or, as the case may be, enters into the related transaction, or

(b) one of the main purposes for which it is or does so.

(5) The references in subsections (3) and (4) to a tax avoidance purpose are references to any purpose which consists of securing a tax advantage for the company or any other person."

39. The term "tax advantage" is defined in s1139(2) Corporation Tax Act 2010 ("CTA 2010") (via s476(1) CTA 2009) as follows:

"(2) "Tax advantage" means—

(a) a relief from tax or increased relief from tax,

(b) a repayment of tax or increased repayment of tax,

(c) the avoidance or reduction of a charge to tax or an assessment to tax,

(d) the avoidance of a possible assessment to tax,

…"

**Transfer Pricing**

40. Section 446 CTA 2009 deals with the interaction of the loan relationships provisions and the transfer pricing rules found in Part 4 of the Taxation (International and Other Provisions) Act 2010 ("TIOPA 2010"). It provides that where an amount is treated as arising to a company from its loan relationships under the transfer pricing rules, credits or debits relating to the imputed amount are to be brought into account for the purposes of the loan relationships legislation to the same extent that they would be in the case of an actual profit or loss, etc. So far as is relevant, the section reads:

"446 Bringing into account adjustments made under Part 4 of TIOPA 2010

(1) This section deals with the credits and debits which are to be brought into account for the purposes of this Part as a result of Part 4 of TIOPA 2010 (provision not at arm's length) applying in relation to a company's loan relationships or related transactions.

…

(4) Subsection (5) applies if under Part 4 of TIOPA 2010 an amount is treated as interest payable under any of a company's loan relationships.

(5) Credits or debits relating to that amount are to be brought into account for the purposes of this Part to the same extent as they would be in the case of an actual amount of such interest.

…"

41. Under Part 4 TIOPA 2010, tax calculations are to be based on an arm's length provision rather than the actual provisions where certain conditions are met, as set out in s147, which so far as is relevant provides as follows:

"147 Tax calculations to be based on arm's length, not actual, provision

(1) For the purposes of this section "the basic pre-condition" is that—

(a) provision ("the actual provision") has been made or imposed as between any two persons ("the affected persons") by means of a transaction or series of transactions,

(b) the participation condition is met (see section 148),

(c) the actual provision is not within subsection (7) (oil transactions), and

(d) the actual provision differs from the provision ("the arm's length provision") which would have been made as between independent enterprises.

(2) Subsection (3) applies if—

(a) the basic pre-condition is met, and

(b) the actual provision confers a potential advantage in relation to United Kingdom taxation on one of the affected persons.

(3) The profits and losses of the potentially advantaged person are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.

(4) Subsection (5) applies if—

(a) the basic pre-condition is met, and

(b) the actual provision confers a potential advantage in relation to United Kingdom taxation (whether or not the same advantage) on each of the affected persons.

(5) The profits and losses of each of the affected persons are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.

…"

42. The "participation condition" is defined in s148 and is met when, at the time of the making or imposition of the actual provision (or within six months thereafter) one of the two affected persons was directly or indirectly participating in the management, control or capital of the other, or a third person was participating in the management, control or capital of both the affected persons. (It is accepted that this participation condition is met.)

43. As regards "the arm's length provision", there are specific provisions that apply where the actual provision relates to lending between (or supported by) connected companies. Section 152(2) requires account to be taken of "all factors" when comparing the actual provision with the arm's length provision, including the rate of interest and other terms which would have been agreed in the absence of the special relationship.

44. An actual provision confers a "potential advantage in relation to United Kingdom taxation" on a person if, inter alia, that person's taxable profits for a chargeable period are smaller in amount as an effect of the

provision not being arm's length (s155 TIOPA 2010).

45. Where only one of the affected parties is potentially advantaged in relation to UK taxation by the actual provision and the other affected party is within the charge to corporation tax in respect of profits arising from the activities in the course of which the actual provision was made, the latter may, subject to conditions, make a claim under s174 so that its taxable profits are calculated as if the arm's length provision had been made instead of the actual provision (s175 to s178 TIOPA 2010).

**Issues**

46. HMRC have disallowed debits arising to the Appellants under s441 CTA 2009 (capping the amount of the disallowance at the amount of the carried forward NTDs used by Speedy 1) as follows:

(1) where a debtor did not have a pre-existing loan relationship with Speedy 1, HMRC disallowed the whole of the interest debit; and

(2) where a debtor had a pre-existing loan relationship with Speedy 1, HMRC disallowed the interest debit to the extent that it had been increased following the reorganisation.

47. It was common ground between the parties that:

(1) the debts of the Appellants in respect of which they have claimed debits are “loan relationships” for the purposes of Part 5 of CTA 2009;

(2) the original inter-company borrowings of the Appellants that were restructured in the reorganisation had a commercial purpose; and

(3) Speedy 1 had incurred significant NTDs in the course of its business. The quantum of those NTDs in Speedy 1 was also agreed.

48. Ms Shaw also accepted for the Appellants that a purpose of the reorganisation was to accelerate the use of Speedy 1's NTDs. That had been clear from the Appellants' grounds of appeal. In giving evidence both Mr Ogura and Mr Andrews sought to avoid using the word “accelerate”, or denied that it was correct. They chose to refer to “utilising” or “accessing” the NTDs. We have concluded that nothing turns on this difference in language. We have not treated this different phrasing as the Appellants seeking to resile from the previous position as stated in their grounds of appeal, and as referred to frequently in the course of correspondence with HMRC leading up to the hearing, and as expressly acknowledged on behalf of the Appellants at the Closure Notice Hearing and before us. It was accepted by the Appellants as a matter of fact that in the absence of the reorganisation (or any alternative planning) the NTDs in Speedy 1 would only be exhausted over a period of 25 years. One consequence of the reorganisation was that they were used over less than three years. In these circumstances, it may be accurately stated that the losses were used, utilised, accessed or indeed that their use was accelerated.

49. The amended statement of agreed facts records that “HMRC have not challenged the specific rate or loan quantum selected by the group for the above steps.” HMRC have not, however, expressly agreed that LIBOR + 5% was an arm's length rate for the various loans. Nevertheless, given that the Appellants submit

that this was arm's length and Mr Andrews gave evidence that this was the rate which PwC advised the group was arm's length, and HMRC have not produced any evidence to challenge this position (which is, of course, consistent with their statement that they do not challenge this rate), we therefore find that it was an arm's length rate.

50. The issues between the parties are:

(1) whether the Appellants were party to the loan relationships for an unallowable purpose, which includes whether there was a relevant tax advantage; and

(2) whether any of the debits claimed by the Appellants were attributable, on a just and reasonable apportionment, to an unallowable purpose.

51. In summary, Ms Shaw submitted that:

(1) The Appellants were not party to the loan relationships for an unallowable purpose - they had a genuine commercial purpose for being party to the original loan relationships, and this did not change as a result of the reorganisation. The purpose for the reorganisation does not inform the purpose of the Appellants in being party to the loan relationships. In any event, neither the claiming of a debit for interest expense nor the accelerated use of NTDs amounts to a “tax advantage” as that term is defined in s1139 CTA 2010.

(2) Even if there was an unallowable purpose, on a just and reasonable apportionment all of the debits are attributable to the underlying commercial purposes of the loans. Those debits would have arisen in any event, and no part should be apportioned to the unallowable purpose.

52. In summary, Ms Wilson submitted that:

(1) There were multiple tax advantages – the accelerated use of Speedy 1's NTDs to relieve taxable income, and the debits claimed for interest expense by each Appellant in respect of their loan relationships.

(2) Obtaining those tax advantages (both for themselves and, for each Appellant, the other Appellants and Speedy 1), was the main purpose or one of the main purposes of the Appellants in being party to the loan relationships in the relevant accounting periods.

(3) The disallowance they have made is just and reasonable on the facts.

**Discussion**

53. The burden of proof is on the Appellants to establish, on the balance of probabilities, that the closure notices and the consequent amendments made by HMRC to their tax returns are incorrect.

54. We first set out the approach taken by the legislation:

(1) Section 441 applies if “in any accounting period” a loan relationship of a company has “an unallowable purpose” (s441(1)). A loan relationship has an unallowable purpose in an accounting period if the purposes for which the company is a party to the loan relationship “include a purpose (“the unallowable purpose”) which is not amongst the business or other commercial purposes of the company” (s442(1)).

(2) If a “tax avoidance purpose” is one of the purposes for which a company is a party to a loan relationship, that purpose is only regarded as a business or other commercial purpose if it is not the main purpose, or one of the main purposes, for which the company is a party to the loan relationship (s442(3) and (4)).

(3) A tax avoidance purpose is any purpose which “consists of securing a tax advantage for the company or any other person” (s442(5)).

(4) A “tax advantage” includes a relief from tax or increased relied from tax or the avoidance or reduction of a charge to tax or an assessment to tax (by s1139(2) CTA 2010).

(5) Where a loan relationship of a company has an unallowable purpose in any accounting period, the company may not bring into account for that period “so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose” (s441(3)).

55. It can readily be seen from the above that:

(1) a company having a “tax avoidance purpose” does not of itself mean that s441 will apply to disallow debits – a tax avoidance purpose will be a business or other commercial purpose of the company unless it was the main purpose or one of the main purposes for which the company is a party to the loan relationship; and

(2) the legislation contemplates that the purposes of a company may change – the provisions apply by reference to each accounting period and ask whether the purposes for which a company are party to the relationship “at times during that period” fall within the definition of an unallowable purpose.

56. In addition, there are some principles which have developed from the case law in considering the application of these provisions:

(1) It the company's subjective purposes that matter. This is clear from *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18 and *Travel Document Service v HMRC* [2018] EWCA Civ 549 at [41].

(2) The object or purpose of the company must be distinguished from the effect. The company's subjective intentions are determinative, but these are not limited to the conscious motives which were in its mind – some consequences are so inevitably and inextricably involved that unless merely incidental they must be taken to be a purpose *(Vodafone Cellular*

*Ltd v Shaw* [1997] STC 734).

(3) “Main” has a connotation of importance *(Travel Document Service* at [48]).

(4) In determining purpose, “all the facts” or “the whole of the evidence” should be considered (*Garforth v Tankard Carpets* [1980] 53 TC 342).

57. Although the steps which were implemented in the reorganisation are agreed (and are set out in Appendix 1) we have first considered those steps and set out our conclusions and findings in relation thereto. We have then considered and reached our conclusions in relation to the questions posed by the legislation, namely:

(1) is there a tax advantage for the Appellants or any other person;

(2) do the Appellants have a tax avoidance purpose for being party to the loan relationships in any accounting period and, if so, is that tax avoidance purpose an unallowable purpose; and

(3) if there is an unallowable purpose, how much of the debits, if any, are attributable to the unallowable purpose on a just and reasonable apportionment.

58. We have taken account of all of the submissions made by Ms Shaw and Ms Wilson but have not found it necessary to refer to all of them in the discussion which follows.

**Steps taken in the reorganisation and the resulting position**

59. After the reorganisation, Speedy 1 was the creditor in respect of various receivables, most (but not all) of which had been assigned to it during the reorganisation.

60. There were various loans where the relevant Appellant had previously owed that amount to a group company (in one instance to Speedy 1 itself) prior to the reorganisation (the “Preexisting Loans”). In the descriptions which follow we refer first in each case to the closing position after the reorganisation:

(1) KF GB owed £11,376,081.54 to Speedy 1 – This amount had originally been owed by KF GB to KF Properties, but KF Properties assigned its receivable to Speedy 1 at step 1 in return for a loan note. (That consideration loan note was then partially netted-off in step 11 against the loan note left outstanding when KF Properties paid a dividend to KF GB at step 2 which was transferred up the group in steps 4, 7, 9 and 10.) The interest rate on this loan was then increased from 0.74% to LIBOR + 5%. KF GB acknowledged and accepted that increased interest rate as part of the reorganisation.

(2) KF Finance owed £67,076,394.32 to Speedy 1 – KF Finance had originally owed this amount to KF Holdings. The receivable was assigned by KF Holdings to Speedy 1 at step 3 in return for a loan note, and that receivable from Speedy 1 was distributed up the group at steps 7, 9 and 10. The interest rate on the loan owed by KF Finance to Speedy 1 was increased from 0.74% to LIBOR + 5% by KF Finance acknowledging and accepting that increased interest rate

as part of the reorganisation.

(3) KFG owed £14.4m to Speedy 1– This is part of a receivable of £106,977,000 originally owed by KFG to KF Finance; this part was assigned by KF Finance to Speedy 1 at step 5. The interest rate on this was increased from 0.74% to LIBOR + 5% by KFG acknowledging and accepting the increased interest rate as part of the reorganisation.

(4) KF GB owed £4,262,000 to Speedy 1 - KF GB had owed KFG £4,262,000. That receivable was distributed by KFG to Speedy 1 at step 10 (this being part of the distribution of £44,265,955.49 referred to at [2.3.10a] of Appendix 1). The interest rate was increased from 0% to LIBOR + 5% by KF GB acknowledging and accepting the increased interest rate as part of the reorganisation.

(5) KF Euro owed £13,294,458.23 to Speedy 1–KF Euro originally owed this amount to ETEL, and this receivable was assigned by ETEL to Speedy 1 at step 17 as part of the consideration for the issue of shares by Speedy 1. The interest rate was increased from 0% to LIBOR + 5% by KF Euro acknowledging and accepting the increased interest rate as part of the reorganisation.

(6) KFG owed £23,413,000 to Speedy 1– KFG originally owed this amount to ETEL. This receivable was assigned by ETEL to Speedy 1 at step 17 as part of the consideration for the issue of shares by Speedy 1. The interest rate was increased from 1.89% to LIBOR + 5% by KFG acknowledging and accepting the increased interest rate as part of the reorganisation.

(7) Stapleton's owed £80m to Speedy 1– Stapleton's originally owed a larger amount to ETEL. £80m of that loan was assigned by ETEL to Speedy 1 at step 17 as part of the consideration for the issue of shares by Speedy 1. The interest rate was increased from 0.7-0.9% to LIBOR + 5% by Stapleton's acknowledging and accepting the increased interest rate as part of the reorganisation

(8) KFG owed Speedy 1 £160,226,000 – This debt was already owed by KFG to Speedy 1 (the "KFG Loan"). The interest rate was increased from 0.74% to LIBOR + 5% by KFG acknowledging and accepting the increased interest rate as part of the reorganisation. (It is this loan in respect of which HMRC has disallowed only the interest debits resulting from the increased rate of interest, allowing the debits in respect of the original interest rate.)

61. There were then three loans which came into existence during the reorganisation. One of those is the loan note of £40,003,955.49 issued by KF GB at step 4. KF GB no longer pursues the debits denied by HMRC in respect of that loan. However, there were two further loans (which remain the subject of this appeal), namely the £16m loan note issued by KF Finance at step 9 and the £19m loan note issued by Stapleton's at step 16 (these two loans being the "New Loans"):

(1) The £16m loan note was issued by KF Finance to KFG at step 9 in satisfaction of a dividend declared by KF Finance to KFG. That loan note was then distributed by KFG to Speedy 1 at step 10. At step 19, Speedy 1 distributed £16m to ETEL, which was satisfied by the release of £16m of £35m of debt due from ETEL to Speedy 1 (that £35m receivable from ETEL having been transferred to Speedy 1 by steps 4 (as the amount had originally been owed to KF GB), 7, 9 and 10).

(2) The £19m loan note issued by Stapleton's at step 16 was issued to ETEL in satisfaction of a dividend declared by Stapleton's to ETEL. At step 18 ETEL then used that £19m loan note to settle part of its £35m debt to Speedy 1.

62. The net effect of these steps described at [61] was that £35m of debt which had been owed from ETEL to KF GB was pushed-down into the group, such that Stapleton's owed £19m to Speedy 1 and KF Finance owed £16m to Speedy 1. These loan notes did not increase the intra-group indebtedness; but instead of a position where the receivables were transferred, and the original debtor remained unchanged (as with the other loans which remain the subject of this appeal), these borrowings replace another borrowing of a different group company.

63. In relation to the reorganisation:

(1) A comparison of the opening and closing positions leads us to conclude that the intra-group borrowings were simplified as a result of this reorganisation. There were fewer intra-group loans in place after the reorganisation, and there were fewer creditors in respect of such loans.

(2) Noting that the description of the reorganisation shown in the August 2013 Paper is incomplete, that still shows that some loans sat elsewhere in the group with a creditor other than Speedy 1 – there is, eg, a loan of £63m from Detailagent to its shareholder KF Euro, and a loan of £175m from KF Euro to KFG.

(3) Different steps could have been taken; and the members of the group could have gone further in terms of achieving simplification as some of the loans could have been extinguished at some points in the reorganisation. By way of example, after step 3 KF Finance owed £67,076,394.32 to Speedy 1. That receivable had been assigned by KF Holdings to Speedy 1 in consideration for a loan note issued by Speedy 1. That loan note was one of the receivables that was later distributed up the group (from step 7 onwards), including through KF Finance. KF Finance could, therefore, have set the amounts owing off against each other at that point, rather than making the distribution at step 9.

(4) The Appellants were each involved in the reorganisation in that whilst they were debtors whose obligations were assigned, they each acknowledged and agreed to the assignment of their receivables and agreed to the increase in interest rates. In addition, they took the further steps which were required of them to enable the reorganisation to proceed. By way of illustration, the board of directors of KF GB approved:

(a) the acknowledgement by that company of the letter of assignment (to be entered into by KF GB, KF Properties and Speedy 1) which assigned the receivable of £11,376,081.54 from KF Properties to Speedy 1;

(b) the declaration of the dividend of £9,193,789.20 to be paid by KF Properties to KF GB, to be satisfied by the issue of a loan note of £9,193,789.20 by KF Properties to KF GB;

(c) the payment of a dividend in specie by KF GB of £50,874,053.09 to its sole shareholder, KF Holdings, to be satisfied by the assignment of various receivables (namely £35m owed by

ETEL, £6,680,263.89 owed by Speedy 1 and £9,193,789.20 owed by KF Properties);

(d) the payment of a dividend of £40,003,955.49 to its shareholder, to be satisfied by the issue of a loan note for that amount by KF GB to KF Holdings; and

(e) the payment of a dividend of £4,304,955.49 to its shareholder, to be satisfied by the set-off of a debt of that same amount due from KF Holdings.

(5) Stapleton's and KF Finance agreed to issue the New Loans.

**Tax advantage**

64. By virtue of s442(5), a “tax avoidance purpose” is defined as “any purpose which consists of securing a tax advantage for the company or any other person”. “Tax advantage” is then defined in s1139(2) CTA 2010 and includes “(a) a relief from tax or increased relief from tax… (c) the avoidance or reduction of a charge to tax or an assessment to tax, (d) the avoidance of a possible assessment to tax”. This definition is found within the provisions relating to “Transactions in Securities”.

65. Relying on the authorities of *IRC v Parker* [1966] AC 141 and *IRC v Sema Group Pension Scheme Trustees* [2002] EWCA Civ 1857 (which are considered further below), Ms Shaw submitted that the determination of whether there was a “tax advantage” involved a comparative exercise, comparing the actual tax consequences with those which might have transpired, and it is only if the actual tax outcome is more favourable than the comparator that a company can be said to have secured a tax advantage. On this basis:

(1) As regards Speedy 1's accelerated use of its NTDs, Ms Shaw submitted that this does not amount to a “tax advantage” as that term is defined:

(a) The NTDs, which it is agreed were available to Speedy 1 to use, were in place before, and did not arise as a result of, the reorganisation.

(b) Applying the reasoning of the House of Lords in *Parker,* HMRC needs to show a contrast as regards the “receipts” between the actual case where these accrue in a non-taxable way with a different possible case in which receipts might have accrued to the same person in a taxable way. Unless this contrast exists, the existence of the advantage is not established.

(c) In this case, the receipt of the interest by Speedy 1 in the actual case was taxable; it was simply offset by the carried forward NTDs properly available to it. For HMRC to establish the contrast identified by Lord Wilberforce in *Parker,* they would need to posit a situation in which Speedy 1 received the interest but did not have any carried forward NTDs. In other words, the difference between the two scenarios is not as to the nature of the receipt, but the existence of the carried forward NTDs.

(d) If no reorganisation had been carried out, there would have been no interest income in Speedy 1, thus no tax payable on that income. There is only a comparative advantage if you compare a situation where Speedy 1 has no NTDs; but that is not the appropriate comparator.

(e) It is odd to suggest that a taxpayer with (genuine and uncontroversial) carried forward NTDs has its position vis-à-vis HMRC improved when they are utilised. Rather, their position vis-à-vis each other is essentially neutral: a credit against HMRC has been realised and extinguished.

(2) Claiming a deduction for interest was not a “tax advantage” as defined:

(a) Obtaining interest debits for genuine commercial borrowings is not a tax advantage. The Appellants had little capacity to repay the sums due and still required debt-funding for their ongoing commercial purposes.

(b) The only situation where it might be an advantage is if there is no commercial need for the borrowing, and the only reason to borrow is to generate a tax deduction. This explains the conclusion in *Oxford Instruments UK 2013 Ltd v HMRC* [2019] UKFTT 254 (TC), where the Tribunal had found that the loan had no commercial purpose.

(c) Where there is a genuine commercial need for the funding it is not appropriate to compare the tax outcome with a situation where there is no loan as that ignores the underlying funding requirements.

(d) It is not in dispute that this increased rate was an arm's length rate, or that the transfer pricing provisions apply to the loans. If the interest rate on the loans had not been increased, Speedy 1 would have been a “potentially advantaged person” within s147(3) TIOPA 2010 (as its taxable receipts would have been less than if an arm's length provision had been made) such that its profits and losses would be required to be calculated for tax purposes as if an arm's length provision (ie higher interest rate) had been imposed. This would then have entitled the Appellants to make a claim under s174 so that their taxable profits were calculated as if that arm's length provision had been made, ie claimed a deduction for interest payable at that same higher rate that Speedy 1 was required to bring into account. It follows from this that the increased debits for the Appellants would have arisen in any event.

66. Ms Wilson submitted that both the reduction in Speedy 1's assessment to tax on its income receipts and (for each Appellant in respect of themselves and each other) the reduction in their assessment to tax by virtue of the interest debits are a “tax advantage”. Ms Wilson submitted that this involved a straightforward matter of statutory interpretation, and that both the ability to set a carried forward NTD against interest income and a deduction for interest expense are “a relief from tax” within limb (a) or a reduction of a charge to tax or an assessment to tax within limb (c). Neither the legislation itself nor the case law to which we were referred makes this any more complicated, and it does not involve the comparative approach on which the Appellants seek to rely. Furthermore, the argument that both the NTDs and the interest debits were ordinary and commercial and thus cannot be construed as a tax advantage confuses the nature of the test – the definition poses a neutral question, as illustrated by *Sema* in which the trustees were exempt yet were found to have received a tax advantage.

67. We now turn to the case law to which we were referred.

68. In *Parker* the company capitalised accumulated profits and applied that amount to pay up debentures which were issued to the existing shareholders of the company. The debentures were later redeemed. The Revenue argued that the transactions in securities rules applied to counteract the tax advantage obtained by shareholders in receiving redemption proceeds (on which no tax was payable) rather than (taxable)

dividends. Their Lordships were addressing the definition of a tax advantage in s43(4)(g) Finance Act 1960 which read as follows:

> "a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains."

69. This was a majority decision of the House of Lords (with the majority comprising Lord Wilberforce, Lord Guest and Viscount Dilhorne). Lord Wilberforce said at pp178E to 179A:

> "The [definition], as I understand it, presupposes a situation in which an assessment to tax, or increased tax, either is made or may possibly be made, that the taxpayer is in a position to resist the assessment by saying that the way in which he received what it is sought to tax prevents him from being taxed on it; and that the Revenue is in a position to reply that if he had received what it is sought to tax in another way he would have had to bear tax. In other words, there must be a contrast as regards the "receipts" between the actual case where these accrue in a non-taxable way with a possible accruer in a taxable way, and unless this contrast exists, the existence of the advantage is not established."

70. In going on to consider the receipt received by the shareholders, Lord Wilberforce went on to set out that a tax advantage had been obtained as they had received the receipt in such a way as not to be taxable when a receipt by way of dividend would be taxable, and through this the shareholders had avoided an assessment or obtained a reduction in an assessment.

71. It is clear from the language and reasoning of the majority that they were addressing limbs (c) and (d) of what is now s1139(2) CTA 2010. Their reasoning, involving a comparative exercise, was not in the context of discussion of whether there was "a relief from tax or increased relief from tax" within s1139(2)(a).

72. In *Sema* the question was whether one of the main objects of sales of shares by a pension fund back to the company in a buy-back was to enable tax advantages to be obtained. The trustees were exempt from income tax but were entitled to receive a repayable tax credit which attached to the distribution. Counsel for the trustees submitted that the entitlement to a tax credit was neither a relief from tax nor a repayment of tax (and it was thus not a tax advantage). This decision did therefore address whether there was a "relief from tax" within limb (a) of the definition.

73. In the Court of Appeal, giving a judgement with which Aldous LJ and Aikens J agreed, Jonathan Parker LJ set out the following:

> "109. In my judgment, what the draftsman was manifestly trying to do when defining 'tax advantage' in s 709(1) was to cover every situation in which the position of the taxpayer vis-a-vis the Revenue is improved in consequence of the particular transaction or transactions. As I read s 709(1) the distinction between 'relief and 'repayment' is not based on any conceptual difference between the two; the true interpretation of s 709(1) is in my judgment much simpler than that. In my judgment, 'relief in s 709(1) is intended to cover situations where the taxpayer's liability is reduced, leaving a smaller sum to be paid, and 'repayment' is intended to cover situations in which a payment is due from the Revenue. In the same way, the

> references to 'increased relief and 'increased repayment'' are directed at situations in which the taxpayer is otherwise entitled to a relief or repayment, with which the 'relief' or 'repayment' referred to in s 709(1) must be aggregated.
>
> 110. It follows that I respectfully agree with the observation of Aldous J in Sheppard and anor (Trustees of the Woodland Trust) v IRC ( No 2) [1993] STC 240 that the words 'tax advantage' in the relevant statutory provision (Aldous J was concerned with s 466(1) of the 1970 Act: the forerunner of s 709(1)) presuppose that a better position has been achieved. However, I respectfully differ from him when he goes on to answer the question 'An advantage over whom or what?' by saying: 'Advantage over persons of a similar class' (see [1993] STC 240 at 253). In my judgment, the simple answer to that question is that a better position has been achieved vis-a-vis the Revenue.
>
> 111. On this issue, therefore, I would uphold the conclusions of the Special Commissioners and of the judge, holding that in consequence of the buy-backs the trustees obtained a 'tax advantage' within the meaning of the definition of that expression in s 709(1)."

74. This judgement emphasises the simplicity of the determination of whether or not there is a relief. Jonathan Parker LJ sets out that a "relief covers situations where the taxpayer's liability is reduced, leaving a smaller sum to be paid. Then, addressing the observation that a tax advantage presupposes that a better position has been achieved, he makes it clear that this is simply vis-à-vis the Revenue, ie a better position than if such relief had not been available. This does not require that different transactions are compared.

75. We were also referred to the decision of the First-tier Tribunal in *Oxford Instruments* where, having been referred to these same authorities, Judge Beare set out his conclusion at [110] that the promissory note secured a tax advantage for the issuer in that the interest arising in respect of that note was set off against the issuer's taxable income and those deductions were accordingly a "relief from tax". Judge Beare concluded that this would be the case irrespective of whether he accepted that the deductions should be treated as part of a single structure which did not give rise to net deductions. That "mere fact" does not mean in and of itself that there has been no "tax advantage" as defined. Addressing, at [112], the taxpayer's argument that a straightforward borrowing between two companies within the UK tax net should not be regarded as giving rise to a tax advantage, Judge Beare did not accept that contention, but noted that the fact that matching income existed might well be highly relevant in considering whether securing the borrower's tax advantage was the main purpose, or one of the main purposes, of the borrower in entering into the borrowing, "but that is a quite separate question".

76. We agree; and would note we find no support in the judge's reasoning at [110] to [112] for Ms Shaw's submission that the decision in *Oxford Instruments* can be explained by the Tribunal's conclusion that the loan had no commercial purpose. That was clearly not the basis for this conclusion on the meaning of "tax advantage", and the judge described arguments relating to purpose as being separate from the question of whether or not there was a tax advantage.

77. We have concluded that the references in *Sema* to a taxpayer obtaining a "better position" vis-à-vis HMRC do not require that there is a comparator transaction. We therefore agree with HMRC that the debits claimed by the Appellants are "tax advantages" within s1139(2)(a) CTA 2010. We have similarly concluded that the use by Speedy 1 of its NTDs to offset against its interest income is a "relief from tax", as without those NTDs being available Speedy 1 would have been required to pay tax on its net interest income. It is irrelevant for this purpose that the NTDs are thereby extinguished and unavailable for future use.

**Do the Appellants have an unallowable purpose for being party to the loan relationships?**

78. A "tax avoidance purpose" is defined by s442(5) as "any purpose which consists of securing a tax advantage for the company or any other person". If a "tax avoidance purpose" is one of the purposes for which a company is a party to a loan relationship, that purpose is only regarded as a business or other commercial purpose (ie not an unallowable purpose) if it is not the main purpose, or one of the main purposes, for which the company is a party to the loan relationship (s442(3) and (4)).

79. We therefore need to consider whether the Appellants had a purpose in being party to the loan relationships of securing a tax advantage for themselves or any other person (which may include securing deductions for themselves or for another Appellant or securing the use of the NTDs by Speedy 1) and, if so, whether or not this was the main purpose or one of the main purposes for which the Appellants were party to their loan relationships.

80. Ms Shaw submitted that the reorganisation was ordinary corporate housekeeping, the purposes of which were to simplify the group balances (establishing Speedy 1 as the group treasury company) and to accelerate the use of the NTDs in Speedy 1. Ms Shaw submitted that facilitating the acceleration of the use of NTDs by Speedy 1 and obtaining debits for the interest expense themselves were not the Appellants' purpose in being party to the loan relationships:

> (1) Acceleration of use of NTDs – this is to confuse the purpose of the reorganisation with the purpose for which the Appellants were party to the loan relationships. One purpose of the reorganisation was to accelerate the use of NTDs; however, that was concerned with the receivables, ie transferring the receivables to Speedy 1 and enabling Speedy 1 to use its NTDs against the interest income. Accessing those NTDs was not the Appellants' purpose as debtor. As debtor, their only objective was (for the Preexisting Loans) to fund their commercial activities and (for the New Loans) to tidy up the intra-group balances and relocate existing commercial debt further down the group. The reorganisation was not concerned with the debtor side of the loan relationships, except in relation to the interest rate.
>
> (2) Debits for interest expense – Obtaining these debits was not a purpose of being party to the loan relationships. This was a necessary and consequential cost of their commercial funding requirements, which they would have incurred if they had borrowed from third parties.

81. Ms Shaw distinguished between the Pre-existing Loans (both those that were assigned to Speedy 1 and the KFG Loan) and the two New Loans:

> (1) Pre-existing Loans - It is agreed that the Appellants had a genuine commercial purpose for being party to the original loan relationships. This purpose did not change during, or as a result of, the reorganisation. The interest rate applied to those loans was understood to be an arm's length rate, and as such the Appellants could not have borrowed more cheaply elsewhere. The Appellants had little incentive or capacity to repay those loans. Whatever the purpose of the reorganisation and the transfers of the receivables, this did not affect the Appellants' commercial requirements for being party to these loan relationships.
>
> (2) New Loans – The purpose of these loans was to push-down the existing commercial debts of £35m owed by ETEL. The steps by which this was achieved took ETEL out of the intra-group borrowing structure. This tidying-up had no net effect on the amount of the loan balances in the

group.

82. Ms Wilson submitted that there were multiple tax advantages and that it was a main purpose of each Appellant that they and the companies obtained such tax advantages. Thus, any of the Appellants may be found to have a tax avoidance purpose by reference to a purpose of securing a tax advantage for themselves, any of the other Appellants, Speedy 1 or indeed any other person. This was a main purpose of being party to the relevant loan relationships and thus an unallowable purpose.

83. Ms Wilson emphasised that:

(1) The new loan relationships were created and the original loan relationships were varied as part of a major reorganisation, in which these Appellants all played active roles, the admitted purpose of which was to accelerate the use of the trapped NTDs in Speedy 1.

(2) The Appellants knew the parts they were playing in this reorganisation and the significance of the steps they each needed to take to facilitate this tax advantage. Taking KF Finance as an example, it acted as conduit for moving £157.1m in receivables from KF Holdings to KFG pursuant to a capital reduction. It also assigned a £14.4m receivable (owed by KFG to Speedy 1) and released KFG from a liability to pay £92.5m. In other words, KF Finance carried out a number of very specific and high value tasks for the purpose of the reorganisation as a whole, without which Speedy 1 would not have acquired KF Finance's own £67m receivable in the precise way that it did (or even at all).

(3) Two firms of accountants were involved to deal with the tax issues. Legal and other professional advice would also have been required. KF Finance (and others) underwent a capital reduction.

(4) Substantial debts were released or assigned. New loans were created, some of which were netted-off almost immediately.

(5) The Appellants agreed to pay interest on loans either for the first time or in increased amounts.

84. Ms Wilson submitted that the clear inference is that the Appellants acquired a new additional purpose in being a party to the Pre-existing Loans: that of assisting Speedy 1 in utilising its trapped NTDs and securing additional debits for the increased interest expense. It is unrealistic for the Appellants to claim that their purposes did not change during, or as a result of, the reorganisation. Being party to these loan relationships now also secured sizeable and intended tax advantages. In addition, the purpose of KF Finance and Stapleton's in being party to the New Loans related only to their roles in the reorganisation, and cannot be blessed by the commercial purposes of ETEL in incurring the original indebtedness.

85. We have first considered some of the authorities to which we were referred on ascertaining purpose, then address the evidence relating to purpose (whether of the Kwik-Fit Group or the Appellants – being mindful that s441 and 442 require consideration of the purpose of the relevant company), and then considered whether the Appellants (each or any of them) had an unallowable purpose in being a party to the loan relationships in the accounting periods in issue.

*Ascertaining purpose*

86. Ms Shaw referred us to the decision of the Court of Appeal in *Sema.* It had been found as a fact in that case that a main reason for the trustees' decision to offer the shares in the buy-back was the availability of the repayable tax credit. The decision of the Special Commissioners that the tax credits were crucial to the decision and so one of the main objects of the sales was to enable tax advantages to be obtained was upheld in both the High Court and the Court of Appeal. Those courts referred to the principle established in *IRC v Brebner* [1967] 43 TC 705 where Lord Upjohn said at [718-719]:

> “My Lords, I would only conclude my judgment by saying, when the question of carrying out a genuine commercial transaction, as this was, is considered, the fact that there are two ways of carrying it out – one by paying the maximum amount of tax, the other by paying no, or much less, tax – it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except upon the footing of paying the smallest amount of tax involved. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence.”

87. Ms Shaw submitted that it follows from this that the fact that a company has chosen the course of action which gives rise to less tax does not of itself mean that in making that choice one of the main objects is avoidance of tax.

88. Whilst we accept that principle, we are mindful that in the present case we are faced with a situation where the Appellants were not choosing between two different ways of carrying out a commercial transaction, but were choosing between leaving the loans where they were, and at the current rate of interest, or implementing the reorganisation.

89. Ms Wilson referred to the decisions in *Fidex v HMRC* [2014] UKUT 454 (TCC) and *Travel Document Service v HMRC* [2017] UKUT 45 (TCC) as authority for the proposition that the use of the loan by the taxpayer may be evidence of, or shed light on, the purpose of that loan, submitting that the fact patterns in those cases were harder for HMRC as in both cases the bonds or shares had been acquired years previously, with no intention to dispose of them. The appellants then took an action which had an effect on the tax treatment but did not vary the terms of the loan relationship.

90. In *Fidex* the company had bonds outstanding and then later issued preference shares (to Swiss Re). Under UK GAAP, Fidex's 2004 accounts showed both the preference shares and the bonds on Fidex's balance sheet. Fidex changed its accounting practice from UK GAAP to IFRS for the year ended 31 December 2005. In Fidex's 2005 accounts (under IFRS) neither the preference shares nor 95% of the bonds were shown on its balance sheet - the terms of the preference shares so matched and cancelled the economic qualities of the bonds such that the IFRS accounting policy required them to be derecognised. The loan relationship rules required that if the carrying value of a loan relationship in a company's accounts changed between the end of one period (2004) and the beginning of the next (2005) by reason of a change in accounting policy, the difference should be treated as deductible or taxable in the later year. This therefore resulted in a “loss” for tax purposes without any economic loss being suffered.

91. The Upper Tribunal, in addressing the arguments raised by the parties as to whether the company's purposes in being party to the loan relationship changed, said:

> "110 It seems to us that what you do with an asset may be evidence of your purpose in holding it, but it need not be determinative of that purpose. The benefits you hope to derive as a result of holding an asset may also evidence your purpose in holding it. A finding that such a hope exists may, depending on the circumstances, be sufficient for a finding that a purpose of holding the assets was the obtaining of that benefit."

92. This point was not appealed to the Court of Appeal. It was reiterated by the Upper Tribunal in *Travel Document Service* (ie another case which went on to the Court of Appeal), at [37]:

> "The use to which an asset is put is perfectly capable, in appropriate circumstances, of shedding light on the owner's purpose in owning that asset. This is such a case. TDS entered into the Swap in order to make the shares it owned in LGI non-qualifying shares, and it entered into the Novations in order to depreciate the shares. Thus TDS's purposes in owning the shares during that period included the purpose of making them non-qualifying and then depreciating them, so as to secure a tax advantage."

93. The Court of Appeal in *Travel Document Service v HMRC* [2018] EWCA Civ 549 then also referred back to the decision of the Upper Tribunal in *Fidex* with approval (at [41]).

94. We do note, as drawn to our attention by Ms Shaw, that in *Travel Document Service* the Court of Appeal considered that the company was "evidently intending" to use the shares in the tax avoidance scheme during the currency of the swap, stating at [46]:

> "46 Mr Turner's witness statement brought out the fact that TDS owned its LGI shares long before the Swap and Novations were thought of and that it continued to have ordinary business reasons for doing so. On the other hand, Mr Turner did not dispute that the Swap and Novations had as a main purpose securing a very large tax advantage that depended on TDS holding the LGI shares. While, therefore, there is no question of TDS having had the tax advantage in mind when it acquired the shares, it was evidently intending to use them in the tax avoidance scheme during the currency of the Swap. Had the tax advantage in view been small, there might have been scope for argument as to whether an intention to use the shares to achieve it implied that obtaining the advantage was now a main purpose of holding the shares. In fact, however, the hoped-for gain was large both in absolute terms (more than £70m) and relative to the apparent value of TDS (some £280m). That being so, I agree with Mr Ghosh that the inescapable inference was that securing the advantage had become a main purpose of holding the shares. The prospective advantage was of such significance in the context that gaining it must have become a main purpose of holding the shares as well as of the Swap and Novations.
>
> 47 That conclusion is not, however, inconsistent with Mr Turner having considered, perfectly honestly, that TDS's 'purpose' in holding the LGI shares was exclusively commercial."

95. This case law gives us helpful guidance on how to determine purpose, albeit that every situation is dependent on its own facts and we are wary of seeking to draw close analogies between different fact patterns.

*Findings of fact potentially relevant to purpose*

96. The identification of the purpose of each or any of the Appellants refers to the purpose of the directors of each company, as it is their intentions which inform the intentions of the company. These intentions may be seen from the board minutes of those companies, viewed in the light of papers which had been sent to the board and other communications with members of the board, and from the evidence of Mr Ogura, who was a director of each of the Appellants (as well as certain other companies within the group which were involved in the reorganisation) at the time all relevant decisions were taken. We also heard evidence from Mr Andrews; it is not his intentions or purpose which are relevant, but he had been the point of contact with PwC and HMRC, and had drafted the briefing memorandum and exchanged emails with Mr Ogura. We have concluded, on the basis of those email exchanges and the witness statement and oral evidence of Mr Ogura, that Mr Ogura understood the information he was given by Mr Andrews and this was taken into account in the decision-making of the directors of the Appellants.

97. Both Mr Ogura and Mr Andrews described the Itochu group as being “risk-averse” in terms of its tax position. However, we find that this does not mean that the Itochu group did not seek to manage its tax position or undertake transactions to make efficient use of tax assets. This is borne out by the evidence of Mr Andrews that he set himself a target to carry out a reorganisation of the group to facilitate the use of the NTDs in Speedy 1 (as his estimate was that it would otherwise take 25 years for the group to use the losses and from a commercial point of view this was far too long), the decision to seek advice from initially Ernst & Young and later PwC as to how to design such a reorganisation, and the decision to implement the reorganisation in full knowledge of its tax impact as set out in the June 2013 Memorandum (as defined and its contents described further below).

98. We accept that in the present context Mr Andrews sought to discuss the proposed reorganisation with HMRC on behalf of the Kwik-Fit Group at an early stage, several months before the details had been finalised, and that if the meeting with Mr Bartley had resulted in HMRC stating that the Appellants would not benefit from tax deductions in relation to their interest expense, Speedy 1 would not be able to use the carried forward NTDs to offset its increased interest income, or that other adverse tax consequences would (or would be likely to) apply, the Kwik-Fit Group (including the Appellants) would not have undertaken the reorganisation in the form in which it in fact took place.

99. After Mr Andrews received the June 2013 Letter, he prepared a paper for the directors of the companies which were to be involved in the reorganisation, which included all of the Appellants, dated 13 June 2013 (the “June 2013 Memorandum”). That paper:

> (1) referred to a long-term aim to simplify the group structure by liquidating superfluous holding companies, and that the first step is to simplify the existing intercompany funding structure. A “significant advantage” of simplifying the funding structure is said to be that it would permit the utilisation of Speedy 1's brought forward NTDs and thus reduce the group's total tax liability;
>
> (2) refers to a report having been discussed at a meeting with HMRC and states that since then HMRC has confirmed it approval of the transactions (in a letter dated 7 June 2013) and he is waiting for HMRC to confirm their agreement to an interest rate of LIBOR + 5%. In this context, the paper refers to it being the level of interest to be applied to the loans which would determine the rate at which the surplus NTDs are utilised; and
>
> (3) includes a paragraph on “Tax impact” as follows:

> "The effect of the proposed transaction is that the interest-paying entities below Speedy 1 would obtain tax relief on their payments and thereby reduce their respective tax liabilities, whilst the interest income arising in Speedy 1 would be offset against the brought forward NTDs without incurring any tax liability."

100. We are satisfied that the directors of the Appellants not only received but also understood the June 2013 Memorandum. They had also received the August 2013 Paper and understood the consequences of the transactions set out in that paper and knew, in the light of changes to the proposal made after that date, that the reorganisation would also involve the creation of new debts, including the New Loans.

101. We find, based on the evidence of Mr Ogura, that:

(1) the decision to implement the reorganisation was made as a whole group; the Appellants were part of that group so they understood and cooperated in that decision;

(2) the June 2013 Memorandum sets out what the directors of each company wanted to achieve, both for themselves and for the other members of the Kwik-Fit Group. That group purpose (as set out in that memorandum) was to create net receivables within Speedy 1, to enable utilisation of the losses in Speedy 1, and tax deductions for the interest expense of each debtor. That outcome was considered to be good for the whole group;

(3) an additional group purpose of the reorganisation was to simplify the intercompany balances within the Kwik-Fit Group;

(4) each of the Appellants knew the full details of the reorganisation which was being implemented, the steps they were required to take to implement that reorganisation, whether for themselves or as shareholder of another company involved in the reorganisation and understood as a matter of fact that the reorganisation had the effect of assigning the receivables under the Pre-existing Loans to Speedy 1. They understood that this was "for the benefit of the whole group"; and

(5) each of the Appellants had a choice as to whether or not to participate in the reorganisation, and if they had decided not to do so then the Pre-existing Loans to which they were party would have been left out of the reorganisation. The only potential reason for not participating given by Mr Ogura was if they had not wanted to pay the increased interest rate on those loans.

102. It was agreed that the Appellants had incurred the debts under the Pre-existing Loans for commercial purposes. We also find that:

(1) this commercial purpose for being party to those loans remained throughout the accounting periods in issue;

(2) the Appellants had little capacity to repay the sums due, and still required debt-funding for their ongoing commercial activities;

(3) all of the Pre-existing Loans were repayable on demand, and there had been no “threat” by the existing creditors to call for repayment of those loans;

(4) it was an integral part of the reorganisation that the interest rate on the Pre-existing Loans would be increased to LIBOR + 5%. If the relevant debtor had not agreed to participate in the reorganisation and take the steps required of it then the relevant Preexisting Loans would not have been assigned to Speedy 1 (other than the KFG Loan under which Speedy 1 was already the creditor) and the interest rate would not have been increased; and

(5) the Appellants agreed to pay a higher interest rate on the amounts they owed as part of the reorganisation. This was on the understanding that such higher rate did not exceed the rate at which they could otherwise borrow from third parties. The Appellants were aware that paying this higher rate of interest on the Pre-existing Loans (which would ultimately be payable to Speedy 1) directly fed into the tax benefit for the group.

103. The £35m of debt of ETEL (which was pushed down to KF Finance and Stapleton's in the reorganisation and resulted in them incurring the New Loans) had been incurred for ETEL's commercial purposes. The £16m incurred by KF Finance and the £19m incurred by Stapleton's as part of the reorganisation did not increase the amount of debt owed within the group. Mr Ogura accepted that these two debts, the New Loans, were incurred in order to assist in the reorganisation. On the basis of that evidence, we find that KF Finance and Stapleton's did not have their own commercial purpose (eg, needing to borrow the funds for their commercial activities) in being party to the New Loans other than the group purpose of facilitating the reorganisation.

104. There were some companies within the group that were almost dormant (if not technically so, on the basis that, eg, they continued to be party to leases). Mr Ogura's evidence was that the Kwik-Fit Group wanted to reduce the number of those companies within the group. The two examples he gave were of Melbourne Holdings (Northern) Ltd (“Melbourne”) and North Eastern Tyre & Exhausts Ltd (“NETE”), both of which were struck off in 2020. We accept that a long-term aim of the group was to reduce the number of dormant companies, and note that these two companies were subsidiaries (direct and indirect) of Stapleton's and have since been struck off. However, we find that this wider aim, whilst having been referred to in the June 2013 Memorandum, was part of the background to the reorganisation proposals but are not satisfied that it was a purpose of the Appellants in approving the reorganisation or agreeing to undertake the transactions required to implement the reorganisation. It was merely part of the background noise, as illustrated by the fact that Melbourne and NETE were not struck off until several years after the reorganisation had been completed.

*Consideration and discussion on unallowable purpose*

105. Whilst s441 uses the phrase “tax avoidance purpose”, the resulting definitions do not require that the Appellants had a purpose of avoiding tax, as that phrase might be more commonly understood. Instead, it is necessary to break down the definitions set out in the legislation, looking at whether there was a tax advantage, whether it was a purpose to secure that tax advantage and whether that was a main purpose (which has the consequence of preventing a purpose of securing the tax advantage from being a commercial purpose).

106. We were referred to HMRC's published guidance on the General Anti-Abuse Rule (“GAAR”), worldwide debt cap and s441.

(1) The Guidance on the GAAR (which is that of HMRC and approved by the GAAR Advisory Panel) notes that the loan relationships regime allows the use of carried forward NTDs against non-trading profits arising in a company, and describes it as "well established corporate housekeeping" to seek to locate profits arising within a group in a company that has available carried forward reliefs. The Guidance gives the accessing of trapped losses as an illustration of the exercising of a legitimate choice:

"D5.5.5 Do the tax arrangements accord with established practice and has HMRC indicated its acceptance of that practice?

These arrangements were discussed in detail during the consultation on the disguised interest rules and the excepted share rule was introduced following representations that they should be allowed to continue. Subject to a loan not having an unallowable purpose within s441 CTA 2009, HMRC has indicated its acceptance of such arrangements. Acceptance of such arrangements is indicated, for example, in CFM 92210 (part of the HMRC manuals that indicate how carried forward deficits can be used in the context of the debt cap)

…

D5.6.2…Arrangements involving intra-group loans which move income into one group member create deductions in another and avoid stranded interest relief have been implemented by corporates, and have been seen by HMRC, on many occasions over the years. Their use is consistent with what is allowed by s457 CTA 2009, and therefore can be seen overall to be consistent with the policy objectives of that provision, without exploiting any shortcoming in it."

(2) Ms Shaw also referred us to CFM 92210, which is part of the chapter dealing with the worldwide debt cap. Under the heading of "The problem of stranded deficits" HMRC say as follows:

"For example, suppose a particular company in a group ('company B') has a non-trading loan relationships deficit brought forward. Without the debt cap, company B might lend money to another group company ('company A') at a commercial rate of interest. Company B has interest income, against which the loan relationships deficit may be set, while company A has loan relationships debits that can be offset against its profits of the accounting period. Planning of this sort, designed to utilise reliefs in the most efficient way, is widespread and has never been regarded as particularly offensive by HMRC."

(3) Ms Wilson referred us to the chapter on the unallowable purpose test which contains the following (at CFM 38180):

"On the other hand, S441 -442 are potentially in point if the main or one of the main purposes of the intra-group funding is to achieve a tax advantage for the group as a whole, in that the loan relationship credit on the intra- group funding is in some way shielded from tax. An example of the loan relationship credit being shielded would be the soaking up of otherwise stranded surplus expenses of management etc. Where the loan relationships involve cross-border transactions, thin capitalisation and transfer pricing legislation as well as the provisions of the Double Taxation Treaties may be applicable."

107. The HMRC guidance thus gives some comfort that accessing carried forward NTDs is not regarded as abusive (in the context of the GAAR) or "particularly offensive", but it is only guidance and not binding on us. In any event, HMRC has reserved its position on whether there may be an unallowable purpose (as can be seen from D5.5.5 in the context of the GAAR) and identified at CFM 38180 that shielding intra-group interest income by using otherwise trapped losses may be within s441. We have not found this guidance to be of any assistance.

108. We have considered all of the evidence before us, and made our findings of fact in relation thereto, as set out above, with a view to considering the purposes of the Appellants in being party to the loan relationships during the accounting periods in issue.

109. It was agreed that a purpose of the reorganisation was to accelerate the use of Speedy 1's losses. Thus, on the basis of our conclusion as to the meaning of tax advantage it was a purpose of those companies implementing the reorganisation (which included the Appellants) to secure a tax advantage for another person, namely Speedy 1.

110. We have concluded that this purpose (albeit still addressing the purpose of the reorganisation at this stage) was a main purpose. The evidence clearly establishes that this was important, the key driver for implementing the reorganisation:

> (1) It was Mr Andrews' target of carrying out a reorganisation of the group to facilitate the use of the NTDs in Speedy 1 (as his estimate was that it would otherwise take 25 years for the group to use the losses and from a commercial point of view this was far too long), and this prompted him to seek advice from Ernst & Young and then PwC.
>
> (2) Mr Andrews discussed the proposed reorganisation with HMRC (with the blessing of the directors of the Appellants).
>
> (3) The June 2013 Memorandum sets out what the directors of each company wanted to achieve in the reorganisation, both for themselves and for the other members of the Kwik-Fit Group. That group purpose was to create net receivables within Speedy 1, to enable utilisation of the losses in Speedy 1, and tax deductions for the interest expense of each debtor. That outcome was considered to be good for the whole group.
>
> (4) If HMRC had said this outcome would not be achieved, the Kwik-Fit Group (including the Appellants) would not have undertaken the reorganisation in the form in which it in fact took place.

111. We accept Ms Shaw's submission that it is important to distinguish between the purpose of the reorganisation and the purpose of being party to the loan relationships. However, there is considerable evidence in support of the conclusion that this group purpose of the reorganisation was, during the accounting periods in issue, one of the main purposes of the Appellants in being party to the loan relationships.

112. The Appellants had a commercial purpose in being party to the Pre-existing Loans throughout. However, we note as regards their purposes in being party to those loans from the time of the reorganisation:

(1) Mr Ogura emphasised that the decision to implement the reorganisation was made as a whole group - the Appellants understood and cooperated in that decision;

(2) the June 2013 Memorandum sets out what the directors of each of the Appellants wanted to achieve, both for themselves and for the other members of the Kwik-Fit Group. That included securing the tax advantages;

(3) each of the Appellants knew and consented to the steps they were required to take to implement that reorganisation. They chose to participate in the reorganisation in respect of their debtor loan relationships – there had been no threat that their commercial funding would be withdrawn; and

(4) not only did the Appellants acknowledge and agree to the assignments (of all of the Pre-existing Loans other than the KFG Loan) but they also agreed to pay an increased rate of interest on those loans. The consequence (which was a known, understood and inevitable consequence) was that the Appellants paid a higher interest rate on those loans to Speedy 1 than they had been paying before the reorganisation. If they had refused to pay that higher rate of interest then the evidence was that the relevant loans would have been left out of the reorganisation.

113. We have found that paying this higher rate of interest on the Pre-existing Loans was an integral part of the reorganisation. It was important. Whilst Ms Shaw submitted that the reorganisation was primarily concerned with moving the creditor relationships around the Kwik-Fit Group in order to achieve the group purpose, the increase in interest rate was a significant additional cost which the Appellants agreed to incur in respect of their existing borrowings. The consequence of this was that the Appellants benefitted from greater interest debits and Speedy 1 was able to use its NTDs over a shorter period of time. We have concluded that the only reason the Appellants agreed to incur that additional cost in respect of their loan relationships was to secure the intended tax advantages for themselves and for Speedy 1. If they had not consented to this increased interest expense, they would have continued to borrow at the cheaper rate from the original creditor (albeit that Speedy 1 was also the original creditor under the KFG Loan). It is the decision to incur this additional cost, rather than agreeing to the assignments of the debt and thus the change in creditor, which we regard as being of greatest significance.

114. Ms Shaw sought to explain the increase in interest rate by reference to the transfer pricing legislation, submitting that the application of transfer pricing rules is mandatory, HMRC had not challenged the rate of LIBOR + 5% which was applied, and that the failure to increase the rate on other loans (a decision which Mr Andrews described as neutral) does not inform the issues in dispute.

115. We do not consider that the existence of the transfer pricing legislation, its application to the Pre-existing Loans (or the New Loans), the decision not to charge this higher rate of interest on other loans in the Kwik-Fit Group that were not involved in the reorganisation, or HMRC's failure to challenge that rate assist with the Appellants' argument:

(1) Section 147 TIOPA 2010 requires that the profits and losses of a potentially advantaged person (in this case Speedy 1) are to be calculated for tax purposes as if the arm's length provision had been imposed instead of the actual provision. This therefore requires that tax is calculated as if an arm's length rate of interest is received; it does not require that such a rate of interest is actually imposed.

(2) It is only if tax is calculated on the basis of an arm's length provision rather than the actual provision that another affected party (in this case the Appellants) may make a claim so that their taxable profits are calculated as if the arm's length provision had been made.

(3) Following the reorganisation, the higher interest rate of LIBOR + 5% was charged on the Pre-existing Loans, ie the loans within the Kwik-Fit Group that were repayable to Speedy 1. This higher rate of interest was not charged on the Detailagent Loan (which was owed by Speedy 1) or on loans owing between other members of the Kwik-Fit Group. The group was taking decisions to manage the amount of net interest income in Speedy 1 – if Speedy 1 had paid out the higher rate of interest on the Detailagent Loan then this would have had the effect of slowing down the rate of utilisation of the NTDs.

(4) Having referred to the fact that the higher rate of interest was not applied to all loans within the group, Mr Andrews stated that had they applied transfer pricing, those loans would become tax neutral anyway. One difficulty with this argument is that we are not satisfied that the Kwik-Fit Group applied the transfer pricing legislation to those other loans when calculating the profits and losses of the creditors and accordingly no claim was made, or was able to be made, by the debtors for a corresponding adjustment.

(5) The selective approach adopted within the group relates therefore not just to the decision as to the actual provision to impose (ie whether the debtors should pay the higher rate of LIBOR + 5%) but also as to whether to apply the (mandatory) transfer pricing legislation.

116. We have concluded that the decisions taken to charge the increased rate of interest on the Pre-existing Loans (and the New Loans) but not on other loans, most notably the Detailagent Loan, are strong evidence that the Appellants, in agreeing to pay an increased rate of interest to Speedy 1, had acquired a new purpose in being party to the loans from the time the reorganisation was implemented. This new purpose, additional to the original commercial purpose, was important to the Appellants, as the new rate was integral to the steps taken and if they had not been prepared to pay this higher rate than the relevant loans would have been excluded from the reorganisation. We are satisfied that the Appellants were party to the Preexisting Loans for a tax avoidance purpose from the time of the reorganisation and that this was a main (and thus unallowable) purpose, in addition to their commercial purpose of obtaining the relevant borrowings. We also accept that this commercial purpose was not only a purpose but a main purpose of being party to the loans.

117. The position is different in respect of the New Loans incurred by KF Finance and Stapleton's. Whilst we have found that the £35m of debt of ETEL which was pushed down to these two companies had been incurred by ETEL for its commercial purposes, and thus the push down did not increase the amount of debt within the group, we have found that KF Finance and Stapleton's did not have their own commercial purpose in borrowing these amounts, other than the group purpose of facilitating the reorganisation, or being party to the New Loans. They agreed to incur these new obligations, on which they paid interest at LIBOR + 5%. They participated in the reorganisation and agreed to incur these obligations in order to secure the intended tax advantages for Speedy 1 and themselves. This was an important purpose in agreeing to incur the New Loans; on the facts, we consider that this was not only a main purpose but also the main purpose for which KF Finance and Stapleton's were party to the New Loans and this tax avoidance purpose is thus an unallowable purpose.

**Amount of the debits attributable to the unallowable purpose on a just and reasonable apportionment**

118. Where the purposes of the Appellants in being a party to the loan relationships include an "unallowable purpose", then s441(2) requires the identification of the amount of any debit "in respect of that relationship [that] on a just and reasonable apportionment is attributable to the unallowable purpose".

119. Ms Shaw submitted that this requires the Tribunal to consider how much greater were the debits as a result of the unallowable purpose, or how much of the debits would not have arisen but for the unallowable purpose. On this basis, she submitted, the debits were not greater; the relevant interest debits would have been incurred in the exact amount in any event (by virtue of the application of the transfer pricing rules) thus, even if there were an unallowable purpose, that did not increase the amount of the debits; no part should be attributed to the unallowable purpose. Ms Shaw relied on *Fidex* and *Travel Document Service* in support of adopting a "but for" approach, and observed that this was followed by the Tribunal in *Oxford Instruments* (albeit obiter) and *Blackrock Holdco 5 LLC v HMRC* [2020] UKFTT 443 (TC) at [122].

120. Ms Wilson submitted that when considering how much of any debit, "on a just and reasonable apportionment is attributable to the unallowable purpose", the Tribunal applies an objective test. All the relevant facts and circumstances should be taken into account. In particular, the statutory test is to be applied without any gloss. Ms Wilson referred us to the decision of the Tribunal in *Versteegh Ltd and others v HMRC* [2013] UKFTT 642 (TC) at [166] where the Tribunal cautioned against applying a gloss on the words of the legislation, saying:

> "166 … That may be answered in a particular case by considering the extent.to which the debit is greater than it would be but for the identified unallowable purpose, but that should not, in our view, be regarded as a substitute for the statutory test itself."

121. Ms Wilson submitted that we should be wary of using the shortcut of a "but for" test in this regard, as not every question of causation is answered by a but for test. Such an approach is particularly dangerous where there are multiple tax advantages for multiple parties (in contrast, say, to *Travel Document Service* and *Oxford Instruments*).

122. We have considered the authorities to which we were referred for guidance as to how to determine the amount of any debit in respect of the loan relationships that, on a just and reasonable apportionment, is attributable to the unallowable purpose.

123. In *Fidex* there was only one purpose for the transaction which gave rise to the debit, the tax avoidance purpose. The Court of Appeal was not concerned with a situation where there were multiple main purposes (or at least one commercial purpose and one tax avoidance purpose). In concluding that the debit was wholly attributable to the unallowable purpose, the Court of Appeal set out the following:

> "72 Mr Flesch continued that if, in an accounting period, a company has one or more allowable (or 'good') main purposes for being a party to a loan relationship and one unallowable (or 'bad') main purpose, it is not just and reasonable to attribute the whole of the relevant debit to the bad purpose absent a very good reason. There could only be such a reason if and in so far as the debit was more than it would have been if there had been no bad purpose. Accordingly, the UT should have asked itself this question: How much greater was the debit in consequence of the bad purpose? This question admitted of only one answer, namely not at all, for it was always Fidex's intention to hold the bonds into 2005. If there had been no bad purpose, it would have held the bonds and the debit would have arisen in just the same way.

73 Moreover, said Mr Flesch, the UT was wrong to say as it did that the good purposes for which Fidex held the bonds related almost wholly to times after the debit had arisen. The good purposes were held from the beginning of 2005 and the fact that Fidex continued to hold them beyond the time for which it held the bad purpose was neither here nor there. Similarly, the UT lost sight of the fact that what mattered was Fidex's purpose in holding the bonds, not its purpose in issuing the preference shares. It was fair to say that the preference shares were issued for one purpose only and that was a bad purpose, but the same was not true of the bonds, for Fidex held these for two good purposes in addition to the bad purpose.

74 I believe that the answer to all of these submissions lies in the words of para 13. The UT was required to assess how much of the debit was, on a just and reasonable apportionment, attributable to the unallowable purpose for which the bonds were held. I am content to assume that Fidex would have held the bonds from the start of 2005 irrespective of the unallowable purpose but that is nothing to the point. The question is whether and to what extent the debit was attributable to the unallowable purpose for which they were held. I agree with the UT that the answer to this question is quite clear. The debit arose from and was entirely attributable to Project Zephyr. But for this tax avoidance scheme there would have been no debit at all.

75 I therefore believe the UT came to the right conclusion. On a just and reasonable apportionment, the debit was wholly attributable to an unallowable purpose."

124. Counsel had thus submitted that the Upper Tribunal should have asked itself how much greater was the debit in consequence of the bad purpose. The Court of Appeal was content to assume that Fidex would have held the bonds irrespective of the unallowable purpose but noted this was "nothing to the point", ie the assumed fact that Fidex would have been paying the interest on the bonds in any event did not protect the debits from being found to be attributable to the unallowable purpose.

125. In *Travel Document Service,* in considering LDI's appeal, the Court of Appeal set out the following:

"51. Mr Peacock's thesis was essentially that, for the purposes of para 13(1), debits should be attributed to the 'unallowable purpose' only if and to the extent that they would not have been incurred but for the tax planning. Here, he said, there was no such excess. LGI would have incurred debits of the same amount even in the absence of the tax avoidance scheme. If its reserves had not been extracted in the way they were, LGI would (Mr Peacock submitted) have borrowed so that it could pay a dividend.

…

53. On balance, however, I agree with Mr Ghosh that the materials before the FTT did not justify the attribution of any of the debits claimed by LGI to anything other than the 'unallowable purpose'. LGI never supplied particulars of what loan(s) it claimed would have been made to it at what rate(s) of interest and for what period(s) had it not adopted the Deloitte scheme. No such details were, for example, given in LGI's Notice of Appeal to the FTT, which simply contended that 'the deductions for interest are allowable for corporation tax purposes' and that 'the non-trading loan relationship debits should be allowed against trading profits'. Again, Mr Turner's witness statement said that the Novations 'could have been replaced by the payment of dividends', but did not expand on how or, in particular, what (if anything) LGI would have borrowed for the purpose. Mr Turner went a little further during his cross-examination, but there was still a dearth of specifics. For how long, for instance, might any borrowing on the part of

> LGI have lasted? Might it have been cleared at once by, say, an injection of equity? Could such an injection have obviated the need for any loan at all?"

126. The appellant's argument at [51] had thus proceeded on the basis of a "but for" test (ie debits should only be attributed to the unallowable purpose if and to the extent they would not have been incurred but for the tax planning). The Court of Appeal rejected this argument, but on the basis that the evidence did not justify the attribution of any of the debits to anything other than the unallowable purpose.

127. At [124(4)] in *Oxford Instruments* Judge Beare considered that the decision of the Court of Appeal in *Travel Document Service* (in particular in relation to LGI's appeal) supported the following:

> "…I believe that it supports the view that, in a case where the debits in question arise solely as a result of the company's being party to a loan relationship (and not as a result of some extraneous transaction or transactions), as long as the company can show that it had one or more commercial main purposes unrelated to any tax advantage in entering into, and remaining party to, that loan relationship, and that the relevant debits would have been incurred in any event, even in the absence of the company's tax advantage main purpose in so doing, then none of the relevant debits should be apportioned to the tax advantage main purpose;"

128. We consider that this illustrates the difficulty with seeking to formulate a principle which can be applied to different fact patterns, as Judge Beare has layered various factual preconditions into a "but for" test.

129. We are wary of seeking to re-write a test which is set out in the legislation, considering instead that we should focus on the requirements therein to determine the amount of the debits which should be attributed to the unallowable purpose, noting that s441(3) already directs us to make such determination by a "just and reasonable apportionment". We nevertheless recognise that asking the "but for" questions of both the existence of the loans and the interest payable thereon may be of assistance in testing the apportionment which is made.

130. The approach taken by HMRC was as follows:

> (1) debits on the loan that was pre-existing within Speedy 1 (ie the KFG Loan) were disallowed to the extent that they were increased by the change in rate; and
>
> (2) debits on loans which were both transferred to Speedy 1 and increased have been disallowed in full (ie the remainder of the Pre-existing Loans and the New Loans); but
>
> (3) this disallowance was only made to the extent that the group accessed trapped losses within Speedy 1. In 2016, there were only £7.5m stranded losses left, which is why the interest disallowed in 2016 is lower than the whole of the interest paid to Speedy 1.

131. HMRC submit that this respects the original commercial purpose of the pre-existing borrowings and the unallowable purpose which was then acquired by disallowing interest insofar as attributable to the desire to access trapped NTDs.

132. In the light of our findings of fact and the conclusions we have reached as to the purposes of the

Appellants, we have concluded that we should approach the debits in respect of the Preexisting Loans and the New Loans separately, and have further considered whether we should distinguish between the Pre-existing Loans (treating the KFG Loan differently from the other pre-existing loans).

133. The New Loans were created during the reorganisation and we have concluded that KF Finance and Stapleton's did not have their own commercial purpose in borrowing these amounts. The tax avoidance purpose was not only a main purpose for which these debtors were party to the loans but it was the main purpose. On this basis we have concluded that the debits in respect of the New Loans are wholly attributable to the unallowable purpose.

134. For the Pre-existing Loans, we have concluded that the Appellants were party to those loans for mixed purposes, both their commercial purpose of having borrowed those amounts and also the tax avoidance purpose and that both of these purposes were a main purpose (hence why, in the case of the tax avoidance purpose, it is an unallowable purpose).

135. Considering first the debits in respect of the KFG Loan, ie the loan from Speedy 1 to KFG in respect of which there had been no change in creditor during the reorganisation but where the only change was to the interest rate, HMRC have disallowed the debits in respect of the increase in interest rate, allowing the debits for the original interest rate. (This is the only loan where HMRC have taken this approach.) We agree with this approach:

> (1) KFG had borrowed at the lower rate from Speedy 1 and would, even if it had not participated in the reorganisation, have continued to incur interest expense and thus debits in respect of that lower rate of interest; and
>
> (2) KFG's agreement to pay an increased interest rate cannot be attributable to any reason other than the tax avoidance purpose on a just and reasonable apportionment. The increase in interest rate was integral to the reorganisation and we regarded it as strong evidence of KFG having a new purpose in being party to the KFG Loan. We do not accept Ms Shaw's submission that this higher rate of interest would have been payable in any event because of the application of the transfer pricing legislation, or that Speedy 1 would have been treated for tax purposes as receiving this higher income if the actual provision had not been amended. This argument was not made out on the facts (as we were not satisfied that transfer pricing adjustments were made to loans where the interest rate had not been increased), and the decision of KFG and Speedy 1 to increase the rate of interest on the KFG Loan was solely attributable to the tax avoidance purpose of KFG.

136. We recognise that this approach has essentially involved us applying a “but for” test, on the basis of the facts as we have found them, and consider this outcome is in line with the authorities.

137. HMRC have then taken a different approach to the remaining Pre-existing Loans, disallowing all of the debits in respect of those loans. There is some merit in such an approach, as without the tax avoidance purpose of the Appellants the loans would not have been assigned to Speedy 1 or the interest rate increased. However, we consider that this approach does not reflect the extent to which the Appellants had a commercial purpose as well as an unallowable purpose. The Appellants had commercial borrowings on which they were paying interest at the lower rates. That was the case before the reorganisation and would have remained so had they decided not to participate in the reorganisation. We have concluded that the debits in respect of the remaining Pre-existing Loans should be treated in the same way as the debits in respect of the KFG Loan, such that the amount of the original interest costs is recognised as being

attributable to the commercial borrowing of the Appellants and that only the debits in respect of increase in the interest rate should be attributed to the unallowable purpose. It is to this extent that we allow the Appellants' appeal.

138. We agree with the approach taken by HMRC of capping the amount of the disallowance at the amount of the NTDs used by Speedy 1. This reflects our conclusion as to the use of these NTDs being one of the tax advantages which the Appellants were seeking to secure.

**Engagement by the Kwik-Ft Group with HMRC**

139. The Appellants sought to describe the reorganisation as having been approved by HMRC. We deal with this relatively briefly as we do not consider that this is relevant to the issues before us – this Tribunal does not have jurisdiction to hear an application for judicial review of decisions of HMRC, and neither party approached this appeal on such basis.

140. Giving evidence, Mr Ogura referred to the reorganisation as having been approved by HMRC in their letters of June 2013, and stated that the directors of the Appellants would not have proceeded with the reorganisation if HMRC had said that deductions would not be available for interest costs. Mr Andrews' evidence was that Mr Bartley had made the comment that he (Mr Bartley) was unsure as to why they were approaching HMRC with this proposal as it seemed to be normal corporate housekeeping. No such comment was included in the meeting note prepared by Mr Bartley, but Ms Wilson did not challenge that this was said (and we find that it was said); rather, her challenge was as to why this had been Mr Bartley's understanding.

141. Whilst HMRC had been approached about the reorganisation in March 2013, and Mr Bartley expressed himself “happy” or “content” in the June 2013 Letter, we do not regard it as accurate to characterise this as HMRC having approved the reorganisation which was actually implemented later that year:

(1) At the meeting Mr Bartley had said that he could only see what the impact of the changes would be when the returns are submitted. Mr Andrews referred to wanting some certainty, and Mr Bartley accepted this. This qualification on what Mr Bartley could say or do was set out from the outset.

(2) Mr Bartley was sent the March 2013 Paper, ahead of a meeting which took place on 22 March 2013. That March 2013 Paper dealt briefly with the proposed steps and did not reflect the final steps which took place – in particular, the dividend of £40m is not set out therein, and nor are the New Loans.

(3) The March 2013 Paper does not refer to the acceleration of the use of losses in Speedy 1, or mention that they could be used in two to three years rather than 25 years. The “Background and scope” section of the paper refers to the complex set of intercompany balances and says “Management wish to reorganise the intercompany funding structure such that Speedy 1 comes the subgroup treasury company”.

(4) Furthermore, the March 2013 Paper did not mention that the interest rate of the loans involved in the reorganisation would be increased. Whilst it is apparent from the meeting note and the follow-up correspondence that HMRC were told that the interest rate on the Pre-existing Loans was to be increased, it is not clear that Mr Bartley could or would have

realised or been told that this was not being applied to all intra-group loans. This is significant in the context of the Detailagent Loan – that loan had been shown in the steps paper and in the manuscript note of intercompany balances handed over at the meeting. That manuscript note included a table setting out the receivables in Speedy 1 after the reorganisation. The Detailagent Loan stands out in that table – the amount is substantial at £57.6m, even in the context of the total amounts of the receivables (as Speedy 1 would have net receivables of £403.7m) and it is the only creditor relationship of Speedy 1 shown on that table.

(5) The meeting only lasted 55 minutes which suggests that the proposal was not discussed in depth – this is particularly significant given the brevity of the March 2013 Paper.

(6) There was no application on behalf of the Kwik-Fit Group for a non-statutory clearance in relation to the debits, the outcome of which may have prompted further questions to arise, or at least resulted in HMRC stating expressly the comfort that they were not giving. Similarly, there was no application for an advance thin cap agreement. The information provided by or on behalf of the group fell far short of the level of information that would be expected to obtain such an agreement, appearing to have consisted solely of a statement by PwC that this would be an arm's length rate. No data was provided in support of this contention – no assumptions, overview of the business, no information as to other borrowings of the Itochu group or its overall credit score, and no information as to potential third-party comparables.

(7) The June 2013 Letters do not contain any statement that HMRC will not challenge the transactions under the unallowable purposes rule.

142. It should not be inferred from this that we consider HMRC were misled. We do not, albeit that we have some reservations as to the transparency in relation to the intentions as regards the interest rate increase not being applied to the Detailagent Loan, a matter which could have been cleared up readily if a more detailed paper had been presented to HMRC. However, we accept and agree with Mr Andrews' explanation that, as the group's CRM, Mr Bartley would have known that there was a significant NTD in Speedy 1, the usefulness of which was limited without specific steps being taken to access those losses, and that the interest rate set by the group as well as the quantum of loans assigned to Speedy 1 would be key drivers of the rate of use of those losses.

143. In all the circumstances we regard it as an overstatement to say that this reorganisation was approved by HMRC; but, as noted above, nothing turns on this as regards this appeal.

**Dispensation**

144. The appeal is allowed in part.

145. We have concluded that each of the Appellants were party to the loan relationships with Speedy 1 for an unallowable purpose such that s441 applies. The amounts of the debits in respect of their loan relationships as on a just and reasonable apportionment are attributable to the unallowable purpose and are thus disallowed by s441(3) are:

(1) In respect of the New Loans, all of the debits attributable to the interest on such loans.

(2) In respect of all of the Pre-existing Loans, the amount of the debits attributable to the increase in the interest rate on such loans. It is to this extent that the appeal is allowed.

146. The total amount of the disallowance shall be capped in each accounting period at the amount of the NTDs used by Speedy 1 in that period.

147. The parties shall seek to agree the amount of such disallowances within 56 days of the expiry of the time limit below for an application for permission to appeal, and failing such agreement shall revert to the Tribunal for further directions to enable the Tribunal to determine quantum.

**Right to apply for permission to appeal**

148. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**APPENDIX 1: STATEMENT OF AGREED FACTS**

**1. Background**

1.1 The Appellants are private limited companies incorporated under the laws of England and Wales (company numbers 04474093, 00332098, 04474262, 01009184 and 03661259 respectively).

1.2 Since March 2011, the Appellants have been part of a group of companies headed by the Itochu Corporation ("Itochu"). All of the Appellants are, and at all material times have been, wholly-owned subsidiaries of, and "controlled"1 by, European Tyre Enterprise Limited, which is itself a wholly-owned subsidiary of the Itochu Corporation. A group structure chart showing the group (so far as is relevant) during the periods material to the appeals is appended to this Statement of Agreed Facts.

**2. HMRC's Enquiries**

2.1 HM Revenue & Customs ("HMRC") opened enquiries into the Appellants' company tax returns for the accounting periods ended 31 March 2014, 2015 and 2016 pursuant to Paragraph 24 of Schedule 18 to Finance Act 1998 on 2 February 2016, 9 March 2017 and 1 February 2018 respectively (the "Enquiries").

**THE STEPS**

2.2 Speedy 1 Limited had historically incurred significant non-trade deficits ("NTDs") in the course of its business, the extent and availability of which are not in dispute. The majority of the NTDs were either utilised against entity income, surrendered to group entities, or reduced following prior year adjustments. The remainder were carried forward.

2.3 The following steps were undertaken in September and October 2013 (with further action taken in 2014 in relation to step 16):

1) Kwik-Fit Properties Limited transferred £11,376,081.54 of its receivable from Kwik-Fit (GB) Limited to Speedy 1 Limited in return for a loan note;

2) Kwik-Fit Properties Limited paid a dividend of £9,193,789.20 to Kwik-Fit (GB) Limited for a loan note left outstanding;

3) Kwik-Fit Holdings Limited assigned £67,076,394.32 receivables from Kwik-Fit Finance to Speedy 1 Limited in return for a loan note;

4) Kwik-Fit (GB) Limited distributed £95,179,008.58 to Kwik-Fit Holdings Limited comprising:

a. £50,874,053.09 of receivables (comprising £35,000,000 from European Tyre Enterprise Limited, £6,680,263.89 from Speedy 1, and £9,193,789.20 from Kwik-Fit Properties Limited);

b. £40,003,955.49, satisfied by the issuance of a loan note from Kwik-Fit (GB) Limited to Kwik-Fit Holdings Limited; and

c. £4,304,955.49

5) Kwik-Fit Finance Limited assigned £14,400,000 of its £106,977,000 receivable from Kwik-Fit Group Limited, to Speedy 1 Limited in return for a loan note;

6) Kwik-Fit Holdings Limited performed a capital reduction to increase distributable reserves by £74,028,900;

7) Kwik-Fit Holdings Limited distributed £157,099,811.61 of receivables to Kwik-Fit Finance Limited comprising;

a. £40,003,955.49 receivable from Kwik-Fit GB Limited;

b. £35,000,000 receivable from European Tyre Enterprise Limited;

c. £72,902,066.92 receivable from Speedy 1 Limited; and

d. £9,193,789.20 receivable from Kwik-Fit Properties Limited

8) Kwik-Fit Finance Limited performed a capital reduction in the amount of £138,675,000 to increase distributable reserves;

9) Kwik-Fit Finance Limited distributed £280,076,811.61 to Kwik-Fit Group Limited comprising:

a. £40,003,955.49 receivable from Kwik-Fit GB Limited;

b. £87,302,066.92 receivable from Speedy 1 Limited;

c. £35,000,000 receivable from European Tyre Enterprise Limited;

d. £9,193,789.20 receivable from Kwik-Fit Properties Limited;

e. £92,577,000 which was set off against a debt owing from Kwik-Fit Group Limited to Kwik-Fit Finance Limited; and

f. £16,000,000, satisfied by the issuance of a loan note from Kwik-Fit Finance Limited to Kwik-Fit Group Limited

10) Kwik-Fit Group Limited distributed £191,880,811.61 receivables to Speedy 1 Limited comprising:

a. £44,265,955.49 receivable from Kwik-Fit (GB) Limited;

b. £87,302,066.92 receivable from Speedy 1 Limited;

c. £35,000,000 receivable from European Tyre Enterprise Limited;

d. £9,312,789.20 receivable from Kwik-Fit Properties Limited; and

e. £16,000,000 receivable from Kwik-Fit Finance Limited

11) Kwik-Fit Properties Limited and Speedy 1 Limited netted off creditor and debtor balances of £9,312,789.20;

12) North Eastern Tyre & Exhausts Limited settled £2,850,000 loan with Stapleton's (Tyre Services) Limited using receivable from Speedy 1 Limited;

13) North Eastern Tyre & Exhausts Limited distributed receivable due from Speedy 1 Limited to Melbourne Holdings (Northern) Limited in the amount of £1,684,444;

14) Melbourne Holdings (Northern) Limited distributed a receivable due from Speedy 1 Limited to Stapleton's (Tyre Services) Limited in the amount of £7,203,444;

15) Step 15 (a planned share capital reduction for Stapleton's (Tyre Services) Limited) was ultimately not carried out because Stapleton's (Tyre Services) Limited was considered to have sufficient distributable reserves to proceed with Step 16;2

16) Stapleton's (Tyre Services) Limited distributed £28,294,444 to European Tyre Enterprise Limited comprising:

a. £19,500,000 satisfied by the issuance of two loan notes by Stapleton's (Tyre Services) Limited to European Tyre Enterprise Limited; and

b. £8,794,444 receivable from Speedy 1 Limited3

17) Speedy 1 Limited issued shares in exchange for £198,157,902.23 of receivables passed down from European Tyre Enterprise Limited comprising:

a. £13,294,458.23 receivable from Kwik-Fit Euro Limited;

b. £23,413,000 receivable from Kwik-Fit Group Limited;

c. £81,450,444 receivable from Speedy 1 Limited; and

d. £80,000,000 receivable from Stapleton's (Tyre Services) Limited

18) European Tyre Enterprise Limited settled £19,000,000 of its payable to Speedy 1 Limited and £500,000 of its payable to Kwik-Fit GB Limited using the £19.5m receivable from Stapleton's (Tyre Services) Limited (received at step 16); and

19) Speedy 1 Limited made a £16,000,000 distribution to European Tyre Enterprise Limited, releasing it from the remaining part of its £35,000,000 payable.

2.4 Following the above steps, the interest rates on pre-existing receivables thereby held by Speedy 1 Limited was set at or increased to LIBOR +5%. The three new receivables created at step 4b, step 9f and step 16a also carried interest at the same rate. The interest rates on inter-company debts that were not involved in the PWC steps were not varied.

2.5 HMRC have not challenged the specific rate or loan quantum selected by the group for the above steps.

**3. The Appellants' applications for closure of the Enquiries**

3.1 The Appellants submitted their applications to the First-tier Tribunal for the closure of the Enquiries on 3 August 2017 (for the accounting periods ended 31 March 2014 and 2015) and 17 April 2018 (for the accounting period ended 31 March 2016) (the “Closure Applications”).

3.2 The Closure Applications were heard by Judge Morgan in the First-tier Tribunal on 24 and 25 April 2018 and a decision was released on 17 July 2018. Judge Morgan directed HMRC to issue closure notices within four months.

### 4. HMRC's decision

4.1 HMRC issued final closure notices to each of the Appellants on 14 November 2018 (the "Closure Notices"). HMRC subsequently issued amendments to each of the Appellants on 16 November 2019 (the "Amendments").

4.2 The Amendments disallowed the Appellants' interest debits as follows:

| **Company name** | **APE 31 March** | **Disallowed amount** |
|---|---|---|
| **Kwik-Fit Group Limited** | 2014 | £4,505,058.00 |
| | 2015 | £10,127,075.00 |
| | 2016 | £3,218,511.00 |
| **Stapleton's (Tyre Services) Limited** | 2014 | £2,704,571.00 |
| | 2015 | £5,518,143.00 |
| | 2016 | £1,632,028.00 |
| **Kwik-Fit Finance Limited** | 2014 | £2,317,408.00 |
| | 2015 | £4,934,818.00 |
| | 2016 | £1,548,529.00 |
| **Kwik-Fit (GB) Limited** | 2014 | £1,523,611.00 |
| | 2015 | £3,117,525.00 |
| | 2016 | £926,081.00 |
| **Kwik-Fit Euro Limited** | 2014 | £373,223.00 |

4.3 The effect of the Amendments was such that, for those Appellants who had loans with Speedy 1 Limited as the creditor prior to the Reorganisation, HMRC disallowed the difference between the interest paid by the Appellant having applied the LIBOR +5% rate and the pre-Reorganisation interest rate. For those Appellants whose loans were assigned to Speedy 1 Limited as a result of the Reorganisation, the entire amount of the interest due to Speedy 1 Limited was disallowed.

4.4 The position before and after the Reorganisation as regards interest rates was as follows:

| **Debtor** | **Creditor *(prior to the Reorganisation)*** | **Creditor *(after the Reorganisation)*** | **Interest rate *(prior to the Reorganisation)*** | **Interest rate *(after the Reorganisation)*** |
|---|---|---|---|---|
| Kwik-Fit (GB) Limited | Kwik-Fit Properties Limited | Speedy 1 Limited | 0.74% | LIBOR + 5% |
| Kwik-Fit Finance Limited | Kwik-Fit Holdings Limited | Speedy 1 Limited | 0.74% | LIBOR + 5% |
| Kwik-Fit Group Limited | Kwik-Fit Finance Limited | Speedy 1 Limited | 0.74% | LIBOR + 5% |

| | | | | |
|---|---|---|---|---|
| Kwik-Fit Finance Limited | N/A | Speedy 1 Limited | N/A | LIBOR + 5% |
| Kwik-Fit (GB) Limited | Kwik-Fit Group Limited | Speedy 1 Limited | 0% | LIBOR + 5% |
| Kwik-Fit (GB) Limited | N/A | Speedy 1 Limited | N/A | LIBOR + 5% |
| Stapleton's (Tyre Services) Limited | N/A | Speedy 1 Limited | N/A | LIBOR + 5% |
| Kwik-Fit Euro Limited | European Tyre Enterprise Limited | Speedy 1 Limited | 0% | LIBOR + 5% |
| Kwik-Fit Group Limited | European Tyre Enterprise Limited | Speedy 1 Limited | 1.89% | LIBOR + 5% |
| Stapleton's (Tyre Services) Limited | European Tyre Enterprise Limited | Speedy 1 Limited | 0.7% - 0.9% | LIBOR + 5% |
| Kwik-Fit Group Limited | Speedy 1 Limited | Speedy 1 Limited | 0.74% | LIBOR + 5% |

**APPENDIX 2: SUMMARY STRUCTURE OF THE KWIK-FIT GROUP OF COMPANIES**

So far as relevant to the appeals. All holdings shown below are 100% of the ordinary share capital. The Appellants are underlined.

IMAGE NOT AVAILABLE

1 Within the meaning of s1124 of the Corporation Tax Act 2010.

2 This Step refers to Stapleton's (Tyre Services) Limited being considered to have sufficient distributable reserves, however, Stapleton's (Tyre Services) Limited's Financial Statements for the Year Ended 31 March 2016 note at Note 10 that:

“Restatement of investments in subsidiary companies and reversal of dividend paid During the accounting period ending 31 March 2014, the company paid a dividend of £28,294,444. Subsequent analysis of this payment has revealed that £7,264,298 of this dividend related to income received from a subsidiary which should have triggered an impairment of the investment in this subsidiary of £8,685,595. Accordingly] the £7,264,928 distribution made by the Company to its parent was unlawful. Adjustments have been to restate the opening reserves position of the company as at 1st April 2014 to reduce them by £1,421,000, representing an impairment of the investment in subsidiaries of £8,685,595 and the reversal of the distribution of £7,264,928 and the creation [of] a corresponding receivable from Group undertakings.” The dividend referred to in this Note is the total dividend paid in Step 16.

3 In fact, this receivable was transferred not by way of dividend in October 2013, but instead by way of an assignment which created a debt due to Stapleton's (Tyre Services) Limited from European Tyre Enterprise Limited in the amount of £8,794,444. Then, on 31 March 2014, a further dividend in a matching amount was declared by Stapleton's (Tyre Services) Limited to European Tyre Enterprise Limited satisfied by setting-off this debt.