Neutral Citation Number: [2017] EWCA Civ 1427

Case No: A3/2015/3547

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
MR JUSTICE HILDYARD AND JUDGE BISHOPP
[2015] UKUT 0447 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2017

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE HENDERSON
and
LADY JUSTICE THIRLWALL

- -

Between:

PATRICK DEGORCE	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Ms Hui Ling McCarthy (instructed by **Enyo Law LLP**) for the **Appellant**
Mr Michael Gibbon QC and Mr Michael Jones (instructed by **the General Counsel and Solicitor to HMRC**) for the **Respondents**

Hearing dates: 14 and 15 June 2017

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Judgment Approved

Lord Justice Henderson:

Introduction

1. At all material times the appellant taxpayer, Mr Patrick Degorce, was a successful hedge fund manager. Although a French national, he lived with his family and worked in the United Kingdom. In the closing days of the 2006/07 tax year, he entered into a series of transactions designed by the promoters of the scheme to produce an allowable trading loss in that year which he could claim to set off against his income from other sources which was expected to be approximately £19 million. If the scheme worked, its effect was to generate a tax loss of £20,151,186 in the initial period of his activity as a sole trader which ran from 2 to 5 April 2007.

2. The scheme was known as "the Goldcrest Film Scheme" or "the Goldcrest Pictures Scheme". Goldcrest is the name of the group which promoted the scheme, and various companies in the group participated in the transactions. It is common ground (although this may not have been known to Mr Degorce at the time) that the scheme fell within the provisions of Part 7 of the Finance Act 2004 which require the disclosure to HMRC of certain tax avoidance schemes – the so-called DOTAS provisions – and that it had been duly disclosed to HMRC before it was implemented.

3. Mr Degorce was introduced to the scheme by the Specialist Tax Group of HSBC Private Bank. On or around 2 April 2007, Mr Degorce received a letter from the Bank which referred to a "Goldcrest Business Proposal" and gave information about the structure of the scheme and its intended tax treatment. The letter made clear that, if Mr Degorce subscribed to the scheme, the Bank would receive an introducer's fee from Goldcrest.

4. The letter gave the following description of how the scheme was intended to operate:

> "**Structure and taxation**
>
> The business proposal provides the opportunity for an individual to engage in the global film industry on a sole trader basis.
>
> With assistance from Goldcrest Pictures, the individual will undertake a trade of purchasing and exploiting film distribution rights in defined territories and specific films.
>
> The financing of such transactions can potentially be leveraged by a limited recourse loan from a Goldcrest entity. Such a loan is expected to cover 78% of the transaction with the balance of 22% coming from the individual's own funds …
>
> Should the individual choose to apply for a loan to cover 78% of the total transactions, it would be 5 years in term on a limited recourse basis. The loan would be secured by a security interest in the Sole Trader's distribution rights with a commercial rate of interest. The interest and principal would be repayable from

a percentage of revenues generated by the exploitation of the distribution rights.

Based upon information provided by Goldcrest Pictures, the Sole Trader will decide to purchase certain territorial rights in defined films from Goldcrest Film Rights Limited. Goldcrest Pictures will then provide ongoing film advisory and administrative services to the Sole Trader covered by the up front fees payable and a performance related fee based on the Sole Trader's exploitation receipts …

The Sole Trader contracts to dispose of his rights to a Goldcrest Distributor in return for a pre agreed share of exploitation revenues which will be monitored by Goldcrest. It is a proportion of these revenues that will be used to repay the loan to Goldcrest Funding (expected to be 55-60% of revenues generated).

Whilst the trade is carried on with a view to being a profitable venture, it is likely that a loss will arise in the first Accounting Period due to Generally Accepted Accounting Principles ("UK GAAP").

Under UK GAAP balance sheet assets represented by "work in progress" (for incomplete films) or "trading stock" (for completed but unsold films) must be valued in the accounts at the lower of:

- Cost; and

- Net realisable value.

Due to the nature of the arrangements entered into to exploit the films, it is anticipated that the net realisable value of the assets will be substantially lower than cost as revenues from the exploitation of distribution rights will not yet be realised and will therefore be uncertain.

The financial illustration in the enclosed Business Proposal assumes that the average net realisable value will be 12% of each asset's acquisition price, although the net realisable value will vary from film to film and from territory to territory and may be higher or lower.

The projected loss will be adjusted for tax purposes and, as a result, for a 40% taxpayer, a tax loss of approximately 34% of the 100% committed capital is expected to arise.

The cashflow in the above scenario for someone committing total capital of £1 million would be:-

Initial cash subscribed £220,000

Estimated net tax relief	£343,556
Net initial cash benefit	+£123,556

…"

5. The letter also drew Mr Degorce's attention to various "risk factors", including reference to advice received from Tax Counsel on "the appropriate level of involvement undertaken by an individual to demonstrate an active trade". The Bank's advice was "that any individual considering this Business Proposal should be prepared and able to spend ten hours per week engaged in the trade throughout".

6. The enclosed Business Proposal by Goldcrest Pictures Limited emphasised that the proposal was for the subscriber to trade in his own right as a sole trader, with "an opportunity to engage in the global film industry assisted by the Goldcrest group of companies, one of the longest-established and most celebrated film companies in the UK". Under the heading "Your Trade", the proposal said:

> "You will undertake the trade of purchasing and exploiting distribution rights in high quality commercial films as detailed in Schedule 1. You will be assisted by Goldcrest Pictures, who will leverage Goldcrest's production, post-production and sales relationships to identify and evaluate film opportunities for you. In the course of your trade you will have the opportunity to:
>
> - Acquire distribution rights;
> - Sell the distribution rights;
> - Generate profits from exploitation of the rights.
>
> When advising you during the course of your trade Goldcrest Pictures will:
>
> - Employ Goldcrest's experience in the film business to negotiate acquisition and distribution agreements for you;
> - Draw on Goldcrest's ability to track and collect your exploitation revenue.
>
> You will undertake the trade in your sole name and nothing in any of the agreements to which you will be a party is intended to form a partnership."

7. On 2 April 2007 Mr Degorce signed an acceptance form for Goldcrest Pictures Limited, which recorded a "Payment Amount" of £21,923,457 and an initial payment on acceptance of £4,823,160 (equal to 22% of the Payment Amount). Mr Degorce also authorised Goldcrest Pictures Limited as his attorney to sign what were defined as "Relevant Agreements", i.e. all documents which he needed to execute in order to participate in the scheme, and he agreed to confirm and ratify the execution of all

Relevant Agreements. On the same day, Mr Degorce applied to another Goldcrest company, Goldcrest Funding Limited, for a loan of the remaining 78% of the Payment Amount. The other documents needed to set up the scheme were also executed between 2 and 5 April 2007.

8. The transactions into which Mr Degorce entered were of considerable complexity, and they evidently comprised a pre-planned package. HMRC have never contended that any of the transactions, or any part of the overall package, was a sham. They have instead focused their attack on the fundamental issue whether, in entering into the transactions, Mr Degorce was indeed beginning to carry on a trade of the distribution and exploitation of film rights. If he was not a trader, in the sense understood by the law, no losses of the trade could have been generated in the first few days of its operation, and the scheme entirely failed to achieve its fiscal objectives. On this analysis, all that Mr Degorce actually did, albeit by elaborate means, was to purchase an investment in film distribution rights. If, on the other hand, Mr Degorce did embark on a real trade, a number of further issues arise which, if answered adversely to Mr Degorce, will either eliminate or reduce the relief which he claims. Those further issues are, in short:

   (a) whether the trade was carried on by Mr Degorce on a commercial basis;

   (b) whether the trade was carried on with a view to the realisation of profits or, in the alternative, whether it was carried on so as to afford a reasonable expectation of profit;

   (c) whether the profits of the trade for the year of assessment 2006/07 were calculated in accordance with UK GAAP; and

   (d) whether Mr Degorce's expenditure on rights in two films, *Tropic Thunder* and *The Love Guru*, was wholly and exclusively laid out or expended for the purposes of the trade.

9. It is important to stress at the outset that this appeal relates only to the tax year 2006/07. It first came before the First-tier Tribunal (Judge Blewitt, or Judge Dean as she now is, and Mrs C E Farquharson) ("the FTT") on a reference made by the parties pursuant to section 28ZA of the Taxes Management Act 1970 ("TMA 1970") of two questions which arose from an enquiry opened by HMRC into Mr Degorce's tax return for the year 2006/07. Those questions were (a) whether any trade losses under Case I of Schedule D (in the Income and Corporation Taxes Act 1988 ("ICTA 1988")) arose from the film distribution activity carried on by Mr Degorce during that year; and (b) if so, the amount allowable for tax purposes. Mr Degorce was one of twelve users of the scheme, each of whom had appealed against decisions made by HMRC in respect of their tax returns. Mr Degorce's case had been selected as a suitable lead appeal, and a direction was made designating it as such while the other eleven (which remain in the FTT) were designated as related appeals. The matter came before the FTT by way of a reference, rather than an appeal from a closure notice, because HMRC were continuing to investigate other unrelated matters in relation to Mr Degorce's return for 2006/07 and it would therefore have been premature to close the enquiry by amendment of his return so as to disallow his claim for loss relief.

10. The case was heard by the FTT over seven days in May and June 2012. Mr Degorce was then represented by Mr Jonathan Peacock QC, leading Mr Jolyon Maugham, while HMRC were represented, as they have been throughout, by Mr Michael Gibbon QC leading Mr Michael Jones. The parties agreed that the two questions referred to the FTT break down into five primary issues, the first being whether, during the year ended 5 April 2007, Mr Degorce carried on a trade ("the trade issue"), and the other four being those identified above which arise only if the first question is answered in the affirmative.

11. The FTT released its decision on 4 March 2013 ("the FTT Decision"). It is a lengthy document, running to 59 pages and 275 paragraphs. The FTT determined the trade issue against Mr Degorce, finding at [156] that "this was not an adventure in the nature of trade". Although it was strictly unnecessary for it to do so, the FTT also proceeded to determine the remaining issues and decided each of them against Mr Degorce as well.

12. The neutral citation reference of the FTT Decision is [2013] UKFTT 178 (TC), and it is also reported at [2013] SFTD 806.

13. Mr Degorce then appealed to the Upper Tribunal (Hildyard J and Judge Colin Bishopp), which heard his appeal over four days in November 2014. He was represented on the appeal by Mr Maugham alone, instructed by Reynolds Porter Chamberlain LLP. The Upper Tribunal released its decision ("the UT Decision") on 24 August 2015. It, too, is a substantial piece of work, running to 38 pages and 137 paragraphs. The neutral citation reference of the UT Decision is [2015] UKUT 0447 (TCC), and it is reported at [2016] STC 542.

14. The Upper Tribunal was critical of some aspects of the FTT's reasoning, and found other parts of it difficult to follow. In particular, the Upper Tribunal identified, at [94], "an error of approach" at [99] of the FTT Decision, where the FTT had found as a fact that "there was no element of repetition" in the transaction undertaken by Mr Degorce in 2006/07. Although he had been involved in similar activities after that year, the FTT noted that those activities were the subject of an enquiry by HMRC and no determination had been made on the issue of trade. In the FTT's view:

> "it would be unsafe to accept the Appellant's assertions [*about his activities before and after 2006/07*] in the absence of any detailed examination of the evidence and consequently [*we*] found that we must deal with the transaction as a one-off transaction."

This passage revealed an error of approach, said the Upper Tribunal, because:

> "one cannot disregard evidence of similar activities because the tax consequences of those activities are under investigation. The tax consequences of a transaction do not determine its character; rather, it is the character of the transaction which determines its tax consequences."

15. Although the Upper Tribunal identified this error of approach, however, they nevertheless dismissed Mr Degorce's appeal on the trading issue, holding that they

could see no sufficient basis for overturning the FTT's overall conclusion that what Mr Degorce actually did and obtained under the scheme in 2006/07 was not an adventure in the nature of trade: see the UT Decision at [96] to [107]. As events have turned out, it is this passage in the UT Decision which Mr Degorce now wishes to put at the forefront of his appeal to this court, subject to the procedural issue which I discuss below.

16. As the Upper Tribunal rightly noted at [107], its conclusion on the trade issue was determinative of the appeal. Nevertheless, as requested by the parties, and in deference to the arguments addressed to it, the Upper Tribunal went on to deal more briefly with the other issues, and in each case came to the same conclusion as the FTT.

17. Mr Degorce now appeals to this court, with permission granted by the Upper Tribunal. His grounds of appeal were settled by Mr Jolyon Maugham QC, as he had now become, on 16 September 2015. The Upper Tribunal granted permission to appeal on 2 October 2015, noting that under the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/2834) they could do so only if the appeal would raise some important point of principle or practice, or if there was some other compelling reason. The Upper Tribunal said they were satisfied that those conditions were met, but did not identify the important point of principle or practice, or other compelling reason, which had led them to this conclusion. Mr Degorce then filed his counsel's skeleton argument in support of the appeal, again settled by Mr Maugham QC, and in due course HMRC filed their skeleton argument in answer. There was, and is, no respondent's notice.

18. There matters rested until January 2017, when there was a change of representation by Mr Degorce. Enyo Law LLP replaced Reynolds Porter Chamberlain as his solicitors, and Ms Hui Ling McCarthy was instructed as sole counsel in place of Mr Maugham QC.

19. On 21 April 2017, Mr Degorce made an application through his new solicitors seeking permission (a) to rely on a supplementary skeleton argument which would replace his existing skeleton argument dated 30 October 2015, and (b) to amend his appellant's notice so as to include a new ground. The proposed new ground of appeal, in short, was that the FTT, having held that only 22% of the purchase price paid by Mr Degorce was incurred on the acquisition of film rights, should have gone on to find that he was to this extent trading in film distribution on a commercial basis with a view to a profit. The proposed replacement skeleton argument was, in part, an updating document, gathering together in a single place all the arguments upon which Mr Degorce still wished to rely in light of the recent significant decisions of this court in the Eclipse and Samarkand cases (Eclipse Film Partners No. 35 LLP v Revenue and Customs Commissioners [2015] EWCA Civ 95, [2015] STC 1429, in which judgment had been delivered on 17 February 2015 and permission to appeal to the Supreme Court had been refused on 13 April 2016; and Samarkand Film Partnership No. 3 v Revenue and Customs Commissioners [2017] EWCA Civ 77, [2017] STC 926, in which judgment was delivered on 24 February 2017). The new skeleton argument went further than this, however, because it developed a substantially new argument on the trade issue, based on the "error of approach" which the Upper Tribunal had identified in the FTT Decision and the evidence which was said to have been before the FTT about Mr Degorce's trading activities both before and after the

events of early April 2007. This argument was presaged, if at all, by paragraph 7 of Mr Degorce's grounds of appeal, which merely said:

> "7. Further and in any event, Mr Degorce says that the UT Decision on "trade" discloses errors of law."

20. Both applications were opposed in full by HMRC, for reasons set out in a written response dated 9 May 2017. HMRC also indicated their intention to apply for permission to rely on a very short supplementary skeleton argument dealing with the recent decision of this court in Samarkand. By a ruling dated 22 May 2017, Longmore LJ (a) gave Mr Degorce permission to rely on the supplementary skeleton argument, but without prejudice to any argument by HMRC at the hearing that it went outside the permitted grounds of appeal; (b) gave HMRC permission to serve a supplementary skeleton relating to Samarkand; and (c) adjourned Mr Degorce's application to amend his grounds of appeal to the hearing.

21. Shortly after the start of the hearing, on 14 June 2017, we indicated that we would not rule on the outstanding applications as preliminary issues, but would hear argument on them together with the substantive issues that the parties wished to address, and would then decide in our judgment whether or not to accede to the applications. Against this background, and having now heard full argument on the procedural issues, I will begin by considering whether Mr Degorce should be permitted to advance the substantially new argument which I have outlined, as well as his proposed new ground of appeal.

The procedural issues

22. In order to place Mr Degorce's applications in context, it is first necessary to say a little more about the way in which his appeal was initiated by Mr Maugham QC.

23. By section 13 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"), an appeal lies against a decision of the Upper Tribunal to the Court of Appeal on a point of law, with permission from either the Upper Tribunal or the Court of Appeal. In a document dated 16 September 2015 and headed "Application for permission and grounds of appeal", Mr Maugham submitted that the question whether Mr Degorce was trading had been the main issue before the FTT, and the FTT's treatment of that issue had been the main issue before the Upper Tribunal. He then argued that, in summary, the Upper Tribunal had held:

    (a) that nothing in the Supreme Court cases of Pendragon (Revenue and Customs Commissioners v Pendragon Plc [2015] UKSC 37, [2015] 1 WLR 2838) or Jones (R (Jones) v First-Tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19, [2013] 2 AC 48) was authority for the proposition that TCEA 2007 had effected any change to the scope of appeals from the fact-finding tribunal;

    (b) in any event, the trade issue as it arose in the present case did not give rise to any matter of principle; and

    (c) on the evidence before it, that it was open to the FTT to conclude that Mr Degorce was not trading in film rights because he had acquired a contingent

income stream, and the composite transaction into which he had entered was akin to that in the Eclipse case.

Each of these points was raised by the then pending application for permission to appeal to the Supreme Court in Eclipse. The Upper Tribunal should therefore give Mr Degorce permission to appeal, unless it considered that the facts of his case were "worse" than those of Eclipse. Mr Degorce's position was that his facts were "better" than those of the LLP in Eclipse, in particular because he took advice from an independent third party expert, purchased highly profitable films, and continued to carry on the trade in subsequent years.

24. Mr Maugham then added, in the paragraph numbered 7 which I have already quoted, that:

> "Further and in any event, Mr Degorce says that the UT Decision on "trade" discloses errors of law."

Mr Maugham proceeded to make submissions about Pendragon, and the need for guidance on the question whether transactions where an asset is purchased and simultaneously leased or sold for an income stream are or can be trading transactions. To approach Mr Degorce's transaction as the purchase of an income stream was, he submitted, wrong in law for the reasons which had been advanced on his behalf to the Upper Tribunal. Mr Maugham then turned to the remaining issues, which the Upper Tribunal had dealt with only briefly, and in respect of which Mr Degorce could do no more than set out summary grounds of appeal: see paragraphs 19 to 21 of the document. Finally, Mr Maugham addressed the question whether the criteria for a second appeal were satisfied.

25. As I have already explained, Mr Degorce obtained permission to appeal from the Upper Tribunal on the strength of this document. When his appellant's notice was filed on 30 October 2015, the same document was appended as his grounds of appeal, together with Mr Maugham's skeleton argument in support of the same date. In paragraph 4 of the skeleton, under the heading "The Basic Facts", Mr Maugham said this:

> "4. In 2007/08 [*Mr Degorce*] entered into very similar transactions for the purchase of a further six films, also arranged by the Goldcrest Group. These transactions are the subject of a separate appeal which the [*FTT*] has yet to hear. Although the transactions he entered into in 2006/07 were loss making (his revenues were less than the price he paid), those he entered into in 2007/08 generated very substantial taxable profits (i.e. of substantially more than the price he paid)."

26. In paragraph 7, the skeleton then identified the issues before this court as falling into three groups:

(a) the nature of the Upper Tribunal's jurisdiction, in light of Jones;

(b) whether the Upper Tribunal erred in law in confirming the FTT's decision on the trade issue; and

(c) whether the Upper Tribunal erred in law in confirming the FTT's decision on the remaining issues.

27. For present purposes, it is sufficient to focus on the trade issue, which was covered in paragraphs 17 to 24 of the skeleton. Mr Maugham summarised Mr Degorce's argument below, and submitted that a transaction whereby the taxpayer purchases and disposes of an asset in a single transaction "is perfectly capable of answering to the statutory description … "trade"." In paragraph 20, Mr Maugham recorded that the Upper Tribunal appeared ready to accept that the FTT may well have made a number of errors on its way to concluding that Mr Degorce was not trading, and in paragraphs 21 and 22 he submitted that if the FTT had directed itself properly in law, and had had regard to the matters articulated by Mr Degorce in his skeleton argument before the Upper Tribunal, the FTT could only have concluded that he was indeed trading. A footnote made it clear that the matters referred to in the earlier skeleton argument were "not repeated here for reasons of brevity but may be referred to". This had the unfortunate consequence that the arguments relied upon by Mr Degorce on this crucial issue were not all to be found in a single document, as the rules clearly envisage, but might require reference to unspecified parts of his skeleton argument before the Upper Tribunal. With due respect to Mr Maugham, that is not a satisfactory way in which to prepare a skeleton argument for use in this court, and HMRC were rightly critical of it in their skeleton argument in answer.

28. Against this background, I turn to the question left open by Longmore LJ when granting Mr Degorce permission to rely on Ms McCarthy's supplementary skeleton argument of 21 April 2017. Does the main argument that she now wishes to deploy on the trade issue go outside the existing grounds of appeal? I have already indicated the general nature of that argument. It builds on the error of approach which the Upper Tribunal identified in the FTT's Decision, and which HMRC do not seek to uphold by a respondent's notice. This error was compounded, she submits, by the FTT's consequential failure to consider a substantial volume of relevant, and largely unchallenged, evidence. Thus the FTT made a material error of law. It is impossible to say how the FTT would or might have determined the trade issue, had it evaluated the totality of Mr Degorce's film-related activities throughout the period from 2005 to 2009, instead of fixing its attention on events which took place over a few days in April 2007. Accordingly, the decision of the FTT on the trading issue, and the decision of the Upper Tribunal upholding it, should be set aside and the question should be remitted to the FTT for redetermination.

29. In my judgment, this argument is one which Mr Degorce should be permitted to advance, provided that this can be done without any unfairness to HMRC. Paragraph 7 of the existing grounds of appeal provides an admittedly slender, but not non-existent, foundation for arguing that the Upper Tribunal itself erred in law in failing to draw the correct conclusions from the error of approach in the FTT Decision which it had identified, and in holding the effect of that error to have been immaterial. Mr Maugham's original skeleton argument in support of the appeal expressly referred to the similar transactions undertaken by Mr Degorce in the following tax year, and his submissions on the trade issue referred (if somewhat obliquely) to the acceptance by the Upper Tribunal that the FTT "may well have made a number of errors" in concluding that Mr Degorce was not trading.

30. Mr Maugham also made it clear that reliance was still being placed on the arguments which had been addressed to the Upper Tribunal on the trade issue. Those arguments included submissions based on the "wider picture" allegedly disclosed by Mr Degorce's film-related activities both before and after April 2007. It is certainly true that one finds no clear articulation of the argument Ms McCarthy now wishes to advance, and that the main focus of the appeal on the trade issue, as originally presented by Mr Maugham, was on matters that have now fallen by the wayside, partly as a result of the refusal by the Supreme Court of permission to appeal in the Eclipse case, and partly as a result of the later decision of this court in Samarkand. But the new argument has its roots in the way the trade issue was explored in evidence and dealt with in argument before both Tribunals, and since it is, of necessity, an argument of law, based on the facts found by, and the evidence adduced before, the FTT, I think that this court should be willing to entertain it unless it would be unfair to HMRC to do so.

31. In their written response to Mr Degorce's application for permission to rely on the supplementary skeleton argument, complaint was made by HMRC about the expansion of Mr Degorce's argument on the trade issue beyond the original grounds of appeal, but it was not submitted that HMRC would be unable to deal with the new argument at the hearing if Mr Degorce's application were granted. HMRC also submitted that the conditions for admission of a supplementary skeleton in paragraph 32(1) of Practice Direction 52C to CPR Part 52 were not satisfied, but it is implicit in the order made by Longmore LJ that those arguments have already been considered and rejected by the court.

32. In his oral submissions to us, Mr Gibbon said that there would be insufficient time for the court to do justice to the new argument, if it were admitted, within the one and a half days allotted for the hearing. He said that far more time, and far more documentary material, would be needed, because it would be necessary to go in considerable detail into matters that were explored in oral evidence before the FTT. Mr Gibbon raised the possibility of an adjournment, but did not in the event apply for one.

33. With respect to Mr Gibbon, I found these submissions unconvincing. HMRC had known for seven weeks before the hearing what the new argument was, and in opening the appeal Ms McCarthy was able to present it economically, with only brief references to the underlying documents. The main arguments which we need to consider are ones of law, and it was not suggested that we should attempt to decide the trade issue ourselves if the error of law contended for by Mr Degorce were made out to our satisfaction. As to the alleged errors of law, HMRC acknowledge the error of approach by the FTT which the Upper Tribunal identified, and to the extent that there may be disagreement between the parties about the interpretation of section 12 of TCEA 2007, Mr Gibbon expressly stated that he had no objection to our considering it. By the conclusion of the argument, I felt that Mr Gibbon had had a fair opportunity to put before us HMRC's points in response to the new argument, and that we had sufficient material to enable us to deal with it justly.

34. For these reasons, therefore, I conclude that Mr Degorce should be permitted to rely on the argument relating to the trade issue which he now wishes to advance.

35. Mr Degorce's second application concerns his proposed new ground of appeal. The new ground relates to one of the subsidiary issues, and I will defer consideration of it until after I have dealt with the main appeal on the trade issue.

The scheme transactions: an overview

36. Before coming to the trade issue, I will attempt to summarise some of the key features of the scheme transactions into which Mr Degorce entered between 2 and 5 April 2007. For a full account, reference should be made to the FTT Decision at [38] to [70], and to the shorter version (with some commentary) in the UT Decision at [9] to [24]. The position is complicated by the fact that the transactions into which Mr Degorce, and the other subscribers, entered with companies in the Goldcrest group formed part of a wider series of arrangements between Goldcrest and companies in the Paramount group, which produced the relevant films and (under the arrangements) retained ultimate responsibility for their distribution. At paragraph [17] of the FTT Decision, the FTT recorded HMRC's contention that the scheme had "three main drivers":

> "(a) The primary goal as far as the individual participants were concerned was to generate income tax losses to shelter their taxable income for 2006 – 2007;
>
> (b) In respect of Paramount, the Scheme represented a means by which it could sell a limited share in the distribution proceeds of its films for what it considered to be a reasonable price for such a share;
>
> (c) As regards Goldcrest, the Scheme generated the income from the individual participants."

At a high level of generality, I do not understand this summary to be contentious, and it is helpful to have it in mind before descending into the detail of the individual transactions.

37. The Goldcrest group of companies (collectively "Goldcrest") was established in 1977, and has financed, produced and/or distributed many films, including such well-known titles as *Gandhi*, *The Killing Fields, Chariots of Fire* and *Room with a View*.

38. I have already explained how Mr Degorce was introduced to the scheme by HSBC Private Bank, and how it was presented to him. The initial proposal was that he would buy rights in a film to be called *Star Trek XI*, which went on to achieve considerable commercial success. For reasons which are not entirely clear, this proposal was then withdrawn and Mr Degorce was instead offered rights in two other films, to be called *Tropic Thunder* and *The Love Guru.* Mr Degorce took advice before he agreed to purchase rights in those films, and there was some adjustment of the price to be paid for each film and some alteration of the territorial extent and duration of the rights he was to acquire, although his initial payment (which had been calculated on the basis that he would acquire rights in *Star Trek XI*) remained unchanged.

39. On 2 April 2007:

(a) Mr Degorce signed the acceptance form which I have already described;

(b) he provided his initial payment of £4,823,160;

(c) he applied to Goldcrest Funding Limited for a loan of the remaining 78% of the Payment Amount; and

(d) Goldcrest acquired indirect control of a BVI company called Upsticks Limited ("Upsticks") whose role appears to have been to participate in the scheme as a special purpose vehicle and a link with Paramount. The FTT found that Upsticks was paid a fee of £25,000 for its role in the scheme.

40. On 4 April 2007, the identity of the films to be purchased by Mr Degorce and his fellow subscribers was finalised. It was at this stage that Mr Degorce, having taken advice, and having already paid his initial contribution, agreed to purchase rights to *Tropic Thunder* and *The Love Guru* instead of *Star Trek XI*. To this end, Goldcrest provided him with a financial analysis and valuation for each film.

41. On 5 April 2007, Mr Degorce acquired the rights in these two films from another Goldcrest company, Goldcrest Film Rights Limited, for a purchase price of about £20 million. Goldcrest had acquired the rights, on the same day and for a price of only £3.7 million, from Upsticks. The Upper Tribunal described the rights acquired by Mr Degorce in [16] of the UT Decision, as follows:

> "The rights acquired by Mr Degorce for each of the two films were also not identical – they differed in their territorial extent and duration – but essentially those he acquired entitled him to receive the bulk of the net profits … derived from the exploitation of the films within the relevant territorial and temporal limits. The remainder (2%) was payable to Goldcrest Pictures Limited …, which had entered into an agreement with Mr Degorce to provide him with certain advisory services, the consideration for which consisted of the 2% share plus an advance fee of £1.6 million."

42. On the same day, Mr Degorce entered into a series of further agreements with Goldcrest, as described in the FTT Decision at [57]. Apart from the advisory agreement with Goldcrest Pictures Limited mentioned above, these included the loan agreement (which was on limited recourse terms) and a distribution agreement with Goldcrest Distribution Limited, whereby he assigned to that company the distribution rights in the two films for a term of 60 years. Goldcrest then entered into sub-distribution agreements with a Paramount company. The consideration payable under the distribution and sub-distribution agreements was defined in such a way that Mr Degorce would in effect be entitled to 15% of the net receipts, both before and after repayment of the Goldcrest loan finance, although nothing would in practice become payable by Goldcrest to Mr Degorce until Paramount had recouped 97% of its own finance costs. The effect of these elaborate provisions, in broad terms, was that Mr Degorce would receive no economic return until Paramount's investment in the film had broken even, but he would then be entitled to 15% of the net proceeds from inception and until the end of the 60 year term. Since only a small proportion of films are a commercial success, it is obvious that Mr Degorce was unlikely to make a return

on any of his films viewed individually. On the other hand, if one of his films was a commercial success, he could eventually expect to make a substantial profit from it, whether by receipt of his fixed share of the receipts or by disposal of his rights to a purchaser for a capital sum.

43. One of the services provided by Goldcrest under the advisory agreement with Mr Degorce was the preparation by accountants instructed by Goldcrest of a valuation of the film rights which he had acquired as at 5 April 2007, together with financial statements covering the period from 2 April to 5 April 2007. The accountants (now part of Mazars LLP) valued Mr Degorce's rights in *Tropic Thunder* at £380,487, and his rights in *The Love Guru* at £501,310. Based on those valuations, the accounts for the initial period of four days showed a "provision made against cost of film rights acquired" of £19,417,698, and an overall net loss of £21,028,124. This was the loss which Mr Degorce claimed to set against his income from other sources for the 2006/07 tax year, leaving an unutilised amount of approximately £1.3 million to be carried forward.

Statutory provisions

44. Mr Degorce's claim was made under section 380(1) of ICTA 1988, which (as in force at the relevant time) enabled a taxpayer to make a claim for relief from income tax on his general income where in any year of assessment he "sustains a loss in any trade, profession, vocation or employment carried on by him either solely or in partnership". The relevant words for present purposes are "sustains a loss in any trade … carried on by him … solely". In the absence of a trade carried on by Mr Degorce as a sole trader in the tax year 2006/07, no entitlement to loss relief under the section could arise.

45. No definition of "trade" has ever been provided in UK tax legislation, but section 832(1) of ICTA 1988 provided that:

> "In the Tax Acts, except in so far as the context otherwise requires - … "trade" includes every trade, manufacture, adventure or concern in the nature of trade."

The relevant phrase here is "adventure … in the nature of trade", which, as the case law shows, can in appropriate circumstances include a single transaction whereby an asset is acquired and then turned to account.

46. By virtue of section 384(1) of ICTA 1988:

> "… a loss … shall not be available for relief under section 380 unless it is shown that, for the year of assessment in which the loss is claimed to have been sustained, the trade was being carried on on a commercial basis and with a view to the realisation of profits in the trade …"

This restriction is then qualified by section 384(9), which states that:

> "For the purposes of subsection (1) above, the fact that a trade was being carried on at any time so as to afford a reasonable

> expectation of profit shall be conclusive evidence that it was then being carried on with a view to the realisation of profits".

It is these provisions which, on the assumption that Mr Degorce was carrying on a trade within the meaning of section 380(1), give rise to the first and second of the subsidiary issues identified in paragraph [8] above.

47. Provisions relating to the computation of trading income were contained in the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005"), section 25(1) of which contained the basic rule that:

> "The profits of a trade must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for income tax purposes."

By virtue of section 26(1) of ITTOIA 2005, losses are to be calculated on the same basis as profits, subject to any express provision to the contrary. Finally, section 34(1) excludes any deduction in calculating the profits of a trade for:

> "(a) expenses not incurred wholly and exclusively for the purposes of the trade, or
>
> (b) losses not connected with or arising out of the trade."

Subsection (2) then provides that:

> "If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade."

48. It is also convenient to set out here section 12 of TCEA 2007, which is headed "Proceedings on appeal to Upper Tribunal". The section provides as follows:

> "12(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal –
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does must either –
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.

> (3) In acting under subsection (2)(b(i), the Upper Tribunal may also –
>
> (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;
>
> (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal –
>
> (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
>
> (b) may make such findings of fact as it considers appropriate."

The meaning of "trade" in the tax legislation

49. In view of the absence of a statutory definition, it is not surprising that a considerable body of case law has developed on the question of what constitutes a "trade" within the meaning of the income tax legislation. Both the FTT and the Upper Tribunal quoted extensively from that case law. For present purposes, however, it is sufficient to concentrate mainly on the decisions of this court in the Eclipse and Samarkand cases, each of which post-dated the FTT Decision and the latter of which post-dated the UT Decision. As it happens, both cases concerned film schemes, although there were substantial differences between the schemes in Eclipse and Samarkand, and neither scheme bore any close similarity to the scheme in the present case.

50. The significance of the two cases, in my judgment, is that they provide an authoritative and recent re-statement of the principles which should be applied in deciding whether activities undertaken by a taxpayer constitute a trade for tax purposes. The passages of principal relevance are to be found in paragraphs [109] to [117] of the judgment of the court in Eclipse, delivered by Sir Terence Etherton C, and in paragraphs [43] to [50], and [59] to [63] of my judgment in Samarkand, with which David Richards and Arden LJJ agreed. It was common ground that, at least in this court, these are the principles which must now be followed, although I should record that Ms McCarthy reserved the right to argue in a higher court that Mr Degorce's activities in the 2006/07 tax year were inherently of a trading character, such that the FTT and the Upper Tribunal erred in law in considering them to be the composite acquisition of an income stream.

51. Although the passages to which I have referred need to be read in full, the following brief extracts are in my view of central importance. In Eclipse, the court said:

> "111. … It is necessary to stand back and look at the whole picture and, having particular regard to what the taxpayer actually did, ask whether it constituted a trade.

> 112. The Income Tax Acts have never defined trade or trading further than to provide that (in the words of TA 1988, s 832(1) which was applicable to the relevant tax year) trade includes every trade, manufacture, adventure or concern in the nature of trade. As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Its meaning in tax legislation is a matter of law. Whether or not a particular activity is a trade, within the meaning of the tax legislation, depends on the evaluation of the activity by the tribunal of fact. These propositions can be broken down into the following components. It is a matter of law whether some particular factual characteristic is capable of being an indication of trading activity. It is a matter of law whether a particular activity is capable of constituting a trade. Whether or not the particular activity in question constitutes a trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles. To that extent the conclusion is one of fact, or, more accurately, it is an inference of fact from the primary facts found by the fact-finding tribunal.
>
> 113. It follows that the conclusion of the tribunal of fact as to whether the activity is or is not a trade can only be successfully challenged as a matter of law if the tribunal made an error of principle or if the only reasonable conclusion on the primary facts found is inconsistent with the tribunal's conclusion. These propositions are well established in the case law …
>
> 114. In *Marson v Morton* [1986] STC 463 at 470-471, [1968] 1 WLR 1343 at 1348-1348 Sir Nicolas Browne-Wilkinson V-C set out a list of matters which have been regarded as a badge of trading in reported cases. He emphasised, however, that the list was not a comprehensive statement of all relevant matters nor was any one of them decisive in all cases. He said that the most they can do is to provide common sense guidance to the conclusion which is appropriate; and that in each case it is necessary to stand back and look at the whole picture and, having regard to the words of the statute, ask whether this was an adventure in the nature of trade … The cases by reference to which the list was compiled are not sufficiently analogous to the facts of the present case to make the list of value in these proceedings."

52. In Samarkand, I said at [59]:

> "… At the most basic level, it is now clear from *Eclipse*, if it was not clear before, that the question whether what the taxpayer actually did constitutes a trade has to be answered by standing back and looking at the whole picture: see [111]. Although it is a matter of law whether a particular activity is capable of constituting a trade, whether or not it does so in any

> given case "depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles": see [112]. It follows that it can never be appropriate to extract certain elements from the overall picture and treat them, viewed in isolation, as determinative of the issue. But that, in essence, is what Mr Furness [*counsel for the taxpayers*] is inviting us to do, when he says that the purchase and leaseback (or onward lease) of a film are inherently trading activities. There is no dispute that such activities are capable of forming part of a trade, and in many contexts the only reasonable conclusion would be that they did form part of a trade. But when the whole picture is examined, the conclusion will not necessarily be the same. The exercise which the FTT has to undertake is one of multi-factorial evaluation, and their conclusion can only be challenged as erroneous in point of law on *Edwards v Bairstow* grounds: see *Eclipse* at [113].
>
> …
>
> 61. In the interests of clarity, it is important to distinguish between the evaluative exercise which the FTT has to perform, on the one hand, and the proposition that a taxpayer cannot be taxed by re-characterising what he has actually done as something else, on the other hand. Mr Furness submitted that the FTT were guilty of such a re-characterisation, but I am satisfied that they did not fall into an elementary error of this description. Their overall assessment of the commercial nature of the agreements as the payment of a lump sum in return for a series of six payments over 15 years … was not a crude conclusion based on an impermissible transformation of the taxpayers' activities into an economic equivalent, but rather a way of expressing the ultimate inference of fact which they drew from the totality of the primary facts which they had found."

53. It is also important to note the warning which the court gave in Eclipse at [117]:

> "Finally, on legal principles, it is elementary that the mere fact that a taxpayer enters into a transaction or conducts some other activity with a view to obtaining a tax advantage is not of itself determinative of whether the taxpayer is carrying on a trade: *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] STC 226 at 241, [1992] 1 AC 655 at 677 (Lord Templeman)."

Lord Templeman was, to put it mildly, no friend of tax avoiders, so it is worth quoting from what he said in Ensign Tankers at 677:

> "The production and exploitation of a film is a trading activity. The expenditure of capital for the purpose of producing and exploiting a commercial film is a trading purpose. By section

> 41 of the Act of 1971 capital expenditure for a trading purpose generates a first year allowance. The section is not concerned with the purpose of the transaction but with the purpose of the expenditure. It is true that Victory Partnership only engaged in the film trade for the fiscal purpose of obtaining a first year allowance but that does not alter the purpose of the expenditure."

The trade issue

(1) The decision of the FTT

54. The FTT began its consideration of the trade issue by reviewing the case law, including a full citation of the "badges of trade" as set out in the Marson case. At [80], the FTT summarised its approach to the question whether Mr Degorce was trading as follows:

> "(1) To consider the badges of trade, bearing in mind that such features, where present, are not necessarily determinative of the issue;
>
> (2) We bore in mind that even where an ulterior (even paramount) motive to obtain a tax advantage is present, this does not automatically "denature" a commercial transaction;
>
> (3) To determine the question of trade as a matter of law and thereafter consider whether, on the facts, a trade existed;
>
> (4) The test is an objective one;
>
> (5) That the transaction must be analysed as a whole and viewed in the context of its surrounding circumstances where that concept assists in determining the true nature of the transaction;
>
> (6) To ask ourselves "What did Mr Degorce actually do?""

I would comment that I can detect no error of law in this statement of the FTT's approach, which seems to me to accord with the more recent guidance given by this court in the Eclipse and Samarkand cases.

55. The FTT then summarised the submissions of the parties on the badges of trade, beginning with the first, namely that the transaction in question was a one-off transaction. Although such a transaction is in law capable of being an adventure in the nature of trade, the lack of repetition is a pointer which may indicate the contrary. At [83], the FTT recorded HMRC's invitation to them to consider only the year 2006/07, on the basis that Mr Degorce's participation in previous years in two "Ingenious" limited liability partnership film schemes was under enquiry by HMRC, and his involvement with other Goldcrest schemes in subsequent years was also under enquiry "on the basis that they repeat the acquisition of potential income streams in 2006/2007". They also recorded the submission for Mr Degorce that his involvement in similar transactions before 2006/07, and (as a sole trader) in subsequent years,

combined with his unchallenged evidence that he had been exploring opportunities in the film sector, pointed to a badge of trade. It was submitted that to ignore those activities would be to ignore the context in which his activities in 2006/07 took place: see [84] and [85].

56. After recording the parties' submissions on the other badges of trade, the FTT made their findings of fact on the badges at [99] to [111]. I have already referred to the critical paragraph [99], where the FTT "found as a fact" that there was "no element of repetition" in Mr Degorce's transaction. In view of its significance, I will now quote the paragraph in full, together with the two following paragraphs:

> "99. We found as a fact that there was no element of repetition in [*the*] Appellant's transaction. We had no detailed evidence before us relating to Mr Degorce's activities either pre or post 2006-2007. As regards those pre 2006-2007, there was no evidence to support the assertion on behalf of the Appellant that there existed a "deemed film trade" nor has any finding been made by a Court or Tribunal in that regard. Similarly, whilst we accepted that the Appellant had been involved in activities similar to that before us after the relevant period (2006-2007), we noted that those activities were subject of an enquiry by HMRC and again, no determination has been made on the issue of trade. In our view, it would be unsafe to accept the Appellant's assertions in the absence of any detailed examination of the evidence and consequently found that we must deal with the transaction as a one-of transaction.
>
> 100. We accepted that Mr Degorce may well have explored opportunities in the film sector, but in our view the contemplation of any such activities is distinguishable from the reality of actually entering into such transactions.
>
> 101. We note that although in our view, the transaction must be regarded as a one-off this finding does not prevent it from being regarded as an adventure in the nature of trade."

57. At [106], the FTT accepted HMRC's submission, based on Ransom v Higgs [1974] 1 WLR 1594 (HL), that Mr Degorce:

> "did not intend to sell the potential income stream and therefore, in the absence of a customer, the transaction cannot be viewed as having been carried through in a way typical of trade."

Although we heard no detailed submissions on this paragraph, it seems to me that this was clearly a bad point. It cannot have been necessary for Mr Degorce to have an intention to sell the income stream at some future date for the transaction to be capable of qualifying as a trading one, and as this court pointed out in Eclipse at [115], the references in Ransom v Higgs to the normal feature of a "customer" in trading activity need to be treated with care in cases of the present type. On the face of it, the immediate assignment by Mr Degorce of his rights in the two films to

Goldcrest Film Distributors Limited in return for the potential income stream was, in itself, an obvious way of turning those rights to account, and it involved a counter-party. As this court said in Eclipse at [116]:

> "Undoubtedly trading activity involves a counter-party of some description. We do not find it helpful, however, in a complex transaction such as the one with which we are concerned to seek to identify whether that counter-party is or is not properly characterised as a "customer", as that word is used in ordinary speech."

58. The FTT clearly attached considerable significance to the apparent absence of any intention by Mr Degorce to sell the future income stream because they returned to it in [109] and [110], and it must have been a major factor in their conclusion, at [111], that "the overall indication in applying the badges of trade is that the nature of the composite transactions was not of a trading nature".

59. The FTT then proceeded to consider "what Mr Degorce actually did", by reference to a detailed "Time Line" which they set out in paragraph [112]. This included a number of references to conversations between Mr Degorce and his adviser, Mr Christopher Petzel, who was a media entrepreneur based in Los Angeles, and from whom the FTT heard oral evidence. The Time Line began in February 2007, when "Mr Petzel visited the Appellant at home and had general discussions regarding [*his*] interest in the film industry". Subsequently, there were telephone conversations between Mr Degorce and Mr Petzel on several occasions between 2 and 4 April 2007, during which (inter alia) Mr Degorce agreed to pay Mr Petzel a fee of $20,000 to assist with an economic analysis, and Mr Petzel helped in the negotiations which resulted in the substitution of *Tropic Thunder* and *The Love Guru* for the *Star Trek* film.

60. At [115], the FTT found that:

> "In addition to advice provided by Goldcrest, Mr Degorce also took advice from Mr Petzel, Howard Kennedy Solicitors and HSBC Private Bank. An assistant was employed by Mr Degorce to assist in managing the trade."

61. The FTT then reviewed Mr Degorce's evidence at [117] to [133], and the evidence of Mr Petzel at [134] to [143]. From this review, I extract the following points:

(a) One of Mr Degorce's reasons for hiring Mr Petzel was to "review all the models, all the assumptions" as he did not want to rely solely on Goldcrest's opinion (paragraph [117]).

(b) Mr Degorce did not rely on the comparables provided by Goldcrest, preferring instead to rely on Mr Petzel, so the financial illustrations provided by Goldcrest formed no part of his consideration (paragraph [119]).

(c) The main advice which Mr Degorce received from Howard Kennedy related to the loan documentation, which was complex (paragraph [126]).

(d) In respect of the prices finally agreed for the two films, Mr Degorce accepted "that the films were looked at globally and it did not matter where a reduction was given" (paragraph [132]).

(e) Mr Petzel confirmed that he had been employed by Goldcrest as a sales executive from 1996 to 1997, and he had an ongoing connection with Goldcrest, although it was not particularly close. In February 2007 Goldcrest contacted him with a request to provide projections and financial modelling assistance for a number of studio films, but no formal engagement ensued (paragraph [143]).

(f) Mr Petzel's role was to verify the information given to Mr Degorce was accurate, and whether the performance assumptions would lead to the payment waterfall portrayed in the Goldcrest documents (paragraph [135]).

(g) Mr Petzel acknowledged that he had made certain calculation errors in the figures which he provided for Mr Degorce (paragraph [141]).

(h) Of the eight films in which Mr Degorce had acquired rights from 2007 onwards, only one film, *Twilight*, had made a return (paragraph [143]).

62. The next section of the FTT Decision, headed "Findings of fact on the issue of trade", runs from paragraphs [144] to [156]. The FTT inferred that Mr Degorce's purpose in entering into the transactions in April 2007 was to shelter his income, and found (contrary to his oral evidence) that he had asked HSBC for advice on the amount of income he could shelter in the current tax year (paragraphs [144] and [145]). The FTT found that Howard Kennedy was not a firm independently chosen by Mr Degorce to provide advice, but had rather been suggested to him by Goldcrest as part of the structured nature of the scheme (paragraph [147]).

63. At [148], the FTT recorded the obvious fact that the transaction "took place over an extraordinarily short period". They inferred from this, at [149], that "the asset subject of the transaction was, in reality, unimportant". Mr Degorce made his initial payment on the basis that he was to acquire the rights to *Star Trek*, and it was only after he had signed the initial acceptance and loan application that he engaged Mr Petzel to analyse certain aspects of the scheme. Moreover, it was only after Mr Degorce had made his initial payment that he was informed, on 4 April 2007, that the rights to *Star Trek* were no longer available. The FTT found there to be no indication that Mr Degorce contemplated withdrawing from or delaying his participation in the scheme, once informed that the rights to *Star Trek* were unavailable; and at [150] they concluded that "the only logical inference" to draw from an answer to a question given by Mr Degorce under cross-examination "was that the films, individually, were of little importance but rather the aim was to provide Mr Degorce with an asset or assets by which Mr Degorce could shelter the amount of income as advised by Ms Challons [*of HSBC*]".

64. When Mr Degorce signed the documents, he had only a limited understanding of the detail of the scheme, and in particular of the valuation aspect, because otherwise there would have been little point in engaging Mr Petzel (paragraph [151]). Furthermore, the exercise carried out for Mr Degorce by Mr Petzel "in reality provided little assistance to Mr Degorce beyond that already obtained from Goldcrest and HSBC"

(paragraph [152]). After referring to certain errors in Mr Petzel's calculations, which Mrs Farquharson had pointed out during his evidence, the FTT said at [155]:

> "Given the value of the transaction, we found it unlikely that had Mr Degorce intended to rely on Mr Petzel's advice in any meaningful way, he would have been content to proceed on the limited documentation provided to Mr Petzel and an analysis which contained errors which were clear. We concluded that the only real understanding Mr Degorce had of the scheme at the time he entered into it and soon thereafter was in respect of the tax implications."

65. In [156], the FTT stated its conclusion:

> "When we asked ourselves "what was Mr Degorce trading" we concluded that his activities were, in reality, focused on the close of the financial year and that his activity was limited to obtaining fixed receipts as prescribed by the Agreement signed which cannot be deemed as "trade". We concluded from the evidence that the asset purchased was irrelevant for the purpose of the scheme; the sole requirement was a lump sum figure which was initially paid for *Star Trek*, and thereafter matched for *Love Guru* and *Tropic Thunder*, in return for the potential income stream. We concluded that this was not an adventure in the nature of trade."

(2) The decision of the Upper Tribunal

66. The Upper Tribunal prefaced its discussion of the trade issue by encapsulating, at [34], the general nature of Mr Degorce's challenge to the FTT's decision. Mr Maugham accepted that the question "whether a given transaction or series of transactions is in the nature of trade is a question of fact", as Millett J had said in Ensign Tankers ([1989] STC 705 at 762). He argued, nevertheless, that the FTT had erred in law in reaching its conclusion, because some of its findings of fact were irrational, in the sense that they were contrary to or unsupported by the evidence, and in some respects they had not made the necessary relevant findings at all. Mr Maugham argued that, even if the FTT's conclusions could be supported if properly explained, the FTT had failed in some respects to provide a proper explanation, which could itself ground an appeal in accordance with the principles stated in Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377 (CA).

67. At [35], the Upper Tribunal recorded Mr Gibbon's acceptance, for HMRC, that "there were some obscurities and infelicities" in the FTT's decision, but he said they fell far short of satisfying the stringent test which had to be met before the Upper Tribunal could interfere. He also submitted that, despite the obscurities and infelicities, the FTT came to the right conclusion, and there was ample evidence to support it.

68. The Upper Tribunal then reviewed the FTT's decision, and at [58] identified three core factors which had led it to its conclusion:

> "First, they were satisfied that there was no element of repetition which might support the conclusion that the transactions represented the continuation or extension of an existing trade or the start of a trade to be continued in later years. Second, they found it significant that the purchase and the assignment were executed simultaneously; and, they said, a purchase of film rights for (in round figures) £20 million followed by their immediate sale at a loss of £19 million could not be viewed as the purchase and independent sale of an asset. The conclusion to be drawn from that factor was that the transactions were inextricably linked and were entered into without regard to the true value of the rights. Third, the F-tT concluded that the evidence showed that it was immaterial what asset Mr Degorce acquired: realistically viewed, the transactions amounted to nothing more than the payment of a lump sum in return for a potential income stream which he did not intend to sell, and they were undertaken as a means of generating tax relief."

69. The Upper Tribunal added that, for good measure, the FTT also concluded that:

> "… any trade there might have been was "denatured" by the fact that the sole purpose of the scheme, and therefore the sole purpose of Mr Degorce's participation therein, was to shelter his taxable income, so that the "shape and character of the transaction was not in reality that of a trading transaction"."

This passage reflected the FTT's discussion, at [157] to [163], of an alternative submission by HMRC based on the principle stated by Lord Morris of Borth-y-Gest in Lupton v F A & A B Ltd [1972] AC 634 at 647 that:

> "It is manifest that some transactions may be so affected or inspired by fiscal considerations that the shape and character of the transaction is no longer that of a trading transaction."

70. The Upper Tribunal then set out at length Mr Degorce's arguments, from [59] to [80]. Mr Maugham argued that the FTT had failed to follow its self-direction that it should concentrate on what Mr Degorce actually did, and had been misled by the judgment of the Court of Appeal in Ensign Tankers into treating Mr Degorce's motive in entering into the transactions as the relevant test. Mr Maugham also submitted that the FTT erred seriously in its examination of the evidence relating to Mr Degorce's activities in other years, and had wrongly concluded that his activity in April 2007 was to be regarded as a one-off transaction.

71. Since this is the central thrust of Ms McCarthy's new argument, it is relevant to note how the Upper Tribunal thought the issue had been presented to it. The Upper Tribunal said this:

> "67. Mr Maugham points out that there was, in fact, extensive evidence before the F-tT of Mr Degorce's activities in the acquisition and disposal of film rights both before and after

2006-07. HMRC themselves have referred in their statement of case to his participation in similar transactions on three occasions. The evidence showed that he had, in addition to this transaction, purchased interests in films in 2005-06, as a member of two LLPs; that from February 2007 he had been engaged in extensive discussions with Mr Petzel about possible purchases of film rights; that he had actively researched the market over a significant period; and that he had purchased rights in several films later in 2007, in 2008 and in 2009. Thus this was merely one of a series of similar transactions by which Mr Degorce had acquired rights in films, some of which had been successful while others had not; he knew that they were transactions of a speculative nature but a trade is no less a trade for being speculative. On the contrary, as Sales J said in *Eclipse Film Partners (No. 35) LLP v Revenue and Customs Commissioners* [2014] STC 1114 at [78], the speculative character of a transaction may be "strongly indicative" of trading. If one were to examine his position for the tax years 2005-06, 2006-07 and 2007-08 together, it would become clear that while his income from other activities amounted to about £44 million, Mr Degorce had spent as much as £74 million on film rights. If his purpose was solely to shelter his income from tax he had gone too far by £30 million. The difference between his taxable income and his expense is, says Mr Maugham, far more consistent with his being an active trader in film rights than with his having no purpose other than tax avoidance.

68. Mr Maugham submits that had the F-tT properly considered that evidence, together with what the Vice- Chancellor said in *Marson v Morton*, they would have been driven to conclude, at the least, that what Mr Degorce did was capable of amounting to trade. They should then have gone on to decide whether, as a matter of fact, it did amount to trade. Instead, they simply treated the purchase and sale as component parts of a different, composite, transaction and failed to consider properly what was their true nature. That was a consequence of their failure to consider critical facts, many of which were unchallenged. That failure led in turn to the F-tT's making findings of fact which could not be supported.

69. As to this, the evidence the F-tT failed to take into account included that relating to the advice Mr Degorce took, to his understanding that he could withdraw from the transaction if his lawyers advised against it, to his decision not to rely on the information provided by Goldcrest but to seek a valuation from Mr Petzel, and to the fact of negotiations about the precise nature of the rights to be acquired and the price to be paid. They also ignored the evidence that Mr Degorce had been discussing with HSBC, since March 2007, the possibility that

> he might set up a film business, with staff, that he had sought advice from Mr Petzel about film investment in a general sense, both before and after these transactions took place, that his later purchases were made in order to broaden his portfolio, with the aim of spreading his risk while improving his prospects of making a positive return, that he had in fact achieved returns on some of the films in which he had acquired rights, that there had been serious negotiations about the price to be paid for the rights in other films, that on one occasion he had refused to invest in a substitute film but had demanded (and received) a return of his money, and that he had sought advice from recognised industry experts rather than from lawyers and others unversed in the film industry. Those, says Mr Maugham, were all indications that Mr Degorce was engaged in a serious trading venture of which this transaction was merely a part.
>
> 70. Instead, the F-tT found that some of the advice he received was not wholly independent and that he had not taken any steps to ensure that he did receive independent advice, that he had not received any advice at all on the deal structure, that the nature of the assets in which he was trading was unimportant to him, that there was no evidence that he contemplated withdrawing when he was told that *Star Trek* was no longer available when it fact it was clear that withdrawal was a real possibility, that Mr Petzel's input was of little value, that there was no true negotiation of either prices or rights, and that there was no evidence of how he assessed commerciality or could be satisfied that the price he paid for the rights was commercial. All of these findings, says Mr Maugham, are contrary to the evidence or unsupported by it. The consequence of their incorrect findings on these points was that the F-tT's approach to the main question before them, namely whether Mr Degorce was trading, was fatally undermined."

72. Although Mr Maugham depicted this as the FTT's "worst error", he also argued that the FTT had asked themselves the wrong question about the loan finance (the fifth badge of trade), by looking at whether it was short-term or long-term, when the real question was whether there was borrowing (an indication of trading) or not (an indication of a purchase for personal reasons or as an investment): see [73]. The Upper Tribunal continued:

> "Mr Maugham emphasises, as a further indication that what Mr Degorce did was in the nature of trade … that, unlike other schemes of a similar basic nature, the Goldcrest scheme did not provide for its users a guaranteed income stream designed to pay off the borrowing or simply return the capital paid out. Everything Mr Degorce was to receive was, Mr Maugham points out, entirely dependent on the success of the films – if they were unsuccessful, or only moderately successful, as in this case, he would receive nothing as all the proceeds were

> taken by the production studio. It was only when a film was truly successful that the production studio's prior claim became satisfied and there was a surplus for a person in Mr Degorce's position. Mr Maugham offered the example of the well-known film *Twilight*, which Mr Degorce had helped to finance, and which had produced considerable profits in which Mr Degorce had shared to the extent of nearly £20 million."

73. The Upper Tribunal then set out HMRC's arguments, at [81] to [90] of the UT Decision. I will quote their record of Mr Gibbon's submission to them on the critical issue of repetition:

> "89. Mr Maugham's argument based on Mr Degorce's claimed repetition of trading in film rights has to be considered against the background of the question to be asked in this case, which is not whether Mr Degorce was trading in film rights in a general sense, but whether the transactions into which he entered in the tax year 2006-07 amounted to trading. It is conspicuous that in his tax return for 2006-07 Mr Degorce stated that his trading activity began on 2 April 2007, the date on which he committed himself to the scheme. It is true that he had been a member of two partnerships in 2005-06, and that those partnerships had undertaken transactions relating to intellectual property rights in films, but even if (which HMRC dispute) the partnerships were trading, being a member of a partnership and undertaking trade on one's own account are quite different things, and the F-tT were entitled to take the view that what Mr Degorce did in 2006-07 did not represent the continuation of an existing trading activity. What is perhaps more important still is that there was no repetition within this scheme; once the rights had been bought and assigned, anything which might have been regarded as a trading activity ceased."

74. The next section of the UT Decision, running from [91] to [126], is headed "Discussion". They began by reminding themselves of the well-known limitations on what an appellate tribunal may ordinarily do when faced with a challenge to the findings of fact of a first-instance tribunal. They referred to the (then) recent decision of this court in Eclipse, and to the statement by Lewison LJ, following a review of the earlier authorities, in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 at [114]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also the evaluation of those facts and to inferences to be drawn from them."

75. The Upper Tribunal then referred to the guidance given by Lord Carnwath about the special role of the Upper Tribunal in the cases of Jones, loc.cit., and Revenue & Customs Commissioners v Pendragon Plc [2015] UKSC 37, [2015] 1 WLR 2838, at [47] to [50]. The Upper Tribunal did not read this guidance as an indication that "the

Upper Tribunal has some special exemption from the restrictions to which Lewison LJ referred", a comment with which I respectfully agree. They added that they did not consider the trade issue, as it arises in this case, to give rise to matters of principle on which it would be appropriate for them to offer guidance. The question of trade is one of fact, and copious guidance already exists on the correct approach to be adopted. Their task was therefore "the more mundane one of enquiring whether the F-tT in this case correctly applied the guidance in determining the facts and evaluating them". Again, I agree.

76. It was in this context that the Upper Tribunal then made the observations in [94] and [95] upon which Ms McCarthy places so much reliance. Although I have already quoted extracts from these paragraphs, it is convenient to set them out again in full:

> "94. We recognise that there are, as Mr Maugham argues and Mr Gibbon accepts, various parts of the F-tT's decision which can be criticised, and we have ourselves found their reasoning difficult to follow in some respects. In particular, we are willing to agree with Mr Maugham that what the F-tT said at [99] … reveals an error of approach: one cannot disregard evidence of similar activities because the tax consequences of those activities are under investigation. The tax consequences of a transaction do not determine its character; rather, it is the character of the transaction which determines its tax consequences.
>
> 95. However, it is not enough simply to attack the approach. Mr Maugham must in addition demonstrate that, had the F-tT approached this part of the evidence correctly, their doing so would, or at least might, have affected the outcome. Mr Maugham's argument seems to elevate the first badge of trade from an indicator, something which may tend to support one conclusion rather than another, into a discrete test. As we understand what the Vice-Chancellor said, this badge, by distinguishing between a one-off transaction on the one hand and repeated transactions of a similar character on the other, is aimed at identifying, respectively, the person who engages in one purchase and sale with no intention of entering into a course of trading and the person whose objective is to trade in the commodity over the longer term. Repetition therefore points to the greater likelihood that the person concerned falls into the latter category; but it does not answer the question whether the activity, repeated or not, is capable of amounting to a trading activity. If, on proper analysis, the transactions into which Mr Degorce entered led to the acquisition of an income stream the fact of repetition does not convert what he did into something else."

77. The Upper Tribunal then identified the core question before it, in a passage which again needs to be set out in full:

"96. The core question is whether there was material before the F-tT from which they could properly conclude that Mr Degorce was not trading in film rights, but that he merely acquired a contingent, or potential, income stream. The F-tT's approach, when shorn of detail, was to undertake the task they had set themselves, namely examine what Mr Degorce did, in entering into a set of pre-arranged contracts which were designed to, and did, follow one another in a very quick sequence. It was, in particular, clear before he entered into the first of the transactions that at the end of them, minutes later, he would be left only with the income stream. No other outcome was possible: the whole set of contracts assumed (simplifying a little) that a Paramount company would sell rights to a Goldcrest company, which would sell them to the user, in this case Mr Degorce, who would do nothing with them but assign them to another Goldcrest company which would in turn assign them back to a different Paramount company. Once the start button was pressed, all the transactions fell into place automatically, with only one possible result.

97. It was not an arrangement which left Mr Degorce with the freedom to retain the rights, assign them elsewhere for cash, or assign part of the rights while retaining the remainder. Not only he but all of the other participants in the Goldcrest scheme – that is, the Goldcrest and Paramount companies – entered into the series of transactions knowing that they could have only one outcome, which in Mr Degorce's case was the right to a potential income stream. Once one focuses on the core question it becomes clear that even if the F-tT were wrong in one or more of the lesser findings they made on the way to their overall conclusion, that overall conclusion was supported by the evidence. It does not matter, in answering the core question, whether Mr Degorce did or did not take advice, or did or did not negotiate, since advice and negotiation do not transform the purchase of an asset, as an income stream is, into a trading activity. They were not included by the Vice-Chancellor in his list of the badges of trade and in our view rightly so. They are as likely, perhaps even more likely, to feature in a person's decision to buy an asset as they are in his decision whether or not to trade in a particular commodity.

98. It is true that the overall exercise was speculative, in the sense that it was unknown whether, and if so to what extent, Mr Degorce would receive income from the exploitation of the rights; but there was no element of speculation in the transactions themselves, which were undertaken on a pre-determined basis with, as we have said, a pre-determined outcome."

78. The Upper Tribunal went on to reject Mr Maugham's argument that the facts of this case are materially indistinguishable from those of Ensign Tankers. There was a similarity, in that the agreements in each case were all entered into on the same day, and related to the exploitation of films, but in other respects there were material differences. In particular, Ensign Tankers "did not merely buy and immediately dispose of rights, but contributed to the financing of the production of the films, as one of the members of a partnership". The Upper Tribunal considered that, if a comparison was to be made with another case, the better comparison was with the Eclipse case "in which the taxpayers, investors in partnerships which acquired rights in films and then assigned them in exchange for an income stream, were found not to have been trading": see the UT Decision at [99].

79. The Upper Tribunal then referred to the observation of Lord Wilberforce in Ransom v Higgs that "everyone is supposed to know what "trade" means", and commented that although the badges of trade identified in the Marson case "are a useful aid, and in a border-line case may tip the balance", "as a general rule a trading transaction should be recognisable as such without close analysis of its detail": see the UT Decision at [100]. The Upper Tribunal added:

> "It does not seem to us that the informed observer, standing back from the detail, would necessarily conclude that what Mr Degorce did amounted to a trading activity or, to align the proposition more closely to the question before us, that it could be said that the informed observer's conclusion that this was not trading could be regarded as perverse."

80. Accordingly, while accepting that some criticism of the detail of the FTT's decision was justified, the Upper Tribunal could see no sufficient basis for overturning their overall conclusion that this was not an adventure in the nature of trade: see [101].

81. In the remainder of their discussion of this issue, the Upper Tribunal addressed HMRC's alternative Lupton argument, observing at [104] that "although the distinction between motive and purpose is often stressed, it can be elusive". They considered that, on this issue too, the FTT had been entitled to conclude as it did. Accordingly, Mr Degorce's appeal on the trade issue was dismissed: see [107].

(3) Mr Degorce's submissions in this court

82. I have already outlined the general nature of the case which Mr Degorce now wishes to advance, based on the undisputed error of approach which the Upper Tribunal diagnosed in paragraph [99] of the FTT Decision. The point is ultimately a short one, and Ms McCarthy was able to develop it with commendable brevity in both her written and her oral submissions. It is an important part of Mr Degorce's case that the question has to be addressed in the light of all the evidence which was before the FTT concerning his interest and participation in film-related activities both before and after April 2007. Although the FTT referred to parts of this evidence in the FTT Decision, his complaint is that they made no comprehensive findings of fact about it, and for the reasons given at [99] they wrongly considered themselves bound to deal with the composite transaction in April 2007 as a one-off transaction. Ms McCarthy relies on the observations of Lord Carnwath in Pendragon at [50] to support her argument that an error of approach by the FTT can constitute an error of law for the purposes of

section 11(1) of TCEA 2007, thereby enabling the Upper Tribunal to exercise the powers conferred on it by section 12. Having correctly identified the error of law in the FTT Decision, she submits that the Upper Tribunal itself erred in law in failing to set aside the FTT Decision, and that it mis-stated the test which needed to be satisfied before it could do so.

83. On this last point, Ms McCarthy submitted that although section 12(2) of TCEA 2007 appears to give the Upper Tribunal a discretion whether or not to set aside the decision of the FTT, once it has been found to involve the making of an error of law, the discretion must in practice be exercised by setting the decision aside unless the Upper Tribunal is satisfied that the FTT would necessarily have reached the same conclusion if it had directed itself correctly. Ms McCarthy supported this submission by reference to the established practice on appeals to the High Court from decisions of the General or Special Commissioners under section 56 of TMA 1970 (see, for example, Brady v Group Lotus Car Companies Plc [1987] STC 635 at 640h-j, per Dillon LJ) and to the similar approach adopted by this court in Revenue & Customs Commissioners v Grace [2009] EWCA Civ 1082, [2009] STC 2707, where the proceedings had begun as an appeal to the High Court from a decision of the Special Commissioner under section 56A of the 1970 Act: see the judgment of Lloyd LJ (with whom Dyson and Waller LJJ agreed) at [38]. Furthermore, submits Ms McCarthy, this approach would be in line with that consistently taken in judicial review proceedings, when a test of materiality is routinely applied in deciding whether to grant relief once an error of law has been established.

84. If that is the correct principle to apply, Ms McCarthy submits that the Upper Tribunal clearly erred in law when it said, at [95], that it was necessary for Mr Degorce to demonstrate that, if the FTT had approached this part of the evidence correctly, "their doing so would, or at least might, have affected the outcome". Not only does this passage mis-state the relevant test, which is whether the FTT's decision would necessarily have been the same, but it wrongly places the burden of proof on Mr Degorce, whereas it would have been for HMRC to show, if they could, that the result would necessarily have been the same despite the FTT's error of law.

85. A similar confusion may be found, says Ms McCarthy, in paragraph [100] of the UT Decision, where the Upper Tribunal expressed the view that an informed observer, standing back from the detail, would not necessarily conclude that what Mr Degorce did amounted to a trading activity, or at least that such a conclusion could not be regarded as perverse. This loses sight of the critical question, which is whether the FTT's decision would necessarily have been the same.

86. More generally, Ms McCarthy submits that it is impossible to discern from the FTT Decision how the FTT would have determined the trade issue if, as it should have done, the FTT had evaluated the totality of Mr Degorce's film-related activities throughout the years 2005 to 2009, instead of focusing on events which took place over a few days in early April 2007. In this connection, she placed particular emphasis on the evidence that during the tax years 2006/07 and 2007/08 Mr Degorce spent approximately £74.1 million on the acquisition of film rights, whereas his income in those years was approximately £45.2 million. I take these figures from a document which Mr Maugham prepared for the Upper Tribunal on 15 November 2014, headed "PD's activities before and after 2006-07". The purpose of this document was to summarise the evidence before the FTT about Mr Degorce's film-

related activities before and after the 2006/07 tax year. Since Mr Degorce's cash contribution was 22%, the amount of this expenditure which Mr Degorce paid out of his own pocket was approximately £16.3 million. On his own estimate in the witness box, the tax which would have been due from him on his earnings of about £45 million during the two years was around £18 million. If his only purpose was to shelter his income from tax, it would hardly have been a sensible proposition for him to spend £16.3 million in an attempt to avoid payment of tax of £18 million. In Mr Degorce's own words, he would have just "thrown £16.3 million down the toilet", which would have been irrational.

87. Ms McCarthy also took us to other evidence of Mr Degorce's close interest in the film trade, including minutes of numerous meetings between him and Mr Petzel discussing various opportunities that had nothing to do with Goldcrest, and a database set up Mr Petzel in which Mr Degorce invested a substantial amount of money. She further pointed out that, although Mr Degorce's transaction with Goldcrest in April 2007 was clearly put together in a rush before the end of the tax year, the subsequent transactions with Goldcrest which Mr Degorce undertook were in August 2007 and March 2008, and the rush to conclude the first transaction in April 2007 was not dictated by his personal tax position, because he could have sheltered his income for 2006/07 by carrying back loss relief from the following year. Furthermore, there was evidence that Mr Degorce employed an assistant simply to deal with his film-related activities. Her role was to act as an administrator, and also to translate film scripts for him into his native French. Later on, in 2009, there was evidence of his involvement in further film opportunities, not involving Goldcrest, which included the purchase of "library titles", that is to say rights to films that had been released in the past but still had commercial value.

(4) The submissions of HMRC

88. On the true construction of section 12 of TCEA 2007, Mr Gibbon submitted that Parliament clearly intended to provide a new system for the determination of appeals within the new tribunal system, and it was wrong in principle to seek to curtail the discretion conferred on the Upper Tribunal whether or not to set aside the decision of the FTT, once an error of law has been found to exist, either by reference to the previous practice in relation to tax appeals under TMA 1970 or by reference to the principles adopted by the High Court on judicial review applications. He referred us to the decision of this court in J D (Congo) v Home Secretary [2012] EWCA Civ 327, [2012] 1 WLR 3273, where Sullivan LJ, delivering the judgment of the court, said at [34]:

> "Section 12(2) of the 2007 Act confers a broad discretion upon the UT if it decides that there is an error of law in the FTT's decision."

Mr Gibbon also reminded us that the Tax and Chancery Chamber of the Upper Tribunal is itself a specialist tribunal which has the same expertise as the FTT to consider and review the evidence, and to make appropriate findings of fact. Furthermore, the power expressly conferred on the Upper Tribunal to re-make the decision, if an error of law is established, has no parallel in the old tax appeal system.

89. Mr Gibbon also relied on the judgment of Lord Carnwath in Pendragon as providing recognition of the flexibility of response inherent in section 12(2), particularly at [48] and [50].

90. What the Upper Tribunal did in the present case, says Mr Gibbon, was in effect to test the validity of the FTT's overall conclusion by looking at the evidence of Mr Degorce's film-related activities in 2007/08. Apart from his discussions with Mr Petzel, his only significant activity in that tax year was to buy two more tranches of Goldcrest scheme films. But these two further sets of transactions were, in all essentials, identical to those which he had undertaken in April 2007. They were structured in the same way, with the same funding arrangements, and in each case they were prompted by a letter from HSBC offering the opportunity to Mr Degorce as a way of sheltering his projected income for the current tax year. Since the FTT had been satisfied that the 2007 transaction was not of a trading character, the fact that he repeated it twice in the following year could not advance his case.

91. Mr Gibbon emphasised, in this connection, that each transaction was presented to Mr Degorce as a package, and that the essential character of the package could not change merely because Mr Degorce bought it three times rather than once. Mr Gibbon referred us to passages in the oral evidence before the FTT where both Mr Degorce and Mr Petzel agreed that each transaction was pre-planned as a single package. He also showed us the passage in Mr Degorce's cross-examination where he was questioned about the further transactions which he entered into in July 2007 and March 2008, and Mr Degorce had no effective answer to the points put to him about the essential similarity between those transactions and the first one in April 2007. Although the later transactions were not at the very end of the tax year, the immediate purpose of the exercise was clearly to shelter Mr Degorce's projected income and to pre-empt any possible changes in the law which might render the scheme ineffective.

92. It was also significant, said Mr Gibbon, that, even taking into account the success of *Twilight*, Mr Degorce came nowhere near making an overall profit on his outlay over the two years. This was partly because, under cross-collaterisation arrangements, *Twilight* formed part of the security for the lending under all three sets of film rights in the March 2008 transaction, but was also a consequence of the prior call which Paramount had on the distribution revenues. Mr Degorce expressly accepted in cross-examination that he had never come close to recouping his overall expenditure of some £74 million. The position was less clear cut if the tax relief which Mr Degorce hoped to obtain was taken into account, but Mr Gibbon argued that in order to obtain loss relief it was necessary to show an accounting profit independently of the intended tax benefit. Otherwise, the calculation would become irretrievably circular.

(5) Discussion

93. I begin by reminding myself of the role of this court on an appeal from the Upper Tribunal. The appeal lies only on a point of law: see section 13(1) of TCEA 2007. For Mr Degorce's appeal to succeed, it is therefore necessary for him to show that the Upper Tribunal made an error of law. It follows that the best approach to the task of this court will often be to look primarily at the merits of the Upper Tribunal's reasoning in its own terms, rather than by reference to the Upper Tribunal's evaluation of the decision of the FTT: see Pendragon at [51]. In performing this task, it is important to remember that the Upper Tribunal is itself a specialist tribunal,

composed in the present case of an experienced High Court judge and an equally experienced Tribunal judge. Furthermore, the case was investigated very thoroughly in both tribunals, with the assistance of expert counsel on both sides. The hearing before the FTT lasted for 7 days, and the hearing in the Upper Tribunal occupied 4 days, which Mr Gibbon told us was barely sufficient with the result that some issues had to be dealt with by written submissions. By contrast, the hearing in this court has been strictly confined to its time estimate of one and a half days. We have only been able to scratch the surface of several issues which were explored in depth below.

94. The appeal from the FTT to the Upper Tribunal was likewise confined to an appeal on any point of law arising from the FTT Decision: see section 11(1) of TCEA 2007. Section 12 then sets out the powers of the Upper Tribunal, in deciding an appeal under section 11, if it finds that the decision of the FTT "involved the making of an error on a point of law". The Upper Tribunal "may (but need not) set aside the decision" of the FTT, and if it does so, it must either remit the case to the FTT with directions for its reconsideration, or itself re-make the decision. If the Upper Tribunal decides to re-make the decision, it has the further powers set out in subsection (4), including power to "make such findings of fact as it consider appropriate".

95. I would accept the submission of Mr Gibbon that, if the Upper Tribunal finds an error of law to have been made, it then has a broad discretion whether or not to set aside the decision of the FTT. That is the clear import of the words "may (but need not) set aside", and in my view it would be wrong in principle to interpret the scope of this discretion by reference to the previous law on tax appeals under TMA 1970. TCEA 2007 set up a new tribunal structure, and the provisions of section 12 apply to all chambers of the Upper Tribunal, not merely to the Tax & Chancery Chamber. That said, however, I consider that a test of materiality will still have a crucial, and usually decisive, role to play in the decision of the Upper Tribunal whether or not to set aside the decision of the FTT, and likewise in the decision of this court if an error of law by the Upper Tribunal is established. At least in cases of the present type, I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision. As a taxpayer, Mr Degorce is entitled to be taxed according to the law, and if an error of law is detected in the FTT's decision, which is material in the sense I have mentioned, justice will normally require nothing less than that the decision be set aside. Conversely, if an error of law is made, but the Upper Tribunal is satisfied that it was immaterial, there will be no injustice to Mr Degorce in allowing the decision of the FTT to stand. Similarly, if we were to take the view that the Upper Tribunal erred in law in the task which it had to perform, but that the errors could have made no difference to its decision to dismiss Mr Degorce's appeal, there would again be no injustice if his appeal to this court were in turn dismissed.

96. I now turn to consider the nature and significance of the admitted error of approach in paragraph [99] of the FTT Decision. On any view, the logic and wording of this paragraph are open to some criticism. To the extent that the FTT declined to take account of Mr Degorce's film-related activities before or after April 2007 because no findings about them had been made by any court or tribunal, or because they were subject to an enquiry by HMRC, the FTT was clearly in error, as the Upper Tribunal rightly recognised. On the other hand, an explicit part of their reasoning was that they

lacked the detailed evidence to make reliable findings of fact about these earlier and later activities. The FTT said they "had no detailed evidence before [*them*] relating to Mr Degorce's activities either pre or post 2006-2007", and that it would be unsafe for them to accept his assertions "in the absence of any detailed examination of the evidence". This was in principle an assessment of the evidence before them which the FTT was entitled to make, and it would alone have provided an adequate reason for concluding that their primary focus should be on the April 2007 transaction. It was, moreover, the only transaction in issue before the FTT, and it was clearly self-contained in the sense that all the steps in the scheme were taken within the space of a few days, and no future input or effort on the part of Mr Degorce was required. He was simply left with a very substantial allowable trading loss, if the scheme worked, and with the fairly remote prospect of future profit, whether or not the scheme worked. In this important sense, therefore, the FTT was in my view fully justified in finding that "there was no element of repetition" in the transaction.

97. That is not the same thing, of course, as finding that the April 2007 transaction had to be viewed and evaluated in isolation, without regard to any previous or later activities which might place it in context and throw light on its character. If this is what the FTT meant by saying that they had to deal with the transaction as a one-off transaction, they were in error. But the impact of any such error was in my judgment very limited. In the first place, they were clearly right to find no assistance in Mr Degorce's previous involvement in the two Ingenious film schemes, if only because they concerned alleged trades carried on by the LLPs, and not any trade carried on by Mr Degorce personally. As Mr Gibbon rightly stressed, Mr Degorce's case in the present proceedings has always been that he began his sole trading activity on 2 April 2007. Further, if regard is had to his subsequent activities, the most salient point was that in the course of the following tax year he entered into two further Goldcrest film scheme packages which in all material respects were the same as the April 2007 package, apart from the films involved. Mere repetition of that nature is most unlikely to throw any useful light on the question whether the first such transaction had a trading character.

98. Nor can it be said that the FTT closed their minds to the wider context in which Mr Degorce's film-related activities took place. It is important to remember that paragraph 99 was concerned only with one of the badges of trade. The FTT went on to examine what Mr Degorce actually did, and their "Time Line" included extensive references to his communications with Mr Petzel between February and April 2007. The FTT referred expressly to the advice which he took from Mr Petzel, Howard Kennedy and HSBC Private Bank, as well as to his employment of an assistant. They also referred to Mr Degorce's evidence about other films which he had rejected, and they reviewed Mr Petzel's oral evidence at some length. The difficulty for Mr Degorce is that the FTT were distinctly unimpressed by the quality and relevance of the advice which Mr Degorce received, and about his real understanding of the detail of the scheme. In particular, they found that Howard Kennedy had not been independently chosen by Mr Degorce to advise him, and the main advice he received from them related only to the loan documentation; while the exercise carried out for him by Mr Petzel "in reality provided little assistance to Mr Degorce beyond that already obtained from Goldcrest and HSBC". No challenge can be made to these findings, which it was clearly open to the FTT to make after hearing several days of evidence and submissions. Similarly, the FTT was entitled to take the view, as I have

said, that it had insufficient material to make reliable findings of fact about Mr Degorce's film-related activities in earlier or later years. The wider picture therefore gave them little help in evaluating the true character of Mr Degorce's activities in April 2007.

99. Nor is Mr Degorce's case much advanced, in my judgment, by the argument upon which Ms McCarthy placed such emphasis, namely the fact that his expenditure on the acquisition of film rights in the tax years 2006/07 and 2007/08 exceeded his taxable income in those years by approximately £29 million: see [86] above. On the assumption that Mr Degorce was carrying on a trade, his surplus trading losses were available to be carried forward and set against subsequent profits of the trade pursuant to section 385 of ICTA 1988. He may well have thought it prudent to lock in surplus losses of this magnitude, at a time when the possibility of legislative intervention to counter film schemes of the present type clearly could not be ignored. But all this shows is that Mr Degorce and his advisers probably thought he had a strong argument that his film-related activities constituted trading, and that he intended to continue those activities in the future. Subjective considerations of this kind cannot assist in determining the proper characterisation of the activities which he actually undertook in April 2007. I see no reason to doubt that the FTT had well in mind Mr Degorce's evidence about his expenditure on the two further Goldcrest schemes in 2007/08, but they were under no obligation to make findings of fact about it unless they considered it material to their conclusion.

100. For all these reasons, it seems to me that the FTT's error of approach in [99] was of very limited significance. I do not think there is any realistic possibility that they would have reached a different overall conclusion, had they directed themselves correctly that the existence of any enquiries by HMRC into Mr Degorce's film-related activities before or after April 2007, and the absence of any findings by any court or tribunal in relation to those activities, were irrelevant. In short, I would say that the error was immaterial.

101. If necessary, I would also reach the same conclusion in relation to what I consider to be the FTT's erroneous emphasis on the lack of any intention by Mr Degorce (as they found) to sell the income stream at some future date: see [57] and [58] above. This was, at best, a matter of peripheral relevance, and like the error in paragraph [99] of the FTT Decision it went only to whether the first so-called badge of trade was established. It formed only a tiny part of the overall picture which the FTT had to evaluate, and as this court said in Eclipse at [114], the cases by reference to which the list of badges was compiled "are not sufficiently analogous to the facts of the present case to make the list of value in these proceedings". That comment was made in relation to the different film scheme under consideration in Eclipse, but there is a sufficient generic similarity between the Eclipse and Goldcrest schemes, in my view, for the same point to hold good in the present case.

102. The primary question which I need to consider, however, is not whether I would myself have regarded the FTT's error of approach as immaterial, but rather whether the Upper Tribunal was entitled to take that view. In considering that question, I must, and do, give considerable weight to its expertise as a specialist tribunal. Furthermore, I can only depart from its view if satisfied that the Upper Tribunal itself erred in law. Leaving aside for the moment the specific errors of law of which Mr Degorce complains, I can find no error in the analysis and reasoning of the Upper Tribunal

which led it to conclude that Mr Degorce was not trading in film rights, but merely acquired a contingent, or potential, income stream. In particular, I can see no error of law in the Upper Tribunal's identification of the "core question" at [96] of the UT Decision, and the subsequent discussion of it at [97] to [101]. Unless, therefore, the Upper Tribunal itself made some other material error of law, I would uphold its conclusion on the trade issue.

103. In support of her argument that the Upper Tribunal itself made specific errors of law, Ms McCarthy concentrates in particular on paragraph [95] of the UT Decision, and the sentence which says:

> "Mr Maugham must in addition demonstrate that, had the F-tT approached this part of the evidence correctly, their doing so would, or at least might, have affected the outcome."

Ms McCarthy argues that this sentence both mis-states the relevant test, and reverses the burden of proof: see [84] above. There is some force in these criticisms, particularly if the sentence is read in isolation. However, I consider that the words "or at least might" show a sufficient recognition by the Upper Tribunal that the relevant test is one of materiality, i.e. whether the FTT's error of approach might, or could, have affected the outcome. As to the burden of proof, although this was technically a misdirection, I cannot find any indication that in practice it influenced the Upper Tribunal's discussion of the issue or the conclusion which it reached.

104. I would make similar comments about the other passage upon which Ms McCarthy concentrated her attack, where the Upper Tribunal said at [100]:

> "It does not seem to us that the informed observer, standing back from the detail, would necessarily conclude that what Mr Degorce did amounted to a trading activity or, to align the proposition more closely to the question before us, that it could be said that the informed observer's conclusion that this was not trading could be regarded as perverse."

I read these observations as comments of a fairly general nature, intended to reinforce the Upper Tribunal's point that a trading transaction should in general be recognisable as such without close analysis of its detail. I do not read the passage as a self-direction about the role of the Upper Tribunal on the appeal to it from the FTT, but rather as a reflection of the familiar Edwards v Bairstow test which would apply where a finding of fact that Mr Degorce was not trading was sought to be challenged on appeal as erroneous in point of law.

105. For these reasons, I consider that the alleged specific errors of law in the UT Decision identified by Ms McCarthy are more apparent than real, and they do not vitiate the Upper Tribunal's conclusion that the FTT was entitled to reach the conclusion which it did on the trade issue. It follows, in my judgment, that the Upper Tribunal made no material error of law in its treatment of the appeal to it on the trade issue, with the consequence that there is no basis upon which this court could interfere with its conclusion.

106. I would add that if, contrary to what I have just said, the Upper Tribunal did make a material error of law, the result would in my opinion be the same. This court would then be entitled to interfere and set aside the Upper Tribunal's decision, but for the reasons which I have already given I would conclude that the FTT itself made no material error of law in concluding that Mr Degorce was not engaged in a trade when he entered into the relevant transactions in April 2007.

107. For all these reasons, therefore, I would dismiss Mr Degorce's appeal on the trade issue.

Overall conclusion

108. It is common ground that the trade issue is determinative, in the sense that if it is determined adversely to Mr Degorce, the other issues on the appeal do not arise. If the other members of the court agree with my conclusion on the trade issue, it is therefore unnecessary for me to go on to consider the other grounds of appeal; and I consider it preferable not to do so, particularly as they were dealt with relatively briefly by the Upper Tribunal. For the same reason, it is unnecessary for us to decide whether to allow Mr Degorce's application to amend his grounds of appeal.

Lady Justice Thirlwall:

109. I agree.

Lord Justice Longmore:

110. I also agree.