UT Neutral citation number: **[2025] UKUT 00374 (TCC)**

UT (Tax & Chancery) Case Number: UT-2024-000088

**Upper Tribunal**
**(Tax and Chancery Chamber)**

The Rolls Building, London

*Income Tax – Payment made to Appellant pursuant to long-term incentive plan – Payment received after Appellant had ceased employment and become non-UK resident – whether Payment within s.62 ITEPA 2003 – Whether Payment attributable to overseas part of split Year under ss.15-16 ITEPA 2003*

**Heard on 15 October 2025**
**Judgment given on:: 31 October 2025**

**Before**

**THE HONOURABLE MR JUSTICE FOXTON**

**JUDGE ANNE REDSTON**

**Between**

**MICHAEL SAUNDERS**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Michael Firth KC, instructed by the Appellant

For the Respondents: Georgia Hicks of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. In January 2017, Mr Saunders received a payment of £1,236,956 ("the Payment") from Hibernia Atlantic UK Ltd ("HAUKL"), his former employer, pursuant to a grant of stock appreciation rights ("SARs") awarded to him by HAUKL's parent company on 4 April 2013. HMRC determined that the Payment constituted taxable income in the UK.

2. Mr Saunders appealed against the decision to the First Tier Tribunal ("FTT"). On 2 April 2024, the FTT (Judge Jeanette Zaman and Tribunal Member Mr Mohammed Farooq) dismissed that appeal ("the Decision"). Mr Saunders was given permission to appeal to the Upper Tribunal against the Decision.

### THE FACTS

3. The parties prepared an agreed statement of facts for the hearing before the FTT, which we reproduce here:

> (1) The Appellant was employed by HAUKL between 2 April 2008 and 31 July 2016.
>
> (2) Throughout the period of employment, the Appellant worked in, and was resident in, the UK. HAUKL was likewise resident, with a permanent base, in the UK.
>
> (3) On 14 March 2013, the board of Hibernia Group ehf (HAUKL's parent company registered and incorporated in Iceland) adopted the Hibernia Group ehf 2013 Long Term Incentive Plan (the "Hibernia LTI Plan").
>
> (4) On 4 April 2013, the Appellant entered into an Agreement for Stock Appreciation Rights with Hibernia Group ehf (the "SAR Agreement"). Pursuant to the SAR Agreement the Appellant was granted: (1) 157,887 SARs at a grant price of $1.32; and (2) 291,667 SARs at a grant price of $1.38.
>
> (5) All of the 157,887 SARs at a grant price of $1.32 and 72,917 of the SARs at a grant price of $1.38 were vested on the date of the grant, being 4 April 2013. The remaining 218,750 SARs were vested in three equal instalments on 1 July 2013, 1 July 2014 and 1 July 2015 in accordance with the terms of the Hibernia LTI Plan as the Appellant remained employed.
>
> (6) On 31 July 2016 the Appellant ceased his employment with HAUKL.
>
> (7) The Appellant became non-resident in the UK on 1 August 2016.
>
> (8) On 9 January 2017 the Appellant received notice that Hibernia NSG (the successor parent company of HAUKL registered and incorporated in Ireland) had been sold to GTT Communications Inc, which constituted a sale for the purposes of the Hibernia LTI Plan and the SAR Agreement.
>
> (9) As the sale occurred within 24 months of the Appellant leaving his employment, this resulted in a payment of cash equal to the amount by which the then current Fair Market Value of the Shares, to which the vested SARs related, exceeded the Grant Price.
>
> (10) As a result, the Appellant received the Payment in the sum of £1,236,956 from HAUKL. The Payment was processed through the Employer's payroll on 13 January 2017 and was subjected to deductions of £549,679.26 PAYE and £26,405.08 Class 1 Primary (Employee's) NICs at source.

(11) In his self-assessment tax return for the year 2016/17, the Appellant claimed the split-year treatment (within the meaning of Part 3 (case 3, para 46) to Schedule 45 of the Finance Act 2013) applied in respect of 2016/17. He recorded the Payment as both (1) "Tips and other payments not on your P60" on the employment page and (2) "Foreign earnings not taxable in the UK" on the additional information page. This resulted in a repayment of tax in respect of the tax deducted at source by HAUKL on 22 May 2017.

(12) On 9 March 2018 HMRC opened an enquiry into the Appellant's 2016/17 tax return under s.9A Taxes Management Act ("TMA") 1970. Following the enquiry, HMRC issued a closure notice, amending the tax return on the basis that the Payment originally claimed as foreign earnings not taxable in the UK was, in their opinion, subject to UK income tax. An assessment was issued under s.28A TMA 1970 for the additional tax, bringing the total income tax owed to £504,109.25.

4. It will be helpful if we set out a little more detail about the Hibernia LTI Plan and the SAR Agreement.

5. Section 1 of the Hibernia LTI Plan stated that its purpose was to "promote the long-term success of the Company and its subsidiaries and the creation of shareholder value by offering selected Employees …. An opportunity to share in such long-term success." The Hibernia LTI plan worked as follows:

(1) Participants would be granted a SAR through a SAR Agreement which, in broad terms, involved a promise to pay a sum of money to the Participant representing the amount of the increase in the Group's share price from a stipulated base in the event of a transaction involving a sale of 43% or more (but less than all) of the Hibernia Group ehf's shares ("a Liquidity Event") or a sale or exchange by the then existing shareholders of all their shares ("a Sale").

(2) If the consideration payable on the Liquidity Event or Sale was not cash but shares, the SAR could be settled by allocating an appropriate portion of those shares.

(3) The SARs gave no rights as shareholders or any form of security.

(4) Each SAR would vest in respect of 25% of the SARS on completion of each year of service through the first to fourth anniversaries of the date of grant.

(5) Where a participant terminated their service with the group for certain acceptable reasons (i.e. the participant was a "Good Leaver"), then the portion of any SAR referable to that year of service would vest. So far as vested SARs are concerned, a participant's entitlement to payment was conditional upon the Sale or Liquidity Event happening within 2 years of termination.

(6) If the participant's employment was terminated in other circumstances (i.e. for wilful misconduct, negligence or other specified reasons) all SARs (vested or unvested) were forfeit.

(7) Subject to that two-year period, the term of the SAR would ordinarily be 15 years from Grant.

6. Those terms were reflected in Mr Saunders' SAR Agreement.

**THE ISSUES AND THE FTT'S FINDINGS**

7. There were two live issued before the FTT.

8. The first issue was whether the Payment falls to be treated as income arising from Mr Saunders' employment. Mr Firth KC, who represented Mr Saunders before the FTT as he did

before us, argued that the reward he had received for employment was not the Payment, but the contingent rights conferred by the SAR Agreement on grant. He submitted that those rights were themselves capable of being "rendered to pecuniary account" or monetarised, and that on the basis of the House of Lords decision in *Abbott v Philbin* [1961] AC 352, that was the relevant taxable event, not the subsequent receipt of the Payment.

9. The FTT rejected that submission, holding that *Abbott* did not mean that any deferred payment rights should be treated separately from the subsequent payment (Decision, [51]), and that it was necessary to focus on exactly what the employee had initially received. Having regard to the nature of the right granted here, they concluded that Mr Saunders' receipt of the Payment arose from his employment relationship ([53]). The FTT also addressed the issue of whether, at the time of the grant, the rights afforded to Mr Saunders could be realised ([52]).

10. The second issue was whether, even if the Payment did constitute earnings, it was "for" the non-resident part of the split year, and was not apportioned over earlier (UK resident) years.

11. Mr Firth argued that the Payment was only earned at the time of the Sale, which was in the overseas part of a split year [61]. The FTT rejected that argument. Taking account of the "full picture", they concluded that the Payment was earned by Mr Saunders for his services performed whilst he was resident in the UK in respect of duties performed there (Decision, [62]-[63]).

12. Mr Saunders appeals both findings.

**THE RELEVANT LEGISLATION**

13. Part 2 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") imposes a charge to income tax on "employment income", which is defined by s.7(2)(a) as including "earnings within Chapter 1 of Part 3". That definition is set out in s.62:

> "**Earnings**
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means –
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment.
>
> (3) For the purposes of subsection (2) "money's worth" means something that is –
>
> (a) of direct monetary value to the employee, or
>
> (b) capable of being converted into money or something of direct monetary value to the employee.
>
> (4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7))."

14. Chapter 4 of Part 2 of ITEPA 2003 then deals with the taxable earnings of UK resident employees:

> **"Taxable earnings**
>
> **14. Taxable earnings under this Chapter: introduction**

(1) This Chapter sets out for the purposes of this Part what are taxable earnings from an employment in a tax year in cases where section 15 (earnings for year when employee UK resident) applies to general earnings for a tax year.

(2) In this Chapter –

(a) sections 16 and 17 deal with the year for which general earnings are earned, and

(b) sections 18 and 19 deal with the time when general earnings are received.

(3) In the employment income Parts any reference to the charging provisions of this Chapter is a reference to section 15.

**UK resident employees**

**15 Earnings for year when employee UK resident**

(1) This section applies to general earnings for a tax year for which the employee is UK resident except that, in the case of a split year, it does not apply to any part of those earnings that is excluded.

(1A) General earnings are "excluded" if they –

(a) are attributable to the overseas part of the split year, and

(b) are neither –

(i) general earnings in respect of duties performed in the United Kingdom,

nor

(ii) general earnings from overseas Crown employment subject to United Kingdom tax.

(2) The full amount of any general earnings within subsection (1) which are received in a tax year is an amount of "taxable earnings" from the employment in that year.

(3) Subsection (2) applies whether or not the employment is held when the earnings are received.

(4) Any attribution required for the purposes of subsection (1A)(a) is to be done on a just and reasonable basis.

(5) The following provisions of Chapter 5 of this Part apply for the purposes of subsection (1A)(b) as for the purposes of section 27(2)—

(a) section 28 (which defines "general earnings from overseas Crown employment subject to United Kingdom tax"), . . .

(b) sections 38 to 41 (which contain rules for determining the place of performance of duties of employment), and

(c)section 41ZA (which is about determining the extent to which general earnings are in respect of United Kingdom duties).

(6) Subject to any provision made in an order under section 28(5) for the purposes of subsection (1A)(b), provisions made in an order under that section for the purposes of section 27(2) apply for the purposes of subsection (1A)(b) too.

**Year for which general earnings are earned**

**16. Meaning of earnings "for" a tax year**

(1) This section applies for determining whether general earnings are general earnings "for" a particular tax year for the purposes of this Chapter.

(2) General earnings that are earned in, or otherwise in respect of, a particular period are to be regarded as general earnings for that period.

(3) If that period consists of the whole or part of a single tax year, the earnings are to be regarded as general earnings "for" that tax year.

(4) If that period consists of the whole or parts of two or more tax years, the part of the earnings that is to be regarded as general earnings "for" each of those tax years is to be determined on a just and reasonable apportionment.

(5) This section does not apply to any amount which is required by a provision of Part 3 to be treated as earnings for a particular tax year.

**17 Treatment of earnings for year in which employment not held**

(1) This section applies for the purposes of this Chapter in case where general earnings from an employment would otherwise fall to be regarded as general earnings for a tax year in which the employee does not hold the employment.

(2) If that year falls before the first tax year in which the employment is held, the earnings are to be treated as general earnings for that first tax year.

(3) If that year falls after the last tax year in which the employment was held, the earnings are to be treated as general earnings for that last tax year.

(4) This section does not apply in connection with determining the year for which amounts are to be treated as earnings under Chapters 2 to [10] of Part3 (the benefits code).

**When general earnings are received**

**18 Receipt of money earnings**

(1) General earnings consisting of money are to be treated for the purposes of this Chapter as received at the earliest of the following times –

Rule 1

The time when payment is made of or on account of the earnings.

Rule 2

The time when a person becomes entitled to payment of or on account of the earnings…

...

(5) Where this section applies –

(a) to a payment on account of general earnings, or

(b) to sums on account of general earnings,

it so applies for the purpose of determining the time when an amount of general earnings corresponding to the amount of that payment or those sums is to be treated as received for the purposes of this Chapter."

## ISSUE 1

**INTRODUCTION**

15. This issue is essentially one of statutory construction and the application of the statute as properly construed. HMRC contend that the Payment constitutes "earnings" for the purpose of s.62 ITEPA 2003, and specifically that it is "an emolument of the employment". In answering this question:

(1) we must determine whether the receipt in issue was "paid to him in return for acting as or being an employee" (*Hochstrasser (Inspector of Taxes) v Mayes* [1960] AC 376, 391-92).

(2) In *Shilton v Wilmshurst* [1991] 1 AC 684, 689, Lord Templeman noted that emoluments were not limited to payments made in the course of employment but included those paid as a reward for past services, or as an inducement to enter into a contract of employment or as an inducement to continue to perform services. He held that it was necessary to distinguish between "an amount which is derived 'from being or becoming an employee' on the one hand, and an emolument which is attributable to something else on the other hand".

(3) In *Bray v Best* [1989] 1 WLR 167, 176-77 Lord Oliver reformulated the question as being "whether a particular payment arises from the existence of the employer-employee relationship" or "from 'something else'."

(4) The causal link between the benefit in issue and the employment relationship which is necessary for the benefit to count as "an emolument of the employment" was described as one of "substantial cause" and "a sufficiently substantial reason" (*Kuehne + Nagel Drinks Logistics Ltd v Commissioner for HM Revenue & Customs* [2012] EWCA Civ 34, [56]-[57] and [60]).

(5) In *RFC 2012 plc v Attorney General for Scotland* [2017] UKSC 45, [64], the Supreme Court noted that "the relevant provisions for the taxation of emoluments or earnings were drafted in deliberately wide terms to bring within the tax charge money paid as a reward for an employee's work".

(6) Finally, when approaching this question, the court is "not to be restricted to the legal form of the source of the payment but to focus on the character of the receipt in the hands of the recipient" (*HMRC v PA Holdings Ltd* [2011] EWCA Civ 1414, [37], and, to similar effect, [39]). In that case it was also observed that "for at least sixty years courts have identified the character of a receipt in the hands of the recipient by looking at its substance and not its form" ([41]).

16. It was not part of HMRC's case at the FTT that Mr Saunders was taxable on *both* the value of the vested rights when he obtained them, and *also* on the Payment, and HMRC's skeleton argument for this hearing similarly did not put forward that argument. However, in the course of oral submissions on behalf of HMRC, Ms Hicks said that a double charge was possible. We disagree. It would take clear words indeed before legislation would allow the employee to be taxed on both the value of the right received and its subsequent realisation (see by analogy *Forde and McHugh Ltd v Revenue and Customs Commissioners* [2014] UKSC 14, [15]-[16]). A court would also seek a clear statutory basis for making the taxable event depend on whether or not the employee chose to realise the right conferred in some way other than awaiting the occurrence of the contingencies (not least because it would involve differential tax treatment of employees in receipt of the same right).

17. Subject to two points to which we will come, approached by reference to the principles set out above, and on the basis of the agreed facts, we agree with the FTT that the answer to

the question "whether the payment of £1,236,956 received by Mr Saunders from HAUKL constitutes 'employment income' for the purpose of s.62 of ITEPA 2003" is clearly yes. We can do no better than adopt the FTT's summary of its reasons for reaching that conclusion:

> (1) The SARs were granted to Mr Saunders and vested in connection with his employment (Decision, [31]).
>
> (2) The SARS were granted to employees and incentivised them to remain employed, with rights vesting as particular periods of employment were completed, and all rights being forfeit if the employment was terminated for cause (*ibid*).
>
> (3) There was a temporal limit of 2 years between the end of Mr Saunders' employment within which a Sale or Liquidity Event had to take place (*ibid*).
>
> (4) The Payment was paid pursuant to and in accordance with the terms of the SAR Agreement ([32]).
>
> (5) Mr Saunders' rights under the SAR Agreement were conditional on his having been a "Good Leaver" (*ibid*).

18. The two points to which we referred above are (a) an argument of principle, and (b) the binding effect of the decision in *Abbott v Philbin*. They are closely related, because that same issue of principle is also at the heart of the decision in *Abbott v Philbin*.

**WHAT IS THE TAXABLE RECEIPT**

19. There is an obvious distinction between (a) an employee's remuneration, and (b) the value which the employee subsequently acquires through the economic exploitation of that remuneration. The former would naturally be taxed as employment income, the latter not (although it may be subject to some other form of taxation, e.g. capital taxes or taxes on non-employment income).

20. That distinction can be justified on two, essentially complementary, bases:

> (1) The employee has already been taxed on the remuneration, and there would be "double taxation" if they were to be taxed again *qua employee* on the economic benefit derived from that income.
>
> (2) Any profitable use made from that income is the product of the employee's own decision-making, which carries with it the risk of loss which is the employee's alone.

21. As a matter of first impression, and without regard to any specific legislative interventions and any tax avoidance arrangements, if an employee was remunerated by his employer transferring shares in a company to him on an unrestricted basis, the value of that receipt would be regarded as employment income. Any appreciation in those shares subsequently, or dividends paid to shareholders in future years, would not be so regarded (any more than a fall in value of shares after transfer would be regarded as diminishing the amount of remuneration received). Indeed, the value of the shares when acquired will reflect contemporaneous market perception of the likelihood of future dividends.

22. Once we move beyond that simple example, matters soon become more complex. If the employer gives the employees not shares, but an option to acquire shares at a favourable price, is it the option which represents the remuneration, by reference to its market value at the date of grant, or the profit made if and when the option is exercised: see *Abbott v Philbin* on which the House of Lords split 3:2. We observe that:

> (1) if the option was granted at a time when market views about the company's prospects are bullish, the employee may realise a profit through selling the option, even

if because of market events it later turned out that the option never became exercisable; but

(2) in a bearish market, where the market value of the option at the time of grant meant that the employee could not realise a profit by selling the option, it may nevertheless prove to be valuable in the future, and be exercised.

23. Matters become more difficult still when moving beyond (a) options to acquire shares at a particular strike price (a widely known asset class, which in many iterations is traded in enormous volumes on the world's financial markets) to (b) other forms of contingent right. To take an extreme example of the latter, what of an employee whose salary is payable in arrears, and who can "factor" that contingent right so as to raise money in advance? Is the taxable receipt then the market value of the accrued right to salary, rather than the money eventually paid by the employer? If that were the position, it would mark a fundamental change to the taxation of employment income.

24. This was a point made by the FTT at Decision [51] when they observed of *Abbott v Philbin*:

> "We do not read that decision as meaning that any deferred payment rights granted or held by employees should be treated as separate from any subsequent payment such that they are taxable on grant or award."

25. Against the background of those general observations, we accept of course that the question we must answer is whether the specific contingent rights received by Mr Saunders on receipt of the vested SARs were taxable remuneration.

***ABBOTT V PHILBIN***

## Introduction

26. Before turning to the facts of *Abbott*, it is helpful briefly to refer to another decision of the House of Lords which features prominently in that case: *Tennant v Smith* [1892] AC 150. In *Tennant* the taxpayer was required to reside in part of his employer's business premises as a condition of employment. The Revenue sought to treat that right (monetarised by reference to the cost of renting alternative accommodation) as a "perquisite," "profit" or "emolument" of his employment. The House of Lords found for the taxpayer, on the basis that the language in the statute required "something acquired which the acquirer became possessed of and can dispose of to his advantage – in other words money – or that which can be turned to pecuniary account" (Lord Watson at p.160).

## The decision in *Abbott*

27. In *Abbott v Philbin* the appellant was the secretary of a company. At its AGM, the company resolved to grant the directors options to acquire shares on such terms as the directors thought proper. On 6th October 1954, the directors were offered the opportunity to purchase an option to acquire shares at the mid-market price at the date of offer (68s 6d). The purchase price was £1 for every 100 shares. As there was some uncertainty before the FTT as to the terms of the option (Decision, [49]) we have checked them from the House of Lords case papers filed in the appeal. The option agreement provided:

> "You will note that the option is not transferable and to the extent not previously exercised will expire on your death or retirement, upon your Service with the Company and/or its subsidiaries ending, or on the tenth anniversary of the date of grant of the Option, whichever first occurs."

28. The option, therefore, had to be both acquired and exercised while the option-holder was still an employee. It is also apparent from those papers that when the ability to purchase the option was made known to the directors, they were told "that [tax] counsel had advised

that they would be taxed on the value option rights at the date of acquisition, which value was generally estimated at nil, but not on any amount by which the share value at date of exercise exceeded the strike price."

29. On 7th October 1954, Mr Abbott wrote accepting the offer to purchase an option to acquire 2,000 shares for £20. On 28 March 1956, he exercised an option to acquire 250 shares (when the market price was 82s).

30. The issue arose as to whether the profit made on that exercise fell within rule 1 of Schedule E to the Ninth Schedule to the Income Tax 1952 which taxed "all salaries, fees, wages, perquisites or profits whatsoever" from "an office or employment." The taxpayer argued that the relevant remuneration was the value of the option when granted. No one argued that the receipt of the Company's offer of 6th October was itself a taxable remuneration, and Lord Denning's judgment explains that such argument would have failed on the basis that the offer was capable of being revoked and was a mere expectation (p.383-84). However, we do not think we can exclude the possibility that someone might have been willing to pay Mr Abbott for the right to decide (a) when he should accept the offer while it remained open and (b) how many options should be exercised. If so, this illustrates the fact that an employee may have something capable of monetarisation, without being in receipt of a legal right of a kind capable of amounting to remuneration.

31. The majority of the House of Lords held that the relevant taxable remuneration was the value of the option at the date of acquisition, not the profit made on its realisation (it followed that the advice originally given by counsel was correct). It is important to note what each of the three judges making up the majority decided.

32. Viscount Simonds at p.366 identified the first issue in the case as being whether the grant of the option was "itself a perquisite or profit of the year 1954-55", saying "it would not, as I understand the argument of counsel for the Crown, be contended that, if the grant of the option was itself a perquisite or profit arising from the office, the subsequent exercise of it would be another perquisite or profit." He held as follows:

> (1) When he acquired the option, the appellant acquired something of "potential value", it not mattering for this purpose "whether it falls into the category of proprietary or contractual right, or into some dim twilight that divides those juristic conceptions".
>
> (2) The words "perquisite or profit whatsoever" were "as wide and general as they well could be", meaning (quoting from *Tennant*) "something acquired which the acquirer becomes possessed of and can dispose of to his advantage, in other words money, or that which can be turned into pecuniary account."
>
> (3) It did not matter that the option was not transferable, because the grantee could agree with a third party to exercise the option and transfer the shares to him (in modern parlance, the equivalent of a transfer could be "synthesised" by an appropriate transaction).
>
> (4) The test was "whether it is something which is by its nature capable of being turned into money", and it was irrelevant whether or not it could be valued: "If it had no ascertainable value then it was a perquisite of no value."
>
> (5) He pointed to the difficulty of contending that an option given to an employee to acquire shares at a price lower than the prevailing market price was "not a perquisite which falls within the Schedule."
>
> (6) As there could not be one perquisite at the date of the grant and a second perquisite when the shares were taken up, the Crown's case failed.

(7) Independently of that, the taxable perquisite must be something arising "therefrom," i.e. (from the office, in the year of assessment) and he "did not find it easy to see that the increased difference between the option price and the market price in 1956 or, it might be, in 1964 in any sense arises from the office", as this difference would be "due to numerous factors which have no relation to the office of the employee, or to his employment in it". He rejected the claim of the Crown on that basis as well. It will be noted that this particular basis echoed the second distinction to which we referred at [20.(2)] above.

33. Turning to Lord Reid:

(1) At p.370, he noted that "the company retained no control over the times at which or the extent to which he might exercise his option". Although the significance of that comment was not explained; it reflects the feature of *Abbott* that the employer's role was, in any direct sense, completed when the option agreement was concluded (albeit we accept that one factor influencing the prevailing market price would be the performance of the company, into which the employer's own effort, as well as general economic conditions and the performance of rival companies would all play a part).

(2) He also suggested that it made no difference to the issue before the court that the terms of the option required the appellant to remain in the service of the company.

(3) He held that "the question is whether this option was a right of a kind which could be turned to pecuniary account", continuing "the test must be the nature of the right and not whether this particular option could readily have been turned to pecuniary account in October, 1954". That comment, and other references to "the nature of the right", formed the basis of a submission by Ms Hicks, which appears to have gained traction with the FTT, that the House of Lords were recognising that different rights might admit of different answers to the "what was the remuneration received" question. Mr Firth submitted that this was simply a reference to the *Tennant* requirement (discussed in the preceding paragraph) that the right in issue could be turned into pecuniary account". However, the passage in issue distinguished between "the nature of the right and "whether this particular option could readily have been turned to pecuniary account", describing the latter as a question of fact on which there was no finding. Doing the best we can, we think Lord Reid was saying that the decision of the House turned on a prior analysis of the nature of the right (an option to receive shares) without reference to any particular factual issues as to the practicalities of converting this right into cash. That is reinforced by the statement at p.372 that "the argument for the Crown was not based on any special difficulty in turning the particular option to pecuniary account. It was based on the nature of the right: it was said that a right of option does not have the necessary qualities to make it a perquisite."

(4) Like Viscount Simonds, Lord Reid did not regard the non-transferability of the option as a determining factor, there being other ways of "turning such a right to pecuniary account." He too gave the example of an option which was "in the money" at the time of grant.

(5) At pp.372-3, he referred to the further difficulty of relating the proceeds to a particular year of assessment as Rule 1 required, and the comparative ease with which the grant of an option be so linked, although he did not express a concluded view on this point.

(6) At p.375, he discussed the relevance of the conditional nature of the right, observing "if the condition is one with which the taxpayer can easily and immediately comply, it does not, in my opinion, form an obstacle to turning the option to pecuniary

account" but "[i]f the condition is one which cannot immediately be complied with that may make a difference" (giving the example of where the perquisite had yet to be earned). He stated that "conditions and restrictions attached to or inherent in an option may affect its value, but are only relevant to the question whether the option is a perquisite if they would in law or in practice effectively prevent the holder of the option from doing anything when he gets it which would turn it to pecuniary account."

34. Lord Radcliffe referred to the conflicting arguments as to when a perquisite was received, and the Revenue's argument of "persuasive force" that it was not when the option was granted (p.376):

(1) At p.377, he noted that "it is a natural enough assumption for the tax gatherer that if a transaction does not attract tax in one year it must in another" but that he did not "regard that as a good general principle upon which to found the construction of the income tax code", referring to the possibility that neither the option (particularly one which was not assignable) nor the proceeds of the realisation fell within Rule 1. However, he was persuaded that the taxable receipt was the granting of the option and the amount of that receipt was the value of the option at the time it was received.

(2) He accepted that "a line has to be drawn somewhere between convertible and non-convertible benefits", but that the option in that case was on the taxable benefits side of the line, being "analogous for this purpose to any other benefit in the form of land, objects of value or legal rights."

(3) He would have rejected the Revenue's claim on another ground, namely that the 1956 profit did not arise from the office, but was "an advantage which accrued to the appellant as the holder of a legal right which he had obtained in an earlier year, and which he exercised as option holder against the company." He concluded that "it would be quite wrong to tax whatever advantages the option holder may obtain through the judicious exercise of his option rights in this way as if they were profits or perquisites from his office arising in the year when he calls the shares."

35. There is a powerful dissenting judgment from Lord Denning, but we will not lengthen this decision by summarising it. The ratio of the majority is binding upon us. What is that ratio? Arnold LJ addressed that question in *Charman v Revenue and Customs Commissioners* [2021] EWCA Civ 1804, [22]:

> "Two points were made by the majority of the House of Lords in *Abbott v Philbin* [1961] AC 352, both of which were subsequently reversed by statute. The first point, and the *ratio decidendi* of the case, is the one referred to by Lord Walker JSC in *Gray's Timber* and by Lord Reed JSC in *UBS* concerning the time at which the option became taxable … The second point, which was *obiter*, was that the difference between the price of the shares under the option and their market value when the option was exercised did not arise "from" the taxpayer's employment."

36. We gratefully adopt that analysis, but add that the more the realisation of the profit from the options turns on the judgment of the employee, the stronger the case for treating the option itself as remuneration provided by the employer (and *vice versa*).

37. We also note the following features of *Abbott v Philbin*:

(1) The right in question – the option to acquire shares in a listed company at a favourable strike price – is a well-recognised asset class, one commonly traded and which very often functions as a proxy to the economic benefits of share ownership (cf. the example at [21] above).

(2) The House of Lords was not asked to consider any particular difficulty in turning the option into account. The process of realisation was not regarded as presenting any obvious challenge by either Viscount Simonds (pp.365-66: "there could be no difficulty"), Lord Reid (p.371: "nothing to indicate that there would have been much difficulty") or Lord Radcliffe (p.378:"he could also at any time, at his choice, sell or raise money on his right to call for the shares").

(3) Indeed if the option was "in the money" so far as the employee was concerned when granted (a possibility to which both Lord Reid and Viscount Simonds referred), it represented an immediate conferral of benefit which the employee could have realised by exercising it on the day of grant.

(4) Once granted, it was for the employee to decide when to exercise it, and take the risk that waiting for a sufficient increase above the strike price might miss the market peak and/or render the option valueless (cf Lord Racfliffe's reference to the employee's "judicious assessment").

(5) Once the employee had been granted the option, the employer had no direct influence over how profitable it would be, save that the better run the company was in general terms (and all other things being equal), the greater the likelihood of appreciation in the share price (cf. Lord Reid at p.370).

(6) Mr Abbott had to be an employee both to acquire and to exercise the option. However, this was broadly within his control, as Lord Reid noted at p.375 (and he appeared to leave open the possibility that conditions with which the employee could not easily and immediately comply may "make a difference"). In any event, should Mr Abbott have decided to retire or leave, he was able to exercise the option immediately prior to departure. It may be that market conditions would not have made that advantageous, or even positively harmful, but that is a matter going to the decision to exercise the right rather than an intrinsic limitation on the right.

(7) There was, independently, a (comparatively generous) 10-year time limit for exercising the option.

(8) Lord Radcliffe said that the case involved line-drawing, with this issue being on the right side of the line.

**The legislative response**

38. As Lord Walker noted in *Grays Timber Products Ltd v Revenue and Customs Commissioners* [2010] UKSC 4, [5]-[6], the judgment in *Abbott* caused some difficulties:

> "The principle of taxing an employee as soon as he received a right or opportunity which might or might not prove valuable to him, depending on future events, was an uncertain exercise which might turn out to be unfair either to the individual employee or to the public purse. At first the uncertainty was eased by extra-statutory concessions. But Parliament soon recognised that in many cases the only satisfactory solution was to wait and see, and to charge tax on some "chargeable event" (an expression which recurs throughout Part 7) either instead of, or in addition to, a charge on the employee's original acquisition of rights."

39. The *Abbott* decision was reversed by s.25 of the Finance Act 1966. Reflecting the ability of legislation to resolve a problem from multiple perspectives, this provided that the grant of a share option was *not* taxable as employee remuneration at the date of grant, but the proceeds of realisation were taxable (i.e. resolving the issue of "double taxation"). However, s.78 of the Finance Act 1972 carved out of the scope of s.25 certain socially and economic

valuable share options (so-called "restricted securities") which were not taxable either when the right was received or where it was realised, unless the option was "in the money" for the employee when granted, in which case it was taxable to that extent at that point (s.78(2)). Various amendments were subsequently made, including by ss.135 and 185 of the Income and Corporation Taxes Act 1988 ("ICTA 1988").

40. As Lord Walker noted in *Grays Timber*, [7], the different tax treatment of certain kinds of share option schemes offered ample scope for tax avoidance. In response, the provisions applicable to the taxing of share options was subject to extensive legislation, initially in the form of s.140A to 140C amending ICTA 1988 and thereafter in Part 7 of ITEPA 2003. We will not attempt to summarise those provisions, beyond noting that, as would be expected, they address when options are taxed on grant, on realisation, or on other forms of disposal.

41. There are two points we would make about the legislative response. The first is that it has involved a complex and iterative process of determining what can be taxed and when, and how to address measures which seek to avoid the imposition of tax or to secure a more preferential tax treatment than is justified. The second is that, to the extent that *Abbott v Philbin* embodies a binding interpretation of what constitutes an emolument from employment, there has been no statutory intervention which renders that interpretation inapplicable in this case.

**The treatment of *Abbott v Philbin* in subsequent authorities**

42. We were referred to a number of cases which considered the "ordinary rule" which *Abbott v Philbin* has been held to establish.

43. The first was *Grays Timber,* in which the Supreme Court was concerned with one of the statutory carve-outs from *Abbott* in relation to employee share options. Lord Walker referred at [5] to "the general principle that employee benefits are taxable as emoluments only if they can be converted into money, but that if convertible they should be taxed when first acquired" (citing *Abbott*). He continued:

> "That case was about share options, which are now dealt with separately in Chapter 5, but it illustrates the general approach that applied in the days when the taxation of employee benefits was very much similar than it is now."

44. The next decision is *PA Holdings*. A company wished to pay annual discretionary bonuses to its directors. Profits were paid into employee trusts, which made awards to employees reflecting their contribution to the company and to the company's success. In 1999, it adopted a different approach with a view to securing a more favourable tax treatment. A new trust was established with the trustee being empowered to award employees shares in a Jersey SPV, with the employees receiving the dividends due in respect of the shares so allotted. The shares allotted to employees were intended to meet the requirements of restricted shares, so as not to be taxable at the time of transfer.

45. The FTT and the UT found that the dividends were a profit arising from employment, noting (a) that employees who left the company ceased to be eligible to receive them, and (b) the stated purpose of the scheme as being a means of remunerating employees who received dividends

46. The issue before the Court of Appeal was whether the dividends were to be regarded as a profit from employment, or simply as the right of the directors as owners of shares allotted to them to the fruits of their ownership. The case did not directly raise the point covered by the *ratio* of *Abbott,* but something quite close to it. The immediate receipt – the shares allocated – involved a benefit (albeit a non-taxable one) which was in turn the source of the

dividends. The second (and we believe closely related) aspect of *Abbott* was very much in issue. At [33]-[35], Moses LJ stated:

> "No one can doubt but that there are circumstances in which employees may be awarded shares as an incentive or reward and that those employees may subsequently receive dividends or distributions in respect of their shareholding, the source of which may properly be identified as the shares and not their employment. The employees, in such a case, receive those payments in their capacity as shareholder or investor and not as employee. When employees were granted options to acquire shares in their employer and exercised those options, they profited by the increased difference between the option price and the market price when they exercised their options. The profit accrued to the employees as holders of their options and not as employees; it was derived from the option and not from employment (*Abbott v Philbin*).
>
> But it is not in every case that an employee who is awarded shares and receives dividends can escape the conclusion that the dividends are remuneration and not investment income … How then is the distinction to be made between the receipt of payments in the form of dividends as employee and the receipt of dividends as shareholder? What determines the character of the income in the hands of the recipient? What determines the capacity in which the recipient receives such income? The answer lies not in the administration of some post- Ramsay prophylactic against tax avoidance but in the methods which the courts have long been accustomed to deploy whenever it is necessary to decide whether income is from employment and should thus be charged under Schedule E.
>
> The conventional approach of the courts is to look at all the circumstances of the case in order to answer the one statutory question, namely whether the income receipts of the employee are emoluments or profits from employment."

47. At [38]-[39], he noted that answering the question to be answered was "one of substance and not form" and "the court should not be seduced by the form in which the payments … reached the employees. It should focus on the character of the receipt in the hands of the recipients". He stated that the FTT's decision that the emoluments were "rewards for services past, present or future" having regard to (i) the fact that the employer funded the purchase of shares with the employees acquiring the shares and dividends at no cost"; (ii) the intention behind the scheme was to motivate employees; and (iii) leavers were eligible, all fully supported the FTT's conclusion. At [42]-[43] he continued:

> "It is that approach which enables a distinction to be drawn between *Abbott v Philbin* and *White v Franklin*. In *Abbott v Philbin*, a realistic appraisal of the facts led to the conclusion that the benefit which arose as a result of the exercise of the option accrued through what Lord Radcliffe (at 369) described as the "judicious exercise" of the holder's option rights. It accrued to him in his capacity as option holder exercising his discretion as to the best time to exercise his rights having regard to the increase in value of the shares, an increase due to what Viscount Simonds described as "the adventitious prosperity of the company in later years" (367) (that it was exercised less than two years after acquisition of the option was neither here nor there).
>
> The facts of this case are miles away from the circumstances in *Abbott v Philbin*. The payments received by the employees owed nothing to fluctuations or increases in the value of shares in Ellastone and everything to the amount which PA had decided to award as bonuses to its employees.

> Whilst it is true that the Mourant trustees exercised a discretion in the sense of independently questioning who should be recipients, the quantum of that which the employees received was entirely dictated by the amount PA decided to award as bonuses. The receipts were triggered by PA's decision to continue its policy of making bonus payments and to fund the 1999 Trust and arrived in the hands of employees, as they were intended to do, as bonuses."

48. The next decision, *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13, was also concerned with an attempt to secure the favourable tax treatment afforded by legislation to certain classes of share option. The employers acquired shares in offshore SPV companies and awarded them to employees in lieu of bonuses. Conditions were attached to the shares to secure the benefits of certain statutory exemptions from income tax. The UBS scheme involved subjecting the shares to a risk of forced sale if the FTSE 100 hit a certain level (there being a 6-12% chance of this happening), which condition had a slight but more than *de minimis* impact on the value of the shares in the employees' hands. The condition was only included for tax avoidance purposes, and its potential adverse effect was off-set by call options. The DBGS scheme was similarly constructed. It included a condition that benefits would be forfeit if an employee voluntarily designed or was dismissed for cause (at [52], Lord Reed noted "neither contingency was likely to occur, not least because its occurrence lay largely within the control of the employee").

49. The Court concluded that the options did not benefit from the tax exemption, the restrictions imposed having no commercial purpose but having only been included for tax avoidance purposes. However, that left the basis on which the remuneration should be valued:

(1) At [4], Lord Reed noted that:

> "Under ordinary principles of tax law, where an employee receives shares as part of his remuneration, he is liable to income tax on the value of the shares, less any consideration which he may have given for them … The position where an employee is granted a conditional share option was considered by the House of Lords in *Abbott v Philbin* [1961] AC 352. That was a case where a company's senior employees had been given an option to subscribe for its shares at the then current market price, the option being exercisable at any time within the next ten years. The employees were thus incentivised to increase the company's prosperity. The option was non-transferable and would expire on the employee's death or retirement. It was held that income tax was chargeable on the realisable monetary value of the option at the date of its acquisition, rather than on the value realised when it was subsequently exercised, as the revenue had argued."

(2) At [94], Lord Reed stated:

> "If the shares were not restricted securities, their recipients therefore fall to be taxed in respect of their receipt of the shares in accordance with ordinary taxation principles. That is broadly as the revenue contended in the narrower version of their argument, subject to one qualification. The revenue argued that the shares should be valued for income tax purposes without regard to the restrictive conditions, since those conditions were not intended to be commercially relevant. I am unable to agree. The shares were subject to conditions which, as the First-tier Tribunal found, had the effect of reducing their value on the date of acquisition by a small amount (below the 10% threshold which would bring section 446B into play). Applying ordinary taxation principles, as laid down in *Abbott v Philbin* [1961] AC 352, the value of the shares has to be assessed as at the date of their acquisition,

> taking account of those conditions. To disregard the conditions would be to treat the employees as having received a more valuable perquisite than they actually received. It is however also necessary to take account of the call options purchased by ESIP out of the sum paid by UBS for its subscription for the shares. Since the options offset the risk to shareholders arising from the conditions, they presumably enhanced the value of the shares and are therefore relevant to the valuation of the perquisite received by the employees."

50. We would note that this second point was concerned with the valuation of *shares*, and the statement that they were to be valued by reference to the conditions attaching to them at the date of receipt was, considerations of tax avoidance apart, wholly uncontroversial. While *Abbott v Philpin* was cited, the issue considered in [94] was not concerned with the issue of "grant of contingent rights v. realisation".

51. The final decision was *RFC 2012 Plc v Advocate General* [2017] UKSC 45. That case was concerned with whether payments made by an employer in return for an employee's services to an employee benefit trust (at the employee's direction) rather than to the employee were nonetheless taxable remuneration so far as the employee was concerned. The answer to that question was yes, but in the course of its analysis the Supreme Court considered those circumstances in which payment to a third party would not, at the point of payment, fall to be treated as a remuneration of the employee. At [41], the Supreme Court identified three such exceptions: (i) the taxation of perquisites, at least since the enactment of ITEPA, (ii) where the employer uses the money to give a benefit in kind which is not earnings or emoluments, and (iii) an arrangement by which the employer's payment does not give the intended recipient an immediate vested beneficial interest but only a contingent interest.

52. When discussing the first exception at [42]-[43], Lord Hodge referred to *Tennant* and *Abbott v Philbin*, observing of the latter:

> "In *Abbott v Philbin* [1961] AC 352 a majority of the House of Lords held that an employee of a company was liable to income tax on the grant by his employer of an option to purchase shares in that company in the tax-year in which the option was granted because the option itself had a monetary value which the employee could realise."

53. When discussing the third exception at [47] ("where the person entitled to receive the sums paid by the employer does not acquire a vested right in those sums until the occurrence of a contingency"), Lord Hodge referred to *Edwards v Roberts* (1935) 19 TC 618 in which an employing company entered into an employment contract to give an employee, in addition to his salary, an interest in a "conditional fund", into which it would make annual payments from its profits, as an incentive for him to advance the company's interests. In that case the employee was entitled to receive the annual income from the fund but had no right to receive any of the capital of the fund other than that which had been held in the fund for five years or more. The taxpayer argued that the relevant remuneration occurred when the employer paid the sums into the fund. That argument was rejected.

54. We noted that the right to receive was said to arise "at the expiration of five … financial years". Lord Hanworth concluded that this was "an emolument which accrued and was not payable in each successive year but the sixth year." The judgment is not wholly clear, however, with Maugham LJ referring to the employee having "a right given to him conditionally".

55. There was some debate before us as to whether *Edwards v Roberts* represented (a) a case in which an employee had a contingent legal right to the amounts in the fund, or (b) a case in which no legal right vested until the employee had completed five years' service.

56. Our view is that the latter is correct, for the following reasons:

(1) If *Edwards* had held that a vested (or accrued) right given to an employee to a certain receipt on the occurrence of a contingency only gives rise to remuneration when the contingency has materialised, and in the amount so realised, it is not consistent with *Abbott v Philbin*.

(2) It is significant that Lord Hodge treats *Edwards* as a case in which the employee did not acquire "a vested right in those sums until the occurrence of a contingency" ([47]). *Edwards* was similarly so treated by Warren J in *Martin v HMRC* [2014] [UKUT 429 (TCC), [21].

57. We would note that *Abbott v Philbin* has been applied by other courts to share option schemes, and treated as establishing a "general rule" that such options are taxable by reference to their value when granted, from which statute has departed in certain cases. However, none of the cases has had cause to consider the particular type and nature of rights which can bring the *Abbott v Philbin* approach into play, and whether there are any limitations on them. We also note that *PA Holdings* stresses the importance of a realistic appraisal of the facts when considering whether the relevant remuneration is the grant of a right or its subsequent realisation.

**The Decision**

58. The FTT began by considering the ratio of *Abbott v Philbin,* which they found to be that there was only one taxable event, namely the grant itself because "the option was 'something' which could be turned into money" ([48]). The FTT then referred the rights in issue in *Abbott* being different from those in the case before them:

(1) The SARs were not securities options, securities or interests but "simple contractual, contingent, payment rights" ([51]).

(2) The decision in *Abbott* did not mean that "any deferred payment rights … should be treated as separate from any subsequent payment such that they are taxable on grant or award" (ibid).

(3) The contrary argument overlooked the need for the employee to receive "something" (per Viscount Simonds) or the need to consider "the nature of the right" (per Lord Reid).

(4) The FTT made this finding at [52] which, it must be said, offers something for both sides:

> "We do not place any weight on Ms Hicks' submission that the value of the SARs could not be realised, either on entry into the SAR Agreement or on vesting as Mr Saunders did not acquire anything of money's worth. There was no evidence of fact or expert evidence as to value relevant to this submission before us, and whilst we consider that there would be considerable difficulties in trying to place a value upon the SARs (as such an exercise would have to take account of the potential Fair Market Value of the Shares, the likelihood of a Sale or Liquidity Event and the risk of Mr Saunders leaving as a bad leaver), we are reluctant to accept that these difficulties mean that the SARs had a value of nil. They had the prospect of paying out a large sum, as indeed happened here."

(5) The FTT concluded that there was not such a separation between the grant of the SARs and the receipt of the Payment as to break the causal chain with Mr Saunders' former employment ([53]).

(6) The Payment was part of the reward for services provided, being paid pursuant to an incentivisation plan to promote success of the Company ([54]).

59. Subject to the issue of whether *Abbott v Philbin* requires us to reach the contrary conclusion as a matter of authority, we agree with the overall thrust of this reasoning, albeit not every element of it.

60. We start from the premise that the court is ultimately engaged in the exercise of statutory construction we have outlined at [15] above, in accordance with the principles there set out. We do not believe it would be consistent with those principles to adopt an overly formalistic approach to the determination of whether it was the vesting of the SARs or the receipt of the Payment which constituted Mr Saunders' earnings. When considering the identification of earnings for the purposes of applying tax legislation, it is necessary to adopt a realistic approach and one which considers substance rather than focussing on mere form. As *PA Holdings* shows, that is as true of the application of *Abbott v Philbin* as it is of other aspects of tax law.

61. The test we have applied, therefore, is to ask ourselves whether, on a realistic appraisal of the facts, and having regard to the substance of the position, Mr Saunders' earnings were the value of the SARS when granted, or the value of the Payment when received.

62. We first identify some features of the SARs which were said to distinguish them from the share options in *Abbott*, but which we have not found of assistance:

(1) The first is the description of the SARs as "simple contractual, contingent payment rights (Decision, [51]). The SARs were a vested right to be paid a sum of money on the occurrence of certain events and provided certain conditions (employment status, or the manner of its termination, and a time condition) were met. The share options in *Abbott* were also contractual rights, and the acquisition of shares pursuant to them contingent on (a) exercise and (b) continuing employment status. A share option does not give the holder a proprietary interest in any specific shares.

(2) Nor do we accept, as Ms Hicks submitted, that the fact that the option was immediately exercisable on grant in *Abbott* but not in this case provides, of itself, a relevant point of distinction. That contention was rejected by the Court of Appeal in *Charman* [33], where Arnold LJ stated:

> "Mr Charman pointed out that, in *Abbott v Philbin*, the option was immediately exercisable although it was not transferable. She submitted that the result would have been different if the option had not been immediately exercisable. I do not accept this. The reasoning of the majority was that the option could be "turned to pecuniary account" (in the words of Lord Watson in *Tennant v Smith* [1892] AC 150, 159 ) as soon as it was granted. This was not because it was immediately exercisable, but because it had a financial value which could immediately be realised in one way or another: see Viscount Simonds at pp 365–366 ("there could be no difficulty in the grantee arranging with a third party that he would exercise the option and transfer the shares to him"), Lord Reid at p 371 ("I find nothing to indicate that there would have been much difficulty in finding someone who would have paid a substantial sum for an undertaking by the appellant to apply for the shares when supplied with the purchase money and called upon to exercise the option and thereupon to transfer the shares"), pp 373–376 and Lord Radcliffe at pp 378–379 ("he could also at any time, at his choice, sell or raise money on his right to call for the shares"). As all three members of the majority recognised, the fact that the option was not transferable affected the value of the option upon grant, but did not alter the fact that it had some

> value. This reasoning would be equally applicable to an option which was not yet exercisable, but which could immediately be turned to account in a similar way."

However, we accept that the inability to exercise the right until some future event has occurred may, in some circumstances, be a relevant factor when the court is required to identify what realistically constitutes the taxable remuneration.

(3) While we accept notional consideration was paid for the options in *Abbott* to make them legally binding (see Lord Denning at p.383), we do not regard this as a sufficiently distinguishing feature. Consideration was provided for the SAR Agreement in the form of Mr Saunders' work for the company (assuming that consideration was required under the law of contract in the Republic of Iceland, which governed both the Hibernia LTF Plan and the SAR Agreement).

63. Nonetheless, there are material differences between the share options in *Abbott* and the SARs here, which (in their cumulative effect) lead to the conclusion that, adopting a realistic view of events, Mr Saunders' taxable remuneration is the amount received by the Payment following a Sale or Liquidity Event, and not whatever amount Mr Saunders might have been able to monetarise the SARs for at the date of grant:

(1) As we have noted, share options (and particularly those in a listed company, as were in issue in *Abbott*) are a well-recognised and widely traded asset class, and one which often replicates the economic rights of share ownership. These are factors which weigh in favour of a realistic determination that the grant of such an asset was itself the employee's remuneration.

(2) By contrast, the same is not true of the highly contingent right constituted by the SARs. The economic value of the SARs in this case is not one which rises and falls with the value of the Company generally, but is specifically linked to the occurrence of one of two forms of one-off transaction (a Sale or a Liquidity Event).

(3) The House of Lords in *Abbott* was clearly of the view that there would be little practical difficulty in ascertaining the value of the option on grant (see [37.(2)] above). However, determining the value of the SARs at time of grant would be a much more difficult task, with an intrinsically greater room for dispute. The FTT referred to the "considerable difficulties" in in placing a value on the SARs. Those difficulties were not the result of some external event (such as temporary illiquidity in the market) but reflected the inherent nature of the right. While we do not accept Ms Hicks' submission that on the basis of [52] we should treat Mr Saunders as having failed to meet the burden of proof of showing that the SARs could be monetarised at all (which we believe to be inconsistent with a fair reading of [52] as a whole), we are persuaded that it is a relevant factor when determining on a realistic basis whether the employee's remuneration is the grant or the realisation. Where valuing the former is very difficult with great scope for dispute, that supports treating the amount realised as the remuneration.

(4) In *Abbott*, once the options were granted, the only conditions on their exercise were largely in Mr Abbott's control: continuing in employment, and exercising the options before they expired. In the case of the SARS, there was no finding that Mr Saunders had any control over the occurrence of the Sale or Liquidity event: he had left his employment in July 2016, and was only informed of the Sale in January 2017.

(5) The amount of profit made in *Abbott* depended on Mr Abbott's decision as to when to exercise the options over time, with the Company having no control over when

he did so. Maximising the economic benefits to be derived from the options thus depended on his "judicious assessment". In this case, by contrast, Mr Saunders makes no decision after the grant of the SARs which determines when and in what amount payments will be received pursuant to the SARS, nor is any amount so received the product of his "judicious assessment".

(6) Mr Saunders' employer retained a significant influence as to whether or when there would be a Liquidity Event or Sale and on what terms, those factors essentially being the result of decisions taken in course of the Company's business. By contrast, the movement in share price in *Abbott* was much less directly linked with the decisions and action of the company (and certainly did not depend on the decision to enter into a particular transaction).

64. It is convenient at this stage to pick up Mr Firth's analogy with a lottery ticket given by an employer to an employee by way of remuneration, which he submitted (and the FTT accepted) would fall to be valued at the point of grant, not by reference to the amount won. We agree with that conclusion, but would note the following:

(1) Lottery tickets are bought and sold in huge numbers on a daily basis.

(2) There is no difficulty in valuing a lottery ticket at the date of grant: it is the cost of the ticket.

(3) Whether the ticket is a winning ticket or not turns on matters wholly extraneous to the employer, its performance or any decisions it makes.

(4) The odds of winning are so remote and utterly dependent on chance, such that the prize cannot realistically be said to be something paid by the employer to the employee at all.

65. Ultimately, we do not believe that the treatment of this very singular and different right is of assistance in the present case.

**Is our conclusion consistent with the ratio of *Abbott*?**

66. In his reply submissions, Mr Firth made the powerful argument that *Abbott v Philbin* does not identify the factors we have relied upon as being those relevant to determine whether receipt of the right or its realisation constitute the employee's remuneration. To that point can be added the fact that Parliament has legislated extensively to address the consequences of *Abbott v Philbin* in some areas, but not this one. These points have given us real pause for thought.

67. However, we have ultimately concluded, like the FTT, that *Abbott* does not lead us to the conclusion that whenever a contingent right to a benefit of some kind is granted by an employer to an employee for their services, which someone could be persuaded to pay something for, that amount (and not the amount received) reflects the taxable remuneration:

(1) In *Abbott* the issue was presented to the House of Lords in stark terms, simply on the basis that the optionality precluded the receipt of the option being a benefit, and without any effort to explore the practical realities (cf. the passage quoted at [33.(3)] above.

(2) One of the three judges making up the majority, Lord Radcliffe, expressly accepted that the court was engaged in an exercise of line-drawing, with the share option in issue falling on the right side of the line so as to be taxable on grant, not on exercise, see p 377 and [34.(2)] above.

68. Nor does the fact that Parliament has chosen to address aspects of *Abbott* in its core field of application (employee share options) lead us to the conclusion that it is otherwise to be treated as of general application to all forms of contingent right or to this right in particular.

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69. The parties agreed, and the FTT found as facts, that Mr Saunders had left his employment on 31 July 2016; became non-resident the following day, and received the Payment in January 2017. The year 2016-17 was thus a "split year" and Mr Saunders received the Payment in the overseas part of that split year.

70. As we have found that the Payment constituted Mr Saunders' employment earnings (Issue 1), we move on to consider whether it was nevertheless not taxable on him because it was "for" the non-resident part of 2016, and so excluded from taxation under ITEPA ss.15(1) and (1A).

71. The FTT summarised Mr Firth's case as follows, see Decision, [61]:

> "the making of the Payment, its timing and its amount were all dependant on extraneous events, outside of Mr Saunders' control as an employee or former employee – the making of the Payment was triggered by the Sale, and the quantum was calculated by reference to the Fair Market Value of the Shares at the time the award was paid out rather than being directly attributable to the work of Mr Saunders in any earlier years. The Payment was, he submitted, a contingent and exceptional bonus, only 'earned' at the time of the Sale, which was in the overseas part of a split year. Had the Sale not occurred within two years of the end of his employment, no payment would have been made."

72. The FTT rejected those submissions (see Decision, [62] – [65]), holding that the Payment was "earned by Mr Saunders for his services performed whilst he was resident in the UK and in respect of duties performed by him in the UK".

73. We agree with the FTT. Our starting point is ITEPA s 16, which "applies for determining whether general earnings are general earnings 'for' a particular tax year". It provides that "General earnings that are earned in, or otherwise in respect of, a particular period are to be regarded as general earnings for that period" and "if the period consists of the whole or parts of two or more tax years, the part of the earnings that is to be regarded as general earnings 'for' each of those tax years is to be determined on a just and reasonable apportionment".

74. The statutory question is thus whether the Payment was "earned in or otherwise in respect of" the years when Mr Sauders was both employed by HAUKL and had vested rights under the SAR Agreement.

75. Mr Firth submitted that the Payment "had nothing to do with" the services Mr Saunders provided for HKAUL during his employment, but instead depended on the Sale, which was a wholly extraneous matter.

76. We disagree, for the same reasons as given by the FTT (see Decision, [62]), namely that:

(1) the express purpose of the Hibernia LTI Plan and the SAR Agreement was to incentivise Mr Saunders' performance as an employee; and

(2) the provisions relating to termination of employment meant he was incentivised to leave as a Good Leaver.

77. As Ms Hicks said, "the prospect of a payment was part of the consideration in return for which the Appellant worked between 4 April 2013 (when he entered into the agreement) and 31 July 2016 (when his employment terminated)". It follows that the payment was "for" the whole of that period.

78. In coming to that conclusion, we have not overlooked the submissions made by Mr Firth on *Bray v Best.* The facts of that case are summarised in the headnote as follows:

> "The taxpayer was employed from 1958 to 1979 by G. Ltd. On 1 April 1979 he, together with all other employees of G. Ltd., was transferred to the employ of G. Ltd.'s parent company. Prior to, and in anticipation of, those transfers the trustees of two trusts formed for the benefit of G. Ltd.'s employees exercised powers to bring into effect provisions leading to their winding up and the distribution of their assets to the employees."

79. The trusts had been set up by "an old established family company". The company enjoyed very broad powers for distribution, accumulation or re-settling of capital (pp.169-170). In 1971 the family company was taken over by a much larger organisation, and the reason for the distributions in issue was that "the trustees anticipated that there might come a time in the future when the company's work force would be absorbed by the parent company and they might either find themselves with no beneficiaries or find themselves unable effectively to restrict the beneficiaries to employees who had given service to the [family] company".

80. The deeds of trust under which the payments were made to employees stated that (see p.170):

> "The trustees shall within the nine months immediately following the termination date pay or provide for all liabilities mentioned in the definition of the terminal fund and apply the terminal fund by allocating thereout in respect of each eligible employee such a sum as the trustees shall in their absolute and unfettered discretion think fit but so that
>
> A. No eligible employee shall be entitled to receive as of right any sum allocated to him…"

81. The judgment records at p.171 that the trustees were concerned that the division of the funds should be conducted as fairly as possible, and that various computer printouts were obtained showing the effect of applying various formulae which attached different weights to length of service and salary scales. None of these was actually adopted, but they were used to form the basis for the ultimate allocation.

82. Mr Bray received £18,111. HMRC's case was that this sum was "for" each of the tax years for which he had worked for his employer. Mr Bray's case was that it was taxable only in the final year of his employment as a payment on termination under ICTA 1970, s 187, after deducting tax relief of £10,000 by virtue of s 188(3) of that Act.

83. The Special Commissioner could not, on the facts, find any feature of any significance which would indicate that the payment fell to be attributed either to the last year in which Mr Bray was employed, or to any or all of the previous years of his employment. He thus held that it remained taxable only as a termination payment subject to the statutory disregard of £10,000. The Court of Appeal and the House of Lords agreed, see Lord Oliver's judgment at p.178. Lord Oliver said he was unable to deduce from the Special Commissioner's decision "a finding that the payment either was, or was intended to be … additional remuneration for services rendered to the company in respect of the previous years in which the taxpayer was employed" (p.175).

84. However, Lord Oliver set out the *ratio* of the judgment as follows:

> "the period to which any given payment is to be attributed is a question to be determined as one of fact in each case, depending upon all the circumstances, including its source and the intention of the payer so far as it can be gathered either from direct evidence or from the surrounding circumstances."

85. In Mr Bray's case there was "no feature of significance" which allowed the payment he received to be attributed to one or more of the years for which he worked for his employer. The trustees used their discretion to allocate the payments to the employees, and as Lord Oliver said at the end of his judgment:

> "The mere fact that the seniority of the taxpayer as an employee was a matter taken into account in arriving at the amount of the distribution does not appear to me to be any indication that the payment determined upon and made in the year of assessment 1979–80 … can properly be treated as made for or in respect of any other period."

86. Mr Saunders' position is very different. The Payment was made by his employer, pursuant to SARs which had been awarded to him with the express purpose of incentivising his work during the period of his employment. That was a feature of significance.

87. Moreover, it is clear from Lord Oliver's judgment that "the period to which any given payment is to be attributed is a question to be determined as one of fact in each case". The FTT determined as a fact that the Payment was "for" the period from 4 April 2013 (when Mr Saunders entered into the SARs Agreement) to 31 July 2016, when he left his employment; in other words, that it was "for" the tax years 2012-13 through to 2015-16. Neither party addressed us on the well-known case law (see *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, 36 TC 207 and subsequent judgments) which sets out when a finding of fact made by the FTT can be challenged on appeal. We note Mr Firth described the FTT's finding as "an unreasonable conclusion" which we take to mean "a view of the facts which could not reasonably be entertained." However, we have identified no basis on which the requirements in the *Edwards v Bairstow* case law have been met in relation to the FTT's finding as to the periods for which the Payment was "for".

88. We therefore dismiss the appeal in relation to Issue 2.

89. We add for completeness that although the Payment was "for" the tax years 2012-13 through to 2016-17, it is taxable in the year of receipt under ITEPA s 18. That was not in dispute.

## DISPOSITION

90. For the reasons set out above, we dismiss the appeal on both Issues 1 and 2.

91. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application, as required by Rule 10(5) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

**THE HONORABLE MR JUSTICE FOXTON**
**JUDGE ANNE REDSTON**

**Release DATE 31 October 2025**