Sections 15 – 21 and Schedule 2: The Loan Charge

Introduction

Sections 15 – 21 and Schedule 2 of Finance Act 2020 modify the Loan Charge, partly implementing the *Independent Loan Charge Review* ("the Morse report").[1]

Few anti-avoidance measures have attracted such polarised and strongly held views as does the Loan Charge. Concerns have been expressed that the "Loan Charge deviates too far from the usual operation of the tax system and therefore undermines taxpayers' rights",[2] especially due to the perceived retroactive or retrospective[3] operation of the loan charge and that it effectively undermines the normal time limits for assessment. Concern has also been expressed of particular "distress and hardship" among those affected, including "reports of people taking their own lives in cases linked to the Loan Charge".[4] It has been suggested that that taxpayers subject to the Loan Charge are victims, mis-sold schemes they often did not understand by unscrupulous promoters.[5] Against this the Government has argued that the Loan Charge is "simply a mechanism which allows HMRC to collect outstanding tax in an effective way".[6] The writer has discussed these concerns in a Current Note in an earlier edition of this *Review*.[7]

This note begins by recapping the legislative history of the disguised remuneration rules ("DRR") on which the Loan Charge operates. The note then reviews certain recent case law and other materials, which shed light of some of the schemes against which the Loan Charge has been invoked. The recommendations for the reform of the Loan Charge in the Morse report are then discussed. Finally, the note discusses how Finance Act 2020 operationalizes those recommendations of the Morse report which the government has accepted, including considering potential issues which arise from the legislation.

Legislative Background

The disguised renumeration rules ("DRR") were introduced in Finance Act 2011,[8] inserting Part 7A in the Income Tax (Earnings and Pensions) Act 2003 (ITEPA). Part 7A ITEPA applies where:

> "(a) a person ("A") is an employee, or a former or prospective employee, of another person ("B"),
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> (b) there is an arrangement ("the relevant arrangement") to which A is a party or which otherwise (wholly or partly) covers or relates to A,

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[1] Sir A. Morse, *Independent Loan Charge Review* (December 2019).

[2] Morse, above fn.1, 3.

[3] As to the distinction, see the discussion in M.C. Blackwell, "The April 2019 Loan Charge" [2019] BTR 240, 247.

[4] Morse, above fn.1, 3.

[5] Blackwell, above fn.3, 252.

[6] Morse, above fn.1, 33.

[7] Blackwell, above fn.3, 240.

[8] FA 2011 s.26 and Schedule 2. See discussion in D. Cohen, "Finance Act 2011 notes: section 26 and Schedule 2: employment income provided through third parties (the "disguised remuneration" legislation)" [2011] BTR 381.

(c) it is reasonable to suppose that, in essence—

(i) the relevant arrangement, or

(ii) the relevant arrangement so far as it covers or relates to A,

is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with A's employment, or former or prospective employment, with B,

(d) a relevant step is taken by a relevant third person, and

(e) it is reasonable to suppose that, in essence—

(i) the relevant step is taken (wholly or partly) in pursuance of the relevant arrangement, or

(ii) there is some other connection (direct or indirect) between the relevant step and the relevant arrangement."[9]

As originally enacted, Part 7A applied in respect of "relevant steps taken on or after 6 April 2011".[10] Relevant step is defined to include the payment (or transfer) of cash to the employee, including by way of loan.[11] But as the relevant step was required to be undertaken by a relevant third person, this did not cover loans made directly by the employer to the employee with no third party involvement. The definition of relevant step was extended by Finance Act 2017 to include the release or write-off of a loan by a relevant third party,[12] and also an assignment of a loan by an employer to a third party,[13] where it took place after 6 April 2017

Finance Act 2018 introduced the "close companies' gateway" into the DRR, with effect from 6 April 2018, which has some similarities to the main case of the DRR. It is designed "to put beyond doubt that office holders participating in EBT schemes should be regarded as employees, were within the DRR."[14]

The Loan Charge, as introduced in Schedule 11 of Finance (No.2) Act 2017,[15] expands the reach of the DRR by treating certain loans/quasi-loans as relevant steps for the purposes of Part 7A of ITEPA, where a loan, or a quasi-loan, has been made to an employee or director and:

- the loan or quasi-loan was made on or after 6 April 1999; and
- an amount of the loan or quasi-loan is outstanding immediately before the end of 5 April 2019.

The effect of the Loan Charge is to create a one-off charge in the 2019–20 tax year, but often in respect of loans received over a period of many years, sometimes referred to as "income stacking", so

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[9] ITEPA s.554A(1).

[10] FA 2011 para.52 Sch.2.

[11] ITEPA s.554C.

[12] ITEPA s.554C(1)(ab).

[13] ITEPA s.554C(1)(aa).

[14] *R (on the application of Cartref Care Home Ltd and others) v Revenue and Customs Commissioners* [2019] EWHC 3382 (Admin); [2020] STC 516 at [70]. The quote is reproduced verbatim: some words appear to be missing.

[15] See discussion in P. Noble, "Finance (No.2) Act 2017 Notes: Section 34 and Schedule 11: employment income provided through third parties; Section 35 and Schedule 12: trading income provided through third parties; Section 36: disguised remuneration schemes: restriction of income tax relief; Section 37: disguised remuneration schemes: restriction of corporation tax relief" [2017] BTR 605.

individuals would not get to use any personal allowances (or fully utilise the basic rate and, since 2011, the higher rate bands) from earlier years and amounts loaned before the introduction of the additional rate in 2011 may be subject to tax at that rate. The Loan Charge was motivated by a desire by the Government for a "quick fix", which roughly approximates the correct tax which they consider should have been paid on the loans.[16] It advantages HMRC by relieving them of the obligation to pursue investigations and litigate each case, to prove they taxpayers were chargeable on their loans.[17] It also advantages HMRC by allowing them to pursue claims for years that were closed and unprotected.[18]

The foregoing applies only to employment income: there were no direct equivalent of the DRR for the self-employed. For the self-employed, Finance (No.2) Act 2017 introduced somewhat similar provisions to the DRR into the Income Tax (Trading and Other Income) Act 2005 (ITTOIA), by inserting sections 23A to 23H, which have effect in relation to relevant benefits arising on or after 6 April 2017. But the Act also created a Loan Charge for the self-employed, with Schedule 12 of Finance (No.2) Act 2017 requiring that any loan or quasi-loan that was made between 6 April 1999 and 6 April 2017 and was outstanding on 5 April 2019 was to be deemed to be a "relevant benefit" and so chargeable under section 23E. The rationale for this was that HMRC were concerned taxpayers were circumventing the DRR by recharacterizing employees as self-employed.[19]

Subsequent caselaw on Loan Charge schemes

The seminal decision on Loan Charge schemes is *RFC 2012 plc (in liquidation) (formerly Rangers Football Club plc) v Advocate General for Scotland* (*Rangers*),[20] on which the writer has published a case note in this *Review*.[21] *Rangers* involved footballers being remunerated both by salary and by payments to an employee benefit trust (EBT). The payment to the EBT was then settled onto a sub-trust of which the footballer was protector but not a beneficiary. Loans were then made from the sub-trust to the footballer. The Supreme Court found that payments to the trust were "remuneration or reward for services"[22] and so formed part of the footballers' earnings, applying *Brumby (Inspector of Taxes) v Milner* (*Brumby v Milner*).[23]

Two recent judicial reviews of the Loan Charge are informative in a consideration of Finance Act 2020, both because they provide factual details of the operation of other Loan Charge schemes, and also because they assess the extent to which those schemes may have been considered effective when entered into. This latter point is especially relevant in considering the reforms to the Loan Charge in Finance Act 2020 which create a cut-off date of 9 December 2010.

The first judicial review was *R (on the application of Cartref Care Home Ltd and others) v Revenue and Customs Commissioners* (*Cartref*),[24] which considered two separate schemes: one entered into by

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[16] Blackwell, above fn.3,, 244.
[17] Blackwell, above fn.3,, 246.
[18] Blackwell, above fn.3,, 253-255.
[19] Nobel, above fn.8, 608.
[20] *RFC 2012 plc (in liquidation) (formerly Rangers Football Club plc) v Advocate General for Scotland* [2017] UKSC 45; [2017] STC 1556.
[21] *Rangers*, above fn.20, [2017] UKSC 45; [2017] STC 1556 at [35].
[22] M.C. Blackwell, "RFC 2012 plc (in liquidation) (formerly the Rangers Football Club plc) v Advocate General for Scotland: discerning the goal of the legislation" [2017] STC 398.
[23] *Brumby (Inspector of Taxes) v Milner, Day (Inspector of Taxes) v Quick* [1975] STC 644 (CA); affd [1976] STC 534 (HL).
[24] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516.

Cartref Care Home Limited (Cartref Care Home) and its directors, the other by Brian Dawson Engineering Services Ltd (DES) and its directors. These were examples of close company schemes.[25]

Both companies invested in and became members of an LLP which was to acquire the distribution rights to films. The directors loaned the money for the acquisition of the film rights to their respective companies on a fully repayable basis. In fact, the loans though notionally to the directors, were directed straight to the LLP. The directors were themselves put in funds by a loan from a third company, which in turn had been put in funds by the seller of the film rights.[26]

The anticipated result of the scheme was each of the directors would receive payments from their companies in which they did not pay income tax or national insurance. Also, each company would have a trading loss, which it could set off against its other income in the relevant year. For Cartref Care Home this was the year ending in 2011 and for DES the year ending in 2013.[27] Thus, as Cockerill J. noted "the particular type of scheme in this case is in many ways a combination of two separate schemes, a profit extraction scheme and a sideways loss scheme."[28] The scheme is therefore very different in its structure to *Rangers*. The taxpayer had argued that it fell outside the purpose of the Loan Charge, however Cockerill J. found that it was not a matter that could be properly determined by way of judicial review, but "ought rather, as a question of statutory interpretation and substantive tax law, be determined by the Specialist Tax Tribunal".[29] Cockerill J. found there to be sufficient evidence to support HMRC's claim that the scheme was avoidance, but suggested HMRC's categorisation of the scheme as "aggressive" avoidance "may be over-egging it".[30]

The second judicial review was *R (on the application of Zeeman and another) v Revenue and Customs Commissioners* (*Zeeman and Murphy*).[31] Zeeman was a contractor employed by umbrella companies between 2006 and 2016. He was remunerated for his services by way of a salary supplemented by loans. In some cases, these loans were direct from in EBT, in other cases the loans were initially made by the umbrella company and subsequently assigned to the trustees of the EBT.

Murphy was a self-employed contractor, who between 2008–10 worked as a consultant engaged by an Isle of Man company, Rathowen Ltd. ("Rathowen"):

> "Rathowen would receive a payment from the end client for Mr Murphy's services, from which it would deduct a fee. The balance would then be used (a) to pay Mr Murphy an annual fee for his consultancy services, which is said to have been calculated on a pro rata basis to the work undertaken, and (b) to fund an EBT…"[32]

Murphy then received loans from the EBT.

In both *Cartref* and *Zeeman and Murphy* it was alleged that the Loan Charge breached Article 1 Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms (A1P1), which provides that:

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[25] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [72].
[26] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [3]–[4].
[27] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [5].
[28] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [72].
[29] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [184].
[30] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [206].
[31] *R (on the application of Zeeman and another) v Revenue and Customs Commissioners* [2020] EWHC 794 (Admin); [2020] STC 828.
[32] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [16].

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
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> The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

This necessitates a two-stage assessment. First does the taxpayer have a possession within the meaning of A1P1.[33] Second, was the deprivation both "provided by law", and also proportionate, striking a "fair balance" between the demands of the general interest and the needs of the community.[34]

In determining whether the taxpayer had a possession the starting point in both cases with a Court of Appeal decision in *R (on the application of St Matthews (West) Ltd and others) v Her Majesty's Treasury and another; sub nom R (on the application of APVCO 19 Ltd and others) v Her Majesty's Treasury and another* (*St Matthews*),[35] which approved the European Court of Human Rights decision in *Kopecký v Slovakia* (*Kopecký*).[36] *Kopecký* established that:

> "where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it".[37]

This led Vos LJ in *St Matthews* to find that:

> "a possession must either exist or be a claim in respect of which an individual has a legitimate expectation that it will be realised, and such a legitimate expectation cannot be based on just an arguable claim... If it were an answer in a tax case to say that legislation closing a tax avoidance loophole was an interference with the money that the taxpayer would in due course use to pay the tax, that would be applicable in many, if not most, cases, since taxpayers rarely pay tax first and dispute their liability later"[38]

and:

> "the money available to pay the SDLT must, in my judgment, be affected by the argument as to whether it is payable to HMRC. Of course, the money is a possession in one sense, but it is a possession impressed with an arguable claim by HMRC, which prevents it being properly regarded as a possession for A1P1 purposes." [39]

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[33] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [127]—[160]; *Zeeman and Murphy*, above fn.31, at [51]—[72].
[34] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [161]—[225]; *Zeeman and Murphy*, above fn.31, at [73]—[97].
[35] *R (on the application of St Matthews (West) Ltd and others) v Her Majesty's Treasury and another; sub nom R (on the application of APVCO 19 Ltd and others) v Her Majesty's Treasury and another* [2015] EWCA Civ 648; [2015] STC 2272.
[36] *Kopecký v Slovakia* (Application No 44912/98) (2005) 41 EHRR 43, ECtHR.
[37] *Kopecký*, above fn.36, 2005) 41 EHRR 43, ECtHR at [52] cited in *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [132] and in *Zeeman and Murphy*, above fn.31, at [53].
[38] *St Matthews*, above fn.35, [2015] EWCA Civ 648; [2015] STC 2272 at [45].
[39] *St Matthews*, above fn.35, [2015] EWCA Civ 648; [2015] STC 2272 at [46].

Thus, the question for the court in *Cartref* and *Zeeman and Murphy* was whether, before the introduction of the Loan Charge, HMRC had an arguable claim.[40] However the answer given by Cockerill J. in *Cartref* differed from that of Andrews J. in *Zeeman and Murphy*. For Cockerill J. the answer differed between the two taxpayer companies, due to the loss relief claim of Cartref Care Home relating to the year ending 2011 and for DES the year ending in 2013. It was in that period which she considered the law had changed giving HMRC a claim. Cockerill J. stated that:

> "156. The answer to this question depends on what was known to be of interest to HMRC at the time of the arrangements in question. In the light of the issues considered above, I conclude that the position was certainly different by the end of 2013 compared to the position in 2010; by the end of 2013 the position was not materially dissimilar to that which pertained in *St Matthews*. Accordingly, I would conclude that DES did not have a possession.
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> 157. So far as Cartref is concerned I would be inclined to say that the position is different. Although Spotlights 5 and 6 were issued, the DRR were not yet in existence; even as they were being consulted upon, the way in which they were being approached was very different to the scheme which Cartref was entering into. To say that there was a claim, when there was no legislation yet in existence which even covered distantly related schemes, would seem to stray too close to an analysis whereby any arrangement is impressed with a potential claim by HMRC."[41]

In *Zeeman and Murphy*, Andrews J. took issue with Cockerill J.'s statement in paragraph [156] observing:

> "that I have some difficulty with the concept that an arguable claim to tax does not exist until HMRC takes positive steps to make that claim known. The claim surely arises from the legislation imposing the charge to tax and depends on its interpretation and application to the facts. It seems to me that the real distinction to be drawn is between a situation in which the State imposes an entirely new tax or charge, and a situation in which the taxpayer cannot establish that the money belongs entirely to him, because legislation already exists which HMRC contends is applicable and creates a liability to pay tax."[42]

The test set out by Andrews J. would seem preferable. "One should be taxed by law, and not be untaxed by concession."[43] However the reasons given by Cockerill J. in paragraph [157] would appear to satisfy Andrews J.'s test. Applying her test in *Zeeman and Murphy*, Andrews J. held neither to have a possession, stating:

> "In the present case, each of the taxpayers was party to an arrangement to receive money as remuneration for his services by a means that he knew was designed and intended to prevent him having to pay the tax that would normally be charged on the same sum if it was paid as part of his salary. For the purpose of ascertaining whether these was a "possession" in this context I would draw no distinction between DR loans made in the period up to and including the tax year 2009/2010, and loans made thereafter. The proposition that a payment which is made as a reward for services is taxable was clearly articulated by the House of Lords in

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[40] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [155] and in *Zeeman and Murphy*, above fn.31, at [59] and [66].
[41] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [156]—[157]: *St Matthews*, above fn.35, [2015] EWCA Civ 648; [2015] STC 2272.
[42] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [61].
[43] *Vestey v Inland Revenue Commissioners* [1977] STC 414 at 439 (ChD) per Walton J.

Brumby v Milner as long ago as 1975. The position of a self-employed trader such as Mr Murphy may have been less clear, perhaps, than that of an employee such as Mr Zeeman, but the nature of the payment as part of the remuneration package was precisely the same."[44]

With regard to Zeeman, this makes perfect sense, but it is unconvincing with regard to Murphy who was self-employed. As an employment income case, *Brumby v Milner* gives guidance on what may be an emolument, but that is irrelevant to whether a charge arises under section 25 of ITTOIA, which elsewhere in her judgment Andrews J. acknowledges as the correct test.[45] Andrews J. concedes that prior to the enactment of sections 23A-23H of ITTOIA in 2017 "[t]he tax position of a self-employed trader in respect of DR schemes, particularly contractor loan schemes, was less clear than the position of an employee."[46] Thus, with regard to Murphy, Andrews J. does not give a good reason why HMRC has an arguable claim resulting in Murphy not having a possession. Here Andrews J. does not, in contrast to Cockerill J. in *Cartref*, suggest that a change occurred between 2010 and 2013. This may be attributable to the Zeeman's case being substantially on par with *Rangers*, which was decided without needing to resort to the DRR which were introduced around that period.

Even if there was a "possession", in both *Cartref* and Zeeman and Murphy the court concluded that A1P1 was not breached as any deprivation was both "provided by law", and also proportionate, striking a "fair balance" between the demands of the general interest and the needs of the community. The reasoning was similar in both cases.

Lawfulness was not "seriously in issue" in either case.[47] Whilst the courts accepted there was a degree of retrospection to the legislation,[48] that did not prevent any deprivation being provided by law. Although the requirement of legal certainty includes the need for the measure to be "sufficiently foreseeable",[49] retrospective/retroactive[50] effects are generally considered as part of the assessment of proportionality.[51]

Assessing the fair balance, both judgments noted that "when framing and implementing policies in the area of taxation, [a State] enjoys a wide margin of appreciation".[52] Accordingly legislation will only be found to breach A1P1 if it is "manifestly without reasonable foundation".[53] In both cases

[44] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [62]: *Brumby v Milner*, above fn.23, [1975] STC 644 (CA); affd [1976] STC 534 (HL).
[45] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [45] and [67].
[46] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [46]. Andrews J. claims ITTOIA ss 23A-23H were enacted in "the first Finance Act 2017", in fact they were enacted in Finance (No.2) Act 2017.
[47] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [74].
[48] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [204]; *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [80].
[49] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [74].
[50] The judgements suggest nothing turns on the distinction in these cases: *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [177]; *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [75].
[51] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [75].
[52] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [200]; *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [76]: both citing *Huitson v United Kingdom* (App no 50131/12) (unreported) at [28].
[53] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [199]; *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [79]: both citing *Huitson v United Kingdom* (App no 50131/12) (unreported)at [28]. (*Huitson* itself refers to "devoid of reasonable foundation")

retrospective legislation was seen to be justified by the objective of combating tax avoidance.[54] Cockerill J. did not consider it relevant that parliamentary conventions relating to retrospective legislation may not have been adhered to, since the balancing exercise under A1P1 "turns on the effect of the legislation, not the processes that led to it."[55] The issue was the length of the retrospection, potentially 20 years. Cockerill J. noted that the any challenge to the length of retrospection would involve balancing "the factors weighting in favour of the legislation with the severity of the consequences".[56] However, she found that on the evidence before her, with regard to both claimants:

> "since before either of these schemes was entered into, HMRC were making it clear beyond peradventure that they regarded the overall approach (if not the precise iteration) as invalid. Where this is the case the taxpayer is to some extent on risk… a moderately well-informed taxpayer would know himself to be on risk, distantly in the case of Cartref and much more immediately by the time of the DES decision."[57]

Cockerill J. had no evidence before her of taxpayers who entered into schemes in earlier years. Whilst the All-Party Parliamentary Loan Charge Group (APPG) report referred to the hardships of taxpayers from earlier years, it was "pure *ex post facto* commentary"[58] and "an expression of opinion from which facts are notably lacking",[59] "not a witness statement, provided under the safeguards of the witness statement process".[60] Accordingly Cockerill J. found that even if the time period was open to challenge, she had no evidence before her on which to find a breach of A1P1. In *Zeeman and Murphy*, Andrews J. based her finding of no breach of A1P1 on the measures being used to combat tax avoidance which therefore fell within the State's margin of appreciation.[61] While Andrews J. acknowledged a theoretical possibility of the loan charge causing hardship in specific cases, she held "that does not mean the legislation itself is contrary to A1P1."[62]

The recent First-tier Tribunal decision in *Hoey v Revenue and Customs Commissioners*[63] presented an example of taxpayer as victim, rather than tax-dodger. In that case Judge Philip Gillett made findings of fact that Mr Hoey's motivation for using the scheme (involving an umbrella company) "was solely to avoid the complexities of running his own company".[64] The cash that he received due to using the scheme as only "slightly better" than he obtained beforehand, as the various intermediaries charged fees of between 10 per cent and 18 per cent, compared to the 1 per cent usually charged by "a simple UK based umbrella company".[65]

[54] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [210]—[214]; *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [83]—[84].
[55] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [182].
[56] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [219].
[57] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [217].
[58] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [169].
[59] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [221].
[60] *Cartref*, above fn.14, [2019] EWHC 3382 (Admin); [2020] STC 516 at [171].
[61] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [96]—[97].
[62] *Zeeman and Murphy*, above fn.3131, [2020] EWHC 794 (Admin); [2020] STC 828 at [93].
[63] *Hoey v Revenue and Customs Commissioners* (*Hoey*) [2019] UKFTT 489 (TC); [2019] SFTD 1195. See discussion in Richard Thomas, "Stephen Hoey v HMRC and Philip Higgs and others v HMRC: section 684(7A) ITEPA—a load of Hoey?" [2020] BTR XXX.
[64] *Hoey*, above fn.63, at [18].
[65] *Hoey*, above fn.63, at [18]—[19].

The Morse Report

In response to concern about the operation of the Loan Charge, in September 2019 the Chancellor of the Exchequer commissioned a report by Sir Amyas Morse to report on the operation of the Loan Charge. This was published in December 2019. Whilst there has been broad cross-party support for the Morse report's findings,[66] the APPG has issued its own *Report on the Morse Review into the Loan Charge* (the APPG report)[67] critiquing the Morse report.

The major substantive recommendations of the Morse report are:

> "**The design of the Loan Charge**
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> 3 the Loan Charge should not apply to loans entered into before 9th December 2010
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> 4 Unprotected Years arising from loans entered into on or after 9th December 2010, where the relevant taxpayer made reasonable disclosure of their scheme usage to HMRC and HMRC did not open an investigation, should be out of scope of the Loan Charge (subject to recommendation 5 below). Other Unprotected Years should remain in scope of the Loan Charge. This will ensure that taxpayers do not benefit from failing to disclose their tax affairs to HMRC. The approach to defining "reasonable disclosure" should build upon HMRC's ordinary compliance approach in considering the extent to which a Self Assessment return is sufficiently clear about the usage of a loan scheme
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> 5 any Unprotected Years arising from loan schemes entered into during the 2016-17, 2017-18 and 2018-19 tax years should all be included in the scope of the Loan Charge, to ensure that taxpayers who entered into loan schemes after the Loan Charge was announced do not unreasonably benefit from HMRC having ceased protecting years following the announcement
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> 6 HMRC should refund the Voluntary Restitution elements of settlements made since 2016 that were paid to settle Unprotected Years when the relevant loans were entered into:
>
> > a) prior to 9th December 2010; or
> >
> > b) between 9th December 2010 and the start of the 2016-17 tax year, where the scheme user made reasonable disclosure of their scheme usage in their tax return
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> 7 taxpayers should be entitled to opt to spread their outstanding loan balances over three years, to mitigate the impact of taxpayers paying tax at a higher rate than they ordinarily would. This reduces the effect of stacking their outstanding loan balances into a single year, which artificially created an increased exposure to a higher rate of income tax
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> 8 the extent to which the Loan Charge looks back to activity in earlier tax years dating back to 1999-2000, and the manner in which ongoing interest is charged on payment arrangements has given rise to concerns over how policy on interest is applied within the tax system. The government should review future policy on interest rates within the tax system and report the results to Parliament by 31st July 2020"
>
> **The individual impact of the Loan Charge**

[66] Hansard Public Bill Committee (2019-20) Finance Bill [Second Sitting] (4 June 2020).

[67] Loan Charge All-Party Parliamentary Group, Report on the Morse Review into the Loan Charge (March 2020).

> 9 all individuals subject to the Loan Charge should only be asked to pay up to half their disposable income each year and a reasonable proportion of their liquid assets. No one should have to sell their primary residence or use their existing pension pot to pay the Loan Charge
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> 10 individuals with income of less than £30,000 in 2017-18 should additionally not have the Loan Charge hanging over their head for any longer than 10 years, and any amount left outstanding after 10 years of paying the Loan Charge should be written off to genuinely draw a line under any outstanding balance. This will allow people to move on after paying what they can afford
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> 11 HMRC should extend to individuals with income from £30,000 up to £50,000 in 2017-18 the same payment terms that were offered to such individuals who settled their tax affairs rather than pay the Loan Charge. Such individuals should be automatically able to pay the Loan Charge over up to five years without having to provide HMRC with further details of their asset ownership"

All of these recommendations were accepted by the government, except recommendation 10. The Government's rationale for not accepting recommendation 10 was that:

> "HMRC already have robust systems in place for those who need time to pay their tax debts… Allowing some Loan Charge liability to be written off would treat tax avoiders more favourably than other individuals with HMRC debts (including tax credit claimants), would reduce taxpayers' incentive to pay off the debt, and would have unwelcome wider impacts that change how HMRC and those in debt interact."[68]

There are currently 600,000 taxpayers paying HMRC through time to pay arrangements. In the year to June 2019 HMRC agreed 438,000 time to pay arrangements, with over 15,000 for more than ten years.[69] It is unclear what proportion of these 15,000 are for things other than loan charge arrangements. Whilst 10 years is a long time, this is not an unusual period to pay a debt. Many student loans are outstanding for over 10 years and mortgages frequently are for much more than 10 years. Accordingly, it does not seem unreasonable for HMRC to have rejected recommendation 10.

The Morse report's rationale for the cut-off of December 2010, is that it is only then when the law "became clear",[70] since "[f]rom early 2010 it was clear that the government would legislate to ensure that loan schemes did not avoid tax and NICs."[71] This cut-off date is also consistent with the decision of Cockerill J. in *Cartref*, as discussed above. As noted earlier for Andrews J. in *Zeeman and Murphey* this was not a significant cut-off. The difference may be attributed to *Carterf* involving a close company scheme that was far from the factual matrix of *Rangers*. Similarly, as identified by the APPG report,[72] a weakness of this cut-off is that it fails to differentiate employed from self-employed schemes, where (as discussed above) legislation was only introduced in 2017. As already noted, the regimes for taxing employment and self-employment are very distinct. Subject to this, there is a sound policy justification in the approach to subsequent Unprotected Years. The choice of cut-off

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[68] HM Treasury, *Independent Loan Charge Review: Government response to the Review* (December 2019).
[69] HM Treasury and HMRC, *Independent Loan Charge Review – summary of evidence: FOI release* (23 April 2020), section 14 – debt collection process.
[70] Morse, above fn.1, 4.
[71] Morse, above fn.1, 20-22.
[72] Loan Charge All-Party Parliamentary Group, above fn.67, 14.

date was also influenced by how the self-employed are required to retain detailed financial records and by "how far back HMRC would usually have been able to look in their investigations from the date of the announcement of the Loan Charge in March 2016".[73]

Recommendation 9 has been partly implemented, as an exception is made for those "with very high disposable income", who may be required to repay more than half of their disposable income.[74] This appears consistent with HMRC's normal practice.[75]

The refund the Voluntary Restitution elements of settlements seems only fair: taxpayers who obeyed the Government's call to settle should not be disadvantaged against those who persevered in their struggle against HMRC. However, as the CIOT has noted,[76] this leaves those taxpayers that repaid outstanding balances on their loans prior to 5 April 2019 to avoid the operation of the Loan Charge (on HMRC's advice), at a relative disadvantage. Relatedly, it seems that some taxpayers may face the double whammy of having both to pay the Loan Charge and repay the loans:[77] apparently some of the EBTs have sold-off their loan books at a fraction of their value.[78] It is unclear how it accords with their fiduciary duties if EBT trustees sold their loan books on this basis.

Finance Act 2020

Section 15 of Finance Act 2020 implements recommendation 3 of the Morse report, so the Loan Charge now only applies to loans made after 9 December 2010, rather than 6 April 1999.

Section 16 of Finance Act 2020 allows the taxpayer to make an election for the Loan Charge to be split over three years. This implements recommendation 7 of the Morse report, mitigating the income stacking effect of the Loan Charge. An estimated 21,000 individuals will reduce their liability under the Loan Charge as a result of this.

Section 17 of Finance Act 2020 implements recommendation 4 of the Morse report, relieving the Loan Charge in respect of loans entered into on or after 9 December 2010, where the relevant taxpayer made reasonable disclosure of their scheme usage to HMRC and HMRC did not open an investigation. The disclosure must be made in a tax return (which includes accompanying documents). "Reasonable disclosure" has been defined in subsection (5) rather narrowly, being where the return:

> "(a) identified the loan or quasi-loan,
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> (b) identified the person to whom the loan or quasi-loan was made in a case where the loan or quasi-loan was made to a person other than T,
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> (c) identified the relevant arrangements in pursuance of which or in connection with which the loan or quasi-loan was made, and

[73] Morse, above fn.1, 35.
[74] HM Treasury, above fn.68, 9.
[75] HM Treasury, above fn.68, 9.
[76] Chartered Institute of Taxation, Finance Bill 2020 – Submission to Public Bill Committee (FB07) (June 2020), 4.
[77] Chartered Institute of Taxation, Finance Bill 2020 – Submission to Public Bill Committee (FB07) (June 2020), 4.
[78] Loan Charge All-Party Parliamentary Group, above fn.67, 43.

> (d) provided such other information as was sufficient for it to be apparent that a reasonable case could be made that for the relevant year T was chargeable to income tax on an amount that was referable to the loan or quasi-loan."

Whilst the disclosure must be in a tax return, the disclosure need not be in the return of the recipient of the loan: it could be in their employer's return. Due to the "onerous" level of disclosure it has been suggested that "very few taxpayers" will meet the requirements of reasonable disclosure.[79]

An estimated 11,000 individuals will be removed from the Loan Charge due to the date the Loan Charge applies from being changed to 2010 and the provisions for those who have made reasonable disclosures.[80]

Section 18 removes liability for interest on the Loan Charge, providing payment is made before the end of September 2020. Section 19 makes minor amendments.

Sections 20 and 21 implement recommendation 6 of the Morse report, allowing HMRC to refund amount paid under settlement agreements which would not have been subject to the Loan Charge as amended by Finance Act 2020.

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[79] Loan Charge All-Party Parliamentary Group, above fn.67, 51.
[80] HMRC, Implementation of recommendations from the independent review of the Loan Charge: Policy Paper (11 March 2020).
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