TC02787

Appeal number: LON/2004/1313 & LON/2009/0166

VAT – burden of proof where assessment on grounds of abuse of law on appellant - owner of golf club transferring business to non-profit making companies which claimed the benefit of VAT exemption for sporting supplies – whether companies were non-profit making – on facts no - whether abusive under* Halifax plc and others (C-255/02) *– yes applying* Atrium Club Ltd [2010] EWHC 970 (Ch) *– appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JULIAN MASSEY AND BERYL MASSEY
T/A HILDEN PARK PARTNERSHIP **Appellant (1)**

HILDEN PARK LLP **Appellant (2)**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 17-21 June 2013

Mr K M Gordon, Counsel and Ms X Montes Manzano, Counsel, instructed by DLA Piper LLP for the Appellant

Mr M Jones, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Outline

1. The case concerns, in broad outline, supplies of sports services at Hilden Park golf course in Kent. The supplies were made by two companies but the assessments at issue in the appeal were on the successive landlords of the site, Mr J Massey and his mother Mrs Beryl Massey trading as Hilden Park Partnership and then on Hilden Park LLP to whom the interest of the partnership in the land was transferred on 1 June 2005.

2. The first appellants, to whom I shall refer by the name of Hilden Park Partnership, or "HPP" for short, appeal against a decision of the Commissioners made on 9 August 2004 and against assessments raised by the Commissioners on HPP:

(a) an assessment issued on 31 August 2004 in the sum of £23,017 (plus interest) for the period 08/01;

(b) an assessment issued on 13 September 2004 in the sum of £237,083 (plus interest) for the periods 11/01 to 05/04 inclusive; and

(c) an assessment issued on 15 August 2005 in the sum of £86,700 (plus interest) for the periods 08/04 to 05/05 inclusive.

The second appellant, Hilden Park LLP ("HP LLP"), appeals against a decision of HMRC and in particular against:

(d) an assessment dated 28 August 2008 in the sum of £27,722 for the period 08/05; and

(e) an assessment dated 27 November 2008 in the net sum of £174,440 for the periods 11/05 to 08/07 inclusive.

3. The assessments were made pursuant to a decision of the Commissioners that the arrangements amounted to an attempt by HPP to avoid paying VAT on supplies of sporting services which would otherwise have attracted VAT and that the doctrine of abuse of rights applied to prevent that avoidance.

4. I am told that in the alternative the two companies making the sporting supplies were also assessed on the basis that neither was, in substance and reality, a non-profit making body with the result that they did not qualify for the VAT exemption. Both companies are in liquidation and neither are a party to this appeal, so I am not concerned with these assessments. I am, however, concerned with the question of whether the companies made exempt supplies as that is relevant to the question of whether HPP and HP LLP's actions amounted to an abuse of law.

5. HMRC allege that that the adoption of this new structure under which the sporting supplies were made amounted to an abusive tax avoidance arrangement liable to redefinition under what is generally referred to as the *Halifax* doctrine. The

appellants' case in this regard is that the arrangements entered into fall a long way short of what could fairly be described as abuse.

Preliminary issue – burden of proof

6. Mr Gordon indicated (with reasons) by written submission prior to the hearing of the case that he intended to make at the hearing and at the close of HMRC's opening, a submission of no case to answer. The submission of no case to answer centred on HMRC's intention to call no evidence.

7. Such a submission, as Mr Gordon recognised, assumed that HMRC had the burden of proof and that HMRC would be opening the case. The appellant could hardly make a submission of no case to answer if it had already presented its own evidence: a submission of no case to answer, would, in such a situation, be no different to asking the Tribunal, having heard both parties' cases, to allow the appeal.

8. HMRC did not agree that it had the burden of proof nor that it was for them to open the hearing and call evidence first. It therefore fell to me to determine, at the start of the hearing, where the burden of proof fell in order to determine which party should present their case first.

9. The parties' submissions and my decision on this issue are recorded in the transcript. I record my decision here with a few additional observations.

Burden of proof – the normal rule

10. It was accepted that in most cases in this tribunal the burden is on the appellant. I was referred to the case of *Tynewydd Labour Working Men's Club and Institute Ltd* [1979] STC 570 where Forbes J stated that (page 581b):

> "Now there is no principle of law which I know of – and both counsel disclaim it – that where a provision is a taxing provision the onus of proof is on the tax gatherer, while if it is a mitigating provision it is on the taxpayer, and to this extent the ratio of the *Ivy Café* case is, in my view, wholly wrong. But that the onus of adducing evidence and satisfying the tribunal that the assessment is wrong lies on the appellant under s 40 I have not any doubt at all."

I note that the judge's reference to s 40 was a reference to s 40 of the Finance Act 1972 which is now s 83 of the Value Added Tax Act 1994 ("VATA"), and was and is the section gives taxpayers the right to appeal assessments of VAT to the Tribunal.

11. The explanation for the judge's view was given a few paragraphs earlier (page 580e-f):

> "….The scheme of the 1972 Act appears to me to be this, that if the taxpayer omits to include in his return something which the commissioners consider, using their proper judgement, is taxable, then the commissioners can, using the best of their judgment, assess the taxpayer at a certain figure…, and if there is no appeal, that figure is

> then deemed to be the tax payable. If the taxpayer wishes to have the assessment altered, he must go to the tribunal, and unless the tribunal finds the commissioners are wrong, the assessment still stands. It seems to me, in those circumstances, that any taxpayer who appeals to the tribunal takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong, because unless he proves this there is nothing on which the tribunal can find an error in the assessment. The facts and figures are known to him…."

12. In the later case of *Grunwick Processing Laboratories Ltd* the Court of Appeal said on the question of burden of proof:

> "Before us counsel for the taxpayer company accepted (as was accepted below) that the burden of proof rested on the taxpayer company, in the sense that the taxpayer company had to show that the assessment was wrong…."

While it is therefore clear the point was not in issue, the Court of Appeal also clearly considered the concession well made and cited the High Court decision with approval where the judge had said:

> "…At no time do the commissioners have any burden to prove anything before the tribunal. Neither its case nor any aspect of the matter, factually or evidentially, carries any burden imposed on the commissioners. It is throughout, in my judgment, up to the taxpayer company, if it can, to attack the assessment in whole or in part…."

13. I am unable to find in the Court of Appeal's short decision any reason as to why the burden is always on the taxpayer in the tribunal: the matter was not in dispute and therefore the Court was not called upon to explain the point. It was a suppression of takings case and the real issue between the parties was whether the tribunal had properly considered the evidence as the tribunal had failed to mention in its decision particular evidence advanced by the appellant to show there were fewer sales suppressed than contended by HMRC.

14. Forbes J gave two reasons (cited in §11 above) for the rule in *Tynewydd*: firstly, that it was the scheme of the legislation that the appellant had to challenge the assessment and, secondly, that the taxpayer would have the facts and figures. I think that the primary reason for the rule is that the taxpayer, as the person carrying out the business or otherwise earning the income or profits, would be or ought to be in possession of the evidence relevant to the question of his liability while the tax authorities would not possess the evidence. While it might be hard to prove a negative, it is impossible to discharge a burden of proof without any evidence at all.

15. An obvious example is an alleged suppression of takings case: HMRC raise the assessment on the basis they consider that the taxpayer's income was greater than declared. While it might be seen as requiring the taxpayer to prove a negative, and in particular that he did not have undeclared income, nevertheless it is accepted that the burden of proof rests on the taxpayer in such a case. In my view this is because the taxpayer ought to be able to substantiate his income from the records he ought to have kept.

Exceptions to the normal rule

16. There is a well known exception to the rule that the burden of proof is on the taxpayer in the tax tribunal. And that is where HMRC' assessment involves an allegation of what would be a criminal matter were the tribunal a criminal court.

17. VATA has (were it necessary) expressly reversed the burden of proof where a penalty is imposed on the grounds of civil evasion: see s 60(7) VATA. And the Court of Appeal in *Mobilx Ltd and others* [2010] EWCA Civ 517 stated that in so-called MTIC cases HMRC would have the burden of proof:

> "[81] … It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion."

Although this paragraph does not explicitly state it, the knowledge that Moses LJ refers to is knowledge of connection to fraud: to allege that someone has entered into a transaction knowing it was connected with fraud is tantamount to an allegation of criminal conduct.

18. Is the exception to the normal rule limited to cases where the allegation is tantamount to an allegation of criminal cases? I think that there may be other exceptions. For instance, although I am not aware of any case where a tribunal or court has considered where the burden would lie in an MTIC case if the assessment was solely on the basis that HMRC alleged that the appellant *ought to have known* that his purchases and sales were connected with fraud, in my view, at least in so far as the allegation that the purchases and sales were connected with fraud is concerned, the burden of proof would still be on HMRC. And this is because the evidence of connection with fraud would be in HMRC's and not the appellant's control. This is so because the evidence will be of an (alleged) chain of transactions, the evidence of which only HMRC has the legal power to acquire. To put the burden on the appellant in such a case would not only require them to prove a negative but to prove it without any evidence.

Is an abuse allegation an exception to the normal rule?

19. In this appeal, it is HMRC's case that the appellant was liable to the assessment because it had entered into an abusive arrangement that could be redefined under the doctrine explained by the CJEU in *Halifax and others* C-255/02:

> "[85]. … the Sixth Directive must be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice.
>
> [86] For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from

> a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.

20. The appellant considers that such allegations of abuse are another exception to the normal rule. It supports this submission by reference to the Upper Tribunal decision in *The Lower Mill Estate Ltd* [2010] UKUT 463 (TCC) and in particular to paragraph [137] of that decision where the Tribunal records:

> "[137]…The onus is on HMRC to establish that there is an abuse and thus that the self-build model is anti-purposive in the present case. Unless we are persuaded, which we are not, that transactions taking place under the self-build model are not normal commercial operations for a developer such as LME, abuse cannot be established. In this context, compare *Halifax* at para 75 where the court said in relation to the second limb that it must be 'apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage'. This language is not consistent with an obligation on the taxpayer to show the reverse."

21. On the basis of this passage it was the appellant's contention that, whatever the rule in most VAT cases, abuse was a separate category of case, as with civil evasion and MTIC cases, where the burden of proof was on HMRC. And that, as a decision of the Upper Tribunal, it was binding on me.

22. HMRC's position was that the Upper Tribunal was not in this case dealing with the question of who had the burden of proof and that was not the question to which this passage was directed; but if they were, then the decision was not binding on me as it was per incuriam, in particular as it failed to consider the Court of Appeal's decision in *Grunwick*.

23. I find that the question of the burden of proof was not an issue in the *Lower Mill* case and the Tribunal appeared to have no submissions on it: what the above quoted passage was dealing with was something slightly different.

24. The case concerned two companies in common ownership. One company, LME, supplied standard rated leases to persons who wanted to buy a holiday home. The other company, CBL, built the holiday homes for these persons and on a normal application of VATA its supplies were zero rated. HMRC's case was that this was an abusive arrangement under *Halifax* because the supply of land together with a completed holiday home would have been a single taxable supply. The First Tier Tribunal agreed with HMRC but the Upper Tribunal overturned the decision on *Edwards v Bairstow* grounds.

25. The Upper Tribunal pointed out that it was not, by itself abusive, for one company to supply the land and another, connected company to supply construction services as this could arise in a commercial context with unconnected companies making the separate supplies. In paragraph [137] the Upper Tribunal appears to me to be saying that it would have been for HMRC to show otherwise and they had failed to do so: but I do not read this as saying that HMRC have the burden of proof, but rather

that the appellant had raised a prima facie case that what they had done was not abusive and HMRC had failed to successfully challenge this.

26. I do not need to go as far as HMRC suggest and consider whether the decision was per incuriam: burden of proof was not an issue in the case and the Upper Tribunal was not cited the relevant authorities in respect of it. It is clear that the Upper Tribunal was not intending to address the question of burden of proof but merely looking at whether an evidential burden, which had shifted to HMRC, had been discharged.

Conclusion on burden of proof

27. Having concluded that *Lower Mill* gives no guidance on burden of proof, I must consider where the burden of proof lies from first principles. As I have said, the reason for the normal rule must be that the appellant controls the evidence or at least would have the evidence if he had kept the records he was by law obliged to keep. I think MTIC cases are different as they both involve an allegation of a criminal matter (knowledge of fraud) and an allegation of a matter (connection to fraud) where the evidence will be in HMRC's rather than the appellant's control. Should *Halifax* abuse cases be different too?

28. Abuse cases do not involve an allegation tantamount to fraud. Despite the use of the word "abuse", they clearly concern avoidance and not evasion as is apparent from [86] of the CJEU's decision where it refers to the "formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it" to the facts of the case and whether something is "contrary to the purpose of those provisions". It is looking at the true meaning of the law and whether conditions have in fact and law been met: it is not looking at whether a taxpayer has concealed the true facts from the tax authorities. Further the second part of the test, looking at the essential aim, is an objective and not subjective test which again indicates it is not a criminal matter.

29. So abuse cases do not require a reversal of the normal burden of proof on the grounds they are tantamount to a criminal allegation as in a civil evasion or an MTIC case: they are not. Is there any other reason which would justify an exception to the normal rule that the appellant bears the burden of proof?

30. Abuse cases look at the appellant's trading: the tribunal is required to consider how the appellant has traded and (objectively viewed) why the appellant has traded in that manner. It will be a case, like the vast majority of cases, where the evidence will be in the control of the appellant.

31. Therefore, I can see no reason why the normal rule would not apply. While the appellant may say it involves proving a negative, that the aim was not abusive, this is no different to other cases, such as an alleged suppression of takings case, where a negative, that there was no suppression, must be proved. As in such a case, the appellant must raise a prima facie case that there was (as the case may be) no abuse or no suppression, and then it is for HMRC to disprove that.

32. The correctness of this conclusion, to my mind, is shown when I consider the reason why this issue arose in this case in the first place. It was because the appellants wished HMRC to open the case as the appellant intended, at the close of HMRC's case, to make a submission of no case to answer on the grounds HMRC was calling no evidence.

33. The appellants said that they were unaware of any other case of abuse in which HMRC had called no evidence. Yet what evidence could HMRC in this case call? The evidence of the transactions the appellant entered into was something in the possession of the appellant. While the documents themselves had been disclosed to HMRC, the only evidence any HMRC officer could have given in respect of them would simply be to state when they had been received.

34. Mr Gordon suggested in his written submission on no case to answer that HMRC ought to call expert evidence of what arrangements would be commercial. But it seems to me that such evidence would be called in a vacuum unless called to rebut evidence from the appellant that what it had done was commercial.

35. So this reinforces my view that the burden of proof, even in a case where the assessments were raised because HMRC considered that the transactions were abusive, rests on the appellant, as the appellant controls the evidence relating to the disputed transactions. It is for the appellant to open the case. And as long as in opening the appellant raises a prima facie case that what it did was not abusive, the evidential burden will shift to HMRC to show otherwise.

36. Is there anything in European law, and in particular in *Halifax,* which would shift the burden of proof? *Halifax* established a substantive rule of European VAT law. Ordinarily, it would have no impact on domestic rules of evidence, as the CJEU itself recognised:

> [76] It is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of Community law is not undermined, whether action constituting such an abusive practice has taken place in the case before it ….

37. I note that, as is usual, the CJEU qualified its statement that, although the rules of evidence would be those of the national court, the rules should not themselves breach the principle of effectiveness. In other words, the rules of evidence should not prevent the application of a substantive rule of EU law. In this context, this would mean national rules of evidence which put the burden of proof on the appellants would be displaced if these rules of evidence made it very difficult or virtually impossible for appellants to show that their arrangements were not abusive.

38. I do not consider that UK law which puts the burden of proof on the appellants in cases of abuse in any way breaches the principle of effectiveness. All the rule requires is for the appellant to raise a prima facie case that its arrangements were commercial: the evidential burden will then shift to HMRC to show that there was abuse.

39. On the first day of the hearing I announced my decision that the appellant had the burden of proof and should open the case, and the appellant duly opened its appeal. Because of that decision, the appellant did not later make a submission that there was no case to answer. Other than that, as I explain in §199 my decision on burden of proof has had no impact on the outcome of this case: whether I regard HMRC or the appellant as having the burden of proof the outcome would have been the same.

The facts

40. I find, and as the appellants accept, arrangements were entered into by HPP with the aim of converting the golf club from a proprietary club (where VAT was chargeable on its supplies) to one owned by a "not-for-profit" organisation whose supplies would be exempt under Group 10 of Schedule 9 to the Value Added Tax Act 1994. From the perspective of the appellants, the appellants' role changed from proprietor of the golf club to the landlord of the golf course: the provision of the right to play golf was supplied by two companies limited by guarantee and by their articles unable to distribute profits.

The position prior to the arrangements

41. The green field site was purchased by Mr Julian Massey in the early 1990s with a view to developing a golf course. He entered into a partnership with a company owned by Mr Anthony Borg and called Borg Developments Ltd which had the effect that the equitable interest in the land was given to the partnership and the partnership developed the golf course. Once completed, the partnership operated the golf course charging VAT on green fees.

42. Other supplies were also made by the partnership. The complex included a golf shop and café. Supplies from these were subject to VAT. It also developed a heath suite at the complex and this was let to a third party company although this arrangement ended on the date that the new VAT structure was adopted.

The arrangements

43. In 2001 the appellant took advice from a Mr Peter Perry of Davies Mayers LLP.

44. This led to the new arrangements the subject of this appeal being implemented. In outline, the golf course, driving range and an area of the complex (comprising the changing rooms and health club space) was jointly let to two non profit making companies. These companies were Hilden Park Members Ltd ("Members") and Hilden Park Visitors Ltd (the original name of this company was Hilden Park Golf Ltd but at some point during the 2001 it changed its name. Nothing turns on its name change and I will for convenience refer to it as "Visitors" throughout).

45. As stated, both companies were limited by guarantee. Each company had two directors. The original two directors were Mr Leonard Kay and Mr Julian Brown. Mr Brown was also the companies' secretary. Mr Kay resigned in July 2004 and was

replaced by Mr Hudson. Mr Brown resigned in February 2007 and was replaced by Mrs Parfett, both as Director and Company Secretary. All directors were unpaid and had paid employment or self-employment elsewhere.

46. HPP's business in so far as it related to allowing persons to use the golf course, driving range and health club was also transferred to the two companies: the business of making supplies to members was transferred to Members and the business of making supplies to non-members was transferred to Visitors. The transfer agreements record that the consideration for the sale of the business in each case was £200.

47. Both HPP and Mr Massey in partnership with his mother and trading as Leisure Management ("LM") agreed to provide services to Members and Visitors, in particular to manage the businesses, to operate the common areas, to lease the necessary equipment and to collect the green fees as agent for the companies.

48. On 1 June 2004 Mr Massey bought out his erstwhile partner in HPP and his mother Mrs Berryl Massey was substituted as partner. On 1 June 2005, Mr Massey's partnership with his mother was converted into an LLP ("HP LLP").

The witnesses

49. The Tribunal had witness statements and heard oral evidence from Mr Massey, Mr Kay and Mrs Parfett. It also had an undisputed witness statement from Mr Stapley.

50. Two long-standing directors of Members and Visitors, Mr Brown and Mr Hudson, were not called as witnesses and I was given no explanation for this.

Mr Massey

51. Mr Massey: I was unable to accept Mr Massey's evidence as entirely reliable. Mr Massey stated in his witness statement that the only reason for converting HPP into a limited partnership was tax. It was put to him in cross examination that the main reason was to obtain limited liability. Mr Massey denied this but I did not find his denial reliable. In particular, he had on a number of occasions mentioned concerns with tortious liability for the club, and had, the year before the conversion, been assessed to substantial sums in VAT by HMRC, yet he was unable to explain what he thought the tax difference between a partnership and a limited partnership was. In re-examination he appeared to agree that the choice was between a limited partnership and a limited company and for tax reasons he preferred the limited partnership: thus only supporting HMRC's contention that his motivation in ceasing to trade as an unlimited partnership was to obtain limited liability by one structure or another and nothing to do with tax. And this is supported by the contemporaneous letters of advice he received which were in evidence. Tax dictated only the choice between limited liability structures.

52. Nothing turns on the reason why Mr Massey chose to convert from an unlimited partnership but I find that in cross-examination he was reluctant to admit his true

motivation (limited liability) which meant that I treated his evidence, particularly on motivation, with caution.

53. Mr Kay: Mr Kay was a director of Members and Visitors from 31 May 2001 until he resigned on 19 July 2004. He was a long standing friend of Mr Massey. They first met in around 1991 or 1992. Mr Massey asked Mr Kay to be a director of Members and Visitors and Mr Kay agreed.

54. Mr Kay had experience of sporting facilities in that his family ran a similar facility in another locality and Mr Kay owned and operated a health club in a town some 25 miles away. Mr Kay was also a user of the Hilden Park golf course.

55. I found that Mr Kay's evidence was often vague, off the point, and repetitive. His evidence was also in parts contradictory, for example he vacillated over whether he had or hadn't negotiated the rent and fees paid to HPP. I did not find his evidence to be entirely reliable.

56. Mrs Parfett: Mrs Parfett is a self employed bookkeeper. She was a user of Hilden Park facilities. She saw an advert for a bookkeeper at Hilden Park, applied and got the job in July 2002. She was not previously acquainted with Mr Massey. As mentioned above, she became company secretary and director of both companies in February 2007 when Mr Brown retired.

57. From mid-2002 she prepared the accounts and kept the books for Members, Visitors and HPP and later for HP LLP. From about 2004 she was also made responsible for PAYE and payroll.

58. Her evidence was that each entity had separate ledgers and separate bank accounts, and were, on the financial side, run entirely separately.

59. Mrs Parfett was a good witness who gave to the point answers and I accepted her evidence.

60. Mr Stapley became an employee of HPP in around 1993 working at various jobs. When the tax planning structure was put in place in 2001, his split of work necessitated him (similarly to a number of other employees) being jointly employed by HPP (later HP LLP) and Members and Visitors.

61. His evidence was to the effect that he remembered seeing the notice put up in the club house complex in May 2001 about Members and Visitors taking over the operation of the golf and health club and that he knew that the customers were well aware of this.

62. Mr Stapley's evidence was unchallenged and I accept it.

The written agreements

63. The written agreements divided into two. The agreements which transferred possession of the land and the business were executed and dated 1 June 2001 and

there was no suggestion that the terms did not reflect exact agreement between HPP and Members and Visitors. The position is not the same with the agreements which set out the services which HPP and LM were to provide to Members Visitors. None of these had been clearly both executed and dated: and there was clear evidence that the terms did not reflect the exact services provided.

64. I summarise the various agreements in more detail:

The tenancy: The joint tenancy was originally a tenancy at will. This document was dated 1 June 2001 and executed. The premises let comprised the golf course, driving range, health and fitness areas and changing rooms. It did not include the common areas or the golf shop or café although there were rights to use the common areas. The annual rent to be paid by the companies was set at the higher of an "Initial Rent" of £364,250 or 50% of the turnover of the two companies.

Debentures: The companies' obligations to pay the rent to HPP were secured by debentures. The debenture was secured over all the assets of the two companies. Mr Massey accepted this was part of the safeguards for HPP as it was legally parting with control of the operation of the golfing and health club facility to a company controlled by independent directors.

Lease: A dated copy of the lease was not produced in evidence. From the draft, I find its terms as to premises let and rent charged were the same as the tenancy at will. In addition the tenant was liable to a service charge which was calculated by the landlord as a fair and reasonable apportionment of all the costs to which the entire premises was subject. The term was seven years. The landlord was given the right to break on one month's notice. The tenant had no right to break and its security of tenure was excluded by Court Order.

Transfer agreements: These were dated 1 June 2001 and signed. The business and goodwill relating to "pay and play" at the club was transferred by HPP to Visitors for £200, and the business and goodwill of the membership side of the business was transferred to Members for £200. HPP was entitled to have the business and goodwill re-transferred to it if Visitor's or Members' occupation of site were to cease. As the lease permitted the landlord to give one month's notice to terminate the lease and security of tenure was excluded, this meant in effect the landlord could force a re-transfer of the business in one month's time at any time as long as it brought the lease to an end.

65. That summarises the agreements in the first category. The second category of agreement dealt with the services to be provided, as follows:

Service agreements: The service agreements I was shown were undated but executed. They were prepared in May 2001. The evidence from Mr Massey and Mr Kay was that the agreements were in effect from 1 June 2001 but I find that these agreements cannot have been executed at that date. Mrs Parfett witnessed Mr Massey's signature on these documents and her evidence was that she

recalled witnessing the signature but not the date of doing so, but that it cannot have been before July 2002 which was when she first met Mr Massey.

The agreements were with Leisure Management ("LM") a partnership between Mr Massey and his mother. The one with Members shows that Members agreed to pay LM an annual Facilities fee of £10,000, and annual management fee of £10,000 and an annual agency fee of £5,000. LM's obligations in returns for these fees were to run the reception, bar, café, and shop and to provide equipment, and to manage the facilities. LM also agreed to collect the green fees on behalf of Members. LM could give 1 months notice to terminate while the company had to give 12 months' notice to terminate. LM was entitled to 'reasonably' vary fees once a year on one months' notice.

The agreement between LM and Visitors was the same as the one with Members except that the facilities fee was £6,000, the management fee was £6,000 and the agency fee was £3,000.

The annual fees from these two agreements totalled £40,000 which was what Mr Perry had allowed for in his costings (see §126 below).

Management agreements: I was only shown a draft. It was not prepared until October 2001 and was prepared in the name of "Visitors" which was not the name of that company in June 2001. The management fee is left blank.

The draft shows that the intention was that LM would manage the golf club on behalf of Visitors. Visitors would pay the management fee and the proportion of the salary of jointly employed staff determined by LM. LM could give one month's notice to terminate and the company could give 12 months' notice to terminate. LM was entitled to "reasonably" vary its fee once a year on one months' notice.

Facilities agency and equipment agreement – 2001: This document was prepared in October 2001 and marked draft. The draft shows the intention was for HPP to provide Visitors with the services set out in the service agreement but for management. It records an agency fee of £3,000 pa and facilities fee of £6,000 per annum.

Visitors could terminate at 3 months' notice and HPP could terminate at one months' notice. HPP could "reasonably" vary the fees once a year on one months notice

Facilities agency and equipment agreement – 2003: There were two agreements with HPP, one each with Members and Visitors, essentially in the same terms as the 2001 version above. The fee for Members was a £5,000 agency fee and £10,000 facilities fee. For Visitors the agency fee was £3,000 and the facilities fee £6,000. I do not know if either of them was ever dated and signed.

66. There are inconsistencies and overlap between these various agreements. It seems reasonable to suppose that the service agreement with LM was superseded by

two separate agreements, the facilities and agency and equipment agreement with HPP and the management agreement with LM. This is a reasonable supposition as the intention was for LM only to provide management services, while only HPP (as owner) could agree to let the equipment to the companies and run the golf shop, café and common areas. The service agreement, in giving LM these responsibilities, was requiring it to do something it could not. The drafting dates also support this assumption.

67. Mr Massey explained the inconsistencies by saying the situation developed as time went on and that their advisers were less clear than he was as to which partnership would carry out which activity. This seems also to support the assumption that the service agreements were incorrect for the above reasons, and were replaced in October 2001 by the management agreements and facilities agency and equipment agreements.

68. What this does not explain is why the service agreement was executed in mid-2002 when it appeared already to have been superseded by the other, more appropriate, agreements drafted in October 2001.

69. In any event, Mr Massey's evidence was that none of the agreements reflected precisely what happened in practice. He said, for instance, that the agency fee was never charged as the agency services were not provided.

70. Mr Kay and Mr Massey both gave evidence that the directors had had sight of the agreements before they were implemented. They both said the agreements had been discussed but they also agreed that there were no negotiations in the sense of haggling over terms. Mr Massey chose to be vague when asked whether any terms changed after the drafts presented to directors.

71. I take into account that no one even suggested that the terms were haggled over. I take into account that the directors did not meet until November 2001 (see §§ 81-83 below) and that at none of the meetings were the terms of any of the above documents recorded as discussed. I take into account that the fee level was exactly that proposed by Mr Perry in his initial costings (see § 126). I also take into account that documents were signed which did not reflect what happened and the evidence discussed below (§§129-131) of the pre-packaged nature of the scheme. I find the terms of these agreements were merely accepted by the companies and not negotiated.

72. It was also accepted that Members and Visitors did not in fact pay the full charges due under these agreements. The initial rent was never charged: it appears that the parties considered that the rent was 50% of turnover and whenever the companies could not afford 50% of turnover, a lesser sum was invoiced and paid. The lease actually provided that the rent was the greater of £364,250 or 50% of turnover.

73. Mrs Parfett's evidence, which I accept, was that each month she would determine the income and expenses for the two companies in order to calculate the balance. If the balance was insufficient to pay the rent at 50% of turnover, she only invoiced what the company could afford to pay (such as 45%). Her evidence was that

Mr Massey would agree to this and the Directors would be aware of it, but the reductions were her on her own initiative having calculated that the companies could not afford the full rent

74. From what accounts the tribunal had it was apparent that the combined rent paid by Members and Visitors in the year to June 2002 was £282, 278 and in the year to June 2006 was £220,000. In fees to the year to June 2002 the two companies paid £69,443 and in the year to June 2006 £60,000.

Who managed the facility?

75. The agreements provided for LM to manage the facility. Mr Massey was in effect LM (the other partner was his mother and her role was minimal, mostly limited to looking after the houseplants at the centre and involvement with parties). All the evidence was that Mr Massey did initially manage the facility.

76. Although he suggested that the structure allowed him to withdraw from management, it was also apparent from his evidence that he withdraw from personal management of the site only in around late 2003 and 2004. To take over his role, LM employed persons to carry on the management. In other words, while Mr Massey may not always have personally run the facility, it was always managed during the period at issue by Mr Massey personally or someone directly employed by his partnership. Therefore, Mr Massey managed or controlled the management of the facility at all relevant times.

77. The appellants say that it was the lack of commercial focus by the trustee directors which led to the fall in turnover from the golf club and health club. However, the directors did not manage the golf club and health club and I find had fairly minimal involvement with it: their commercial focus or lack of it would not be affect the operation of the clubs. I find that the lack of commercial focus was due to Mr Massey's decision to step back from personally managing the site in late 2003 and employ others to do this job for him. As he says in evidence, he was forced to return to managing the site a few years later because of the downturn in business while he was largely absent.

Choice of directors

78. Mr Massey agreed that he asked Mr Kay and Mr Brown to be the directors. He agreed he had known them both for some time and they were friends. He felt handing over control to independent directors left him exposed and he wanted persons he felt "comfortable" with. Later on, he also asked Mr Hudson to be a director. Mr Hudson was someone Mr Massey had known since 1993; he knew him socially and he felt comfortable with him. He said he could not recall if he had asked Mrs Parfett to be a director but agreed he also felt "comfortable" with her as a director.

79. While I accept that only directors could actually and did appoint new directors, this appears to have been a rubber stamping exercise like so much else the directors

did (such as signing the agreements). From what evidence I had, in practice the directors were persons chosen by Mr Massey.

Directors' meetings

80. Mr Kay and Mr Brown were appointed as directors in May 2001. There were minutes which showed that the directors met once a quarter, with the first meeting six months after their appointment and the commencement of trading by the two companies.

81. Were there any other meetings? My conclusion is that the only directors meetings which took place were those for which minutes were produced to the Tribunal. I find this because the only suggestion that there may have been more meetings was in Mr Kay's oral evidence, but when probed this appeared to be a claim that, although he visited the club 3 or 4 times a month, it was often to use the facilities and he would merely drop in on Mr Massey and/or site managers in order to report problems such as a leaking shower. It was not a claim that he met with the other director and made decisions in their capacity as directors. In any event, I also note that Mr Kay's witness statement only claims that the directors meetings took place once a quarter and there is nothing in the reports of those quarterly meetings to suggest that any other meetings took place. Therefore I find that the meeting notes record all the meetings which took place between the directors acting as directors.

82. From the meeting notes, I find that Mr Massey attended all the meetings. He took the notes at the meetings. He had not been appointed as director but he was (as a partner) the companies' landlord and the manager of their businesses.

83. The first meeting was on 28 November 2001 which was, as I have said, six months after the companies had commenced operation, and six months after the company's occupation of the golf course came into effect and after LM commenced providing its management and HPP the other services. That the charges were already agreed before this meeting is indicated by the minutes for this meeting as it records that Mr Massey agreed to provide to the directors a schedule of the rent and service charges which the companies were liable to pay "for the Directors to familiarise themselves with".

84. I am unable to accept that the minutes are entirely an accurate reflection of the events at directors meetings. For instance, in the first three meetings it was agreed that the charges from LM should continue at their current level. However, I find this minute cannot reflect any informed discussion on the matter. Firstly, the written agreements gave no right to the companies to re-negotiate. Even accepting that the written agreements were not a true reflection of what happened in practice, it is clear from the minutes that the accounts were not available and so any discussion could not have been an informed discussion. And lastly, the charges were in practice reduced by Mr Massey but the minutes do not reflect this.

85. I do not think it coincidental that this meeting was held not long after Mr Perry gave written advice that directors meetings should be held and the charges approved.

And I find that after these first three meetings the charges and rents paid to HPP (and later HP LLP) were never again discussed.

86. Apart from those first three meetings, accounts, either final or management, were produced at every meeting. The absence of the accounts in the first three meetings was due to Mrs Parfett's predecessor being less than efficient. But after the first three meetings, most meetings had no financial discussions at all apart from recording the production and approval of accounts. By far the largest chunk of the meetings seemed to be concerned with discussion of more minor matters such as staff changes, advertising, sponsorship activities, repairs, members' concerns and more trivial items (including the adoption of a cat). And even then largely the minutes merely record that these issues were *reported* to the directors rather than recording active decisions taken by the directors.

87. The notes do record that the directors agreed to price increases for members and visitors. One meeting note records a query on the price of fertiliser; another that increased number of reception staff was pushing up the wages bill; and another commented that the overheads of staff, utilities and insurance needed to be reduced. No other financial matters were recorded as discussed over nearly six years.

88. In March 2007 the meeting note recorded that consideration was being given to closing down the companies due to the ongoing VAT investigation. The decision to cease trading was taken at a meeting in August of that year and the last meeting note, for September 2007, records the decision to place the company in voluntary liquidation. The decision was a response to advice given to Mr Massey after he went to a meeting hosted by Mr Perry's firm in wake of the Tribunal decision in *South Herefordshire* [2006] UKVAT V19653 which found that a purported non-profit making company was not non-profit making.

89. What is most significant about the meeting notes is what was not discussed by the directors. Nothing was discussed before November 2001 although the companies came into operation, and entered into their rent liabilities, on 1 June 2001. There was no mention of the precarious financial position of the companies and in particular there was no mention that the only reason the companies were able to continue trading was because their major creditor (HPP) did not insist on full payment of the rent. There was virtually no mention at all of the companies' indebtedness to HPP and LM and when it was mentioned it was only in the first three meetings and I have commented that this discussion took place in a vacuum: accounts were not available.

90. My conclusion from all this that while legally control of the companies rested with the directors, they did not have any real interest in the financial position of the companies nor of the moneys owed by the companies to HPP and LM. It seems there was no discussion by the directors of the level of rent (and other charges by LM and HPP) before the company became bound to pay them and no discussion thereafter of the companies' inability to pay them in full. Therefore, I find that the directors' discussions of financial matters was token.

The directors' role

91. It was Mr Kay's evidence that he consented to be a director of Members and Visitors to help Mr Massey achieve his aims of (a) withdrawing from the management of the club and (b) enabling the club to be more community based.

92. His explanation of how he intended the club to be more community based was to encourage customer loyalty with ideas such as installing suggestion boxes and hosting members' parties. He was asked to explain why the new structure was a prerequisite to any of these ideas being implemented but his answers were vague and off the point. I found he was unable to explain any connection between the new structure and making the golf club more community based.

93. He also stated that the new structure enabled Mr Massey to have some freedom from being at the "helm" of the facility. Yet this seems to be a misunderstanding by Mr Kay of the agreements the companies of which he was director had entered into. The agreements provided for Mr Massey (trading as Leisure Management) to be the manager of the facility on behalf of Members and Visitors, and, as I have said, Mr Massey did in fact manage the facility.

94. While Mr Kay said he had negotiated on behalf of Members and Visitors the various documents entered into, from the detail of his evidence it was clear that no real negotiations had taken place at all (as stated in §§ 70-71 above). Ultimately Mr Kay agreed that he took everything "on trust" in the sense that he trusted that none of the agreements would actually result in the insolvency of either Members or Visitors as it was not in Mr Massey's interest for either company to become insolvent. The sum of his evidence on this was that he thought everyone's interests were identical and the agreements were in everyone's interests and that therefore he had not concerned himself with any of the details.

95. He said that prior to signing the agreements, he had seen the golf club's figures for previous years and that financially the proposals "stacked up" but when probed it was clear that what he meant that he took it on trust from Mr Massey and trusted that it was not in Mr Massey's interests for the structure to fall apart. Mr Kay had not taken any independent advice on behalf of the companies despite also telling the Tribunal that he would not have understood the entirety of all the documents. He said quite a few times that it was not comparable to a normal business negotiation.

96. My conclusion is that Mr Kay had not considered whether the various rents and fees to be paid were fair and reasonable or whether they were actually affordable by Members or Visitors or whether any of the other unusual or onerous terms were in the best interests of the company. From his overall evidence I was given the impression that he had given very little thought to the terms of the agreements at all either at the time they were signed or later.

97. Mr Kay had never considered whether to run the facilities without Mr Massey's management services. He was unable to explain to the Tribunal the contradiction in his own evidence of employing Mr Massey as manager and yet saying that Mr Massey's input in the management of the facility was very limited.

98. His evidence on what was his role as director was confused. Sometimes he would distance himself from any involvement in management but on another occasion claimed that he was running the club. He frequently referred to being able to have "input" and make "comments" about things (such as the cleaning rota and installing a suggestions box.) From his evidence overall, and the evidence of the directors' meeting notes, I find that at most his influence extended to making comments and suggestions to both to staff and to Mr Massey. He also took some formal decisions, such as to approve the accounts.

99. I had no direct evidence from Mr Brown and Mr Hudson. Taking into account the meeting notes which (for the reasons given above) I find reveal virtually no interest by the directors in the true financial position of the company, and taking into account Mr Kay's attitude to his position as director as set out above, that Mr Massey chose the directors he felt comfortable with, and that there was no evidence which suggested otherwise, I find Mr Brown and Mr Hudson's attitude to their directorship would have been as hands-off as Mr Kay's was.

The accounts

100. Visitors: the Tribunal had the accounts for Visitors for the year ended 31 May 2003 with the profit and loss for the previous year as comparables. In other words the Tribunal had the figures for profit and loss for the first two years of trading

101. The figures were roughly similar for the two years of about £300,000 in pay and play payments, which after expenses left nearly £7,000 in profit in the year to June 2002 and (£167) in the year to June 2003. In other words, in both years expenditure was virtually equal to takings.

102. Members: For Members the tribunal only had its profit and loss account for its first year of trading. This showed fees received of about £385,000 and a net profit of approximately £10,000.

103. In summary, from what little accounting information was available Members and Visitors made at best a very small surplus and sometimes a loss. I was told that their liquidation was because they had no funds to pay the VAT assessments. Further, Mrs Parfett's evidence was that she was careful to ensure that the companies never went overdrawn as they had no overdraft, and that this sometimes meant that they paid less than what they owed to HPP and HP LLP. All this supports the accounting evidence that in approximate terms the two companies broke even, with neither loss or nor profit.

104. The partnerships' accounts: the Tribunal had in evidence the financial statements for HPP for year to June 2002, which included the profit and loss account for the year to June 2001 as a comparable. So this showed HPP's profit and loss position in the one year before the new structure was implemented and for the one year after it was implemented.

105. These accounts show that HPP made a profit of about £125,000, almost entirely from the golf shop, in the year to June 2002 compared with about £167,000 for golf club fees and subscriptions the previous year. The rents soared in the second year from about £37,000 to £329,000 as would be expected as it had converted from running the golf club to renting it out. Its expenses seemed about the same save that (putting aside an approximately £50,000 increase in professional fees) a five fold increase from about £25,000 to £126,000 in "cleaning, waste and maintenance". Mr Massey was unable to explain this expense.

106. Overall the accounts showed a loss in both years once expenses, depreciation, finance costs, and partner's salary had been accounted for; but the loss in the year to June 2002 was some £30,000 smaller than previous year despite the increased expenses.

107. HP LLP: The tribunal was only shown the accounts for the year to June 2006. These show a loss of about £134,000. However, a closer look at the figures show that the shop and café were profitable once closing stock was allowed for: the loss was really an accounting loss brought about by a large write down (mostly of goodwill purchased from HPP).

108. Overall profitability: Mr Massey exhibited tables to his witness statement comparing figures which, he said, showed that the returns to HPP and HP LLP were lower under the structure than at other times.

109. The chart was prepared with accounts which were not produced to the tribunal but HMRC did not challenge them on that basis. The tables showed that looking at the overall picture of the owner of the golf club, and adding back in interest and salaries paid to the partners plus the write down of the goodwill in the LLP, a decreasing loss in first four years of operation (1994-1997). Profits of approximately £75,000 and £90,000 were achieved in the next two years. Profits were then down in the first year of operation of the new structure and back up to £98,000 in the year to June 2002. The next four years show a loss.

110. Another summary sheet also prepared with access to accounts not before tribunal showed sporting turnover and total expenditure. The turnover represented the green fees received by the partnership before, and received by Members and Visitors after, the structure was introduced. The expenditure was the expenditure of all the partnerships and companies involved in the golf club operation. The turnover started at approximately £220,000 in 1994 and increased to about £640,000 in 2000. It fell back slightly in next three years down to low of £523,000 in the year to June 2005 and then was back to £600,000 by the year to June 2007. The table showed a steady increase in expenditure throughout the period.

111. From another table it was apparent that the increase in expenditure was largely due to an increase in the wages bill. There was a significant increase of about £55,000 in wages bill in the first year of operation of the new structure. But as this included the wages of HPP and LM as well as Members and Visitors, it was not clear whether

the extra wages were incurred on running the golf and health club, or the shop, café, reception or in management.

112. The wages bill of Members and Visitors remained relatively stable throughout their existence.

113. There was a further hike in wages bill of about £50,000 between 2003 and 2004 and it was clear that this was an increase in staff in HPP. This was at about the time that Mr Masssey withdrew from active management of the club and employed extra staff to take over his management role, and this therefore the most likely explanation for this hike in the wages bill. It was not an increase in the wages costs of Members and Visitors.

114. Members and Visitors' expenses other than wages tended to increase over time: they started at about £20,000 per annum and eventually increased to £67,000 per annum.

115. In summary, I am unable to determine from the scant accounting information whether HP LLP made more money from the golf course during the currency of the structure or after it terminated: I do not have its accounts for the later years. But I do not need to determine this as (for reasons explained below in §§174-177) it is irrelevant.

116. I do find that, contrary to what was said in evidence, Members and Visitors did not invest more in staff over time. Their wages bill remained constant. However, there was a hike in wages costs close to the start of the new structure but, as I have said, I am unable to determine from the little information I have where these new staff were deployed: on the golf course, in the health club, in the shop or café, in reception area or in management or in all?

117. I set no store on the evidence of Mr Kay and Mr Massey that Members and Visitors increased their staff as overall as what they said was vague: the only increase in staff that is clear on the documentary evidence is an increase in reception area and in management staff, and it may be the witnesses were simply referring to the fact that Members and Visitors had to pay a part of the costs of these staff.

118. It was also Mr Massey's evidence that the commercial tenant in 2010 reduced the staff from 30 to 6 and offered reduced service, and it was Mr Gordon's case that this indicated that the companies in the previous 9 years had ploughed back profits by employing extra staff and offering better service.

119. Again this evidence is imprecise. I do not know how many staff were employed in the golf club and health club before the companies took over, during the time the companies operated, and then afterwards. The staff increases and decreases may have been in management, the shop, the café or reception area.

120. If I had to determine the matter I would conclude it against the appellant and determine that they had failed to prove that there was a significant increase in staff in the health club or golf course. This would be on the basis that I have determined that

they have the burden of proof, and they have not discharged it, and it is their claim that the VAT saved by the structure was spent on hiring more staff. However I do not have to determine this as it is not relevant for the reasons I give in §§ 210-215 below.

121. It was also submitted that the companies invested significant sums on additional staff and facilities at the site to avoid operating surplus. I found no evidence of investment in facilities by Members and Visitors.

Advice from Mr Perry

122. The Tribunal was shown a series of advisory letters in 2001 from Mr Perry to Mr Massey. It included a meeting note between Mr Massey and Mr Perry on 18 September 2001 where various matters relating to Members and Visitors (by then already in operation and with directors) were discussed, but the directors did not attend it.

123. Mr Perry's letters contain advice to Mr Massey that he should ensure that directors approve expenditure and hold quarterly meetings. He suggests that the directors should debate a price rise in the fees charged. He advises members and visitors to the club should be informed by notice of the arrangement. It is clear from his letter of 1 June is that this advice is given as HMRC "seem to be concentrating on the substance of the arrangements".

124. The overall impression from these letters is that Mr Perry's advice was at the root of the structure, even down to the holding of meetings of directors and what the directors should discuss. It explains in part the artificiality apparent from the meeting notes: notes which are full of reports of fairly trivial matters but which never discuss what should have been the burning issue of the companies' liability to pay rent and services charges it could not afford.

125. Mr Perry provided draft costings to Mr Massey in February 2001 based on HPP's turnover. HPP's turnover was £620,000. Mr Perry proposed the rent to Members and Visitors should be 50% of this turnover plus VAT (ie £364,250 which is half of £728,500). The figure of £364,250 was used in the tenancy at will and lease but, as reported above, in practice the company only paid at most 50% of its actual turnover. For the two years' figures the tribunal had, this was £282, 278 in the first year and in the year to June 2006 was £220,000. This was very significantly lower than the rent actually due under the terms of the agreement.

126. Mr Perry also suggested Members and Visitors should pay HPP an additional £40,000 in fees. This rough calculation estimates that on this basis Members and Visitors would have a surplus of about £30,000.

127. In October 2001 Mr Perry appears to react to a suggestion that the fees should be increased to £64,000. He points out that this would extinguish any surplus and that the directors might not approve the change unless other charges were reduced. The minutes do not record any change in level of fees but I find (see above) that the accounts show that about £60,000 was paid each year in fees.

128. The costings showed that Mr Perry estimated that the net vat savings would be £86,000.

129. There was a dispute whether the structure was a pre-packaged planning scheme and whether Mr Massey knew this. Mr Massey agreed he was provided with a series of agreements.

130. Findings in other tribunal hearings (*Barnett & another t/a Burghill Valley Golf Course* [2009] UKFTT 119 (TC) and *South Herefordshire)* report that Mr Perry had advised other taxpayers running golf courses on similar schemes with similar documents (even to the transfer of the business being for £200). Mr Gordon objected to the Tribunal relying on findings of facts in other tribunal decisions: while I agree that it would be unusual for a Tribunal to do so, a tribunal is not bound by strict laws of evidence and in this instance the particular evidence relied on was not in dispute in those cases and by ignoring it the tribunal would be shutting its eyes to a remarkable similarity that could not be considered coincidental. Further, it only corroborated evidence in this case: a letter to Mr Massey from Mr Perry actually referred to advice given to other clients in a similar position; Mr Perry also referred in writing to HMRC having accepted the structure (or at least not challenged) the structure at other facilities; and Mr Massey himself attended a conference of the Association of Golf Club Owners who (he reported in his witness statement) advised participants at the conference to adopt the structure. It was obvious Mr Massey knew that other golf clubs had adopted or were considering adoption of similar structures and he did not suggest otherwise. At one point he denied knowing that they were pre-packaged but later agreed it was explained to him that they were pre-packaged.

131. I find based on this evidence, even though some of it would not be admissible in a court, that Mr Massey knew that Mr Perry and others were giving similar advice to other golf club owners to adopt a similar structure to the one that he adopted. I do not have the evidence to conclude that the agreements in this case were "pre-packaged" in the sense of being virtually identical to others used by other taxpayers although it is likely that they were quite similar and I find Mr Massey knew this.

Membership scheme?

132. I mention in passing that there was a dispute between the parties which emerged at the hearing over whether there was or had ever been a membership scheme at Hilden Park. On the evidence, the "members" were people who paid for annual season tickets while "visitors" were those who paid a fee each time they played ("pay and play"). Membership did not secure the members any rights to vote or in any other way control the management of the golf club.

133. No one suggested that it made any difference to the outcome of this case: it seems it was the belief that there was or might be a membership scheme which led to the separation of HPP's business into two separate companies in order to ensure VAT exemption for "pay and play" fees as much as for the annual fees (as explained in §142 below).

134. While the appellants' current view that there was no membership scheme and never had been is likely to be right, I do not decide the issue as I cannot see it having any impact on the decision. Members and Visitors treated the supplies they made as VAT exempt.

The situation after 1 June 2005

135. With effect from 1 June 2005 the second appellant, HP LLP replaced HPP in the arrangements following a transfer of assets from the latter to the LLP. This was done pursuant to an LLP Conversion Agreement of that date. The members of the LLP were Mr Massey, Mrs Beryl Massey, and a Hilden Park Leisure Ltd.

136. The arrangements then carried on substantially as they had prior to 1 June 2005, with HP LLP simply taking over the position of HPP.

The situation after August 2007

137. The companies transferred their trade to new companies in August 2007 and, as mentioned above, entered into liquidation the following month. HMRC have raised assessments in respect of the period following August 2007 but they are not the subject of this appeal, but stayed behind it. These arrangements ceased in April 2010.

The situation after March 2010

138. In April 2010 HP LLP rented out the entire site to a third party commercial operator. This included not only the premises let to Members and Visitors, but the golf shop, café and common areas. Mr Massey's unchallenged evidence was that the new operator of the club reduced the staff from 30 to 6.

139. The company pays rent to HP LLP under a seven year lease. It started at £90,000 per annum and had increased as provided in the lease to £135,000 per annum by 2013. The landlord has no break clause and security of tenure for the tenant is not excluded.

The law

Exemption for sporting services

140. There is no dispute that Mr Massey acted on advice in order (it was thought) to bring supplies of sporting services at Hilden golf club within the VAT exemption.

141. In general, conferring a right on an individual to come onto land to play golf or use health facilities will amount to a taxable supply. However, where that right is conferred to an individual by "an eligible body", the supply is exempt from tax by virtue of Item 3 of Group 10 VATA:

Group 10— Sport, sports competitions and physical education

Item No

…

3 The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part.

142. Supplies of sporting services by an eligible body are therefore exempt except to the extent that that body runs a membership scheme and makes supplies to non-members.

143. The definition of eligible body for these purposes is as follows:

(2A) Subject to Notes (2C) and (3), in this Group "eligible body" means a non-profit making body which—

(a) is precluded from distributing any profit it makes, or is allowed to distribute any such profit by means only of distributions to a non-profit making body;

(b) applies in accordance with Note (2B) any profits it makes from supplies of a description within Item 2 or 3; and

(c) is not subject to commercial influence.

(2B) For the purposes of Note (2A)(b) the application of profits made by any body from supplies of a description within Item 2 or 3 is in accordance with this Note only if those profits are applied for one or more of the following purposes, namely—

(a) the continuance or improvement of any facilities made available in or in connection with the making of the supplies of those descriptions made by that body;

(b) the purposes of a non-profit making body.

144. Notes (2C) to (17) make further provisions for the purposes of determining whether a given taxpayer is an "eligible body".

145. These provisions of UK law were accepted (save for what I say below in relation to the reference in the case of *Bridport* at §§267-273) as implementing the exemption formerly contained in Article 13(A)(1)(m) of the Sixth VAT Directive and now contained in Article 132(1)(m) of the Principle VAT Directive:

Exemptions for certain activities in the public interest

Article 132

1. Member States shall exempt the following transactions:

…

(m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education;

146. The application of Art 132 is subject to Arts 133 and 134. Under Art 133 of the Principal Directive (formerly Art 13A(2)(a) of the Sixth Directive) Member States are

entitled to impose certain conditions in relation to the kinds of bodies that can fall within the exemption:

> **Article 133**
>
> Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:
>
> (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;
>
> (b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;
>
> (c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;
>
> (d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

147. While it is accepted by all parties that the supplies made by Members and Visitors were intended to be exempt under these provisions, I have to decide whether or not in law they actually were. I deal with this below.

VAT status of charges by HPP/HP LLP and Leisure Management

148. Members and Visitors paid rent to HPP (and subsequently HP LLP) under a lease. The payments were free of VAT as neither HPP nor HP LLP had waived the exemption from VAT for supplies of property.

149. Members and Visitors, as set out above, paid various fees for services to Leisure Management, HPP and later HP LLP. These fees were accepted by HMRC as not attracting VAT on the basis that, although the supplies were taxable, Mr Massey (trading as Leisure Management), HPP and HP LLP were not over the VAT registration threshold and not registered or registrable.

150. In other words, the supplies made by Members and Visitors were (or were treated as) free of VAT, and the monies paid by Members and Visitors to the appellants were also free of VAT.

Were the companies eligible bodies?

151. HMRC say that Members and Visitors were not entitled to make VAT exempt supplies. They consider that this is a secondary part of their case as they consider *Halifax* applies irrespective of whether Members and Visitors were eligible bodies. Be that as it may, logically the first thing to consider is what was the VAT status of the receipts of Members and Visitors? Did the structure that was implemented work as intended?

152. Note (2A)(a) to the sporting exemption, set out above in § 143, makes it clear that an eligible body is one which must be precluded from distributing any profit it makes. This is similar, but not identical to the Article of the Principle VAT Directive which it implements, which provides that a non-profit making body must not distribute the surpluses it makes.

153. The CJEU in *Kennemer Golf & Country Club* (Case C-174/00) [2002] STC 502 at §§ 26-28 and §33 held that an organisation was non-profit-making if it did not have the aim of achieving profits (in the sense of financial advantages) for its members; the Court also said it was irrelevant if the organisation systematically aimed to make operating surpluses, so long as the surpluses were not distributed to the organisation's members as profits.

154. *Kennemer* was considered by the Court of Appeal in its decision in *Messenger Leisure Developments Ltd v HMRC* [2005] STC 1078, which held that in determining whether or not a given body has a "commercial aim" for these purposes it is necessary to look at the transactions in question in their full factual context. The court considered that the company, which had accumulated large surpluses, was profit making when it was possible for it, currently unable to distribute its profits, to alter its articles in order to distribute profits to members.

155. *Kennemer* was also applied by the VAT Tribunal in *Hangleton Farm Education Limited* (VTD 19001) which involved a company limited by guarantee being set up in order to carry on a riding school business, with an occupational licence agreement being entered into between the new company and the owner of the premises from which the business was run. The tribunal concluded, by reference to *Kennemer*, that the company was not a non-profit-making body, and so not an "eligible body" for the purposes of the education exemption, because:

> "[52]…the appellant company, although precluded by its Memorandum and Articles of Association from distributing any profit does in practice distribute 'profit' for VAT purposes by paying a licence fee [to the landlord] which is variable by him or at his request…"

156. Although not expressly stated I find that the basis of this decision was that the payment of rent and other fees by the purported eligible body to its landlord was not negotiated at arm's length: no commercial transaction would be entered into on the basis that one party unilaterally controlled the price. Further, the ability of the landlord to determine the amount of the licence fee at will meant he controlled whether or not the purported eligible body made a surplus or a loss. By agreeing to

this, the purported eligible body was in effect agreeing to give covert profit to its landlord.

157. HMRC rely on *Messenger Leisure* to make out their case that Members and Visitors were not eligible bodies. Mr Jones' is of the opinion that as a matter of company law, despite being limited by guarantee, the Memorandum and Articles of Members and Visitors could be altered to permit them to distribute surpluses. I had no submission on whether this is correct as a matter of company law, and I do not need to determine it as it is a sterile argument: as a matter of fact, Members and Visitors did not accumulate profits and would not be in a position to distribute profits even if they could legally change their articles to permit this. This is quite different to the position in *Messenger Leisure.*

158. Perhaps ironically, and anticipating what I say in §§ 267-273 below, it seems to me that question of whether Members and Visitors were eligible bodies depends on the answers to the same questions that would be asked to determine whether the arrangements were abusive. Following *Kennemer* and *Hangleton,* making covert profit distributions would prevent a company being an eligible body: but whether Members and Visitors made covert distributions would depend on whether Members and Visitors dealt with HPP and HP LLP on an arms length basis or paid excessive amounts in respect of rent and fees, which is a question which determines at least the first part of the two part test in *Halifax.*

159. Therefore I put off answering the question of whether Members and Visitors were eligible bodies until I reach a conclusion on the issue of abuse.

Abuse of law

160. It was agreed that the leading case on the European principle of abuse of law is the CJEU's decision in *Halifax* where the Court said:

> "[69] The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law …..
>
> [70] That principle of prohibiting abusive practices also applies to the sphere of VAT.
>
> [71] Preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive ….
>
> [72] However, as the Court has held on numerous occasions, Community legislation must be certain and its application foreseeable by those subject to it …. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them …..
>
> [73] Moreover, it is clear from the case law that a trader's choice between exempt transactions and taxable transactions may be based on

> a range of factors, including tax considerations relating to the VAT system…. Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, as the Advocate General observed in para 85 of his opinion, taxpayers may choose to structure their business so as to limit their tax liability.
>
> [74] In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
>
> [75] Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in para 89 of his opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.

161. The above paragraphs were then summarised in paragraphs 85 and 86 of the Court's judgment which I have already set out above in § 19 of this decision. HMRC's submission is that this gives a two stage test for abuse:

> (1) Do the transactions gave rise to a tax advantage contrary to the purpose of the relevant VAT legislation (national and EU); and
>
> (2) Is it objectively apparent that the principal aim of the transactions was to obtain a tax advantage?

And if this two stage test was met, the transactions should be re-characterised to remove the abuse. The appellant did not agree.

Wrongful?

162. Mr Gordon pointed to the use of the word "wrongfully" by the CJEU in §69 of their decision in *Halifax* to support a proposition that for a court of find abuse of law, the court must not only find a non-commercial purpose but a sufficiently nefarious purpose that could be called "wrong". His point was that in his opinion nothing remotely improper had happened in this case.

163. I do not agree that the test for abuse is any more than as set out in paragraph §86 of the CJEU's decision and in particular it merely comprises the two stage test of (a) accruing a tax advantage contrary to the purpose of the legislation and (b) having such tax advantage as an essential aim. The use of the word "wrongful" in §69 should be seen as no more than a shorthand description of this two stage test: the tax advantage is wrongful because (a) it is contrary to the purpose of the legislation and (b) obtaining it was the essential aim of the transaction. There is no third limb that, in addition to this two stage test, something "wrongful" must have occurred.

164. Mr Gordon also relied, in support of his proposition, on comments by Parker LJ in *Messenger Leisure Developments Ltd* [2005] EWCA Civ 648 where he said:

> "[83] At the outset, I must make it clear that it has not been suggested by the commissioners at any stage that in bringing Developments into use in the way that he has, [the owner of the taxpayer company] has done anything remotely improper. As [counsel] says, it is a commercial decision for a taxpayer whether to arrange his affairs in such a way as to bring a particular supply within the terms of a statutory exemption…."

165. The *Messenger* case involved arrangements similar to those in this case: ownership of the business of three profit making golf courses was reorganised so that the supplies were made by a company intended to be entitled to exemption as non-profit making. Mr Gordon's submission was that 'abuse of law' could not apply in this sort of case because Parker LJ had said in his judgment that there was nothing "remotely improper" in such arrangements.

166. I reject the proposition. Firstly, as a matter of law, most importantly, *Halifax* makes it clear that it is a two stage test (as set out above) and that test does not include one of wrongdoing per se. Secondly, *Messenger* was decided before the CJEU decision in *Halifax* and the concept of 'abuse of law' was not considered and Parker LJ cannot be taken as saying that 'abuse of law' could not apply without 'wrongdoing'. The case was simply about whether the arrangements, of a similar sort to those in this case, were effective: was the company making the sports supplies a non-profit making body entitled to exemption? Thirdly, it is clear from *Atrium Club Ltd* [2010] EWHC 970 (Ch) that arrangements involving the sporting exemption can be abusive under *Halifax.*

167. Lastly, as a matter of fact, Mr Gordon's submission fails to recognise an extremely important distinction between *Messenger* and this case. The trading company in *Messenger* accumulated its profits. While the case was concerned only with whether its supplies were exempt, the recital of the facts suggests that the taxpayer in that case could pay the VAT having lost its appeal precisely because it accumulated its profits. A quite different scenario pertains in this case. Members and Visitors are in liquidation because it was recognised that they could not pay the VAT assessment raised on them. Had these circumstances been the circumstances in *Messenger*, it seems extremely unlikely that Parker LJ would have said that nothing "remotely improper" had occurred. On the contrary, the companies in this appeal implemented a scheme which, if it did not work, would leave them with a VAT liability they could not discharge. This was not the case in *Messenger.* So even if *Halifax* included a test of wrongdoing, which it does not, the appellants could not rely on *Messenger* to show there was nothing wrongful in what they did.

Two or three preconditions?

168. It was also Mr Gordon's submission that the *Halifax* test was a three-stage test:

(1) The transactions must give rise to a tax advantage; and

(2) That tax advantage must be contrary to the purpose of the relevant VAT legislation (national and EU); and

(3) It must be objectively apparent that the principal aim of the transactions was to obtain a tax advantage.

169. In essentials, I cannot see any difference in the two stage formulation of the CJEU and other cases and Mr Gordon's three stage test. I think it is correct to view it as a two stage test, albeit that the first test has two elements. It certainly might be convenient to break down the CJEU's first stage of the test into two elements and consider whether there was a tax advantage and then whether, if there is a tax advantage, whether it was one contrary to the purpose of the Sixth/Principle VAT Directive.

What is a tax advantage?

170. Having set out the test, I have to decide what it means. What is a tax advantage? I consider that a tax advantage will arise where less net tax is payable to the Government (or more net tax recoverable from the Government) under one structure than another.

171. There are likely to be a number of different kinds of tax advantage, such as adopting a structure which allows the recover of a greater amount of input tax than would have been the case if the structure was not adopted, as in *Halifax*, or, as in *Atrium*, whether less net VAT had to be accounted for on particular supplies than if the structure had not been adopted.

172. The parties were agreed that the object of the structure adopted on 1 June 2001 was to allow the fees to be collected free of VAT from members of and visitors to the golf course and health club, whereas if the structure had not been adopted those fees would have remained standard rated.

173. I find as a matter of law that is a tax advantage. While exemption inevitably means recovery of input tax is restricted, it was not suggested that the input tax restriction exceeded the output tax saving and indeed I find that Mr Perry's illustrative costings showed a net tax gain of about £86,000 once irrecoverable VAT was taken into account. Therefore there was a tax advantage in the structure HPP and HP LLP adopted.

174. <u>No financial advantage:</u> It was part of the appellant's case that in practice, no tax advantage had accrued to HPP or HP LLP. Referring to the evidence summarised in §§108-121 above, it was the appellants' case that the financial returns to HPP/HP LLP decreased during the currency of the structure and that overall returns have been much better since the site was let to a third party operator in 2010.

175. I agree with HMRC that the appellant is here confusing financial gain with tax advantage. It is no part of the *Halifax* test that overall the taxpayer must have been better off with the tax advantage than without it. As a matter of law the question here is simply whether there was a *tax* advantage.

176. If the ultimate finding of this tribunal is that the appellants had an abusive tax advantage, it avails them nothing if they can show that financially they would have been better off letting the site to a third party rather than adopting the tax efficient structure. It is simply a commercial misjudgement on their part: it does not affect the application of the principle of abuse of law.

177. I note as a matter of fact that I am unable, on the paucity of information provided, to be satisfied one way or the other whether Mr Massey was better off with the structure adopted or since 2010. Very few accounts are provided and none since 2010. While it was Mr Massey's oral evidence that he considered he was better off, this was merely his opinion and in any event I did not consider his evidence entirely reliable for the reasons given above. If the point was significant (which it is not), I would decide it against the appellants on this point on the basis they had failed to discharge the burden of proof.

What is a tax advantage contrary to the purpose of the Directive?

178. I have considered above what a tax advantage is: a tax advantage by itself is not abusive. The appellants point out that they have the right to chose a tax efficient structure and, it is clear that within certain confines they can do so:

> "By way of a preliminary point, it must be recalled that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system. Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, taxpayers may choose to structure their business so as to limit their tax liability. (§47 of *Part Service Srl* but virtually verbatim §73 of *Halifax)*

179. The appellants' case is that they were entitled to split their business so that instead of an owner-occupier supplying golfing services, the owner supplied the right to occupy to a non-profit making company which supplied the golfing services. In principle, the cases on abuse show that the appellant is right in this.

180. So an appellant has choice; but if it exercises that choice to choose a structure which gives a tax advantage contrary to the purposes of the Principle VAT Directive then (subject to the second limb of *Halifax)*, his tax liability can be redefined.

Must the structure be abusive for Halifax *to apply?*

181. Certain tax efficient structures adopted by taxpayers can be abusive. That is clear from the facts of *Halifax* itself. There the appellant created a complex structure the result of which was that, despite its largely exempt supplies, it could recover a significant proportion of its input tax.

182. And I agree with the appellant that, as a structure, leasing to a non-profit making company, is not by itself an abusive structure.

183. The appellants' case was that they had accepted an invite from HMRC to adopt the structure: HMRC had published guidance stating that it was possible to adopt a structure with a non-profit making company. I agree with this as far as it goes: a structure which involves a profit making company letting a golf course to a non-profit making company is by itself not abusive. It was permitted by EU and UK legislation.

184. However, I find that there can be abuse even if the structure used by the appellant was not by itself abusive. The CJEU itself refers to "an abusive practice" in *Halifax.* And then in *Weald Leasing* the CJEU considered that the leasing structure used was not by itself abusive: only the terms of it might make it abusive:

> "[38] …resort to a leasing transaction in respect of an asset does not automatically mean that the amount of VAT on that transaction will be less then would have been paid if the asset had been purchased.
>
> [39] That being so, the national court will have to determine, first, whether the contractual terms of the leasing transactions at issue in the main proceedings are contrary to the Sixth Directive and of the national legislation transposing it. That would particularly be the case if the rentals were set at levels which were unusually low or did not reflect any economic reality.
>
> ….
>
> [45]. … the tax advantage accruing from an undertaking's recourse to asset leasing transactions, such as those at issue in the main proceedings, instead of the outright purchase of those assets, does not constitute a tax advantage the grant of which would be contrary to the purpose of the relevant provisions of the Sixth Directive and the national legislation transposing it, provided that the contractual terms of those transactions, particularly those concerned with setting the level of rentals, correspond to arm's length terms and that the involvement of an intermediate third party company in those transactions is not such as to preclude the application of those provisions, a matter which it is for the national court to determine. The fact that the undertaking does not engage in leasing transactions in the context of its normal commercial operations is irrelevant in this regard."

185. So it is legitimate to set up a structure so that an exempt trader leases rather than buys assets but only where an abusive tax advantage is not generated by leasing on terms which do not correspond to arm's length terms.

186. I consider the situation in the *Lower Mill* case an example of where only the second type of abuse could have been relevant. This is because there is no reason why the supply of land in the circumstances of that case could not, in a commercial context, be provided separately from the supply of the construction services. To split the two supplies was VAT efficient and the taxpayer had the right to chose to do this. But it would have been abusive if the terms had involved value shifting so that the price paid for the standard rated supply was less than it would have been if the two supplies were made by independent entities.

187. In conclusion there are (at least) two types of abuse: adoption of a structure which of itself gives rise to an abusive tax advantage, or adoption of tax efficient structure on terms which are not commercial and which give rise to an abusive tax advantage.

Is there an abusive tax advantage in this case?

188. I have already determined that there is a tax advantage in this case. Is it an abusive tax advantage?

189. Structure: I agree with the appellants that the structure they adopted was not by itself abusive. The law explicitly provides that some supplies of sporting services will be exempt and others will be taxable depending on the identity of the supplier. The taxpayer can opt between one course or the other and, as Mr Gordon says, it cannot be said that to choose one course over the other the person is necessarily acting "contrary to the purpose of" the legislation.

190. A tax advantage contrary to the Directive: The question is therefore whether the *terms* on which Members and Visitors transacted with HPP and HP LLP were an abusive practice contrary to the rule in *Halifax*.

191. What does abusive mean in this context? It means something that was opposite to the intention of the legislation. The intention of the sports exemption is stated by the CJEU in *Kennemer* as follows:

> "[19] … the exemptions …cover organisations acting in the public interest in a social, cultural, religious or sports setting or in a similar setting. The purpose of the exemptions is therefore to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes."

192. A commercial purpose is the making of profit from a venture. It was clear from that case that the CJEU did not regard making a profit with a view to reinvesting it in services as abusive as no profits would be extracted from the venture: it regarded it as abusive if the profit was made and distributed.

193. So the question is whether the structure enabled covert distribution of profits by Members and Visitors to the appellants. I have already commented (in § 158) that this comes down to exactly the same question that has to be answered to determine whether Members and Visitors were truly non-profit making. This is no coincidence. The question is whether in reality the companies were non-profit making. If they were not truly non-profit making because they covertly distributed profits, they would not have been entitled to the exemption and an attempt by them to obtain the exemption would be abusive.

194. So I must determine whether Members and Visitors were truly non-profit making. As *Lower Mill* suggests, one way of doing this is to look at comparators. As the CJEU says in *Weald Leasing,* I must also look at the terms of the agreements and whether agreements were negotiated at arms length.

Application to the facts in this case

195. As Mr Gordon says, the use of the phrase "tax advantage" implies a comparison, as a structure could not be advantageous if there was not also a different structure which was disadvantageous. The question of comparators, and in particular the correct comparator, was a major issue in the case of *Lower Mill.* The Upper Tribunal said in that case that it was right to compare the actual structure to the same structure involving a third party operator because the structure was not by itself abusive.

196. In this case Mr Gordon says the only comparators would be a comparison to the appellant no longer accounting for output tax or a golf club operating in VAT exempt environment. I do not agree. I think *Lower Mill* is right: it is also binding on me. Where the structure by itself is not abusive, the comparison should be with a third party operator implementing the structure in order to test whether the terms are an abusive practice. So in this case I should compare the position with what would have happened if the site had been let to third party operators rather than Members and Visitors.

The terms of trading

197. When considering whether the terms of trading were abusive, he CJEU has said that the following is relevant although I do not think that the list is exhaustive:

- Contractual terms: in *Weald Leasing* the CJEU said to look at whether the rents were unusually low or otherwise did not reflect economic reality. In this case the question would be whether the rents were unusually high or otherwise did not reflect economic reality.

- Whether the parties dealt on arm's length terms.

198. As I have said in a slightly different context, what is not relevant is the overall financial return to the taxpayer and in particular whether implementing the scheme gave a better or worse return than renting the site to third parties. The question is whether the legislation was *abused* not whether it was financially worthwhile to adopt the structure.

Conclusions on the facts

199. I record my findings on the facts below. None of these findings of fact have depended on whom the burden of proof lay.

200. Comparator: this is a case where it is easy to make a comparison to a third party operator because the site was let to a third party operator in 2010. In that lease the annual rent started at £90,000 (increasing to £135,000 by the date of the hearing) and the property demised comprised the whole of the golf complex, including the shop and café and reception area.

201. Therefore, I find that in 2001 the rent chargeable to Members and Visitors under the terms of the tenancy at will and lease was *four times* higher for a *smaller* demised area. The full rent was never paid, but what was paid was more than twice the initial rent in 2010.

202. This alone strongly indicates that the rent charged to Members and Visitors was considerably higher than would have been paid by an independent operator which, unlike Members and Visitors, had absolutely no connection with the appellants.

203. Although property values fluctuate, no one suggested that the change in property values was the cause of this discrepancy. Mr Massey suggested that the discrepancy was accounted for because the 'profitable' elements only were let to Members and Visitors while the commercial tenant in 2010 took the entire premises, including the shop and café.

204. I reject this explanation. I do not find that the shop and café were loss making. The appellants' evidence was that sometimes franchisees would operate them which would scarcely be the case were they run as loss leaders. Further, what accounts were produced to me do not show the shop and café to be loss making. Even if they were, the new tenant could simply have ceased to operate them. Although I am prepared to accept that the shop and café may not have been the most profitable part of the operation, so that the inclusion of the shop and café in the lease might not have greatly increased the rent a third party was prepared to pay, I do not accept that their inclusion in the lease *decreased* what the third party was prepared to pay in rent, let alone explained a four fold decrease in what rent could be charged.

205. In conclusion, using a comparator of a truly independent tenant, I find that the rent charged to Members and Visitors was excessively high and that this means under the test in *Halifax* and *Weald Leasing* the terms of the lease amounted to an abusive tax advantage.

206. Terms of trading. Putting aside the comparison, and considering the terms of trade in isolation I find as follows:

- The lease and other agreements were not negotiated in any meaningful sense by the directors of Members and Visitors.

- While legally the landlord and tenant were not connected parties, the directors considered their interests to be identical with the landlords' and there was no haggling over terms.

- In practice, the rent was considerably larger than the two companies could afford to pay. Under the terms of the tenancy at will and lease the annual rent should never have been less than £364,250 (the 50% of turnover was only payable if *greater* than this figure). In practice the company appears to have paid between £220,000 and about £280,000 per annum because it could not afford to pay more. This suggests the rent was agreed by the directors without regard to whether it was a commercial rent.

- It is apparent from the advice from Mr Perry that Mr Perry decided on the rental figure (together with the service and management charges) and that the only consideration he gave to whether it was affordable was to ask Mr Massey if it was fair and reasonable. But Mr Massey simply adopted the figures. It is also apparent that Mr Perry calculated the amount to leave at best a small surplus in the operating companies, and that surplus was less than the projected VAT saving. The calculation was not based on what the lease was worth.

- The terms of the agreements were very one sided. The landlord could terminate on one month's notice. The business could also be forcibly re-transferred to HPP on one month's notice. Mr Gordon's opinion was that these were not uncommercial terms if the tribunal took into account that the price of the business transfer was nominal. I cannot agree: Members and Visitors (if acting independently) would of necessity have to take on long term commitments of employing staff and entering into supply contracts and therefore, if operating commercially, would have been most unlikely to agree to terms that that they could lose their business and premises on one months' notice at the whim of the landlord. And it is worth noting that the commercial tenant in 2010 did not agree to such terms.

- Another indication that the agreements were not at arms length was that in the services agreements HPP was entitled to unilaterally increase the price once a year, albeit only in so far as "reasonable". But this was not a defined term and it was most unlikely to be a term agreed in an arms length situation;

- Another indication that the agreements were not at arms length was that they did not reflect what actually was intended to happen. The service agreement was completely inappropriate in the sense that it had LM agreeing to do things which only HPP could perform. And while this might be put down to simply an error which was corrected after a few months of operation when new agreements being drafted, nevertheless Mr Massey and the directors decided to execute the agreement some months after it had been superseded. And according to Mr Massey none of the agreements really reflected exactly what happened in practice.

207. Mr Kay said a number of times in his evidence that it was not a normal business situation and I have to agree. It was not. The terms were uncommercial and very much favoured HPP against the companies.

208. Mr Gordon says the fact that there was cooperation and trust between the two sides to the various legal agreements is not indicative of abuse. It is normal to have trust between parties who contract with each other. I find that Mr Gordon is failing to distinguish between different sorts of trust and cooperation. The normal trust in a commercial situation would be trust that the other contracting party would fulfil their side of the bargain: it would be unwise to enter a contract if you did not trust the other party to this extent. Trust is uncommercial where you trust the other side to determine how much money you will have to pay, which, bluntly, is the sort of trust Mr Kay and

the other directors had in Mr Massey. They did not negotiate the terms of the agreement, they did not concern themselves with whether they were affordable, they permitted the inclusion of terms that HPP could unilaterally increase the prices in the services agreement, trusting that it was not in Mr Massey's interests to force the companies into insolvency. This sort of degree of trust is not the sort that would exist in a commercial context and *is* indicative of abuse.

209. I note in passing that I agree with Mr Gordon that the transfer of the business for £200 by HPP to Members and Visitors for a nominal fee was not indicative of abusive terms. The transfer was part and parcel of the lease. The landlord could terminate the lease at any time on a month's notice and this would trigger a reversion of the business to the landlord. In these circumstances, I would expect the transfer to be for a nominal amount, and the real payment for the use of the premises and the goodwill of the existing business to be as an income rather than capital payment. It was effectively tied up in the rent.

And I note that a similar situation existed with the commercial tenant in 2010: while there were no break clauses, a nominal amount was paid for the business but a substantial amount paid in rent.

210. Expenditure on staff: As I have mentioned it is the appellant's case that the VAT advantage was spent by Members and Visitors on increased staff and other expenses. I have rejected this as a matter of fact in §120 above.

211. But I also reject it as a matter of law.

212. Firstly, it would make a nonsense of the test in *Halifax* if the Tribunal were called to determine which part of the expenses of Newco represented the VAT saved. Members and Visitors had many expenses, the total of which were well in excess of the VAT saved, as would be expected bearing in mind VAT was chargeable (at that time) at less than 20%. How could the Tribunal say one expense rather than another represented the VAT saved?

213. Secondly, even if the appellants could prove that the companies chose to increase expenditure, whether on staff or other facilities, this would be no more than a business decision. Increases in expenditure are made in the hope of increasing revenue and profitability. As this case may demonstrate, such increased expenditure is not always successful in its objective: Mr Massey thinks that by cutting staff (and revenues) the tenant in 2010 was nevertheless able to increase profitability.

214. While the companies could have used surpluses to increase expenditure, demonstrating increased expenditure does not prove that all surpluses were used for this purpose. So the tribunal must look at whether at whether covert profits were paid: even proving that expenditure was increased would not answer this question.

215. Thirdly, and most significantly, it is clear that the CJEU do not require the Tribunal to consider the companies overall financial position and determine whether expenditure was increased. From cases such as *Weald Leasing,* it is clear that the

tribunal is called upon to consider the terms of trading: were the terms what would be expected in a commercial situation? If not, then the structure was abusive.

216. Conclusion: there would be an abusive tax advantage if the appellants received covert profits from a company which made supplies which were treated as exempt on the basis that it was non-profit making. It would be abusive because the legislation only intended exemption to apply to truly non-profit making taxpayers. I find that the rent due to be paid and the rent actually paid by Members and Visitors to HPP and then HP LLP was well in excess of market value and (in so far as it is relevant) in excess to a greater amount than the net VAT saving. I also find that the terms of trading were not at arms length and were very much to the disadvantage of Members and Visitors. Therefore, the payment of rent was a covert payment of profit by Members and Visitors to HPP and then HP LLP.

Did the transactions actually give rise to a tax advantage contrary to legislation?

217. There is a possible irony here. The facts which show that there was an abusive tax advantage also show that neither Members and Visitors were eligible bodies as they paid covert profits. Therefore, they were not entitled to exempt the supplies they made and therefore the scheme failed in law (although not in practice).

218. If the two companies were not eligible bodies, the formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, have not resulted in the accrual of a tax advantage. The question arises whether *Halifax* has any application here at all.

219. This is critical to the appellants. While Members and Visitors should have (but did not) account for VAT as they were not eligible bodies, they are limited companies in liquidation because they did not have the assets to meet the assessments. Members and Visitors will never pay the VAT they owe. HMRC can only have recourse to the appellants if HMRC can raise an effective assessment on the appellants under *Halifax.*

Does Halifax apply as Members and Visitors were not eligible bodies?

220. HMRC's case that as a matter of law *Halifax* applies even if an individual step did not succeed as intended (for example, if the sporting exemption turned out not to be available) provided that a tax advantage contrary to the purpose of the relevant provisions results from the arrangements. They cite *Atrium Club Ltd* [2010] STC 1493, at [34] to [37] as authority for this.

221. *Atrium* involved a scheme similar to the one in this appeal, in the sense the operation of a golf course was passed by the taxpayer to a purportedly non-profit making company which paid rent to the taxpayer. It was found that the operating company making the sports services (comparable to Members and Visitors in this appeal) was not, contrary to the taxpayer's intention, an eligible body entitled to make VAT exempt supplies. Roth J in the High Court had to consider whether, in such circumstances, the taxpayer could be assessed to VAT under *Halifax.*

222. The first limb of the rule in *Halifax* requires that:

> "the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions."

223. The taxpayer in *Atrium* pointed out that the operating company had no tax advantage as its supplies turned out to be standard rated. However, the question of tax advantage to the operating company is, by itself, irrelevant. The question is whether the taxpayer who has been assessed under *Halifax* achieved an abusive tax advantage.

224. The taxpayer in *Atrium* received a turnover rent. It received this free of VAT as it was rent over unelected property. Roth J held that this was a *tax* advantage as receipt of VAT free rent was an essential part of the scheme. And this was unaffected by the operating company's failure to make exempt supplies because the rent was calculated on the mistaken assumption that the operating company was not liable to VAT on its supplies and the operating company in practice would not pay the VAT:

> "[33] When [the taxpayer] itself operated the Club and made supplies of sporting services, it accounted for VAT on the consideration for those supplies. The [scheme] was designed to secure for [the taxpayer] the net proceeds of the supplies by the Club free from liability to VAT. That was to done through establishing a new company to operate the Club that would make the supplies as a non-profit making organisation without attracting VAT, and pay over all the benefit derived from those supplies to [the taxpayer] by way of a licence fee ….which similarly did not attract VAT. And the latter element was necessary…so as to pass the profit over to [the taxpayer] without VAT being incurred. Accordingly I do not accept…that use of the land exemption was no part of the arrangements seeking to achieve a tax advantage.
>
> [34] …I consider that the scheme resulted in [the taxpayer] achieving a real benefit. And, in my judgment, that benefit is properly to be regarded as a tax advantage since [the taxpayer] was not liable to pay VAT on the [licence fee] whereas [the operating company], although, contrary to the parties' understanding, not within the sporting exemption and thus liable to account for VAT on the Club's supplies, had by payment of that fee removed its ability to discharge such a liability. It seems to me that an arrangement which results in that situation is contrary to the purpose of the exempting provisions in the Sixth Directive."

225. The appellant points out that the construction of the first limb in *Halifax* presupposes that the tax advantage results from correct application of the VAT directive: in *Atrium* the tax advantage in fact resulted from an *incorrect* application of the VAT directive: the operating company failed to pay the VAT it should have paid. The scheme as implemented did not work as it was intended. Roth J considered this point too. He said:

> "..that does not mean that if on consideration of the scheme as a whole it is found to produce a tax advantage, application of the *Halifax* principle is precluded because an individual step in the scheme did not succeed."

226. The point is that although the CJEU said the tax advantage was "notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it" it was not a prerequisite of abuse that the scheme had to succeed. This must be right: the taxpayer had taken the tax advantage on the assumption that the scheme worked. It was no less abusive because it turned out he was mistaken on the law because in practice he received the tax advantage.

227. So far as the second limb of *Halifax* is concerned, Roth J said a tax advantage "broadly construed" was the aim of the scheme. In other words, the intended tax advantage was for the taxpayer to take, free of VAT, the benefit of its tenant's making supplies free of VAT. It achieved this benefit but not in the way intended: it intended the operating company's supplies to be free of VAT on the grounds they were VAT exempt as a matter of law; instead the operating company's supplies were in practice free of VAT because it treated them as exempt and did not and could not pay the VAT due.

228. The appellant accepts that the decision in *Atrium* is on this point of law binding on this Tribunal but it does not accept that it is right. On appeal it reserves the right to argue that Roth J was wrong but it cannot do so in this Tribunal. Mr Gordon notes, for instance, that the taxpayer made only written rather than oral submissions to the High Court.

229. Mr Gordon's reasons for criticising the High Court decision are irrelevant in this tribunal in that Roth J's decision, right or wrong, is binding on me. Nevertheless, it is interesting to note that Mr Gordon's chief criticism of Roth J's decision is, as I understand it, based on the same fallacy outlined in §§ 183-184 above. This is that Mr Gordon considers that the intended scheme in *Atrium* was not abusive. As Mr Gordon sees it, the taxpayer had merely accepted an invite in the Sixth Directive and adopted a VAT efficient structure of a non-profit making body making supplies of sporting services. Therefore, reasons Mr Gordon, as, when the scheme failed, the taxpayer received only the same rent as it would have received had the scheme been successful, the failure of the scheme could not convert something that was not an abusive tax advantage into something that was. While I cannot fault the logic in the second half of this submission, the first half is based on a false premise. Roth J clearly considered that the scheme, had it worked as planned, to be abusive. As set out above, it was not a case where the structure was inherently abusive but a case where the terms of the transaction creating the structure were abusive as they were not those that would exist in arms length transactions as explained by the CJEU in *Weald Leasing.*

230. There is therefore nothing in Mr Gordon's criticism of Roth J's decision. While my opinion is irrelevant, I note in passing that I do not consider that Roth J was wrong: read literally there is nothing in *Halifax* which requires the tax advantage

which was the aim of the transaction to be exactly the same tax advantage as was achieved. And in any event there is every reason to suppose that the CJEU would apply abuse of law to a case where the scheme had the intended tax advantage for the taxpayer albeit by a route which, while unintended, was, on a true application of the law, nevertheless an inevitable consequence of the scheme as it was operated. (In other words, the scheme involved leaving Members and Visitors with no surpluses because they paid covert profits; because of this their supplies were not exempt *and* they were without funds to pay the VAT they owed. While it was not suggested the appellants intended this result, it was an inevitable consequence of the operation of the scheme). In practice, the appellants achieved their tax advantage even if, had the law been properly applied by Members and Vistors, they would not have done.

231. In other words, the factors which made the tax advantage abusive also meant the scheme failed as a matter of law. Where the taxpayer took the tax advantage because he considered (incorrectly) that the scheme succeeded in law, then it is still abusive. The only situation I can see in which it would not be abusive would be one, such as in *Messenger Leisure*, where the supplier of the sporting services can and does pay the VAT assessment arising because of the failure of the scheme. In such a case the taxpayer who implemented the abusive scheme does not in practice receive the tax advantage. Any distribution of profits from Messenger Leisure to its shareholders would, I must suppose, have been *less* the VAT assessed by HMRC. There is no risk of double taxation.

232. The *Messenger* situation is not the case here. The appellants in this case received the abusive tax advantage in the form of uncommercially high rent payments from Members and Visitors. Whether Members and Visitors did not account for VAT because their supplies were properly not subject to VAT, or whether they are unable to account for the VAT owed as they are in liquidation, either way HPP (and later HP LLP) received an abusive tax advantage.

The objective aim

233. For the doctrine in *Halifax* to apply, there must not only be an abusive tax advantage but in addition the aim of the transactions must have been to obtain that tax advantage. The CJEU in *Halifax* said:

> "[75] Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in § 89 of his opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages."

Sole or principle aim?

234. There was a dispute whether as a matter of law the prohibited aim (that of seeking a tax advantage contrary to the purpose of the legislation) had to be the sole aim or merely the principle aim of the transactions.

235. In *Halifax* itself the Court referred to the "essential" aim of the transaction (§86). Mr Gordon relied on the use of the word "sole" in §82 but I find that this was not part of the ratio of the CJEU's decision: they were merely reporting a finding of fact of the UK court. In its ratio, the CJEU used the word "essential".

236. The CJEU repeated this test with the word "essential" in the case of *Weald Leasing Ltd* C-103/09 [2011] STC 596 at §30. Moreover, the issue had to be addressed by the CJEU in the later case of *Part Service Srl* (C-425/06) where the structure adopted by the taxpayer had an abusive tax advantage and in addition other commercial advantages. The ECJ held:

> "[45]. … there can be a finding of abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue."

237. In the later case of *Ampliscientifica sr*l (Case C-162/07) [2011] STC 566 the Court referred to transactions carried out "solely for the purpose of wrongfully obtaining advantages provided for by Community law" and cited *Halifax* as its authority. Mr Gordon relies on this to say that it is not settled law whether the purpose must be the sole purpose or merely the principle purpose.

238. I cannot agree. While this is a later case than *Halifax* or *Part Service*, it was not a case on abuse of law but a question on VAT grouping. *Halifax* was mentioned to explain that abuse of law is contrary to EU principles and prevention of abuse was therefore one of the justifications for member states adopting rules which restricted the availability of VAT grouping. In this case, the CJEU referred to the *Halifax* doctrine in only the most general way and most certainly did not intend in anyway to refine the details of it. It certainly did not mention *Part Service* and therefore cannot be taken to have intended to modify what it had said in that case. While it did use the word "solely" in its shorthand summary of what *Halifax* said, its judgments should not be read like statutes, particularly when the court is merely referring to an established doctrine rather than elucidating it. Its use of the word "solely" in this case cannot be taken in any way to qualify what it said in *Halifax* and *Part Service*..

239. Mr Gordon also relied on, as authority that the tax advantage must be the sole aim, the first sentence of §89 of the Advocate General's opinion in *Halifax:*

> "The prohibition of abuse, as a principle of interpretation, is no longer relevant were the economic activity carried out may have some explanation other than the mere attainment of tax advantages against tax authorities….."

240. This was repeated and therefore approved in §75 of the judgment. However, it cannot bear the interpretation Mr Gordon puts on it. Firstly the Advocate General is not drawing a distinction between "sole" or "principle" but considering the position where objectively the sole or principle aim might not be a tax advantage. Secondly, the CJEU approve and repeat the passage in a paragraph where they set the test of "essential aim" and they later explain (in *Weald)* that "essential" means principle rather than sole.

241. Therefore, I find, contrary to Mr Gordon's submissions, that the CJEU is clear that the tax advantage must be the essential or principle aim but it need not be the sole aim. In any event in this case the dispute is academic: as I set out below I find that the new structure had only one aim.

Objective factors

242. It was not in dispute that the test of the essential aim was objective. Nevertheless, that did not prevent the parties referring to what they considered to be the subjective aim. The Upper Tribunal has said, however, in *Pendragon plc and others* [2012] UKUT 90 (TCC) that evidence of subjective motive is inadmissible as the test is objective:

> "[93] …evidence from the finance director of Pendragon which attempts to answer the question as to why Pendragon entered into the transactions would appear to be on the wrong side of the line as to admissibility, as it would appear to deal with the subjective motives of Pendragon and not the objective character of the transactions.

The judge also made the comment that

> "In addition, evidence of that kind, even if admissible, would be likely to be self serving."

243. In this case at least, I am not sure that there is any distinction. The Tribunal would look at the question of aims objectively in order to determine what the subjective intention really was, and in particular whether it was what the appellants said it was. But as a matter of law I do not need to go beyond the first stage: I only need to determine the aims objectively.

244. What are the objective factors that should be considered? In the case of *Part Service Srl* C-425/06 which applied *Halifax*, the CJEU said:

> "[62]. … the national court … may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved (Halifax) (para 81)), those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition of economic objectives arising from, for example, marketing, organisation or guarantee considerations.

245. In *Pendragon*, the Upper Tribunal listed relevant factors at §92. These largely repeat *Part Service's* requirement to look at artificiality and the links between participators but in addition in §93 says the Tribunal should consider:

- The appellant's particular circumstances in general but not its evidence on motive as to why it entered into these particular transactions;

- That evidence as to tax planning advice is to be treated with care as tax payers are at liberty to take tax into account. The question is whether the steps taken were normal and commercial or contrived;

- Expert evidence may be relevant but not essential.

Application to the facts

246. Is there some other explanation for the implementation of the structure at issue in this case other than obtaining an abusive tax advantage?

247. The objective factors are as follows:

(1) The rent was set without regard to what would be paid commercially and was in fact more than the company could afford. This suggests that objectively the purpose of the rent was to strip out the profits from the companies. It was considerably more than a commercial rent.

(2) While the directors were legally independent, in practice they did not negotiate the lease and other agreements.

(3) The directors' only concern with the company's financial position was that Mr Massey would not in practice charge so much that the company would become insolvent: this suggests that the directors knew that the objective was to strip out the profits (but no more) and were content with this situation.

(4) The directors were Mr Massey's friends and he was "comfortable" with them. The evidence shows that no real independence was exercised by the directors and in practical terms they were ciphers.

(5) The legal agreements allowed Mr Massey to regain legal control of the business on one month's notice. So were the directors ever to try to retain profit within the companies or do anything with the facility with which Mr Massey did not agree, he could collapse the arrangements. In particular, he could give one month's notice to terminate the lease and have the business re-transferred to HPP or HPP LLP. Security of tenure for the tenant was excluded by court order.

(6) In practice, Mr Massey was in control. Mr Massey chose the directors. The directors did not meet for the first six months of operation and then had no real interest in the financial position of the companies. The directors were not at the 18 September 2001 meeting with Mr Perry when the position of the companies was discussed, while Mr Massey attended every meeting of the directors. Tellingly it was Mr Massey who attended the conference about the *South Herefordshire* and was therefore instrumental in the companies' decision to liquidate.

(7) The effect of the debenture was that financially Mr Massey would be able to compel the company to pay the rent: objectively this degree of control was intended from the outset.

(8) Advice on the scheme was taken from a VAT consultant and his advice discloses that no consideration was given to the commercial position of Members and Visitors. The terms were not negotiated.

(9) Mr Massey remained in control of the companies' business as he remained the manager (as a partner in Leisure Management).

248. In summary, while legally autonomous, in practice HPP (and then HP LLP) could reclaim the premises and business, so the companies were not in practice autonomous. The directors did not in practice act independently and this is not surprising when the evidence was that Mr Massey selected his friends to be directors. The agreements were not negotiated at arms length and even then the terms of them (particularly as to sums paid) were not adhered to by consent on both sides.

249. None of this is consistent with normal commercial practice. The arrangements were artificial in that (objectively speaking) they appear intended to create a picture of fully autonomous non-profit making companies running the golf and health club when the reality was that HPP and Mr Massey remained very much in charge and in a position to extract from the new companies the VAT saving.

250. My conclusion is that objectively speaking the sole and essential aim of the new structure was an abusive tax advantage.

251. I have a few points of detail to make on these conclusions:

252. HMRC consider the fact that the scheme was pre-packaged relevant. The Upper Tribunal in *Pendragon* thought that it might be relevant. But it is clear that the Upper Tribunal meant it could only be relevant to whether the planning was commercial or not commercial. The mere fact the planning is *pre-packaged* does not answer this as even legitimate tax planning could be pre-packaged. What is significant is the sort of advice given by the advisers. Were figures proposed with no commercial input? As I have said in this case the evidence was that the parties adopted Mr Perry's figures from illustrative costings, there was no negotiation nor reference to valuers nor any other means to determine market value. This does suggest the arrangements were artificial because the parties did not consider the actual market rent to be relevant.

253. The appellants' case is that the main purposes of the structure were:

- to enable Mr Massey to withdraw from management; and
- to make club a community based club; and
- to enable profits to be ploughed back in to improve the facilities.

I cannot accept that any of these factors were objectively even a subsidiary aim of the scheme:

254. <u>Withdrawal from management?</u> Firstly, as I have already said, in fact Mr Massey did not withdraw from management. He remained the manager. All that happened is that he delegated his management to employees for a few years. The

structure did not and was not designed to facilitate his withdrawal from management. The agreements from the outset provided for Mr Massey to manage the facility. This never changed. Further, had Mr Massey wished to withdraw from active management (and I accept that to an extent he did), the structure was superfluous to his achieving that object. HPP could have retained the business and all Mr Massey needed to do (which in fact is what he did) was employ someone to manage the business for him.

255. Objectively speaking, the structure did not and was not designed to facilitate Mr Massey's withdrawal from management. It was not even a subsidiary benefit of the structure.

256. Community based club? Secondly, there was nothing in the design of the new structure which made the club a more community based club. At its strongest the evidence was that under the new structure, there were community based initiatives. For instance, a suggestions box for members was introduced and there were members parties and a certain amount of sponsorship combined with advertising (such as a bouncy castle loaned out for free) undertaken. Firstly, there was no evidence that these sorts of initiatives were not undertaken when HPP owned the business; secondly, there was no reason at all why HPP could not have undertaken these initiatives while it remained the owner of the business. The structure did not in any way facilitate these initiatives and therefore objectively speaking, they could not have been the objective.

257. To the extent it was the appellants' case that the new structure brought in the ideas of the directors, who were not previously involved with the management of the club, I reject this. Not only was the directors' role in the companies token, I have found that largely it comprised making suggestions. Mr Kay could have been consulted with for his suggestions: the structure under which he was made a director was entirely unnecessary just to enable him to suggest improvements.

258. I reject this as an objective aim of the structure at all. It was certainly not the principle aim.

259. Ploughing back the VAT? The appellants' last claimed objective was to save the VAT on the fees in order to plough back the money that would otherwise have represented VAT into facilities. I have already said that the evidence does not show that any money was ploughed back into facilities by the new companies. The evidence does show an initial increase in wages bill although I have not been able to determine from the information produced by which entity these new persons were employed, and have therefore determined (as it is for the appellants to prove their case) that they have not satisfied me that the increase in staff related to the golf and health club.

260. But even if I had been satisfied of this, I would not accept that this was the aim of the structure. If the aim of the structure had been to enable the saved VAT to be ploughed back in then the terms of the structure would have been commercial. The rent would have been commercial and the companies would have been given autonomy. Instead, as I have already said, the agreements were not at arms-length,

the rent was much higher than would have been agreed in an arms-length transaction and the terms were such that HPP could have collapsed the arrangement on one month's notice for any reason.

261. Seen in context, objectively speaking the aim of the structure was not to permit the company to plough profits back into the facility.

262. Lastly, it was also the appellants' case that their failure to make more profit from their ownership of the golf facility indicates that they were not stripping out VAT in profits. I reject this for the reasons given above. The evidence suggests that the failure to make larger profits was due to Mr Massey's temporary withdrawal from a management role and a decision to employ a large staff. In any event, this is a roundabout way of saying that the VAT saved was expended on staff and facilities, and I have rejected this on both facts and law.

Re-definition

263. I am satisfied that the arrangements between the appellants and Members and Visitors were an abuse of law: they were objectively intended to and in practice did realise a tax advantage contrary to the purpose of the Sixth and Principle VAT Directives.

264. The effect of such a finding is that the transactions:

> "must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice" (see *Halifax* at [94]).

265. The supplies of sporting services made by HPM and HPV accordingly fall to be redefined as supplies made by HPP (in the period from 1 June 2001 to 31 May 2005) and by HP LLP (in the period 1 June 2005 to 31 August 2007). This is in accordance with the redefinition prescribed by the High Court in *Atrium Club* (see [47]) in relation to what was effectively the same scheme.

266. No issue was taken at the hearing with the manner in which HMRC had redefined the supplies nor with the amount of the assessment. As the issue was not raised, I accept that HMRC correctly redefined the transactions and dismiss the appeal.

New ground of appeal

267. On 3 June 2013 the Appellants served amended grounds of appeal on the Commissioners, which included as ground 6 a new challenge that:

> "The legislation that distorts competition between different types of golf operator is in breach of the Treaty of Rome."

268. This ground of appeal seems to suggest that the appellant considers that Article 132(1)(m) of the Principle VAT Directive creates unlawful distortion of competition

between profit making and non-profit making sports bodies and that therefore the supplies of all sporting bodies should have the benefit of exemption.

269. The parties were not agreed as to whether the appellant required the leave of the Tribunal to amend their grounds of appeal. However, I was not called on to decide this at the hearing because the appellant chose not to pursue this new ground at the Tribunal although Mr Gordon said that they reserved the right to rely on this new ground on any appeal from my decision should it go against them.

270. HMRC's view was that, if my leave was required, I should refuse it; and if it was not required, I should simply strike out this part of the appellant's case as having no prospect of success. They considered that this Tribunal had no jurisdiction to consider it. However, while I agree that this Tribunal could not determine such an issue, it could refer a question to the CJEU if it had real doubts about the compatibility of the Principle VAT Directive with the Treaty of Rome.

271. The appellants referred not only to the Treaty of Rome but also to the recent reference by the Upper Tribunal to the CJEU in the case of *Bridport and West Dorset Golf Club Ltd* [2012] STC 2244. As the appellant chose not to pursue this ground of appeal, I do not know what they consider the relevance of this case to be to this appeal. It is not obvious. The reference is about the compatibility with the UK legislation (which distinguishes between members and non-members of non profit making clubs) with the Principle VAT Directive. This issue does not affect the appellant as exemption was not denied on the basis that that there were supplies by a members club to non-members. And there is no question regarding the compatibility of the Principle VAT Directive with the Treaty of Rome in the *Bridport* case.

272. Putting aside the question of whether this ground has any prospect of success, I can deal with the issue quite simply. The appellant does require leave in order to amend its grounds of appeal. And while the appellant asked for leave to amend its grounds of appeal, it made it clear that it would not pursue the new ground of appeal in the Tribunal. There is no point in giving leave to argue a point that the appellant does not wish to argue and so I refuse to give leave. I do not need to consider whether the point is arguable.

273. If the appellant wishes to make an appeal against my decision and gets leave to do so, and also wishes to pursue this ground on such an appeal, it must ask for leave from the Upper Tribunal.

Identity of supplier

274. A few days after hearing of this case CJEU published its decision in *Newey* C-653/11. The ratio of this decision was:

> "Contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a 'supply of services' …. They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial

> arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine."

275. I comment in passing that the effect of the decision is that it might not have been necessary to re-characterise the supplies of sporting services as being made by HPP and HP LLP: the effect of *Newey* might be that the suppliers always were HPP and HP LLP and not Members and Visitors. However, the point was not argued and I do not need to decide it. The recharacterisation following the application of *Halifax* is that HPP and HP LLP are treated as having been the suppliers.

Costs

276. Both parties accept that this is a transitional case in which the old costs rules have been directed to apply. HMRC have succeeded in their appeal and it was clear from their skeleton that therefore they are seeking their costs from the appellants. It is also clear from the appellants' skeleton that they would oppose such an application on the grounds that they rely on the Sheldon statement.

277. Neither party addressed me at the hearing on whether the Sheldon statement would apply and so my direction is that no later than 56 days after the release of this decision the appellants should indicate whether they continue to oppose HMRC's application for costs. If they do not give any such indication, I will make an order for costs in HMRC's favour. If the appellants do give such an indication, I will issue directions for HMRC's application to be decided at a hearing or on the papers.

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

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 16 July 2013