Neutral Citation: [2022] UKFTT 168 (TC)

Case Number: TC08495

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/00989

VALUE ADDED TAX – option to tax election – sale of site with planning consent for development – transferor hitherto as lessor of buildings on site – structure of sale agreement as Transfer of a Going Concern (TOGC) – article 5 of SPO – whether there was a property development business being transferred – whether there was a property lettings business being transferred in the alternative – ***appeal dismissed***

Heard on: 3 to 5 November 2021
Judgment date: 18 May 2022

Before

TRIBUNAL JUDGE HEIDI POON
MEMBER JULIAN SIMS

Between

HAYMARKET MEDIA GROUP LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Thomas and Quinlan Windle, of counsel, instructed by Dechert LLP

For the Respondents: James Puzey, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal by Haymarket Media Group Limited against a notice of assessment to VAT dated 18 January 2019 in the sum of £17,000,000 for the period 01/16.

2. The appeal was originally brought by Haymarket Group Properties Limited ('**Haymarket**' or '**HGPL**') as the vendor in the sale transaction. The parties agree that the appellant should have been Haymarket Media Group Limited as the representative member of the VAT group of which HGPL is a member; (henceforth the '**appellant**'). By Tribunal's directions of 28 July 2020, the appellant was substituted for HGPL in these appeal proceedings. The appellant and Haymarket are both companies in the same group ('**Haymarket Group**').

3. The VAT assessment was in consequence of the ruling by the respondents ('**HMRC**') by letter dated 14 January 2019, which concluded that the sale of land and property at Teddington Studios, Middlesex ('the **Property**' or the '**Teddington Site**') was a supply of an asset and not a supply of a business as a transfer of a going concern ('**TOGC**') for VAT purposes.

4. In its VAT return for 01/16, the appellant had treated the sale of the Teddington Site by HGPL as a transfer of a going concern under the terms of domestic legislation, and therefore involving neither a supply of goods nor a supply of services for VAT purposes.

5. For the avoidance of doubt, the Tribunal only has jurisdiction in respect of appealable decisions which fall into one of the categories set out in section 83(1) of the Value Added Tax Act 1994 ('**VATA**'): *Buckingham Bingo Limited*. The appealable decision is the notice of VAT assessment of 18 January 2019. The respondents' ruling in relation to the substantive issue by letter of 14 January 2019 is not a decision that falls within the scope of s 83(1) VATA.

EVIDENCE

6. The joint bundle of documents (of 1999 pages), together with witness statements and exhibits are lodged. The parties called the following witnesses, who appeared in the order of:

(1) For the appellant, David Ashcroft, Chief Executive of Dartmouth Capital Advisors Limited, which was appointed in 2013 as the UK adviser to the Singaporean property company, the ultimate purchaser of the Teddington Site. A substantial bundle of exhibits totalling 2977 pages is lodged to accompany Mr Ashcroft's witness statement.

(2) For the appellant, Philip Goodman, Group Financial Controller of Haymarket Group since 1 November 2010.

(3) For the respondents, Officer John Barker, a VAT specialist and the decision maker of the ruling that resulted in the assessment under appeal.

7. We have no issue with the credibility of any of the witnesses, and accept their evidence as to matters of fact, but have set aside any statements that represent opinion evidence.

8. As to Mr Ashcroft's evidence, we have reservations about some of the explanations given as regards the intentions of the parties entering into the lease and sale agreements in issue. We have regard to the fact that Dartmouth, whilst being the UK adviser to, and representative of the purchaser, was not a party to the sale agreement that gave rise to the TOGC contention. We have accorded more weight to contemporaneous documents which evidence the parties' intentions at the time, and to the circumstantial factors which inform our findings of fact for the purposes of determining this appeal.

LEGISLATION FRAMEWORK

9. By provisions of the Principal VAT Directive (2006/112/EC of 28 November 2006) (**'PVD**'), member states are authorised to implement domestic legislation for business transfers not to be regarded as supplies of goods or services. The relevant Articles in the PVD are:

(1) Article 19 in relation to the supply of goods provides as follows:

> 'In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place, and that the person to whom the goods are transferred is to be treated as the successor to the transferee.
>
> Members States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition. They may also adopt any measures needed to prevent tax evasion or avoidance through the use of this Article.'

(2) Article 29 states: 'Article 19 shall apply in like manner to the supply of services'.

10. The UK has implemented Articles 19 and 29 of the PVD by enactment under article 5 of the Value Added Tax (Special Provisions) Order 1995/126 ('**SPO**'), which provides as follows:

> (1) Subject to paragraph (2) below, there shall be treated as neither a supply of goods nor a supply of services the following supplies by a person of assets of his business –
>
> (a) their supply to a person to whom he transfers his business as a going concern where –
>
> (i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor, and
>
> (ii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person … ;
>
> (b) their supply to a person to whom he transfers part of his business as a going concern where –
>
> (i) that part is capable of separate operation,
>
> (ii) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor in relation to that part, and
>
> (iii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person ...
>
> (2) A supply of assets shall not be treated as neither a supply of goods nor a supply of services by virtue of paragraph (1) above to the extent that it consists of –
>
> (a) a grant which would, but for an option which the transferor has exercised, fall within item 1 of Group 1 of Schedule 9 to the Act; or
>
> (b) a grant of a fee simple which falls within paragraph (a) of item 1 of Group 1 of Schedule 9 to the Act,
>
> unless the conditions contained in paragraph (2A) below are satisfied.
>
> (2A) The conditions referred to in paragraph (2) above are that the transferee has, no later than the relevant date–
>
> (a) exercised an option in relation to the land which has effect on the relevant date and has given any written notification of the option required by paragraph 20 of Schedule 10 to the Act; and

(b) notified the transferor that paragraph (2B) below does not apply to him.

[…]

(3) In paragraph (2) of this article –

"option" means an option to tax any land having effect under Part 1 of Schedule 10 to the Act;

"relevant date" means the date upon which the grant would have been treated as having been made or, if there is more than one such date, the earliest of them;

"transferor" and "transferee" include a relevant associate of either respectively as defined in paragraph 3 of Schedule 10 to the Act.

11. There has been no divergence following the exit of the UK from the European Union on 31 December 2020, either through legislation or appellate courts. Consequently, the parties are agreed that retained EU law, both domestic and the Court of Justice of the European Union (' '), remains the relevant law for the purposes of this appeal: section 4 of the European Union (Withdrawal) Act 2018 ('the **2018 Act**').

12. EU case law continues to apply to the interpretation of the SPO and VATA as retained EU law, subject to limited exceptions as provided by sections 5(2) and 6(1) and (2) of the 2018 Act: *Target Group* at [97]. Consequently, the SPO and VATA continue to be interpreted in conformity with the principles derived from European jurisprudence: *Marleasing* at [8].

AUTHORITIES

13. The citations of authorities lodged by the parties are set out in the Annex. The additional authorities referred to in this Decision and not included in the bundle are marked by an asterisk.

THE FACTS

Background

14. The Haymarket Group was formed in 1995 as a publisher of magazines. It is now an owner of brands in a variety of media including exhibitions and online content.

15. According to Mr Goodman's evidence, which we accept, that 'from the late 1970s until 2015, the Haymarket Group was also a property owner, utilising those properties for its own offices, as investments and as rental opportunities'. The Group acquired its first freehold site in 1977 and continued to own freehold sites in central and outer London until 2015. These sites were refurbished for office use when acquired, and were all eventually sold for development.

16. Haymarket was a subsidiary of the Haymarket Group. During the period relevant to this appeal, Haymarket's accounts described its principal activity as investment in freehold properties. The appellant is the Representative Member of the VAT Group, of which Haymarket has been a member on joining the VAT group from 22 January 2004.

17. In the period prior to the sale, the Teddington Site was occupied by the Haymarket Group as its business premises, concurrently with tenants to whom leases had been granted or assigned by Haymarket as the owner of the site.

Entities and their roles

18. Pinenorth Properties Ltd ('**Pinenorth**') was the Purchaser of the Teddington Site. Pinenorth is a Jersey company incorporated on 8 April 2014 as a Special Purpose Vehicle ('SPV'), and a wholly owned subsidiary of Welland Investments Limited ('**Welland**'), another Jersey incorporated company formed on 6 June 2013. Welland, in turn, is a wholly owned subsidiary of a large Singaporean property company. Welland is an intermediate holding company, through which all UK property investments of the Singaporean property company are held. Pinenorth is described by HMRC as a 'non-established trader ultimately owned by City Developments Ltd' ('**CDL**'), a company incorporated in Singapore.

19. In relation to the acquisition of the Teddington Site, Welland and Pinenorth were advised by Dartmouth Capital Advisors Limited ('**Dartmouth**'). Dartmouth is a UK incorporated company owned by David Ashcroft and Guy Duckworth, who are also two of its directors. Dartmouth is an asset manager, and specialises in advising offshore clients wishing to invest in UK real estate.

20. Other entities referred to in this appeal include:

(1) Teddington Studios Ltd, ('**Teddington Studios**') was a tenant on the Property.

(2) Hartstone Enterprises Ltd ('**Hartstone'**) was the entity from which HGPL acquired the Teddington Site; was incorporated in Isle of Man and dissolved on 7 October 2005.

(3) Southern Demolition Company ('**SDL**') was contracted by Pinenorth to strip out some of the existing buildings on the Teddington Site prior to their demolition.

Haymarket's ownership of Teddington Site

21. The facts relevant to Haymarket's ownership of the Teddington Site for this appeal are:

(1) On 26 January 2004 Haymarket had elected to opt to tax in respect of the Teddington Site to be purchased, and notified HMRC of its election on 27 January 2004.

(2) On 10 March 2004, HMRC acknowledged the notification. At around the same time, Haymarket applied to become a member of the appellant's VAT group with (retrospective) effect from 20 January 2004.

(3) On 20 July 2004, Haymarket acquired the Teddington Site from Hartstone and inherited a lease granted by Hartstone with the following details:

(a) The lease was granted on 22 October 1999 to Teddington Studios, a subsidiary of Pinewood Group Limited, (a film and television studio company unconnected with the Haymarket Group) for a term of 25 years.

(b) The lease provided for annual rent (exclusive of VAT) of £500,000 from 24 August 2001 until 24 August 2004; £650,000 for the next five years, and then rent to be determined in accordance with rent reviews every five years with the first review being on 24 August 2009.

(c) The benefits and burdens of the leases with Teddington Studios were passed to Haymarket, and were amended and supplemented on several occasions.

(d) An agreement dated 24 September 1999 between Teddington Studios Ltd and Vodafone Ltd for the installation of telecommunication apparatus (antennas and dish antennas) for an annual fee of £5,500; the sub-lease by Teddington Studios to Vodafone continued after the change of ownership to Haymarket.

(4) On 12 July 2010, Haymarket granted a lease of a significant part of the Teddington Site to Haymarket Publishing Services Limited, another subsidiary of the Group. The term of the lease was to expire on 18 March 2019, with initial rent of £1,449,000 per annum, subject to review. The Group had circa 1,000 people working on the Site.

(5) On 22 September 2011, Teddington Studios exercised a break right to surrender the lease granted on 22 October 1999, with the exit date being 24 December 2014.

Planning permission application

22. In 2013, Haymarket made the decision to apply for planning permission to develop the Teddington Site with a view to selling the site with the benefit of planning consent. Mr Goodman's evidence referred to the fact the Group's borrowings stood at £100m, and it was

necessary to reduce the costs of borrowings with the sale proceeds from the Teddington Site. The Group's balance sheet position at the time underpinned Mr Goodman's statement that:

> 'The capital costs of carrying out the development were in excess of what the Haymarket Group could realistically have afforded; there was no real expectation that the Haymarket Group would carry out the whole development.'

23. By email dated 6 December 2013, Mr Soper (Principal Director of TP Bennett LLP) wrote to Jeremy Duckworth (Group Finance Director of Haymarket Media Group) in relation to the fee proposal for architectural services for 'redevelopment of the Teddington Studios site', described by Soper as 'currently includes your own headquarters buildings'. Soper's fee proposal of seven long substantive paragraphs sets out the 'brief', and concludes with the provision of a licence to be passed on to the prospective purchaser.

> 'The brief from yourselves is quite clear in that you wish to maximise the amount of residential floorspace and hence value for this site. This involves minimising the affordable housing required as well as the relocation of existing office content elsewhere in the borough… *You then intend to sell the site with the benefit of consent to the best offer from a developer*.
>
> For a project of this scale and complexity, given its prominent and sensitive location it does present many challenges including that of carefully crafted, clever design. …
>
> I would therefore, taking all the foregoing into account, suggest a fee of £330,000 plus VAT for the Planning Stage and then a success fee of £50,000 plus VAT on receiving a Planning Approval. This will also then provide you with a licence to use our drawings which can be passed on to the prospective purchasers. This is, as ever, subject to the usual exclusions.' (italics added)

24. The application process involved the engagement of some 14 different consultants, and the expenditure of more than £870,000 in fees over a period of about 18 months. The earliest invoice for consultancy fees was dated 17 April 2013. The engagement of the firm of architects (TP Bennett) by Haymarket was in May 2013.

25. On 7 March 2014, Haymarket submitted an application for planning permission to London Borough of Richmond upon Thames, and the permission sought included:

(1) Demolition of the existing buildings, with the exception of Weir Cottage;

(2) Erection of buildings containing flats, ranging from 3 to 7 storeys above ground.

(3) Erection of six three-storey houses along the Broom Road frontage;

(4) Provision of 258 car parking spaces at basement and ground level;

(5) Closure of existing access and provision of two new accesses from Broom Road;

(6) Provision of a publicly accessible riverside walk, together with cycle parking and landscaping.

26. On 22 October 2014, the London Borough of Richmond upon Thames resolved to grant planning permission, subject to the signing of a Section 106 Agreement setting out the planning obligations to be provided by Haymarket to the Council.

27. On 19 December 2014, planning permission was formally granted to Haymarket for the construction of 213 flats and 6 houses on the Teddington Site, together with other aspects in the planning application as set out above.

Section 106 Planning Agreement

28. The Planning Permission Application dated 7 March 2014 was accompanied by the Heads of Terms for a Section 106 Agreement, also dated 7 March 2014. The final terms of the Section 106 Agreement to accompany the grant of the planning permission varied slightly, but the terms remained essentially the same as those drawn up at the planning application stage, which are summarised as follows:

(1) *Financial Payments*: Haymarket shall pay to the Council: (a) a Transport payment of circa £1.42m; (b) a Public Realm payment of circa £226,321; (c) a Health Payment of £57,360; (d) an Education payment of £886,052.

(2) *On-Site Affordable Housing*: to construct 12 units of affordable housing on the Site (4 one-bedroom, and 8 two-bedroom units), and to transfer the freehold interest to a Registered Provider.

(3) *Off-Site Affordable Housing Contribution*: Haymarket to pay the Council £3m towards the provision of affordable housing, and to work with the Council to identify a site in the Council's area for such provision.

(4) *Highway Works*: closing three existing and form two new vehicular access points; widen existing footway, and dedicate the same as public highway for Council's adoption.

(5) *Riverside Pedestrian Walkway*: detailed specifications on location, security, management, right of public access across the development once works are complete.

(6) *Relocation of Haymarket Media Group*: Haymarket shall use reasonable endeavours to purchase from Richmond upon Thames College (RuTC) a freehold (or long leasehold) interest in RuTC's land at Egerton Road, Twickenham to accommodate the construction of a building of no less than 125,000 square feet Class B1 floorspace.

29. The actual Section 106 Agreement is somewhat buried in Mr Ashcroft's bundle of near 3,000 pages of exhibits, which are unindexed and unpaginated, and contains at least 49 documents. The Agreement (at pp 2706-2742 of the exhibits bundle) provides for the detailed terms of the many conditions to be imposed for granting the planning permission, as outlined (and in addition to) those Heads of Terms of March 2014 to accompany the planning permission application.

30. The Section 106 Agreement was by Deed dated 9 December 2014, and included an undertaking by Haymarket towards a local facility called the Tech Hub, and a commitment to relocate its office premises within the Richmond Upon Thames borough, whilst the conditions relating to the Property itself were to be fulfilled by Haymarket's successor in title, including £8m towards affordable housing – 'a tax on developer' as referred to by Mr Ashcroft.

Events leading to the exchange of contracts

31. The dates in relation to the key events leading up to the exchange of contracts between Haymarket and Pinenorth for the sale of the Teddington Site are summarised as follows.

(1) In June 2014, Savills was instructed to market the Property.

(2) Between October 2014 and February 2015, Haymarket entered into Letters of Appointment with 12 of the consultants who had been engaged for the planning process with the view that the rights under these Letters of Appointment should be assigned to a purchaser of the Teddington Site.

(3) For instance, a letter from TP Bennett setting out the 'Terms of Engagement' was dated 5 November 2014, and coincided with the Council's resolution to grant planning consent on 22 October 2014, and 2 days before the Property was brought onto the market.

The material aspect of the terms of engagement from TP Bennett concerns the warranty and licence to be granted by TP Bennett in the following terms:

> 'We confirm that upon request we will enter into (a) a Collateral Warranty … and (b) a Copyright Licence in favour of any purchaser of the Site from you…[details of which in appendices to the letter of engagement]'

(4) On 7 November 2014, the Teddington Site was formally brought to the market with a marketing brochure, and Savills was instructed to market the site to interested parties, and direct approaches to possible purchasers would probably have been made. Savills invited bids and a deadline of 12 noon on 5 December 2014 was set.

(5) On 18 November 2014, Mr Ashcroft and Mr Duckworth, as directors of Dartmouth inspected the Teddington Site with a view to advising Welland and Pinenorth on whether the Property was worth acquiring, and if so on the bid price.

(6) On 5 December 2014, Pinenorth submitted a bid of £85m for the Teddington Site.

(7) On 19 December 2014, Heads of Terms were sent by Savills to Dartmouth.

(8) From 10 to 12 December 2014, Pinenorth was given access to data room.

(9) On 24 December 2014, the lease with Teddington Studios Ltd terminated. On the same day, a new lease was granted by Haymarket to Dartmouth: 'the **Dartmouth Lease**'.

(10) On 24 December 2014, the contracts for the sale of the Property were exchanged.

The Marketing Brochure

32. The Site was marketed as 'Teddington Riverside', and the particulars in the brochure relevant to our consideration are summarised below with the brochure headings in italics:

(1) *Teddington Riverside:* the subject matter for sale is described as follows:

> 'A rare, riverside development opportunity in prime, south west London.
>
> Planning permission for demolition of the existing buildings and redevelopment to provide 213 new build apartments and 6 new build houses together with 258 parking spaces and refurbishment of an existing house.
>
> Proposed new build, net resaleable area of 20,830 sq m (224,211 sq ft)
>
> 1.8 hectares (4.45 acres)
>
> Freehold for sale.'

(2) *History of the Site*: reference to Teddington Studios as being established in early 20th century and 'has long been at the heart of the UK entertainment industry', with an output ranging from silent films to popular TV programmes such as The Benny Hill Show, Morecambe & Wise, Minder, and The Office, and association with entertainment icons such as The Rolling Stones and The Beatles.

(3) *The Site*: Teddington Riverside is described as 'a broadly square site situated on the north bank of the Thames'; extending to approximately 1.8 hectares comprising 'a series of non-descript buildings' that had been adapted and extended in the previous eight decades and 'currently in office and film studios use'.

(4) *The Development*: this section contains four landscape photographic imaging of what the developed site would look like, with the following description:

> 'The development proposals … seek to open up the site and create greater connectivity between Broom Road and the River Thames. … in a scheme with a wharf-like ambience in a parkland setting. The proposals are sympathetic to the site's riverside location and its partial positioning in the Teddington Lock Conservation Area.'

(5) *Area Schedule*: the site plan with the proposed buildings (Block A to E) and 6 houses with a table setting out the number of units in each block and their respective resaleable area to arrive at the total of 20,830 square metres (or 224,211 square feet).

(6) *Planning Summary and Technical Overview*: these two sections have the highest density of text in the whole brochure. The Planning Summary provides details on the Planning Permission, the Section 106 Agreement, and Community Infrastructure Levy (CIL), whereby 'the Developer will be obliged to pay both [the s106 agreement] and Mayoral CIL' estimated to be £300,500 (Mayoral), and £1.14m (Borough). Technical Overview provides a summary of the specialist reports as concerns Rights of Light (survey by TP Bennett, architects), Ground Conditions (investigation report by Campbell Reith Hill consulting engineers), and Flood Risk Mitigation (risk assessment by Hydro-Logic Services).

(7) *Research*: this section provides an overview of the UK and London Market housing market, and the growth in house price in 2013 to 2014, and the average transaction value in the twelve months to August 2014.

33. The last section heading comes under *Tenure Proposal* with the following particulars:

(1) *Tenure & Tenancies*:

> 'The site is sold with the benefit of a freehold title, subject to an agreement with Vodafone Limited. The agreement relates to the installation of telecommunications equipment for a term of 10 years, expiring on 23 September 2009. Vodafone are currently holding over and consequently the Vendor has served the requisite … notices to secure vacant possession. It is expected that the purchaser will conclude the vacant possession process should Vodafone still be in occupation at the point of sale completion.'

(2) *The Proposal*: 'Offers are invited for the freehold interest.'

(3) *Method of Sale*: 'The property is to be sold by informal tender. Offers are invited subject only to contract. A bid deadline will be set in due course.'

(4) VAT: 'The property is elected for VAT.'

Heads of Terms by Savills to Dartmouth of 9 December 2014

34. HMRC requested the disclosure of the Heads of Terms ('HOTs') drawn up by Savills as vendor's agent to Dartmouth as the purchaser's representative, and to the parties' acting solicitors. The conditions of sale numbered as 1 to 8 are as follows:

> '1. Subject to contract only.
>
> 2. Contracts to be exchanged within 10 working days of receipt of draft contract.
>
> 3. 10% deposit payable on exchange of contracts.
>
> 4. Deposit is held as stakeholder until such time as the unchallenged judicial review period has expired, after which it will become held as agent and released to the Vendor.
>
> 5. Vacant possession.
>
> 6. Copyright of all consented plans, sections and elevations to be novated to the Purchaser.
>
> 7. The Vendor is [sic] use all reasonable endeavours to procure warranties, letters of reliance or copyright of all reports, surveys, plans etc submitted as part of the planning permission.
>
> 8. VAT is payable on the purchase price.'

Discussions by parties on the terms in the agreement

35. After the Heads of Terms were issued by Savills to the Vendor and Purchaser and their respective solicitors, being Dechert for Haymarket, and Wedlake Bell for Pinenorth, there were email exchanges between the solicitors and with third parties when the possibility of structuring the sale as a TOGC was mooted on behalf of the purchaser.

(1) Email of 9 December 2014 from Savills to Dartmouth attaching the Heads of Terms, (and the same email forwarded to Dechert on 10 December):

> 'Haymarket's solicitors have drafted a contract, … Having discussed the matter, we have concerns over the deliverability of a TOGC transaction and therefore the HOTs and the contract are drafted on the basis of a property on the basis of a property transaction. We would of course be open to any suggestions that you might have as to how a TOGC transaction might work in this instance without breaching the necessary requirements for such a transaction.'

(2) Email of 10 December 2014 from Ashcroft to Savills after a meeting with the chairman of City Developments Ltd:

> '… CDL would be delighted to undertake the deal on the terms you enclosed [HOTs] … subject to contract and being able to use part(s) of the site for a sales centre … Ideally we should like to achieve a TOGC sale which will help cash flow and save SDLT.'

(3) Savills replied to Ashcroft and Wedlake Bell on 10 December 2011:

> 'Haymarket are more than willing to work with you in relation to the TOGC and sales centre matters.'

(4) On 11 December 2014, to CDL directors from a Senior Client Administrator of the TMF Group in Jersey, which provides local knowledge to global clients like CDL:

> 'Dear All Directors
>
> Please find below recommendations from David [Ashcroft] regarding a property at Teddington Riverside, exchange of contracts would need to take place before December 24th 2014 with completion to follow in September 2015 once vacant possession of the property is secured.
>
> Planning has already been granted to demolish the existing building and construct a new residential scheme.
>
> Please provide your approval for David to proceed with arranging the exchange of contracts. … In addition to the property recommendation David has asked that Field Fisher are engaged to advise on TOGC and VAT.'

(5) On 16 December 2014, Ashcroft emailed Jeremy Duckworth:

> ' … can I please arrange for Nick Beecham our VAT expert on TOGC to have a conference call with you and I tomorrow with Kim Lalli [of Wedlake Bell] about what is possible and acceptable to Haymarket.'

(6) Jeremy Duckworth of Haymarket emailed:

> 'Happy to listen re VAT and I would like to include Bill Fryzer from Dechert and my colleague Philip Goodman … to consider a structure providing it works for all parties.'

(7) On 16 December 2014, Ashcroft replied to Jeremy Duckworth as follows:

> 'Nick and I need to identify any leases that could be in place upon completion and might complete the deal early to qualify for TOGC or if not the question

then arises would you allow say a CDL friendly company to take a lease over part of the vacated area say as a site office prior to completion.

On an un-related VAT matter, the possibility to take a lease for early access for a sales centre on a building such as Weir Cottage.'

36. The substantive comments between the parties after the conference call to structure the sale as a TOGC include the following:

(1) Fryzer from Dechert wrote to Jeremy Duckworth of Haymarket (16 Dec 15:38)

'As discussed, the structuring of the proposed sale as a transfer of a going concern so as not to attract VAT ought to be respected by HMRC. However, it is not possible to be absolutely certain of this (given the lettings are only in respect of two of the buildings and only a small part of one of those buildings will generate only a modest amount of rent and involve a tenant which is a related company, albeit only commercially, to the buyer) and HMRC could decide that the transaction did not qualify for the relief. In this scenario and while HMRC may not decide to do this as there should not be any actual loss of VAT to HMRC by treating it as a TOGC, on a technical level, HMRC would be entitled to raise an assessment for the full amount of VAT they consider payable (around £17M).

(2) The risk assessment as to structuring the sale as a TOGC was summarised by Fryzer in his email of 16 December 2014 to Jeremy Duckworth:

'In summary therefore we cannot say there is no risk.

Given that Haymarket is being asked to assume the same for no reason other than to facilitate a potential benefit from the Buyer's perspective, we concur that it would not be unreasonable for you to seek additional security from the buyer group in order to cover off what admittedly is a small risk but in respect of a large exposure if that risk were ever to occur.'

(3) The reservations from Dechert about structuring the sale as a TOGC were related to Dartmouth; Ashcroft in turn turned to Ann Nee (as the CFO of CDL) with the following request:

'We need to give a letter of comfort on VAT should HMRC not accept the TOGC structure. I will get Nick to draft the letter as it should touch upon our confidence of our planning and what if scenario and you can then add how CDL will support Pinenorth and you can then send to Jeremy.'

(4) On 17 December 2014, Ann Nee emailed Jeremy Duckworth, attaching two letters to 'give the necessary comfort' as an alternative to the request of a banker's guarantee:

(a) A CDL letter to assure that CDL has the financial resources to ensure payment to complete the transaction subject to contract;

(b) A bank letter from one of CDL several Core International Bankers addressed also to Lord Heseltine whose family is the ultimate owner of the Haymarket Group.

(5) Ann Nee's email with the two letters attached was sent on 17 December 2014 at 02:57 hours (possibly timing difference from Singapore). The response from Jeremy Duckworth thereto was: 'This is very helpful from Ann Nee indeed but doesn't cover off the VAT issue as per my email to you both yesterday – any progress at your end?'

37. There was a conference call on the morning of 17 December 2014. To allay Jeremy Duckworth's concern that the VAT issue still remained uncovered, Ashcroft reported to Ann Nee at 1:58pm:

> 'We need to give a letter of comfort on VAT should HMRC not accept the TOGC structure. I will get [Field Fisher] to draft the letter as it should touch upon our confidence of our planning and what if scenario and you can then add how CDL will support Pinenorth and you can then send to Jeremy.'

38. By the afternoon of 17 December 2014 (15:39 hours) Wedlake Bell were able to forward their amendments to the draft contract to Dechert to reflect what the parties had agreed in order to move various matters forward to exchange. The cover email from Wedlake Bell itemised twelve areas of amendments to the contract terms, of which:

> '4. VAT – we have inserted TOGC wording as discussed.
>
> 7. The Vodafone Tenancy – as this tenancy is not relevant for TOGC purposes we expect the seller to have procured termination and removal of all the equipment prior to completion, and to have dealt with any compensation payable.'

The Letter of Comfort

39. The intense activity on 17 December 2014 on the TOGC issue concluded with an email from Ashcroft to Ann Nee at 22:10 hours, attaching a draft letter from Field Fisher (CDL's VAT adviser) 'to cover off the VAT position with Haymarket', and with Ashcroft's wording to cover CDL's undertaking for Ann Nee's review. Ashcroft referred to another conference call to take place at midday on 18 December 2014, and asked that the letter should be 'in [Haymarket'] hands by 12.00' as the TOGC matter was 'a big issue for Haymarket'. Reporting on the benefit of structuring the sale as a TOGC, Ashcroft stated to Ann Nee:

> 'Setting up the deal this way CDL will obtain a cash-flow saving of not having to finance the payment and recovery of £17m of VAT. The SDLT with VAT being charged is £4.08m. The SDLT with the benefit of a TOGC is £3.4m equating to saving of £680,000.'

40. In this email to Ann Nee, Ashcroft also pre-empted the matter about rental payments on the Dartmouth lease in the following terms:

> 'CDL/Pinenorth will have to reimburse Dartmouth the rent but I suggest we add the rent without saying so specifically to Development Advisor fee.'

41. The Letter of Comfort drafted by Field Fisher for adoption by CDL was addressed to Jeremy Duckworth. It set out the basis for the 'transfer of a property rental business' as a TOGC in accordance with HMRC's guidance, and on that basis, 'there are very good grounds for the view that the purchase of the property subject to the lease described' will be a TOGC, and no VAT payable on the purchase price. The Letter continued by addressing the risk:

> 'There remains a small risk of [HMRC] taking a different view. If [HMRC] were to rule that the purchase of the property were not a TOGC then (unless the ruling was successfully challenged) [Pinenorth] would have to pay VAT at a rate of 20% (£17m) in addition to the purchase price. [Pinenorth] would recover this VAT from [HMRC] through its VAT return after a period which could be anywhere between 1 and 4 months depending on the timing of completion in relation to its VAT prescribed accounting period.'

42. The Letter of Comfort concluded with CDL's financial undertaking as follows:

> I confirm that City Developments Ltd will financially stand behind Pinenorth Properties Ltd and will meet the full costs involved should the property not be considered a TOGC sale by HM Revenue & Customs.'

The grant of the Dartmouth Lease

43. On 24 December 2014, the day when the lease with Teddington Studios Limited terminated, a new lease (Weir Cottage, site offices and car parking space) between Dartmouth and Haymarket was agreed, for an annual rent of £22,000 exclusive of VAT, for unspecified duration defined as 'the term granted by this Lease', and 'Termination of the Term' defined as: 'the expiration or sooner determination of the Term so far as it relates to the whole or (as the context so admits or requires) the part or parts of the Demised Premises in question'.

44. Mr Ashworth said Dartmouth needed to have premises on the Teddington Site during the period between exchange and completion for two reasons.

(1) As adviser to Pinenorth, Dartmouth was concerned that parts of the Teddington Site might be listed, due to the history of the Teddington Studios being a tenant and its association with the production of some iconic films and TV series. If listing were to take place, this would have prevented Pinenorth from completing the planned development and would have reduced the value of the Site. We understand from Mr Ashcroft that to allay this concern, Haymarket gave permission for the process of removing and stripping out asbestos from the buildings most at risk to be carried out before completion. The steps of removal and strip-out of asbestos normally precede full demolition; by bringing forward the process, those buildings most at risk would be put beyond economic repair so as to reduce the 'risk' of these buildings being listed by English Heritage. Dartmouth required premises in order to oversee this process.

(2) Secondly, Pinenorth was aware that potential buyers had already been enquiring about purchasing residential units in the completed development, and instructed Dartmouth to set up sales centre so as to begin selling units as quickly as possible.

45. Dartmouth instructed its solicitors to draw up a lease and proposed a rent based on Mr Ashcroft's experience of the market in the local area. According to Mr Ashcroft, he was concerned that Dartmouth would have been 'vulnerable to being charged a premium rent' by Haymarket after the exchange of contracts, and wanted to secure the lease before exchange of contracts when Haymarket was 'likely to be more agreeable'. The sale of the Property was subject to the Dartmouth Lease, and was appended to the sale agreement.

The Sale Agreement of 24 December 2014

The subject matter of the agreement

46. The parties to the agreement are HGPL as the named Seller, and Pinenorth as the named Buyer. The Contract was drawn up by Dechert LLP. The transaction in issue is recorded in the agreement dated 24 December 2014, being the '*Contract for Sale and Purchase of freehold property at Teddington Studios, 5 Broom Road, Teddington, Middlesex, TW11 9BE*' ('the Contract'), and the subject matter of the agreement is referable to the following clauses.

(1) Clause 1 sets out the Definitions and Interpretation in relation to specific expressions in the Contract. The Definition for 'the Property' is stated as:

> 'freehold premises known as Teddington Studios, 5 Broom Road, Teddington, Middlesex being the whole of the land whose title is registered at the Land Registry under the title number SGL20910'

(2) Clause 2 is headed 'Agreement for Sale' and records that:

> 'The seller agrees to sell and the Buyer agrees to buy the Property'.

(3) Clause 3 is headed 'Purchase Price' and is £85 million, and Clause 4 provides for the deposit of £8.5 million to be paid as specified by the relevant appended schedule.

The terms in relation to VAT

47. The parties' respective obligations in relation to the VAT position of the transaction are set out as follows:

(1) Clause 5 is headed 'VAT' with the relevant sub-clauses being:

> '5.1 Subject to the following sub-clauses of this clause 5, all sums payable under this contract by the Buyer are expressed exclusive of any VAT.
>
> 5.2 (Save as provided in clause 5.8.1) the parties intend that the sale of the Property pursuant to this Contract shall be treated as a transfer of business as a going concern ("TOGC") within Article 5 of the Value Added Tax (Special Provisions) Order 1995 ("The Special Provisions Order").
>
> 5.3 The Seller warrants that it is registered for VAT and has exercised its option to tax pursuant to Part 1 Schedule 10 of the Value Added Tax Act 1994 ("VATA") or is bound by such an option.

(2) Under sub-clause 5.4, the Buyer warrants the following, and to keep the Seller indemnified against breach of any of the warranties (clause 5.5), whereby:

> 5.4.1 That, … it shall apply to register for VAT, exercise its option to tax pursuant to Part 1 Schedule 10 VATA, give appropriate notification of such option to HM Revenue & Customs and supply copies of such application and notification to the Seller.
>
> 5.4.2 That is [sic] shall not revoke the said option to tax within one year following the date on which completion takes place.
>
> 5.4.3 That Article 5(2B) of the Special Provisions Order does not apply to the Buyer.
>
> 5.4.4 That it shall continue to carry on a rental business in respect of the Property *for at least 6 months after completion takes place*. (italics added)

(3) Under sub-clauses 5.6 and 5.7, the contingency as concerns parties' obligations in the event of an unfavourable ruling by HMRC on the TOGC status of the transaction is covered in the terms as follows:

> '5.6 If HM Revenue & Customs shall rule in writing that the sale of the Property pursuant to this Contract is subject to VAT, or shall otherwise raise an assessment for, … the Buyer shall pay the VAT … and indemnify the Seller against all interest and penalties in respect of such VAT consequent upon such ruling, assessment, or demand (as the case may be).
>
> 5.7 … the Seller shall take such action as the Buyer may reasonably require to contest the ruling, assessment or demand in question subject to the Buyer indemnifying the Seller in respect of its reasonable costs incurred in so doing….'

The terms as concerns leases

48. In relation to both existing and prospective leases, the relevant clauses include:

(1) Clause 8 is on 'Matters to which Sale Subject', and clause 8.1 provides that the Property is sold subject to:

> (a) the Dartmouth Lease set out in Appendix 4 to the Agreement, and the 'Demised Premises' under the lease are defined as: (i) the Site Offices, and (ii) Weir Cottage, plus car parking spaces adjacent to the demised Site Offices.
>
> (b) any remaining rights of the Vodafone Tenancy and/or Licence;

(c) any other lease granted with the consent of the Buyer pursuant to clause 24.

(2) Clause 21 provides that the Seller shall use all reasonable endeavours to procure the termination of the Vodafone Tenancy and all rights and interests arising pursuant to the same, and the removal of all telecommunications equipment installed in the period between exchange of contracts and until registration of the transfer of the Property. Under clause 21.2, all professional fees and costs and expenditure, and payments to Vodafone by way of compensation up to an aggregate of £40,000 shall be borne by the Seller and the Buyer equally.

(3) Clause 24 on Management provides for the Seller not to vary or waive the terms of the Dartmouth Lease, Vodafone Tenancy/Licence.

The terms as respects the Planning Consent

49. The Agreement provides the following in relation to the planning consent obtained.

(1) Clause 17.1 provides that Haymarket shall execute and deliver a deed of assignment to the purchaser on completion, to assign the rights and benefits arising pursuant to the contracts with the various construction professionals engaged by Haymarket for the purposes of obtaining planning consent.

(2) Clause 18 provides for the terms relating to 'Copyright Licence and Reliance Letters', whereby Haymarket shall: (a) procure that the architect, TP Bennett LLP shall complete and deliver the Copyright Licence to the Buyer on the date of the contract; (b) use all reasonable endeavours to procure as soon as practicable after the date of the contract Reliance Letters from consultants engaged in the planning application process.

(3) Clause 24 provides that the Seller shall not vary or terminate any Consultants' Appointments, and will comply with its obligations under these Appointments.

(4) Clause 27 on 'Surveys and Inspections' obliges the Seller to 'permit such access to the Property for the Buyer and authorised persons for the purpose of 'stripping out in whole or in part the internal parts of any buildings on the Property, of carrying out intrusive and nonintrusive surveys measurements and/or inspections reasonably required.

(5) Clause 28 on 'Planning Obligations' stipulates that the Seller shall not during the subsistence of this contract Implement the Planning Permission or any New Planning Permission or vary them or any related Planning Agreement(s).

50. Clause 25 on TUPE stipulates that the parties do not intend for there to be a transfer of employees from the Seller to the Buyer pursuant to the Employment Regulations or otherwise.

The terms as regards Risk of Listing

51. Clause 32 is extensive, covering some 5 pages. It provides for the risk, insurance and retention etc in relation buildings most at risk of being listed.

(1) The Retention is set at £10m;

(2) Listed Building Risk Policy insurance is set at a minimum of £40m to cover the risk of loss to the Buyer and the Seller as co-insured parties;

(3) The method to establish Residual Land Value;

(4) The scope for carrying out 'At Risk Building Strip Out Works', defined as 'all works necessary to strip out all internal fixtures fitting and/or other internal parts within all the 'At Risk Buildings' but not, for the avoidance of doubt, so as to extend to include any works that would Implement the Planning Permission.

52. In the period of negotiation between HOTs being issued to the signing of the Sale Agreement on 24 December 2014, Haymarket had informed Dartmouth that Haymarket Publishing Services Limited would need to relocate and as no new office premises had yet been secured, Haymarket might not be able to complete on the sale for up to 12 months.

Events between exchange and completion

53. On 20 November 2015, the sale of the Teddington Site completed. The key events in 2015 after the exchange of contracts to completion date are as follows:

(1) On 6 January 2015, Dartmouth's Head of Construction began putting in place plans to meet the planning conditions necessary to commence with demolition. Two survey proposals necessary for asbestos removal to commence were obtained in the month.

(2) On 19 January 2015, Pinenorth elected to waive exemption.

(3) On 6 March 2015, a letter of intent was signed by Southern Demolition and a contract signed on 30 March 2015, as a result of Pinenorth agreeing with SDL to carry out a phased strip-out and subsequent demolition starting with the two buildings considered most at risk of being listed.

(4) On 22 April 2015, Fryzer (of Dechert) emailed Bhandal (of Wedlake Bell) in relation to the 'Short-term Lease of Weir Cottage and Site Offices' in terms as follows:

> 'It has since occurred to me that we may need only to surrender part of the existing lease (i.e. leave the existing lease in place so far as it relates to Weir Cottage) – this might assist with the Vat treatment as referred to below.
>
> As an aside I know that Mark Stapleton and Nick Beecham [Vat specialists of Field Fisher] have also discussed the proposal direct as to any implications for Vat (in particular also in light of a recent Vat case where HMRC challenged the TOGC treatment of a sale and purchase in similar but, they felt, materially different circumstances to our own. Mark commented as follows: "*However, as a further safeguard and given that it is intended that an additional lease will be entered into with the tenant it makes sense to ensure as far as possible that the tenant contacts Haymarket direct and as far as possible negotiates the lease directly with Haymarket and the involvement of the buyer is minimised. The sale agreement will of course need to be amended to reflect that the sale will be subject to this lease too.*"
>
> Can you bear this in mind when taking instructions – although obviously, we will have to get Pinenorth's agreement to the change and the corresponding variation to the sale and purchase agreement.'

(5) Meanwhile, Pinenorth decided to vary the planning consent, which meant it could not pre-sell any units until the new planning consent was approved. The establishment of the proposed sales centre by Dartmouth was delayed.

(6) On 3 July 2015, the lease granted by Teddington Studios Ltd to Vodafone Ltd expired by operation of law.

(7) On 3 July 2015, a licence to occupy land was granted by Haymarket to Cornerstone Infrastructure Telecommunications Ltd (a subsidiary of Vodafone Ltd) at a peppercorn rent of £1.

(8) On 3 September 2015, SDL approached Haymarket to lease 'South/Engineering Block'; SDL was already on site on behalf of Pinenorth as its demolition contractor, and had undertaken a substantial amount of the asbestos stripping-out and removal works to the extent that Mr Ashcroft was confident that the buildings that had been most at risk of being listed were put beyond economic repair and therefore no longer at risk of listing.

(9) On 16 October 2015, Haymarket granted a second lease to Dartmouth (for its site office): the '**Second Dartmouth Lease**'. The rent was £10,000 plus VAT per annum.

(10) On 22 October 2015, Haymarket and Dartmouth agreed a deed of surrender under which Dartmouth surrendered part of the demised premises granted by Haymarket on 24 December 2014. The surrender reduced the rent payable under the Dartmouth Lease to £10,000. These changes were made due to Dartmouth having identified an alternative building more suitable for use as a sales centre. Dartmouth made use of the newly rented building for other purposes in the period before completion as the opening of a sales centre was delayed by Pinenorth's application to vary the planning consent.

(11) On 30 October 2015, Haymarket's lease with Haymarket Publishing Services Ltd was surrendered by formal transfer, and the office premises were vacated in early November 2015.

(12) On 17 November 2015, a lease (comprising the ground floor of an office building and car parking) was granted by Haymarket to Pineworth's demolition contractor SDL. One invoice for rent due on this lease was raised by Haymarket, for a 14-day period from 17-30 November 2015, (and Haymarket received 3 days of the rent from this invoice).

54. In terms of progressing with architect's drawings to awarding tenders to contractors, Mr Ashcroft stated in oral evidence in reply to Tribunal's questions:

> 'It's all very well to get drawings but a lot of detailed design is needed to award a tender. Contractors need detailed drawings. You can clear a lot of these items as you approach the award of a contract. … We had access rights to go on site and clear a lot of these conditions.'

Events after Completion

55. The key events after completion in relation to existing leases in connection with the Teddington Site are as follows:

(1) On 3 January 2016, the licence to occupy land granted by Haymarket to Cornerstone Infrastructure Telecommunications Ltd at the peppercorn rent of £1 expired.

(2) On 9 February 2016, Pinenorth served a notice on SDL to terminate its lease on 11 March 2016.

(3) On 4 November 2016, Pinenorth served notice to terminate the remaining lease granted by Haymarket to Dartmouth. On 6 December 2016, the Second Dartmouth Lease terminated.

56. The facts as concerns the rentals arising from the leases:

(1) On 20 November 2015, Dechert on behalf of Haymarket wrote to Dartmouth and SDL informing them that future rent payments should be made to Pinenorth.

(2) The rent from both Dartmouth and SDL due to Pinenorth for the period straddling completion was paid to Pinenorth by way of apportionment between Haymarket and Pinenorth, and the rental receipts by apportionment was recognised in its accounts.

(3) Following completion, Pinenorth sent no further rent invoices to Dartmouth or SDL and no additional rent was paid.

(4) On 10 February 2016, Michaela Harrison-Gray of Pinenorth stated to HMRC that the Property (i.e. the Teddington Site) was vacant, and in development, and no output VAT was due as no rental income had been received.

(5) On 21 December 2017, Pinenorth submitted Corporation Tax return for the period from 5 July 2016 to 31 December 2016 declaring nil trading income.

57. Following completion, Pinenorth secured new planning consent for 239 units, spread over 7 buildings. Pinenorth started the construction of the buildings at different times with work on the first building commencing soon after completion. By January 2020, Pinenorth had sold some units on the Teddington Site.

THE APPELLANT'S CASE

58. In summary, the appellant contends that Haymarket was carrying on a business before the sale of the Property. This business consisted of two elements: (i) property development, and (ii) property lettings. TOGC treatment is therefore available in respect of the sale of the Teddington Site. Mr Thomas submits that Haymarket carried out two activities at the Teddington Site that together, or separately, amount to a business for VAT purposes.

Property development business

59. In relation to property development, the appellant avers that Haymarket was carrying on a property development business at the Teddington Site whereby:

(1) Haymarket took the property and improved its value for future sale including by obtaining planning. It used the services of at least 14 third-party contractors incurring costs of more than £870,000. This is clearly an economic activity the carrying on of which entitled Haymarket to recover relevant VAT as input tax: *Rompleman*.

(2) The process required the substantial involvement of senior executives for around two years to carry out activities in respect of the development of the Teddington Site, which included the securing of planning permission for development.

(3) Haymarket's property development business was then transferred to Pinenorth as a going concern, and Pinenorth continued to operate the property development business after the transfer.

Property lettings business

60. In relation to the property lettings business, Haymarket was

(1) For many years up to the sale, Haymarket generated income exceeding £1 million. At the time of the exchange of contracts, the lease to Haymarket Publishing Services for office premises was still running on the Teddington Site.

(2) The leases to Dartmouth and SDL were a part of and a continuation of that business.

(3) Dartmouth leased part of the Teddington Site from Haymarket for 11 months and needed these premises during that time for commercial reasons, and paid a commercial rent on which Haymarket accounted for VAT and corporation tax. The Dartmouth second lease continued beyond completion.

The transfer of assets capable of carrying on an independent economic activity

61. The assets transferred were the freehold of the Teddington Site, the rights and benefits contained in at least ten contracts with ten separate consultants who had worked for Haymarket in pursuance of the development project, and a licence to copy and use a substantial number of architects' drawings, together with the benefit and burden of the Dartmouth and SDL leases.

62. These were assets sufficient to allow the recipient to carry on both a property development business and a property lettings business. transferred assets to Pinenorth which together constituted an undertaking capable of being carried on as an independent economic activity. Pinenorth intended to use, and did use, those assets to carry on both a property development and a property lettings business. The terms of the Sale and Purchase Contract

made it clear that it was fundamental to the transfer that Pinenorth would take over the development project and also the lettings business.

Transferee intended to use the assets transferred to operate a business

63. Pineworth acquired the assets with the intention of continuing the property development business which was commenced by Haymarket. HMRC are understood to accept that Pinenorth used the assets received from Haymarket to carry on the property development business after the transfer of assets. Pinenorth used and benefitted from the surveys and reports prepared for Haymarket, and intended to build in accordance with the planning permission obtained by Haymarket. The planning consent was subsequently used as the basis for its amended planning permission application, the success of which was made much easier due to the previous work done. Ultimately, Pinenorth went on to further increase the value of the freehold and then sell interests in it.

64. Pinenorth also intended to continue the lettings business and received income from the rent allocated to it in the completion statement. The leases were not immediately terminated but continued for months after the transfer of the assets.

HMRC'S CASE

65. In response to the Mr Thomas' submissions, the respondents' case is that there was no property development business being carried on by Haymarket prior to the sale of the Teddington Site for the transfer of the assets to be a TOGC. In relation to the alleged property lettings business, the subject matter of the sale was to enable Pinenorth to have vacant possession on completion. The leases extant on the date of completion were leases with the purchaser's tenants and not the seller's tenants being passed on as a TOGC.

The alleged property lettings business

66. In relation to property development, Mr Puzey submits that the intention of the parties to a transaction is relevant to determining what has been transferred and, in particular, how the assets or property are to be used by the transferee.

> (1) In the present case, Haymarket's initial response to HMRC's disclosure request did not disclose the email correspondence between Seller and Purchaser during the negotiation process before the exchange of contracts. It was upon HMRC's repeated request that the series of communications was disclosed which make clear that that Dartmouth lease was entered into for the purpose of achieving TOGC.
>
> (2) The SDL lease was not in play at the time contracts were exchanged and that the possibility of characterising the sale as a transfer of a property development business was not within the contemplation of the parties whilst they were looking for a VAT-efficient way to structure the transaction.
>
> (3) The importance of VAT to the parties is evident from an early stage from Savills' HOTs. The negotiation process involving the parties' legal advisers all the way to the issue of the Letter of Comfort.

67. HMRC have not, and do not, allege that the arrangements are abusive in the VAT sense but these communications are relevant in assessing the intention of the parties and whether in substance there was a transfer of any business in this case, or whether the contracts were drafted in order to give that impression, without actually delivering the outcome in fact.

68. The appellant's property lettings argument hinges upon the leases granted to Dartmouth and SDL. Nothing else was transferred that could supplement the sale of the land so as to comprise a TOGC. Dartmouth was never, in substance, part of the appellant's property lettings business. Its status as a tenant of Pinenorth did not mean that the latter was running a property

lettings business; this is evident from the fact that Pinenorth charged no rent. SDL was Pinenorth's demolition contractor, and was on site after exchange to carry out work for Pinenorth. SDL had no prior connection to Haymarket; it was never part of Haymarket's lettings business, whilst Pinenorth received only 11 days of rent from the first invoice rendered by Haymarket, and did not charge SDL any rent after completion.

The alleged property development business

69. There was no property development business at Teddington Studios Site prior to the sale to Pinenorth. Haymarket owned the site and wished to sell it. Its application for planning permission was undertaken with a view to the sale of the property with the benefit of planning consent, as was made clear in the marketing brochure from Savills.

70. The Contract for Sale is for a sale of the Property and not a business. The contemporaneous communications relating to TOGC do not at any stage refer to the possibility of characterising the sale as one of the property development business. Advice was taken from numerous professionals, and none of them saw this as the sale of a property development business. The alleged property development business was an 'afterthought' that was raised with HMRC at a later stage. The fact that nobody at the time considered that a property development business was being sold is good evidence that there was no such business to sell.

71. Further, there is no basis for any assertion that the sale contract which included the assignment of construction contracts was sufficient of itself for Pinenorth to undertake development of the property. A simple illustration of that fact is that Pinenorth had to bring in its own demolition contractor prior to completion to put buildings on the site beyond economic repair so as to forestall any potential listing of the same for heritage purposes.

DISCUSSION

The issue for determination

72. The issue for determination in this appeal is whether the transaction in question falls within the meaning of article 5 of the SPO to qualify as a transfer of a going concern, whether it was by way of a transfer of a property development business or a transfer of property lettings business. The appellant bears the burden of proof.

73. There is no dispute that if the transaction in question did not fall within the TOGC provision, then the VAT payable of £17m, by Pinenorth as the purchaser of the Property on completion, is fully reclaimable as input VAT by Pinenorth as the transferee. The real tax that is at stake is the SDLT of £680,000, being the difference of £4.08m and £3.4m (with the benefit of TOGC), which was succinctly related to CDL by Mr Ashcroft on 17 December 2014 (§39).

Case law principles for determining the TOGC issue

74. Article 5 of the SPO is the UK implementation of the 'no-supply rule' under Article 19 of the Principal VAT Directive. The domestic provisions under article 5 are therefore to be construed, so far as possible, in conformity with EU law under the *Marleasing* principle. The precursor to Article 19 of the PVD is Article 5(8) of the Sixth VAT Directive, which provided:

> 'In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and in that event the recipient shall be treated as the successor to the transferor. Where appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax.'

75. The application of Article 5(8) of the Sixth Directive was considered by the European Court of Justice ('**ECJ**') in *Zita Modes.* The sale in *Zita Modes* concerned a ready-to-wear clothing business being sold to a company (Milady) which operated a perfumery. Three

questions were referred to the ECJ by the national court in Luxembourg, including whether the no-supply rule applied to any transfer of a totality of assets, or only to those where the transferee pursues the same type of economic activity as the transferor. The Advocate General Opinion ('**AGO**') by AG Jacobs in *Zita Modes* emphasised that the no-supply rule under Article 5(8) is to be given a purposive construction within the context of the VAT system as a whole. The ECJ's judgment in *Zita Modes* set out the purpose of the no-supply rule at [36] to [39], wherein it is observed:

> '[39] The context of art 5(8) and the purpose of the Sixth Directive, … make it clear that that provision is intended to enable the member states to facilitate transfers of undertakings or parts of undertakings by simplifying them and preventing overburdening the resources of the transferee with a disproportionate charge to tax which would in any event ultimately be recovered by deduction of the input VAT paid.'

76. The ECJ in *Zita Modes* remarked on the fact that Article 5(8) 'makes no express reference to the law of the member states for the purposes of determining the meaning and scope of the concept of a transfer of a totality of assets or part thereof'. The conclusion in the AGO at [59] gave direction to the ECJ on answering the first two of the questions referred as follows:

> '(1) Where a member state has exercised the option in art 5(8) of the Sixth VAT Directive, it must consider that no supply has taken place whenever there is a transfer of a totality of assets or part thereof within the meaning of that provision, subject only to any limitations contained in national measures designed to prevent distortion of competition in cases where the transferee is not wholly liable to tax.
>
> (2) In order for there to be such a transfer, the assets transferred must form a sufficient whole to allow the pursuit of *an economic activity* and *that activity* must be pursued by the transferee. The transaction and its surrounding circumstances must be assessed globally in order to determine whether that is the case, having regard in particular to the nature of the assets transferred and the degree of *continuity* and *similarity* between the activities carried on before and after the transfer. In that context, it is *not necessary* for the transferee's business to be *the same as* that of the transferor.' (italics added)

77. Pausing here, it is to be noted that the TOGC regime under article 5 of SPO requires the transferee to continue with '*the same kind of business*' as that of the transferor, whilst the no-supply rule under Article 19 of PVD is to be construed as making no such express requirement: 'it is not necessary for the transferee's business to be the same as that of the transferor' (AGO *Zita Modes*). Neither party takes issue with this divergence in the TOGC provisions, since the express requirement of continuance with the same kind of business by the transferee is within the margin of discretion of a member state when exercising the option to implement the no-supply rule. This is as provided by the second sentence of Article 5(8), a member state 'may take the necessary measures' to prevent any distortion of competition: AGO at [30] *Zita Modes*.

78. Given the divergence, it is important therefore to have regard to the interpretation of the TOGC provisions by the UK courts, since article 5 of SPO contains 'the necessary measures' specific to the domestic implementation of the no-supply rule by the UK. The continuance of the same kind of business is what Birss J in the Upper Tribunal's decision of *Royal College of Paediatrics* referred to as '*the necessary second element*' in addition to the mere transfer of assets for there to be a TOGC.

> '[28] It seems to me that a critical point arising from these mainly European authorities (with some UK cases too) is that for a transfer to fall into the relevant class there are two things which have to be transferred. First of course an asset must be transferred. However something else has to be transferred as

> well. That further element is referred to variously as a business, an undertaking, or an economic activity (or part of such a thing). Merely transferring an asset on its own will never be enough to satisfy the test. In order to work out whether the necessary second element has been transferred, one needs to look at all the relevant circumstances. The test is one of substance not form. The circumstances can include the intentions of the parties.'

79. In establishing whether 'the necessary second element' obtains in a transfer of assets, the Upper Tribunal in *Intelligent Managed Services*, similarly emphasised at [37] the importance of having regard to 'all the circumstances', which 'must be considered both from the perspective of the transferor, and what is transferred, and from the perspective of the transferee, who must intend to operate the business as a continuation of the independent economic activity previously carried on by the transferor'.

80. The principles extracted from domestic and European case law by the Upper Tribunal in *Intelligent Managed Services* at [36] provide helpful guidance to the fact-finding tribunal:

> '(1) In order to be a transfer of a totality of assets, or part thereof, the assets transferred mut together constitute an undertaking capable of carrying on an independent economic activity.
>
> (2) This is to be distinguished from a mere transfer of assets.
>
> (3) The nature of the transaction must be ascertained from an overall assessment of the factual circumstances, which includes the intentions of the transferee, as determined by objective evidence, and the nature of the economic activity sought to be continued.
>
> (4) The transferee must intend to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately and sell the stock, if any.
>
> (5) Although succession to the business is not a condition, but a consequence of the application of the no-supply, the nature of the transaction must be such as to allow the transferee to continue the independent economic activity previously carried on by the seller.'

81. We apply these case law principles in relation to the TOGC regime to the two elements of business in turn. Mr Thomas, in submission, has put forward the property development business as the principal argument, and the lettings business as the secondary argument.

Was there a TOGC of a property development business?

82. Mr Thomas urges on the Tribunal to consider the issue by considering the questions in a three-limb test, which we adopt in our analysis of the factual matrix.

(1) Was Haymarket carrying on a business before the transfer?

(2) Did Haymarket transfer assets that together constitute an undertaking capable of carrying on an independent economic activity?

(3) Did Pinenorth intend to use the assets to operate a business and not simply to liquidate the activity concerned immediately?

83. Mr Thomas submits that in relation to the first limb of the test, '*Zita Modes* simply asks [the tribunal] to consider whether Haymarket was carrying on an economic activity. If so, that is enough to satisfy limb 1', and 'all that is necessary is that the site amounts to part of a business which is capable of separate operation, which is certainly the case here'. In reply, Mr Puzey submits that the appellant 'sets the bar for a TOGC too low', by asserting that all that is necessary is that the Teddington Site amounts to part of a business which is capable of separate operation; that the sale of the Property alone is not sufficient to amount to a TOGC; more is

required, and the test is one of substance and not of form; and just because one is carrying on economic activity does not mean that one has created an independent business capable of independent operation: *Faxworld* at [25], and *XBV* at [34].

84. As we understand it, Mr Thomas would seem to be relying on the first point in the conclusion stated in the AGO *Zita Modes*, which states that 'the assets transferred must form a sufficient whole to allow the pursuit of an economic activity and that activity must be pursued by the transferee'. Mr Thomas may also be relying on the AGO in *Zita Modes* which expressly states that it is 'not necessary for the transferee's business to be the same as that of the transferor'; hence Mr Thomas submits that *Zita Modes* simply asks whether Haymarket was carrying on *an economic activity*.

85. As a matter of fact, we find that the Teddington Site as transferred by Haymarket did form a sufficient whole to allow the pursuit of the separate economic activity of property development, and that property development was the activity pursued by Pinenorth as the transferee. To that end, the second and third limbs of the test are met by our findings of fact.

86. Whilst the no-supply rule under EU law does not stipulate that the transferee's business needs to be the same as that of the transferor, it is as noted above that the domestic implementation of Article 19 PVD under article 5 of SPO does stipulate the continuance of 'the same kind of business' as a condition for the TOGC provisions to apply. Whilst Mr Thomas is perhaps not wrong to assert that *Zita Modes* simply asks whether Haymarket was carrying on *an economic activity* (i.e. unspecified), the appeal falls to be determined by reference to the domestic implementation under article 5 of SPO, which requires both *continuity* and *sameness* of the said business before and after the transfer to obtain.

87. The crux of the matter as regards whether there was a transfer of a property development business as a TOGC therefore hinges on the first limb of the test. For there to be a TOGC of a property development business, it is not sufficient that Pinenorth was carrying on with the economic activity of property development. Given the TOGC provision requires that the '*same kind of business*' was being carried on by the transferor as that of the transferee in relation to the transferred assets, the critical finding of fact that will determine the appeal in this respect concerns whether *Haymarket* (as the transferor) was carrying on a property development business prior to the transfer with the Teddington Site. Applying case law principles, we make our findings of fact in respect of the first limb of the TOGC test with reference to the intentions of the parties, the substance of the transaction, and the surrounding circumstances.

The intentions of the parties

88. Having regard to the following obtainable facts and contemporaneous documents, we conclude that it was not Haymarket's intention to carry on a property development business.

(1) Haymarket Group has never been in the business of property development; its main business activity is in publishing, with diversification into media and online content.

(2) The Teddington Site was held by Haymarket as investment, as part of its portfolios of freehold estates either used as office premises by the Group, or leased to third-party tenants. The only economic activity Haymarket had undertaken with the Site was as a landlord generating passive income from granting leases to tenants (including that to a Haymarket Group company) for the use of buildings on the Site.

(3) When Teddington Studios Ltd exercised a break right to surrender the lease with an exit date of 24 December 2014, that would seem to be a major underlying reason for the Group's decision to sell the Site, notwithstanding the fact that Haymarket Publishing Services had only been granted a lease in July 2010 with an expiry date in March 2019.

(4) Haymarket had never intended to develop the Site prior to sale, as the capital costs of the undertaking of property developing was in excess of what the Group could afford given its bank borrowings at the time being at £100m (§22).

(5) From the outset, Haymarket had intended 'to sell the site with the benefit of consent to the best offer from a developer', and this intention was clearly stated in the brief as understood by Mr Soper of TP Bennett, the firm of architects instructed (§23).

(6) Whilst the planning application process involved the time of senior management of the Group for some 18 months, and incurred costs of circa £870,000, the time and costs were expended in order to enhance the value of the site as investment. Without the planning consent, the sale prospect of the site to a potential developer would have been greatly diminished. With the planning consent, the value of the Teddington Site was significantly enhanced in terms of millions, far exceeding the costs of £870,000.

(7) The Section 106 Agreement was entered into by Haymarket with the view that the conditions relating to the Teddington Site would be fulfilled by the purchaser of the Site.

89. Not only did Haymarket never intend to undertake property development of the Site, we also find that the parties to the transaction never intended that there was to be a transfer of a property development business, having regard to the following facts.

(1) The subject matter for sale by Haymarket was clearly identified in the marketing brochure as 'Freehold' of 4.45 acres with the scope of the planning consent being specified as for the 'redevelopment' of residential apartments: §32(1).

(2) Haymarket as vendor of the Site tendered the Property to potential buyers as a 'development opportunity' (not a development business). The marketing brochure invited purchasing offers for 'the freehold interest' (not as a property development business to be continued): §33(2).

(3) The Heads of Terms drawn up by Savills and accepted by Pinenorth were in line with the transfer being that of a freehold interest with planning consent; that was the basis for the copyright of all consented plans being novated, and warranties of reports and surveys, and letters of appointment being assigned from Haymarket to Pinenorth: §34.

(4) Even when the parties were engaged in the discussion of structuring the transfer as a TOGC, those discussions never touched on the possible construction of a transfer of a property development business. The parties and their respective advisers (Dechert for Haymarket, and Dartmouth, Field Fisher, Wedlake Bell for Pinenorth) recognised the intrinsic absence of any property development business being carried on by Haymarket prior to the transaction for that to form a credible basis for structuring a TOGC (§§35-8).

(5) The contracts that were exchanged on 24 December 2014 defined the Property as the 'freehold premises' at the Teddington Site, not a property development business (§46). The terms as regards the conditions and the benefits of the planning consent being assigned to the purchaser are standard in a transfer of a freehold interest with consent, and there is nothing exceptional to make the letters of appointment indicative of a property development business being carried on by Haymarket as averred by Mr Thomas.

Substance not of form

Contractual analysis inconclusive

90. In giving the leading judgment in the majority decision of the Supreme Court in *Airtours* (2016), Lord Neuberger referred to what he said at [35] of *Secret Hotels2* (2014) and reiterated that 'when assessing the VAT consequences of a particular contractual arrangement, the court

should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts' (*Airtours* at [47]).

91. Lord Neuberger's guidance in characterising the nature of a supply for VAT purposes in *Airtours* is a succinct summary of what the Court of Justice of the European Union ('CJEU') set out in *Newey* on the general approach in characterising a supply:

> '[43] ... Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a "supply of services" transaction ... have to be identified.
>
> [44] It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> [45] That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.'

92. The CJEU in *Newey* continued by stating the occasions when the national court should depart from the contractual analysis for 'preventing possible tax evasion, avoidance and abuse'; these are circumstances in which to prohibit the abuse of rights 'is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage' (at [46]). In a similar vein to *Newey*, Lord Neuberger's leading judgement of the Supreme Court in *Secret Hotels2* (2014) describes the approach in categorising a supply in the following terms:

> '[31] Where parties have entered into a written agreement which appears on its fact to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligation, unless it is established that it constitutes a sham.'

93. HMRC do not contend that the contract in question amounted to an abuse of rights. We accept that the contract was not one of artificial arrangements that does not reflect the economic reality to such an extent that the Tribunal has to depart from the contractual analysis for the purpose of characterising the nature of the transaction. However, there are qualifiers to be borne in mind when construing a written agreement, as set out by Lord Neuberger in *SecretHotels2*:

> '[32] When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as a whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and often be of little weight.'

94. The form of the contract as entered into by Haymarket and Pinenorth was structured as a TOGC, but the label adopted by the parties is not conclusive for the purpose of characterising the transaction. The substance of the transaction means the economic reality of what was being transferred, as the ECJ in *Loyalty Management* stated at [39]-[40], 'consideration of economic realities is a fundamental criterion for the application of the common system of VAT', and that involves consideration of 'the nature of the transactions carried out in the particular case'. It is the economic reality of whether the transfer of the Teddington Site by Haymarket included '*the necessary second element*' in the nature of a property development business that is determinative, as established by case law principles from the EU and in the domestic context.

EU case law principles on no-supply rule

95. In finding whether the substance of the transfer of the Teddington Site constituted an economic activity that would accord with the description of property development, we are also addressing the eventuality that the parties to the contract, whilst structuring the transaction as a TOGC of property lettings (not of development), could have missed the real substance of the transaction being one of a property development business as Mr Thomas seeks to advance.

96. Case law principles from European jurisprudence on establishing the economic reality of a transaction in a no-supply context which are relevant to our consideration are as follows.

(1) In *Schriever*, a German retail business selling sports equipment from premises owned by the transferor sold the stock and fittings of the shop to a company, and leased the business premises to the company. The ECJ found that the transfer fell within the no-supply rule, on the basis that:

> '[25] …. in order to find that there has been a transfer of a business, or of an independent part of an undertaking, for the purposes of art 5(8) of the Sixth Directive, all of the elements transferred must, together, be sufficient to allow an independent economic activity to be carried on.
>
> [26] The question whether there must be both movable and immovable assets among those elements must be assessed in the light of the nature of the economic activity at issue.'

(2) The acquisition, holding and sale of shares in a company did not in themselves amount to an economic activity within the meaning of the Sixth Directive because: (a) 'unlike the holding of the assets of an undertaking, the holding of shares in an undertaking is not sufficient to allow an independent economic activity to be carried on'; and (b) the mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis': *X BV* at [35] and [36].

(3) 'The essential question is whether the transferee has obtained a business or an undertaking (or part thereof) which he can continue to operate': AGO in *Spijkers*.

Domestic law context: the 'Kenmir' test of TOGC

97. In *Golden Oak* the VAT Tribunal found that Golden Oak partnership acquired a freehold interest with the intention to build office accommodation on the land in two further phases (Phase II and III) and to grant zero-rated 25-year leases to single major occupiers and that subsequently the tenanted building would be sold to institutions. Golden Oak obtained outline and detailed planning permissions, and carried out a considerable amount of work on the infrastructure to the Phase II land, and claimed input tax on the expenses incurred. The infrastructure works being undertaken by Golden Oak included: (a) a road and driveways; (b) two electricity substations; (c) one gas meter station; (d) sewerage pumping station and piping.

98. An unexpected offer then came from Penwind Limited to purchase the Phase II land, which was accepted. Penwind was in the business as a property developer, and had contacted the planners before making its offer to purchase the land. Penwind did not use the planning permission obtained by Golden Oak, but applied for its own detailed planning permission which was granted. The Tribunal found that the Phase II land was 'in the course of active development which had to be completed within a time limit', and that the transfer in the particular circumstances was a transfer of a going concern as part of the business being carried out by the partnership. The VAT Tribunal had regard to the 'well-known passage' of Widgery J (as he then was) in *Kenmir Ltd v Frizzell & Others* [1968] 1 ALL ER 414 at p 418:

> 'In deciding whether a transaction amounts to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry without interruption. Many factors may be relevant to this decision though few will be conclusive in themselves.'

99. In contrast to *Golden Oak*, the VAT Tribunal in *Gulf Trading* found that the 'vital' factor that the land was in the course of 'active development' did not exist, given the fact that all that the taxpayer company did was to obtain planning permission, inspect the soil, and put up some fencing to secure the plot. Applying the *Kenmir* test of 'a going concern the activities of which the transferee could continue' to the substance of the transaction, the Tribunal in *Gulf Trading* concluded that the land was not being actively developed when it was sold for the transfer to be a TOGC (at [14]).

The Kenmir test applied to the facts of the case

100. The factors that are relevant to our consideration in the present case are as follows:

(1) All that Haymarket had ever done with the Site in terms of an economic activity was that of 'the leasing or letting of immovable property', which falls under Article 135(1)(*l*) of the PVD; and it is an 'exempt' activity within the meaning of Article 4 of the PVD, being transactions which 'do not produce relevant added value' due to the passive nature of the activity of leasing and letting.

(2) In terms of domestic legislation, the economic activity being undertaken by Haymarket in relation to the Teddington Site would have been an exempt supply under Schedule 9 Item 1 for land exemption, but for the option to tax which permits such a supply to be brought within the VAT system.

(3) The option to tax election would have enabled Haymarket to recover its input VAT incurred on the consultancy services supplied in the planning permission application process, but the recoverability of the input VAT did not equate to there being an active property development business.

(4) What Haymarket had done was to obtain planning consent, which is a step which may enable development to take place, but it was not active development in itself.

(5) Unlike the transferor in *Golden Oak*, Haymarket had never intended to develop the Site actively as an economic activity. On the contrary, Haymarket had been clear that its intention was to sell the Site after obtaining planning consent.

(6) In obtaining the planning consent, what Haymarket had done is common for a vendor of land to obtain planning permission for the land to be developed. The planning consent so obtained, as we understand, had enhanced the value of the Site by millions, but the activity of obtaining planning consent, however protracted and involving, did not make the sale of the land a sale of a property development business as a going concern.

(7) Haymarket had never intended to embark on developing the Site prior to the transfer, unlike the transferor in *Golden Oak*, which had laid down infrastructure to develop the land in accordance with its intention before the unexpected purchase offer. As a matter of fact, Haymarket did not undertake any of the extensive infrastructure requirements of the Site under the Section 106 Agreement. As to the Tech Hub, it was a s106 community facility provision for Haymarket to fulfil, but was completely unrelated to the Site itself. We reject that Haymarket was developing the Site due to the Tech Hub.

101. When we consider the steps taken by Haymarket, from obtaining the planning consent for the Site, all the way to procuring the letters of appointment and warranties from its planning consultants prior to launching the Property onto the market, it cannot be fairly or meaningfully said that these steps amounted to being an economic activity of a property development business which was carried on as a going concern. The 'vital' factor that the land was in the course of 'active development' was completely absent at the point of exchange of contracts.

102. When we consider the activities embarked upon by Pinenorth as the transferee in the period between exchange and completion: (a) the risk assessment to identify the buildings at risk of listing; (b) bringing in demolition contractor SDL to put buildings at risk of being listed beyond economic repair; (c) establishing a prospective sales centre; (d) amending the planning consent for more units to be built; (e) drawing up detailed design plans to commence with the tendering process, these steps can be fairly and meaningfully described as constituting an economic activity in property development. None of these activities undertaken by Pinenorth, however, can be fairly and meaningfully described as being a 'continuation' of the same economic activity undertaken by Haymarket for there to be a TOGC.

The surrounding circumstances

The commercial reality

103. The substance of the transaction means also to have regard to the commercial reality of the transaction. For CDL as the developer, buying a site with consent removed the risk involved in applying for planning permission, a fact which Mr Ashcroft agreed. For Haymarket as the vendor, being able to offer the Site with planning consent made the property significantly more valuable, to the extent of millions of pounds, but that is as far as the objective of obtaining the planning consent goes for Haymarket.

104. The commercial reality is that neither the vendor nor the purchaser wanted the planning consent to go any further. Clause 28 (§49(5)) stipulated that Haymarket shall not during the subsistence of this contract implement the planning permission, or in any way vary the planning agreement. Clause 32 in relation to the scope of 'At Risk Building Strip Out Works' stipulates that it must not extend to include any works that would implement the planning permission (§51(4)). The commercial reality is that a purchaser of a development site with planning consent wants to be in full charge of the development. In the present case, Pinenorth wanted to start with a clean slate as *the* developer, and Haymarket was prohibited from commencing in any manner or form to develop the Site.

105. The situation in *Golden Oak* where the purchaser took over the development project that had been started by the vendor is somewhat an exception, and indeed the purchase offer in *Golden Oak* was 'unexpected'. This kind of commercial arrangement whereby a potential purchaser succeeding to a development project that has been started by the vendor is deterred from being the norm because the exposure to unknown risks and liabilities is all the greater, the due diligence exercise required is all the more extensive, and the valuation process to ascertain a fair purchase price with existing tenders at different stages is all the more difficult, involving, and protracted.

106. The key clauses in the Sale Agreement (§49) as concerns the planning consent obtained by Haymarket, together with the assignment of rights, licences and warranties on which Mr Thomas relies heavily to make the case that there was a property development business is simply standard commercial practice. It is common sense, sound commercial practice, that Haymarket sold the Site with planning consent as assets for Pinenorth to start the development. There was clear demarcation of each party's role in relation to the Site's development, and there was no development business being commenced by Haymarket for Pinenorth to succeed.

The VAT grouping dimension

107. In *Intelligent Managed Services*, the transferor IMSL transferred its banking support services business, consisting of the business assets and staff, to Virgin Money Management Services Limited (VMMSL), which was a member of the VAT group of the Virgin Money Group. The question on appeal was narrowed down to whether when the transaction is regarded as a sale by IMSL to the single taxable person, the VMG VAT group, that group fails to satisfy the 'same kind of business' test. The Upper Tribunal found the FTT to have erred in law by not considering the TOGC provisions in the context that the relevant business in question was that of the transferee VMMSL rather than the business of VMG VAT group.

108. The Upper Tribunal allowed IMSL's appeal on the basis that if VMMSL were a stand-alone company, then the sale of the business by IMSL was a TOGC, including that VMMSL was carrying on the same kind of business as IMSL. In relation to the application of the deeming provisions for VAT grouping under section 43 of VATA in the context of the TOGC provisions, the Upper Tribunal found at [49]:

> 'By virtue of the single taxable person fiction, as applied by s 43(1) VATA, the group is to be treated as carrying on all the businesses carried on by group companies. That fiction does not, however, change the nature of those businesses. They remain separate businesses as a matter of fact. The fiction does not extend to treating the group as carrying on a different, amalgamated, business in which the separate businesses of the group lose their individual identity.'

109. For the avoidance of doubt, whilst we are conscious that at all material times, Haymarket Group Properties Limited was a member of a VAT group whose main economic activity is in media and publishing, we have considered the substance of the transfer for TOGC purposes with reference to the economic activity specific to Haymarket Group Properties Limited (HGPL), and not with regard to the Haymarket Group as a whole. Our findings of fact that enable us to reach our conclusion that HGPL was not carrying on a business of property development are made in the context of the specific economic activities undertaken by HGPL as the transferor.

110. The appeal therefore fails in relation to the primary argument advanced that there was a TOGC of a property development business being transferred. We now consider the argument in the alternative, that there was a TOGC of a property lettings business.

Was there a TOGC of a property lettings business?

111. Even by Mr Thomas' own estimation, that there was a property lettings business being transferred is a weaker argument than the primary case of a TOGC in the nature of a property development business, and we agree.

112. From Haymarket's perspective, to complete the sale, the Teddington Site must be transferred to Pinenorth with *vacant possession*. That is the definitive position, and the reason why there could not have been a property lettings business being carried on by Haymarket to be transferred on completion. The parties to the contract were very clear from the outset that the subject matter for sale was the freehold title with vacant possession, and there was no deviation from that position from the launch onto the market to completion.

(1) The marketing brochure clearly anticipated that the only tenant the purchaser might have to conclude the vacant possession process was Vodafone (§33(1)).

(2) The HOTs from Savills stated 'vacant possession' as a key term (§34(5)).

(3) The CDL directors were briefed of the fact before exchange that completion would have to wait till 'vacant possession of the property is secured'; (§35(4)).

(4) The exchange of contracts on 24 December 2014 coincided with the date the lease with Teddington Studios terminated, when Haymarket was sure that the major third-party tenant was gone, leaving only Haymarket Publishing Services as the residual tenant.

(5) The delay of completion (on 20 November 2015) was to allow Haymarket Publishing Services to relocate its premises so that CDL could secure vacant possession.

113. The fact that Haymarket entered into the leases with Dartmouth and SDL was purely to play its assigned role in CDL's plan to structure the transaction as a TOGC, as evidenced by the discussions between the parties prior to exchange of contracts (§§35-38). Haymarket was less than enthusiastic about playing its part, and demanded assurance by way of the Letter of Comfort (§§39-42). Specific terms were incorporated into the Sale Agreement to protect Haymarket's position in the event that the TOGC structure was challenged (§47).

114. The critical feature in the present case is that the putative tenants on completion were the 'CDL friendly' tenants, as identified by Mr Ashcroft with Field Fisher's advice to 'complete the deal' in the hope to 'qualify for TOGC' (§35(7)). Dartmouth offered itself as a candidate for a tenancy, but was upfront that 'CDL/Pinenorth will have to reimburse Dartmouth' the rent payable to Haymarket on the lease granted on 24 December 2014. After completion, the assumption of the Dartmouth lease by Pinenorth was in form rather than substance, as evidenced by Pinenorth's statement to HMRC in February 2016 that it received 'no rental income', and the Site was 'vacant and in development' (§56(4)).

115. As to Southern Demolition, it was granted a lease by Haymarket because it was a contractor to Pinenorth for the pre-demolition works to put buildings at risk of listing beyond economic repair. As a matter of fact, the lease was granted only 3 days before completion, and Haymarket rendered one invoice for a 14-day period of which it was entitled to only 3 days.

116. The commercial reality is that CDL did not want any true tenants from Haymarket. The only residual tenant Vodafone was referred to in the discussion as '*not relevant to TOGC purposes*' and Haymarket was to procure termination *prior to completion* and deal with any compensation payable (§38). The putative tenants at the date of completion were connected to the purchaser, and that reflects the economic and commercial reality that CDL/Pinenorth simply could not afford the risk of taking over any true tenants from Haymarket, which could possibly obstruct its title with vacant possession of the whole Teddington Site as the developer.

117. In its final analysis, the leases granted by Haymarket to Dartmouth and SDL were not sufficient to establish a TOGC of a property lettings business, because both Dartmouth and SDL were tenants originating from the purchaser. The findings by Birss J in *Royal College of Paediatrics* are instructive for present purposes. In that case, Coleridge was the vendor, Royal College was the purchaser, and British Association of Perinatal Medicine ('BAPM') was the tenant. On appeal from the first-instance tribunal's decision in favour of Royal College due to the lease being granted by Coleridge to BAPM that there was a TOGC, Birss J observed:

> '[38] The fact that it is true that BAPM could in some circumstances have compelled Coleridge to grant a lease to BAPM does not, in my judgment, make this in substance a TOGC. It ignores the special position of BAPM in these circumstances. If BAPM had been a third party unconnected with the purchaser then the conclusion might follow but BAPM was not in that position. … The [subsequent] lease granted by the Royal College to BAPM was obviously nothing to do with the agreement between Coleridge and BAPM. …
>
> [39] … The critical feature of this case is the relationship between BAPM and the Royal College. The terms of the agreement do not alter the substance of that relationship.'

118. The critical feature of the special relationship between the putative tenants and the purchaser is fatal to the argument that there could have been a TOGC as a property lettings business. The parties' advisers to the arrangement were aware of this, and advised that whilst any changes would 'have to get Pinenorth's agreement', the tenant was to 'contact Haymarket direct as far as possible' as 'a further safeguard' when negotiating the Second Dartmouth lease; (§53(4)). We conclude that on the date of completion, neither Dartmouth nor SDL was in substance true tenants of a property lettings business being carried on by Haymarket. Consequently, there was no property lettings business being transferred as a TOGC.

DISPOSITION

119. The appeal is accordingly dismissed. The notice of assessment to VAT dated 18 January 2019 in the sum of £17,000,000 for the period 01/16 is confirmed, for the reason that there was no transfer of a going concern for the transaction in issue to fall within article 5 of the SPO.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

120. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 13 JUNE 2022

ANNEX

The authorities are listed in the order as included in the bundle; the additional authorities referred to in the Decision and not included in the bundle are marked by an asterisk.

(1) *Rompelman v Minister van Financien* (Case 268/83) [1985] 3 CMLR 202 (‘***Rompelman***’)

(2) *Marleasing S.A. v La Comerical Internacional de Alimentación S.A.* (Case C-106/89) [1992] 1 CMLR 305 (‘***Marleasing***’)

(3) *The Golden Oak Partnership v Commissioners of Customs and Excise* (1992) VAT Tribunal 7212 (‘***Golden Oak***’)

(4) *Gulf Trading and Management Ltd v Commissioners of Customs and Excise* 200) VAT Tribunal 16847 (‘***Gulf Trading***)

(5) *Zita Modes Sàrl v Administration de l’Enregistrment et des Domaines* (Case C-497/01) [2004] CMLR 533, [2005] STC 1059 (‘***Zita Modes***’)

(6) *Finanzamt Offencbach am Main-Land v Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR* (Case C-137/03) [2005] STC 1192 (‘***Faxworld***’)

(7) *Halifax plc and Others v Customs and Excise Commissioners* (Case C-255/02) [2006] STC 919 (‘***Halifax***’)

(8) *Dartford Borough Council v HMRC* (2007) VAT Tribunal 20423 (‘***Dartford***’)

(9) *Finanzamt Lüdenscheid v Schriever* (Case C-444/10) [2012] STC 633 (‘***Schriever***’)

(10) *Staatssecretaris van Financien v X BV* (Case C-651/11) [2013] STC 1893(‘***X BV***’)

(11) *HMRC v Royal College of Paediatrics and Child Health and another* [2015] STC 1243 (‘***Royal College of Paediatrics***’)

(12) *Intelligent Managed Services Ltd v HMRC* [2016] STC 290 (‘***Intelligent Managed Services***’)

(13) *Gemeente Borsele v Staatssecretaris van Financien* (Case C-520/14) [2016] STC 1570 (‘***Gemeente Borsele***’)

(14) *HMRC v Airtours Holiday Transport* [2016] STC 1509 (‘***Airtours***’)

(15) *Mailat* (Case C-17/18)

(16) *HMRC v TGH (Commercial) Ltd* [2017] UKUT 116(TCC) (‘***TGH***’)

(17) *Target Group Ltd v HMRC* [2021] EWCA Civ 1043, [2021] STC 1662 (‘***Target Group***’)

(18) *Associates Fleet Services Ltd v Comrs of Customs and Excise* (2001) VAT Tribunal 17255 (‘***Associates Fleet***’)

(19) *Skatteverket v AB SKF* [2010] STC 419 (‘***Skatteverket***’)

(20) *Buckingham Bingo Limited v HMRC [2018] UKFTT 257 (TC),* [2019] UKUT 140 (TCC) (‘***Buckingham Bingo Limited***’) *

(21) *HMRC v Paul Newey* (Case C-653/11) [2013] STC 2432, CJEU (‘***Newey***’) *

(22) *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16; [2014] STC 937, SC; [2011] UKUT 308 (TCC), [2011] STC 1750 (‘***Secret Hotels2***’) *

(23) *Revenue and Customs Comrs v Loyalty Management UK Ltd and Baxi Group Ltd* (Joined Cases C-53/09 and C-55/09) EU: C: 2010:590; [2010] ECR 1-9187; [2010] STC 2651 (‘***Loyalty Management***’) *

(24) *Spijkers v Gebroeders Benedik Abbatoir CV* [1968] ECR 1119 (‘***Spijkers***’) *