Appeal number: UT/2016/0185
UT/2016/0186

CORPORATION TAX – group relief - section 154 CTA 2010 Effect 2 - whether shareholders lost control of company on appointment of receivers over the whole property of company - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

FARNBOROUGH AIRPORT PROPERTIES COMPANY
FARNBOROUGH PROPERTIES COMPANY

Appellants

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge Kevin Poole

Sitting in public at Royal Courts of Justice, Strand, London, WC2A 2LL on 12 and 13 June 2017

Philip Ridgway, counsel, instructed by KPMG LLP, for the Appellant

Jonathan Bremner, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. The Appellants (referred to in this decision simply as 'Farnborough') appealed to the First-tier Tribunal (Tax Chamber) ('FTT') against decisions by the Respondents ('HMRC') to disallow Farnborough's claims for group relief under section 154 of the Corporation Tax Act 2010 ('CTA 2010') of some £10.5 million from Piccadilly Hotels 2 Limited ('PH2L') for the accounting period ending 31 May 2012.

2. In a decision released on 17 June 2016 with neutral citation [2016] UKFTT 431 (TC) ('the Decision'), the FTT (Judge McNall) held that PH2L ceased to be a member of the same group of companies as Farnborough in the relevant accounting period because, under section 154 CTA 2010, the appointment of a receiver over PH2L constituted arrangements which had the effect that the shareholders of Farnborough no longer controlled it for the purposes of the group relief provisions. In consequence, PH2L could not validly surrender group relief to Farnborough. Accordingly, the FTT dismissed Farnborough's appeal. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Decision.

3. Farnborough now appeals, with permission of this Tribunal, against the Decision on the grounds that the FTT erred in law in determining that:

(1) the shareholders no longer had control over PH2L within the meaning of section 1124 CTA 2010 once receivers had been appointed in respect of that company; and

(2) entering into a Deed of Debenture and/or the appointment of a receiver thereunder gives rise to arrangements which have "Effect 2" in section 154(3) CTA 2010.

4. For reasons given below, we have concluded that the appeal must be dismissed.

Factual background

5. There was no dispute before the FTT about the facts which were set out in a Statement of Agreed Facts which the FTT reproduced at [2] as follows:

> "(1) The Appellants and Piccadilly Hotels 2 Limited ('PH2L') are each at least 75% subsidiaries of Kelucia Limited ('KL') for the purposes of section 152 of the Corporation Tax Act 2010 ('CTA 2010'). The relevant group relationships are as follows:
>
> > (a) The Appellants are 100% subsidiaries of Gatevalley Limited, which is in turn (partly directly and partly indirectly) an 80.5% subsidiary of KL;
> >
> > (b) PH2L is a 100% subsidiary of Piccadilly Hotels 1 Limited, which is in turn (partly directly and partly indirectly) a 92.3% subsidiary of KL.
>
> (2) On 27 June 2011 PH2L was placed into receivership. This was effected by the appointment of a receiver by Bank of Scotland plc over the whole of the property of PH2L.
>
> (3) By a letter dated 16 January 2014, Mr Bruce Hunter of Rotch Property Group Limited requested non-statutory clearance in respect of claims and surrenders of group relief between the Appellants and PH2L. The Respondent refused clearance by email on 31 January 2014.

(4) On 30 May 2014, the First Appellant (Farnborough Airport Properties Company Ltd) submitted an amended corporation tax return for the period ended 31 May 2012 ('the First Appellant's Amended Return') including a claim to group relief of £5,721,318 surrendered to it by PH2L.

(5) Also on 30 May 2014, the Second Appellant (Farnborough Properties Company Ltd) submitted an amended corporation tax return for the period ended 31 May 2012 ('the Second Appellant's Amended Return') including a claim to group relief of £4,906,391 surrendered to it by PH2L.

(6) The Respondent opened enquiries into the Amended Returns on 3 October 2014. The Respondent wrote to Mr Hunter on 13 October 2014, setting out why HMRC considered that the two claims to group relief surrendered by PH2L were not valid.

(7) KPMG wrote to the Respondent on 3 December 2014, setting out why they considered that there should be no bar to the group relief claims and surrenders between the Appellants and PH2L. KPMG's letter concluded with a request for a 'determination' against which an appeal could be made if the Respondent was still unable to accept the group relief claims.

(8) On 24 December 2014 the Respondent issued closure notices which amended the Amended Returns and their effects were explained in a letter to Mr Hunter dated 23 December 2014. The closure notices denied the group relief of £5,721,318 and £4,906,391 claimed from PH2L.

(9) The Appellants wrote to the Respondent on 19 January 2015 appealing against the conclusion stated in the closure notices and requesting reviews.

(10) Reviews were performed and on 6 March 2015 the Respondent notified the Appellants of their decision to refuse claims for group relief."

6. The FTT made some important additional findings of fact at [4] to [12] of the Decision:

"4. The Bank of Scotland appointed receivers on 27 June 2011, by virtue of a deed of appointment of that same date.

5. The statutory Notice of Appointment (Form LQ01) records - by way of a ticked box - that the receivers were appointed, as 'Receivers' (rather than as 'Administrative Receivers' or 'Managers') over '*The whole of the property of the company*', as opposed to '*Part of the property of the company*'.

6. The Bank of Scotland's rights flowed ultimately from its appointment as Security Trustee under a Deed of Debenture dated 10 October 2006. By Clause 3.1 of that Deed of Debenture, PH2L, as one of the Original Chargors, granted security in favour of the Security Trustee by way of (i) a first legal mortgage against all its Property (meaning the Real Property from time to time owned by the Chargor or in which the Chargor has an interest together with all proceeds of sale deriving from any such Real Property, the benefit of all covenants given in respect of such Real Property and any monies paid or payable in respect of such covenants), (ii) a first fixed charge on all the land and buildings, (iii) a first fixed charge on plant and machinery, other chattels, investments, insurances, book debts, bank balances, intellectual property, authorisations, goodwill and uncalled capital.

7. By way of Clause 3.5 of that Deed of Debenture, PH2L granted a first floating charge of 'all their assets and undertakings whatsoever and wheresoever both present and future not effectively charged by way of legal mortgage or fixed charge pursuant to the provisions of clause 3.1 (fixed charges) or effectively assigned by way of security pursuant to clause 3.2 (assignment by way of security), but extending over all its property, assets, rights and revenue as are situated in Scotland or governed by Scottish law'.

> 8. Clause 3.7.2 of the Deed provides for the automatic crystallisation of the rights under the floating charge if a receiver is appointed in respect of PH2L, thereby converting the rights under it into a fixed charge.
>
> 9. Clauses 9.6 and 9.7 of that Deed of Debenture provide for Enforcement of Security as follows:
>
>> '9.6 The Receiver will have the power on behalf and at the cost of the Chargor he acts for:
>>
>> 9.6.1 to do or omit to do anything which he considers appropriate in relation to the Secured Assets; and
>>
>> 9.6.2 to exercise all or any of the powers conferred on the Receiver or the Security Trustee under this deed or conferred upon administrative receivers by the Insolvency Act (even if he is not an administrative receiver) or upon receivers by the LPA or any other statutory provision (even if he is not appointed under the LPA or such other statutory provision).'
>
> 10. The 'powers' which are referred to in Clause 9.6.2 are to be found in Schedule 1 of the *Insolvency Act 1986* ('Powers of Administrator or Administrative Receiver') and include (except insofar as they are inconsistent with any of the provisions of the Deed of Debenture) the following powers:
>
>> '12. Power to do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the company.
>>
>> 13. Power to carry on the business of the company'
>
> 11. Those powers are not inconsistent with the Deed of Debenture.
>
> 12. Schedule 12 of the Deed of Debenture sets out the Receiver's Specific Powers. The Receiver will have *'full power and authority in relation to the Chargor ... it is appointed to act as agent for'* including the following power:
>
>> '2. **CARRY ON BUSINESS**
>>
>> generally to manage the Secured Assets and to manage or carry on, reconstruct, amalgamate, diversify or concur in … carrying on the business of that Chargor or any part of it as he may think fit'"

7. It was common ground that the relevant shareholders had control, as defined by section 1124 CTA 2010, of Farnborough prior to the appointment of the receivers and remained in control of Farnborough after the appointment. It was also common ground that the receivers appointed over the assets of PH2L ("the Receivers") did not hold any shares in PH2L and therefore did not hold any powers under the Articles of Association of PH2L.

Legislative framework

8. Sections 130(2) and 131(1)(a) CTA 2010 provide that, to make a claim for group relief, Farnborough must be a member of the same group of companies as PH2L. The relevant statutory provisions are introduced by section 150 CTA 2010. Section 150(1)(b) specifies that Chapter 5 of Part 5 CTA 2010 "explains how to determine if a company […] is a member of a group of companies". Section 150(2) CTA 2010 states that "Sections 154 to 156 qualify those explanations in cases involving transfers of companies."

9. Section 152 CTA 2010 provides:

> "152 Groups of companies

> For the purposes of this Part two companies are members of the same group of companies if -
>
> (a) one is the 75% subsidiary of the other, or
>
> (b) both are 75% subsidiaries of a third company."

10. At the relevant time, section 154 provided:

> "154 Arrangements for transfer of member of group of companies etc.
>
> (1) This section applies if, apart from this section, one company ('the first company') and another company ('the second company') would be members of the same group of companies.
>
> (2) For the purposes of this Part the companies are not members of the same group of companies if -
>
> (a) one of the companies has surrenderable amounts for an accounting period ('the current period'), and
>
> (b) arrangements within subsection (3) are in place.
>
> (3) Arrangements are within this subsection if they have any of the following effects.
>
> Effect 1
>
> At some time during or after the current period, the first company or any successor of it—
>
> (a) could cease to be a member of the same group of companies as the second company, and
>
> (b) could become a member of the same group of companies as a third company (see subsection (4)).
>
> Effect 2
>
> At some time during or after the current period a person (other than the first or second company) has or could obtain, or persons together (other than those companies) have or could obtain, control of the first company but not of the second company.
>
> Effect 3
>
> At some time during or after the current period, a third company could start to carry on the whole or a part of a trade that at a time during the current period is carried on by the first company and could do so—
>
> (a) as the successor of the first company, or
>
> (b) as the successor of another company which is not a third company and which started to carry on the whole or a part of the trade during or after the current period.
>
> (4) A 'third company' means a company that is not, apart from any arrangements within subsection (3), a member of the same group of companies as the first company."

11. The parties agreed before the FTT and us that Effects 1 and 3 of section 154(3) CTA 2010 are not directly relevant.

12. For the purposes of section 154 CTA 2010, 'arrangements' is defined in section 156(2) as follows:

> "(2) 'Arrangements' –
>
> (a) means arrangements of any kind (whether or not in writing), but

> (b) does not include a power of a Minister of the Crown, the Scottish Ministers or a Northern Ireland department to give directions to a statutory body as to the disposal of assets belonging to the body or to a subsidiary of the body."

13. Section 1124(2) CTA 2010 defines 'control' as follows:

> "(2) In relation to a body corporate ('company A'), 'control' means the power of a person ('P') to secure –
>
> > (a) by means of the holding of shares or the possession of voting power in relation to that or any other body corporate, or
> >
> > (b) as a result of any powers conferred by the articles of association or other document regulating that or any other body corporate,
>
> that the affairs of company A are conducted in accordance with P's wishes."

The Decision

14. The FTT began its discussion by considering the correct approach to statutory interpretation at [21] and [22]. The FTT then considered, at [24] to [38], whether it should admit certain extra-statutory materials to aid the interpretation of the provisions at issue in this appeal under the principles set out in *Pepper v Hart* [1993] AC 593 and the extent to which it could have regard to marginal notes and explanatory notes in determining the purpose of the legislation.

15. At [47], the FTT concluded that the clear purpose of section 154 CTA 2010, read purposively, is simply to make group relief unavailable between companies which are not under the same control. Accordingly, the FTT held that the type of transaction to which section 154(3) and Effect 2 were intended to apply was simply a transaction whereby the control of two companies came to be in separate hands, irrespective of the motive or purpose for the transaction.

16. Having determined the purpose and scope of the relevant legislation, the FTT then turned to consider the meaning of 'arrangements' in section 154 CTA 2010. At [56], the FTT concluded that the appointment of the Receivers under the Deed of Debenture constituted 'arrangements' for the purposes of section 154 CTA 2010.

17. The FTT then considered whether Farnborough and PH2L were under the same control as defined by section 1124 CTA 2010. The FTT's conclusion on this point is set out at [67] to [70] as follows:

> "67. In my view, the receivers of PH2L, on the facts of these appeals, control it within the meaning of CTA 2010 s 1124(2). Both on the Agreed Facts, and on the terms of their appointment as set out above:
>
> > (1) The whole of the property of the company was put into the hands of the Receivers;
> >
> > (2) The Receivers had very extensive powers, including the power to do or omit to do anything which they considered appropriate in relation to the Secured Assets;
> >
> > (3) The Receivers had the power to do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the company;
> >
> > (4) The Receivers had the power to carry on the business of the company.

> 68. It seems to me that the entire affairs of PH2L, read practically, were put into the hands of the Receivers.
>
> 69. As a cross-check, it does not seem to me as if there were any relevant powers outside the scope of the receivership, nor any suggestion that the receivers had disavowed any of their powers, so as to permit any realistic argument, on the facts, that some sufficient control of PH2L's affairs, for the purposes of CTA s1124(2) remained vested in the directors or shareholders of PH2L. I have already remarked that there is no evidence as to what the Receivers have actually been doing. Whilst the directors did remain in office, their powers of management were rendered incapable of being exercised. The receivers replaced the boards as the persons having the authority to exercise the companies' powers.
>
> 70. In my view, once the receivers had been appointed, the affairs of PH2L were no longer being conducted in accordance with the wishes of the Appellants' shareholders. That was sufficient to degroup PH2L. Whilst the Appellants' shareholders continued to have control over the Appellants, they did not have control over PH2L, in the sense that they were no longer able to secure that PH2L's affairs were conducted in accordance with their wishes."

18. Accordingly, the FTT held that, in the accounting period ending 31 May 2012, PH2L was no longer a member of the same group of companies as Farnborough for the purposes of CTA 2010 and so PH2L could not surrender group relief to Farnborough.

Issues

Introduction

19. The issue in the appeal before the FTT was whether the appointment of the Receivers over the assets of PH2L had the effect of de-grouping PH2L and Farnborough so that losses could not be surrendered by PH2L to Farnborough by way of group relief. The issue for us is whether the FTT was correct, as a matter of law, to conclude that Farnborough was not entitled to claim group relief in respect of the losses of PH2L.

Preliminary point

20. Before addressing this issue, there is an important preliminary point to be highlighted and disposed of.

21. When discussing the issue of "control", there appears to have been at the very least a degree of ambiguity, both in the arguments of the parties and in the Decision, as to where "control" of both Farnborough and PH2L actually resided, disregarding the effect of the Debenture and the appointment of the Receivers pursuant to it. This is clearly of key importance when considering whether arrangements are in place whose effect is that control of Farnborough (on the one hand) and PH2L (on the other) has or could become separated.

22. The FTT said this of the post-receivership situation (at [70] and [71]):

> "Whilst the appellants' shareholders continued to have control over the appellants, they did not have control over PH2L… Accordingly then, the effect of the appointment of receivers over the whole of the property of PH2L constituted 'arrangements' which had 'Effect 2'".

It seems to us to be implicit in this statement that the FTT was assuming that "the appellants' shareholders" (i.e. Gatevalley Limited) had, crucially, lost control over PH2L.

23. In Farnborough's skeleton argument, it was stated that "it is common ground that the shareholders had control under s 1124 CTA 2010 prior to the appointment of the receiver", but without specifying which shareholders were being referred to; and in the written summary of their case provided towards the end of the hearing, it was stated that:

> "As the receivers powers are not relevant for tax control, PH1 must control PH2 otherwise there would be an absurd, thus incorrect, result, that no person or persons together could control PH2".

This passage appears to suggest Farnborough was arguing that control of PH2L resided in its immediate parent company.

24. In HMRC's skeleton argument, the following passage appeared:

> "It is common ground that the shareholders of each Appellant remained in control of each Appellant. The result was that the appointment of the Receivers over all the assets of PH2L had the effect that (a) the shareholders of each Appellant were in control of each Appellant but (b) the shareholders of each Appellant were not in control of PH2L."

25. It should of course be remembered that all the shares in both Appellants were held by Gatevalley Limited, which at no stage had any interest as a shareholder (whether direct or indirect) in PH2L. It is only when one looks several tiers upwards in the group structure that the link between Farnborough and PH2L is established via KL, the common parent company of their respective parent companies Gatevalley Limited and Piccadilly Hotels 1 Limited. Thus Farnborough's shareholder (Gatevalley Limited) clearly could never be said to have had control over PH2L at any point, either before or after PH2L's receivership.

26. At first sight, if it is accepted that Gatevalley Limited had control over its subsidiaries (Farnborough) but did not have control over PH2L as a result of the "arrangements" inherent in the structure of the group, then "Effect 2" would always have applied to preclude any possibility of group relief between them. This cannot be correct, otherwise group relief would be unavailable in any but the simplest of group structures, a limitation which is clearly outwith the contemplation of the provisions as drafted. This point was considered by Lord Bridge in *Pilkington Brothers Limited v CIR* [1982] STC 103 ('*Pilkington*') at 113j, who considered it "powerfully arguable" that intermediate subsidiary companies must be disregarded (as they were always subject to an obligation to act as instructed by their parent companies).

27. The remaining question is whether "control" in a group situation ought properly to be found to reside in the parent company of the group, or in its shareholders (who, as "persons together" might be said to have control over all the companies in the group, including its parent company).

28. In *Pilkington*, it was made clear (per Lord Bridge at 111e) that the Crown's case was put to their Lordships on the basis that:

> "'arrangements [were] in existence by virtue of which' at all material times 'persons together' (sc the shareholders of the taxpayer

> company) '[had] control of the first company' (the taxpayer company) 'but not of the second'".

Clearly their Lordships decided the case in favour of the Crown on that basis.

29. Much of the decision in *Pilkington* was taken up with the question of whether the effect of the pre-existing constitutional arrangements should be included in the "arrangements" to be tested against the relevant statutory provision, and at least one leading commentator has described the decision as "strange"[1]. Nonetheless (and in spite of the same commentator's criticism of it as "impossibly wide"), we consider part of the ratio in that case, which is binding on us, is that in "normal" group situations (i.e. in the absence of some extraneous arrangement which places "control" of a group company in some other hands), the shareholders of the ultimate parent company are to be regarded, for the purposes of "Effect 2" as "persons together" having control of the parent company and, through it, of all companies in the group; and that this precludes any company in the group (including the parent company) from having such control over any other group company. It follows that when considering the issue of separation of control, the starting point must be that the shareholders of KL's ultimate holding company ("the Shareholders") must be regarded as initially having "control" of both Farnborough and PH2L. The substantive issues raised by the parties must then be argued from this starting point. We acknowledge however that, in this case, the result would be the same whether control is considered to lie in KL or the Shareholders.

Statement of the issues

30. In the light of the above, the first substantive issue is whether the Shareholders ceased to control PH2L for the purposes of section 1124 CTA 2010 once the Receivers had been appointed in respect of that company ('the Control Issue')[2]. The submissions in relation to the Control Issue, as formulated by Farnborough, addressed two separate points as follows:

(1) whether a receiver can or could obtain control of a company as defined by section 1124 CTA 2010 ('the Receivers Control Issue'); and

(2) whether the shareholders of a company can or could obtain control of that company once receivers are appointed over all the assets ('the Shareholders Control Issue').

31. The second substantive issue as formulated by Farnborough is whether, on a purposive construction, the appointment of a receiver is a type of 'arrangement' that was envisaged by section 154 CTA 2010 ('the Arrangements Issue').

32. Before determining either substantive issue (which must be read in the light of the preliminary point discussed above), we consider the interpretation to be applied to the legislative provisions under consideration.

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[1] "Taxation of Companies and Company Reconstructions" by Bramwell, T1.5.2

[2] Both parties were agreed that the earlier execution of the Debenture should be disregarded as potential "arrangements" for this purpose.

Approach to construction of the legislation

General

33. It was common ground that we should adopt a purposive approach to the construction of the legislation and we consider what that means and how that affects the interpretation of the provisions at issue in this case before applying it to the facts. The FTT, at [21], set out the guidance given by Lewison LJ in in *Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 753, [2013] STC 1479 at [24]. Since that case, the Supreme Court has addressed the subject of purposive construction in *UBS AG v HMRC* [2016] UKSC 13 ('*UBS*') and *RFC 2012 Plc (formerly The Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45 ('*Rangers*').

34. In *UBS*, Lord Reed outlined his approach to the interpretation of the statutory provisions in issue in the appeals at [72]:

> "… it seems to me to be preferable to begin with the interpretation of the legislation, and the fundamental question whether it can be given a purposive interpretation going beyond its literal terms: that is to say, whether a "*Ramsay*" approach is possible at all, and if so, the purposive construction on which it is to be based. … the question next arises how, on its proper interpretation, the legislation is to be applied to the facts."

35. Lord Reed then said at [73] that the statute, the Income Tax (Earnings and Pensions) Act 2003, contained no explanation of the purpose of the provision on which a purposive interpretation might be based and it was in that context that he examined the historical background to and development of the legislation by reference to budget notes, explanatory notes and case law.

36. In *Rangers*, Lord Hodge, with whom the other Justices agreed, set out the history of the change from a generally literalist interpretation of taxing statutes to a more purposive approach brought about by *W T Ramsay Ltd v IRC* [1982] AC 300 and its successors as explained by Lord Nicholls of Birkenhead in the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684. Lord Hodge, at [15] and [16], then made three points in relation to statutory interpretation of charging provisions that were important in determining the *Rangers* appeal and we consider are relevant, with suitable adaptation, to the group relief provisions under consideration in this one.

> "15. … First, the tax code is not a seamless garment. As a result provisions imposing specific tax charges do not necessarily militate against the existence of a more general charge to tax which may have priority over and supersede or qualify the specific charge. … Secondly, it is necessary to pay close attention to the statutory wording and not be distracted by judicial glosses which have enabled the courts properly to apply the statutory words in other factual contexts. Thirdly, the courts must now adopt a purposive approach to the interpretation of the taxing provisions and identify and analyse the relevant facts accordingly.
>
> 16. … In answering the question whether the relevant statutory provisions were intended to apply to the transaction, the proper approach is, first, to interpret the relevant statutory provisions purposively and, secondly, to analyse the facts in the light of those statutory provisions so construed."

37. Lord Hodge went on to consider the purpose of the legislation by reference to, and after careful examination of, the provisions of the primary and subordinate legislation. He did not find it necessary to consider any contemporaneous extra-statutory material.

Interpretation by reference to legislative context

38. Mr Ridgway submitted that the purpose of the group relief provisions could be discerned from the legislation without reference to extrinsic materials. His argument, in summary, was as follows.

39. The legislation deals with transfers of group relief between companies in the same economic group. The transfer is prohibited if there are arrangements for another (third) company to take control. In *Cricket plc v Inspector of Taxes* [1998] STC (SCD) 101 ("*Cricket*"), the Special Commissioners found a similar purpose in respect of materially identical legislation for ACT (at 104):

> "We accept that the apparent purpose of s 240(11)(a) [Income and Corporation Taxes Act 1988] is to ensure that the benefits of the section, which were designed to help a company pass over surplus advance corporation tax to a subsidiary (and thus within a group), did not apply when the effect in reality would be to pass those benefits to an unrelated company outside the group".

40. Here the purpose of section 154 CTA 2010, he submitted, was to ensure that the similar benefits of Part 5 CTA 2010 in relation to losses did not apply when the effect, in reality, would be to pass those benefits to an unrelated company outside the group i.e. a company where there is no real common economic interest. This was reinforced by section 150(2), which referred explicitly to "transfers of companies" as being the mischief to which the provisions of sections 154 to 156 were directed.

41. Mr Ridgway contended that the legislation looks to ensure that the shareholders have an economic interest in the companies from which and to which the losses are being surrendered. A 75% shareholding link is a necessary but not sufficient condition. There must also be 75% interests in any profits available for distribution and any assets available on a winding up (though of course the lack of any such profits or assets would not break the economic link).

42. Mr Bremner, on the other hand, submitted that the legislative context did not really assist Farnborough's argument at all. The clear effect of the legislation was that in addition to the 75% shareholding link (including the associated 75% economic tests relating to profits and assets on a winding up), there was a requirement for common control; no more and no less. The legislation was perfectly clear and comprehensive as to the meaning of "control" for this purpose, and there was no warrant in the statutory language for excluding cases such as the present where there was no suggestion of any tax avoidance motive for the relevant transactions. Appropriate vocabulary to achieve that result had been readily available to the draftsman but had not been used.

Interpretation by reference to extrinsic material

43. Mr Ridgway submitted that, although an examination of the legislation as a whole was sufficient for his purposes, it is also permissible to look at the historic context in which the legislation was passed to ascertain the purpose of the legislation. There were two limbs to his submissions, as we understood them.

44. First, he argued that the criteria in *Pepper v Hart* (supra) were satisfied, and accordingly reference could be made to Hansard for assistance. This was because, in his submission, the legislation is ambiguous as to whether it is intended to apply to

"normal commercial" transactions and whether there needs to be a third party beneficiary of any arrangements involved in relation to "Effect 2". He submitted that certain passages in Hansard demonstrate first, that there needs to be a third party; and second, that the section is not to apply to commercial situations. The passages in Hansard refer specifically to the types of schemes the provisions were aimed at i.e. the sale of losses to companies outside the group. The borrowing of money, giving of security and appointment of a receiver, on the other hand, were in his submission ordinary (if ultimately unfortunate) incidents of commercial life. It has never been suggested that any avoidance is involved and the Respondents' interpretation of the legislation would prevent ordinary commercial activities.

45. Mr Bremner submitted that the criteria in *Pepper v Hart* were not satisfied and that therefore we should go no further down that route.

46. We agree. In order to be admissible as an aid to the construction of CTA 2010 s 154, Farnborough would need to demonstrate that the material in question satisfied the *Pepper v Hart* criteria. We do not consider there to be any ambiguity, obscurity or absurdity in the statutory provisions that would justify resort being had to Hansard (see the tests articulated by Lord Browne-Wilkinson at 634C-E and Lord Oliver at 620C-D).

47. Second, even if there were such ambiguity or obscurity or absurdity, there is no clear statement by the Minister that governs the meaning of the relevant clauses. In particular, we agree with Mr Bremner that:

> (1) It is not sufficient for Farnborough to demonstrate that one situation (or even a principal situation) targeted by section 154 CTA 2010 was tax avoidance. That would not demonstrate that tax avoidance was the only target of the legislation, still less that the legislation ought to be limited to situations of tax avoidance.
>
> (2) Nor is it sufficient for Farnborough to identify a general policy in section 154 of combating tax avoidance. The identification of a general policy of that nature would not justify the rewriting of the legislation for which Mr Ridgway contends. This can be seen from *Page v Lowther* [1983] STC 799 (in which the purpose of the legislation was specifically identified in the statute itself) and *Project Blue Limited v HMRC* [2016] EWCA Civ 485 (where the heading of the relevant statutory provision was "tax avoidance").

48. Mr Ridgway's second argument was a more general one, effectively that an examination of the historical perspective leading to the enactment of any particular provision would assist in understanding its purpose. He referred to the "Explanatory Notes to Ministers" and Budget Press Releases issued when the predecessor provisions were first introduced in 1973, the Hansard report of the Standing Committee debates at the time and the Explanatory Notes accompanying the Tax Law Rewrite of the provisions.

49. Mr Bremner argued that the guidance given by the House of Lords in *Pilkington* authoritatively established the purpose of section 154, and could not be overridden by reference to any extra-statutory material. In addition, any attempt to introduce the Hansard material by reference to this argument was merely an attempt to circumvent the criteria set down in *Pepper v Hart.*

50. We essentially agree with Mr Bremner. Lord Bridge in *Pilkington* said this:

> "…if one seeks to discern a legislative purpose underlying [the earlier provision which became "Effect 2"] one is driven, I think, to conclude that this provision was intended to introduce a requirement, as a qualification for entitlement to group relief, that the two companies… claiming membership of the same group of companies should be under the same control."

51. The FTT at [47] said this:

> "Taking the above into account, it seems to me that the clear purpose of s 154, read purposively, is simply to make group relief unavailable between companies which are not under the same control. Applying the guidance in *Pollen*, then the nature of the transaction to which s 154(3) and Effect 2 was intended to apply was simply a transaction whereby the control of two companies came to be in separate hands, irrespective of whether that motive or purpose was (put neutrally) a salutary one or not."

Subject perhaps to substituting "arrangements" for "transaction", we concur. In the light of this, we see no need to explore the legislative background and history of the provisions any further.

Receivers Control Issue

52. Setting this point in context, it is concerned with whether the Receivers had or could obtain, at any relevant time, control of PH2L (it being common ground that they did not have control of Farnborough, nor could they obtain it). There was also no suggestion that the Receivers held any relevant shares or possessed any voting power at any stage so as to bring section 1124(2)(a) CTA 2010 into play, nor did any of their powers derive from any articles of association.

53. Applying the residual relevant wording of section 1124(2) CTA 2010, the question to be addressed therefore is whether the Receivers had power to secure, as a result of any powers conferred by any "other document regulating" PH2L or any other body corporate, that "the affairs" of PH2L were "conducted in accordance with" their wishes.

Arguments

54. Mr Ridgway submitted there were essentially two reasons why this question should be answered in the negative. First, the Receivers' powers were conferred by the Debenture, which was not a "document regulating" PH2L or any other body corporate. This was supported by *Fenlo Limited v HMRC* [2008] STC (SCD) 1245, in which a materially identical "control" definition was considered. In that case, the parties had agreed (and the Special Commissioner did not disagree) that "in construing the phrase 'other document [i.e. other than the articles of association] regulating the company'…, 'other document' must take its flavour from and be akin to the articles of association of a company." The relevant "other document" in that case was a facility letter which "regulated (amongst other things), the objects of the company, the payment of dividends and the remuneration of officers and employees". The Special Commissioner agreed that notwithstanding these provisions, the facility letter "did not have the flavour of, nor was it akin to, articles of association." Mr Ridgway also asserted in his skeleton

argument that the FTT had "erred in law in concluding that the Debenture is a document regulating PH2L" within the meaning of section 1124(2)(b) CTA 2010.

55. In response, Mr Bremner submitted that the broad extent of the powers conferred pursuant to the Debenture (including, for example, the power to manage PH2L's business in place of its board of directors) was such that the Debenture amounted to a "document regulating the company" for the purposes of section 1124(2)(b) CTA 2010. Any attempt to limit that phrase in the way Mr Ridgway argued would effectively frustrate the intention behind the provision; it was "precisely when the shareholders' rights do not reflect the substance of the case (in the light of other arrangements) that the provisions should apply."

Discussion and conclusion

56. We agree with Mr Ridgway on this point. Whilst the Tribunal made no explicit finding that the Debenture was an "other document regulating" PH2L, it did hold at [67] that "the receivers of PH2L, on the facts of these appeals, control it within the meaning of CTA 2010 s 1124(2)", and must therefore have reached the view that the Debenture was an "other document regulating" PH2L.

57. It is clear from the syntax that the words "regulating that or any other body corporate" refer back both to 'the articles of association" and to the 'other document' contemplated in section 1124(2)(b), and accordingly the type of regulation being referred to must be similar in relation to both. Therefore, the phrase 'other document regulating that or any other body corporate' when read in context must, in our view, refer to a constitutional document akin to articles of association (i.e. one which sets out the governance arrangements for a body corporate which is binding upon members and officers by virtue of their status as such, without the need for them to agree separately to its terms). We infer that in referring to "other document", the draftsman had mainly in mind the constitutional documents governing "non-standard" types of body corporate (e.g. companies incorporated overseas or bodies established by Royal Charter, where the legal terminology often does not include the phrase "articles of association").

58. Having reached that view, it follows that however extensive the powers conferred on them by the Debenture, we consider the Receivers did not at any time have (nor were they able to obtain) "control" of PH2L as defined in section 1124(2) CTA 2010; accordingly, we decide the Receivers' Control Issue in favour of Farnborough.

59. It is not therefore necessary for us to go on to consider Mr Ridgway's second argument on this point, which was essentially that such powers as the Receivers had, although admittedly extensive, (a) were held by them in a fiduciary capacity and (b) did not extend to "constitutional" matters, which was in his submission the type of control to which section 1124 refers. The Receivers, he submitted, act as agents of PH2L and can only act in accordance with the powers set out in the Debenture. When dealing with the charged assets, a receiver acts in a fiduciary capacity and cannot act in accordance with his own personal wishes. The powers of the Receivers were therefore sufficiently circumscribed to prevent them from having "control" for the purposes of section 1124(2) CTA 2010. Nor do we consider it necessary to set out Mr Bremner's extensive submissions in reply on this point.

Shareholders Control Issue

60. To set this issue in context, it is common ground that the Shareholders at all times had control over Farnborough. The question is whether there were arrangements in place pursuant to which, at the relevant time, they did not have control of PH2L.[3]

61. In passing, we observe that whilst this point was not brought out at the hearing before us, and does not appear to have been put to the FTT either, the "current period" referred to in Effect 2 is the accounting period for which the surrenderable amounts arise (see section 154(2)(a) CTA 2010) rather than the accounting period of the claimant company for which group relief is claimed. From the documents before us and the FTT, it appears that the accounting periods of PH2L in respect of which the losses arose were the years ended 31 January 2012 (as to £7,114,177) and 31 January 2013 (as to £3,513,532), though both amounts were claimed by Farnborough in relation to its accounting period ended 31 May 2012. As the Receivers were appointed on 27 June 2011, and continued in office until after 31 January 2012, they were in office during at least part of both PH2L's relevant accounting periods. Thus the overall timing is such that if the appointment of the Receivers deprived the Shareholders of control for the purposes of Effect 2, it will have done so in relation to both sets of claimed losses.

Arguments

62. Mr Ridgway submitted that control of a company is to be tested by reference to constitutional control (i.e. the members' relationship with the company) and board level control (i.e. who controls the constitution of the board). It is not a test of who is making day to day management decisions, it is a test of continual constitutional control over PH2L. The appointment of the Receivers had no impact on the constitutional documents of PH2L such as its articles of association or the shareholders' powers under those constitutional documents. The appointment of the Receivers had simply deprived PH2L, temporarily, of its assets. If control were to be tested solely by reference to the ability to control what is done with a company's assets, it would be impossible to control a dormant company or one which has agreed a contract for selling its business and assets to a third party. Furthermore, if the Shareholders so wished, they could invest further capital in PH2L to settle the secured debt and remove the Receivers, thus recovering total control.

63. "Control" in section 1124 CTA 2010 is, he submitted, defined by reference to the ability to secure certain things through holding shares (or analogous voting rights). This meant that the draftsman intended control to be tested by reference to who controls the shares, who controls the voting power, who controls the board of directors, who controls the ability to declare a dividend of profits and who controls the ability to wind up the company and distribute its surplus assets (if any). The shareholders of PH2L continued to have powers under its articles of association, inter alia:

(1) to appoint and remove members of the board of directors of PH2L

(2) to appoint a voluntary liquidator to wind up PH2L

(3) to amend the Articles of Association of PH2L

(4) to alter the Memorandum of PH2L

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[3] This question is complicated slightly by the issues discussed at [6969] and [75] to [77] below.

(5) to increase, cancel or reorganise the shares forming the share capital of PH2L

(6) to change the company name of PH2L

(7) to require the directors to call a general meeting of PH2L, and

(8) to determine the remuneration of PH2L's Directors.

64. In the light of this, Mr Ridgway submitted that the Shareholders controlled, or could obtain control of, PH2L and therefore the FTT erred in law in concluding that the shareholders did not and could not, control PH2L.

65. Citing *Cricket* at 104e (where the Special Commissioners held that "in the last resort someone must control every company"), he submitted that someone must have control of PH2L at all times; if the Receivers did not have control then logically their appointment could not deprive the Shareholders of the control which had previously been indisputably vested in them.

66. Mr Bremner argued that, following their appointment, the Receivers (and not the directors) had the power to carry on the business of PH2L. The wishes of the directors and/or shareholders in relation to the affairs of PH2L were therefore necessarily subordinated to the decisions of the Receivers. Some powers might still reside with the shareholders but the existence of those powers in no way altered the conclusion that (a) it was the Receivers who were carrying on the business of PH2L (and not the directors or the shareholders) and (b) the powers which the shareholders did retain did not give the shareholders power to secure that the affairs of PH2L were conducted in accordance with their wishes.

Discussion and conclusion

67. The statutory enquiry we are required by section 154 CTA 2010 to pursue is whether there were "arrangements" in place whose effect was that, at any time during (or after) the accounting period ending on 31 January 2012 (or, as the case may be, 2013), the state of affairs identified in Effect 2 existed.

68. We do not consider there was any <u>single</u> person who had, or was able to obtain, control of any of the companies[4]. We have found that the Receivers, as "persons together", did not have (nor could they obtain) "control" of PH2L (see [58] above). Thus the question to be decided is whether, after the Receivers were appointed, it would have been correct to say that arrangements existed whose effect was that the Shareholders together "have or could obtain control of the first company [Farnborough] but not of the second company [PH2L]."

69. It is common ground that the Shareholders had control of Farnborough at all relevant times, and at first sight this results in a simple question needing to be addressed, namely "was there any relevant time when those shareholders did not have control of PH2L?" But the shorthand phrase "but not of PH2L" derived from the wording of Effect 2 conceals a difficulty: does it refer solely to control, or does it also

[4] As stated at [60] above, the Shareholders together held control before the receivership, and even if (contrary to our view) the Receivers had "control" of PH2L, that could only have been as "persons together".

refer to the ability to obtain control? If the latter is correct, then the true question to be asked is "was there any time when the Shareholders had neither control nor the ability to obtain control of PH2L?" Put another way, even if it were shown that the Shareholders did not have actual control of PH2L once the Receivers were appointed, would the "common control" test still be breached if those Shareholders were still able to gain, i.e. regain, such control?

70. Before addressing that question, we consider first whether the appointment of the Receivers did indeed result in the Shareholders losing "control" of PH2L.

71. The argument as put forward by Mr Bremner was effectively that the powers which the Receivers acquired over PH2L and its business and assets were so extensive that, whether or not the Receivers technically obtained "control" of PH2L, the Shareholders were deprived of it. Mr Ridgway effectively argued that section 1124 was concerned with "constitutional" control – by reference to voting rights in relation to what might be called "structural" matters rather than day to day operations. Furthermore, in relation to control, the law abhors a vacuum and therefore if the Receivers did not have control, it must have still resided in the Shareholders.

72. Whilst Mr Ridgway's arguments are superficially attractive, we do not consider they can be justified by reference to the wording of the statute. When section 1124 talks of constitutional matters (voting rights etc) it does so by reference to the means through which the putative controller's power is exercised; but the fact remains that the power which must be held in order to have "control" is "the power to secure that the affairs of [PH2L] are conducted in accordance with P's wishes". We see no warrant for qualifying the word "affairs" by the word "constitutional" or any interpretation to a similar effect. Were it otherwise, the "common control" purpose of Effect 2 could easily be circumvented by means of some contractual arrangement which separated the day to day commercial operation of a company's business from its constitutional structure.

73. Once the Receivers were appointed, their powers (as summarised in the Decision at [9] to [12]) were, in our view, so extensive that the Shareholders could no longer be fairly said to have "the power to secure that the affairs" of PH2L were "conducted in accordance with" their wishes.

74. It does not in our view matter that, on this interpretation, neither the Shareholders nor the Receivers had "control" of PH2L within the meaning of section 1124 CTA 2010. The wording of Effect 2 in section 154 CTA 2010 recognises that "control" can be vested in more than one person "together", and it may well have been the case that the Shareholders and the Receivers together had "control" of PH2L. In that context, argument as to the correctness of the assertion that "in the last resort *someone* must control every company" (per *Cricket* at 104e) somewhat misses the point.

75. Would our conclusion on this point be altered if it could be shown that the Shareholders, even though they had lost "control" of PH2L, were able to regain it at any time? Mr Ridgway submitted that the terms of the Debenture were such that the Shareholders would always have been able to arrange for payment of PH2L's debt, which would have resulted in the termination of the Receivers' rights under the Debenture; whilst this was in the context of a submission that the Shareholders had

never lost control of PH2L, it might equally be taken as a submission that this ability amounted to a right to regain such control if it had in fact been lost.

76. In the interests of simplicity in addressing this question, let us disregard for the moment the situation of "persons together", and consider a situation involving a single person P. The underlying issue then is whether, if there are "arrangements" whose effect is that P has control of the first company and does not have (but is able to obtain) control of the second company, Effect 2 is triggered because P "has or could obtain control of the first company but not of the second company". A taxpayer in that position might argue that because P "could obtain control" of the second company, the words "but not of the second company" do not apply to trigger Effect 2: P is in a state of controlling or being able to obtain control of both companies and the "common control" requirement which is embodied in Effect 2 is therefore satisfied.

77. We can see that if this argument were correct, it would give rise to immense scope for avoidance of what we consider to be the clear purpose of these provisions. It would allow for the creation of structures in which control of a company would for all practical purposes be lost but could be retained for group relief purposes by the inclusion of artificial provisions in appropriate terms allowing for control to be "regained" at some future date. We do not consider such an interpretation of the provisions would be consistent with their overall purpose and we therefore reject it. It follows that even if Mr Ridgway is right that the Shareholders would be able to recover control of PH2L by paying off the receivership debt, we do not consider that the existence of that possibility means that Effect 2 does not apply in a situation where the Shareholders have lost control of PH2L whilst retaining control of Farnborough.

Arrangements Issue

78. At [56], the FTT held that the appointment of the Receivers under the Deed of Debenture constituted 'arrangements' for the purposes of section 154 CTA 2010. Judge McNall concluded that the term should be read widely because it seemed to him, as he put it in [51], that:

> "… section 154 is designed to be of straightforward and practical application, both for taxpayers, their advisers, and HMRC, without needing to inquire into concepts such as meetings of minds, or consensus."

79. Judge McNall found support for that view in section 155B CTA 2010 which excludes certain mortgage arrangements from being arrangements within section 154(3). He also relied on two decisions of the Special Commissioners relating to different provisions with similar wording.

80. Mr Ridgway accepted that "arrangements" is a very wide term but he contended that, to be an arrangement for the purposes of section 154, it must be the type of arrangement envisaged by Parliament, ie an arrangement which sought to defeat the purpose of the legislation. Mr Ridgway contended that, on a purposive construction, the appointment of a receiver is not the type of 'arrangement' that was envisaged by section 154 CTA 2010. Mr Ridgway said that Farnborough did not seek to argue that "arrangements" in section 154 must be read as only applying to arrangements which include an avoidance motive or artificial arrangements. He argued that "arrangements" must be interpreted as a general term to achieve the purpose of section 154. That purpose is to prevent arrangements whereby a group passes entitlement to tax losses to a third party without also passing economic ownership. He contended that the

appointment of a receiver is not such an arrangement and therefore cannot break a group under Effect 2. He submitted that, but for the appointment of the Receivers, the losses could be surrendered within the group. The appointment of the Receivers did not disturb the economic group and, therefore, it is not the type of arrangement envisaged by section 154.

81. Another argument in favour of interpreting "arrangements" in section 154 as referring only to arrangements involving the transfer of a company was that section 150(2) CTA 2010 states that "Sections 154 to 156 qualify those explanations in cases involving transfers of companies" and section 154 is headed "Arrangements for transfer of member of group of companies etc." We do not accept that the wording of section 150(2) and the heading to section 154 require us to restrict the interpretation of arrangements to arrangements involving the transfer of a company. In our view, the fact that Effect 3 does not involve any transfer of a company shows that section 150(2) cannot be relied on to support an interpretation of "arrangements" as having to involve one or more transfers of companies. Further, such an interpretation ignores the presence of "etc" in the heading to section 154 which appears to broaden the section's scope beyond transfers of companies. We agree with Mr Bremner that the term "arrangements" is extremely broad. That can be seen from the definition of "arrangements" in section 156(2) as "arrangements of any kind (whether or not in writing)". That was also the view of Lord Bridge in *Pilkington* at 112j:

> "the definition of 'arrangements' as meaning arrangements of any kind predisposes me against imposing any limitation on the ordinary meaning of the word unless forcibly driven to do so by the context"

82. In our view, "arrangements" is a word that has a very broad meaning. There are two points in this case when there might be arrangements: first, the giving of the Debenture; and second, the appointment of the Receivers. The parties agreed that the entering into of the Debenture does not, of itself, constitute arrangements which have Effect 2. We have already given our views on the purpose of section 154 CTA 2010 ", insofar as Effect 2 is concerned, at [50] and [51] above. Consistently with that purpose, Effect 2 was intended to apply to arrangements of any kind (other than those described in section 156(2)(b) CTA 2010) whereby the control of two companies is or could be in separate hands, irrespective of the motive or purpose of such arrangements. We have found at [73] that, once the Receivers were appointed, the Shareholders no longer had control as defined in section 1124(2) CTA 2010. Accordingly, the appointment of the Receivers under the Debenture had the effect described in Effect 2 in section 154(3).

Anomalies

83. Mr Ridgway referred to what he called two "anomalies" which would arise from HMRC's interpretation of the statutory provisions. It appears from the Decision (at [36]) that he had sought to persuade the FTT that these supposed anomalies were so absurd that it was appropriate effectively to override them by reference to Parliamentary materials. The FTT rejected this argument, saying this:

> "… I do not agree that it is an absurd outcome if the appointment of a receiver over PH2L has the effect of degrouping it. To my mind, CTA 2010 s 155B (which enacts Extra Statutory Concession 10) answers the point, since it makes clear that it is not the entry into the security instrument which degroups, but the actual exercise of the rights under the security."

84. Mr Ridgway, in his skeleton argument, said this about the FTT's rejection of his argument in [36] of the Decision:

> "The Tribunal (para 36) erred it conclusion [sic] that s.155B provides further support for the conclusion that "arrangements" is to be read widely and, specifically, that it points to the Deed of Debenture being arrangements. To the extent that s.155B is an aid to the construction of s.154(3) it supports the Appellant's interpretation and not HMRC's. By being limited to mortgage arrangements secured by way of shares or securities, what s.155B in fact illustrates is that the draftsman had firmly in mind that "arrangements" (a) entailed the transfer of economic value or control to a third party (i.e. the lender) and (b) so far as control is concerned, would effect that change of control at the constitutional level of the company, hence the qualification "secured by way of shares or securities in the company" (see also s.155A(2)(a) and (b)). The debenture/receivership in this case does not entail the transfer of shares or securities and hence does not transfer control to a third party. It is wholly consistent with the Appellants argument that arrangements have to be something which disturb the fundamental economic tests of forming a group relief group and control is to be tested at constitutional level."

85. He went on to express his first suggested anomaly in his skeleton argument in these terms:

> "… if s155B were required to prevent the entering into of a mortgage from being arrangements then, if HMRC are correct, the entering into of *[a]* floating charge must likewise be an arrangement if it might result in a receiver being appointed and the shareholders losing control. This will degroup companies above the company which gives the floating charge. Many existing groups would thereby be unable to group relieve losses which hitherto they have done. This anomaly was alluded to in *Fenlo*."

86. What he characterised as the "extreme" consequences of this anomaly were, in his submission, somewhat ameliorated by a second anomaly, which he put in the following terms:

> "On HMRC's interpretation if a company A is the parent company of company B, the appointment of a receiver over company B will mean the shareholders of A will control A but not B and the group relationship will be broken. If, however, company A has a second subsidiary, company C, and it also has had a receiver appointed the shareholders will control neither B nor C and the group will not be broken between B and C and so group relief surrenders can be made between them.
>
> If anomaly 1 is correct, provided all companies in a group have given floating charges to a bank anomaly 1 will disappear; however, all group companies will have to charge all their assets in order to surrender group relief.
>
> If company A holds only shares in companies B and C then it will have to acquire other assets to charge as the mere charging of shares in B and C over which a receiver can be appointed will not give rise to a loss of control by the shareholder because of s155B."

87. Clearly the interpretation of s 155B CTA 2010, a provision which is itself somewhat obscure in parts, is significant to the points being made by Mr Ridgway.

88. Section 155B was enacted to replace a previous Extra Statutory Concession, C10, which provided (in relevant part) as follows:

> "Mortgage of shares or securities

> 7 If shares or securities in a company are used as security under a mortgage (or legal or equitable charge) the mortgage will not by itself be regarded as constituting "arrangements" … until the default or other triggering event occurs which allows the mortgagee to exercise his rights against the mortgagor. This only applies if prior to default the mortgagee possesses no more control over the shares or securities which are the subject of the mortgage than is required by the mortgagee to protect his interest.
>
> 8 If a default occurs but is remedied before the mortgagee exercises his rights, "arrangements" … will be regarded as not having come into existence as a result of the default.
>
> Application
>
> 9 The concession does not apply when the person or persons standing to acquire … control could, alone or with connected persons within the meaning of TA 1988 s 839, dictate the terms or timing of the acquisition in advance of the triggering event having occurred. For this purpose … a mortgagee will not be regarded as connected with the company whose shares are the subject of the mortgage by reason only of the mortgage."

89. ESC C10 was clearly concerned with situations where shares in (or securities of) a company were mortgaged by their holder, not by the issuing company – indeed, it is difficult, if not impossible, to see how a company could grant a mortgage over its own shares (though the point was not specifically raised before us). Yet section 155B CTA 2010 refers to "arrangements entered into by a company which … are a mortgage, secured by way of shares or securities in <u>the</u> company". In the circumstances, we consider the only rational interpretation of section 155B is that it is intended to refer to situations in which a <u>holder</u> of shares or securities in a company (rather than the company itself) grants a mortgage over those shares or securities. Nonetheless, if section 155B was considered necessary in order to prevent the mortgage itself being treated in such circumstances as giving rise to "arrangements" for the purposes of section 154 CTA 2010, then it is at least arguable that the existence of such a mortgage would, if section 155B did not exist, amount to such "arrangements" and, by extension, that the existence of a mortgage or some other security interest entirely outwith the provisions of section 155B would, therefore, necessarily amount to such "arrangements".

90. We see matters somewhat differently, as (it appears) do HMRC; they have not argued these appeals on the basis that the execution of the Debenture gave rise to the "arrangements" in question, rather that it was the appointment of the Receivers that did so.

91. We consider that, on a straightforward interpretation of section 154(3) CTA 2010, they were correct to argue on that basis. Effect 2 is only engaged when the "arrangements" have the effect that a third party has (or could obtain) control of one of the two companies but not of the other. The execution of the Debenture did not have that effect, because the severance of control occurred only upon the commencement of the receivership, which required further events to take place after the execution of the Debenture (namely an event of default and the appointment of receivers). Those further events did not follow automatically upon execution of the Debenture, and there is no hint of any suggestion that the Shareholders either had the power or even sought to bring them about. Once an event of default had taken place, the mortgagee clearly had the right (but no obligation) to appoint receivers under the Debenture, entirely independent of the wishes of the Shareholders. Until it chose to do so, the Shareholders

retained control of both Farnborough and PH2L; once it had done so, they lost control of PH2L.

92. Thus if one examines in turn (a) the execution of the Debenture and (b) the occurrence of an event of default under it (giving rise to the right to appoint a receiver) then considers each of those events (or the state of affairs arising as a result of them) as "arrangements", and asks whether those arrangements had Effect 2, the answer is in our view "no" because both of them required a further event entirely outside the control of the Shareholders to occur (i.e. the appointment of the Receivers) before the Shareholders would lose control of PH2L.

93. We are aware that this interpretation might be regarded as sitting somewhat uneasily with section 155B CTA 2010. We are however conscious of Lord Hodge's comment in *Rangers* that "the tax code is not a seamless garment", and we consider this to be one of those situations in which the legislative patterns simply do not match up fully at the seams.

94. It follows that we do not accept that Mr Ridgway's first anomaly arises at all: the action of entering into a floating charge (or any other normal security arrangement) does not, of itself in our view, constitute or give rise to "arrangements" having Effect 2. As to his second "anomaly", it is not before us for decision, but we do not regard any unexpectedly beneficial effect for taxpayers that might so arise as undermining the only sensible interpretation of the provisions as a whole.

Disposition

95. For the reasons given above, the Appellants' appeals against the Decision are dismissed.

Costs

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

Judge Greg Sinfield
Judge of the Upper Tribunal

Judge Kevin Poole
Judge of the Upper Tribunal

Release date: 4 October 2017