[2021] UKUT 147 (TCC)

Appeal numbers: UT/2019/0079
UT/2019/0087

CAPITAL ALLOWANCES – payment of development sum by LLP in relation to conversion of flight training centre into functioning hotel – eligibility of payment for Business Premises Renovation Allowances – whether particular amounts paid qualified for BPRA

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LONDON LUTON HOTEL BPRA PROPERTY FUND LLP	**Appellant/Respondent**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents/Appellants**

TRIBUNAL: MR JUSTICE MICHAEL GREEN
JUDGE THOMAS SCOTT

Sitting in public by way of video hearing treated as taking place in London from 18 to 26 November 2020

Malcolm Gammie QC and Jonathan Bremner QC, instructed by DWF Law LLP, for London Luton Hotel BPRA Property Fund LLP

Jonathan Davey QC, John Brinsmead-Stockham, Sam Chandler and Nicholas Macklam, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for HMRC

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DECISION

1. This is our decision on the appeals by London Luton Hotel BPRA Property Fund LLP (the "LLP") and HMRC against the decision of the First-tier Tribunal (the "FTT") reported at [2019] UKFTT 212 TC (the "Decision").

Background

2. In its tax return for the year ended 5 April 2011 the LLP claimed £12,478,201 of business premises renovation allowances ("BPRA"), a form of capital allowances.

3. That expenditure had been incurred by the LLP under an agreement entered into between the LLP and OVL (Bankfield) LLP[1] ("OVL" or the "Developer") which provided for the conversion of a former flight training centre near London Luton Airport into a Ramada Encore hotel.

4. HMRC opened an enquiry into the tax return and issued a closure notice[2] on 5 February 2016 which reduced the BPRA claim. HMRC subsequently revised the amount so disallowed, with the result that £5,255,761 of the claim was disallowed and a claim for BPRA of £7,222,439 was allowed.

5. The basis of the disallowance by HMRC was that the following items of expenditure, discussed in detail below, were not qualifying expenditure under the BPRA legislation:

(1)The Interest Amount.

(2)The Capital Amount.

(3)IFA (Independent Financial Adviser) fees.

(4)Promoter fees.

(5)Legal fees.

(6)Franchise costs.

(7)Fixtures, Fittings and Equipment.

(8)Part of the Residual amount.

6. The LLP appealed against the closure notice. The LLP's primary case was that the entirety of the sum paid to OVL qualified for BPRA, and it was not appropriate to enquire into the constituent elements of OVL's expenditure. The LLP further argued that, if the FTT did not accept that case, the constituent elements disallowed by HMRC were all eligible for BPRA.

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[1] OVL later changed its name to Cannock Projects LLP, and is referred to by the FTT in the Decision variously as OVL and Cannock.

[2] Under s28B Taxes Management Act 1970.

7. The FTT rejected the LLP's primary case.

8. In relation to the eligibility for BPRA of the constituent elements of expenditure disallowed by HMRC, the FTT allowed the LLP's appeal in part. Its conclusions were as follows:

(1)The Interest Amount qualified.

(2)The Capital Amount did not qualify.

(3)The IFA Fees qualified.

(4)The Promoter Fees qualified.

(5)"Most of" the Legal Fees did not qualify, but some did, with the specific amounts left to be agreed by the parties.

(6)As regards the Franchise Costs, part (the "Sanguine Payment") did not qualify, and part (the "Ramada Payment") did.

(7)The Fixtures, Fittings and Equipment qualified.

(8)The Residual amount must be apportioned between qualifying and non-qualifying amounts, with the precise apportionment being left to the parties to calculate.

9. With the permission of the FTT, the parties appeal most of the grounds on which each of them failed before the FTT.

10. The LLP appeals against the FTT's decision on its primary case, and also against the FTT's decisions that: the Capital Amount; "most of" the Legal Fees; the Sanguine Payment and the non-qualifying element of the Residual amount did not qualify for BPRA.

11. HMRC appeal against the FTT's decisions that: the Interest Amount; the IFA Fees; the Promoter Fees; the qualifying portion of the Legal Fees and the Fixtures, Fittings and Equipment (as regards certain items only) did qualify for BPRA.

12. The hearing before us took place remotely over a two-week period. The Tribunal is grateful to all Counsel for their assistance and patience in ensuring that the hearing dealt with the considerable volume of documentation and issues efficiently and within the allotted time.

Summary of the key facts and documents

13. We deal below in detail with the contractual provisions relevant to the issues in this appeal, but the following is a summary of the key facts and documentation.

14. As will be seen below, the BPRA legislation provides 100% capital allowances for capital expenditure incurred on or in connection with specified activities which bring certain business premises in designated areas called Enterprise Areas back into productive use. In 2009, the Developer identified a building known as Blush House (the "Property") near London Luton Airport as having the potential to be

renovated and to qualify for BPRA. Blush House was a vacant business property which had formerly been used as a flight training centre.

15. By 2011 OVL had developed a proposal to raise the necessary finance to convert Blush House into a fully functioning 124-bedroom Ramada Encore hotel. OVL would manage and oversee the conversion and development, and the converted property would be owned by investors, who, it was hoped and intended, would be eligible for BPRA on the qualifying element of their investments. OVL engaged the services of Downing LLP ("Downing") as sponsors of the fund (the "Fund") which it had worked with on five previous development projects designed to attract BPRA. The LLP was established in order to enable investors to invest in the conversion project. The project was to be financed through a combination of debt and equity.

16. Downing issued an Information Memorandum in relation to the proposals, which was provided to potential investors and to IFAs. On 25 March 2011 individual investors subscribed in aggregate £7.2 million for interests in the LLP. Under a Facility Agreement between the Co-Operative Bank (the "Co-op") and the LLP dated 25 March 2011 (the "Co-op Loan Agreement") the LLP drew down a loan of £7 million (the "Co-op Loan"). OVL also lent the LLP £1,985,000 under a Developer Loan Agreement entered into that day (the "Developer Loan").

17. For the purposes of obtaining the Co-op Loan OVL procured that a valuation of the converted hotel be carried out by Edwards Symmons. The valuation was produced in a report to the Co-op dated 15 February 2011 (the "Valuation").

18. On 25 March 2011 the LLP then entered into two transactions. It purchased the freehold of Blush House, including the access land and car parking, for £2.85 million from Chainridge Limited, an independent third party. The LLP and its wholly owned subsidiary, London Luton Hotel 2010 Limited (the "Operating Company") also entered into a development agreement (the "Development Agreement") with OVL for the conversion of Blush House into the Ramada Encore hotel. Under the Development Agreement the LLP appointed OVL to procure the carrying out of the development works in return for a fixed price of £12,513,200 excluding VAT (the "Development Sum").

19. On the same day, OVL, the LLP and the Co-op entered into a deed (the "Intercreditor Deed"). This document related to the liabilities of OVL to the LLP and the Co-op. It is discussed in detail below.

20. On 24 March 2011 OVL had entered into an agreement with Multibuild (Construction and Interiors) Limited ("Multibuild"). Under that agreement (the "Design and Build Contract"), in consideration of £5,894,555[3] Multibuild agreed to design, carry out and complete the physical conversion of Blush House.

[3] The sum initially provided in the Contract was £5,721,914, which the parties subsequently agreed to increase to £5,894,555.

21. OVL also entered into agreements with other parties in relation to the conversion, including a project manager, surveyor and architect.

22. OVL set up an account with the Co-op with a deposit of £2 million (the "Capital Account"). OVL also entered into a Capital Account Deed with the LLP, the Co-op and Blakes Partnership LLP ("Blakes") (a partnership co-owned by the founding partner of Downing). Both of these documents are discussed in detail below.

23. OVL paid £350,000 (the "Interest Amount") into an account with the Co-op, withdrawals from which were regulated by a Licence Deposit Deed entered into between OVL and the LLP. Under the Licence Deposit Deed, OVL was obliged to pay an amount to the LLP by way of a quarterly licence fee for the occupation of the property so as to carry out the development works. Again, these documents are discussed in detail below.

24. The LLP granted a 25 year lease of the property to the Operating Company. The Operating Company entered into a hotel management agreement with ThenHotels LLP for the day-to-day operation and management of the completed hotel.

25. OVL made a loan of £685,000 to the LLP to fund the supply of furniture, fittings and equipment for the hotel.

26. The Operating Company took out a loan from OVL of £250,000 for working capital purposes.

27. OVL entered into an agreement dated 24 March 2011 with Multibuild for the supply of fixtures, fittings and equipment for £735,541[4] (the "FF&E Agreement").

28. Blush House was duly converted, renovated and refurbished as contracted for by the LLP, and Wyndham (owner of the Ramada brand) permitted its opening as a Ramada Encore hotel.

29. Subsequently, in 2014 the management of the hotel was changed in response to commercial pressures, partly arising from the opening of a competing hotel in the close vicinity. The brand was changed to Holiday Inn in September 2015. The LLP refinanced the Co-op debt through National Westminster Bank, and the Capital Account arrangements were restructured. The converted hotel continues to be owned by the LLP and operated by the Operating Company.

Relevant legislation

30. The BPRA legislation as in force at the relevant time was contained in Part 3A of the Capital Allowances Act 2001 as amended by the Finance Act 2005

[4] Initially agreed at £685,000.

("CAA"). All references below are, unless otherwise stated, to the provisions of the CAA in force at that time.

31. Capital allowances are provided for in the CAA for certain categories of capital expenditure. Generally, an amount of capital expenditure is treated as incurred when there is an unconditional obligation to pay it: s5.

32. BPRA were introduced by the Finance Act 2005 to provide a 100% allowance for expenditure incurred on or in connection with the repair, renovation or conversion of unused business property in certain designated disadvantaged areas. The allowances are available for expenditure incurred on or after 11 April 2007[5].

33. Section 360A provides as follows:

> **360A Business premises renovation allowances**
>
> (1) Allowances are available under this Part if a person incurs qualifying expenditure in respect of a qualifying building.
>
> (2) Allowances under this Part are made to the person who—
>
> (a) incurred the expenditure, and
>
> (b) has the relevant interest in the qualifying building.

34. An allowance at 100% is provided for by s360G:

> **360G Initial allowances**
>
> (1) A person who has incurred qualifying expenditure in respect of any qualifying building is entitled to an initial allowance in respect of the expenditure.
>
> (2) The amount of the initial allowance is 100% of the qualifying expenditure.
>
> (3) A person claiming an initial allowance under this section may require the allowance to be reduced to a specified amount.
>
> (4) The initial allowance is made for the chargeable period in which the qualifying expenditure is incurred.

35. So, the two key concepts in the legislation are "qualifying expenditure" and a "qualifying building".

36. "Qualifying expenditure" is defined by s360B as follows:

> **360B Meaning of "qualifying expenditure"**
>
> (1) In this Part "qualifying expenditure" means capital expenditure incurred before the expiry date on, or in connection with—
>
> (a) the conversion of a qualifying building into qualifying business premises,

[5] The Finance Act 2005, s92 and Schedule 6, (Appointed Day) Order 2007 (SI 2007/949) paragraph 2.

(b) the renovation of a qualifying building if it is or will be qualifying business premises, or

(c) repairs to a qualifying building or, where the qualifying building is part of a building, to the building of which the qualifying building forms part, to the extent that the repairs are incidental to expenditure within paragraph (a) or (b).

(2) In subsection (1) "the expiry date" means—

(a) the fifth anniversary of the day appointed under section 92 of FA 2005, or

(b) such later date as the Treasury may prescribe by regulations.

(3) Expenditure is not qualifying expenditure if it is incurred on or in connection with—

(a) the acquisition of land or rights in or over land,

(b) the extension of a qualifying building (except to the extent required for the purpose of providing a means of getting to or from qualifying business premises),

(c) the development of land adjoining or adjacent to a qualifying building, or

(d) the provision of plant and machinery, other than plant or machinery which is or becomes a fixture as defined by section 173(1).

(4) For the purposes of this section, expenditure incurred on repairs to a building is to be treated as capital expenditure if it is not expenditure that would be allowed to be deducted in calculating the profits of a property business, or of a trade, profession or vocation, for tax purposes.

(5) The Treasury may by regulations make further provision as to expenditure which is, or is not, qualifying expenditure.

37. Therefore, with exceptions for expenditure on or in connection with land (s306B(3)), qualifying expenditure is capital expenditure incurred on or in connection with the conversion etc of a "qualifying building" into "qualifying premises". These terms are defined by sections 360C and 360D respectively. These provide as follows:

360C Meaning of "qualifying building"

(1) In this Part "qualifying building", in relation to any conversion or renovation work, means any building or structure, or part of a building or structure, which—

(a) is situated in an area which, on the date on which the conversion or renovation work began, was a disadvantaged area,

(b) was unused throughout the period of one year ending immediately before that date,

(c) on that date, had last been used—

(i) for the purposes of a trade, profession or vocation, or

(ii) as an office or offices (whether or not for the purposes of a trade, profession or vocation),

(d) on that date, had not last been used as, or as part of, a dwelling, and

(e) in the case of part of a building or structure, on that date had not last been occupied and used in common with any other part of the building or structure other than a part—

(i) as respects which the condition in paragraph (b) is met, or

(ii) which had last been used as a dwelling.

(2) In this section "disadvantaged area" means—

(a) an area designated as a disadvantaged area for the purposes of this section by regulations made by the Treasury, or

(b) if no regulations are made under paragraph (a), an area for the time being designated as a disadvantaged area for the purposes of Schedule 6 to [FA] 2003 (stamp duty land tax: disadvantaged areas relief).

(3) Regulations under subsection (2)(a) may—

(a) designate specified areas as disadvantaged areas, or

(b) provide for areas of a description specified in the regulations to be designated as disadvantaged areas.

(4) If regulations under subsection (2)(a) so provide, the designation of an area as a disadvantaged area shall have effect for such period as may be specified in or determined in accordance with the regulations.

(5) Regulations under subsection (2)(a) may—

(a) make different provision for different cases, and

(b) contain such incidental, supplementary, consequential or transitional provision as appears to the Treasury to be necessary or expedient.

(6) Where a building or structure (or part of a building or structure) which would otherwise be a qualifying building is on the date mentioned in subsection (1)(a) situated partly in a disadvantaged area and partly outside it, only so much of the expenditure incurred in accordance with section 360B as, on a just and reasonable apportionment, is attributable to the part of the building or structure located in the disadvantaged area is to be treated as qualifying expenditure.

(7) The Treasury may by regulations make further provision as to the circumstances in which a building or structure or part of a building or structure is, or is not, a qualifying building.

360D Meaning of "qualifying business premises"

(1) In this Part "qualifying business premises" means any premises in respect of which the following requirements are met—

(a) the premises must be a qualifying building,

(b) the premises must be used, or available and suitable for letting for use,—

(i) for the purposes of a trade, profession or vocation, or

(ii) as an office or offices (whether or not for the purposes of a trade, profession or vocation),

(c) the premises must not be used, or available for use as, or as part of, a dwelling.

(2) In this section "premises" means any building or structure or part of a building or structure.

(3) For the purposes of this Part, if premises are qualifying business premises immediately before a period when they are temporarily unsuitable for use for the purposes mentioned in subsection (1)(b), they are to be treated as being qualifying business premises during that period.

(4) The Treasury may by regulations make further provision as to the circumstances in which premises are, or are not, qualifying business premises.

The FTT's findings of fact

38. We discuss below how the appeal was framed before and by the FTT. It is first helpful to discuss two areas of general relevance to the FTT's findings.

Evidence

39. The FTT considered over 1,000 pages of submissions and transcripts, 55 files of documents and 9 bundles of authorities: [6]. It also heard from eight witnesses for the LLP and seven for HMRC, some giving expert evidence.

40. The FTT recorded (at [42]-[43]) various arguments raised by Mr Gammie (who, with Mr Bremner, also represented the LLP before the FTT) as to the weight to be afforded to the evidence given by two of HMRC's witnesses as to valuation. The FTT dealt with one of those arguments (discussed below) but made no comment on the others. Moreover, it expressed no view as to the credibility or reliability of the evidence given by any of the witnesses. It described the approach it adopted to the evidence, taking account of the passage of time, as one of "placing greater reliance on contemporaneous documents than the recollections of the individuals concerned": [47].

41. While neither party challenges the FTT's findings of primary fact, certain of the detailed arguments are in substance allegations of *Edwards v Bairstow*[6] type

[6] [1956] AC 14.

errors, in other words assertions that findings were irrational[7] on the facts. It is unhelpful in considering those challenges to be lacking any assessment by the FTT of the reliability of the evidence given by the various witnesses. In the absence of any indication in the Decision or submissions by the parties to the contrary, we have assumed that there is no reason to doubt the veracity of any of the witness evidence, but that, where any conflict arises, evidence provided by contemporaneous documentation is to be given greater weight.

Relationships between the parties and the LLP's intentions

42. It is apparent that HMRC sought to demonstrate before the FTT that the transaction was deliberately structured with the intention of "ramping up" the LLP's claim for BPRA. That much is recorded at [171], though without any view being expressed by the FTT. Counsel for HMRC reasserted that claim before us.

43. We can see that this issue might arguably be relevant. However, in the hearing before the FTT it appears to have become subsumed within the question of whether various parties had been acting at arm's length. The full discussion of the issue by the FFT was as follows, at [132] to [136]:

> 132. Although HMRC did not go quite as far as to allege collusion between the parties, particularly Cannock and the LLP, to increase the BPRA claim, the argument advanced did not stop far short of that. In closing, Mr Davey contended that it was fundamental to recognise that the nature of the relationship between the parties was put in issue by the LLP and points to its skeleton argument in support which states:
>
> > "The Development Agreement, like all agreements which have been entered into in relation to the Property, was negotiated at arm's length. Thus, the Development Sum was the amount which the [LLP] was required to pay in order to secure the conversion of the Property into an hotel."
>
> 133. Mr Davey contends that such an assertion is "fundamentally flawed" in that, as Mr Lewis [founder of Downing] accepted, there was no record of any negotiation between Downing, the LLP and Cannock. However, it is not disputed that prior to their transactions concerning the Property, Cannock and Downing had worked together and had an established business relationship (see paragraph 48, above). As such, it is perhaps not surprising that there were not drawn out detailed and documented negotiations between them leading to an agreement on the services to be provided by Downing and for what fee.
>
> 134. Moreover, as Mr Gammie argues, the notion of parties being "connected" is a statutory concept of which there are many examples, eg s 286 of the Taxation of Chargeable Gains Act 1992 which provides how, "the question of whether one person is connected to another" for the purposes of that Act is to be determined. Clearly, neither Cannock, Downing or the LLP are "connected" in a statutory sense and, as such,

[7] Adopting the terminology of Lord Diplock in *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

> any transactions between them are to be regarded as being at "arm's length" commercial transactions.
>
> 135. HMRC have also queried the independence of the Co-op and Mr Matthews [senior development manager at the Co-op] in relation to the transactions citing in particular the valuations and reports of Edward Symmons and Gleeds in the light of the emails sent to Mr Matthews on 17 January 2011 by Mr Tracey asking him to "ensure" that Edward Symmons "can be appointed as [the] banks valuers" (see paragraph 69, above) and by Carl Ridgely of Edward Symmons on 2 February 2011, referring to "our customer", Mr Bantoft seeking formal instructions from the Co-op to proceed with the valuation (see paragraph 76, above).
>
> 136. However, we fully accept the evidence of Mr Matthews (see paragraphs 83 and 84, above) that neither Edward Symmons nor Gleeds would take the risk of opening themselves up to a claim for breach of contract, professional negligence or professional misconduct or jeopardise their relationship with the bank for the sake of a "one-off" valuation and that if he had any doubt of the integrity or accuracy of the reports or their independence the Co-op would not have accepted the reports relationship between the bank notwithstanding the "very tight time frame" involved[8].

44. A number of points arise in relation to this passage.

45. First, apparently in response to the way in which Mr Davey (who also represented HMRC below) framed his argument in closing, the discussion appears to assume that the question of whether the parties were acting at arm's length turned on the extent to which transaction documentation was negotiated. That is at best a considerable oversimplification.

46. Second, the conclusion in the final sentence of [134] that because the various parties were not "connected" within any statutory definition "as such, any transactions between them are to be regarded as being at "arm's length" commercial transactions" involved an error of law. The existence of a statutory "connection" between parties may (depending on the relevant legislation) have the result that transactions between them are deemed not to be at arm's length, but its absence does not mean that such transactions are arm's length. That question must be determined on the facts. Furthermore, there was no statutory "connected" test in the legislation under consideration in these appeals.

47. Finally, having concluded (albeit in part on an erroneous basis) that the relevant transactions were at arm's length, the FTT does not go on to consider the substantive submission by HMRC that the transactions were deliberately structured with the aim of inflating the LLP's BPRA claim. That was the substantive question because even if the parties had been acting otherwise than at arm's length, *of itself* that would not have caused the relevant BPRA claim to fail. If, however, the FTT had found as a fact, for example, that all or elements of the expenditure incurred by

[8] Some wording has obviously been omitted from the closing lines of this paragraph.

the LLP had been incurred solely in order to increase BPRA, that might have been a relevant issue to take into account.

48. In considering both parties' appeals, we have therefore proceeded on the basis that there were no findings of fact to support the assertion by HMRC that the motivation or purpose of structuring the LLP's payments to OVL as they were structured under the Development Agreement was to inflate the LLP's claim for BPRA.

Whether expenditure was incurred not in issue

49. Importantly, the FTT did not need to determine whether the LLP "incurred" expenditure when it paid the Development Sum to OVL.

50. HMRC applied very shortly before the FTT hearing to amend its statement of case to enable it to argue that certain elements of the LLP's expenditure were not expenditure "incurred" so as to be capable of qualifying for BPRA. The FTT dismissed the application. HMRC initially appealed against that decision, but subsequently withdrew that appeal.

Determining the issues in the appeal

51. It is a striking feature of this appeal that troublesome issues arise from the way in which the LLP's appeal was (a) framed before the FTT, (b) determined by the FTT, and (c) argued before us.

52. Under the Development Agreement the LLP appointed OVL to procure the carrying out of the development works in return for a fixed price. The obligations on OVL to allocate and apply that sum in certain stated ways were contained not in the Development Agreement but primarily in the Intercreditor Deed.

53. So, an obvious question which arises in relation to the LLP's claim for allowances, which entails determining what the LLP's expenditure was incurred on or in connection with, is whether the LLP obtained in return for the sum incurred the development obligation (under the Development Agreement) or (or in addition) a package of distinct obligations (under the Intercreditor Deed).

54. However, rather than this question forming part of a consideration of the relevant legislation as applied to the facts, before the FTT it was framed as a free-standing ground of appeal by the LLP: see FTT [3]-[5] set out in [75] below.

55. The FTT found for HMRC on the LLP's "primary case". That is the LLP's first ground of appeal before us. The point to highlight before we consider that appeal is the way in which that primary case was framed. The question was not framed as to whether the LLP obtained a single obligation (under the Development Agreement) or a series of separate obligations (under the Intercreditor Deed), but whether it was necessary in determining the LLP's entitlement to allowances to investigate the uses *the Developer* made of the Development Sum.

56. With respect to the parties and the FTT, that is a quite different question. As discussed below, the fact that the question was framed and determined in this way is material not only in relation to the LLP's appeal in relation to its "primary case", but also in establishing with clarity what further questions must be asked if the LLP does not prevail in that appeal.

57. The parties referred to the LLP's appeal against the FTT's decision on its primary case as "Issue One", and to the various appeals and cross-appeals in respect of its decisions on detailed items (which must be determined if that decision is upheld) as "Issue Two". We adopt that terminology in our decision.

Issue One: The FTT's Decision

58. The parties' respective positions on Issue One were initially summarised by the FTT at [3]-[5], set out at [75] below. The next relevant reference was at [129]-[130] of the decision:

> 129. In essence, the dispute between the parties concerns whether the LLP is entitled to BPRA on the entire £12,478,201 claimed, ie the £12,513,200 it paid to Cannock under the Development Agreement (see paragraph 103, above) less £34,999 deducted in respect of estimated legal fees incurred for the costs of acquisition of the Property paid by the LLP to Cannock (see paragraph 124, above). HMRC contend that it is therefore first necessary to consider whether it is permissible to examine what Mr Davey refers to as the constituent elements of the Development Sum, ie to consider the various payments made by Cannock and if so, to examine the following elements and ask whether they meet the definition of "qualifying expenditure" contained in the legislation:
>
> (1) The Interest Amount (£350,000);
>
> (2) The Capital Account (£2,000,000);
>
> (3) IFA fees (£372,423.40);
>
> (4) Promoter fees (£310,000);
>
> (5) Legal fees (£135,409.89);
>
> (6) Franchise costs (£272,862);
>
> (7) FF&E and other non-qualifying amounts (£587,556.35); and
>
> (8) Residual amount/profit (£1,209,510).
>
> 130. For the LLP Mr Gammie and Mr Bremner contend that not only this is [sic] the wrong approach but that it is not supported by the language of the statute or authority. Rather than examine and disqualify the expenditure of Cannock they say we should consider whether the LLP has incurred the capital expenditure and, if so, what was that expenditure incurred on or in connection with. This, they say, does not require a two stage approach as HMRC contend but merely an

> answer to the second, straightforward question, whether the expenditure was incurred "on or in connection" with the conversion of the Property which can be contrasted with the usual statutory language entitling particular expenditure on allowances which solely refers to expenditure "on" the construction of a building or "on" the provision of plant and machinery.

59. The reference to legal fees of £34,999 being deducted from the Development Sum in the LLP claim for BPRA is explained at [123]-[124]:

> 123.On 5 May 2011 after completion of the contractual arrangements regarding the Property but before the BPRA claim had been submitted there was a meeting attended by Mr Malcolm Smith of HMRC, Mr Lewis and Mr Pierre Clarke of Downing and Mr Robert Jones of Adducere LLP in respect of a different project. Mr Lewis explained that Mr Smith had "highlighted the need to deduct any legal costs that we incurred in relation to the acquisition of the building in respect of future BPRA claims". However, Mr Smith could not recall whether he had said this as he had not been provided with a note of the meeting prepared Mr Jones.
>
> 124.Therefore, although Downing did not agree with such an approach, still considering that all of the Development Sum paid by the LLP to Cannock should qualify for BPRA, it was decided, as Mr Lewis said, "in the spirit of compromise and in order to work constructively with HMRC to obtain early settlement of what was not, we thought at the time, considered by HMRC to be a contentious BPRA claim," to accept an adjustment to the legal fees in connection with the acquisition of the Property. Accordingly, £34,999 was deducted from the Development Sum of £12,513,200 (see paragraph 103, above) reducing the BPRA claim to £12,478,201. This was seen as a simply pragmatic decision by Downing which was intended to remove a possible objection by HMRC in the hope the BPRA claim could be concluded swiftly.

60. The FTT's discussion of Issue One is set out at [144]-[171]. It was not in dispute between the parties that the converted property was a "qualifying building" which at completion of the conversion comprised "qualifying business premises". The issue was the extent to which the Development Sum comprised expenditure on or in connection with the conversion, renovation or repair of the property.

61. References henceforth to "Conversion" are to any of the processes of conversion, renovation or repair falling within Section 360B(1).

62. HMRC's central submission was that because the BPRA legislation was focussed on physical works, in order for expenditure to be "qualifying expenditure" it must be closely connected to the physical processes of Conversion of the building. The FTT concluded that there was nothing in the legislation to restrict qualifying expenditure to that on physical works. Rather, it was necessary to construe the words "on or in connection with": [146].

63. The FTT considered that the interpretation of those words depended on the statutory context, citing authorities including *Barclays Bank plc & Anor v HMRC* [2007] EWCA Civ 442 and *J&A Young (Leicester) Limited v HMRC* [2015] UKFTT 638 (TC). The FTT further drew from the authorities that "in connection with" is a broad expression which must be given a wide construction.

64. However, the FTT appeared to accept at least part of HMRC's argument, at [155]:

> 155. It is also clear from the legislation that for the expenditure concerned to be "qualifying expenditure" it must be incurred on or in connection with the building, ie in this case the Property and its conversion from a flight training centre into hotel premises and not given so wide a construction so as to provide an entitlement to relief on all expenditure associated with creating a fully functioning hotel business.

65. The FTT then turned to HMRC's contention that in determining what expenditure had been incurred "on or in connection with", it was necessary to consider, among other things, the purpose of the taxpayer in making the payment. Mr Davey relied in support of that proposition on *Tower MCashback LLP 1 and another v HMRC* [2011] UKSC 19 ("*Tower MCashback*"), *Acornwood LLP and others v HMRC* [2016] UKUT 361 (TCC) ("*Acornwood*") and *Marathon Oil UK LLC v HMRC* [2017] UKFTT 822 (TC). Mr Gammie contended that *Acornwood* did not assist HMRC as it concerned a different statutory test. He suggested that HMRC's construction appeared to be rooted in the approach of Park J in the High Court in *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2002] STC 1068 ("*BMBF*"). However, neither the Court of Appeal nor House of Lords accepted that such an approach was correct.

66. The FTT accepted Mr Davey's submission for HMRC that it was necessary to adopt "a realistic view of the facts taking account of all the relevant circumstances of the case" ([165]) and "a practical commercial approach to the reality of the expenditure and whether it was actually used on or in connection with the conversion or renovation of the property": [167]. It rejected Mr Gammie's argument that while the LLP may have had knowledge of how OVL would utilise the Development Sum, that did not mean the LLP intended the sum to be so used. Its conclusion on Issue One is set out at [169]-[170]:

> 169. Despite being initially somewhat attracted to this argument it is clear from the Intercreditor Deed, to which the LLP was a party and which directs how the Development Sum was to be spent, that the LLP in addition to having the knowledge also intended how the Development Sum should be utilised. In the circumstances it is therefore necessary to consider what Mr Davey referred to as the "constituent elements" of the Development Sum which were paid by Cannock and whether these are "qualifying expenditure" as defined by the legislation.
>
> 170. We also consider that, by excluding £34,999 as relating to the acquisition of land from its BPRA claim, the LLP may have implicitly

accepted such an approach despite its attempts to explain it away as a pragmatic compromise.

Issue One: Submissions of the parties

67. Mr Gammie made the following points in arguing that the FTT's conclusion on Issue One was wrong:

(1)This was not a case (in contrast to many of the authorities cited by HMRC) in which the claim to allowances had been inflated with non-existent or unrealistic valuations of the asset in respect of which expenditure was claimed to have been incurred. The LLP paid a market price for the development project.

(2)The evident purpose of BPRA is to encourage expenditure on bringing longer-term vacant business properties in disadvantaged areas back into business use. That is clear from the definition of "qualifying business premises". It is also supported by relevant contemporaneous Parliamentary and other material. That is exactly what happened here.

(3)The relevant question posed by the legislation is "what did the LLP get for its money?". The only answer to that question in this case is that the Development Sum was the expenditure that the LLP was obliged to pay and did pay in order to acquire a converted Blush House. That is what it contracted to acquire and that is what it got. All of that sum was expenditure incurred "on" or, in any event, "in connection with" the Conversion of Blush House.

(4)The FTT asked itself the wrong question. It concluded that Issue One should be determined by the use made of the Development Sum by OVL. That was wrong: there was no basis for splitting the Development Sum into "constituent elements" by reference to what OVL did with the money it received in return for its obligation to deliver to the LLP a converted Blush House.

(5)The "on, or in connection with" test is deliberately broad and encompasses the entire Development Sum.

(6)The statutory test must be answered by reference to the time when the expenditure is incurred, not by reference to what happens subsequently.

(7)The FTT's conclusion failed to take into account its findings that the development was an arm's length commercial transaction, concluded at the market price.

68. In support of the proposition that the object of statutory scrutiny is the expenditure incurred by the LLP, Mr Gammie referred to *BMBF*; *Tower MCashback*; *Ensign Tankers (Leasing) Limited v Stokes* [1992] 1 AC 655 ("*Ensign*"); *The Vaccine Research Limited Partnership v HMRC* [2014] UKUT 389 (TCC) ("*Vaccine Research*"), and *The Brain Disorders Research Limited Partnership v HMRC* [2017] UKUT 176 (TCC) ("*Brain Disorders*"). The two concepts that link these authorities, he submitted, are whether the taxpayer had

actually incurred the expenditure it claimed and, to the extent that it had, what the taxpayer got for its expenditure. The FTT's reliance on *Acornwood* was misplaced, because that case concerned the different question of whether expenditure had been incurred wholly and exclusively for the purposes of the taxpayer's trade. In this appeal, the LLP's subjective reasons why expenditure was incurred and its knowledge of what the recipient would do with the Development Sum are irrelevant.

69. The FTT concluded (at [155]: see paragraph 64 above) that "on, or in connection with" was not to be given so wide a construction as to provide relief for all expenditure associated with creating a fully functioning hotel business. That was an error of law, said Mr Gammie, as was evident from the non-statutory materials relating to BPRA. The FTT failed to take account of the evident purpose of BPRA.

70. The fact that OVL was prepared to place part of the so-called profit it derived from selling the Blush House development on secured deposit with the Co-op via the Capital Account was entirely irrelevant. Similarly, OVL's willingness to meet stated expenses associated with the project was irrelevant. Those factors did not affect what the LLP got for its money.

71. In their skeleton argument, HMRC summarised their position as follows (footnotes omitted):

> The law on this issue is clear and settled. In determining what expenditure by a taxpayer has been incurred "on" (and, by analogy in the present case, "on, or in connection with"), the Tribunal must adopt a "practical, commercial approach to the reality of the expenditure". This requires the Tribunal to consider the expenditure in the light of the entire factual background in order to determine both: (i) what the taxpayer acquired in return for the expenditure; and (ii) the taxpayer's purpose in incurring the expenditure. The correct analysis of the contractual position is of fundamental importance to both of these (related) questions.
>
> In the present case, the relevant evidence pointed overwhelmingly towards the conclusion that the Development Sum was paid by the LLP for a package of discrete rights and benefits (ie HMRC's contention) and not simply for the conversion, renovation and incidental repair of the Property (ie the LLP's contention).

72. HMRC made the following further points:

(1)As a matter of straightforward contractual analysis, it was clear that the LLP did not pay the Development Sum simply for the Conversion of the Property. The LLP entered into the Development Agreement as one document in a suite of contractual documents that formed a composite transaction. The entirety of that suite of documents must be read together in order to determine their legal effect. Read together, in particular with the Intercreditor Deed, those documents show that the LLP acquired a number of specific rights and obligations as against the Developer. Further, the relevant

evidence other than the contractual documents showed that the LLP knew and intended that the Development Sum would be used in the manner set out in the Intercreditor Deed.

(2)The FTT asked the right question, namely what the LLP acquired for its expenditure, and took into account in answering that question the use to which OVL put the Development Sum. What OVL did with the sum was a relevant factor to take into account in determining the BPRA entitlement, on the authority of *Tower MCashback*.

(3)In concluding that the parties acted at arms' length because they were not "connected" in any statutory sense, the FFT erred in law. The FTT's findings in relation to the valuation of Blush House were also unclear.

Issue One: Discussion

73. The LLP appeals against the FTT's conclusion on Issue One. Therefore, it is first necessary to clarify what the FTT decided on this issue and the reasons it gave for that decision.

74. Mr Davey and Mr Brinsmead-Stockham asserted that in deciding Issue One the FTT had determined, and only determined, that the LLP had obtained a package of obligations from OVL, each of which needed to give rise to qualifying expenditure, and not a single obligation from OVL. The FTT had not focussed on the expenditure by OVL "as an end in itself".

75. That analysis is not supported by the terms of the Decision. It is clear that the FTT rejected the LLP's case that the entire Development Sum (less the excluded land-related expenditure) was qualifying expenditure. However, it did so on the basis that the correct test for determining eligibility to BPRA was to scrutinise the individual payments made by the Developer, rather than the sum paid to the Developer by the LLP. This is evident from the outset, when we look at the terms in which the FTT presented the parties' positions (highlights added to original):

> 3. HMRC, represented by Jonathan Davey QC, John Brinsmead-Stockham, Ruth Hughes, Sam Chandler, Nicholas Macklam and Hugh Cumber**,** contend that the total price paid under the contract with the developer was part of a total price paid for an "entire package" of assets and services that constituted a fully operational branded hotel business together with the cost of, amongst other things, borrowing. Although it is accepted that the sum paid to the developer did include "qualifying expenditure" of £7,222,439.36 for BPRA purposes, HMRC do not accept that this extends to the entire £12,478,201 claimed and contend that **the payments, listed above, by the developer out of the sum it received from the LLP do not come within the definition of "qualifying expenditure"** under Part 3A of the Capital Allowances Act 2001 for BPRA purposes:
>
> 4. Malcolm Gammie QC and Jonathan Bremner QC for the LLP contend that as all of the £12,478,201 paid by the LLP to the developer is expenditure incurred "on or in connection with the conversion,

> renovation or repair" of the Property, the LLP is entitled to BPRA on the entire sum claimed and that **it is not appropriate to undertake an investigation into the use of the money by the developer.**
>
> 5. However, if contrary to the LLP's primary case, we were to find such an investigation to be appropriate, it is argued that the LLP would still be entitled to BPRA on the full amount claimed as **each item of expenditure by the developer which is disputed by HMRC is "qualifying expenditure"** for BPRA purposes.

76. The FTT's focus on payments made by Cannock (OVL) and the expenditure of Cannock is also evident in [129] and [130] (set out in [58] above), including in particular the following highlighted passage :

> HMRC contend that it is therefore first necessary to consider **whether it is permissible to examine what Mr Davey refers to as the constituent elements of the Development Sum, ie to consider the various payments made by Cannock and if so, to examine the following elements and ask whether they meet the definition of "qualifying expenditure"** contained in the legislation:
>
> …

77. The decision reached by the FTT was described in terms which are entirely consistent with this approach at [169]:

> **In the circumstances it is therefore necessary to consider what Mr Davey referred to as the "constituent elements" of the Development Sum which were paid by Cannock and whether these are "qualifying expenditure" as defined by the legislation.**

78. So, by its interpretation of Issue One, the FTT decided that in order to determine the LLP's entitlement to BPRA, it was necessary to consider the various payments made by the Developer and whether those payments constituted qualifying expenditure.

79. In considering the reasons given by the FTT for this conclusion, it is necessary to piece these together from various passages. The FTT rejected one of HMRC's primary contentions, namely that qualifying expenditure had to be closely connected with physical works: [145]-[146]. Four possible reasons may then be discerned behind the FTT's decision on Issue One, as follows:

(1)It was clear from the Intercreditor Deed that in addition to having knowledge, the LLP also intended how the Development Sum should be utilised by OVL: [169].

(2)By excluding from the BPRA claim £34,999 of the Development Sum as relating to the acquisition of land, "the LLP may have implicitly accepted [HMRC's suggested] approach despite its attempts to explain it away as a pragmatic compromise": [170].

(3)It was necessary to adopt "a realistic view of the facts taking account of all the relevant circumstances of the case so as to identify the true legal and tax effects of the transactions avoiding affording primacy to purported form over substance": [165]. In doing so, "it is necessary to consider the economic realities of the transactions and examine the extent that [sic] the Development Sum comprises qualifying expenditure": [166].

(4)The legislation must not be given so wide a construction "as to provide an entitlement to relief on all expenditure associated with creating a fully functioning hotel business".

80. Did the FTT err in law in reaching this decision?

81. The starting point is that there is nothing in the legislation to support the view that the eligibility of expenditure for BPRA is determined by considering anything other than the expenditure of the claimant. Section 360A(2) states explicitly that allowances are made to the person who incurred the expenditure: in this case, the LLP, not the Developer. The 100% allowance is provided by s360G in the following terms:

> (1) A person who has incurred qualifying expenditure in respect of any qualifying building is entitled to an initial allowance in respect of the expenditure.

82. The relevant question is therefore whether the expenditure incurred by the LLP, namely the payment of the Development Sum, was incurred on or in connection with the Conversion of a qualifying building into qualifying business premises. Contrary to the FTT's decision, entitlement to BPRA is not determined by the uses to which the LLP's counterparty put the sum it received.

83. That proposition becomes self-evident when one considers one of the substantial items of expenditure in the appeal which HMRC contended did not qualify for allowances, namely that proportion of the "residue" which, per HMRC, related to non-qualifying expenditure. The residue was described, somewhat loosely as we shall see, as the Developer's "profit" from the development, being that part of the Development Sum not specifically earmarked by the Intercreditor Deed. There is no meaningful sense in which any part of the Developer's profit can be categorised, let alone scrutinised, as what the FTT described as one of the "payments made by Cannock"[9] or one of "the "constituent elements" of the Development Sum which were paid by Cannock"[10]. Profit retained is the opposite of a sum paid.

84. We discuss in detail below the various authorities referred to by the parties. However, at this stage we consider only the extent to which the relevant authorities support the FTT's decision on Issue One, in view of the terms in which that decision was made.

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[9] FTT [129].

[10] FTT [169].

85. Mr Gammie relied in particular on the decision of the House of Lords in *BMBF* as demonstrating that the legislative focus in a claim for capital allowances is on the acts and purposes of the person claiming the allowances. That case concerned finance leasing transactions. As part of a composite transaction, a company ('BGE') sold an oil pipeline to BMBF for £91m. BMBF granted a lease back of the pipeline to BGE in return for lease rentals. BGE granted a sublease of that pipeline to its UK subsidiary ('BGE UK'). BGE UK agreed to assume direct responsibility to BMBF for BGE's obligations to pay rent under the head lease. BMBF had borrowed the £91m paid for the pipeline from Barclays Bank. Barclays Bank also provided a guarantee to BMBF of BGE's obligations in respect of the lease rentals. As counter-security for its potential liability under the guarantee, Barclays Bank required BGE to provide a charge over the £91m. This was achieved via a complex series of agreements between BGE, BGE (UK), Barclays Bank and certain other entities. The effect of the arrangements was that BGE, having sold the pipeline, could not get its hands on the purchase price, and the benefit obtained by BGE was entirely attributable to BMBF being able to pass on the benefit of its capital allowances to BGE through the terms of the financing.

86. The question in *BMBF* was whether BMBF had "incurred capital expenditure on the provision of machinery and plant". The House of Lords upheld the decision of the Court of Appeal, reversing the decisions of the Special Commissioner and Park J in the High Court. The passages relied on by Mr Gammie are at [39]-[42], as follows:

> 39. The present case, like *MacNiven*, illustrates the need for a close analysis of what, on a purposive construction, the statute actually requires. The object of granting the allowance is, as we have said, to provide a tax equivalent to the normal accounting deduction from profits for the depreciation of machinery and plant used for the purposes of a trade. Consistently with this purpose, section 24(1) requires that a trader should have incurred capital expenditure on the provision of machinery or plant for the purposes of his trade. When the trade is finance leasing, this means that the capital expenditure should have been incurred to acquire the machinery or plant for the purpose of leasing it in the course of the trade. In such a case, it is the lessor as owner who suffers the depreciation in the value of the plant and is therefore entitled to an allowance against the profits of his trade.
>
> 40. These statutory requirements, as it seems to us, are in the case of a finance lease concerned entirely with the acts and purposes of the lessor. The Act says nothing about what the lessee should do with the purchase price, how he should find the money to pay the rent or how he should use the plant. As Carnwath LJ said in the Court of Appeal [2003] STC 66, 89, para 54:
>
>> "There is nothing in the statute to suggest that 'up-front finance' for the lessee is an essential feature of the right to allowances. The test is based on the purpose of the lessor's expenditure, not the benefit of the finance to the lessee."
>
> 41. So far as the lessor is concerned, all the requirements of section 24(1) were satisfied. Mr Boobyer, a director of BMBF, gave

> unchallenged evidence that from its point of view the purchase and lease back was part of its ordinary trade of finance leasing. Indeed, if one examines the acts and purposes of BMBF, it would be very difficult to come to any other conclusion. The finding of the special commissioners that the transaction "had no commercial reality" depends entirely upon an examination of what happened to the purchase price after BMBF paid it to BGE. But these matters do not affect the reality of the expenditure by BMBF and its acquisition of the pipeline for the purposes of its finance leasing trade.
>
> 42. If the lessee chooses to make arrangements, even as a preordained part of the transaction for the sale and lease back, which result in the bulk of the purchase price being irrevocably committed to paying the rent, that is no concern of the lessor. From his point of view, the transaction is exactly the same. No one disputes that BMBF had acquired ownership of the pipeline or that it generated income for BMBF in the course of its trade in the form of rent chargeable to corporation tax. In return it paid £91m. The circularity of payments which so impressed Park J and the special commissioners arose because BMBF, in the ordinary course of its business, borrowed the money to buy the pipeline from Barclays Bank and Barclays happened to be the bank which provided the cash collateralised guarantee to BMBF for the payment of the rent. But these were happenstances. None of these transactions, whether circular or not, were necessary elements in creating the entitlement to the capital allowances.

87. HMRC argued that any reliance placed by the LLP on *BMBF* in relation to Issue One was misplaced. The facts of that case were materially different, because in *BMBF* the taxpayer had paid the entirety of the expenditure for the plant in question, and the taxpayer had no knowledge or concern as to what the recipient did with the money. Further, the similarities relied on by the LLP between various features present in *BMBF* and this appeal were wrong and in any event irrelevant, since the issues to be determined are largely questions of fact. Finally, the contention that the legislative provisions are not concerned with what the counterparty does with the money it is paid is unsustainable in the light of the Supreme Court's judgment in *Tower MCashback*, on which HMRC rely.

88. In *Tower MCashback*, the relevant statutory question was whether the taxpayers had incurred capital expenditure on the provision of plant and machinery for the purposes of s11 CAA. Tower MCashback had developed software that allowed manufacturers to promote products to retail customers by offering free airtime on their mobile phones. Manufacturers paid Tower MCashback "clearing fees" for the use of that software. The taxpayer LLPs paid consideration for the grant of software licences which would entitle the LLPs to a proportion of the clearing fees that Tower MCashback received. The LLPs funded the consideration payable out of the subscriptions paid by members for their membership interest. 25% of the subscriptions was provided out of the individuals' own resources and the remaining 75% was provided by loans made to the individual members, limited in recourse to their shares in the LLP. Tower MCashback placed around 82% of the consideration it received on deposit which was used as security for the loans

made to the individual members. The Special Commissioner[11] found as facts that (i) while the scheme was not a sham, it was pre-ordained and designed as a composite whole; (ii) the market value of the software licences was "very materially below" the price that the LLPs ostensibly paid for those rights and (iii) there was little chance that the loan to the members would be repaid in full within ten years. The Special Commissioner concluded that the LLPs had not incurred the full amount of expenditure that they had claimed, essentially because 75% of that expenditure was "filtered back" to the LLPs.

89. In the High Court, Henderson J (as he then was) reversed this conclusion[12], deciding that on the authority of *BMBF* the LLPs had incurred the full amount they claimed on the provision of plant for the purposes of s11, and it was irrelevant that the market value of the software licences was materially below the sums the LLPs claimed to have incurred in acquiring them. The Court of Appeal dismissed HMRC's appeal[13].

90. The Supreme Court reversed the decision of the Court of Appeal. Lord Walker considered (at [75]) that 75% of the capital raised, although not a sham, "was really being used in an attempt to quadruple the investor members' capital allowances." While there was a genuine loan "there was not, in any meaningful sense, an incurring of expenditure of the borrowed money in the acquisition of software rights. It went into a loop in order to enable the LLPs to indulge in a tax avoidance scheme." The relevant question was not simply whether there was real expenditure but whether there was real expenditure "on the acquisition of software rights": [209]. At [77] Lord Walker distinguished *BMBF* on the basis that in that case the full £91m had been borrowed, and the pipeline had been acquired, on fully commercial terms. In contrast, in *Tower MCashback*, "the borrowed money did not go to MCashback, even temporarily; it passed, in accordance with a solicitor's undertaking, straight to R&D where it produced no economic activity … until clearing fees began to flow from MCashback to the LLPs …". The Supreme Court reduced the taxpayer's allowances to 25% of the amount claimed.

91. This is not the first appeal, nor doubtless the last, in which the taxpayer points to *BMBF* and HMRC point to *Tower MCashback*. The disagreement between the parties as to whether *Tower MCashback* was decided on the basis that part of the claimed expenditure was not incurred, or on the basis that it was incurred, but not on eligible items, is readily explicable by the "tortuous course"[14] of its procedural history stemming from the way in which the issues were initially reframed by the Special Commissioner. *Tower MCashback* was decided on the basis that not all of the expenditure was incurred "on" plant and machinery, but the result was the same as if it had been decided that a portion of it (funded by the circular loan) had not been "incurred" at all.

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[11] [2008] STC (SCD) 1.

[12] [2008] EWHC 2387 (Ch).

[13] [2010] EWCA Civ 32.

[14] The words of Lord Walker in *Tower MCashback* at [3].

92. We do not consider that differences or similarities in fact patterns between the *BMBF* and *Tower MCashback* decisions or between this appeal and those decisions are of great assistance; what matters are the principles which can be drawn from the decisions. As to those principles, we agree with the analysis of the Upper Tribunal in *R (Cobalt Data Centre 2) LLP v HMRC* [2019] UKUT 342 (TCC) ("*Cobalt*"), where the issue was the extent to which sums were paid "for" a relevant interest so as to qualify for Enterprise Zone Allowances, and at [210], it said as follows:

> …for present purposes we merely note that the comparison of the facts of other cases with the facts before us is of limited assistance. What is important is the principles to be derived from the authorities. As to that, we derive the following propositions from *BMBF* and *TowerM*:
>
> (1) The first step is to construe, purposively, the relevant statutory provision.
>
> (2) It is then necessary to analyse the contractual arrangements to determine whether, in accordance with a purposive construction of the statutory provisions, they fall within them.
>
> (3) Matters such as the presence or absence of circularity of funding, or the valuation of the assets ostensibly acquired, are relevant considerations, but only as part of the process identified in (1) and (2) above.

93. Applying these propositions to Issue One, we consider that (1) the relevant statutory question is "on or in connection with what was the LLP's expenditure incurred?", (2) the relevant statutory question is not "on or in connection with what was the developer's expenditure incurred?", and (3) all matters and circumstances should be taken into account insofar as they are relevant to answering question (1).

94. The FTT's decision on Issue One was, as we have described, in substance a decision that the relevant statutory question was question (2). That was an error of law, because such a conclusion is contrary to both the statutory provisions and case law. None of the reasons given by the FTT (summarised at [79] above) justified that decision.

Issue One: Decision

95. Having found that in relation to Issue One the making of that decision "involved the making of an error on a point of law", we may (but need not) set it aside. If we set it aside we may either remake it or remit it to the FTT: section 12 Tribunals, Courts and Enforcement Act 2007.

96. We are clear that since the error was material that part of the Decision must be set aside.

97. We consider that we have all the necessary facts and information to remake it. In doing so, it is necessary to be completely clear as to the relevant question to be determined.

98. The error which we have found was made by the FTT is encapsulated in the words in FTT [129] (see [58] above) "ie to consider the various payments made by Cannock". If those words are deleted from [129], we consider that the paragraph fairly sets out the first issue in this appeal. We accept HMRC's description in its skeleton argument, as follows:

> The first issue the FTT had to decide was whether the Development Sum ought properly to be analysed as comprising a number of elements of expenditure, some of which qualified for BPRA and some of which did not (HMRC's position) or whether the whole of the Development Sum had been paid for "*the conversion of the Property under the Development Agreement*" [quoting the LLP's skeleton argument for the FTT hearing] and therefore qualified for BPRA in its entirety (the LLP's position).

99. There was considerable discussion before the FTT and before us of the meaning and relevance of the "purpose" of the LLP's expenditure. Mr Gammie produced an interesting analysis of the capital allowances authorities divided into cases involving the acquisition of an asset, those involving the acquisition of an asset to be constructed or manufactured and those involving expenditure with a particular purpose or object. In this appeal, while we accept that the authorities establish that it is necessary to determine the purpose of the expenditure, we do not find that a particularly helpful starting point in determining the initial question as properly framed. That initial question was well expressed by Mr Gammie as "what did the LLP get for its money?". Essentially, that entails determining whether the specific rights and obligations set out in the Intercreditor Deed on the part of OVL were or were not part of what the LLP got for its money.

100. Only once that question has been answered can it be determined whether all or part of the expenditure was incurred on or in connection with Conversion, so as to qualify for BPRA. In so determining eligibility, the proper construction of the statutory provisions and their application to the facts becomes determinative. But the answer to the necessarily prior question of what the LLP got for its money is found not in the statute but in the contractual documents.

101. The two documents critical to this question are the Development Agreement and the Intercreditor Deed. We set out the key provisions of those documents in the Appendix to this decision.

102. As to what the LLP got for its money, Mr Gammie and Mr Bremner set out the LLP's position on this issue in their skeleton argument as follows:

> The question whether BPRA are available is to be addressed by analysing the nature and quality of the expenditure incurred by the LLP. The relevant question is: *what did the LLP get for its money?* Or, put another way to reflect the legislative expression "incurred on, or in connection with", *how much did the LLP spend to get what it got?*
>
> In the present case, there is only one answer to those questions:

> (1) The Development Sum was the expenditure that the LLP was obliged to pay and did pay (and which it therefore incurred or spent) in order to acquire a converted Blush House - converted from a disused flight training centre into a hotel. That is what it contracted to acquire – a converted Blush House – and that is what it got.
>
> (2) The Development Sum is what the LLP spent (it being conceded that it was incurred) to get what it got. All of the Development Sum is therefore expenditure incurred "on" or, in any event, "in connection with" the conversion (etc) of Blush House.

103. Mr Gammie argues that the LLP's approach is supported by both the policy objective and wording of the BPRA legislation. He points out that in contrast to many of the tax avoidance cases in recent years, there is no question in this case of the LLP inflating its entitlement to capital allowances with non-existent or unrealistic valuations in respect of the project. The development was an arm's length commercial transaction concluded at the market price. The Development Sum was the amount which the LLP was required to pay in order to secure the conversion of Blush House into a hotel. The fact that the price the LLP paid was to be used by OVL in various recognised ways in order to achieve that objective was of no relevance to the statutory question.

104. We agree that in the circumstances of this appeal there was no finding by the FTT that the LLP was "ramping up" its claim to BPRA. As to the issue of valuation, which we discuss further below, it is clear from *Tower MCashback* that this is not to be dismissed as irrelevant. It is, in a case where it is accepted that all the expenditure was incurred, relevant only in enquiring into on (and, by extension, in connection with) what the LLP's expenditure was incurred. However, in this appeal, while there is room for debate about what the Valuation was valuing, there is no evidence of such a striking discrepancy between the claimed expenditure and the valuation of the completed project as was present in *Tower MCashback* and some of the other authorities to which we were referred. The relevance of this is that in this appeal issues of valuation do not in our opinion call into question the plausibility of the claimed expenditure being incurred in order to deliver the completed project as opposed to being incurred on something else. The Valuation was admittedly a business valuation rather than a "bricks and mortar" valuation, but, as we discuss below, the concept of qualifying business premises in the BPRA code is based on a business rather than purely on bricks and mortar.

105. In addition to the position regarding the valuation in this case, Mr Gammie also sought to strengthen the LLP's argument by pointing out that the FTT had found that the transactions between the LLP and the Developer were commercial, arm's length arrangements. HMRC vigorously contested that interpretation of the FTT's decision. As we have discussed above (at [42]-[48]), we find the FTT's discussion of this question to be unsatisfactory, and, given the error which we identify regarding the arms' length analysis, its conclusion on that point must be questionable. However, ultimately we do not consider that any debate as to the extent to which the LLP and the Developer were at arm's length informs the issues to be decided in this appeal.

106. As to the more amorphous question of commerciality, HMRC state in their skeleton argument that, in reliance on *Tower MCashback,* "an assessment of the commerciality of the arrangements plays an important role in determining the extent to what, on a realistic view of the facts, the taxpayer has incurred expenditure on, or in connection with". It is said that the FTT erred in failing to make findings as to the commerciality of various aspects of the arrangements, despite being urged to do so by HMRC. HMRC point out that both the Developer and Downing stood to make substantial profits from the transactions.

107. Again, we do not find that the determination of what the LLP got for its money is greatly illuminated by the debate as to commerciality. It may be relevant to whether particular items of expenditure qualify for BPRA as being on or in connection with Conversion, but the FTT made no findings which would support HMRC's assertion that viewed broadly the relevant transactions were uncommercial. Downing raised the Development Sum from the LLP in the open market at a price which investors were prepared to pay and did pay, having regard to the anticipated return on their investments and the anticipated availability of BPRA and the Valuation.

108. In our opinion, the position in relation to valuation and commerciality does not answer the question in this appeal "on (or in connection with) what did the LLP incur the expenditure which is claimed to be eligible for BPRA?". That question is to be determined by considering the contractual documents.

109. We therefore turn to the Development Agreement and the Intercreditor Deed.

110. Under the Development Agreement, the LLP was obliged by Schedule 2 to pay to OVL the Development Sum (£12,513,200) in consideration of the obligations entered into by OVL under the Development Agreement. The LLP was also obliged to pay the Licence Fee Amount (£350,000) into a designated deposit account, and (pursuant to the Deed of Rectification) to pay the FF&E Sum to OVL. OVL's obligations were set out in Schedule 1. Under paragraph 6 of Schedule 1 OVL was obliged to carry out the Works and to use reasonable endeavours to procure that the Works were practically completed by 1 September 2012. The Works meant (broadly) the construction of the Development, and the Development meant the stripping out, refurbishment and upgrading of the Blush House site in accordance with various agreements.

111. Mr Gammie says that one need not and must not look beyond the Development Agreement. All of the Development Sum was incurred to acquire the obligations of the Developer in the Development Agreement. Nothing more was acquired by the LLP. HMRC's position, in contrast, is that the Development Agreement, under which the Development Sum is paid, is only one of a number of contracts entered into by the LLP as part of a suite of agreements, and those agreements together constitute a composite transaction. When the suite of agreements is read together, and the other relevant evidence is considered, it is plain that in return for the payment of the Development Sum the LLP received a

variety of specific rights and/or benefits over and above the obligations in the Development Agreement.

112. HMRC say that because the suite of documents formed part of a composite transaction, in order to determine the legal rights and obligations acquired by the LLP in return for the Development Sum, it is necessary to read all the documents together. Specifically, the Development Agreement must be read together with the Intercreditor Deed. This approach is said to be justified by the decision in *Ingenious Games LLP and others v HMRC* [2019] UKUT 226 (TCC) ("*Ingenious Games*").

113. HMRC's reliance on *Ingenious Games* fails to acknowledge the substance of the tribunal's analysis in that case. HMRC point to [110] of the decision as justifying their approach. It is necessary, however, to see that paragraph in context:

> [107] We are therefore not persuaded that, as a matter of contractual construction, the FTT was correct in adopting a 'composite agreement' approach without reference to *Ramsay*. In our view, the starting position for the FTT in construing the contracts should have been to consider them separately in accordance with the basic principles set out at [79] and [80] above.
>
> [108] However, where a number of contracts are entered into together, at the very least the existence of the other contracts is part of the factual background known to the parties at or before the date of the contract, as referred to by Lord Neuberger at [10] of *Wood v Capita* (quoted at [79] above) and commonly referred to as the 'factual matrix'. The existence of the other contracts is therefore a relevant part of the factual matrix when construing any one of them. Furthermore, where the contracts specifically cross-refer or there are other indications that they are intended to operate only as a package, then that fact will be relevant.
>
> [109] Authority for this approach is to be found in Lewison *The Interpretation of Contracts* (6th edn, 2016) para 3.03 where it is said:
>
> > 'Many transactions take place by the entry into a series of contracts … In such cases, where the transaction is in truth one transaction all the contracts may be read together for the purpose of determining their legal effect. This principle is a more specific example of the general principle that background is admissible in interpreting a written contract. It applies to other documents executed as part of the same transaction, whether they happen to be executed before, at the same time as, or after the document requiring to be interpreted.'
>
> [110] Therefore, where there is in truth one transaction, the tribunal is entitled to read the contracts together for the purpose of determining their legal effect. That is not the same as saying that where there is a series of contracts to implement a transaction there is a single composite agreement. As we have said, the 'composite agreement' approach is not correct as a matter of contractual construction. However, what must not be done is to adopt blinkers in looking at each agreement. In determining the legal rights and obligations acquired by

> the LLPs pursuant to the contractual arrangements, the FTT was entitled and correct to look at the entirety of each set of transaction documents, which it found at [91] were entered into at the same time and as a single package. That set of documents, which we have referred to at [82] above, reflected what was undeniably a single, albeit multi-party, transaction as a commercial matter. Even though it was common ground that none of the documents in question could be regarded as a sham, the absence of any allegation of sham does not prevent the tribunal following the approach outlined above or, for example, examining critically whether the written provisions of the documents had the effect when read together that the LLPs maintained that they did. This is consistent with the principle, illustrated in *Antoniades v Villiers* as discussed above, that the tribunal is not bound by labels that the parties have chosen to apply if those labels do not reflect the true nature of the legal rights and obligations created pursuant to the contractual arrangements.

114. The Tribunal was not advocating the blunt approach suggested by HMRC. Indeed, a "composite agreement" approach as a matter of contractual construction is specifically rejected. Rather, the Tribunal endorsed an uncontroversial tenet of contractual interpretation recognised by Lewison (set out at [109] of the decision) and applied it to the particular factual situation in the case.

115. In this appeal, the Development Agreement and the Intercreditor Deed were entered into at the same time and as part of a "single package" of transaction documents. However, there was no allegation that those documents were a sham, or even that they bore labels which did not reflect the true nature of the legal rights and obligations created pursuant to those documents.

116. Therefore, we do not find it helpful to compare and contrast *Ingenious Games* in resolving the question of what the LLP got for its money. That turns simply on whether Mr Gammie is right that the Intercreditor Deed is irrelevant to that exercise.

117. The Intercreditor Deed was entered into between OVL, the LLP and the Co-op on the same date as the Development Agreement. Under clause 16.5 each of OVL and the LLP directs that the balance of the Subscribers Account (being the Co-op account into which the £7 million Co-op Loan and the £7.2 million of equity subscribed by the LLP have been deposited) be utilised as follows:

> 16.5.1 £2,850,000 (two million eight hundred and fifty thousand pounds) will be utilised to assist with the purchase of the Property; and
>
> 16.5.2 simultaneously therewith the balance of the Subscribers Account shall be transferred or used as follows:-
>
> (a) the Stamp Duty Amount shall be used to pay SDLT in respect of the Property;
>
> (b) the Construction Amount shall be transferred to the Construction Account;
>
> (c) the Capital Amount shall be transferred to the Capital Account;

> (d) the Interest Amount shall be transferred to the Interest Account;
>
> (e) the Cost Overrun Amount shall be transferred to the Construction Cost Overrun Account;
>
> (f) the Bank Fees Amount shall be used by the Bank to pay its fees and the fees of its professional advisers;
>
> (g) the FF&E Amount shall be transferred to the FF&E Account;
>
> (h) the Working Capital Amount shall be paid to the Working Capital Account; and
>
> (i) the remaining balance shall be transferred to [OVL] or as [OVL] shall direct in and towards the discharge of the fees and other expenses detailed in Schedule 1 (Payments).

118. Schedule 1 sets out a list of payments to various third parties as set out in the Appendix to this decision.

119. Mr Gammie and Mr Bremner submit that the only purpose of the Intercreditor Deed was to direct the Co-op as to how it should deal with the mixed fund of money which had been deposited in the Subscribers Account to the extent that those funds were due to each of the LLP and OVL. OVL's direction was required simply because the funds were due in part to OVL consequent on the LLP's payment of the Development Sum for OVL's development obligation. The directions which OVL gave the Co-op can form no part of the consideration given by OVL to the LLP in return for the Development Sum. Nor do those directions represent an agreement by OVL in favour of the LLP as to the manner in which OVL will apply the Development Sum. All that the Intercreditor Deed does is to provide assurance to the Co-op as to the way in which the funds raised for the development will be applied.

120. Mr Gammie may well be correct that the primary purpose of Clause 16.5 of the Intercreditor Deed was to give the Co-op protection as to how the funds in the Subscribers Account would be allocated. However, it does not follow from this that the Intercreditor Deed could not also contain rights and obligations given by OVL to the LLP which form part of what the LLP acquired from OVL in return for the expenditure which the LLP incurred.

121. While *Ingenious Games* discusses a considerably more nuanced approach to contractual construction than HMRC suggest, we do consider that the material documents in this case were interlocking and inextricably linked. As Mr Davey points out, the Development Sum could not have been paid without the Co-op Loan, and the execution of the Intercreditor Deed was a condition precedent of the Co-op Loan[15]. Mr Gammie accepted that we were dealing with a composite set of agreements.

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[15] Co-op Loan Agreement Clause 8(1)(b) read with the definition of Finance Documents in Clause 1.3.

122. We have concluded that the Intercreditor Deed should be construed as setting out specific rights and obligations owed by OVL to the LLP and which relate to the Development Sum. The purpose of the Deed is expressed to be the regulation of claims by the Co-op and the LLP in respect of the Liabilities[16], which includes all liabilities and obligations payable or owing by OVL[17]. "Liabilities" includes Liabilities to the LLP arising under or in connection with the Development Agreement[18]. While it is stated that OVL enters into the Deed for the purpose of acknowledging and agreeing the arrangements between the Co-op and the LLP[19], the specific obligations in Clause 16.5 are expressed as directions of both OVL and the LLP in relation to the Subscribers Account.

123. The liabilities owed by OVL to the LLP under the Development Agreement are in our opinion supplemented by the specific rights and obligations in the Intercreditor Deed. Clause 5 of the Deed states that the Intercreditor Deed, the Development Agreement and certain security documents "form the entire agreement as to the London Luton BPRA Liabilities". Indeed, it goes on to state that if there is any inconsistency between the terms of the Intercreditor Deed and the terms on which the London Luton BPRA Liabilities were incurred by OVL, the terms of the Intercreditor Deed shall prevail.

124. The conclusion which we have reached does not have the consequence of recognising rights and liabilities being acquired from OVL by the LLP which were never intended to arise or which arose by a side wind. It was not disputed that the LLP both knew and intended how the money it paid to OVL would be used. That was found as a fact by the FTT: see [167] of the Decision.

125. The contrary conclusion, for which the LLP contends, would have the result that in determining the LLP's claim to BPRA it would not be permissible to look beyond the obligation of OVL to carry out the Works (summarised at [110] above) under the Development Agreement in consideration for the payment of the Development Sum. The only question to be addressed would be whether expenditure on the Works was expenditure incurred on or in connection with Conversion.

126. Section 360B provides that expenditure does not qualify for BPRA if it is incurred on or in connection with various matters, including the acquisition of land or rights in or over land, the development of adjoining land or the acquisition of non-fixture plant or machinery. It would necessarily follow from the approach advocated by the LLP that even if it was known and intended by the LLP and OVL that some part of the Development Sum was clearly to be expended on one of these excluded items, that was to be ignored, because the only rights and obligations acquired by the LLP were those set out in the Development Agreement.

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[16] Development Agreement Clause 2.1.

[17] Development Agreement Clause 1.

[18] Definition of "London Luton BPRA Liabilities", Development Agreement Clause 1.

[19] Development Agreement Clause 2.2.

127. In our view, that consequence points strongly against the LLP's approach to the construction of the documents. If it had been known and intended, for instance, that £1 million of the Development Sum was to be paid for land and another £1 million for plant and machinery, and that had been spelt out in a document to which OVL and the LLP were parties, then on the LLP's analysis that would not affect the eligibility of the Development Sum for BPRA, because the only thing the LLP got for its money was the obligation of OVL to carry out the Works under the Development Agreement. The statute would be concerned solely with whether the Works were on or in connection with Conversion.

128. Importantly, a situation of this type in fact arose in this case. The sum paid by the LLP to OVL as the Development Sum was £12,513,200. The amount claimed as BPRA, however, was only £12,478,201. The background is set out in the Decision at [123]-[124] as follows:

> 123. On 5 May 2011 after completion of the contractual arrangements regarding the Property but before the BPRA claim had been submitted there was a meeting attended by Mr Malcolm Smith of HMRC, Mr Lewis and Mr Pierre Clarke of Downing and Mr Robert Jones of Adducere LLP in respect of a different project. Mr Lewis explained that Mr Smith had "highlighted the need to deduct any legal costs that we incurred in relation to the acquisition of the building in respect of future BPRA claims". However, Mr Smith could not recall whether he had said this as he had not been provided with a note of the meeting prepared Mr Jones.
>
> 124. Therefore, although Downing did not agree with such an approach, still considering that all of the Development Sum paid by the LLP to Cannock should qualify for BPRA, it was decided, as Mr Lewis said, "in the spirit of compromise and in order to work constructively with HMRC to obtain early settlement of what was not, we thought at the time, considered by HMRC to be a contentious BPRA claim," to accept an adjustment to the legal fees in connection with the acquisition of the Property. Accordingly, £34,999 was deducted from the Development Sum of £12,513,200 (see paragraph 103, above) reducing the BPRA claim to £12,478,201. This was seen as a simply pragmatic decision by Downing which was intended to remove a possible objection by HMRC in the hope the BPRA claim could be concluded swiftly.

129. The FTT considered that by excluding the £34,999 as relating to the acquisition of land the LLP "may have implicitly accepted" that it was necessary to consider the eligibility of the separate obligations acquired by the LLP[20]. Mr Gammie contested this conclusion, and pointed out that in any event any such acceptance could have no relevance to the question of statutory construction in the appeal. However, we consider that it was relevant not to the construction of the legislation, but to the prior question of what the LLP got for its money. On the LLP's analysis of that question, the fact that the parties knew and intended that part of the Development Sum would be used for non-qualifying purposes, being

[20] Decision [170].

required under the Intercreditor Deed to be paid towards the legal fees referred to in Schedule 1 of that Deed, would have been irrelevant to the BPRA claim.

130. Of course, the LLP chose to exclude that amount from the BPRA claim. However, what that throws into sharp relief is that on the LLP's construction it was the LLP which was to be the sole arbiter of what to exclude and in what amount. On the LLP's construction it could quite properly have included that amount in its BPRA claim, just as much as any other part of the Development Sum which was earmarked for a particular use as described in the Intercreditor Deed.

131. We consider that what the LLP got for its money was not simply an obligation from OVL to carry out the construction Works. It also obtained as part of its bargain a series of specific obligations on the part of OVL. It is therefore necessary in determining to what extent the sum claimed by the LLP qualifies for BPRA to consider each of those obligations.

132. As we have reformulated Issue One, we therefore remake the FTT's decision so as to dismiss the LLP's appeal on this issue.

Issue Two

133. We have decided that it is necessary in determining the LLP's claim to BPRA to consider separately the various rights which the LLP obtained from the Developer. The Intercreditor Deed listed a number of specific obligations on the part of the Developer relating to specified amounts of the Development Sum which had to be dealt with in certain ways. In determining what the LLP's expenditure was incurred on (or in connection with), it is necessary to consider each of those specific obligations. Of course, HMRC do not dispute that expenditure on certain of those obligations (such as that relating to the Construction Account) qualified for BPRA. However, the FTT's decisions relating to the items set out below have been appealed by one or both parties, and as regards each item we must determine whether expenditure incurred on that item was expenditure on or in connection with Conversion, which was not otherwise within any of the statutory exclusions from eligibility for BPRA.

134. It is therefore necessary to consider whether expenditure on the Developer's obligation in relation to the following items was expenditure on or in connection with Conversion:

(1)The Capital Account.

(2)The Interest Amount.

(3)IFA Fees.

(4)Promoter Fees.

(5)Legal Fees.

(6)Franchise costs.

(7)Fixtures, Fittings and Equipment.

(8)The Residual Amount.

135. Before we begin that exercise, we set out some observations as to the meaning and scope of the BPRA legislation. We also comment on the Valuation and its relevance to the exercise. These points will be relevant to the appeals in respect of each of the items set out above.

The statutory test

136. To recap, the legislation provides a 100% allowance to a person who incurs "qualifying expenditure". Section 360B(1) provides that:

> In this Part "qualifying expenditure" means capital expenditure incurred before the expiry date on, or in connection with—
>
> (a) the conversion of a qualifying building into qualifying business premises,
>
> (b) the renovation of a qualifying building if it is or will be qualifying business premises, or
>
> (c) repairs to a qualifying building or, where the qualifying building is part of a building, to the building of which the qualifying building forms part, to the extent that the repairs are incidental to expenditure within paragraph (a) or (b).

137. Section 360B(2) excludes certain expenditure from that definition. In particular, expenditure incurred on or in connection with the acquisition of land or rights in or over land is not qualifying expenditure.

138. The definition in section 360B(1) encompasses (broadly) expenditure on or in connection with the Conversion of a "qualifying building" into "qualifying business premises". A qualifying building is one which is in a "disadvantaged area" (designated as such), which is unused and which had last been used for the purposes of a trade or as an office. Qualifying business premises means a qualifying building which is "used, or available and suitable for letting for use" for the purposes of a trade or as an office.

139. A balancing charge will arise if certain events occur within seven years[21] after the building is brought back into use, including its disposal or demolition or the building ceasing to be qualifying business premises. The BPRA relief therefore has a "lock-in" period for investors if the full amount of relief is to be preserved. As Mr Gammie put it, "investors needed to remain invested".

Extra-statutory material

140. It was common ground that the legislation must be construed purposively. In doing so, it is permissible to consider "any material that is likely to be genuinely

[21] Reduced to five years by section 66 Finance Act 2014.

helpful in illuminating the context within which legislation is to be construed"[22]. Background material cannot be allowed to take precedence over the clear words used and the material must have been available to the general public[23].

141. The FTT was referred by Mr Gammie to the Consultation Document "Capital allowances: renovation of business premises in disadvantaged areas" issued by the Inland Revenue in December 2004 (the "Consultation Document"). The FTT dismissed its relevance, accepting HMRC's submission that while the document set out the Inland Revenue's policy objectives it could not be assumed that those objectives were in accordance with the purpose of the legislation as enacted: FTT [36].

142. In this appeal, we were referred by the parties to other non-statutory public materials said to be helpful in understanding the purpose of the BPRA code. These included the Pre-Budget Report 2003; Budget Note 34 from the 2005 Budget which dealt with the proposed provisions; the Regulatory Impact Assessment for BPRA published in 2005, and HMRC's Explanatory Memorandum to the BPRA Regulations 2007 (SI 2007/945).

143. Each party sought to draw specific points from these materials said to support its case. Bearing in mind the limitations on the weight to be attached to such materials in construing the wording of the legislation, we were not persuaded that any of those arguments informed that process of construction. However, although the Consultation Document did indeed represent the views of the Inland Revenue, we consider that the extracts identified by the FTT are a helpful description of the policy objectives as found in the legislation itself. The relevant passages of the FTT decision are at [34]-[35], as follows:

> 34.One of the documents, the Consultation Document, *Capital allowances: renovation of business premises in disadvantaged areas*, issued by the Inland Revenue in December 2004, after setting out the Government's intention to introduce draft legislation, states, at paragraph 1.7:
>
> > "We have therefore designed a scheme that will be open to individuals and companies who own or lease business property that has previously been unused for 12 months or more. The scheme will allow them to claim up-front tax relief on all their capital spending on the renovation or conversion of the property in order to bring it back into business use."
>
> 35. Annex C of the Consultation Document, which sets out "the purpose and intended effect of the measure" states:
>
> > "C.7 Boarded-up rows of derelict shops and empty business properties are a common sight in the most deprived areas of the UK. The Government has identified that further barriers to regeneration in these areas are caused by the presence of such properties. Available data shows: (i) that there is a significantly greater proportion of long-term empty properties in the 2,000

[22] *Craies on Legislation*, 11th ed (2017) at 27.1.1.2. Parliamentary material is subject to the more restricted rule in *Pepper v Hart* [1993] 1 AC 593.

[23] See the helpful summary in *Christianuyi v HMRC* [2018] UKUT 0010 (TCC) at [25].

Enterprise Areas than in other areas of the UK and (ii) that market prices can hit a floor below which the costs of maintaining/refurbishing the premises would be higher than the expected yield the owner could expect to obtain as a result of incurring such costs. This is the so-called "negative rent" effect, which acts as a barrier to regeneration.

…

C.9 The presence of such [empty] properties can also act as a drag on the whole neighbourhood. This is sometimes referred to as the "broken window" effect, which can deter new people and businesses from locating in these disadvantaged areas.

C.10 Over time, the degree of dereliction can increase, until such time as the costs of renovation could outweigh any private returns. At this point the site will not be brought back into use without some form of public support. However, earlier intervention could have saved significant public funds and so would have led to economic efficiency gains. The BPRA scheme will encourage early remediation, thus preventing the costs of remedying dereliction from spiralling until they become unaffordable.

…

C.12 Finally, buildings in disadvantaged areas can often be in need of significant redevelopment and refurbishment to bring them back to standard suitable for occupation. While the price for purchase or lease may reflect this, the need for a significant up-front investment can act as a disincentive compared to the more straightforward occupation of a building in other areas. This can increase the risk of greenfield, rather than brownfield development, with a corresponding reduction in amenity and biodiversity."

The scope of the legislation

144. Turning to the wording of the relevant legislation, we must determine whether the expenditure by the LLP on each of the elements set out above was qualifying expenditure. By comparison with other capital allowances provisions, there are two unusual features of the BPRA code. The first is its extension to expenditure incurred "in connection with" a qualifying purpose. The second is the effect of the definition of "qualifying business premises".

"On, or in connection with"

145. The leading authorities in relation to capital allowances generally concern whether expenditure was incurred and, if so, whether it was incurred "on" or "for" a particular purpose. The LLP's expenditure incurred in acquiring the various rights/obligations in this appeal will also be eligible if it was incurred "in connection with" a qualifying purpose.

146. The FTT considered the meaning of the words "in connection with" at [147]-[154]. It referred to some of the relevant case law guidance in the following passage:

147. Clearly the interpretation of these words, particularly "in connection with" depends on its statutory context. In the rating case of *Coventry and Solihull Waste Disposal Company Limited v Russell*

(Valuation Officer) [1999] 1 WLR 2093 Lord Hope considered the phrase in relation to the issue of whether the primary function of premises was "in connection with" the production of electricity and heat, saying at 2103:

> "It may be that in some contexts the substitution of the words "having to do with" will solve the entire problem which is created by the use of the words "in connection with". But I am not, with respect, satisfied that it does so in this case, and [counsel for the respondent] did not rely on this solution to the difficulty. As he said the phrase is a protean one which tends to draw its meaning from the words which surround it. In this case it is the surrounding words, when taken together with the words used in the Amending Order of 1991 and its wider context which provide the best guide for a sensible solution of the problem which has been created by the ambiguity."

148. Such an approach was adopted by the Court of Appeal in *Barclays Bank plc & Trustees of the Barclays Bank Pension Fund v HMRC* [2007] EWCA Civ 442 in which the "primary question" as identified by Arden LJ (as she then was) at [18], was "the proper meaning of the words 'in connection with past service.' She observed that the expression, "in connection with", "could describe a range of links" and recognised, at [20] that "a connection may be indirect for the purpose of the definition of relevant benefits". She continued, at [30] dismissing counsel for the appellants argument that the scope of the provision should be limited because of its context:

> "… that Parliament has used a broad expression, namely the expression "in connection with". Having cast the net widely, Parliament has drawn it in particularly by imposing a limit that there should be a connection with service. The limitations prescribed by Parliament are the limitations that the court should apply. The context of occupational pension schemes cannot be used to narrow the phrase 'in connection with past service' yet further."

149. A similar approach has been taken by this Tribunal. In *Talisman Energy (UK) Limited v HMRC* [2010] SFTD 359 where, in relation to petroleum revenue tax and having referred to *Barclays Bank*, it considered, at [52], that the expression "in connection with":

> "… should be given a broad meaning and that the only limitations should be those prescribed by Parliament"

150. In *J& A Young (Leicester) Limited v HMRC* [2015] UKFTT 638 (TC) the issue was whether certain property was held "in connection with" business premises held as an investment in the context of the taxation of a pension scheme. The Tribunal observed at [72] that:

> " There are many authorities which consider the words "in connection with" in a variety of different statutory contexts. It is a phrase commonly used by in statutes and delegated legislation, as well as in commercial contracts. The phrase is very frequently used in tax statutes. For example, the words "in connection with" occur over 30 times in the Finance Act 2015 alone. The words are often used in charging and anti-avoidance provisions to extend the scope of the charge to tax. For example, section 401 ITEPA charges to income tax payments made "in connection with" the termination of employment. Another example, in this case an anti-avoidance provision, is section 686 (3) Income Tax Act 2007 where the

> provision applies in circumstances where an abnormal amount by way of dividend is received "in connection with" certain transactions in securities. It is fair to say, however, that the use of the phrase "in connection with" to extend the scope of a relieving provision, as in this case, is less common. In these appeals, HMRC is in the slightly unusual position of having to argue that the words "in connection with" should be narrowly construed when more frequently HMRC is wont to urge this Tribunal and the higher courts that the same phrase should be given an expansive meaning when used in a charging provision."
>
> 151. Similarly in the present case it is the LLP rather than HMRC that is inviting us to adopt such a wide approach. At [73] of *Young* the Tribunal considered that:
>
> > "… two propositions can be derived from the dozens of authorities which have considered those words in different contexts. First, the words "in connection with" generally have a very broad meaning. Secondly, the degree of connection – the remoteness, proximity and type of connection – required by the use of that phrase in a particular statute must be identified from the particular statutory context in which it is used."

147. We draw the following conclusions in relation to the meaning of the phrase "in connection with" in the BPRA code:

(1)It is clearly intended to encompass a broader category of expenditure than expenditure "on" Conversion.

(2)It is to be given a broad meaning.

(3)The degree of connection required depends on the statutory context, as to which see below. For this reason, it is not helpful to seek guidance in decisions on the phrase in different statutory or contractual contexts.

(4)It bears the same meaning in both the definition of qualifying expenditure and the specific exclusions from qualifying expenditure.

148. The statutory context is in our view found both in the policy objectives of the BPRA rules and in particular in the definition of "qualifying business premises".

"Qualifying business premises"

149. At the broadest level, BPRA was one element of what the Government's Pre-Budget Report of 2003 described as the Government's plan for "regenerating Britain's towns and cities"[24]. As the Consultative Document stated, boarded-up rows of derelict shops and empty shops in the most deprived areas of the UK were seen as causing economic damage in a number of ways. The generous BPRA was intended to encourage "early remediation" of the problem, recognising that buildings in disadvantaged areas could often require a considerable up-front investment on "redevelopment and refurbishment to bring them back to a standard suitable for occupation".

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[24] Pre-Budget Report 2003 page 164.

150. The relief is given for the conversion or renovation of a qualifying building into qualifying business premises, and for repairs incidental to such conversion or renovation. A qualifying building is one which has been unused for at least a year and was previously used for the purposes of a trade or as an office. Qualifying business premises means a qualifying building which "must be used, or available and suitable for letting for use" for the purposes of a trade or as an office.

151. The relief is not obtained simply by carrying out physical works of conversion or renovation of unused buildings in disadvantaged areas. The relief is only available by reference to the outcome of the process, that outcome being that the building is in fact used, or at the least is available and suitable for letting for use, for the purposes of a trade or as an office. Put another way, the target of the relief is not a converted or renovated building but a functioning building which is "open for business" and being used for a trade or as an office. That is what must be delivered for the relief to be available.

152. HMRC renewed before us the argument which the FTT appears to have rejected[25] to the effect that the relief is targeted at *physical* works of construction and renovation. HMRC say that the words "conversion", "renovation" and "repair" in section 360B are fundamentally physical in character. Section 360C(1) refers to "conversion or renovation work" and "work" is an inherently physical concept. HMRC accept that the relief is not specifically limited to physical works, but contend that on a purposive construction there must be a close connection between an item of expenditure and physical works in order for it to qualify.

153. We do not accept this argument. It fails to recognise that fundamentally the relief is not designed to encourage conversion or renovation in itself but rather to encourage (via unusually generous reliefs) activity which will result in unused buildings becoming buildings actually being used for trades or as offices. The necessary degree of connection required by the words "in connection with" must be determined in this statutory context.

154. We consider that the definition of qualifying business premises is key to the purpose and policy of BPRA. Importantly, it is a definition based on the *use* (and availability and suitability for use) of a building rather than just its physical state.

155. What is justifiable and necessary at a granular level in order to place a qualifying building in a position where it is used for trading purposes or as an office (or available and suitable for letting for such use) will depend on the actual use intended in any particular project. In this appeal, the intended use was as an operational Ramada Encore hotel.

156. At [155], the FTT stated as follows in its conclusions as to the breadth of "in connection with":

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[25] At [146].

> 155. It is also clear from the legislation that for the expenditure concerned to be “qualifying expenditure” it must be incurred on or in connection with the building, ie in this case the Property and its conversion from a flight training centre into hotel premises and not given so wide a construction so as to provide an entitlement to relief on all expenditure associated with creating a fully functioning hotel business.

157. This apparently repeated a submission in these terms from HMRC. In our view, it is too sweeping and broad a statement to provide useful guidance. To the extent that it is drawing a principled distinction between expenditure in connection with Conversion into “hotel premises” and expenditure in connection with Conversion into premises used for a hotel business, with the latter not being “in connection with” Conversion, we reject it, for the reasons we have given. In this appeal, the expenditure incurred by the LLP related to a building which would be operational as a Ramada Encore hotel. As a matter of principle, in a factual situation such as this, the relief is available for expenditure on or in connection with Conversion into a building *used* for the purposes of a Ramada Encore hotel trade. Whether any particular item of expenditure satisfied this test will depend on all the facts and circumstances, as discussed below.

The Valuation

158. Edward Symmons provided a valuation of the proposed hotel showing its projected value on various stated assumptions and in different scenarios. HMRC challenged the integrity and independence of the Valuation but that challenge was unequivocally rejected by the FTT at [135]-[136].

159. HMRC mounted a further challenge in respect of the Valuation, which they renewed in the appeal. This challenge related to the basis on which the valuation had been carried out. The FTT dealt with this at [138]-[142] as follows:

> 138. Although, for the reasons above, we consider the Edward Symmons valuation to be wholly independent it was not disputed that it established the anticipated value to the LLP of the completed conversion of the Property into a Ramada Encore hotel (ie the business) rather than value the Property as a building or particular works of renovation, conversion or repair.
>
> 139. Mr Davey contends that the consequence of this is that the Edward Symmons stabilised valuation figure does not provide the LLP with any support for its argument that the Development Sum was a reasonable sum to pay Cannock for the conversion work as it had no correlation with the costs of converting and renovating the Property. Therefore, he says that the report cannot be used to test the market value of the works undertaken or to determine the purpose for which the LLP paid the Development Sum to Cannock. Additionally, he says, relying on the expert evidence of Mrs Cochrane, that the Edwards Symmons valuation is an overvaluation.
>
> 140. Taking the overvaluation point first, given our conclusion that Edwards Symmons valuation was wholly independent and was

provided for the benefit of the Co-op, we can see no reason to doubt the integrity of its valuation. Additionally, we accept Mr Gammie's criticism of Mrs Cochrane who, when cross examined, was unwilling, for perfectly understandable reasons of client confidentiality, to provide any detail, even in general terms, of her experience of undertaking valuations that could stand comparison with type of transaction with which we are concerned in this appeal. This can be contrasted with the experience of the LLP's valuation expert, Mr Harper (see paragraph 38(6), above) who was "overall" satisfied that the Edward Symmons report accurately reviewed the value of the hotel and who disagreed:

> "… with the Revenue's statement that the valuation was inaccurate in that it constitutes or includes an overvaluation"

141. As to the correlation between the Development Sum and the renovation or conversion of the Property, Mr Davey contends that given the valuation was directed at valuing an operational business rather than the value of physical premises from which it operates and having regard to the approach of Nugee J in *Acornwood*, that there is no valid basis on which the LLP can advance the Edward Symmons valuation as any reliable indication of the market value of the conversion works acquired by the LLP.

142. However, we agree with Mr Gammie who contends that HMRC have confused costs with value which is irrelevant to investors. The question with which they are concerned is what do they get for their money with the answer being the Property converted into a Ramada Encore hotel. He says that it is clear from the IM that the price paid by the investors was that which the market was prepared to pay and that, although prepared for the Co-op, Edward Symmons would also have known that their valuation would provide the basis for the IM.

160. We consider that HMRC's argument is primarily relevant in relation to Issue One. As we have concluded, the Valuation was not of relevance in itself, but was one relevant factor (of many) in determining on or in connection with what the LLP's expenditure was incurred. As *Tower MCashback* and other leading authorities establish, if there is known to be a striking discrepancy between the value of an item (or no valuation exists) and the amount claimed by the taxpayer to have been incurred on acquiring it, that is a relevant factor in determining whether all of the expenditure was incurred (not in issue in this appeal) or incurred on or for that item. While HMRC contend that the Valuation is too high because it values the premises on the basis that they are trading, we have concluded in relation to Issue One that any debate about the precise basis for the valuation does not call into doubt that the LLP incurred the Development Sum on (or in connection with) the package of rights and obligations it acquired from OVL. We agree with Mr Gammie that this was in effect the price the market was prepared to pay.

161. At the Issue Two stage, when considering the specific rights/obligations acquired by the LLP, having determined that the LLP did incur expenditure in the allocated amount in acquiring the relevant item, it is not a valid ground of challenge to eligibility for BPRA that the market value of the item may be more

than the price paid. Any profit made by OVL in meeting a particular obligation to the LLP, or in meeting the specific obligations in aggregate, is not relevant to the statutory question of on or in connection with what was the expenditure incurred. As stated in *Cobalt* at [284(4)]:

> That leaves Developer's profit. HMRC contended that once it is accepted that part of the Price was paid for some element other than the relevant interest, then it must follow that to the extent that any profit element for the Developer was built into the Price, then such part of the profit that is referable to the purchase of that other element must also be disallowed. We do not find this analysis helpful. The relevant question is what was paid 'for' the relevant interest, as opposed to 'for' something else. An amount is paid 'for' an asset, irrespective of the fact that part of that amount was arrived at by building in a profit element for the seller. It is not relevant, therefore, to identify such part of the price paid for an asset which reflected the seller's profit.

162. As we have said in relation to the FTT's decision on Issue One, the legislation concerns itself with the expenditure of the LLP, not the financial position of its counterparty. In *Ben-Odeco Ltd v Powlson* [1978] I WLR 1093 ("*Ben-Odeco*"), Lord Russell rejected an argument by the taxpayer that it should be able to claim capital allowances on its borrowing costs because if its supplier had had to borrow that would have been reflected in the price paid for the plant. He stated as follows, at page 1106C:

> The supplier's price would reflect the whole cost to him of supplying the plant, including overheads, interest on necessary borrowing, or on commitment of working capital, and a profit element, the whole price being subject to a perhaps competitive market. I am not able to see how the build-up of the supplier's price can have any relevance to the problem raised in this appeal.

The Capital Account

163. The FTT decided against the LLP that the Capital Account sum of £2 million was not expenditure incurred by the LLP on or in connection with the Conversion of Blush House into qualifying business premises. The LLP appeals against the FTT's decision in this respect.

164. We have concluded above that it is necessary to identify what the LLP, not the Developer, actually incurred the expenditure on, what it got for that expenditure and whether that was in connection with the Conversion of Blush House. The money in the Capital Account was part of the Development Sum and much of the argument in relation to the Capital Account was as to whether it should properly be described as part of OVL's profit which OVL decided to apply in the way set out in the documentation to assist in the funding of the project (as the LLP says) or whether it was never really received by OVL at all and just went round in a circle back to the Co-op (as HMRC says).

165. We begin by reiterating that there is no appeal in this case by HMRC in relation to whether any part of the sum claimed by the LLP was “incurred”.

166. The FTT decision on this issue was based on two main findings:

(1)That the proper construction of the Capital Account Deed has the result that OVL could be “deprived of enjoying the fruits of the Capital Amount” in that, under clause 3.5.3 of the Capital Account Deed, the Co-op could withdraw the Capital Amount and it would be as though the Capital Amount had never been “received by [OVL]” (FTT [191]); and

(2)That the Capital Account was “in reality…[a] circular and self-cancelling cash-flow commencing and concluding under the Co-op and as such was not incurred on or in connection with the conversion or renovation of the property” (FTT [196]).

167. Both aspects are challenged by the LLP and we deal with the particular issues below. They both to a certain extent rely on the construction of the Capital Account Deed but what seems to underlie the FTT’s overall conclusion in relation to the Capital Account is that it was never really OVL’s money because it could be lost to OVL if the Co-op exercised its rights under clause 3.5.3 of the Capital Account Deed. HMRC say that the FTT decided that OVL was never the beneficial owner of the Capital Amount and that it was a “mere legal shell”, although FTT [189] is only purporting to record HMRC’s submission to it in that respect. It does appear, however, this was the basis upon which the FTT came to its two main findings above.

168. It seems to us that, even if the FTT correctly construed the Capital Account Deed, clause 3.5.3 only provides one instance where that might be the result. It was accepted by all parties that if moneys were withdrawn from the Capital Account under clauses 3.5.1 or 3.5.4, they would be received or effectively received by OVL. This does not appear to have been considered by the FTT in concluding that the Capital Account was “circular and self-cancelling”. Nor does the FTT explain why it is relevant to the central question that, under one scenario, the money is not received by OVL whereas under all other scenarios, it is.

The Facts

169. The FTT referred to and set out the terms of some of the relevant contractual documentation. It will be necessary to look at this in some more detail, together with some of the pre-contractual material for context.

170. At FTT [63] and [64], the terms of the Debt Finance Request to the Co-op were set out. The Debt Finance Request explained the details of the development and in particular how it was going to be financed. It sought a loan of £7 million from the Co-op and it described the security that was being offered to the Co-op which included a charge over a number of “initial deposits” including the “Developers Security Account” in the sum of £2 million, ie the Capital Amount. It said that the Co-op would have “access to the Developer’s Security Account in the

event repayments are not made by the [LLP].” It went on to describe this in more detail (underlining added):

> The Developers Capital Account is provided by the developer to give additional comfort to the bank and the investors throughout the initial loan period. It may be called upon in the event that pre-agreed interest and amortisation payments (and other loan covenants) are not met out of trading income. The benefit of the account should therefore be taken into account when calculating the loan covenants throughout the period.
>
> If money is drawn from this account a similar amount is added to the developers [sic] loan to the [LLP] that is subservient to the bank loan and is secured by way of second charge only.

171. It seems reasonably clear that this was considered to be OVL’s money that it had agreed to deposit in an account to give comfort to the Co-op. The last sentence that is underlined also indicated to the Co-op that any money withdrawn from the account would be added to the loan that OVL would be making to the LLP as part of the funding for the development. No distinction was made as to the manner by which the money had to be withdrawn from the account for it to be added to the Developer Loan.

172. The Information Memorandum sent to potential investors is referred to at FTT [90]-[93]. At FTT [92] the section headed “Ownership of Hotel/Developer’s Capital Account” is set out, but the last paragraph was omitted. The full paragraph is as follows (with underlining added):

> A feature of an investment in the Fund is that investors, through the Fund, will own the company that operates the hotel as well as the Property itself. This means that should the hotel meet its projections (which have been analysed and commented on by TRI Hospitality Consulting, a major hotel consultancy …), the overall levels of return for investors will be higher than if the Property was leased to a third party on normal commercial terms. However, there is a risk that the hotel will fail to meet its trading projections, and consequently, that the Fund will be unable to meet its repayments to the Bank. This risk has more serious consequences in the first seven years following refurbishment, because if the Bank enforced a sale of the Property then investors would suffer a clawback of the tax reliefs. In order to mitigate this risk, the Developer has agreed to provide a cash deposit of £2 million in the Developer’s Capital Account at the Bank. This cash is not an asset of the Fund; however, the Developer has agreed that this account will be charged to the Bank. The Developer’s Capital Account can be accessed by the Bank should the Fund be unable to meet its payment obligations to the Bank. In the event such a drawdown occurs, the drawn funds from the Developer’s Capital Account will be deemed to be lent to the Fund and will create a secondary loan (without covenant tests) which will be repaid either from the ultimate sale proceeds of the Property of following a refinancing. Significantly, any balance in the Developer’s Capital Account will be taken into account in assessing the level of all financial covenant tests under the terms of

> the Loan Facility. This will provide a significant headroom on the agreed covenant tests.
>
> The £2 million to be deposited in the Developer's Capital Account represents cash collateral as security for the Bank over 24.1% of the total Loan Facilities of £8.3 million. These arrangements provide comfort that the amounts invested in the Fund, the amounts generated by the operations of the hotel and the Developer's Capital Account will be sufficient to meet the Fund's payment obligations to the Bank and reduce the risk of a cash call for investors or a forced sale of the Property.

173. Once again, the Capital Account is regarded as the "Developer's Capital Account", containing its money. It is being used as further "cash collateral" for the Co-op loan to the LLP. There is no suggestion that OVL has any sort of primary liability in respect of the Co-op loan; it was simply prepared to provide some additional security to the Co-op for the benefit of the LLP. It explicitly confirms what would be implicit in any event from such an arrangement, namely that if the money was withdrawn by the Co-op in order to repay the loan, then those sums would be payable to OVL by the LLP by way of addition to the Developer Loan.

174. On 25 March 2011 all the relevant contractual documentation was entered into. The material contracts in relation to the Capital Account are as follows:

(1) The Co-op Loan;

(2) Guarantee and Charge by OVL to the Co-op;

(3) The Developer Intercreditor Deed;

(4) The Capital Account Deed;

(5) The Developer Loan Agreement and Charge to secure it.

The Co-Op Loan

175. The "Capital Account", "Capital Account Deed" and "Capital Amount" were all defined terms in the Co-op Loan. "Capital Account" was defined as follows:

> "**Capital Account**" means the account nominated by the Bank into which the Capital Amount will be deposited in accordance with the Developer Inter-creditor Deed, such accounts to be charged to the Bank in accordance with Clause 15.2(a)(ii)

176. By clause 3, payments from the Capital Account "shall be made in accordance with the terms of…the Capital Account Deed".

177. Clause 15.2 sets out the security taken by the Co-op for the loan. In clause 15.1(b)(iii) one part of the security was "a limited recourse Guarantee, provided by the Developer in respect of the Borrower's obligations to the Bank." Clause 15.2 provides as follows:

> The obligations of the Developer to the Bank under its Guarantee in favour of the Bank shall be secured by:-
>
> (a) Security in the Bank's preferred form as follows:-
>
> …
>
> (ii) a first Legal Charge over the Capital Account…

178. So OVL agreed to provide some of the security for the loan by guaranteeing the LLP's obligations to repay the loan. As part of the security for that guarantee, OVL agreed to provide a Legal Charge over the Capital Account. It was clearly assumed that the money in the Capital Account was OVL's.

Guarantee and Charge by OVL to the Co-op

179. The Guarantee and Legal Charge were in the Co-op's standard form. Sums were payable under the guarantee on demand in writing and whether or not demand had been made on the LLP. OVL's liability was limited to:

> the realisable value of the Guarantor's assets which are charged, assigned or otherwise secured in favour of the Bank pursuant to security documentation more particularly described in clause 15 of the facility letter dated on or around the date hereof and made between (1) the Customer and (2) the Bank and, accordingly, the Bank shall be entitled to have recourse only to such assets and the proceeds thereof.

180. The Legal Charge took the form of a charge over the deposit in the Capital Account and amounted to a release of the deposit to the Co-op until the sums for which OVL was liable as guarantor had been discharged in full. This was referred to in FTT [86].

The Developer Intercreditor Deed

181. As described above, The Developer Intercreditor Deed was entered into by OVL, the LLP and the Co-op. Clause 16 provided for the setting up of a number of accounts by OVL with the Co-op and required that the "Capital Amount" of £2 million be transferred into the "Capital Account".

The Capital Account Deed

182. The Capital Account Deed was entered into between OVL, the LLP, the Co-op and Blakes. The material terms are set out at FTT [106]. In addition it is relevant to point out that OVL's guarantee to the Co-op is referred to and is a defined term, as is the "Guarantee Release Date" which means the date on which all of OVL's guarantee liabilities to the Co-op have been fully discharged. Upon the Guarantee Release Date the Capital Account will be closed and any credit balance transferred to OVL (see clause 3.8). It is also relevant to refer to clause 3.6.2 that "No withdrawals from the Capital Account may be made except as permitted by this Deed."

183. The scheme in clause 3.5 in respect of payments from the Capital Account is reasonably clear:

(1)By clause 3.5.1, OVL was able to withdraw sums from the Capital Account after the Calculation Date, which was three years after the date of the Deed. The amounts that could be withdrawn were limited to the amount that had been repaid on the loan since the last Calculation Date. OVL therefore was able to benefit substantially from the sums in the account after the three years were up.

(2)By clause 3.5.3, the Co-op can withdraw sums from the Capital Account "upon the occurrence of an Event of Default which is continuing" but only "towards the cure of such Event of Default". An "Event of Default" means any of the events described in clause 11.1 of the Co-op Loan Agreement. The clause expressly refers to the consent of OVL and Blakes to withdrawals by the Co-op on such basis. HMRC rely heavily on the fact that, by contrast to clause 3.5.4, there is no express right given to OVL to add the amounts withdrawn by the Co-op to the Developer Loan. It should also be pointed out that there is no reference to OVL's guarantee as the basis for withdrawals under this clause.

(3)By clause 3.5.4, the LLP can direct the Co-op to make withdrawals from the Capital Account. The Co-op is not obliged to comply with such a direction but it must act reasonably in considering whether to do so. The crucial penultimate sentence says:

> In the event that such withdrawals are made pursuant to this Clause 3.5.4 then the amounts so withdrawn shall form part of the debt due by the Borrower to OVL pursuant to the Developer Borrower Facility Agreement.

The final sentence records that Blakes consents to withdrawals under this clause. It does not refer to OVL's consent. HMRC says this is significant.

184. Our analysis of this clause appears below.

The Developer Loan Agreement and Legal Charge

185. This was referred to in clause 3.5.4 of the Capital Account Deed and its material provisions were set out in FTT [89]. The first point to note about this agreement is that it is more informal than the other documents signed on that day in that it is a letter written by or on behalf of OVL that has been countersigned by two members of the LLP on behalf of the LLP. The Co-op is not a party to this agreement.

186. At the top of the first page of the letter the following is written:

> (Subject to the Intercreditor Deed of todays date made between the Lender (1) the Borrower (2) and Co-Operative Bank plc (3))

187. The heading to the letter is: "£1,985,000 Loan Facility and £2,000,000 capital account". Then the recital to the operative terms of the Loan states as follows:

> We are pleased to confirm that [OVL] (the "Lender") has agreed to provide a loan of £1,985,000 to [the LLP] (the "Borrower"). In the event that sums are withdrawn from the Capital Account, as referred to in the deed dated today's date and made between the Lender (1) the Borrower (2) and Co-operative Bank plc (3), then such sums withdrawn shall be treated as having been added to the sums advanced pursuant to this letter and shall form part of the loan hereunder (together in aggregate the "Loan").

188. HMRC say that the reference to the "deed dated today's date" must be to the Capital Account Deed, not the Intercreditor Deed, because the latter makes no provision for withdrawals from the Capital Account. The FTT at [89] seems to imply that it was the Intercreditor Deed that was referred to (although it is not apparent that this construction was proposed by the LLP). Both parties accepted that it must have been inaccurate drafting in the Developer Loan because Blakes were also a party to the Capital Account Deed and the reference at the top of the page to the Intercreditor Deed was also probably a mistake. In our view, this recital was clearly intending to refer to withdrawals from the Capital Account and such withdrawals could only take place pursuant to the Capital Account Deed. The recital did not, however, limit this to withdrawals under clause 3.5.4 of the Capital Account Deed.

189. The same mistake appears to have been made in the Legal Charge between the LLP and OVL to secure repayments of the Developer Loan. This had the same reference to "Intercreditor Deed" in brackets at the top of the first page and the definition of "the Principal" is clearly referring to the Capital Account Deed even though it too does not include reference to Blakes. The definition is, however, interesting because this is what the Legal Charge is securing:

> 1.2 "the Principal" means £1,965,000 together with such amount as shall have been withdrawn from the Account from time to time in accordance with the deed dated with today's date and made between the Lender (1) the Borrower (2) and Co-Operative Bank plc (3).

190. The "Account" is the Capital Account. No distinction is made between withdrawals under clause 3.5.3 and 3.5.4.

The FTT Decision

191. The Capital Account is dealt with in FTT [182] to [196]. In FTT [182] to [191] the FTT sets out the parties' respective submissions. There is a long quote from *Bupa Insurance Limited v HMRC* [2014] STC 2615 in [190] which deals with the test for beneficial ownership, as opposed to beneficial entitlement, in the context of group/consortium relief. It is not immediately obvious what relevance this had to the issue. HMRC was submitting that the Capital Amount was beneficially owned, not by OVL, but by the Co-op. It is not clear whether the FTT

actually found that to be so, but it may be that that is reflected in its conclusions on the Capital Amount. HMRC submitted, as recorded in FTT [191] that OVL was "deprived of enjoying the fruits of the Capital Amount" because of the wording of clause 3.5.3 of the Capital Account Deed.

192. Even though it does not say so expressly, that submission of HMRC does seem to have been accepted by the FTT and the basis for its acceptance is set out in FTT [192]- [194]. In those paragraphs, the FTT decided that sums withdrawn by the Co-op under clause 3.5.3 of the Capital Account Deed would not be added to the Developer Loan. Its reasoning was as follows:

(1)The FTT rejected the evidence of Mr Lewis and Mr Tracey as not being relevant to an objective interpretation of the Capital Account Deed;

(2)The FTT rejected the LLP's interpretation of the Capital Account Deed in rather attenuated form because it

> does not recognise that both [OVL] and the Co-op may make a withdrawal from the Capital Account, [and] is inconsistent with the terms of the Capital Account Deed under which it is only under clause 3.5.4 that a withdrawal "shall form part of the debt due by the [LLP] to [OVL] pursuant to the Develop Borrower Facility.

(3)The FTT thought that the LLP's construction of the clause did not "reflect commercial reality" as the Co-op "had a clear and legitimate interest in knowing and defining the circumstances in which the LLP's indebtedness to [OVL] could increase by £2 million" and the Co-op was not a party to the Developer Loan Agreement.

193. The FTT also thought it was material to this question that the Capital Account was not a requirement of the Co-op and that rather it "became part of the loan process on the initiative of OVL". The FTT considered, in FTT [195], that it was "at best questionable" whether the £2 million in the Capital Account acted as an incentive to OVL.

194. Finally, and as an alternative basis for rejecting the Capital Account as being qualifying expenditure, the FTT, in very compressed analysis, held in [196]:

> We also agree with HMRC, that in reality the nature of the Capital Account was circular and self-cancelling cash-flow commencing and concluding under the Co-op and as such was not incurred on or in connection with the conversion or renovation of the Property.

195. We consider that the FTT's abbreviated reasoning in relation to the Capital Account was flawed in a number of material respects.

The Parties' Submissions

196. The LLP ran three main arguments on its appeal in relation to the Capital Account:

(1)The FTT misconstrued the contractual documentation and misunderstood the function of the Capital Account;

(2)The Capital Account was neither circular nor self-cancelling;

(3)The FTT misunderstood the law on circularity and failed to apply the correct test.

197. On the question of the construction of the various contractual documents, the LLP focused on the terms of the Developer Loan and the alleged intention of the parties as set out in the Information Memorandum and the Debt Finance Request. It also pointed to what actually happened to the Capital Account as described in FTT [126] and [128], namely that following a breach of the financial covenants in the Co-op loan, the Co-op withdrew the Capital Amount, which was then added to the Developer Loan. Both the Co-op and OVL were paid off through the re-financing of the LLP's debt with National Westminster Bank plc. It is, however, unclear whether the sums were withdrawn under clause 3.5.3 or 3.5.4 of the Capital Account Deed.

198. Mr Gammie in his oral submissions sought to explain the absence of any express reference in clause 3.5.3 to sums withdrawn being added to the Developer Loan. He said that this was because withdrawals under clause 3.5.3 occur when there has been an Event of Default by the LLP under the Co-op Loan and that this would inevitably have triggered OVL's liability under its guarantee to the Co-op. Thus withdrawals under clause 3.5.3 were effectively payments under the guarantee and it was unnecessary for OVL's rights as against the principal debtor, the LLP, to be set out in clause 3.5.3. By contrast, withdrawals under clause 3.5.4 would not be under the guarantee and so OVL's rights as against the LLP had to be expressly provided for. In any event, said Mr Gammie, a withdrawal of OVL's money from the Capital Account under clause 3.5.3 to repay the Co-op loan would give rise to a restitutionary claim against the LLP.

199. Mr Gammie further submitted that the FTT's and HMRC's construction would make a "commercial nonsense of the parties' arrangements". OVL put part of its profit at risk by guaranteeing the Co-op loan to the extent of the Capital Amount. There was no good reason for OVL giving up its rights as against the principal debtor and it was of no concern to the Co-op that it should do so.

200. Mr Brinsmead-Stockham made submissions on this issue on behalf of HMRC. He relied principally on the absence of express words in clause 3.5.3 by contrast with clause 3.5.4 and submitted that this was carefully and deliberately drafted in this way. This was also consistent with the Developer Loan Agreement when the latter agreement was properly understood to have been referring to sums withdrawn pursuant to the Capital Account Deed. In other words, he said that the Developer Loan Agreement was subordinate to the Capital Account Deed and importantly the Co-op was only a party to the Capital Account Deed. The commercial rationale, therefore, was that the Co-op would have a legitimate interest in controlling the circumstances under which the indebtedness of the LLP to OVL might possibly increase by up to £2 million. As to the potential restitutionary claim that OVL would have, Mr Brinsmead-Stockham said that this

was not available in respect of a withdrawal under clause 3.5.3 for a number of reasons including in particular that the contractual provisions precluded such a claim in allocating responsibility for repaying the Co-op. It was also part of HMRC's case that the monies in the Capital Account were not beneficially owned by OVL (which argument seemed to find favour with the FTT).

201. As to the Capital Account being circular or self-cancelling, the LLP's main argument, apart from its construction of the Capital Account Deed, was that this ignored the reality that OVL had deposited its money in the Capital Account and that it was not simply handing the money back to the LLP or its members upon a withdrawal under clause 3.5.3. Moreover, the money in the Capital Account could have been dealt with in a number of ways, only one of which, on HMRC's case, might result in it being effectively returned to the LLP. If it was withdrawn under clause 3.5.1 or 3.5.4, OVL would unquestionably receive the benefit of the monies in the Capital Account. Accordingly the notion that the money was never really OVL's is untenable and an analysis of the Capital Account in terms of beneficial ownership (see FTT [189] to [190]) was "unintelligible".

202. Even though the FTT does not explain in [196] the legal basis for its conclusion that the Capital Account was a "circular and self-cancelling cash flow commencing and concluding under the Co-op", Mr Gammie submitted that this would in any event have provided no basis for denying BPRA. Furthermore, it was the LLP's case that if the £2 million Capital Amount had not been borrowed from the Co-op, so that the LLP had borrowed £5 million rather than £7 million, the LLP would have had to borrow the £2 million from elsewhere, most likely from OVL by adding it to the Developer Loan. That was because the Capital Amount was part of the Development Sum which was the price at which the development had been sold to the market (and which was the market price). He also submitted that the FTT effectively failed to recognise its acceptance that the Development Sum was expenditure "incurred" by the LLP, something which HMRC were not allowed to challenge. If it was expenditure incurred by the LLP, the FTT ought to have asked itself the question "on what had the LLP's expenditure been incurred?"

203. Mr Brinsmead-Stockham submitted that the FTT was right to describe the Capital Account as a circular and self-cancelling arrangement as that was the inevitable conclusion to the FTT's finding on the meaning of clause 3.5.3 such that the Capital Amount could not sensibly be considered part of OVL's "profit". Furthermore, he submitted that the LLP only really borrowed a net amount of £5 million and that the Co-op never understood why the LLP had borrowed £7 million and immediately placed £2 million of that back in a blocked deposit account at the Co-op. Put shortly, HMRC's case was that the Capital Account was put in place purely to ramp up the LLP's claim for BPRA and it served no other purpose. This was no different, said Mr Brinsmead-Stockham, to the circular nature of the payments in *Tower MCashback* and it was similarly uncommercial.

Discussion

(a) Introduction

204. We consider that there has been too much focus on the contractual construction argument both by the parties and the FTT. We will consider the proper construction of the relevant contractual documents but it is necessary to step back and ask why it is necessary to do this, given that clause 3.5.3 only covers one possible scenario, where the project would appear to be failing and where both the LLP and OVL would be likely to lose money. Under the other scenarios, namely those covered by clauses 3.5.1 and 3.5.4, OVL retains the benefit of the Capital Amount, even if it has to wait at least 3 years to withdraw it under clause 3.5.1. Furthermore, it is entitled to interest on the Capital Amount. Even if we were to conclude that under clause 3.5.3 OVL was not entitled to add any sums withdrawn to the Developer Loan or otherwise claim them from the LLP, we are left wondering why that answers any relevant question.

205. HMRC and the FTT considered that if clause 3.5.3 was construed as they said it should be, it meant that the money in the Capital Account was never really OVL's and it could not sensibly be regarded as its developer profit. It was, therefore, in reality money going round in a circle from the Co-op and back to the Co-op without serving any commercial purpose except to enable BPRA to be claimed on the Capital Amount. But if there was no Event of Default and the project was a success and the Co-op was repaid, the Capital Amount would quite clearly be OVL's profit. Why then should the construction of a clause dealing with one of three commercially possible outcomes lead to a characterisation of the Capital Account that is determinative for the purposes of BPRA?

206. This misplaced concentration on the construction of clause 3.5.3 led to an obscuring of the relevant issue in relation to Issue Two. That was to determine whether the amount deposited in the Capital Account was expenditure incurred by the LLP "on or in connection with" the Conversion of Blush House into qualifying business premises. HMRC and the FTT had accepted that the expenditure had been "incurred" by the LLP; but the FTT does not appear to have made any finding as to what the Capital Amount was incurred on or in connection with.

(b) The construction of clause 3.5.3

207. Even though we do not think it provides an answer to the relevant question, we do need to deal with the construction question. HMRC's argument is wholly based on the differences between clauses 3.5.3 and 3.5.4 and in particular the absence in clause 3.5.3 of the words "In the event that such withdrawals are made pursuant to this Clause 3.5.4 then the amounts so withdrawn shall form part of the debt due by the [LLP] to [OVL] pursuant to the [Developer Loan Agreement]". HMRC assert that there was a commercial basis for distinguishing between the effects of a withdrawal under clause 3.5.3 and 3.5.4.

208. We consider that the Capital Account Deed should be construed within the context of the contractual arrangements and their commercial purposes as a

whole. The money for the development, including the acquisition of Blush House, came from a mixture of debt finance from the Co-op and OVL and equity finance from the investors. The Development Sum paid to OVL constituted a market price within a reasonable range for the converted Ramada Hotel. OVL decided to assist the LLP in relation to the funding from the Co-op by guaranteeing the LLP's repayment of the Co-op loan up to a maximum of £2 million, being the Capital Account. As was said in the Debt Finance Request, this was done to give "additional comfort" to the Co-op which was already adequately secured by its charge over the property. This was spelled out further in the Information Memorandum where the mechanism of the "Developer's Capital Account" was explained, in particular emphasising that this was not the LLP's money; it was OVL that had agreed to put £2 million of its money into the Capital Account which would be charged to the Co-op. Both documents made clear that withdrawals from the Capital Account would be added to the Developer Loan and the Co-op was aware of this arrangement before it agreed to lend.

209. The various documents do not tie neatly together – Mr Gammie aptly described the position as some pieces not fitting perfectly into the jigsaw – but we believe the intended arrangement was reasonably clear. At the heart of it was OVL's agreement to guarantee the LLP's obligations to the Co-op and the Capital Account and associated Legal Charge was the means by which the guarantee was to operate and be secured. Thus:

(1) The Guarantee was the Co-op's standard form guarantee, not tailored at all to the particular arrangements save for the limitation to the extent of the Capital Account; under the normal operation of such a guarantee, the guarantor, OVL, as surety, would have rights against the principal debtor, the LLP, in the event that the guarantee was called upon;

(2) The Guarantee was secured by a Legal Charge over the Capital Account, which, given that it was an account at the Co-op, would amount to a release of the deposit to the Co-op if enforced;

(3) The Intercreditor Deed obliged OVL to pay the Capital Amount into the Capital Account, which was what OVL had agreed to do to support the LLP;

(4) The Capital Account Deed was entered into to "regulate withdrawals by OVL from the Capital Account" (clause 2). Its purpose was not to override the guarantee; rather it added to it by providing for withdrawals from the Capital Account outside of the guarantee which would amount to a partial release of the Co-op's security for the loan;

(5) The Developer Loan Agreement and the Legal Charge referred to sums "withdrawn from the Capital Account" being treated as having been added to the Loan; HMRC says that there should be implied into that "under clause 3.5.4", whereas the LLP says that the words "by the Co-op" should be implied, so as to exclude withdrawals under clause 3.5.1.

210. Given the structure and nature of the above arrangements, we cannot identify any credible commercial reason why OVL would have agreed that a withdrawal under clause 3.5.3 would effectively amount to a gift to the LLP while

a withdrawal at the request of the LLP under clause 3.5.4 would not. So far as OVL was concerned there was no logical basis for there being different outcomes vis a vis the LLP depending on which clause the withdrawal is made under. If HMRC and the FTT were correct, then OVL agreed that there should be such a distinction but we cannot see that there would be any reason for OVL to do so.

211. HMRC submitted, and the FTT seemed to accept, that the commercial rationale for the distinction was in relation to the Co-op and the Co-op's desire to know the circumstances under which the LLP might be subject to an increased liability to OVL of up to £2 million. However, that does not explain why the Co-op was content for a clause 3.5.4 withdrawal to be added to the Developer Loan. Nor does it recognise that there has to be a commercial basis for all parties to enter into such an arrangement. There was no evidence that this was an important point so far as the Co-op was concerned; indeed the evidence was that the Co-op apparently did not fully understand why the Capital Account arrangement was established. However, it would inevitably have been aware of the contents of the Debt Finance Request and the Information Memorandum before it agreed to lend £7 million to the LLP.

212. OVL's guarantee to the Co-op was a defined term in the Capital Account Deed but there is little reference to it in the body of the Deed. "Bank Liabilities" was also a defined term, meaning all of OVL's liabilities "arising under or in connection with the Guarantee". It seems to us that OVL's contingent liabilities under the guarantee were the foundation for the Capital Account Deed. Clause 3.5 specifies what payments can be made from the Capital Account in the context of OVL's guarantee.

213. There are three scenarios envisaged by clause 3.5 of the Capital Account Deed:

(1) Under clause 3.5.1, after at least 3 years from the signing of the Agreements, and to the extent that the LLP has made repayments on the Co-op loan, OVL can withdraw amounts from the Capital Account. This provision would come into play in practice if the development was proving to be successful and the LLP was able to start repaying some of its borrowing. In that situation, the Co-op would be unlikely to be calling on OVL's guarantee.

(2) Under clause 3.5.3, however, this will only be available to the Co-op if there is an Event of Default under the Co-op Loan Agreement. This is therefore a situation where the project was failing and it would be likely that the LLP and probably OVL would be losing money. Clearly the Co-op could call on OVL's guarantee as well as exercising its other security. Even though the guarantee is not mentioned in clause 3.5.3, we believe that it is what is behind the provision. It is extremely unlikely that there are two separate regimes for pursuing OVL when the LLP is in default. When the Co-op exercises its right to withdraw funds under clause 3.5.3, it is effectively calling on the guarantee and the legal charge over the Capital Account.

(3) Under clause 3.5.4, the project is somewhere between the default situation in clause 3.5.3 and the solvent situation in clause 3.5.1. The Co-op is not able to call on the guarantee but the LLP and the Co-op can agree for there to be a withdrawal from the Capital Account so as to help the LLP meet its obligations to the Co-op.

214. Mr Brinsmead-Stockham made much of the fact that OVL and Blakes expressly consented to withdrawals under clause 3.5.3 whereas only Blakes did so in relation to withdrawals under clause 3.5.4. He also submitted that it was significant that the Co-op did not have to consent to withdrawals under clause 3.5.4 but had to act reasonably in refusing consent if it chose to do so. This showed that the Co-op had some measure of control over whether such withdrawals would happen and so be added to the Developer Loan. In our view, this reads too much into the differences. It may well have been thought that, as it was expressly stated that the withdrawals would be added to the Developer loan, OVL's consent was implicitly contained within that arrangement.

215. We largely agree with Mr Gammie's submission that clause 3.5.3 is essentially the mechanism by which OVL's guarantee is enforced. We consider it highly unlikely that the parties could have contemplated that the Co-op had different routes against OVL: one under the guarantee and legal charge and the other under clause 3.5.3. This was an imprecise and imperfect way of providing for the method by which OVL's guarantee should be enforced. As such, clause 3.5.3 did not need to provide for the withdrawals to be added to the Developer Loan because OVL was entitled to its normal remedies against the LLP as the principal debtor. Clause 3.5.4 did need to so provide because such withdrawals were not under the guarantee.

216. Furthermore, if the Co-op's purported commercial rationale was a desire to control the LLP's other liabilities, it is difficult to see why it would be more concerned about a clause 3.5.3 insolvency scenario than a clause 3.5.4 survival scenario. If the project was failing, it would be of no material relevance to the Co-op what the LLP's other liabilities might be. It had the £2 million Capital Amount and the remaining £5 million was easily covered by its first legal charge over the hotel. It would surely be more concerned about other liabilities in the clause 3.5.4 situation where there might in effect be a continuing struggle for survival.

217. In the circumstances, we do not feel it is necessary to deal with the precise basis upon which OVL could claim against the LLP in respect of withdrawals under clause 3.5.3, which we have found are effectively calls under the guarantee. We agree with Mr Gammie that the recital to the Developer Loan Agreement is referring to any sums withdrawn by the Co-op pursuant to the Capital Account Deed, that is under *either* clause 3.5.3 and 3.5.4, and that therefore OVL was entitled to add the LLP's liability to the Developer Loan, as made clear by the definition of "Principal" in the Legal Charge securing the Developer Loan. As we have found that OVL was so entitled, HMRC's arguments about the unavailability of a restitutionary remedy fall away.

218. Therefore, we conclude that the FTT was wrong to find that OVL was not able to add a commensurate amount to the Developer Loan in the event of a withdrawal under clause 3.5.3.

(c) Beneficial ownership of the Capital Account

219. As referred to above, the purpose of HMRC's argument as to the construction of the documents seems to have been to show that OVL was never the beneficial owner of the Capital Amount or the Capital Account. Quite apart from our finding on the construction argument, we would have been unpersuaded that there is any serious doubt as to OVL's beneficial ownership.

220. The £2 million was paid to OVL as part of the Development Sum. On receipt by OVL it was clearly OVL's money. OVL had agreed to place the money in an account in its name at the Co-op. All interest earned on the Capital Account monies were credited to OVL (see clause 3.2). OVL charged the Capital Account to the Co-op. We do not see that the fact that OVL might have to wait for at least 3 years before being able to withdraw funds affected its beneficial ownership of the funds in question. Similarly, even if we are wrong on the construction of clause 3.5.3, the money in the Capital Account remained OVL's unless and until it was withdrawn by the Co-op.

221. Mr Gammie submitted that an analysis of the Capital Account in terms of its beneficial ownership was "unintelligible". We do not agree that it is unintelligible in the sense he was arguing (namely whether a bank account ever has a beneficial owner) but we do think that the concept of beneficial ownership in this context was not particularly helpful. OVL had agreed to put its money at risk for the purposes of securing its guarantee to the Co-op. Simply because that money was at risk of being withdrawn by the Co-op pursuant to the guarantee or the Capital Account Deed did not mean that it was not really received by OVL or was not its money at any material time. It is therefore properly to be described as its profit out of the Development Sum which it chose to use by supporting the LLP in achieving a successful outcome to the project.

(d) Circularity

222. The fact that the Capital Amount was part of OVL's profit means there can be no substance to the FTT's alternative basis for disallowing the claim for BPRA, namely that it was circular and self-cancelling. HMRC's contention was that it was circular in the sense that the extra £2 million of borrowing from the Co-op came straight back to the Co-op upon deposit in the Capital Account and being subject to withdrawal under clause 3.5.3. The FTT concluded in [196] that such a circular cash flow "was not incurred on or in connection with the conversion or renovation of the Property". As the basis for this was circularity from and to the Co-op, it rather looks as though the FTT was making a finding that the Capital Amount was not expenditure incurred by the LLP (although see [187]). If so, such a finding was not open to it as it had earlier refused HMRC's application to amend its case in such respect (see FTT [7] – [26]).

223. The FTT and HMRC referred to the circularity of the payments in *Tower MCashback* but we consider that this is far from an analogous situation. Even in *BMBF* there was more circularity in the payments than in this appeal, in that they all started and ended up with Barclays Bank. In this case, there was in reality no circularity or self-cancellation at all. There was merely the possibility that the Co-op might enforce its guarantee and exercise its rights under clause 3.5.3 if the LLP was in default of its loan obligations.

224. Having accepted that the Capital Amount was expenditure incurred by the LLP as part of the Development Sum, the only question is on what it was expended. Our analysis shows it was in substance a guarantee by OVL of the LLP's obligations to the Co-op, sourced from OVL's potential profit from the project which it had agreed to put at risk. That was clearly expenditure "on or in connection with" the Conversion of Blush House and the fact that the guarantee may not have been called on does not detract from that.

Conclusion

225. Accordingly, we allow the LLP's appeal in relation to expenditure incurred in relation to the Capital Amount.

The Interest Amount/Licence Fee

Introduction

226. In relation to the Interest Amount/Licence Fee of £350,000 (which we will hereafter refer to as the "Licence Fee"), the FTT reached the opposite decision to the Capital Account and decided in the LLP's favour that it did qualify for BPRA. In our view the Licence Fee is a far clearer case of circularity and uncommerciality than the Capital Account and it is surprising that the FTT decided the issues in this way. This is, therefore, HMRC's appeal against the FTT's decision.

227. The Licence Fee was part of the Development Sum. OVL was required to pay it into a deposit account with the Co-op and withdrawals from it were regulated by the Licence Deposit Deed entered into at the same time as all the other agreements. So far, that is similar to the Capital Account. But the terms of the Licence Deposit Deed were very different to the Capital Account Deed. They required OVL to pay an amount back to the LLP by way of a quarterly licence fee for the occupation of the Property so as to carry out the development works, such licence fee being equal to the quarter's interest payable to the Co-op under the Co-op Loan.

228. It may be wondered why the quarterly interest payments were not simply paid by the LLP to the Co-op without going first to OVL and then back again to the LLP. The LLP says that this is a perfectly normal arrangement that has been adopted in many other schemes, including Enterprise Zone Allowance schemes that HMRC have approved. Indeed, the FTT concluded that it was a "commercial arrangement": FTT [179]. There was some evidence before the FTT that in a

typical investment structure for a project such as this the expectation would be that the investment would be made entirely up-front, with no ongoing payments following the initial subscription. However, we note that if the interest had simply been paid by the LLP, that would have been an income expense, not a capital expense, and so potentially not eligible for BPRA.

229. HMRC challenge whether this was, in fact, a "commercial arrangement" and heavily criticise the FTT's factual conclusions on that point. HMRC also challenge the FTT's analysis of the tax effect of the arrangements and its alleged failure to address the statutory question. HMRC further submit that the Licence Fee Amount was "on or in connection with…the acquisition of…rights in or over land" within the exception in section 360B(3)(a).

230. Part of the LLP's argument in relation to the Licence Fee was based on its case that the overall Development Sum was at a market price and that that included the Licence Fee which was an accepted feature of similar schemes. This seems to us to be an argument that is more relevant to Issue One. Looking at it as a separate right/obligation acquired by the LLP, we must examine, as Mr Gammie puts it, what it was that the LLP got for the Licence Fee.

The Facts

231. By paragraph 1.1 of Schedule 1 of the Development Agreement, the LLP granted a licence to OVL (and specified other parties) to enter upon and to occupy the Property in order to carry out the development works. By paragraph 2 of Schedule 2 of the Development Agreement, the LLP was obliged to pay the Licence Fee Amount "into a deposit account to be drawn down in accordance with the terms of a Licence Deposit Deed entered into between [OVL] and the [LLP]". Paragraph 1.2 of Schedule 1 of the Development Agreement then said:

> In consideration of the licence granted at paragraph 1.1 and subject to paragraph 2 of Schedule 2, [OVL] shall pay the Licence Fee Amount on the date hereof to be utilised in payment of a quarterly licence fee equal to each quarters interest charged to the [LLP] on the finance obtained from the [Co-op] to fund part of the Development Sum, incurred from and including the date hereof until and including the date that the hotel at the Site opens for trade as an operational hotel and any shortfall shall be paid by [OVL] and/or be paid out of the Costs Overrun Account.

232. Hence, OVL would appear to have been liable to continue paying the quarterly licence fee until the hotel opened, including after the Licence Fee had been exhausted. The LLP argued that OVL was therefore bearing a risk of the development overrunning and this was of benefit to the LLP and its members.

233. The rationale for equating the licence fee with the quarterly interest payments was that the LLP would not be receiving any income while the development was being carried out and it therefore needed income with which to pay the interest on the Co-op loan. The mechanism of charging OVL a licence fee

in precisely the same amount as the interest payments due under the loan provided the necessary income so that the LLP could make the interest payments.

234. By clause 16.5.2(d) of the Intercreditor Deed, OVL was obliged to transfer the "Interest Amount" (defined in the Co-op Loan as the amount of £350,000) into the "Interest Account". That Interest Account was charged to the Co-op pursuant to clause 15.2(a)(iii) of the Co-op Loan. A Legal Charge was entered into on 25 March 2011. By clause 16.9 of the Intercreditor Deed, OVL could not withdraw any amount from the deposit account save to allow the LLP to make interest payments to the Co-op.

235. The Licence Deposit Deed defined OVL as the "Chargor" and the LLP as the "Chargee". That was because the LLP was granted a second charge over the deposit account, after the Co-op's first charge. The "Licence Fee" was defined as the sum of £350,000 "to cover interest payable on the funding advanced by the [Co-op]". By clause 4, interest on the account was "released" to OVL. Clause 5 provided for withdrawals and was in the following terms:

> [OVL] shall pay to the [LLP] the following payments from the Deposit and upon such terms as contained in the Development Agreement a sum equal to each quarter's rent to be utilised in payment of a quarterly licence fee equal to each quarters interest charged to the [LLP] on the finance obtained from the [Co-op] to fund the Development Sum (as defined in the Development Agreement), incurred from and including the date hereof until and including the date that the Site opens for trade as an operational hotel.

236. Then clause 6, which was said by the parties to contain at least one, and possibly two, errors, read as follows (without substituting OVL and LLP for Chargor and Chargee):

> 6. REPAYMENT OF DEPOSIT
>
> The Chargee shall release the Deposit in accordance with clause 5 above. Any remaining sums in the Deposit Account shall be paid to the Chargee upon completion of the Lease.

237. One possible error was whether "completion of the Lease" should actually have been "termination of the Licence". Licence was a defined term in the Licence Deposit Deed, whereas Lease was not. It was, however, a defined term in the Development Agreement and it was the Lease to be entered into by the LLP with the Operating Company, which was to start once the development was complete and the hotel commenced trading. The clause makes sense if it is a reference to that Lease, because the Licence would have come to an end when the Lease came into force. So we do not think this was an error.

238. The other alleged error was put forward by the LLP and is more relevant to the issues we have to decide. The LLP says that the reference to the "Chargee" in the second sentence is wrong and it should have referred to the "Chargor", ie OVL. HMRC says that this was not an error. The first sentence is clearly correct, confirming that payments of the licence fee could be made out of the deposit

account despite the existence of the LLP's second charge. (We do not know how the Co-op's consent was obtained but presumably it knew about the purpose of the account.) Mr Bremner, who argued this aspect on behalf of the LLP, said that the Licence Fee was OVL's money and so when the licence terminated, the second charge would too and the money would be OVL's. This was what in fact happened as the amount paid out of the account was £316,120 and the balance of £33,880 from the £350,000 was apparently retained by OVL (see FTT [110]).

239. Mr Brinsmead-Stockham, who argued this aspect on behalf of HMRC (Mr Davey also argued in relation to the commerciality issues on this – see below), said that the clause should be read as it is and that that was a good signifier as to the circularity of this arrangement. Furthermore, it would not make sense having a clause that provides for the payment of money in OVL's account to OVL. In [109], the FTT seemed to adopt this approach in referring to the LLP in its quote of clause 6. However, that was not commented on in the light of its finding in the next paragraph that the balance of the £350,000 was then retained by OVL.

240. In our view, there is no basis for regarding the reference to the "Chargee" in the second sentence as a mistake. As such we are bound to proceed on the assumption that it is a correct reference and that the balance should in fact have been paid back to the LLP.

241. Between 25 March 2011 and 10 October 2012 the LLP invoiced OVL for "rent" and requested that payment be made directly to the LLP's bank account with the Co-op. As stated above, a total of £316,120, excluding VAT, was paid in this way.

The FTT Decision

242. The FTT deals with this in FTT [172] to [181]. However, most of those paragraphs are taken up with recording the parties' submissions. There is little or no analysis of those submissions and, with respect, it is unclear what the FTT's conclusions were as to the parties' arguments.

243. After setting out the broad facts in [173], the FTT records HMRC's submissions in [174] – [177], including that there was no commercial reason for the Licence Fee being paid to OVL. In [177], the FTT expressly disagreed with HMRC's argument that the Licence Fee was excluded from being qualifying expenditure because it fell within the land exception contained within section 360B(3). In [178], the FTT summarises two arguments of the LLP.

244. The FTT's main conclusion and reason for allowing the LLP's claim to BPRA in relation to the Licence Fee is in [179], which states as follows:

> It is accepted that the LLP knew and accepted that is [sic] granted the licence to [OVL] because it was necessary to enable it and its contractors to enter the Property for the purposes of carrying out the project. Also, the LLP did not have the funds to meet it [sic] obligation to pay interest to the Co-op during the development phase of the

> project. We agree with Mr Gammie that this was a commercial arrangement, the effect of which was not to increase the tax deduction available to the LLP as the income it received from the licence fee was taxable.

245. Mr Davey described the FTT's conclusion that this was a "commercial arrangement" as "risible" as there was no basis for such a conclusion and there was certainly no reasoning for such a conclusion explained in the Decision.

246. In [180] the FTT expressly accepted the LLP's submission, and thereby rejected HMRC's submission, that the wider wording of section 360B made the case distinguishable from that of *Ben-Odeco.*

The Parties' Submissions

247. Both Mr Davey and Mr Brinsmead-Stockham mounted a full scale attack on the FTT's finding that this was a "commercial arrangement". They submitted that the reasoning of the FTT in this respect, such as it is, ignored the self-cancelling nature of a payment going from the LLP only so as to be paid back to the LLP for the purpose of the LLP meeting its interest costs. The only purpose, they said, to such an arrangement was to increase the BPRA claim by the amount of £350,000. There was no other commercial purpose and the proper construction of clause 6 of the Licence Deposit Deed, together with the LLP's failure to recover the balance, confirmed the lack of commerciality.

248. Mr Brinsmead-Stockham also submitted that the FTT's apparent conclusion that the arrangements were effectively tax neutral was incorrect. He said that the effect and purpose of the arrangements was to convert a revenue expense, the interest expense on the Co-op loan, into a capital expense on which the LLP (and its members by way of sideways loss relief) could claim BPRA. Insofar as the FTT was influenced by the alleged tax neutrality of the arrangement, that was an error of law. Accordingly, HMRC submitted that the self-cancelling, circular and uncommercial nature of the Licence Fee Amount meant that it was not incurred "on or in connection with" the Conversion of Blush House. Alternatively, HMRC relied on section 360B(3)(a) on the basis that the Licence Fee was incurred "on or in connection with…the acquisition of…rights in or over land", namely the licence to OVL and its contractors to occupy the Property.

249. Mr Bremner defended the FTT's decision on the Licence Fee, saying that it was a factual finding that it was a "commercial arrangement" and that this was based on ample evidence, in particular expert evidence, that was before the FTT. As a factual finding, HMRC are not entitled to challenge it as if it were a point of law save on the very narrow grounds explained by the House of Lords in *Edwards v Bairstow.* As to the alleged illegitimate conversion of an income expense to a capital expense, Mr Bremner argued that this was a wholly new point raised by HMRC on this appeal but that in any event it went nowhere, as it only concerned the timing of the relief and there was no evidence that the BPRA claim had been ramped up. Finally, Mr Bremner submitted that the Licence Fee was clearly on or in connection with the Conversion of Blush House and the exception in section

360B(3)(a) did not apply because it was not the LLP which was acquiring an interest in the Property.

Discussion

(a) Commerciality

250. It is very difficult to discern the basis for the FTT's conclusion that this was a "commercial arrangement". As we have discussed, at [134] the FTT appeared to decide that because the parties to the transactions, meaning in particular the LLP and OVL, were not "connected" in any statutory sense, that "any transactions between them are to be regarded as being "arms' length" commercial transactions." Quite apart from that being an error of law, it was an illogical and unjustifiable leap in the FTT's reasoning to conclude that this meant that all the transactions between the parties were "arms' length commercial transactions".

251. While we have concluded that the arrangements overall and the Development Sum in particular were commercial and broadly at market price, we are now evaluating the separate right/obligation acquired by the LLP for £350,000. It is necessary to look at the constituent elements and decide whether it was commercial in determining whether it amounted to expenditure incurred "on or in connection with" the Conversion of Blush House. Looking at the Licence Fee in isolation from the other parts of the Development Sum, we cannot discern any credible commercial reason to pay a sum of money to a person who is contractually obliged to return it.

252. In [179], the FTT gave two purported reasons for such an arrangement:

(1)That OVL and its contractors needed a licence to occupy the Property for the period of the development; and

(2)That the LLP needed funds to pay the interest on the Co-op loan at a time when the Property was not generating any income.

253. As to (1), the need for a licence does not explain why the LLP had to provide the funds to OVL so that it could pay the licence fee. Nor does it justify charging such a large amount for the licence. The FTT did not refer to HMRC's expert on property development and associated market practice, Mr Anthony Williams, who had given evidence that a licence to a developer would usually be at a nominal fee and that he had never seen a fee based on the interest expense of the owner of the property.

254. As to (2), whilst the LLP obviously needed funds to pay the interest, it did not need to pay the Licence Fee only for it to be returned in order to generate those needed funds. The LLP had the funds in the first place and it is quite artificial to suggest that the funds needed to be generated in this circular way.

255. It is clear that the amount of the licence fee payable by OVL was not set by reference the value of the licence but instead by reference to a completely unrelated factor, namely the amount of interest payable by the LLP to the Co-op. The LLP had adduced evidence from Mr Nicholas Lewis, the founding partner of Downing and the promoter of the LLP, and Mr Michael Tracey, the director and shareholder of OVL and the Cannock Group of Companies, that this sort of arrangement was a normal feature of a pre-funded structure where ongoing debt interest had to be funded. They said that this was a standard way of financing interest costs and that it had been accepted by HMRC in other Enterprise Zone and BPRA transactions. This was also supported by their expert Mr Douglas Smith who agreed that a licence fee to fund the development's interest costs was "quite usual" in "tax-driven" development projects.

256. Even though the FTT did not expressly refer to such evidence, it may be that it was behind its conclusion that this was a "commercial arrangement". The FTT also does not refer to the LLP's argument that the Licence Fee arrangement incentivised OVL to deliver on its development obligation on time because the risk of overruns was effectively transferred to OVL by it continuing to be liable to pay the licence fee until the development was complete and even if the Licence Fee Amount had been exhausted. However, as Mr Brinsmead-Stockham pointed out, the Licence Fee was unnecessary to provide such an incentive, and OVL's liability in respect of overruns could easily have been provided for in the Development Agreement without the device of paying money to OVL only for it to be returned.

257. Unlike the Capital Account, in our view the Licence Fee was clearly a circular and self-cancelling arrangement that had no real discernible commercial purpose. Even if interest charges on a bank loan can properly be characterised as a development cost and for that reason it is justified to include it within the Development Sum, we do not think that the specific Licence Fee transaction can be properly described as a "commercial arrangement". There was insufficient analysis in the FTT's Decision as to its conclusion in such respect and it ignored the undisputed facts indicating that it was a completely circular arrangement. We consider that this was an *Edwards v Bairstow* error of law by the FTT, and it was not "based on careful evaluative findings of fact" – see [74] of *Ingenious Games LLP and ors v HMRC* [2019] STC 1851.

(b) Tax neutrality

258. The last sentence of [179] implies that the FTT thought that its conclusion on commerciality was strengthened by the arrangement being tax neutral, in the sense that the LLP would have to pay tax on the licence fees it received from OVL but that the interest was tax deductible.

259. HMRC submitted on this appeal that that tax neutrality only applied on the revenue side, whereas the arrangement allowed the LLP, or more particularly its members, to claim it as a capital expense and thus claim BPRA by way of sideways loss relief. It was part of the incentive for investors that they could claim sideways loss relief in year one of the development. Mr Bremner submitted that

there was nothing in any of these points because, as the hotel was successful, it was only a question of timing as the LLP would have been able to claim the revenue deduction against its profits. He also said that HMRC's analysis ignored the possibility of BPRA being withdrawn if there was a balancing event within the first seven years.

260. Again the difficulty we have with this is that it is unclear what impact the alleged tax neutrality had on the FTT's conclusion on commerciality. In our view, it is reasonably clear that a major factor for investors who decide to invest in such a scheme is the availability of sideways loss relief in year one. It is therefore in their interests for the BPRA claim to be as high as possible. While over the course of the many years the tax effect may or may not turn out to be neutralised, it is undeniable that the revenue expense has been converted into a capital expense, facilitating its inclusion in the BPRA claim.

(c) Was it qualifying expenditure?

261. As to whether the Licence Fee was incurred "on or in connection with" the Conversion of Blush House, the LLP rather hedged its bets. Taking into account the width of "in connection with", which was much broader than the relevant provisions in *Ben-Odeco*, Mr Bremner submitted that:

(1)Either it was expenditure on a licence fee which OVL had to pay in order to gain access to the Property so as to carry out the conversion; or

(2)It was interest on bank debt that was necessary for the development to proceed.

262. If it were (1), it might fall into the trap of being within the exception in section 360B(3)(a) (dealt with below). If it were (2), it might fall into the trap of being a revenue rather than a capital expense.

263. But the fact that it could be one or the other or possibly both undermines the LLP's claim. We have concluded that this was a circular and self-cancelling arrangement that, in itself and outside the context of the Development Sum as a whole, had no commercial justification. As such, it cannot sensibly be said to have been incurred by the LLP on or in connection with the Conversion of Blush House, however widely the test is interpreted.

(d) The exception in section 360B(3)(a)

264. Section 360B(3) provides that expenditure is not qualifying expenditure if it is incurred on or in connection with the acquisition of land or rights in or over land.

265. It was common ground that the words "on or in connection with" in section 360B(3) had to be construed as having the same width as in the definition of qualifying expenditure in section 360B(1). It was also common ground that the Licence was a "right in or over land".

266. The FTT held that the Licence was not caught by the exception because it was acquired by OVL and not the LLP (see FTT [177]). The LLP supports that construction of section 360B(3)(a) on the basis that it must be the same person that incurs the qualifying expenditure as incurs the excepted expenditure (referring back to section 360A in this respect). The LLP granted a licence in respect of the land that it had acquired and it had made no claim to BPRA in respect of that acquisition.

267. The LLP's position does not sit well with its submissions in relation to whether the Licence Fee was qualifying expenditure incurred by the LLP. It argued that the breadth of the words "on or in connection with" meant that OVL's payment of a licence fee to the LLP was qualifying expenditure by the LLP. Mr Bremner rather backtracked from that in his submissions in this context, understandably seeking to focus on the fact the money was ultimately used to pay the LLP's interest costs and that was why it was qualifying expenditure.

268. The example was posed during oral submissions in relation to the separate exception in section 360B(3)(d) relating to the provision of plant and machinery and whether that would be within the exception if the actual expenditure for that plant and machinery was incurred by the contractor. We consider that the section is plainly wide enough to cover such expenditure and that it would be excluded from BPRA. Similarly if part of the Development Sum was to be used by OVL to acquire adjoining land that was necessary for the development, that would surely be excluded expenditure.

269. The Licence Fee was paid by the LLP to OVL at least in part to enable OVL to fund the acquisition of a licence over the land. As such, if it was otherwise qualifying expenditure incurred by the LLP (contrary to our conclusion) then we see no reason why it is not, therefore, expenditure incurred "on or in connection with" the acquisition of the licence. The expenditure is still incurred by the LLP but the exception is not necessarily limited, in our view, to the acquisition by the LLP of "land or rights in or over land". There is no warrant for reading words into section 360B(3)(a) (or subsections (b) to (d)) such that the acquisition, extension, development or provision of the items has to have been by or to the person incurring the qualifying expenditure.

270. Accordingly, we disagree with the FTT's conclusion as to the inapplicability of the exception in section 360B(3)(a) and if we are wrong on our main conclusion in relation to the Licence Fee then this would have been an alternative basis for allowing HMRC's appeal in this respect.

Conclusion

271. HMRC's appeal against the FTT's decision in relation to the Licence Fee Amount is allowed.

IFA Fees and Promoter Fees

272. It is convenient to deal with these items together as they raise similar issues. HMRC appeal against the FTT's decisions that expenditure on both items was eligible for BPRA.

273. £372,424 of the Development Sum was to be used to pay the fees of IFAs. This figure comprised £209,552 of fees paid by Downing and reimbursed by OVL and £162,872 of fees paid directly by OVL: FTT [114].

274. £310,000 of the Development Sum was to be used to pay Promoter Fees. £50,000 was paid to Downing as a "consultancy fee" and the balance to Blakes: [115].

The FTT Decision

275. The FTT dealt with these items at FTT [197]-[203].

276. HMRC argued before the FTT that Downing as the regulated entity was responsible for engaging IFAs and paying their fees, so there could have been no commercial reason for OVL to be obliged to pay or reimburse such fees. The fees were not "in connection with" the Conversion as they were too remote. They would not have been allowable for BPRA if the LLP had paid them directly.

277. The FTT rejected this argument, commenting that even if the LLP had paid the IFA fees directly they would have been eligible as being "in connection with" the Conversion.

278. The FTT rejected a further argument by HMRC that the IFA fees should, "partly at least" be disallowed as paid in connection with the acquisition of land. The FTT found that the fees were paid to IFAs for their services in raising equity finance and the exclusion did not go so far as to catch them.

279. In relation to the Promoter Fees, HMRC argued that there was no commercial reason to have obliged OVL to pay these fees other than inflation of the BPRA claim, and, again, they were partly referable to the acquisition of land.

280. The FTT rejected both arguments for essentially the same reasons.

The Parties' submissions

281. HMRC renewed both arguments in the appeal. Mr Macklam dealt with this issue (as well as the Franchise Costs and Legal Fees). He submitted that the IFA and Promoter Fees were not "in connection with" the Conversion, because they were not costs which would arise in a "conventional property development", and it cannot have been the intention to allow BPRA for costs relating to setting up an investment vehicle and issuing an Information Memorandum. He argued that the FTT gave no reasons for its conclusions that both sets of Fees were "in connection with" the Conversion and failed to address the absence of any

commercial rationale for structuring the payments in this way. The only conclusion open to the FTT was that this "unnecessary and artificial payment mechanism" was used "for the sole purpose of inflating a tax relief claim". If the LLP had paid the fees directly they would have been ineligible for BPRA as being revenue expenditure. As to the land exclusion, the FTT decision was "devoid of analysis or reasoning".

282. The LLP argued that the FTT had reached the right decision for the right reasons. Without the equity obtained by the IFAs and on the basis of the Information Memorandum there would have been no funds for the Conversion at all. The expert evidence showed that the reimbursement of Downing's fees by the developer was the normal practice for similar investment structures in Enterprise Zones. If the LLP had paid the IFA fees directly they would have been capital expenditure and allowable as "in connection with" Conversion. As to the land exemption, the IFA and Promoter Fees were paid for services in raising equity for the project.

Discussion

283. We consider it clear that the LLP's expenditure in acquiring OVL's obligation to pay the IFA Fees and Promoter Fees was expenditure incurred on or in connection with the Conversion within section 360B(1).

284. HMRC's appeal on this issue is effectively a combination of its restricted interpretation of "in connection with" (which requires a close connection to physical works) with a renewed attempt to overcome the FTT's failure to find that the purpose of the transaction was ramping up the BPRA claim. Neither forms a basis for overturning the FTT's decision. The reason for the FTT decision was sufficiently clear, even if HMRC does not accept it.

285. Nor do we accept HMRC's argument that BPRA cannot have been intended to allow costs incurred in setting up an investment vehicle or issuing an Information Memorandum to prospective investors. While many BPRA claims may have been small in amount, the Conversion of Blush House would naturally have required equity investment for such a project. There is no warrant in the legislation for restricting BPRA in the way which HMRC advocate; indeed, HMRC's approach would operate to restrict and reduce the effectiveness of the regeneration of disadvantaged areas which was the underlying rationale for the relief.

286. It is not material that the IFA and Promoter Fees could have been paid in a different way. In any event, we do not accept that the structure was an "artificial mechanism". What matters is what the LLP got for its money and whether that was on or in connection with the Conversion. We consider that given the breadth of that phrase and the purpose of the legislation it was; the Conversion could not have taken place without the equity financing being raised.

287. In relation to the land exception, HMRC's argument has a superficial attraction. They say that since the total finance raised for the project was used in part to buy the freehold and to pay related costs such as SDLT in relation to that acquisition, surely a proportionate amount of the IFA and Promoter Fees relating to the raising of that finance must be excluded by section 360B(3)(a)?

288. However, we do not consider the exclusion is intended to operate or does operate as an automatic apportionment mechanism in the factual situation in this appeal.

289. In round terms, the LLP raised £7.2 million of equity and £9 million of debt (£7 million from the Co-op and £2 million from OVL). Of that £16.2 million, £2.85 million (plus stamp duty) was used to buy the land, £12.5 million was paid as the Development Sum to OVL and the balance was paid out to OVL and used for fixtures and fittings. The BPRA claim was £12,478,201. Against this backdrop, it is by no means obvious how any apportionment could be carried out on a principled basis in respect of the IFA and Promoter Fees. The thrust of HMRC's appeal, it seems to us, is that the FTT should have found as a fact that the acquisition of the land was sourced wholly or in (some unspecified) part from the equity which the IFAs and Promoter helped to raise, rather than from the larger amount of debt. Notably, of the total of £16.2 million raised, the BPRA claim already excludes the land element. We consider that section 360B(3)(a) would only restrict a claim by the LLP if an identifiable element of the IFA or Promoter Fees had been incurred in connection with the acquisition of the land (or related costs). While the burden rests on the LLP to show that the Fees qualify for BPRA, that does not mean that it can simply be assumed without more that the acquisition of the land must have been funded in part from the finance raised through the Fees. While the phrase "in connection with" should be interpreted in the same way for both qualification and exclusion, we consider that the FTT was entitled to find, as it did, that on the facts the Fees were incurred for the general purpose of raising equity for the project, and not partly in connection with the acquisition of the land, no part of which was included in the BPRA claim.

Conclusion

290. HMRC's appeal against the FTT's decision in relation to the IFA Fees and Promoter Fees is dismissed.

Legal Fees

291. One of the obligations acquired by the LLP from OVL was that OVL should pay certain specified legal fees amounting in aggregate to £188,408. As we have seen, the LLP deducted £34,999 of those fees from its BPRA claim on the basis that they related to the acquisition of the land.

292. The FTT set out the composition of the fees at [117]-[118], as follows;

117. Legal fees of £153,409.89 – this is the balance of the total amount of legal fees paid after deduction of £34,999 which the LLP accepts is attributable to the acquisition of the Property and which therefore does not qualify for BPRA. This sum can be further broken down as follows:

(1) a payment of £8,520.36 to Shakespeare Putsman (solicitors) which was described by Mr Tracey as being in respect of an "agreement with vendor" for the Property. The invoice for the transaction, dated 21 April 2010 describes the sum as an "interim bill re purchase of [the Property]" and includes disbursements for items including HM Land Registry fees. In evidence Mr Tracey agreed that the invoice related to the purchase of the Property;

(2) a payment of £24,958.07 to Shakespeare Putsman. The invoice, dated 29 March 2011, refers to "our professional fees in connection with the purchase of [the Property]" and again includes disbursements including HM Land Registry fees. In evidence Mr Tracey described these fees as relating to "due diligence in relation to the purchase of the Property";

(3) a payment of £6,000 described by Mr Tracey as "completion legal fees of £5k+irrecoverable VAT. In evidence he agreed that this payment related to "the raising of finance and debt for the Property – for the purchase of the Property";

(4) a payment of £36,330.20 described by Mr Tracey as the Co-op's "charges of solicitors costs re sale of [the Property]." In evidence he explained that this related to the Co-op's costs of obtaining security over the Property and agreed that it was "in relation to the purchase of the Property;

(5) a payment of £71,468.76 made on 18 April 2011 to Downing in relation to the LLP's solicitors, Squire Sanders Hammonds, fees. The invoices concerned refer to the Property and Mr Tracey accepted that at least "some" of these fees related to its acquisition;

(6) a payment of £1,919 on 18 April 2011 to Downing in respect of Squire Sanders Hammonds fees described by Mr Tracey as the "recharge of Hammonds non vatable disbursements;

(7) a payment of £400 to Shakespeare Putsman dated 29 July 2017 described by Mr Tracey as "agreement of licence over car park". He agreed that these fees were in respect of a right over land;

(8) a payment of £8,812.50 which Mr Tracey said was deducted at source on 28 May 2010 and for which no invoice was available. He described the payment as being "Legal Fees [the Property]" and explained that these were the vendor's legal fees for the sale of the Property to the LLP; and

(9) a payment of £30,000 made on 31 March 2011 to "Chainridge Vendor". Although the invoice states that the fee is a "deposit on sale of [the Property] in evidence Mr Tracey described it as a "Lock Out Fee" to ensure that the LLP could acquire the Property for development in accordance with the project and prevent it being sold to a third party.

> 118. The Debt Finance Request provides for payment of the legal fees using funds raised by the LLP and paid to the developer, Cannock, (see paragraph 64, above). Additionally, under clause 16.5.2(i) and Schedule 1 of the Intercreditor Deed Cannock is required to pay Shakespeare Putsman Fees, Hammonds Fees and Freeholders Legals and costs" (see paragraph 88, above). Both Mr Lewis and Mr Tracey accepted that the LLP knew and intended that part of the Development Sum would be utilised in payment of legal fees.

293. HMRC disallowed the entire amount claimed of £153,409 on the basis that all of the fees were paid on or in connection with the acquisition of land. The FTT's decision on the issue is contained in the following two paragraphs:

> *Legal fees (£153,409.89)*
>
> 204. HMRC contend, having regard to the breakdown of the legal fees (see paragraph 117, above) that these were incurred on or in connection with the purchase of the Property and, as such, cannot be qualifying expenditure as it is excluded because of s 360B(3)(a). However, while we accept that this is to a large extent the case, it is apparent that not all of the expenditure concerned falls within this category. For example, the first item, the payment of £8,520.36 to Shakespeare Putsman (solicitors) is expenditure incurred by Cannock its purchase [sic] of the Property from Chainridge. Similarly, item 4, relates to the Co-op legal fees in relation to the grant of security which is, as Mr Gammie contends, not in connection with the purchase of land but in connection with the lending of money.
>
> 205. Further analysis of these amounts are [sic] therefore necessary and it is hoped that this is something that can be left to the parties to undertake and agree in the light of our conclusion that most of the expenditure under this heading is not in fact qualifying expenditure within the legislation. In the event that it is not possible for the parties to reach agreement either may apply to the Tribunal to resolve this matter.

294. In its summary of conclusions at [234], the FTT said that "as we have observed in paragraph 204 above, a proportion of the expenditure on legal fees does also qualify for BPRA".

295. Unfortunately, the parties have signally failed to agree any apportionment of the Legal Fees as the FTT had hoped and suggested. In the appeal, the LLP maintains that the FTT was wrong to decide that any of the Legal Fees were not eligible. HMRC takes the opposite position, that the FTT was wrong to determine that any of the Fees were eligible.

296. The LLP makes two arguments why all of the Legal Fees were eligible. First, it says that the fees were paid by OVL and not paid or reimbursed by the LLP, and the exclusion "does not apply to OVL's expenditure". Second, in referring to the acquisition of land or rights in or over land, section 360B(3)(a) requires that the relevant land must be acquired by the LLP.

297. We do not accept either argument. The first argument in effect re-opens Issue One. The relevant question at this stage is what the LLP got for its money in respect of this particular obligation. The identity of the payer of the fees is not relevant; rather it must be determined whether OVL's obligation is on or in connection with the acquisition of land etc. We have rejected the second argument for the reasons given above.

298. The LLP runs a further argument, which relates to the factual position. It says that the fees all relate either to the grant of security, or for legal advice in relation to the viability and robustness of the project as a whole.

299. We are therefore left with a position where each of the parties takes a diametrically opposed position as to whether, as a matter of fact, each of the nine items set out above was incurred on or in connection with the acquisition of land.

300. This is a paradigm issue to have been determined by the FTT as the fact-finding tribunal. Unfortunately, it did not do so. The nine items set out above identify the relevant invoices, but make no findings and express no conclusions as to the material issue to be determined by the FTT, simply recording evidence given by Mr Tracey for the LLP in relation to them. The FTT only expressed any sort of view in relation to two of the nine items. The way in which that view is expressed is itself ambiguous: in stating that "further analysis of these amounts" is necessary, is the FTT referring to all nine amounts or only to the two which it singles out as potentially not being excluded? And what is intended by "for example" in relation to the two identified items? The FTT refers to the first item, but from the description of that invoice at [117] we are left unclear as to why that should have been selected by the FTT as (potentially) not excluded. It then refers to the fourth item, apparently accepting Mr Gammie's argument that this invoice related to security arrangements (we think that is what is meant by "the lending of money") and not the acquisition of land.

301. We also note that the FTT was wrong in the opening of [117] in stating that the nine specific items amounted in aggregate to the disallowed £153,409. In fact, they amount to £188,408, being the total legal fees before the £34,999 which, we have seen, the LLP elected not to claim on the basis that it did relate to the acquisition of land. We do not know to which of the nine items that £34,999 related, although we probed that question during Mr Bremner's oral submissions.

302. Each party took us to their selection of detailed evidence in relation to each of the nine items (the smallest of which was £400) in an attempt to establish their case as to whether that invoice related to an acquisition of land etc. However, unless we identify an error of law, set aside the FTT decision and remake it, this is not a re-trial but an appeal against the FTT's decision. What we must determine is whether the FTT erred in law in reaching its decision, on the basis of all the written and oral evidence before it, that "to a large extent" the Legal Fees were within the land exclusion, with only two items identified specifically as not being caught. To the extent that either party seeks to pass the high hurdle that the FTT's conclusion was an *Edwards v Bairstow* error of law (namely a decision which was, in Lord

Diplock's words, irrational on the facts) we do not consider that they met the requirement to put before us all the evidence which was before the FTT and to demonstrate the precise grounds of irrationality.

303. We do not accept Mr Gammie's alternative argument that the Legal Fees cannot be excluded because they related to the granting of security or to the project as a whole. Even if they did, that does not prevent them from also being "in connection with" the acquisition of land.

304. It is clearly desirable to achieve finality in relation to this issue. We also bear in mind that the LLP has the burden of proof of establishing on the balance of probabilities that the items were not excluded and so were eligible.

305. As we have said, we do not know the composition of the £34,999 amount which was not claimed as being eligible for BPRA. In any event, we consider that each of the nine invoices which is described at [117] is apparently for legal services in relation to the acquisition of land or an interest in land[26]. Mr Tracey's evidence in each case, as recorded at [117], was that the invoice related to some aspect of the purchase of the Property, save that in relation to item five his evidence was that "at least some" of the fees related to that purchase, and there was no meaningful analysis of item six. The FTT was, therefore, entitled to reach the conclusion it reached that the LLP had not discharged the burden of proving that the majority of the Legal Fees were not excluded.

306. We do not consider that the FTT provided any reason for identifying the first item as not being excluded. In relation to the other item which it identified as not being excluded, the FTT's reason appears to have been that those costs related to the Co-op Loan and the Co-op's security. However, that invoice was described as "charges of solicitors costs re sale of [the Property]", and Mr Tracey's evidence was that it was "in relation to the purchase of the Property": [117(4)]. We do not therefore consider that the FTT was right to identify this invoice as not (also) relating to the acquisition of land; in fact, it related to one aspect of that acquisition. We therefore conclude that the FTT erred in law in its reasons for concluding that these two items were/might not be (it is not clear which) excluded.

Conclusion

307. We conclude that in obtaining the obligation from OVL regarding the Legal Fees, the LLP incurred expenditure which was excluded by section 360B(3)(a). The LLP's appeal in this respect is therefore rejected, and HMRC's appeal succeeds.

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[26] Item nine relates to the acquisition of the Property but does not appear to represent fees for legal services at all.

Franchise Costs

308. OVL undertook to the LLP to pay franchise costs amounting in aggregate to £272,862, all of which were disallowed as eligible for BPRA by HMRC. £248,000 was payable to Sanguine Hospitality Management Limited ("Sanguine") (the "Sanguine Payment"). £24,862 was payable to Ramada International Inc ("Ramada") (the "Ramada Payment").

309. The FTT decided that the Sanguine Payment did not qualify for BPRA. The LLP appeals against that decision. The FTT decided that the Ramada Payment did qualify. HMRC appeal against that decision.

The Sanguine Payment

310. The factual background to the Sanguine Payment was set out by the FTT at [55]:

> 55. During March and April 2010 Cannock was in discussions with a Mr Simon Matthews-Williams of Sanguine Hospitality Management Limited ("Sanguine") in relation to the anticipated trading figures for a Ramada Encore hotel operating at Luton Airport and provision of advice on the layout, design and finishes for the completed hotel. However. Cannock subsequently identified ThenHotels Limited trading as ThenHospitality ("ThenHospitality") as suitable mangers and operators for the hotel on completion and its, rather than Sanguine's, assistance was sought throughout the design and development of the project. Mr Lewis explained that this was because of the deterioration of the personal relationship between Mr Bantoft, who Mr Lewis described as "not always the easiest person to get on with", and Mr Matthews-Williams and that although Sanguine was not appointed to that role it did receive a payment of £248,000 (net of VAT) by Cannock. Mr Tracey said that that this payment was not a Franchise cost but a sum agreed between Sanguine and Mr Bantoft as a result of the decision to use ThenHospitality and not Sanguine to advise throughout the design and development period and as a suitable [sic] for the operation of the hotel.

(a) The FTT's Decision

311. The FTT's discussion and decision in relation to the Sanguine Payment was at [206]-[207]:

> 206. Mr Davey says that the £248,000 paid to Sanguine Hospitality was a gratuitous payment arising out of the disagreement and inability of Sanguine and Cannock to work together because of the clash of personalities of the individuals concerned and, as Mr Tracey accepted, not a franchise cost at all. Accordingly, it cannot be qualifying expenditure as defined by the legislation. Mr Gammie accepts that the LLP knew that Cannock would have to bear this cost to fulfil its obligations under the Development Agreement. However, he contends that the payment to Sanguine was made by Cannock out of its own resources and therefore should not be treated differently from a

> payment that Multibuild might chose to make to assuage a disgruntled sub-contractor whose service had been dispensed with.
>
> 207. In any event he contends that the payment was made in connection with the physical work done on the Property to meet the brand specifications to enable it to operate as a Ramada Encore hotel. We disagree. Unlike the payment to Ramada, which we consider below, the payment to is was [sic] not made for such a purpose. Rather it was made to remove Sanguine from any involvement with the project and, notwithstanding the wide construction of the expression "in connection with" cannot, in our view, be treated as qualifying expenditure.

312. It emerged during the hearing before us that in fact the Sanguine Payment was not in the list of payment obligations undertaken by OVL in the Development Agreement. An invoice indicated that it had been paid before the Development Agreement was entered into. However, the parties agreed that the obligation in relation to the Sanguine Payment should nevertheless be considered in the same way as the other specific items, and we proceeded on that basis.

(b) The Parties' submissions

313. The LLP argues that the FTT erred in law for two reasons. First, there is no distinction between a payment for work done in the context of a conversion project and a payment to remove a contractual counterparty who had carried out work on the project and who would (absent the payment) continue to do so. Both are "in connection with" Conversion. Second, the FTT's conclusion was contrary to the evidence because Sanguine had already worked on the branding of the hotel, and OVL merely chose to use some of its "profit" to pay Sanguine a fee for its services. The LLP was not concerned in the decision by OVL to use its profit to make the payment to Sanguine.

314. HMRC say the FTT was right to disallow the Sanguine Payment, because it was not incurred in connection with *the building* at all. Rather, it related to the business relationship between OVL and Sanguine. Even if it were considered to be a "franchise cost" (which it is not) it related to Sanguine's work in relation to the fully functioning business to be carried on, not to the Property itself, and was therefore not "in connection with" Conversion.

(c) Discussion

315. We have already discussed and rejected several of the arguments put forward by the parties. The fact that OVL chose to make the payment, whether or not out of its "profit", is not material; what matters is the right/obligation obtained by the LLP for its expenditure. The phrase "in connection with" is wide enough in principle to include expenditure which does not closely relate to physical work and to expenditure which relates to the establishment of a functioning trade or business.

316. In our view, whether or not the Sanguine Payment qualifies for BPRA turns entirely on the degree of connection required by the phrase "in connection

with". Contrary to the submissions made by the LLP in the appeal, the evidence before the FTT shows that the payment was not made simply in return for services already rendered, but essentially in recognition of the loss of an active role in the future design and development of the project following the change of tack on the part of OVL. Sanguine's role had related to the design and development of the hotel business, and potentially the management of that business, and it appears that its continuing role would have been similar.

317. We consider that the Sanguine Payment was made "in connection with" Conversion, albeit at the outer limits of that phrase. As we have concluded, a key to obtaining BPRA is that the converted property must operate as "qualifying business premises". It is to be expected that establishing a hotel business will inevitably involve design and development stages, and that in order for the converted property in this case to be "used" for the purposes of a hotel business it would have required management. So, if the LLP had acquired an obligation from OVL to meet costs in these areas, we would have expected that in principle expenditure on such an obligation would have qualified for BPRA. It is not uncommon in practice for longer-term projects to involve parties in the project chain being replaced. The Sanguine Payment was in substance a payment made in recognition of such replacement, with the amount reflecting that the parties were not intending to bring their overall relationship to a final close but might work together in future. An undertaking to make such a payment was not, in our view, expenditure incurred "on" Conversion, but it was connected to the Conversion project and we consider that the degree of connection was sufficient for it to qualify for BPRA. The FTT therefore erred in not so concluding.

(d) Conclusion

318. The LLP's appeal against this item is allowed.

The Ramada Payment

319. The LLP obtained an obligation from OVL in respect of two payments to Ramada. The FTT set out the position at [119]:

> 119. Franchise costs of £272,862 – in addition to the £248,000 paid to Sanguine (for which see paragraph 55, above) this sum includes £24,862 paid to Ramada International Inc. by the Operating Company to use the Ramada brand and can be further broken down as follows:
>
> (1) an initial fee of $15,000, paid in accordance with a Franchise Agreement in relation to a licence to use the Ramada brand; and
>
> (2) a fee of £15,000 pursuant to a Technical Services Agreement to which the Operating Company was a party which Mr Tracey explained related to "preliminary co-operation between the brand and hotel developer from the project inception through to its opening."

(a) The FTT Decision

320. The FTT's decision in relation to the payments was set out at [208]-[209]:

> 208. With regard to the sums paid to Ramada, the initial $15,000 paid in accordance with the Franchise Agreement and £15,000 subsequently paid by the Operating Company under the Technical Services Agreement, HMRC's case is that these fees are not allowable as they are not sufficiently connected to the conversation, or renovation of the Property as required by the legislation. Mr Davey also contends that there was no reason for the payments by the Operating Company to be routed through Cannock and that this is another reason why they should be excluded from relief.
>
> 209. However, as Mr Gammie reminds us the legislation does not refer to "sufficiently connected" but "in connection with". Also, that it is necessary to look at what happened not whether the transaction could have been undertaken differently. We consider that these payments, to ensure the Property complied with the requirements and branding to enable its operation as a Ramada Encore hotel, were made in connection with the conversion or renovation of the Property and are therefore qualifying expenditure for BPRA purposes.

321. HMRC appeals against this decision. Mr Macklam stated in his oral submissions that HMRC were no longer pursuing their appeal in relation to the amount paid under the Technical Services Agreement. Their appeal relates only to the amount paid under the Franchise Agreement.

(b) The Parties' submissions

322. HMRC point out that the Franchise Agreement, pursuant to which the $15,000 was incurred, permitted the operating company to operate the hotel using the Ramada brand. This payment, they say, therefore related to the operation of the business to be run at the hotel under a particular brand, and not to Conversion. The FTT failed to apply the principle which it had correctly identified at [155] of the Decision that the LLP was not entitled to relief on all expenditure "associated with creating a fully functioning hotel business". The arrangement was also uncommercial, because the sole reason for the structure was to inflate the BPRA claim. It could lead to excessive BPRA claims if brand usage costs were allowable.

323. The LLP points out that the FTT's finding that the Ramada Payment was made to ensure that the property complied with the requirements and branding to enable its operation as a Ramada Encore hotel was squarely based on Mr Tracey's evidence to this effect. The payment was clearly made "on, or in connection with" the conversion of Blush House.

(c) Discussion

324. It is clear in our view that the obligation to make the Ramada Payment was eligible. HMRC's objections serve to highlight the unduly restrictive approach to the legislation which they advocate. Where particular qualifying business

premises are to operate under a brand, we consider that costs such as this are a straightforward example of expenditure intended to be made eligible by the use of the words "in connection with". The policy behind the relief is to encourage unused buildings in disadvantaged areas to be converted into buildings which are open for business. The concern of the legislation is in effect the *end product*—a building which is operating as a business or office. A hotel being operated under a particular franchise is not open for business if it is not entitled to use the relevant franchise and able to comply with its franchise obligations.

325. The FTT decision was correct.

(d) Conclusion

326. HMRC's appeal in relation to this item is dismissed.

Fixtures, Fittings and Equipment ("FF&E")

327. HMRC disallowed £587,556 of the LLP's claim for BPRA in respect of FF&E and other non-qualifying amounts.

328. It should be noted that FF&E is a misleading description. In fact, fixtures, fittings and equipment were paid for separately and not claimed as eligible for BPRA. A more accurate label might have been "Construction Costs".

329. The relevant categories of expenditure were set out by the FTT at [121] as follows:

> (1) work on external areas which comprise the external tarmacking for the provision of a car park, landscaping and drainage. Although all of these are outside the footprint of the Property there are [sic], as Mr Huxley agreed when cross examined within its curtilage;
>
> (2) drainage works all of which are below ground and external to the Property;
>
> (3) roof plant, a substantial structure which houses the air-handling units, chiller units and extract ventilation fans. It is clearly attached to the Property but with no direct internal access Property [sic] other than fixed vertical ladders onto the roof.;
>
> (4) mains service connections;
>
> (5) FF&E comprising bedroom FF&E, other FF&E; and FF&E sundries. These include cupboards, headboards, mirrors, reception desk, bar counters etc. Although items such as headboards cupboards and other bedroom furniture was [sic] initially installed to comply with the Ramada Encore franchise requirements they have remained in place notwithstanding the change of brand to a Holiday Inn (see below). When we visited the Property these items appeared to us to be permanently fixed, in that they could not be removed without causing damage to the internal bedroom walls.

(a) The FTT Decision

330. The FTT dealt with this issue at [210]-[227].

331. In addition to the exclusion for acquisitions of land, section 360B(3)(c) contains a separate exclusion from qualifying expenditure for "the development of land adjoining or adjacent to a qualifying building". The FTT first considered an argument raised by Mr Gammie that a building includes its curtilage and insofar as external areas fell within the curtilage of the Property, they could not be land "adjoining or adjacent to" it so as to be caught by this exclusion. HMRC agreed that certain of the disputed works were undertaken within the curtilage of the Property, but argued that this did not assist the LLP because section 360B contains no reference to curtilage. The FTT accepted Mr Gammie's argument: [211]-[214].

332. In relation to the five categories of expenditure set out above, the FTT decided that they were all eligible for BPRA and were not prevented from being eligible by any of the exclusions. The other exclusions which HMRC had argued applied were the exclusions for expenditure on or in connection with the extension of a qualifying building and for expenditure on or in connection with the provision of non-fixture plant or machinery.

(b) HMRC's Appeal

333. HMRC appeal against the FTT's decision on certain categories within this item. Their skeleton argument raised various grounds of appeal, but six days before the hearing HMRC confirmed that they would only be pursuing one of those grounds, namely that relating to the curtilage point. HMRC withdrew their arguments that the FTT had erred in concluding (1) that the car park was a "structure" and therefore a "qualifying building", (2) that the underground drainage works, mains service connections and roof plant were not disqualified as "extensions" to the building, and (3) that the FF&E items were not excluded plant and machinery because they were fixtures. We therefore make no comment on those issues.

334. HMRC did not amend their skeleton argument, and it was not entirely clear to us from their oral submissions which of the five categories of expenditure identified by the FTT remained within the scope of HMRC's appeal, and what amounts were at stake. At our request, HMRC produced a short note to clarify the position. It stated as follows (footnotes omitted):

> 1. Contrary to HMRC's contention that it constituted the development of land adjoining or adjacent to Blush House, the FTT found that the following external work, being within its curtilage, did not fall within the scope of the exclusion at s.360B(3)(c) of the Act:
>
> a. Tarmacking, landscaping and drainage: [121(1)] and [216] of the FTT Decision.
>
> b. Mains service connections: [121(4)] and [225] of the FTT Decision.

> 2. HMRC's position below was that the car park was the development of land adjoining or adjacent to Blush House and therefore non-qualifying, but the FTT found that the car park was itself a structure, and therefore a qualifying building in its own right: see [220] of the FTT Decision. HMRC does not challenge that conclusion. Expenditure on, or in connection with the car park is therefore not in issue.
>
> 3. Therefore, so far as regards this particular error of law, the items in issue are those articulated at paragraphs 1(a) and (b) above.
>
> 4. Given how they are categorised, it is not entirely straightforward to identify the precise sum, in financial terms, in dispute. In the event that HMRC's challenge in relation to the curtilage is upheld, HMRC anticipates that consequential discussions between the parties may be required in order precisely to determine the expenditure affected by such an outcome. Subject to that, the expenditure on external areas is £88,205: see paragraph 14 of Trevor Huxley's witness statement dated 31 July 2017 [Main Bundle/51/1319] (though that includes the car park, which, as noted at paragraph 2 above, is not in issue). The expenditure on mains service connections is £26,367: see Trevor Huxley's witness statement, at paragraph 29 [Main Bundle/51/1322].

(c) Discussion

335. The issue which HMRC invited us to determine was whether the references to "building" in the BPRA legislation, and in particular the exceptions for development or extension, import the curtilage of the building. HMRC pointed out that this was an important point of principle with wider consequences.

336. We agree that this is a point of principle with wider relevance. However, for the reasons set out below we have concluded that we do not need to, and should not, determine that question in this appeal.

337. The narrowed scope of HMRC's appeal relates to (1) external tarmacking, landscaping and drainage, and (2) mains service connections. The sole ground of appeal is that expenditure incurred on these items (and therefore the LLP's expenditure in acquiring an undertaking to meet that expenditure) was excluded by section 360B(3)(c) as being on or in connection with "the development of land adjoining or adjacent to a qualifying building".

338. Mr Bremner argued for the LLP that even if HMRC were right that "building" in the BPRA code did not extend to the curtilage of the building, the exclusion still did not apply to the relevant items. In short, that was because expenditure on those items was development of the building, not development of adjoining or adjacent land.

339. We accept Mr Bremner's submission. The words "development of land" in the exclusion should be given their normal meaning, and as a matter of purposive construction stand in contrast to expenditure on the Conversion of a qualifying building. We can see no sensible justification for categorising the external tarmacking, landscaping and drainage or mains service connections as

"development of land". They are in our view plainly works which assisted, and were presumably necessary, in rendering the converted building suitable for its intended use as a hotel. They did not *develop* the land or add to its value or have any purpose independent of the conversion of Blush House into qualifying business premises.

340. We are conscious that this was not the basis on which the FTT reached its decision that these items were eligible for BPRA. Since we have determined that the curtilage issue would be best decided in a case where it is dispositive, we have not identified any error of law in the FTT's decision on this issue so as to be able to set it aside and remake it. However, we consider that the FTT reached the right decision, albeit that we have reached it for a different reason.

(d) Conclusion

341. HMRC's appeal in relation to this item is dismissed.

Residual amount/profit

342. As we have seen, OVL agreed in the Intercreditor Deed to use the Development Sum to meet a series of obligations. After meeting those specific obligations, a residual amount of £1,209,510 was described before the FTT as the amount of OVL's "profit" which HMRC had disallowed for BPRA.

343. The only finding of fact in relation to this amount appears to be at [122] of the Decision, as follows:

> 122. Residual amount/profit (£1,209,510) – it was accepted by Mr Lewis in evidence that Cannock would earn a profit of approximately £4 million from the project of converting the Property into an hotel[27].

(a) The FTT Decision

344. The FTT's discussion of this issue and its decision is contained at [228]-[231], which we set out in full:

> 228. HMRC contend that the part of the Development Sum paid to provide remuneration to Cannock in the form of profit cannot be qualifying expenditure as defined in the legislation. This is on the basis of an apportionment between non-allowable and allowable items.
>
> 229. The LLP is critical of such an approach. Mr Gammie contends that the fact that Cannock made a profit on the Development Agreement does not call into question the quantum of expenditure upon which BPRA is available. Mr Gammie also attacks HMRC's approach to the profit figure as "misconceived" for the following reasons:

[27] The LLP disputes this figure. Even HMRC do not seem to accept it, referring in their Reply Skeleton Argument to profit of £2.4 million.

(1) HMRC have taken into account the initial acquisition cost of the Property at £2.85 million despite the vendor of the land being an unconnected third party;

(2) It is wrong in principle to apportion the profit over the total price paid by investors in addition to the cost of conversion as this could produce a different BPRA figure depending on whether it was a freehold or leasehold property on a ground rent;

(3) If profit is to be apportioned it should be over the Development Sum and not sums in respect of land purchase which would not have proceeded if all other elements had not been in place; and

(4) If we were to uphold HMRC's arguments, the apportionment is still incorrect as the LLP would have directly paid the IFA fees, the promoter's fee, the licence fee/interest and other costs reducing the Development Sum which should be used as the basis for any apportionment.

230. In response Mr Davey says that "quite plainly" if we hold, as we have, that elements of the Development Sum are not allowable and [sic] profit by the developer should be apportioned across qualifying and non-qualifying elements. This, he contends should include the acquisition cost of the freehold, because:

(1) Cannock assembled a package for the LLP;

(2) That package was "cradle to grave" and included securing the freehold of the Property from which the hotel business would operate;

(3) The profit paid to Cannock was attributable to all elements of the package, including the freehold premises; and

(4) The profit was calculated by reference to a stabilised valuation predicated on the assumption of freehold ownership.

Accordingly, Mr Davey submits that it necessarily follows that profit should be apportioned by reference to the total price of that package. He also dismisses the argument of the LLP that such an approach would lead to different BPRA figures in [sic] depending whether the property concerned was freehold or leasehold as it would be necessary for a case-by-case apportionment to be undertaken. This, he says, would also answer the further criticisms levelled at the apportionment by the LLP.

231. We agree with Mr Davey, for the reasons he has outlined, that there should be an apportionment in this case. However, the apportionment sought by HMRC will have to be varied to take account of our conclusions in relation to the various "elements" of the Development Sum. As with the issue of legal costs (see paragraph, 205, above) we would hope that this is something that can be left to the parties to undertake and agree in the light of our conclusions. But, in the event that it is not possible for the parties to reach agreement either may apply to the Tribunal to resolve this matter.

(b) The Parties' submissions

345. Perhaps predictably, the parties failed to agree any apportionment. The LLP appeals against the FTT's decision that any part of the residue is not eligible for BPRA, and further challenges the principles of the FTT's suggested apportionment if it fails on this argument. HMRC submit that the FTT decision was correct, but appeal "on a protective basis" in case we determine in this appeal that the claim should be disallowed to a greater extent than did the FTT, resulting in a larger apportioned disallowance.

346. We consider initially whether this element should be disallowed at all, since if we determine that it should not, the differences between the parties as to the basis of apportionment will be academic.

347. Mr Gammie and Mr Bremner argued that there was no basis for any apportionment of OVL's "profit" between qualifying and non-qualifying items. The object of scrutiny in the legislation is the expenditure incurred by the LLP. OVL's "profit" is irrelevant to that enquiry. Apportioning the so-called residue is "an irrational and illogical exercise". HMRC's case starts from the presumption that the amount remaining after the deduction of the specific elements of the Development Sum is pure "profit". That figure may bear no relation to its eventual profit, on which OVL will in any event pay tax.

348. The LLP describes the rationale for HMRC's apportionment as "mysterious, to say the least". OVL assumed the obligation to convert Blush House into a Ramada Encore Hotel and the LLP incurred expenditure of £12,513,200. HMRC cannot deny that OVL was entitled to be remunerated for delivering a converted Blush House. We do not know what "profit" OVL derived because the list of payments taken by HMRC as its starting point relates only to identified third-party costs and not in-house costs. OVL makes any profit which it does eventually make from delivering the completed project; it derives no profit from (say) paying the Capital Amount or discharging legal fees, which HMRC say should be disallowed, so that profit attributed to them is also disallowed. These are in substance third-party expenses which merely serve to reduce OVL's profit.

349. More fundamentally, the LLP submits that HMRC identify no reason or principle why the real "profit" made by OVL on the Blush House development cannot qualify for BPRA, and that HMRC's approach is simply an unprincipled mathematical exercise.

(c) Discussion

350. The FTT accepted HMRC's submissions that (1) the excess of the Development Sum over the aggregate of certain specified payment obligations was OVL's "profit", (2) that profit must relate in part to the acquisition of the freehold land and other excluded terms, and (3) that related part must therefore be ineligible for BPRA. The argument then turned to the basis for the apportionment.

351. We consider that this approach was wrong, and was infected by the FTT's error of law in relation to Issue One.

352. In the first place, for the reasons given by Mr Bremner and summarised above, the mathematical exercise of deducting from the Development Sum the list of specified third party obligations would not have revealed OVL's actual profit, however that term is defined. Apart from the fact that OVL would likely have had other costs, its eventual profit would have depended on its delivery of its development obligations under the Development Agreement, and the actual costs of satisfying those obligations. That may be why the figure produced by the mathematical calculation was alternatively described as the "residual amount".

353. This is not mere semantics. The fact that the figure was in no meaningful sense OVL's profit means that HMRC's submissions as to the source of the profit, which were accepted by the FTT, were built on sand.

354. Most importantly, the approach of scrutinising that figure and trying to estimate its derivation or composition was misconceived. It was based on the same fallacy as the FTT's decision in relation to Issue One, namely that what mattered in determining eligibility for BPRA was what OVL did with the money it received from the LLP. As we have explained, that was the wrong question. The right question was what the LLP's expenditure was incurred on (or in connection with), or, colloquially, "what did the LLP get for its money?".

355. We have determined that the answer to that question was that the LLP acquired a series of discrete rights/obligations from OVL as set out in the Intercreditor Deed. However, the existence of a mathematical difference between the Development Sum and the aggregate amounts expended on those discrete rights/obligations did not mean that the LLP had acquired in addition something else in incurring the expenditure, all of which was accepted to be incurred. It was not a right or asset acquired by the LLP at all.

356. What the LLP got for its money (what it incurred the expenditure on or in connection with) was the series of discrete rights/obligations. The aggregate amount which OVL might have to utilise in meeting those obligations was less than the Development Sum, but that was relevant only to OVL's position and as one element of its eventual profit from its overall development obligations. It does not mean that the LLP acquired something else so that, as in some of the anti-avoidance cases, not all of its expenditure was incurred on or for items eligible for allowances.

357. As we have discussed, the object of scrutiny in a BPRA claim is the position of the LLP, and not its counterparty or any profit which might be made by its counterparty: see, in particular, [161]-[162] above. If a taxpayer incurs expenditure of £100 to acquire a series of specific obligations which the supplier can discharge for £80, the question for BPRA purposes is not whether the taxpayer

has made a good bargain[28], or how the £20 should be allocated, but whether the specific obligations are on or in connection with Conversion.

358. We therefore conclude that the FTT erred in law in deciding that part of the LLP's BPRA claim should be denied by reference to the composition of the "profit" or "residue" figure.

(d) Conclusion

359. The LLP's appeal against the FTT's finding that some part of the "profit" or "residue" figure should be disallowed is allowed.

Disposition

360. In relation to the elements of the BPRA claim addressed at the Issue Two stage, our decision is as follows:

(1)The Capital Account: this is eligible and the LLP's appeal succeeds.

(2)The Interest Amount: this is not eligible and HMRC's appeal succeeds.

(3)IFA Fees: these are eligible and HMRC's appeal is dismissed.

(4)Promoter Fees: these are eligible and HMRC's appeal is dismissed.

(5)Legal Fees: these are not eligible, HMRC's appeal succeeds and the LLP's appeal is dismissed.

(6)Franchise costs: these are eligible, the LLP's appeal succeeds and HMRC's appeal is dismissed.

(7)Fixtures, Fittings and Equipment: these are eligible and HMRC's appeal is dismissed.

(8)The Residual Amount: this is eligible and the LLP's appeal succeeds.

361. The result is that the Interest Amount and Legal Fees were not eligible for BPRA, but the remainder of the disputed items qualified.

Conclusion

362. The issues in this appeal have, of necessity, been framed by the terms of the FTT Decision, which was itself framed by the way in which the parties put their cases before the FTT. However, we observe that in general it is not helpful to approach the question of entitlement to allowances in terms of a binary "Issue One" and "Issue Two" analysis. The correct starting point is the statute, purposively construed. Having established an amount of capital expenditure incurred, the relevant question is what it was incurred on or in connection with,

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[28] See, for example, the decision of the Court of Appeal in *Samarkand Film Partnership No 3 v HMRC* [2017] EWCA Civ 77 at [110]: "…in answering the question what expenditure is incurred on, in a statutory context designed to provide relief for expenditure, the focus should be on the fact and the object of the expenditure, rather than on whether the money was well spent".

and whether that answers the statutory requirements. The enquiry is necessarily fact-specific.

Signed on Original

MR JUSTICE MICHAEL GREEN
JUDGE THOMAS SCOTT

RELEASE DATE: 17 June 2021

APPENDIX

A. The Development Agreement

The Development Agreement was entered into on 25 March 2011 by the LLP, the Operating Company and OVL. It is described on the title page as "Development Agreement relating to the funding of a development of a Ramada Encore Branded Hotel at Blush House, Airport Way, Luton". The relevant provisions are as follows:

> INTRODUCTION
>
> A The [LLP] has agreed to appoint [OVL] to procure the carrying out of the Works.
>
> B In consideration of the Works, the [LLP] will provide finance for the Works to [OVL] in accordance with the terms of this agreement.
>
> C The Operating Company has agreed to join in this agreement to take the Lease.
>
> 1 DEFINITIONS AND INTERPRETATION
>
> …
>
> "Approved Plans" means the plans, drawings and specification annexed in Annexure 3 agreed on behalf of the parties before the date of this agreement as added to, modified or varied from time to time in accordance with the provisions of this agreement.
>
> …
>
> "Development" means the stripping out refurbishment and upgrading of the Site in accordance with the Approved Plans, the Building Contract, FF&E Contract and the Agreements.
>
> …

"Development Sum" means twelve million, five hundred and thirteen thousand, two hundred pounds (£12,513,200.00) exclusive of VAT.

…

"Licence Fee Amount" means three hundred and fifty thousand pounds (£350,000.00).

…

"Site" means the freehold property known as Blush House, Airport Way, Luton being part of the property comprised in Title Number BD214131.

…

"Works" means the construction of the Development as shown on the Approved Plans and all other ancillary building, engineering, road, drainage, service and landscaping works (if any) and the provision and installation of the fixtures, fittings and equipment to be carried out by [OVL] either within the Site or on areas adjacent to the Site under the provisions of the Planning Permission and any Third Party Agreements.

…

2. DEVELOPMENT AND FUNDING

[Cannock] and the [LLP] shall comply with their respective obligations in and accept the terms of:

(a) Schedule 1 (Development)

(b) Schedule 2 (Funding)

…

SCHEDULE 1

Development Obligations

LICENCE

1.1 This agreement shall not operate or be deemed to operate as a demise of the Site of any part of it but the [LLP] and/or the Operating Company grant licence to [OVL], the Consultants, the Contractor and its and their respective employees and agents and Sub-contractors to enter upon and occupy the Site as from the date of this agreement for the sole purpose of carrying out the Works and [OVL's] obligations under this agreement.

1.2 In consideration of the licence granted at paragraph 1.1 and subject to paragraph 2 of Schedule 2 [OVL] shall pay the Licence Fee Amount on the date hereof to be utilised in payment of a quarterly licence fee equal to each quarters interest charged to the [LLP] on the finance obtained from the [Co-op] to fund part of the Development Sum, incurred from and including the date hereof until and including the date that the hotel at the site opens for trade as an operational hotel and any

shortfall shall be paid by [OVL] and/or be paid out of the Costs Overrun Account.

…

4 DEVELOPER'S AGREEMENT

4.1 The Developer agrees that it:

(a) has used and will continue to use all reasonable skill and care to be expected of a competent and experienced developer in the carrying out of the Works and generally in the performance of its duties under this agreement and its duties as employer under the Building Contract and the FF&E Contract:

(b) will comply with the conditions, obligations and covenants imposed on the Syndicate pursuant to its title obligations and upon notice being received in respect of any breach (so far as the same relates to the Developers obligations in this agreement or any payments due thereunder) to forthwith make good any such breach and indemnify the Syndicate against any expenses, costs, losses and claims.

(c) will discharge its obligations and will diligently take all steps necessary to procure the due performance and obligations and duties of the Contractor under the Building Contract and the FF&E Contract; and

(d) will take all reasonable remedial steps available to the Developer under the Building Contract and the FF&E Contract.

5 BUILDING CONTRACT AND WARRANTIES

…

5.3 [OVL] shall ensure that:

(a) within 10 working days of completion of the Building Contract and in any event prior to the drawdown of any funds from the Construction Account and in any event prior to Practical Completion [OVL] enters into and delivers a collateral warranty deed to the [LLP] and a separate warranty to the [Co-op] in the form of the drafts annexed at Annexure 1;

(b) within 10 working days prior to Practical Completion and in any event prior to drawdown of any funds from the Construction Account the Consultants (save the CDM Co-ordinator) each enter into and deliver a collateral warranty deed to the [LLP] and a separate warranty to the [Co-op] in the forms of the drafts annexed at Annexure 2;

(c) the Subcontractors each enter into and deliver a collateral warranty deed to the [LLP] and a separate warranty to the [Co-op] in the forms of the drafts annexed at Annexure 7 …

(d) the Building Survey Reports are re-addressed to the [LLP] and the Operating Company and the [Co-op] respectively (or suitable reliance letters provided) on or before the date hereof.

(e) all guarantees and warranties in respect of fixtures, fittings and equipment are assigned, addressed and delivered to the [LLP] in accordance with the terms of the FF&E Contract.

…

6 DEVELOPER'S OBLIGATIONS

6.1 Subject to the provisions of this agreement and in consideration of the [LLP's] agreement to pay the sums referred to in Schedule 2 [OVL] shall:

(a) before beginning the Works:

(i) prepare such Additional Drawings as need to be prepared;

(ii) do whatever is lawfully required of a "client" as set out in the CDM Regulations;

(iii) give all notices required by statute and/or regulations which are lawfully required in connection with the Works and supply all drawings and plans required in connection with any such notice and pay any fees or charged lawfully required to be paid under any statute and/or regulations;

(iv) take such steps as may be necessary and/or reasonably required by the [LLP] and the Operating Company to prevent unauthorised persons from being admitted to the Site;

(v) insure or arrange the insurance of the Site against third party liability from the date hereof until the commencement of the Building Contract;

(b) at its own expense with all convenient speed and due diligence [OVL] shall to the reasonable satisfaction of the [LLP] and the Operating Company in a good workmanlike manner and in accordance with good building practice and all relevant British Standards and Codes of Practice and any manufacturers instructions and free from defects ensure the Works are carried out and completed using new and good quality materials of their several kinds in accordance with the Approved Plans and the Planning Permission and any Third Party Agreement;

(c) [OVL] shall ensure that the Works are commenced as soon as reasonably practicable and in any event by 1 May 2012 and shall use reasonable endeavours to procure the Works are practically completed by the Estimated Completion Date and best endeavours to ensure that the Works are practically completed by the Long Stop date;

(d) carry out the Works to the reasonable satisfaction of the [LLP's] Surveyor;

(e) consult with and supply the [LLP's] Surveyor with such information as they may reasonably require to perform efficiently their duties under this agreement;

(f) on Practical Completion supply to the [LLP] two complete sets of as-built drawings for the Development and two copies of any maintenance information for the mechanical, electrical and other installations and services to the Development and the Site (in completed readable form and hard copy);

(g) as soon as they become available to [OVL] supply the [LLP's] Surveyor with one copy in every case of all the relevant copy documents and information specified in Schedule 3;

(h) generally perform and observe all the terms and conditions imposed on [OVL] in relation to the Works or under any Third Party Agreements;

(i) carry out the Additional Works (if any) in a good and workmanlike manner with all due diligence and expedition in accordance with such Consents as are relevant and any Third Party Agreements and ensure that they are Practically Completed by Practical Completion.

…

10 DEVELOPER'S LIABILITY FOLLOWING PRACTICAL COMPLETION

…

10.3 Provided [OVL] has complied with clause 5.3 of this Schedule following the issue of the Certificate of Completion of Making Good Defects in relation to the Works [OVL] will have no liability whatsoever to the [LLP] and the Operating Company under the agreement in connection with such Works and will be deemed to have performed to the full and final satisfaction of the [LLP] and the Operating Company all of its obligations under this agreement of such Works.

…

SCHEDULE 2

Funding Provisions

1. In consideration of the obligations entered into under this agreement by [OVL] the [LLP] shall pay to [OVL] the Development Sum on the date hereof.

2. Immediately on the date hereof the [LLP] shall pay the Licence Fee Amount into a deposit account to be drawn down in accordance with the terms of a Licence Deposit Deed entered into between [OVL] and the [LLP].

B. The Deed of Rectification

On 13 July 2012 the LLP, the Operating Company and OVL entered into a deed of rectification (the "Deed of Rectification")" The Introduction to this Deed explains that an error was identified in the description of "Development Sum" and "Works" in the Development Agreement which:

> "A. … should not and did not include the cost of supplying and installing the FF&E for which a separate payment, over and above the Development Sum was made.
>
> B. The FF&E sum was paid in addition to the Development Sum by the [LLP] to [OVL] and such sums were invoiced to and paid by the [LLP] on completion. The parties have understood and intended (and funds were paid accordingly) that the FF&E sum was payable in addition to the Development Sum.
>
> C. The Information Memorandum which recorded the terms of the transaction prior to completion of the Development Agreement set out that the FF&E Sum was payable in addition to the Development Sum. The Development Agreement did not reflect the agreed position and did not reflect the payments made on completion.

Clause 2 of the Deed of Rectification under the heading, "Development Sum, Works and FF&E Sum" confirms the parties' agreement to rectify the Development Agreement by amending the definition of the "Development Sum" and "Works" as set out in the Deed of Rectification and also that a definition of "FF&E Sum", which, as the Deed of Rectification states, "was accidently omitted from the [Development] Agreement", be included and that the Development Agreement should be construed in accordance with the Deed of Rectification. Clause 2.2 provides:

> "The [LLP] and [OVL] agree and confirm that there should have been a payment obligation at Schedule 2 of the [Development] Agreement at paragraph 3 to provide that the [LLP] was (and did) pay the FF&E Sum on the date of the [Development] Agreement."

C. The Intercreditor Deed

Also on 25 March 2011, OVL, the LLP and the Co-op entered into the Intercreditor Deed**.** The Deed incorporates by reference various definitions from the Co-op Loan Agreement[29], as follows:

> "Capital Account" means the account nominated by the Bank into which the Capital Amount will be deposited in accordance with the Developer inter-creditor Deed, such account to be charged to the Bank in accordance with Clause 15(2)(a)(ii)
>
> "Capital Amount" means the amount of £2,000,000
>
> "Construction Account" means the account nominated by the Bank into which the Construction Amount will be deposited in accordance

[29] Intercreditor Deed Clause 1.4.

with the Developer inter-creditor Deed, such account to be charged to the Bank in accordance with Clause 15(2)(a)(i)

"Construction Amount" means the amount of £5,721,914

"Construction Cost Overruns Account" means the account nominated by the Bank into which the Cost Overrun Amount will be deposited in accordance with the Developer inter-creditor Deed, such account to be charged to the Bank in accordance with Clause 15(2)(a)(iv)

"Cost Overrun Amount" means the amount of £250,000

"FF&E" means fixtures, fittings and equipment

"FF&E Account" means the account nominated by the Bank into which the FF&E Amount will be deposited in accordance with the Developer inter-creditor Deed, such account to be charged to the Bank in accordance with Clause 15(2)(a)(v)

"FF&E Amount" means the amount of £685,000

"Interest Account" means the account nominated by the Bank into which the Interest Amount will be deposited in accordance with the Developer inter-creditor Deed, such account to be charged in accordance with Clause 15(2)(a)(iii)

"Interest Amount" means the amount of £350,000

"Working Capital Account" means the account nominated by the Bank into which the Working Capital Amount will be deposited in accordance with the Developer inter-creditor Deed, such account to be charged to the Bank in accordance with Clause 15.3(a)(iv)

"Working Capital Amount" means the amount of £250,000

The Intercreditor Deed is described on the title page as "Intercreditor Deed relating to the liabilities of OVL to London Luton BPRA and the Bank". There are no recitals. The relevant provisions are as follows:

1. INTERPRETATION

"Liabilities" means all present and future sums, liabilities and obligations payable or owing by OVL (whether actual or contingent, jointly or severally or otherwise howsoever)

"London Luton BPRA Liabilities" means all Liabilities arising under or in connection with the Development Agreement to [the LLP] and all other liabilities now or hereafter due, owing or incurred to [the LLP] in any manner whatsoever

…

2. PURPOSE OF THIS DEED

2.1 Regulation of claims

The Bank and [the LLP] agree to regulate their claims in respect of the Liabilities as to subordination and priority in the manner set out in this Deed.

2.2 OVL's acknowledgement

OVL enters into this Deed for the purpose of acknowledging and agreeing the arrangements between the Bank and [the LLP] and, save for those in Clause 16 (OVL Accounts) none of the undertakings given in this Deed are given to OVL nor shall be enforceable by it.

2.3 Consents

The Bank consents to the creation and registration of the account charges referred to above in favour of [the LLP]. [The LLP] consents to the creation and registration of the Bank Security Documents.

5. DOCUMENTATION

This Deed, the Development Agreement and the London Luton BPRA Security Documents form the entire agreement as to the London Luton BPRA Liabilities. If there is any inconsistency between the terms of this Deed and the terms on which the London Luton BPRA Liabilities were incurred by OVL, the terms of this Deed shall prevail. If there are any other terms relating to the London Luton BPRA Liabilities existing at the date hereof and not comprised in this Deed, the Development Agreement or the London Luton BPRA Security Documents such terms shall be of no further force and effect…

13. PRESERVATION OF LIABILITIES

The London Luton BPRA Liabilities shall remain owing or due and payable in accordance with their terms and interest, default interest and indemnity payments will accrue on missed payments accordingly. No delay in exercising any rights or remedies under the Development Agreement or London Luton Hotel BPRA Security Documents by reason of any term of this Deed postponing, restricting or preventing such exercise shall operate as a permanent waiver of any of those rights and remedies as between OVL and [the LLP].

16. ACCOUNTS

16.5 OVL/London Luton BPRA Directions

Each of [OVL] and [the LLP] directs that the balance of the Subscribers Account at the date of this Deed be utilised as follows:-

16.5.1 £2,850,000 (two million eight hundred and fifty thousand pounds) will be utilised to assist with the purchase of the Property; and

16.5.2 simultaneously therewith the balance of the Subscribers Account shall be transferred or used as follows:-

(a) the Stamp Duty Amount shall be used to pay SDLT in respect of the Property;

(b) the Construction Amount shall be transferred to the Construction Account;

(c) the Capital Amount shall be transferred to the Capital Account;

(d) the Interest Amount shall be transferred to the Interest Account;

(e) the Cost Overrun Amount shall be transferred to the Construction Cost Overrun Account;

(f) the Bank Fees Amount shall be used by the Bank to pay its fees and the fees of its professional advisers;

(g) the FF&E Amount shall be transferred to the FF&E Account;

(h) the Working Capital Amount shall be paid to the Working Capital Account; and

(i) the remaining balance shall be transferred to [OVL] or as [OVL] shall direct in and towards the discharge of the fees and other expenses detailed in Schedule 1 (Payments).

16.6 Payments from the Construction Account

[OVL] shall only make withdrawals of amounts standing to the credit of the Construction Account for payment to the Contractor during the Development Period and for payment of the VAT Bridge.

…

16.9 Interest Account

[OVL] may only withdraw amount relating to the credit of the Interest Account to transfer sufficient amount to permit [the LLP] to comply with payment options under clauses 4 (Interest) and 7 (Payments) of the Facility Agreement.

…

Schedule 1

Payments

Sponsors and IFA Fees

Shakespeare Putsman Fees

Hammonds Fees

Franchise Fees[30]

Freeholders Legals and costs

Pre contract professional fees and Reports

Project Management

Bank Monitoring fees

Valuation fee including TRI [TRI Hospitality Consulting]

Title insurance

Section 106 Payments

Planning Consultant fees

[30] The extract from Schedule 1 set out at [88] of the Decision omits Franchise Fees. This is clearly a typographical error.