[2015] UKUT 0405 TCC

Appeal number: FTC/132/2013
FTC/102/2014

VALUE ADDED TAX - exemption - sports services - partnership transferred golf club business to non-profit making companies and leased golf course to companies for turnover rent - abuse of law - jurisdiction of Upper Tribunal in abuse of law appeals - burden of proof in abuse of law cases - whether arrangements an abuse of law - yes - appeal dismissed
PROCEDURE - application for permission to rely on new ground of appeal not argued in FTT - application refused
COSTS - Sheldon practice - whether case fell within exceptions to practice - whether HMRC entitled to add to list of exceptions - whether FTT wrong to reject Appellants' criticisms of Respondents' conduct of case when considering costs - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JULIAN MASSEY AND BERYL MASSEY
T/A HILDEN PARK PARTNERSHIP

First Appellants

HILDEN PARK LLP

Second Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: The Hon Mrs Justice Rose DBE
Chamber President
Judge Greg Sinfield

Sitting in public in London on 27 - 29 April 2015

Keith Gordon and Ximena Montes Manzano, counsel, instructed by Davies Mayers Tax Advisers LLP for the Appellants

Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and summary

1. The First Appellants ('the Partnership') owned and operated a golf club at Hilden Park golf course ('Hilden Park') in Kent. Supplies of services closely linked to golf by golf clubs that are privately owned and run as a business for profit ('proprietary golf clubs') to persons taking part in the sport are chargeable to VAT at the standard rate. The Partnership charged and accounted for VAT on supplies of the right to play golf at Hilden Park. In 2001, the Partnership entered into arrangements with the aim of converting Hilden Park from a proprietary club to one owned by a 'not-for-profit' organisation. Supplies by non-profit making bodies of services closely linked to sport are exempt under Group 10 of Schedule 9 to the Value Added Tax Act 1994 ('VATA94'). The Partnership transferred the golf club business to two companies ('the Companies') limited by guarantee and prohibited by their articles from distributing profits. The Partnership retained the golf course and club premises, which it let to the Companies. The Companies paid rent to the Partnership and, subsequently, the Second Appellant ('the LLP'), which succeeded the Partnership as landlord. The Appellants considered that they made exempt supplies of land so that no VAT was charged or accounted for on the rent and the Companies considered that they made exempt supplies of sports services so that no VAT was accounted for on the supplies of golf services to members and guests at the club.

2. HMRC considered that that the arrangements were an attempt by the Appellants to avoid liability for VAT on supplies of sporting services which would otherwise have attracted VAT and that they were an abusive practice within the meaning of that concept in EU law. The principle of abuse of law, if it applied, meant that the arrangements must be redefined so as to re-establish the situation that would have existed if there had been no abuse. Between 2004 and 2008, the Respondents ('HMRC') assessed the Appellants for VAT on supplies of sports services. The Appellants appealed against the assessments to the First-tier Tribunal ('FTT').

3. In a decision released on 16 July 2013, [2013] UKFTT 391 (TC), ('the Substantive Decision'), the FTT (Judge Mosedale) held that the arrangements were objectively intended to and, in practice, did realise a tax advantage contrary to the purpose of the VAT Directives. They were, therefore, an abuse of law and fell to be redefined. The FTT redefined the transactions so that the taxable supplies of sports services made by the Companies were made by the Partnership and, later, the LLP. The Appellants now appeal against the Substantive Decision on grounds that are described more fully below. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Substantive Decision.

4. In a further decision, released on 20 January 2014, ('the Costs Decision'), Judge Mosedale directed that the Appellants pay HMRC's costs of the appeals on the standard basis to be assessed by a Costs Judge of the Senior Courts Costs Office if not agreed. The Appellants also appeal against the Costs Decision. We discuss the appeal against the Costs Decision at the end of this decision.

5. For the reasons set out below, we have decided that the Appellants' appeals against the Substantive Decision and the Costs Decision are dismissed.

Background

6. The Appellants accepted the facts recorded in [40] - [48] of the Decision and summarised in paragraphs 7 to 12 below as uncontroversial. Those facts and the other facts found by the FTT, some of which are disputed by the Appellants, may be summarised as follows.

7. In the early 1990s, Mr Julian Massey purchased a green field site near Tonbridge, Kent with a view to developing it as a golf course. He entered into a partnership with a company, Borg Developments Limited, which later became the Partnership. Mr Massey transferred an equitable interest in the land to the Partnership. The Partnership developed and operated the golf course. The development included a golf shop and café, which were operated by the Partnership, and a health suite, which was let to a third party company. Hilden Park, as operated by the Partnership, was a proprietary golf club and, as such, the Partnership was liable to charge and account for VAT on its supplies, eg the right to play in return for membership subscriptions and green fees. It also made supplies subject to VAT in relation to the shop and café.

8. In 2001, having taken advice from Davies Mayers LLP, the Partnership entered into arrangements with the aim of converting Hilden Park from a proprietary club to one owned and operated by a non-profit making body. Supplies of services closely linked to sport by non-profit-making bodies to persons taking part in the sport are exempt under Group 10 of Schedule 9 to the VATA94.

9. Under the new arrangements, the Partnership transferred its business of allowing people to use the golf course, driving range and health club to the Companies in return for a payment of £200 in each case. The Companies were limited by guarantee and prohibited by their articles from distributing any profits. The Partnership also let the golf course, driving range, changing rooms and health club to the Companies. The directors of the Companies were unpaid and had paid employment or self-employment elsewhere. One of the original directors was Mr Leonard Kay who was a witness for the Appellants in the appeal before the FTT. Another witness was Mrs Janet Parfett, a self-employed bookkeeper who worked for the Companies and, from February 2007, was company secretary and director of the Companies.

10. The Partnership considered that, as a result of the new arrangements, it had ceased to be the proprietor of Hilden Park and the supplies of the right to play golf were made by the Companies. The Partnership considered that the supplies were exempt from VAT because the Companies were non-profit making bodies.

11. Throughout the relevant period, Leisure Management, a partnership between Mr Massey and his mother, provided services to the Companies, such as running the reception, bar and café, managing the businesses, operating the common areas, leasing of necessary equipment and collecting green fees, in return for a consideration.

12. On 1 June 2004, Mr Massey purchased Borg Developments Limited's share in the Partnership and his mother, Mrs Beryl Massey, became a partner. On 1 June 2005, the Partnership was converted into a limited liability partnership, the LLP.

13. In addition to those facts, which were not disputed, the FTT also found that the golf course premises (excluding common areas, golf shop and café) were let to the Companies under a tenancy at will (later a lease for seven years) at the higher of

(1) an 'Initial Rent' of £364,250; or

(2) 50% of the turnover of the companies.

The landlord, ie the Partnership then the LLP, was given a right to terminate the lease on one month's notice. By agreement, the Companies had no security of tenure.

14. The transfers of the businesses to the Companies included a condition that the Partnership was entitled to have the business and goodwill re-transferred to it if the Companies' occupation of the site were to cease. The FTT found, at [64], that the break clause in the lease meant that the Partnership (and later the LLP) could effect a re-transfer on one month's notice.

15. The FTT also found that the agreements between Leisure Management and the Companies to provide various services in return for set fees allowed Leisure Management to vary those fees 'reasonably' annually on one month's notice. The agreements also allowed Leisure Management to terminate the agreements on one month's notice. The Companies had to give 12 months' notice to terminate the agreements.

16. The FTT found that terms of the various agreements were not the subject of negotiation but were merely accepted by the Companies. The FTT concluded that the agreements were very one-sided and were not arm's length.

17. The FTT found that, notwithstanding the new arrangements, Mr Massey remained in control and managed or controlled the management of Hilden Park at all relevant times. The FTT found that Mr Massey chose the directors of the Companies who were all friends or acquaintances of Mr Massey with whom he felt 'comfortable'. The FTT concluded that the directors showed no real independence and were, in practical terms, 'ciphers'.

18. In relation to the tenancy at will and the lease, the FTT found that the rents stipulated in the lease as payable by the Companies were excessively high and, in practice, were never paid in full. Instead, Mrs Parfett simply calculated what the Companies could afford to pay and invoiced them only that amount. The FTT found that the rent was considerably higher than a commercial rent and was, in fact, more than the Companies could afford. This led the FTT to conclude that the purpose of the rent was to strip the profits out of the Companies.

19. The FTT concluded that the arrangements were artificial in that, objectively speaking, they appeared to be intended to create a picture of fully autonomous non-profit making companies running the golf club and health club when the reality was that the Partnership, later the LLP, and Mr Massey remained in control and in a position to extract any profit, including the VAT saving, from the Companies.

20. On 9 August 2004, HMRC issued a decision that the Partnership was liable to account for VAT on supplies of services ostensibly provided by the Companies to persons playing golf and using the facilities at Hilden Park. The decision was followed by assessments for VAT (and interest) that HMRC considered to be payable by the Partnership as follows:

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

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

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

21. HMRC also issued assessments for VAT in relation to the LLP as follows:

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

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

22. In July 2006, the decision of the VAT and Duties Tribunal in *South Herefordshire Golf Club v HMRC* [2006] UKVAT V19653 was released. That decision found that a purported non-profit making company was not non-profit making. Mr Massey attended a meeting at Davies Mayers LLP, following which it was decided that the Companies should cease trading. The Companies transferred their trade to new companies ('Newcos') in August 2007. In September 2007, the Companies went into voluntary liquidation. HMRC assessed the Newcos for VAT in relation to the period after August 2007 but those assessments were stayed behind the Appellants' appeals. The arrangements with the Newcos ceased in April 2010 when the LLP let the entire site, apart from the car park, to a third party commercial operator.

Legislation

23. The assessments against which the Partnership appeals relate to a time when the VAT legislation of the United Kingdom was derived from the provisions of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of Member States relating to turnover taxes - common system of value added tax: uniform basis of assessment, 77/388/EEC ('the Sixth VAT Directive') (OJ L145 13.6.1977, p.1). With effect from 1 January 2007, the relevant directive was Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the Principal VAT Directive') (OJ L347 11.12.2006 p. 1). The assessments appealed by the LLP relate to some VAT accounting periods when the Sixth VAT Directive was in force and others when the Principal VAT Directive applied. As there is no material difference between the relevant provisions, we have only set out the provisions of the Principal VAT Directive below. Where it is not necessary to distinguish between the two directives, we use the term 'VAT Directive' which refers to the directive in force at the relevant time.

24. Article 132 of the Principal VAT Directive exempts certain activities in the public interest. Article 132(1)(m) exempts:

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

25. Article 133 of the Principal VAT Directive allows Member States to make the exemption of supplies of, among others, services linked to sport by certain bodies subject to conditions including the following:

> "(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;"

26. Article 135(1)(l) of the Principal VAT Directive exempts the leasing or letting of immovable property.

27. It should also be noted that Article 131 of the Principal VAT Directive provides:

> "The exemptions provided for in Chapters 2 to 9 [which include Article 132(1)(m)] shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

28. The UK has implemented the provisions of the Sixth VAT Directive and the Principal VAT Directive in the VATA94 and regulations made under it. The exemptions provided for in the VAT Directive are implemented in the United Kingdom by section 31 of and Schedule 9 to the VATA94. Section 31(1) provides that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 to the Act.

29. Item 3 of Group 10 of Schedule 9 to the VATA94 exempts supplies of services by an eligible body to an individual where those services are closely linked with and essential to sport in which an individual is taking part. If the eligible body operates a membership scheme, supplies of such services to an individual who is not a member are excluded from the exemption. The definition of an 'eligible body' is contained in Notes (2A) and (2B) to Group 10, which provide as follows:

> "(2A) Subject to Notes (2C) and (3), in this Group 'eligible body' means a non-profit making body which -
>
> (a) is precluded from distributing any profit it makes, or is allowed to distribute any such profit by means only of distributions to a non-profit making body;
>
> (b) applies in accordance with Note (2B) any profits it makes from supplies of a description within Item 2 or 3; and
>
> (c) is not subject to commercial influence.
>
> (2B) For the purposes of Note (2A)(b) the application of profits made by any body from supplies of a description within Item 2 or 3 is in accordance with this Note only if those profits are applied for one or more of the following purposes, namely -
>
> (a) the continuance or improvement of any facilities made available in or in connection with the making of the supplies of those descriptions made by that body;
>
> (b) the purposes of a non-profit making body."

30. The exemption for supplies of land is implemented in the United Kingdom by item 1 of group 1 of Schedule 9 to the VATA94 which exempts the grant of any interest in or right over land or of any licence to occupy land.

The *Halifax* principle

31. The Court of Justice of the European Union ('the ECJ') first applied the principle of abuse of law in the context of VAT in Case C-255/02 *Halifax plc and Others v HMCE* [2006] STC 919 ('*Halifax*'). For that reason, the principle is often referred to as the *Halifax* principle in VAT cases. We start by considering the meaning of the *Halifax* principle and how it has been applied by the courts and then we consider its application to the facts of this case.

32. The facts of *Halifax* are very different from those of this case and it is not necessary to set them out in detail. It is sufficient to state that Halifax wished to construct four call centres. As a bank that made exempt supplies of financial services, Halifax could recover only a small proportion of the VAT that it paid on the building works. Halifax entered into arrangements involving transactions with a number of wholly-owned subsidiaries that were intended to enable it to recover all the VAT incurred on the cost of constructing the call centres. HMRC refused various claims for the repayment of VAT. One of HMRC's arguments in support of the refusal to pay the amounts claimed was that transactions entered into solely for the purposes of VAT avoidance were an 'abuse of rights' and should be disregarded for VAT purposes. On appeal, the VAT and Duties Tribunal referred some questions to the ECJ for a preliminary ruling.

33. In its judgment, the ECJ observed, at paragraph 71 of the judgment, that preventing possible tax evasion, avoidance and abuse was an objective recognised and encouraged by the Sixth VAT Directive. The ECJ noted, at paragraph 73, that taxable persons may choose to structure their business so as to limit their tax liability. The Sixth VAT Directive did not require a taxable person to choose the structure that involves paying the highest amount of VAT. The ECJ then set out the two elements necessary for a finding that arrangements constitute an abusive practice in relation to VAT:

> "74 In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
>
> 75 Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages."

34. The ECJ gave further guidance at paragraphs 80 and 81 of its judgment:

> "80 To allow taxable persons to deduct all input VAT even though, in the context of their normal commercial operations, no transactions conforming with the deduction rules of the Sixth Directive or of the national legislation transposing it would have enabled them to deduct such VAT, or would have allowed them to deduct only a part, would be contrary to the principle of fiscal neutrality and, therefore, contrary to the purpose of those rules.

> 81 As regards the second element, whereby the transactions concerned must essentially seek to obtain a tax advantage, it must be borne in mind that it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden"

35. The ECJ summarised the position in relation to abusive practice at paragraph 86:

> "86. For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage."

36. In *Halifax*, the ECJ thus held that the principle of abuse of law applies in the context of VAT. The principle applies where, first, transactions, even if formally falling within the provisions conferring a tax advantage, result in the accrual of a tax advantage which is contrary to the purpose of the VAT Directives and the national legislation transposing them; and, secondly, the essential aim of the transactions, established by reference to objective factors, is to obtain a tax advantage. If the transactions may have some explanation other than obtaining a tax advantage then the principle does not apply to prohibit that result.

37. The *Halifax* principle was considered again by the ECJ in Case C-425/06 *Ministero dell'Economia e delle Finanze v Part Service Srl* [2008] ECR I-897, [2008] STC 3132 ('*Part Service*'). In *Part Service*, the ECJ held, in paragraph 45 of the judgment, that it is not necessary to find that the sole aim of the transactions concerned is to obtain a tax advantage in order to find that an abusive practice exists. There can be a finding of an abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue. In relation to the second part of the first *Halifax* criterion, the ECJ in *Part Service* held that transactions could be contrary to the objective that tax should be charged on all the consideration received from the customer. At paragraph 62, the ECJ stated:

> "As regards the second criterion [ie that the essential aim of the transactions is to obtain a tax advantage], the national court, in the assessment which it must carry out, may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved (*Halifax and Others*, paragraph 81), those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations."

38. The ability of a taxable person to choose to structure transactions so as to reduce his or her VAT liability, as noted by the ECJ in paragraph 73 of *Halifax*, was referred to in another reference from the United Kingdom on the subject of abuse of law, namely Case C-103/09 *HMRC v Weald Leasing Ltd* [2010] ECR I-13589 ('*Weald Leasing*'). In that case, an insurance group leased assets for use in its business from a subsidiary,

Weald Leasing, and an unconnected third party. The effect of the lease arrangement was to defer irrecoverable VAT that would have been incurred by the insurance group if it had purchased the assets. The lease rentals were set below open market value thus extending the period of deferral. The reason for inserting the third party into the structure was to prevent HMRC from being able to direct, under paragraph 1 of Schedule 6 to the VATA94, that the value of the supplies under the leases was the open market value. The ECJ held, at paragraph 33, that leasing transactions came within the scope of the Sixth VAT Directive and the tax advantage that arose did not in itself constitute a tax advantage contrary to the purpose of those provisions. However, it would be for the national court to determine whether the contractual terms of the leases, particularly the level of rentals, corresponded to arm's length terms and that the involvement of the third party was not such as to preclude the application of the provisions of Schedule 6 to the VATA94. The ECJ also held that a finding that there is an abusive practice is to be inferred, not from the nature of the commercial operations usually engaged in by the person who engaged in the disputed transactions, but from the object and effects of those transactions, as well as their purpose.

39. On the same day as it released its decision in *Weald Leasing*, the ECJ gave judgment in Case C-277/09 *HMRC v RBS Deutschland Holdings GmbH* [2010] ECR I-13805. The case concerned the taxpayer's right to deduct input tax in relation to a leasing transaction where no output tax had been accounted for as a result of differences in the implementation of the VAT place of supply rules by the UK and Germany. The ECJ confirmed that the right to deduct input tax was not dependent on there being a payment of output tax and went on to consider whether the deduction was precluded on the grounds that there was an abuse of law. The ECJ held that it was not so precluded, stating at [52] - [54]:

> "52. In those circumstances, the fact that services were supplied to a company established in one member state by a company established in another member state, and that the terms of the transactions carried out were chosen on the basis of factors specific to the economic operators concerned, cannot be regarded as constituting an abuse of rights. RBSD in fact provided the services at issue in the course of a genuine economic activity.
>
> 53. It is important to add that taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens.
>
> 54. The court has held that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the neutral system of VAT (see *Customs and Excise Comrs v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, [2001] ECR I-7257, para 33). In that connection, the court has made clear that, where it is possible for the taxable person to choose from among a number of transactions, he may choose to structure his business in such a way as to limit his tax liability (see *Halifax* (para 73))."

40. The ECJ's jurisprudence on the abuse of law principle was reviewed recently by the United Kingdom Supreme Court in *Pendragon Plc v HMRC* [2015] UKSC 37 ('*Pendragon*'). The Supreme Court's decision was issued on 10 June 2015 while we were preparing our decision. In response to our invitation, the Appellants made written

supplementary submissions on the relevance of the decision to this appeal. HMRC did not wish to make any further submissions.

41. In *Pendragon*, Lord Sumption, with whom the other Justices of the Supreme Court agreed, set out the two tests for determining whether an abusive practice exists as formulated by the ECJ in paragraphs 74 and 75 of *Halifax*. He observed at [10] of the judgment that the application of the principle of abuse of law gave rise to two difficulties when applied to tax avoidance schemes. The first was the difficulty of determining what are 'normal commercial operations', which *Weald Leasing* showed meant operations that are normal in the context of the relevant line of business, not necessarily normal for the particular taxpayer. Lord Sumption considered that this was not a separate test but a factor in determining whether the tax advantage that accrued as a result of the transactions was contrary to the purpose of the VAT Directive and legislation implementing it. The second difficulty was that of concurrent purposes where, as will usually be the case, the arrangements have some commercial purpose as well as a tax avoidance one. Lord Sumption held that the potential for abuse consists in the method chosen to achieve the commercial purpose.

42. In relation to the first limb of the *Halifax* test, namely whether the tax advantage was contrary to the purpose of the VAT Directive and legislation implementing it, Lord Sumption held, at [27], that general principles of EU law, such as abuse of law, apply to national VAT legislation which has its origin in a member state's obligation to implement a Directive and also where it is a product of a domestic legislative choice permitted under the Directive or EU law. He concluded that the scheme in *Pendragon* was contrary to the EU policy underlying the margin scheme for cars, and that the first *Halifax* test was satisfied.

43. Lord Sumption described the way that a tribunal or court should approach the second part of the *Halifax* test in [12] and [13] as follows:

> "12. … Identifying the 'essential aim' in a case of concurrent fiscal and commercial purposes depends on an objective analysis of the method used to achieve the commercial purpose. … The question is therefore whether the commercial objective is enough to explain the particular features of the contractual arrangements which produce the tax advantage.
>
> 13. ... Is the relevant 'aim' that of the scheme as a whole or of its component parts? The answer is that it may be either or both. Because the principle of abuse of law is, in this context, directed mainly to the method by which a commercial purpose is achieved, it is necessary to analyse each transaction by which it is achieved. Because the purpose of each step will generally be to contribute to the working of the whole scheme, the effect of the whole scheme has also to be considered."

44. Lord Sumption also described the nature of the evidence which may be relevant or admissible to prove the essential aim of the transaction as follows at [31]:

> "Since the purpose of a contract is not necessarily the same as its meaning, the evidence which is admissible to prove it cannot be limited to what would be admissible as an aid to construction. It may in an appropriate case include evidence not just of the background knowledge available to the parties, but of the financial position and objective commercial requirements of the party obtaining the tax advantage, the relationship between the participants, the reasonableness of the

> consideration, the mechanics of the performance, the normal course of the relevant business and potentially other matters."

45. Lord Sumption then observed that:

> "Much of the evidence which the parties deployed before the First Tier Tribunal could go only to Pendragon's subjective intention or motive, or KPMG's assumptions about the attractions of their scheme to their client. Much of the rest was of no assistance in a case where tax planning was admitted to be part of the rationale of the scheme and transactions comprising it spoke for themselves."

46. In [33], Lord Sumption held that the scheme had two special features; each of which was essential to the tax efficacy of the scheme and neither of which had any commercial rationale other than the achievement of a tax advantage. Accordingly, he concluded that the second *Halifax* test was also satisfied and that the scheme was an abuse of law.

Appeal against the Substantive Decision

47. The Grounds of Appeal lodged by the Appellants identified 15 separate errors of law. In addition, the Appellants submitted that the FTT improperly assessed the facts, for example by misreading the Companies' financial accounts and unfairly criticising and then rejecting the evidence of the Appellants' witnesses of facts. At the hearing, the LLP applied for permission to rely on a ground of appeal, namely that the assessments issued to the LLP were out of time, that had not been argued before the FTT.

48. We will consider first the questions of law raised by the appeal. We found the grounds of appeal rather diffuse and we note that the skeleton argument recognises that the different grounds overlap or attempt to make broadly the same point in a slightly different way. We consider below those points which appeared to us to raise identifiable legal points which are capable of determination.

Where does the burden of proof lie in abuse cases?

49. Before the FTT, Mr Gordon, who appeared for the Appellants, submitted that HMRC had the burden of proof and should open the case. He made this submission because he intended to make a submission, at the close of HMRC's opening, that, as HMRC had indicated that they did not intend to call any evidence, the Appellants had no case to answer. The FTT decided that the Appellants had the burden of proof and should open the case. Although it found that the burden of proof lay with the Appellants, the FTT stated, at [39] and [199], that none of its findings of fact depended on who had the burden of proof and the outcome of the appeal would have been the same regardless of which of HMRC or the Appellants had the burden of proof.

50. Mr Jones contended that the starting point was that the onus was on the taxpayer to show that the assessment was wrong. He said that there were two reasons for the rule. The first was that it followed from section 73(9) VATA94 which provides:

> "Where an amount has been assessed and notified to any person … it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

51. The second reason was that the taxpayer, rather than HMRC, would ordinarily be in possession of the relevant facts and figures. Mr Jones relied on *Tynewydd Labour Working Men's Club and Institute Ltd v Customs and Excise* [1979] STC 570 in which Forbes J referred to the predecessor of section 73(9) and observed, at 580:

> "If the taxpayer wishes to have the assessment altered, he must go to the tribunal, and unless the tribunal finds the commissioners are wrong, the assessment still stands. It seems to me, in those circumstances, that any taxpayer who appeals to the tribunal takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong, because unless he proves this there is nothing on which the tribunal can find an error in the assessment. There should be no difficulty in the way of the appellant in assuming this burden. The facts and figures are known to him, and if he does not understand the commissioners' case, the rules provide for the commissioners to give a proper explanation. Neither counsel contends that there is a principle in tax law which throws the burden one way or the other."

52. The point was also accepted by the Court of Appeal in *Grunwick Processing Laboratories Ltd v Customs and Excise* [1987] STC 357, at 360:

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

53. Mr Jones acknowledged that HMRC had the burden of proof in cases where fraud was alleged. He submitted that fraud was always treated differently and that is why HMRC had the burden of proof in MTIC fraud appeals. He contended that no such exception applied to abuse cases. In any event, Mr Jones submitted that, as the FTT had stated that none of its findings of fact depended on who had the burden of proof and the outcome of the appeal would have been the same whichever party bore the burden of proof, this ground was of purely academic interest.

54. Mr Gordon submitted that the issue of burden of proof was not merely academic as the FTT's ruling that the Appellants had the burden of proof permeated and infected the Substantive Decision. Mr Gordon submitted that the FTT made findings contrary to the Appellants' case simply on the basis of not accepting the evidence of the witnesses. Mr Gordon submitted that section 73(9) VATA94 was not concerned with burden of proof but was an administrative measure concerned with enforcement of assessments. Mr Gordon relied on the comments of the Upper Tribunal in *Lower Mill Estate Ltd v HMRC* [2010] UKUT 463 (TCC), [2011] STC 636, at [137]:

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

55. Mr Jones took us through the *Lower Mill* decision at some length to support his contention that the Upper Tribunal did not mean that the burden of proving abuse was on HMRC. He submitted that when it used word "onus" the Upper Tribunal was not

referring to the burden of proving abuse as a matter of evidence but to the burden of establishing a proper comparator as a matter of argument. If, contrary to his submission, the Upper Tribunal did mean that the burden was on HMRC then he contended that the decision was per incuriam because it did not take account of the Court of Appeal's views in *Grunwick*.

56. We agree with Mr Jones' submission that the issue of burden of proof in this case is purely academic. It is clear from [39] and [199] that nothing turned on which party had the burden of proof. The Appellants had submitted that HMRC had the burden of proof because they wished to make a submission of no case to answer if, as had been indicated, HMRC did not call any witnesses. The FTT rejected the submission and the hearing proceeded in the usual way. The FTT considered all the evidence, both oral testimony and documents, and made findings of fact without the need to resort to the burden of proof in order to do so.

57. Our conclusion means that it is not necessary to consider where the burden of proof in abuse of law appeals falls but, as the matter was fully argued before us and may be relevant in future cases, we set out our views below.

58. In tax appeals, it has long been established that the taxpayer has the burden of showing that the assessment issued or decision reached by HMRC is wrong (see *T Haythornthwaite & Sons Limited v Kelly (Inspector of Taxes)* (1927) 11 TC 657 for direct tax appeals and *Tynewydd Labour Working Men's Club* for appeals relating to VAT). In cases where fraud is alleged, it is accepted that HMRC bears the burden of proof. In *Mobilx Ltd and others v HMRC* [2010] EWCA Civ 517, [2010] STC 1436 Moses LJ stated that HMRC have the burden of proof in MTIC fraud cases in the following terms:

> "[81] … It is plain that if HMRC wishes to assert that a trader's state of knowledge [of connection to fraud] was such that his purchase is outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary."

59. Fraud is not the only situation where HMRC bear the burden of proof in tax appeals. As Mr Gordon observed, HMRC have the onus of proving an allegation that a transaction is a sham: see *Hitch and others v Stone (Inspector of Taxes)* [2001] EWCA Civ 63, [2001] STC 214 per Arden LJ at [32]. It has also long been accepted that HMRC bear the burden of proving that a person is liable to a penalty for late submission of a return or late payment of tax whereas the taxpayer bears the burden of establishing that he or she has a reasonable excuse.

60. In determining who bears the burden of proof in an appeal where abuse of law is alleged, it is necessary to consider which party substantially asserts that there is or has been an abuse. As discussed above, it is the nature of an abusive arrangement that the taxpayer's appeal would succeed on the purely formal application of the legislation. The appeal will only fail if it can be shown that there is an abuse, ie the resulting tax advantage is contrary to the VAT Directives and the essential aim of the transactions is to obtain a tax advantage. If abuse were not alleged or, having been alleged, cannot be established then the appeal must be allowed. It follows that establishing that a tax advantage is contrary to the VAT Directives and the essential aim of the transactions is to obtain a tax advantage is an essential part of HMRC's case in an appeal where abuse of law is alleged. Accordingly, HMRC bear the burden of proving those matters.

61. Our view is consistent with the observation of the Upper Tribunal in *Lower Mill* that the onus is on HMRC to establish that there is an abuse. The FTT considered that the passage from *Lower Mill* gave no guidance on burden of proof because burden of proof was not an issue in that case, the Upper Tribunal appeared to have had no submissions on it and the Tribunal was dealing with something slightly different. We do not need to consider whether the FTT was correct in its view of the context in which the point arose in *Lower Mill* but we consider that the passage in the Upper Tribunal's decision correctly states the position as to who bears the burden of proof in cases of abuse of law. We do not accept that the comments of the Court of Appeal in *Grunwick* show that the Upper Tribunal in *Lower Mill* was in error. The Court of Appeal was considering an appeal against an assessment and there was no question of fraud, sham or abuse of law. Applying the general rule, the burden was clearly on the taxpayer in *Grunwick*, as the taxpayer's counsel accepted in that case.

62. Even if the FTT had accepted that HMRC had the burden of proving abuse of law, it is far from clear to us that the FTT would have required HMRC to open the case or that, if it had, a submission that the Appellants had no case to answer would have been either appropriate or successful. Under rules 5 and 15 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the FTT has wide powers to regulate the conduct of proceedings and the evidence before it. Even if the FTT had concluded that HMRC had the burden of proving that the *Halifax* principle was engaged, it could have required the Appellants to lead evidence about the transactions and the background to them. Further, in considering a submission of no case to answer, the FTT could take account of the documents before it, whether formally produced by witnesses or not, and require witnesses to give evidence about such documents. It follows that we reject this ground of appeal.

Is it necessary for the scheme to work in order for there to be an abuse?

63. The Appellants contend that it is a pre-requisite of applying the abuse of right principle that the scheme actually does work on the strict construction of the legislation. The abuse doctrine cannot apply where a scheme does not achieve its objective because its failure means that, in fact, no tax advantage accrues and the first limb of the *Halifax* test is not satisfied. The Appellants have accepted for the purposes of these proceedings, following the *South Herefordshire Golf Club* case, that the scheme did not work because the Companies were not, in fact, non-profit making entities. Mr Gordon relied on the observation of Lloyd LJ in the Court of Appeal in *Pendragon*, at [44], that:

> "The arrangements made complied with the requirements of the national legislation, just as those adopted in the present case do. If this were not so it would not be necessary to have resort to the abuse of right principle."

64. As the Appellants put it in their skeleton, the supposed tax advantage accrues to the parties to the arrangements only because the companies went into liquidation unable to pay the VAT that they owe. Mr Gordon contended that what should have happened in this case was that HMRC should have claimed the unpaid VAT from the Companies on the basis that they should have, but did not, account for VAT on their supplies to golfers. The fact that, in the present case, the Companies were insolvent and could not usefully be pursued for the money did not justify, he submitted, HMRC turning instead to the Appellants and claiming the unpaid VAT from them. The Judge therefore erred, the Appellants contend, by conflating the test for whether the Companies are non-profit

making bodies entitled to exemption with the test for whether there is an abuse of law here. On the contrary, an abuse can only arise where the taxpayers' scheme has formally succeeded in conferring a tax advantage.

65. HMRC contended that it is not an essential element in the abuse of right principle that the scheme actually works in the way the parties intended. Mr Jones relied on the decision of Roth J in *HMRC v Atrium Club Limited* [2010] EWHC 970 (Ch), [2010] STC 1493 (*'Atrium'*).

66. We agree with HMRC's submissions that the facts of this case are indistinguishable from the facts of *Atrium* and that there was an advantage accruing to the Appellants even though, in the event, the justification for the arrangements conferring that advantage – namely that the Companies were exempt from VAT – turned out not to be true. At the start of his judgment, Roth J noted that Atrium had not participated in the oral hearing because of lack of funds and he had not therefore had full adversarial argument in the case. As we had the benefit of counsel on both sides at our hearing, we will consider the issue in more detail than might otherwise be necessary.

67. The facts in *Atrium* were as follows. Atrium Club Limited ('ACL') operated a health and fitness club. ACL implemented a structure to take advantage of the sports services exemption and change supplies from standard rated to exempt. In 2000, ACL entered into arrangements referred to in the judgment as the WJB Scheme. This involved a Turnover Licence granted by ACL to a new company, AAB Sports Limited ('AAB') granting AAB a non-exclusive right to occupy the premises and carry on business of the Club in return for £2000 plus 50% of the net turnover of AAB per month. AAB did not account for VAT on its supplies to the Club's members because it initially asserted that it was eligible for exemption as a non-profit making body and ACL did not account for VAT on the rent as it relied on the exemption relating to supplies of land.

68. In 2004, HMRC challenged the scheme on two main grounds. The first was that, notwithstanding the involvement of AAB, ACL was liable to account for VAT. The second was that the arrangements were an abusive practice as described in *Halifax* and should be redefined. On appeal, the VAT and Duties Tribunal found in favour of ACL, in part because the scheme did not work as AAB was, as ACL accepted, not within the sports services exemption and was accordingly liable to account for VAT. The tribunal decided that because AAB's supplies were, contrary to the plans and expectations of the parties, standard rated, the initial condition for the operation of the *Halifax* principle was not satisfied. HMRC appealed to the High Court solely on the ground of abuse.

69. Roth J held, at paragraph 32, that the Tribunal was correct when it stated that it was necessary to identify what tax advantage the scheme sought to achieve in order to determine whether a tax advantage resulted. However, the correct characterisation of that advantage was critical. In paragraph 33, Roth J described the scheme and its intended effects as follows:

> "When Atrium itself operated the Club and made supplies of sporting services, it accounted for VAT on the consideration for those supplies. The WJB Scheme … was designed to secure for Atrium the net proceeds of the supplies by the Club free from liability to VAT. That was to be done through establishing a new company to operate the Club that would make the supplies as a non-profit making organisation without attracting

> VAT, and pay over all the benefit derived from those supplies to Atrium by way of a licence fee under a Turnover Licence which similarly did not attract VAT. This combination of inter-related elements was essential to the scheme. And the latter element was necessary not in order to remove AAB's capacity to make a profit, since AAB could have used all the net proceeds for the development of the Club facilities without losing its non-profit making status, but so as to pass the profit over to Atrium without VAT being incurred. Accordingly, I do not accept Atrium's submission, as set out in its skeleton argument, that use of the land exemption was no part of the arrangements seeking to achieve a tax advantage."

70. At paragraph 34, Roth J held that ACL obtained a tax advantage that was contrary to the purpose of the exempting provisions in the VAT Directive and the national legislation that implemented it as follows:

> "… I consider that the scheme resulted in [ACL] achieving a real benefit. And, in my judgment, that benefit is properly to be regarded as a tax advantage since [ACL] was not liable to pay VAT on the fee under the Turnover Licence whereas AAB, although - contrary to the parties' understanding – not within the sporting exemption and thus liable to account for VAT on the Club's supplies, had by payment of that fee removed its ability to discharge such a liability. It seems to me that an arrangement which results in that situation is contrary to the purpose of the exempting provisions in the Sixth Directive."

71. We agree with that analysis and we consider that it applies in the present case. The tax advantage here is the fact that VAT was not charged and accounted for on the supplies of sports services by the Companies. The advantage was contrary to the purpose of the Directive because only supplies by non-profit making bodies are exempt and Companies were not non-profit making. The benefit of the tax advantage accrued to the Partnership and the LLP in the form of rent, which was exempt for VAT purposes, in that the amount that the Companies could afford to pay as rent was greater than it would have been if they had accounted for VAT.

72. At [216] - [217], Judge Mosedale found that the rent paid by the Companies to the Partnership and the LLP was in excess of market value and was a covert distribution of profit by the Companies to the Partnership and the LLP. At [247], Judge Mosedale listed the objective factors that she considered showed that the essential or principal aim of the transactions was to obtain a tax advantage. Those factors, or to use Lord Sumption's term in *Pendragon*, 'special features' may be summarised as follows:

(1) Mr Massey remained in control of all aspects of the Companies' business;

(2) the rent payable by the Companies was considerably more than a commercial rent;

(3) the rent payable was more than the Companies could afford to pay;

(4) the rent actually paid by the Companies was whatever they could afford; and

(5) the Partnership and the LLP accepted the lesser amount of rent paid.

73. We do not see the comment of Lloyd LJ in *Pendragon*, quoted at [63] above, as other than a statement of the facts in that case. We do not consider that Lloyd LJ was

seeking to lay down a rule that there could be no abuse where arrangements did not work as they were intended to do but nevertheless resulted in VAT not being accounted for. The fact that, following the *South Herefordshire Golf Club* case, the Appellants accepted that the arrangements did not result in the Companies being non-profit making does not alter what actually happened. As in *Atrium*, it was an inherent feature of the scheme that, because they wished to be seen as non-profit making, the Companies paid as much as they could afford to the Appellants by way of rent (covert profit) and did not accumulate any profits or surpluses thereby depriving themselves of the means to pay any liability to VAT that might (and did) arise. The fact that the scheme did not work does not, therefore, affect the tax advantage that has accrued to the Appellants.

74. Having heard full argument on the point, we agree with the conclusion in *Atrium* that the fact that the scheme does not work as the parties intended does not mean that no tax advantage accrued. Further it is not right to say that HMRC should have sought to recover the VAT from the Companies. Who is liable to pay the VAT once a scheme is found to be an abuse of law depends on the proper redefinition of the transactions following the finding of abuse. Here, the transactions were redefined so as to remove the Companies and treat the services as having been taxable supplies made directly by the Appellants to the members and guests at Hilden Park. The Appellants did not challenge that as being the correct re-definition in the event that the finding of abuse is upheld: see [266]. If that is right then there was no VAT liability on the part of the Companies and nothing to collect from them. Their insolvency does not, therefore, make any difference to the accounting position.

Relevance of the overall financial outcome of the arrangements

75. At [175] and [176], Judge Mosedale rejected the submission that no tax advantage accrued because the financial return under the arrangements was lower than has been achieved since 2010 when the golf course was subject to a commercial tenancy agreement with an arm's length third party. Mr Gordon contended that this was an error of law because, before any arrangements can be considered abusive, it is necessary for the FTT to view the arrangements in the context of the wider commercial and/or financial setting within which the taxpayer is operating. He submitted that Judge Mosedale was wrong to focus solely on the tax advantage without regard to the wider financial implications of the arrangements.

76. We do not find any error of law here. It is clear from Lord Sumption's comments at paragraph 13 of his judgment in *Pendragon*, and we respectfully agree, that it may be necessary both to analyse each transaction in a scheme individually and also to consider the effect of the scheme as a whole when identifying the essential aim of the transactions. In our view, this was the approach adopted by Judge Mosedale. She concluded, at [250], that it was objectively apparent that the sole and essential aim of the arrangements was to obtain an abusive tax advantage. She did so because she found, for reasons set out in [247] and [248], that the arrangements were artificial and inconsistent with normal commercial practice. Lord Sumption held that the scheme in *Pendragon* had two special features, each of which was essential to the tax efficacy of the scheme and neither of which had any commercial rationale other than the achievement of a tax advantage. It appears to us that the scheme in this case also had such special features, identified by Judge Mosedale, namely that the rent was not set by reference to what would be paid commercially but at a level designed to ensure that the Companies appeared to be non-profit making. The Companies thought that his enabled them to make exempt supplies while the Partnership, later the LLP, continued to control

the business of Hilden Park and benefit from the surplus generated by the Companies in the form of rent that was also exempt. In our view, Judge Mosedale was correct to conclude that the essential aim of the arrangements was to obtain a tax advantage. Accordingly, the arrangements were abusive and fell to be redefined.

77. We do not consider that any comparison between the financial return earned under the arrangements in dispute and the post-2010 arrangements was either necessary or helpful. There are many reasons why the business may have done better in later years. This is not something which the tribunal could properly investigate and we reject the suggestion that it was relevant to a consideration of the arrangements.

The reliance on the comparator with the rent under the commercial lease in 2010

78. In order to evaluate whether the essential aim of the transactions was the obtaining of a tax advantage, Judge Mosedale, at [200] - [205] compared the rent chargeable to the Companies under the terms of the tenancy at will and lease in 2001 with the terms of the lease to a third party operator in 2010. She concluded that the rent charged to the Companies was excessively high. In grounds 1(d) and (e), which can be dealt with together, the Appellants contend that Judge Mosedale was wrong to use the lease granted in 2010 as a comparator. First, the Appellants submit that although it appeared from the lease that the rent chargeable to the Companies under the 2001 lease was four times higher than that paid by the third party operator under the 2010 lease, that level of rent was never actually paid by the Companies. What was paid was more than twice the initial rent in 2010. Secondly, they argue that the terms of the leases and the scope of the land demised were different. Under the 2001 lease, the Companies took the more profitable elements of the site whereas, under the 2010 lease, the third party operator took the site, including some less profitable elements such as the café and the shop. In particular, Mr Gordon submitted that the car park, which was used by commuters as well as members, was excluded from the 2010 lease and, under the 2001 lease, the landlord bore more expenses.

79. In our view, Judge Mosedale was entitled to have regard to the 2010 lease as a comparator when considering whether the essential or principal aim of the transactions, including the 2001 lease, was to obtain a tax advantage. It was not disputed that the 2001 lease included the car park, which was let separately to another third party operator under the 2010 arrangements. Mr Massey's evidence was that the rent from the car park increased the total rent payable for the golf club and car park "up towards £200,000". It is not clear from the Decision that Judge Mosedale took account of the additional rent from the car park but, even if it is considered, the increased total rent was still significantly below the rent of some £364,000 payable under the 2001 lease. Judge Mosedale considered and rejected Mr Massey's evidence that the additional areas of the café and the shop included in the 2010 lease reduced the rentable value of the premises. She was entitled to conclude that the café and shop, which she found were not loss making, did not decrease the open market value of the 2010 lease.

Other alleged errors of law

80. Various other grounds assert other errors of law by the Judge in her reasoning. It is submitted in ground 1(f) that the Judge confused the test for whether Mr Kay had failed to comply with his duties as a director of the Companies with the test as to whether there was an abuse of right by the Appellants. There is nothing in this point. The Judge did not equate any breach of duty by Mr Kay with a finding of abuse. Rather

she correctly considered that the absence of any real negotiations over the level of rent between the Companies and the Appellants was one of several factors which demonstrated the artificiality of the arrangement concluded.

81. In ground 1(h) the Appellants complain that the Judge held that an arrangement would be abusive whenever the terms were not what would be expected in a commercial situation. We do not consider that that is a fair reading of the Decision. The Judge was well aware of the different elements of the test she had to apply and she applied them correctly.

82. We have considered each of these assertions but we do not find any such flaw in the Judge's reasoning.

The challenges to the findings of fact

General approach

83. Lord Carnwath, with whose judgment in *Pendragon* the other Justices of the Supreme Court agreed, recognised that the proper approach of the Upper Tribunal to challenges to findings of fact made by the First-tier depended on the stage at which those challenges were being considered. Appeals to the Upper Tribunal are on a point of law only. Lord Carnwath confirms that a challenge to findings of fact can only of itself amount to an error of law entitling the Upper Tribunal to intervene in the narrow circumstances described in the often-cited observations of Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14, 33, and in the context of VAT the judgments in *Procter & Gamble v HMRC* [2009] EWCA Civ 407; [2009] STC 1990. However, once an error of law has been established – whether on the application of the *Edwards v Bairstow* test or because of some other kind of error of law - it is important to recognise the power of the Upper Tribunal under section 12 of the Tribunals, Courts and Enforcement Act 2007 to re-make the decision of the FTT and, in doing so, to make appropriate findings of fact. At that stage, the Upper Tribunal is not bound by the FTT's findings of fact and can either make its own findings, if it has sufficient information to do so, or remit the case to the FTT if does not.

84. In the light of *Pendragon*, we consider that challenges to issues of pure finding of fact by the FTT can only succeed on the familiar basis set out by the House of Lords in *Edwards v Bairstow* [1956] AC 14. There Viscount Simonds said, at page 29, that a finding of fact should be set aside if it appeared that the finding had been made "without any evidence or upon a view of the facts which could not reasonably be entertained". Lord Radcliffe, at page 36, said that a finding of fact would be an error of law where the facts found were "such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal" or, in a formulation which he said he preferred, "the true and only reasonable conclusion contradicts the determination". The proper approach thus remains as described by Evans LJ, who gave the only judgment, in the Court of Appeal in *Georgiou and another (trading as Mario's Chippery) v HM Customs and Excise* [1996] STC 463 at 476:

> "... the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there

> evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

Rejection of the evidence of the main witnesses

85. In determining the essential aim of the transactions, Judge Mosedale made various findings which showed that she did not accept the evidence of one of the First Appellants, Mr Julian Massey, and a former director of one of the Companies, Mr Leonard Kay. At [51] and [55], Judge Mosedale stated that she was unable to accept Mr Massey's or Mr Kay's evidence as entirely reliable. She found that Mr Kay's evidence was often vague, off the point, repetitive and, in parts, contradictory.

86. Mr Gordon submitted that Judge Mosedale's finding that the evidence of Mr Massey and Mr Kay was unreliable was unfair and unjustified. Essentially, Mr Gordon argued that Judge Mosedale reached conclusions about the reliability of the witnesses' evidence that she was not entitled to reach, in the *Edwards v Bairstow* sense. He referred us to passages where Judge Mosedale had criticised the witnesses and sought to undermine her conclusion that the evidence was not entirely reliable. For example, at [51] and [52], Judge Mosedale did not accept Mr Massey's denial, when it was put to him in cross-examination, that the reason for converting the Partnership into the LLP was to obtain limited liability and concluded that "he was reluctant to admit his true motivation (limited liability)". Nothing turned on the reason for changing from a partnership to a LLP but, as Judge Mosedale noted, it led her to treat Mr Massey's evidence, particularly on motivation, with caution. Similarly, at [177], Judge Mosedale did not accept Mr Massey's oral evidence that he considered he was better off under the 2010 lease to the third party tenant than he was before although she noted that the point was not significant. There were other parts of Mr Massey's evidence that Judge Mosedale found unsatisfactory, eg [117]-[118] and [130]-[131].

87. In relation to Mr Kay's evidence, Mr Gordon submitted that Mr Kay was a voluntary, part-time and non-remunerated former director who was giving evidence about events that had happened 12 years earlier and some nine years after his last involvement with Hilden Park. Mr Kay's recollection was, by his own admission, vague but that was unsurprising. Mr Gordon criticised Judge Mosedale's comment, at [55], that Mr Kay was repetitive as not taking account of the fact that Mr Jones, who appeared as counsel for HMRC in the FTT, repeatedly asked Mr Kay the same question. Mr Gordon also criticised Judge Mosedale for saying, again at [55], that Mr Kay went off the point. Mr Gordon said that Mr Kay's answers were not off the point and, in any event, that was not a reason to disregard all of his evidence.

88. We reject this criticism. Mr Kay and Mr Massey were cross-examined for a considerable period before the Judge and she was well able to come to a conclusion

about their reliability. We have looked at the individual exchanges to which Mr Gordon drew our attention but we do not consider that that is a fruitful exercise because a judge's view as to how far he or she can rely on the evidence of a particular witness is not only derived from the individual responses to particular questions but from an overall assessment of the witness' candour. In our judgment, there is no basis for concluding that the Judge formed an incorrect view of the witnesses' evidence.

The Strutt & Parker letter

89. The Appellants contend that Judge Mosedale failed to consider a letter from the surveyors Strutt & Parker that was an important piece of evidence. Mr Gordon submitted that the letter considered the profitability and onerousness of different aspects of a golf and health club; how the objectives of a not-for-profit operator might differ from those of a commercial operator; the range of possible lease arrangements that might be encountered and issues relevant to the rent to be charged in such situations. Mr Gordon said that the letter showed that the arrangements in relation to rent adopted by the Appellants and the Companies were not, in themselves, abusive.

90. Although the letter was exhibited to Mr Massey's witness statement, Judge Mosedale did not refer to it in the Decision. Mr Gordon submitted that this showed that the letter had been overlooked which was an error.

91. When refusing permission to appeal, Judge Mosedale stated that:

> "All the evidence was considered. Not every piece of evidence was referred to in the written decision. In any event there is no suggestion as to how it would make a difference to the decision so this ground is refused."

92. We agree with Judge Mosedale's response to this ground. The Strutt & Parker letter does not deal with the lease between the Appellants and the Companies but contains general statements about the types of lease arrangements that different golf clubs might adopt. The letter is a general statement of opinion but it appears to be of only peripheral relevance to the Appellants' case. As Patten LJ observed in *Weymont & Anor v Place* [2015] EWCA Civ 289, at [6]:

> "The judge is not, of course, required to deal with every point raised in argument, however peripheral, or with every part of the evidence."

93. The letter did not purport to be expert evidence that the rent payable under the 2001 lease was an open market rent or that it was not excessive. In our view, the Strutt & Parker letter was not relevant to the issue of whether the rent payable under the 2001 lease was excessively high and did not contradict Judge Mosedale's finding that it was excessive. In our view, Judge Mosedale cannot be criticised for omitting to refer to the Strutt & Parker letter in the Decision. The letter could not have made any difference to her conclusions. Accordingly, we reject this ground of challenge.

Relevance of trust placed by the Companies' directors in Mr Massey

94. Mr Gordon also submitted that Judge Mosedale was wrong to find, at [208], that Mr Kay and the other directors trusted the Partnership to determine how much the Companies would have to pay as rent was indicative of abuse. We do not accept this submission. Judge Mosedale set out her findings of fact that showed that the Companies had not tried to negotiate the terms of the agreement, could not afford the

rent payable and relied on the Partnership and the LLP being willing to accept less by way of rent than was due under the lease. Those findings are not challenged. The ECJ in *Halifax* at paragraph 81 of its judgment said that the national court "may take account of … the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden".

95. Judge Mosedale did not say that the relationship showed that there was abuse but that it was indicative of abuse, ie it was a factor to be taken into account. She cannot be criticised for that conclusion. She was entitled to have regard to the relationship between the Appellants and the Companies as a relevant factor when considering whether the essential aim of the transactions was to obtain a tax advantage.

Extent of spending on facilities at the Club

96. The Appellants criticised the Substantive Decision on the grounds that the Judge did not come to a conclusion about how much of the VAT savings the Companies had in fact invested back into the facilities and services provided by the golf course. She also failed to take account of the 'significant community spirit' at Hilden Park. The Appellants say that by requiring the Appellants to disprove any allegation of profit distribution without regard to the increased expenditure on facilities, the Judge 'was setting the Appellants a test they were bound to fail'.

97. As we have already noted, the Appellants accept, following the *South Herefordshire Golf Club* case, that they would not succeed in showing that they were non-profit making. We agree with the Judge's conclusion that such a split is impossible to carry out and is not relevant given the Judge's conclusion that the rent paid by the Companies calculated even after the supposed extra expenditure was above the commercial level.

Analysis of the Partnership's financial accounts

98. The Appellants submitted that Judge Mosedale's assessment of the Partnership's accounts for the periods to 31 May 2001 and 2002 at [104]-[106] was unfair and misconceived. In particular, she failed to recognise that the former period was only six months in duration and did not include the summer months. Mr Gordon argued that, by failing to recognise and/or acknowledge the difficulties inherent in comparing financial performance of a golf course, which is a seasonal business, over two periods of different lengths, when one covers a full year and the other covers a six-month period (1 December until 31 May), Judge Mosedale's analysis of the financial data was compromised.

99. There was no dispute that Judge Mosedale referred, in [104], to both periods of account as being for a year. That appears to have been a slip but we cannot see what effect it would have had on the outcome of the appeal. The accounts were discussed because they were part of the evidence but they do not seem to have formed any significant part of Judge Mosedale's conclusions. We regard the reference to the earlier period of account as a period of one year rather than six months as an immaterial error that does not cast any doubt on the FTT's conclusions in relation to the abuse issue.

Application for permission to appeal on new ground

100. At the hearing, the LLP applied for permission to rely on a ground of appeal, namely that the assessments against the LLP were out of time, that had not been argued before the FTT. Under section 73(6) VATA94, an assessment must be made within the later of two years after the end of the relevant VAT accounting period or one year after HMRC learn of evidence of facts sufficient to justify the assessment but subject to a limit of three (at the time but now four) years from the end of the relevant period. In summary, the LLP argued that HMRC had sufficient information to assess the LLP for VAT by no later than 14 July 2005. HMRC assessed the LLP for VAT in relation to accounting period 08/05 on 28 August 2008 and in relation to accounting periods 11/05 to 08/07 on 27 November 2008. Although they were within the three-year time limit, the assessments were more than two years after the end of accounting periods up to period 08/06 and, Mr Gordon contended, more than one year after HMRC had sufficient evidence to justify the assessment in July 2005.

101. Mr Gordon submitted that this was a live ground of appeal before the FTT. It had been raised in a Notice of Appeal, dated 26 September 2008, which was ignored in the HMRC's statements of case and, consequently, was not expressly dealt with by the FTT. He contended that the matter did not need to be remitted to the FTT but could be dealt with by us on the existing documentary evidence, which he showed us. Mr Gordon acknowledged that in *Pegasus Birds Ltd v HM Customs & Excise* [1999] STC 95, Dyson J observed that it was common ground that the burden of proof is on the taxpayer to show that the assessment was made outside the time limit specified in section 73(6)(b) of VATA94. Mr Gordon submitted that the statement in *Pegasus Birds* was wrong and contrary to the general rule that the burden lies upon the party who substantially asserts the affirmative of an issue (see *Phipson on Evidence* 18th edition at 6-06).

102. Mr Jones said that HMRC did not accept that the assessments were raised out of time. Mr Jones submitted that leave to appeal should be refused because parties are not normally permitted to raise on appeal arguments which they could perfectly well have run below, but for whatever reason failed to do so (see *Tanjoukian v HMRC* [2012] UKUT 361 (TCC) [58]). He contended that this is not a point of pure law but one that, had it been made at the proper time, would have affected the conduct of the appeal and the evidence adduced. He also submitted that the issue could not be dealt with on the documents because it turned on the actual knowledge of HMRC which would require evidence from the assessing officer as to what he considered sufficient to assess.

103. We accept that there was a "Notice of Additional Appeal" in September 2008 that referred to the assessments being out of time; however, that document showed the Partnership, not the LLP, as the appellant although it referred to an assessment issued on 28 August to the LLP. The out of time point is not mentioned in HMRC's Amended Consolidated Statement of Case, dated 15 March 2013, which only refers to the LLP's Notice of Appeal, dated 24 December 2008, against assessments notified on 27 November 2008. That Notice of Appeal did not refer to the assessments being out of time. Further, the Appellants' Amended Grounds of Appeal, served in response to HMRC's Amended Consolidated Statement of Case, did not include in its six grounds any assertion that the assessments were raised out of time. For whatever reason (and we were not given one), the issue of whether the assessments against the LLP were out of time was not raised as a ground in the appeal before the FTT. It is therefore a new ground in these proceedings.

104. The approach to an application a party to raise on appeal an argument not relied on below was stated by Rix LJ in *Lowe v W Machell Joinery Ltd* [2011] EWCA Civ 794, [2012] 1 All ER (Comm) 153 as follows at [81]:

> "It is a long-standing and fundamental principle of this court that a new point of law which was not presented to the court of trial may be raised on appeal, but normally only where there is no possibility of any injustice occurring by reason of the fact that, if it had been raised at trial, it might have affected the conduct and in particular the evidence or its evaluation in those proceedings …"

105. In *Tanjoukian,* Henderson J said at [58]:

> "[58] It is no answer to this point, in my judgment, to say that the case could now be remitted to the FTT for further findings of fact to be made, coupled with liberty to adduce new evidence. If that were a sufficient answer, the content of the rule in cases of the present type would become virtually non-existent. There is a strong public interest in finality in litigation of all kinds, and one facet of this is that parties are not normally permitted to raise on appeal arguments which they could perfectly well have run below, but for whatever reason failed to do so. Where the new point is a pure question of law, and where its admission on appeal would not occasion any injustice of the type referred to by Rix LJ in *Lowe v W Machell Joinery Ltd* [2012] 1 All ER (Comm) 153 at [81], the interests of justice will normally favour the grant of permission to argue the point. But the position is very different where the conduct of the trial below either would, or might, have been significantly different if the new point had been taken. In those circumstances, the balance will nearly always come down the other way and permission to argue the new point will be refused."

106. We are not satisfied that the issue could be determined by us on the documents. There was a meeting between HMRC and the Appellants to discuss the position in January 2008 and we were shown a letter dated 19 May 2008 from HMRC asking for more information from the LLP. That evidence suggests that HMRC did not consider that they had sufficient evidence to assess at that time and whether they did or not could only be resolved by hearing evidence from the assessing officer about what evidence was available to him. It appears to us that Mr Jones is correct when he says that the conduct of the appeal before the FTT and, in particular, the evidence adduced would have been different if the issue had been raised. Applying the approach taken in *Lowe v W Machell Joinery Ltd* and *Tanjoukian*, we refuse permission to appeal on this ground.

Conclusion on the appeal against the Substantive Decision

107. For the reasons given above, the Appellants' appeal against the Substantive Decision is dismissed. We uphold Judge Mosedale's finding that this scheme was an abuse of law within the *Halifax* principle. HMRC were therefore correct to re-define the transactions and there was no challenge to their redefinition, which is to treat the supplies made by the Companies as having been made by the Partnership between 1 June 2001 and 31 May 2005 and by the LLP between 1 June 2005 and 31 August 2007.

Appeal against the Costs Decision

108. The Appellants started their appeals in the VAT and Duties Tribunal. When the FTT was created in April 2009, the appeals were transferred to it as 'current proceedings' within paragraph 6 of Schedule 3 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) ('the 2009 Order'). One of the consequences of being current proceedings is that the FTT may apply any provision of the Value Added Tax Tribunals Rules 1986 ('the 1986 Rules') which applied to the proceedings before the VAT and Duties Tribunal. By virtue of rule 29 of the 1986 Rules, the VAT and Duties Tribunal had an unrestricted (save by the exercise of ordinary judicial discretion) power to award costs. A direction was made under paragraph 7(3) of Schedule 3 to the 2009 Order that rule 29 of the 1986 Rules should apply to the appeal.

109. Following the release of the Substantive Decision, HMRC applied for a direction under rule 29 of the 1986 Rules, that the Appellants should pay HMRC's costs of the appeals. There was a hearing of the application before Judge Mosedale at which Mr Gordon submitted on behalf of the Appellants that the FTT should not make any award of costs because HMRC should be regarded as bound not to seek their costs by what is commonly referred to as the Sheldon practice. The Sheldon practice was the policy of HM Customs and Excise, later HMRC, not to seek costs from unsuccessful appellants other than in certain specified cases. It was called the Sheldon practice because it was first set out in a parliamentary answer given by the Right Hon Robert Sheldon, the Financial Secretary to the Treasury, in 1978. The text of the parliamentary answer was as follows:

> "… the Commissioners [ie HM Customs & Excise] have concluded that, as a general rule, they should continue their policy of not seeking costs against unsuccessful appellants; however, they will ask for costs in certain cases so as to provide protection for public funds and the general body of taxpayers. For instance, they will seek costs at those exceptional tribunal hearings of substantial and complex cases where large sums are involved and which are comparable with High Court cases, unless the appeal involves an important point of law requiring clarification. The Commissioners will also consider seeking costs where the appellant has misused the tribunal procedure – for example, in frivolous or vexatious cases, or where the appellant has failed to appear or to be represented at a mutually arranged hearing without sufficient explanation, or where the appellant has first produced at a hearing relevant evidence which ought properly to have been disclosed at an earlier stage and which have saved public funds had it been produced timeously."

110. The policy was confirmed and extended by the Treasury Minister, the Right Hon Peter Brooke, on 24 July 1986 as follows:

> "The new penalty provisions and right of appeal to the Value Added Tax Tribunals have made no change to this policy. Customs and Excise, with the agreement of the Council on Tribunals, consider that appeals against penalties imposed under FA 1985 s13 [now VATA 1994 s60 – civil dishonesty penalties] on the grounds that a person has evaded VAT and his conduct has involved dishonesty fall to be considered as being comparable with High Court cases. Where such appeals are unsuccessful, Customs and Excise will normally seek an award of costs."

111. In a written ministerial statement made on 10 March 2009, the then Financial Secretary to the Treasury, the Right Hon Stephen Timms, confirmed that the Sheldon practice would continue to apply on a transitional basis and HMRC would not seek costs from appellants in most cases.

112. At the costs application, Mr Gordon submitted that the Sheldon practice applied and HMRC should not be able to resile from it. Mr Jones contended that HMRC were not bound by the Sheldon practice because they had written to the Appellants in 2008 and 2011 stating that they would seek their costs if they were successful in the appeals "as is [their] normal practice in cases where tax avoidance is in issue". Mr Gordon pointed out that the Sheldon practice made no special provision for tax avoidance cases.

113. Judge Mosedale held, at [4] of the Costs Decision, that it was a reasonable exercise of HMRC's discretion to add tax avoidance as another category of case as an exception to the Sheldon practice. Judge Mosedale concluded that the Appellants should have expected that, if they were unsuccessful, costs would be awarded to HMRC. Judge Mosedale also held, at [6], that the appeals fell within the exclusion to the Sheldon practice for "exceptional tribunal hearings of substantial and complex cases where large sums are involved and which are comparable with High Court cases". Mr Gordon referred to *South Herefordshire Golf Club v HMRC* [2006] UKVAT V19767 ('the *South Herefordshire Golf Club* costs case') which he contended was similar to these appeals and in which no order for costs was made. Judge Mosedale did not accept that the cases were similar. Judge Mosedale observed that the hearing of these appeals had lasted four and a half days, the issues of law and evidence were complex and substantial, the amount at stake was some £500,000 and counsel appeared for both sides. The judge concluded that it was not a run-of-the-mill tax tribunal case.

114. Mr Gordon submitted that, if the Sheldon practice applied, the appeals fell within the exception to the exclusion because the appeals involved "an important point of law requiring clarification". Judge Mosedale did not agree, holding, at [8], that the case was largely about factual issues and there was existing case law authority in relation to the issues of law.

115. Mr Gordon also contended that Judge Mosedale should refuse to make an award of costs because of Mr Jones's conduct at the hearing, in particular in relation to his closing submissions. Judge Mosedale did not accept the criticisms and concluded at [10]:

> "Mr Gordon made these submissions to me as part of his reply at the hearing, and they did not find favour with me then, and they still do not now. I do not consider that HMRC's closing submissions can be criticised on these grounds. I do not consider that the Appellant has come even close to making out a case that HMRC misled the Tribunal."

116. The FTT directed, under rule 29 of the 1986 Rules, that the Appellants should pay HMRC's costs of the appeals on the standard basis to be assessed by a Costs Judge of the Senior Courts Costs Office if not agreed.

117. The Appellants now appeal against the Costs Decision on grounds that Judge Mosedale erred in law in:

(1) placing undue weight or emphasis on HMRC's indications that they would seek their costs if the Appellants were unsuccessful;

(2) wrongly endorsing HMRC's retrospective curtailment of the practice described in the Sheldon statement;

(3) in comparing the Appellants' case to High Court litigation and distinguishing the *South Herefordshire Golf Club* costs case; and

(4) failing to consider properly or at all the Appellants' submissions on HMRC's unreasonable conduct during the proceedings.

118. At the hearing before us, Mr Gordon repeated his submissions before the FTT while criticising the conclusions of Judge Mosedale on each point. The only issue before us is whether Judge Mosedale made any error of law.

119. We are concerned that HMRC's letters indicate an unannounced amendment to the Sheldon practice and, even though the letters were sent some years in advance of the hearing, the intention to seek costs was only notified some four years after the first appeal had been made. We do not have to reach a conclusion on this point, however, as Judge Mosedale also decided that the Appellants should pay HMRC's costs on the basis that the Sheldon practice had not been amended.

120. As to whether the case was substantial and complex, having heard an appeal on the points described elsewhere in this decision that required a hearing of two and a half days in the Upper Tribunal, we cannot fault Judge Mosedale's conclusion that this was not a run-of-the-mill tax tribunal case. Although the amount at stake only reached nearly £500,000 because the appeal related to several accounting periods over a number of years that still means that the appeals involved large sums.

121. Judge Mosedale was not obliged to follow the *South Herefordshire Golf Club* costs case decision, even if it was factually similar, and that it is unsurprising that, in matters involving the exercise of judicial discretion, different judges might, perfectly properly, make different decisions.

122. The primary point of law raised in the appeal had already been decided in *Atrium*. The FTT was bound by *Atrium* and so no clarification was required.

123. In our view, the criticisms about comments made and the time taken by Mr Jones in closing were not central to the appeal and did not need to be separately set out in the Substantive Decision. It is clear from the Costs Decision that Judge Mosedale did not accept the criticisms and, therefore, saw no reason not to award costs to HMRC. This ground cannot succeed unless it can be shown that Judge Mosedale's decision was unreasonable. Mr Gordon has wholly failed to do so.

124. We are satisfied that Judge Mosedale's decision was a proper exercise of her discretion and one with which we agree. Accordingly, we dismiss the Appellants' appeal against the Costs Decision.

Disposition

125. The Appellants' appeal against the Substantive Decision is dismissed.

126. The LLP's application to be allowed to rely on a ground of appeal, namely that the assessments against the LLP were out of time, that was not argued before the FTT is refused.

127. The Appellants' appeal against the Costs Decision is dismissed.

Costs

128. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the UT Rules.

The Hon Mrs Justice Rose DBE
Chamber President

Greg Sinfield
Judge of the Upper Tribunal

Release date: 28 July 2015