Neutral Citation: [2024] UKFTT 00160 (TC)

Case Number: TC09086

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2020/03954
TC/2020/03955
TC/2020/00394

CAPITAL GAINS TAX – entrepreneurs' relief – whether Condition B in section 169I Taxation of Chargeable Gains Act 1992 satisfied – in particular, whether the company in question was a trading company throughout the period of one year ending on a date falling within 3 years of the date of disposal – no – appeal dismissed

Heard on: 27-29 November 2023
Judgment date: 26 February 2024

Before

TRIBUNAL JUDGE MARK BALDWIN
MR MICHAEL BELL

Between

MARK STOLKIN
MARGEAUX STOLKIN
FAYE CLEMENTS

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Sherry, of counsel, instructed by Shipleys LLP

For the Respondents: Imran Afzal, Harry Winter, and Riya Bhatt, all of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This case is concerned with the question whether a company (Stolkin Greenford Limited ("SGL")), which had acquired a substantial parcel of land in West London as a fixed capital asset of its investment business, subsequently began to carry on a trade in relation to a part of that land. This matters because, if it began to carry on such a trade around the time the Appellants say it did (on 3 December 2013), the Appellants (who were shareholders in SGL) would be entitled to claim entrepreneurs' relief in relation to the gains they made on disposing of their shares in SGL.

2. At the time when the Appellants disposed of their shares in SGL (which they did when SGL went into liquidation, and they received distributions in respect of their shares in SGL between 11 March and 5 April 2016) the rate of capital gains tax ("CGT") otherwise applicable to capital gains made by the Appellants was 28%. Entrepreneurs' relief (which has subsequently been renamed and modified) entitled individuals to pay CGT at a lower rate (10%) on gains they made on disposing of assets which qualified for entrepreneurs' relief, subject to a lifetime cap on gains on which they could make such claims of £10m.

3. Each of the Appellants claimed entrepreneurs' relief in relation to their disposal of shares in SGL in their self-assessment tax returns for the tax year 2015/16. HMRC opened enquiries into the returns of Mark Stolkin and Margeaux Stolkin and issued closure notices on 28 April 2020 denying entrepreneurs relief. In the case of Faye Clements HMRC raised a discovery assessment on 27 March 2020 which assessed her to CGT on the basis that entrepreneurs' relief was not available in respect of her disposal of SGL shares. Each of the Appellants appeals against the closure notice or discovery assessment issued to them.

ENTREPRENEURS' RELIEF

4. Entrepreneurs' relief was available in respect of gains arising on "qualifying business disposals"; section 169H(1) Taxation of Chargeable Gains Act 1992 ("TCGA"). A "material disposal of business assets" counted as a qualifying business disposal; section 169H(2) TCGA. Section 169I TCGA provided that a disposal of assets would be a material disposal of business assets if certain conditions (which varied depending on the asset being disposed of) were met.

5. If SGL was a trading company, it would have ceased to be one before the Appellants disposed of their shares in it. (It would have ceased to be a trading company when the sale of the Site to Greystar completed in December 2015, whereas the Appellants did not dispose of their share before 11 March 2016.) Accordingly, the condition relevant here is Condition B in section 169I(7), which read as follows:

> "(7) Condition B is that the conditions in paragraphs (a) and (b) of subsection (6) are met throughout the period of 1 year ending with the date on which the company—
>
> (a) ceases to be a trading company without continuing to be or becoming a member of a trading group, or
>
> (b) ceases to be a member of a trading group without continuing to be or becoming a trading company,
>
> and that date is within the period of 3 years ending with the date of the disposal."

6. The provisions of subsection (6) referred to in subsection (7) were that:

> "(a) the company is the individual's personal company and is either a trading company or the holding company of a trading group, and

> (b) the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group."

7. A company was an individual's personal company if they held at least 5% of the ordinary share capital of the company and at least 5% of the voting rights in the company were exercisable by virtue of that holding; section 169S(3) TCGA.

8. Section 169SA TCGA provided that the meaning of "trading company" was to be as set out in Schedule 7ZA TCGA, which in turn provided that "trading company" had the same meaning as in section 165 TCGA (subject to certain modifications, which are not relevant for us). Section 165(8)(aa) TCGA provided that the meaning of trading company was to be found in section 165A, which (in subsection (3)) defined a trading company as "a company carrying on trading activities whose activities do not include to a substantial extent activities other than trading activities". Section 165A(4) further expands on this by providing that:

> "(4) For the purposes of subsection (3) above "trading activities" means activities carried on by the company—
>
> (a) in the course of, or for the purposes of, a trade being carried on by it,
>
> (b) for the purposes of a trade that it is preparing to carry on,
>
> (c) with a view to its acquiring or starting to carry on a trade, or
>
> (d) with a view to its acquiring a significant interest in the share capital of another company that—
>
> (i) is a trading company or the holding company of a trading group, and
>
> (ii) if the acquiring company is a member of a group of companies, is not a member of that group."

9. For these purposes "trade" has the same meaning as in the Income Tax Acts (see section 989 Income Tax Act 2007); section 169S(5) TCGA. In turn, section 989 ITA provides that ""trade" includes any venture in the nature of trade".

10. It is common ground that all the requirements of Condition B were met except the requirement that SGL was a trading company for at least a year in the three-year period running up to the time when the Appellants disposed of their shares in SGL. HMRC's case is that SGL was never a trading company, whereas the Appellants say that it began to carry on a trade on 3 December 2013. It was not suggested that, if SGL would otherwise be a trading company, it carried on other activities to a substantial extent and which would prevent it being a trading company.

11. These appeals turn on the answer to a single question, "Was SGL a trading company throughout the period of at least 1 year ending with the date on which it ceased to be a trading company and did that date fall within the period of 3 years ending with the date of the disposal?"

OUTLINE TIMELINE

12. An outline statement of facts was agreed between HMRC and the Appellants. We set this out below with the addition of events described by Mr Stolkin in his (unchallenged) witness statement. This statement is expanded on significantly by Mr Stolkin, but it may be helpful to have a summary of the position at the outset, and this is as follows:

(1) SGL acquired the former head-quarters site of GlaxoSmithKline in Greenford (the "GSK Land") under a contract dated 4 February 2011 and a Deed of Variation dated 28 April 2011. For planning purposes at this time, the GSK Land had an allocation as

Strategic Industrial Land ("SIL") within the Local Plan, which protects the land for employment uses.

(2) The GSK Land was the only fixed asset of SGL.

(3) SGL's first set of accounts covered the period 3 June 2010 to 30 June 2011. The accounts stated, "The principal activity of the company during the year was that of property investment." Following its acquisition, the GSK Land was classified in SGL's accounts as an investment.

(4) The GSK Land comprised two office buildings, called "G1" and "G2", and car parks on the northern part of the GSK Land. On the southern part there was a range of buildings previously used for offices, manufacturing and industrial processes, research and development and other commercial purposes, as well as car parking and security lodges. The part of the GSK Land excluding G1 and G2 is referred to as the "Site".

(5) On 3 September 2012 the Greater London Authority ("GLA") wrote to the London Borough of Ealing ("LBE") advising that, in preparing its local development plan, the loss of the Site from the SIL allocation was in principle acceptable.

(6) On 3 April 2013 LBE issued a development strategy document, which identified the Site as a Special Opportunity Site to provide high-density mixed-use development, including offices, housing, leisure and community uses.

(7) G2 was let, and then sold on 14 June 2013. The sale was returned in SGL's corporation tax computation as a capital disposal giving rise to a chargeable gain.

(8) On 7 November 2013 a related company, Stolkin & Clements Greenford Limited ("SCG"), exchanged contracts to acquire the former RHM bakery site for £5.23m.

(9) On 29 November 2013 SGL substituted a hybrid planning application for the development of up to 593 dwellings, including the conversion of and an extension to Glaxo House, leisure, retail and community use, the re-opening of Berkeley Avenue, and the provision of public open space.

(10) On 3 December 2013 the Site was appropriated to trading stock by SGL.

(11) On 10 December 2013 LBE adopted its Development Sites DPD. This allocated the Site for employment-led redevelopment with the introduction of residential and community/ leisure uses north of the Grand Union Canal.

(12) On 16 December 2013 SCG completed the acquisition of the RHM site and demolition began shortly thereafter.

(13) On 23 April 2014 LBE considered the hybrid planning application in committee, and resolved to approve the application, subject to conditions and completion of legal agreement.

(14) G1 was sold on 9 July 2014. This sale was also returned in SGL's corporation tax computation as a capital disposal giving rise to a chargeable gain.

(15) On 15 October 2014 GLA provided their 'Stage 2' report in relation to the planning application. This confirmed that the Mayor of London was content to allow LBE to determine the case itself, subject to any action that the Secretary of State may take, and did not therefore wish to direct refusal or to take over the application for its determination.

(16) On 24 November 2014, LBE granted hybrid planning permission for the redevelopment of the Site and provision of up to 593 homes, an extension and conversion

of the Glaxo House from office to residential use, the provision of retail, restaurant and community space and a cinema, and the re-opening of Berkeley Avenue to public use.

(17) On 23 September 2015 Greystar offered to purchase the Site.

(18) On 10 December 2015 contracts were exchanged to sell the Site to Greystar and on 18 January 2016 the sale completed.

(19) SGL went into members' voluntary liquidation on 11 March 2016. At that date the Appellants were the only shareholders in SGL. They were also directors, and there were no other employees. Mr Stolkin and Mrs Stolkin owned 30 shares each and Ms Clements owned 40 shares.

THE EVIDENCE BEFORE US

13. We had witness evidence from Mr Mark Stolkin and Ms Faye Clements, two of the Appellants, and from Mr Nigel Colson and Mr Ray Magill of Shipleys, SGL's accountants and tax advisers. The witnesses were not cross-examined and so we accept their evidence. Mr Stolkin described the history of SGL's involvement with the GSK Land in some detail, and this is set out below. We also summarise (more briefly) the evidence of the other three witnesses.

14. The hearing bundle ran to over 8,600 pages. Over 2,600 pages comprised copies of documents, such as feasibility studies for alternative schemes prepared at various times, demolition and refurbishment surveys and a range of other materials relevant to the project. Another 4,600 pages were taken up with documents related to the planning process. We were also provided with hyperlinks which enabled us to look at planning applications and supporting documentation on the LBE website. At intervals the witnesses referred to documents in support of their evidence. As their evidence was unchallenged, we have not referred to documents except where they add to (rather than just support) their evidence. For similar reasons, we have not tried to summarise the large volume of documentation, although we note that Mr Sherry points to the volume of documentation as supporting his submission that the level of activity connected with SGL's activities in relation to the GSK Land was substantial. We can readily accept that submission.

Mark Stolkin

15. Mr Stolkin has worked full time in the property industry since 1984.

16. Mr Stolkin says that the acquisition of the GSK Land was a protracted process. He led the process and dealt with the due diligence for SGL.

17. Mr Stolkin exhibited the GSK sales brochure which identified the extent of the GSK Land and the existing buildings on it. SGL's initial plan was to try and let the two office buildings (G1 and G2), which were in good condition. The Site had significant high-density cover of older buildings in poor condition and a listed building on it. The intention here was to look at trying to bring many of the buildings back into use and let them or redevelop them for industrial/warehouse use and retain the property for an income yield.

18. The route forward was unclear as the cost of refurbishment and the viability of the existing buildings needed exploring and market conditions were fluid.

19. Mr Stolkin said that the Site was suitable for the development of an industrial/employment led scheme, which would readily let and would have been within existing planning policy. He exhibited a purely indicative proposed redevelopment industrial layout from the time of the purchase, and also a potential tenant list that SGL's agents Savills explored at the time of purchase.

20. SGL had security staff on site all day every day, but as the Site was so extensive it was still exposed to intruders. So, SGL decided to let car parking on the Site to a Volkswagen (VW) dealer for them to store new cars awaiting delivery. The cars were high value and so the VW dealer had 24-hour security in addition to SGL's. The initial lease was from September 2013 and the dealer paid a rent of £85,000 per annum. In October 2014 SGL entered a new lease which raised the rent to £150,000 per annum. Both leases had rolling break options, so SGL could obtain possession on short notice. Mr Stolkin confirmed that the motivation was security and not to create a long-term income stream.

21. There were numerous other very short term lets on elements of the Site, which were entered into purely to mitigate rating liability and did not create any meaningful income. Despite all these leases, SGL operated at a significant trading loss each year.

22. In addition to seeking potential users and investigating demand for the Site, G1 and G2 were immediately offered to let on the open market. G2 was a traditional office building, but SGL could not find a traditional office occupier for all or part of G2 and so SGL let the building to a business school in July 2012. This investment was sold in June 2013 as SGL had concerns about the tenant's covenant strength and did not wish to have the building fall vacant again. Their concerns were well founded as the tenant went into administration.

23. The Site had a complex planning background due to its existing and historic use for offices, medical research, industrial/storage and car parking. It was identified in the Ealing Local Plan for employment use and was covered by a GLA SIL designation to secure continued industrial use.

24. In September 2012, without SGL's prior knowledge and without any lobbying on their part, the GLA wrote to LBE advising that in preparing its Local Plan the loss of the Site from the SIL allocation would be acceptable, giving LBE greater scope to determine the Site's future use.

25. In April 2013 LBE issued a development strategy document identifying the area as suitable for a mixed-use development including offices, housing, leisure and community uses.

26. SGL then engaged with LBE at the most senior level. Together with their planning consultant, Iceni, Mr Stolkin met senior LBE officers a number of times. Iceni staff also met LBE officers on a more frequent basis. Dialogue was also by email, but most progress came in meetings as policy matters were evolving and (Mr Stolkin says) LBE wanted to avoid committing itself to anything and this was more easily achieved by not putting views in writing.

27. It became clear that LBE would consider a mixed use of development on the Site, which could contain a low percentage of residential if SGL was prepared to provide a primarily commercial/employment led scheme that also re opened a previously adopted highway which ran through the Site and provided access for the public to the Grand Union Canal. This proposal was progressed. To gain LBE support, and at their request, the Site's predominant use was to be as a large cinema with a food store and restaurants and a community facility. A large multistorey car park would be retained to serve the commercial element. Some residential use was envisaged.

28. LBE continued to refine its own policy for the Site, which was finally adopted in December 2013.

29. A further major event occurred around this time, which (Mr Stolkin says) cemented SGL's strategy and led to the appropriation of the Site to trading stock. This was the acquisition of the old Rank Hovis McDougal (RHM) site. The suitability of the Site for residential was greatly impacted by RHM's bakery, as it was directly opposite the Site. The bakery could operate 24 hours a day, emitted noise and odours and was incredibly ugly, with massive

unsightly storage cisterns and a high-level roof top car park. The access for the car park was along an elevated roadway on the canal frontage, so cars and vans parking and leaving were visible at high level from the Site. RHM had decided to sell their factory and in November 2013 the RHM bakery site was acquired by Stolkin & Clements Greenford Limited ("SCG"). Mr Stolkin said that SCG had the same family ownership as SGL. The RHM site was purchased in a separate vehicle, as his family trusts had the necessary funds. Nevertheless, Mr Stolkin regards the purchase of the RHM site as part of the GSK transaction. SCG would not have purchased it otherwise. Mr Stolkin says that SCG held the RHM site as trading stock.

30. Now that it owned and controlled the RHM site, SCG could start to demolish the RHM buildings, removing all the blight that affected the Site. The acquisition also eliminated the largest possible objector to any major residential scheme. RHM could have objected on the basis that residential property in close proximity to its factory would fetter their existing ability to operate 24 hours a day and expose them to complaints about noise and odours from their operation. The removal of the factory made the residential proposals SGL wanted to bring forward far more attractive.

31. Mr Stolkin explained that he was in regular dialogue with Ray Magill of Shipleys and he was aware of what was happening. He and Ms Clements met with Ray Magill and Nigel Colson of Shipleys on 3 December 2013 to deal with general and specific accounting matters. They discussed their intentions regarding the Site. The plan was, after achieving the initial consent to the current application, to submit further applications in a strategic and piecemeal way to remove the commercial elements and multi-storey car park and eventually end up with a high rise, multi block, high density residential development. SGL did not have the expertise or capital to build that style and size of development (which would have cost hundreds of millions of pounds and taken many years) and would sell once they had maximised planning value, which they anticipated would most likely take up to 5 years. They were also advised by Savills that they would most likely need to sell the Site in multiple lots, as it was likely too big for a single developer in that location. Mr Magill advised that, bearing in mind what SGL was doing and intended to do, SGL was most likely already trading and the Directors should consider appropriating the Site to trading stock. Mr Stolkin and Mr Clements agreed and as Directors they appropriated the Site to trading stock. Mr Stolkin says that the appropriation was made in clear recognition that the Site was now not to be redeveloped for industrial use and retained, nor would existing buildings be let to create a long-term income. Instead, SGL was going to engage in a protracted planning gain strategy. This risked incurring substantial expenditure on planning and design costs on multiple applications, with the potential to lose the technical arguments at any point. They would also risk the loss of hope value, if an application failed. This was all being done with the intention of creating a massive profit on selling the Site.

32. G2 had been sold and G1 remained as investment stock as SGL was still trying to let it. The SGL statutory accounts consistently reflected the appropriation of the Site.

33. Mr Stolkin says that in December 2013 three major events had occurred which gave SGL confidence to take a long-term view as to how to maximise the value of the Site, which, from experience, they knew would take a long time and have many hurdles and risks. The three significant events were the Site being released from SIL designation, LBE adopting new planning policy for the Site and the acquisition of the RHM site by SCG. This was now a totally different backdrop to when SGL acquired the GSK Land.

34. The initial planning applications SGL submitted were for a mixed-use scheme which had substantial commercial space including a cinema, food store, restaurants and community spaces as well as residential. The commercial element was needed from a planning point of view, and was a prerequisite to obtaining a residential presence on the Site, but it impacted the value of

the residential and was not viable. The commercial space was not viable, as the location was not of interest to large cinema operators, despite LBE's aspirations to have a cinema. The food retail landscape was changing quickly, so that what was designed was no longer acceptable, and the proposed restaurants would not set up there unless a cinema operator was committed to opening and trading, which was not possible as SGL could not attract a cinema operator.

35. Mr Stolkin says that, from as early as 2012, SGL knew these plans were not viable and they were already beginning to take a different direction. It was also becoming clear that SGL would not be developing the Site for investment. The commercial element was massive, incredibly expensive to deliver and would stand vacant. In addition, the section 106 agreement was always going to add millions of pounds to the development cost and restrict a good proportion of the residential to affordable accommodation.

36. Whilst Mr Stolkin and his associates were progressing the first applications, they were already actively considering and preparing for the next application. They knew that the original applications were in the main not viable. However, if approved, the applications would be an important steppingstone to establishing the acceptability in principle of a residential project. The series of planning applications was designed to establish a partial erosion of employment use, to establish acceptability in principle of a residential element and to be a steppingstone for future applications to create a predominantly residential site, which in turn would lend itself to having its density increased by building high rise buildings over all of the Site not just part of it.

37. Late in 2013 and into 2014, significantly before they had obtained a consent for the initial applications, SGL began looking at how they could redesign the application scheme if consented to create significant increase in value. Numerous alternate layouts and schemes were prepared and considered. The original starting point was to provide some residential alongside a commercial development, and now they were eroding the commercial areas to create a predominantly residential scheme. This would have been totally unacceptable to the planners before the initial applications were consented, but once consented SGL could utilize the fact that the Site had been confirmed as a suitable location for residential to further increase density by going higher, removing houses and building flats, using the commercial site area and car park area to create more blocks of flats and so on. SGL had a number of designs prepared through 2014 and 2015, eliminating the unviable commercial element and introducing smaller employment uses.

38. LBE were not aware that SGL's initial applications were a steppingstone for future applications; if they had been aware of what SGL were considering, Mr Stolkin has no doubt but that they would have failed with the initial applications. SGL risked losing all its speculative expenditure on this, as it would have been abortive work if the hybrid initial applications were refused. In addition, any hope value for residential on the Site would have been damaged by a refusal.

39. The initial planning applications were not straightforward and carried significant risk. If approved by LBE, they would have to be approved by the GLA and there was a possibility they could be called in by the Secretary of State. There was a general concern that employment land in London was scarce and becoming more so. The proposals incorporated substantial changes to a large, listed building located on the southern frontage of the Site, including building blocks of flats either side, which could have been thought to impact the setting of the listed building, and an English Heritage objection was possible. LBE could have refused the applications for a number of reasons, which would have been difficult to overcome, and GLA and or the Secretary of State could have blocked the project. There were also significant technical matters to overcome such as drainage and highway issues and the level of affordable housing provision.

40. Whilst all this planning work was going on SGL still had not been successful with the letting of G1, as it was a particularly high specification building which was expensive to run. Mr Stolkin said G1 had been designed for GSK as a head office and they were not cost conscious. However, in March 2014 SGL had an enquiry from the owners of Ferrero Roche who wanted to purchase G1 as their headquarters. SGL advised them that they wished to let the building, but Ferrero were adamant they would not lease and did not want to have a landlord. They offered an incredibly high price, but (more significantly) SGL felt their high-quality brand/image would enhance the immediate locality and benefit the value of its trading assets significantly. With this in mind, and as they had not been able to let the building despite three years of trying and the building was in need of upgrading, they agreed to sell. G1 was sold to Ferrero in July 2014.

41. Mr Stolkin noted that the Site was a complex one to develop and that with such complexity came far higher risk. He referred to:

(1) The Site had been used for testing and pharmaceutical development and GSK, as a global multinational company, was particularly concerned about contamination risk. SGL had to adhere to strict protocols relating to development, so as not to invalidate an indemnity policy that covered the land in favour of GSK.

(2) They had to resolve surface water discharge into the Grand Union Canal, which had a risk of taking contamination into the watercourse. There was no right to drain surface water into the canal if SGL redeveloped, which is where a significant amount of discharge was going.

(3) Demolition strategy was more complex and carried higher risk due to this. In addition to the extensive building, many of them many high rise, a strategy was needed to demolish part of a listed building and retain the residue and also to cope with a triple depth basement beneath one of the larger buildings and a large gas main close to the area of demolition.

(4) There was a high voltage transformer station on site and high voltage lines that SGL had to (and did) relocate. There were concerns about other potential cabling under the Site, and a worry that some were fibre optic.

42. SGL had numerous meetings with its property advisors Savills, including discussions with a number of specialized teams, about how to redesign the application schemes once consented to maximise values. This was all happening in parallel with the initial applications.

43. By October 2014 SGL had a planning report prepared by Iceni re-evaluating the potential and risk for their new aspirations and whether in planning terms they could "push the envelope" further. Architects were again directed to design new potential layouts with a view again to increasing density and reducing commercial space.

44. By November 2014 SGL was looking to redesign the scheme completely and looked at various feasibility studies replacing elements of the scheme. Schemes considered varied in the mix of residential, housing (now being eradicated) and flats and the extent, location and mix of the now limited commercial offer.

45. Mr Stolkin observed that from the time of purchase to this time they were in a fast-evolving economic climate. Values of property were rapidly changing. Food, retail and cinema uses in secondary commercial locations such as this were disappearing, but the flip side was a substantial rapid growth in residential values. As demand soared for residential and values increased, taller buildings and higher density development became far more valuable. In addition, if a significant scale of development could be carried out in one location, together with an upgraded environment (by way of example, walkways with views and access to the

canal, central squares etc), their advice was that the Site would become a destination location, they would then not be restricted by the lower values of older housing stock around the Site, and values could be pushed higher and higher. The improving economy was fuelling price growth and making the prize of a high density, high rise, primarily residential scheme even more attractive.

46. Meetings to redesign the application scheme were held regularly, often every week or every other week, with a full team which would include Mr Stolkin, Ms Clements and many people from Iceni. They also had many meetings with Savills. Most of the alternative schemes were fully interrogated for their deliverability and value by the various teams.

47. SGL obtained a planning consent for the first applications in November 2014. Mr Stolkin says that the planning consent significantly changed the nature of the Site and its potential.

48. In December 2014 SGL signed a lease with Tesco for them to park cars on the Site. The rent was £75,000 per annum. As with the VW dealer, SGL had a break clause to terminate the lease, so its development plans were not prejudiced. The primary reason SGL let to Tesco was political. Tesco had a massive distribution warehouse directly to the west of the Site. Tesco had a short-term issue with parking, as there was a continuous stream of delivery vans to accommodate and so their staff were having to park off site on roads, which was causing a local issue. Whilst Tesco looked for alternative parking solutions, SGL assisted which was appreciated by the local community and LBE.

49. SGL was regularly receiving enquiries for the Site from prospective purchasers. This started when the first applications were submitted. Savills were instructed that SGL was not interested in selling the Site and not to enter into dialogue with anyone.

50. From when the first applications were submitted, Mr Stolkin says that he and Ms Clements we were spending a disproportionate part of their working time on this project. They spoke and communicated daily about it and, due to the intensity of the workload, they each focused on different elements of the project, although there was also overlap. Mr Stolkin was the lead in terms of planning negotiations with LBE and the commerciality and Ms Clements focused on the professional teams pushing the project forward.

51. A decision was made to go through the pre-conditions in the planning consent so that SGL could demolish the listed building and surrounding properties as soon as commercially beneficial. Their complicated nature meant that they approached this in two phases. There were a number of enabling items that would be required before demolition, such as moving substations, putting in a pump system to the extremely deep basements that had been used for animal testing etc. This was all done whilst preparing new plans for the Site. Although SGL got itself to a position where it could start demolition works, it did not do so.

52. Once the first scheme was consented, SGL was presented with further challenges and risks. The extensive buildings on the site were a liability and concern (24 hour security remained in place, the electricity needed to remain on, insurers had requirements to be met) and demolition would have been a distinct benefit. There were approximately three quarters of a million square feet of buildings, which over time had decayed and were becoming a risk to people accessing the Site, both legally or illegally. Commercially, however, there were good reasons to retain the buildings, despite the risk and cost of keeping them. Firstly, the presence on a significant scale of unattractive buildings which were not in use is always an encouragement for a planning authority to see development come forward. So, their retention and presence was seen by SGL as a positive for when they submitted future/new planning applications. Also, if SGL kept the buildings, when they made new planning applications the vacant building credit regime that existed at the time would allow SGL to offset any affordable housing requirement. .

53. Mr Stolkin commented that, although value was hard to calculate, SGL did not want to sell the Site just with the initial consents. They intended to maximise value by redesigning and submitting multiple planning applications. The scheme originally approved was blighted, as a massive element of what was consented was very expensive to build, would not attract occupiers and so was a significant liability. A residential developer might have bought the residential element independently, but they would have been concerned about what was happening with the land consented for commercial use; indeed, they could have been advised that, if the commercial element was not to be built out, the validity of the residential consents might be questioned as the scheme was a comprehensive redevelopment consented as a whole. If SGL had decided to market the consented scheme in 2014, they would most likely have had to accept over 70% less for the Site than they eventually sold it for.

54. Throughout the period up to the eventual sale, Iceni continued engaging with the local community and politically lobbying with a view to presenting new schemes. After the first applications were consented Iceni and Mr Stolkin met with LBE planners at a senior level several times to discuss and promote their new ideas. Following meetings with Pat Hayes of LBE, where he repeatedly expressed his desire to see Private Rented Schemes (PRS) come forward in the Borough (widely rolled out in US but just emerging in UK), they explored PRS with Savills and Iceni.

55. After starting this process, Mr Stolkin was encouraged to meet Greystar by Savills and in March 2015 Savills made an introduction. Greystar is a major US major PRS operator. The introduction and initial discussions were to see if they could advise SGL and "add value" to their scheme by introducing a PRS block (located where there was currently commercial space). SGL knew Greystar were entering the UK market in a very acquisitive manner and they knew Mr Hayes of LBE would love the idea. SGL's initial plan was to introduce some PRS in the location where the cinema was, to try and ease any LBE annoyance at their trying to move away from including a cinema in their scheme.

56. At this time, due to market conditions, rental communities in and around London were beginning to be considered as a potential route to deliver homes to people who could not, or did not want to, buy in the traditional manner. Mr Stolkin was fully aware from Mr Hayes, with whom he had many meetings, that LBE had a strong desire to see PRS development in the borough, and he felt that introducing the largest US provider of PRS on to the Site would help immensely with the desire to remove the low value uneconomical commercial element from the Site and replace it with PRS residential. SGL looked with Greystar at redesigning the area of the leisure complex, large food store and the multi-story car park and replacing it with a development of PRS flats and additional traditional residential blocks.

57. Even with Greystar's interest, SGL were still intent on pushing their designs forward. SGL was hopeful that LBE would see Greystar coming to the Site with a new style world leading PRS provision as attractive enough to allow them to remove the non-viable commercial development elements previously consented. PRS was seen as more affordable, and they hoped that a PRS addition to the development might reduce the affordable home provision they would have to provide. Greystar met with Mr Hayes on several occasions and Mr Stolkin continued to meet with LBE officers.

58. Greystar was advised of the confidentiality of the situation and that the Site was not being offered to anyone and was not available in part or whole to anyone. They undertook to maintain confidentiality, and SGL's advisors were also told that Greystar's involvement was not to be construed as meaning that others could look at the Site. SGL did not want to sell the Site, nor did it want to prejudice future planning applications, and the designs they were proposing to bring forward, by having other people talk to LBE or for LBE to start thinking they might sell.

What typically happens, Mr Stolkin said, is that if a site is seen to be available, developers talk to the planning authority; they may, as they do not have a financial commitment to the land, offer a development that the owner would not consider, and this can create an alternate aspiration that the planners wish to pursue. That would be very counterproductive in terms of strategy. In addition, if LBE thought SGL was selling the Site, they would be less interested in pursuing discussions with them. Even with constant reconfirmation to third parties that the Site was not and would not be available, parties did approach LBE, and SGL had to make it clear they were speculative approaches and SGL were not selling or offering the Site for sale The Site was not offered for sale in part or whole to Greystar. There was discussion about the product they could provide and how it could have been leased to them, or they could enter a joint venture on the initial block they were encouraged to design.

59. The introduction of Greystar into the process meant SGL had to put their new plans on hold, so not to prejudice Greystar's discussions with LBE. This was not a problem for SGL as they were taking a long-term view of refining and improving the planning over the coming years, as they could see the potential to double or treble the value of the Site over time. Mr Stolkin reiterated that, of course, there was always the risk of failing on application and appeal, which would see significant expenditure becoming abortive and a reduction in value of the Site.

60. SGL viewed Greystar's dialogue with LBE as them promoting SGL's objectives. Greystar continued to use SGL's planning consultants and SGL were represented at all meetings with LBE and received immediate feedback on the meetings. It became clear to Mr Stolkin that LBE viewed Greystar as presenting an opportunity to deliver a new product they wished to see in Ealing and were excited and motivated. Also, LBE recognized Greystar had the expertise and ability to build PRS homes quickly, which particularly excited them; delivery of physical homes rather than consents alone was LBE's goal.

61. Greystar commissioned their own evaluations, surveys and professional advice and undertook to share all knowledge and information with SGL. Greystar mainly used SGL's professional team but introduced their own architects. They were effectively spending money progressing SGL's site on their behalf and SGL remained very much involved.

62. There was a "Purdah" period before the Local and General Elections in May 2015 and then a very slow restart, which resulted in a slowdown in LBE responses. As the discussions with Greystar and LBE went forward, it became clear that Greystar's designs for the southern part of the Site were seen by LBE as revolutionary. It also became clear that LBE perceived an opportunity to bring forward a landmark development of a type so far unseen in the UK. They encouraged Greystar to look at the complete Site.

63. On Mr Stolkin's return from his summer holidays in 2015, he met with Greystar on 3 September 2015 when they told him they wanted to make a proposal to buy the Site. On 10 September Mr Stolkin told Greystar what SGL would accept, and on 16 September Greystar made their offer to purchase, which was accepted. Mr Stolkin's email accepting the offer concludes,

> "To agree the above we would need to know what you intend to do in terms of progressing the site in the period from now until exchange meaning a list of actions and instructions and timings etc, and we would require transparency so we can see all that is happening and also have the benefit of all that you have done (including assignment and copyright of works, plans reports etc if you didn't exchange and complete). What we don't want to do is agree a deal, for us to down tools and for you not to be moving at 100 mph, as then the risk of us not progressing our plans is too high".

64. Mr Stolkin says this clearly shows that SGL had the benefit of all Greystar were negotiating, as well as its clear intent to carry on with its planning strategy if Greystar failed to perform in the very tight time frame. SGL did not want to slow down on its planning strategy. So, SGL agreed in mid-September 2015 to allow Greystar to engage with LBE further, with a view to being able to purchase the Site. This was on a confidential basis. SGL could see that Greystar had the ability to obtain a consent that no other party would be able to achieve, because of their unique offer and expertise in the PRS field. LBE were very aware that the largest US PRS provider had the ability to bring forward and build the development expeditiously and provide needed homes.

65. The caveat on SGL selling was that they wanted to realise the potential value of the Site, as if they had been successful with their intended future planning applications. Greystar presented their plans for the full Site to LBE and advised LBE that, if they wanted to see Greystar bring forward the Site, they had a small window of opportunity to do so. LBE were extremely keen to see the Site come forward quickly for PRS and knew Greystar could deliver quickly and would build out the development. LBE were also concerned they would otherwise be "stuck" with SGL for a long time, as they had recognized by now that SGL were intent on improving the consent and were not a developer, meaning they would not build out, and most likely any developer who purchased would want to replan layouts, creating years of delay.

66. From September 2015 to January 2016 Greystar's proposals were interrogated by LBE and they were working together to give Greystar the comfort they required.

67. Mr Stolkin commented that by January 2016 Greystar were prepared to take a commercial view that their "incredibly ambitious" proposals for the whole Site would be looked upon favourably by LBE, although obtaining a consent, even for a scheme LBE wished to see come forward, would realistically take a year or more. Mr Stolkin says that Greystar were clearly given significant comfort by LBE that they would be accommodated and supported, For SGL to achieve what they wanted could have taken up to 5 years or more with a real chance of failing at any time, but LBE by now wanted this unsightly and disused key strategic site to be built out quickly by Greystar for PRS, as a landmark scheme giving LBE a massive number of PRS homes as quickly as possible. LBE would also be seen as innovative and have its profile raised. Mr Stolkin says that SGL were fully in the picture with all discussions with LBE (its consultants attended all meetings).

68. SGL accepted an unconditional offer for the Site at a level Mr Stolkin felt was vastly (many multiples) more than the value they had created, and in excess of or equal to the value of their redesigned schemes, if they had been consecutively consented potentially 5 years later. Of course, if SGL had continued with its applications, there was the risk of refusal and losing subsequent appeals, meaning loss of site value, capital tied in for many years, speculative expenditure lost, and the opportunity cost of not doing something new. They recognized that they would not be successful in achieving the Greystar designs or density as the scheme was even more ambitious than they hoped to achieve over the protracted timeline they had (as they would need to improve density layout and use gradually over time not in one bold attempt) and so they took a commercial view at that point to sell the Site to Greystar and not to carry on further. The price Greystar paid of £72,000,000 reflected their confidence in LBE's assurances that Greystar's proposals (which were dramatic in terms of density of residential and removal of the non-viable dominant commercial uses) would be supported by LBE. SCG sold the RHM site to Greystar at the same time.

69. Greystar's scheme was ultimately consented in March 2017, and they achieved nearly 2,000 flats (SGL's consented scheme had 593 homes).

Faye Clements

70. Ms Clements has worked in commercial property since 1997 qualifying as a chartered surveyor in 2000. She worked for King Sturge, now part of Jones Lang La Salle and CBRE, before starting to work with Mr Stolkin after her father died quite suddenly in December 2003. She was appointed as a Director of SGL on 18 April 2011.

71. Ms Clements corroborated a large proportion of Mr Stolkin's evidence, and we summarise here only the additional points she made in relation to her role in, or perspective on, this project.

72. At the start of the project her focus was primarily on coordinating the management of the site (which was difficult as it was a huge complex site and they needed to work out how to stop the buildings deteriorating, keep them secure and keep outgoings and all costs as low as possible).

73. Once there appeared to be some prospect of a redevelopment Ms Clements' role changed and she focused mainly on coordinating the planning and designing of a scheme which would consider feedback from the agents, planners' desires and the numerous physical and technical constraints that existed. Ms Clements described this as an evolving process and, whilst she did not attend the meetings with the LBE planners, she met and worked with Iceni on a regular basis in relation to planning and related matters considering the physical constraints of the site and ensuring the scheme worked in practical terms. With Iceni she coordinated the project team in preparing the planning application.

74. The focus for Ms Clements changed around the end of 2013 and much of her time was spent looking forward at how SGL could redesign and improve the application scheme on the assumption it would be consented. She was having meetings with property agents, analysing viability models, and looking at alternative solutions for some of the practical issues. She was also still dealing with the viability and queries / changes that were required to the current application, as without that being approved none of SGL's long-term planning strategy could be delivered. She attended the marketing meetings for G1 as SGL needed to keep G1 in employment use as this was what LBE wanted, and it would assist with the planning application.

75. As the prospects for a positive outcome for the planning application improved, the team started to look at how most of the buildings on the Site could be demolished and what would be needed in advance of this. They appointed a firm of architects to assist as a project manager on the technical side. This was complicated and would take a lot of time because of the size of the buildings, many of which were multi storey, with a triple level basement in one, SGL's contractual obligations to GSK not to invalidate the contamination indemnity policy, high voltage cables and potential fibre optics within the Site and a general awareness that the Site drained into an active watercourse, the Grand Union Canal.

76. Once the consent was issued for the application, Ms Clements' role was to continue to work with the architects and Iceni (the planning consultants) to improve the initial scheme with a view to making the next planning application which was expected to be submitted towards the end of 2015. She also coordinated with advisers on releasing some of the conditions from the planning consent so that the demolition programme could be started when they were ready. SGL started formally trying to discharge conditions (required for the demolition only) in December 2014 and discharged them between January 2015 and August 2015.

Brian Magill

77. Mr Magill is a chartered accountant and a consultant to Shipleys LLP. He advised SGL, primarily in relation to tax matters.

78. He described the meeting with Mr Stolkin and Ms Clements on 3 December 2013. The meeting was described as the annual review of entities Mr Stolkin and Ms Clements were involved in. During the meeting and after discussion and advice from Mr Magill, Mr Stolkin and Ms Clements decided that certain land (the Site) held by SGL as an investment was to be appropriated to trading stock. The land in question was that part of the land which was not suitable to hold as an investment to generate income going forward, but in respect of which SGL was now seeking major planning consents for change of use with a view to its onward sale.

79. After the meeting Mr Magill emailed his colleague at Shipleys, Ravinder Atwal, to inform her of the decision to appropriate land to trading stock. She was responsible for the accounts preparation for SGL and needed to know about the appropriation. Mr Magill also copied the email to Nigel Colson and Ben Bidnell of Shipleys. Later the same afternoon Mr Stolkin emailed Mr Magill and copied Ms Clements with a site plan identifying the land that was being appropriated to trading stock.

Nigel Colson

80. Mr Colson is a Chartered Tax Adviser employed by Shipleys LLP. His evidence corroborated that of Mr Magill, but did not add anything to it.

THE APPELLANTS' SUBMISSIONS

81. Mr Sherry identifies the issue here as being whether SGL ever was a trading company and whether it was such throughout the year down to the date of the disposal of the Site to Greystar.

82. What constitutes "trade" or "trading" has been considered in numerous cases. The Royal Commission on The Taxation of Profits and Income (1955) Cmnd 9474, in its Comments on the "badges of trade" identified the following:

(1) The subject matter of the realisation;

(2) The length of the period of ownership;

(3) The frequency or number of similar transactions by the same person;

(4) Supplementary work on the or in connection with the property realised;

(5) The circumstances that were responsible for the realisation; and

(6) Motive.

83. To this list he says we should add the presence of risk and in particular the risk of loss; and the speculative hope of profit.

84. It is clear that land dealing may be a trade, while at the same time it is clear that land may be acquired held and disposed of as an investment or by way of speculation. Whether in any given case what has occurred amounts to trading involves a multi factorial evaluation.

85. It is also clear that an asset which is acquired as a trading asset may be appropriated to investment and that an asset acquired as an investment can be appropriated to a trade; see e.g. *Taylor v Good* (1973) 49 TC 277 per Russell LJ at p297 and *Simmons v IRC* (HL) [1980] 1 WLR 1196 per Lord Wilberforce at p 1202.

86. While the badges of trade are all of importance, motive is of particular significance; see Wheatcroft on the Taxation of Income (Sweet & Maxwell 1962) §1-414 and the cases there cited. Thus (subject to two exceptions), where there is a clear profit motive in an activity, that will be trading. One of those exceptions is where the external objective, commercial organisation of the activity amounts to trading, but there is no profit motive (e.g. within a

charitable endeavour, or where there is an alternative motive, such as securing part of a plot for a residence). The lack of profit motivation here will not prevent the activity from being trading. The other exception is where a desire to make a profit is present but there is nothing more. Where the evidence of motive is derived from the trader and is at odds with the objective characteristics of the activities; in this circumstance the subjective evidence that there is a profit motive may not be determinative. Otherwise, the profit motive is determinative.

87. Whether an asset that could be either an investment or the subject of a dealing trade is held as one or the other at any given time is to be determined by reference to motive if the facts are otherwise equivocal; *Iswera v IRC* [1965] 1 WLR at p668

88. The circumstances in which the acquisition of the Site took place were not clear cut. G1 and G2 were clearly acquired as investments. While the GSK Land (the Site, along with G1 and G2) was classified as investment in SGL's accounts from its acquisition, as to the Site, this was a marginal decision.

89. There was a clear appropriation to trading stock on 3 December 2013, more than two years before the disposal of the land. The evidence is compelling and so there is evidence of trading intention. Moreover the acquisition of the RHM site (albeit as a separate site, it was acquired in its own special purpose vehicle) was designed to enhance the Site as a potential residential location. That was wholly consistent with the changed intention to make a profit from enhancing the value of the Site and onward selling. SGL's systematic commercial approach to generating a profit by incrementally improving planning permissions provides further support.

90. There is no rule of law to the effect that, whenever a property owner develops their land by making roads and laying sewers and selling plots, they can never be carrying on a trade; *Pilkington v Randall* per Salmon LJ at p673.

91. On the badges of trade,

(1) The first two (the subject matter of the realisation and the length of the period of ownership) in the present context take the matter little further. Land may be held as an investment or as stock of a dealing trade. However once the decision was taken to appropriate the Site to trading stock, the way in which the land was managed was more consistent with trading than investment. The period of ownership from the point at which the appropriation took place in 2013 down to the sale in 2016, while seeking a better planning outcome, is likewise inconsistent with holding as an investment, especially when taken together with the way the Site was managed during that period.

(2) The third badge of trade, frequency of transactions, is a hallmark of trading generally but where, as here there is only one very valuable asset which has been dealt in, it does not assist. This is particularly so in the property world where properties are normally held in individual companies (special purpose vehicles) as was the case here.

(3) The fourth badge of trade, supplementary work on or in connection with the property realised, is clearly present here. The extensive work done by the directors and SGL's consultants etc. was clearly done "in connection with the property realised". While it is true that work done preparatory to the realisation of a capital asset merely to maximise the sale proceeds may not, on its own, be sufficient to turn the disposal of a capital asset into a trading transaction, taken together with the clear appropriation to trading stock the extensive and expensive work done seeking the most profitable planning outcome points to trade. In addition to the extensive consultancy work commissioned, the directors were engaged in the project over a number of years and they as directors

and owners were involved in other land dealing ventures which points towards their activity being in nature of an adventure in the nature of a trade.

(4) The fifth badge of trade is the circumstance of realisation. Here there is no suggestion of a forced sale of what would otherwise have been held long-term/as an investment. Nor, after the appropriation, is there evidence of systematic exploitation of the Site to generate income. The reverse was the case. Such lettings as there were, were designed to facilitate early termination. The decision to purse a process of cumulative residential planning applications meant that SGL would have to sell to yield a profit on its further activity. But that followed on from the decision to appropriate. The sale to Greystar, which was fortuitous only in that it came earlier than was wholly consistent with the planned activity following the appropriation.

(5) Finally, the sixth badge, which Mr Sherry says is the most important, motive, the desire to make a profit. Here the decision to appropriate is clear objective evidence that the necessary motive (which, Mr Sherry submits, would be sufficient on its own to establish trading) is present. A further factor to consider is "risk". The directors considered that, having obtained a planning permission of some utility and value, the Site was more valuable than it was without permission; it also had some further hope value that further permissions might yield a bigger element of approved residential development and hence higher value for the Site as a whole. But applying for such further permissions involved the risk that they would be rejected, which would adversely affect the hope value otherwise attaching to the Site. Nevertheless, SGL proceeded with proposals for further permissions in the light of this consideration, thus risking reducing the ultimate value of the Site. This type of risk is entirely consistent with trading, but inconsistent with investment. The mirror to the risk of loss is "the speculative hope of profit". Mr Sherry submits that the profit hoped for here clearly fell into that category

HMRC'S SUBMISSIONS

92. SGL was an investment company at the outset. Following its acquisition, the G S K Land was classified in SGL's accounts as an investment and was held as an investment property until 3 December 2013 when the Site was purportedly appropriated to trading stock.

93. HMRC's case is that no trade came into existence (whether on 3 December 2013 or otherwise).

94. They agree that, if a company (or indeed any other person) initially holds a property asset (here the Site) as an investment, in principle it is possible for a trade to come into existence and for the company to start trading in relation to the asset.

95. As well as a change of intention, (i) what is newly intended must be something that constitutes trading, and (ii) the newly intended activity that can constitute trading must be carried on. In the present case the newly intended activity was done, namely seeking to obtain planning permission for a residential development such that the Site could be sold at as high a value as possible, whilst not actually undertaking the development itself since SGL did not have the expertise to do this and did not want to.

96. HMRC distill these principles from the caselaw:

(1) The House of Lords in *Ransom (Inspector of Taxes) v Higgs* [1974] 1 WLR 1594 held at 1606 that "[i]n considering whether a person "carried on" a trade it seems to me to be essential to discover and to examine what exactly it was that the person did". At 1600, it was held that "trade" in tax legislation meant "operations of a commercial

character by which the trade provides to customers for reward some kind of goods or services".

(2) The factual analysis must involve a "realistic approach" and "[i]t is necessary to stand back and look at the whole picture and, having particular regard to what the taxpayer actually did, ask whether it constituted a trade": *Eclipse Film Partners No 35 LLP v HMRC* [2015] EWCA Civ 95 at [111].

(3) Mere management activity in relation an asset, no matter that it is extensive and active, is not capable of giving rise to the existence of a trade: *Webb (Inspector of Taxes) v Conelee Properties Ltd* [1982] STC 913 at 920

(4) The Inner House of the Court of Session in *Inland Revenue v Livingston* 1927 SC 251 explained at 256-257 that putting an article in a suitable condition for favourable sale does not point towards trading; in contrast to a process "which changed the character of the article".

(5) It is also explained in *Livingston* at 259 that the extent to which the changes are made by the person in question rather than through the engagement of a skilled third party is relevant. This latter point is echoed in *Ransom* in which the House emphasised at 1601H, 1606H, 1612H, 1619G and 1622D that procuring another person to carry out transactions or activities amounting to trade does not of itself amount to trading.

(6) The Court of Appeal in *Ingenious Games LLP v HMRC* [2021] EWCA Civ 1180 indicated that significant and complex organization and repetition can be characteristic of both investment and trade, with the example being given there of private equity – an extremely complex and time-consuming activity which is, nevertheless, still investment.

97. There are also important authorities on the specific question of trading or investment where real property is concerned. The key authority is *Taylor v Good* [1974] STC 148 in the Court of Appeal. At 154 there is a helpful survey of the authorities, from which key passages are as follows:

(1) "The fact that a landowner lays out part of his estate with roads and sewers for sale in building lots does not constitute a trade, nor the fact that he may have expended money in getting the property up for sale". So putting in infrastructure and getting property up for sale does not make a trade.

(2) Discussing another case, it was said "[h]ere was the element of purchase and sale with which we are not concerned as a combination indicating trade". That element of purchase and sale is lacking the instant case too because, as explained above, the Site was not purchased in order to be sold.

98. In the present case what SGL did in relation to the Site was insufficient to give rise to a trade and the Site remained an investment. In particular:

(1) It is very hard to say that SGL ever provided to customers for reward any goods or services in line with the definition of trading in *Ransom*. That fact that what it did was complex and time-consuming is not enough: see *Ingenious*.

(2) Much of what SGL did amounted to mere management activity, and even if one views the management as being extensive that does not alter matters (per *Webb*): obtaining security and insurance and preventing buildings deteriorating

(3) SGL procured that skilled professionals on its behalf carried out preparatory work for further planning applications that would move towards a more valuable purely residential scheme. As to that:

(a) That activity is, patently, not such as to change the character of the Site: rather, it was merely putting the Site in a suitable condition for favourable sale. The same would be true even if the further planning applications had actually been successfully made – but they were not made at all, let alone successfully. As noted above, SGL has admitted that it has not "*carried out substantial works to*" the Site.

(b) The Site was bought without present intention to sell. SGL was not a developer. In those circumstances, the fact that it subsequently merely took steps to enhance the value of the property in the eyes of a developer who might wish to buy for development is not a trade.

(c) Even if (which is denied) SGL did change the character of the Site, it would face the problem that the changes were not, viewed realistically, made by SGL rather than through the engagement of a skilled third party: see *Livingston* and *Ransom.*

(4) The steps taken by SGL regarding demolition and utilities are sufficiently *de minimis* as not to be material in a realistic appraisal of whether SGL's activities amount to a trade.

(5) The three leases of parts of the Site noted above point against trading: generating income from the holding of assets is a classic investment activity.

99. The fact that a trade did not come into existence is reinforced by various factors including the following:

(1) The differences in what was done in respect of the Site after the purported appropriation, as compared to beforehand, were

(a) preparations were made for planning applications (as opposed to planning applications being made as they had been before 3 December 2013),

(b) a sale to Greystar was agreed after the purported appropriation, and

(c) some changes in respect of utilities were made.

Given that SGL was not trading before the purported appropriation, it is mysterious as to why these limited differences should change matters in that regard.

In particular, (a) is actually weaker vis-à-vis trading after the purported appropriation, (b) is clearly applicable to an investment as well as trading, and as to (c) the changes were *de minimis* and clearly insufficient to change the character of the Site.

(2) G1 was sold after the Site was allegedly appropriated to trading stock, and the sale was returned for corporation tax purposes as a capital disposal. The fact that G1 continued to be held as an investment reinforces the fact that, in reality, the Site also continued to be an investment asset. The expenses listed in SGL's tax computation as deductible in arriving at the capital gain on G1 appear very similar to the activities in respect of the Site which purportedly amounted to trading. The same point can be made about G2, though it was sold before the purported appropriation. SGL's application to the VOA after the sale of G2 (i.e. the application made on 18 June 2014) was made at a time after the alleged appropriation of the Site to trading stock on 3 December 2013, but no mention was made of the alleged appropriation.

100. HMRC submits that the badges of trade are of limited utility in the present case. The better approach is to consider in particular the cases which have involved the question of trading as regards real property and the appropriation of property to trading stock. Furthermore, even if the badges of trade are considered to have some utility in this case, they have been held not to be decisive. Mr Sherry submitted that "*the presence of risk and in particular the risk of loss*" and "*the speculative hope of profit*" should be added to the badges of trade. However, these factors do not assist in determining whether a person is carrying on a trade as opposed to investing, because those factors can equally apply when a person is investing.

101. Furthermore, even if one does consider profit motive, it is important to remember that a person carrying out an investment activity will also have a profit motive, and so the mere presence of a motive of making a profit cannot necessarily mean that a trade exists. Instead, one must focus on the *type* of profit which it is intended to make: i.e. whether the motive is to make a *profit of a trading nature* or a *profit of an investment nature*. On that point, a systematic commercial approach (i.e. organisation) is a feature of both trading and investment activity.

102. The Appellants appear to be suggesting that a "change of intention" is sufficient to give rise to a trade. That is plainly incorrect, and the Appellants have mischaracterised what was said in *Simmons*. In that case, properties were acquired as investment properties, and were sold when the acquiring group decided to go into liquidation. There was no change in activity or intention in relation to the properties between the time they were acquired and when they were sold, other than the decision of the group to go into liquidation. Lord Wilberforce stated that a change of intention was necessary for there to be trading, but he did not suggest that a change of intention would alone be sufficient to result in a sale being made in the course of a trade rather than as an investment.

THE LAW

103. The relevant statutory provisions are set out above. In addition, we discussed a substantial body of case law, to which we now turn.

104. It is not disputed that an asset can be acquired by a person for a non-trading purpose and later be transferred to be held for the purposes of a trade carried on by that person, nor is it disputed that the reverse could happen, and an asset held for the purposes of a trade could cease to be so held and be held for another purpose of the same person. That transfer, when the asset crosses (in either direction) the line dividing trading and non-trading activity is what we refer to as "appropriation". In *Simmons v IRC*, [1980] 1 WLR 1196, Lord Wilberforce commented (at 1199A):

> "Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as an investment? Often it is necessary to ask further questions: a permanent investment may be sold to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed, What was first an investment may be put into trading stock – and, I suppose, vice versa. …. What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status — neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review."

105. That case concerned a group of companies established to acquire properties for development and retention for investment. The plan was to create a group of companies which could be listed, but that plan was thwarted by the passing of the Rent Act and the introduction of tax on capital gains. So, the decision was taken to sell the properties and liquidate the group. The revenue sought to argue that the disposal of the portfolio gave rise to trading profits. Having reviewed the findings of fact made by the Special Commissioners, Lord Wilberforce described the fact pattern (at p1202) as follows:

> "I find the position, though complicated, reasonably plain. Mr. Simmons wanted to build up an investment portfolio; he formed investment companies; allied himself with an investment trust; caused each (relevant) company to acquire one property, or at most two properties, to develop and let it, and was forced into a realisation of these completed investments. This was simply a realisation of capital."

106. Dealing with the question whether the realization of a capital asset results in the taxpayer carrying on a trading activity, he said (at p1202) that, "In particular, it is rightly recognised that a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention."

107. For reasons we will discuss later, Mr Sherry considers it important that the analysis in *Simmons* appeared to be conducted on a "group wide" basis. We consider that to be an overstatement of the position, which was more that it was accepted that Mr Simmons "caused each (relevant) company to acquire one property, or at most two properties, to develop and let"; in other words, each company, looked at individually, was carrying on an investment business. Although not cited by either party, we consider the decision of the Court of Appeal in *New Angel Court Ltd v Adam*, [2004] EWCA Civ 242, to be a clear underscoring of the need to look at the position of individual companies (even within a single group of companies) separately.

108. *Taylor v Good*, [1974] 1 WLR 556, is a case we need to consider in some detail. Taking the facts from the headnote, in 1959 the taxpayer, who carried on the business of a retail grocery and a newsagent, bought a house with grounds at a public auction for £5,100. At the time of the purchase there was a possibility that he and his family might live there but that plan did not materialise. In 1963, he obtained outline planning permission to develop the site by the demolition of the house and the erection of 90 houses. In September 1963 he sold the property to a firm of developers for £54,500. The Crown did not suggest that the purchase could be regarded as any part of an adventure in the nature of a trade. Instead they argued that an adventure in the nature of a trade started not long after the purchase and culminated in the sale. Megarry J held that the facts could support a finding of a relevant adventure, excluding the purchase as part of the adventure and he remitted the case to the Commissioners to find when the trade started so that the true measure of profit (starting with the value at that time) could be calculated. In reaching that conclusion, Megarry J relied on upon the decision in *Mitchell Bros. v. Tomlinson* (1957) 37 T.C. 224, and dicta in three other cases, *Cooksey v. Rednall* (1949) 30 T.C. 514; *Lucy & Sunderland Ltd. v. Hunt* [1962] 1 W.L.R. 7 and *Leach v. Pogson* (1962) 40 T.C. 585. In response to this, Russell LJ observed that,

> "I do not think that that case and those dicta at all support the judge's view, bearing in mind the fact that we are to regard the purchase in this case as in no wise a step taken with the object of later sale and as no different from an ordinary acquisition of a residence, or an inheritance by the taxpayer: and further bearing in mind that the taxpayer was at no time engaged, or intending to engage, in the activity of buying any other properties with a view to their sale at a profit, his other acquisitions of other properties being for investment only."

109. He referred to *Hudson's Bay Co. Ltd. v. Stevens,* (1909) 5 T.C. 424, and *Rand v. Alberni Land Co. Ltd.,* (1920) 7 T.C. 629, and *Pilkington v. Randall,* (1965) 42 T.C. 662, before concluding:

> "All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy for development."

110. He caveated that by observing:

> "If of course you find a trade in the purchase and sale of land, it may not be difficult to find that properties originally owned (for example) by inheritance, or bought for investment only, have been brought into the stock-in-trade of that trade. To such circumstances I would relate the dicta relied upon in the other three cases referred to by Megarry J. But where, as here, there is no question at all of absorption into a trade of dealing in land of lands previously acquired with no thought of dealing, in my judgment there is no ground at all for holding that activities such as those in the present case, designed only to enhance the value of the land in the market, are to be taken as pointing to, still less as establishing, an adventure in the nature of trade. Were the commissioners, on a remission to them, to decide otherwise, it seems to me they would be wrong in law."

111. The Crown submitted that all the cases discussed were "matters of degree" and so it should be left to the commissioners to determine whether subsequent events amounted to an adventure in the nature of trade. The Court of Appeal disagreed, holding that, even if that were the case, with Russell LJ commenting that, "I cannot think that the activities of the taxpayer in this case subsequent to the purchase, which I have already summarised, could be so regarded by any reasonable body of commissioners versed in the relevant law."

112. In *The Hudson's Bay Co Ltd v Stevens*, (1909) 5 TC 424, the company was established by Charter. Before 1869 it owned large territories in Rupert's Land, North America. In 1869 it surrendered to the Crown its territory and rights of government in exchange, inter alia, for a money payment and for a right to claim, within fifty years, a twentieth share in certain lands in the territory as they were settled. The lands granted to the company in pursuance of this agreement were sold by the company from time to time. It was held that the proceeds the company obtained from selling this land were not a trading profit. The Master of the Rolls said (at p436):

> "The real question is whether this money can be regarded as profits or gains derived by the Company from carrying on a trade or business. In my opinion it cannot. The Company are doing no more than an ordinary landowner does who is minded to sell from time to time, as purchasers offer, portions suitable for building of all estate which has devolved upon him from his ancestors. I am unable to attach any weight to the circumstance that large sales are made every year. This is not a case where land is from time to time purchased with a view to resale; the Company are only getting rid by sale as fast as they reasonably can of land which they acquired as part of a consideration for the surrender of their Charter."

113. In *CIR v Livingston*, (1926) 11 TC 538, a ship repairer, a blacksmith and a fish salesmen's employee purchased a cargo vessel with a view to converting it into a steam-drifter and selling it. They were not connected in business, and they had never previously bought a ship. Extensive repairs and alterations to the ship were carried out by the orders of the three individuals, the first two of them being employed in their ordinary capacity and at their ordinary

trade rates. They sold the vessel at a profit. The Court of Session agreed that this was a trading transaction. They started from the proposition that an isolated transaction of purchase and sale not within the ambit of the trade of the person concerned was not a trading transaction, nor was putting an asset in a favourable condition for sale, but the carrying out of significant work on something which changed its nature might do. Lord Sands commented (at p543-4):

> "I do not think that merely putting the article in question in a suitable condition for favourable sale would necessarily have [the effect of taking a transaction out of the class of an isolated purchase and sale], as, for example, having a picture cleaned, or a ship's boilers cleaned and the hull repainted. But I am disposed to think that it would introduce the element, of carrying on a trade if the purchaser were, by himself or his own employees or by a contractor, to carry through a manufacturing process which changed the character of the article. An illustration might be the purchasing of a quantity of pig iron and having it manufactured into steel, or of gold bearing ore and having the gold extracted by milling the ore."

114. And again, at p545 he said:

> "That purchase and transmogrification of the thing purchased by manufacturing or industrial process and resale (the transaction being one of such magnitude that it might in ordinary course be the whole business for the time being of a person regularly engaged in the trade) is carrying on a trade within the meaning of the Statute for the time being, although the transaction be isolated, is a legal interpretation of the Statute."

115. Lord Sands was very clear that it did not matter that two of the three venturers were engaged like hired workmen as he considered that a trade might be carried out by individual labour, by employees or by contractors. Lord Blackburn, on the other hand, was less sure that the taxpayers would have been trading had the whole of the repair work been put into the hands of a specialist ship repairer. Lord Clyde did not focus on the question of who carried out the work, instead describing the profit from the venture as arising "From the expenditure on the subject purchased of money laid out upon it for the purpose of making it marketable at a profit".

116. In *Rand v The Alberni Land Company Limited*, (1920) 7 TC 629, a company was incorporated in 1904 with the primary object of acquiring, managing and developing land in British Columbia with a view to sale. The various pieces of land were held in trust for different people and the share capital of the company was fixed at a nominal amount, solely to facilitate division among the beneficiaries, and was not determined by reference to the value of the lands acquired. All the ordinary shares had been allotted in consideration of' the conveyance of these lands to the company, and these shares had been continuously held by the original allottees, or their representatives. Working capital had been provided by the issue to ordinary shareholders of preference shares for cash. In 1908 the company issued deferred shares in return for services which enhanced the value of the lands. Rowlatt J described the question as being whether this company, which was formed for what he called family reasons, had really only realized some property held as capital by those who became its shareholders or whether it had got to the point of embarking on a trade of which the sale proceeds were the profits. The company had cleared the land and formed roads. It sold parts of the land and kept some of the money and ploughed it back into the land. It issued shares in its capital to certain people who were instrumental in bringing a. railway there. The Crown argued that the company had gone beyond the stage of merely realizing the property and had embarked upon a business. However, Rowlatt J held (at p639) that an individual who did all these things would "only [be] properly developing and realising his land" and would not be carrying on a trade or business and went on to hold:

> "I do not believe a land-owner would be liable for a moment, and I do not think that the Company is liable. I feel the force of what is said, that they were

> very enterprising. They did more than a lazy or a too conservative land-owner would do. They were enterprising, but I do not think they did more, as Mr. Romer put it, than act as the machinery by which the development and progressive sale could be carried out, and by which alone, practically speaking, it could be carried out, when the lands were subject to a trust of this kind."

117. In *Iswera v Commissioner of Inland Revenue*, [1965] 1 WLR 663, the Privy Council was concerned with an appeal by a lady from Ceylon who, in order to live near the school which her daughters were attending, entered into an agreement for the purchase of a site of about two and a half acres of land near the school. She had tried to buy a part only, but the vendor would only sell the whole site. She borrowed, and paid, the amount of the deposit, and then divided the site into 12 building lots, nine of which she sold to nine sub-purchasers, keeping two lots for her own house and one for reconveyance to the vendor. She was assessed to income tax on the ground that the whole transaction was an adventure in the nature of trade and that the site purchased by the appellant for her house must be brought into the computation of profit. The Privy Council agreed that the transactions here amounted to an adventure in the nature of a trade. The Supreme Court of Ceylon had decided that "it is the total effect of all relevant factors and circumstances that determines the character of the transaction". The Ceylonese tax authorities had decided that the dominant motive or intention of the taxpayer was not her desire to live near her daughters' school and the transaction presented a picture of trading. The Supreme Court agreed that the tax authority had applied the correct legal principles, as did the Privy Council. Lord Reid commented (at p668):

> "It may seem that too much emphasis has been put on motivation, but that is probably due to the nature of the argument submitted for the appellant. Before their Lordships, counsel for the appellant came near to submitting that, if it is a purpose of the taxpayer to acquire something for his own use and enjoyment, that is sufficient to show that the steps which he takes in order to acquire it cannot be an adventure in the nature of trade. In their Lordships' judgment that is going much too far. If, in order to get what he wants, the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does. But if his acts are equivocal his purpose or object may be a very material factor when weighing the total effect of all the circumstances.
>
> In the present case not only has it been held that the appellant's dominant motive was to make a profit, but her actions are suggestive of trading as regards the greater part of the site which she bought. She had to and did make arrangements for its subdivision and immediate sale to the nine sub-purchasers before she could carry out her contract with the vendor of the site. The case may be a borderline one in the sense that the Board of Review might have taken a different view of some of the evidence. But, on the facts as found by the board, their Lordships find it impossible to hold that in law they were not entitled to reach their conclusion."

118. In *Pilkington v Randall*, (1966) 42 TC 662, P's father, who died in 1929, demised an estate of 100 acres on trust for sale for the benefit of his wife, who died in 1945, for life, with remainder to P and his sister. Between 1929 and the outbreak of war the father's executors made several roads and sold about 30 acres in plots. Sales were resumed in 1949. P's sister asked that the land remaining in the surviving executor's name should be sold at the earliest possible moment. On the other hand, P thought it would be best to develop it for building and make roads, drains and so forth. As a result, P purchased his sister's interest in the land. and constructed roads and installed drains and services with a view to selling plots to the best advantage. The plots were advertised for sale in the local press and by a board on the site, and

sales took place continuously. P was assessed to income tax on the basis that he was carrying on a trade of developing and selling the land, which started when he bought out his sister and included all the land, not just the land interests acquired from his sister. P said that he was just realizing inherited property. The Court of Appeal (not without reluctance on the part of at least two members) agreed with the Special Commissioners that the only reason P purchased his sister's land was to sell it on at a profit and he had embarked on a trade. Salmon LJ commented (at p673-4):

> "I do not read the decision of this Court in *Hudson's Bay Co. v Stevens*, or the decision of Rowlatt, J., in *Rand v Alberni Land Co., Ltd*. as laying down a proposition of law to the effect that, whenever a property owner develops his land by making roads and laying sewers and selling plots, he can never be carrying on a trade. This would be opening the door very wide to modern property developers. I think the highest it can be put is that usually in such circumstances the property owner is not carrying on a trade, but whether in the particular case he is or is not doing so must depend on the facts of the particular case. It is essentially a question of fact and degree.
>
> I think one of the circumstances which is in favour of the Commissioners view is that the Appellant, when he bought out his sister's share, did so, as the Commissioners have found, with the intention of making a profit out of the whole of the land by reselling it after development. Although the intention with which the land was acquired is by no means an absolute criterion, it is a factor, when there is doubt, which can be thrown into the balance, as is laid down by Lord Reid in *Iswera v Commissioner of Inland Revenue*, [1965] 1 W.L.R. 663 (P.C.). It is further to be observed that, at the time the Appellant acquired his sister's share, the whole of the land, as it was, was worth something between £24,000 and £25,000. The Appellant spent as much again on developing the land with a view to reselling portions of it at a profit. Again I do not think this is by any means conclusive, and the Commissioners might well have come to a different conclusion. But on the facts here it seems to me quite impossible to say that, because they decided as they did, they must have been misdirecting themselves in law, and equally impossible to say that no reasonable man could have reached the same conclusion."

119. Although the statute gives little guidance on the meaning of trade, the concept has been explored in several cases. The judgment of Sir Nicholas Browne-Wilkinson V-C in *Marson v Morton*, [1986] STC 463, contains what is generally regarded as the classical discussion of the factors which may help to determine whether an activity amounts to a trade. He said this (at p470):

> "It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another. In relation to transactions such as this, that is to say a one-off deal with a view to making a capital profit, there do seem to be certain things which the authorities show have been looked at. For convenience I will refer to them in a moment. But I would emphasise that the factors I am going to refer to are in no sense a comprehensive list of all relevant matters, nor is any one of them so far as I can see decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate.
>
> The matters which are apparently treated as a badge of trading are as follows:

(1) That the transaction in question was a one-off transaction. Although a one off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.

(2) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.

(3) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman quoted from Reinhold? For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment.

(4) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature?

(5) What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade.

(6) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.

(7) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought.

(8) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.

(9) Did the item purchased either provide enjoyment for the purchaser (for example, a picture) or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale, that is a strong pointer in favour of it being a trade rather than an investment."

120. Considering the risk of loss and the hope of profit, the FtT in *Ingenious Games LLP v HMRC*, [2016] UKFTT 521 (TC), commented (at [431]-[432]):

> "In *Ensign* Millett J regarded the speculative hope of profit as indicative of trade. (But we note that in *Harrison* 40 TC 281 at 293 Lord Reid says that absence of profit motive may not be fatal to a conclusion that a person is trading.) In *Eclipse* (at [398]) the FTT regarded the speculative hope of profit as an important factor.
>
> This factor is present. There was a possibility of profit and a risk of loss. We discuss the nature and the measurement of the likelihood of such a profit later in this decision, but we conclude that there was a speculative hope of profit of some kind."

121. In the Court of Appeal it was observed (at [2021] EWCA Civ 1180 at [49]) that,

> "There appears to be no substantial disagreement between the LLPs and HMRC about the basic tests which have to be satisfied if an activity is properly to be characterised as a trade. Nor is it now contended by either side that the Tribunals below materially misunderstood the relevant legal principles."

122. On the topic of organisation and complexity the Upper Tribunal in *Ingenious* ([2019] UKUT 226 (TCC) at [251]) commented that:

> "In particular, focus on organisation and repetition as indicators of trading, plus the amount of work involved, can lead to error: building a portfolio of investments can involve repetition and significant organisation, but it is still investment. Contrary to the suggestion by the FTT at [1351], investing in, for example, unquoted shares and securities, particularly private equity, real estate and infrastructure investments, can involve a significant amount of complexity, work on legal documentation and subsequent monitoring."

123. Of those comments the Court of Appeal said (at [100]):

> "Those observations are undoubtedly true, as far as they go, but they cannot begin to establish any error of law on the part of the FTT. Such activity may be a hallmark of certain types of investment, but equally it is a characteristic of many types of trade. In the present context, it was for the FTT to decide what weight (if any) to accord to these features of the overall picture which it built up and had to assess."

124. Finally, in *Samarkand Film Partnership No 3 and Ors v HMRC*, [2017] EWCA Civ 77, we have (at [59]) Henderson LJ's stress on the need, when deciding whether an activity constitutes a trade, to stand back and look at the whole picture and carry out a multi-factorial evaluation of all the facts:

> "At the most basic level, it is now clear from *Eclipse*, if it was not clear before, that the question whether what the taxpayer actually did constitutes a trade has to be answered by standing back and looking at the whole picture: see [111]. Although it is a matter of law whether a particular activity is capable of constituting a trade, whether or not it does so in any given case 'depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles': see [112]. It follows that it can never be appropriate to extract certain elements from the overall picture and treat them, viewed in isolation, as determinative of the issue. But that, in essence, is what Mr Furness is inviting us to do, when he says that the purchase and leaseback (or onward lease) of a film are inherently trading activities. There is no dispute that such activities are capable of forming part of a trade, and in many contexts the only reasonable conclusion would be that they did form part of a trade. But when the whole picture is examined, the conclusion will not necessarily be the same. The exercise which the FTT has to undertake is one of multi-

factorial evaluation, and their conclusion can only be challenged as erroneous in point of law on *Edwards v Bairstow* grounds: see *Eclipse* at [113]."

DISCUSSION

125. As we have already noted, it is common ground that an asset which is purchased as trading stock can be appropriated to be held as an investment and vice versa.

126. An important point in this context is the observation by Lord Wilberforce in *Simmons*, that an asset must be characterised at any point in time as being either trading stock or a permanent, capital asset; it cannot inhabit some third, limbo-like state where it is neither one nor the other. This is the case even though it may be acknowledged that things may change and an asset may at some point in the future move from one classification to the other. Even where that is an acknowledged possibility, a given asset must at any given moment in time fall into one of those two categories.

127. Looking at the GSK Land, this was treated by SGL as a fixed, permanent asset at the time of acquisition. It was suggested that this might in some way be a marginal or colourable characterisation. We do not agree. In his witness evidence, Mr Stolkin set out in detail what SGL's initial plans were. They were to let the two principal office buildings, G1 and G2, and then to improve or redevelop the Site, but with the intention of retaining the Site to produce an income yield. He suggested that there might have been some uncertainty around this, as the viability of some of the existing buildings needed to be explored and market conditions were always changing. Nevertheless, at the time of acquisition the whole of the GSK Land was treated as a fixed capital asset of SGL and we consider that that was a correct, indeed on Mr Stolkin's evidence the only, categorisation open to SGL. The possibility of those plans changing does not seem to have occurred to anyone until the Autumn of 2012, more than 18 months after the acquisition, when the planning status of the Site started to change. On Mr Stolkin's evidence, SGL had not done anything to bring about this change in approach by the planning authorities. On Mr Stolkin's evidence, it was not until the Spring of 2013, more than two years after the acquisition, that SGL started to engage with LBE with a view to working up a different proposal, which might lead to a different future for the Site. All of this indicates to us that the characterisation at the outset of the GSK Land as a fixed capital asset of an investment business of SGL was correct.

128. Given that the Site was a fixed capital asset of SGL, it is nevertheless accepted that it could change its status if SGL carried on (or started to carry on) a trade and the Site became trading stock, rather than a fixed capital asset, of that trade.

Was SGL trading?

129. It is also common ground that, in deciding whether a trade is being carried on, all the relevant factors need to be considered, a so-called multi-factorial approach, and at the end one needs to stand back and look at the whole picture. Although HMRC have their doubts about their value in this case, we need to put a framework around our analysis of whether SGL's activities amounted to a trade. In doing this the "badges of trade" listed in *Marson v Morton* are a useful starting point, but they should be applied critically in a manner appropriate to the context. In any particular case, some of the badges of trade may be more relevant than others. Some may not be relevant at all. There may be other relevant factors to consider. Nevertheless, they constitute a useful starting point, and we propose to look at SGL's activities using the badges of trade to frame our discussion, but, having made of the badges of trade and any other relevant factors we can identify such use as we can, we will then "stand back … and look at the whole picture".

Period of Ownership/subject matter/number of assets

130. The Site was owned by SGL for five years, three before the purported appropriation and two after. We do not consider that an overall holding period of five years particularly points one way or the other. If anything, the overall period of ownership would suggest that the Site was a capital asset of SGL. A holding period of two years, on the other hand, is a relatively short ownership period for a fixed, capital asset, but we need to bear in mind that merely deciding to sell an asset does not convert a fixed asset into trading stock and, therefore, the holding period after a decision to sell an existing capital asset cannot of itself carry much (if any) weight in the multi-factorial assessment. In the circumstances, we have not found the period of ownership to be a relevant consideration.

131. We agree that the subject matter of the transaction, real estate, is equivocal when it comes to the question of investment or trading. Similarly, the fact that SGL only has one valuable asset does not point strongly one way or the other, when (which we agree) we are dealing with such a substantial asset in an industry which would typically deal in and hold assets in separate vehicles.

132. The circumstances of realisation may be a useful indicator of trading or investment. Here, the sale to Greystar was (on Mr Stolkin's evidence) unsolicited. It is, however, consistent with the plan of selling the Site once planning value had been maximised. The fact that the Site was sold before SGL had gone through with its planning stratagem is not inconsistent with SGL being a trader, but nor does it provide much support for that position.

Economic and Physical Work on the Site

133. Some supplementary work was done on the Site, but as far as its physical nature is concerned no-one has suggested that it is substantial. Clearly, work was done to change the planning status of the Site. This may not have changed the physical state of the Site, but it very clearly changed its economic value. However, the initial change in approach by LBE/GLA was not, on Mr Stolkin's evidence, something SGL lobbied for. It was something they sought to build on subsequently, but they were not responsible for the initial change of approach.

134. At the time of the sale to Greystar, SGL was working on the planning status of the Site. It had submitted one planning application and that application had been successful. SGL had begun to plan a process of making successive planning applications with a view to getting incrementally to a point where it had a site on which it had permission to carry out a large-scale residential development and which it could sell with that development potential.

135. We accept that obtaining planning permission for a large site can be a lengthy and difficult process, and the fact that all that SGL had to show for its efforts at the end of 2014 was a planning consent they knew to be unviable does not, in and of itself indicate that SGL was not trading.

136. However, the "game changer", which led to the sale of the Site at such a high price, was not something which SGL brought about. As Mr Stolkin explained, the Site was sold to Greystar, because of LBE's wish to have a PRS development in the Borough and their belief that Greystar was the person to do that for them. That is what unlocked value for SGL, but Mr Stolkin indicated that it would have taken SGL a long time to get anywhere close to the position the presence of Greystar secured, indeed his evidence is that SGL could never have got there and there was much delivery risk along the way.

137. SGL submitted its first hybrid planning application in November 2013 and that application was consented in November 2014. During 2014 and through to the end of 2015, SGL was working on improving the planning position, but from March 2015 that was done alongside Greystar, with (as we understand Mr Stolkin's evidence) Greystar taking an

increasingly important role as LBE began to perceive their importance for delivering their aspirations.

138. Whilst SGL was working on the improved planning applications, and we accept that they took up time and, no doubt, cost money, the only improvement that SGL had made was to persuade LBE to consent to a planning application which SGL did not consider to be viable. It was simply the first step along the road.

139. For the reasons discussed in [122], we do not consider that SGL's planning strategy being complicated or sophisticated (if indeed it was either of those things) would point one way or the other. Investment strategies can be sophisticated or complex, just as much as trading ones.

140. We do not agree with HMRC's argument that the use of third parties (here planning and development consultants such as Iceni or Savills) means that the work carried out is to be disregarded in deciding whether SGL was trading. The passages said to support that view in *Ransom v Higgs* merely indicate that A is not trading if they procure or compel B to trade. That is not the position here at all. SGL is not procuring Iceni or Savills (or any other consultants) to trade; SGL is buying-in their services as contractors to help it carry on the activities it carries on as principal and which (it says) amount to trading. *Livingston* does not provide clear support for the view that, to be trading, a person must carry out the relevant activities personally (if an individual) or by using employees; contractors' services can be used without that preventing a trade being carried on. On Mr Stolkin's and Ms Clements' evidence, the consultants' work was co-ordinated by the directors of SGL and, of course, SGL owned the Site. We ascribe no importance to the fact that SGL had no planning experience and had to buy in services from Savills, Iceni and others.

141. We will come back to the work SGL had carried out (and planned to continue) in seeking to enhance the value of the Site through the planning system.

Intermediate income/management

142. In the meantime, work was carrying on looking after the Site, such as keeping it secure and granting leases to secure rating and security advantages. We do not consider that this points one way or the other. The level of income was low, but this would have been the case on the original plan (to create an improved investment asset) until the Site had been improved.

SCG's acquisition of the RHM bakery

143. It was suggested that this acquisition suggested that SGL had started to trade, because SCG would not have purchased the RHM site otherwise than to assist SGL in realising the Site for a residential development. We do not think that we can put too much weight on this transaction, although we acknowledge that the transaction was funded by a company which was under the umbrella of the Stolkin/Clements families. We say this for a number of reasons. Firstly, although Mr Stolkin said that SCG always held the RHM bakery site as trading stock (it certainly described its activities as "property dealing, development and management" in its 2014 statutory accounts), we have no real evidence of what that company's plans for the RHM site were and how they dovetailed in with SGL's aspirations. Secondly, even though both companies were in the ownership of Clements/Stolkin family interests, their ownership was not identical, as the Stolkin interests were held by trusts for the benefit of Mr Stolkin's children. In any event, even if the ultimate ownership of both companies was the same, the tax position of each company, in particular whether it is investing or trading, needs to be considered by looking at that company on its own. That much is clear from *New Angel Court*.

144. Mr Sherry draws a parallel between the situation here (taking the activities of SGL and SCG as one for the moment) and the situation which obtained in *Pilkington*. Here, P bought out his sister's interest in land they had inherited, because he thought that a better result could

be obtained by carrying out works on the site and then disposing of it, rather than simply selling it, which is what his sister had proposed. It was held that, from the time he acquired his sister's land, P began to carry on a land development trade. That was found to be the case by the Special Commissioners, although we note their observation (42 TC 662 at 665) that they were asked to decide between the Revenue's position (that the entire activity was a trade, including the activity on the land P had inherited) or P's position (that he was simply disposing of inherited land and certainly not carrying on a trade). The Special Commissioners expressly recorded that they had not been invited to go down a middle way (holding that P's disposal of his own inherited land was not trading, but his transactions in the land he bought from his sister was). We have already noted the Court of Appeal's articulated reluctance to endorse the Special Commissioners' ultimate position (that the whole activity was trading).

145. Even if *Pilkington* provided more enthusiastic support for the proposition that a subsequent acquisition of a separate asset as trading stock can of itself change the classification of an existing capital asset, there is an obvious point of distinction. *Pilkington* was concerned with a single individual; we are confronted by two companies, not even in the same ownership.

Motivation: Making a profit/trading/risk of loss

146. Mr Sherry places great emphasis on the desire to make a profit. This he says is a strong indicator of a person carrying on a trade. If that is linked with complexity of operations and a willingness to risk loss in order to make that profit, that he says is further evidence of a trade. We agree that, in the vast majority of cases, a desire to make a profit is an important part of being a trader. However, the fact that there may be a larger motivation (to fund the purchase of a house in a particular place or to carry on a trade for charitable/benevolent purposes) does not alter the fact that a desire to make a profit normally needs to be present for there to be a trade.

147. However, we do not agree that it follows from the fact that a person wishes to make a profit from a transaction that that person is carrying on a trade. People, including substantial endowment funds, charities and pension funds, all make investments in a systematic, considered way with a view to making a profit. That does not, however, make them a trader, and we have the examples of private equity, real estate and infrastructure investments from *Ingenious*. In deciding whether a person is trading, it is not enough to ask <u>whether</u> a person is looking to make a profit from a transaction (rare indeed would be the person who sets out to make a financial loss), but rather we also need to ask <u>how</u> that person is looking to make a profit.

148. We saw that in *Simmons* Lord Wilberforce commented that, "Trading requires an intention to trade" Mr Sherry placed great emphasis on intention, in particular the presence of an intention to trade. At times he seemed to come close to suggesting that it is possible to will a trade into existence. When pressed, however, he was clear that that was not his submission. If we look at Lord Wilberforce's wider comment, beyond those opening words, we consider that, in asking whether a person had an intention to trade, he was asking whether someone is seeking to make a profit through carrying on activities which have all the other characteristics of a trade, exactly the "whether" and "how" questions we have just identified. We would not accept that a person can start to trade by doing no more than articulating a desire to do so in those terms. That is relevant to the appropriation of the Site to trading stock in December 2013. SGL appropriating the Site to trading stock cannot have any tax significance if SGL was not carrying on a trade. It can be important to know when an asset crosses the capital asset/trading stock dividing line, but identifying such a time cannot have any significance if there is no line to cross. We do not regard the "purported appropriation" (as Mr Afzal took to calling the decision taken at the meeting in December 2013) as significant in deciding whether SGL was carrying on a trade, nor do we attach any significance to the way SGL dealt with costs in its

tax computations. Equally, we do not consider the facts that SGL continued to hold a large capital asset (G1) or that it made planning applications before the appropriation as counting against SGL's assertion that it was trading in relation to the Site. It is perfectly possible, although probably rarely seen in practice, for a single company to carry on separate activities (one investment and the other trading) in relation to different assets.

149. As far as risk is concerned, we accept that there was a possibility of costs and time being sunk into the making of planning applications which failed. However, those costs would be contained by SGL's strategy of seeking incremental increases in the planning position. As far as larger financial risk is concerned, SGL purchased the GSK Land with no intention of carrying out any kind of residential development and with significant planning restrictions on the use of the GSK Land. If it had completely failed to obtain any planning permission at all, this would not make its possible use of the Site any more restricted than the uses that were open to it at the time of acquisition. We accept that a failure at any point along SGL's journey to obtaining the next desired planning permission would take away any future hope of value increase, but there was no suggestion that it would take away the value which had already been obtained from the planning permissions which had been consented or the value which existed before LBE/GLA began to change their planning policy. There clearly was a level of risk involved in SGL's plans, but there was no suggestion that it would have been substantial (in the sense of creating a risk of overall loss, rather than losing the possibility of future gain). It is not the same level of risk as that taken by a speculative dealer in assets with volatile values or where pricing is outside the control of the dealer.

150. We do not consider the fact that SGL (undoubtedly) wanted to make a profit or that its plans carried some risk of wasted expenses and opportunity cost point towards trading.

Intention at the outset/time of purchase

151. One badge of trade identified in *Marson v. Morton* is a person's intention as to resale at the time of purchase. Clearly, SGL's intention at the time of purchase was to hold the Land in the long term as a capital asset to generate an income yield. Although that factor was said not to be decisive in itself in *Marson v Morton*, it seems to us that it is an important point where a person acquired a long-term asset and then asserts that their plans for that asset have changed and, as a result, they look to sell it. The taxpayer's intention at the time of purchase was considered to be important by the Court of Appeal in *Kirkham v Williams*, [1991] 1 WLR 863, when deciding whether a taxpayer (who was not a land dealer) was trading in land. The Court observed that the Crown had not suggested that there was any change in character of the asset after its acquisition, which (of course) is the question that confronts us. Nevertheless, at the very least, *Kirkham v Williams* indicates that purpose at the time of acquisition is more important than *Marson v Morton* might suggest, albeit that (like all the other factors we are considering) it will not be of equal importance in all cases.

152. We accept Mr Stolkin's evidence that SGL changed its plans as to how it intended to maximise value from the Site. It no longer wished to develop the Site and hold it as a long-term source of income. It did not have the expertise to carry out the kind of development that it was hoping eventually to obtain planning permission for, nor does it seem that SGL had the required finance available to it to do that. There was certainly a change of plan in how SGL hoped to realise value from the Site.

153. However, this factor (why the asset was purchased in the first place) may explain the outcome of a lot of cases where a person who changed their mind and decided to sell a capital asset (and even carried on some work on it) was nevertheless held not to be trading. In contrast, a person who purchases a piece of land with the intention of carrying out some physical work on it, or simply getting planning permission, and "flipping" the land as soon as possible after

that has been done, without ever enjoying the land or receiving income from it, would undoubtedly be held to be a trader. The position of such a person can be contrasted with the position of the taxpayer in many of the cases we have discussed. In *Hudson's Bay*, a distinction was drawn between the company which was "only getting rid by sale as part of the so reasonably can of land which they acquired" not as trading stock, and a case where land is purchased from time to time with the view to resale. We see that in *Taylor v. Good*, where the point was made very clearly that a person who owns or buys without present intention to sell is not engaged in a trade if, not being a developer, that person "merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy it for development". It was expressly stated that the absorption of land acquired by inheritance (as in *Pilkington*) into an existing trade might lead one to a different conclusion, but merely trying to enhance the value of land acquired other than as a trading stock before its disposal is not sufficient to amount to a trade.

154. Mr Sherry stressed the expression "merely takes steps to enhance the value of the property" in Russell LJ's judgment. Certainly, in *Pilkington*, Salmon LJ was clear that the question whether a person is carrying on a trade is a question of fact and degree and there was no rule of law that, whenever a property owner develops his land by making roads and laying sewers and selling plots, they can never be carrying on a trade. One important, indeed decisive, additional feature in that case was the purchase by P of his sister's share of land with the clear intention of carrying out development works and then disposing of it. There was a trade in other assets, albeit that those assets were acquired later, and that is what tipped the balance in favour of P being a trader (albeit that, as far as his pre-owned land was concerned, this was a conclusion that both the Special Commissioners and the Court of Appeal appeared quite reluctant to reach). There is, of course no such indication here. We have already commented on the acquisition of the RHM bakery site by SCG.

155. We agree that, in the multi-factorial test, the fact that a person acquired a significant asset to hold (even after some development) long-term as a source of income does not prevent a conclusion that the taxpayer subsequently became a trader in relation to that asset, but we do consider that it is a weight in the balance against such a conclusion. We appreciate that this means that it may be harder for a person to carry on a trade in relation to an asset acquired other than as trading stock than it is for a person who acquires an asset as trading stock and then does the same as the first person does after the point of "appropriation" (more neutrally, changing their mind and deciding to sell). That, we consider, is an inevitable result of land being acquired as a capital asset. The thinking behind the original acquisition will always be something which has to be considered. Depending what else happens, of course, the weight to be attached to that may change, but, rather like the blood on Lady Macbeth's hands, it will never completely go away and is always something which needs to be considered in the multi-factorial assessment.

156. All we have here, to weigh against the circumstances of acquisition, is the fact that SGL had changed its plans once GLA/LBE began (of their own volition without any effort by SGL) to loosen the planning noose around the Site, had acquired a better planning permission and was working to try to achieve an even better position before selling the Site. That incurred cost (in terms of external advisers' and directors' time), but we do not consider that what SGL was doing or planning to do (even if it had carried on with its plans and not sold the Site to Greystar), amounted to more than taking advantage of this fortuitous turn of events by putting its single fixed asset into the best position for onward sale. We have witness and documentary evidence that a lot of effort was expended in doing this, but a large site/project will always require more energy than a small one. Whether a project is trading or not cannot be determined by its scale. SGL was not going to carry out a development or do anything which would make a significant

change to (transmogrify) the Site. It had not laid out any roads or other material infrastructure, nor had it done (nor did it plan to do) any other significant works on the Site. As it happens, the real changes in planning status and value came from the (unsolicited by SGL) policy shift by GLA/LBE and, most significantly of all, from the introduction of Greystar by Savills and the way LBE perceived Greystar and the value they could bring. Although SGL stayed involved alongside Greystar, Mr Stolkin's evidence clearly indicates than none of the changes flowing from Greystar's introduction were brought about by SGL.

157. We agree with Mr Sherry that, because of the need to carry out a multi-factorial analysis in each case, none of the authorities we have discussed binds us to find that SGL was not trading, but we do consider that the sheer weight of authority (*Hudson's Bay*, *Alberni Land*, *Pilkington*, *Simmons*, *Taylor v Good*) indicates that, to be held to be trading, a person such as SGL, which acquired the asset which it says is trading stock otherwise than as trading stock, needs to do something more decisive to escape the fetters of the past than simply decide to sell the asset and then do no more than take steps to enhance the asset's value prior to sale. We consider that this is all SGL has done here.

Was SGL preparing to trade?

158. Section 165A(4)(b) TCGA provides that trading activities include activities a company is carrying on for the purposes of a trade that it is preparing to carry on. We do not consider that this helps SGL here. SGL was already seeking to improve the planning position of the Site by gradually getting more beneficial planning consents until it reached its intended goal, when it would sell the Site. It was not planning on doing anything different in the future from what it was already doing. There is no qualitative difference between what SGL was doing and anything it was planning to do in the future (and would have done had the sale to Greystar not gone ahead) which could lead to the conclusion that its activities were for the purposes of a trade it was preparing to (but had not yet started to) carry on. We consider that, if SGL was not carrying on a trade, neither was it preparing to carry one on.

DISPOSITION

159. For the reasons set out above, we have concluded that the answer to the question we posed ourselves at [11] above is "No". It follows that the Appellants did not meet the conditions for claiming entrepreneurs' relief on the disposal of their shares in SGL.

160. These appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 26th FEBRUARY 2024