TC06189

Appeal number: TC/2014/03441

VAT – option to tax under Part 1 Schedule 10 VATA – whether disapplication provisions in paragraphs 12 to 17 applied on basis that land was exempt land and grantor was a developer – whether there was the necessary "intention" or "expectation" – whether the required connection existed within s1122 CTA 2010 – appeal dismissed

IRST-TIER TRIBUNAL
TAX CHAMBER

PGPH LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE SARAH FALK

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 18 to 21 September 2017

Tarlochan Lall for the Appellant

Peter Mantle, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an appeal against a decision by HMRC to refuse input tax credits on the basis that the appellant PGPH Limited ("PGPH") was not making taxable supplies. Following the consolidation of a number of separate appeals, the periods covered by the appeal, and the amounts at stake for those periods, are as follows:

Return	**VAT reclaim (£)**
02/14	20,227.09
05/14	20,354.21
08/14	33,299.60
11/14	28,580.62
02/15	28,081.06
05/15	16,772.29
08/15	16,500.29
11/15	20,815.45
Total	**184,630.61**

(The point at issue in the appeal remains relevant for subsequent periods, but the periods set out in the table are the ones formally included in the appeal.)

2. As described further below, PGPH was formed to carry on a property business in the healthcare sector. It acquired a lease of a property for use in that business and exercised the option to tax under Part 1 of Schedule 10 to the Value Added Tax Act 1994 ("Schedule 10" and "VATA"). The dispute relates to a grant by PGPH of a right to use the property to a company called Smart Medical Clinics Limited ("SMCL"), following which PGPH incurred expenditure on refurbishment works. Initially HMRC denied input tax credits on the grounds that it was not considered that PGPH was making or intending to make taxable supplies, but in an amended Statement of Case HMRC based their refusal on the provisions in paragraphs 12 to 17 of Schedule 10 having the effect that the option did not apply to the grant to SMCL, so that supplies pursuant to it were not taxable supplies.

The statutory framework

3. The most relevant provisions of Schedule 10, together with paragraph 113 of the Value Added Tax Regulations 1995 (the "VAT Regulations") and relevant provisions of the Corporation Tax Act 2010 ("CTA 2010"), are set out in the Appendix to this decision.

4. The starting point is that grants of interests in, or any licence to occupy, land, generally give rise to exempt supplies for VAT purposes, under Group 1 of Schedule 9 VATA. Leaving to one side grants of "major interests" (freeholds and leases exceeding 21 years), supplies relating to property are treated as supplies of services and, where periodic payments are made, those services are treated as separately and successively supplied, generally at the time when payments are made or if earlier when a VAT invoice is issued (ss5, 6 and Schedule 4 VATA, and regulation 90 VAT Regulations).

5. Part 1 of Schedule 10 makes provision for a person to "opt to tax" any land. Where the option is effectively exercised then grants made by that person, or by certain associates, in relation to the land at a time when the option has effect do not fall within Group 1 of Schedule 9 VATA. Such grants therefore give rise to standard rated (taxable) supplies.

6. The option to tax provisions reflect Article 137 of Directive 2006/112/EC (the "Principal VAT Directive"), which permits Member States to allow a right of option for taxation in respect of certain supplies, including supplies of land and buildings. Article 137(2) provides that Member States may restrict the scope of this right. The UK has chosen not only to allow an option to tax but also to restrict it pursuant to Article 137(2). The domestic law provisions which give effect to this restriction are those in paragraphs 12 to 17 of Schedule 10, entitled "Anti-avoidance". Their effect is to prevent an option to tax rendering supplies taxable where certain conditions are met. Despite the title, the conditions set out do not include any tax avoidance purpose.

7. Paragraph 12(1) is the main operative provision. It provides:

> "A supply is not, as a result of an option to tax, a taxable supply if-
>
> (a) the grant giving rise to the supply was made by a person ("the grantor") who was a developer of the land, and
>
> (b) the exempt land test is met."

Both conditions (a) and (b) are in dispute in this case, that is whether PGPH was a "developer" and whether the "exempt land" test was met.

8. Paragraph 13 effectively defines developer by describing when a grant is made by a developer for the purposes of paragraph 12. Under paragraph 13(2) this test is met if the land "is, or was intended or expected to be, a relevant capital item" and the grant is made at an "eligible time as respects that capital item". The remainder of paragraph 13 expands on these concepts. In summary, "relevant capital item" is defined by reference to whether the asset in question falls to be treated as a capital item for the purposes of regulations under s26(3) and (4) VATA which provide for adjustments

relating to the deduction of input tax over a period. This is a reference to what is generally known as the Capital Goods Scheme, contained in Part XV of the VAT Regulations. A grant is made it at an "eligible time" if it is made before the end of the adjustment period provided for in those regulations (10 years in the case of land and buildings). The effect of paragraph 13(4) is that the relevant intention or expectation must be that of the grantor or a development financier (as to which see below). Although not explicit in paragraph 13 HMRC accepted, and the appellant did not dispute, that the time at which the intention or expectation must exist is the date of the grant.

9. Regulation 113 of the VAT Regulations lists the items which are to be treated as capital items. The list includes a building or part of a building on which capital expenditure with a value of not less than £250,000 is incurred on acquisition, construction, refurbishment, fitting out, alteration or extension. It was accepted by both parties that "value" in this context means the VAT exclusive cost.

10. Paragraph 12(2) provides that the exempt land test is met if, when the grant was made, the grantor or a development financier intended or expected that the land would become exempt land or would continue to be exempt land. The concept of exempt land is explained in paragraphs 15 and 16. Under paragraph 15(2) land is exempt land if a "relevant person" is in occupation and the occupation is not wholly, or substantially wholly, for eligible purposes. In broad terms occupation for the purposes of making taxable, but not exempt, supplies counts as eligible purposes (paragraph 16). "Relevant person" is defined as the grantor, a development financier and any person connected with either of them, see paragraph 15(3). By virtue of paragraph 34(2), the question whether persons are connected is determined by applying the tests in s1120 Corporation Tax Act 2010 ("CTA 2010"). The provision agreed by the parties to be relevant to this case is s1122(3), which provides that a company is connected with another person if that person has control of the company (or if the person does so with other connected persons). The definition of control for these purposes is that found in ss450 and 451 CTA 2010.

11. The term "development financier" is defined in paragraph 14 of Schedule 10. In summary it is a person who has provided finance for the grantor's development with the intention or expectation that the land will become or continue to be exempt land. Paragraphs 14(3) and (4) expand on the circumstances in which a person is to be regarded as providing finance. Paragraphs 14(5) and (6) explain that references to the grantor's development extend not only to the acquisition of land but also its construction, reconstruction or the carrying out of works by reference to which it was intended or expected to be a relevant capital item.

12. The parties agreed that the points in dispute could be refined to two key issues. The first is the question whether PGPH "intended or expected" the land to be a "relevant capital item" at the date of grant, such that it was a developer. HMRC did not seek to dispute that the actual expenditure that PGPH incurred was less than £250,000. The second is whether, at the time the grant was made, the grantee (SMCL) was a "relevant person" within paragraph 15(3). There was no dispute that the land

was not being occupied wholly or substantially wholly for eligible purposes. There was also no dispute that the burden of proof is on PGPH.

Evidence

13. I heard oral evidence from four witnesses who each produced witness statements and were cross-examined. The two witnesses for the appellant were Gerard Barnes and Michael Parker, and the witnesses for HMRC were John Gaskell and Robert Moore, who are both officers of HMRC. Mr Barnes' witness statement was dated June 2016. Mr Parker produced two witness statements, the first in June 2016 and the second in February 2017. The second one was produced in compliance with directions from the Tribunal made at HMRC's request, which required the appellant to produce additional documentation. Documentary evidence included corporate information and unaudited accounts for PGPH and SMCL, documentation relating to the lease under which PGPH holds its own interest in the property, documentation relating to the grant in dispute and other correspondence between relevant parties and with HMRC, including notes of two meetings discuss further below.

14. Mr Barnes has a background as a chartered accountant. He worked initially for a major accounting firm and then in the banking industry. He has since held roles as finance director of various companies and has focused on the healthcare sector, providing strategic and financial consulting services to, and investing in, a number of healthcare companies specialising in private medicine. He is currently a director of both PGPH and SMCL. I have accepted most of Mr Barnes' evidence. However, in some respects I found his answers to be less complete and candid than might have been hoped and there is also one area, relating to the intended use of funds lent by him to PGPH, where I have not been able to accept his evidence.

15. Mr Parker is a director of PGPH and is currently chairman and chief executive of SMCL. He left formal education at 17 and initially worked in his family's business before becoming a serial entrepreneur who has set up, run and sold over 65 companies in a number of different sectors including the medical sector, in which he has a keen interest. He is also an experienced builder.

16. I had particular difficulty with some aspects of Mr Parker's evidence. Some of the concerns I had could be attributed to a somewhat careless, broad brush approach by an individual who perhaps does not fully think through the detail of precisely what he is being asked, but overall I concluded that Mr Parker's answers to questions raised in cross examination quite frequently tended to be evasive, and that at times he sought to distract attention from the point at which the question was aimed. In my view there were also inconsistencies in his evidence and some points that, in all the circumstances, I do not consider were credible. Overall I have concluded that there are aspects of Mr Parker's evidence that cannot be accepted.

17. I would also make the general comment that neither Mr Barnes' nor Mr Parker's witness statements were as comprehensive as might have been hoped. A number of further details emerged during oral evidence but I remain doubtful that the evidence has presented a full picture.

18. Mr Gaskell is a VAT specialist working within the Tax Avoidance & Partial Exemption (TAPE) unit. Mr Moore works in local compliance as a VAT Higher Officer in the small business compliance section, and has had primary responsibility for dealing with PGPH's VAT affairs at HMRC. Mr Gaskell became involved in February 2015 when Mr Moore and a colleague were referred to him for assistance in relation to the option to tax disapplication provisions. He provided technical assistance and, following the receipt of witness statements from Mr Barnes and Mr Parker in June 2016, he assisted HMRC in gathering further information from PGPH's landlord and its managing agent. The main function of his witness statement was to exhibit the documents obtained.

19. I accept the evidence provided by Mr Gaskell and Mr Moore insofar as it relates to matters of fact.

Findings of fact

20. My findings of fact are set out below, first in the form of a chronology of the relevant events. This is followed by separate sections covering PGPH's funding arrangements, dealings between Mr Parker and Mr Barnes, specific questions relating to PGPH's actual and intended expenditure and whether part of the expenditure was intended to be incurred on equipment rather than building works, a question whether PGPH made supplies in respect of the property to anyone other than SMCL, Mr Barnes' relationship with SMCL, relevant dealings with HMRC and the appeal to this Tribunal.

The chronology

21. The property the subject of the dispute is a part of a building in the Chelsea area of London which is used for the provision of private medical services. Until late 2013 the property was occupied by a company called Westover Medical Limited ("Westover"), under a lease from a partnership referred to at the hearing as the Hodges partnership. Westover fell into financial difficulties. The reasons for this were at least in part attributable to the fact that it was occupying expensive premises, including the property to which this appeal relates, that it was not fully utilising. Mr Barnes became involved after being approached with a view to investing in Westover, which he declined to do. He did however introduce Mr Parker to the individual who was running Westover and who owned the majority of its shares, Dr Amber Kennard. Mr Parker and Mr Barnes had known each other from around 2009 when they were directors of competitor companies.

22. Mr Parker first met Dr Kennard at around Easter 2013. It became clear to Mr Parker that it would be necessary to revamp Westover's business model to generate more income, and this would require the property to be refurbished to make it more attractive to other medical related users. Mr Parker believed he could assist in identifying additional users, as well as with the refurbishment.

23. In the summer of 2013 Mr Parker became aware that Westover's bank was about to withdraw banking facilities. There was insufficient time to set up new banking

arrangements before the deadline set by the bank. Mr Parker had a shelf company available with an existing bank account, and it was agreed that this company, called PG London Trading Limited ("PG London"), would effectively lend the use of its bank account to Westover by providing services which included receiving and paying all amounts on its behalf.

24. It was initially considered that Westover might be able to occupy the whole property following refurbishment with additional users being sub-tenants of Westover, but this changed and a proposal was developed for the lease held by Westover to be assigned to a new entity. PGPH was formed on 4 November 2013 for this purpose, with Mr Parker as the sole director and shareholder.

25. Mr Parker had, and still has, a clear view of the "business model" he would like to achieve, both at the property in dispute and elsewhere. He described this as a "Regus type" facility for medical practitioners. Regus is a well-known supplier of serviced office accommodation. Mr Parker's vision of the medical equivalent would be premises equipped for medical and related services, including dentistry, which different specialists could hire for (say) one day each per week at a fee. The premises would be appropriately equipped to provide the relevant specialist services. This is discussed further below.

26. During the autumn of 2013 Mr Barnes was also having discussions with Dr David Smart, one of the GPs who worked for Westover at the property. Dr Smart had concerns about the viability of the business. He and a number of other doctors had not been paid by Westover for some time. A proposal was developed that a new company would be set up. This was SMCL. Mr Barnes would deal with the financial side of the business, would provide the start-up funds and have a majority of the shares. Dr Smart and another doctor, Dr Spira, would deal with the day-to-day running of the practice, and a fourth individual Ms Anjana Odedra would deal with staffing, regulatory and other support issues. Mr Barnes' evidence, which I accept, was that the intention was that the new company would offer GP, nursing and dental services to the local community, generally for a monthly subscription, and would seek to retain the use of the existing building. I also accept his evidence that he regarded it as very important for the business to remain in the same premises that Westover had occupied. This was not only to avoid disruption to activities previously carried on by Westover that SMCL would also undertake, but also because Mr Barnes considered that it would be difficult to identify alternative premises in the locality which had the requisite planning consent to operate as a medical practice. In Mr Barnes' view remaining in the same area was important because SMCL was providing services aimed at the local community.

27. SMCL was incorporated on the same day as PGPH, 4 November 2013. The sole shareholder and director on incorporation was Dr Smart, who acquired a single share on incorporation. Mr Barnes became a director on 24 January 2014 and Ms Odedra and Dr Spira became directors on the following day. No further shares were issued until August 2014, when 18 shares were issued to Mr Barnes and one share to Ms Odedra, as a result of which Mr Barnes held 90% of the issued shares and Dr Smart

and Ms Odedra each owned 5%. The precise date of these share issues is unclear. As discussed further below Mr Parker was appointed as a director on 1 September 2014.

28. On 29 November 2013 the Hodges partnership granted a licence for the lease to be assigned from Westover to PGPH, and entered into a revised agreement for lease with PGPH. The arrangements with the Hodges partnership required PGPH to make an initial rent deposit of £143,198.71, receipt of which was acknowledged in the documentation entered into on 29 November. The lease was formally assigned by a Land Registry transfer form on the same date. I accept Mr Parker's evidence that it took three or four months prior to this to negotiate and agree the terms of this agreement with the Hodges partnership, during which time Westover was still trading. I have also concluded that for at least most of that time it remained unclear whether Westover would continue to trade or whether what became SMCL would take over the operations.

29. During the same period Westover's financial problems continued. They became critical when another existing shareholder in Westover who had been contemplating making an additional investment in it decided not to do so. On Friday 6 December 2013, BM Advisory LLP, a firm that had been employed to advise Westover, applied as a creditor to wind up Westover. PG London made a similar application on 13 December. A winding up order was granted on 27 February 2014.

30. SMCL started operating at the property in place of Westover. The precise details are unclear but it is most likely that it commenced operations on or about Monday 9 December 2013. Mr Barnes had clearly had discussions with Mr Parker, both about the incorporation of SMCL and about Mr Parker's plans for the property. It was agreed in principle that SMCL would continue to use the premises, including during refurbishment work, and that there would be an initial rent free period.

31. Mr Barnes funded SMCL by way of loan. The initial funding provided by Mr Barnes to SMCL was £30,000. It appears that some of this was spent in acquiring furniture and fittings from bailiffs acting on behalf of Westover's creditors. SMCL also offered to pay outstanding sums to medical practitioners who had not been paid by Westover, as a goodwill gesture to ensure continuity, and took on liabilities in respect of some patients who had paid advance membership fees to Westover (in some cases for annual membership). Additional loan funding was provided by Mr Barnes subsequently as required, reaching a total of around £110,000 by December 2014.

32. PG London continued to provide receipt and payment related services, as it had done to Westover. Mr Barnes' evidence is that SMCL had little choice but to rely on PG London. There had already been considerable fallout from patients as a result of the changeover from Westover to PG London's banking arrangements and there was no wish to have a repeat of this. I accept that in the short term SMCL may well have considered it necessary to continue Westover's arrangement with PG London for continuity reasons (and probably because at that time it had no banking arrangements of its own). The longer term position is discussed further below.

33. The arrangement with PG London was formalised in a Service Level Agreement between PG London and SMCL which is stated to have an effective date of 1 March 2014. One of the points relied on by HMRC at the hearing was that Mr Barnes signed this on behalf of SMCL both as a director and as "shareholder".

34. During the early part of 2014 there were further discussions between Mr Parker and SMCL, and in particular with Ms Odedra. This led to an exchange of letters between Mr Parker for PGPH and Ms Odedra for SMCL in March 2014. The first letter, from Ms Odedra, was dated 3 March. It confirms "in principle" that SMCL would enter into a lease agreement with PGPH on the following "agreed terms". The terms specified provided for a 12 year term, commencing in 2014, at a rent inclusive of VAT of £19,500 per calendar month. There would be a 12 month rent free period from March 2014, and three yearly upwards only rent reviews. In relation to refurbishment it provides as follows:

> "You, as Landlords, will completely remodel and refurbish the building layout at your expense in agreement with drawings submitted and discussions. This will result, once completed, in Smart Medical Clinics having the benefit of 8 medical rooms and a reception area with back office and meeting room. Building works will be carried out in August ready for the 1st September. I understand that these building works will cost somewhere in the region of £400k-500k. The remaining parts of the building will be divided into a dentist practice and Physiotherapy centre and will be occupied by other third party providers similar to Westover's previous occupation."

The other terms provided for a legal lease agreement to be drawn up by the end of the year, once the building had been completely refurbished and the other tenants had been sought, that occupants would not infringe on others' space or carry out similar activities, and that a rent deposit of £250,000 would be paid in full before March 2015, to be held by PGPH. The letter concludes by confirming that the board of SMCL had all agreed the terms.

35. Mr Parker responded on 7 March. He referred to Westover's insolvency as having left PGPH in a "very awkward position", and said he had little option but to accept the terms proposed. This would require PGPH to refinance its trading activities. The letter refers to SMCL's exploiting PGPH's position, and stated that there would be no room for further negotiations. Mr Parker would take Ms Odedra's word that the terms would be honoured and a legally binding agreement entered into "once the building works have been carried out and other tenants have been found for the remaining parts of the building". Mr Parker also required confirmation that, if a lease agreement was not entered into, the building would be vacated within 30 days of written notice, with any costs being "added to your debt".

36. Ms Odedra replied on 12 March agreeing these terms, expressing understanding of the "mess" that Westover had caused PGPH, and saying that the Board would do everything in their power to "pay back your trust and support". The letter also stated that as a gesture of good faith they would start paying money on account of the rent deposit as cash flow permitted, and that they hoped to be in a position to have paid the

majority of the rent deposit before the year end. The letter refers to an explanation that Mr Parker had evidently given about that the fact that the building was opted to tax, and concluded by saying that Ms Odedra knew that Mr Parker was a great believer in verbal communication, and that dialogue would continue to be encouraged.

37. The major part of the refurbishment works was timed to start around the beginning of August 2014, although some work was done in the preceding two months. August was chosen because it was the quietest, and therefore the least disruptive, month for SMCL's business. SMCL continue to operate at the premises throughout the period, but the work was clearly intense, including work done at night. Mr Parker's evidence was that he was on site twice a day during this period, seven days a week. The majority of the work was done during August, with further work being done largely at weekends thereafter. According to a statement in correspondence with HMRC, which Mr Parker confirmed was correct at the hearing, the work was mainly completed by 1 November 2014, although there was a certain amount of small jobs still to be dealt with thereafter.

38. Mr Parker's first witness statement stated that the work involved full internal remodelling to provide 24 internal spaces, electrical, plumbing, air-conditioning and soundproofing works, new flooring, network and phone systems, refurbishment of waiting areas, alarms and CCTV, and the installation of some specialist equipment. Mr Parker explained at the hearing that the reference to internal spaces included all rooms such as shower rooms as well as medical and other rooms. We accept this evidence, although at the hearing Mr Parker referred to 26 spaces.

39. During Mr Parker's cross examination he explained that he had originally thought that the rooms intended for use by dentists would require lead lining. Once the work started it was discovered that this work had in fact been done previously. Mr Parker volunteered that this resulted in a dramatic difference in cost compared to his prior "guesstimate" (as to which see below). He referred to this again in re-examination, confirming that in March 2014 he was under the impression that the building did not have lead lined walls in the dentistry area and that when it was discovered during the works that it did this resulted in a saving of between £50,000 and £70,000. I accept this evidence.

40. Refurbishment works were carried out by a company called Echo Tango Trading Limited ("ETTL"). ETTL is owned, via two holding companies, by Mr Parker's two sons. (The superior holding company also owns the shares of PG London.) In practice Mr Parker operates the company alone. He uses the company to carry out building projects he is undertaking, whether for third parties or businesses that he is connected with. I understood it to be, effectively, a project management company that uses subcontractors to do the actual works. It generally operates on a cost plus basis, seeking a margin of around 10% on work for unconnected parties. Where there is a business or other connection with the customer ETTL may well work at cost, which essentially means that Mr Parker's time and input is given for free. I understood that to be the case as regards PGPH. Mr Parker explained this by reference to the fact that he owned both companies at the time the arrangement was put in place.

41. There was no documentation recording any terms agreed between ETTL and PGPH. Although Ms Odedra's 3 March letter referred to drawings having been submitted to SMCL, no drawings were produced in evidence other than a single layout plan produced by a furniture company that HMRC had obtained from the Hodges partnership. Mr Parker's evidence, which HMRC disputed, was that his modus operandi is never to provide quotes, specific estimates or contracts. At most he will provide a "guesstimate" of what he thinks the maximum cost might be, which he appreciates clients often need to ensure that they have funding available. In his experience the final cost is usually less than this (unless clients change their original instructions as to what is required). He does not work on a fixed-price basis or use quantity surveyors. His approach is that the cost will be whatever is required to do the job properly. I discuss this evidence, which I largely but not entirely accept, further below.

42. The only documentation available between ETTL and PGPH in relation to the works were a series of invoices from ETTL exhibited to Mr Parker's first witness statement. The total VAT exclusive value of the invoices was £233,000. The invoice details were as follows:

Invoice date	**VAT exclusive amount (£)**	**Description**	**Total invoiced including VAT charged (£)**
30 June 2014	20,000	Works	24,000
1 August 2014	80,000	Goods	96,000
29 August 2014	60,000	Goods	72,000
28 November 2014	30,000	Goods	36,000
1 January 2015	18,000	Goods	21,600
31 March 2015	25,000	Charges	30,000
Total	**233,000**		**279,600**

43. The narrative on each invoice other than the last one reads "To provide building refurbishment works as per layout drawings and as agreed". The narrative on the last invoice states "To supply materials for recent works carried out at your property". The first invoice is also described as "Part payment as deposit" and refers to "Payment terms by arrangement". The other invoices state "Payment due by return".

44. Very little evidence was available in relation to ETTL's own arrangements with subcontractors. Again, there were no written agreements. The only documentary

evidence produced comprised computer purchase ledgers for ETTL showing various items of expenditure incurred, an outline timetable of works which indicates how many subcontractors of a particular type were expected to be on site each day and night during August 2014 (in some cases indicating their first names) and copy bank statements for ETTL.

45. At some point Mr Parker approached Mr Barnes for assistance in funding the refurbishment works, and Mr Barnes agreed to do so. The precise date that the approach occurred is unclear but my conclusion from the evidence is that it is more likely than not that it was made no more than around couple of weeks before the funding was provided. Mr Barnes agreed to provide a loan of £96,000 (discussed further below). It was also agreed that Mr Barnes would become a director of PGPH and receive a 33% shareholding. Mr Barnes and Mr Parker regarded this as security for Mr Barnes' investment.

46. The agreed loan was paid by bank transfer to PGPH in two amounts of £50,000 and £46,000 on 12 and 18 August 2014. No written agreement was entered into at the time the loan was made, but the arrangement was subsequently formalised by a loan agreement dated 13 November 2014 between Mr Barnes and PGPH. This refers to the purpose of the loan as being for working capital purposes, and provides for an interest rate of 6% above a bank base rate and for repayment at the lender's discretion.

47. The Companies House records for PGPH show that in the period from incorporation Mr Parker held one ordinary share of £1. A further single £1 preference share was issued to each of Mr Barnes and Mr Parker on 1 September 2014, reflecting the agreement that Mr Barnes should own 33%. Mr Barnes became a director on 12 November 2014. The Companies House records also show that on 1 December 2014 Mr Parker transferred his ordinary and preference shares to Mr Barnes, so that Mr Barnes became the sole shareholder on that date. No stock transfer form has been located. Mr Parker's first witness statement was inconsistent with this, stating that Mr Barnes owned 33% and that Mr Parker remained the majority shareholder and would make any final decision about the company's business. Mr Barnes' witness statement also failed to mention the fact that he owned all the shares, and stated that he regarded himself as able to provide his financial expertise to the business, but considered that the business "is very much driven by" Mr Parker and that he (Mr Barnes) has little day-to-day engagement.

48. Mr Parker's explanation for the transfer at the hearing was that he was involved in a very acrimonious divorce, did not consider the shares to have any value and did not want an argument over their valuation in the divorce proceedings. Mr Barnes agreed to take the shares. I accept this so far as it goes, although at the least it helps demonstrate the close relationship between Mr Barnes and Mr Parker (discussed further below). It also gives no indication of whether Mr Barnes is in reality holding the shares for Mr Parker. Mr Barnes' witness statement and Mr Parker's first witness statement rather suggest that he is.

49. Mr Parker and Mr Barnes also discussed Mr Parker becoming directly involved in SMCL. Mr Parker was appointed a director on 1 September 2014, and also made a

£50,000 loan to SMCL just before that which was used for working capital. Further share subscriptions were recorded in August 2015 which resulted in Mr Parker acquiring a 5% shareholding in SMCL and Echo Tango Holdings Limited, the ultimate parent company of ETTL, acquiring a 37.5% shareholding. Dr Smart, Ms Odedra and Dr Spira also subscribed shares so that each had or retained 5% shareholding, and Mr Barnes subscribed further shares such he ended up with a 42.5% shareholding. In Dr Smart's case the shares remained unpaid. Other documentary evidence indicates that at least some of these investments were made earlier, in June 2015, but the formalities were not completed until August. That evidence also appears to suggest that all of Dr Smart's shares were unpaid, which is potentially relevant because holders of shares that are not paid up are not entitled to vote in accordance with SMCL's Articles. However, I have concluded that it is more likely than not that at least the initial £1 share acquired by Dr Smart on incorporation was paid up.

50. PGPH's first rent invoice to SMCL was dated 28 February 2015, covering the period from March to May 2015. The amount invoiced was £105,000 (£35,000 per month) plus VAT of £21,000. The invoices for the following two quarters were for the same amount. From December 2015 the VAT exclusive rent reduced to £19,750 per month. Each invoice refers to it being "In line with rent and Service agreement". No formal lease agreement has been entered into, and there is no other documentation available setting out the terms of the arrangements between PGPH and SMCL.

51. SMCL's use of the premises for the purposes of its own medical related activities has turned out to be less than was anticipated in the March 2014 correspondence, which referred to the use of eight medical rooms. Mr Parker's first witness statement (dated June 2016) refers to it using five rooms, and at the hearing Mr Parker said that it was currently using only three. The arrangements between SMCL and other users are discussed further below. I accept Mr Parker's explanation that SMCL's reduced rent reflected the reduction in usage.

PGPH's funding arrangements

52. As already explained ETTL invoiced PGPH a total of £233,000 plus VAT for the works. PGPH was also required to pay a rent deposit to the Hodges partnership of just under £144,000. Although the oral evidence was somewhat inconsistent I have concluded that the rent deposit must have been funded by a loan of £144,000 to PGPH from Mr Parker, which was subsequently recorded in a loan agreement dated 13 November 2014 in similar terms to the loan from Mr Barnes.

53. During 2014 PGPH received no rental income from SMCL because of the rent free period that had been agreed. However, it did receive some amounts towards the agreed rent deposit. Although not referred to in the March 2014 correspondence the documentary evidence indicates that some payments were made before the date of that correspondence. As discussed at [69] below, in practice Mr Parker had control of what payments were made by SMCL through his control of PG London, and his oral evidence, which I accept, was that he insisted that some payments were made as a condition of SMCL remaining in the building.

54. PGPH's abbreviated unaudited accounts for the period to 30 November 2014 show additions to tangible fixed assets of £212,499 before depreciation, which Mr Parker said reflected the costs of the works during that period, the total cost being the £233,000 reflected in the invoices. The accounts also show an interest-free unsecured loan from Mr Barnes of £96,000 and a further interest-free unsecured loan from Mr Parker of £55,550. The latter figure obviously does not reconcile with the loan agreement documenting a loan of £144,000 and I have disregarded it.

55. As already mentioned, Mr Parker approached Mr Barnes for a loan fairly shortly before it was made in August 2014. Mr Parker's evidence, which I accept, is that he had initially asked Mr Barnes for £150,000, which Mr Barnes was not prepared to provide. No alternative sources of finance were discussed with Mr Barnes.

56. Mr Barnes' witness statement states that he understood that the reason the loan was required from him was because HMRC were refusing to refund VAT to PGPH, and that he lent the money so that PGPH could meet commitments under the head lease. The witness statement also states that Mr Barnes never intended to contribute to the refurbishment, either at the time SMCL started using the property or later. Mr Parker's first witness statement states that Mr Barnes provided the loan as a direct result of HMRC's refusal to deal with the VAT position, and after the refurbishment works were completed. The latter statement is clearly inconsistent with the other evidence.

57. In cross examination Mr Barnes stated that the purpose of the loan was for working capital purposes. He was well aware of the VAT dispute and also knew that the refurbishments were happening at the time. PGPH was "up against it" because of the situation with HMRC. He did not know what the arrangements were with ETTL. As far as he was concerned the purpose of the loan was not for the refurbishment, but given that SMCL was a beneficiary of the refurbishment he would not have been concerned if the money had been used for it. Mr Parker had told him that he was appealing against HMRC's decision and seemed confident that he would succeed, so that all that was required was a short-term bridge. He did not find it surprising that Mr Parker had approached him because SMCL was an important tenant. For the reasons discussed below I do not consider that Mr Barnes' comments about the purpose of the loan not being related to the refurbishment to be realistic.

58. Mr Parker's evidence on this issue was in my view both incomplete and somewhat evasive. Although he referred in cross examination to the possibility of obtaining a loan from a bank as an alternative, and also talked about loan funding he provided, I do not consider that the possibility of a bank loan, or any other source of finance apart from himself or Mr Barnes, was really considered at the time. Mr Parker clearly approached Mr Barnes close to the planned commencement of the works, and even if bank financing was realistically possible it seems highly unlikely that it could have been arranged very quickly. It was also clear from Mr Parker's evidence that he wished to share risk with Mr Barnes, strongly indicating that he did not wish to fund the entire project himself. He also accepted that, until the refurbishment was complete, it would not be possible to attract other occupiers to the building.

59. I also consider that Mr Parker ultimately accepted in oral evidence that the refurbishment works had in fact been funded by loans from Mr Barnes and himself. This was in line with what he stated to Mr Moore according to Mr Moore's notes of the meeting on 10 February 2015, discussed further below.

60. The "extended cash book" produced for that meeting with HMRC (see [77]) indicates that the two payments that comprised the loan from Mr Barnes were each immediately spent in part payment for refurbishment costs. The amount of the loan also corresponds precisely to the invoice from ETTL dated 1 August 2014. In addition, ETTL's bank statements show credits for £50,000 on 12 August and £46,000 on 18 August.

61. I have concluded that the loan was spent on the refurbishment. I also do not accept that the purpose of the loan was unrelated to the refurbishment. I do accept that Mr Barnes would not have been privy to the precise arrangements between PGPH and ETTL but it would have been quite obvious to him that significant refurbishment works were going on and that material expenses were in the process of being incurred. It is also clear that if the refurbishment work had stopped then SMCL would have been in a difficult position, bearing in mind Mr Barnes' view of the importance of the premises to SMCL. From Mr Parker's perspective, he clearly knew that Mr Barnes' priority was to keep SMCL in the building, and that Mr Barnes was providing funding to SMCL. The building work had commenced in earnest. Subcontractors would need to be paid and materials acquired. I infer that Mr Parker's intention was to spend the money on the refurbishment works, that he fully expected that Mr Barnes would provide funding if and when requested, and that his confidence was such that he made no contingency plans to cover the risk that Mr Barnes might refuse to assist. My conclusion on this last point is also consistent with references in Mr Parker's oral evidence to Mr Barnes' ongoing willingness to provide finance to SMCL whenever requested by Mr Parker (see [69] and [70] below).

62. I also do not accept that the loan can be directly attributed to a shortfall caused by HMRC's failure to make VAT refunds. The VAT refunds claimed in respect of the 02/14 and 05/14 periods totalled a little over £40,000. Adding the amount claimed in respect of 08/14 of around £33,000 bring the total to about £73,000, but the 08/14 return would not have been compiled or submitted by the time Mr Barnes and Mr Parker were having their discussion. Both figures fall significantly short of the £96,000 lent, and certainly well short of the £150,000 that Mr Parker originally requested. The VAT problems would also not require Mr Barnes to advance all the funds in August, well in advance of when those later VAT refunds might be expected. In addition, Mr Parker seemed to consider that the VAT issue would be a short-term problem which would be resolved relatively quickly. In that case he would surely not have expected the outstanding VAT to increase to the amount he initially asked Mr Barnes to lend.

63. It is not clear from ETTL's bank statements how, if at all, PGPH has paid the other invoices issued for the building works. Mr Parker was unable to assist on this at the hearing, saying he would need input from his accountant. I understood him to suggest that he had put his own funds into ETTL to discharge the amounts owed by

PGPH, increasing the amount owed to him on his loan account with PGPH, but the position is far from clear.

64. On 24 December 2014 SMCL and PGPH entered into a debenture, with SMCL described as the borrower and PGPH as the lender. Under this document SMCL granted both fixed and floating charges over its assets in respect of "Secured Liabilities" of £240,000. This debenture did not reflect any actual lending transaction between the two companies. The amount of £240,000 is the total of Mr Barnes' loan of £96,000 to PGPH and Mr Parker's loan of £144,000. The explanation given by Mr Parker in his first witness statement was that this reflected the fact that PGPH had secured the building and allowed the individuals behind SMCL to continue to use the premises for their medical practices on very favourable terms, that subsequently the tables turned when PGPH faced financial difficulties and that Mr Barnes and Mr Parker were not prepared to inject their own money without some security from a company which was now trading very well. Subject to the point that the security related to funds already injected by Mr Parker and Mr Barnes, and not a future investment, this was broadly consistent with Mr Barnes' explanation at the hearing that the purpose of the debenture was to make clear to the other directors of SMCL the extent of the financial exposure that Mr Parker and Mr Barnes had taken on in relation to PGPH. It is also consistent broadly consistent with Mr Barnes' explanation at the hearing that it reflected concerns about PGPH's financial position, in comparison to SMCL's then stronger position. I accept Mr Barnes' explanation.

Dealings between Mr Parker and Mr Barnes

65. Mr Parker's first witness statement states that he had numerous business conversations with Mr Barnes regarding PGPH, that Mr Barnes also discussed SMCL with him, and that conversations were easier to have regularly during the refurbishment works because Mr Parker was on site every day. I accept this, but also consider that they must have had a significant degree of contact about the property in the latter part of 2013, before the two companies were formed. It was Mr Barnes who originally introduced Mr Parker to Westover. SMCL and PGPH were incorporated on the same day in November 2013, with very similar addresses for their registered offices. I accept Mr Parker's evidence that the registered office for PGPH was his home address and that for SMCL was his office address, which was physically separate, and that the reason SMCL had its registered office there was that Mr Parker had an account with a company formation agent whereas Mr Barnes did not, and that Mr Parker offered to assist. Nevertheless, it demonstrates that there must have been a significant amount of discussion between the two at that stage, as well as during 2014.

66. Mr Parker's evidence was that the relationship between PGPH and SMCL was initially very fluid. Mr Parker's focus through PGPH was to achieve a Regus style operation at the property for medical professionals, with both regular or repeat users and some infrequent users. Initially he had planned that Westover would continue to operate at the property and that additional users would be introduced, although he was aware that Mr Barnes was in discussions with Dr Smart over a Phoenix type operation if Westover failed. Mr Parker regarded this as "Plan B". From his perspective SMCL could also have chosen to take space elsewhere either during or after the

refurbishment works. Although the fact that SMCL operated from the site was clearly helpful to PGPH he did not place the same stress as Mr Barnes did on the importance for SMCL of it remaining in the same property, or on the difficulty of relocating. Around 60% of the patients were international and came from all over the world. Mr Parker also thought it would be possible to identify alternative properties, and this had since been demonstrated by contingency planning for SMCL. He did however see the importance of continuity. In contrast Mr Barnes considered that remaining in the same location was very important. Mr Barnes also said that PGPH and SMCL were dependent on each other: if one failed the other one would too (he referred to "mutually assured destruction"), although he subsequently sought to clarify this by saying that his comment referred to the position as it is today rather than in 2014.

67. Mr Parker's second witness statement states that at the time PGPH was formed there was no intention to group the two companies together or share common directors. Westover's failure left PGPH in a very uncomfortable position and Mr Parker was keen to protect its interests. SMCL was in a position to assist PGPH's business. However, Mr Parker was not initially anticipating that he would become a director or shareholder of SMCL.

68. I accept that the relationship between PGPH and SMCL was initially fluid and that Mr Parker contemplated that PGPH might have a relationship with Westover rather than with SMCL, but it must have been clear by the time the lease was assigned to PGPH that Westover's future was in very significant doubt. I also do not entirely accept Mr Parker's evidence about SMCL going elsewhere. SMCL's presence in the building was obviously important to PGPH and was the only source of regular receipts (albeit in the form of rent deposits) before and during the building work. It was highly unlikely that an alternative occupier would be found before the refurbishment was complete. As far as I can tell it was also SMCL's staff that provided the necessary on-site services to allow the building to be used by practitioners, whether before or after refurbishment. My conclusion is that the business relationship between SMCL and PGPH (via Mr Barnes and Mr Parker) was extremely close from at least December 2013 onwards and that Mr Barnes' reference to one failing if the other did was probably as accurate throughout 2014 as it is now. I do however accept that Mr Parker was not initially anticipating that he would become a director or shareholder of SMCL.

69. It is instructive to consider SMCL's arrangement with PG London. PG London was effectively controlled by Mr Parker, who of course also controlled PGPH (at least until December 2014). I have accepted that initially SMCL may well have considered it necessary to continue Westover's arrangement with PG London. But it is more difficult to see why the arrangement would continue, or at least be operated in the way that it was, in the longer term if those companies had been genuinely independent. In particular, in practice it was PG London (in the form of Mr Parker or persons employed by him at the office he maintained near his home address) that made the decisions as to what payments were made and when. Mr Barnes contributed more funding when he was asked to do so, apparently without him or anyone else at SMCL first interrogating exactly what expenses were being incurred. As discussed further at [97] below Mr Barnes initially devoted less time to the business than turned out to be

required, which he regarded as a dereliction on his part. This would also help explain the position of PG London in the short term, but not the longer term. The more likely explanation for the continuation of the arrangement with PG London was that Mr Barnes fully trusted, and continues to trust, Mr Parker, to the extent of being prepared to allow him to make decisions about expenditure without referring to Mr Barnes, even during a period when Mr Parker was not a shareholder or director of SMCL. It is also indicative of a close business relationship between Mr Parker and Mr Barnes.

70. Mr Parker's first witness statement states that he was approached to become a director of SMCL because SMCL was keen to engage with BUPA, with whom Mr Parker was having conversations. My understanding from the evidence is that it is Mr Parker who has proved to be the main driving force behind SMCL. Mr Barnes's focus is on the financial position and as an investor. His role is much more passive: Mr Parker described him as not good at dealing with day-to-day issues. I accept Mr Parker's oral evidence that this, together with the potential for business from BUPA, was why Mr Parker was asked to become more directly involved in SMCL. It was also clear from Mr Parker's oral evidence that Mr Barnes continues to provide funding whenever requested by Mr Parker. He mentioned that Mr Barnes had provided £10,000 only the preceding week.

71. As mentioned above Mr Parker is now the chairman and chief executive of SMCL, and clearly has significantly more day-to-day involvement in the business operations than Mr Barnes. In particular, it is Mr Parker who has focused on finding and agreeing terms with new users of the premises, including BUPA.

Expenditure on the refurbishment: the evidence

72. A key part of the appellant's case was that any references to expenditure in excess of £250,000 in connection with the refurbishment did not demonstrate that there was an intention or expectation to spend more than £250,000 on building works, on the basis that any higher figure was simply a guesstimate and also included expenditure on equipment rather than on the building. The conflicting evidence on this issue is summarised in the following paragraphs. Relevant findings of fact follow under the next subheading.

73. The correspondence between PGPH and SMCL in March 2014 refers to expenditure of "£400k-500k". Mr Parker's explanation of this in cross examination was that it was a guesstimate figure that he had come up with for Dr Kennard in relation to her plans for refurbishment by Westover. Dr Kennard's vision for the refurbishment involved significant expenditure on items such as granite floors. Although the plans for refurbishment under PGPH's ownership were much less grand the figure was nevertheless carried over into the March 2014 correspondence as an indication of the maximum cost for the entire refurbishment, including equipment. He gave Ms Odedra a number because she wanted one, and he did not place any importance on it. The specification for the works would be very different to that discussed with Dr Kennard.

74. There was also a significant focus at the hearing on the fact that a figure of £350,000 had been provided to HMRC. This first appeared in a letter from Mr Parker dated 10 December 2014 in reply to a letter from Mr Moore dated 5 December. In response to a question about the full cost of the refurbishment works Mr Parker responded "£350,000".

75. Mr Moore followed this letter up by requesting a face-to-face meeting, and also asking for an audit trail showing how the refurbishment cost was funded. He explained at the hearing that the reason he asked about funding was because he was being accompanied by a direct tax colleague who had asked him to ask that question. The meeting was eventually arranged for 10 February 2015 at Mr Parker's home address. Mr Parker said that Mr Barnes would also be attending as finance director, although in fact he did not join the meeting. Mr Moore was accompanied by a colleague.

76. Mr Moore took handwritten notes at the meeting and subsequently produced a typed report which was captured electronically to HMRC's systems on 18 February 2015. Mr Moore's witness evidence reflects the typed meeting notes in stating that Mr Parker said that the total cost of the refurbishment was £350,000, that ETTL had so far invoiced £190,000 plus VAT, that it had an additional £160,000 plus VAT to invoice for the supply of the works and that the cost was being funded by loans from Mr Barnes and Mr Parker. Mr Moore also recorded Mr Parker as saying that the refurbishment was a "complete refit" and that the work was "pretty much done". Mr Moore was cross-examined at the hearing about potential discrepancies between the handwritten and typed notes. I do not accept that there is any real substance in this. The electronic notes were prepared by Mr Moore by 18 February, relatively shortly after the meeting and when it would still have been fresh in his mind. I accept that they accurately reflect his understanding of what was said and do not consider that the apparent differences Mr Moore was questioned about are material. I also accept Mr Moore's explanation that the question "how valued?" recorded in the handwritten notes in relation to the work in progress figure of £160,000 reflected a discussion he had with his colleague after Mr Parker had left them to look at the documents.

77. Financial information for PGPH was produced for the purposes of the same meeting. This comprised a single page of management accounts, a trial balance and an "extended cash book" prepared for the period up to 30 November 2014. I accept Mr Parker's evidence that PGPH does not generally produce management accounts and that Mr Barnes produced these documents in response to HMRC's requests for information. The trial balance includes assets of £190,000 described as leasehold refurbishments, and a further £160,000 labelled "work in progress". The total of these is £350,000. The £190,000 figure corresponds to the total of the invoices from ETTL up to 28 November 2014.

78. Mr Parker's evidence was that £43,000 of the work in progress figure was reflected in the invoices issued by ETTL after 30 November 2014 and that the balance of £117,000 related to possible expenditure on machinery to provide equipment for potential occupiers, and not on refurbishment. His second witness statement stated that he understood from Mr Barnes that of the £117,000, £7000 related to

refurbishment expenditure that was never incurred and the balance "was equipment for dentists that was intended to be acquired through Echo Tango" (ETTL).

79. The statement went on to say that the most significant item of expenditure on equipment would have been an Orthopantomgraph dental machine or "OPG", a form of x-ray machine the cost of which could exceed £75,000, and that Mr Barnes had made enquiries about acquiring such equipment. An email was produced, addressed to Mr Barnes at a Smart Clinics email address and dated 12 September 2014, from a specialist financier in the healthcare sector. This set out the information needed to enable the equipment to be acquired. This included up-to-date bank statements, projections for the new venture, management accounts and details of the cost of acquisition of the business. Mr Barnes' evidence on this was less than clear. He agreed in cross-examination that the questions raised in the email would have related to SMCL's position, rather than that of any other entity, but on re-examination pointed out that by this stage he had acquired shares in PGPH and the question whether he was approaching the financier on behalf of PGPH or SMCL would not have been uppermost in his mind. Mr Parker's second witness statement stated that the equipment was not acquired partly because it transpired that the financier would have required personal guarantees from directors, and also because some dentists had left and an insufficient number of new dental specialists have been attracted to justify the cost. Mr Parker's oral evidence was that there was an additional reason, namely that at the time the equipment was thought not to fit the available space.

80. On 25 February 2015 Mr Moore and the same colleague visited Mr Parker at the property. On this occasion they were introduced to Mr Barnes but Mr Barnes did not take part in the meeting. As with the previous meeting Mr Moore took handwritten notes which he subsequently typed up. The typed notes were captured electronically on 9 March 2015. Mr Moore's witness statement again reflects the typed notes in stating that Mr Parker told him that the total value of the refurbishment works was £350,000 and that ETTL still had an additional £80,000 to invoice PGPH for the supply of the works. The typed notes also state that Mr Parker explained that the works would be "complete by this coming Monday 02/03/15". They also record that there were no drawings or valuations and that, when asked for details of subcontractors, Mr Moore was given the name of one specialist woodworking firm. Mr Moore could not recall any other names being volunteered.

81. As with the notes of the 10 February meeting Mr Moore was cross-examined about possible discrepancies between his handwritten notes and the typed version. Again I do not accept that there is any substance in this, for the same reasons. I also accept Mr Moore's confirmation in cross-examination that he understood the references to refurbishment works as being to building works rather than expenditure on equipment, but that he did not ask at the meeting how the £350,000 figure was broken down, or exactly what the £160,000 work in progress was or how it was valued. As far as he was concerned the total figure had never wavered from £350,000.

82. Mr Moore did request a schedule of works for the refurbishment in the letter dated 18 March 2015 referred to at [104] below. Mr Parker's response on 20 March expressed annoyance that Mr Moore had chosen to ask for information he had been

given repeatedly, and said that the refurbishment works had been "clearly explained" and invoiced by ETTL in the correct manner. I accept Mr Moore's evidence that at no stage in the correspondence and discussions did Mr Parker explain that any part of the expenditure was to be on equipment rather than building works.

83. Mr Parker's oral evidence was that the £350,000 was a guesstimate and was a maximum figure for the entire cost of the refurbishment including equipment. He had been pressed for a figure by Mr Moore and had provided it. By refurbishment he meant a complete refit, and his use of that expression in the meeting on 10 February was also recorded in Mr Moore's notes. The references to the work being complete referred to the physical building work. The refit in its entirety was not and is not complete because Mr Parker was and is still negotiating with medical professionals, and the equipment obtained would depend on attracting a sufficient number of professionals of a particular kind. Mr Moore had not asked the right question: if he had been asked about equipment at the meeting Mr Parker would have explained. Mr Parker thought the £80,000 figure was not referring to work that had already been done but was not yet invoiced. His explanation for not mentioning the possibility of an OPG machine to Mr Moore was that lots of different types of equipment, including an OPG, were being considered on a continuing basis.

84. The unaudited accounts of PGPH for the period from incorporation to 30 November 2014 show additions to land and buildings of £195,302. In the accounts for the year to 30 November 2015 the same figure is shown as expenditure on leasehold improvements. Mr Parker said that £190,000 related to the invoices from ETTL referred to above, and the balance probably related to different premises which SMCL also operated under an arrangement with PGPH. The accounts for the period to 30 November 2014 also show cost of plant and machinery of around £17,000, with additions of just under £20,000 being reflected in the accounts for the following year. Mr Parker thought this expenditure would include computers, and that some equipment such as dental chairs was acquired when the lease was taken over from Westover.

85. ETTL's purchase ledgers include reference to payments being made for a piece of equipment which Mr Parker confirmed was used by Smart rTMS (referred to at [93] below) in the treatment of depression and certain other disorders. However, this equipment was sold on direct to Smart rTMS and not to PGPH.

Expenditure on refurbishment: conclusions

86. I have reached the conclusion that I cannot fully accept Mr Parker's evidence on this issue. Taking account of all the evidence, PGPH has not made out its case that Mr Parker (and therefore PGPH) did not have an intention or expectation that PGPH would spend more than £250,000 on refurbishment works to the building as at March 2014, or indeed as at any earlier time between December 2013 and March 2014 at which a grant by PGPH to SMCL might be treated as being made. Overall the evidence points the other way, and I have concluded that it is more likely than not that by early March 2014 at the latest Mr Parker did intend or expect that PGPH would spend more than £250,000 on building works.

87. The reasons for my conclusion are as follows:

(1) Mr Parker is an experienced businessman and builder. Although I accept that he likes to work with no more than what he calls "guesstimates", anyone of his experience would have some reasonable idea of what a project is expected to cost, albeit that that there would be contingencies and uncertainties.

(2) At the relevant time PGPH was wholly owned by Mr Parker and the refurbishment project was PGPH's project. I think it highly unlikely that PGPH would have agreed to take on the lease, in circumstances where there seemed to be little dispute that refurbishment was required, without a broad idea of the likely cost of the work.

(3) My conclusions on this are strongly supported by the somewhat unguarded comment Mr Parker volunteered about lead lining. He said that when it was discovered that the walls in the dentistry area did not have to be lead lined because the work had already been done, that resulted in a saving of between £50,000 and £70,000. This statement very clearly indicates that Mr Parker had a figure in his head, from which this saving was deducted. He mentioned no other savings or any unexpected costs that did have to be incurred. He clearly only became aware of the existing lead lining when work started in earnest in August 2014, so I infer that between December 2013 and March 2014 the intention or expectation must have been that the work would need to be done. Given that the admitted value of the actual works is £233,000, that alone would result in a figure of over £250,000.

(4) I also do not find Mr Parker's explanation of the "£400k-£500k" figure that he clearly gave Ms Odedra convincing. It was pretty clear from his oral evidence that the work he had planned would not include all the items that he had originally discussed with Dr Kennard, but a person of his experience must by then have had a reasonable idea of the project he wanted to undertake. Ms Odedra was clearly left with the strong impression that the cost would be in the region of the figures she included in the correspondence, and Mr Parker made no attempt to correct this in his response.

(5) I did not find Mr Parker's attempts to explain the £350,000 figure given to HMRC to be at all persuasive. The correspondence is quite clear. The figure was first included in the letter from Mr Parker dated 10 December 2014. This contains an unqualified statement that the full cost of the refurbishment works was £350,000 and says nothing about expenditure on equipment. His subsequent letter of 20 March, in response to a request for a schedule of works, stated that the refurbishment works had been "clearly explained". But no such explanation had included any reference to equipment. Mr Parker's attempt to justify this on the basis that he was not asked about equipment, or for a breakdown of the £160,000, figure, is not credible in circumstances where he is now claiming that over £100,000 was intended to be spent on equipment. In my view the explanation is also

hard to reconcile with his statements at the first meeting that the work was "pretty much done" and that ETTL still had £160,000 to invoice, and his statement at the second meeting that the works would be complete by 2 March 2015. If Mr Parker had had in mind that the figure he was providing included over £100,000 on equipment which had not even been chosen, let alone ordered and acquired, and I think he would have said so. I do not accept that Mr Parker was simply referring to the building work being complete by that date. The clear impression given was that the project would be completed by then.

(6) This is further supported by inconsistencies in Mr Parker's evidence about what the equipment was. His first witness statement stated that it was to be expenditure on equipment for dentists, in particular an OPG machine. His oral evidence was that, among other things, it was concluded that such a machine would not fit the space. I infer that this conclusion must have been reached between the date of Mr Barnes' email correspondence with the financier in September 2014 and Mr Parker's statements to Mr Moore about the cost of the works. At the hearing Mr Parker sought to argue instead that the OPG remained on a list of possible equipment but he was also looking at equipment for other specialists, and not only dentists. This may very well have been the case but, if Mr Parker was right that specialist equipment was included in the cost of the works he provided to Mr Moore, then I would expect the figure provided to be more uncertain. But it was stated clearly to Mr Moore on more than one occasion, without any hint that the final cost was dependent on the choice of equipment, or indeed on any equipment being provided at all.

(7) No evidence has been produced of any equipment being acquired by PGPH. Mr Barnes reasonably clearly made his enquiry about the OPG on behalf of SMCL, bearing in mind that the questions raised by the financier referred to its position. The only evidence of expenditure by ETTL on equipment was on an item which it sold on to Smart rTMS, not PGPH.

(8) ETTL issued no invoices to PGPH in respect of the project after 31 March 2015. There is no other documentary evidence as to the actual cost of the works and it is not possible to determine the costs incurred by ETTL on the project from the limited records available in respect of ETTL itself. As discussed below, Mr Parker first took professional advice about PGPH's VAT position in April 2015, after Mr Moore had first raised the subject of the disapplication provisions in a letter sent on 18 March 2015. I am not persuaded that the absence of any further invoice from ETTL is purely coincidental. ETTL was on Mr Parker's own admission controlled by him, and it would have been entirely straightforward to ensure that no further invoices were issued.

(9) The suggestion that the reference at the second meeting with HMRC to there being £80,000 still to invoice related to works that were not in fact done is not consistent with what then happened. In fact a further £25,000 (plus VAT) was invoiced after the date at that meeting, which was described as being for the supply of materials. Given that it was also stated

at the meeting that the work was to be completed "by this coming Monday" (a date falling just five days after the date of the meeting) it is hard to see how £25,000 could actually have been incurred during that period.

(10) For completeness (although the point was not argued) there was no indication in Mr Parker's evidence that it was intended or expected at the date of grant that ETTL would make a loss on the project, such that even if the total expenditure exceeded £250,000 then PGPH's own expenditure would be less than that. In contrast Mr Parker gave clear evidence that, in this case, the intention was that ETTL would work at cost.

Occupation by other users: the Regus model and the licence agreements

88. As already mentioned, Mr Parker's original vision for PGPH involved the supply of dedicated rooms, including specialist equipment and serviced facilities, for as many medical professionals as possible. He was specifically interested in specialists who could command significant fee income. As well as doctors he was interested in attracting other specialists such as ophthalmologists. Ideally, a number of specialists of the same type would be attracted to use a dedicated room for (say) a day a week, because if there were sufficient numbers of them that could justify expenditure, or greater expenditure, on specialist equipment which the specialists could not justify on an individual basis. My impression from the evidence is that, in reality, the property has not yet attracted the level or extent of use by specialist practitioners that Mr Parker would like.

89. One point in dispute between the parties is whether those specialist practitioners that have chosen to work from the property have or had their arrangement with SMCL or PGPH. This is relevant to whether PGPH has made any taxable supplies, or whether its only supplies have been to SMCL pursuant to a grant in respect of which (on HMRC's case) the option to tax is disapplied. Mr Parker's evidence was that other users have entered into arrangements with PGPH rather than SMCL, and that PGPH has had to be flexible in attracting sufficient users to help defray costs, choosing to accept income by allowing occupation on a short term basis in the absence of being able to secure longer fixed term occupiers. His first witness statement referred to a list of additional users beyond SMCL. The list refers to "Smart Smile", BUPA, "rTMS", HCA and two named individual doctors. HCA is HCA International Ltd, a private hospital operator.

90. Mr Barnes' description of SMCL's business model in oral evidence was that it primarily employs salaried GPs but also engages self employed specialists who work on a revenue share basis. Under this arrangement revenue is collected by SMCL and, after deductions for costs, a percentage is paid on to the specialists, typically 60%. He also said that SMCL was not the only occupier of the building, including in March 2014, although it was the largest single occupant at that time.

91. Following initial confusion the position in relation to BUPA was clarified in Mr Parker's second witness statement and in the documentary evidence. It is now clear that in fact there is an arrangement between BUPA and SMCL, rather than a licence

from PGPH to BUPA. Mr Parker brought the business to SMCL, which involves the provision of medical assessments for BUPA. Mr Parker described SMCL as essentially operating like a franchisee for BUPA. BUPA is now a significant source of revenue for SMCL.

92. Mr Parker's second witness statement exhibited an agreement with HCA. Again, this is an arrangement between HCA and SMCL. It is as expressed as a licence to occupy from 1 November 2015 for a 12 month term, allowing medical practitioners associated with HCA to use one of the consulting rooms. The licence fee covers use of the room and the provision of services, including receptionist and booking services.

93. The documentary evidence included copies of four licence agreements entered into by PGPH with, respectively, Manuel Vila for "Smart Smile" (dated 23 December 2014, to commence on 1 January 2015), Tom Parker (Mr Parker's son) for "Smart rTMS" (dated 1 January 2016), and two other named practitioners commencing on other dates. These granted licences to occupy individual consulting rooms for a period of 12 or 24 months, in exchange for a monthly fee expressed to be payable "via" PG London. The fee covers services, including receptionist and booking services. Mr Parker's evidence was that there were oral agreements with other users in a similar form.

94. Mr Barnes' oral evidence was that initially Dr Vila operated as part of SMCL, having transferred from Westover, but subsequently entered into a direct arrangement with PGPH. Mr Parker gave similar evidence, to the effect that Dr Vila and certain others had historic arrangements but that new consultants were being encouraged on to the direct licence agreement model. Under both types of arrangement revenue earned by the practitioners was paid to PG London. Under the new type the licence fee was then deducted and paid to PGPH. Other costs such as consumables were deducted and the balance split with SMCL under the revenue sharing arrangement referred to above. In contrast under the old arrangements SMCL paid PGPH for use of the space.

95. No amounts in respect of any of the four documented licence agreements entered into by PGPH, or any other licence arrangements (other than the arrangement with SMCL), are reflected in the VAT returns the subject of this dispute, whether as taxable outputs or otherwise. Mr Parker said at the hearing that there was evidence available in the form of email correspondence with the relevant consultants setting out the calculations, but he did not consider that this was covered by the Tribunal's direction for disclosure of all documents relating to payments made under these arrangements. He also said that no VAT was being charged on the licence fees. In response to being shown a copy of an email in which the agent to the Hodges partnership stated that they were not aware of any subtenants, Mr Parker said that PGPH's landlord was fully aware of all occupants of the building and that he had spoken to the landlord's solicitor on that subject.

96. I have concluded that the evidence available does not demonstrate that PGPH has received licence fees or other amounts from the property otherwise than from SMCL during the periods under appeal. Any such amounts should have been included in

PGPH's VAT returns, but no such amounts were (see [102] below). Mr Barnes drew no distinction in his evidence between specialists engaged by SMCL and specialists with direct arrangements with PGPH when he stated that the revenue share was typically 60%. If the emails Mr Parker referred to exist and assist PGPH's position as he suggested then it is very odd that they were ignored when responding to the Tribunal's direction, bearing in mind that PGPH was professionally advised at that time. I also note that the four licence agreements appear to commit PGPH to provide a fully serviced facility, including matters such as booking and receptionist services. At no stage was there any indication that PGPH had or has any personnel on the premises that could provide these services. In contrast, SMCL clearly can provide the services, and does so or has done so both to BUPA and HCA.

Mr Barnes' relationship with SMCL

97. As explained above Mr Barnes was not initially a shareholder or director of SMCL, although he provided the finance by way of loan. He became a director in January 2014 and a 90% shareholder in August 2014. Mr Barnes gave evidence in cross examination that when he put money into SMCL there was what he variously described as an arrangement, understanding or agreement between himself, Ms Odedra and Dr Smart that he would be the financier and in addition would have a majority of the shares. In cross examination he accepted that the arrangement gave him an entitlement to acquire shares, although he subsequently confirmed that he had taken no legal advice and was not intending to say that he had an entitlement or agreement in a legal sense. This understanding or agreement was reached in December 2013 or January 2014. The precise shareholdings were not agreed at that stage, but it was understood that Mr Barnes would have the majority of the equity in return for providing the funding. No one else provided funds, Ms Odedra and Dr Smart not having funds available. At least during the first few months of operation Ms Odedra and Dr Smart ran the operation on a day-to-day basis. Mr Barnes was busy on other matters and was not at the premises more than around one day a week initially. When he was there his primary role was to manage the finances, including collecting debts and ensuring that creditors such as specialists were paid. He regarded his absence from the business as something of a dereliction on his part, because he had underestimated the amount of time that would be required and no one was really controlling the business. His aspiration was to be more actively involved. By the date of his witness statement in June 2016 he was spending around three days a week on the business.

98. I accept Mr Barnes' evidence on these aspects insofar as they relate to matters of fact. I also accept that, although he signed the Service Level Agreement with PG London as "shareholder", he was not, and was aware that he was not, a shareholder at that time, although he, Dr Smart and Ms Odedra intended that he become one.

99. The documentary evidence included a note of a shareholders meeting held on 26 August 2015 at Dr Spira's request. This refers not only to a new proposed shareholders agreement but also to an agreement entered into previously between Mr Barnes and Ms Odedra, apparently on the same terms. However, neither agreement was included in the documentary evidence.

Dealings with HMRC

100. Mr Parker sought no independent VAT advice when he set up PGPH, but he did speak to HMRC's helpline on more than one occasion in late 2013. He concluded that PGPH should be registered for VAT and also that it should opt to tax the building. His evidence was that HMRC had told him that he had to opt to tax the building and that he had attempted to challenge this. I do not consider it at all likely that any HMRC officer would advise that there was an obligation to exercise the option to tax as such. It was clear from Mr Parker's oral evidence that Mr Parker knew there would be VAT on the refurbishment works and that he had a significant concern about whether PGPH would be able to recover that VAT. It is much more likely that what occurred is that Mr Parker explained that refurbishment works would be undertaken and was advised that if he wished to recover VAT on the refurbishment works then the option to tax would need to be exercised. The activities of the company were also discussed with helpline staff and it was thought that not all the users of the building would be carrying on VAT exempt activities. (Supplies by registered medical practitioners, dentists and certain others are exempt under Group 7 of Schedule 9 VATA. This would not cover, for example, some supplies of cosmetic procedures.) Mr Parker appeared to believe that this would itself require PGPH to be VAT registered because its taxable turnover would exceed the VAT registration threshold.

101. Mr Parker initially applied to register PGPH for VAT purposes on 3 December 2013. He was sent details of additional information required, including a form allowing him to notify the option to tax. After further correspondence HMRC wrote on 25 February 2014 confirming an effective date for the option to tax of 15 January 2014. PGPH was also registered for VAT with effect from the same date. The option to tax is stated to relate to the first floor of the property. (It was at no stage suggested that the grant to SMCL covered any part of the building not also covered by the option.) The confirmation letter from HMRC makes brief reference to the fact that an option to tax may not make a grant taxable where it relates to property which is, or is expected to become, a capital item within regulations 112 to 116 of the VAT Regulations, and also refers to the provisions in paragraphs 12 to 16 of Schedule 10 VATA, stating that these may disapply the option if PGPH, or a person funding the acquisition or connected with either, intends or expects to occupy the property for anything other than mainly taxable business purposes. I accept that Mr Parker either did not read these statements or did not appreciate their significance at the time.

102. PGPH filed its first VAT return for the 02/14 period. This showed no supplies being made by PGPH, and reclaimed input tax in the amount indicated at [1] above. The same pattern repeated for the 05/14, 08/14 and 11/14 returns, with no taxable supplies being shown as having been made by PGPH. Returns for the remaining periods in dispute each show VAT due on supplies made by PGPH of £21,000. (The amounts shown in the table at [1] above are the full amounts of input tax credit claimed, so the actual VAT reclaimed from HMRC is the difference between the two figures.) The VAT shown as charged on PGPH's first rent invoice to SMCL was also £21,000: see [50] above, leading Mr Moore subsequently to conclude that PGPH did not appear to be accounting for any turnover other than that received from SMCL.

103. Mr Moore first became involved on 30 May 2014 when a colleague contacted him to ask him to seek verification of PGPH's 02/14 return prior to the claimed VAT refund being paid. Mr Moore contacted Mr Parker, initially by telephone, asking for information. Mr Parker responded by email attaching invoices and some other documentation. After some further correspondence Mr Moore emailed Mr Parker on 10 June 2014 disallowing the input tax on the basis that it had not been demonstrated that PGPH was in business and making taxable supplies, or had a firm intention of doing so. The sort of evidence that HMRC would expect to see would be a signed lease agreement. The email also made a specific comment about input tax claimed in relation to legal fees which Mr Moore said related to Westover and could not be claimed on that basis. PGPH appealed. Further correspondence followed in relation to the 02/14 and later periods, denying the VAT credits claimed, together with the two meetings in February 2015 which are discussed above. The March 2014 correspondence between SMCL and PGPH referred to at [34] to [36] above was provided to Mr Moore in October 2014.

104. During February 2015 Mr Moore took advice from other colleagues, including Mr Gaskell, about the potential application of paragraphs 12 to 17 of Schedule 10. He was not aware of those rules before that time. He first wrote to Mr Parker about them in a letter dated 18 March 2015. This letter requested further information and documents and advised Mr Parker that HMRC was considering the disapplication of PGPH's option to tax under those provisions. The letter does not specifically mention the Capital Goods Scheme or the £250,000 threshold. I accept that it was only at this stage that Mr Parker and Mr Barnes became aware of rules that disapply the option to tax. I find it somewhat harder to accept Mr Parker's evidence that, despite being an experienced builder, he had never heard of the Capital Goods Scheme, but am prepared to do so for the purposes of this appeal. The subject was not raised by Mr Moore at the meetings in February 2015.

105. Mr Moore wrote again to Mr Parker on 10 April 2015 noting that PGPH had failed to provide information and documents requested, and informing him that HMRC's decision remained unchanged but the grounds for it had changed. HMRC were now relying on paragraphs 12 to 17 of Schedule 10 as applying to the grant to SMCL. Mr Parker first sought professional advice following receipt of this letter.

106. Mr Parker's evidence was that Mr Moore had been involved in the VAT affairs of a number of businesses that Mr Parker had been associated with, and in each case where a VAT reclaim had been submitted Mr Moore had sought to challenge its validity. Mr Parker clearly strongly believes that he is in some way being singled out. The terms "axe to grind" and "vendetta" were used. Whilst I accept that Mr Parker may genuinely hold this belief, I do not consider that the evidence indicates that Mr Moore was acting with an improper motive or doing anything other than performing his role. I also do not consider that this issue is relevant to the matters I need to determine.

Appeal to this Tribunal

107. PGPH first appealed to the Tribunal in June 2014, initially in respect of the 02/14 and 05/14 periods. Other periods were added subsequently. The procedural history is somewhat tortuous, and appears to have involved a number of delays and failures to comply with directions on HMRC's part, with PGPH at one stage applying to bar HMRC from taking further part in the appeal, for which PGPH was also criticised. From HMRC's perspective there was also a failure by PGPH to provide information HMRC had requested. HMRC's initial statement of case was served in February 2015 following an extension of time being permitted. Following the correspondence from Mr Moore in March and April 2015 referred to above HMRC was subsequently permitted to serve a revised statement of case relying on the disapplication rules.

The issues for decision

108. I now turn to the legal issues I need to decide. I deal first with whether PGPH was a developer for the purposes of the rules, and secondly with the exempt land test and in particular SMCL's status as a "relevant person".

The developer test

109. The key issue I need to decide in relation to the question whether PGPH was a "developer" is whether, at the date of the grant to SMCL, the land was "intended or expected" to be a "relevant capital item" as referred to in paragraph 13(2) of Schedule 10. This is expanded upon in paragraph 13(4) which it makes it clear that the intention or expectation is that of the grantor or a development financier, and that it must relate either to the land or a building or part of a building on it. The question is whether it was intended or expected that the land or building "would become a capital item". HMRC's case was that the grantor, PGPH, had that intention or expectation.

110. For the purposes of this discussion I have proceeded on the basis that the date of grant was on 12 March 2014, the date of the final letter in the correspondence between SMCL and PGPH referred to at [34] to [36] above. Mr Mantle proceeded on this basis for the purposes of his submissions. I think he was correct to do so. Apart from invoices in respect of rent that correspondence is the only documentary evidence available of the terms on which SMCL has occupied the building for the periods in dispute. Furthermore, all payments of rent by SMCL to PGPH, and therefore all supplies made to SMCL in respect of its occupation, were made after this correspondence occurred. (Although Mr Mantle questioned the rent deposit arrangements during cross examination I did not understand HMRC to argue that payments made by SMCL to PGPH with that label in fact constituted rent rather than a refundable deposit.) As a result, even if there was an earlier grant of a right of occupation, the grant resulting from the correspondence was the grant giving rise to the supplies which PGPH claims are taxable supplies and which HMRC claim are not by virtue of the disapplication provisions.

Submissions

111. Mr Lall for PGPH submitted that PGPH was not a developer because the property is not a relevant capital item, and PGPH did not intend it to become one at the time the March 2014 grant (or any earlier grant) was made. At that time there was no firm plan as to what the work would involve. The cost might or might not have exceeded £250,000. The actual expenditure was £233,000, as demonstrated by the invoices and the company's accounts. There was no contract for the provision of further work, and possible expenditure on equipment did not count. Mr Lall referred to *Water Property Limited v HMRC* [2016] UKFTT 721 (TC) where it was concluded that different types and phases of expenditure (in that case, expenditure on acquisition of a property, expenditure to provide a day care nursery at the property and expenditure to convert another part into residential flats) could not be aggregated to make the property a capital item where the works were financed separately and had been uncertain at the time of acquisition. He also relied on a statement in VAT Notice 706/2 (which covers the Capital Goods Scheme) which reflected a change to the VAT Regulations from 1 January 2011 to remove any reference to whether goods were affixed to a building in determining whether expenditure on them was expenditure on land or buildings. The VAT Notice states that capital expenditure is normally expenditure capitalised for accounting purposes, and that it no longer matters whether goods are affixed to the structure.

112. Mr Lall referred to a further argument in an additional skeleton argument in reply to HMRC's skeleton. This was that in order for HMRC to succeed the Tribunal needed to conclude that PGPH had an intention or expectation (in the form of the intention or expectation of Mr Parker as the sole shareholder and director) (a) to incur expenditure, (b) about what that expenditure would be on and (c) that the expenditure would be capitalised as expenditure on land and buildings. Mr Lall relied on *Shurgard Storage Centres UK Ltd and others* (2008, VAT decision number 20797), a decision of the VAT and Duties Tribunal, where it was accepted that the reference to whether there was an "intention or expectation" that the asset would become a capital item was a subjective test. He developed this orally at the hearing to say that the references to "would become a capital item" in paragraph 13(4) and to an asset "falling … to be treated as a capital item for the purposes of the relevant regulations" in paragraph 13(8) required Mr Parker to have at least some understanding of the Capital Goods Scheme. Mr Lall suggested that, at the least, Mr Parker would need to have had some knowledge that the rules existed, that they applied to expenditure of at least £250,000 and that they required some form of the adjustment to input tax recovery over a period.

113. Finally, Mr Lall submitted that the anti-avoidance rules could not apply where, even if there was an intention or expectation to spend more than £250,000 on building works at the date of grant, the actual expenditure subsequently incurred was less than that amount, such that no adjustment period ever commenced the purposes of the Capital Goods Scheme. If HMRC were right then the option would be disapplied indefinitely, whereas the intention was that the operation of the rules should be time-limited to the adjustment period. The rules would be unworkable, or at least not work as intended.

114. Mr Mantle for HMRC submitted that nothing in paragraph 13 actually requires that the land or building becomes a capital item, but simply whether there was an expectation or intention at the date of grant to incur expenditure on something which would in fact be a capital item. That did not extend to the person's subjective characterisation of the expected or intended events and did not require an examination of motive. *Shurgard* was unhelpful to PGPH's case rather than supportive of it. The requirement in paragraph 13(2)(b) that the grant was made at an eligible time was satisfied because it was necessarily the case in those circumstances that no adjustment period would have ended. It did not matter that no such period had commenced. There were also no phases to the building works which might need to be treated separately. As to the date of grant, there was clearly a grant in March 2014 (assumed to be 12 March) as evidenced by the correspondence between SMCL and PGPH, even if there was some form of earlier grant as well. The evidence clearly showed that in March 2014 PGPH intended or expected that building works would be carried out, predominantly in around August of that year, and that the cost would be £350,000 or more.

Discussion

115. I have already concluded on the facts that by early March 2014 Mr Parker did have an intention or expectation that PGPH would spend more than £250,000 on building works, as opposed to additional equipment ([86] above). I also do not consider that there is any evidence that this project was conceived of in separate phases or as separate projects with each phase or project being less than £250,000 in value, such that it might be argued (as HMRC accept in VAT Notice 706/2 at paragraph 4.12) that there was more than one refurbishment which should be treated separately for Capital Goods Scheme purposes. All the evidence indicates a single project or phase, which started in earnest in August 2014 and was largely complete by November with some outstanding work completed by early March 2015 (see [37] and [80] above). The position is different to that considered in the *Water Property* case, where it was held that the acquisition of the property and the refurbishment of part of it to create a children's nursery and another part to create residential flats should not be aggregated. In that case external finance was required to carry out the refurbishment and it was uncertain at the date of acquisition that the finance would be available (paragraphs [51] and [52] of the decision). There were also two contracts for building works, one for the nursery and one for the flats, and the work on the nursery was done before the work on the flats. The value of the acquisition, and of each phase of the building works, was less than £250,000 so the anti-avoidance rules did not apply.

116. It is clear that the references to intention or expectation in paragraphs 13(2) and (4) of Schedule 10 impose a subjective test. For the test to be satisfied the relevant person, in this case PGPH through its sole shareholder and director Mr Parker, must have had an intention or expectation at the date of grant. The question is exactly what that intention or expectation must be. In my view it must be an intention or expectation to incur expenditure on something which, if it is incurred, will result in there being a capital item within paragraph 113 of the VAT Regulations. In the context of internal building works I consider that it must be an intention or

expectation to incur capital expenditure with a value of at least £250,000 on the refurbishment, fitting out or alteration of the building (within regulation 113(3)(b)(iii), (iv) or (v) of the VAT Regulations).

117. It is not the case that the capital item must exist at the date of grant. That would be contrary to the clear words of paragraphs 13(2) and (4) and would defeat their evident purpose. I also do not consider that there is any justification for concluding that a grant cannot be treated as made by a developer unless the land does in fact subsequently become a capital item. I do not consider that this is supported by the text of the rules and do not agree that the absence of this requirement makes the rules unworkable.

118. There is no indication from the text of the legislation that Parliament only intended the rules to apply if the land did become a capital item. The draftsman could readily have addressed the point, for example by inserting "and became" after the reference to "intended or expected to be" in paragraph 13(2). It might also be expected that it would be specified that the land needed to become a capital item within a stated period. No such provision was included. Such a construction would also give rise to significant difficulties. The rules must be capable of being applied with legal certainty. If Mr Lall's submission was correct then the VAT treatment of a supply made pursuant to a grant at a time when the other requirements are satisfied but it remains unclear whether the land would or would not become a capital item would be wholly uncertain, and would effectively be retrospectively adjusted at some point after the supply was made. This would clearly affect not only the supplier but also the recipient of the supply, whose own VAT treatment, and economic position, could be fundamentally affected. That cannot be right. At the very least, Parliament would need to have addressed how any supplies made during such a period should be treated. Not to do so would contravene a basic objective of the VAT system of ensuring legal certainty: see for example *HMRC v Mercedes-Benz Financial Services UK Ltd* (Case C-164/16) at [41].

119. I also do not agree with Mr Lall that his submission is supported by the fact that paragraph 13(2)(b) requires the grant to be made before the end of the adjustment period specified for Capital Goods Scheme purposes. The rules apply to all supplies made pursuant to grants which satisfy the requirements of the rules. In the case of a lease, this is irrespective of the length of the lease, which could well exceed the adjustment period under the Capital Goods Scheme (10 years in the case of land and buildings). However, the requirements of the rules must be satisfied at the date of grant. If when the grant is made there is no intention or expectation, or there is no longer any intention or expectation, to carry out works which would result in a relevant capital item, and no capital item has in fact been created, then the rules would not apply to the grant. The rules are therefore not indefinite in their operation. They are time-limited to supplies pursuant to grants made at a time when the requirements of the rules are met, and not to grants made after that time. It is also the case that the exempt land test operates by reference to the adjustment period: under paragraph 15(2) land is exempt land if a "relevant person" is in occupation, otherwise than substantially wholly for eligible purposes, before the end of the adjustment period. As discussed further below, the rules only apply if the land is already exempt land at the

date of grant (and is intended or expected to continue to be so) or it is intended or expected that it will become exempt land. Where the land is not already a capital item this means that the rules can only apply where it is intended or expected that the land will be occupied in the specified way at some point before the expiry of the *expected* adjustment period. This is another illustration of the point that the rules are not open-ended.

120. Mr Lall submitted that the references to "would become a capital item" in paragraph 13(4) and to an asset "falling … to be treated as a capital item for the purposes of the relevant regulations" in paragraph 13(8) required Mr Parker to have at least some understanding of the Capital Goods Scheme. I do not agree. In my view the question is what PGPH factually intended or expected to spend money on and whether that expenditure was intended or expected to have a value of at least £250,000, and not what it intended the legal characterisation of that expenditure, or indeed the accounting treatment that expenditure (if that is relevant), to be. I do not consider that the intention or expectation either needs to encompass a precise figure for the expenditure, provided it is intended or expected to amount to at least £250,000, or that the precise nature and scope of the works needs to be settled, provided that the contemplated works fall within one or more of the relevant provisions of regulation 113(3)(b) of the VAT Regulations.

121. Paragraph 13(4) requires the grantor to have intended or expected that the land or building (or part of it) "would become a capital item in relation to the grantor". Paragraph 13(8) defines "capital item" in relation to any person as "an asset falling, in relation to the person, to be treated as a capital item for the purposes of the relevant regulations" (i.e. the regulations governing the Capital Goods Scheme). Reading in the text of the definition in paragraph 13(8) and the definition of "the relevant regulations" in paragraph 13(9), paragraph 13(4) would read (so far as relevant):

> "The land was intended or expected to be a relevant capital item if the grantor … intended or expected that … part of a building on … the land would become an asset [falling, in relation to the [grantor], to be treated as a capital item for the purposes of regulations … providing for adjustments relating to the deduction of input tax …] …"

122. Mr Lall submits that this imports a requirement for some knowledge of the Capital Goods Scheme. Whilst I can see that that is a conceivable literal interpretation of the words, I do not think that it is the correct interpretation on any form of purposive construction, or indeed that it is necessary to strain the language of the words to conclude that the interpretation Mr Lall suggests is wrong. A perfectly legitimate literal interpretation is that the words "falling … to be treated as a capital item" simply describe a set of facts that would fall within the relevant regulations. The reference to "would become" relates to the nature of the intention or expectation: did the grantor in fact intend or expect that works would be undertaken of a type which would in fact fall within the regulations.

123. If it were correct that the grantor needs to have some knowledge of the Capital Goods Scheme then that would lead to capricious results. A grant by a grantor who was completely unaware of the regulations would not be caught. The rules would

however apply to a grantor who was aware of the regulations to the extent suggested by Mr Lall, but did not have a detailed knowledge. Mr Lall also accepted, in the light of the *Shurgard* case, that the rules would apply to a grantor who was fully aware of the regulations but was under the mistaken impression that they or the disapplication rules did not apply on the facts. As Mr Mantle submitted, if it was necessary to draw distinctions between categories in this way then that would open up an entire line of enquiry for which there is no justification in the rules, and which cannot have been intended from a policy perspective. The purpose of the rules must be better served by applying the provisions in the same way to each category, irrespective of the grantor's extent of knowledge of the law. I can see no conceivable policy reason to draw a distinction between different categories.

124. I also agree with Mr Mantle that the *Shurgard* case does not support Mr Lall's argument. That case related to a so-called "option washing out" scheme relating to the purchase by Shurgard of a property at which a storage business was carried and which the seller, West London, had opted to tax but Shurgard did not wish to do so. Under the scheme West London sold the business to Shurgard and agreed to sell the property on a deferred basis, with works being undertaken in the interim which Shurgard financed (so that it became a development financier). Shurgard had the benefit of a licence during the interim period. The aim of the scheme was that the option to tax would not apply to the sale to Shurgard by virtue of the disapplication rules. The version of the legislation considered in Shurgard is a predecessor to the version relevant in this case, but for present purposes there do not appear to be material differences. At paragraph [81] of the decision the tribunal accepted a submission by Shurgard's counsel (referred to at paragraph [57]) that the test to determine whether the property was a capital item comprised an objective test and a subjective test, the former relating to whether the property was (already) a capital item (see now paragraph 13(3)), and the latter relating to whether the grantor or a development financier intended or expected it to become a capital item (see now paragraph 13(4)).

125. The tribunal's key conclusion in *Shurgard* was that the expenditure in that case was solely for the purpose of selling the property, rather than on property which the seller used in the course or furtherance of a business, so that it did not meet the requirement in regulation 112(2) of the VAT Regulations (paragraphs [53], [83] and [85]). A reference Mr Lall relied on at paragraph [88] to the need to look into the minds of the partners in West London was clearly directed to this requirement: see paragraphs [87] and also [91], where the tribunal state their view that the partners never intended there to be a continuing economic activity after the business was sold.

126. Mr Lall also relied on the following statement at paragraph [93] as indicating that some knowledge is needed about how the scheme works (the reference to paragraph 3A(2)(b) is essentially to what is now paragraph 13(4)):

> "With reference to the alternative subjective test in paragraph 3A(2)(b) [counsel for Shurgard] submitted that West London and Shurgard intended or expected that the Property would become an asset falling in relation to West London to be treated as a capital item for the purposes

> of the capital good scheme regulations. This intention or expectation arose because of advice from PwC and Kenneth Parker QC."

127. This paragraph simply recites counsel's submission, also referred to at paragraphs [64] and [65], that what was needed was an intention or expectation of a legal result, namely that the land would become a capital item within the Capital Goods Scheme. As recorded at paragraph [95], counsel submitted that this was the case whether or not that intention or expectation was based on a correct view of law (in that case it was based on an incorrect view). The tribunal rejected this argument at [96], saying:

> "In our opinion such a submission is tantamount to asserting that because a person desires their intended actions to have a particular legal consequence, they are to be construed as having that consequence, no matter what their actual effect in law. This is to usurp the function of the courts and Parliament would not have intended such a consequence – either at all, or certainly not without the clearest of words."

128. Mr Lall accepted that, based on *Shurgard*, the test could not be entirely subjective, in the sense that mere intention to fall within the Capital Goods Scheme was not enough where the correct legal position was misunderstood. However, in my view the reasoning adopted in paragraph [96] is equally applicable to a case where a person does not have any knowledge, whether actual or mistaken, of what the legal consequences of their intended actions are. The same applies to the accounting treatment, to the extent that is relevant (and I make no comment on whether or the extent to which it is, bearing in mind that VAT Notice 706/2 does not have the force of law). I cannot see any justification for reading in a requirement that the intention or expectation must extend to a knowledge or belief that the expenditure in question would be capitalised for accounting purposes, as referred to at paragraph 4.1 of the Notice.

129. Accordingly, I have concluded that the grant by PGPH to SMCL was a grant made by a developer, within paragraphs 12(1)(a), and 13(2) and (4), of Schedule 10. I next turn to consider whether the exempt land test was met.

The exempt land test

130. The exempt land test requires that, when the grant was made, the grantor or a development financier intended or expected the land to become or continue to be "exempt land", being land occupied by a "relevant person" at any time before the end of the relevant adjustment period not wholly or substantially wholly for eligible purposes. There was no dispute about the eligible purposes part of this test, given the use of the building to supply exempt health services within Group 7 of Schedule 9 VATA. The reference to the adjustment period is to the period provided under Part XV of the VAT Regulations (see paragraph 14(4), cross referring to paragraph 13). The key question is whether or not PGPH as grantor, or a development financier, intended or expected that the land would not only be occupied by SMCL (which was clearly the case as regards PGPH as grantor at least) but whether that person intended or expected that the building would be occupied by a "relevant person" at some point

during the adjustment period. HMRC's case focused on PGPH's intentions or expectations and an argument that SMCL was a relevant person, so that this test was met.

Submissions

131. Mr Lall submitted that the exempt land test was not met at the date of any relevant grant, either in December 2013 or March 2014. During that period PGPH did not expect that any person connected with it or with any development financier would be in occupation. In particular, it was not expected or intended that PGPH and SMCL would become connected or that Mr Barnes and SMCL would become connected. At the relevant times Mr Barnes was not a shareholder in SMCL. It was also not expected that Mr Barnes would lend money to PGPH. This meant that it was not known by March 2014 whether he would be a development financier and whether SMCL would be connected with a development financier (or indeed whether SMCL would become connected with PGPH). Furthermore, Mr Barnes did not provide finance for the development with the intention or expectation that the land would become or continue to be exempt land within paragraph 14(2) of Schedule 10, because he, like Mr Parker, was not aware of the Capital Goods Scheme or the anti-avoidance rules in Schedule 10. The legislation required the arrangements to have as their aim the mischief at which the rules were targeted, and neither Mr Barnes and Mr Parker had the requisite state of mind.

132. Mr Mantle submitted that Mr Barnes had control of SMCL at least by early March 2014, such that he and SMCL were connected. Mr Barnes lent funds which were used to carry out the refurbishment works, and on the facts he was a development financier. The only really controversial question was whether it was intended or expected at the date of grant that Mr Barnes would make such a loan.

Discussion: general

133. In the light of the evidence I think Mr Mantle was correct to focus his submissions on the question whether Mr Barnes was connected with SMCL at the relevant time, and on whether it was intended or expected that Mr Barnes would be a development financier. I do not think that the evidence establishes that by March 2014 it was intended or expected that SMCL and PGPH would become connected with each other.

134. Paragraph 12(2), read with paragraph 12(3), requires that at the time the grant was made either the grantor or a development financier intended or expected that the land would become exempt land (paragraph 12(2)(a)) or would continue for a period to be exempt land (paragraph 12(2)(b)). I understood Mr Mantle's submissions to focus on the intention or expectation of PGPH as grantor, rather than any intention or expectation that Mr Barnes had at the date of grant. I agree with this. The evidence does not support a conclusion that Mr Barnes was a development financier in (or before) March 2014. At that stage he had not provided finance for the development or entered into an arrangement to provide finance for the development, as referred to in paragraph 14(2). He was not approached by Mr Parker to advance funds to PGPH

until shortly before he lent it money in August 2014. The definition of development financier in paragraph 14(2) is in terms of someone who either has provided finance or has entered into an arrangement to do so, and does not extend to someone who the grantor intends or expects to provide finance in the future but with whom there is no existing arrangement.

135. I also do not consider that the land was exempt land at the date of the grant, such that it falls within paragraph 12(2)(b) (land which "would continue" to be exempt land). This is on the basis that the only evidence of occupation at that time was occupation by SMCL, and at that stage SMCL was not connected with PGPH or with someone who was (at that time) a development financier. Mr Mantle did not submit that the rent deposit arrangements had the result that SMCL was itself a development financier. It follows that there was no occupation by a "relevant person" at the date of grant, within paragraph 15(2)(a) and (3) (defined to cover the grantor, a development financier and any person connected with either of them).

136. It is therefore necessary to consider paragraph 12(2)(a). On the facts, the question is whether PGPH as grantor intended or expected that the land "… would become exempt land (whether immediately or eventually and whether or not as a result of the grant) …". Read with the definition of exempt land in paragraph 15(2) the question is whether PGPH intended or expected that a "relevant person" would, at some time before the end of the adjustment period, be in occupation of the land not wholly, or substantially wholly, for eligible purposes. Although not expressed in this way I think HMRC's submissions must amount to saying that, on the facts, SMCL became a relevant person when Mr Barnes became a development financier, and that it did not matter that SMCL was already in occupation. The latter point is supported by the words "whether or not as a result of the grant" and I think must be the right interpretation. If this was not the case then it could be straightforward to avoid the rules, for example by delaying the provision of finance until after occupation had commenced.

Was Mr Barnes a development financier?

137. It is convenient to consider next whether Mr Barnes did in fact become a development financier. The definition in paragraph 14(2) refers to a person who has "provided finance" for the grantor's development, or has entered into any arrangement to do so, "with the intention or in the expectation that the land will become exempt land or continue (for a period at least) to be exempt land". Paragraphs 14(3) and (14) provide a broad definition of "provided finance". In particular, paragraph 14(3)(a) provides that finance is provided for the grantor's development if funds are provided "for meeting the whole or any part of the cost of the grantor's development of the land", and paragraph 14(4)(a) has the effect that references to providing funds for a particular purpose cover "the making of a loan of funds that are or are to be used for that purpose". The reference to funds that "are … used" means that, in my view, finance is provided for the grantor's development if funds lent are actually used for that purpose, even if the lender did not have that purpose in mind. I have concluded that the loan Mr Barnes made to PGPH was spent on the refurbishment, and I have also inferred that Mr Parker's intention was to spend the

money on the refurbishment works: see [61] above. Although (given the breadth of paragraph 14(4)(a)) I do not consider it necessary to reach a conclusion on Mr Barnes' purpose in making the loan, I do not consider that it has been demonstrated on a balance of probability that the loan was provided for any purpose other than funding the building works. I therefore conclude that Mr Barnes "provided finance" for the grantor's development within paragraph 14(2) when he provided the loan to PGPH in August 2014. (I have disregarded as immaterial on the facts the alternative possibility that Mr Barnes entered into an arrangement to provide finance at an earlier date, since the evidence indicates that any such earlier date would have been very shortly before the loan was made, and would not make any difference to the conclusions I need to reach.)

138. Paragraph 14(2) also requires that, to be a development financier, the person providing finance must do so with the intention or in the expectation that the land will become or continue to be exempt land. I consider that this requirement was satisfied such that Mr Barnes became a development financier in August 2014. Mr Lall submitted, as he did in relation to the developer test, that the rules could not apply to Mr Barnes because at the relevant time he did not have any knowledge of the Capital Goods Scheme or the disapplication rules. I reject that argument for the same reasons as discussed above in relation to the developer test. In my view the test is whether Mr Barnes intended or expected that the facts would be such as to amount in law to the land either becoming exempt land or continuing to be exempt land. When Mr Barnes lent the money to PGPH SMCL was already in occupation and (as discussed further below) he was connected with SMCL. He was well aware that the building was being used for the provision of health related services by SMCL such that its occupation was not in fact wholly or substantially wholly for eligible purposes. By making the loan Mr Barnes became a development financier, and this meant that SMCL was now connected with a development financier. SMCL therefore became a "relevant person" at that point (or at any slightly earlier stage when Mr Barnes arranged to provide the finance). As a result the land became exempt land. I therefore conclude that Mr Barnes became a development financier when he made the £96,000 loan to PGPH in August 2014, or (although this is again immaterial on the facts) at a slightly earlier stage when he made an arrangement to do so.

Connection between Mr Barnes and SMCL: relevant date

139. I next turn to the question whether Mr Barnes was connected with SMCL. Mr Mantle proceeded at the hearing on the basis that the connection needed to be established at the date of the grant, assumed to have been made on 12 March 2014. On further reflection I am not persuaded that that is correct. The question is whether at the date of grant PGPH intended or expected the land to become exempt land. It would do so if it intended or expected that, at some time before the end of the adjustment period, someone would be in occupation (otherwise than substantially wholly for eligible purposes) who was either the grantor, a development financier, or a person connected with either. Again, I read this as requiring PGPH to have an intention or expectation as regards a factual state of affairs which, in law, would amount to the land being exempt land, rather than any understanding of the legal position.

140. It follows that, on the facts, the question is whether PGPH intended or expected that, at a relevant point in time, SMCL would be in occupation and that it would be a person who was (at that time) connected with someone who fell within the definition of a development financier. The legislation is therefore capable of applying where it is intended or expected not only that a person who was already connected with an occupier (or intended occupier) at the date of grant would become a development financier, but also where the grantor intended or expected that a factual state of affairs would exist which would amount in law to a connection being created between the occupier and a person who is or later becomes a development financier. The exempt land test could then be satisfied provided that at the date of grant it was intended or expected that at some point before the end of the (expected) adjustment period a person would be in occupation and would at that time be connected with a development financier. Put another way, on the facts of this case the intention or expectation at the date of grant would need to be that the following state of affairs would exist at some point before the end of a 10 year period following the planned works: (a) Mr Barnes is a development financier, (b) Mr Barnes is connected with SMCL, and (c) SMCL is in occupation not substantially wholly for eligible purposes. I think Mr Lall recognised this in submitting that, at the date of grant, there was no intention or expectation that Mr Barnes would be a development financier, or any intention or expectation that he would become connected with SMCL.

Were Mr Barnes and SMCL connected in March 2014?

141. In any event, however, I have concluded that Mr Barnes was connected with SMCL by March 2014, and indeed from the date of the first loan he made to SMCL, which I infer must have been made in December 2013. As already explained, the question whether a person is connected with another person must be decided in accordance with s1122 CTA 2010, in this case s1122(3) which provides that a person (here Mr Barnes) is connected with a company (SMCL) if he has control of it. Under s1123(1) "control" must be read in accordance with s450 and s451. Mr Mantle's primary submissions were (1) that as at March 2014 Mr Barnes had what has been described in case law as "actual control" within what is now s450(2), on the grounds that he in fact exercised or was able to exercise, or was entitled to acquire, control over SMCL's affairs, even though he did not at that time own a majority of the shares, and (2) that the arrangement between Mr Barnes, Dr Smart and Ms Odedra was in any event such that Mr Barnes was "entitled to acquire" a majority of the shares, such that he had control within s450(3) on that basis.

142. Following a request for submissions on the point, Mr Mantle alternatively relied on s450(3)(d), which provides that a person (P) controls a company (C) if P possesses or is entitled to acquire:

> "such rights as would entitle P, in the event of the winding up of C or in any other circumstances, to receive the greater part of the assets of C which would then be available for distribution among the participators."

143. Under s454(2)(b) the definition of participator covers a loan creditor. Section 453 defines "loan creditor" as covering, among other things, a creditor in respect of debt

incurred by the company for any money borrowed by it. (It is worth noting that s450(4) specifically requires loan creditors to be disregarded for the purposes of s450(3)(c). No similar provision is made in relation to s450(3)(d), clearly indicating that the reference to participators in that paragraph does extend to loan creditors.)

144. In my view Mr Barnes had control of SMCL under s450(3)(d) from the date of his first loan to it. His evidence was quite clear that it was he, rather than anyone else, who funded the company. The definition of loan creditor in s453 does not extend to all creditors, such as trade creditors or (for example) HMRC. The definition is confined to debts incurred (a) for money borrowed or capital assets acquired, (b) for any right to receive income, or (c) for consideration the value of which was substantially less than the amount of the debt, together with any redeemable loan capital. There was no suggestion that in or before March 2014 SMCL had any debt falling within any of these descriptions, other than the debt it owed Mr Barnes. (I also note that normal bank debt is excluded by s453(4), although it was not suggested that there was any such debt in any event.) Mr Parker lent money to SMCL, but this occurred only just before he became a director on 1 September 2014.

145. Mr Lall submitted that s 450(3)(d) should be read as positing a solvent winding up in which assets were available to shareholders, such that Mr Barnes would not receive the greater part of the assets, or that the reference to "assets" should be read as net assets, after allowing for liabilities. I do not think that this is correct. It is clear that loan creditors are to be taken into account as participators for the purposes of that paragraph. The "assets" available for distribution among the participators must be those assets that are in fact available for distribution not only to shareholders but to other participators, including loan creditors (but not other creditors who are not loan creditors and therefore not participators). In other words, it would be necessary to look at the company's assets that would be available for distribution to those persons who fall within the definition of participators, having first taken account of any amounts that other creditors would receive on a winding up (because such amounts would not correspond to assets available for distribution among the participators).

146. The only circumstance in which, on this basis, Mr Barnes would not receive a majority of the assets available on a winding up of SMCL in or before March 2014 would be if the total value of the assets available to participators was more than twice the amount he had lent, since Dr Smart as sole shareholder would then be entitled to the majority of the assets available to participators. Given the short time after the business had been taken over from Westover, and its uncertain and financially difficult position at the time (as evidenced by the correspondence with PGPH in March 2014, for example the reference to starting to pay the rent deposit as cash flow permitted) I have concluded that it is more likely than not that Mr Barnes would indeed have received the majority of the assets available to participators if SMCL had been wound up.

147. In case I am wrong on this, and also wrong in my view that it is not actually necessary for Mr Barnes to have been shown to be connected with SMCL in March 2014 in order for the disapplication rules to apply, I have however also considered Mr Mantle's primary submissions that by March 2014 Mr Barnes had control under

s450(2) or that he was entitled to acquire a majority of the shares or other rights within s450(3).

148. What is now s450(2) has been considered in a number of cases, in particular *R v Inland Revenue Commissioners, ex parte Newfields Developments Ltd* [2001] UKHL 27, [2001] STC 901, *Kellogg Brown & Root Holdings (UK) Ltd v HMRC* [2010] EWCA Civ 118, [2010] STC 925 and *Steele (Inspector of Taxes) v European Vinyls Corp. (Holdings) BV* [1995] STC 31. I was also referred to the decisions of the Upper Tribunal and Court of Appeal in *UBS AG v HMRC; Deutsche Bank Group Services (UK) Ltd v HMRC* [2013] STC 68; [2014] STC 2278 (I should also note that the Court of Appeal's decision was reversed by the Supreme Court, but on other grounds.)

149. In *Newfields* Lord Hoffmann referred at [10] to what is now s450(2) (then the opening words of s416(2) Income and Corporation Taxes Act 1988) as describing "a concept of control which reflects its meaning in ordinary speech", which is then "enormously widened" by subsequent subsections. Lord Scott referred to the same provision as prescribing a "test of actual control", with subsequent provisions describing other situations where a person is taken to have control, even where another person has control under another part of the test, such that control could be attributed to several different people (paragraphs [41] and [42]). In *Kellogg* Lord Neuberger MR (as he then was) referred at paragraph [34] to these comments in *Newfields* as confirming the approach of giving the opening part of s416(2) its ordinary meaning, not an artificially narrow meaning because of the scope of the following subsections. In *Steele* Lightman J concluded at first instance at page 51 that "control over the company's affairs" referred to control at general meetings rather than at board level, and this was upheld by the Court of Appeal ([1996] STC 785 at 794-5). In *UBS* the Upper Tribunal referred to these comments in *Steele* and concluded that they were binding on it and had not been implicitly overruled by House of Lords in *Newfields* (paragraphs [117] to [124] in the Upper Tribunal decision). In the Court of Appeal decision in *UBS* it was noted at [92] that HMRC accepted that control in s416(2) meant control at shareholder level, although the conclusion reached was that in the *Deutsche Bank* appeal the Upper Tribunal had taken the wrong approach in overturning the First-tier Tribunal's finding that the control test was not satisfied on the facts.

150. It is clear from *Newfields* and *Kellogg* that the provisions that follow what is now s450(2), including s450(3), both significantly widen the concept of control and should not be regarded as cutting down the scope of s450(2). It is also clear that different people can be regarded as each having control at the same time.

151. Mr Mantle submitted that in March 2014 Mr Barnes was in fact able to exercise control over, and was entitled to acquire control of, SMCL within s450(2), or that he was entitled to acquire the greater part of the share capital or voting power within s450(3)(a) or (b) (or alternatively entitled to acquire shares that would give him the right to the greater part of the assets on a winding up within s450(3)(d)). At that stage one share was in issue held by Dr Smart, which was assumed to be a fully paid share. There were three directors, Dr Smart, Mr Barnes and Ms Odedra. Mr Barnes

contributed all of the start-up funds by way of loan and neither of the others provided funds. There was no evidence of any fixed term for the loan so the proper inference was that it was repayable on demand. At some point before March 2014 an agreement was reached between Dr Smart, Mr Barnes and Ms Odedra that Mr Barnes would be given a majority of the shares. Although the precise percentage was not agreed, given that Mr Barnes had an agreement with the sole shareholder and with each of the other directors he should be regarded as having actual control within s450(2)(b) or (c) because he was able to exercise or entitled to acquire control. The practical position was that only Mr Barnes was prepared to fund the company and he could call in his loan at any time. If Dr Smart did not agree with what Mr Barnes wanted Mr Barnes could in practice get control. Furthermore, the nature of the understanding or agreement that Mr Barnes should have a majority of the shares was not incomplete or void for certainty. This was not in the nature of the family agreement, binding in honour only. There was a clear commercial context given the funding arrangements and, if there had been a dispute, a court would have had no difficulty in recognising that Mr Barnes was entitled to acquire at least 51% of the shares. In any event s450(2)(a) and (b) (in contrast to s450(3) and, probably, s450(2)(c)) did not require there to be a legal entitlement, and in reality Mr Barnes was able to exercise actual control. The fact that Dr Smart may also have had control as the sole shareholder did not prevent Mr Barnes having control.

152. Mr Lall relied on the comments by the Upper Tribunal and Court of Appeal in *UBS* confirming that control needed to be tested at the shareholder, not board, level. Mr Barnes was not a shareholder at the relevant time. Although it was understood that he would end up with control, the terms on which he would do so and the level of control were not agreed and he took no advice. The understanding was vague and it was not clear whether there was any consideration. It did not amount to a legal entitlement.

153. I do not think that the fact that Mr Barnes alone was funding SMCL is sufficient to establish control under s450(2). It is clear from the case law that control under that provision means control, or the ability to obtain control, at shareholder level. So I think the key question is whether Mr Barnes actually had control at that level, or was able to exercise it or entitled to obtain it. There was no suggestion that Dr Smart was holding the sole share in issue on behalf of Mr Barnes or that Dr Smart had agreed to exercise his right to vote the share as Mr Barnes directed. I think Mr Mantle was right not to seek to argue that the expression "entitled to acquire" in s450(2)(c) and (3) means anything less than a legal entitlement. He did however maintain that the expression "able to exercise" control (s450(2)(b)) went beyond a legal ability to exercise control, because of the emphasis in the case law on "actual control". However, I did not hear any detailed argument on point.

154. I can see that there are certain circumstances where the reality is that a person exercises, or is able to exercise, control over a company even if legal power to do so is not vested in that person. An example of that might be a family situation where in practice one family member exercises rights that are vested in another (indeed there appears to be a practical example of this in Mr Parker's effective control of PG London). However, I think it much more unlikely that that sort of situation would

arise in dealings between third parties, and in the absence of any direct evidence from Mr Barnes on the point, or any evidence from Dr Smart, I do not think that the facts justify the conclusion that Mr Barnes was in fact exercising or able to exercise control at a shareholder level before he acquired shares in SMCL.

155. However, Mr Barnes did give clear evidence that there was an understanding or agreement between him, Dr Smart and Ms Odedra that he would have a majority of the shares. That of course duly occurred, with Mr Barnes acquiring 90%, clearly with the full agreement of Dr Smart and Ms Odedra. The relationship between Mr Barnes and the other two individuals was clearly a business one. In the circumstances I have reached the conclusion that it is more likely than not that Mr Barnes did have the benefit of a legally enforceable entitlement to acquire a majority of the shares, in the form of a contract with Dr Smart (as sole shareholder and director) and Ms Odedra (as director), the consideration provided by Mr Barnes being his continued willingness to provide loan funding to SMCL and leave it outstanding. In the absence of any understanding about the level of shareholding I would expect that in the event of dispute his entitlement would be limited to the acquisition of sufficient shares at their par value to give him a bare majority (that is, over 50%), but that would clearly be sufficient to amount to control.

156. I therefore conclude that Mr Barnes was connected with SMCL in March 2014 both in his capacity as a loan creditor (on the basis that he had control in that capacity under s450(3)(d)) and as a person entitled to acquire control at a shareholder level within s450(2)(c) and (3).

Connection between Mr Barnes and SMCL in August 2014

157. For the reasons already given, I do not think that Mr Mantle was correct to assume that a connection needed to be established between SMCL and Mr Barnes by March 2014 in order for HMRC to succeed. Mr Barnes acquired 90% of SMCL's share capital in August 2014, at which point he clearly had control on any basis and was therefore connected with it. The precise date of that share subscription is unclear and it is conceivable that it occurred a little after Mr Barnes became a development financier. However, I do not think that matters. By the end of August 2014 Mr Barnes was clearly a development financier and was also clearly connected with SMCL. SMCL was also in occupation otherwise than wholly or substantially wholly for eligible purposes. The only question is whether PGPH as grantor intended or expected at the date of grant that this set of (factual) circumstances would arise, which I address below.

158. It is also worth pointing out that establishing a connection between SMCL and Mr Barnes at the date of the *grant* is not in fact sufficient for HMRC to succeed on this issue. Mr Barnes was not a development financier at that time and the land could only become exempt land (on the case advanced by HMRC) at a time when (a) Mr Barnes was a development financier, (b) SMCL was in occupation not substantially wholly for eligible purposes, and (c) Mr Barnes was (at that time) connected with SMCL. However, there was clearly no dispute that these three requirements were all satisfied together by some point in August 2014.

What did PGPH intend or expect at the date of grant?

159. Mr Mantle's submissions on this point related to whether PGPH (in the form of Mr Parker) intended or expected at the date of grant that Mr Barnes would become a development financier. I agree that this is a critical question. I would add that, if Mr Barnes was not already connected with SMCL at the date of grant (with no expectation that the connection would cease) it would similarly be relevant to determine whether PGPH intended or expected that Mr Barnes would become connected with SMCL. (In each case it is would also be necessary to demonstrate that the intention or expectation was that SMCL would be in occupation at some point during the adjustment period when both the requirement of connection and the requirement for Mr Barnes to be a development financier were satisfied.)

160. Mr Lall submitted that there was no arrangement between Mr Barnes and Mr Parker that finance would be provided before Mr Barnes was approached close to the date the loan was made. He suggested that in the absence of an arrangement it was hard to see that PGPH could have an intention or expectation that funding would be provided. I disagree. In my view an intention or expectation is clearly capable of being formed unilaterally, whereas an arrangement generally connotes some plan or understanding involving more than one person. The legislation uses both concepts and I think that is intentional, because they are quite distinct. The definition of development financier includes someone who has entered into any "arrangement" to provide finance, indicating some understanding, agreement or plan to which another person or persons is or are party.

161. I have concluded on the balance of probabilities that by March 2014 Mr Parker, and therefore PGPH, did intend or expect that Mr Barnes would provide finance which would help fund the refurbishment, even though he did not actually approach Mr Barnes on the subject until shortly before the loan was made. My reasons for this conclusion are as follows:

> (1) It was quite clear that by March 2014 the refurbishment was already planned, including that work would commence in earnest in August. Plans were clearly discussed between Mr Parker and Mr Barnes (see [30] and [65] above). PGPH, through Mr Parker, had an intention or expectation that the expenditure on building works would exceed £250,000 (see [86] above). A substantial sum was therefore required and Mr Parker would have known that a significant amount of expense would arise in August. (In fact, the expenditure proved to be materially less than Mr Parker had anticipated, because it was not necessary to lead line the dentistry area.)
>
> (2) I have not accepted that the loan was sought from Mr Barnes only because of the VAT dispute with HMRC, or that it was sought for working capital purposes unrelated to the refurbishment. Although the VAT issue would have contributed to the cash flow problems it does not justify a conclusion that Mr Parker did not intend to seek a loan from Mr Barnes in March 2014. For the reasons discussed at [62] above the numbers simply do not fit with that explanation, bearing in mind the timetable for the works. If the claimed VAT refund had been paid then that could have

reduced the amount of funding required from Mr Barnes, but would not have eliminated any need for it.

(3) I have found that there is no indication that Mr Parker took any steps to source funding from elsewhere, and that the alternative of bank finance that Mr Parker mentioned in oral evidence was not really considered. Mr Parker was clearly well aware that Mr Barnes (alone) was funding SMCL and that he had funds available to invest. Mr Parker's evidence was clear that he wished to share risk with Mr Barnes, strongly indicating that he did not wish to fund the entire project himself. There is no indication that he was of a different opinion in March 2014, or that at that time he was in a position to fund the entire project himself but then became unable to do so. Mr Parker also accepted that, until the refurbishment was complete, it would not be possible to attract other occupiers (and therefore other potential sources of funds) to the building.

(4) Mr Parker would have been well aware that if the refurbishment work did not proceed, or stopped, then SMCL would be in a difficult position. I infer that he would also have been well aware of Mr Barnes' view of the critical importance of the premises to SMCL.

(5) Comments made by Mr Parker about Mr Barnes during oral evidence strongly indicate that Mr Parker holds the view that Mr Barnes is not only able but willing to provide funds at short notice (see [69] and [70] above). It is also clear that Mr Barnes is willing to allow Mr Parker to take a leading role in business operations, with Mr Barnes taking more of a "back seat". In my view this is a correct description not only of how SMCL is managed now with Mr Parker in the role of chairman and chief executive, but also describes the relationship in late 2013 and early 2014. From inception, Mr Parker had a very significant involvement in SMCL via PG London, and in practice controlled cash flows. Mr Barnes advanced further money when required, and this can only have been at the request of Mr Parker or people working for him at PG London. So there was a clear track record of Mr Barnes providing funds at Mr Parker's request. As discussed at [69] above this in is indicative of a close business relationship between Mr Parker and Mr Barnes.

(6) It is of course of some relevance, although by no means determinative, that funding was in fact provided by Mr Barnes shortly after Mr Parker's request.

162. As already discussed, a further question is whether PGPH's intentions or expectations at the date of grant extended to an intention or expectation that SMCL would be connected with Mr Barnes at a time when he was a development financier. I do not accept Mr Lall's submission that the understanding that Mr Barnes would acquire control of SMCL was insufficient to give rise to an expectation that Mr Barnes would have control. I think it is clear from the evidence that Mr Parker understood that it was Mr Barnes rather than anyone else that was funding SMCL, and that Mr Barnes was or at least was expected to become the controlling shareholder. Mr Parker also arranged for SMCL to be established by Mr Parker's own

company formation agent at Mr Barnes' request. Given the close business relationship between Mr Barnes and Mr Parker in relation to the property I think it inconceivable that Mr Parker would not have had a reasonable understanding of Mr Barnes' intended relationship with SMCL and the arrangement Mr Barnes had with Dr Smart and Ms Odedra. I therefore conclude that Mr Parker, and therefore PGPH, expected at the date of grant that Mr Barnes would have control of SMCL.

Principal VAT Directive

163. For completeness, I should mention that I received no submissions on a point discussed in the *Water Property* case referred to at [111] above, relating to whether Article 131 of the Principal VAT Directive places any restriction on Member States' ability to restrict the scope of the right to opt to tax under Article 137(2). Article 131 provides for the exemptions conferred by the following provisions of the Directive to be applied "in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse". In *Water Property* the tribunal judge reached the conclusion that Article 131 qualified Article 137(2) and suggested that the UK legislation went beyond what was permitted by Article 131. This view was clearly strongly contested by HMRC.

164. In the absence of any submissions on the point I do not think I should comment further, save to say that I am not bound by *Water Property* and do not propose to express a view either on whether the judge was correct or whether the point would actually make any difference on the facts of this case.

Conclusion

165. I have concluded that paragraph 12 of Schedule 10 VATA had the effect that PGPH's option to tax in respect of the property did not apply to supplies made by it to SMCL pursuant to the grant made in March 2014. It follows that the rent payments made by SMCL to PGPH pursuant to the grant were not chargeable to VAT. Accordingly, PGPH's appeal is dismissed.

166. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 30 OCTOBER 2017

Appendix: relevant legislation

Extracts from Part 1 Schedule 10 VATA

Anti-avoidance

Developers of exempt land

12 (1) A supply is not, as a result of an option to tax, a taxable supply if-

(a) the grant giving rise to the supply was made by a person ("the grantor") who was a developer of the land, and

(b) the exempt land test is met.

(2) The exempt land test is met if, at the time when the grant was made (or treated for the purposes of this paragraph as made), the relevant person intended or expected that the land-

(a) would become exempt land (whether immediately or eventually and whether or not as a result of the grant), or

(b) would continue, for a period at least, to be exempt land.

(3) "The relevant person" means-

(a) the grantor, or

(b) a development financier.

(4) For the meaning of a development financier, see paragraph 14.

(5) For the meaning of "exempt land", see paragraphs 15 and 16.

…

Meaning of grants made by a developer

13 (1) This paragraph applies for the purposes of paragraph 12.

(2) A grant made by any person ("the grantor") in relation to any land is made by a developer of the land if-

(a) the land is, or was intended or expected to be, a relevant capital item (see sub-paragraphs (3) to (5)), and

(b) the grant is made at an eligible time as respects that capital item (see sub-paragraph (6)).

(3) The land is a relevant capital item if-

(a) the land, or

(b) the building or part of a building on the land,

is a capital item in relation to the grantor.

(4) The land was intended or expected to be a relevant capital item if the grantor, or a development financier, intended or expected that-

(a) the land, or

(b) a building or part of a building on, or to be constructed on, the land,

would become a capital item in relation to the grantor ...

…

(6) A grant is made at an eligible time as respects a capital item if it is made before the end of the period provided in the relevant regulations for the making of adjustments relating to the deduction of input tax as respects the capital item.

…

(8) In this paragraph a "capital item", in relation to any person, means an asset falling, in relation to the person, to be treated as a capital item for the purposes of the relevant regulations.

(9) In this paragraph "the relevant regulations", as respects any item, means regulations under section 26(3) and (4) providing for adjustments relating to the deduction of input tax to be made as respects that item.

Meaning of "development financier"

14 (1) This paragraph explains for the purposes of paragraphs 12 to 17 what is meant, in relation to the grantor of any land, by a development financier.

(2) A "development financier" means a person who-

(a) has provided finance for the grantor's development of the land, or

(b) has entered into any arrangement to provide finance for the grantor's development of the land,

with the intention or in the expectation that the land will become exempt land or continue (for a period at least) to be exempt land.

(3) For the purposes of this paragraph references to finance being provided for the grantor's development of the land are to doing (directly or indirectly) any one or more of the following-

(a) providing funds for meeting the whole or any part of the cost of the grantor's development of the land,

(b) procuring the provision of such funds by another,

(c) providing funds for discharging (in whole or in part) any liability that has been or may be incurred by any person for or in connection with the raising of funds to meet the cost of the grantor's development of the land, and

(d) procuring that any such liability is or will be discharged (in whole or in part) by another.

(4) For the purposes of this paragraph references to providing funds for a particular purpose are to-

(a) the making of a loan of funds that are or are to be used for that purpose,

(b) the provision of any guarantee or other security in relation to such a loan,

(c) the provision of any of the consideration for the issue of any shares or other securities issued wholly or partly for raising those funds,

(d) the provision of any consideration for the acquisition by any person of any shares or other securities issued wholly or partly for raising those funds, or

(e) any other transfer of assets or value as a consequence of which any of those funds are made available for that purpose.

(5) For the purposes of this paragraph references to the grantor's development of the land are to the acquisition by the grantor of the asset which-

(a) consists in the land or a building or part of a building on the land, and

(b) is, or (as the case may be) was intended or expected to be, a relevant capital item in relation to the grantor (within the meaning of paragraph 13).

(6) For this purpose the reference to the acquisition of the asset includes-

(a) its construction or reconstruction, and

(b) the carrying out in relation to it of any other works by reference to which it is, or was intended or expected to be, a relevant capital item (within the meaning of paragraph 13).

(7) In this paragraph "arrangement" means any agreement, arrangement or understanding (whether or not legally enforceable).

Meaning of "exempt land": basic definition

15 (1) This paragraph explains for the purposes of paragraphs 12 to 17 what is meant by exempt land.

(2) Land is exempt land if, at any time before the end of the relevant adjustment period as respects that land-

(a) a relevant person is in occupation of the land, and

(b) that occupation is not wholly, or substantially wholly, for eligible purposes.

(3) Each of the following is a relevant person-

(a) the grantor,

(b) a person connected with the grantor,

(c) a development financier, and

(d) a person connected with a development financier.

...

(4) The relevant adjustment period as respects any land is the period provided in the relevant regulations (within the meaning of paragraph 13) for the making of adjustments relating to the deduction of input tax as respects the land.

…

Meaning of "exempt land": eligible purposes

16 (1) This paragraph explains what is meant for the purposes of paragraph 15 by a person occupying land for eligible purposes.

(2) A person cannot occupy land at any time for eligible purposes unless the person is a taxable person at that time (but this rule is qualified by sub-paragraphs (5) and (6)).

(3) A taxable person occupies land for eligible purposes so far as the occupation is for the purpose of making creditable supplies (but this rule is qualified by sub-paragraphs (5) to (7)).

(4) "Creditable supplies" means supplies which--
(a) are or are to be made in the course or furtherance of a business carried on by the person, and
(b) are supplies of such a description that the person would be entitled to a credit for any input tax wholly attributable to those supplies.

…

(10) For the purposes of this paragraph a person occupies land-
(a) whether the person occupies it alone or together with one or more other persons, and
(b) whether the person occupies all of the land or only part of it.

[Note: paragraph 17 also forms part of the disapplication rules but is not relevant on the facts.]

Other definitions etc

34…(2) For the purposes of this Part of this Schedule any question whether a person is connected with another person is to be decided in accordance with section 1122 of the Corporation Tax Act 2010 …

Extract from the Value Added Tax Regulations SI 1995/2518

113 *Capital items to which this Part applies*

(1) The capital items to which this Part applies are any of the items specified in paragraph (2) on or in relation to which the owner incurs VAT bearing capital expenditure of a type specified in paragraph (3), the value of which is not less than that specified in paragraph (4).

(2) The items are-

(a) land;
(b) a building or part of a building;
(c) a civil engineering work or part of a civil engineering work;
(d) a computer or an item of computer equipment;
(e) an aircraft;
(f) a ship, boat or other vessel.

(3) The expenditure--
(a) in the case of an item falling within paragraph (2)(a) or (d), is the expenditure relating to its acquisition;
(b) in the case of an item falling within paragraph (2)(b), (c), (e) or (f), is the expenditure relating to its-
(i) acquisition,
(ii) construction (including where appropriate manufacture),
(iii) refurbishment,
(iv) fitting out,
(v) alteration, or
(vi) extension (including the construction of an annex).

(4) The value for the purposes of paragraph (3) is-
(a) not less than £250,000 where the item falls within paragraph (2)(a), (b) or (c);
(b) not less than £50,000 where the item falls within paragraph (2)(d), (e) or (f).

Extracts from Corporation Tax Act 2010

450 *"Control"*

(1) This section applies for the purpose of this Part.

(2) A person ("P") is treated as having control of a company ("C") if P-
(a) exercises,
(b) is able to exercise, or
(c) is entitled to acquire,
direct or indirect control over C's affairs.

(3) In particular, P is treated as having control of C if P possesses or is entitled to acquire-
(a) the greater part of the share capital or issued share capital of C,
(b) the greater part of the voting power in C,
(c) so much of the issued share capital of C as would, on the assumption that the whole of the in-come of C were distributed among the participators, entitle P to receive the greater part of the amount so distributed, or
(d) such rights as would entitle P, in the event of the winding up of C or in any other circumstances, to receive the greater part of the assets of C which would then be available for distribution among the participators.

(4) Any rights that P or any other person has as a loan creditor are to be disregarded for the purposes of the assumption in subsection (3)(c).

(5) If two or more persons together satisfy any of the conditions in subsections (2) and (3), they are treated as having control of C.

(6) See also section 451 (section 450: rights to be attributed etc).

451 *Section 450: rights to be attributed etc*

(1) This section applies for the purposes of section 450.
(2) A person is treated as entitled to acquire anything which the person-
(a) is entitled to acquire at a future date, or
(b) will at a future date be entitled to acquire.

(3) If a person-
(a) possesses any rights or powers on behalf of another person (a), or
(b) may be required to exercise any rights or powers on A's direction or behalf,
those rights or powers are to be attributed to A.

(4) There may also be attributed to a person all the rights and powers-
(a) of any company of which the person has, or the person and associates of the person have, control,
(b) of any two or more companies within paragraph (a),
(c) of any associate of the person, or
(d) of any two or more associates of the person.

(5) The rights and powers which may be attributed under subsection (4)-
(a) include those attributed to a company or associate under subsection (3), but
(b) do not include those attributed to an associate under subsection (4).

(6) Such attributions are to be made under subsection (4) as will result in a company being treated as under the control of 5 or fewer participators if it can be so treated.

453 *"Loan creditor"*

(1) For the purposes of this Part, "loan creditor", in relation to a company, means a creditor-
(a) in respect of any debt within subsection (2), or
(b) in respect of any redeemable loan capital issued by the company.
But this is subject to subsection (4).

(2) Debt is within this subsection if it is incurred by the company--
(a) for any money borrowed or capital assets acquired by the company,
(b) for any right to receive income created in favour of the company, or

(c) for consideration the value of which to the company was (at the time when the debt was incurred) substantially less than the amount of the debt (including any premium on the debt).

(3) A person who-
(a) is not the creditor in respect of any debt or loan capital to which subsection (1) applies, but
(b) has a beneficial interest in that debt or loan capital,
is, to the extent of that interest, treated for the purposes of this Part as a loan creditor in respect of that debt or loan capital (but this is subject to subsection (4)).

(4) A person carrying on a business of banking is not treated as a loan creditor in respect of any debt or loan capital incurred or issued by the company for money lent by the person to the company in the ordinary course of that business.

…

454 *"Participator"*

(1) For the purposes of this Part, "participator", in relation to a company, means a person having a share or interest in the capital or income of the company.

(2) In particular, "participator" includes-
(a) a person who possesses, or is entitled to acquire, share capital or voting rights in the company,
(b) a loan creditor of the company,
(c) a person who possesses a right to receive or participate in distributions of the company or any amounts payable by the company (in cash or in kind) to loan creditors by way of premium on redemption,
(d) a person who is entitled to acquire such a right as is mentioned in paragraph (c), and
(e) a person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for the person's benefit.

(3) For the purposes of subsection (2), a person is treated as entitled to do anything which the person-
(a) is entitled to do at a future date, or
(b) will at a future date be entitled to do.

…

1122 *"Connected" persons*

…

(3) A company is connected with another person ("A") if-
(a) A has control of the company, or

(b) A together with persons connected with A have control of the company.

…

1123 *"Connected" persons: supplementary*

(1) In section 1122 and this section-

…

"control" is to be read in accordance with sections 450 and 451 (except where otherwise indicated),

…