[2021] UKFTT (TC)

TC08294

VAT - whether payment was consideration for the grant of a lease – yes - whether agreement for lease, lease, counterpart lease and counterpart underlease fall to be treated as single transaction - Mydibel and Balhousie Holdings considered – yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00618

BETWEEN

POLO FARM SPORTS CLUB **Appellant**

-and-

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

TRIBUNAL: JUDGE: ANNE SCOTT
MEMBER: GILL HUNTER

The hearing took place on Tuesday 23 and Wednesday 24 March 2021. With the consent of the parties, the form of the hearing was by way of a telephone hearing on the Tribunal telephone platform. A face to face hearing was not held because of the Covid-19 pandemic.

Mr Graeme Macdonald, for the Appellant

Ms Sarah Black, of counsel, for the Respondents

DECISION

INTRODUCTION

1. This is the appellant's appeal against a decision of the respondents ("HMRC") dated 30 October 2018 and upheld on review in a letter dated 11 January 2019 wherein HMRC determined that the funds received by the appellant from Canterbury Christ Church University ("CCCU"), in relation to the development of a new indoor sports centre, prior to entering into a counterpart lease with the appellant, constituted consideration for the grant of a leasehold interest in the development, and were therefore standard rated pursuant to the Value Added Tax Act 1994 ("VATA").

The hearing

2. We heard only submissions from Mr Macdonald and Ms Black. We had the Substantive Bundle extending to 1245 pages and the Authorities Bundle from the previous hearing. We had no less than three iterations of Authorities Bundles supplied for this hearing, the last of which extended to 1139 pages. We also had an Additional Hearing Bundle extending to 139 pages.

3. We had a Statement of Agreed Facts to which we refer at paragraph 11. We also had Skeleton Arguments from both parties.

The history

4. In the course of the extensive correspondence both before and after the Notice of Appeal was lodged, and in the course of the previous hearing and this hearing, Mr Macdonald advanced many disparate arguments which were at times incomprehensible to both us and HMRC and which were not inherently consistent.

5. This appeal has had what can only be described as an unhappy procedural background which is to an extent set out in a summary decision issued by me on 30 November 2020.

6. That decision covered the appellant's February 2020 application to serve witness evidence and exhibits out of time and HMRC's objection to that, HMRC's February 2020 application to strike-out the appeal and the appellant's objection to that, and the appellant's further application dated October 2020 for permission to amend the Grounds of Appeal and introduce further evidence out of time and HMRC's objection to that.

7. Having heard Mr Macdonald at considerable length in the hearing on those applications and objections, I decided that:

(a) The two applications for admission of late evidence were refused on the basis of relevancy.

(b) One witness statement was excluded on the basis of relevancy.

(c) The other, being that of Mr Macdonald was admitted only in part, again on the basis of relevancy.

(d) The appellant's application to amend the Grounds of Appeal was refused on the basis of relevancy.

(e) The strike-out application was not granted on the basis that I had come to the view that the sums involved were large and, scattered disparately through the voluminous correspondence, Mr Macdonald had advanced various arguments which taken together might amount to a possible stateable Ground of Appeal.

8. I have made explicit at every stage that I simply pulled together some of the more credible and arguable points made by Mr Macdonald. The Ground of Appeal drafted by me for him should read (I have corrected some typographical errors):

> "The use of the word 'premium' in the contractual documents has as its derivation a letter dated 11 October 2012 from Furley Page LLP, the appellant's solicitors, to CCCU. That letter referenced a meeting where proposed Heads of Terms had been discussed. The key features of that letter are as follows:-
>
> > 'The essence of the proposed arrangement is that Canterbury Christ Church University ("CCCU") wants to make a capital contribution of £2 million towards development costs of a new sports hub at Polo Farms. The trustees of the Polo Farms Sports Club ("the Club") will also contribute £2 million pounds (sic), and carry out the development …
> >
> > The Club is concerned to retain the freehold of the ground and to retain control over the facilities. It is also keen to ensure the £250,000 annual fee which CCCU has agreed to pay going forward.
> >
> > CCCU on the other hand need some security for the considerable capital investment and the annual fee and wants to be assured of continuing use of the facilities.
> >
> > The usual way of securing a capital payment would be a first legal charge registered over land but the Club has already indicated that it cannot grant a charge in this case.
> >
> > There is a great desire by both parties to find a solution which gives them comfort in relation to their individual concerns and some heads have been prepared …'.
>
> Not only the draft Heads of Terms but also the documentation which implemented those fall to be read within the context of that letter. It is clear, and always has been, that at all times CCCU were making a capital contribution to the development costs. The leases were simply a mechanism. They were not leases *per se*.
>
> Support for that can be found, for example, in the audited accounts of CCCU which show that the payments that they made under the Lease were neither a premium, in the conventional sense of that word, nor a payment of rent in any form. They are recorded as being expenditure on buildings and the payments have not been amortised.
>
> More pertinently the terms of the contractual documents point to this being a landlord and tenant relationship in name only. For example, clauses 15.6 to 15.8 of the Agreement for Lease make it explicit that the relationship is one where CCCU is funding the development works. There are other clauses in the documentation which also support that argument."

9. In that summary decision I issued a number of Directions because, as I had recorded in the decision, Mr Macdonald had laboured under a number of misapprehensions and neither the law nor the procedure had been understood notwithstanding the issue by me on 1 October 2020 of very detailed Directions explaining the relevant law ("the October Directions").

10. In particular, I directed that the appellant could not put forward any further documentary or witness evidence without the permission of the Tribunal and that a Statement of Agreed Facts drafted by HMRC should be lodged.

11. HMRC timeously complied with the latter Direction and the Agreed Statement of Facts is set out at Appendix 1 and, of course, that forms part of this decision. We have adopted that unusual course of action because it is very long and, as HMRC correctly argue, it includes

many facts on which the appellant insists, but those facts are not in HMRC's, or our, opinion relevant to the Ground of Appeal. We make our own key findings in fact below.

12. On the same day, 11 December 2020, the appellant lodged with the Tribunal two files, entitled A and B purporting to be Statements of Facts which were "…in addition to those agreed between the parties…". Statement of Facts A purported to be extracts from various documents. HMRC took no objection to that other than questioning the relevance of certain points. They correctly pointed out that, as the information was derived from the Bundles, the Tribunal should reference the complete documents rather than the quotations. We agree.

13. HMRC certainly did object to Statement of Facts B characterising it as an attempt by the appellant to introduce yet further evidence without requesting permission from the Tribunal in direct contradiction of the Tribunal's Directions. It provided new information and an analysis of rental value similar to the analysis in Mr Macdonald's witness statement (which was part of what had not been admitted at the previous hearing). There was no underlying witness evidence.

14. That matters because not only had I explained to Mr Macdonald at the previous hearing, and in writing, that HMRC were correct in stating that at all times the appellant's case had consisted of bald assertions unsupported by evidence, but I had also pointed out to him that that was why Judge Vos had issued an UNLESS Order relating to witness statements with a covering letter explaining what was needed. It is also why I issued the extensive October Directions. We quote from that below.

15. On 21 December 2020 I issued yet more Directions pointing out firstly, that the only substantive Ground of Appeal was that set out at paragraph 31 of the summary decision and secondly, that HMRC's objections to Statement of Facts B would be decided as a preliminary matter at the hearing of the substantive appeal.

16. On 28 January 2021, the appellant lodged an application withdrawing Statement of Facts B, without explanation, and seeking permission to file as a Statement of Facts, a document described as "Appellant's Additional Statement of Facts Polo Farm Accounts" together with three further schedules.

17. On 11 February 2021, HMRC lodged a detailed objection and invited the Tribunal to deny the application and refuse reliance on either Statement of Facts B or the new document and schedules.

18. Mr Macdonald then lodged further decisions upon which he wished to rely, both in English and French, and on 19 March 2021, lodged copies of the English decisions with French words inserted. HMRC vigorously objected to the admission of those.

Decision on the application and the documentation in French and mixed French and English

19. HMRC's primary objection was that the documents lodged by Mr Macdonald were simply not statements of fact. To the extent that they included analysis and calculations, they did not relate to expert, or indeed any, witness evidence that was admissible. The previous hearing had made it quite explicit that the only witness evidence for the appellant that was relevant and admissible, was Mr Macdonald's witness statement and only insofar as it related to the background to the contractual arrangements and where it was evidence of fact and it was not opinion.

20. The guidance that I had given to the appellant in the October Directions included the following:

"25. The appellant asked whether reference can be made to the witness statement in any submissions. It is entirely for the appellant to decide what is in a submission but it might be of assistance if I refer the appellant to *Edwards v HMRC*[1] where the Upper Tribunal referenced, with approval, *Qureshi v HMRC*[2], paragraph 50 where it stated:-

> "In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts …"

and at 51:

> "The FTT also made the following observation … with which we would agree:-
>
> '…
> 15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that 'would have' or 'should have' happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.'"

26. I also draw the appellant's attention to Mrs Justice Proudman in *HMRC v Sunico*[3] at paragraph 29 where she states:

> "29. Accordingly, and in the absence of any expert evidence, much in this case turns upon my assessment of the documentary evidence in the light of the parties' respective analysis of it. As I have already noted, to the extent that the witnesses expressed their opinions on the documents they discussed I have discounted their evidence."

27. As can be seen opinions of either witnesses or those presenting a case are not evidence."

21. Notwithstanding Mr Macdonald's protestations that *Sunico* could be distinguished on the facts, it cannot. Paragraph 29, which was quoted, deals with a point of law. We are bound by Mrs Justice Proudman on points of law.

22. We have repeatedly explained that "documents" in the quotation above means original documents such as contracts or accounts. It does not extend to analyses of those unless supported by relevant evidence. Mr Macdonald argued that the schedules were simply explanations and he was trying to advance "inferences of fact". Amongst other things he was trying to argue what the rental payments covered. Shortly put, inferences are not facts. The various analyses created by Mr Macdonald for the hearing do not form part of an exhibit to a witness statement of any sort, let alone from an expert. They are not evidence, nor a summary of facts found elsewhere in the very limited evidence, as opposed to assertion or opinion.

23. We agree with HMRC that, by any standard, by the time of the hearing, the appellant should have been aware of what was required in terms of admissibility and relevance. Sadly, neither concept had been grasped.

24. Mr Macdonald has conceded, without explanation, that Statement of Facts B should be excluded. We decided that whilst we would allow the actual statutory accounts for the appellant to be admitted in evidence, almost everything else in the purported Statement of Facts with further schedules should be excluded on the basis that much of it was not relevant to the only issue to be decided by the Tribunal. To the very limited extent that it might have been

[1] [2019] UKUT 131 (TCC)
[2] [2018] UKFTT 115 (TC)
[3] [2013] EWHC 941 (CH)

relevant, it amounted to Mr Macdonald's opinions and was therefore not admissible. Further, much of it was unsupported by witness evidence.

25. As far as the decisions using French were concerned, HMRC's position was that they simply did not know why he wished to lodge them since his Skeleton Argument merely had a bland statement that "We shall refer to the French version of judgement (sic) and Directives, if required". That referenced two judgments whereas he produced three. Ms Black argued that HMRC had been unable to prepare for a response to his application.

26. In response Mr Macdonald pointed to the fact that the Advocate General in *Apple and Pear Development Council v C & E Commissioners*[4] had drawn attention to the fact that Articles 2 and 73 of the Principal VAT Directive ("PVD") in English used the word consideration whereas in French and other languages, different words were used and so where "consideration" was utilised, one needed to know in what sense it was utilised.

27. Ms Black quite rightly pointed out that that was the first time that that argument had been raised and more importantly that there was absolutely no evidence before the Tribunal of the meaning of either of the French words.

28. As far as the documents in French and the documents in French and English were concerned, we decided that those were not admissible since there was no witness evidence in relation to them and in any event the application was procedurally inept since it was unheralded by any argument.

Other preliminary issues

29. In his Skeleton Argument Mr Macdonald had included arguments under the following headings, namely:-

(a) 4. Application of Accounting Standards in VAT European Case Law

(b) 5. Accounting Background

(c) 6. Substance over form in the application of accounting standards

(d) 7. CCCU's Accounts for year ended 31 July 2018

(e) 8. Would a decision upholding our analysis of the transaction result in tax avoidance?

30. His Skeleton Argument also included three Appendices extending to 17 pages. All are calculations unsupported by witness evidence. All would fall into the category of purported expert evidence and all appear to try and corroborate the schedules included in the January 2021 application. As with that application, none is admissible.

31. We pointed out to Mr Macdonald that there was absolutely no evidence before us, let alone expert evidence, as to accounting standards or indeed any other accounting matters. In the absence of that, as a specialist Tribunal we bring our own knowledge to the matter, but beyond that we are limited to noting the documents to which he referred but his calculations and arguments about accounting treatment were, again, simply his opinions and fell to be discounted.

32. Ms Black made it very clear that there was no suggestion that there was any issue involving tax avoidance. Accordingly there was no dispute in that regard.

[4] Case 102/86

THE SUBSTANTIVE ISSUE

HMRC's arguments

33. HMRC has at all times argued that on the basis of all of the documentary evidence and proper contractual analysis, the payment of £2 million represents consideration for the grant of the leasehold interest and therefore is subject to VAT.

34. There is a direct link between the agreement to pay the monies and the grant of the lease, a legal relationship between the parties and reciprocal performance in the form of clearly expressed mutual obligations being the payments and the granting of the lease.

35. The contractual matrix is

(a) Heads of Terms

(b) Agreement for Lease

(c) Counterpart Lease

(d) Counterpart Underlease

The Appellant's arguments

36. Ultimately Mr Macdonald conceded that he was not advancing any argument that the £2 million should be classified as financing which was the original Ground of Appeal. He has adopted the Ground of Appeal formulated by the Tribunal based on some of his arguments and which we set out at paragraph 8 above.

37. In the course of the extensive correspondence, both before and after the Notice of Appeal was lodged, and in the course of the previous hearing and this hearing, Mr Macdonald advanced many and varied disparate arguments.

38. Unfortunately, as HMRC correctly pointed out, many of the arguments advanced by him appear to have no direct relevance to the sole Ground of Appeal. Even on a tenuous basis many do not stand up to scrutiny.

39. Equally unfortunately, even when addressing, for example, the issue of the premium, he advanced diametrically opposed arguments. On the one hand, he argued that it was quite simply a label and the word should be disregarded but on the other hand he argued that the term was important and he relied on *King v Earl Cadogan*[5] and *Clarke v United Real (Moorgate) Limited*[6], from which he quoted extensively, to advance an argument that "premium" has a technical meaning which the Tribunal should apply. Later he went on to acknowledge that it had no specific meaning for VAT purposes, as he had argued in his Skeleton Argument. However, he also advanced an argument based on the uses of the word in sections 277 and 278 Income Tax (Trading and Other Income) Act 2005 which he said proved that the meaning of "premium" is capitalised rent.

40. It was not just the Tribunal who had difficulty in identifying the appellant's arguments. In their Skeleton Argument, having pointed out the difficulties in understanding the appellant's Skeleton Argument, HMRC stated that it appeared to them that the appellant had only two points namely:

(a) CCCU did not account for the £2 million as a premium for the lease, but for the building of the Hub, and so it cannot be for the lease.

(b) The appellant's accounts supported by the appellant's calculations (which have not been admitted in evidence) show that the rental was sufficient to cover the costs

[5] 1915 1 KB

[6] 1988 STC 273

associated with the Hub, so the £2 million cannot be a premium (in a technical sense) for the lease or use of the facilities, as essentially CCCU would then be overpaying.

41. We agree with HMRC that the appellant did advance those two arguments. Looking at the appellant's Skeleton Argument in conjunction with his oral evidence, since Mr Macdonald is effectively a party litigant, in fairness to him, we would add the following arguments advanced by him in oral argument:

(a) The onus was on HMRC to prove by clear reference to statute why tax is or is not payable.

(b) HMRC's decision letter, in its conclusion had relied only on the Counterpart Lease whereas it was the Agreement for Lease that was the relevant contract because that is where the obligation to make the £2 million payment arose.

(c) Under the Agreement for Lease the appellant made no supplies. The payments made by each of CCCU and the appellant amounted to the sharing of the cost of supplies incurred with regard to the development in accordance with their respective obligations under the Agreement for Lease. In his words, "… the payments are 'bounded' by that agreement".

(d) The Lease and the Underlease were separate transactions and could not be looked at together.

(e) The supply made by the appellant is not just a lease. CCCU get fully serviced and maintained facilities.

(f) The payments made by CCCU are only what the Agreement for Lease states that they are, namely, contributions to the development.

42. Whilst it would be our usual practice to outline and address an appellant's arguments, in this appeal that is neither proportionate nor feasible. As we have made clear the appellant has never understood:

(a) What is evidence?

(b) What is opinion?

(c) What is assertion?

(d) What is admissible?

Therefore we address only the substantive issues in this appeal and disregard the multiple peripheral arguments.

43. Neither we, nor HMRC can see why the appellant is relying on the Bill of Rights 1689 and that is characteristic of the "scattergun" approach to this appeal.

44. Sadly, Mr Macdonald, in his Skeleton Argument, referred to no less than 40 decisions. He went on to refer to more thereafter. We are not writing a treatise on VAT law, and in any event most are old cases which have been the subject of learned analysis and commentary in the Upper Tribunal and in higher courts and those are binding upon us. A good example is *National Car Parks Limited v HMRC*[7]. It would be neither proportionate nor appropriate to address all of his arguments.

[7] [2017] UKUT 247 (TCC)

Key Findings in Fact

45. The appellant is a non-profit club that provides facilities for hockey, cricket, tennis and croquet. The general purpose services and facilities are also sometimes used for football and other sports.

46. Both the appellant and CCCU have been registered for VAT at all relevant times, albeit the latter's supplies are primarily exempt.

47. Over an extended period of time, since the 1990s, the appellant has discussed with CCCU the idea of developing a new indoor sports centre to be used both by them and by the local community at large.

48. On 11 October 2012, CCCU's lawyers, Furley Page LLP, wrote to CCCU following discussions at a meeting about proposed heads of terms for what was described as the Polo Farm Arrangement. They stated

> "The essence of the proposed arrangement is that [CCCU] wants to make a capital contribution of £2 million towards development costs of a new sports hub at Polo Farm … [the appellants] will also contribute £2 million pounds (sic), and carry out the development … The Club is concerned to retain the freehold of the ground and to retain control over the facilities. It is also keen to ensure the £250,000 annual fee which CCCU has agreed to pay going forward. CCCU on the other hand needs some security for the considerable capital investment and the annual fee and wants to be assured of continuing use of the facilities".

They then outlined the discussion that had taken place and expressed their reservations about the proposed structure which they described as "unduly complicated".

49. We had undated Heads of Terms which provide that:

> "Capital Funding to consist of £2m provided by each of PFSC and CCCU to complete stage 1 development and associated works. As consideration for its funding CCCU will lease the site of the hub for 65 years; it will lease this back to PFSC for the same term less a day with PFSC obliged to build the hub. This arrangement provides security for CCCU's funding but allows PFSC to retain day to day operational responsibility…
>
> CCCU to have access to facilities, subject to booking, as follows:
>
> <u>On a priority basis</u>

All facilities	Mon-Fri	9am-3pm
	Mon-Fri	Evenings tba
	Sat, Sun	tba
All facilities except indoor tennis centre	Wed	3pm-5pm
Indoor tennis centre	Wed	3pm-4pm

> <u>On an availability basis</u> All other times
>
> All facilities
>
> It is understood that priority access does not involve exclusive access, and that all bookings are to be used and facilities not left vacant.
>
> CCCU to contribute an annual rent/service charge fixed at £250,000 pa + VAT for the first year, adjusted thereafter to reflect changes in actual costs.

Costs will include actual costs incurred …

The VAT position to be reviewed to maximise tax efficiency".

50. On 19 December 2012, amended Heads of Terms were drafted setting out the proposed arrangements between the parties but these expressly stated that they did not create a binding legal agreement and were subject to contract. It outlined what was described as a formal development agreement, the principal terms of which would be:

(a) The appellant to obtain planning permission, procure the construction and to appoint building contractors etc.

(b) CCCU "… to pay £2m as a premium for the grant of the CCCU Lease which is to be used for the construction of the Hub"; and

(c) The appellant to contribute £2 million towards the new build and the upgrading of existing facilities. The appellant would be responsible for any cost overrun.

51. It set out the principal terms of the Lease and Underlease. In summary, the appellant leased the Hub to CCCU for £250,000 per annum and CCCU leased it back to the appellant for a peppercorn rent.

52. On 14 January 2013 the VAT consultant employed by the appellant responded to a request for advice on the VAT liability in respect of the £2 million payment from CCCU and the last paragraph of the recommendation and conclusion was "As the VAT Legislation is unclear, if an option to tax is not taken, it will be necessary to seek HMRC confirmation as to whether or not (within the terms of the lease) the £2m payment should be taxable. We would be pleased to assist in drafting such a request on your behalf". The appellant did not pursue that recommendation.

53. Ultimately, extensive advice having been taken by both parties including both tax and property law advice, on 9 December 2014, the parties entered into the Agreement for Lease.

54. The "Tenant's Contribution" is specified as being £2 million (inclusive of VAT) and the "Landlord's Contribution" as being the same also but also to include other sums that might become due.

55. Clause 13.1 states clearly that:

"In consideration of the Tenant's obligations under this agreement, the Landlord shall grant the Tenant and the Tenant shall accept from the Landlord the Lease and the Tenant shall grant to the Landlord, the Occupational Underlease, each on the terms set out in this Agreement. No purchase price, or deposit is payable.".

An earlier draft had included the word "premium" in the second sentence of that clause. The "Agreed form of Lease" in its Appendix B stated clearly that there was a premium payable of £2 million.

56. During 2016 and 2017, HMRC and the appellant corresponded about the £2 million following an "opt to tax" application.

57. The culmination was the issue of a VAT assessment in the sum of £308,883 on 21 July 2017. On 1 September 2017, there was a site visit by HMRC and on 6 September 2017, the long heralded Counterpart Lease and Counterpart Underlease were entered into.

58. Clause 2.1 of the Counterpart Lease provides:

"In consideration of the Premium (receipt of which the Landlord hereby acknowledges) the Landlord lets with full title guarantee the Property to the Tenant for the Contractual Term".

The premium is described therein as the payment of £2 million.

59. Correspondence ensued between HMRC and the appellant and on 30 October 2018 the decision notice that is the subject matter of this appeal, was issued.

60. The first payment request, in the sum of £414,000 was issued by the appellant on 3 December 2014. The fourth and last payment, in the sum of £146,700, was made on an unspecified date. All four payments were made against valuation certificates.

61. Both parties were professionally advised throughout and we find that the contractual documents were carefully negotiated.

The Law

62. It is trite law to say that VAT is charged on taxable supplies of goods and services made for consideration[8].

63. VAT is charged on the "taxable amount" and that is defined in Article 73 of the PVD which reads:-

> "In respect of the supply of goods or services … the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or their party …".

64. Article 73 is enacted in domestic law by section 19 VATA which provides:

> " …
>
> (2) If the supply is for consideration in money, its value shall be taken to such amount as, with the addition of the VAT chargeable, is equal to the consideration … and
>
> (4) where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it".

Discussion

65. Perhaps because he is an accountant, Mr Macdonald was very focussed on the accounts and the extensive calculations that he had produced in connection therewith so, although the starting point, as we have repeatedly advised the appellant is the contractual position, we turn to those first, since they are easily dispensed with.

CCCU's accounts

66. Mr Macdonald consistently argued that CCCU's intention in making the £2 million payment "… is objectively evidenced by the accounting treatment of the payments as shown in its audited Annual published accounts". We note the position in those accounts but that is the extent of our views on the subject. We heard no evidence whatsoever and as Ms Black pointed out, the accounts lodged with the Tribunal are those for 2018 and yet the payments were made in 2015. Although the appellant has produced emails involving CCCU's Finance Director, there is again no evidence and no reasoning has been produced. We agree with HMRC that we cannot know what CCCU's thinking and rationale might have been at any given point since we have no evidence. However, we can and do find that the chosen mechanism was the <u>whole</u> contractual matrix.

67. We can see from the documentation that CCCU were advised that the £2 million should be described as a premium for Stamp Duty Land Tax purposes (albeit ultimately they did not pay any). Furthermore, crucially, the extract from HM Land Registry makes it clear that CCCU

[8] Articles 2 and 9 of the PVD and Sections 4 and 5 VATA

had title as a leasehold. At A 7 under the heading "Short particulars of the lease(s) (or under-lease(s)) under which the land is held" it states that it is held for 65 years from 6 September 2017 and CCCU are identified as the lessee. Under the heading "Proprietorship register" it states explicitly "The price, other than rents, stated to have been paid on the grant of the lease was £2,000,000" (emphasis added). CCCU's adviser's lodged that entry.

68. We find that no evidential weight can be attributed to the 2018 CCCU accounts. Therefore the appellant's argument set out at paragraph 40(a) above does not succeed.

The appellant's accounts

69. In his oral submissions Mr Macdonald took us to the appellant's accounts which had been admitted in evidence. Unfortunately there was a spreadsheet attached to that and to which he referred. We were unable to access the spreadsheet in the course of the hearing as it was not only included in the bundle at an angle which it was impossible to read but it was also in tiny print. On checking after the hearing we found that it was part of the inadmissible evidence.

70. In any event, the way that any taxpayer treats expenditure in its accounts is not determinative of its tax treatment as the many cases on whether a receipt is capital or income make clear.

71. To the extent that the appellant's accounts might be relevant that is only within the context of the contractual matrix.

The contractual framework

72. In the guidance to the appellant included in the October Directions I included the following:

> 10. I draw the appellant's attention to these factors because, in terms of substantive law, the Supreme Court has held that the contract is the starting point in determining the nature of a supply and the legal rights and obligations between the parties. This is because the contractual position normally reflects the economic and commercial reality of the transactions.
>
> 11. Thus, in *HMRC v Secret Hotels2 Ltd*[9], Lord Neuberger stated at [31]-[32]:
>
> "31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
> 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J. said in A1 Lofts Ltd v Revenue and Customs Commissioners [2010] STC 214, para 40, in a passage cited by Morgan J:
>
> > 'The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy* Centres (UK) Ltd v Lanwall Services Ltd [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.'"

[9] [2013] STC 784

12. The appellant may also wish to note Lord Neuberger in *Arnold v Britton and others*[10] at paragraph 15 which reads:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi**) disregarding subjective evidence of any party's intentions.** In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30."

13…I have highlighted in bold the wording at (vi) since it is particularly relevant in this appeal. I make no comment on these cases, since that would be a matter for the substantive appeal if the strike out application is not successful, but they demonstrate the legal framework for an appeal such as this one …".

73. A core part, to the extent that it could be identified as such, of the appellant's arguments was that, as we indicate at paragraph 41, the appellant states that the contractual documents cannot be considered together, as HMRC alleged, and must be considered in isolation.

74. That was wrong in law at the time of the hearing in light of the decision of the CJEU in *Mydibel SA v Etat Belge*[11] ("Mydibel") to which, unfortunately, neither party referred us.

75. That decision makes it explicit at paragraph 39, in particular, that it is for the national court to assess if, the contractual structure of the transaction notwithstanding, the evidence put before the court discloses the evidence of a single transaction.

76. Mr Macdonald relied, without particularisation, on an Inner House of the Court of Session decision (we observe that this appeal was not a Scottish case so that decision would only have been persuasive at best). That decision was reversed by the Supreme Court on 31 March 2021 only days after the hearing of this appeal. Of course we are bound by the Supreme Court.

77. In summary, the Supreme Court, even with a dissenting decision which came to the same result but by a different route *via Mydibel*, found in *Balhousie Holdings Ltd v HMRC*[12] that a series of transactions may have to be looked at in the aggregate in particular contexts[13]. EU law principles apply and one must look to the "composite effect" of the transactions.

78. The Lease, and the other contractual documents were freely entered into by both parties. The Furley Page letter on which the appellant relies was simply part of an opening "skirmish" in the negotiations. It is interesting and gives context but no more.

79. What is far more significant is the deliberate decision to characterise the £2 million as a premium (see paragraph 55 above). Mr Macdonald had many and varied arguments, as we have pointed out above, on the nature of a premium.

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[10] [2015] 2 WLR 1593

[11] *C-201/19*

[12] [2012] UKSC 11

[13] Paragraph 40

80. Insofar as the use of the word is relevant in looking at the contracts, we find that the parties' legal and tax advisors had moved from a stance where there would be no premium and explicitly provided that the payment by CCCU was a premium (see paragraph 58 above). That was done in the full knowledge that HMRC considered the payment to be in respect of the grant of the lease.

81. As I had pointed out in the summary decision, "premium" has no definition in VAT jurisprudence, the usual rules of interpretation apply and The New Shorter Oxford English Dictionary defines a premium as being "a sum paid in addition to the rent on a leased property. Read in its context in the contractual documentation that is exactly what it is.

82. However, that is simply not the VAT issue. The issue is whether, in terms of VAT law the payments were a consideration for the grant of the lease.

83. We fully accept that the grant of the Counterpart Lease and the Counterpart Underlease were not contemporaneous with the Agreement for Lease but, as soon as the Agreement for Lease was signed on 9 December 2014, at all times it was known, that as night follows the day, the other contractual documents would follow. In this case quite apart from the contractual documentation, which is explicit, the parties having taken appropriate advice, the funding requisites dictated the character of the composite transaction.

84. In this case there is no scintilla of doubt. The deal that was done was a package, no more and no less. All of the contract documents fall to be read together. The appellant's arguments on that fail.

85. What then are the VAT consequences?

86. In his Skeleton Argument Mr Macdonald states that "the question for VAT is what are the rights that the lease has secured" and goes on to argue that CCCU had only periodic rights of access to the Hub, and they did, and they had no right to exclude the appellant and others. There is no requirement to have exclusive access in a lease.

87. As HMRC point out that is quite simply not the question and what matters is whether the payment is consideration for a supply. The appellant argues that the annual rental of £250,000 is sufficient to cover costs so the £2 million cannot be a premium notwithstanding the wording in the contracts because that "would make no sense".

88. It is trite law that, in the context of VAT law "consideration" is a subjective value and is "…the consideration actually received and not a value assessed according to objective criteria"[14]. Therefore the argument articulated at paragraph 40 (b) above fails.

89. Lastly the appellant argues that the fact that there are fully serviced and maintained facilities means that the supply is not just of a lease but of services. As the CJEU found at paragraph 30 of *Card Protection Plan Limited v CC&E*[15] ("CPP") which reads:

> "There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. **A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied". (emphasis added)**

90. The principal supply in this case is undoubtedly the grant of the lease for the reasons that we have given.

[14] Newey LJ at paragraph 9 in National Car Parks Ltd v HMRC
[15] Case C-349/96

91. The payment of £2 million and the grant of the lease (and the terms of the other contractual documents including access to the serviced and maintained facilities) are indeed inextricably linked on an economic and commercial basis.

92. We find that :

(a) There is a legal relationship between the parties.

(b) There is reciprocal performance.

(c) There is a direct link between the lease and the consideration.

(d) The consideration, being the £2 million, was for the grant of the lease.

Decision

93. For all these reasons the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

94. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 04 OCTOBER 2021

Appendix 1

AGREED STATEMENT OF FACTS

This Statement of Facts is agreed between the parties for the purposes of this appeal (TC/2019/00618) only.

Background

1. Polo Farm Sports Club ("PFSC") was established in 1979 and its business commenced on 1 May 1980. PFSC has been VAT registered since 13 October 1981. It is a non-profit club that provides facilities for hockey, cricket, tennis and croquet. The facilities are also occasionally used for football and other sports.

2. Over an extended period PFSC discussed with Canterbury Christ Church University ("CCCU") the idea of some sort of collaboration in relation to an indoor sports centre ("the Hub"). The documentation shows a number of possibilities were discussed at different times, including, inter alia, CCCU buying one of the sports fields for £2m[16]. By June 2012, the minutes show that a revised scheme was contemplated instead, the first being the building of the Hub and upgrading of facilities, with £2m "still earmarked for [PFSC] but subject to acceptance of final business case". The Hub would be used by PFSC, CCCU and the local community.

PFSC and CCCU negotiations

3. On 11 October 2012 CCCU's lawyer sent a letter to CCCU recapping a meeting they had had with CCCU (this letter was circulated to PFSC). The letter stated, inter alia, that CCCU wanted to make a 'capital contribution' towards the development costs of the Hub, and that both parties wanted to be able to use the Hub once completed. It also said:

> 'The Club is concerned to retain the freehold of the ground and to retain control over the facilities. It is also keen to ensure the £250,000 annual fee which CCCU has agreed to pay going forward.
>
> CCCU on the other hand needs some security for the considerable capital investment and the annual fee and wants to be assured of the continuing use of the facilities.
> The usual way of securing a capital payment would be a first legal charge registered over the land but the Club has already indicated that it cannot grant a charge in this case.'

4. The parties had drafted Heads of Terms which recorded the intention of the parties. The letter stated, in relation to the Heads of Terms:

> 'The Heads of Terms mention the stage payments as the premium under the Headlease but for various reasons this is undesirable. In any event, the money will be required before the Lease is granted (on completion of the hub) so if you contributed funds before the Lease is granted, you would be exposed'.

[16] PFSC Development Committee minutes August 2011, Substantive Bundle, document no. 64, p 1153-1156.

5. On 19 December 2012 amended Heads of Terms were drafted which stated, inter alia:

> 'The proposal is that PFSC constructs a building at Polo Farm which is referred to as the Hub… PFSC grants CCCU a long lease (CCCU lease) of the Hub. CCCU will then grant PFSC an under lease (PFSC under lease) back of [sic] the Hub and with CCCU retaining rights to use parts of the Hub at certain times. The CCCU Lease will also contain rights for CCCU to use certain facilities at Polo Farm and these will be recorded in the CCCU Lease covering the way the shared access works.
> …
>
> The Principle terms of the Development Agreement will be:-
>
> …
>
> (d) CCCU to pay £2,000,000[17] as a premium for the grant of the CCCU Lease which is to be used for the construction of the Hub. This is to be paid in instalments against an agreed payment schedule in accordance with the Hub Build Contract schedules and associated construction timetables for the other Polo Farm schemes. CCCU will pay 50% of each stage payment; and
>
> (e) PFSC is to contribute £2,000,000 towards the construction of the Hub and the upgrading of existing facilities at Polo Farm. PFSC to be responsible for any cost overrun'.

6. On 14 January 2013 PFSC obtained professional advice in relation to the VAT liability of the £2,000,000 and the access rights in the lease. The report stated, inter alia:

> '… Logically however, HMRC could take the view that either the £2m payment is a payment for the exempt lease in the Hub, or it is the payment to the developer for the construction of the Hub.
> …
> As the VAT legislation is unclear, if an option to tax is not taken, it will be necessary to seek HMRC confirmation as to whether or not (within the terms of the lease) the £2m payment should be taxable'.

7. Throughout May, June and July 2014 the lawyers for CCCU (FP) and PFSC's (GC) discussed the form of the leases which were to be agreed, and the VAT treatment of the £2,000,000, with various drafts of the leases being exchanged. Over 21st/22nd May there were emails arising from a review of the draft contracts between Graeme Macdonald and James Knox (JK) regarding inconsistencies within the drafts as to whether there was a premium or not. JK explained that "The heads of terms refer to CCCU paying a premium of £2m for the grant of the lease. This is actually paid as staged payments for the works but it will still be treated as a premium ie CCCU would pay SDLT on the £2m etc. ... The payments for the works are in effect the premium".

8. On 2 July 2014 a member of PFSC wrote to other PFSC members and said that it was agreed with CCCU that '*they [CCCU] would [not] have any interest in how we managed the VAT on the project.'* PFSC and CCCU agreed that PFSC would bear the risk of any VAT that had to be paid on the £2,000,000.

[17] CCCU agreed to pay PFSC a total of £2,000,000, however, to date CCCU has paid £1,853,300. The final amount is to be paid by CCCU once the Hub is finished (the car park is not yet complete).

9. On 9 December 2014 the parties entered into an Agreement for Lease, with PFSC as Landlord and CCCU as the Tenant ("the Agreement for Lease"). The Agreement for Lease states, inter alia:

a. 'Landlords contribution- the sum of Two Million Pounds (£2,000,000) (inclusive of any VAT) plus any sums payable in accordance with clause 25.5;

b. Tenant's contribution- Two million pounds (£2,000,000) (inclusive of any VAT);

c. Development- the construction on the Property and the Landlord's Property of the Hub and the Ancillary Works as more particularly described in the Development Specification;

d. Development Costs- the total costs directly related to the carrying out the Development on the Property including;

e. Development Specification – the plans, specifications, drawings and other data in respect of that part of the Development to be carried out on the Property in the form annexed to this agreement including any variations that may be made in accordance with clause 16;

f. Landlord's works- the works to construct the Development on the Property and the Landlord's Property to be carried out by the Landlord in accordance with the Development Specification.

g. Planning application- Within 20 working days after the date of this agreement, the Landlord shall submit the proposed planning application for the Development to the Tenant for approval (clause 3.1);

h. Within 10 working days after the Tenant has received the proposed planning application (time being of the essence), the Tenant shall notify the Landlord in writing that the Tenant either approves or disapproves of the proposed application… (clause 3.2);

i. If the Tenant does not approve the proposed planning application, the Landlord shall submit a revised planning application to the Tenant for approval (clause 3.3);

j. Agreement for lease - In consideration of the Tenant's obligations under this agreement, the Landlord shall grant to the Tenant and the Tenant shall accept from the Landlord the Lease and the Tenant shall grant to the Landlord, the Occupational Underlease, each on the terms set out in this agreement. No purchase price, or deposit is payable (clause 13.1);

k. If the Tenant considers that the Landlord is in breach of its obligations to carry out the Landlord's Works, the Tenant may serve notice giving the Landlord 20 Working Days' notice of its intention to step-in and complete the Landlord's Works (clause 15.6);

l. If the Tenant steps-in to carry out the Landlord's Works the Landlord shall procure that the Building Contractor and each member of the Professional Team accepts instructions from the Tenant in relation to the Landlord's Works (clause 15.7);

m. The provisions in clause 25 shall still apply after the Tenant has stepped-in save that the Tenant shall be responsible for serving Payment Requests on the Landlord (clause 15.8)

n. The Tenant shall pay to the Landlord: (clause 16.8)

i. Within 20 working days of demand any element of the Variation Costs included in any interim or final certificate under the Building Contract or when otherwise incurred by the Landlord; and

ii. Following completion of the Variation, within 20 working days of demand any balance of the Variation Costs provided that where any element of the Variation Costs is not then finally ascertained, a reasonable estimate may be made and once finally determined:

1. The Tenant shall pay to the Landlord any further Variation Costs due; or

2. The Landlord shall reimburse to the Tenant and over-estimated Variation Costs previously paid by the Tenant;

within 20 working days of the date on which the Variation Costs are finally ascertained.
o. Payment of Landlords and Tenant's contribution- Subject to the provisions of clauses 25.2 and 25.3 and the Landlord carrying out the Landlord's Works in accordance with this agreement, and upon receipt by the Tenant of a payment request ("Payment Request"), the Tenant shall, as a contribution to the Landlord's expenditure on the Landlord's Works, pay the Tenant's Contribution to the Landlord. The Tenant's payment shall be 50% of the relevant stage payment (clause 25.1);

p. If the Development Costs exceed £4 million, the Landlord shall be solely liable for any cost overruns, except and insofar as the excess is represented by Variation Costs (clause 25.5);

q. Title guarantee- The Landlord shall grant the Lease with full title guarantee (clause 27.1)';

10. Construction of the Hub commenced late 2014/early 2015.

Correspondence with HMRC

11. On 25 August 2015 PFSC emailed HMRC requesting to 'Opt to Tax' supplies in respect of the Hub.[18] As part of this email PFSC provided HMRC with the Agreement to Lease. This email stated, in relation to the £2,000,000:

> 'Under the lease the tenant will pay a premium of £2m - this will have been received prior to the signing of the lease under the terms of the agreement to lease in up to 4 stage payments. The lease will be for a period of 65 years and the tenant will pay an annual rent of £250k for the grant and ancillary rights, including the right to use other PFSC sports facilities at specified times as set out in an access schedule'.

12. On 8 June 2016 PFSC emailed HMRC in relation to its 'Opt to Tax' application.[19] As part of this email, PFSC discussed the £2,000,000 and stated:

a. 'CCCU and PFSC were both desirous of having access to an indoor sports facility. PFSC did not have the funds to build this; CCCU was not willing/able to put the funds into acquiring one as it was prohibitive in cost.

b. Whilst both parties agreed to finance a building on PFSC land jointly, CCCU were prohibited, by their Charter, from making donations but that the legal language available is restricted.

c. The £2m paid by CCCU, and described as a premium, was finance supplied by CCCU under the terms of the agreement to lease. If it were relevant to opting to tax (i.e. if the annual rent were otherwise exempt) then the option would be dis-applied because the payments were the provision of finance not land. In PFSC's view, the internal HMRC manual VATLP24800 at 24830 and 24840 made this absolutely clear. The reference in the manual to a parliamentary question on the legislation also makes clear that what is at issue is the substance of the transaction (finance) not the words used in the legal documentation. This is a provision of finance by CCCU and thus outside the scope of VAT.

d. The head lease and sub occupational lease have been combined to provide CCCU with the security they wanted (understandably having provided finance) lest PFSC run into financial difficulties etc.'

13. On 16 June 2016 HMRC requested further documents/correspondence/emails between CCCU and PFSC concerning the £2,000,000, including any relevant terms, if applicable.

14. On 21 July 2016 PFSC responded to HMRC's 16 June 2016 request and stated that it was able to provide some information, but that it was awaiting additional documentation from its solicitors in relation to the £2,000,000. The email went on to state that, thus far, CCCU had paid £1,853,300 out of the £2,000,000, and that the balance would fall due once the final works had been completed.

15. PFSC were unable to provide the further information requested by HMRC as it had encountered difficulty obtaining the correct consents to allow PFSC to enter into the Counterpart Lease with CCCU. HMRC asked for this information again on 6 December 2016 and 1 February 2017. On 4 July 2017 HMRC emailed PFSC in relation to the information requested by HMRC and reiterated the information it required (within the next 14 days of the email), being:

a. The completed lease (signed and dated);

b. Any further documents/correspondence/emails between CCCU and PFSC concerning the £2,000,000 'contribution' including any repayment terms (if applicable).

[19] PFSC did not pursue its application for permission to 'Opt to Tax' the Hub any further as it considered that such permission was not required because no prior exempt supplies of the Hub had been made. PFSC agreed with HRMC that the supplies under the lease with CCCU are taxable as supplies of sporting facilities which do not fulfil the conditions for the exception to standard rating under Note 16, Group 1, Schedule 9, VATA 1994.

16. On 4 July 2017 PFSC replied and said that it could not guarantee that it would provide the information within 14 days, as the lease had not yet been completed.

17. On 21 July 2017 PFSC emailed HMRC and stated that CCCU's solicitors were awaiting instructions from CCCU in order to complete the lease. HMRC responded to this email later that day and said that as PFSC had made some progress towards finalising the lease, it was an appropriate time to set up a meeting. HMRC provided some possible dates for a meeting. The email also restated that the further information which had been requested by HMRC multiple times since June 2016 needed to show the commercial arrangement between the two parties in relation to the £2,000,000.

18. On 21 July 2017 an officer of HMRC made and notified a VAT assessment at £308,883 to account for output tax due on the payments made by CCCU to PFSC (totaling £1,853,300), as HMRC viewed these payments as consideration for the granting of a lease to CCCU ('The Assessment'). This Assessment was raised as, although the parties were still in discussions about the VAT treatment of the £2,000,000 and the information contained in the lease, HMRC was required to raise the Assessment so as to not fall foul of the assessment time limit rules.

19. On 1 September 2017, Officer Kudaisi issued the VAT655 Notice of VAT Assessment in the sum of £308,883.

20. On 5 September 2017, at the invitation of PFSC, HMRC undertook a site visit at the Hub in order to discuss the £2,000,000. A post-visit letter and notes of the meeting were issued to PFSC by HMRC shortly after, and the amended notes of meeting were returned to HMRC on 17 October 2017.

Lease Documentation

21. On 6 September 2017 PFSC and CCCU entered into a Counterpart Lease ('the Counterpart Lease'). The Counterpart Lease states, inter alia:

a. 'Premium- £2 ,000,000 (LR7);

b. Annual Rent- rent at an initial rate of £250,000 per annum and then as revised pursuant to this lease (clause 1.1);

c. Contractual Term- a term of sixty five (65) years beginning on, and including the date of this lease (clause 1.1);

d. Premium- £2,000,000 (Two million pounds) (clause 1.1);

e. Review date- the fifth anniversary of the date of this Lease and every fifth anniversary thereafter during the Contractual Term (clause 1.1);

f. Grant- In consideration of the Premium (receipt of which the Landlord hereby acknowledges) the Landlord lets with full title guarantee the Property to the Tenant for the Contractual Term (clause 2.1);

g. The grant is made together with the ancillary rights set out in clause 3, excepting and reserving to the Landlord the rights set out in clause 4, and subject to the Third Party Right (clause 2.2);

h. The grant is made with the Tenant paying the following as rent to the Landlord (clause 2.3):

- The Annual Rent and all VAT in respect of it; and
- All interest payable under this lease.

i. The tenant shall pay the Annual Rent and any VAT in respect of it by four equal instalments in advance on or before the Rent Payment Dates. The payments shall be made by banker's standing order or by any other method that the Landlord requires at any time by giving notice to the Tenant (clause 6.1);

j. The first instalment of the Annual Rent and any VAT in respect of it shall be made on the date of this lease and shall be the proportion, calculated on a daily basis, in respect of the period from the date of this lease until the day before the next Rent payment Date (clause 6.2);

k. On each anniversary (including any Review Date) of the commencement of the Contractual Term the CPI Indexed Rent shall be calculated by multiplying the Annual Rent by the index value of the CPI for the month two months before the relevant anniversary falls and dividing the product by the index value of the CPI for the month fourteen months before the relevant anniversary (clause 7.2)'.

l. The amount of the Annual Rent shall be reviewed on each anniversary of the commencement of the Contractual Term:

- other than on Review Dates to equal the CPI Indexed Rent and for the avoidance of doubt if the CPI shows a decrease the Annual Rent may be reduced accordingly but so that the Annual Rent shall never be less than £250,000
- on Review Dates to equal the amount determined by Schedule 4 (clause 7.3).

22. On 6 September 2017 the parties also entered into the Counterpart Underlease ('The Counterpart Underlease'). The Underlease states, inter alia:

a. Annual Rent: One Peppercorn (clause 1.1);

b. Contractual Term: a term of sixty five (65) years less one day beginning on, and including the date of this lease and ending on, and including (clause 1.1);

c. The Tenant covenants to comply with the Tenant's Covenants which is defined as "the obligations in this lease, which include the obligations in the Incorporated Terms, to be observed by the Tenant." (see clause 2.5 and definition of Tenant's Covenants".

23. The practical effect of the Counterpart Lease and the Counterpart Underlease is that CCCU have an absolute right to book the Hub within the stipulated hours Monday to Friday but must do so 14 days in advance. If CCCU do not book within these stipulated hours (and 14 days in advance), then PFSC are entitled to make third party lettings pursuant to the Counterpart Underlease. Schedule 2 of the Counterpart Lease, the Access Schedule, identifies the facilities to which CCCU will have access and sets out the terms of access, provided here as 'Appendix 1 – Access Schedule).

24. To date, PFSC has contributed a total of £1,400,000 and CCCU has contributed £1,853,300 towards the development of the Hub (these payments by CCCU were made on 5 January 2015, 1 June 2015 and 17 August 2015). PFSC have also made non-monetary contributions in the form of professional services provided by volunteers.

Further correspondence with HMRC

25. On 17 October 2017 PFSC provided HMRC with some of the further information HMRC had been requesting since July 2016, including a copy of the Counterpart Lease and the Counterpart Underlease

26. By letter dated 24 November 2017 HMRC acknowledged the information provided by PFSC on 17 October 2017 and asked some follow up questions in relation to the further information.

27. On 7 February 2018 PFSC replied to 'HMRC's letter of 24 November 2017 and attached the professional advice it had received regarding the £2,000,000 on 14 January 2013 (see [5]). Part of this advice states 'Under the terms of the proposed lease, PFSC is building a facility called the Hub at a total cost of £4m, £2m of which is being contributed by CCCU. In return for this £2m contribution, CCCU will receive a 65 year lease and after leasing some of new commercial property [sic] (The Hub) back to PFSC, CCCU will retain the rights to use parts of The Hub at certain specified times. The lease will also allow CCCU to use other facilities around the Hub.' This advice stated that it was unclear whether or not the £2,000,000 provided by CCCU to PFSC would be taxable.

28. On 17 May 2018 HMRC responded to PFSC's 7 February 2018 email thanking PFSC for the clarifications provided. This letter asked for further clarifications concerning the accounting treatment applied to the £2,000,000. In their letter of 7 February 2018 PFSC had asserted that the £2,000,000 had been treated in the same way as a grant would be accounted for. PFSC replied to this letter and said that 'Put quite simply the £2m was not treated as lease premium income because it is NOT- it is a contribution or grant as we have consistently tried to explain'.

29. On 30 October 2018, after numerous exchanges with PFSC, HMRC issued its decision in relation to the funds received by CCCU. HMRC decided that the funds received by PFSC from CCCU, in relation to the Hub, prior to entering into the Counterpart Lease with PFSC constituted consideration for the grant of a leasehold interest in the development, confirming the assessment issued.

30. On 29 November 2018 PFSC asked for a formal review of the 30 October 2018 decision. PFSC also wrote to HMRC outlining why it believed HMRC's decision was wrong. Part of PFSC's argument was that:

> a. A lease seemed the most obvious way of providing the necessary security for both CCCU and PFSC and that the Agreement to Lease was the way to provide security during the period of development.
>
> b. The rent (£250,000) was 'to no extent reduced on account of the payments made under the agreement for lease. The figures provided to yourselves show quite clearly that the payments made by CCCU under the agreement for lease can in no sense be regarded as an advance payment of rent- the maximum potential value of usage by CCCU and their actual value of usage substantiate this assertion. The payments under

the agreement to lease were not linked to CCCU's usage of facilities for which the rent was full consideration; they were simply the Tenant's contribution which, together with the Landlord's contribution, financed the Landlord's works including the Ancillary Works.'

31. The review was undertaken and was provided to PFSC on 11 January 2019. The review upheld the previous decision of HMRC.

Appeal

32. On 30 January 2019 PFSC lodged its Appeal.

33. On 30 November2020 the FTT directed that the Appeal can proceed on the further ground:

34. 'The use of the word 'premium' in the contractual documents has as its derivation a letter dated 11 October 2012 from Furley Page LLP, the appellant's solicitors, to CCCU. That letter referenced a meeting where proposed Heads of Terms had been discussed. The key features of that letter are as follows:-

'The essence of the proposed arrangement is that Canterbury Christ Church University ("CCCU") wants to make a Contribution of £2m towards development costs of a new sports hub at Polo Farms. The trustees of the Polo Farms Sports Club ("the Club") will also contribute £2m, and carry out the development …

The Club is concerned to retain the freehold of the ground and to retain control over the facilities. It is also keen to ensure the £250,000 annual fee which CCCU has agreed to pay going forward.

CCCU on the other hand need some security for the considerable capital investment and the annual fee and wants to be assured of continuing use of the facilities.

The usual way of securing a capital payment would be a first legal charge registered over land but the Club has already indicated that it cannot grant a charge in this case.

There is a great desire by both parties to find a solution which gives them comfort in relation to their individual concerns and some heads have been prepared …'.

Not only the draft heads of terms but also the documentation which implemented those fall to be read within the context of that letter. It is clear, and always has been, that at all times CCCU were making a capital contribution to the development costs. The leases were simply a mechanism. They were not leases per se.
Support for that can be found, for example, in the audited accounts of CCCU which show that the payments that they made under the Lease were neither a premium, in the conventional sense of that word nor a payment of rent in any form. They are recorded as being expenditure on buildings and the payments have not been amortised.

More pertinently the terms of the contractual documents point to this being a landlord and tenant relationship in name only. For example, clauses 15.6 to 15.8 of the Agreement for Lease make it explicit that the relationship is one where CCCU is funding the development works. There are other clauses in the documentation which also support that argument.'

Appendix 1 – Access Schedule as contained in Schedule 2 of the Counterpart Lease

CCCU will be able to use the Hub sports facilities between 9am and 3pm on weekdays
CCCU will be able to use the scheduled sports facilities detailed on the attached colour access plan at Polo Farm between 9am and 3pm on weekdays

Extended use of sports facilities on Wednesdays, up to 6.00pm, to be agreed in advance of the start of the academic term. Such agreement to be mindful of the need for PFSC to also accommodate local schools at these times on one waterbase pitch and PFSC commitments to provide indoor tennis on two of the indoor courts from 4.00pm onwards.

Use by CCCU means by its students, staff and alumni

The facilities which CCCU can use can be added to, amended, removed or replaced as agreed between CCCCU and PFSC subject to any agreed rental adjustments as in 7.10
CCCU are to have priority access at no change, subject to booking at least 14 days in advance, to the above facilities during the above hours. The full charge will be payable if such booked facilities are not used.

CCCU to have access to such facilities outside of the above hours if booked subject to availability and with no priority and at 75% of the normal letting charge. The full charge will be payable if such booked facilities are not used.

Unbooked facilities remain available to PFSC at no charge

All grass facilities subject to control of PFSC groundsmen as to fitness of use

CCCU are to have one non-voting place on the PFSC executive committee for the duration of the CCCU Lease and PFSC Lease. The person is to be nominated by CCCU and replaced by them from time to time. PFSC shall give the CCCU executive committee member proper notice of all meetings of the executive committee and will supply them with all relevant minutes

CCCU and PFSC acknowledge that the access sharing is intended to run over a long period of time. They will act in good faith and cooperate to make the arrangements work. They will review the access arrangement every 2 years and will amend/update as appropriate. Any disputes will be referred to the Chairman of PFSC and Chancellor of CCCU to resolve. If they are unable to resolve any dispute the dispute shall be referred to an independent arbitrator
Each of CCCU and PFSC shall each appoint and replace as necessary from time to time a liaison person for the day to day contact between CCCU and PFSC and the proposed arrangements
Additionally CCCU undertake to provide administrative support to work with the Club Manger and to assist with facility and pitch bookings.