Appeal number: UT/2017/0105

VAT – sporting exemption-whether First-tier Tribunal made errors of law in concluding that taxpayer a non-profit making body for the purposes of the exemption-no- Group 10 Schedule 9 VATA 1992 Item 3 – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

STOKE BY NAYLAND GOLF AND LEISURE **Respondent**

TRIBUNAL: Judge Timothy Herrington
Judge Kevin Poole

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 26 and 27 June 2018

Aparna Nathan, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Amanda Brown, of KPMG LLP, for the Respondent

DECISION

Introduction

1. This is an appeal by HMRC against the decision of the First-tier Tribunal ("FTT") (Judge Anne Redston and Mrs Janet Wilkins) released on 3 April 2017 ("the Decision").

2. The FTT allowed the appeal of Stoke by Nayland Golf and Leisure ("Leisure") against HMRC's decision to assess Leisure to VAT for the period from 1 January 2009 to 30 September 2013.The assessment had been made on the basis that Leisure did not satisfy the VAT sporting exemption because it was not a non-profit making body and/or was subject to commercial influence.

3. Leisure, which is a company limited by guarantee but because of its objects is not required to have "Limited" as part of its name, operates a golf club on the site of the Stoke by Nayland Hotel, Golf and Spa resort. Ownership and management of the entire site between 1973 and 1996 was held and carried on wholly by Stoke by Nayland Club Limited ("Club") which is a profit-making company. Club was registered for VAT and until 1996, accounted for VAT on all golf and leisure related income including both periodic membership subscription and green fees.

4. Leisure was established in 1996 following a decision by Club to separate the golf course from the rest of the commercial group of which Club formed part. Initially, there was some commonality of directors between Leisure and Club but in 1999 following the enactment of the Value Added Tax (Sport, Competitions and Physical Education) Order 1998 ("the Sports Order"), a new board was appointed comprised of persons unconnected with Club.

5. Leisure pays Club an annual licence fee for use of the golf and fitness facilities, which remain in the ownership of Club. The licence is renewable on an annual basis at which time the fee payable is negotiated and agreed. Prior to 2009, all income generated in respect of green fees was received by Club and the corresponding supplies were subject to the standard rate of VAT. From 1 January 2009, these activities were transferred from Club to Leisure.

6. Leisure operated the golf club on the basis that it was a non-profit making body, a position that was enquired into by HMRC following a site visit in March 2011 and which resulted in Leisure being registered for VAT retrospectively with effect from 1 January 2009 pending final determination by HMRC as to Leisure's non-profit making status. On 7 February 2014, HMRC issued the decision which prompted Leisure's appeal to the FTT, a decision which was subsequently confirmed on 2 March 2015.

7. The FTT decided that Leisure was a non-profit making body not subject to commercial influence. The basis of the Decision was that the licence fee was set at an arm's length figure, the directors of Leisure acted independently and in the interests of

Leisure, that there was no manipulation of cross-charges between the two entities so as to covertly distribute profits to Club and Leisure was not bearing certain costs which should properly have been charged to Club. Furthermore, the FTT found that the fact that Club provides the infrastructure of the golf club operated by Leisure which meant that Leisure did not spend any of the surpluses they generated on capital infrastructure did not prevent Leisure benefiting from the VAT sporting exemption. The FTT also found that Leisure does not operate as an integral part of a single commercial operation with Club.

8. Permission to appeal against the finding in the Decision that Leisure was a non-profit-making body was granted to HMRC by Judge Bishopp on 14 August 2017. There was no appeal by HMRC against the finding in the Decision that Leisure was not subject to commercial influence.

The Facts

9. HMRC make extensive criticisms, as discussed below, of the FTT's findings of fact which form the most substantial part of their grounds of appeal. HMRC contend that the findings of fact amount to errors in law. We deal with these contentions below but because of the detailed criticisms that HMRC have made of the FTT's findings it is necessary for us to set out in considerable detail what we see as the principal findings of fact on which the FTT based its decision including those which are subject to HMRC's grounds of appeal. References to numbered paragraphs in parentheses, [xx], unless stated otherwise, are references to paragraphs in the Decision.

10. In 1995 Mrs Susanna Rendall, ("Mrs Rendall") became managing director of the Boxford Group which at that time included a number of businesses, including a farm, a golf course and the Stoke by Nayland hotel ("the Hotel") next to the golf course ([14]).

11. Mrs Rendall wanted to focus on what she regarded as more important business issues than the golf club which she found took up a disproportionate amount of time, but she did not wish to sell the golf course and wanted the membership to be looked after and taken forward ([16] and [17]). It was decided to separate the golf course from the rest of the Boxford Group for these reasons ([18]).

12. Leisure was incorporated on 8 November 1996 as a company limited by guarantee. Its objects, as set out in its Memorandum of Association, were in essence to carry on business as a golf club, to promote the golf club and its members' interests generally and to deal generally in any activity for the furtherance of golf ([19]). As is common with companies limited by guarantee, the Memorandum of Association required the income and property of Leisure to be applied solely towards the promotion of its objects and prohibited any payment directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to members of Leisure. ([20]).

13. We were told that the only persons who were members of Leisure, in the company law sense, were those who were from time to time directors of Leisure.

Consequently, those who became members of the golf club operated by Leisure by joining and paying subscriptions (which were retained by Leisure) did not become members of Leisure itself.

14. Initially, Mrs Rendall was the only active director of Leisure. She hired a golf consultant and a manager to take care of the financial side of the golf club to whom day-to-day responsibility for the golf club's operations were delegated. ([22]).

15. In 1999 the English Golf Union wrote to its member clubs, advising that the effect of the Sports Order might prevent some affiliated clubs from continuing to claim exemption from charging VAT on membership subscriptions. Mrs Rendall took advice and was told that the sharing of directors between Leisure and Club would mean that Leisure was deemed to be subject to Club's commercial influence and so would not benefit from the VAT exemption. ([23] to [27]). Consequently, after some temporary arrangements, a new board was constituted, consisting of three new directors recruited by Mrs Rendall, Dr Robert Bruce, Mr Ivan McCallin, and Mr David Anderson. The FTT made the following findings regarding the new directors at [29]:

> "Dr Bruce was Chairman of the Board; he had previously been the head of agricultural lending at Midland Bank, and was a keen golfer. Mr Anderson was a former member of the golf club and was the sales director at Philips UK Ltd. Mr McCallin had been at university with Mrs Rendall. He was from a farming background but later became part of an "angel investor" group supporting start-up businesses. When Dr Bruce stepped down as Chairman in May 2012, Mr McCallin took on that role."

16. The FTT described the arrangements under which Leisure occupied the golf course and its facilities at [30] to [35]. Essentially, although described as a Lease, Leisure was given the right to occupy the land on which the golf course had been developed, together with the buildings from which the golf club operated, on a non-exclusive basis in return for a licence fee payable annually in advance. The annual licence fee commenced at a sum of £280,000 but by 1999 had reached £550,000 per annum and stayed at the same rate for four years; it was reduced to £475,000 in 2003 and again to £450,000 between 2004 and 2008 before increasing to £725,000 for the years 2009 to 2013.

17. Until 2009 green fees (that is fees paid by non-members for the right play on the golf course) were paid to and retained by Club but on 7 May 2009 Leisure agreed to increase the licence fee payable to Club in exchange for the transfer to it of the green fees. The FTT found that there was a general market shift away from fixed membership to people preferring to play as visitors at different clubs which had led to a decline in membership subscriptions. That was putting pressure on Leisure's income stream and if membership fees were increased to cover the licence fee, it was likely that this would trigger a further decline in numbers. The FTT also found that Club had recently spent some £2 million on improving facilities for golf club members which was not reflected in the existing licence fee. ([36] to [38]).

18. As found by the FTT at [40], the extra licence fee negotiated for the years 2009 to 2013 was calculated as 75% of Club's green fee income, net of VAT, plus a 3% interest charge on the £2 million spent on the improvements to the golf club.

19. Leisure's day-to-day operations and management were delegated by the Board to three senior employees. In particular, Mr Andrew Cracknell was Leisure's accountant from mid-2002 and continued in that role throughout the period which is relevant to this appeal, alongside his role as Club's Finance Director, which he assumed in November 2005. ([41] to [43]).

20. The members of the golf club operated a members' committee and its meetings were attended by members of Leisure's management team. At those meetings matters such as the state of the course, the clubhouse and issues with the staff and facilities were discussed. The outcome of these meetings was reported by the golf manager to the Board of Leisure. The golf club members' committee makes recommendations to the Board as to the membership fees, which were not always accepted ([46] to [48]).

21. As to Leisure's finances, The FTT found that over the years between 1999 and 2010 either comparatively small surpluses or losses were generated and that the licence fee represented about 40% of its costs, the bulk of the remainder consisting of employment costs ([49] to [52]).

22. As regards Club's operations and the interface with Leisure, the FTT found at [53] that Club runs the Hotel and takes green fee bookings, the income from which, as we have seen, was passed to Leisure after 2009. Part of Club's revenue comes from sales of food and beverages, including to members of the golf club.

23. HMRC's enquiries commenced early in 2011. As found by the FTT at [55], On 1 February 2011, Mr Richard Hughes of HMRC, ("Mr Hughes") sent the following email to the HMRC officer with responsibility for Club:

> "I suspect this may be a longstanding tax voidance [sic] scheme (1996/7) that has remained unchallenged…I have to say from what I read this is such an avoidance scheme and for a significant sum ([Leisure] having a turnover of >£500k) and feeding into, through a variable licence structure, [Club] which is a large operator of hotel and club facilities for the benefit of its shareholders/directors. Considering the principles from the *Kennemer* case I can't see that exemption applies (and never has). If it is a case of avoidance then we…would be very keen to assist in making a decision and consequential assessments."

24. Following correspondence and meetings over a considerable period of time, on 7 February 2014 HMRC issued the decision which was the subject of the appeal to the FTT. ([56] to [59]).

25. At [73] the FTT set out a list of the disputed factual issues which it had to resolve. The FTT's findings on those of those issues which are relevant to HMRC's grounds of appeal are summarised as follows.

Mrs Rendall's purpose in establishing Leisure

26. HMRC contended that Mrs Rendall took VAT planning advice from Deloitte & Touche before setting up Leisure. The FTT accepted Mrs Rendall's evidence that no such advice was taken and that HMRC's minutes of a meeting at which they allege Mrs Rendall made statements to the contrary were incorrect in that respect ([75] to [82]).

27. The FTT gave detailed reasons for this finding. We set out below those of its reasons given at [84] to [95] because they are the focus of HMRC's challenge on this appeal on this finding:

> "84. If Mrs Rendall had been acting on advice from Deloitte & Touche, it would be reasonable to expect that Deloitte & Touche would have organised the incorporation, but Leisure was instead incorporated by Thorntons, a local firm of accountants.
>
> 85. The letter from Mr Khan [of Thorntons] makes no reference to VAT planning advice. Instead, he refers only to a standard package of services provided on incorporation, including information on HMRC rulings relating to non-profit companies.
>
> 86. The disputed minute begins "the family had received advice from Deloitte & Touche, the Club's auditors". However, Mrs Rendall's unchallenged evidence was that Deloitte & Touche did not become Club's auditors until 1997. They can therefore not have given advice in that capacity about the setting up of Leisure the previous year.
>
> 87. Although HMRC have chosen to concentrate on the disputed passage in the August 2012 minutes, both HMRC's version and Mrs Rendall's amended version of those minutes also record that:
>
> > "RH [Mr Hughes] advised SR [Mrs Susanna Rendall] that when Leisure was formed in 1996 it coincided with changes to the sporting services VAT exemption for non-profit making bodies…SR said that the formation of Leisure in 1996 was not VAT orientated."
>
> 88. We also take into account the minutes issued by Mrs Howlett and Mr Hughes after the June 2012 meeting. These contained a number of mistakes, all of which were subsequently corrected after Mr Henry (who had attended the meeting with Mr McCallin and Dr Bruce) wrote to Mrs Howlett pointing out the errors. As an example, the minutes as originally drafted stated that Mr Barfield, Mr Manning and Mr Pritchard were directors of Leisure. Mr Henry said his letter to Mrs Howlett: "Peter Barfield, Matthew Manning and Keith Pritchard are not directors of Leisure and never have been". Those specific, detailed errors of fact do not inspire confidence in the accuracy of HMRC's minutes.

89. The draft minutes of the June 2012 meeting also stated that:

> "RH advised IM [Mr McCallin] and RB [Dr Bruce] that VAT appeared to be a significant reason for Leisure being set up. RH asked if either IM or RB had taken advice before joining the board of directors for Leisure – both confirmed that they had not taken any independent advice they had trusted the family. Neither were aware of the VAT arrangements."

90. Mr Henry's letter to Mrs Howlett corrected this, saying that when Mr McCallin and Dr Bruce were approached to join the Board:

> "VAT did not feature as a consideration and neither was aware that VAT was or had ever been a material issue. In relation to the fact that neither Mr McCallin nor Dr Bruce had sought specific advice on VAT, it was stated that neither thought that there was a need for advice (it was explained that VAT did not exist as an issue in their minds) because there was no reason to consider VAT a matter of potential controversy…Our client must stress again that VAT was not the reason for Leisure being set up."

91. Mrs Howlett and Mr Hughes changed the June 2012 meeting minutes to reflect those amendments.

92. That is not only another significant change to the minutes, but the original draft gave the misleading impression that Dr Bruce and Mr McCallin had accepted that "VAT arrangements" existed. That too does not give the Tribunal any confidence in the objectivity of the draft minutes taken at the August 2012 meeting.

93. Moreover, by making this correction, Mrs Howlett and Mr Hughes accepted that Mrs Rendall had told neither Dr Bruce nor Mr McCallin that the incorporation of Leisure had been partly motivated by VAT planning. There are only two possible reasons for this: either she did not pass on that important information to her replacement directors (which would be surprising), or she did not have that VAT motivation. We find that the latter was the case.

94. We further find that Mr Hughes approached both meetings with something of a closed mind. As early as February 2011, he had emailed Ms Hill, and copied Mrs Howlett (see §55) to say:

> "I suspect this may be a longstanding tax voidance [sic] scheme (1996/7) that has remained unchallenged…I have to say from what I read this is such an avoidance scheme and for a significant sum ([Leisure] having a turnover of >£500k) and feed into, through a variable licence structure, [Club] which is a large operator of hotel and club facilities for the benefit of its shareholders/directors."

> 95. When this was put to Mr Hughes under cross-examination, he denied that he had "effectively made up [his] mind this was likely to be or was an avoidance structure". However, the draft minutes of the June 2012 meeting refer to Mr Hughes "advising" Mr McCallin and Dr Bruce "that VAT appeared to be a significant reason for Leisure being set up", and the August 2012 draft minutes record that Mr Hughes "advised" Mrs Rendall that "when Leisure was formed in 1996 it coincided with changes to the sporting services VAT exemption for non-profit making bodies"."

The reasons why the directors were appointed to the Board

28. The FTT rejected HMRC's submissions that the directors were appointed to Leisure's Board because they were personal acquaintances of Mrs Rendall or her family, the implication being that they would not be independent but would instead be likely to comply with instructions by Mrs Rendall.

29. In rejecting HMRC's submissions the FTT accepted the following evidence which Mrs Rendall gave on the individual directors, as summarised at [104]:

> "(1) She had not been personally acquainted with Dr Bruce, although her mother had met him in a business context on two or three occasions. She had approached him to be Chairman because he was known as a "very respected person in the industry" and was "at the top of his profession". She described him as someone who "would not say 'yes' to me" and who was "not a puppet". She referred to Dr Bruce's negotiations to reduce the licence fee as "negotiations against me", and said he was "a very firm person".
>
> (2) Mr Anderson had been asked to join the Board because he had business experience from his senior role at Philips, and because he was familiar with the golf club (he was a former member and his son had been a junior captain), but as he had moved away from the area, he "wasn't going to be influenced by any of the members".
>
> (3) Although Mrs Rendall had known Mr McCallin since university, he had been asked to join the Board because he had relevant experience: until 1997 he had been the managing board member of Newark Chamber of Commerce, a non-profit company, and by 1999 had been a managing board member of Nottingham Help the Homeless Association ("NHHA"), a registered charity, for some six years; in that year NHHA was working on a merger with Macedon, another Nottingham charity. NHHA and Macedon had over 60 full-time equivalent staff and a combined turnover of over £3m."

30. Consequently, the FTT found at [107] and [108]:

> "107. We have no hesitation in finding as a fact that these directors were appointed because of their experience. They all had relevant expertise and, as Mr McCallin said, their skills were complementary. We also agree with Mrs Rendall that Dr Bruce, the Chairman of the Board, acted independently and in the interests of Leisure, as did the other

directors, see our further findings at §§132-134; §147; §§176-177 and §§180-181.

108. If Mrs Rendall's sole or main criterion for suggesting a person be appointed to the Board had been that he was known to Mrs Rendall, and had her true aim been to pack the Board with her friends who would comply with her wishes, it would have relatively easy to find directors. Instead, she took time to identify appropriate Board Members with strong and highly relevant experience. The fact that she used her own and her family's network to identify them is irrelevant: many charities and non-profit companies identify new board members by canvassing their contacts."

31. As found by the FTT at [109], Mr Anderson resigned from the Board in 2008 and was replaced by Mr Adam Creeden, who the FTT found was known to Mrs Rendall's brother-in-law as someone with business acumen as well as being a golfer. The FTT rejected HMRC's contention that a key criterion for his appointment was that he was known to Mrs Rendall's family. It said at [112]:

"Having assessed this evidence and considered the submissions, we find as facts that Mr Creeden was identified by Mrs Rendall, but it was the Board who decided whether to invite him to become a director, and they did so because his experience meant he was suitable for the role. In assessing that experience the Board relied on their own interview of Mr Creeden. Although they drew comfort from the fact that he was already known to the Peake family, this is no different from an employer appointing a new employee, who relies on a reference provided by a known and trusted person."

How the licence fee was decided, and how it was adjusted

32. The FTT found, on the basis of Mrs Rendall's evidence, that right from the outset in 1996, the licence fee was fixed on the basis of it representing 50% of the membership fee income before Leisure was established and a further fee for the use of facilities and the premises, both of which had been paid for by Club, and that the fee was set with the assistance of Barker Goatlee, a local firm of solicitors, as to the quantum and the methodology of the licence fee. It said this at [122] and [123]:

"122. Mrs Rendall also said:

"We did it with Barker Gotelee, what was fair and reasonable because I had to be fair and reasonable. It was going to be a separate company. You can't set up something that's not going to work, and it had to be fair to us and it had to be fair to them."

123. HMRC did not accept that this was the position. Instead, Ms Nathan suggested that "the whole point" of the licence fee was to extract profits from Leisure to Club. This is, of course, a wider issue to which we return below. But in the context of the 1996 licence fee, we find that in 1996 the methodology and quantum of the fee were "fair and

> reasonable", being based on 50% of the membership fee income, plus a further £95.5k for the use of the premises and facilities. The balance of the membership fee income is £89k, which remained with Leisure to pay its other costs. There is no link between the licence fee and profits, so no mechanism was put in place to extract future profits and pass them to Club. Instead, the fee was based on Leisure's actual income and its costs."

33. As we have mentioned at [16] above, by 1999 the licence fee had reached £550,000, which the FTT found at [124] arose so as to reflect a percentage of Club's significant further investment in new facilities such as a gym and other leisure facilities which had not existed in 1996. At [126] the FTT referred to Mr McCallin's evidence that no independent valuation to justify the increased fee was obtained because professional valuations are expensive, and the Board would not expend Leisure's money unnecessarily. In response to HMRC's submission that the failure to obtain a valuation showed that the directors were not acting independently of Club, but were instead passively accepting a non-arms' length rental imposed by Mrs Rendall, the FTT said at [128]:

> "We do not accept that submission, because:
>
> > (1) the starting point for the licence fee in 1996 was fair and reasonable;
> >
> > (2) Club had made significant further investment in the premises and facilities hired out by Leisure, and the investment was of such a scale that Leisure was able to increase its income by around 33% in 1999, even though this was the first period of the leisure facilities being open, and its period of operation was no more than eight months of that financial year;
> >
> > (3) the directors had extensive and relevant business experience; and
> >
> > (4) we accept Mr McCallin's evidence that the directors did not consider there to be any business justification for spending Leisure's income on an independent valuation of the licence fee charged by Club, because it was seen to be a fair and reasonable sum."

34. As we have mentioned above, there were reductions to the licence fee in 2001, 2003 and 2004. HMRC submitted that the reductions were not negotiated by the directors but had been determined by Mrs Rendall so as to prevent Leisure's insolvency. The FTT considered the evidence available to it on this issue at [130] and [131] as follows:

> "130. Mr McCallin's evidence was that Dr Bruce had negotiated these reductions with Mrs Rendall. His evidence is supported by the Board minutes, which contain references to those negotiations, for example:

> (1) the minutes for 15 February 2001 record that "the Board will be negotiating an amended licence fee when the new lease is signed for next year, based on the projected budget figures";
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> (2) the minutes for 18 May 2001 record that the rental remains unchanged as the current Lease "is still under negotiation":
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> (3) the minutes for 20 May 2003 record that "it was agreed that the licence costs...would be negotiated downwards if necessary in line with the decline in membership numbers"; and
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> (4) the minutes for 23 July 2003 record that the directors had agreed the licence fee "should be reduced with the suggested figure to be re-negotiated at £475,000", and that the draft licence which was then before the Board "sets the licence fee at £580k and at the current levels of income and overheads this is an unsustainable rent"; in consequence the directors were looking to agree a further reduction to take effect from January 2004.
>
> 131. Mrs Rendall's evidence was that she met Dr Bruce each year, around December, to discuss the licence fee and that she hadn't wanted to agree these reductions. However, she had been persuaded by Dr Bruce, who made a reasonable case against a background of Leisure's net income being lower than expected. She strongly rejected Ms Nathan's suggestion that the licence fee had been reduced because Leisure would otherwise become insolvent, and because it suited Club to have a solvent tenant, saying that Leisure could have raised its membership subscriptions to cover the licence fee but had decided not to do so."

35. The FTT then made the following findings at [132] and [133]:

> "132. We have no hesitation in accepting Mrs Rendall's and Mr McCallin's evidence that Dr Bruce initiated and negotiated these reductions. Although Leisure's Board minutes do not set out the negotiations themselves, that is unsurprising: they are a record of the directors' meetings, not of the meetings between Mrs Rendall and the Chairman of the Board. But, as set out above, the minutes do reference the negotiations.
>
> 133. Mrs Rendall described Dr Bruce as a tough negotiator, and we accept her evidence that she agreed to these reductions with reluctance."

36. At [135] the FTT refers to minutes of a Board meeting held on 4 May 2006, referring to a projected profit of £49,000 that year, and which stated that this could lead to a review of the licence fee "with a suggested increase of £25,000". HMRC relied on this Board minutes as support for its case that any surpluses which did accrue were distributed to Club, at least in part by way of the licence fee. The FTT's findings on this point were set out at [140] as follows:

> "140. We start from the position that, as Mr McCallin said, the licence fee did not increase at any point between 1999 and 2013, except when the

> green fees were transferred. Instead, it was reduced three times. When we consider what actually happened, the licence fee was not "adjusted up and down, depending on whether there were profits that needed taking away" as Ms Nathan invited us to find. We do not know who made the suggestion in the meeting of 4 May 2006: it could have been one of the directors, or one of the other attendees. We also do not know why the suggestion was made: Mr Cracknell put forward one possible reason, but this was only "a guess". The most we can say is that someone at a Leisure board meeting suggested that the recently reduced licence fee might be increased, but the suggestion was not taken up. That does not provide any sort of sound evidential basis for a finding of fact that the licence fee was adjusted in order to transfer surpluses to Club, and we decline to make such a finding."

37. As regards the decision to transfer the green fees to Leisure, HMRC submitted that the absence of any record in Leisure's board minutes as to the reasons for the transfer demonstrated that the transfer was imposed on Leisure by Mrs Rendall. It made further submissions to the effect that the directors' failure to obtain an independent valuation of the increased licence fee and independent advice on the VAT position was because they were not acting independently of Club and had simply accepted what had been determined by Mrs Rendall.

38. The FTT rejected those submissions in the following terms at [147]:

> "147. We do not agree. The directors met Mrs Rendall and "quizzed" her as to the calculation of the new licence fee. That meeting, as Mr McCallin said, preceded the formal Board meeting at which the transfer was recorded. We find as facts that:
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> (1) the directors properly considered the transfer of the green fees, and made their decision in the context of their knowledge of Leisure's business and of the golf industry generally;
>
> (2) it was entirely reasonable for the directors not to obtain an independent valuation: they could clearly see, as Mr McCallin said, that Leisure was "being offered the opportunity to have additional income reflecting the trend in greater numbers of green fee visitors whilst at the same time struggling to find ways of increasing member numbers"; and
>
> (3) the issue for the Board was Leisure's declining revenues, not VAT planning, and against that background it was reasonable for the Board to have relied on the advice Club had obtained from VATability."

39. In 2013 Club had obtained a valuation stating that the market rent for the golf course at that time was £735,000 at a time when £725,000 was being paid. In 2014, Leisure had obtained a valuation which stated that the market rental was £700,000. ([148] and [149]).

40. HMRC submitted that Leisure's failure to negotiate a reduction of the licence fee based on its own valuation indicated that the Board were not acting independently. The FTT rejected this submission in the following terms at [153]:

> "153. We instead find that the difference is well within an acceptable margin of error for professional valuations, and, as Mr McCallin said, if Leisure had sought to reduce the licence fee to bring it into line with Stanford's valuation, Club would have responded by seeking to rely on the higher valuation provided by Christie & Co. We also agree with Mr McCallin that the legal costs of drawing up a new lease were an appropriate and relevant consideration. It follows that in deciding not to renegotiate the lease, the directors were acting independently of Club, and on behalf of Leisure."

41. Finally, on this issue, the FTT dealt with an overall submission by HMRC that the licence fee was not the subject of independent valuation or evidenced by any negotiations, so it cannot be said to be at arm's length and that to the extent of any overvaluation it must be a financial benefit to Club from Leisure.

42. The FTT rejected this submission in the following terms at [160] to [162]:

> "160. However, Ms Nathan did not put the overvaluation point to either Mr McCallin or Mrs Rendall. It is, rather, her own conclusion from points set out in the immediately preceding parts of this decision. HMRC did not lead any evidence on valuation. Mr Cramer invited the Tribunal to find that the two valuations obtained in 2013 and 2014 showed that the licence fee had been set at a reasonable rate. He submitted:
>
> > "Whilst neither of these valuations is put forward as expert evidence *per se,* in the absence of any other evidence from HMRC as to a reasonable market rental figure, it is submitted that they must be afforded significant weight."
>
> 161. We agree. The two independent valuations show that the licence fee was set at fair and reasonable level in 2013 and 2014. We have already found that the licence fee was also set at a fair and reasonable level in 1996, following advice from Barker Gotelee. It follows that the start and end points are clearly established. In the intervening years, and contrary to Ms Nathan's submission, Dr Bruce negotiated strongly with Mrs Rendall to agree reductions to the licence fee when Leisure's revenues failed to match expectations.
>
> 162. Taking into account all relevant evidence, and giving it due weight, we find as a fact that Leisure was paying an arm's length licence fee from 1996 onwards."

Mr Cracknell's role at Leisure

43. There was a dispute between the parties as to the extent of Mr Cracknell's role at Leisure. Mr Cracknell's evidence was that his responsibility extended only to

keeping the books on a day-to-day basis in a financial reporting and financial control role. HMRC suggested that he had a more responsible role, namely that he was responsible for telling the Board what was happening on the ground in other areas and also that his role at Leisure was essentially the same as his role at Club, where he was Finance Director and sat on the Board. Mr Cracknell's evidence was confirmed by Mr McCallin. ([168] to [175]).

44. The FTT made the following findings at [176] to [178]:

> "176. We accept the evidence given by Mr Cracknell and Mr McCallin, which we find to be entirely credible in itself, as well as being consistent with the Board minutes, which show Mr Cracknell as simply presenting the information he has collated from the managers.
>
> 177. We find as facts that:
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> (1) Dr Bruce and Mr Pritchard were financially literate and well able to examine the budgets and other financial information;
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> (2) the budgets were on occasion challenged by the Board and subsequently revised; and
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> (3) Mr Cracknell's role was as he and Mr McCallin described it. In short, he was Leisure's book-keeper and no more.
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> 178. Our findings are consistent with Mr Cracknell's clear inability, when in the witness box, to answer many of the questions put to him. This was in striking contrast to Mr McCallin's comprehensive grasp of the issues facing Leisure. For the avoidance of any possible doubt, we record that we found Mr Cracknell's performance in the witness box to be entirely genuine. He was trying to respond to Ms Nathan, but found many of the questions beyond his knowledge, recollection or experience, and was embarrassed and discomforted by his failures to respond."

Cross-charging

45. The FTT considered in detail how cross-charging on matters such as salaries, insurance, hire charges for equipment and business rates operated. In relation to charges made by Club to Leisure for the use of certain items of equipment it made the following finding at [213]:

> "213. We find Mrs Rendall's evidence to be particularised, clear and credible. It follows that we do not accept Ms Nathan's submission that the hire charges were "a fluid cost". We also find that it is reasonable that Leisure pay for the use of these specific items by way of a hire charge, rather than by further amendments to the Licence, as that would incur legal costs. The fact that the amounts owed were dealt with by journal adjustments, rather than invoices, does not lead to any necessary inference that the hire charges were being manipulated, as Ms Nathan alleged."

46. The FTT made the following overall conclusion on cross- charging at [216]:

> "216. It follows from the above findings that the cross-charge for post operates in favour of Leisure. In all other areas, the cross-charges are operated on a fair and reasonable arm's length basis and do not constitute a back-door way of distributing profits from Leisure to Club."

How PGA events operated at the golf course

47. As the FTT found at [217] and [218], the Professional Golfers Association (PGA) from time to time held an event at the golf course and that Club is responsible for hosting the event for which it receives sponsorship income, but that the event made a loss which was borne by Club and/or by members of Mrs Rendall's family.

48. Certain of Leisure's staff also work at the event, on the basis of which HMRC made a submission that because the event was being hosted by Club, Leisure was paying its staff to work for Club's benefit.

49. At [225] the FTT found:

(1) the contribution to the PGA event was not a payment to Club, but instead covered Leisure's extra employee costs;

(2) the golf club members benefitted reputationally;

(3) they welcomed the event, as can be seen from their voluntary marshalling; and

(4) they also benefited from the consequential improvement in the course itself.

50. It then concluded at [226]:

> "In other words, golf club membership fees were increased in exchange for something which the golf club members both wanted and welcomed, and from which they benefitted. There is, again, no basis for us to make a finding that Leisure was spending its income on costs which properly belong to Club."

Whether Leisure and Club were part of a single commercial operation

51. HMRC relied on a number of matters for a submission that Leisure and Club were only "nominally separate" enterprises and the way they operated in practice should cause the FTT to find that they were "regarded as a single enterprise" ([227]).

52. The FTT found as facts the matters on which HMRC relied and also other matters which arose from Mrs Rendall's evidence and then concluded at [229] that Leisure and Club were not merely "nominally separate" but were in fact separate businesses because:

> "(1) Leisure is supplying the golf club members with access to the golf courses as part of its business of running a golf club; it provides visiting players, including Hotel guests, with similar access following its acquisition of the green fee business. Those activities are clearly demarcated and the income therefrom is paid to Leisure, which has its own sales staff. It is irrelevant that a Hotel guest may not realise there are two businesses: that is a question of perception only.
>
> (2) Club is supplying food, drink and accommodation to club members and to Hotel guests. None of these activities are carried out by Leisure. Most golf clubs franchise out the sales of food and beverages to other companies, and what has happened here is no different.
>
> (3) Golf club members and visitors paying green fees have a choice as to whether or not to buy food and/or drinks, and/or stay overnight in the Hotel. They can, as Mrs Rendall says, simply use the facilities, including the showers, and leave the premises without making any payment to Club."

53. We make reference to further findings of fact by the FTT when considering HMRC's submissions in support of their challenges to the FTT's findings on this appeal.

The Law

Relevant EU provisions

54. The power for member states to exempt from VAT certain activities in the public interest, so far as relevant to this appeal, are set out in Articles 131 to 133 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT ("the Principal VAT Directive").

55. We set out those provisions, so far as relevant, as follows:

(1) Article 131:

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

(2) Article 132:

> "1. Member States shall exempt the following transactions:
> ...
> (m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education;
> ..."

(3) Article 133:

> "Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:
>
> (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;
>
> (b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;
>
> (c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;
>
> (d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT."

Relevant domestic law provisions

56. Section 4 of the Value Added Tax Act 1992 ("VATA") sets out the scope of VAT on taxable supplies as follows:

> "(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

57. Section 31 VATA makes provision for exempt supplies as follows:

> "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 and an acquisition of goods from another member State is an exempt acquisition if the goods are acquired in pursuance of an exempt supply."

58. Group 10, Schedule 9 VATA, which is headed "Sport, sports competitions and physical education" implements the requirements of Article 132 of the Principal VAT Directive. Item 3 of that Group is the provision relevant to this appeal and provides an exemption for:

> "The supply by an eligible body to an individual. . . of services closely linked with and essential to sport or physical education in which the individual is taking part."

59. The Notes relevant to this item set out the conditions to be satisfied in order to obtain the benefit of this exemption as follows:

(1) Note (2A) defines what is an eligible body for the purposes of Item 3 Group 1 Sch 9 VATA:

> "(2A) Subject to Notes (2C) and (3), in this Group "eligible body" means a non-profit making body which—
>
> (a) is precluded from distributing any profit it makes, or is allowed to distribute any such profit by means only of distributions to a non-profit making body;
> (b) applies in accordance with Note (2B) any profits it makes from supplies of a description within Item 2 or 3; and
> (c) is not subject to commercial influence."

(2) Note (2B) provides:

> "(2B) For the purposes of Note (2A) (b) the application of profits made by any body from supplies of a description within Item 2 or 3 is in accordance with this Note only if those profits are applied for one or more of the following purposes, namely—
>
> (a) the continuance or improvement of any facilities made available in or in connection with the making of the supplies of those descriptions made by that body;
>
> (b) the purposes of a non-profit making body."

(3) Note (4) defines "commercial influence" and provides:

> "(4) For the purposes of this Group a body shall be taken, in relation to a sports supply, to be subject to commercial influence if, and only if, there is a time in the relevant period when—
>
> (a) a relevant supply was made to that body by a person associated with it at that time;
>
> (b) an emolument was paid by that body to such a person;
>
> (c) an agreement existed for either or both of the following to take place after the end of that period, namely—
>
> (i) the making of a relevant supply to that body by such a person; or
>
> (ii) the payment by that body to such a person of any emoluments."

Principal authorities

60. It was common ground that the legal principles to be applied to the question as to whether conditions of being a "non-profit making body" were satisfied in any particular case are those identified in the judgment of the European Court of Justice ("ECJ") in *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (2002) Case C-174/00 [2002] STC 502 ("*Kennemer*").

61. The relevant facts in *Kennemer,* as summarised by the ECJ at [9] to [12] of its judgment, were that the appellant, a Netherlands Association whose objects were the pursuit and promotion of golf and which owned a golf course and clubhouse for that purpose, obtained its income from members' subscription fees as well as green fees from non-members. Over a number of tax years, the appellant made an operating surplus which was appropriated as a provisional reserve fund for non-annual expenditure. The Appellant believed that its services to non-members were exempt from VAT and did not account for VAT on those supplies. The tax authorities considered that the appellant was aiming to make profit and imposed an additional assessment to VAT in relation to those services.

62. For present purposes, the essence of the main issue referred to the ECJ was whether the provisions of what is now Article 132 (1) (m) of the Principal VAT Directive was to be interpreted as meaning that an organisation which systematically sought to achieve surpluses should, for that reason, be precluded from the exemption in spite of using those surpluses for the provision of its services. This was expressed by the Advocate General at [36] of his opinion as to what extent an organisation seeking to be classed as non-profit-making may nevertheless make a surplus and what the relevance in that regard was of the provisions which are now contained in Article 133 (a) of the Principal VAT Directive, the text of which is set out at [55] above.

63. The Advocate General's conclusions on this question were set out at [45] to [50] of his opinion as follows:

> "45. First, I agree with what appears to be the consensus of the Finnish and United Kingdom Governments and the Commission, that the idea of profit-making in this context relates to the enrichment of natural or legal persons - in particular those having a financial interest in the organisation in question - rather than to whether in any given period the organisation's income exceeds its expenditure. The concept of a non-profit-making organisation contrasts essentially with that of a commercial undertaking run for the profit of those who control and/or have a financial interest in it.
>
> 46. Second, in accordance with most of the language versions, the focus must be on the aims of the organisation concerned rather than on its results - the mere fact that an entity does not make a profit over any given period is not enough to confer non-profit-making status. Moreover, from the fact that "non-profit-making" is used to qualify "organisation", it would seem that the aims in question are those which are inherent in the organisation rather than those which it may be pursuing at a particular point in time.

> 47.When assessing those aims, therefore, it is necessary but not sufficient to look at the organisation's express objects as set out in its statutes. It is also necessary however to examine whether the aim of making and distributing profit can be deduced from the way in which it operates in practice. And in that context it is not enough to look simply for an overt distribution of profits in the form of, say, a direct return on the investment represented by contributions to the organisation's assets. Such distribution might also, at least in some circumstances, take the form of unusually high remuneration for employees, redeemable rights to increasingly valuable assets, the award of supply contracts to members, whether or not at prices higher than the market rate, or the organisation of sporting "competitions" in which all the members won prizes. No doubt further methods of covert distribution can be devised.
>
> 48. On the other hand, as the Finnish and United Kingdom Governments have also submitted, it would not be reasonable to define an organisation as profit-making simply because it sought to achieve a surplus of regular income over regular expenditure in order to budget for irregular but foreseeable expenditure. A golf club might need, for example, to re-roof its clubhouse after a number of years or to extend its course. To deny it non-profit-making status simply because it accumulated a surplus for that purpose would be to discourage it from managing its affairs economically, with prudence and foresight, and to ignore the fact that no material benefit will accrue to any person as a result of the surplus. Organisations would moreover be liable to acquire and lose their right to exemption depending on where they stood in their budgeting programme, although their fundamental nature and aims would remain unchanged. That cannot in my view have been the intention of the legislature when it enacted the category of "non-profit-making organisations".
>
> 49. Clearly, in each case the assessment must be a matter for the national court, which is in a position to investigate the circumstances of the organisation. In the present case, it does not seem possible for this Court to give more than general guidance, since it is not clear from the case-file exactly how the excess income paid by Kennemer into its reserve funds was actually used or intended to be used.
>
> 50. The relevant part of the Hoge Raad's question may none the less be answered to the effect that a non-profit-making organisation within the meaning of Article 13(A)(1)(m) of the Sixth Directive is one which does not have as its object the enrichment of natural or legal persons and which is not in fact run in such a way as to achieve or seek to achieve such enrichment; however, the fact that a body systematically aims to make a surplus which it uses for the services it supplies in the form of a facility to practise a sport does not preclude its classification as such a non-profit-making organisation."

64. In its judgment, the ECJ emphasised that the question as to whether an organisation is "non-profit-making" is to be determined by having regard to the aim which the organisation pursues. It held at [26] to [28]:

> "26. …. it must be observed first of all that it is clear from Article 13A(1)(m) of the Sixth Directive that an organisation is to be classed as being "non-profit-making" for the purposes of that provision by having regard to the aim which the organisation pursues, that is to say that the organisation must not have the aim, unlike a commercial undertaking, of achieving profits for its members …..
>
> 27. It is for the competent national authorities to determine whether, having regard to the objects of the organisation in question as defined in its constitution, and in the light of the specific facts of the case, an organisation satisfies the requirements enabling it to be categorised as a "non-profit-making" organisation.
>
> 28.Where it is found that this is indeed the case, the fact that an organisation subsequently achieves profits, even if it seeks to make them or makes them systematically, will not affect the original categorisation of the organisation as long as those profits are not distributed to its members as profits. Clearly, Article 13A(1)(m) of the Sixth Directive does not prohibit the organisations covered by that provision from finishing their accounting year with a positive balance. Otherwise, as the United Kingdom points out, such organisations would be unable to create reserves to pay for the maintenance of, and future improvements to, their facilities."

65. The ECJ gave further guidance on what was meant by "profit" in this context. It said this at [33]:

> "…it is not profits ("bénéfices"), in the sense of surpluses arising at the end of an accounting year, which preclude categorisation of an organisation as "non-profit-making", but profit ("profit") in the sense of financial advantages for the organisation's members."

66. It is important, in our view, to put the observations of the Advocate General at [47] of his opinion to the effect that a distribution of profits can be made covertly through, for example, the award of contracts to members at prices higher than the market rate, into the context of the holding by the ECJ at [26] of its judgment that the test to be applied is whether the aim of the organisation in question was to make profits for its members. At [47] the Advocate General makes it clear that matters which might be construed as a covert distribution of profits are relevant only in so far as the aim of making and distributing profit can be deduced from such matters. Consequently, in our view it is clear from the judgment that it is not sufficient that the organisation in question has, for example, entered into contracts which might be said to be otherwise than at market rates, but whether in doing so it had the aim of making a distribution of profits, in the sense of conferring a financial advantage, on those who have a financial interest in the organisation; such an aim might be inferred from such actions, but is not necessarily implicit in them. In that regard, in our view a person who has control of an organisation must be regarded as having a financial interest in it, because such a person has the power to determine whether any profits that are made by the organisation concerned are distributed to him.

67. It must also be assumed that it is not necessary that the distribution of profits be made, whether covertly or overtly, to a person who is a "member" of the organisation, (either, for instance, because, as in the case of Leisure, he is a member of the

company for company law purposes, or, again to give Leisure as an example, he is a member of the golf club which Leisure exists to support) before it might result in the organisation in question no longer qualifying as "non-profit-making" for the purposes of Article 132(1)(m). In the case of *Kennemer* itself, as appears from the facts, there was no suggestion of any distribution of profits to persons who were not members of the organisation, so it is unsurprising that the judgment focuses on the relationship between the organisation and its members but it is clear from [45] and [50] of the Advocate General's opinion that he had in mind the question of whether the organisation existed to enrich any person who had a "financial interest" in the organisation in question or control of it, a category that obviously goes wider than being a member of the organisation in one form or another. In circumstances such as the present, we consider that an aim of enriching Club would offend against the "non-profit-making" requirement of Article 132(1)(m).

68. The Advocate General also makes it clear at [49] of his opinion, as does the ECJ at [27] of its judgment, that the assessment of the organisation's aims is a matter for the national court, to be established on a case-by-case basis having investigated all the circumstances of the case. This calls for the tribunal in question to undertake a multifactorial assessment, taking into account all of the evidence and surrounding circumstances, carrying out a balancing exercise by weighing up the various factors which tend to suggest that the aim of the organisation was to enrich those who have a financial interest in the organisation against those which tend to suggest the opposite and coming to a conclusion.

69. It is therefore necessary for the tribunal to commence its assessment by establishing who has a "financial interest" in the organisation in question. It is clear that the examples given by the Advocate General at [47] of his opinion as to what might amount to a "distribution of profits" are only relevant in so far as there is a distribution to a person who is a member, or who otherwise has a financial interest in the organisation (including by way of controlling it). So much is clear from his observation at [45] of his opinion that the idea of profit-making relates to the enrichment of persons having "control and/or a financial interest" in the organisation in question and [50] of his opinion must be read in that context.

70. It is clear that a "financial interest" can be established by ownership by a profit-making body or by control of a profit-making body over the organisation in question, or where the body in question is subject to common control with other entities who are part of a commercial group so that all the entities concerned amount to a single commercial enterprise.

71. Therefore, it appears to us that in cases where (as in the present case) the body to whom it is said profits are distributed is neither a member nor otherwise has ownership of the body in question, it is necessary to see whether the body in question is under the control of the entity to whom it is alleged profits have been distributed. That would be the case, for example, where the directors of the body in question do not act independently or solely in the interests of the body of which they are directors but from their actions it can be deduced that they are exercising their powers, or refraining from exercising them, in accordance with the interests of the entity to

whom it is alleged that profits are being distributed. In those circumstances, it will be open to the tribunal to conclude that the latter entity has a financial interest in the organisation in question and to deduce that the aim of the organisation in question is to enrich that entity.

72. Whether the organisation in question entered into arrangements at an undervalue or an overvalue may provide evidence of an aim to enrich the third party in the absence of clear evidence that the Board of Directors of the organisation in question acted independently and dealt with the third party on an arm's length basis.

73. If the evidence does establish that the Board of Directors of the organisation in question did act independently, solely in the interests of that organisation and dealt with the third party on an arm's length basis then that should be sufficient for the tribunal to infer that the body in question did not have the aim of enriching those who have a financial interest in the organisation in question. There is then no need to go any further and consider whether any of the payments made to the third party amount to a distribution of profits.

74. In *Longborough Festival Opera v HMRC* [2006] EWHC 40 (Ch) ("*Longborough*"), the High Court (Lightman J) considered the meaning of "profits" in the context of the cultural services exemption.

75. It is important to note that there are a number of differences between the sporting exemption and the cultural services exemption, so that the cases on the latter are of limited assistance in construing the former exemption. In particular, the definition of "eligible body" is different in that, unlike the sporting exemption there is no specific requirement that a body which wishes to take advantage of the cultural services exemption is a "non-profit making body".

76. The relevant requirements to satisfy the cultural services exemption are that the body is precluded from distributing, and does not distribute, any profit it makes, applies any profits made to the continuance or improvement of the facilities made available by means of its supplies and is managed and administered on a voluntary basis by persons who have no direct or indirect financial interest in its activities. As Lightman J said at [33] of his judgment, the condition that the body does not systematically aim to make a profit is a condition which, under what is now the Principal VAT Directive, is an optional condition and the UK chose not to implement it, so that condition was not relevant in that case. However, in relation to the sporting exemption, Note (2A) to Group 10, Schedule 9 VATA requires that an eligible body must be a "non-profit making body", as required by Article 132 (1) (m) of the Principal VAT Directive a term which must be interpreted in accordance with the meaning given to it by the ECJ in *Kennemer*.

77. The issues for determination in *Longborough* were whether on the facts Longborough Festival Opera (LFO) was an eligible body for the purposes of the cultural services exemption and, in particular, first, whether it was precluded from distributing and did not distribute its profits and second, whether the Trustees managed and administered LFO on a voluntary basis and had no direct or indirect

financial interest in its activities: see [26] of the judgment. Having determined that the constraint on distribution of profits was addressed by the terms of LFO's Memorandum and Articles of Association and the fiduciary duties of the directors, Lightman J dealt with the financial interest issue at [35] of the judgment as follows:

> "…. In this condition the word "profits" means surplus or profit on the bodies' activities. The condition precludes any dilution of such surplus or profit by the entry into contracts not in the best interests of the body or on terms other than the best reasonably obtainable, but does not preclude the entry into contracts by the cultural body with members, staff or third parties provided that by their true character or terms they are not a method of distribution of profit to another party. If the contract is for goods or services (or in this case the use of the opera house or equipment) needed by the body at the best price reasonably obtainable and is not made with the member, employee or third party because he is such and for his benefit, the provisions of the First Indent are complied with. Accordingly the potential for the making of contracts between LFO and Mr Graham or LDL as contemplated in the Memorandum and as set out in the recited facts does not involve any dilution of the profits of LFO nor will the conclusion of such contracts do so if the Trustees comply with their fiduciary duties to LFO…" (emphasis added)

78. It is therefore clear that this judgment is of assistance in determining whether there has been distribution of "profits" to those who have a financial interest in the organisation, but it is of limited assistance in relation to the requirement of the sporting exemption that for the body in question to be regarded as a "non-profit making body" there must be no aim of enriching those having a financial interest in the organisation in question, as decided in *Kennemer*.

79. However, as recognised by Lightman J in *Longborough*, the question as to whether the directors have entered into contracts on behalf of the organisation in question in its best interests is a key consideration and in that respect the question as to whether both the directors have acted in accordance with their fiduciary duties and the company has itself acted lawfully in not making any disguised distribution of its assets is highly relevant to this issue.

80. As Pennycuick J observed in *Ridge Securities Ltd v Inland Revenue Commissioners* [1964] 1 WLR 479, 495,

> "A company can only lawfully deal with its assets in furtherance of its objects. The corporators may take assets out of the company by way of dividend, or, with the leave of the court, by way of reduction of capital, or in a winding-up. They may of course acquire them for full consideration. They cannot take assets out of the company by way of voluntary distribution, however described, and if they attempt to do so, the distribution is ultra vires the company."

81. This principle was applied by the Supreme Court in its judgment in *Progress Property Company Limited v Moorgarth Group Limited* [2010] UKSC 55, where the issue was whether the sale of a company's assets which it was accepted had been sold

at an undervalue amounted to unlawful distribution of its assets. Lord Walker said this at [29]:

> "The participants' subjective intentions are however sometimes relevant, and a distribution disguised as an arm's length commercial transaction is the paradigm example. If a company sells to a shareholder at a low value assets which are difficult to value precisely, but which are potentially very valuable, the transaction may call for close scrutiny, and the company's financial position, and the actual motives and intentions of the directors, will be highly relevant. There may be questions to be asked as to whether the company was under financial pressure compelling it to sell at an inopportune time, as to what advice was taken, how the market was tested, and how the terms of the deal were negotiated. If the conclusion is that it was a genuine arm's length transaction then it will stand, even if it may, with hindsight, appear to have been a bad bargain. If it was an improper attempt to extract value by the pretence of an arm's length sale, it will be held unlawful. But either conclusion will depend on a realistic assessment of all the relevant facts, not simply a retrospective valuation exercise in isolation from all other inquiries."

82. In our view this approach is consistent with the approach that we have found should be taken in relation to the question as to whether a supply contract with a third party should be regarded as a means of effecting a covert distribution of profits for the purposes of determining whether an organisation is a non-profit-making body. Contrary to submissions made by Ms Nathan before us, this passage also indicates that a transaction may still be regarded as an arm's length transaction, even though it be effected at something other than market value. It could simply be a bad bargain, but that is not fatal, either to the company law issue as to whether there has been an unlawful distribution or to the issue in relation to the eligible body conditions of the sporting exemption, because the test centres around the aim of those who enter into the transactions on behalf of the body in question.

83. Lord Walker also makes it clear, however, that transactions where there may be an incentive to enter into them otherwise than at market value do need careful scrutiny, and that is equally the case here bearing in mind the history of the relationship between the two bodies. However, the mere fact that there is a close relationship between the two bodies, which does not amount to one body having control over the other, does not, in our view, preclude the body in question being held to be an eligible body for the purposes of the sporting exemption.

84. *Kennemer* was considered by the Court of Appeal in *Messenger Leisure Developments v HMRC* [2005] EWCA Civ 648. The essential facts in that case were that a company limited by guarantee whose object was to operate a golf club and which had a prohibition on distributing its profits was wholly owned by a commercial group controlled by one of its directors, who was also the sole director of the ultimate holding company in the group and the company which operated the golf club. The question was whether, for the purposes of the sporting exemption, the latter company could be said to be a non-profit-making organisation on the basis that it built up surpluses which were not distributed but were reinvested in the golf club facilities.

85. Parker LJ gave the leading judgment. At [85] he observed that the issue in *Kennemer* was different from the issue that arose in *Messenger* in that the former case concerned an organisation (a members' club) which would otherwise (that is to say, leaving out of account the making of surpluses) be categorised as "non-profit-making". He emphasised at [88] that *Kennemer* was not authority for the very different proposition that an organisation which has no power to make, and which does not make, distributions to its members is necessarily a "non-profit-making organisation" notwithstanding that it may achieve surpluses which it retains and uses for its own purposes.

86. His reasoning for that conclusion was set out at [89] as follows:

> "First, in agreement with Mr Paines I can see no basis for treating the expression "financial advantages for the organisation's members" in para 33 of the ECJ's judgment in *Kennemer* as restricted to a particular category of advantage, viz a distribution of surplus funds to members. Indeed, when read in the context of the judgment as a whole it seems to me that it is plainly not so limited. Second, whether or not an organisation is "non-profit-making" for the purposes of art 13A(1)(m) must, as the ECJ tells us, depend on the "aim which [it] pursues". As to that, I also agree with Mr Paines that in determining what is the "aim" which the organisation is pursuing when it makes the supply in question it is necessary to look at the transactions in question in their full factual context. Thus, the fact that an organisation systematically achieves surpluses which it retains for its own purposes may, depending on the context, demonstrate an "aim" which is far removed from "non-profit-making".

87. The Court found at [90] that the company operating the golf club (referred to as Developments in the judgment) represented an integral part of the commercial operation of the group as a whole, and hence of the controlling director (Mr Shah), in acquiring and running golf and country clubs (that is proprietary clubs) and, from time to time, in selling them. At [91] it concluded that the building up of reserves in that company was a clear financial advantage to the group, and hence to its controlling director. The ease with which the constitution of Developments could have been changed by the group was also clearly regarded as relevant, especially by Arden LJ at [96]-[97].

88. At [92] the court considered whether the test of "aim" is a subjective or objective one and concluded:

> "….. I have no difficulty in accepting Mr Thomas' submission that Mr Shah's subjective intentions in relation to Developments were relevant matters for the Tribunal to take into account as part of the general context; but, the reasons already given, they are far from conclusive as to Developments' "aim" in making the supplies in question. Indeed, when all the surrounding circumstances are taken into account, the inevitable conclusion (as it seems to me) is that Developments' aim in making the supplies in question was to further the commercial aims of the group as a whole, and hence of Mr Shah…."

89. This judgment therefore confirms that the tribunal must undertake a multifactorial assessment of all of the surrounding circumstances so as to establish the aim of the company in question and that the subjective intentions of those who establish and control the company are relevant but not conclusive factors in that context. If the tribunal finds that the company in question is part of a single integrated commercial organisation then that will be determinative of a finding that the company is not "non-profit-making". The judgment also confirms that there are many different ways in which a distribution of profits can arise, but the fact that no profits are so distributed is not in itself conclusive of the question as to whether the organisation has the aim of enriching those who have a financial interest in it.

The Decision

90. The FTT set out, without further analysis, at [66] to [68] the relevant passages from *Kennemer* which establish the meaning of the term "non-profit-making".

91. At [69] the FTT correctly identified that whether or not an organisation is "non-profit making" is to be decided in the light of the specific facts of the case. Consequently, the FTT correctly identified at [72] that the FTT's findings on the factual issues in dispute would be determinative of the question as to whether Leisure was a non-profit-making body.

92. At [244] the FTT recorded the essence of HMRC's case being that Leisure was not a non-profit-making body because:

> (1) its affairs were managed so as to ensure that any surpluses or financial advantages could be, and were in fact, applied, whether directly or indirectly, for the benefit of Club and in effect, to Club's shareholders;
>
> (2) any surpluses that did accrue were distributed to Club by way of the Licence fee or recharges, so Leisure did not distribute its profits only to a non-profit making body;
>
> (3) it operated as an integral part of a commercial operation of which Club also formed part; and
>
> (4) as the infrastructure was owned by Club, it is not possible for Leisure to claim that it applied any surplus to the continuance or improvement of the facilities. Although Leisure spent money on the upkeep of the green and making sure that its payroll costs were paid, that was insufficient to meet the statutory test.

93. The first and second of HMRC's submissions, as set out at [92] above, were rejected by the FTT on the basis of its findings that the licence fee was set at an arm's length figure; the directors acted independently and in the interest of Leisure; that there was no manipulation of the cross-charges so as to covertly distribute profits to Club; and that Leisure was not bearing costs relating to the PGA event which should properly have been charged to Club: see [247].

94. At [250] the FTT rejected HMRC's third submission on the basis of its findings at [229], as set out at [52] above, that Leisure did not operate as an integral part of a single commercial operation with Club.

95. The FTT rejected HMRC's fourth submission for the following reasons set out at [253] and [254]:

> "253.HMRC rightly accept that Leisure spent its money on "the upkeep of the green and making sure that its payroll costs were paid". Those sums are self-evidently for "the continuance or improvement of the services supplied. Leisure also paid its arms-length licence fee, and a fair and appropriate share of the charges for overheads such as business rates and insurance, again on an arm's length basis.
>
> 254. The fact that Club provides the infrastructure, for which Leisure makes an arms-length payment, is no different from the position of any other non-profit making body paying a third party to provide the capital infrastructure used for the delivery of its services. For example, a theatre company might rent its building, and apply any surplus to improving its props, or in hiring a better orchestra. A zoo might pay an arm's length rent for the use of a park owned by a landowner, and then use any surplus to recruit more staff, or improve the visitor experience. The fact that neither the theatre nor the zoo spend their surplus on capital infrastructure owned by a third party does not prevent them benefitting from the exemption. This can be clearly seen in *Longborough,* where the opera house and equipment was not owned by the opera company, but by Mr Graham, who incorporated the company in question. The High Court found that this was not relevant: what mattered was that the body "must be legally incapable of distributing its profits, or diluting its profits in favour of its directors or members, and must not do so" (see [50] of the judgment)."

96. The FTT concluded its reasons for holding that Leisure was a non-profit-making body at [255] by a further reference to *Kennemer* and a reiteration of its findings of fact that Leisure does not have an overt or covert aim of achieving profits for Club.

97. It was apparent that many other cases had been cited to the FTT, but the FTT stated at [256] that it came to its decision on the basis of its findings of fact in the light of the statutory provisions as interpreted by *Kennemer.* The implication of this statement was that the FTT did not find much assistance from those other cases, although it did provide some analysis of the two cases on which it said the parties had placed most weight, namely *Messenger* and *Hilden Park* [2013] UKFTT 391 (TC). The FTT then distinguished those cases on the facts ([257] to [262]).

Grounds of Appeal

98. HMRC's grounds of appeal extend to 20 pages. There are three distinct areas covered by the grounds of appeal as follows:

(1) a large number of contentions that the FTT erred in law in making findings of fact or inferences for which there was either no evidence or which were inconsistent with the evidence, or were made on the incorrect premise that the findings were unchallenged or accepted by HMRC;

(2) a contention that the FTT failed to apply the correct legal principles as enunciated in *Kennemer*, although this ground was unhelpfully included under the general heading of the FTT having erred in making findings of fact or inferences for which there was no evidence. It is, however, clear that it is a separate ground and was argued accordingly, the basis for it being that in focusing on the arm's-length nature of the licence fee and not taking into account that it is possible to have distributions of profit even where contracts are priced at the market rate the FTT made an error of law; and

(3) a contention that the Tribunal erred in failing to take account of other decisions of the FTT which had material similarities to the operation in this case.

99. For convenience, we shall deal with the grounds of appeal by reference to these three broad grounds.

Errors of law and the Upper Tribunal's powers

100. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") provides that a party to a case before the FTT only has a right of appeal to the Upper Tribunal on a point of law arising from the FTT's decision. There cannot be an appeal on a pure question of fact which is decided by the FTT. However, a tribunal may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14 in which Lord Simonds referred to making a finding, without any evidence or upon a view of the facts which could not be supported, as involving an error of law: see at page 29. In the same case, Lord Radcliffe, at page 36, regarded cases where there was no evidence to support a finding or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding, as cases involving errors of law. HMRC in this case rely on this reasoning for their challenges to the FTT's findings of fact set out in its grounds of appeal.

101. In relation to an appeal which is said to involve a point of law of the kind identified in *Edwards v Bairstow*, we were reminded by Ms Brown of what was said by Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463 at 476, as follows:

> "It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High

> Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled."

102. He continued:

> "... For a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make."

103. He concluded:

> "what is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court."

104. Furthermore, as Ms Brown submitted, the bar to establishing an error of law based on the challenge to findings of fact is deliberately set high. As Kitchin LJ said in *FAGE UK Limited and another v Chobani UK Limited and another [2014] EWCA Civ 5* at para 114:

> "Appellate courts have been repeatedly warned … not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluations of those facts and inferences to be drawn from them. … The reasons for this approach are many. They include:
>
> > i) the expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;
> >
> > ii) the trial is not a dress rehearsal. It is the first and last night of the show;
> >
> > iii) duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas the appellate court will only be island hopping;
>
> v) the atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

105. As regards multifactorial assessments of the kind with which this case is concerned, Jacob LJ made the following observation at [9] of *Proctor and Gamble UK v HMRC* [2009] STC 1990:

> "Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that is so, an appeal court (whether first or second) should be slow to interfere with that overall assessment."

106. In support of that statement Jacob LJ quoted the following passage from the well-known speech of Lord Hoffmann in the House of Lords case of *Biogen v Medeva* [1997] RPC 1 at page 45:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression but which may play an important part in the judge's overall evaluation."

107. An appellate court should also be slow to interfere with an assessment of the credibility of a witness. In *Alexander Langsam v Beachcroft LLP and others* [2012] EWCA Civ 1230 Arden LJ, as well as reiterating the correct approach to multifactorial assessments, said at [72]:

> "It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence which is not available to the appellate court. It is therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take account that the judge has reached a multi-factorial judgement, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements of the evaluation unless it is shown that the judge is clearly wrong and reached a conclusion which he was not entitled to reach."

108. We shall therefore approach HMRC's challenges to the FTT's findings of fact these judicial statements firmly in mind.

109. Furthermore, the fact that we may find that one or more of the FTT's findings disclose errors of law on its part does not necessarily mean that we should allow the appeal and set aside the Decision. Section 12 TCEA provides that if the Upper Tribunal finds that the making of the relevant decision involved the making of an error on a point of law it "may (but need not) set aside" the decision. That language clearly indicates that we have a discretion in that respect. In our view, we should not exercise our discretion to set aside the Decision if we were satisfied, notwithstanding errors of law in the Decision, that there was a sufficient basis in the findings of the FTT which were fully reasoned and not subject to challenge to justify its conclusions that Leisure was a non-profit-making body. If we conclude that one or more of HMRC's criticisms of the FTT's findings of fact are made out, we may still consider whether the remainder, taken together with those matters relied upon by the FTT which were not challenged, nonetheless constituted a sufficient basis for the Decision. That is consistent with the passage from *Georgiou* quoted at [102] above: we should not regard any finding of fact as disclosing an error of law where it is not significant in relation to the finding in the Decision with which these appeals are concerned, namely the conclusion that Leisure was a non-profit-making body.

Discussion

Whether the FTT erred in principle

110. We shall start by considering HMRC's contention that the FTT misdirected itself by basing its decision that Leisure was an eligible body for the purposes of the Sporting Exemption on the basis of its finding at [160] to [162] that Leisure was paying an arm's length licence fee from 1996 onwards. HMRC contend, in reliance on what was said by the Advocate General at [47] of his opinion in *Kennemer,* that the fact that arm's length prices are paid under a contract does not definitively answer the question of whether there is a distribution of profit and the FTT erred in not asking itself whether despite the payment of arm's length prices there was nevertheless a distribution of profits.

111. We approach this question on the assumption that the FTT were correct in their finding that Leisure paid an arm's length licence fee, a matter to which we will return in the context of HMRC's challenges in this appeal to the FTT's findings of fact.

112. The underlying premise of Ms Nathan's submissions on this point was that the licence fee and other charges were paid by Leisure to Club only because of Club's relationship with Leisure. Ms Nathan submits that the entire restructuring which led to the operation of the golf course being vested in Leisure was envisaged on terms that Club would continue to own the golf course but would let Leisure use it for a fee. Since Leisure obtained the licence to use the golf course and Club received the licence fee simply because of their relationship to each other and for no other reason, the FTT could not have been satisfied that there was no distribution of profits. Ms Nathan relies on Lightman J's statement at [35] of *Longborough* that there is no distribution

of profit where a contract is entered into for goods or services needed by the body "at the best price reasonably obtainable and is not made with the member, employee or third party because he is such and for his benefit" and contends that those conditions are not met in this case.

113. Ms Nathan submits that having found that the arrangements for the licence were made at arm's length the FTT should have gone on to consider whether there was nevertheless a covert distribution of profits to Club. It was apparent, she submitted, from the findings at [160] to [162] (as set out at [42] above) that the FTT gave no consideration to this issue. Similarly, at [247] notwithstanding the fact that the FTT found that the directors acted independently and that there was no manipulation of cross-charges the FTT made no further enquiry as to whether there was nevertheless a covert distribution.

114. In particular, Ms Nathan submits that the FTT should have taken into account the close relationship between Leisure and Club, which was a profit-making enterprise and should therefore have given consideration to the following factors:

(1) whether Leisure should lease a golf course from someone other than Club;

(2) whether a licence term in excess of 12 months should have been negotiated;

(3) whether the other direct payments made to Club were distributions of profit, such as (i) the 3% interest charge in respect of the improvements to the golf club which was built into the licence fee as referred to at [18] above (bearing in mind the observation at [47] of the Advocate General's opinion in *Kennemer* that a direct return on investment would be a distribution of profits) and (ii) the payments made to Club for food, drink and accommodation to golf club members provided by Club; and

(4) why by 1999 the licence fee had almost doubled but there had only been a 33% increase in turnover.

115. Ms Nathan submits that the FTT erred further in not recognising that Leisure operated as an integral part of a commercial operation of which Club also formed part. It failed to note:

(1) The premises of both businesses were shared – they both used the golf courses, they both used the same physical complex and facilities;

(2) the Respondent had no club house or bar of its own and so the offering of such facilities to the Respondent's members was always conceived as being provided by Club. In effect, Club benefitted financially because it had a captive clientele;

(3) Mrs Rendall's acknowledgement in evidence that there was an anticipated benefit to Club from the Respondent's members who might seek to book Club's facilities for functions e.g. weddings.

116. We start by reminding ourselves that the task of the FTT, consistent with the test set out by the ECJ at [27] of *Kennemer*, was to carry out a multifactorial

assessment and determine whether, having regard to the objects of Leisure, and in the light of the specific facts of the case, Leisure satisfied the requirements enabling it to be categorised as a "non-profit-making organisation". In carrying out that exercise, it was the FTT's task, as established at [26] of the ECJ's judgment in *Kennemer*, to establish whether Leisure had the aim of achieving profits for its "members".

117. In that regard, although paragraph [50] of the Advocate General's opinion in *Kennemer* makes it clear that non-profit-making status will not be available to a body which has the aim of enriching third parties who are not members, as Ms Brown submitted, the opinion does not say, and neither does the judgment of the ECJ say, that the award of supply contracts to persons who do not have a financial interest in the organisation at a market price can amount to a covert distribution. Paragraph [47] of the opinion talks only about the award of supply contracts to "members" whether or not at prices higher than the market rate, being capable of amounting to a covert distribution. However, in the light of what the Advocate General said at [45] of his opinion, the award of supply contracts to any person who has a financial interest in the organisation (including by the exercise of control over it) must also be regarded as capable of amounting to a covert distribution.

118. Nor does the passage from *Longborough* in our view assist Ms Nathan. The first part of [35] of the judgment, set out at [77] above, makes it clear that the conditions of the exemption did not preclude the entry into contracts with third parties "provided that by their true character or terms they are not a method of distribution of profit to another party". The passage which appears later in that paragraph which is relied on by Ms Nathan must be read in the context of the earlier passage just quoted. This emphasises the point that it is the task of the FTT to establish whether the contracts in question have the aim of distributing profit to a person with a financial interest in the organisation.

119. Our only criticism of the FTT is that it did not explicitly refer to the fact that in coming to the conclusions that it did at [247], as referred to at [93] above, it was thereby concluding that it was not the aim of Leisure to enrich Club. It would have been helpful had it said so explicitly and in so doing, cross referred to its findings at [229] that Leisure and Club were separate businesses the aim of Leisure being to supply golf club members with access to the golf courses as part of its business of running a golf club, thereby rejecting the thesis put forward by HMRC that Leisure and Club formed part of a single commercial enterprise run for the benefit of the association of which both formed part. However, when the Decision is read as a whole and [229] and [249] are read together it is clear that they amount to a conclusion that it was not the aim of Leisure to enrich Club, but it existed, as Ms Brown submitted, to give members of the golf club the ability to play golf on the golf courses which it licensed from Club on the basis of a licence agreement negotiated at arm's-length.

120. It was therefore clear that the FTT was aware that it needed to determine first, whether Leisure's activities were carried on for the purpose of applying any surpluses generated for the benefit of any person other than Leisure, secondly whether surpluses that did accrue were in fact distributed and thirdly, whether any surpluses that were

generated were applied to the continuance or improvement of the facilities at the golf course. If it carried out that exercise properly, in our view it would have applied the correct principles to the question as to whether Leisure was a non-profit-making body, as established in *Kennemer*.

121. By making the findings at [247], in our view, the FTT implicitly therefore found, on the basis of its previous detailed findings of fact that the directors acted independently and in the interests of Leisure, that it was not the aim of Leisure to enrich Club (the only potential third party under consideration). It is also implicit in the findings at [247] that the FTT found that there was no overt or covert distribution of profits to Club through the setting of the licence fee, the various cross-charges and the responsibility for the costs relating to the PGA event. There was a further explicit finding at [249] that the licence fee and the cross-charging were not methods of distributing profit, or for the benefit of Club, but were on arm's length terms, having made reference at [248] to Lightman J's definition of "profit" as set out at [35] of *Longborough.* By its findings at [253] and [254], as set out at [95] above, the FTT dealt with the question as to the application of the surpluses.

122. The FTT's findings that the directors of Leisure acted independently in the interests of Leisure and that it dealt with Club on an arms-length basis, not only in relation to the licence fee but also the other arrangements that it had entered into with Club, were therefore sufficient for it to conclude, as it clearly did at [247], that there had been no covert distribution of profits. This was not a case where, unlike *Messenger*, Leisure was under the control of Club or where the two entities were under the control of a common owner.

123. As we have said at [82], the approach taken by Lord Walker in *Progress Property Company*, in the company law context, as set out at [81] above is consistent with the approach that we have found should be taken in relation to the question as to whether a supply contract with a third party should be regarded as a means of effecting a covert distribution of profits for the purposes of determining whether an organisation is a not for profit body. It is precisely the approach the FTT took in this place by determining whether the arrangements with Club were at arm's length and, as we have said, contrary to Ms Nathan's submissions before us, a transaction may still be regarded as an arm's length transaction, even though it is effected at something other than market value.

124. As we have also said at [83] above, the mere fact that there is a close relationship between the two bodies, which does not amount, as the FTT found here, to one body having control over the other does not preclude the body in question being held to be an eligible body for the purposes of the sporting exemption. We therefore reject the submissions made by Ms Nathan, as recorded at [112] above, that the matter can be determined by a finding that Club received the licence fee simply because of its relationship with Leisure. It follows that the matters referred to by Ms Nathan and recorded at [114] above are not material in this case. It is not for the FTT to undertake an enquiry as to whether Leisure could have got a better deal from Club, as we have repeatedly said, it was its task to establish what the aim of the arrangements in question were. Clearly, the fact that the arrangements concerned may

have been entered into otherwise than at market value may put the FTT on enquiry as to whether that aim did in fact exist, but it is quite clear from the FTT's findings that it did take the last three of the matters identified by Ms Nathan and recorded at [114] into account when deciding that issue.

125. As far as the first item is concerned, that is the question as to whether Leisure should have leased a golf course from someone other than Club, we find that suggestion plainly absurd when the whole purpose of Leisure was, as the FTT found, to give the golf club members the continuing opportunity to play on the golf courses which it occupied under the licence from Club. For the same reasons, we reject the submissions recorded at [115] above. The FTT did not fail to consider whether Leisure operated as an integral part of a commercial operation of which Club formed part, rather having considered the evidence it determined that there was not a single commercial operation which meant that Club had a financial interest in Leisure.

126. It is also no surprise that the FTT did focus primarily on the arm's-length issue because of the way HMRC argued the case in the FTT. As is apparent from the transcripts of the hearing, HMRC's statement of case, and the submissions made (particularly as recorded by the FTT at [159]), Ms Nathan did not submit before the FTT that a distribution could have occurred even where contracts are priced at the market rate. HMRC's case was that the licence fee was a covert distribution of profits because it was overvalued.

127. Our criticism of the FTT is therefore slight and one of form rather than of substance. We are satisfied that the FTT identified the correct legal test to be applied and applied it correctly to the findings of fact that it made.

128. For these reasons, in our view HMRC has not made out its case on this ground of appeal and we find no reason to interfere with the FTT's Decision on this ground.

Whether the FTT's findings of fact disclose any error of law

129. In her skeleton argument, Ms Nathan set out some 32 individual challenges to the findings of fact made by the FTT. Even if those challenges are made out, that is not in itself sufficient to amount to an error of law. As the passage from *Georgiou* set out at [102] above makes clear, in order for a question of law to arise in the circumstances there is a four stage process to be followed. HMRC must in this case:

(1) Identify the finding which is challenged;

(2) Show that it is significant in relation to the conclusion;

(3) Identify the evidence, if any, which was relevant to that finding; and

(4) Show that that finding, on the basis of that evidence, was one which the FTT was not entitled to make.

130. In her submissions Ms Nathan clearly identified in each case the finding of fact that was challenged. In cases where she submitted the FTT was not entitled to rely on evidence that it did in making its conclusion in question she identified that evidence but not, in the main, the other evidence relevant to the issue that was available to the

FTT, which on the basis of what we have said above, she should have done. In relation to some findings she made submissions that there was no evidence to justify the conclusion. Ms Nathan did not make any submissions as to why the finding that was being challenged was significant in relation to the overall conclusion made by the FTT, namely that Leisure was not a non-profit-making body.

131. As regards the latter point, as we have found, subject to any successful challenges to the FTT's findings of fact, the FTT's overall conclusion was that it was not the aim of Leisure to enrich Club. The FTT's basis for those findings was, as we have set out at [122] above, that the directors of Leisure acted independently and in the interests of Leisure with the consequence that there was no overt or covert distribution of profits to Club through the setting of the licence fee, the various cross-charges and the responsibility for the costs relating to the PGA event, and that the dealings with Club as regards the licence fee and other matters were not methods of distributing profit, or for the benefit of Club, but were on arm's length terms.

132. Therefore, for HMRC to succeed on their challenges to the FTT's findings of fact, they must demonstrate, in relation to each of the findings that they challenge, that the finding is significant in relation to the FTT's conclusions on the matters referred to at [131] above. If they are successful in that regard, then, as we said at [109] above, we will need to consider whether or not there remains a sufficient basis in the findings of the FTT to justify its conclusion that Leisure was a non-profit-making body.

133. As we have said, Ms Nathan made no submissions on the significance of the various points in which she made challenges to the FTT's findings, although it is clear that some of them are self-evidently significant.

134. Ms Brown, helpfully, in an annex to her skeleton argument analysed each of the 32 matters in respect of which challenges were made by reference to the four factors set out at [129] above. We have broadly accepted that analysis and accordingly have decided that there is a sufficient basis for the FTT's findings of fact to justify its conclusions.

135. We therefore now set out our conclusions on the challenges made by HMRC. We have done so by grouping the various challenges by subject matter under three headings as follows.

(1) Whether Mrs Rendall took VAT planning advice before setting up Leisure and consequently whether there was a VAT planning motivation behind Leisure's establishment

136. HMRC contend that there was no evidential basis for the FTT's findings that Mrs Rendall did not take VAT planning advice from Deloitte & Touche before setting up Leisure, that there were errors in HMRC's minutes of a meeting at which Mrs Rendall made statements to the contrary, and that Mr Hughes approached those meetings "with something of a closed mind". They also challenge the FTT's finding that Mrs Rendall decided to separate the golf course from the rest of the Boxford

Group for commercial reasons as being inconsistent with the evidence which demonstrates that the setting up of Leisure as a separate company was purely VAT motivated based on the advice it received.

137. Although the FTT dealt with these matters in considerable detail in the Decision: see [75] to [82] and its reasoning at [84] to [95], as quoted at [27] above, it is clear to us that they are of no relevance to the FTT's findings on the issues which it was required to determine in this case, namely whether, applying the test in *Kennemer*, Leisure was a "non-profit making" body. As Ms Brown correctly submitted, whether the arrangements were purely VAT motivated is relevant to the question as to whether the arrangements were abusive, consistent with the principles laid down by the ECJ in *Halifax plc v Customs and Excise Commissioners* (Case C-255/02) [2006] STC 919.

138. It appears from many of the "golf club" cases which arose out of the restructurings made by a number of operators of golf courses following the coming into force of the sporting exemption that where HMRC sought to challenge the arrangements they often did so on two alternative grounds, namely first that the arrangements infringed the *Halifax* principle, in which case they would have to demonstrate that they were motivated by obtaining a VAT advantage, and alternatively that applying the principles in *Kennemer* the body concerned was not "non-profit-making". In this case there never was a challenge on the grounds of abuse. Therefore, the only legal issue before the FTT was whether the arrangements were consistent with the principles in *Kennemer*. Whether or not there was a VAT motivation is irrelevant to that issue.

139. As the Court of Appeal observed at [83] of *Messenger,* it is a commercial decision for a taxpayer whether to arrange his affairs in such a way as to bring a particular supply within the terms of the statutory exemption. In the absence of an abuse challenge, the issue is whether, in relation to the supplies in question, a taxpayer has succeeded in doing so.

140. Accordingly, we find that none of the challenges summarised at [136] above are significant in relation to the FTT's conclusion on the issues that it had to determine and, as we have observed, Ms Nathan made no submissions to that effect. Accordingly, we conclude that the FTT made no error of law in relation to those matters.

141. For completeness, had it been necessary to do so we would have found that the challenges would have failed. It is clear that the FTT carefully weighed up all the evidence that was available to it, and in particular relied on its assessment of Mrs Rendall's credibility and accepted her evidence, finding Mr Hughes's evidence, on the basis of what they saw of him as a witness and the relevant documentation, to be less reliable. We therefore agree with Ms Brown that to a large part the challenges amount to an impermissible attack on Mrs Rendall's credibility and the weight that the FTT gave to the evidence that was before it.

(2) Whether the directors of Leisure were appointed solely because of their connections with Mrs Rendall or her family

142. The FTT's findings as to the manner in which the directors of Leisure were appointed, their experience and qualifications, and the way in which they acted in practice, are clearly highly relevant and significant to its conclusion that Leisure was a "non-profit making" body.

143. HMRC's challenges in this respect can be summarised as follows:

(1) there was no evidence to support the FTT's finding at [104(3)] that Mr McCallin was chosen as a director for his experience rather than because of his personal relationship with Mrs Rendall;

(2) at [108] the FTT erred in holding without any evidential basis that "many charities and non-profit companies identify new board members by canvassing their contacts" a finding which cannot be regarded as an exercise in judicial notice;

(3) at [112] the FTT erred in finding that Mr Creeden's appointment, being based on drawing comfort from him already being known to Mrs Rendall's family, was no different from an employer who in appointing a new employee relies on a reference provided by a known and trusted person;

(4) at [128(3)] the FTT erred in finding that the directors had extensive and relevant business experience because there was no contemporaneous evidence of the directors having extensive relevant experience of running sporting facilities; and

(5) at [177(3)] the FTT erred in finding that Dr Bruce and Mr Pritchard were financially literate and able to examine the budgets and other financial information.

144. As far as (1) is concerned, in our view there was clear evidence on the basis of which the FTT was entitled to conclude that Mr McCallin was chosen because of his experience. Both Mrs Rendall and Mr McCallin were cross-examined on this point. Mrs Rendall in particular, explained the importance of the new directors appointed being independent and the need to appoint persons that had no personal interest in the golf club, but who could look at matters from the perspective of what was for the benefit of the overall membership. The FTT found at [9] that Mr McCallin was "wholly credible" as a witness and that Mrs Rendall was a "straightforward and honest witness". The FTT were therefore fully entitled to make the findings they did on this point and HMRC's challenge is no more than an impermissible attack on the credibility of the witnesses concerned.

145. As far as (2) is concerned, we regard this as an insignificant point which can be characterised as being more in the nature of an observation rather than a finding on which the FTT relied. As Ms Brown submitted, the FTT reached conclusions on the evidence that it heard and made an observation that it was consistent with its own knowledge of the practices in the sector. As far as the judicial notice point is concerned, as the passages from *Bennion* to which we were taken illustrate, a tribunal

(particularly a specialised tribunal such as the FTT) is expected to draw upon its knowledge of the way that businesses operate and its "knowledge of the world", particularly the business world, in order to deal effectively with a business tax such as VAT. If, as has been held, it is permissible to take account of the fact that professional and habitual criminals frequently take steps to conceal their profits from crime, it seems to us that it is equally permissible for a specialist tribunal to refer to its knowledge of the manner in which non-profit-making bodies typically appoint their directors.

146. As far as (3) is concerned, Ms Nathan submitted that the FTT's statement at [112] reveals that the FTT failed to recognise that there is a qualitative difference between appointing a director of a company and a mere employee and that it is not appropriate to take a recommendation of a director on trust and that the FTT failed to recognise the importance of the context in which the recommendation was made. A relevant consideration which the FTT did not appear to consider was whether the recommendation furthered Mrs Rendall's interest as the person who made the recommendation.

147. We regard this point as insignificant. The FTT was fully aware of the circumstances in which Mr Creeden was identified as a potential director. It found at [108] that Mrs Rendall took time to identify appropriate Board Members with strong and highly relevant experience. The evidence demonstrates that Mr Creeden had considerable experience at board level, had good golfing knowledge and Mr McCallin gave evidence to the effect that following from Mr Creeden's interview the Board considered he was worthy of appointment based on his business acumen and his financial responsibility and that Mr Creeden came with proven credentials. On the basis of that evidence, the FTT was clearly entitled to conclude that Mr Creeden was appointed because of that experience, and the method by which he came to be recommended is very much secondary to those considerations. Again, in substance, HMRC's challenge amounts to no more than an impermissible attack on the credibility of the witnesses that the FTT heard.

148. As far as (4) is concerned, we have already referred to Mr McCallin's golfing knowledge; in his oral evidence he explained his experience as a member of two golf clubs and as a farming business owner. Mr McCallin also explained the different experience the three directors brought to the Board, in particular Mr Anderson's marketing skills and Mr Bruce's legal and financial skills. We have also explained Mr Creeden's experience above. It is also relevant that Mr Cracknell explained the roles and experience of the senior management in relation to golfing matters and the manner in which the golf manager's reports were challenged.

149. Accordingly, we reject HMRC's premise that it was necessary for all of the directors to have extensive experience of running sporting facilities. It would be expected that a board of this kind would have a range of complementary business skills. In our view, there was ample evidence on the basis of which the FTT was entitled to make its finding that the directors had extensive and relevant business experience.

150. As far as (5) is concerned, Mr McCallin gave evidence explaining that Mr Pritchard, the company secretary, was a retired but qualified accountant and that Dr Bruce had spent his career in the field of banking. Mrs Rendall gave evidence as to Dr Bruce's credentials through his banking experience. In our view, there was therefore clearly evidence on which the FTT was entitled to make the findings it did on this point.

151. Accordingly, we conclude that the FTT made no error of law in relation to the matters summarised at [143] above.

(3) Whether the directors of Leisure acted independently in their dealings with Club

152. The FTT's findings as to the manner in which the directors of Leisure acted in practice, are clearly highly relevant and significant to its conclusion that Leisure was a "non-profit-making" body.

153. HMRC's challenges in this respect can be summarised as being that the FTT erred:

(1) in holding at [107] and [133] that Dr Bruce acted independently in the interests of Leisure as did the other directors and that Dr Bruce was a tough negotiator;

(2) in holding at [123] and [128] that the 1996 licence fee was "fair and reasonable";

(3) in making its findings at [147] without appreciating that contradictory statements were made to HMRC at meetings held in 2012 and 2014 in respect of which meeting notes were agreed;

(4) in holding at [213] that it was reasonable to pay for certain items by way of hire charges rather than a change in the licence fee as this would incur legal costs;

(5) in finding at [213] that Mrs Rendall's evidence relating to hire charges was particularised, clear and credible;

(6) in finding at [225 (1)] and [226] that in relation to the PGA event Leisure was not spending its income on costs which properly belong to Club;

(7) in holding at [123] that there was no link between the licence fee and profits, so no mechanism was put in place to extract future profits and pass them to Club;

(8) in relying on its finding at [162] that Leisure was paying an arm's length licence fee from 1996 onwards (in part) on the fact that Ms Nathan did not put the point to Mr McCallin or Mrs Rendall that the licence fee was overvalued; and

(9) in holding at [229] that most golf clubs franchise out the sales of food and beverages.

154. We reject all of the submissions and the challenges made to the FTT's findings on these points for the following reasons.

155. In relation to (1), Ms Nathan submitted as follows:

> (a) The finding that Dr Bruce was a "tough negotiator" was astonishing given that Dr Bruce offered no evidence with the result that the FTT relied entirely on the self-serving and non-contemporaneous evidence of Mrs Rendall, who was a person interested in the outcome of the appeal;
>
> (b) There was no evidence to support the FTT's finding that the other directors too acted in the interests of Leisure. The facts indicate otherwise, for example there was no attempt to secure an independent valuation of the licence fee and it was no justification to say that valuations would have incurred costs;
>
> (c) no independent advice was taken in 2009 in relation to the decision to accept a higher licence fee in return for the green fee income; and
>
> (d) the failure to carry out such basic tasks rather than simply taking matters on trust is inconsistent with the directors' fiduciary duties and in those circumstances the FTT's findings to the contrary are unjustified and no tribunal properly instructed and acting judicially could reasonably have come to the same view.

156. As regards the presence or otherwise of negotiations concerning the licence fee, in essence Ms Nathan submits that there was no evidence of such negotiation beyond Mrs Rendall's evidence which, she says, the FTT should not have accepted, in the absence of any evidence from Dr Bruce.

157. As far as Dr Bruce's absence is concerned, Mrs Rendall gave cogent and compelling evidence as to why it was not feasible for him to give evidence. The transcript shows that she explained that he was currently aged over 80 and was in poor health, although she expressed a clear view that she would have liked him to have been able to give evidence. HMRC would appear to have accepted that explanation because there was no suggestion that the FTT should have drawn an adverse inference from Dr Bruce's absence.

158. The transcripts show that Mrs Rendall gave consistent explanations in the course of her oral evidence on a number of occasions on which the licence fee was made subject to negotiation over the years. She was challenged repeatedly by Ms Nathan on the basis that in reality there were no negotiations, but she was consistent in her replies to the contrary. As we have previously explained, the FTT found Mrs Rendall to be a credible witness. In any event, it is clear from the FTT's description of the evidence at [130], that there was evidence beyond that of Mrs Rendall alone on which they could base their findings at [132] and [133]. The various board minutes show evidence of negotiations and Mr McCallin, who was also found to be a credible witness, provided corroboration of that. Furthermore, and importantly, the "proof of the pudding is in the eating". Significant reductions of the licence fee were, as the evidence shows, in fact achieved.

159. Ms Nathan relies on the absence of an independent valuation of the licence fee or independent advice on it as demonstrating that the directors of Leisure acted in breach of their fiduciary duties.

160. However, as Ms Brown observed, this was not part of HMRCs case before the FTT. Nor did Ms Nathan address us on the relevant legal test to be applied and, by reference to the decisions made by the directors, how the relevant standards had not been met.

161. As Ms Brown referred to in her submissions, directors have fiduciary duties arising from a requirement for integrity and loyalty and the general duty to act with reasonable skill and care.

162. As Jonathan Parker LJ said in *Regentcrest Plc v Cohen and another* [2001] 2 BCLC 80 at [120] the test of integrity and loyalty is essentially subjective, focusing on whether the director concerned honestly believed his actions to be in the interests of the company. As regards the duty to act with reasonable skill and care, that will be assessed by reference to the normal standards of negligence by reference to the objective standard applied to any director and the subjective standard applied by reference to the knowledge of the individual director concerned: see *Bristol and West Building Society v Mothew* [1996] 4 AER 698.

163. As recorded by the FTT at [128] and [153], Mr McCallin provided a cogent explanation as to why the Board of Directors of Leisure felt it was unnecessary to obtain an independent valuation. That was a business judgment which in our view the directors were perfectly entitled to make. It is clear from Mr McCallin's evidence that he clearly and honestly believed that he acted in the best interests of Leisure. HMRC made no case that any of the directors had breached their duty to act with due skill, care and diligence.

164. In essence, HMRC are seeking, impermissibly, to second-guess the business judgment of the directors. Furthermore, as we have already found, the question of whether the transaction for the licence fee was entered into at an overvalue is a secondary consideration to the question of whether the negotiations were at arm's length. As we have previously mentioned, the fact that the transactions were effected otherwise than at market value may be evidence of a lack of an arm's-length negotiation, but in this case, as we have found, there was clear evidence on which the FTT was entitled to rely that the directors did carry out an arm's-length negotiation. In those circumstances, the fact that an independent valuation might have indicated that Leisure was overpaying for the licence is of no significance.

165. In relation to (2), Ms Nathan submits that the finding that the 1996 licence fee was "fair and reasonable" is unsupported by any contemporaneous supporting evidence. She submits that the FTT were not entitled to rely on the input of Barker Gotelee as they were not professional valuers but a firm of solicitors and since the FTT were not valuation experts they should not have judged this issue in the absence of valuation evidence. Ms Nathan submits that this finding was used as the starting point to justify its findings that there was no need for the directors to have

subsequently obtained an independent valuation and therefore infected the entirety of the FTT's thinking on the valuation issue.

166. In the light of our findings above that the question of whether or not an independent valuation was obtained was not significant in the context of the FTT's finding that the licence fee was the product of an arm's-length negotiation, likewise we find the question as to whether the licence fee agreed in 1996 was "fair and reasonable" as not being significant in relation to the FTT's overall findings.

167. In any event, we do not consider that the FTT was impermissibly taking on the role of a valuer. Its finding that the licence fee in 1996 was "fair and reasonable" was based on an assessment of the methodology used to determine the quantum of the fee, being based on 50% of the membership fee income, plus a further fee for the use of the premises and facilities. It is readily apparent that a calculation based primarily on a proportion of the membership fee makes sense when the only asset of Leisure was its membership base.

168. In that context, there can be no criticism of Mrs Rendall having consulting advisers who were not themselves valuers as to the methodology that was to be adopted and therefore for the FTT to rely on that process having been undertaken for its assessment that the fee was calculated on the basis that was "fair and reasonable". Indeed, in the context of HMRC putting it to Mrs Rendall that the fee was set at a figure so as to extract profits, the fact that Mrs Rendall did take advice on the methodology is evidence that contradicts that contention.

169. In relation to (3), Ms Nathan submits that the FTT failed to take into account that the note of the meeting held in June 2012 records Dr Bruce saying that the 7 May 2009 board meeting was the first time that the transfer the green fee activity was discussed and that the note of a meeting held in September 2014 records Mr McCallin saying that the other directors of Leisure were not involved in the negotiation and that the transfer was discussed and ratified by the Board after the event, in May 2009. Ms Nathan submits that these statements sit uncomfortably with the evidence given at the hearing and should have been expressly addressed in the Decision.

170. This point appears to us to be insignificant in relation to the FTT's overall conclusions. In so far as these contradictions exist, they appear to go to the credibility of the witnesses concerned, both of whom the FTT found to be credible. Ms Nathan made no submissions as to why these matters were significant.

171. In relation to (4), Ms Nathan submits that there was no evidence to support a finding that it was reasonable to pay for certain items by way of hire charges rather than a change in the licence fee as this would incur legal costs. Again, this appears to be a suggestion that the directors breached their fiduciary duties in dealing with those items in this matter, a contention which, for the reasons we have already set out above, we reject.

172. In relation to (5), Ms Nathan submits that the FTT failed to take into account contradictory statements given to HMRC, in particular the agreed note of the

September 2014 meeting which recorded that there was one asset that was the subject of a hire charge from Club to Leisure, namely greenkeeping equipment. Mr Cracknell said at the meeting that this was the only hire charge between the entities and that it was charged to Leisure on a straight-line depreciation basis. This contrasts with Mrs Rendall's evidence that the hire charges related to various items of gym and golf equipment and that the hire charges adjusted the new purchases by rounded up sums to the nearest thousands. Ms Nathan submits that at the very least this evidence should have led to the FTT questioning the credibility of the witness as well as the accuracy of her evidence.

173. This appears to us to be a nit-picking point of no significance in relation to the FTT's overall conclusions. Ms Brown submitted that the alleged inconsistency concerning the equipment hire was not put to either Mr Cracknell or Mrs Rendall, which was not disputed by Ms Nathan in her oral submissions.

174. In relation to (6), Ms Nathan submits that it is clear from the minutes of the Board meeting held on 7 September 2006 that Leisure's directors agreed to increase the subscription fees of the members in order to raise funds to meet some of the costs of staging PGA events and that such assistance clearly constituted a contribution from Leisure to Club and/or members of Mrs Rendall's family. Accordingly, Ms Nathan submits, the FTT's finding is inconsistent with the evidence.

175. It is clear to us that the FTT in effect found that the PGA event was something which was of mutual benefit to both Club and Leisure. Therefore, Ms Nathan's submission that the costs were only properly payable by Club is inconsistent with that finding. In our view the FTT was entitled to make that finding on the evidence before it. Leisure agreed to bear part of the costs because this was agreed by the members' committee. As Ms Brown submitted, the evidence supports their rationale for doing so in that Leisure and the members benefited both in reputational terms and in terms of course quality. Once again, there can be no question of the directors having breached their fiduciary duties in making that decision or that the FTT's conclusion that the decision to contribute to the costs was not a means of distributing profits to Club was not open to it on the evidence. This challenge therefore amounts to an impermissible attack on the weight placed by the FTT on the evidence that was before it.

176. In relation to (7), Ms Nathan submits that the FTT's finding fails to give adequate weight to relevant factors such as:

> (a) the fees and other charges resulted in sums being paid out of Leisure's funds to Club;
>
> (b) in each year, the taxable profit left in Leisure was very low despite the high income levels; and
>
> (c) in years where there were, exceptionally, higher-than-expected profits, additional costs were generated to offset the profits.

177. Ms Nathan submits that these factors together indicate that no reasonable tribunal properly instructed and acting judicially could come to the same view as the FTT did in relation to this matter.

178. As far as the first of these factors is concerned, because of the structure of the arrangements whereby Leisure jointly occupies land owned by Club, such payments are inevitable. The key issue is therefore whether these charges were negotiated on an arm's length basis. There was extensive evidence before the tribunal, in the form of witness evidence from Mrs Rendall, Mr McCallin and Mr Cracknell who explained the process as to how these charges were agreed in great detail. As far as the second of these factors is concerned, since Leisure was established as a non-profit-making organisation it would be expected that the taxable profit would be low. As far as the third factor is concerned, it is not clear to us on what evidence Ms Nathan bases that submission.

179. Is therefore clear to us that these challenges amount to no more than an impermissible attack on the weight that the FTT gave to the evidence that was before it in coming to its conclusion that there was no manipulation of cross-charges in order to distribute profit to Club.

180. In relation to (8), since a large part of HMRC's case before the FTT was that there was an overvaluation of the licence fee, it is perhaps surprising that they did not cross examine either Mrs Rendall or Mr McCallin directly on the point. In *Seven Individuals v HMRC* [2017] UKUT 132 the Upper Tribunal made it clear that a witness should be subject to sufficient cross examination so as to allow him or her appropriately to address the case that is put to them or of which he or she has notice. However, this rule is not to be applied in an over-technical way so that it is not necessary to continue exploring a point in detail when the witness has had an opportunity of stating his or her case: see [111] to [114] of the decision.

181. Therefore, although all the questions put to Mrs Rendall and Mr McCallin in relation to valuations appeared to focus on the question as to whether or not there had been independent valuations and if not, why not, it was clear that the question of whether there had been an overvaluation in the sense that Leisure had paid more for the licence fee than it should have done, was clearly in issue, and insofar as the FTT may have suggested otherwise, that was an over-technical approach to the question as to whether the case had been adequately put.

182. Nevertheless, the reasons we have given, the question of whether there had been an overvaluation or not is not the key issue in this case, and in our view such error of approach that there may have been on the part of the FTT is not significant in relation to its finding that Leisure and Club dealt with the licence on arm's length terms.

183. In relation to (9), Ms Nathan submits that there was no contemporaneous evidence before the FTT on this point which corroborated the assertions of Mrs Rendall to this effect and the FTT should not have accepted such unsubstantiated assertions.

184. Once again, we do not see how this point can be significant to the outcome of this appeal. The FTT did not find that there was any payment from Leisure to Club; it is a question for the members as to whether they choose to buy food and drink and insofar as the suggestion is that Club's provision of the catering services demonstrates

that Club and Leisure were commercially one operation it is, as Ms Brown submitted, a very weak point to rely on.

185. In any event, Mrs Rendall's evidence, as demonstrated from the transcript, was that she considered that franchising of food and drink by not-for-profit clubs was not abnormal, and she stated that she was aware that a neighbouring golf club operated on that basis. That evidence was not challenged by HMRC and in those circumstances, the FTT was entitled to rely on the evidence provided by Mrs Rendall. Again, HMRC's challenge is no more than an impermissible attack on Mrs Rendall's credibility.

(3) Other challenges

186. HMRC made a number of other challenges without indicating how those findings were significant to the FTT's conclusions. In particular, HMRC contend that the FTT erred:

> (1) at [47] in holding that the Board did not always accept recommendations put to them by the golf club members' committee because there were only two such occasions (when compared to "the numerous other occasions" on which the board did follow the committee's recommendations); and
>
> (2) at [178] in holding that Mr Cracknell's poor performance as a witness was because he found many of the questions beyond his knowledge, recollection or experience.

187. As far as (1) is concerned, the fact that Leisure did generally follow the recommendation of the members committee supports the conclusion that Leisure operated in a way which took account of its members interests. Had the Board generally ignored the interests of members, that in itself might give credence to the claim that it acted in the interests of Club, but the evidence on this point clearly does not indicate that to be the case. We therefore find no significance in this point.

188. As far as (2) is concerned, Ms Nathan submits that the FTT confused Mr Cracknell's unwillingness to answer questions with an inability to answer.

189. We have no hesitation in rejecting this challenge. This is a direct challenge to the FTT's assessment of Mr Cracknell's credibility as a witness and the view it took of his knowledge, recollection and experience following a lengthy cross-examination. The FTT found that Mr Cracknell had a subordinate role in relation to Leisure and we agree with Ms Brown that the FTT's assessment of Mr Cracknell was consistent with that finding.

Conclusion

190. Our overall assessment of HMRC's challenges to the FTT's findings of fact is that they amount to no more than what Evans LJ described in *Georgiou* in the passage set out at [103] above as "a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and

was therefore wrong" combined with impermissible challenges to the FTT's assessment of the credibility of the witnesses who gave evidence on behalf of Leisure.

191. We therefore have no hesitation in concluding that there is no reason, let alone a compelling reason, why we should interfere with the FTT's findings of fact in this case. It is clear from the Decision that the FTT has been careful in weighing up the evidence and deciding what weight to give to the documents it saw and the evidence that it heard. The FTT was also assiduous in giving full reasons for the findings that it made.

192. For these reasons, in our view HMRC has not made out its case on this ground of appeal and we find no reason to interfere with the FTT's Decision on this ground.

Whether the FTT erred in failing to take into account other decisions of the FTT which had material similarities to the operation in this case

193. In her skeleton argument Ms Nathan set out a table referring to a considerable number of "golf club" cases and listing features present in those cases on the basis of which the FTT had decided whether or not the entity concerned was a "non-profit making" body and therefore entitled to the sporting exemption. The table also contained remarks as to whether one or more of those features was present in this appeal.

194. Ms Nathan submits that the FTT erred in failing to appreciate the material factual and operational similarities between HMRC's case in this appeal and the cases referred to in her table. Ms Nathan submits that had it noted and appreciated the many features of, and reasoning in, those cases which led the tribunals in those cases to hold that those bodies were not "non-profit making bodies" the FTT would not have erred in this case in holding that Leisure was a "non-profit-making body".

195. We reject those submissions for the following reasons.

196. First, as we have stressed, the FTT's task was to carry out a multifactorial assessment of the circumstances present in this particular case and then apply the correct legal test to those circumstances.

197. Consequently, previous decisions of the FTT, which have no precedent value in any event and turn on their own particular facts, would have been of little assistance to the FTT, as it correctly recognised in the Decision. In relation to the two cases that the FTT did refer to in detail, namely *Messenger* and *Hilden Park*, there were clear differences which meant that in any event the FTT could place little weight on the conclusions arrived at in those cases. In particular, in relation to *Messenger*, the key issue was that it was found that the appellant had no business purpose separate from the commercial group of which it formed a part and was not dealing at arm's length in relation to other members of the group. In *Hilden Park*, HMRCs primary case was based on the structure being abusive within the meaning of *Halifax*.

198. Furthermore, as Ms Brown submitted, the Court of Appeal has warned against a tribunal being misled into treating as binding in law decisions which are in truth no

more than examples of the application of established principles to their own particular facts: see *CEC v Ferrero UK Limited* [1997] STC 881, per Lord Woolf MR at page 884 and Hutchinson LJ at page 888.

199. In our view, the cases cited by HMRC in this case are no more than examples of the application of established principles to their own particular facts and the FTT therefore made no error of law in not referring to those decisions any further than the limited way in which it did.

200. For these reasons, in our view HMRC has not made out its case on this ground of appeal and we find no reason to interfere with the FTT's Decision on this ground.

Disposition

201. The appeal is dismissed.

JUDGE TIMOTHY HERRINGTON **JUDGE KEVIN POOLE**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 17 October 2018