**TC04302**

**Appeal number: TC/2012/09439 & TC/2012/09545**

***CORPORATION TAX – chargeable gains – group relief – sections 170,171 TCGA 1992 – tax avoidance scheme – Ramsay principle – purposive construction of the group relief provisions – whether the transactions fell within the group relief provisions – appeal allowed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**GEMSUPA LTD** **Appellants**
**CONSOLIDATED PROPERTY WILMSLOW LTD**

**- and -**

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

**TRIBUNAL: JUDGE JONATHAN CANNAN**

**Sitting in public at Bedford Square, London on 22-24 September 2014**

**Mr Julian Ghosh QC and Mr Jonathan Bremner of counsel instructed by Mr William Marshall Smith (in-house solicitor) for the Appellant**

**Ms Aparna Nathan of counsel instructed by HM Revenue & Customs Solicitor's Office for the Respondents**

## DECISION

*Background*

1. The Appellants ("Gemsupa" and "Wilmslow", together "the Companies") owned freehold and long leasehold investment properties ("the Properties") known as Centre Retail Park, Oldham and Manchester Road Retail Park, Hyde. In 2006 the Companies negotiated and completed a sale of the Properties to British Land. The total consideration for the disposal was £126.2m.

2. The sale of the Properties involved all parties implementing a tax avoidance scheme whereby the Companies sought to avoid any corporation tax on chargeable gains on the disposal. In very broad terms arrangements were put in place whereby the Companies contend that the disposal of assets took place whilst they were members of the British Land group of companies and therefore at a no gain / no loss consideration for capital gains purposes. The purchaser was a company called Cleartest Limited which was a member of the British Land group.

3. In their corporation tax returns for the periods ending 30 June 2007 the Companies declared that no corporation tax was payable in relation to the disposals. They disclosed the scheme under the Disclosure of Tax Avoidance Schemes provisions.

4. On 4 March 2009 the Respondents ("HMRC") opened enquiries into the Companies' corporation tax returns. Those enquiries resulted in closure notices which amended the returns to show corporation tax on chargeable gains of £18,584,845 for Gemsupa and £10,155,348 for Wilmslow.

5. The parties were agreed that the issue for determination on this appeal is as follows:

> " *Whether, for the purposes of corporation tax on chargeable gains, on a proper construction of the intra group asset transfer provisions of s171 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992") and in the light of all the facts, the disposal by each of the Appellants …. was a transaction to which s171 TCGA 1992 applied and, in particular, whether in the light of all the facts and on a proper construction of the interpretation provisions of s170 TCGA 1992, the Appellants and Cleartest Limited were members of the same group at the time of the disposals?*"

6. The mechanics of the scheme were the subject of a Statement of Agreed Facts and I set out them out in summary form below. I also heard evidence from Mr William Marshall Smith, an in-house solicitor who was also at the time of the transactions a director and company secretary of the Companies. Factual issues arise in relation to his evidence and I separately set out my findings of fact below.

*The Scheme*

7. The following findings of fact summarise the way in which the scheme was implemented. They are derived from the Statement of Agreed Facts or are not controversial. I use the following abbreviations:

| **Entity** | **Abbreviation** | **Description** |
|---|---|---|
| Consolidated Property Group | CPG | An informal term referring to a number of associated companies carrying on businesses of retail property investment and development, including the Appellants. The owners of CPG were various family trusts of its founder, Stuart Dawson. |
| Gemsupa Limited | Gemsupa | The First Appellant |
| Consolidated Property Wilmslow Limited | Wilmslow | The Second Appellant |
| Cleartest Limited | Cleartest | A subsidiary of British Land which purchased the Properties |
| BL (CPG) No 1 Limited | BL1 | A company initially owned by Cleartest and which subscribed for shares in Gemsupa |
| BL (CPG) No 2 Limited | BL2 | A company initially owned by Cleartest and which subscribed for shares in Wilmslow |
| CPG No 1 (Gemsupa) Limited | CPG 1 | A company in the CPG group which eventually purchased BL1 |
| CPG No 2 (Wilmslow) Limited | CPG 2 | A company in the CPG group which eventually purchased BL2 |

8. In this decision I shall use the term “corporate transaction” to refer to those parts of the scheme which involved dealings in the shares of Gemsupa, Wilmslow and other companies. I shall use the term “property transaction” to refer to the actual sale

of the Properties by Gemsupa and Wilmslow to Cleartest. I do so as a convenient shorthand whilst appreciating that the Respondents contend that both were separate elements of one scheme.

9. The scheme operated in exactly the same way for Gemsupa and Wilmslow, albeit with different assets and figures. I shall therefore limit my description to the disposal by Gemsupa of its interest in the Oldham retail park.

10. On 15 December 2006 the following corporate transactions took place:

(1) Cleartest provided a loan facility to BL1 in the sum of £61,636,431 with interest at the rate of 4.6% pa.

(2) BL1 subscribed for 3,000,001 B ordinary shares in Gemsupa at a total price of £61,637,431. The B ordinary shares in Gemsupa entitled holders to 51% of its distributable profits and 51% of any surplus assets on a return of assets whether on liquidation or otherwise. The only reason for the issue of these shares to BL1 was because the parties intended to create a group structure. The subscription agreement provided for Mr Andrew Jones, who was also a director of Cleartest to be a director of Gemsupa. It also made provision for a number of "reserved matters" which Gemsupa covenanted not to do unless it had the prior written consent of CPG and British Land.

(3) Cleartest (with British Land as Guarantor) entered into non-coterminous put and call options with CPG1 over the shares of BL1 whereby:

(a) Cleartest had a put option to transfer the shares of BL1 to CPG1 exercisable in the period 24 December 2006 to 24 January 2007. The option price was £1,000.

(b) CPG1 had a call option to acquire the shares of BL1 from Cleartest, exercisable broadly in the period 1 February 2007 to 28 February 2007. The option price was £1,000

11. On 22 December 2006 the following property transactions took place:

(1) Gemsupa as vendor entered into a sale agreement with Cleartest as purchaser and British Land as guarantor for a sale of its interest in the Oldham retail park at a price of £67,367,456. The consideration was left outstanding as a loan bearing interest at 4.6% pa.

(2) Cleartest, Gemsupa, BL1 and CPG1 entered into an "Offset Deed" whereby Cleartest would satisfy the purchase consideration due to Gemsupa by treating the sum due to it from BL1 as being repaid in full in consideration of the sum due to Cleartest by BL1 being treated as owed by BL1 to Gemsupa. The effect of the Offset Deed was that instead of Cleartest owing money to Gemsupa and being owed money by BL1, BL1 owed money directly to Gemsupa. The Offset Deed only took effect if the options over BL1 shares were exercised.

(3) Completion of the property sale agreement from Gemsupa to Cleartest took place on the same date.

12. On 28 December 2006, Cleartest gave notice of its intention to exercise the put option over the shares in BL1.

13. On 29 December 2006 CPG1 paid the option price and purchased the shares in BL1.

14. On 2 January 2007 Gemsupa purchased 2,612,039 of its own B ordinary shares from BL1 with the consideration being satisfied by a deemed part repayment of the loan from BL1 to Gemsupa.

15. On 8 January 2007 Gemsupa purchased the remaining 387,962 of its own B ordinary shares from BL1 with the consideration being satisfied by a deemed part repayment of the loan from BL1 to Gemsupa.

16. The effect of these transactions, and the similar transactions involving Wilmslow, was that Gemsupa and Wilmslow had the proceeds of sale, Cleartest had the Properties and CPG1, CPG2, BL1 and BL2 were all effectively shell companies in the CPG group.

17. I make further findings of fact below as to the context in which the parties entered into these transactions.

*Context of the Transactions*

18. There were two key areas of factual dispute in the parties' submissions:

(1) Whether by 15 December 2006 when the corporate transactions took place it was a practical certainty that the property transactions would also take place.

(2) Whether as at 15 December 2006 it was a practical certainty that the options would be exercised.

19. I set out below the way in which these two issues were dealt with in the evidence and my findings of fact based on that evidence.

20. At all material times for the purposes of the transactions described above, responsibility for day to day decision making in respect of CPG, including Gemsupa and Wilmslow, lay with Mr Marshall Smith and Mr Dawson. Mr Dawson was Chairman and Managing Director of CPG and a director of Gemsupa and Wilmslow.

21. Wilmslow owned the retail park in Hyde and the first phase of the retail park in Oldham. Gemsupa owned the remainder of the retail park in Oldham. Until 1987 the business of CPG involved acquiring and developing out of town retail units for occupation by DIY businesses such as Homebase, Texas and B&Q. Once developed CPG would sell the land and buildings to institutional investors. In the late 1980s the value of such properties fell significantly and as a result instead of selling the Properties CPG retained them as investments properties and received the rental income.

22. In June 2006 British Land approached CPG and expressed an interest in purchasing the Properties. CPG was keen to sell the Properties in order to diversify its investment portfolio. The Properties represented a substantial proportion of the assets of Gemsupa and Wilmslow. The funds generated were to be used in a larger number of smaller investments and projects with a view to spreading risk. Such risk included for example the possibility that a rival retail park might be built close by, having a significant effect on the value of an existing retail park.

23. In a letter dated 2 June 2006 Mr Dawson wrote to British Land stating that in normal circumstances the Properties would not be sold, and that tax mitigation was a major consideration. British Land would be expected to set up, administer and participate in the tax risk associated with the disposal. CPG did not want the Properties to be sold if corporation tax on chargeable gains would be payable. Otherwise diversification would have an unacceptable cost to CPG.

24. CPG instructed KPMG Manchester office, Halliwells and Savills as professional advisers. British Land instructed KPMG London office (with a "Chinese wall"), Deloittes and Jones Day

25. Mr Marshall Smith only became involved in the transactions in October 2006 when the parties were close to agreeing Heads of Terms. His involvement was limited to property law aspects of the deal and whilst he was aware of discussions involving corporate and taxation aspects he did not advise in relation thereto.

26. A meeting between CPG and its professional advisers took place on 6 October 2006. A note of the meeting records the following in relation to the proposed sale of the Properties together with another asset called The Silkworks, Macclesfield:

> "*If sold on the open market, this would trigger a chargeable gain resulting in corporation tax payable by the relevant CPG companies of approximately £25-28m. KPMG have suggested an alternative acquisition structure which should extinguish the gain and enable CPG to reinvest the full proceeds received from BL in new assets, effectively re-basing the property portfolio for tax purposes.*"

27. It is clear from an email dated 2 October 2006 from KPMG Manchester to Halliwells that the detail of the scheme was known by early October 2006, including the unwinding of the group structure using put and call options. The put and call options protected both British Land and CPG. The email states:

> "*…we will need to ensure …. that there is some control to ensure that the properties are extracted before we re-acquire [Gemsupa/Wilmslow]* "

28. The tax saving was essential to the transaction proceeding. It was envisaged that British Land would indemnify CPG against any tax exposure so that additional consideration would be payable by British Land if the tax planning was ineffective. In the final agreement there was a cap on British Land's tax liability of £25m. This was achieved through the agreement whereby Cleartest agreed to subscribe for shares in Gemsupa and Wilmslow. In the event that a tax liability accrued, there was provision for a further subscription for shares.

29. The negotiations progressed so that on 26 October 2006 CPG entered into an exclusivity agreement with British Land and on 27 October 2006 "Heads of Terms" were agreed, subject to Board approval by British Land and CPG. The Heads of Terms referred in brief outline to the corporate elements of the proposed transaction.

30. The Heads of Terms included a timetable as follows:

"> *Agreed Heads of Terms by 26$^{th}$ October 2006*

> *7 days to issue appropriate legal documentation*

> *Subscription 20$^{th}$ November 2006 (earlier if possible)*

> *Exchange on property w/c 27$^{th}$ November 2006 to British Land Group*

> *All matters property and corporate to reach completion by Friday 15$^{th}$ December 2006.*"

31. Mr Marshall Smith suggested in evidence that this timetable might only have been intended to cover the period up to the sale of the Properties. In the context of a scheme which was already agreed in detail it seems to me that the reference to corporate completion in the last bullet point is a reference to the exercise of the options. It was clearly hoped that all elements of the transaction would be completed and the group unwound within one month of it coming into existence following the share subscription.

32. As far as the Properties were concerned the Heads of Terms expressed the purchase price to be £111,265,000. That was the price later identified in the property sale agreement, although the parties now agree, for reasons which do not concern me, that the consideration was £126.2m. There were other assets in Gemsupa and Wilmslow, including The Silkworks which British Land did not wish to acquire. The subscription price for the shares paid by BL1 and BL2 reflected the value of those other assets.

33. The letter in which the Heads of Terms were set out was sent by Mr Darren Richards, a director of British Land. The last line of his letter included the following:

"*With regard to your ongoing involvement we will need to discuss, but I will outline a proposal in due course.*"

34. Mr Marshall Smith in his evidence suggested that this led to subsequent discussions about the possibility of a joint venture continuing. British Land said that they had lots of assets that might be of interest to CPG either through a sale or through a joint venture. However this never came to fruition. Mr Marshall Smith said that at some stage after the options had been exercised a list of property assets was sent by British Land to CPG.

35. Mr Marshall Smith's evidence in this regard was rather vague and it was not clear that he had first hand knowledge of such discussions. Nor was it clear that these

discussions were in the context of Gemsupa and Wilmslow continuing as joint venture companies. I am not satisfied that there was any discussion between CPG and British Land directed towards the continuation of Gemsupa and Wilmslow as joint venture vehicles.

36. On 9 November 2006 Mr Marshall Smith emailed KPMG as follows:

> "*I have to say that I share Stuarts concern about the option price generally. It is absolutely fundamental that we get the shares back without either*
>
> *(a) having to pay a substantial sum for them or*
>
> *(b) having an argument about the valuation at all and*
>
> *(c) certainly not having an argument about valuation where BLs auditors decide the outcome.*"

37. It was put to Mr Marshall Smith that this meant getting the shares back was fundamental. Mr Marshall Smith did not agree. He said that what was fundamental was that if the option was exercised the option price should be easily identifiable.

38. Mr Marshall Smith's email followed an email of the same date from KPMG to Stuart Dawson, following a conversation between the Manchester and London offices of KPMG about option periods and option pricing models. In relation to the call option period the email stated:

> "*During our previous discussions with Julian Ghosh, he stated that he was relatively relaxed on the timing of the option periods, however it is important to ensure that the options are 'real' options. Therefore a gap between the possible exercise of the put and call options is advisable.*"

39. In relation to option pricing the email stated:

> "*We [Manchester and London offices of KPMG] were both in agreement that the intention of the transaction is that, from completion, BL should benefit from the rental income from [the Properties] … and CPG should benefit from the cash and other assets held by [Gemsupa and Wilmslow].*
>
> *… the default position was that [BL1 and BL2] should undertake a full valuation of its shares in Gemsupa/Wilmslow in order to determine the option price … I think the way forward is to model the actual financial impact of this on CPG … The fact that the option periods are now shorter will reduce the impact of this…*"

40. Stuart Dawson replied stating that the trustees were all very worried about the issue of option pricing and the potential for subsequent dispute.

41. Against that background I am satisfied that Mr Marshall Smith's email of 9 November 2006 was written on an assumption that the options were exercised. I do not consider that he was acknowledging in that email that the call options would

inevitably be exercised if Cleartest did not exercise the put options. The most that can be said is that the email is consistent with the proposition that the options would inevitably be exercised. It is equally consistent with uncertainty as to whether the options would be exercised. It does not really assist either way.

42. On 13 November 2006 Mr Marshall Smith emailed KPMG referring to instructions to counsel submitted by Deloittes, who were acting for British Land. It seems that those instructions, which were not referred to in evidence, deviated from the scheme Mr Marshall Smith had previously understood. One variation was the timescale for exercising the call option. Mr Marshall Smith stated "*There is no way that we can wait 9-12 months before exercising our call option*". In fact it appears that Mr Marshall Smith had misunderstood what was being proposed, but the point as to whether the call option would be exercised remains.

43. It was put to Mr Marshall Smith that in the light of this email it was not accurate to say that the options might not be exercised. Mr Marshall Smith did not accept that. He said that his email was in the context of a scheme whereby British Land could exercise their put option in January 2007 but CPG would be in a weaker position because they could not exercise the put option for 9 months.

44. In my judgment, again the most that can be said is that the email is consistent with the proposition that the options would inevitably be exercised. It is equally consistent with uncertainty as to whether the options would be exercised. It does not really assist either way.

45. Also on 13 November 2006, in an email from KPMG to CPG consideration was given to the tax charge which would accrue to Gemsupa and Wilmslow in relation to interest on the loan to Cleartest and after the offset deed to BL1 and BL2. It was a concern that taxable interest in the hands of Gemsupa and Wilmslow would not be matched by a tax deduction for interest paid by BL1 and BL2. The potential exposure to tax was identified as some £1.6 million per annum. Consideration was being given to eliminating the loans as soon as possible after the transaction. There were two suggestions, which must have been intended to apply only if BL1 and BL2 joined the CPG group. One possibility was waiving the loans, the other possibility which in fact occurred was a purchase of own shares by Gemsupa and Wilmslow giving BL1 and BL2 funds to repay the loans.

46. On 30 November 2006 Mr Dawson emailed British Land who were apparently concerned that the structure of the transaction might prejudice their status as a REIT. He was clearly shocked that British Land were intimating that they had changed their position in relation to the deal. Mr Dawson became aware of a possible change of position on 29 November 2006. This was a day the CPG shareholders had scheduled as a "completion meeting". He said as follows:

> "*As I understand it, BL now believe that whilst the legal structure we have put in place will work, it may prejudice their Reit status and therefore effectively do not wish to proceed other than on a traditional open market value basis with CPG paying full capital gains tax.*

*Clearly the Properties were never available on this basis …*"

47. This was the first mention of REIT status in the evidence before me. REITs are real estate investment trusts and were introduced by Finance Act 2006 coming into effect on 1 January 2007. Companies that become REITs are not charged to corporation tax on income and gains arising from property rental businesses provided they meet certain conditions.

48. In the event, by 4 December 2006 the deal was back on, on the original basis.

49. On 14 December 2006 KPMG emailed Mr Dawson and Mr Marshall Smith with detailed schedules summarising the "net cash position based on different outcomes with HMRC".

50. Mr Marshall Smith described the position as at 15 December 2006 as follows. There was a willing vendor and a willing purchaser for the Properties. The documentation had not been finalised. There was a large measure of agreement but one or two points were still outstanding. He described British Land as "a bit flighty" and said that there seemed to be a tension between the property advisors (surveyors and deal makers) on the one hand and the accountants on the other hand. That had resulted in a number of points being brought up at the last minute in the run up to 15 December 2006. One such point was the capping of British Land's liability which Mr Marshall Smith said had not previously been mentioned.

51. An email from KPMG to Stuart Dawson on 18 December 2006 referred to 15 December 2006 as being "*a long and painful day*". It referred to tax on the interest that Gemsupa would receive from the loan to Cleartest. If 15 December 2006 was only putting in place the structure to avoid tax on the transactions then it is not immediately clear why it would referred to as a long and painful day for Stuart Dawson. However Stuart Dawson did not give evidence and Mr Marshall Smith was not asked whether he could shed any light on this comment.

52. Mr Marshall Smith was invited to say where on the spectrum the deal (that is the Property sale) stood as at 15 December 2006, where 1 was precarious and 10 was certain to go ahead. He put it at 8/10.

53. There was no evidence of any further negotiations in relation to the property sale between 15 December 2006 and 22 December 2006.

54. Mr Marshall Smith's evidence was that it was the hope and intention of CPG and British Land that Gemsupa and Wilmslow would be brought back into the sole control of CPG using the put or call options following sale of the Properties. He said that both parties recognised however that there was a possibility that this might not turn out to be possible or desirable.

55. Mr Marshall Smith was asked why the exercise of the options might not be possible or desirable. He gave the following hypothetical examples:

(1) A change in the law or regulations, for example a retrospective change in tax law.

(2) A major change in the property market.

(3) A change in advice from advisers.

56. Mr Marshall Smith also canvassed the possibility that British Land might try to renegotiate the price. He put it in terms that "*it had been by no means discounted that British Land would try and chip away at the price again*". However that goes to the issue of whether the property transaction would go ahead, rather than whether the options would be exercised.

57. Mr Marshall Smith said that CPG could have lived with it if the options were not exercised. Joint ventures he said were quite common in the property market, but it was not "plan A".

58. A note of a directors' meeting of Cleartest on 15 December 2006 recorded the following:

"*5.1 IT WAS NOTED that it is anticipated by the parties to the Options that the Options are likely to be exercised at a future date.*

*5.2 IT WAS HOWEVER NOTED that in the event that either Option is not exercised, although the resulting situation would not be ideal, all the parties … had agreed that they would be comfortable with the joint venture in respect of Gemsupa and [Wilmslow] going forward.*

*5.3 IT WAS FURTHER NOTED that any buy back of the Gemsupa Shares and the [Wilmslow] Shares by Gemsupa and [Wilmslow] respectively has not been agreed (whether in principle or in detail). The relevant parties importantly wish to ensure that a section 171 transfer is established and that accordingly nothing be done that may potentially jeopardise the relevant CGT grouping.*"

59. This was a Cleartest document and Mr Marshall Smith said that he could not help with any discussions there might have been in relation to the note. In particular he could not recall whether there was any discussion between CPG and British Land before Cleartest exercised its out options.

60. By 20 December 2006 the property sale agreement was in its final form. There was still a lot of work to be done agreeing apportionments of rent and assignments of the benefit of building contracts and warranties.

61. It was put to Mr Marshall Smith that the reason the de-grouping was left to options was to break any link which might support an argument that the transactions were pre-ordained. Mr Marshall Smith accepted that if the scheme had worked without options, that is how they would have carried it out. He accepted that it was clearly contemplated that the options would be exercised. He did not accept that "absent hell and high water" the options would be exercised.

62. In the light of the evidence, Mr Ghosh QC who appeared for the Appellants invited me to make the following findings of fact:

(1) Without group relief, the property transactions would not have taken place.

(2) There were no arrangements to vary the distribution of dividends or assets on a winding up of Gemsupa or Wilmslow.

(3) There was no "done deal" for a sale of the Properties as at 15 December 2006 when BL1 and BL2 subscribed for shares in Gemsupa and Wilmslow and the options put in place.

(4) Exercise of the options was a preferred course of action for CPG, but it was not a certainty.

(5) CPG "could have lived" with a joint venture with British Land through Gemsupa and Wilmslow if necessary. In broad terms CPG had swapped its 100% interest in Gemsupa and Wilmslow for a 49% interest in something approximately double the value following the share subscriptions.

63. Ms Nathan who appeared for the Respondents invited me to find that as at 15 December 2006 there was no realistic possibility that the property transaction and the exercise of the options would not go ahead on the terms by then agreed.

64. In relation to these particular aspects I find as follows:

65. It was certainly the intention of CPG that in the absence of group relief or an appropriate indemnity from British Land that it would not sell the Properties.

66. It has not been suggested that there were any arrangements to vary the distribution of dividends or assets on a winding up of Gemsupa or Wilmslow and I find accordingly that there were no such arrangements.

67. I take into account that a tax avoidance motive can throw light on the evidence as to the likelihood of pre-planned events occurring (See the Upper Tribunal in *UBS AG v Revenue & Customs Commissioners [2012] UKUT 320 (TCC)* at [162]). It is accepted in this case that the sole reason for entering into the corporate transactions on 15 December 2006 was tax avoidance in relation to the sale of the Properties.

68. Mr Ghosh pointed to Mr Marshall Smith's evidence that at 15 December 2006 the property deal was 8/10 on the spectrum between precarious and certain. He equated that with being "very likely". I accept that was what Mr Marshall Smith intended to convey by his evidence. Mr Ghosh also submitted that there was no cross-examination on that point and that it was not put to Mr Marshall Smith that the property transaction was pre-ordained or a practical certainty as at 15 December 2015.

69. I have looked carefully at the cross-examination of Mr Marshall Smith. Ms Nathan did not put to Mr Marshall Smith that as at 15 December 2006 the property transactions would inevitably take place. The case put to him as to what was pre-ordained was the exercise of the options. I have noted that there was no evidence as to

any negotiations in relation to the property transaction between 15 December 2006 and 22 December 2006. I have also noted the description of 15 December 2006 as a long and painful day. However it seems to me that without the issue being put to Mr Marshall Smith I must take Mr Marshall Smith's evidence on this point at face value. I do so readily, taking into account that he was an honest and credible witness doing his best to assist the tribunal. In some respects I have indicated that his evidence was vague. I infer that was because Mr Stuart Dawson was very much running the commercial aspects of the deal and also because of the passage of time since these events occurred. There is no reason for me not to accept his evidence that the property transaction was anything more than very likely to take place.

70. In the circumstances I am satisfied that as at 15 December 2006 the property transaction was very likely to go ahead, but nothing more. The corporate transactions on 15 December 2006 were preparatory to the property transaction. They were intended to provide a tax efficient structure for the property transaction if it did go ahead. If it did not go ahead for any reason then the put and call options were available to unwind the structure.

71. I have set out above the evidence in relation to the whether it was a practical certainty that the options would be exercised and whether CPG could have lived with Gemsupa and Wilmslow as joint venture companies. What is a practical certainty and what is highly likely is a matter of degree. I acknowledge that Mr Marshall Smith's evidence was to the effect that it was not a practical certainty that the options would be exercised. I am unable to accept his evidence in that regard. His examples of circumstances where the options might not be exercised were, with respect, theoretical rather than practical possibilities. Further, there was no evidence from Cleartest to substantiate the content of the directors' meeting of that company on 15 December 2006. It seems to me that the Respondents would be entitled to expect such evidence so that what was said in the minutes could at least be tested.

72. In the circumstances I find that as at 15 December 2006 it was a practical certainty that the options would be exercised, either by Cleartest or by CPG1 and CPG2.

73. The decision by Gemsupa and Wilmslow to buy back their own shares was made in January 2007. It was not taken until the directors had satisfied themselves that there were distributable profits available for the purpose.

74. On 2 January 2007 there was a board meeting of Gemsupa attended by Mr Marshall Smith and Mr Dawson (by telephone). Gemsupa resolved to purchase 2,612,039 of its own shares from BL1. The consideration payable was £53,623,377 which was satisfied by offset against a loan of £61,745,181 then outstanding from BL1 to Gemsupa.

75. On 8 January 2007 a further buy back of own shares was carried out by Gemsupa dealing with the balance of the shares and outstanding loan.

76. The purchase of own shares was essentially a tidying up exercise in order to simplify the CPG group structure after the transactions. It involved an exercise to identify the extent of distributable profits necessary to effect the purchase of own shares.

*Statutory Framework*

77. Companies are chargeable to corporation tax on chargeable gains accruing in an accounting period. The chargeable gains which are subject to corporation tax are computed in accordance with the principles applying for capital gains tax. Save where otherwise appears statutory references in this section are to the Taxation of Chargeable Gains Act 1992 ("TCGA 1992").

78. TCGA 1992 includes specific provisions dealing with particular matters relating to groups of companies. Section 171 makes general provision for transfers of assets within groups of companies. It provides as follows:

> " *(1) Where—*
>
> > *(a) a company ("company A") disposes of an asset to another company ("company B") at a time when both companies are members of the same group, and*
> >
> > *(b) the conditions in subsection (1A) below are met,*
>
> *company A and company B are treated for the purposes of corporation tax on chargeable gains as if the asset were acquired by company B for a consideration of such amount as would secure that neither a gain nor a loss would accrue to company A on the disposal.*
>
> *(1A) The conditions referred to in subsection (1)(b) above are—*
>
> > *(a) that company A is resident in the United Kingdom at the time of the disposal, or the asset is a chargeable asset in relation to that company immediately before that time, and*
> >
> > *(b) that company B is resident in the United Kingdom at the time of the disposal, or the asset is a chargeable asset in relation to that company immediately after that time.*
>
> *For this purpose an asset is a "chargeable asset" in relation to a company at any time if, were the asset to be disposed of by the company at that time, any gain accruing to the company would be a chargeable gain and would by virtue of section 10B form part of its chargeable profits for corporation tax purposes.*"

79. In broad terms the effect of section 171 is that the transfer of an asset by one group company, to another company in the same group is treated as taking place on a no gain / no loss basis.

80. Section 170 sets out rules for determining whether companies form part of the same group for the purposes of section 171. It provides as follows:

> " *(1) This section has effect for the interpretation of sections 171 to 181 except in so far as the context otherwise requires, and in those sections—*
>
> > *(a) "profits" means income and chargeable gains, and*
> >
> > *(b) "trade" includes "vocation", and includes also an office or employment.*
>
> …
>
> *(2) Except as otherwise provided—*
>
> > *(a) . . .*
> >
> > *(b) subsections (3) to (6) below apply to determine whether companies form a group and, where they do, which is the principal company of the group;*
> >
> > …
>
> *(3) Subject to subsections (4) to (6) below—*
>
> > *(a) a company (referred to below and in sections 171 to 181 as the "principal company of the group") and all its 75 per cent subsidiaries form a group and, if any of those subsidiaries have 75 per cent subsidiaries, the group includes them and their 75 per cent subsidiaries, and so on, but*
> >
> > *(b) a group does not include any company (other than the principal company of the group) that is not an effective 51 per cent subsidiary of the principal company of the group.*
>
> *(4) A company cannot be the principal company of a group if it is itself a 75 per cent subsidiary of another company.*
>
> …
>
> *(7) For the purposes of this section and sections 171 to 181, a company ("the subsidiary") is an effective 51 per cent subsidiary of another company ("the parent") at any time if and only if—*
>
> > *(a) the parent is beneficially entitled to more than 50 per cent of any profits available for distribution to equity holders of the subsidiary; and*

> *(b) the parent would be beneficially entitled to more than 50 per cent of any assets of the subsidiary available for distribution to its equity holders on a winding-up.*

> *(8) Schedule 18 to the Taxes Act (group relief: equity holders and profits or assets available for distribution) shall apply for the purposes of subsections (6) and (7) above as if the references to subsection (7) of section 413 of that Act were references to subsections (6) and (7) above and as if, in paragraph 1(4), the words from "but" to the end and paragraphs 5(3) and 5B to 5E and 7(1)(b) were omitted.*"

81. In broad terms a group will only include companies which are both 75% subsidiaries and effective 51% subsidiaries.

82. Section 170 applies the definition of "75% subsidiary" found in section 838 Income and Corporation Taxes Act 1988 ("ICTA 1988") which provides as follows:

> " *(1) For the purposes of the Corporation Tax Acts a body corporate shall be deemed to be –*
>
> …
>
> *(a) a "75 per cent subsidiary" of another body corporate if and so long as not less than 75% of its ordinary share capital is owned directly or indirectly by that other corporate body;*
>
> *...*
>
> *(2) In subsection (1)(a) and (b) above "owned directly or indirectly" by a body corporate means owned, whether directly or through another body corporate or other bodies corporate or partly directly and partly through another body corporate or other bodies corporate*
>
> (3) *In this section references to ownership shall be construed as references to beneficial ownership.*"

83. The term "ordinary share capital" is defined in section 832(1) ICTA 1988 as follows:

> "*'ordinary share capital', in relation to a company, means all the issued share capital (by whatever name called) of the company, other than capital the holders of which have a right to a dividend at a fixed rate but have no other right to share in the profits of the company.*"

84. Section 170(8) gives effect to the provisions of Schedule 18 ICTA 1988 for the purposes of s170(6) and (7), with certain modifications. Schedule 18 ICTA 1988 provides as follows with the words omitted by virtue of section 170(8) in bold:

> " *1 (1) For the purposes of sections 403C and 413(7) and this Schedule, an equity holder of a company is any person who—*

*(a) holds ordinary shares in the company, or*

…

*(2) For the purposes of sub-paragraph (1)(a) above "ordinary shares" means all shares other than fixed-rate preference shares.*

…

*2 (1) Subject to the following provisions of this Schedule, for the purposes of sections 403C and 413(7) the percentage to which one company is beneficially entitled of any profits available for distribution to the equity holders of another company means the percentage to which the first company would be so entitled in the relevant accounting period on a distribution in money to those equity holders of—*

*(a) an amount of profits equal to the total profits of the other company which arise in that accounting period (whether or not any of those profits are in fact distributed); or*
*(b) if there are no profits of the other company in that accounting period, profits of £100;*

*and in the following provisions of this Schedule that distribution is referred to as "the profit distribution".*

…

*3 (1) Subject to the following provisions of this Schedule, for the purposes of sections 403C and 413(7) the percentage to which one company would be beneficially entitled of any assets of another company available for distribution to its equity holders on a winding-up means the percentage to which the first company would be so entitled if the other company were to be wound up and on that winding-up the value of the assets available for distribution to its equity holders (that is to say, after deducting any liabilities to other persons) were equal to—*

*(a) the excess, if any, of the total amount of the assets of the company, as shown in the balance sheet relating to its affairs as at the end of the relevant accounting period, over the total amount of those of its liabilities as so shown which are not liabilities to equity holders as such; or*
*(b) if there is no such excess or if the company's balance sheet is prepared to a date other than the end of the relevant accounting period, £100.*

…

*4 (1) This paragraph applies if any of the equity holders—*
*(a) to whom the profit distribution is made, or*
*(b) who is entitled to participate in the notional winding-up,*
*holds, as such an equity holder, any shares or securities which carry rights in respect of dividend or interest or assets on a winding-up which are wholly or partly limited by reference to a specified amount or amounts (whether the*

*limitation takes the form of the capital by reference to which a distribution is calculated or operates by reference to an amount of profits or otherwise).*

…

*5 (1)This paragraph applies if, at any time in the relevant accounting period, any of the equity holders—*

*(a) to whom the profit distribution is made, or*

*(b) who is entitled to participate in the notional winding-up,*

*holds, as such an equity holder, any shares or securities which carry rights in respect of dividend or interest or assets on a winding-up which are of such a nature (as, for example, if any shares will cease to carry a right to a dividend at a future time) that if the profit distribution or the notional winding-up were to take place in a different accounting period the percentage to which, in accordance with paragraphs 1 to 4 above, that equity holder would be entitled of profits on the profit distribution or of assets on the notional winding-up would be different from the percentage determined in the relevant accounting period.*

…

***(3) If in the relevant accounting period an equity holder holds, as such, any shares or securities in respect of which arrangements exist by virtue of which, in that or any subsequent accounting period, the equity holder's entitlement to profits on the profit distribution or to assets on the notional winding-up could be different as compared with his entitlement if effect were not given to the arrangements, then for the purposes of this paragraph—***

***(a) it shall be assumed that effect would be given to those arrangements in a later accounting period, and***

***(b) those shares or securities shall be treated as though any variation in the equity holder's entitlement to profits or assets resulting from giving effect to the arrangements were the result of the operation of such rights attaching to the shares or securities as are referred to in sub-paragraph (1) above.***

***In this sub-paragraph "arrangements" means arrangements of any kind whether in writing or not.***

…

***5B (1) This paragraph applies if, at any time in the relevant accounting period, option arrangements exist; and option arrangements are arrangements of any kind (whether in writing or not) as regards which the two conditions set out below are fulfilled.***

***(2) The first condition is that the arrangements are ones by virtue of which there could be a variation in –***

***(a) the percentage of profits to which any of the equity holders is entitled on the profit distribution, or***
***(b) the percentage of assets to which any of the equity holders is entitled on the notional winding up.***

***(3) The second condition is that, under the arrangements, the variation could result from the exercise of any of the following rights (option rights) –***

***(a) a right to acquire shares or securities in the second company referred to in paragraphs 2(1) and 3(1) above;***
***(b) a right to require a person to acquire shares or securities in that company.***"

*Outline Submissions on the Law*

85. I shall deal with the submissions of both parties in detail below. Those submissions directed towards caselaw relevant to the application of *Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101* (the Ramsay principle). By way of outline, Mr Ghosh's submissions on the law were broadly as follows:

(1) Capital gains are triggered by a disposal at a single point in time. For group relief purposes it is necessary to identify whether a group exists at that point in time. That is why Schedule 18 is modified for capital gains purposes and no regard is paid to the existence of options.

(2) The Ramsay principle cannot be used by the Respondents to construe section 170 so as to ignore the actual shareholdings and/or treat the options as having been exercised in determining whether a group exists.

86. Ms Nathan's submissions on the law identified as the essential question whether there was a group for capital gains purposes at the time BL1 and BL2 subscribed for shares in Gemsupa and Wilmslow. In seeking to apply the Ramsay principle she submitted that:

(1) The purpose of the group relief provisions in the present context is to recognise only groups which in a real sense form part of a commercial and economic whole.

(2) In the light of that purpose, and given the existence of the options, no significance should be attached to the shares issued to BL1 and BL2.

87. In other words, Gemsupa and Wilmslow were not part of the British Land group for capital gains purposes at the time of the disposal of the Properties.

*Decision*

88. The key dates of relevant transactions may be summarised as follows:

| Date | Transaction |
|---|---|
| | |
| 15 December 2006 | BL1 and BL2 subscribe for shares in Gemsupa and Wilmslow |
| 22 December 2006 | The Properties are sold by Gemsupa and Wilmslow to Cleartest |
| 29 December 2006 | Cleartest exercises the put options. CPG1 and CPG2 purchase BL1 and BL2 |
| 2 January 2007 | Gemsupa and Wilmslow purchase own shares from BL1 and BL2 (first tranche) |
| 8 January 2007 | Gemsupa and Wilmslow purchase own shares from BL1 and BL2 (second tranche) |

89. The articles of association of Gemsupa and Wilmslow were amended on 15 December 2006. It was common ground that the effect of the amended articles and share subscription by BL1 and BL2 was, at least on the face of the documentation, to make each of Gemsupa and Wilmslow a 75% subsidiary of Cleartest and an effective 51% subsidiary of Cleartest as at 15 December 2006

90. It is not controversial that chargeable gains are triggered by a disposal which takes place at a single point in time. The computation of a gain takes place by reference to the date of disposal. The consideration for a disposal where the disposal takes place within a group is defined by section 171. I accept Mr Ghosh's submission that it is at the date of disposal that one must consider whether or not there is a group. That involves identifying whether the subsidiary is both a 75% subsidiary and an effective 51% subsidiary at that time.

91. The term 75% subsidiary is on the face of it straightforward. It describes a company where at least 75% of its ordinary share capital is owned directly or indirectly by another company.

92. Identifying an effective 51% subsidiary is less straightforward. It involves the modified application of Schedule 18 and concerns beneficial entitlement to profits and assets on a winding up.

93. Mr Ghosh submitted that Schedule 18 operates in relation to two different types of group relief. Firstly for trading losses, where it focuses on an accounting period. In relation to trading losses there is express provision in relation to option arrangements. Secondly in relation to capital gains tax, where it focuses on the time of disposal and therefore the option provisions are expressly disapplied.

94. Mr Ghosh submitted that to construe Schedule 18 in the present context having regard to the existence of the option arrangements would be to do the opposite of what Parliament intended by its clear language. The option arrangements must be ignored because section 170(8) states that they must be ignored.

95. The issue which the parties had agreed was whether "*the Appellants and Cleartest Limited were members of the same group at the time of the disposals?*". In the light of that issue Mr Ghosh's argument is elegant in its simplicity. Gemsupa and Wilmslow were 75% subsidiaries and effective 51% subsidiaries of Cleartest.

96. Ms Nathan's submissions focused on a purposive construction of the grouping provisions. Before coming on to those submissions in detail, I must set out some general points in relation to the Ramsay principle.

97. In *Barclays Mercantile Business Finance Limited v Mawson [2004] UKHL 51* Lord Nicholls carried out a comprehensive review of Ramsay and subsequent authorities. At [36] he stated:

> " *Cases such as these gave rise to a view that, in the application of* any *taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46, para 35:*
>
> > '*[T]he driving principle in the* Ramsay *line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.*'"

98. It is also clear from the decision of the House of Lords in *Inland Revenue Commissioners v Scottish Provident Institution [2004] UKHL 52* that deliberately including a commercially irrelevant contingency, for example by way of options, does not affect the application of the Ramsay principle to a composite transaction.

99. Both parties referred me to the conclusions of Lewison J sitting in the Upper Tribunal in *Berry v Revenue & Customs Commissioners [2011] UKUT 81 (TCC)* at [31] where he states:

> " *In my judgment:*
>
> *i) The Ramsay principle is a general principle of statutory construction (Collector of Stamp Revenue v Arrowtown Assets Ltd (2004) ITLR 454 (§ 35); Barclays Mercantile Business Finance Ltd v Mawson [2005] STC 1 (§ 36)).*
>
> *ii) The principle is twofold; and it applies to the interpretation of any statutory provision:*

*a) To decide on a purposive construction exactly what transaction will answer to the statutory description; and*
*b) To decide whether the transaction in question does so (Barclays Mercantile Business Finance Ltd v Mawson (§ 36)).*

*iii) It does not matter in which order these two steps are taken; and it may be that the whole process is an iterative process (Barclays Mercantile Business Finance Ltd v Mawson (§ 32); Astall v HMRC [2010] STC 137 (§ 44)).*

*iv) Although the interpreter should assume that a statutory provision has some purpose, the purpose must be found in the words of the statute itself. The court must not infer a purpose without a proper foundation for doing so (Astall v HMRC (§ 44)).*

*v) In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole (WT Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101, 184; Barclays Mercantile Business Finance Ltd v Mawson (§ 29)).*

*vi) However, the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words. (This, I think, is what Arden LJ meant in Astall v HMRC (§ 34). As Lord Hoffmann put it in an article on Tax Avoidance: "It is one thing to give a statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there": See Mayes v HMRC [2010] STC 1 (§ 30)).*

*vii) In looking at particular words that Parliament uses what the interpreter is looking for is the relevant fiscal concept: (MacNiven v Westmoreland Investments Ltd [2001] STC 237 (§§ 48, 49)).*

*viii) Although one cannot classify all concepts a priori as "commercial" or "legal", it is not an unreasonable generalisation to say that if Parliament refers to some commercial concept such as a gain or loss it is likely to mean a real gain or a real loss rather than one that is illusory in the sense of not changing the overall economic position of the parties to a transaction: WT Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101, 187; Inland Revenue Commissioners v Burmah Oil Co Ltd (1981) 54 TC 200, 221; Ensign Tankers Ltd v Stokes [1992] 1 AC 655, 673, 676, 683; MacNiven v Westmoreland Investments Ltd (§§ 5, 32); Barclays Mercantile Business Finance Ltd v Mawson (§ 38).*

*ix) A provision granting relief from tax is generally (though not universally) to be taken to refer to transactions undertaken for a commercial purpose and not solely for the purpose of complying with the statutory requirements of tax relief:*

*(Collector of Stamp Revenue v Arrowtown Assets Ltd (§ 149)). However, even if a transaction is carried out in order to avoid tax it may still be one that answers the statutory description: (Barclays Mercantile Business Finance Ltd v Mawson (§ 37). In other words, tax avoidance schemes sometimes work.*

*x) In approaching the factual question whether the transaction in question answers the statutory description the facts must be viewed realistically. (Barclays Mercantile Business Finance Ltd v Mawson (§ 36).*

*xi) A realistic view of the facts includes looking at the overall effect of a composite transaction, rather than considering each step individually: (WT Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101, 185; Carreras Group Ltd v Stamp Commissioner [2004] STC 1377 (§ 8); Barclays Mercantile Business Finance Ltd v Mawson (§ 35).*

*xii) A series of transactions may be viewed as a composite transaction where the series of transactions is expected to be carried through as a whole, either because there is an obligation to do so, or because there is an expectation that they will be carried through as a whole and no likelihood in practice that they will not: (WT Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101, 185).*

*xiii) In considering the facts the fact finding tribunal should not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way in which the scheme was intended to operate: (Astall v HMRC (§ 34)).*

*xiv) In considering whether there is no practical likelihood that the whole series of transactions will be carried out, it is legitimate to ignore commercially irrelevant contingencies and to consider it without regard to the possibility that, contrary to the intention and expectation of the parties it might not work as planned: (Commissioners of Inland Revenue v Scottish Provident Institution (2004) 76 TC 538, 558 § 23). Even if the contingency is a real commercial possibility it may be disregarded if the parties proceeded on the basis that it should be disregarded: (Astall v HMRC (§ 34)).*"

100. My first task is to identify the purpose of the group relief provisions described above, so as to identify what arrangements and transactions fall within them ("Step 1"). I must then consider whether the arrangements and transactions entered into by Gemsupa and Wilmslow answer that statutory description, taking a realistic view of the facts.

101. In relation to Step 1 Ms Nathan emphasised sub-paragraphs (iv), (v) and (vi) of the conclusions of Lewison J in Berry. I accept that it is still necessary to look for the purpose of statutory provisions even where their scope is set out in detail. I was referred to an example of that approach in the decision of Proudman J in *Mayes v Revenue & Customs Commissioners [2009] EWHC 2443 (Ch)* subsequently upheld by the Court of Appeal at [2011] EWCA Civ 407.

102. The purpose of the capital gains group relief provisions was stated by Hoffmann J as he then was in *Westcott v Woolcombers Ltd [1986] STC 182* at 189,190:

> " *From language, concept and authority, I turn to the guidance which can be obtained from the general scheme of the legislation. As Lord Wilberforce said in Ramsay (WT) Ltd v IRC [1981] STC 174 at 182:*
>
> > *'The capital gains tax was created to operate in the real world, not that of make-belief.'*
>
> *The policy of para 2(1) of Schedule 13[the precursor of section 171 TCGA 1992] is to recognise that in the case of transactions between members of a group of companies, the legal theory that each company is a separate entity does not accord with economic reality. It gives effect to that policy by, broadly speaking, ignoring transactions within the group, computing the gain as the difference between the consideration given when an asset was acquired by the group and the consideration received when it left the group, and charging the tax on whichever company made the outward disposal …Thus all the provisions with which we have been concerned are directed to neutralising the tax effects of transactions which are disposals in legal theory but not in real life*"

103. Ms Nathan submitted that the tests for 75% subsidiaries and effective 51% subsidiaries were not exhaustive. The legislation must be looked at in context, and that context required consideration of whether the economic reality was that the companies formed part of a group. In particular whether the companies had a common commercial purpose. That question had to be answered by looking at the totality of the arrangements. In most cases it would be apparent that applying the tests in section 171 accorded with commercial reality. But in some circumstances, such as the present, the economic reality was different. Failing to take those circumstances into account would subvert the purpose of the group relief provisions.

104. It seems to me that Ms Nathan was inviting me to find that the definition of a 75% subsidiary required consideration of what exactly is ordinary share capital for the purposes of section 838 ICTA 1988. It is defined in a straightforward manner by section 832 ICTA 1988 as all the issued share capital of a company. I note that there is no express provision which requires the existence of options or other arrangements to be taken into account.

105. In relation to an effective 51% subsidiary, Schedule 18 is incorporated into the capital gains regime in a modified way. I will come to the modifications in due course, but Schedule 18 essentially prescribes the following matters to be taken into account when considering whether there is an effective 51% subsidiary:

> (1) Paragraph 1 defines the relevant shares that are to be taken into account, that is ordinary shares.
>
> (2) Paragraph 2 sets out what is to be taken into account in identifying the percentage beneficial entitlement to profits in a relevant accounting period, namely entitlement on a distribution or notional distribution of profits.

(3) Paragraph 3 sets out what is to be taken into account in identifying the percentage beneficial entitlement to assets on a distribution in a winding up or notional distribution on a winding up.

(4) Paragraph 4 makes provision for a situation where the shareholding company owns shares where rights to dividends or assets on a winding up are limited by reference to a specified amount.

(5) Paragraph 5 is an anti-avoidance provision dealing with a situation where the shares are such that their rights would be different if the distribution or winding up were in a different accounting period. Paragraph 5(3) provides that if arrangements exist, outside the articles of association, by virtue of which that situation arises then for the purposes of paragraph 5 it is assumed that effect would be given to those arrangements.

(6) Paragraph 5B applies if at any time in the relevant accounting period <u>option arrangements</u> exist by virtue of which:

(a) there could be a variation in the percentage of profits or assets on a winding up to which the shareholder is entitled, and

(b) The variation could result from the exercise of put or call option rights to sell or acquire shares in the subsidiary company.

106. It is important to note that paragraph 5(3) is disapplied for the purposes of capital gains by section 170(8). I accept Mr Ghosh's submission that this is because capital gains tax is looking at a particular point in time, namely the time of disposal. Parliament has determined that for capital gains purposes the focus is on the rights given by the articles of association, and not in arrangements outside the articles of association which affect other accounting periods.

107. It is particularly important in the context of the present appeal that paragraph 5B is also disapplied for the purposes of capital gains group relief by section 170(8). Again, I infer that this is because for capital gains purposes the focus is the position as at the date of disposal rather than anything that might happen during an accounting period.

108. It is also worth noting that the options referred to in paragraph 5B(3) are options over shares of "the second company". The second company is the company which would be paying a dividend or distributing assets, that is what might be described as the subsidiary company. For present purposes Gemsupa and Wilmslow would each be the second company. However the options were over the shares in BL1 and BL2.

109. I was referred to *J Sainsbury plc v O'Connor [1991] STC 318* which was decided in May 1992. Paragraph 5B was introduced into Schedule 18 by the Finance (No 2) Act 1992 with effect for option arrangements made after 14 November 1991.

110. Sainsbury was concerned with an agreement in 1979 whereby Sainsbury and a third party ("GB") established Homebase as a joint venture company. It had originally been intended that the shares would be held in the proportion 70% to Sainsbury and 30% to GB. However on that basis Sainsbury would not be entitled to group relief for

trading losses incurred by Homebase. It was therefore decided that Sainsbury should hold 75% of the issued share capital and GB 25%. At the same time put and call options were granted pursuant to which GB could purchase or be required to purchase 5% of Sainsbury's shares in Homebase. The options were not exercisable until the fifth anniversary of the incorporation of Homebase. In fact they were never exercised and some 6 years after the incorporation they were terminated.

111. Sainsbury claimed group relief in respect of the trading losses of Homebase. The issues were whether Sainsbury was the beneficial owner of the whole 75% holding and if so whether the options amounted to arrangements for the purposes of what is now paragraph 5(3) Schedule 18. The Court of Appeal held that Sainsbury was the beneficial owner and that the options were not arrangements within paragraph 5(3). The rights carried by the shares were the same rights whether or not the options were exercised. The option agreements affected ownership of the shares but not the rights attaching to them. At p329g Lloyd LJ stated as follows:

> " *… the whole of para 5 of Sch 12 is concerned with shares of a certain description, namely, shares carrying special rights whereby they may, for example, cease to carry the right to any dividend in the future. If that is the right view, then para 5(3) is concerned solely with arrangements whereby shares, or a class of shares, may be brought within that description. An arrangement affecting the ownership of shares is a very different sort of arrangement, and quite outside the ambit of para 5.*"

112. There was no suggestion in Sainsbury that the options were a sham or that the Ramsay principle might operate to prevent group relief. Ms Nathan submitted that in Sainsbury there was no question that Sainsbury and Homebase were parent and subsidiary. The issue only related to 5% of the shares in Homebase. Further the options over those shares were only exercisable after 5 years. In my view those are not material distinctions in identifying the purpose of the capital gains group relief provisions. Essentially the shares were allotted and the options granted so as to enable the 75% subsidiary test to be satisfied over a period of time during which Sainsbury wanted to claim the benefit of group relief for trading losses.

113. Following Sainsbury, the provisions of paragraph 5 were amended to reverse the effect of the decision. Paragraph 5B was introduced. However paragraph 5B only applies for the purposes of group relief for trading losses. At the same time as introducing paragraph 5B, Finance Act (No 2) 1992 amended section 170(8) so as to expressly disapply paragraph 5B in relation to capital gains. That is not surprising because paragraph 5(3) was already disapplied in relation to capital gains.

114. *BUPA Insurance Limited v Revenue & Customs Commissioners [2014] UKUT 0262 (TCC)* is a decision of the Upper Tribunal in relation to consortium relief (a form of group relief) and Schedule 18. Mr Ghosh was one of the judges in that case and therefore, rather unusually for an advocate, he is relying on his own decision.

115. Briefly, Bupa Insurance concerned an issue as to whether a corporate shareholder, receiving a distribution on shares held in a subsidiary, was not to be

treated as beneficially entitled to the distribution for the purposes of Schedule 18 because of a contractual obligation to pay an equivalent sum to another party within 10 business days of receipt.

116. HMRC's submissions in Bupa Insurance echo the submissions of Ms Nathan in the present case. It was submitted in Bupa Insurance that the consortium in that case was "*not the sort of consortium that Parliament wished to be the subject of consortium claims*". It also seems that HMRC went further than Ms Nathan in the present case and submitted that a purposive construction of tax statutes requires any transaction effected for a solely tax avoidance purpose to be ignored (See [44] and [46]).

117. At [88] the Upper Tribunal identified the issue as follows:

> " *The statutory question in this appeal is whether, given the composite transaction whereby Bupa Finance passes the value of any distribution it receives … within 10 business days of receipt of the distribution, Bupa Finance has more than a "mere legal shell" of ownership rights to that (cash) distribution.*"

118. The reference to a "mere legal shell" was to a test adopted by the Court of Appeal in *Wood Preservation Limited v Prior (1968) 45 TC 112* and also applied to the first issue in Sainsbury. The Upper Tribunal found at [72] that the purpose of the statutory provisions (section 403C(2) and Schedule 18) was to restrict consortium relief "*by reference to the connecting factors of the beneficial ownership of shares, the beneficial entitlement to (notional) distributions and the beneficial entitlement to assets on a notional winding up*". It found at [75] and [89] that the ownership rights of Bupa Insurance amounted to more than a mere shell and it was therefore entitled to relief notwithstanding what was a composite transaction. At [49] it stated:

> " *The purpose of the group relief provisions and thus the consortium relief provisions (since consortium relief is merely a form of group relief: see above) is readily apparent from their terms. These provisions recognise a "substantial measure of identity" between surrendering companies with losses on the one hand and claimant companies with profits on the other, which identity is sufficient, so far as the draftsman is concerned, to permit the surrender of losses by the former to the latter.*"

119. Bupa Insurance was not concerned with options, but with a contractual obligation to pay the value of the distribution to the other party. That is effectively the position in this appeal given my finding that there was no practical likelihood that the options would not be exercised.

120. Mr Ghosh relied in particular on sub-paragraph (vi) of the conclusions of Lewison J in Berry. Parliament has closely defined the availability of group relief in setting conditions, in particular the definition of an effective 51% subsidiary. Those conditions seek to prevent the manipulation of share rights in paragraphs 4 and 5

Schedule 18. He submitted that in those circumstances there is little if any room for an appeal to a purpose which is not within the literal meaning of the words.

121. I accept Mr Ghosh's submission that HMRC's case as to the purpose of the group relief provisions is inconsistent with the decision of the Upper Tribunal in Bupa Insurance and the decision of the Court of Appeal in Sainsbury. Both are binding upon me. In the light of Bupa Insurance and Sainsbury I cannot say that group relationships, intended to be limited in time and established only for the purposes of obtaining the relief, are outside the purpose of the provisions.

122. In light of the authorities I do not accept Ms Nathan's overarching submission that group relief is only available where there is some form of commercial economic unity above and beyond the conditions set out in the literal words of Schedule 18.

123. I can therefore deal with Step 2, whether the arrangements and transactions answer the statutory description, relatively briefly. Ms Nathan's submissions relied upon her purposive interpretation of the group relief provisions. She emphasised sub-paragraphs (xii) and (xiv) of the conclusions of Lewison J. She submitted that just because there is some commercial aspect to an element in the overall transaction doesn't mean that it is to be taken into account if the parties proceed on the basis that it is not to be taken into account or if they are put into the scheme solely to create an appearance of uncertainty. Such elements of the transaction should be disregarded.

124. The particular aspect of the scheme which led to this submission was the existence of the options and Ms Nathan's submission that the exercise of the options was pre-ordained in the sense that there was no practical likelihood that they would not be exercised. I agree that there was no practical likelihood that the option would not be exercised.

125. Mr Ghosh submitted that HMRC were seeking to pick and choose those parts of the arrangements which they wished to tax whilst ignoring those parts they did not like. He suggested that HMRC were picking the property disposal, which they wished to tax, but ignoring the share subscriptions because of the existence of the options. In support of that submission Mr Ghosh referred me to a number of cases including *Countess Fitzwilliam v Inland Revenue Commissioners [1993] STC 502, Reynaud v Inland Revenue Commissioners [1999] STC (SCD) 185* and *Trustees of Eyretel Unapproved Pension Scheme v Revenue & Customs Commissioners [2009] STC (SCD) 17*

126. In fact I do think Ms Nathan was making her submissions on that basis and she did not rely on any authority in support of a submission that HMRC could pick and choose parts of a composite transaction. Her principal submission was more subtle than that. It was that the existence of the options and the fact that the exercise of the options was pre-ordained meant that the corporate transaction did not fall within a purposive construction of the group relief provisions. The arrangements did not cause Gemsupa and Wilmslow to become part of the same economic group as British Land.

127. Mr Ghosh sought to answer that submission by saying firstly that the exercise of the options was not pre-ordained. For the reasons previously given I do not accept that submission. However he also submitted that even if the exercise was pre-ordained, the grouping provisions expressly ignore the existence of options and there is binding authority to that effect. The purpose of the provision was clear. For the reasons previously given I accept that submission.

128. In *Astall v Revenue & Customs Commissioners [2009] EWCA Civ 1010* Arden LJ said this in relation to Step 2:

> " *Both Mawson and SPI emphasise the need to interpret the statute in question purposively, unless it is clear that that is not intended by Parliament. The court has to apply that interpretation to the actual transaction in issue, evaluated as a commercial unity, and not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way the scheme was intended to operate. SPI also illustrates another important point, namely that the fact that a real commercial possibility has been injected into a transaction does not mean that it can never be ignored. It can be disregarded if the parties have proceeded on the basis that it should be disregarded.*"

129. I must identify the transaction in issue. The disposal said to give rise to a chargeable gain is the disposal of the Properties on 22 December 2006. It took place as part of a scheme which involved the corporate transactions on 15 December 2006. I cannot treat the corporate transactions and the property transactions as part of a composite transaction because the disposal of the Properties was not pre-ordained at the time of the corporate transactions. I can however treat the corporate transactions including the exercise of the options as a composite transaction because the exercise of the options was pre-ordained.

130. That is how I understood Ms Nathan to put her case. The relevant transaction was the disposal of the Properties. Everything else she submitted was "*window dressing and mechanism*".

131. Incidentally, in my view the purchase of own shares by Gemsupa and Wilmslow in January 2007 was a tidying up exercise, rather than an essential part of the scheme. I am not therefore concerned with whether that was a pre-ordained part of the corporate transaction.

132. It seems to me that the question I must ask is whether the corporate transaction answers the description of a group for which group relief is available in the light of the construction of sections 170 and 171 described above.

133. Ms Nathan submitted that the present scheme did not give rise to an economic group for the purposes of those sections. She submitted as follows:

> (1) The fact that Gemsupa and Wilmslow would only have entered into the transactions if group relief was available was irrelevant. The parties' belief as to the availability of group relief was not sufficient to establish a group.

(2) The tax avoidance motive does not render the scheme ineffective in itself, but is relevant to understanding the nature of the arrangements.

(3) As at 15 December 2006 there was no realistic possibility that the property transaction and the unwinding of the corporate relationships through the options would not go ahead. The group relationship was intended to be temporary and the subsequent transactions were pre-ordained. The only serious negotiations, such as those evidenced by the email dated 30 November 2006, all happened prior to 15 December 2006.

(4) The only circumstances in which the options might not have been exercised were fanciful.

134. Save in relation to the property transaction being pre-ordained as at 15 December 2006 I accept those submissions. The corporate structure was put in place on 15 December 2012. If Gemsupa and Wilmslow were part of the British Land group on that date then they were also part of the British Land Group on 22 December which was the date of disposal for capital gains purposes.

135. Ms Nathan reminded me of what Lord Hoffmann said in *Carreras Group Ltd v Stamp Commissioner [2004] UKPC 16* at [8]:

> " *Whether the statute is concerned with a single step or a broader view of the acts of the parties depends upon the construction of the language in its context. Sometimes the conclusion that the statute is concerned with the character of a particular act is inescapable: see MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd [2003] 1 AC 311. But ever since Ramsay Ltd v Inland Revenue Commissioners [1982] AC 300 the courts have tended to assume that revenue statutes in particular are concerned with the characterisation of the entirety of transactions which have a commercial unity rather than the individual steps into which such transactions may be divided. This approach does not deny the existence or legality of the individual steps but may deprive them of significance for the purposes of the characterisation required by the statute. This has been said so often that citation of authority since Ramsay's case is unnecessary.*"

136. I was referred to a similar approach by the Special Commissioner in Eyretel at [11] and [12].

137. In *Schofield v Revenue & Customs Commissioners [2012] EWCA Civ 927* at [43] Hallett LJ stated:

> " *The relevant transaction here is plainly the scheme as a whole: namely a series of interdependent and linked transactions, with a guaranteed outcome. Under the scheme as a whole, the options were created merely to be destroyed. They were self cancelling. Thus, for capital gains purposes, there was no asset and no disposal. There was no real loss and certainly no loss to which the TCGA applies. There is in truth no significant difference between this scheme and the scheme in* ***Ramsay,*** *other than the nature of the "asset". A consideration of the scheme "asset by asset" (or step by step) as urged upon us by Mr*

*Schofield ignores the reality of the scheme, the findings of the First Tier Tribunal and the* ***Ramsay*** *principle.*"

138. Schofield concerned the generation of a capital loss by means of the sale and purchase of FTSE 100 put and call options and certain gilt put and call options. Gains or losses on the gilt options were exempt from capital gains tax. The result was that whatever movement there was in the underlying assets, when two of the options were exercised the taxpayer would generate a capital loss to be offset against a previous chargeable gain realised whilst he was resident in the UK. At the same time the other two options would generate a gain which would not be taxable because the taxpayer had since become non-resident.

139. The Court of Appeal gave a purposive construction to the meaning of the terms "asset", "disposal" and "loss". The relevant composite transaction was the four options together and there was no disposal for capital gains purposes.

140. Ms Nathan submitted that the position in the present appeal is analogous. Where relationships and rights are created simply to be destroyed they can be deprived of significance where they do not fall within the purpose of the statute. She also relied on an analogy with the facts of *Furniss v Dawson [1984] STC 153.*

141. In my judgment Ms Nathan's description of the principle to be derived from cases such as Schofield and Furniss v Dawson is unobjectionable. However, it depends on identifying the purpose of the statute. It is the purpose of the group relief provisions that I am concerned with and not the meaning of the more general terms which were considered in Schofield.

142. HMRC's argument is essentially that the shares and the options should be ignored because the motive was tax avoidance and there was no commercial and economic unity in the corporate structure that was established. For the reasons given above I am satisfied that corporate transactions did establish a group for group relief purposes as at 15 December 2006 and more importantly at the time of the disposal on 22 December 2006. This is a case where in my view it is not possible to construe the group relief provisions so as to negate the existence of a group at the time of disposal. I am satisfied that the corporate transactions in the present case do answer the statutory description of a group for group relief purposes.

*Conclusion*

143. For all the reasons given above I must allow this appeal. That will no doubt be viewed as an unsatisfactory result given the tax avoidance motive of the Appellants. However it follows from the way in which Parliament has defined groups for group relief purposes.

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

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JONATHAN CANNAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 3 March 2015**