[2021] UKFTT 0350 (TC)

TC08284

VAT – Opco/Propco structure – lease of "turnkey" care home – treatment of furniture, fixtures and equipment supplied by PropCo to OpCo – extent to which items are "incorporated" or are "building materials" for purposes of "builder's block" - whether single composite supply - zero rating - Article 6, Value Added Tax (Input Tax) Order 1992

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/01919/V

BETWEEN

SILVER SEA PROPERTIES (LEAMINGTON SPA) SARL **Appellant**

-and-

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

TRIBUNAL: JUDGE ALEKSANDER
JULIAN SIMS

The hearing took place on 19 May to 21 May 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal's Video Hearing service. A face-to-face hearing was not held because the impact of the COVID-19 pandemic made such a hearing impractical.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Philip Simpson QC, counsel, instructed by KPMG Law, for the Appellant

Andrew Macnab, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

INTRODUCTION

1. The Appellant ("PropCo") appeals against HMRC's statutory review decision notified by letter dated 27 January 2017 upholding a VAT assessment for the 05/14 period dated 12 May 2016. The 12 May 2016 assessment was later replaced by a revised Notice of Assessment dated 21 May 2017. The VAT in dispute in this appeal is £96,291. This appeal is being treated as a lead case for another appeal by one of PropCo's sister companies.

2. The appeal concerns the correct VAT treatment of certain items of furniture, fixtures, and equipment ("FF&E") supplied with a new care home known as Priors House, Old Milverton Lane, Blackdown, Leamington Spa, Warwickshire, CV32 6RW ("Priors House"). Priors House was leased by PropCo to Care UK Community Partnerships Ltd ("OpCo"). The issues before the Tribunal are

   (1) The extent to which the FF&E are "incorporated" into Priors House for the purposes of the "builder's block";

   (2) Whether "incorporated" FF&E were "building materials" (or whether such items were excluded from being building materials). Credit for input tax on incorporated FF&E is blocked unless those items of FF&E are "building materials"; and

   (3) Whether the FF&E formed an element of a single (composite) zero-rated supply of Priors House to OpCo.

3. At the video hearing of this appeal, PropCo was represented by Philip Simpson QC and HMRC were represented by Andrew Macnab.

4. Witness statements were produced from Matthew Rosenberg and Craig Prior for PropCo, and Keith Metcalfe for HMRC, and each of these witnesses gave oral evidence and was subject to cross-examination.

5. Matthew Rosenberg is currently the chief financial officer of Care UK Limited ("CUK"), the parent company of OpCo. He is also a director of PropCo and Silver Sea Property Holdings Sàrl ("SSPH" - the parent company of PropCo) and of OpCo. His employment with CUK commenced on 6 May 2014, and he became a director of OpCo, SSPH, and PropCo shortly thereafter. Mr Rosenberg was one of only two individuals that were directors of companies within both the SSPH and CUK groups (but currently he is the only one). Prior to joining CUK, he was the CFO of a European hotels business. He is a chartered accountant.

6. Craig Prior has been the Operational Projects Director of OpCo since August 2013. He is qualified to operate a residential care home in a regulatory compliant manner. His responsibilities include overseeing the development, construction and fit-out of all new care homes that are leased to OpCo and ensuring that the homes and their managers are compliant with all relevant regulatory requirements. Although his job title describes him as a "director", he is not a director for the purposes of the Companies Act. In addition to his employment by OpCo, Mr Prior also works for CUK. However, he does not work for SSPH, Silver Sea Developments Sàrl ("SSD") or PropCo.

7. Prior to his employment with OpCo, Mr Prior had been employed as an operations director and as a regional operations manager for other care home groups. In these roles he was responsible for the operational management and control of between 12 and 21 care homes. He also has previous experience as the manager of a 138-bed facility caring for individuals with dementia and other dependencies.

8. Keith Metcalfe is the HMRC officer responsible for the VAT assessments in this case.

9. In addition to witness evidence, an electronic bundle of documentary evidence comprising 1953 pages was produced in evidence.

BACKGROUND FACTS

10. For the most part, the background facts are not in dispute, and we find them to be as follows.

Group Structure

11. In 2010, funds managed by Bridgepoint (a private equity fund manager) incorporated Care UK Health and Social Care Holdings Limited ("Holdings"). Holdings (through subsidiaries) acquired the share capital of CUK (then called Care UK plc). Following the acquisition, the Bridgepoint funds and CUK's management team set up a care home development business outside the Holdings group. The parent company of the group of companies forming the development business is SSPH, a Luxembourg company. Within the SSPH corporate group, various subsidiary companies ("SPVs") are incorporated to buy and develop suitable sites into new residential care homes. Once completed, the new care homes are leased to OpCo, a subsidiary of CUK, which is the care home operating entity within the Holdings group. Another subsidiary of SSPH, SSD, a Luxembourg company, was incorporated to act as the project manager for the development of new care homes and is registered for UK VAT.

12. Neither PropCo nor SSD have any employees. Their directors (other than Mr Rosenberg, and previously another CUK director) are provided by a Luxembourg corporate services business. SSD outsources its obligations under the Framework Agreement to OpCo.

13. PropCo is a subsidiary of SSPH. PropCo is the SPV incorporated specifically in relation to the site acquisition, construction, and leasing of Priors House. PropCo was registered for VAT on 1 October 2010 as a non-established taxable person.

14. On 31 July 2019, a subsidiary of Holdings acquired the shares in SSPH, so that SSPH, PropCo, SSD, CUK and OpCo are now all indirect subsidiaries of Holdings.

15. The relationships between the entities in the SSPH and Holdings groups were at all material times governed by a number of agreements. The agreements relevant to this appeal are the Framework Agreement dated 10 September 2010 ("the Framework Agreement"), the Technical Services Agreement dated 10 September 2010 ("the Technical Services Agreement"), the Agreement for Lease and Development dated 21 March 2013 ("the Agreement for Lease"), and the Occupational Lease dated 11 August 2014 ("the Lease"). A selection of key provisions from each of these documents is set out in Annex One to this Decision.

16. Mr Rosenberg's evidence was that he was not aware of any other agreements that related to the supply of the FF&E by PropCo to OpCo, and that as regards the FF&E, PropCo was "not giving anything away for free".

Framework Agreement

17. The Framework Agreement is between SSPH, OpCo, SSD, and CUK. It sets out the overarching framework by which companies in the SSPH group are commissioned to appraise, plan, and execute the development of new care homes, and to arrange for such care homes to be leased to OpCo. The agreement also includes provisions dealing with sites developed by third parties which are leased to OpCo.

18. The Framework Agreement provides for a staged process. Scheduled to the Framework Agreement are various model forms of agreement that are to be used in relation to the development of a care home. These include (i) a schedule of amendments to the standard JCT

Design and Build Contract, (ii) a model form of agreement for lease and development in respect of a care home, and (iii) a model form occupational lease of a care home.

19. The stages prescribed by Clause 7 of the Framework Agreement are broadly as follows:

(1) SSD investigates and pursues potential opportunities for the acquisition of sites and the development of care homes. Following the identification of a potential site, SSD prepares an Initial Feasibility Appraisal.

(2) If the Initial Feasibility Appraisal is positive, then SSD seeks an "exclusivity agreement" with the site owner and is authorised to engage a professional team to undertake further "due diligence" on the site and prepare draft drawings and specifications. The Framework Agreement sets out a budget for this work and the criteria and minimum requirements for the drawings and specifications. OpCo must prepare a draft business plan, in practice this is for a period of five years starting with the opening of the care home. Mr Rosenberg's evidence was that a five-year plan allowed for the care home to reach maturity with a stable occupancy of 92% to 93%; taking the business plan beyond five years had little value, as it became a desktop exercise in adjusting the component financial figures for inflation.

(3) SSD then prepares and sends a Final Transactional Appraisal to the boards of SSPH and OpCo for their review and approval. The Final Transactional Appraisal includes (amongst other things):

(a) Final draft drawings and specifications which accord with the design criteria and minimum requirements scheduled to the Framework Agreement.

(b) A business plan (incorporating an operating budget including details of projected EBITDAR - being earnings before interest, tax, depreciation, amortisation, and rent). Mr Rosenberg described the finances of OpCo and PropCo as being linked, as OpCo had to have a profitable care home in order to be able to pay rent to PropCo;

(c) A draft development budget;

(d) Drafts of relevant agreements; and

(e) The calculation of the initial rent payable by OpCo, which is to be calculated by reference to a rent cover of 1.6 to 1.8 times EBITDAR (or such other calculation as the parties may agree) (the reason this level of rent cover was chosen was because it corresponded to the financial covenants in the loan facility. Mr Rosenberg confirmed that the calculation of the initial rent for Priors House followed this formula);

(4) Following the approval of the Final Transactional Appraisal by the boards of SSPH and OpCo, an SPV is incorporated and buys the site, and the relevant agreements are prepared by SSPH and executed by the relevant parties. These agreements include the agreement for lease and development (in the form scheduled to the Framework Agreement, amended only with changes necessary to reflect the details of the particular development project) and the project documents (including the JCT Design and Build Contract and the agreements with the professional team).

(5) The development then goes ahead in accordance with the terms of the agreement for lease and development, the building contract, and the other agreements and documents.

(6) Following practical completion of the care home, OpCo and PropCo enter into a 25-year occupational lease of the care home in the form scheduled to the agreement for lease and development (which itself follows the form scheduled to the Framework Agreement amended only with changes necessary to reflect the details of the particular development project).

Technical Services Agreement

20. SSD has no employees. It therefore outsources its obligations under the Framework Agreement to OpCo pursuant to the Technical Services Agreement.

Turnkey Development

21. The developments undertaken by the SSPH group for OpCo are described by Mr Rosenberg as "turnkey developments" - in other words, that the properties developed by the SSPH group are supplied to OpCo in a state that means that they are capable of being immediately operated - all OpCo has to do is "turn the key" and walk in. Mr Prior described a "turnkey development" as a development where OpCo was able to turn the key and admit residents from the moment it acquired control of the building. He said that it was quite common in the care home sector for new care homes to be constructed on a turnkey basis; two of his former employers (Gracewell and Four Seasons) used turnkey developments.

22. Mr Rosenberg's evidence was that Priors House was developed as a Turnkey Site under the terms of the Framework Agreement, with SSPH as the developer, and PropCo as the SPV company which acquired Priors House on completion of the development.

23. Mr Rosenberg's evidence was that the care home is constructed and leased to OpCo inclusive of all of the FF&E required in order for the care home to be immediately operational. This is done under a single agreement and for the payment of a single, all inclusive, rent. Mr Prior described the arrangements as meaning that OpCo was only responsible for supplying "consumables" (such as food and drink, paper, and chemicals) and staff in order for the care home to be ready to accept residents. As we discuss below, in our view, and we find that, the reality of these arrangements is somewhat different.

24. In his evidence, Mr Rosenberg describes a number of the aspects of turnkey developments that make them attractive for both the landlord/developer and tenant. These include:

(1) Convenience – the tenant has a completed home ready for use.

(2) The developer has a tenant in place to whom the property is let once the construction has been completed. This reduces the risk to the developer of the property not being profitable or marketable.

(3) The development project is forward funded by the developer, which means that the tenant does not incur any costs until the project has been completed.

(4) These arrangements separate the operation of the business from the asset and allocate risks between developer and tenant in a manner that is apparently more attractive to their respective investors.

25. Virtually all of these advantages are present in any typical pre-letting arrangement between arm's length parties, rather than solely in relation to a "turnkey" development. The only one that is not is "convenience". But in the case of Priors House, any convenience is illusory, as all the obligations of the developer have been delegated to OpCo under the Technical Services Agreement, so OpCo (the tenant) has the responsibility for getting the property ready in any event.

26. And it strikes us that the other "advantages" may be considered illusory in cases where the ultimate shareholders in the developer and tenant are identical (as was the case in respect of PropCo and OpCo until 31 July 2019), or are members of the same corporate group (as has been the case in respect of PropCo and OpCo since 1 August 2019). Whilst these advantages may be apparent at the level of OpCo and individual SPVs – they disappear when considered from the perspective of the ultimate parent company or an investing shareholder. Indeed, Mr Rosenberg in his evidence described the finances of OpCo and PropCo as being linked, as OpCo had to have a profitable care home in order to be able to pay rent to PropCo.

27. Mr Prior describes another advantage of a turnkey development as being an additional warranty provided in respect of FF&E by the developer. He says the following in his witness statement:

> 50. Whilst [OpCo] could procure the FF&E directly from relevant supplier, entering into an agreement with [PropCo] for the development of the site on a turnkey basis provides [OpCo] with an additional warranty which is underwritten by the developer. The warranty from the developer is typically for 10 years in duration and is therefore approximately 9 years longer than the warranty [OpCo] would otherwise be offered by the FF&E supplier directly. Additionally the developer is a known entity, which means [OpCo] is better able to assess the developer's financial capacity to meet and follow-through on the warranty if so needed. Therefore, where the purchase of the FF&E is funded by [PropCo] under the agreement to develop the site on a turnkey basis, the risk to [OpCo] (both financial and reputational) which may potentially arise in relation to defective goods is greatly reduced.

Mr Prior was cross-examined on this statement, and his initial response was that he was "unsure" about whether PropCo gave a 10-year warranty on all FF&E, and that any 10-year warranty was "more to do with building". He was not able to refer to any provision in any agreement to support this statement and said that it was his "understanding". Mr Macnab asked him whether a 10-year warranty applied to J-Cloths (one of the items that PropCo asserts is leased to OpCo under the terms of the Lease), to which Mr Prior said that these would have to be replaced, as would anything else that has a life of less than 10 years.

28. We consider the more plausible reason for the use of opco/propco structures is Mr Rosenberg's evidence that a special purpose property vehicle appears to be able to negotiate better terms with lenders than an operating company. His evidence was that the growth of Holdings was constrained by cash-flow, and the opco/propco split provided good leverage and improved the profitability of the business. And his evidence in this respect accords with the experience of the Tribunal panel (as an expert tribunal familiar with opco/propco type structures generally). It therefore made commercial sense for Bridgepoint and Holdings to establish an opco/propco split so that the Holdings/SSPH businesses could access more favourable borrowing terms.

29. And as the SSPH companies would have access to more favourable borrowing terms, it also made sense for the FF&E (so far as possible) to be acquired by the SPV (financed by borrowings through the property development side of the structure), rather by OpCo.

30. Mr Rosenberg was asked whether these arrangements effectively allowed OpCo to acquire the FF&E on credit, and whether leasing was a method of funding the costs that OpCo incurs in running its business. Mr Rosenberg's response was that in these arrangements the developer (PropCo) incurs the costs to acquire the asset, and OpCo is willing to pay rent to PropCo for the right to use the asset.

31. Mr Macnab asked Mr Rosenberg whether these arrangements meant that OpCo was able to obtain the use of the FF&E without incurring VAT (Mr Macnab said that HMRC did not

regard any reduction in OpCo's VAT liability as being abusive). Mr Rosenberg's response was that OpCo was partially exempt and could not recover all of the input VAT it incurred.

Construction of Priors House

32. The proposals to develop Priors House go back to 2012 – which is prior to the involvement of either Mr Rosenberg or Mr Prior with SSPH, Holdings, OpCo and PropCo.

33. Mr Rosenberg was asked about his involvement with the development of Priors House (and the FF&E in particular), and his response was he was not involved with it, as he arrived at around the same time as Priors House opened. In any event, he would not be involved at the level of detail of FF&E, and questions relating to FF&E were better directed to Mr Prior.

34. Mr Prior's evidence was that his involvement related solely to the fit-out of Priors House and its compliance with CQC requirements. He was not involved in the decision-making process to construct a new care home in Leamington Spa, nor in any of the contractual arrangements. Indeed, Mr Prior only became an employee of OpCo after the Agreement for Lease for Priors House was executed - so he was not involved in the initial design of the Priors House building as specified in the Agreement for Lease and the plans attached to it.

35. PropCo was incorporated in 2012, shortly before its acquisition of the site on which Priors Home was constructed.

36. On 17 July 2012, AECOM Professional Services LLP (under its previous name of Davis Langdon LLP) ("AECOM") wrote to CUK with a fee proposal for the provision of professional services (including acting as employer's agent and quantity surveyor, as quality monitor, and as CDM co-ordinator under a JCT Design & Build form of contract) in connection with the construction of Priors House. On 5 April 2013, SSD and AECOM entered into an agreement for the provision of consultancy services in relation to the development of Priors House. Included in Annex One to this decision are key provisions of that agreement, including Schedule 5, which sets out the services to be provided by AECOM (and which correspond to the services set out in their July 2012 proposal).

37. Mr Rosenberg described AECOM as construction and building specialists, and that it made commercial sense for SSPH and its subsidiaries to engage a company such as AECOM to manage the construction of Priors House. In his witness statement he said:

> 65. AECOM were engaged by [PropCo] to project manage the entirety of the development of the build from the planning processes through to the FF&E fit-out and ensured that the build was completed in accordance with the design and contract specifications agreed between [PropCo] and [OpCo]. This included overseeing the fit-out of the FF&E items and ensuring that the FF&E were sourced in a manner which was compliant with regulatory standards and from reputable suppliers. As a result, AECOM will ensure that the development is completed in accordance with the agreed timelines and specifications and will also resolve any disputes between the developer and the construction team.

38. Mr Rosenberg then went on to say that AECOM took instructions solely from PropCo and were "fully and only accountable to" PropCo.

39. In his witness statement Mr Rosenberg described the relationship between AECOM, PropCo, and OpCo as follows:

> 66. In order to help [PropCo] to ensure that the final development met the relevant operational requirements, members of [OpCo]'s team, who have significant experience of how a care home operates in practice, were ordinarily

on site during the development and FF&E fitout processes i.e. from the start to end of the build.

67. [OpCo] were therefore readily available to advise [PropCo] on matters such as the plumbing of the sinks, the siting of electrical sockets and the likely movement of the residents around the home. This is logical and beneficial to both parties, as the [OpCo] team were going to ultimately operate the care home once the development was complete and therefore, had greater insight into how such items would be used in practice.

68. In order to streamline this process, AECOM, on [PropCo]'s behalf, therefore worked closely with [OpCo] to ensure that both the development and the installation of the FF&E were consistent with the likely end operation of the site as a profitable and working care home and all relevant legislation and regulation.

69. Nevertheless, the ultimate financial and contractual responsibility for the development and the FF&E fit-out vested in [PropCo] throughout.

70. The fit-out of the loose FF&E is ordinarily completed shortly after practical completion for reasons of practicality: the loose FF&E cannot be installed until after practical completion, as items such as bedroom furniture cannot be installed until after the walls have been erected and painted. Additionally, the practical completion certificate confirmation that the structural works are completed and structurally sound.

[…]

90. [PropCo] was both the owner and developer in the Leamington Spa build and as a result, [PropCo] was responsible both for securing the land and all subsequent development processes, including the design, construction, and completion of the build. Again, I had ultimate responsibility for both the procurement and development of the site.

[…]

94. Under the contractual agreements, [PropCo]'s responsibilities extended to undertaking the fitout of the FF&E items. This included ensuring that the FF&E were procured from reputable suppliers and installed in a manner which was compliant with all regulatory and legislative requirements.

95. Considerations regarding the scope, design and installation of the FF&E therefore took place during the early planning stages of the development, as part of the agreement as to the overall design and use of the completed premises. This was in part in order to ensure compliance with the Care Legislation and in part because certain items, such as built-in cabinets or the plumbing for items such as sluice machines, are required to be incorporated into the build.

96. As a result, [PropCo] made a commitment to incur the FF&E costs prior to the prospective tenant, [OpCo], taking on responsibility for the lease or becoming financially responsible for the completed development.

97. Nevertheless, as [OpCo] would ultimately be occupying and operating the care home, it was sensible to include [OpCo]in the discussions as to the placement of the FF&E. In so doing, [PropCo] was able to ensure that the care home, once completed, was capable of operating effectively and that the requirements of Regulation 15 were met.

98. As indicated above, I am a director of both SSPH and [OpCo]. From [OpCo]'s perspective, it would have been inconvenient, time consuming and costly if following practical completion they then had to also separately source

> and install the FF&E items. Where the developer has the end-to-end engagement, it is for the developer to ensure that the completed site is fit for purpose and therefore that all connections are appropriately sited. This includes matters such as ensuring that the walls are appropriated spaced, the storage capacity is adequate and the completed care home is equipped with the FF&E necessary for the care home to be operational. The tenant can merely walk into the completed building and open the premises for trade, untroubled by matters such as contractor or sub-contractor disputes, overruns and budget management. The tenant is therefore able to save the immediate capital spend on FF&E which would otherwise cause the opening of new homes to be very burdensome for the tenant.

40. Mr Prior described AECOM as acting as a "middle person". He was asked whether AECOM were on "your" side by Mr Macnab, to which Mr Prior's response was that they were "on both sides" and were "independent" as OpCo employed their own project managers. But Mr Prior also said that he was not involved in the negotiation or agreement of any of the contracts relating to the development of care homes and was not involved with the engagement of AECOM or the engagement of Thomas Vale Construction plc – these were all matters for Mr Rosenberg.

41. On 21 March 2013, PropCo (as Landlord) entered into an Agreement for Lease and Development ("the Agreement for Lease") with OpCo (as Tenant). SSD (as Developer) and CUK (as Guarantor of OpCo) were also parties. We note that the Agreement for Lease was executed before Mr Prior began his employment with OpCo.

42. Although a copy of the Building Contract was not included in the bundle, we infer from the terms of the Agreement for Lease that Thomas Vale Construction plc was engaged by SSD (not PropCo) as contractor under a JCT Design and Build Agreement dated 23 May 2014. As an expert tribunal used to dealing with property development, we have some familiarity with the suite of JCT building contracts, and a broad understanding of the way in which JCT Design and Build Agreements function.

43. In order for the grant of a major interest in Priors House to qualify for zero rating, a "Certificate for sales and long leases of zero-rated buildings" must be completed in the form specified in Section 18 of VAT Public Notice 708 (Buildings and Construction). The certificate for Priors House was dated 13 May 2013 and delivered by OpCo to PropCo. It states that the "Value (or estimated value) of the supply" [of the care home] was £199,500.

44. Notice of Practical Completion was given to Thomas Vale Construction plc by AECOM (as Employer's Agent) on 23 May 2014. The Notice was given subject to the agreement of the contractor to complete outstanding works set out in a covering letter from AECOM dated 23 May 2014. This included various snagging and other items, most of which had to be resolved by 6 June 2014.

45. The Lease between PropCo (as landlord), OpCo (as tenant) and CUK (as guarantor), was executed on 11 August 2014. The term of the Lease is 25 years from and including 24 May 2014.

Fitting out of Priors House

46. A care home has to be registered with the Care Quality Commission ("CQC") and comply with their standards, which include health and safety, infection control, and the safeguarding of vulnerable residents. CQC's requirements need to be considered in the design of the care home (including the choice and location of FF&E).

47. CQC's requirements depend upon the circumstances of the residents of a care home and the services it offers. Mr Prior gave as an example, a care home (such as Priors House) which

catered for residents with dementia. Such residents have greater dependencies and requirements than other residents, which need to be reflected in the design of the home and the furniture and other equipment used.

48. Mr Prior provided detailed evidence of the requirements of CQC. His evidence was that all the FF&E supplied by PropCo to OpCo was required by OpCo for it to operate Priors House as a care home in compliance with CQC's requirements (and other relevant regulatory obligations).

49. Of the various requirements prescribed by CQC, of particular relevance to this appeal are the requirements relating to the physical attachment of furniture and other items to walls and floors. Mr Prior describes this in his witness statement as follows:

> 39. […] [OpCo]'s health and safety requirements provide that items which are over 1 metre in height such as wardrobes or bookcases, which would ordinarily be "loose" items in a domestic setting, are required to be attached to the wall. This is consistent with the CQC's guidance on the application of Regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the "Regulations") as considered in the CQC's Inspection Reports for each care home and best practice. Similarly, televisions are required to be installed on brackets and the brackets must be attached to the wall. These are attached to the wall by way of a screw and therefore, it is possible to detach these items from the wall without causing damage to the building.
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> 40. These attachment measures are aimed at reducing the risk of vulnerable occupants causing harm to themselves or others by pulling over potentially large and heavy furniture.
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> 41. Residents with physical dependencies often use fixtures and furniture to provide additional support and stability when moving around the premises, which means it is imperative that items such as mirrors are more securely attached to the wall. This is because there is risk of greater harm to the resident if such item is accidentally pulled from the wall or removed in an unsafe manner. This risk is increased where the care home provides dementia care and accommodation, as residents with these specific dependencies often have a decreased awareness of the stability of these items or the harm which may occur if the items are improperly used. Securing these items helps to maintain the residents' independence and provide reassurance to family members and carers. Nevertheless, it is still possible to remove these items and move them to other rooms in the home without causing damage to the building.

50. Mr Prior also described the design philosophy adopted by OpCo:

> 24. The key principles in the design and building of a care home are to create a homely, domestic environment in which residents can live with dignity and find care, security, support, privacy and companionship. It is therefore important that the home does not feel impersonal, institutional or clinical.
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> […]
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> 51. CUCP care homes, including Leamington Spa, are designed to be a "home for life", meaning that CUCP focuses on ensuring that the residents are happy, settled and as far as possible, able to continue to lead independent lives.
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> 52. Incumbent in that commitment is the requirement, as regulated by the CQC, to offer the resident a choice in how they occupy and use the premises.
>
> […]

> 54. The residents' choice primarily affects the individual's bedrooms, however in a small number of cases this element of choice will extend to the communal areas. The most obvious example of how residents' choice operates in practice is in the selection of the colour scheme of the residents' room. CUCP ordinarily offer 8 different colour schemes for the residents to choose from and a certain number of rooms will be made available in each of those colour schemes. To the extent that, for example, a "green" room is not available at the time of the resident taking occupation of the care home, the resident may request that the colour scheme of an otherwise available room be changed to meet their personal preference. In addition to changing the soft furnishings, this will include removing and changing items such as the curtains. As a result, CUCP requires the ability to change and move the FF&E around the premises.
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> […]
>
> 56. As recorded at pages 84 to 100 of the 2019 CQC Inspection Report, CUCP also in practice moves FF&E around the premises where the rooms are occupied by a couple. This is in order to facilitate the couple sharing one room for sleeping and using their other room as a shared living room.
>
> 57. As regards the communal rooms, the residents are often offered a choice as to how they would like to use the room and as a result, what items are FF&E are necessary to be installed in that room. By way of example, the residents may elect to turn a craft or hobby room into a cinema.
>
> 58. Again, CUCP therefore requires the ability to change items in, for example, the residents' rooms and to move the FF&E items around the care home, dependent on both the residents' personal choice and preferences and the residents' and staff' wellbeing requirements. CUCP require the ability to make such changes without damaging the structure of the care home.

51. Mr Rosenberg has limited involvement with the selection and installation of FF&E. He was not involved with FF&E in relation to Priors House, as he only joined the businesses in May 2014. And after he joined the businesses, he described his involvement with FF&E as being limited to the approval of payments to suppliers, and that questions relating to FF&E were better directed to Mr Prior. He described Renray Healthcare Limited ("Renray") as one of the suppliers of FF&E used by the businesses, and he said that they assisted in the fitting-out of FF&E into care homes.

52. Mr Prior said that he would ordinarily become involved with the design of a care home to ensure that it met all regulatory requirements. He would review the build specifications and the FF&E to ensure that it met CQC's requirements.

53. Mr Prior's evidence was that choice and location of FF&E were matters which OpCo discussed with PropCo during the early planning stages of Priors House, to ensure that CQC's requirements were "incorporated into the build".

54. In his witness statement, Mr Prior said that ordinarily the OpCo projects team will be on the premises of a care home during the fit-out of the FF&E. This would be undertaken:

> 30. […] after the building has reached practical completion. The fit-out of the FF&E is usually done after practical completion, as the developers needed to first obtain a building certificate confirming that the development was structurally sound. This must be done before the FF&E fit-out can be commenced and residents accepted into the building. Once the care home has been fitted out, the care home staff will be brought on site for 3 weeks of training, following which the care home will be opened to residents. This inevitably leads to a small delay between practical completion and fit-out,

> however this delay is necessary for health and safety reasons, as it avoids a scenario where care home staff are on site for training whilst heavy furniture is being moved and installed around the premises.

55. The specification annexed to the Building Contract ("the Construction Specification") requires the contractor to provide a carpenter to be available for two weeks following practical completion of the construction to assist with fit out.

56. There is a six-month lead time for sourcing and delivery of FF&E, so its selection and the timetable for its fit-out is finalised during the course of the construction of a care home. In the case of Priors House because of overruns and delays in its construction, there was an overlap between the finalisation of the construction (described in AECOM's covering letter to the practical completion certificate) and the commencement of the fitting-out of the FF&E.

57. Once the fitting-out has been completed, the care home staff will be brought onto the site for three weeks of training. Only then will the care home be opened to residents.

58. The application to CQC for registration of a care home must be made at least 12 weeks prior to the planned opening date, and typically CQC will undertake a pre-occupational inspection prior to the planned opening date.

59. In the case of Priors House, the key dates in relation to its development were as follows:

	Date
Commencement of training for Priors Hall leadership team (OpCo)	3 March 2014
Commencement of training for Priors Hall core care team (OpCo)	8 May 2014
AECOM notice of practical completion	23 May 2014
Commencement of Lease term	24 May 2014 (but Lease executed on 11 August 2014)
Application to CQC for registration	26 May 2014
OpCo goes into occupation as licensee (first working day after practical completion)	27 May 2014
Commencement of FF&E fit out	27 May 2014
CQC pre-registration inspection	28 May 2014
Completion of FF&E fit out	6 June 2014
CQC registration	23 June 2014
Arrival of first resident	23 June 2014
Lease executed	11 August 2014 (but Term commenced on 24 May 2014)
First CQC compliance inspection	28 June 2016

60. We note that 23 May 2014 was a Friday, and that Monday 26 May 2014 was a bank holiday. The first working day after practical completion was Tuesday 27 May 2014.

61. Mr Rosenberg's evidence was that AECOM oversaw the fit-out of the FF&E items and were responsible for ensuring that the FF&E items were sourced in a manner which was compliant with regulatory standards and from reputable suppliers. However, Mr Prior's evidence was that AECOM were not involved in the sourcing and installation of FF&E unless the item of FF&E needed to be integrated into the construction programme (such as a custom-built servery counter which was integrated into the building itself). They would not be involved in sourcing or installing items bought from third-party suppliers (such as an armchair). Rather there was an individual employed by OpCo who was responsible for sourcing FF&E.

62. The majority of the FF&E was supplied by Renray a company specialising in supplying care homes. Mr Prior's evidence was that the choice of Renray as a supplier had been made by OpCo in conjunction with "the exec". However, there are other items supplied by other companies. These range from specialist items of equipment (such as telecommunications and computer networking, televisions, coffee machines and photocopiers) to more unusual items such as jigsaws and books designed for individuals with dementia. The total cost incurred by PropCo for FF&E (inclusive of VAT) was £586,422.97.

63. Included within the hearing bundle is "Revision 5" of the "FF&E Specification Address: Leamington" ("the Renray Specification"). Mr Rosenberg's evidence was that this was prepared by Renray in consultation with OpCo. Mr Prior's evidence was that the first draft of this specification was prepared by OpCo as part of the procurement process with Renray. It was, he said, a list of everything required by OpCo to run Priors House as a care home (with the exception of consumables such as food, paper, and chemicals). No copies of any of the other communications between OpCo and Renray were included in the bundle, nor was a copy of Renray's supply and installation contract.

64. The Renray Specification includes in its heading "Care UK Order No ARLS/AW600/GB01". Mr Prior said that the reference in the heading to the specification should not have included "Care UK" but should have referred instead to PropCo. For the reasons given above, we do not find Mr Prior's evidence reliable in this respect and find that the reference to "Care UK" (which we find must be a reference to OpCo) is correct as on any basis OpCo would be responsible for the sourcing of FF&E.

65. Mr Prior described the procurement process with Renray as involving a "design freeze meeting" attended by representatives from Renray and representatives from OpCo's design team and OpCo's regional director. A colour scheme for the home would be agreed with Renray, and a subsequent meeting would be convened at a later date to review "mood boards" presented by Renray. An initial specification for the home would then be prepared by OpCo and sent to Renray for pricing. The specification would be returned populated by prices and with a thumbnail illustration for each item incorporated into the specification. This iterative to-and-fro process would be repeated as the Renray Specification was finalised.

66. The Renray Specification goes through each room in Priors House and sets out in detail the items of furniture and equipment needed for that room. By way of example, the page of the Renray Specification for a staff lounge is set out in Annex Three to this decision. It can be seen that a dining table, stacking chairs, and scatter cushions had been removed from an earlier iteration of the specification, and that a tub chair had been added in the place of stacking chairs.

67. Once finalised, the Renray Specification was sent to "the exec" for final "sign-off". Providing the price for the items specified fell within the budget for the care home (as set out in the Final Transactional Appraisal), Mr Prior said that it was likely to be approved. We asked Mr Prior what he meant by "the exec", and he described this as meaning the senior management team within CUK.

68. Renray not only supplied the items included in their specification but fitted them as well. During the fitting out of Priors House, Renray would install the equipment they supplied. OpCo would also be on site to supervise the installation.

69. It can be seen from the table above that the installation of the FF&E commenced after practical completion of Priors House and after OpCo went into occupation. The installation was completed before the Operating Lease was granted.

70. Mr Prior was asked about the siting and location of furniture in rooms, and he said that the rooms in Priors House had been designed for the furniture to be located in a particular place.

This was needed to ensure, for example, that the room was accessible for wheelchairs, with sufficient turning spaces. He was asked whether the furniture had been designed with these issues in mind, but his response was that the majority of the furniture had been designed so as to be suitable for use by a person with disabilities.

71. Mr Prior also explained that although OpCo did not as a rule normally move furniture, there were times when it was moved. He gave as an example the case of couples who would be allocated two bedrooms with intercommunicating doors. One room would be used as their bedroom with en-suite bathroom. The other room would be a living room, with the associated bathroom converted into a kitchenette. In consequence furniture would need to be moved and relocated between the rooms.

72. It was also the case that some residents wanted the bedroom to include some of their own furniture, and OpCo would accommodate this whenever possible and appropriate, in order to provide the resident with a homely environment and to comply with CQC's requirements in this regard. Mr Prior said that OpCo kept one or two bedrooms in a care home unfurnished, and these would be available to a new resident who wanted to furnish his or her bedroom with his or her own furniture.

73. During the course of cross-examination of Mr Rosenberg and Mr Prior, we discovered that the distinction made between "consumables" (food, paper, chemicals) and the FF&E supplied for a "turnkey" development was blurred, as there were a number of items supplied to PropCo by Renray that had a very limited life or were disposable. The prime example of this were the "J-Cloths" which were included in the list of FF&E supplied by PropCo. There were also a number of single-use items included in the list, such as resuscitation masks and the contents of first-aid kits (such as wound dressings). Further, although we had no specific evidence on the point, our own personal experience is that items such as light bulbs, mop heads, plastic denture baths, and plastic protective googles have a limited life (and Mr Prior's evidence was that first-aid kits expired after five years).

74. When Mr Rosenberg was questioned about these items, his response was that he didn't think of these items as rented. but that these items were owned by the landlord and that the tenant had a leasehold interest in the item, and that the items had a "varying degree of life". Asked what happened when a J-Cloth was no longer usable and was thrown away, Mr Rosenberg's answer was the Lease was a "triple net" lease (what we would describe as a full repairing lease), and that the tenant was responsible for all repairs and replacements. If the item was included at the start of the lease, and the item was broken, the tenant would be expected to replace the item by the time the lease ended. Mr Rosenberg said that these items were included in the costs of the development incurred by PropCo, were provided by PropCo, and contributed to the rental return received by PropCo.

75. Mr Prior's evidence was that J-Cloths were not "consumables". He said that there would be a number of cleaning cupboards in a care home, and in each cupboard there was a trolly on which there were different coloured brushes and mops (for cleaning different kinds of spills and waste), and different coloured cloths which were associated with the different brushes and mops. As regards wound dressings, Mr Prior said that it was a consumable, as a plaster could only be used once.

76. Mr Prior stated that PropCo's consent was not required to relocate or replace items of FF&E. Mr Prior's evidence was that the care home's annual operating budget would make provision for the repair and replacement of worn or soiled items (to the extent that the budget was insufficient, the care home manager would need to put a new budget to "the exec"). When asked about the provision of new items, Mr Prior's evidence was that CQC did not make retrospective changes to equipment requirements. If the care home manager considered that

additional equipment was desirable, the manager would make a recommendation to "the exec" for the equipment to be purchased at OpCo's cost. As the new equipment was purchased by OpCo, it would not form part of the FF&E within the Lease and would remain the property of OpCo.

77. We noted also that some packs of tea and coffee were provided with the tea and coffee machines.

78. During the course of our questioning of Mr Prior, he stated that staff uniforms were not included in the list of items provided by PropCo. Mr Prior's explanation was that there was no obligation under CQC regulations for staff to wear uniforms – as there were circumstances where the wearing of uniforms in a care setting would be inappropriate. The use of uniforms at Priors House was only the practice of CUK and OpCo, and therefore it was outside the scope of a "turnkey" development, as these were not needed by a care home operator to be able to operate a care home from day one.

THE EVIDENCE

79. Mr Rosenberg's evidence was that:

(1) PropCo was both the owner and the developer of Priors House;

(2) the ultimate financial and contractual responsibility for the development and the FF&E fit-out vested in PropCo throughout;

(3) PropCo was responsible for the design, construction and completion of the build of Priors House;

(4) Priors House was developed as a turnkey development;

(5) He (Mr Rosenberg) had ultimate responsibility for the procurement and development of the Priors House site;

(6) AECOM took instructions solely from PropCo;

(7) AECOM were fully and only accountable to PropCo;

(8) AECOM oversaw the fit-out of the FF&E items and ensured that the FF&E items were sourced in a manner which was compliant with regulatory standards and from reputable suppliers;

(9) OpCo advised PropCo on aspects of the design of Priors House and the selection and sourcing of FF&E; and

(10) Under the contractual arrangements PropCo's responsibilities included undertaking the fit out of FF&E.

80. Mr Prior's evidence was that:

(1) Priors House was developed as a turnkey development;

(2) AECOM acted as a "middle person", were "on both sides", and were "independent" (as OpCo employed their own project managers);

(3) choice and location of FF&E were matters which OpCo discussed with PropCo during the early planning stages of Priors House, to ensure that CQC's requirements were "incorporated into the build";

(4) OpCo's recommendations were sent to "the exec" for "sign off", and that "the exec" then communicated with PropCo (although he had no knowledge as to how this was done);

(5) development on a turnkey basis provides OpCo with an additional 10-year warranty underwritten by the developer, which is longer than the warranty OpCo would otherwise be offered by the FF&E supplier directly; and

(6) it was quite common in the care home sector for new care homes to be constructed on a turnkey basis and that two of his former employers (Gracewell and Four Seasons) used turnkey developments.

81. Mr Rosenberg was neither a director nor an employee of any of OpCo, CUK, PropCo, SSPH, or SSD at any point of time during the planning and construction of Priors House. His evidence was that he was not involved in the purchase or procurement of the FF&E of any care home within the group – save to authorise spending after he joined the businesses. And he confirmed that as he joined the businesses at around the same time as Priors House opened, he was not, and could not, have been involved in the development or fitting out of Priors House.

82. Mr Prior's evidence was that he was not involved in the decision-making process to construct a new care home in Leamington Spa, nor in any of the contractual arrangements. His involvement in the development of Priors House (prior to its opening to residents) related solely to the fit-out of Priors House with FF&E and its compliance with CQC requirements.

83. We find that to the extent that anyone other than OpCo had contractual responsibility for undertaking the fit-out of FF&E, it could not have been PropCo. Mr Rosenberg's reference to the contractual arrangements can only be a reference to the Agreement for Lease and the Lease itself, as PropCo was not a party to any of the other agreements. Under the terms of the Framework Agreement and the Agreement for Lease, although PropCo was the owner of Priors House, it was SSD, and not PropCo, that was the developer of Priors House (it was SSD, not PropCo, that entered into the Building Contract with Thomas Vale Construction plc), and under the terms of the Agreement for Lease, whilst PropCo was liable for meeting the costs of the development of Priors House, it was SSD that had contractual responsibility for undertaking the development.

84. As Mr Rosenberg only joined the business at around the time that the construction of Priors House was completed, we do not understand his statement that he had ultimate responsibility for the procurement and development of the Priors House site.

85. Mr Rosenberg did not provide details of the source for his evidence about the communications between the various companies and that developments were undertaken on a "turnkey" basis, but in the course of cross-examination he said that there was a "template process" used by the businesses for all developments, and that all sites – both before and after he joined the businesses – followed the template. His evidence was that, so far as he was aware, nothing had changed since he joined CUK, and none of the documents have been amended. If this "template process" was merely the provisions of the Framework Agreement, then this "template" says nothing about new developments having to be undertaken on a "turnkey" basis. If the template is something more than just the Framework Agreement (and the model documents associated with it), copies were not included in the bundles, and there is no evidence (other than Mr Rosenberg's second-hand oral evidence) that this "template process" had been used for Priors House, and Mr Rosenberg gave no source for his belief that it was so used.

86. Mr Rosenberg and Mr Prior both assert in their evidence that OpCo communicated with PropCo about various matters. Mr Rosenberg said that OpCo advised PropCo on issues such as the plumbing of sinks and the siting of sockets. Yet, if this occurred, it was before Mr Rosenberg joined the Holdings and SSPH companies, and it would be something of which he could have no first-hand knowledge.

87. Mr Prior's evidence was that OpCo made recommendations to "the exec", and it was the exec who communicated with PropCo – as to which he had no first-hand knowledge.

88. There was no documentary evidence of any communications between SSD/PropCo on the one hand, and CUK/OpCo on the other. Nor was there any evidence of any communications between OpCo and "the exec", or between "the exec" and SSD/PropCo.

89. Under Framework Agreement and the Agreement for Lease, it is SSD (and not PropCo) which has the obligation to prepare the design and specification for Priors House and to appoint the professional team (and we note that AECOM's consultancy agreement is with SSD and not PropCo). SSD (and not PropCo) is responsible for procuring that the contractor builds Priors House and is treated as the only client for the purposes of the CDM Regulations 2007. It is SSD (and not PropCo) that enters into the Building Contract with Thomas Vale Construction plc. Under the terms of the agreements, it is SSD (and not PropCo) that has responsibility for the delivery of Priors House in accordance with the design and specifications (although we note that SSD is released from liability upon the issue of a Certificate of Making Good Defects). And as SSD has no employees of its own, it outsources its obligations to OpCo under the Technical Services Agreement. There is no documentary evidence to suggest that PropCo was in any way actively involved in the development process, beyond executing the Agreement for Lease and the Lease, and paying the bills. There is no documentary evidence suggesting that PropCo was involved in any way in the selection and purchase of FF&E (beyond payment of invoices addressed to it). In this context we note that AECOM's certificate of practical completion gives PropCo's address as "c/o Care UK" at OpCo's address in Colchester, and AECOM's covering letter to Thomas Vale Construction plc (setting out the additional works needed to be done after practical completion), was copied to Justin Daley of Care UK, and not to PropCo. Mr Daley is a construction project manager employed by OpCo. The fact that AECOM copied their correspondence to an OpCo manager supports our finding that it was OpCo (having delegated authority to act for SSD under the Technical Services Agreement) to whom AECOM reported. According to Mr Prior's evidence, there are four individuals employed within OpCo's construction team, of whom Mr Daley is one. His job is to ensure that the building meets the specifications set out in the associated plans and the mechanical and electrical engineering specifications. He will discuss this with AECOM, who will then deal with the contractor. Mr Prior did not know whether AECOM "fed back" to PropCo – and there is no evidence that it did so.

90. There is a conflict between Mr Prior's and Mr Rosenberg's evidence as to whether AECOM oversaw the fit-out of the FF&E items. Mr Rosenberg's evidence was that AECOM supervised the sourcing and installation of FF&E. Mr Prior's evidence was that AECOM only became involved if the installation of an item of FF&E needed to be integrated into the construction of the care home (such as a servery counter in the dining room). The services provided by AECOM under the terms of their consultancy agreement relate solely to the construction of the Prior House building and grounds – the agreement does not include any services relating to the FF&E or fitting-out. There is no documentary evidence to suggest that AECOM had any involvement in the selection or installation of FF&E. As Mr Rosenberg had not been involved in the procurement of FF&E or its installation, and as there is nothing in the terms of AECOM's consultancy agreement that corroborates Mr Rosenberg's evidence, we have no hesitation in preferring the evidence of Mr Prior in this respect. We find that OpCo (and not AECOM) was responsible for sourcing and overseeing the fit-out of the FF&E at Priors House.

91. We also note that Mr Prior's description of AECOM being on "both sides" is inconsistent with the terms of their consultancy agreement with SSD. Although a copy of the building contract with Thomas Vale Construction plc ("the Building Contract") was not included in the

bundle, as an expert tribunal familiar with property development, we have some familiarity with the operation of JCT Design and Build contracts and are aware that an employer's representative is required to act impartially when issuing certificates – but it is clear that in all other respects AECOM owed their duties to SSD, and not to Thomas Vale Construction plc, the building contractor, and so find. We find that AECOM did not act "on both sides".

92. We find that the evidence of both Mr Rosenberg and Mr Prior relating to the development of Priors House in the period before practical completion are inconsistent with the provisions of the documentary evidence. We find that the limited documentary evidence before us is more reliable than the evidence of both Mr Rosenberg and Mr Prior, and we draw adverse inferences from the absence of other documentary evidence (such as copies of communications and minutes of meetings). We find that the reality was that there was no need for OpCo to liaise with SSD or PropCo, as SSD had delegated all decision making relating to the development of Priors House to OpCo. And we find that AECOM took its instructions from OpCo, in its capacity as the service provider to SSD (AECOM's client under its consultancy agreement).

93. Mr Prior's evidence was that PropCo provided a 10-year warranty on FF&E under the terms of the Lease (or the Agreement for Lease). This evidence broke down under cross-examination and we find that there is nothing in any of the agreements that amounts to PropCo providing a "warranty" in respect of any item of FF&E, and that Mr Prior's statement that there is any such warranty is wrong.

94. More generally, we find that much of Mr Prior's evidence is just wishful thinking on his part. He had no real knowledge or understanding of the legal and contractual relationships between the parties, and his evidence about these relationships and the communications that occurred amounts to what he thought was or ought to have been the case, rather than what actually occurred (based on first-hand knowledge). Save to the extent that Mr Prior's evidence is self-evidently true or uncontested, or is corroborated (for example, by Mr Metcalfe, by photographs, or by documents), we place no reliance upon it.

95. We also place little reliance upon Mr Rosenberg's evidence. Much of his evidence related to periods prior to his joining the businesses, and he provided no basis for his beliefs as to what occurred prior to him joining. His evidence as to the economic reasons why opco/propco arrangements are used is consistent with our own knowledge (as an expert tribunal) of these kinds of arrangements. However, he had no first-hand knowledge about the development of Priors House or the FF&E, and we place no reliance on this aspect of his evidence, save to the extent that it is corroborated by documentary evidence.

96. Mr Metcalfe's evidence primarily related to the background to the making of the VAT assessments, and to his inspection of the FF&E at Priors House. His evidence as to the manner in which FF&E was installed was entirely consistent with that of Mr Prior, and we find that it is reliable.

ISSUES IN THIS APPEAL

97. The FF&E in dispute fall into two broad categories:

(1) FF&E which are in some manner fixed, attached, or installed in Priors House, which HMRC submit are "incorporated" and which PropCo submits are "loose". This includes items such as wardrobes and bookcases.

(2) FF&E which are on any basis "loose" (and not "incorporated"), this includes a wide range of items, such as chairs and tables, beds, linen, kitchen equipment, crockery, and general household goods, first aid kits, hairdressing kits, J-Cloths, puzzles, photocopier consumables and bird tables.

98. HMRC made its assessment on two separate bases, these are described as being the "input tax issue" and the "output tax issue".

99. The input tax issue concerns PropCo's entitlement to credit for input tax incurred on the purchase of FF&E, and whether the entitlement to credit is blocked by the operation of the "Builder's Block".

100. The output tax issue is whether PropCo should have charged output tax on its supply of the FF&E to OpCo. HMRC argue that any loose FF&E not blocked by the Builder's Block must be treated as separately supplied from the grant of the major interest in the building. Output tax is therefore chargeable on the FF&E. PropCo submits that no output tax arises on the basis that the FF&E forms part of a single supply of Priors House, the principal element of which was the zero-rated grant of a major interest in the Priors House building.

101. We therefore have two broad issues to determine.

102. The first is the input tax issue – to what extent is PropCo prevented from claiming credit for input tax on FF&E because of the operation of the Builder's Block?

103. The second is the output tax issue – was the FF&E supplied by PropCo to OpCo as an element of a single supply – the principal element of which was the zero-rated grant of a major interest in the Priors House building?

104. HMRC's assessments were made on the basis that

> (a) the FF&E was supplied to PropCo in the same VAT accounting period as the FF&E were supplied by PropCo to OpCo, and
>
> (b) the (VAT exclusive) value of the supply of FF&E to PropCo is the same as the (VAT exclusive) value of the supply of FF&E by PropCo. In other words, there is no "margin" between the price PropCo buys FF&E and sells it.

105. The legal burden of proof falls on PropCo in relation to all issues.

106. In considering these issues, it is not disputed that the FF&E was purchased by PropCo for onward supply to OpCo. This is evidenced by, amongst other things, the invoices for the FF&E which were addressed by Renray (and the other suppliers) to PropCo. It is not disputed that PropCo paid these invoices. We agree and find that PropCo purchased the FF&E with the intention of making an onward supply of the FF&E to OpCo, and that PropCo actually supplied the FF&E in dispute in this Appeal to OpCo.

107. Nor is there any dispute that the initial grant of the Lease was the grant of a major interest in land falling within Item 1(a)(ii) of Group 5, Schedule 8, VAT Act, and is therefore a zero-rated supply. Again, we agree and find that the grant of a lease of the Priors House building and associated land on the terms of the Lease was the grant of a major interest in land by PropCo to OpCo.

108. At the risk of stating the obvious, Priors House is located in England. The Framework Agreement, the Technical Services Agreement, the Lease and AECOM's consultancy agreement are all expressly governed by English law. Curiously, the Agreement for Lease does not include a jurisdiction clause, but it will be governed by English law by virtue of the Rome I Regulations (Regulation (EC) No 593/2008) which were applicable at the relevant times.

109. Mr Macnab informed us that HMRC had taken a pragmatic position when raising its assessments in respect of items of FF&E that it considered were both incorporated in Priors House and subject to the Builder's Block. HMRC had treated these items as being part of a single composite supply of the Priors House building. As regards other items, HMRC had

raised its assessments on the basis that the value of the supply made by PropCo to OpCo was the same as the cost of the item to PropCo.

THE LEGISLATION

Output tax liability

110. Section 1 VATA provides:

> **1.— Value added tax.**
>
> (1) Value added tax shall be charged, in accordance with the provisions of this Act—
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply) […]

111. Section 4 VATA provides

> **4.— Scope of VAT on taxable supplies.**
>
> (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.

112. Section 30 VATA provides

> **30.— Zero-rating.**
>
> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section—
>
> (a) no VAT shall be charged on the supply; but
>
> (b) it shall in all other respects be treated as a taxable supply;
>
> and accordingly the rate at which VAT is treated as charged on the supply shall be nil.
>
> (2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 […]

113. Schedule 8, Group 5, VAT Act specifies the following descriptions of goods or services for the purposes of zero-rating:

Item No	
1	The first grant by a person— (a) constructing a building— […] (ii) intended for use solely for a relevant residential […] purpose; […] of a major interest in, or in any part of, the building, dwelling or its site.
2	The supply in the course of the construction of—

(a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose;

[…]

4 The supply of building materials to a person to whom the supplier is supplying services within item 2 or 3 of this Group which include the incorporation of the materials into the building (or its site) in question.

Notes

(4) Use for a relevant residential purpose means use as

[…]

(b) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder;

[…]

(12) Where all or part of a building is intended for use solely for a relevant residential purpose or a relevant charitable purpose—

(a) a supply relating to the building (or any part of it) shall not be taken for the purposes of items 2 and 4 as relating to a building intended for such use unless it is made to a person who intends to use the building (or part) for such a purpose; and

(b) a grant or other supply relating to the building (or any part of it) shall not be taken as relating to a building intended for such use unless before it is made the person to whom it is made has given to the person making it a certificate in such form as may be specified in a notice published by the Commissioners stating that the grant or other supply (or a specified part of it) so relates.

[…]

(14) Where the major interest referred to in item 1 is a tenancy or lease—

(a) if a premium is payable, the grant falls within that item only to the extent that it is made for consideration in the form of the premium; and

(b) if a premium is not payable, the grant fails within that item only to the extent that it is made for consideration in the form of the first payment of rent due under the tenancy or lease.

114. Section 96(1) VAT Act provides that-

> "major interest", in relation to land, means the fee simple or a tenancy for a term certain exceeding 21 years […]

115. Paragraph 4, Schedule 4, VAT Act provides that the grant of a major interest in land is a supply of goods.

Input tax credit

116. As regards credit for input tax, s25 VAT Act provides:

> **25.— Payment by reference to accounting periods and credit for input tax against output tax.**
>
> (1) A taxable person shall—
>
> (a) in respect of supplies made by him,

[…]

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

[…]

(7) The Treasury may by order provide, in relation to such supplies … as the order may specify, that VAT charged on them is to be excluded from any credit under this section […]

117. Article 6, Value Added Tax (Input Tax) Order 1992, provides as follows:

Disallowance of input tax

6.—Where a taxable person constructing, or effecting any works to a building, in either case for the purpose of making a grant of a major interest in it or any part of it or its site which is of a description in Schedule 8 to the Act, incorporates goods other than building materials in any part of the building or its site, input tax on the supply, acquisition or importation of the goods shall be excluded from credit under section 25 of the Act.

118. Article 2 of the Builder's Block defines "building materials" by reference to Notes 22 and 23 to Schedule 8, Group5, VAT Act

'building materials' means any goods the supply of which would be zero-rated if supplied by a taxable person to a person to whom he is also making a supply of a description within either item 2 or item 3 of Group 5.

119. Notes 22 and 23 of Schedule 8, Group 5, VAT Act provide as follows:

(22) "Building materials", in relation to any description of building, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site), but does not include—

(a) finished or prefabricated furniture, other than furniture designed to be fitted in kitchens;

(b) materials for the construction of fitted furniture, other than kitchen furniture;

(c) electrical or gas appliances, unless the appliance is an appliance which is—

(i) designed to heat space or water (or both) or to provide ventilation, air cooling, air purification, or dust extraction; or

(ii) intended for use in a building designed as a number of dwellings and is a door-entry system, a waste disposal unit or a machine for compacting waste; or

(iii) a burglar alarm, a fire alarm, or fire safety equipment or designed solely for the purpose of enabling aid to be summoned in an emergency; or

(iv) a lift or hoist;

(d) carpets or carpeting material.

> (23) For the purposes of Note (22) above the incorporation of goods in a building includes their installation as fittings.

OPERATION OF THE BUILDER'S BLOCK

120. The effect of the Builder's Block is to block claims for input tax on incorporated FF&E unless those items of FF&E are "building materials".

121. This means that PropCo can only claim credit for input tax on items of FF&E supplied to OpCo if (broadly) the item of FF&E:

(1) has not been incorporated into the Priors House building; or

(2) is an item of "building materials" that has been incorporated into the Priors House building; in other words, the incorporated item is both

(a) of a description ordinarily incorporated by builders into care homes, and

(b) not expressly excluded because it is furniture (other than kitchen furniture), a gas/electrical appliance, or carpets

122. There are therefore two elements of the Builder's Block that we need to consider:

(1) The extent to which the FF&E have been "incorporated" into Priors House for the purposes of the Builder's Block; and

(2) Whether "incorporated" FF&E were "building materials" (or whether such items were excluded from being building materials).

Were items of FF&E incorporated into Priors House?

123. The law relating to the application of the Builder's Block was decided definitively in the decisions of the Upper Tribunal in *Taylor Wimpey v HMRC (No 1)* [2017] STC 639 and *Taylor Wimpey v HMRC (No 2)* [2018] STC 689. As decisions of the Upper Tribunal, they are binding upon us. These decisions related primarily to the supply of kitchen appliances ("white goods") as part of the sale a newly built residential home.

124. In *Taylor Wimpey 1*, the Upper Tribunal drew a distinction between the English land law concept of a fixture, and "incorporation" for the purposes of VAT:

> [98] As to "installation as fittings", we do not consider that the word "fitting" has any legally established meaning. It means, in substance, no more than a chattel somehow attached to the building where the degree of attachment is not sufficient, on the facts of the particular case, to constitute the item as a fixture. In the 1995 Order there is, of course, an express provision which brings items installed as fittings into the concept of "incorporation". For our part, we do not think that that is to stretch the concept incorporation. And just as the express provisions of the 1995 Order do not stretch the concept of incorporation, so too, it is a perfectly natural use of the word "incorporates" in earlier iterations of the Builder's Block to include within its concept the installation of a chattel as a fitting. It will be necessary, in a given case, to consider whether something has been installed as a fitting, or whether it is a mere chattel, but we consider that assistance may be derived from considering the question not solely from the perspective of whether something may be described as "a fitting", but whether it is installed as such. If something requires installation, that will, in our view, often be an indication that it falls to be considered to be a fitting.
>
> […]
>
> [101] The purpose of the Builders' Block is to block recovery of input tax on all components of a building other than the excepted, core, items. It would be

inconsistent with this purposive approach to construe the Builders' Block in a way that would exclude items installed as fittings from being regarded as incorporated in the building, with the result that such fittings would be zero-rated as part of the single supply with the dwelling and the input tax on those fittings would be recovered. That would have the consequence, at least prior to 1 March 1995, that installed fittings would have the benefit of recovery of input tax, but fixtures which were not 'core' in the sense of not having been ordinarily installed by builders would not benefit from recovery. Adopting a purposive approach to the construction of 'incorporated', we find that the expression cannot be limited to fixtures, but must include items installed as fittings before as well as after the 1995 Order.

[…]

[111] In our judgment, therefore, the test of incorporation is not determined by reference to the English land law of fixtures, nor by whether the item is part of the single zero-rated supply for VAT purposes. An item will be incorporated in a building if it is a fixture, and also if it is installed as a fitting. That does not depend on nice distinctions of land law, and whether something is part of the land. Nor does it involve an enquiry into whether the item is part of the single supply of the dwelling, either because it is part of the building or on *CPP* principles; that is a pre-condition for the Builders' Block becoming material in a given case, but it does not determine the application of the block.

[112] That leaves the question of the criteria that should be applied in order to determine if an item, which is not a fixture, is installed as a fitting. The test must be such as to be consistent with the statutory language of incorporation in a building. Without setting a prescriptive test, there must in our view be a material degree of attachment to the building, albeit less than the degree of annexation required for something to be a fixture. In our judgment mere attachment to an electricity supply by a removable plug is not, on its own, sufficient for the item to be regarded as installed as a fitting, or incorporated. Some other feature or features of installation is necessary, whether by housing the item in a particular structure, or by fixing the item in a manner designed to be other than temporary either to a physical part of the structure or to a supply of electricity, gas or water or means of ventilation or drainage.

[…]

Installed fittings

[119] We are unable, without further submission, finally to determine the extent to which those Claim Items that were not fixtures should be classified as installed fittings so as to meet the test of incorporation in the building. Our view essentially is that, from the list of Claim Items, the only items that will be neither fixtures nor installed fittings will be white goods that are free-standing and attached to the building by means only of a removable plug or other temporary attachment to the mains services, in circumstances where the equipment is of its nature portable in the ordinary course.

[120] Without making any findings in relation to the Claim Items themselves, it would be expected, for example, that a built-in oven, a surface hob (to the extent they were not fixtures), an extractor hood, a wired and plumbed-in washing machine and a wired and plumbed-in dishwasher would all be installed fittings. Stand-alone washer driers and tumble driers would likewise be installed fittings if either they were attached in a non-temporary manner to ventilation or were installed in a location with some reasonable expectation of permanence, in the sense of the expected working life of the appliance. If the latter criterion were met, the same would apply to refrigerators, freezers and

> fridge freezers, and to microwave ovens. It is only if such items are essentially free-standing and properly regarded as portable, even if attached to the mains, that they would not qualify as fittings, but would be mere chattels, and thus outside the meaning of 'incorporated' for the purpose of the Builders' Block. An example would be a microwave oven that is simply placed on the kitchen work surface, and which is plugged in for use. Finally, fitted carpets would clearly be fittings.

125. Because the parties were not able to resolve whether items were to be treated as installed or incorporated on the basis of the Upper Tribunal's decision, in *Taylor Wimpey 2* the Upper Tribunal analysed particular items that the developer supplied with a home:

> [13] For Taylor Wimpey, Mr Peacock submitted that Claim Items which meet any of the following criteria would fall not to be 'incorporated' for the purpose of the Builder's Block, namely: (1) Claim Items that are free-standing; (2) Claim Items that are attached to the building by means only of a removable plug or other temporary attachment to the mains services; and (3) Claim Items that are goods properly regarded as 'portable' even if attached to the mains.
>
> [14] With respect to Mr Peacock, that is not a fair reading of what we said at [119] of the first UT decision. It is, we think, clear from that paragraph that all of the criteria we referred to would have to be present if an item included in the sale of the building were not to be an installed fitting.
>
> [15] Mr Peacock submitted in the alternative that even if it were the case that all those criteria had to be met, the Claim Items would satisfy that test, and should thus be found not to have been incorporated in the buildings at the relevant times. As part of this submission, Mr Peacock argued that our description of the required feature or features of installation in [112] would exclude an item, albeit one that was plugged-in, that was merely placed in a space left for it in a kitchen as that would not amount to the item being housed in a particular structure. He submitted that, on the basis of the FTT's findings of fact, all the High Specification Appliances were up to 1996 free-standing and not integrated, attached to the building by means only of a removable plug and inherently portable.
>
> [16] Mr Peacock points to the finding of the FTT, at FTT1, [177], that 'in the 1980s the high specification appliances were merely plugged and plumbed in. They were not built in or installed.' He refers also to the FTT's finding, at *FTT1*, [62], that 'Wimpey Homes' marketing strategy changed [in 1996] to provide fully integrated kitchens. This meant that installed appliances (where appropriate) would be integrated into the fitted kitchen units (normally by having a matching door) …' Mr Peacock submits in this regard that the conclusion to be drawn from this is that prior to 1996 all appliances were free-standing and merely plugged and plumbed in, and that they were consequently not 'incorporated' for the purposes of the Builder's Block according to the tests set out in the first UT decision. He further submits that even during 1996 and 1997 (the end of the Claim Period), the majority of white goods would still have been free-standing as the change to having fitted kitchens only began to be rolled out from this time in respect of certain brands. In relation to so-called 'wet appliances', namely dishwashers, washing machines and washer driers (except in so far as they may have been self-condensing), Mr Peacock submitted that the only evidence before the FTT was that wet appliances were free-standing until 1996 and that such free-standing appliances were not wired-in but were connected to the water and waste through temporary connections.

[17] We do not accept Mr Peacock's submissions in this respect. First, we regard it as clear from the first UT decision that it is not necessary that an item should be integrated, in the sense of being fixed to the fabric of the building or a structure within it such as a cabinet or door. Such integrated items would, according to our decision at [113]–[118], be fixtures; and it is clear that items other than fixtures may be regarded as installed as fittings and thereby be incorporated in the building.

[18] Secondly, the suggested distinction between items that are free-standing and those which are integrated does not have sufficient regard to our description at [120] of the first UT decision of installed fittings as including items such as washer driers and tumble driers that are attached to ventilation in a non-temporary manner, or those and other items such as refrigerators, freezers, fridge freezers and microwave ovens, that are installed in a location with some reasonable expectation of permanence, in the sense of the expected working life of the appliance. Items may be free-standing, in the sense that they are not screwed in but merely rest on their own weight, but nonetheless be installed fittings by being fitted into a kitchen in a location where they can reasonably be expected to remain and not be moved on a regular basis.

[19] Thirdly, our conclusion that free-standing items that were properly regarded as portable, even if attached to the mains, would be mere chattels, and not installed fittings does not depend, as Mr Peacock suggested that it should, on whether the item may be removed at any stage, for example by being capable of being taken by the owner to a new home on the sale of the house in question. Our reference in [120] to an item being 'properly regarded as portable', is a reference back to the requirement we had identified at [119] that for a Claim Item not to be an installed fitting (and thus not incorporated in the building), not only would it have to be free-standing and attached to the building by means only of a removable plug or other temporary attachment to the mains services, it would also have to be of its nature portable in the ordinary course.

[20] It is apparent that some confusion might have been caused by our use of the expression 'portable in the ordinary course'. By that we meant to confine the cases where the Claim Item would not be an installed fitting to those where the item itself was portable as a matter of its general day-to-day use. We had in mind, though by analogy only as they were not Claim Items, appliances such as toasters or irons, which in their day-to-day use might reasonably be expected to be moved from place to place. Our conclusion in principle with regard to microwave ovens that are merely placed on a work surface and are plugged-in in a temporary manner was based on the essential day-to-day portability of such an appliance (it may in the normal course of its use as such be moved from place to place on the work surface), and not on the fact that it could be taken by the householder to a new house on removal from the existing property.

[21] It is thus the case, in our view, that Claim Items that are placed in a space in a kitchen designed or intended to accommodate those items, are installed as fittings and are to be regarded as incorporated in the building for the purposes of the Builder's Block. As Mr Macnab submitted, the evidence in relation to the High Specification Appliances was that those items were, at the least, removed from their packaging, positioned into the slots or spaces designed or intended to accommodate them, plugged in, plumbed in (where appropriate) and operational (see *FTT1*, at [148]). The FTT found, at *FTT1*, [83], that even in the 1970s, kitchens would be fitted such that appliances might be installed by the buyers in the spaces left for that purpose. By the time, in the 1980s, that

> High Specification Appliances began to be included, those appliances, although self-standing and not at that stage yet integrated, were fitted and installed by the builders themselves, or their sub-contractors, into designated spaces in the fitted kitchen units. For example, as the FTT found at *FTT1*, [101], by reference to a 1982 plan for a four-bedroomed house, the kitchen units were fully fitted, with spaces for 'a dishwasher and built under fridge'.
>
> [22] High Specification Appliances, other than any microwave ovens that are merely placed on the work surface in the manner we have described, also lack the essential element of portability in their day-to-day use in order not to be regarded as installed fittings. We do not regard such items, even if they are free-standing in the sense of not being integrated by being screwed-in or otherwise fixed to the fabric of the building or the kitchen units, as being outside the description of installed fittings.

126. In the light of two *Taylor Wimpey* cases, we find that the following characteristics need to be considered in determining whether an item is "incorporated":

(1) For an item to be incorporated, it need not necessarily be a fixture for the purposes of English law (*Taylor Wimpey 1* at [111] and *Taylor Wimpey 2* at [17]).

(2) A material degree of attachment to the structure of the building, or permanence in its location, is required for an item to be incorporated (*Taylor Wimpey 1* at [112] and *Taylor Wimpey 2* at [18]).

(3) Whether the item is included within a single (composite) supply of the building is irrelevant to the question of whether it is incorporated (*Taylor Wimpey 1* at [111]).

(4) Mere attachment to an electricity supply by a removeable plug is not sufficient for an item to be incorporated (*Taylor Wimpey 1* at [112]).

(5) An item is incorporated if it is housed in a "particular structure" (*Taylor Wimpey 1* at [112]).

(6) "Integrated" appliances (in the sense of being fixed to the fabric of the building or a structure within it such as a cabinet or door) are fixtures and incorporated (*Taylor Wimpey 2* at [17]).

(7) An item is incorporated if it is fixed to a physical part of the structure in a manner designed to be other than temporary (*Taylor Wimpey 1* at [112]).

(8) An item is incorporated if it is fixed to an electricity, gas, or water supply, or to ventilation or drainage, in a manner designed to be other than temporary (*Taylor Wimpey 1* at [112]).

(9) Items that are free-standing, in the sense that they are not screwed in but merely rest on their own weight, will nonetheless be incorporated if they are fitted in a location where they can reasonably be expected to remain and not be moved on a regular basis (*Taylor Wimpey 2* at [18]).

(10) An appliance will be treated as incorporated if it is placed in a location with some reasonable expectation of permanence, in the sense of the working life of the appliance (*Taylor Wimpey 2* at [18])

(11) An item that is of its nature "portable in the ordinary course" (in other words which in its day-to-day use might reasonably be expected to be moved from place to place) is not incorporated (*Taylor Wimpey 1* at [119] and *Taylor Wimpey 2* at [20]).

(12) Appliances that are placed on work surface and plugged-in for use are not "incorporated" (*Taylor Wimpey 1* at [120]).

127. PropCo and HMRC have been able to agree on the "incorporated" status of many of the items of FF&E. We set out in Annex Two a table of all the items of FF&E where their "incorporated" status remains in dispute, the evidence in respect of the item, the respective submissions of the parties relating to the item, and our findings as to whether they are to be treated as "incorporated".

General observations

128. As Mr Simpson made a number of submissions that apply to all or across many of the items of the FF&E that HMRC submit are incorporated in Priors House, it is convenient to deal with those submissions here.

129. He submits that these items can be grouped into the following four categories:

(1) items that rest on the floor and in other contexts are normally not attached to the wall, but in a care home are attached to a wall with one or two screws to reduce the risk of being pulled over. These items include wardrobes, bedside tables, bookcases, sideboards, library units, workstations, lockable and other storage cupboards, and lockable and other filing cabinets; ("otherwise free-standing items" or "otherwise free-standing furniture");

(2) items that do not rest on the floor, but are attached to a wall, although they can be unattached and moved to a different location without significant damage to the wall. These include display cases, wall brackets for bath thermometers, wall brackets for suction machines, paintings, and maiden pulleys ("wall mounted items");

(3) items that are mounted on a bracket or other mounting that is itself attached to a wall and falls within (2) above, but can be removed from the mounting by lifting. These are the bath thermometers, suction machines, and televisions ("clipped items"); and

(4) curtains, voiles, and blinds ("window dressings").

Otherwise free-standing and wall mounted items

130. Mr Simpson submits that none of the items in dispute are attached to Priors House with any degree of permanence. He submits that this is because it is important for these items to be moved easily around the care home in order to meet the regulatory requirement that residents have a say in how they live in and occupy what is now their home. A resident may, for example, want a wardrobe to be moved to a different location in his or her room. The reason why they are attached to the wall is to reduce the risk of the item falling over and onto a resident (Mr Prior gave as an example an open drawer of a bedside table, and a resident grabbing onto it in order to steady him or herself). Mr Simpson submits that although the attachment is undertaken to avoiding the risk of toppling, the attachment is deliberately done in a way that makes the furniture easy to detach without damage to the walls so it can be moved to a different location.

131. We disagree with Mr Simpson's submissions for the following reasons.

132. The only evidence of otherwise free-standing furniture being moved was Mr Prior's evidence relating to movement of bedroom furniture and to the repurposing of a communally used room (such as an art/crafts room being repurposed as a cinema, or vice versa). There was no evidence of any of the otherwise free-standing furniture located in offices (and other areas not frequented by residents) ever being moved. This includes, for example, staff lockers, storage cupboards, and filing cabinets. There was also no evidence of the otherwise free-standing furniture located in communal areas used by residents being moved (other than when a communal room was repurposed). Some of these items (such as a servery counter in a dining room) were "bespoke", specifically designed for the particular location, and were clearly never intended to be moved once installed. There was no evidence that other items that were not

bespoke were ever intended to be moved (such as picture frames and the workstations used by care home staff).

133. In considering movement of bedroom furniture, Mr Prior's evidence was that:

(1) Bedrooms were designed with an intention that each item of furniture in the bedroom would be located in a specific place. This was necessary to ensure that there was sufficient space to accommodate, for example, the turning of a wheelchair.

(2) There were some bedrooms with intercommunicating doors. If a couple became residents, they could occupy one of the intercommunicating rooms as a bedroom (with en suite bathroom) and use the other room as a living room (with an en suite kitchenette). The furnishings of the rooms would be reallocated between the two rooms appropriately (and the bathroom attached to the living room would be repurposed as a kitchenette).

(3) Residents could bring their own furniture (such as a wardrobe) to make their room more homely, but this would be subject to the furniture being appropriate (and in compliance with relevant regulations) and its location not interfering with the access requirements (such as for wheelchair movement). It would need to be secured to the wall in the same way as Prior House's own furniture.

(4) Residents could ask for furniture to be moved within a bedroom, but this would be subject to the new location not interfering with the access requirements.

(5) In the case of wardrobes, a wooden batten was screwed to the wall, and the wardrobe was then fixed with screws to the batten. In the case of smaller furniture (such as bedside tables or dressing tables) one end of a strap or bracket was screwed to the furniture, and the other end screwed to the wall. In both cases, the fixings could be removed without damaging the furniture or the wall.

(6) The electrical and signal connections for televisions were located on the wall next to the television bracket wall plate – which meant that in practice the television bracket and television could not be moved to any other location in the room.

134. As regards the repurposing of a communal room (say from an art/craft room to a cinema), we had no evidence of the nature of the furniture that would need to be moved as a result of the repurposing, nor the frequency with which repurposing would occur.

135. In relation to bedroom furniture, Mr Prior's evidence was that OpCo did not as a rule normally move furniture. We infer from his evidence that any movement of furniture (for example the substitution of a resident's own furniture or the relocation of furniture between interconnecting rooms) would occur (if at all) when individuals first became residents of Priors House. We also infer from Mr Prior's evidence that it would be very difficult to change the location of major items of furniture within a bedroom (such as beds or wardrobes) because of the need for the furniture to be positioned to allow access for equipment and wheelchairs. So, although we note that otherwise free-standing furniture in a bedroom can be moved, this is unusual. And once a new resident has moved into a particular bedroom, the furniture will remain in its location for as long as that resident lives in the care home. We find that once installed, this furniture can reasonably be expected to remain in place and not be moved on a regular basis.

136. Mr Prior's evidence was that one or two bedrooms in a care home would be left unfurnished. In consequence, the fact that a new resident wanted to use their own furniture would not necessarily mean that existing furniture had to be moved.

137. We note Mr Prior's evidence that otherwise free-standing furniture and wall mounted items that are installed in bedrooms can be uninstalled without incurring damage to the building

or the item (although we believe that some degree of "making good" and redecorating might be required to stop-up any holes in the walls). But we are aware, for example, that integrated kitchen appliances (such as refrigerators or dishwashers, which the Upper Tribunal held in *Taylor Wimpey 2* at [17] were installed as fixtures) can also be uninstalled without incurring any damage to a building. We find that the fact that an item can be uninstalled without incurring significant damage is irrelevant to the issue of whether that item is to be regarded as incorporated.

Clipped items

138. The wall brackets for bath thermometers and suction machines are (in each case) designed specifically for the associated clipped items, and it appears unlikely (and we find) that the wall bracket could accommodate a thermometer or suction machine (as the case may be) other than the model for which it is designed.

139. The wall brackets for the suction machines, as well acting as convenient storage points, also act as charging stations and are connected to a nearby electrical socket. The suction machine makes an electrical connection with the bracket, so that the machine is kept fully charged whilst stored on the bracket. Whilst the wall brackets for the thermometers do not have any charging function, they are designed specifically for the associated bath thermometers. Mr Prior's evidence was that the siting of the thermometer wall brackets was chosen so that they would be in full view of a staff member when running a bath for a resident, so he or she would be reminded to check the bath temperature.

140. Both the suction machines and the bath thermometers are supplied together with their associated wall bracket by Renray as composite items. The suction machine is described in the Renray Specification as "Laerdal Suction Unit with disposable system (78001003) with wall mounting bracket", and the bath thermometer as "Copper cased scooped bath thermometer". They are priced inclusive of the associated bracket – the brackets are not sold as a separate item that is separately priced. We find that the sale by Renray of each clipped item together with its associated wall bracket – and any onward supply by PropCo to OpCo - is a single (composite) supply for VAT purposes, and the supply takes its character from its primary element in each case – which is not the wall bracket but the clipped item (the suction machine and the bath thermometer respectively). Alternatively (if we were found on an appeal to be wrong to treat these items in this manner), we would find that the value of the wall bracket was negligible in comparison to the clipped item.

141. We distinguish the suction machines and the bath thermometers from televisions. Neither the bath thermometers nor the suction machines are intended to be used whilst on their brackets, their brackets are intended to store the item when not in use and are designed so that the item can be easily removed for use when required. In the case of the televisions, the television can only be used when fitted to a wall bracket (the televisions have no "stand" and cannot be placed on top of a table or shelf, for example, without falling over). The televisions are wired into the television signal and electricity sockets located by the wall bracket. Contrary to Mr Simpson's submissions, the televisions cannot be removed from their wall mountings simply by lifting - Mr Prior's evidence was that the televisions were bolted to the brackets.

Window dressings

142. The assessments in this appeal were made prior to the decision of the FTT in *Wickford Development Company v HMRC* [2020] UKFTT 387 (TC), and Mr Metcalfe acknowledged that he had not considered that case when he made the assessments. In the light of that decision, he accepted that manual blinds were incorporated fittings of a kind ordinarily incorporated by builders and were therefore not blocked.

143. We address the status of curtains and voiles in Annex Two.

Were items of FF&E "building materials"?

144. The term "building materials" is defined in Notes 22 and 23 of Schedule 8, Group 5, VAT Act as being

> goods of a description ordinarily incorporated by builders in a building of that description.

145. However, Note 22 specifically excludes the following items from being building materials:

(1) Finished or prefabricated furniture (other than kitchen furniture);

(2) Materials for the construction of fitted furniture (other than kitchen furniture);

(3) Electrical and gas appliances (with limited exceptions); and

(4) Carpets.

146. In Annex Two we set out our findings as to whether any of those items are specifically excluded from being building materials by virtue of Note 22.

147. The Upper Tribunal in *Taylor Wimpey 1* considered whether items are to be considered as ordinarily incorporated by builders in a building:

> [124] In our judgment, the proper focus must be on the language of the provision, which applies a test of ordinariness of the installation or incorporation in a building. The question is not a new one: it was considered as long ago as 1968 in *F Austin (Leyton) Ltd* by reference to corresponding provisions under the Purchase Tax Act 1963. Two questions arose in that case. The first, with which we are not concerned, was whether a fixed and built-in dressing table was 'furniture' within the relevant statutory meaning. The second was whether a unit of that nature was 'ordinarily installed by builders as a fixture'.
>
> [125] The provision at issue in *F Austin (Leyton) Ltd*—Group 11, Sch 1 to the 1963 Act—bore similarity to the exceptions to the Builders' Block, in that it grouped together builder's hardware, sanitary ware and other articles of kinds ordinarily installed by builders as fixtures. Given the similarity, it is worth e referring fully to the analysis given by Stamp J, [1968] Ch 529 at 538–539:
>
> > As a matter of the ordinary meaning of the English language, the word "ordinarily", in my view, governs the whole of the rest of the phrase "installed by builders as fixtures" and does not serve to distinguish articles installed ordinarily as fixtures from those which are installed by builders, but not as fixtures. To fall within the category described, the articles must be both of a kind ordinarily installed by builders and of a kind ordinarily installed by builders as fixtures. Nor, in my judgment, does the word "ordinarily" serve to distinguish articles ordinarily installed by builders as fixtures from articles ordinarily installed as fixtures by persons who are not builders. The word "ordinarily" when read in conjunction with the opening words "builders' hardware, sanitary ware and other articles of kinds" and the concluding words "as fixtures" indicate, in my judgment, that what is meant by the words "ordinarily installed by builders" is that they are ordinarily installed in the course of building—articles which one would expect a builder to install as fixtures in the ordinary way and without any special instruction. The articles which are specifically spoken of are clearly articles which one would expect a builder to install as fixtures as a matter of course because a builder when performing his function of building ordinarily installs them. A prospective purchaser viewing a house and finding no pipes, basins, baths, cisterns or w.c.s would, I venture to

> think, express surprise that such articles were not there, and he would do so because these articles are of kinds ordinarily installed by builders as fixtures. If, however, he said to the builder following him round "Why are there no fitted dressing tables?", the surprise would, I venture to think, be on the other side, and the question might appropriately be answered by the builder by some such remark as "builders in this country do not at present ordinarily install articles of that kind as fixtures", and, if the impertinent visitor remarked, "But I have been looking at some houses up the road where the builder has installed dressing tables as fixtures" the builder might, I think, patiently and, in my judgment, correctly reply "that is still today exceptional though the time may come when all furniture is ordinarily installed as fixtures". That day is, in my judgment, still before us. As I have indicated, I am assisted to the conclusion to which I have come on this part of the case by the consideration that the phrase in question is part of a longer description of articles which comprise articles of a kind which a builder does ordinarily install and does ordinarily install as fixtures—e.g. builders' hardware and sanitary ware—and if the latter part of the phrase is not to be construed as ejusdem generis with builders' hardware and sanitary ware, it would at least derive colour from those terms. But the whole description is of a genus, namely articles which a builder would instal as fixtures.'

[126] That the judgment of Stamp J in *F Austin (Leyton) Ltd* is as relevant in the VAT context as it was to purchase tax is apparent from the later case, in 1982, of *Customs and Excise Comrs v Smitmit Design Centre Ltd*, *Customs and Excise Comrs v Sharp's Bedroom Design Ltd* [1982] STC 525. In that case the issue did not concern the Builders' Block, but the analogous provisions for zero-rating for contract builders. Having referred at length to the above passage from Stamp J's judgment, Glidewell J (at 531) made it clear that to equate 'ordinarily' with 'invariably' would be to apply too rigid a test, saying that 'ordinary' means in the ordinary way, and suggesting other synonyms of 'commonly' or perhaps 'usually'.

[127] We respectfully agree that, as a matter of language, 'ordinarily' means something that is not invariable, and it must permit of exceptions. But that does not mean that it must be confined to those cases where the installation is so prevalent that it is only in exceptional cases that it would not be carried out. That too would be too rigid a test. Something will be ordinarily installed or incorporated, in our judgment, unless its installation or incorporation would be out of the ordinary, uncommon or unusual. The test, we consider, is whether the installation or incorporation of the item by builders is at the relevant time commonplace or not out of the ordinary.

[128] On the other hand, we do not consider that merely because the installation or incorporation of a particular item has a quality of recurrence that permits it to be described as not exceptional, that will be sufficient to meet the degree of prevalence required to satisfy a test of ordinariness. Doing something merely more commonly or more usually than on an exceptional or isolated basis does not render that something as ordinarily done. There is a range of activity between something that is exceptional or an isolated occurrence and something that is ordinary. It cannot be enough, as the tribunal in Rainbow Pools appears to have thought, that the mere fact that swimming pools are sometimes included in luxury dwelling houses means that they must be regarded as ordinarily installed in such houses.

[129] In our judgment, for an item to be ordinarily installed, the prevalence of its installation must be greater than that it is not exceptionally installed, and

> greater than merely sometimes installed. However, we do not consider that ordinariness can be equated with likelihood, and we disagree therefore with the FTT when it said, at [369], that ordinary means no more than that the item in question is more likely to be installed than not. Furthermore, we would not ourselves adopt the synonym of 'usually' as suggested by Glidewell J in Smitmit; we consider that the meaning of ordinarily is closer to commonly, an expression also referred to by Glidewell J.
>
> [130] There is no bright-line test. The test, in our view, is one of ordinariness or commonness, which does not require that there be any industry standard (though clearly, if there were, that would be material factor), or that the items would be installed in most dwellings. It is, in the end, a matter of judgment, having regard to the evidence as to the relative frequency of installation by builders of the item in question at the material time.
>
> […]
>
> [138] In our view the proper comparator in the case of any buildings is buildings which most closely accord with the use of the building in question. Thus, a building designed for a single family unit will be compared, for the purpose of determining the ordinariness of the installation as fixtures (or, from 1 March 1995, fittings) with single dwelling houses. A flat or apartment in a block of several storeys will be compared with buildings designed as multiple dwellings. Maisonettes will be compared with maisonettes. Sheltered homes, as in *McCarthy & Stone*, are to be compared with other such buildings. That in our view is the case both prior to and from 1 March 1995. There is no reason to consider that the March 1995 changes in wording, by including specific reference to 'buildings of that description' was intended to change the law.

148. In *Wickford* this Tribunal considered whether blinds were ordinarily incorporated by builders:

> [57] In Ms Black's submission, it is first necessary to identify whether goods of a *generic* description are ordinarily incorporated by builders, and then to determine whether the goods in question fall within that generic category: *Customs and Excise Comrs v Smitmit Design Centre Ltd* [1982] STC 525 at 532, per Glidewell J. That passage quotes with approval the decision of the Manchester VAT Tribunal in *F Booker (Builders & Contractors) Ltd v Customs and Excise Comrs* [1977] VATTR 203, itself considering *F Austin (Leyton) Ltd v Customs and Excise Comrs* [1968] 2 All ER 13 at 19, [1968] Ch 529 at 538–539, per Stamp J.
>
> [58] I agree. The task is therefore to identify the genus of which the goods in this case are to be considered against. Acknowledging that blinds share characteristics with curtain poles, curtains and shutters, Ms Black argued that either 'window dressings' or 'blinds' were the relevant genus in this case. On balance, she concluded that window dressings were too wide a category and that therefore blinds constituted the relevant genus. In doing so, Ms Black recognised that this made her task rather harder, as she would have to establish that blinds alone (rather than window dressings in general) were 'goods of a description' ordinarily incorporated by builders.
>
> [59] Mr Qureshi had no relevant submissions on this point.
>
> [60] Contrary to Ms Black, I consider that the *genus* in this case is that of 'window dressings', of which curtains and poles, shutters, and blinds are each *species*. In this, I find support in *Booker*:
>
> > '… it is a wrong approach to look at any article in its specific capacity, that is to say to look at it either as a gas fire or as a central heating unit or as a

> solid fuel heating arrangement. What has to be looked at, in our view, … is the generic description of a heating installation.'
>
> [61] I therefore agree with Ms Black's submission that '[i]f the goods being assessed were window dressings/coverings, then HMRC's illogical distinction in its guidance between curtain poles and blinds is wholly unjustifiable.' As Ms Black continued, '… this distinction … [is] wholly unjustifiable in any event, even if the generic category to be considered is "blinds". Given the level of incorporation required, it is much more logical to align blinds with curtain poles and rails, rather than with curtains themselves, which are easily attached and detached from the pole or rail.' Quite so, and the evidence (especially including the photographic evidence) presented to this Tribunal amply substantiates those propositions.

149. The Tribunal in *Wickford* also considered whether the phrase "by builders" meant that the incorporation had to be the practice of builders in general (in other words, not just one builder), or whether the incorporation merely had to have been undertaken by a builder – in other words, during the course of the development of the building by the builder:

> [89] After that, Mr Qureshi's core submission was that parliament specifically intended the use of the plural in 'builders' – to the exclusion of the singular meaning that the practice of just one builder would be insufficient for these purposes: the practice of at least two builders would be necessary to satisfy this part of the test. In Mr Qureshi's submission, the burden of proof was on the appellant to establish (to the civil standard) that builders (plural) incorporated blinds in new-build homes ordinarily, and otherwise than by special request. He argued that the appellant had failed to do so. between them, Persimmon and Bellway controlled more than a third of the residential property development market. These factors, she argued, demonstrated that 'builders' plural did incorporate blinds, thus answering Mr Qureshi's submission.
>
> [90] Ms Black relied on the submissions summarised above in respect of the practice of other housebuilders, exemplified by Persimmon and Bellway, together with the practice of the appellant. Evidence was provided that between them, Persimmon and Bellway controlled more than a third of the residential property development market. These factors, she argued, demonstrated that 'builders' plural did incorporate blinds, thus answering Mr Qureshi's submission.
>
> [91] Ms Black argued that, properly understood, the phrase 'by builders' actually only required that the item be incorporated (by the builders) during the period of construction. In her submission, it had nothing to do with the number of builders required before installation of an item could be considered 'ordinary'. She pointed to s 6 Interpretation Act 1978, which specified that ('unless the contrary intention appears') words in the singular include the plural and vice-versa.
>
> [92] I prefer Ms Black's submissions on this point: there is nothing in the language of Note 22 which of itself requires the use of the plural exclusive of the singular. If that was what Parliament had intended one would have expected it to have made its meaning clearer. Of course, the 'ordinarily' test set out in *TWUT1* [122]–[130] and applied to the facts of this case would typically require multiple builders to adopt the same practice as regards window blinds in most or all circumstances, but that is a different point. Ms Black's submission of the meaning of 'by builders' referring to the time of incorporation seems to me to be the right interpretation.

150. Mr Simpson submits that the proper comparators in this Appeal when considering whether an item is "ordinarily incorporated" into a building are care homes.

151. Mr Simpson submits that in *Wickford* the First-tier Tribunal decided at [92] that (in relation to the requirement that the item be incorporated "by builders") the definition required no more than the item be incorporated during the course of construction of the building.

152. Mr Simpson further submits that not only were the disputed items of FF&E incorporated in Priors House during the construction of Priors House, but that it is "more or less inevitable" that these items are ordinarily incorporated in care homes. This is because in each case the item concerns either the nature of a care home or is an item required by regulations. He gives as examples (assuming they are treated as incorporated), wardrobes, pictures, and televisions. Wardrobes must be present in every care home because they provide residential accommodation. Wardrobes have to be fixed to walls in order to prevent them from toppling (to comply with regulatory safety requirements). If the fixing causes the wardrobe to be incorporated, it must follow that it is commonplace for them to be so incorporated. Pictures must be present in every care home in order to meet the regulatory requirement that the care home meets the emotional and cultural needs of its residents. To the extent that they are incorporated by being fixed to the walls by some means, this is not just commonplace, but an inevitable consequence of having pictures on the walls. Televisions must be present in every care home in order to meet the regulatory requirement that the care home meets the emotional and cultural needs of its residents. To the extent that they are incorporated by being mounted on wall brackets, this is because of regulatory health and safety requirements, and is bound to be commonplace.

153. Mr Simpson submits that it is also commonplace for care home developers to undertake "turnkey" projects, and they are standard for OpCo for the financial reasons given by Mr Rosenberg. It is, therefore, he submits, commonplace, and not out of the ordinary, for care homes to be supplied by builders in a fully equipped state.

154. Mr Macnab submits that the First-tier Tribunal was wrong in its finding at [92] in *Wickford* that "by builders" merely meant that the item was incorporated by the builder, and that the Tribunal had ignored the requirement for the items being "ordinarily incorporated" as set out in *Taylor Wimpey 1* at [127] to [130]. In addition, the finding of the First-tier Tribunal was internally inconsistent, as the evidence was that the blinds were fitted by "an independent third company" after construction and internal decorations had been completed. However, Mr Macnab said that HMRC accepted that mechanical blinds were usually incorporated by builders in houses as this was the practice of many housebuilders.

155. In the light of the cases cited to us, we find that the following characteristic need to be considered when determining if an item is "ordinarily incorporated by builders":

(1) An item is "ordinarily incorporated" if its incorporation is (at the relevant time) commonplace or not out of the ordinary (*Taylor Wimpey 1* at [127]).

(2) The item must of a kind that you would expect a builder to incorporate without any special instruction (*F Austin (Leyton) Ltd* cited with approval in *Taylor Wimpey 1* at [125]), in other words it must be "core" to the building (*Taylor Wimpey 1* at [101]).

(3) There is no "industry standard" of "commonness", nor a requirement that the item be incorporated in most buildings. It is a matter of judgment (having regard to the evidence) as to the relative frequency of incorporation by builders of the item in question at the relevant time (*Taylor Wimpey 1* at [130]).

(4) The proper comparator in determining whether an item is "ordinarily incorporated" is a building which most closely accords with the use of the building in question. (*Taylor Wimpey 1* at [138]).

156. We agree with Mr Simpson that the proper comparators for "ordinarily incorporated" in the case of Priors House are care homes.

157. We note that items expressly excluded by Note 22 cannot fall within the definition of building materials, even if they are "ordinarily incorporated". So, for example, incorporated furniture (other than kitchen furniture), and incorporated electrical appliances, cannot be "building materials", even if they are "ordinarily incorporated". If incorporated, they will fall within the scope of the Builder's Block on any basis.

158. We disagree with Mr Simpson's submissions that the reference in the legislation to the installation being "by builders" refers to the timing of the installation. We agree with Mr Macnab that the decision of this Tribunal in *Wickford* in this respect was inconsistent with the Upper Tribunal's decisions in *Taylor Wimpey 1*. The interpretation posited by Mr Simpson would lead to absurd results if applied to domestic houses and flats – as it is commonplace and not out of the ordinary for homes to have within them (for example) wardrobes, pictures and televisions. Putting to one side the exclusions within Note 22, if Mr Simpson's interpretation was correct, any housebuilder who supplied a fully-furnished house would be outside the Builder's Block for all installed furnishings.

159. Even if the Tribunal in *Wickford* was correct that the reference to "by builders" in the legislation was a reference to timing, we find that in the circumstances of this Appeal, the installation of virtually all the FF&E in dispute did not occur during the course of construction of the building. The construction stopped with the issue of the Certificate of Practical Completion, and OpCo went into occupation on the following working day. The installation of the FF&E supplied by Renray and many other suppliers occurred after OpCo went into occupation and did not therefore occur during the course of construction.

160. The only evidence before us that turnkey developments are "commonplace and not out of the ordinary" is the oral evidence of Mr Prior. Mr Rosenberg provided no evidence on this point, and there is no documentary evidence before us that is relevant to this issue. We do not consider Mr Prior's evidence in this respect to be reliable. Mr Prior, by his own admission, was not involved in the negotiation or approval of any of the contracts relating to the construction and development of Priors House – and there is no evidence to suggest that he was involved in any way in the negotiation or approval of development contracts for any of his former employers. His answers, when questioned about the warranties allegedly provided by PropCo for FF&E, indicated to us that his knowledge and understanding of the contractual arrangements that were in place between OpCo and PropCo were superficial at best – and we infer from his answers relating to questions about AECOM, that he has little knowledge or understanding about construction and development agreements generally. We therefore find that he cannot provide reliable evidence about the terms on which care homes are supplied by builders to care home operators, and therefore whether "turnkey contracts" are commonplace and not out of the ordinary.

161. Even if Mr Prior is correct that FF&E are ordinarily supplied under turnkey contracts, that does not answer the test posed by the legislation, which is whether it is commonplace and not out of the ordinary for builders to incorporate FF&E in a care home. Stamp J in *F Austin (Leyton) Ltd* (quoted with approval in *Taylor Wimpey 1*) referred to

> articles which one would expect a builder to install as fixtures in the ordinary way and without any special instruction

and the Upper Tribunal throughout its decision in *Taylor Wimpey 1* refers to the Builder's Block enabling recovery of input tax on "core items". The corollary is that input tax is not recoverable on items which one would expect a builder only to install on special instruction, in other words, non-core items. The question that needs to be answered is whether the FF&E items would ordinarily be incorporated by builders in care homes without special instruction because they are core items, and irrespective of whether the relevant building contract is a "turnkey" contract.

162. The fact that there is (for example) a regulatory requirement for:

(1) care homes to provide pictures in care homes; and

(2) those pictures to be secured to the wall with screws to eliminate the risk of them being weaponised

is irrelevant to this issue, unless PropCo can prove that it is commonplace and not out of the ordinary for care home builders to incorporate those pictures – as distinct, say, from those pictures being incorporated by the care home operator. And on this issue, PropCo provided no evidence of any kind. Mr Rosenberg did not give any evidence on this point. Mr Prior's evidence on this issue concerned the use of "turnkey contracts" by his former employers (which in any case we did not consider reliable), and he gave no evidence as to the "ordinariness" or "commonplaceness" of the incorporation of FF&E by care home builders generally. Unlike *Wickford* (where the Tribunal was shown brochures produces by other builders), there was no documentary evidence in support of PropCo's submissions.

163. The burden of proof falls on PropCo to show that incorporated FF&E are goods of a description ordinarily incorporated by builders in care homes. They have not discharged that burden. We therefore find that none of the incorporated FF&E are goods of a description ordinarily incorporated by builders in a care home.

WAS THE FF&E AN ELEMENT OF A SINGLE SUPPLY BY PROPCO TO OPCO?

164. The principles to be applied in determining whether a transaction that comprises multiple items is to be characterised as a single (composite) supply, or multiple (separate) supplies were considered by the Court of Justice in its decisions in *Card Protection Plan* (Case C-349/96) [1999] STC 270, [1999] 2 AC 601, and *Levob* (Case C41/04) [2006] STC 766. These are conveniently summarised in the decision of the Upper Tribunal in *Honourable Society of Middle Temple v HMRC* [2013] UKUT 250 (TCC) (which was quoted with approved by the Upper Tribunal in *Taylor Wimpey 1*):

> [60] The key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies may be summarised as follows:
>
> (1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
>
> (2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.
>
> (3) There is no absolute rule and all the circumstances must be considered in every transaction.
>
> (4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.

> (5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.
>
> (6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.
>
> (7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.
>
> (8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.
>
> (9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.
>
> (10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
>
> (11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.
>
> (12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

165. The decision of the House of Lords in *College of Estate Management v CEE* [2005] UKHL 53 related to the supply of distance learning by the College, and whether the supply of textbooks was one element of a composite supply of exempt education, or whether there were separate and distinct supplies of exempt education and zero-rated textbooks. We were referred to the concurring opinion of Lord Roger at [12]:

> [12] But the mere fact that the supply of the printed materials cannot be described as ancillary does not mean that it is to be regarded as a separate supply for tax purposes. One has still to decide whether, as a matter of statutory interpretation, the College should properly be regarded as making a separate supply of the printed materials or, rather, a single supply of education, of which the provision of the printed materials is merely one element. Only in the latter event is there a single exempt supply, to which section 31(1) of the Act applies and section 30(1) does not apply. The answer to that question is not to be found simply by looking at what the taxable person actually did since ex hypothesi, in any case where this kind of question arises, on the physical plane the taxable person will have made a number of supplies. The question is whether, for tax purposes, these are to be treated as separate supplies or merely as elements in some over-arching single supply. According to the Court of Justice in *Card Protection*, at para 29, for the purposes of the directive the criterion to be applied is whether there is a single supply "from an economic point of view". If so, that supply should not be artificially split, so as not to distort (altérer) the functioning of the value added tax system. The answer will accordingly be found by ascertaining the essential features of the transaction under which the taxable person is operating when supplying the consumer, regarded as a typical consumer. Since the 1994 Act has not adopted

> any different mechanism to give effect to this aspect of the directive, the same approach must be applied in interpreting the provisions of the Act. The key lies in analysing the transaction.

166. We were also referred to the following paragraphs of the decision of the CJEU in *Purple Parking v HMRC* (C-117/11) [2012] STC 1680:

> 23. By its first and second questions, which should be considered together, the Upper Tribunal (Tax and Chancery Chamber) asks, in essence, whether the Sixth Directive must be interpreted as meaning that, for the purpose of determining the rate of VAT applicable, services for the parking of a vehicle in an 'off-airport' car park and for the transport of the passengers of that vehicle between that car park and the airport terminal concerned must, in circumstances such as those at issue in the main proceedings, be regarded as a single complex supply of services or as two distinct and independent taxable supplies which must be appraised separately.
>
> […]
>
> 26. According to settled case law, it follows from art 2 of the Sixth Directive that every supply must normally be regarded as distinct and independent. However, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system (see, inter alia, *CPP* (para 29); *Levob Verzekeringen and OV Bank* (para 20); *Aktiebolaget NN v Skatteverket* (Case C-111/05), para 22; judgment of 2 December 2010 in *Everything Everywhere Ltd (formerly T-Mobile (UK) Ltd) v Revenue and Customs Comrs* (Case C-276/09), paras 21 and 22; and judgment of 10 March 2011 in *Finanzamt Burgdorf v Bog and other references* (Joined cases C-497/09, C-499/09, C-501/00 and C-502/09), para 53.
>
> 27. Furthermore, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, separately, to taxation or exemption, must be considered to be a single transaction when they are not independent (see *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06), para 51; *RLRE Tellmer Property* (para 18); *Don Bosco Onroerend Goed BV v Staatssecretaris van Financiën* (Case C-461/08), para 36; and *Everything Everywhere* (para 23)).
>
> 28. Such is the case particularly where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied (see, inter alia, *CPP* (para 30); *Customs and Excise Comrs v Primback Ltd* (Case C-34/99), para 45; *RLRE Tellmer Property* (para 18); *Everything Everywhere* (paras 24 and 25); and *Bog* (para 54)).
>
> 29. Further, there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see *Levob Verzekeringen and OV Bank* (paras 22 and 30); *Aktiebolaget NN* (para 23); *Part Service* (para 53); *RLRE Tellmer Property* (para 19); *Don Bosco Onroerend Goed* (para 37); and *Bog* (para 53)).
>
> 30. In order to determine whether the taxable person is making to the customer, envisaged as being a typical consumer, several distinct principal supplies or a single supply, the essential features of the transaction must be

ascertained and regard must be had to all the circumstances in which that transaction takes place (see, to that effect, *CPP* (paras 28 and 29); *Levob Verzekeringen and OV Bank* (paras 19 and 20); *Aktiebolaget NN* (paras 21 and 22); *Commission v France* (paras 32 and 33); *Everything Everywhere* (para 26); and *Bog* (para 52)).

31. In that regard, the fact that, in other circumstances, the elements in issue can be or are supplied separately is of no importance, given that that possibility is inherent in the concept of a single composite transaction, as is apparent from para 27 of the present order.

32. In the context of the co-operation established by art 267 TFEU, it is for the national courts to determine whether the taxable person makes a single supply in a particular case and to make all definitive findings of fact in that regard (see, to that effect, *CPP* (para 32); *Levob Verzekeringen and OV Bank* (para 23); *Part Service* (para 54); and *Bog* (para 55)).

33. In respect of the dispute in the main proceedings, it is apparent that the parking and transport services supplied, in the circumstances described by the Upper Tribunal (Tax and Chancery Chamber), by the appellants to their customers form, for the purposes of VAT, a complex single supply in which the parking element is predominant.

34. In that respect, it is appropriate, in particular, to take into consideration the pricing of the services in issue (see, by analogy, *Ludwig v Finanzamt Luckenwalde* (Case C-453/05) [2008] STC 1640, [2007] ECR I-5083, para 19). The appellants charge their customers a single price, which may be an indication, without being decisive, that there is a single supply (see to that effect, in particular, *CPP* (para 31), and *Everything Everywhere* (para 29)). Furthermore, and above all, the amount of the price to be paid is exclusively calculated on the basis of the period for which the vehicle is parked, whereas the number of passengers and, therefore, the extent of use of the transport are irrelevant.

35. That pricing concept reflects the interests of the parties concerned. The customer seeks, first and foremost, parking at an advantageous price. By contrast, the transport service is only the inevitable consequence of the fact that the car park is located at a certain distance from the airport, a location accepted by the customer given that that distance allows him to pay less for the parking service. Secondly, the car park operator offers the transport service in order to be capable, in spite of that distance, of competing with the parking within the airport.

36. Further, the importance of the parking element follows from the measures adopted in order to guarantee the safety of the car park, set out in para 13 of the present order, which are also emphasised in the appellants' brochures. Those measures are particularly important for the customers in the light of the fact that, on average, they park their vehicles for several days.

37. By contrast, the cost of the transport service incurred by the appellants is not capable of invalidating the finding in para 33 of the present order. As follows from para 16 of this order, the proportion of that cost as against the cost of the parking service varies considerably from one service provider to another without that difference affecting the provision of the service from the point of view of the customer.

167. We were also referred to the decisions of the CJEU in *BlackRock Investment Management (UK) v HMRC* (C-231/19), ECLI:EU:C:2020:513, and *Frenetikexito–Unipessoal*

Lda v Autoridade Tributária e Aduaneira, (C-581/19) ECLI:EU:C:2020:855 (AG Kokott), ECLI:EU:C:2021:167.

PropCo's Submissions

168. Mr Simpson makes the following submissions on behalf of PropCo:

(1) The Priors House building and the FF&E were supplied by PropCo to OpCo: in other words, there was identity of supplier and identity of recipient;

(2) What OpCo bargained for was the supply to it of a care home that was in "turnkey" state, that is to say, needed nothing doing in order to bring it into operation beyond turning the key to open the door. This meant that the building and its contents had to be supplied together;

(3) The Priors House building and the FF&E were supplied under a single contract (being the Lease); and

(4) The price payable by OpCo was a single one, covering both the Priors House building and the FF&E.

In consequence there was a single composite supply of the Priors House building and the FF&E by PropCo to OpCo.

169. Mr Simpson submitted that it was necessary for the lawful operation of a care home that there is within it furniture for residents and staff (such as beds and wardrobes), personal care facilities (such as adapted bathrooms and mobile commodes), medical equipment, cleaning equipment, leisure facilities, and decoration to make the home feel like a home – as it is indeed the residents' home. All the items of FF&E in dispute were, he submits, needed by OpCo to operate Priors House as a care home either because of operational or because of regulatory requirements. There was a single economic purpose underpinning the arrangements, which was that PropCo financed the Priors House care home in full – barring consumables – and supplied the care home on a turnkey basis to OpCo.

170. From the perspective of a landlord (such as PropCo), its ownership of not only the building, but also the FF&E, means that if the tenant (in this case OpCo) ceases to operate the home (for example, because of insolvency), it is easier for the landlord to find a substitute tenant and operator. From the perspective of the tenant and operator, the inclusion of the FF&E in the lease allows the tenant to spread the cost of the FF&E (which is a substantial amount) over the period of the lease. This benefits OpCo because it better matches OpCo's cash-flow, and allows OpCo a corporation tax deduction in full in the accounting periods in which the liability to pay rent occurs.

171. Mr Simpson submits that in the circumstances of this appeal, the FF&E items are all ancillary to the principal element of the supply which is the Priors House building. He submits that it is beyond dispute that crockery is a means of better enjoying the Priors House building, and that it cannot in any way be said that the building is a means of better enjoying the crockery. The cost incurred by PropCo in respect of the FF&E was £600,000 (approx), which was not negligible, but was dwarfed by the £4.7m (approx) incurred by PropCo in acquiring the site and constructing the care home building. It was therefore clear that the building was the predominant element of the supply, and the FF&E was an ancillary element.

172. He submits that it would be artificial to split the various items into separate supplies because:

(1) The parties bargained for a single supply;

(2) Objectively the supply of Priors House as a turnkey development was a single indivisible economic whole; and

(3) It is unclear what the separate supplies would be.

Mr Simpson submits that the social and economic reality is that what was being supplied for both parties was a turnkey care home. What was being supplied was a lease of a care home that was ready to receive residents as soon as staff training had been completed.

173. Mr Simpson noted that the form of the Lease was annexed both to the Framework Agreement and the Agreement for Lease. He submitted that there was a single process for planning and developing Priors House under the Framework Agreement, and the building and FF&E were all planned and obtained as a whole. OpCo agreed with PropCo the FF&E that was required, and the entirety of the building and FF&E were leased to OpCo.

174. Mr Simpson submitted that there was no dispute that PropCo purchased the FF&E in dispute and supplied it to OpCo. He submitted that there was no intention on the part of PropCo to give away the FF&E free of charge, and there was no evidence of there being any contract, other than the Agreement for Lease and the Lease itself, between OpCo and PropCo for the supply of the FF&E. The only consideration paid by OpCo to PropCo was the rent payable under the Lease. He therefore submitted that the FF&E was leased to OpCo under the terms of the Lease.

175. We were referred to the definition of "Premises" in the Lease. This definition is used in clauses 3 and 4 of the Lease, which provide that it is the Premises that are leased by PropCo to OpCo for the rent. Paragraph (b) of the definition is as follows:

> (b) all landlord's fixtures, fittings, plant, machinery, apparatus and equipment now or after the date of this Lease in or upon the same including any lifts, lift shafts and lift machinery, any boilers and central heating and air conditioning plant, any sprinklers and the water and sanitary apparatus;

176. Mr Simpson submitted that the reference in the definition to "apparatus and equipment" included all the items of FF&E in dispute. He submitted that the rent paid by OpCo for the use of the Premises included the FF&E in dispute.

177. We questioned Mr Simpson as to whether the reference to "apparatus and equipment" would be limited by the references in the definition to "lifts, lift shafts and lift machinery, any boilers and central heating and air conditioning plant, any sprinklers and the water and sanitary apparatus". Mr Simpson submitted that the *ejusdem generis* rule of construction did not apply, as it only applied in circumstances where specific words were followed by general words, whereas in this definition, general words were followed by specific words. He referred us to the principle of *noscitur a sociis* and that there was no basis for limiting the words "apparatus and equipment" by reference to the list of machinery included within the definition.

178. He also submitted that the reference to "apparatus and equipment" should not be limited to items within the scope of the Builder's Block. There was no reason why a definition of this kind would have been drafted with VAT law in mind. The "pragmatic approach" adopted by HMRC had no basis in law.

179. Mr Simpson also referred us to the definition of "Assumptions" in the Lease and that the Premises are to be assumed to be:

> […] fully fitted-out and equipped for immediate occupation and used by the incoming tenant in accordance with the finalised specification and plans agreed by the parties pursuant to the agreements to grant this Lease and may be lawfully used by any person for any of the purposes permitted by this Lease;

Clause 17.1 provides that OpCo can only use the Premises for the "Permitted Use" – being "a good class care home". Mr Simpson submits that this shows that the intention of the parties that Priors House be used as a fully fitted out care home (which includes the FF&E in dispute).

180. He contrasted sections 14 of the Construction Specification (Fixtures and Fittings by Contractor) and 15 (Specialist Equipment by Contractor) with section 16 (Client's Furniture, Fixtures and Equipment). Paragraph 16.1 stated that:

> 16.1 All furniture, fittings and equipment necessary for the registration and operation of the home to be provided and room placed to the client's requirements by others, after Practical Completion has been given to the contractor.

Mr Simpson submitted that the reference to "others" in 16.1 was used to specify that the installer was someone other than Thomas Vale Construction plc. In contrast, Thomas Vale Construction plc was responsible for installing the fittings specified in sections 14 and 15.

181. Mr Simpson acknowledged that there was a possibility that the Lease did not include "loose" FF&E, but even in those circumstances there would still be a single composite supply. This is because the distinction between single and multiple supplies does not just depend on the terms of the contract, but on all the circumstances, including the intention of the parties. He referred us to the decision of the Court of Justice in *Levob* at [19] and *McCarthy & Stone (Developments) Ltd and another v RCC* [2013] UKFTT 727 at [44]. In *McCarthy & Stone*, there was no express provision in the lease of a flat for the furnishing of common areas, yet the Tribunal held that the common area furnishings were part of a single composite supply ancillary to the flat lease. He submitted that the intention of the parties was that Priors House would be supplied on a turnkey basis and would include everything required to run a care home, other than consumables (such as food, paper and chemicals), and staff.

182. In relation to items of FF&E that were disposable or had a limited life, Mr Simpson asked us to consider a car rental arrangement, where the car was supplied with a full tank of fuel, and the hirer was required to return the car at the end of the hire period with a full tank of fuel. When the hirer returned the car, the fuel in the tank was not the same fuel as was in the tank at the time the hire commenced. We were also referred to the chapter in Halsbury's Laws of England on gratuitous quasi-bailment or *mutuum*[1], a familiar example of which is borrowing a packet of sugar from a neighbour:

> The essence of the transaction in the case of such loans is not that the borrower should return to the lender the identical chattels lent, for such specific return would ordinarily render the loan valueless, but that upon demand or at a fixed date the lender should receive from the borrower an equivalent quantity of goods of similar quality. Thus if money is advanced, its value in money must be returned, and if corn, wine or sugar is lent, then similar corn, wine or sugar of an equivalent amount must be returned; and enhancement in the commercial value of the commodity lent will not justify the borrower in tendering a less quantity than he actually received.

Mr Simpson submitted that the concept of gratuitous quasi-bailment applied to those items of FF&E that were single-use (such as plasters in the first-aid kit) or had a limited life or were disposable (like J-cloths). The obligation in clauses 12 and 13 of the Lease required OpCo to keep the FF&E in good repair, and to replace them to the extent that any such items were missing, damaged, or destroyed.

[1] *Halsbury's Laws* vol 4 (2020), para 140

HMRC's submissions

183. It is not disputed that PropCo bought the FF&E and made an onward supply of the FF&E to OpCo. But Mr Macnab submitted that the FF&E were not supplied by PropCo to OpCo under the terms of the Lease. He submitted that no thought had been given to the FF&E when the various documents were drafted, let alone how the items of FF&E were to be restored to PropCo at the end of the 25-year term. He submitted that the Lease is not a lease of chattels, and the FF&E is not within its scope. In these circumstances, he submitted, there cannot be a single composite supply of a turnkey care home which includes the FF&E.

184. The question the Tribunal needs to determine is whether the provision of FF&E by PropCo to OpCo is ancillary to the principal supply (the zero-rated supply as specified in Item 1(a)(ii)), and not whether any of the FF&E are used or to be used by OpCo for the purpose of the business it carries on in Priors House, even if the FF&E is a regulatory necessity or is desirable for that business.

185. Mr Macnab submitted that the general rule is that each transaction must be regarded as distinct and independent, and each supply as distinct and separate unless either:

(1) Two or more elements are so closely linked that they form, objectively, a single, indivisible, economic supply, which would be artificial to split; or

(2) One or elements must be regarded as ancillary to a principal supply because they do not constitute for the customer an aim in themselves, but rather a means of better enjoying the principal supply and must share the tax treatment of the principal supply.

186. Mr Macnab submitted that the Tribunal must take particular care in this case because of the zero-rating of the supply of a care home under Schedule 8, Group 5, Item 1(a)(ii), and the principle that zero rating provisions must be interpreted strictly, as they operate as a derogation from the general principle that all supplies should be subject to VAT at the standard rate (see *News Corp UK & Ireland Ltd v RCC* [2021] EWCA Civ 91 at [56]-[57]). Schedule 8, Group 5, Item 1(a)(ii) zero-rates the first grant of a major interest in a care home, and then only to the extent of the first payment of rent. The provisions, submitted Mr Macnab, do not zero-rate the supply of a "turnkey development" – being a fully formed care home business. If the supply made by PropCo to OpCo was a single composite supply, it would not be a zero-rated supply within Schedule 8, Group 5, Item 1(a)(ii), as it would be more than a zero-rated grant of a lease of a care home building.

187. Mr Macnab submitted that the FF&E are not elements of a single supply that are ancillary to the supply of the Priors House building for the following reasons:

(1) To the extent that any of the FF&E are incorporated in the Priors House building so that they are a fixture, they form part of the building and must be within the scope of the Lease on any basis and within the zero-rated grant. The issue before the Tribunal relates only to items of FF&E that are not fixtures – which is a strong factor against any of the disputed FF&E constituting an ancillary element of a single composite supply, and strongly in favour of the item being a separate taxable supply.

(2) The FF&E was supplied by PropCo on the basis of OpCo's specific requirements and instructions.

(3) There was no reason (external to the parties) why OpCo had to obtain the FF&E from PropCo. PropCo is not a specialist manufacturer or distributor of any of the items and did not make them itself. The items were purchased by PropCo from UK suppliers, and there was no special reason by OpCo could not have bought the items from PropCo's supplier itself.

(4) The FF&E was installed after practical completion of the building, and after the commencement of the term of the Lease – namely after OpCo had gone into occupation of Priors House. Most of the FF&E was installed by Renray and OpCo's fit-out team.

(5) OpCo specified the FF&E and had genuine freedom to choose the FF&E to be supplied. In effect, OpCo asked PropCo to procure the various items that OpCo required as inputs for its business, and which OpCo would otherwise have to buy itself. The fact that they were supplied to OpCo by PropCo was for OpCo's convenience (including in order to benefit from the financing advantages available to PropCo). The fact that it may be more convenient or advantageous to the parties to lease the FF&E as a single package does not make the FF&E an element of a single composite supply. Mr Macnab also submits that an obvious inference to be drawn from these arrangements is that OpCo obtains the use of the FF&E without incurring irrecoverable input tax.

(6) The supply of the FF&E is independent of the supply of the Priors House building. None of the items of FF&E in dispute is a vital part of the fabric of Priors House, and Priors House (as a building) would still be a care home building without them. PropCo's evidence and submissions were that all the items of "installed" FF&E could be removed without damaging the building, and could be replaced if necessary, and the uninstalled (loose) items of FF&E can be separated from the building without any artificiality.

(7) The fact that PropCo does not make a separate charge for the FF&E is not determinative of whether there is a single supply or multiple supplies.

(8) It is inappropriate to analyse the arrangements in place between OpCo and PropCo as if they were arm's length parties, or to consider OpCo as a hypothetical "typical consumer" envisaged by case law. The supplies in this appeal form part of carefully structured arrangements between SSPH, CUK, SSD, OpCo and PropCo which relate to the setting up and management of a care home under the "Care UK brand" – from conception, through to identification and acquisition of the site, construction of the building, and ultimately running a care home business from the building. There is nothing artificial in splitting or dissecting an alleged single transaction which has been assembled as such by supplier and customer.

(9) The FF&E is not supplied in order that OpCo can "better enjoy" the Priors House building. OpCo does not "enjoy" the building in the sense that an end-consumer "enjoys" a supply. Rather the FF&E are inputs which OpCo utilises to make supplies of care home services to its own customers. The fact that the FF&E are items that are necessary or desirable for the onward supplies that OpCo makes, does not make the FF&E ancillary to the supply of the building by PropCo.

(10) The social and economic reality (see *Dr Beynon and Partners v CEC* [2004] UKHL 53 at [31]) is that OpCo acquired a newly constructed care home building (zero rated), and goods (standard rated) to run a care home business (exempt) at that care home.

188. Mr Macnab submitted that the FF&E are not elements are so closely linked to the Priors House building such that they form, objectively, a single, indivisible, economic supply, which would be artificial to split for the following reasons:

(1) There is nothing in the Agreement for Lease that could be construed as an obligation to PropCo to sell or hire the disputed FF&E to OpCo, or to include those items within the scope of the Lease. Section 16 of the Construction Specification expressly provides for the installation of FF&E to be done by "others". In particular, the provision of the FF&E within section 16 did not form part of the works undertaken by the building contractor. Section 16 uses the term "client" in contradistinction to the term "Contractor"

The term "client" is ambiguous, as it could mean SSD (as Developer), PropCo (as Landlord), or OpCo (as Tenant). Whatever the correct interpretation of "client", there is no provision in the Agreement for Lease that imposes any obligation on PropCo to fit out Priors House

(2) There is no provision in the Lease itself that relates to unincorporated items of FF&E. The provisions in the lease only relate to items of FF&E that are installed as fixtures and fittings and that form part of the physical Premises – hence the inclusion of the terms "all landlord's fixtures, fittings, plant, machinery, apparatus and equipment" in the definition of "Premises". The terms "apparatus and equipment" are to be construed *ejusdem generis* and take their colour from the immediately preceding words, which are all items that are of the same type as landlord's fixtures and fittings, and can only refer to incorporated items. It was a "stretch" to say that "loose" FF&E (such as J-cloths) could be items of "apparatus and equipment".

(3) Mr Simpson's submissions relating to the definition of "Assumptions" is misguided. The definition is relevant only to the rent review provisions of clause 5 and the definition of "Open Market Rent". The purpose of the assumption to which Mr Simpson refers was explained in *London & Leeds Estates Ltd v Paribas Ltd* [1993] 2 EGLR 149, and is to preclude an actual tenant from arguing (during the course of a rent review) that the hypothetical tenant was entitled to a discount on account of the actual state of repair of the building, or that the hypothetical tenant would be required to undertake work at its cost to make the building suitable for its use (which would result in a reduction in the rent).

(4) There is no reference in the definition of "Assumptions" to any obligation on the part of PropCo to have fitted out the Premises with FF&E. The Assumption refers back to the "the finalised specification and plans agreed by the parties pursuant to the agreements to grant this Lease", which can only be a reference to the Construction Specification and plans annexed to the Agreement for Lease – and the Agreement for Lease contains no obligation on PropCo or SSD to fit out Priors House with FF&E.

189. Mr Macnab submitted that PropCo's evidence is limited. Mr Rosenberg had no involvement in the development of Priors House and the grant of the Lease. Mr Prior only became involved after the development had begun and the relevant documents had been finalised. Mr Macnab submitted that Mr Prior's expertise relating to the development and leasing of care homes was extremely limited, as can be illustrated by his witness statement, in which he said that PropCo gave a 10-year warranty on all items of FF&E, which would include J-cloths.

190. Mr Macnab submitted that the concept of *mutuum* and gratuitous quasi-bailment had no relevance in this case. The reason someone hiring a car has to return it with a full tank of fuel is because that is what the hire contract expressly requires – not because there has been a gratuitous quasi-bailment.

191. Mr Macnab submitted that none of the Framework Agreement, the Agreement for Lease, nor the Lease itself address the terms on which the FF&E is supplied by PropCo to OpCo. There were no discussions between OpCo and PropCo to identify which items were leased and which were not. No one had given any thought as to what items were to be given back to PropCo at the end of the term of the Lease. Mr Prior's evidence was that when FF&E was replaced, the replacement was paid for out of the operating budget of the care home, and thereafter belonged to OpCo.

192. Mr Macnab submitted that the Lease is not a chattel lease, and cannot include the "loose" FF&E. The supply of the loose FF&E was the supply of the right to dispose of tangible property as owner and was a separate taxable supply.

193. Mr Macnab submitted that what PropCo is now attempting to do is to "reverse engineer" the supply of FF&E back into the lease arrangements.

194. Mr Macnab submitted that a plausible theory of what occurred was that the Priors House building was supplied with a "starter pack" of FF&E, and the cost of the FF&E was factored into the rent as part of the analysis of the viability of the project from the start.

195. In his skeleton argument, Mr Macnab noted that the value of the zero-rated supply declared on the zero-rating certificate was £119,500, whereas that the first payment of Initial Rent under the Lease was £798,000, which would be the actual value of the zero-rated supply by PropCo to OpCo.

Discussion

196. It is convenient to consider the issue of whether there is a single composite supply using the broad headings identified by Mr Simpson in his submissions.

Identity of supplier and identity of recipient

197. It is not disputed that PropCo acquired the FF&E in dispute and supplied it to OpCo. We find that there is an identity of supplier and customer.

Did OpCo bargain for a turnkey development?

198. Great emphasis is placed by PropCo on the fact that all the relevant parties intended that Priors House was to be developed as a "turnkey development". Mr Simpson's submissions, that the supply of FF&E was an ancillary part of the supply of the Priors House building, rests to a very great extent on Priors House having been developed on a turnkey basis – in other words that OpCo was supplied with a care home that was in a state that was ready for immediate operation, save for consumables (food, paper, chemicals) and staff.

199. However, there is remarkably little evidence (if any) that supports Mr Simpson's submission that the intention of the parties was to develop Priors House on a turnkey basis.

200. Although we were provided with copies of the Framework Agreement, the Agreement for Lease, and the Lease, the copies of the Framework Agreement and the Agreement for Lease were incomplete, as they did not include complete copies of all the schedules and attachments (such as a complete copy of the Building Contract). Also absent from the bundle were copies of any of the communications between the Holdings and SSPH companies and copies of any minutes of meetings relating to Priors House. In particular we were not provided with a copy of the Final Transactional Appraisal and its associated documents, which might well have cast light on whether Priors House was developed on a turnkey basis.

201. We draw inferences from the decision of PropCo not to provide us with copies of any of these documents, particularly as neither Mr Rosenberg nor Mr Prior were involved in the planning or preparation for the development of Priors House.

202. There was no documentary evidence nor anything in the contractual arrangements to indicate there was an agreement for Priors House to be developed on a turnkey basis.

203. Mr Rosenberg described the development of Priors House as being the development of a "Turnkey Site" for the purposes of the Framework Agreement - with SSPH as the developer, and PropCo as the SPV company which acquired Priors House on completion of the development. But we find that this is obviously incorrect. A Turnkey Site is defined in the Framework Agreement as a site that is developed by a Third Party Developer under a Third

Party Development Agreement between SSPH and the Third Party Developer. So, if SSPH was the developer (as Mr Rosenberg said), for Priors House to be a development of a Turnkey Site, SSPH would have to contract with itself to develop the care home. This is plainly absurd. We find that SSPH was not a Third Party Developer and that there was no "Third Party Development Agreement". We find that the definition of "Third Party Developer" means what it says – in other words the developer is an entity outside the Holdings and SSPH groups. And we find that this is inherent in the definition. We find that Priors House was not developed as a Turnkey Site. Priors House was developed pursuant to the Agreement for Lease in the form scheduled to the Framework Agreement, to which SSPH was not a party. We find that Priors House was a standard (non-third party) development.

204. Clause 11 of the Agreement for Lease requires SSD to procure that the Contractor carries out and completes the Works – in other words, constructs Priors House in accordance with the approved drawings and specifications (as may be varied in accordance with the provisions in the Agreement for Lease). Thomas Vale Construction plc must have been appointed as the building contractor by the time the Agreement for Lease was signed, as they are defined as "the Contractor" in the Agreement for Lease. Clause 11 goes on to require SSD to procure that Thomas Vale Construction plc carries out and completes the Works in accordance with the Building Contract.

205. Clause 6 of the Agreement for Lease requires that the Construction Specification forms the basis of the detailed design specification for Priors House. Clause 7 requires SSD (following grant of planning consent) to procure that detailed drawings and specifications are prepared, and that these are consistent with the Construction Specification. The Agreement for Lease sets out a mechanism for the approval of the drawings and specifications, and for later variations to be made to them.

206. A copy of the Building Contract was not included in the bundle, nor were any variation notices made under either the Building Contract or the Agreement for Lease. But we infer from the definition of Building Contract in the Agreement for Lease and some of the other documentary evidence that the Building Contract was a modified version of the JCT Design and Build agreement. We also infer that the Construction Specification (in the form included in Annex 1 to the Agreement for Lease) was the specification used for the purposes of the Building Contract without any material amendments, and the submissions of both parties' counsel relating to the Construction Specification were made on that basis.

207. Clause 16 of the Agreement for Lease governs the issuance of the Certificate of Practical Completion by the Certifier (AECOM). In essence, the Certificate of Practical Completion for the purposes of the Building Agreement serves also as the Certificate of Practical Completion for the purposes of the Agreement for Lease. The fact that the Certificate carries this dual role indicates that there was nothing in the specification and plans for the building in the Agreement for Lease that was not also in the specification and plans for the building under the Building Contract. In other words, there was nothing more for SSD to do (such as procure the installation of FF&E) once Thomas Vale Construction plc had finished constructing the building in accordance with the Construction Specification and plans, and we so find.

208. The effect of the delivery of the Certificate of Practical Completion therefore not only brings the construction of the property to a conclusion (bar defects) under the Building Agreement as between Thomas Vale Construction plc and SSD, but also brings to a conclusion the development of the property under the Agreement for Lease as between PropCo, OpCo and SSD. The Certificate acts as a trigger for the grant of the Lease (clause 21) and the Lease term commences on the day after the date on which the Certificate of Practical Completion is issued

(clause 22). OpCo goes into occupation of the Premises as licensee (clause 20) on the working day following practical completion.

209. We note that the fit out of the FF&E did not occur prior to the issue of the Certificate of Practical Completion. It occurred afterwards. The fit-out of FF&E only took place once OpCo had gone into occupation, and after the term of the Lease had commenced (admittedly with retrospective effect). This strongly indicates, and we find, that the supply and installation of the FF&E did not form part of the Works, otherwise the Certificate of Practical Completion could not have been given unless and until the FF&E had been installed.

210. It therefore follows that Section 16 of the Construction Specification relates to items that are installed after the completion of the construction of the building and after OpCo has gone into occupation. They are not installed during the course of construction of Priors House by the builder (irrespective of whether the "builder" for these purposes is Thomas Vale Construction plc, SSD, or PropCo).

211. The evidence before us as to the arrangements for the selection and purchase of the FF&E shed no useful light on whether the development of Priors House was intended to be undertaken on a turnkey basis. Mr Rosenberg could provide no evidence about these arrangements. Mr Prior's evidence was that OpCo communicated with PropCo about the selection of the FF&E, but he was not a party to any such communications (his evidence was that these communications were routed via "the exec"), and there was no documentary evidence of any such communications. We find that there were no such communications. Indeed, that there should be such communications would be inconsistent with the terms of the Framework Agreement, the Technical Services Agreement, and the Agreement for Lease – as the responsibility for procuring the development rested with SSD (not PropCo), and SSD delegated all of its functions to OpCo under the Technical Services Agreement. There was therefore no need for OpCo to communicate with either PropCo or SSD – either because it arranged the purchase of FF&E for itself on its own behalf, or because it arranged the purchase on behalf of SSD in accordance with its delegated powers under the Technical Services Agreement.

212. The only evidence provided to us that Priors House was intended to be a turnkey development was the oral evidence of Mr Rosenberg and Mr Prior, neither of whom had any direct involvement in that process, and neither of whom provided details of any of the sources on which they relied in giving their evidence about the turnkey nature of the development. And for the reasons given earlier, we do not find their uncorroborated evidence in these respects to be reliable.

213. And when you drill down into Mr Rosenberg's and Mr Prior's definitions of "turnkey development", and compare it to what was actually supplied, there are many inconsistencies. So, items with a short lifespan, or are single use (which on any sensible basis would be treated as "consumables") are treated as FF&E – such as J-cloths, sticking plasters, denture baths and so on. And items such as uniforms (which on any sensible basis would not be regarded as consumables) are not. The boundary between "consumables" and FF&E appears to be arbitrary, and is a matter of convenience, based on the identity of the supplier, rather than on whether the item is genuinely "consumable".

214. We find that there was no intention on the part of Holdings, SSD, PropCo or OpCo that Priors House be developed on a turnkey basis.

Was the FF&E rented to OpCo under a single contract - the Lease?

215. Mr Simpson referred us to the definition of Premises in the Lease, that it included "apparatus and equipment", and that these words included the FF&E. We disagree. We do not consider that "apparatus and equipment" are appropriate terms for many of the items of

disputed "loose" FF&E (such as, for example, bedlinen, most furniture, pictures, and artificial plants). We agree with Mr Simpson that *ejusdem generis* does not apply and that *noscitur a sociis* does. But the *noscitur a sociis* principle is that words take their meaning and colour from their context, and the context here are all words that describe fixtures – such as heating and ventilation systems, lifts and their associated machinery, and sanitary fittings (such as toilets and washbasins). We do not consider that the definition of "Premises" can be read to include chattels that are not fixtures and typical landlord's fittings, and we so find.

216. Nor do we consider that the definition of "Assumptions" can be used in the manner submitted by Mr Simpson. The Assumptions are all artificial in some sense – and deliberately so - and are intended to prevent the tenant from being able to argue that the actual state of the Premises (or compliance with the terms of the Lease) warrant a reduction in the level of the Open Market Rent as reviewed. Interestingly, Mr Rosenberg's evidence was that the provisions for an Open Market Rent review were removed when the freehold reversion in Priors House was sold, and so it seems likely that the definition of Assumptions would also have been deleted (or become irrelevant). But as this sale occurred after the grant of the Lease, it is not of relevance to the issues before us, and we have taken no account of it.

217. We also consider that there is something very odd in the notion that an item which can only be used once (such as a wound dressing, like a plaster), or has a very limited life or disposable (like a J-cloth) can be rented. We are not persuaded by Mr Simpson's submissions on *mutuum* and gratuitous quasi-bailment for the following reasons:

(1) Mr Simpson's own submission is that the supply of FF&E by PropCo is for valuable consideration. Whereas, by its very definition, *mutuum* only arises in respect of a gratuitous "loan".

(2) We agree with Mr Macnab, that the reason why the hirer of a car returns it with a full tank of fuel is because he or she has expressly agreed to do so under the terms of the hire agreement. We find that there are no provisions in the Lease which relate to the replacement of chattels that are single-use, disposable, or have a very limited life. Mr Simpson referred to clauses 12 and 13 of the Lease. But we find that Clause 12 is not relevant. It obviously only relates to landlord's fixtures and fittings and makes no sense when applied to loose items. This nonsense becomes even more obvious when considering clause 12.5, which applies (amongst other things) to "apparatus and equipment", and requires OpCo to employ reputable contractors to inspect, maintain and service the "apparatus and equipment" (which would, on Mr Simpson's construction, include sticking plasters and J-cloths) on a regular basis. Clause 13 relates to the replacement of Landlord's fixtures and fittings, and items such as sticking plasters or J-cloths cannot, on any basis, be regarded as "fixtures or fittings". Interestingly, clause 13.1.2 requires OpCo to remove "tenant's fixtures, fittings, furniture and effects" at the end of the Lease – which suggests that the term "fixtures and fittings" does not include all items of furniture and effects.

218. For completeness, we note that we disagree with Mr Macnab about the zero-rating certificate and find that there was no discrepancy between the value declared on the certificate (£199,500), and the amount of the first rental payment. The rent is stated in the Agreement for Lease to be £798,000 per annum. As rent is paid quarterly, the first rental payment (after the initial rent-free period) would have been £199,500 – corresponding to the amount declared on the certificate.

219. We also find that the "pragmatic approach" adopted by HMRC in relation to FF&E within the scope of the Builder's Block cannot be sustained as a matter of law. Mr Simpson's submissions are that none of the FF&E in dispute have been "incorporated", and although we

have disagreed with him about the incorporated status of various items of FF&E, we consider that in no case is the degree of affixation such that they would be fixtures, and we so find.

220. There remains a very nice point as to whether any of the incorporated items of FF&E might be landlord's fixtures, and to the extent that they are, they might well fall within the definition of Premises, and might be included within the scope of the Lease. But even if they are, for the reasons we give later, we find that they are not part of a composite single supply of Priors House for VAT purposes.

221. We find that the FF&E is not rented to OpCo under the terms of the Lease, save to the extent that the item is a landlord's fitting.

Was the price paid by OpCo a single one?

222. We find that the only consideration paid by OpCo to PropCo was the rent payable under the Lease.

Mislabelling

223. We asked the parties whether the Lease might be "mislabelled" in the sense used in *Antoniades v Villiers* [1990] 1 AC 417, but neither Mr Simpson nor Mr Macnab considered that there was any mislabelling of the Lease, and we agree.

Was the FF&E an element of a composite supply of Priors House?

224. We agree with Mr Macnab that, in the light of the jurisprudence of the Court of Justice, there is a presumption that each element of a transaction must be regarded as distinct and independent, and each supply as distinct and separate unless either:

(1) Two or more elements are so closely linked that they form, objectively, a single, indivisible, economic supply, which would be artificial to split; or

(2) One or more elements must be regarded as ancillary to a principal supply because they do not constitute for the customer an aim in themselves, but rather a means of better enjoying the principal supply and must share the tax treatment of the principal supply.

225. We agree with Mr Simpson that the legal formalities are not determinative, and the fact that an item might (or might not) be within the scope of the Lease does not necessarily make it (or prevent it from being) an element of a single composite supply. We agree with Mr Macnab that the fact that PropCo does not make a separate charge for the FF&E is not determinative of whether there is a single supply or multiple supplies. We need to consider all the facts and circumstances.

226. We find that the Priors House building and the FF&E are not so closely linked that they form an indivisible economic supply. We have found that none of the FF&E are fixtures, forming part of the land. We have found that the FF&E (unless an item is a landlord's fixture) are not supplied under the terms of either the Agreement for Lease or the Lease itself. Nor are any of the FF&E items indivisible from the building itself – the evidence is that any installed items can be uninstalled without damaging the building. We agree with Mr Macnab that the supply of the FF&E is independent of the supply of the Priors House building. None of the items of FF&E in dispute (even if they are a landlord's fitting) is a vital part of the fabric of Priors House, and Priors House (as a building) would still be a care home building without them. The FF&E can be removed from the building without any artificiality.

227. Nor do we consider that the FF&E form part of a composite supply, where the FF&E are ancillary to the building. Mr Simpson's submission that the supply of crockery is to enable OpCo better to enjoy the building (rather than the other way around) is to miss the point. It is items such as lifts or air conditioning systems that enable the tenant of a building to better enjoy

the building. The crockery does not enable OpCo (as tenant) better to enjoy the building – rather it enables OpCo to supply care home services to residents.

228. We consider that the reality of what happened is that it was probably convenient for the FF&E to be purchased by PropCo because of its access to advantageous borrowing facilities. However, no thought had been given at the time the FF&E was purchased by PropCo as to the basis on which it would be supplied to OpCo. The parties then sought to "reverse engineer" the Agreement for Lease and the Lease and argue that they should be construed to bring the FF&E within their scope, even though there was no intention at the time those agreements were executed that they would include the FF&E. This would also have the benefit of zero-rating the supply of FF&E, so avoiding the expense of irrecoverable input tax in the hands of OpCo.

229. So, on what basis did PropCo supply the FF&E to OpCo? We consider that Mr Macnab's analysis that the FF&E formed a kind of "welcome pack" is the best analysis. We find that there was never any intention that the FF&E would be returned to PropCo at the end of the term of the Lease. We infer from inclusion of single-use and disposable items within the FF&E that it must have been the intention of the parties that title to the FF&E would pass to OpCo, as a commercial agreement to hire a single-use or disposable item for a term of 25 years is a nonsense. We find that the supply of FF&E by PropCo was a supply of the right to dispose of tangible property as owner. We find that none of the items of FF&E are an element of a single composite supply of the Priors House building.

CONCLUSIONS

230. Our findings in relation to the "incorporated" status of FF&E are set out in Annex Two, as are our findings as to whether recovery of input tax on those items is "blocked" under the Builder's Block.

231. We have found that the supply of FF&E to OpCo was not a single composite supply.

232. The appeal is dismissed, save in respect of the unincorporated status of curtains and voiles and bath thermometers.

233. We leave it to the parties to agree any adjustments that need to be made to the VAT assessments. They have a right to apply to the Tribunal to determine the adjustments if they are unable to reach agreement.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

234. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 07 SEPTEMBER 2021

Cases referred to in skeletons, but not in this decision:

Grunwick Processing Laboratories Ltd v CEC [1986] STC 441
Grunwick Processing Laboratories Ltd v CEC [1987] STC 357
A.G. Securities v Vaughan and Others; Antoniades v Villiers and another [1990] 1 AC 17
Field Fisher Waterhouse LLP v HM Revenue and Customs C-392/11, [2013] STC 136
BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie C-224/11, [2013] STC 2162
Colaingrove Ltd v RCC [2015] UKUT 2 (TCC),
Marriott Rewards LLC v RCC, Whitbread Group plc v RCC [2017] UKFTT 140 (TC)
Virgin Media Ltd v RCC [2018] UKFTT 556 (TC)

ANNEX ONE - KEY CONTRACTUAL PROVISIONS

Framework Agreement dated 10 September 2010	
Parties	"**Investor**": SSPH "**Tenant**": OpCo "**Developer**": SSD "**Guarantor**": CUK
Clause 1: Definitions	"**Agreement for Lease and Development**" means the agreement by which the Developer will agree to develop any Development Site for the relevant Property SPV Company and pursuant to which the Tenant will agree to accept a lease of the Development Site from the Property SPV Company and which shall be substantially in the form attached at Schedule 1 with such amendments as may be approved between the Parties and the relevant Property SPV Company from time to time; "**Building Contract**" means a building contract to be entered into which: (a) in respect of a Development Site, shall be in the form attached at Schedule 1 with such amendments as may be agreed between the Parties from time to time; and (b) in respect of a Turnkey Site, shall be entered into by the Third Party Developer in the form attached at Schedule 1 with such amendments as may be agreed between the Parties from time to time or such other form to be agreed with the Third Party Developer provided that such alternative form would not put the Parties or the relevant Property SPV Company in a materially worse position than they would have been in had the form at Schedule 1 been used (saved where the Parties have acknowledged acceptance of that alternative); "**Design Criteria and Minimum Requirements**" means the design criteria and requirements set out in Schedule 7 as with such amendments as may be agreed from time to time by the Parties; "**Lease**" means a lease to be granted by a Property SPV Company to the Tenant and the Guarantor upon practical completion of a Turnkey Site or a Development Site and which shall be substantially in the form attached at Schedule 1; "**Third Party Developer**" means a developer to be appointed to develop a Turnkey Site pursuant to a Third Party Development Agreement; "**Third Party Development Agreement**" means an agreement entered into between the Investor and a Third Party Developer for the development of a Turnkey Site, upon completion of which, the relevant Property SPV Company nominated by the Investor will acquire the Turnkey Site and the Tenant will take a lease of that Turnkey Site from the relevant Property SPV Company and which shall be in the form in Schedule 1 with such amendments as may be agreed between the Parties from time to time;

	"**Turnkey Site**" means a Site which is acquired by a Property SPV Company upon completion of development by a Third Party Developer.
Clause 6: Fees for Services	**6.1 Fee** 6.1.1 In consideration for the Developer: (a) providing the Services to the Investor and/or Property SPV Companies in respect of each Site pursuant to this Agreement; and (b) agreeing to enter into the Agreements for Lease and Development and undertaking to develop Development Sites pursuant to such agreements, and subject to the Developer complying with its obligations under this Agreement, the Investor shall procure that the relevant Property SPV Company shall pay to the Developer the Fee subject to and in accordance with this Clause 6.1. […] 6.1.3 The instalments of the Fee in respect of any Site shall be one hundred and twenty five pounds sterling (£125.00) multiplied by the number of beds to be provided at the Site (based upon the anticipated number of beds referred to in the Final Transaction Appraisal for that Site (the "Quarterly Instalment Amount") provided that in respect of any Site: (a) the first instalment of the Fee shall be the Quarterly Instalment Amount multiplied by three (as consideration for the provision of the Services provided to the Property SPV Companies prior to the Fee Commencement Date); and (b) the last instalment to the extent it would result in the Fee for the Site being exceeded shall be reduced so that the total amount paid shall not exceed the Fee.
Clause 7: Steps for Site Identification and Acquisition	**7.4 Site Investigation and Design** 7.4.1 The Developer shall work with the Consultant to: (a) undertake Initial Due Diligence on the Site; and (b) procure the preparation of a set of draft Drawings and Specifications for the relevant Site which accord with the Design Criteria and Minimum Requirements, in consultation with the Investor and the Tenant in respect of any material issues arising which could impact on the Design Criteria or the Minimum Requirements. **7.5 Development of Drawings and Specifications** The Developer shall consult with the Investor and the Tenant in relation to the development of the draft Drawings and Specifications in respect of any Site with the aim of having a set of final Drawings and Specifications prepared within six (6) months following an Initial Feasibility Appraisal for that Site. **7.6 Tenant Business Plan** 7.6.1 The Tenant shall, in consultation with the Developer and the Investor, develop the initial draft Business Plan for the purpose

	of being able to provide this to the Developer for incorporation into the Final Transaction Appraisal and the Developer shall provide all reasonable assistance to the Tenant for this purpose. **7.8 Final Transaction Appraisal and Investor Board Recommendation** 7.8.1 As soon as reasonably practicable and upon finalisation of the draft Business Plan by the Tenant, the Developer shall prepare and submit to the Investor and the Tenant a Final Transaction Appraisal in respect of each Site that has become the subject of a PreAcquisition Budget for consideration by the Investor's executive board and the Tenant's executive board which shall attach the following documents relating to that Site: (a) Business Plan (incorporating the Operating Budget which shall contain details of projected EBITDAR); (b) draft Project Budget; (c) draft Initial Development Programme; (d) drafts of all other relevant Development Project Documents and any other material agreements (highlighting the changes to any previously agreed forms or proformas, as applicable) and including details of the Initial Rent to be paid by the Tenant upon taking a lease of the Site; and (e) details of the calculation of the Initial Rent that would be payable by the Tenant (by referent to a rent cover (defined as EBITDAR/Rent) of 1.6-1.8x or such other calculation as the Parties may agree from time to time; and (f) any other documents required under the Banking Facilities. … 7.8.3 The Parties will work together to seek to agree the contents of the Final Transaction Appraisal as soon as possible (taking into account the requirements of the Banking Facilities and requirements in order to obtain any in-principle consent from any bank providing debt funding to the Property SPV Companies). **7.9 Third Party Development** Upon agreement of the Final Transaction Appraisal in relation to any Turnkey Site, the Developer shall, in consultation with the other Parties, work to settle the terms of a Third Party Development Agreement with the relevant Third Party Developer. **7.10 Development Site Acquisition** Upon agreement of the Final Transaction Appraisal in relation to any Development Site, the Developer shall, in consultation with other Parties, work to settle the terms of an Agreement for Lease and Development in respect of the Development Sites.

Technical Services Agreement dated 10 September 2010	
Parties	"**Developer**": SSD "**Technical Services Provider**": OpCo "**Guarantor**": CUK
Clause 1: Definitions	"**Services**" means the services to be provided by the Developer to the Investor and the Property SPV Companies pursuant to and in accordance with the provisions of the Framework Agreement and the performance of all the covenants of the Developer under the Framework Agreement and any Agreement for Lease and Development entered into pursuant to the Framework Agreement;
Clause 3: Appointment, Authority and Covenants	**3.1 Technical Services Provider's Appointment** In consideration of the fees and expenses payable to the Technical Services Provider by the Developer pursuant to this Agreement, the Developer hereby appoints the Technical Services Provider to provide the Services and perform all of the obligations of the Developer as set out in the Framework Agreement (subject to the terms of the Framework Agreement and only for so long as the Developer is required to perform them) and the Technical Services Provider hereby accepts such appointment and undertakes to provide and carry out the Services upon the terms set out in this Agreement

Agreement for Lease and Development of Care Home Development Site at Old Milverton Lane, Leamington Spa, Warwickshire dated 21 March 2013	
Parties	"**Landlord**": PropCo "**Tenant**": OpCo "**Developer**": SSD "**Guarantor**": CUK
Clause 1: Definitions	"**Building**" means that building to be built on the Site in accordance with the Planning Permission; "**Building Contract**" means the Joint Contract Tribunal Limited 2011 Design and build contract to be entered into between the Contractor and the Developer substantially in the form set out in Schedule 4; "**Certification Date**" means the date of issue of the Certificate of Practical Completion: "**Certificate of Practical Completion**" means the certificate of Practical Completion issued by the Certifier in accordance with and under the Building Contract; "**Certifier**" means Davis Langdon LLP of Clarence House Minerva Business Park Lynchwood Peterborough PE2 6FT or such other professionally qualified person, firm or company as may be appointed as the "Employer's Agent" under the Building

	Contract and the certifier under this Agreement appointed to certify Practical Completion or such other party as previously approved in writing by the Tenant (such approval not to be unreasonably withheld or delayed) provided that the persons listed in Annex 4 are deemed to have been approved by the Tenant; "**Defects Liability Period**" means the defects liability period under the Building Contract being a period of not less than twelve months from the Certificate Date; "**Major Equipment**" means the following items of equipment to be installed in the Building as part of the Works: (a) generator; (b) chiller; (c) air-handling unit; and (d) lift motor, to the extent such equipment is included within the Specification; "**Practical Completion**" means practical completion of the Works in accordance with the Building Contract certified by the Certifier and which shall not be certified before the Works have been practically completed subject only to the outstanding items being Minor Defects which are in the Certifier's proper discretion snagging items and which, in the Certifier's proper discretion, are not in such quantity or location as to materially adversely affect the beneficial use and occupation of the Site by the Tenant; "**Site**" means that area shown edged red on Plan 1 known as Care Home Development Site at Old Milverton Lane Leamington Spa Warwickshire, and each and every part of it; "**Specification**" means the initial specification contained in Annex 1, as may be amended, supplemented or replaced in accordance with the terms of clause 6 from time to time save where any departure is required in order to comply with or obtain any Required Consent or comply with any statutory requirement or as otherwise agreed between the parties (acting reasonably and expeditiously), or otherwise provided in the Specification "**Term Commencement Date**" has the meaning attributed to it in Clause 22; "**Works**" means the construction of the Building and associated works in accordance with the Specification and the Planning Permission.
Clause 6: Specification	6.1 The Specification shall form the basis and outline of the detailed designs and specifications for the Site and Building. 6.2 The Developer may not make any changes to the Specification without the prior written consent of the Tenant and the Landlord (not to be unreasonably withheld).

Clause 11: Carrying out of Works	Subject to the Developer obtaining such of the Required Consents as are normally obtained prior to or during the course of the carrying out of the Works, the Developer shall use reasonable endeavours to procure that the Contractor shall proceed diligently to carry out and complete the Works: 11.1.1 in a good and workmanlike manner in accordance with any Required Consent or comply with any statutory requirement or as otherwise agreed between the parties (acting reasonably and expeditiously), or otherwise provided in the Specification; 11.1.2 with good and sound materials to the extent otherwise not specified in the Specification; 11.1.3 in compliance with all necessary Required Consents; 11.1.4 in accordance with the Approved Plans; 11.1.5 free of any Prohibited Materials (unless specified in the Approved Plans); and 11.1.6 in accordance with the Building Contract.
Clause 16: Practical Completion	**16.1 Developer to give notice of inspection** The Developer shall procure that the Certifier gives to the Landlord and the Tenant not less than five (5) Working Days' prior written notice of the date and time at which the Certifier intends to carry out its inspection of the Works in anticipation of issuing the Certificate of Practical Completion and such procedure shall be carried out on each occasion that the Certifier intends to carry out an inspection of the Works. **16.3 Certifier's discretion** The Certifier shall not be fettered from issuing the Certificate of Practical Completion at such time as in his reasonable opinion and in accordance with the terms of his appointment as he thinks fit.
Clause 17: Commissioning of Plant and Equipment	17.1 Prior to Practical Completion the Developer is to: 17.1.1 give the Landlord and the Tenant not less than ten (10) Working Days' written notice of the date on which the commissioning and testing of Major Equipment installed as part of the Works will take place; and 17.1.2 permit the Tenant, the Tenant's Surveyor, the Landlord and the Landlord's Surveyor to attend and to make representations on the proposal to issue the commissioning reports and test certificates for the items of Major Equipment installed as part of the Works and the Developer shall have reasonable regard to (but not be bound by) those representations.
Clause 18: Following Practical Completion	18.2 Following Practical Completion and in any event within ten (10) Working Days thereafter, the Developer shall leave the Site in a good and clean condition, cleared of all unused building materials, plant and equipment used in the carrying out of the Works and temporary structures.

Clause 19: Minor Defects	19.1 The Developer is to use reasonable endeavours to procure that the Building Contractor makes good all Minor Defects which have been identified in the Certificate of Practical Completion as soon as reasonably practicable after the Certificate Date. 19.2 The Developer is to use reasonable endeavours to procure that all defects in the Works for which the Building Contractor is responsible under the Building Contract that arise within the Defects Liability Period are made good to the reasonable satisfaction of the Tenant in accordance with the terms of the Building Contract.
Clause 20: Occupation by Tenant	**20.1 Tenant as licensee** Pending the grant of the Lease, any occupation of the Site by the Tenant shall be deemed to be that of a licensee only and shall be subject to, and have the benefit of, the same rights, exceptions, reservations, covenants and conditions as are to be contained in the Lease (as if it had been granted) so far as any of the same are capable of applying to occupation by a licensee and are not inconsistent with any provision of this Agreement or with the physical state or condition of the Site.
Clause 21: Completion of Lease and Call Option Agreement	**21.1 Lease** Within ten (1) Working Days following the later to occur of: 21.1.1 the Certificate Date; and 21.1.2 determination of the Net Internal Area in accordance with Clause 15; the Landlord shall grant and the Tenant shall accept, and execute a counterpart of the Lease and deliver the same to the Landlord in exchange for the original (the "Completion Date"), with the details of such Lease having been completed by the Landlord's Solicitors by the Landlord's Solicitors by: 21.1.3 inserting the Term Commencement Date (as ascertained in accordance with Clause 22.1) in Prescribed Clause LR6 of the Lease; 21.1.4 completing the definition of Initial Rent; 21.1.5 completing the definition of Rent Commencement Date; and 21.1.6 completing the definition of External Decoration Year and Internal Decoration Year with the date being the 5th anniversary of the Term Commencement Date. **Clause 21.3 Plan(s)** The parties agree that the provisions of Schedule 1 of the Lease, the plans to be annexed to the Lease and the Definition of Plans in the Lease may need to be amended and supplemented prior to the grant of the Lease as the parties may agree (acting reasonably) in order to reflect the specific rights and reservations and plans in the context of the "as-built" Building by

	reference to the rights and reservations proposed in the form of Lease annexed to this Agreement.
Clause 22: Term and Term Commencement Date	22.1 The term of the Lease shall be for twenty-five (25) years commencing on the date following the Certificate Date. 22.2 The commencement date ascertained under Clause 22.1 shall be the "Term Commencement Date" and inserted in Prescribed Clause LR6 of the Lease.
Clause 23: Rent	23.1 The Initial Rent shall commence to be payable from the Rent Commencement Date. 23.2 The Rent Commencement Date shall be inserted in the Lease. 23.3 The Initial Rent shall be subject to review on the Relevant Review Dates and Relevant Open Market Review Dates (as each term is defined in the Lease).
Schedule 5: Form of Building Contract - Annex 1: Specification	**Introduction** This document has been produced as a specification for all Silver Sea Developments S.a r.l./Care UK Community Partnerships Lid nursing homes. The specification should be read in conjunction with the Room Data Sheets, Drawings and M&E Specification where further detail will be shown. The Contractor should identify any assumption or proposed alternative to these documents in their Contractor's Proposals, otherwise the specification is unchanged. Any discrepancy or conflict in these documents should be highlighted to Care UK by the Contractor in their Contractor's Proposals, otherwise the contract conditions prevail. If there is any specific item that appears to be unspecified in the Specification, Drawings, Room Data Sheets and M&E Specification then this should be highlighted to Care UK by the Contractor and the Contractor should make a proposal for Care UK's approval. **14.0 Fixtures and Fittings by Contractor** 14.1 Supply and fix shelving as indicated on Room Data Sheets. 14.2 Allow for kitchen fittings as Room Data Sheets: 14.3 Allow for softwood curtain battens to all windows (to clear window by 150 mm each side). Finishes as Client Colour Schedule. 14.4 Supply and fix timber hat and coat rails and hat and coat hooks on pattress as indicated in Room Data Sheets

	14.5 Provide and fix laminate faced vanity top to each en-suite WC room to detail (not white). 14.6 Not used 14.7 Provide and fix toilet roll holder to each ensuites. Sample to be approved. 14.8 Paper towel dispensers and soap dispensers to each basin, supplied and fixed by Client. 14.9 Provide and fix 450 x 1100 mm mirrors over all wash hand basins. 14.10 Provide and fix towel ring in each en-suite WC. 14.1 1 Provide and fix coloured grab rails as indicate on Room Data Sheets in accordance with colour schedule 14.12 Provide and fix cream shower curtain to match tiles to all showers, along with half height carer screen (screen to assisted bathrooms only) 14.13 Provide all necessary internal statutory signage and signs to comply with the Fire Officer's Requirements. See item 4.20 14.14 Fix only Client supply controlled metal drugs cabinet in each Drugs room. Cabinet to be securely bolted to wall. 14.15 Supply and Fix bedpan washers in sluice rooms. The model supplied is Panamatic Midi from Dolphin Disinfection Company Ltd (Tel No 01202 667399). The Contractor to check the specific requirements from the supplier and provide the relevant power, cold water and waste as necessary. 14.16 Provide and install 1 nr wall mounted folding slatted shower seat to all showers with folding arms. 14.17 Bedroom doors to be provided with cardholders/photo holders and room numbers. 14.18 Remaining doors to be fitted with door identification plates and signage. 14.19 Provide and fix memory boxes outside bedrooms. Manor Art as Room Data Sheets. 14.20 The Contractor should allow for the fitting of all Client supplied directional signage, door signage and external signage as stated in the Room Data Sheets. Contractor is to supply and fit bedroom door signage. **15.0 Specialist Equipment by Contractor** 15.1 Main Kitchen Installation fully designed, supplied, installed and commissioned by specialist. This work is covered under a Provisional Sum. Main Contractor to allow for installing M&E Services up to 500mm of appliances 15.2 Main Laundry equipment fully designed, supplied, installed and commissioned by specialist. This work is covered under a

	provisional sum. Main Contractor to allow for installing M&E services up to 500inm of appliances 15.3 Assisted baths to be Arjo Rhapsody/Malibu specialist baths including fixing and commissioning. See room data sheets for models. 15.4 Supply and fix fire extinguishers and all signage to Fire Officer's requirements and to the relevant British Standard. **16.0 Client's Furniture, Fixtures and Equipment** 16.1 All furniture, fittings and equipment necessary for the registration and operation of the home to be provided and room placed to the client's requirements by others, after Practical Completion has been given to the contractor. 16.2 The Contractor may be asked to assist with arranging for the co-ordination of furniture and fabric colours to give an integrated interior design and coordination package. 16.3 Contractor to allow for Carpenter to be on site for 2 weeks during fit out and commissioning period under direction of Care UK

Occupational Lease of Care Home at Old Milverton Lane, Leamington Spa, Warwickshire dated 11 August 2014	
Parties	**"Landlord":** PropCo **"Tenant":** OpCo **"Guarantor":** CUK
Prescribed Clauses	**LR6 Term for which the Property is leased** The term is as follows: twenty five (25) years from and including 24 May 2014
Clause 1: Definitions	"**Assumptions**" means the following assumptions (if not facts) at the relevant review date:- (a) that the Premises are fully fitted-out and equipped for immediate occupation and used by the incoming tenant in accordance with the finalised specification and plans agreed by the parties pursuant to the agreements to grant this Lease and may be lawfully used by any person for any of the purposes permitted by this Lease; (b) that no work has been carried out to the Premises by the Tenant or any undertenant or their respective predecessors in title during the Term, which has diminished the rental value of the Premises; (c) that if the Premises or any part of them have been destroyed or damaged, they shall have been fully rebuilt and reinstated;

	(d) that the Premises are in a good state of repair and decorative condition; (e) that all the covenants on the part of the Tenant contained in this Lease have been fully performed and observed; and (f) that all the covenants on the part of the Landlord contained in this Lease have been fully performed and observed; "**Open Market Rent**" means the yearly rent which might reasonably be expected to become payable in respect of the Premises after the expiry of any rent free, concessionary rent and/or after the giving of any other inducement (whether by means of a capital payment or otherwise) given in each case in connection with the fitting out of the Premises by the incoming tenant of such length or of such amount or nature as would be negotiated in the open market between a willing landlord and a willing tenant (to the intent that no discount, reduction or allowance shall be made in ascertaining the open market rent to reflect such rent free, concessionary rent or other inducement as would be negotiated as aforesaid or to compensate the tenant for its absence) upon a letting of the Premises as a whole in the open market with vacant possession at the Open Market Review Date by willing landlord to a willing tenant and without the landlord receiving any premium or other consideration for the grant of the lease for a term of 25 years commencing on the Open Market Review Date and otherwise on the terms and conditions and subject to the covenants and provisions contained in this Lease (other than the amount of the rent payable under this Lease but including the provisions for the review of rent contained in this Lease with review at the same intervals as under this Lease) and making the Assumptions but disregarding the Disregarded Matters; "**Permitted Use**" means a good class care home within Class C2 (Residential Institution) of the Town and Country Planning (Use Classes) Order 1987 only and not any amendment or re-enactment of such Order made after the date of this Lease and purposes ancillary to such use; "**Premises**" means the land situated at Old Milverton Lane, Leamington Spa, Warwickshire, together with the buildings erected on it or on part of it and shown edged/coloured red on the Plan/s and each and every part of the land and building including: (a) any Conduits in, on, under or over and exclusively serving them, except those of any utility company; (b) all landlord's fixtures, fittings, plant, machinery, apparatus, and equipment now or after the date of this Lease in or upon the same including any lifts, lift shafts and lift machinery, any boilers and central heating and air conditioning plant, any sprinklers and the water and sanitary apparatus; and (c) any additions, alterations and improvements; but excluding the air space more than two (2) metres above the height of the top of the building as erected on the said land at the date of this Lease; "**Term**" means the term specified in Prescribed Clause LR6 and includes the period of any holding over or any extension or continuation, whether by statute or common law;

	"**Term Commencement Date**" means the date specified in Prescribed Clause LR6;
Clause 2: Interpretation	The headings in this Lease do not affect its construction and in this Lease:- 2.5 the words "include" and "including" shall be deemed to be followed by the words "without limitation";
Clause 3: Grant, Rights and Other Matters	**Clause 3.1 Demise and Term** In consideration of the Rents, covenants and agreements reserved by, and contained in, this Lease to be paid and performed by the Tenant in accordance with this Lease, the Landlord leases the Premises to the Tenant for the Term.
Clause 4: Rents	**Clause 4.1 Tenant's obligation to pay** The Tenant covenants to pay to the Landlord at all times during the Term by way of rent: 4.1.1 yearly, and proportionately for any fraction of a year, the Initial Rent and from and including each Review Date and Open Market Review Date, such yearly rent as shall become payable under clause 5; 4.1.2 the Insurance Rent; 4.1.3 the Additional Rent; and 4.1.4 any VAT Rent.
Clause 5: Rent Review	**Clause 5.1 Rent reviews** 5.1.1 The Principal Rent shall be reviewed at each Review Date in accordance with the provisions of this clause and from and including each Review Date the Principal Rent shall equal the higher of:- (a) the Principal Rent contractually payable immediately before the Relevant Review Date (or which would be payable but for any suspension of rent (in whole or in part) under this Lease); and (b) the RPI Increased Rent on the Relevant Review Date. 5.1.2 The Principal Rent shall be reviewed on each Open Market Review Date in accordance with the provisions of this clause and from and including each Open Market Review Date the Principal rent shall equal the higher of:- (a) the Principal Rent contractually payable immediately before the Relevant Open Market Review Date (or which would be payable but for any suspension of rent (in whole or part) under this Lease); and (b) the Open Market Rent on the Relevant Open Market Review Date as agreed or determined pursuant to this clause.
Clause 12: Repairs,	**12.1 Repairs**

Decoration Etc.	Subject to clause 12.2, The Tenant shall:- 12.1.1 repair and keep in good and substantial repair and condition the Premises and, as often as may be necessary, reinstate, rebuild or renew each part of them; 12.1.2 as and when necessary, replace any of the landlord's fixtures and fittings which may be or become beyond repair with new ones which are similar in type and quality; 12.1.3 take all necessary precautions to prevent frost damage to any pipes or water apparatus in the Premises; and 12.1.4 keep all parts of the Premises which are not build on in a good and clean condition, adequately surfaced and free from weeds, and any landscaped areas properly cultivated and maintained, and any trees preserved. [Clause 12.2 excepts from the obligations in clause 12.1 damaged covered by risks insured by the landlord]. **12.5 Plant and machinery** The Tenant shall keep all lifts, boilers and central heating and air conditioning plant, sprinklers and other plant, machinery, apparatus and equipment in the Premises properly maintained and in good working order and condition and for that purpose shall:- 12.5.1 employ such reputable contractors regularly to inspect, maintain and service them; 12.5.2 renew or replace all working and other parts as and when necessary; and 12.5.3 ensure, by directions to the Tenant's staff and otherwise, that such plant and machinery is properly operated.
Clause 13: Yield Up	**13.1 Reinstatement of Premises** Immediately prior to the expiration or earlier determination of the Term and to the extent the Landlord reasonably requires, the Tenant, at its own cost, shall:- 13.1.1 replace any of the Landlord's fixtures and fittings which shall be missing, damaged or destroyed, with new ones of similar kind and quality or (at the option of the Landlord) pay to the Landlord an amount equal to the cost of replacing any of them; 13.1.2 remove from the Premises any sign, writing, or painting of the name or business of the Tenant or any occupier of them and all tenant's fixtures, fittings, furniture, and effects and make good, to the reasonable satisfaction of the Landlord, all damage caused by such removal […] 13.2 Yielding up in good repair At the expiration or earlier determination of the Term, the Tenant shall quietly yield up the Premises to the Landlord in good and

	substantial repair and condition and in accordance with the covenants by the Tenant contained in this Lease.
Clause 15: Alterations	**15.2 No alterations to landlord's fixtures** The Tenant shall not make any alteration or addition to any of the Landlord's fixtures or to any of the Service Media in the Premises without the prior written consent of the Landlord (such consent not to be unreasonably withheld).
Clause 17: Use of Premises	**17.1 Permitted use** The Tenant shall not use the Premises or any part of them except for the Permitted Use.
Schedule 1: Exceptions and Reservations	Para 1 There are expected and reserved to the Landlord and the tenants and occupiers of any Adjoining Property and all other persons authorised by the Landlord or having similar rights:- 1.2 the right to enter the Premises with all necessary materials, equipment, appliances and workmen in order to:- … 1.2.3 to examine the condition of the Premises and to take details of the Landlord's fixtures in them and do anything which the Landlord may do under this Lease;

Agreement for the provision of consultancy services in relation to a development at Quarry Farm, Old Milverton Lane, Leamington Spa dated 5 April 2013	
Parties	"Client": SSD "Consultant": AECOM (under its previous name "Davis Langdon LLP")
Clause 1: Interpretation	1.1 In this Agreement: "**Contractor**" means the main building contractor engaged or to be engaged by the Client to carry out the Development; "**Services**" means the professional services to be performed by the Consultant under this Agreement as more particularly described in Schedule 5 and other services reasonably incidental thereto;
Clause 2: Appointment of the Consultant	2.1 The Client appoints the Consultant as Quantity Surveyor, Employer's Agent and CDM Co-ordinator for the Project and the Consultant accepts such appointment and agrees to carry out and complete the Services and any Additional Services, if any, fully and faithfully and in the best interests of the Client and in accordance with the terms and conditions of this Agreement.
Schedule 5: The Services	As set out in the Consultant's fee proposal (reproduced below) **<u>Part Two</u>** **Schedule of services**

	Employer's Agent/Quantity Surveyor Services Pre- construction stage • Ensuring that planning, Section Agreements and Building Control Regulations are submitted on time and monitor progress. Carry out any post tender negotiations. • Advise on and prepare Employer's Requirements/Tender documentation/Contract documentation • Confirm contractor's proposals comply with Employers Requirements. Arrange for signing of contract documents • Organised chair and minute pre-contract meeting • Assist with obtaining collateral warranties as necessary Construction stage • Organise, chair and minute monthly site meetings • Agree lump sum prices for variations • Prepare monthly valuations, certifying the same • Prepare monthly financial statements throughout the contract. • Ensure that the Client's instructions are carried out by the contractor • Issue Certificate of Practical Completion (subject to input from others) • Ensure all Warranties, Guarantees, Building Regulations, NHBC etc. are in place • Ensure that the contractor has complied with all the requests of the CDM Coordinator Completion handover • Agree Final Account with Contractor • Monitor defects throughout the defects period • Issue Certificate of Making Good Defects • Issue Final Certificate • Ensure appropriate certification has been processed • Manage the handover process of key documentation Quality monitoring services General Services

	The principal role of Quality Monitoring is to ensure that the building is being constructed to the required standards. This is to be primarily a part time supervisory role to confirm that the building has been constructed in line with the drawings and specification and in accordance with Building Regulations and industry standard good practice. Services include the following:- • Review and comment on drawings and specifications submitted by the contractor for compliance with the building contract • Attend design team meetings where necessary and becoming actively involved in ensuring that Clients design criteria and specification requirements are being met • Seek to establish and maintain positive contractor relationships • Undertake fortnightly visual inspections of the works to monitor progress against the contract programme and check work is executed in accordance with the contract documents (excluding mechanical and electrical services, specialist installations, infrastructure, areas which are covered, unexposed or not reasonably accessible from within the site or adjacent public areas) • Provide a regular report to the Client, Employer's Agent and the Contractor which confirms the progress and quality of the works in accordance with the Client's agreed standard and specification. This inspection report does not absolve the contractor's overall responsibility for the design and construction of the works • Carry out snagging inspections including preparation of schedules and back checking as the building nears completion. Advise on Practical Completion • Carry out inspection and back check, twelve months after Practical Completion, and advise on End of Defects <u>CDM Coordinator Services</u> **Mandatory Services to comply with CDM Regulations (NB - the content of this part of Appendix A must be read in context with the CDM Regulations as a whole)** 1. Seek the cooperation of and cooperate with other duty holders involved in the Project so far as necessary to enable them all to perform their duties under the CDM Regulations (Regulation 5) 2. Give suitable and sufficient advice and assistance to the Client on the following measures: (a) taking reasonable steps to ensure that the arrangements for managing the project or suitable to ensure that: (i) the construction work can be carried out so far as reasonably practicable without risk to the health and safety of any person; (ii) the requirements of Schedule 2 to the CDM Regulations ("welfare facilities") are complied with; and

	(iii) any structure designed for use as a workplace has been designed to take account of the provisions of the Workplace (Health, Safety and Welfare) Regulations 1992 which relate to the design of, and materials used in, the structure (Regulation 20(1)(a)) (b) taking reasonable steps to ensure that these arrangements are maintained and reviewed throughout the project (Regulation 20(1)(b)) (c) advising the Client on what pre-construction information is required (Regulation 20(1)(a)) (d) ensuring that the construction phase does not start unless the Principal Contractor has prepared an adequate Construction Phase Plan and that appropriate welfare will be provided during the construction phase (Regulation 20(1)(a)) (e) providing health and safety information for the Health and Safety File (Regulation 20(1)(a)) 3. Ensure that suitable arrangements are made and implemented for the co-ordination of health and safety measures during planning and preparation for the construction phase including facilitating: (a) co-operation and co-ordination between duty holders on the Project (Regulation 20(1)(b)(i)) (b) the application of the general principles of prevention and in particular: (i) avoiding risks; (ii) evaluating the risks which cannot be avoided; (iii) combatting the risks at source; (iv) developing a coherent overall prevention policy; (v) giving collective protection measures priority over individual protective measures (Regulation 20(1)(b(ii) and Appendix 7 of ACOP) 4. Take all reasonable steps to identify and collect the pre-construction information and distribute the relevant parts of it promptly in a convenient form to every Designer and every Contractor who may be or has been appointed by the Client (Regulation (20)(2)(a) and (b)) 5. Liaise with the Principal Contractor on: (a) the information which the Principal Contractor needs to prepare the Construction Phase Plan; (b) any design development which may affect planning and management of the construction work; and (c) the contents of the Health and Safety File (Regulation 20(1)(c)) 6. Take all reasonable steps to ensure that the Designers comply with their duties (Regulation 20(2)(c)) 7. Take all reasonable steps to ensure cooperation between the Designers and the Principal Contractor during the construction phase in relation to any design or change to a design (Regulation 20(2)(d))

	8. Prepare where none exist or otherwise review and update the Health and Safety File incorporating relevant information from other duty holders (regulation 20(2)(e)) 9 deliver one copy of the Health and Safety File to the Client (Regulation 20(2)(f)) 10. Obtain the Client's signed approval to the terms of the notice to be given to the Health and Safety Executive in accordance with Regulation 21 and ensure that such notice is given to the HSE. Notwithstanding anything to the contrary contained herein, the Consultant shall not be responsible for any construction means, methods, procedures, sequences or techniques, or for site safety.

ANNEX TWO –FF&E ITEMS WHOSE "INCORPORATED" STATUS IS IN DISPUTE

	Item	Evidence	Submissions	Tribunal's Findings
1	Bedroom wardrobe	Photograph of floor standing wardrobe. Mr Prior: There is a regulatory requirement for care homes to provide arrangements for the storage of residents' personal property, wardrobes must therefore be provided. Because of the risk of wardrobes (and other heavy furniture) toppling, they are screwed at the top to a wooden batten, which is in turn screwed to the wall. This attachment is temporary, which allows the wardrobe to be detached without incurring structural damage should it need replacing or relocating. Mr Metcalfe: Securely fixed to the wall with screws. A metal bracket with two screws attached to the wardrobe, and the bracket was attached to the wall with screws. It did not look like an item that would be moved around. The nature of the building meant that the furniture was not as portable as in a normal bedroom, as the furniture must be fixed for regulatory purposes. It was	PropCo: These are not installed in spaces specifically designed to accommodate the item. The furniture can be moved, and resident can substitute own furniture. Any attachment is not of a permanent nature, the item can be detached without damage either to item or to building, as the attachment is for health and safety reasons, rather than because of the item's location or nature. It is important for these items to be able to be moved easily around the Care Home to meet the regulatory requirement that residents have a say in how they live in and occupy what is their home. HMRC: It is PropCo's own case that the items in question must be fixed to the building to comply with regulatory requirements. Item expressly excluded from being "building materials" by Note 22(a) ("finished or prefabricated furniture, other than furniture designed to be fitted in kitchens").	Item is incorporated and expressly excluded from definition of "building materials". We find these items are incorporated by reason of the fact that they are screwed to a wooden batten, which is in turn screwed to the wall. We find that this is a material degree of attachment. We find (for the reasons given in the body of the decision) that once installed, the item can reasonably be expected to remain in place and not be moved on a regular basis. We find that the item is installed with a reasonable expectation of permanence. The item is expressly excluded from being "building materials" by Note 22(a).

		not intended to be portable in an everyday sense.		
2	Wardrobe, chest of drawers and shelving in bedroom for resident with dementia	Photograph of bedroom with floor standing wardrobe and chest of drawers. Mr Prior: The wardrobe and the chest of drawers have clear fronts, so that the resident can see the clothes in the wardrobe and drawers, even when they are shut. The wardrobe, shelves and drawers all have a wooden batten behind them (at the top of the unit) which is screwed to the wall, and the unit is then screwed into the batten. Mr Metcalfe: As regards dressing tables and bedside cabinets, he was informed that these were not of a height requiring attachment and were free-standing. If they were screwed to the wall, he considers that they would be incorporated. See comments above in relation to wardrobes.	PropCo: as for item 1 (wardrobe). HMRC: as for item 1 (wardrobe)	There was a degree of confusion in the evidence as to the attachment of the chests of drawers, and other "low level" furniture. Mr Prior's evidence was that these were screwed to the wall (either directly or with a batten), because of the risk that a resident might place his or her weight on an open drawer for balance. Mr Metcalfe's evidence was that these were not attached. Irrespective of their attachment, we nonetheless find that they are incorporated and expressly excluded from the definition of "building materials". Even though an item might not be screwed to the wall (or to a batten), once it was put into its place, the item can reasonably be expected to remain in place and not be moved on a regular basis. We find that the item is installed with a reasonable expectation of permanence. The item is expressly excluded from being "building materials" by Note 22(a).

3	Floor standing bookcase	Photograph of top of small bookcase showing strap fixing bookcase to wall. Mr Metcalfe: Securely fixed to the wall with a tab. The tab is a short strap screwed into the top of the bookcase at one end, and the wall at the other end.	PropCo: as for item 1 (wardrobe). HMRC: as for item 1 (wardrobe)	Item is incorporated and expressly excluded from definition of "building materials". We find these items are incorporated by reason of the fact that they are screwed to a wooden batten, which is in turn screwed to the wall. We find that this is a material degree of attachment. We find that once installed, the item can reasonably be expected to remain in place and not be moved on a regular basis – unlike bedroom furniture, there was no evidence that these items would ever be moved once installed. We find that the item is installed with a reasonable expectation of permanence. The item is expressly excluded from being "building materials" by Note 22(a).
4	Library bookcase with display shelves (library unit)	Photograph of a wooden bookcase with shelves with books and with sloping display racks on which large "coffee table" type books were displayed. Mr Prior: These are twice the size of bedroom wardrobes, so require a double fixing. A batten is screwed to the wall behind the top of the	PropCo: These are not installed in spaces specifically designed to accommodate the item. The furniture can be moved. Any attachment is not of a permanent nature, the item can be detached without damage either to item or to building, as the attachment is for health and safety reasons, rather than because of the item's location or nature.	Mr Metcalfe during his oral evidence corrected a typographical error in his witness statement where he referred to this units (incorrectly) as wardrobes. Item is incorporated and expressly excluded from definition of "building materials".

		bookcase, and the bookcase is then screwed to the batten. Mr Metcalfe: These are a substantial piece of wall furniture and securely fixed to the wall.	HMRC: as for item 1 (wardrobe)	We find these items are incorporated by reason of the fact that they are screwed to a wooden batten, which is in turn screwed to the wall. We find that this is a material degree of attachment. We find that once installed, the item can reasonably be expected to remain in place and not be moved on a regular basis – unlike bedroom furniture, there was no evidence that these items would ever be moved once installed. We find that the item is installed with a reasonable expectation of permanence. The item is expressly excluded from being "building materials" by Note 22(a).
5	Workstation (workbench)	Photograph of computer workstation with "rolltop" type lid. Mr Prior: This is a "CareSys" unit. It contains a computer so that staff can access the care home's computerised care plan. The lid can be locked shut when not in use. It is attached to the wall, and the legs are attached to the floor with "L" brackets. The unit has additional secure fixing because it contains electrical equipment.	PropCo: as for item 4 (library bookcase) HMRC: as for item 1 (wardrobe)	The item has the appearance of a lockable rolltop desk. Item is incorporated and expressly excluded from definition of "building materials". We find these items are incorporated by reason of the fact that they are screwed both to the wall and the floor. We find that this is a material degree of attachment. We find that once installed, the item can reasonably be expected to remain in

		Mr Metcalfe: Although he did not inspect this item specifically it was his understanding that this item is fixed to the wall.		place and not be moved on a regular basis. We find that the item is installed with a reasonable expectation of permanence. As the item needs wired connections both for power and for the computer network, the item will need to be located where there are outlets for both in the wall behind the unit (we note from the photograph that the items are not wired to floor points, so it seems unlikely (and we so find) that there is a suspended floor with moveable floor traps for network wiring). We therefore find that there will only be very limited locations in Priors House where these workstations can be located, and therefore relocating these workstations will be a major exercise, and unlikely to occur on a regular basis (if at all). The item is expressly excluded from being "building materials" by Note 22(a).
6	Tall floor standing filing cabinet (Lockable filing cabinet)	Photograph of floor standing cabinet. Mr Prior: This item is found in the administrative offices, nurses' stations, and in the manager's office. It is used for storing personal files. It	PropCo: as for item 4 (library bookcase) HMRC: as for item 1 (wardrobe)	Item is incorporated and expressly excluded from definition of "building materials". We find these items are incorporated by reason of the fact that they are

		is lockable. It is the same size as a bedroom wardrobe, and is fixed in the same way (batten screwed to wall behind top of cabinet, and cabinet screwed into batten) Mr Metcalfe: This was a fixed piece of storage furniture.		screwed to a wooden batten, which is in turn screwed to the wall. We find that this is a material degree of attachment. We find that once installed, the item can reasonably be expected to remain in place and not be moved on a regular basis – unlike bedroom furniture, there was no evidence that these items would ever be moved once installed. We find that the item is installed with a reasonable expectation of permanence. The item is expressly excluded from being "building materials" by Note 22(a).
7	Bath thermometer (wall mounted thermometer)	Photograph of a thermometer on a bathroom wall. Mr Prior: The storage cassette is screwed permanently to the wall, and the thermometer clips into the cassette for storage. The thermometer is used to check that the temperature of bath water is less than 43°C, as there was a risk that the thermostat on the tap might fail. Mr Metcalfe: These were attached to the wall by a screw.	PropCo: There is no reasonable expectation that any attachment to the building is permanent. The items are 'portable in the ordinary course'. HMRC: It is fixed to the wall; it has to be. It lacks the essential element of portability in day-to-day use in order not to be regarded as installed fittings. The fact that it could be moved "without significant damage to the wall" is irrelevant to the question whether it is "incorporated".	We find that this item is not incorporated. We find that the thermometer and its bracket are supplied as a single composite item for VAT purposes. They are supplied together for a single price, and the wall bracket is ancillary to the thermometer itself and designed specifically for it. As the bracket is ancillary to the thermometer, the composite item takes its character from the thermometer, and not the bracket.

				We find that the thermometer is not incorporated. We find that it is by its nature "portable in the ordinary course", as it must be unclipped from the wall bracket for use, and it is reasonable to expect it to be removed from the wall bracket in its day-to-day use.
8	Memory cases (Display cases)	Photograph of a wall mounted display cabinet with one horizontal shelf in the middle. Mr Metcalfe: These were units attached to the wall outside the residents' room to hold pictures/mementoes.	PropCo: as for item 4 (library bookcase). HMRC: as for item 1 (wardrobe).	We note that paragraph 14.19 of the Construction Specification provides that the building contractor is to provide and fix memory boxes outside bedrooms. We cannot find the memory boxes as being supplied by Renray under the Renray Specification, so it appears to us likely (and we find) that the memory cases were installed under the terms of the Building Contract. They therefore do not fall within the scope of this Appeal. But in any event, they are incorporated and expressly excluded from definition of "building materials". We find these items are incorporated by reason of the fact that they are screwed to the wall. We find that this is a material degree of attachment. We find that once installed, the item

				can reasonably be expected to remain in place and not be moved on a regular basis – unlike bedroom furniture, there was no evidence that these items would ever be moved once installed. We find that the item is installed with a reasonable expectation of permanence. The item is expressly excluded from being "building materials" by Note 22(a).
9	Kitchen worktop (sideboard)	Photograph of a "peninsular" style kitchen worktop. Mr Prior: The worktop is attached to the wall at one end with a wooden batten and stands on legs at the other end. This is an old-style worktop, as new care homes now have storage cupboards underneath. Mr Metcalfe: This was had to have a good degree of fixing, otherwise it would be dangerous.	HMRC: HMRC accept that this is incorporated kitchen furniture	Item is incorporated kitchen furniture, and therefore input tax credit is not blocked.
10	COSH storage cabinets (lockable storage cupboard)	Photograph of a metal floor standing cabinet. Mr Prior: Storage cabinets for chemicals located "back of house". The cabinets are kept locked and require a security code to unlock.	PropCo: as for item 4 (library bookcase). HMRC: as for item 1 (wardrobe)	Item is incorporated and expressly excluded from definition of "building materials". We find these items are incorporated by reason of the fact that they are screwed to a wooden batten, which is

		Wooden batten is screwed to the wall behind the top of the cabinet, and the cabinet is screwed to the batten. The cabinet is screwed to the wall because of its weight and the risk of toppling. Mr Metcalfe: Recollection was that this was attached to the wall with a bracket or tab at the top, but because of its height it was difficult to see. But didn't disagree with Mr Prior's evidence.		in turn screwed to the wall. We find that this is a material degree of attachment. We find that once installed, the item can reasonably be expected to remain in place and not be moved on a regular basis – unlike bedroom furniture, there was no evidence that these items would ever be moved once installed. We find that the item is installed with a reasonable expectation of permanence. The item is expressly excluded from being "building materials" by Note 22(a).
11	Suction machine	Photograph of suction machine mounted on wall bracket, with electrical lead trailing from bracket to nearby socket. Mr Prior: Suction machines are used to remove blockages from a resident's airway "to prevent pulmonary aspiration and facilitate breathing". The machines can only be operated by a qualified nurse, and there is typically one suction machine provided for every nursing suite in the care home. OpCo could not provide care in a regulatory compliant manner without suction machines. The suction machine itself	PropCo: There is no reasonable expectation that any attachment to the building is permanent. The items are 'portable in the ordinary course'. HMRC: The parties have agreed that the wall bracket is installed and blocked. The suction machine itself is not portable in ordinary sense used in *Taylor Wimpey 1*. It is the opposite of the "toasters, irons or microwave ovens" considered in that case: the suction machine is "unplugged" when in use but is necessarily "plugged in" and attached to the fabric of the building (in its charger) when not in use. It is excluded from being	We find that this item is not incorporated. We disagree with the parties that the suction machine and the wall bracket should be considered separately. We find that the suction machine and its bracket are supplied as a single composite item for VAT purposes. They are supplied together for a single price, and the wall bracket is ancillary to the machine itself and designed specifically for it. As the bracket is ancillary to the machine, the composite item takes its character from the machine, and not the bracket.

		is “loose” and is clipped into its wall bracket for charging and storage. The bracket is bolted to the wall and is powered from an adjacent electric wall socket. The suction machine is released from the bracket when needed in the event of an emergency. Mr Metcalfe: The suction machine can be lifted off the bracket and isn’t itself securely fixed. But the bracket and machine are one composite item.	“building materials” by Note 22(c) (electrical or gas appliances).	We find that the suction machine is not incorporated. We find that it is by its nature “portable in the ordinary course”, as it must be unclipped from the wall bracket for use. and it is reasonable to expect it to be removed from the wall bracket in its day-to-day use. The fact that it is charged when not in use and stored on the bracket does not affect its portability (any more than a mobile phone would cease to be portable because it is charged on a stand when not in use).
12	Picture frame with picture	Photograph of a wooden picture frame. Mr Prior: The frames are not hung on a wall hook with wire but are secured to wall with four security screws. If the picture was hung from a hook, there would be a risk that a confused or distressed resident could knock the picture to the floor or could remove the picture and use it to hit another resident or a member of the care home staff. The frames can be removed from the wall so that the care home can substitute one of the resident’s own pictures to make his/her room more homely.	PropCo: as for item 4 (library bookcase). HMRC: It is (obviously) “installed as [a fitting]”. It is fixed to the wall; it has to be. The fact that it could be moved “without significant damage to the wall” is irrelevant to the question whether it is “incorporated”.	Item is incorporated and excluded from definition of “building materials” because it is not ordinarily incorporated into care homes by builders. We find these items are incorporated by reason of the fact that they are screwed to the wall. We find that this is a material degree of attachment. We find that once installed, the item can reasonably be expected to remain in place and not be moved on a regular basis – unlike bedroom furniture, there was no evidence that these items would ever be moved once installed. We find that the item

		Mr Metcalfe: These were held securely by a fixed bracket to the wall which appeared to lock the painting to it.		is installed with a reasonable expectation of permanence. We find that the picture frames are not "furniture" and are therefore not blocked by Note 22(a), but there is no evidence that the picture frames are ordinarily incorporated by builders into care homes, and we so find.
13	Cinema poster display cases	Photograph of a cinema poster in a display case. Mr Prior: The cases were used to display posters for films being screened in the care home cinema. The cases were screwed and bolted to the wall. The case itself can be opened to allow the poster to be changed.	PropCo: as for item 4 (library bookcase). HMRC: as for item 12 (pictures)	Item is incorporated and excluded from definition of "building materials" because it is not ordinarily incorporated into care homes by builders. We find these items are incorporated by reason of the fact that they are screwed to the wall. We find that this is a material degree of attachment. We find that once installed, the item can reasonably be expected to remain in place and not be moved on a regular basis – unlike bedroom furniture, there was no evidence that these items would ever be moved once installed. We find that the item is installed with a reasonable expectation of permanence. We find that the picture frames are not "furniture" and are therefore not blocked by Note 22(a), but there is no

				evidence that the picture frames are ordinarily incorporated by builders into care homes, and we so find.
14	Television	Photograph of the side view of a flat-screen television on an articulated bracket which is attached to the wall. Mr Prior: Access to televisions is a regulatory requirement, as a care home must give residents the opportunity to maintain a lifestyle consistent with that that they had before joining the home, and in order to exercise independence. Historically OpCo used televisions with stands, that were placed on cabinets, but these were regularly pulled off the cabinets. So now all televisions are mounted on wall brackets. The bracket is fixed to the wall with bolts. The television is designed to be mounted onto brackets and secured onto the bracket with bolts. The television is wired to the electrical mains and the TV signal at wall sockets behind the television. Mr Metcalfe: The televisions were secured to wall mountings which in turn were securely fixed to the wall.	PropCo: No reasonable expectation that any attachment to the building is permanent. The items are 'portable in the ordinary course'. HMRC: The item is (obviously) "installed as [a fitting]". It is fixed securely to the wall by way of the wall mounting. The fact that it could be moved "without significant damage to the wall is irrelevant. It is excluded from being "building materials" by Note 22(c) (electrical or gas appliances).	Item is incorporated and expressly excluded from definition of "building materials". We find these items are incorporated by reason of the fact that they are bolted to a wall bracket, and the bracket is bolted to the wall. We find that this is a material degree of attachment. We find that once installed, the item can reasonably be expected to remain in place and not be moved on a regular basis. We find that the item is installed with a reasonable expectation of permanence. As the item needs wired connections both for power and for the TV signal, the item must be located next to the relevant wall outlets. There is no other location in the bedroom to which the television can be relocated. The item is expressly excluded from being "building materials" by Note 22(c).

15	Servery counter	Photograph of large wooden servery counter, with shelving below on which crockery was stored. Mr Prior: This is in the café area. It is an item of bespoke furniture and is fitted by the building contractor as part of the fitting out of the kitchen. It was not on the list of FF&E items and cannot be purchased from Renray. Mr Metcalfe: This was a fixed and substantial piece of storage furniture.	PropCo: PropCo: as for item 4 (library bookcase). HMRC: Mr Prior's evidence is that the item was installed by Thomas Vale Construction plc, but no further evidence as to its status was given. If this is correct, then the item is outside scope of appeal. But in any event, it is incorporated and excluded from being building materials by Note 22(a) or 22(b))	If the item was installed under the terms of the Building Contract by Thomas Vale Construction plc, it does not fall within the scope of this Appeal. We cannot find the memory boxes as being supplied by Renray under the Renray Specification, so it appears to us likely (and we find) that the counter was installed under the terms of the Building Contract and therefore does not fall within the scope of this Appeal. But in any event, it is incorporated and expressly excluded from definition of "building materials". This is a large counter dividing the staff serving area from the resident's area in the café. On any basis this is a substantial item of furniture. It is clearly made specifically for the location in which it stands and could not be moved anywhere else in the building. There is no doubt in our minds that its installation is permanent. The item is expressly excluded from being "building materials" by Note 22(a) or (b).

16	Bedroom curtains and voiles	Photograph of window with metal curtain pole mounted above the window frame on which there were eyelet curtains, and another (narrower) metal pole set within the window frame on which there was a slot headed voile. Mr Prior: There is a regulatory requirement for care homes to treat residents with respect and dignity, including making sure that they have privacy when they want it (including when they are asleep, unconscious, or lack capacity). Each bedroom must be equipped with curtains and voiles to ensure this requirement is met. However, curtains and voiles present an infection risk, as they cannot be wiped down. So, there must be a facility to remove curtains and voiles for cleaning. The practice is for them to be cleaned every six months. The curtain pole is removed by undoing the screws at each end and from the bracket in the middle of the window. The finial at one end of the rail is then removed, and the curtains can then slide off the pole. The voiles are mounted on a metal rail which runs through a hem at the top of the voile, and the rail is then fixed above the	PropCo: There is no reasonable expectation that any attachment of curtains and voiles to the building is permanent. The items are 'portable in the ordinary course'. This is supported by the consideration that hygiene requirements mean items must be capable of being removed easily and without damage for cleaning. It does not make sense for the degree of attachment of a curtain to be determined by the manner in which it hangs from a rail – the fact that these curtains use eyelets rather than hooks for hanging can make no difference to their "attachment" to the building. HMRC: The assessments in this appeal were made prior to the decision of the FTT in *Whitford*, and so Mr Metcalfe had acknowledged that he had not considered that case when he made the assessments. He considered that manual blinds were like the curtain poles themselves, and he accepted that both were installed fittings. However, in the case of curtains and voiles, although Public Notice 708, "Buildings and Construction", paragraph 13.8.1, accepts curtains rails and poles as	Items are not incorporated We find that the curtains and voiles in Priors House have not been incorporated. Although "a process" must be undertaken to remove both curtains and voiles from their respective poles, we find that they are not attached to the poles (and therefore not attached via the poles to the walls) with any degree of permanence. The intention is that curtains and voiles can be, and are, removed regularly for cleaning. Whilst curtains and voiles might not be "portable" in the sense that a kettle is portable, we find that they are not incorporated. We agree that it would be odd if the method of hanging a curtain determined its incorporation status – so that a curtain hanging from a rail by hooks was not incorporated, but a curtain hanging by eyelets from a pole was incorporated. We note that Section 13.9 of Public Notice 708 lists curtains, blinds and carpets as being articles "not ordinarily incorporated in dwellings". However, the statement in the Public Notice only applies to items that have

		window frame. OpCo does not use curtain hooks to attach curtains and voiles to rails, as the plastic hooks snap off. The style of curtain used is easy for residents to open and close. Mr Metcalfe: The photographs included in the bundle of the curtains, blinds, and voiles were taken in an OpCo managed care home in Cheltenham, but they are identical in all material respects to the curtains, blinds and voiles in use in Prior House. Eyelet curtains are fixed to the curtain pole, and a process must be followed in order to remove the curtains from the pole. As such they are attached with a degree of permanence and are not portable in the everyday sense. Similar reasoning applies to the voiles. Even if the curtains were fixed with curtain hooks, they would be regarded as blocked for the same reasons.	articles "ordinarily incorporated", the curtains, voiles and blinds themselves could not be goods "ordinarily incorporated" by builders in a care home, by parity of reasoning with the guidance in paragraph 13.9 of Notice 708. Installed non-building materials and therefore blocked.	been incorporated, and we have found that the curtains and voiles in this case have not been incorporated. If we had found that they had been incorporated, we would have agreed with the Public Notice that curtains and voices are not "ordinarily" incorporated as there is no evidence before us that that would support a finding of such incorporation being commonplace.
17	Manual blinds	Photograph of a "Roman" style blind mounted above a window frame in a communal room. Mr Metcalfe: HMRC now accept in the light of *Whitford* that manual blinds are not blocked.	In the light of the FTT's decision in *Whitford* HMRC accept that manual blinds are not blocked.	In the light of HMRC's concession that they do not regard input tax on manual blinds as being blocked, we make no findings.

	Wi-Fi/computer network/telephone system	Mr Prior: PropCo and HMRC have agreed that the telephone and computer network both have three components: (1) the loose and therefore, non-incorporated handset or modem; (2) the wiring, which is incorporated into the structural build and therefore formed part of the building materials; and (3) the hubs, which were incorporated into the building by way of attachment to the wall and were permanently sited but which were nevertheless non-building materials. PropCo and HMRC have agreed a 50/50 apportionment in respect of the blocked input tax incurred on these systems.		In the light of the agreement reached between the parties, we make no findings.
18	Comms Unit	Photograph of a tall floor standing cabinet with a clear door to the front. Inside appears to be electronic equipment mounted on racks. Wiring emerges from the rear of the cabinet which is connected to various connectors fixed to the wall. Mr Metcalfe: This was an electrical communication hub with several secure connections to sockets on the wall. I therefore considered this to be an incorporated item		Neither party made any specific submissions as regards this item, and it is unclear whether it remains in dispute. But in any event, it is incorporated and expressly excluded from definition of "building materials". We find that although the item appears to be free-standing, we find that it is placed in a location where it can reasonably be expected to remain and not be moved on a regular basis and with some reasonable expectation

				of permanence. The photograph shows many cables emerging from the cabinet which are connected to wall sockets. There is no evidence before us that indicates that there are relevant network sockets anywhere else in the building allowing this item to be relocated. We find that PropCo have not satisfied the burden of proof that this item is not incorporated. The item is expressly excluded from being "building materials" by Note 22(c) as it is electrical.
19	Maiden Pulley	No evidence provided.	The parties have agreed that this item is incorporated and blocked.	In the light of the agreement reached between the parties, we make no findings.

ANNEX THREE – EXTRACT FROM RENRAY SPECIFICATION

renray

Staff Lounge

Main Order Date: Quote Stage Only N/A

	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Reception	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge	Colleagues Lounge
Product	**Toasters**	**Undor Counter Fridge**	**First Aid Kit**	**Notice Board**	**kettle**	**Clock**	**Tea/Coffee/Sugar Jars**	**Microwaves**	**CREAM PEDAL BIN 30LTR/20LTR**	**Cutlery Organiser**	**Belton 2 Seater Sofa**	**Dining Table**	**Chair**	Napoli tub chairs		**Coffee Table**	**Scatter Cushions**	**Bar Stools**
Description	4 slice toaster, black and chrome	5.1cu.ft gross capacity, white undercounter fridge with FREEZER compartment (w550 x h850 x d612mm)	First aid kit with wall bracket to be fixed to the wall in an agreed location	NOBO Grey fabric notice board 900 x 600mm		White plastic clock - to be wall mounted	Stainless steel, clear wording, approx 20cm in height	0.6cu.ft capacity, silver 700w manual microwave		Plastic insert for standard sized drawer					4 coat hooks mounted in panel fixed to wall			
Room Number														**1**				
Quantity	1	1	1	3	1	1	3	1	1	1	2	0	0		1	1	3	5
wood stain															White	pippy oak	WALNUT	-
fabric					YAN									NAP				
Code	18140	TFA1	80038A	ER0465	KETG	RWC	D2068	400/2688	CUKCB	HW0143	BEL2S	DTR	F833		875/5340	MINICTCL	**PB**	YOGUEHS
delivery date	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A		Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A	Quote Stage Only N/A
Fabric 1																		
Fabric 2																		
Additional Comments	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**	**First Wagon**		**First Wagon**			**First Wagon**
selling	£ 8.00	£ 2 50.00	£ 1 5.00	£ 1 4.71	£ 3 0.00	£ 1 2.00	£ 6 .41	£ 6 0.00	£ 4 5.00	£ 4 .60	£ 1 17.00	£ 1 80.00	£ 1 50.00	£ 1 50.00	£ 4 0.00	£ 7 5.71	£ 2 1.28	£ 1 70.00
total selling	£ 8 0.00	£ 2 50.00	£ 1 5.00	£ 4 4.12	£ 3 0.00	£ 1 2.00	£ 1 9.24	£ 6 0.00	£ 4 5.00	£ 4 .60	£ 1 ,034.00	£ -	£ -	£ 1 50.00	£ 4 0.00	£ 7 5.71	£ -	£ 8 50.00
Photo																		
Care UK Comments	**Care UK Comments**	**Care UK Comments**	**Care UK Comments**	**Care UK Comments**	**Care UK Comments**	**Care UK Comments**	**Care UK Comments**	**Care UK Comments**	**Care UK Comments**	**Care UK Comments**	**Care UK Comments**	**Reduced from 1-0 Care UK**	**Stacking chairs not required - however Tno OutlonNapoli tub chair needed as per SD drawing**	**Added as per Care UK**	**Care UK Comments**	**Care UK Comments**	**Reduced from 4-0 Care UK**	**Care UK Comments**