SDLT – higher threshold interest 15% rate – relief for a qualifying property rental business – intention that a non-qualifying individual be permitted to occupy a dwelling on the land (paragraph 5(2), Schedule 4A, FA 2003) – whether a non-qualifying individual was permitted to occupy the dwelling during the control period (paragraphs 5G(2) and 5G(3)(c), Schedule 4A, FA 2003) – meaning of "occupation" – Abbey National v Cann *considered – representative occupation for legitimate business purposes – purchase from a connected LLP – sum of the lower proportions calculation (paragraphs 18 and 20, Schedule 15, FA 2003) – identity of the relevant owners – "control" (s.1122 CTA 2010) – attribution of control to associates (s.451(5)(b) CTA 2010)* – R v CIR ex p Newfields Developments Limited *and* Gascoines Group Ltd v HMRC *considered – appeal dismissed*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/00878

BETWEEN

WATERSIDE ESCAPES LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE JAMES AUSTEN
MR JOHN AGBOOLA JP

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 5 August 2019

Mr Patrick Cannon of Counsel, instructed by Buss Murton Law, Solicitors, for the Appellant

Mrs Christine Cowan, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

APPEAL

1. This is an appeal by Waterside Escapes Ltd ("the appellant") against a Closure Notice issued on 12 September 2016 (the "Closure Notice") in respect of Stamp Duty Land Tax ("SDLT") at the higher rate of 15% on the acquisition of Hook House, Bewl Bridge Lane, Cousley Wood, Wadhurst TN5 6HW ("the Property").

2. The Tribunal's jurisdiction arises under paragraph 36D(3) of Schedule 10 to Finance Act 2003 ("FA2003" – all statutory references in this decision are to this Act unless specified otherwise). Under paragraph 42(4) of Schedule 10, the Tribunal has power to increase or reduce the amount assessed by the Closure Notice.

3. We dismiss the appeal and confirm the Closure Notice, which we amend pursuant to paragraph 42(4) of Schedule 10 to show a chargeable consideration of £625,000 and a total SDLT liability of £93,750, of which £68,750 has been paid, leaving an outstanding balance of £25,000. The reasons for our decision are set out below.

BACKGROUND

4. The principal activity of the appellant is a holiday property rental business.

5. The Property was bought by the appellant from Bewl Holiday Homes LLP (the "LLP") on 23 June 2015 for the sum of £1,250,000.

6. The Appellant originally submitted an SDLT Return to HMRC assessing the SDLT payable as £68,750, calculated as follows:

Purchase Price Bands (£)	Percentage Rate (%)	SDLT due (£)
Up to 125,000	0	0
Above 125,000 and up to 250,000	2	2,500
Above 250,000 and up to 925,000	5	33,750
Above 925,000 and up to 1, 500,000	10	32,500
Above 1, 500,000 +	12	0
Total SDLT due -		£68,750

7. Since 21 March 2012, the acquisition by companies of chargeable interests in residential property worth over a specified threshold (£500,000 by the time of the acquisition of the Property) is chargeable to SDLT at the higher rate of 15%. The relevant provisions are contained in Schedule 4A. This rate is intended to dis-incentivise the so-called "enveloping" of properties within corporate vehicles. A number of reliefs are available to reduce the higher rate of SDLT in specified circumstances.

8. As is apparent from the calculation at [6] above, the SDLT Return submitted by the appellant in respect of the Property was made on the basis that the appellant qualified for relief from the 15% SDLT rate because it operates a qualifying property rental business (and that the chargeable consideration was £1,250,000). HMRC accepts that there is a qualifying rental business.

9. The Closure Notice amended the appellant's SDLT return by increasing the SDLT due on the acquisition of the Property from £68,750 to £187,500. This was on the ground that the conditions for relief from the higher rate of SDLT were not available to the appellant because the Property was said by HMRC to have been available for occupation by a "non-qualifying

individual", and was in fact so occupied within the 3-year "control period". Hence, said HMRC, the Property was not acquired "exclusively" for the purposes of its qualifying rental business. This is referred to in this decision as the "Occupation Issue".

10. A substantive hearing to deal with the Occupation Issue was listed for 20 July 2018.

11. In the skeleton argument dated 6 July 2018 prepared by Mr Cannon for that hearing, a new point was raised for the first time: it was said that:

> …because the Property was purchased from a connected LLP…, the SDLT partnership provisions in Part 3, Schedule 15, FA 2003 applied to determine the amount of chargeable consideration for the acquisition. It is this amount that would be subject to the higher rate of 15% were the higher rate held to be applicable. Because Helen Hume Kendall was a 50% partner in [the] LLP (of which the members were herself and her husband, Simon Hume Kendall) and she is connected with the Appellant within section 1122 Corporation Tax Act 2010, the chargeable consideration for the acquisition was reduced by 50% from £1,250,000 to £625,000 under paragraphs 18 and 20, Schedule 15, FA 2003. Therefore the normal SDLT charge should have been £21,250, not £68,750, and if the 15% higher rate applied, the SDLT charge would have been £93,750 and not the £187,500 charged by the Closure Notice.

12. As a result, the hearing listed for 20 July 2018 was postponed and the parties entered into correspondence about this new point.

13. Ultimately, HMRC accepted Mr Cannon's revised calculation for the reasons he gave and requested in the skeleton argument dated 19 July 2019 prepared by Mrs Cowan for this hearing that the Tribunal amend the Closure Notice to reduce the SDLT chargeable to £93,750, of which £68,750 had already been paid, leaving a balance owing of £25,000.

14. Then, on 26 July 2019, Mr Cannon submitted a supplementary skeleton argument. This raised yet another new point for the first time:

> 2. On reviewing the Respondents' amended Skeleton dated 19 July, 2019, it is noted that they now accept that paragraphs 18 and 20, Schedule 15, FA 2003 are engaged to reduce the chargeable consideration to half the actual consideration, regardless of whether or not the rate of 15% applies. On this basis, the Respondents contend that the SDLT charge should be £93,750.
>
> 3. On considering this development, and after further reflection, the Appellants consider that the correct statutory position under paragraphs 18 and 20, Schedule 15, FA 2003 is that the chargeable consideration was nil, regardless of whether or not the 15% rate applies.
>
> 4. The reason for this is that Simon Hume Kendall ("Simon"), as both the husband of Helen Hume Kendall ("Helen"), and the other partner in LLP, was a corresponding partner in relation to the Appellant. This is because under the connected party provisions in sections 448, 450, 451, 1122 and 1123 Corporation Tax Act 2010, as applied to Schedule 15 FA 2003 by paragraph 39 of that Schedule, he was an individual who was deemed to have been connected with the Appellant…
>
> 6. Because Simon and Helen were both partners in LLP and were both connected with the Appellant, paragraphs 18 and 20, schedule 15, Finance Act 2003 applied. Under paragraph 18(1)(b) where a chargeable interest is transferred from a partnership to a person connected with a person who

is a partner, the chargeable consideration is determined using the formula MV x (100 - SLP)% where MV is the market value of the property transferred and SLP is the sum of the lower proportions…

7. Under paragraph 20, the SLP is determined as follows:

   Step One: the relevant owner is the Appellant

   Step Two: the corresponding partners being individuals connected (as above) with the relevant owner are Simon and Helen

   Step Three: the relevant owner's entitlement to the Property is 100% and this is apportioned to the corresponding partners as to the full 100%

   Step Four: the lower proportion of each of the corresponding partners was 50% being their individual interests in the LLP

   Step Five: the SLP is therefore 50% + 50% = 100%.

8. Therefore applying the formula above:

   £1,250,000 x (100 – SLP)% = £nil chargeable consideration.

15. In this decision, this is called the "SLP Issue".

16. In consequence of Mr Cannon's new argument on the SLP Issue, HMRC made a written application to the Tribunal on 2 August 2019 for a postponement of the hearing listed before us on 5 August 2019 on the basis that the late notice of a new point (for the second time) was prejudicial to them and they needed more time to consider and respond to the new issue being raised.

17. Having considered HMRC's application, I informed the parties that I was minded to refuse leave to postpone the hearing, but that I would consider further submissions on the point if received that afternoon.

18. The parties did both make written submissions that afternoon, which I considered. Having done so (and having had in mind the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules") – and especially Rule 2, the overriding objective to deal with cases fairly and justly), I directed that the hearing would take place on 5 August 2019, as scheduled, and we would hear preliminary submissions on the SLP Issue at the beginning of the day. Accordingly, I refused HMRC's postponement application. I added that Mrs Cowan could if she wished re-make her application orally, with further details as to why, in her view, a postponement (or, by then, an adjournment) was the most appropriate course of action in the circumstances.

19. At the beginning of the hearing, we heard submissions from Mr Cannon and Mrs Cowan on the SLP Issue. After carefully considering those submissions in light of the Rules (again, particularly in the context of Rule 2), we decided that it was in the interests of justice for the hearing to deal with the appeal as originally framed (in respect of the Occupation Issue) and I directed that the parties should make written submissions on the SLP Issue within 14 days, which they did. We duly read and considered those submissions.

20. This decision deals first with the Occupation Issue, before moving on to deal with the SLP Issue.

Burden and standard of proof

21. Neither Mr Cannon nor Mrs Cowan addressed us on the evidential burden of proof. Whilst the burden of proof was not determinative of the outcome, we record for completeness that the burden is on the appellant to show that the Closure Notice is incorrect.

22. The standard of proof is the civil standard, i.e. on the balance of probabilities.

THE OCCUPATION ISSUE

23. Insofar as relevant, Schedule 4A provides as follows:

> 1
>
> (1) In this paragraph "interest in a single dwelling" means so much of the subject-matter of a chargeable transaction as consists of a chargeable interest in or over a single dwelling (together with appurtenant rights).
>
> (2) An interest in a single dwelling is a higher threshold interest for the purposes of this Schedule if chargeable consideration of more than [£500,000] is attributable to that interest.
>
> 2
>
> (1) Sub-paragraphs (2) to (8) apply to a chargeable transaction whose subject-matter consists of or includes a higher threshold interest.
>
> (2) If the main subject-matter of the transaction consists entirely of higher threshold interests, the transaction is a high-value residential transaction for the purposes of paragraph 3
>
> …
>
> 3
>
> (1) Where this paragraph applies to a chargeable transaction—
>
> (a) the amount of tax chargeable in respect of the transaction is 15% of the chargeable consideration for the transaction, and
>
> (b) the transaction is not taken to be linked to any other transaction for the purposes of [section 55(1B), (1C) and (4)].
>
> (2) This paragraph applies to a chargeable transaction if—
>
> (a) the transaction is a high-value residential transaction, and
>
> (b) the condition in sub-paragraph (3) is met.
>
> (3) The condition is that—
>
> (a) the purchaser is a company
>
> …
>
> 5
>
> (1) Paragraph 3 does not apply to a chargeable transaction so far as its subject-matter consists of a higher threshold interest that is acquired exclusively for one or more of the following purposes—
>
> (a) exploitation as a source of rents or other receipts (other than excluded rents) in the course of a qualifying property rental business;
>
> …
>
> 5A

(1) In paragraph 5 "non-qualifying individual", in relation to a chargeable transaction, means any of the following—

…

(c) an individual (a "connected person") who is connected with the purchaser;

…

5G

(1) Sub-paragraph (2) applies where relief under paragraph 5 has been allowed in respect of a higher threshold interest forming the whole or part of the subject-matter of a chargeable transaction.

(2) The relief is withdrawn if at any time in the period of three years beginning with the effective date of the chargeable transaction ("the control period") a requirement in sub-paragraph (3) is not met.

(3) The requirements are that—

(a) the higher threshold interest (if still held by the purchaser) is held exclusively for one or more of the purposes mentioned in paragraph 5(1)…

24. The essential legal question was agreed between the parties and was as follows (quoted from Mr Cannon's 6 July 2018 skeleton argument):

> …the chargeable consideration given by the Appellant for its acquisition of the Property from the… LLP, will not be exempt from the higher rate of 15% if despite the operation of a qualifying rental business…, either:
>
> 1. it is intended that a non-qualifying individual will be permitted to occupy a dwelling on the land (paragraph 5(2), Schedule 4A, FA 2003); or
> 2. within the control period (3 years beginning with the effective date of the acquisition on 23 June, 2015), a non-qualifying individual is permitted to occupy the dwelling (paragraph 5G(2) and (3)(c), Schedule 4A, FA 2003).

25. Two facts – which were not in dispute between the parties – are particularly relevant to that legal issue:

(1) A Shareholders' Agreement was completed on 23 June 2015 between Mrs Hume-Kendall (1); the trustees of the A.L.G.H. Settlement (2) (Mrs Hume-Kendall and the trustees together being the then-shareholders in the appellant); and the appellant (3) (the "Shareholders' Agreement"). At the relevant time, clause 13 provided as follows:

> **13 USE OF THE PROPERTY**
>
> Each Shareholder shall be entitled to use the Property for no charge for a maximum of five nights in any financial year provided the dates of such use of the Property have been agreed in advance by prior agreement with the other Shareholder and that the Property would otherwise be vacant on the dates of occupation by such Shareholder.

(2) Mrs Hume-Kendall "stayed four nights" in the Property (during the 3-year control period for the purposes of paragraph 5G(2) of Schedule 4A), as confirmed to HMRC by the appellant's accountant by e-mail on 29 July 2016.

26. The dispute between the parties was on the significance of those facts and the precise meaning and effect of the Shareholders' Agreement in the context the statutory provisions in question.

27. We had witness statement evidence and sworn oral testimony from Mrs Helen Hume-Kendall (shareholder in and director of the appellant) and Mr Andrew Sayers (the HMRC officer who issued the Closure Notice), both of whom were cross-examined.

Mrs Hume-Kendall

28. The salient parts of Mrs Hume-Kendall's witness statement are as follows:

> 8. Prior to completion… solicitors… prepared a Shareholders Agreement which included a number of provisions relating to the management of the company including clause 13 which deals with the use of the Property and which states that each Shareholder is entitled to use the Property for a maximum of five nights in any financial year… provided that the Property would otherwise be vacant…. I have to admit that I never properly considered this clause as I had no intention of using the Property for my personal use. The whole purpose of the exercise was to establish and run a business based on letting out the Property for short term holiday lets….
>
> 10. Since completion of the purchase of the Property I have visited it often. I am the manager on behalf of the Appellant and I need to supervise all the works to it and to make sure that it is in a suitable condition for our guests. I visit it most weeks and often several times a week to supervise and to do many of the domestic chores myself. I have on a few occasions had to stay overnight in order to carry out my duties as manager of the business. On the 25th June 2015 when we were preparing for the arrival of our first guests I was working late into the night and the following morning so to save time I spent the night there. And on three subsequent occasions when we had to prepare for a quick changeover of guests coupled with a need to do remedial works and redecoration I also stayed the night. This happened on the nights of the 29th December 2015, 15th August 2016 and 31st August 2016. On each occasion the sole purpose of my visit was to deal with the requirements and needs of the business.
>
> 11. It has never been the intention of the shareholders or the directors of the business that we should occupy the Property for our personal use and indeed the demands of our guests has been such that there has rarely been a time when the Property has been available for our personal use.

29. In oral evidence, Mrs Hume-Kendall confirmed that her main residence at the time was a 25-minute drive from the Property. She said that she sometimes needed to see builders at the last minute and that she personally undertook a lot of work to the Property in its first year of ownership by the appellant, including painting and decorating late into the night and supervising workmen. On those occasions, it was easier to stay in the Property for the night than to return home. Mrs Hume-Kendall's evidence was that she had never planned to stay at the Property, and had never packed an overnight case. Insofar as she could recall, she had ("probably") never stayed for a complete 24-hour period at the Property.

30. In cross-examination, Mrs Hume-Kendall acknowledged that she was aware of the terms of the Shareholders' Agreement and confirmed that she had not queried clause 13. In her view, she had no reason to do so, as she had no intention of using the property. She added that once she had realised the implication of the clause, she took action to remove it. She acknowledged the existence of clause 13 at the material times, but had not understood its significance.

Mr Sayers

31. Mr Sayers was the HMRC officer in charge of the enquiry into the appellant. He is an officer with 41 years' experience and has special expertise in SDLT enquiries into returns where residential property is acquired by a company. It was Mr Sayers who issued the Closure Notice.

32. We did not find Mr Sayers' evidence of any real assistance and we have not needed to consider it further. We were, though, pleased to note that the timeous nature and validity of the Closure Notice were asserted in Mr Sayers' evidence and specifically pleaded in Mrs Cowan's submissions. No contrary argument was made for the appellant.

Submissions and Discussion

Clause 13 of the Shareholders' Agreement and the entitlement to use the Property

33. Mr Cannon accepted that Mrs Hume-Kendall was a "non-qualifying person" in relation to the appellant. Consequently, if we find that the relevant intention existed that she would be "permitted" by the appellant to "occupy" the Property, then paragraph 5(2) of Schedule 4A would be engaged so as to disapply the relief in paragraph 5(1) and HMRC will succeed on the Occupation Issue.

34. The point therefore turns on disentangling the appellant's subjective intention at the relevant time, which involves considering all the evidence before us, consisting chiefly of Mrs Hume-Kendall's testimony and the Shareholders' Agreement. The question is one of fact.

35. Mrs Hume-Kendall's evidence was that neither she nor the appellant had any intention that she – or anyone else other than paying guests of the appellant's holiday letting business – should be permitted to occupy the Property.

36. However, we consider it material that in cross-examination, Mrs Hume-Kendall admitted that she was aware of clause 13 of the Shareholders' Agreement at the time. She said that she did not know the meaning of the clause and had left the drafting of the Shareholders' Agreement to the solicitors to deal with. She confirmed that once she had realised the implications of the clause, she took action to remove it.

37. Mr Cannon submitted that, properly construed, clause 13 of the Shareholders' Agreement was *restrictive*, rather than permissive: its function, he argued, was to set a *limit* of five days on any use of the appellant's asset by its shareholders, rather than to make the Property available to them by granting them permission to occupy it. In his view, in the absence of such a restriction, the Property "could otherwise be used generally by [the appellant's] directors and shareholders at any time."

38. Mr Cannon put it to us that "…the appropriate test is not the presence of clause 13 but instead whether there was at the time an actual intention to permit the shareholders to occupy the dwelling rather than merely an enabling provision in the form of clause 13 which limited any such permission to give nights." That is true, but it fails to take account of the fact that actual intention of the appellant might be revealed by the existence of the clause.

39. Whilst the point was not expressly argued before us, and no express concession was made by Mrs Cowan, we understood her impliedly to acknowledge that if clause 13 was intended to apply only to the use of the property by a non-qualifying person wholly and exclusively for the purposes of the appellant's business, then HMRC would not consider that paragraph 5(2) was in point. We note in passing that the authors of *Stamp Duty Land Tax* (2nd edition, Sweet & Maxwell, 2014) state this opinion at 3-020:

> …this exception [paragraph 5(2)] does not apply if it is intended that any "non-qualifying individual" will be permitted to occupy it—even if on a fully commercial basis and paying a market rent. Note that in a genuine "representative occupation" case, like that of a caretaker, the individual does not occupy at all, it is the company that occupies.

40. We think the (non-statutory) nomenclature of "representative occupation", which Mrs Cowan described as "legitimate business reasons", is useful and we have adopted it in this decision.

41. Mrs Cowan asked why, if clause 13 was only ever intended to relate to "legitimate business reasons", was the entitlement limited to five days? As she submitted, "[t]his makes no commercial sense as there is no way that the Appellant could anticipate that any legitimate business activity could be restricted to only five days per year each [shareholder]."

42. Mr Cannon replied by pointing to what he considered to be the flaw in HMRC's reasoning: such stays "…do not count towards the five-night restriction because they are not regarded by the Appellant as occupation for the purpose of clause 13, being instead dictated by the operation needs of the Appellant's business."

43. In the context of Mrs Hume-Kendall's actual use of the Property (see [54]ff below), Mr Cannon sought to draw out the legal distinction between "use" of a property and its "occupation", noting that this legislation required the latter (his argument was naturally that the "use" of the Property did not amount to "occupation" in this case). This point also has relevance to the construction of clause 13, which itself refers to "use… for a maximum of five nights…", rather than "occupation" for that period.

44. Questions of subjective intention are some of the most difficult faced by this Tribunal. This is particularly so when considering what weight to give to witness evidence by a party whose interests are served by a relevant intention *not* being found. In a different context (there, relating to domicile), this Tribunal (Judge Tony Beare) wrote in *Henkes v HMRC* [2020] UKFTT 00159 (TC) at [152]:

> …we are dealing here with a question of the Appellant's intentions, which is to say the Appellant's state of mind. …this requires note to be taken of declarations of intention which the Appellant has made in the course of the enquiries and in giving his evidence *but those declarations need to be examined critically in view of the fact that it is clearly in the interests of the Appellant to say that his intentions are not [those purported by HMRC]. This means that the Appellant's intentions instead "have to be ascertained by the court as a fact by a process of inference from all the available evidence…"* (see Mummery LJ in *Agulian* at paragraph [13]).
>
> [our emphasis]

45. We note that both the appellant and Mrs Hume-Kendall were both parties to the Shareholders' Agreement, and clause 15.1 expressly binds the appellant to be bound by its terms and conditions. No evidence was offered to suggest that the inclusion of clause 13 was an inadvertent drafting error, or some 'gilding of the lily' by an over-zealous solicitor. Nor was it shown that it was a standard clause normally included in precedent shareholders' agreements. Indeed, there was no evidence before us that the inclusion of the clause was not at the instruction – or, at least, the knowing acceptance – of the appellant. Such evidence could have been adduced if it was otherwise – evidence from the solicitor responsible for drafting the Shareholders' Agreement would have sufficed. Absent satisfactory evidence that the

Shareholders' Agreement (which appears on its face to have been validly executed as a deed) did not give effect to the intentions of its parties, it is to be presumed that it did. We proceed on that basis.

46. The meaning of clause 13 of the Shareholders' Agreement – and the intention underlying it – seem plain to us. We cannot agree with Mr Cannon that its overall intention and effect were restrictive on non-qualifying persons. In our view, for Mr Cannon to succeed on this point, he would have had to have shown that the provision was *wholly* restrictive, to the exclusion of any permissive element. He could not do so to our satisfaction: we consider that the very existence of the clause establishes the permissive intention of the appellant, as contended for by HMRC. We agree with Mr Cannon, of course, that the express limitation of the entitlement conferred in the clause to five days per year is restrictive – but that nowhere near exhausts the meaning and effect of the provision, which we conclude is fundamentally permissive and we so find as fact. We note that Mr Cannon even described clause 13 – correctly, in our opinion – as an "enabling provision" at one point in his submissions. An "enabling provision" which is wholly restrictive would be a contradiction in terms.

47. The exemption from the 15% SDLT rate contained in paragraph 5(1) of Schedule 4A only applies if the relevant interest is acquired "exclusively" for a specified purpose (including, at 5(1)(a), a qualifying property rental business such as that carried on by the appellant). In our view, the lack of an express motive test for intended use in paragraph 5(2) becomes explicable in that context, and it explains the stated view of the authors of *Stamp Duty Land Tax* in the passage quoted at [39] above. Where, as they put it, "representative occupation" for what Mrs Cowan described as "legitimate business reasons" occurs, whether by a non-qualifying individual or otherwise, the *company* is the occupant under paragraph 5(1), and not the individual – hence one does not move on to consider paragraph 5(2) at all. But subject to that, the wide effect of paragraph 5(2) is shown by the authors' other proposition: even if it is intended that any other occupation by a non-qualifying individual were to be on fully commercial terms, it would still fall foul of that provision. This is because as soon as any intended occupation is not "representative occupation", the lack of a motive test in paragraph 5(2) demands that *any* such intended occupation by a non-qualifying individual means that the relevant interest was not acquired "exclusively" for the specified purpose. This is irrespective of the nature of the (non-business) reasons for the intended use or the intended terms of the occupation.

48. We agree with Mrs Cowan that it is inherently implausible that clause 13 of the Shareholders' Agreement was intended to be construed as permitting "representative occupation" and Mr Cannon was right to concede as much in his skeleton argument: such a construction would make no commercial sense.

49. We have already rejected Mr Cannon's contention that the Shareholders' Agreement should be construed to be restrictive to the exclusion of any permissive element.

50. As we noted above, we consider it relevant in this context that Mrs Hume-Kendall admitted in cross-examination that once she realised the implications of clause 13, she took action to remove it. This admission only really makes sense if the clause is construed as we have decided it must be. We should make it clear that the actual use which Mrs Hume-Kendall subsequently made of the Property is irrelevant to our assessment.

51. Consequently, it follows (and we so find) that clause 13 of the Shareholders' Agreement is to be construed such that it demonstrated an intention on the part of the appellant that use of

the Property other than "representative occupation" was permitted to persons including non-qualifying individuals. Mrs Hume-Kendall's evidence does not persuade us otherwise.

52. Of course, the intended "use" of the Property which we have found does not exhaust Mr Cannon's arguments: he rightly points to the statutory requirement for "occupation" of a dwelling house on the land (see [59] below). We do not agree with Mr Cannon that a distinction can sensibly be drawn between the entitlement to "use the Property for no charge for a maximum of five nights…" in clause 13 of the Shareholders' Agreement as we have construed it and "occupation" as that word was intended by parliament in paragraph 5(2). In our view, in the context of clause 13 as we find it must be construed, there are no circumstances in which such intended use would not constitute "occupation" for these purposes.

53. As a result, we conclude that paragraph 5(2) of Schedule 4A applies to the acquisition of the Property by the appellant such that relief under paragraph 5(1) of that Schedule is removed and (subject to our decision at [117] below) the purchase was subject to SDLT at 15% by virtue of paragraph 5(3) of Schedule 4A.

The actual use of the Property by Mrs Hume-Kendall

54. Had we concluded that clause 13 of the Shareholders' Agreement did *not* fall foul of paragraph 5(2) of Schedule 4A, we should have had to go on to consider whether Mrs Hume-Kendall's actual use of the Property during the three year "control period" fell within paragraph 5G(2) and 5G(3)(c) of the same Schedule. In light of our decision at [53], it is not strictly necessary for us to deal with the point, which falls away. Nevertheless, as the issue was fully argued, we record our decision for completeness.

55. It was not in dispute that Mrs Hume-Kendall was present in the Property for four nights during the "control period" pursuant to paragraph 5G(2) of Schedule 4A. The questions that arise are whether:

(1) the purpose of Mrs Hume-Kendall's use of the Property was "representative occupation" for what Mrs Cowan called "legitimate business reasons"; and

(2) whether such use constituted "occupation".

56. HMRC argued that Mrs Hume-Kendall's occupation of the Property on those four nights did engage paragraphs 5G(2) and 5G(3)(c) of Schedule 4A and invited us to find accordingly. However, it is fair to say that HMRC's arguments were primarily directed at the paragraph 5(2) issue dealt with above, and Mrs Cowan's submissions relating to paragraph 5G were fairly sparse. In fact, Mrs Cowan did not challenge Mrs Hume-Kendall on the specific reasons for her acknowledged use of the Property during cross-examination. For our own part, we considered that the evidence offered by the appellant for Mrs Hume-Kendall's overnight stays in the Property was unhelpfully scant – amounting only to Mrs Hume-Kendall's own unsupported statements. We should have wished for more. Nevertheless, as the evidence – such as it was – was unchallenged, we accept as fact that Mrs Hume-Kendall's presence at the Property on those four occasions was wholly and exclusively "representative occupation" in respect of her duties as the manager of the appellant's business.

57. It follows from our conclusion at paragraph [47] that our finding at [56] would be sufficient to resolve the actual occupation point in favour of the appellant. This is because paragraph 5G operates by retrospectively withdrawing the relief under paragraph 5 if the appellant's interest ceases to be held "exclusively" for one of the purposes in paragraph 5(1) – including, at 5(1)(aa), use of the premises for a qualifying property rental business. Our finding that Mrs Hume-Kendall's actual use of the Property *was* wholly for "legitimate business

reasons" constituting "representative occupation" on behalf of the appellant means that the conditions for the withdrawal of relief in paragraph 5G(2) are not met and the relief could not be clawed back.

58. As a result, it is not necessary for us to consider the meaning of "occupation" relied on by Mr Cannon, and we offer the following comments only out of respect for the careful submissions he made to us.

59. Both parties referred us to the words of Lord Oliver in *Abbey National v Cann* [1990] 1 All ER 1085 at 1101 (HL):

> …It is, perhaps, dangerous to suggest any test for what is essentially a question of fact for 'occupation' is a concept which may have different connotations according to the nature and purpose of the property which is claimed to be occupied.

60. We would respectfully add to Lord Oliver's dictum that just as 'occupation' is a concept which has different connotations depending on the relevant facts, so too does it have different meanings depending on the applicable statutory context. Words such as "occupation" are used across a number of different legislative landscapes, and it cannot necessarily be assumed that the meaning of the word intended by parliament in the context of one Act should necessarily apply equally in a different context.

61. Whilst FA2003 contains a number of statutory definitions, "occupation" is regrettably not among them. We were not directed to any jurisprudence on the meaning of "occupation" for the purposes of Schedule 4A, nor within the scheme of SDLT as a whole. Accordingly, we approach constructions of the same word in different legislative contexts with caution. Other than HMRC's reliance on *Jowitt's Dictionary of English Law* (4th edn.), which was of limited use, we were not referred to any judicial dicta or any standard reference works on statutory interpretation (e.g. *Bennion*), but we consider the essential principles to be beyond doubt and not really in dispute between the parties. Chiefly, the word must be interpreted in its context to discover parliament's intended meaning, and a purposive approach is required.

62. The parties were agreed that "occupation" requires both possession and control. Mr Cannon reminded us that Lord Oliver opined in *Abbey National v Cann* (at 1101) that occupation:

> …does, in my judgment, involve some degree of permanence and continuity which would rule out a mere fleeting presence. A prospective tenant or purchaser who is allowed, as a matter of indulgence to go into property in order to plan decorations or measure for furnishings would not, in ordinary parlance, be said to be occupying it, even though he might be there for hours at a time.

63. In Mr Cannon's submission, Mrs Hume-Kendall's presence in the Property on the four nights in question was of a kind with Lord Oliver's example. Mr Cannon added that Mrs Hume-Kendall "was not present for a complete 24 hours on any occasion and her presence overnight consisted merely of resting and sleeping in between no doubt energetic and urgent operational tasks to get the Property ready for incoming guests the next day."

64. In response, Mrs Cowan argued that *Abbey National v Cann* was not decisive on precisely what length of stay was required to amount to occupation of a property, neither is there any statutory threshold. HMRC accepted that occupation could not arise from a "mere fleeting presence", per Lord Oliver. By way of comparison, we were also directed to *RCC v Principal*

and Fellows of Newnham College in the University of Cambridge [2008] STC 1225, and s.107(4)(b) Finance Act 2013, both of which used "use" and "occupy" as two distinct concepts.

65. Mrs Cowan accepted that "occupation" meant just that, and that "use" by itself was insufficient. Mrs Cowan pointed to clause 13 of the Shareholders' Agreement, which she argued (and we have found) intended permission for the occupation of the Property by Mrs Hume-Kendall by way of a personal benefit, as opposed to representative occupation. Mrs Cowan thereby equated "use" with presence in the Property for the purposes of the business on the one hand, and "occupation" with presence there for any other purpose having the effect of conferring a benefit on the other. Mrs Cowan noted that Mrs Hume-Kendall's own house was only a short drive away, and she chose to stay in the Property when she need not have done: that element of personal choice by Mrs Hume-Kendall was demonstrative of the personal benefit accruing to her.

66. In our view, Mrs Cowan's submissions presupposed – incorrectly – that Mrs Hume-Kendall's presence in the Property on those four nights occurred pursuant to clause 13. We have already found as fact at [56] that it was not. Accordingly, if we were to accept the logic of Mrs Cowan's submissions summarised at [65] then she would not succeed on this point.

67. In any event, our present task is to construe "occupation" for the purposes of Schedule 4A and references to cases on the same word in entirely different contexts have only been of limited use to us.

68. The Tribunal asked Mr Cannon to explain what he saw as the mischief which parliament had in mind when enacting paragraph 5(2). He replied that it was to prevent a person connected with a purchaser enjoying a personal benefit arising from their occupation of the property. We agree (although, of course, using a word when attempting to discern the meaning of that word is unhelpfully circular).

69. In our opinion, the meaning of the word "occupy" in paragraph 5(2) of Schedule 4A, as engaged by paragraph 5G, has a deliberately wide meaning. The provision in question restricts the availability of a relief to avoid the mischief identified by Mr Cannon. That relief was only intended by parliament to be available under paragraph 5(1) if a purchaser satisfied the specified and tightly drawn criteria.

70. In that context, we think Mr Cannon's emphasis on the fact that Mrs Hume-Kendall was ("probably", as she said) not present in the Property for the whole of any given 24-hour period was misconceived, as was the assumption – seemingly by all parties – that an overnight stay was required to establish "occupation": we do not consider either necessarily to be the case. Both the quality and quantity of use are certainly relevant to "occupation", though their relative importance will vary according to the relevant facts. We acknowledge that the precise point at which "use" becomes "occupation" for the purposes of FA2003 is difficult to predict in advance, and it is to be found by a process of weighing the evidence as a whole in the context of the specific facts of the case.

71. We are not required to decide whether Mrs Hume-Kendall's actual use of Property constituted "occupation" if it was otherwise than "representative occupation" for the "legitimate business reasons" of the appellant. In the circumstances, we prefer to leave that question open. Had we been required to decide the point, we would have been concerned to ensure that paragraph 5G was interpreted purposively so as to catch the mischief identified by Mr Cannon. As it is, on the basis of the facts found, we have concluded that Mrs Hume-Kendall's use of the Property did *not* amount to occupation such as to engage paragraph 5G.

Decision on the Occupation Issue

72. For the reasons given at paragraphs [33] to [53] above, we have decided that paragraph 5(2) of Schedule 4A *does* operate so as to disapply the relief in paragraph 5(1), because it was intended by the appellant that a non-qualifying individual would be permitted to occupy the Property.

73. The result of our decisions to this point are that, subject to our decision on the SLP Issue below, the 15% SDLT rate did apply to the appellant's acquisition of the Property. Depending on the SLP Issue, the chargeable consideration to which that rate shall be applied will either be £625,000 or £0, giving rise either to: (a) an overall SDLT liability of either £93,750 (of which £68,750 has already been paid, leaving a balance owing of £25,000); or (b) nil, meaning that HMRC would have to reimburse the appellant the £68,750 paid in error.

THE SLP ISSUE

74. In this decision "SLP" means "the sum of the lower proportions" as that phrase is used in Schedule 15.

75. Mr Cannon's initial submissions on the SLP Issue are recorded at paragraph [14] above. These were supplemented by his post-hearing written submissions dated 19 August 2019.

76. In her post-hearing written submissions dated 16 August 2019, Mrs Cowan confirmed that HMRC does not accept Mr Cannon's methodology in calculating the SLP.

77. The SLP calculation can be relatively complex. The particular facts of this case make it even more so. Ultimately, the outcome here depends on whether Mrs Hume-Kendall's husband Simon is deemed to be connected with the appellant by virtue of: (1) his marriage to her; and (2) the proper construction of the documents prepared in anticipation of the acquisition of the Property by the appellant – especially the terms of the Shareholders' Agreement. In particular, it turns on whether the trustees of the ALGH Settlement are to be treated as having an interest in the appellant at the relevant time, and, if so, whether that interest is to be attributed to Mr Hume-Kendall as well as to Mrs Hume-Kendall.

78. By way of summary, the operation of the SLP calculation is conveniently set out in *Sergeant & Simms on Stamp Taxes* at AA3.7:

> Where the transfer out of the partnership is of a freehold or existing leasehold interest …, the formula for the deemed consideration as set out in paragraph 18 is 'MV × (100 – SLP)%', where 'MV' is the market value of the chargeable interest transferred. Hence one has to start with a calculation of the sum of the lower proportions using the steps in paragraph 20 of Schedule 15. These are—
>
> (1) identify the relevant owner(s), ie, the person(s) entitled to a proportion of the property immediately after the transaction and being a partner (or connected with a partner) immediately before it;
>
> (2) for each, find the corresponding partner(s), being a person who was a partner and was the relevant owner or was an individual connected with the relevant owner (for this purpose, a company is treated as an individual where it holds property as a trustee and is connected with the relevant owner only because of CTA 2010 s 1122(6));
>
> (3) for each relevant owner, find the proportion of the chargeable interest to which he is entitled immediately after the transaction and 'apportion that proportion' between any one or more of his corresponding partners (for this purpose persons who are entitled to a chargeable interest as beneficial joint

tenants are taken to be entitled to the chargeable interest as beneficial tenants in common in equal shares, see para 20(2));

(4) find the lower proportion for each corresponding partner in relation to the relevant owner(s), being the proportion of the chargeable interest attributable to the partner (if he is a corresponding partner in relation to only one relevant owner, this is the proportion attributed at step (3); if in relation to more than one relevant owner, it is the sum of those proportions) or, if lower, the partnership share attributable to the partner (which is zero unless the partnership acquired the relevant chargeable interest before 20 October 2003 or, if on or after that date, ad valorem stamp duty was duly paid or any SDLT payable was duly paid on that acquisition…: FA 2003 Sch 15 para 21); and

(5) add the lower proportions of each person who is a corresponding partner in relation to one or more relevant owners.

The result is the sum of the lower proportions.

79. We have gone to and considered all the legislation referred to in [78].

Identification of the shareholder(s) in the appellant

80. There was no dispute that the LLP was the transferor of the Property and the appellant (being a person connected with a person who is or has been one of the partners of the LLP) was the purchaser. It was therefore agreed by the parties that paragraph 18(1)(b) of Schedule 15 applied to the transaction, which meant that the SLP calculation in paragraph 18(2) (as explained and applied in paragraph 20) determined the chargeable consideration.

81. Mr Cannon submitted that HMRC's stated practice is to accept that the chargeable consideration calculated pursuant to the SLP calculation takes precedence over the market value rule in s.53, and directed us to HMRC's Stamp Duty Land Tax Manual at SDLTM34170. Whilst that practice has no direct statutory support, we consider it to be a correct statement of the law. It appears from HMRC's conduct of this case that this is agreed.

82. The parties did not agree on the identity of the shareholder(s) in the appellant at the time of the acquisition of the Property, and this was the primary cause of the disagreement between them on the applicable SLP calculation.

83. Relying on the relevant Companies House records, the acquisition transaction documents contained in our bundle, and the terms of paragraph 20 of Schedule 15, Mrs Cowan considered that the shareholders of the appellant at the time of the acquisition of the Property for the purposes of the SLP were Mrs Hume-Kendall as to 50% and the trustees of the ALGH Settlement (whose shares were registered in the name of Mr Mark Holden, who was one of their number) as to the other 50%. This was because, in her view:

> The Trust had no beneficial interest in the chargeable interest transferred prior to the transaction, but immediately after the transaction, it has acquired 50% of the value of the chargeable interest through its shareholding in the company.

84. Step 1 of the SLP calculation, set out in paragraph 20, is as follows:

Step One

Identify the relevant owner or owners. A person is a relevant owner if –

(a) *immediately after the transaction, he is entitled to a proportion of the chargeable interest*, and

(b) immediately before the transaction, he was a partner *or connected with a partner*.

[our emphasis]

85. Mr Cannon reminded us that at the time of the board meeting of the appellant on 23 June 2015, the sole director and shareholder was Mrs Hume-Kendall (Mr Hume-Kendall having previously transferred his shares to her on 8 June 2015) and she was the person who passed the relevant written shareholder resolution and director's resolution for the Appellant to acquire the Property from the LLP (whose members were then Mr and Mrs Hume-Kendall).

86. In Mr Cannon's submission:

> The fact that immediately following the acquisition of the Property by the Appellant, it was authorised to enter into the shareholders' agreement and allot 100 ordinary shares to the trustees of the ALGH Settlement by the resolution at 9 of the Minutes of the meeting referred to… above does not affect the fact that at the time the Property purchase was effected, the sole director and holder of the entire issued share capital of the Appellant was Helen Hume-Kendall.

87. At paragraph 7.1(b) of the minutes of the board meeting at 12.15pm on 23 June 2015, the board (being at that time Mrs Hume-Kendall alone) resolved to approve the Transaction Documents (as therein defined) concerning the appellant's acquisition of the Property and related matters. Paragraph 9.1(a) of those minutes records that the board also resolved to allot and issue 100 shares in the appellant to the trustees. An HM Land Registry Form TR1 effecting the acquisition of the Property and a share certificate for 100 shares in favour of the trustees were both completed on the same date. There was no direct evidence before us as to the relative timings of those latter two documents. We infer that the company's statutory books were written up in parallel with the share certificate being completed, as would be the standard practice in such transactions.

88. Paragraph 7.1(b) of the board minutes could never have sufficed to effect the acquisition of the Property – hence the Form TR1 in this case, which appears on its face to have been validly executed (and was, we infer, registered by HM Land Registry as such). Paragraph 7.1 of the minutes did not therefore effect the transfer of the Property: it was a unilateral act by the proposed transferee simply resolving (at (b)) to approve the transaction, and (at (c)) to authorise a director to execute the Transaction Documents, which could only properly happen subject to those resolutions. The minutes do not record that the meeting was adjourned to enable completion of the Transaction Documents to take place before the rest of the business of the meeting was conducted (in contrast to paragraph 6.5 of the minutes, at which an adjournment for the purposes of obtaining a prerequisite members' written resolution was expressly recorded). We have therefore concluded as fact that the execution of the TR1 did not take place until after the conclusion of the board meeting. The chronology of Mr Cannon's submission as recorded at [86] is incorrect.

89. Paragraphs 8 to 10 of the minutes of the board meeting record the following:

> **8. SHAREHOLDERS AGREEMENT AND ALLOTMENT OF SHARES**
>
> 8.1 There was produced to the meeting an engrossment of the Shareholders Agreement… entered into by [Mrs Hume-Kendall], the ALGH Trust (3) and the [appellant] and an application from the Trustees of the ALGH Trust (3) for the allotment to them of 100 Ordinary Shares of £1.00 in the [appellant]

> **9. RESOLUTION**
>
> 9.1 After careful consideration of the [Shareholders' Agreement] and the matters referred to in section 172(1) of the Companies Act 2006 IT WAS RESOLVED THAT:
>
> (a) The [appellant] shall allot and issue 100 Ordinary Shares of £1.00 each in the capital of the [appellant] to Mark Julian Hugo Holden, Sarah Jane Duggan, and Palinda Samarasinghe (as trustees of the ALGH Settlement (3))
>
> (b) To appoint Mark Holden as a director of the Company
>
> **10 FILING**
>
> The Chairperson agreed to make all necessary and appropriate entries in the books and registers of the [appellant] and to arrange for the necessary forms and documents to be filed and to arrange for a share certificate to be issued for the share allotment referred to in minute 9.1 above.

90. We remind ourselves that the task in hand, per paragraph (a) of Step One of the SLP calculation in paragraph 20 of Schedule 15, is to identify "the relevant owner or owners" of the appellant – each being person who "immediately after the transaction… is entitled to a proportion of the chargeable interest".

91. It is worthwhile stepping back at this point and considering the overall commercial purpose of the Transaction Documents referred to in the board minutes and the involvement of the ALGH Settlement. We were told by Mrs Hume-Kendall in her witness statement that:

> 6. …[the LLP] agreed to sell the Property to a newly formed company [the appellant] which was formed by me and a Trust known as the ALGH Settlement… The Trust is totally independent of [the LLP] and my family and was in business as I understood for the purpose of providing funding for commercial projects.
>
> 7. Funding for the acquisition [of the Property] was provided by both me and the Trust [by way of Term Loan Agreements by them in favour of the appellant, each completed on 23 June 2015]. It was our clear intention that the Property be acquired solely for commercial purposes…
>
> 8. The [appellant] completed the purchase of the Property on the 19th June 2015 [*sic* for 23 June 2015]. Prior to completion the solicitors for the Trust prepared a Shareholders Agreement which included a number of provisions relating to the management of the company…

92. We have not had any evidence from the trustees of the ALGH Settlement as to their involvement in these arrangements.

93. The evidence of Mrs Hume-Kendall and the Transaction Documents referred to in the board minutes are consistent with the view that the ALGH Settlement was providing the capital investment enabling the transfer of the Property for value by the LLP to the appellant by way of equity finance (as to £100) and debt finance (as to some £1,318,875, it appears).

94. In that context, it is not surprising that the trustees of the ALGH Settlement (via their solicitors), as the funders of the transaction, should have required that the various elements be in agreed form in advance and executed in sequence. Clause 3 of the Shareholders' Agreement specifies as follows:

> **3. ACQUISITION OF THE PROPERTY AND SHARE ALLOTMENT**

> 3.1 Completion shall take place on the date of this Agreement… when:
>
> 3.1.1 [Mrs Hume-Kendall] shall enter into a loan agreement in the Agreed Form with the [appellant];
>
> 3.1.2 The Trust shall enter into a loan agreement in the Agreed Form with the [appellant];
>
> 3.1.3 The [appellant] shall enter into an agreement for the sale to it of the Property in the Agreed Form.
>
> 3.2 The Trust hereby subscribes, conditional upon the acquisition of the Property by the [appellant] for 100 ordinary shares of £1.00 each in the capital of the [appellant] to be issued at par value and [Mrs Hume-Kendall] and the [appellant] undertake that within one Business Day of the acquisition of the Property by the [appellant] that the [appellant] will allot and issue to the Trustees 100 ordinary shares of £1.00 each in the capital of the [appellant].

95. From this, we learn that the trustees' subscription for shares in the appellant was made in (or parallel with) the Shareholders' Agreement, which Mrs Hume-Kendall confirmed in her evidence had been completed *prior to* the board meeting. The subscription was conditional only upon the acquisition of the Property by the appellant. We know from the board meeting minutes (and we have found as fact) that the board resolved to issue and allot the shares to the trustees prior to completion of the appellant's acquisition of the Property in the TR1. The share certificate for 100 shares registered to the trustees was dated the same day and the Companies House formalities were dealt with subsequently.

96. We take judicial notice of s.558 Companies Act 2006:

> **558 When shares are allotted**
>
> For the purposes of the Companies Acts shares in a company are taken to be allotted when a person acquires the unconditional right to be included in the company's register of members in respect of the shares.

97. The parties seemed to have considered it self-evident that paragraph (a) of Step One would be met upon the trustees of the ALGH Settlement becoming shareholders in the appellant. We agree that that would be the latest point in time, but we were not addressed on the relevant legal principles which we think may be rather more nuanced. In our view, questions arise as to: (1) precisely at what time on 23 June 2015 the trustees acquired an interest in the appellant; and (2) whether that time was no later than "immediately after the transaction" for the purposes of paragraph (a) of Step One of the SLP calculation contained in paragraph 20 of Schedule 15.

98. Bearing in mind the evidence summarised above, we conclude as fact on the balance of probabilities that the allotment and issuance of shares to the trustees of the ALGH Settlement in the context of the commercial transaction as we have construed it took place concurrently with or, at the latest, "immediately after" the acquisition of the Property by the appellant.

99. As a result, we conclude that the trustees of the ALGH Settlement *were* a shareholder in the appellant (as to 50% of the issued shares) at or "immediately after" the acquisition of the Property by the appellant and so paragraph (a) of Step One of the SLP calculation in paragraph 20(1) of Schedule 15 is satisfied.

100. Mr Cannon's primary submission, that Mrs Hume-Kendall's 100% ownership and control of the appellant was attributed to Mr Hume-Kendall by virtue of their marriage, therefore fails.

Who had control over the appellant?

101. Our conclusion at [99] is not sufficient to conclude the SLP Issue, because we are also required to decide whether control over the appellant should be attributed to (1) Mrs Hume-Kendall and (2) Mr Hume-Kendall such that paragraph (b) of Step One of the SLP calculation in paragraph 20(1) of Schedule 15 was satisfied in respect of both. Again, the parties were divided on this question.

102. It is important to appreciate at this point that "control" of the appellant is a relevant concept here because paragraph 39 of Schedule 15 defines "connected persons" for the purposes of that Part of FA2003 inter alia by applying s.1122 Corporation Tax Act 2010. In turn, s.1123 of the latter Act, which contains supplementary provisions to s.1122, provides that for the purposes of the s.1122 connected persons test, " "control" is to be read in accordance with sections 450 and 451 [Corporation Tax Act 2010] (except where otherwise indicated)". To identify who is connected with whom in the context of the appellant, it is therefore necessary to determine who has – or is deemed to have – control of the appellant.

103. In Mr Cannon's alternative submission, Mrs Hume-Kendall was:

> …deemed to have control within section 450(5), CTA 2010 under the shareholders' agreement… because under clause 5 of that agreement, each of the shareholders agreed not to pass any of the resolutions, or do any of the things set out in Schedule 3 of that agreement, without the prior written consent of the other shareholder.

104. Accordingly, in Mr Cannon's view (and here we quote in full the submissions on which the outcome of the whole appeal turns):

> 17. As regards Simon Hume-Kendall, section 450(6), CTA 2010 brings in section 451, CTA 2010… for the purpose of deciding the persons who are deemed to have control within section 450. Section 451(4)(c), CTA 2010 provides that for that purpose there "may be attributed" to a person all the rights and powers of any "associate" of that person. The phrase "may be attributed" here does not confer a discretion on HMRC and "may" in effect means "shall": see Lord Hoffman's judgment in *R v CIR ex parte Newfields Developments Limited* [2001] UKHL 27 at paragraphs 14 to 19…. In the same judgment at paragraph 19, Lord Hoffman also said:
>
> > *"Even without subsection (6), the definition of control is wide and can apply to people who have no real control over the company's affairs."*
>
> 18. Helen is an "associate" of Simon because she is his spouse: section 448(1)(a) and (2)(a), CTA 2010…. The rights and powers of Helen in relation to the Appellant are therefore to be attributed to Simon: see section 451(4)(c), CTA 2010… and Lord Hoffman in *Newfields* at paragraph 10… and Lightman J in *Gascoines Group Ltd v HMRC* [2004] EWHC 640 (Ch) at paragraph 9… in which he said:
>
> > *"As is apparent from its terms associated companies are defined in section 13(4) of the 1988 Act as companies of which one company controls or is controlled by another or which are both under the control of the same person or persons. Again as is apparent from its terms section 416 of the 1988 Act identifies not merely those who have control of a company but also the much wider class or group of those who shall be taken to have control. The consequences of actual control and attributed control are the same. Lord Hoffmann analysed the operation of sections 16 and 17 of the 1988 Act in R v Inland Revenue Commissioners ex parte Newfields*

Development Ltd [2001] 1 WLR 1111 ("Newfields"). At paragraph 11 of his speech he said:

> *"The effect of these cumulative definitions [in sections 416 and 417] is that for the purposes of deciding whether a person "shall be taken to have control of a company" under section 416(2) it may be necessary to attribute to him the rights and powers of persons over whom he may in real life have little or no power of control. Plainly the intention of the legislature was to spread the net very wide." "*

Sections 415 and 417, ICTA 1988 were of course the predecessors of sections 448 – 451, CTA 2010 and so the above judicial remarks apply to the latter provisions, as they do to the former. In particular, section 450(5) CTA 2010 re-enacts section 416(3) ICTA 1988 and provides as follows:

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

In *Gascoines Group Ltd v HMRC* [2004] EWHC 640 (Ch) Lightman J said in relation section 416(3) as follows:

> "[12]…....(3) Mr D W H Gascoine also had control of Saracens because: (a) the trustees of the 1987 trust owned 99% of Saracens. The trustees therefore together had control of Saracens because they owned the greater part of the share capital: s 416(2) and s 416(3); (b) the trustees are associates of Mr D W H Gascoine, because he is a settlor of the 1987 trust: s 417(3)(b); and (c) therefore, the rights of the trustees are to be attributed to Mr D W H Gascoine who is to be taken to have control of Saracens: s 416(6)."

The Appellants put their primary submission in terms that Helen had direct control over the Appellant at the time that the purchase of the Property was effected so that as an associate of Simon, her control is clearly attributed to Simon. However, *if Helen is viewed as having had control by virtue of the shareholders' agreement and section 450(5) CTA 2010 then she was still deemed to be a person in control of the Appellant and that control also falls to be attributed to Simon. The fact that the control arises from a person acting together with the other shareholder should not affect the attribution of that person's rights and powers under section 451(4)(c) CTA 2010.* The words of Lightman J above in relation to the control by the trustees of Saracens and the attribution of that control to Mr Gascoine suggests that this is the correct application of the legislation. This is reinforced by the fact that this is anti-avoidance legislation and the words of Lord Hoffman from *Newfields* quoted above that: "Plainly the intention of the legislature was to spread the net very wide."

19. Accordingly, whether at the time of the purchase of the Property Helen is treated as having had direct control of the Appellant or control through acting together with the other shareholder, her control was attributed to Simon and he is therefore deemed to have been connected with the Appellant. It is perhaps unsurprising that under these wide-ranging anti-avoidance provisions, the spouse of a person who is deemed to control a company is also deemed to be connected with that company. Were the Tribunal to hold otherwise it would be signalling a limitation on the spread of the net that Lord Hoffman said Parliament had intended to spread very wide.

[our emphasis]

105. Mrs Cowan accepted that Mrs Hume-Kendall was connected with the trustees of the ALGH Settlement:

> 8. Paragraph 18(1)(b) Schedule 15 FA 2003 is applicable in the instant appeal as the higher threshold interest in question was transferred from a partnership – Bewl Holiday Homes LLP - the vendor – to a person connected with a person who is or has been a partner – Waterside Escapes Ltd – the Appellant/ purchaser.
>
> 9. The basis of this connection is as follows:
>
> (a) Helen Hume-Kendall ("HHK") was a 50% shareholder in the Appellant (at the effective date) and also a partner with a 50% income profit share in the vendor (at the effective date). The other 50% shareholder in the Appellant (at the effective date) was the ALGH Settlement (''the Trust"), and the other partner in the vendor (at the effective date) was Simon Hume-Kendall ("SHK"), HHK's spouse.
>
> (b) HHK is connected with the Appellant by virtue of sections 1122(3) (b) and 1122(4) (a) of the Corporation Taxes Act (''CTA'') 2010.
>
> (c) Specifically, HHK is connected with the Trust because they are 'two or more persons acting together to secure or exercise control of the Appellant' [section 1122 (4) (b) CTA 2010]. This is evidenced by the Shareholders' Agreement which states that both shareholders agree to control the Appellant together. This is also confirmed by paragraph 21 of the Appellant's original skeleton argument dated 6 July 2018.
>
> (d) It then follows that HHK is connected with the Appellant because HHK together with persons connected with HHK have control of the company [section1122 (3) (b) CTA 2010].

106. But she nevertheless disagreed with Mr Cannon's view on Mr Hume-Kendall, instead arguing as follows:

> 15. The Respondents submit that SHK is not a corresponding partner in relation to the transaction, such that the initial SLP calculation carried out is correct and that the chargeable consideration remains as £625,000. The reasons for this are as follows:
>
> (a) To be a corresponding partner in relation to a relevant owner, a person must be a partner and either be the relevant owner, or an individual connected with the relevant owner.
>
> (b) There is no dispute that SHK is a partner in the vendor.
>
> (c) As the relevant owner is the Appellant, SHK must be connected with the Appellant to be a corresponding partner.
>
> (d) As has been established in paragraph 9 above, HHK is connected to the Appellant by virtue of 'acting together' with the Trust to exercise control of the company. The Shareholders' Agreement states that HHK and the Trust agree to act together to exercise control of the company's affairs. This is the only way in which HHK is connected with the Appellant under section 1122 CTA 2010, as her 50% shareholding alone is not sufficient to secure control.

(e) *SHK cannot be said to have control of the company by virtue of his spousal connection to HHK alone;*

(i) SHK does not have control of the company (section 1122 (3) CTA 2010), because even with HHK's rights and powers attributed to him he only then owns 50% of the shares which alone do not confer control (section 450(3) (a) CTA 2010) states it must be the greater part of the share capital or issued share capital of the company).

(ii) SHK also does not, together with persons connected with him, have control of the company as he is not connected with the Trust. HHK is connected with the Trust as per the terms of the Shareholders' Agreement which contains an agreement for the shareholders to act together, but this agreement does not extend to SHK, regardless of whether or not HHK attributes her rights to him.

16. As SHK is not an individual connected to the company, he is not a corresponding partner and must be excluded from the SLP calculation.

[our emphasis]

107. From those submissions, the fundamental issue between the parties can readily be discerned: it is whether trustees' shareholding, which both parties accept must be attributed to Mrs Hume-Kendall for the purposes of the SLP calculation pursuant to the relevant provisions of the Corporation Tax Act 2010, should fall out of account when considering the attribution of Mrs Hume-Kendall's shareholding to her husband (as argued for by Mrs Cowan) or not (as argued for by Mr Cannon).

108. This is a difficult question. We found *R v CIR ex parte Newfields Developments Limited* [2001] UKHL 27 and *Gascoines Group Ltd v HMRC* [2004] EWHC 640 (Ch), to which we were directed by Mr Cannon, of limited assistance because of the factual differences between those cases and this.

109. In our view, the answer is to be found in s.451(5)(b) Corporation Tax Act 2010:

(5) The rights and powers which may be attributed under subsection (4) –…

(b) *do not include those attributed to an associate under subsection (4).*

[our emphasis]

110. We must add that Mr Cannon did not draw this sub-section to our attention in the context of his otherwise fully argued submissions. He did, though, refer to other sub-sections of s.451, and so we assume that he was aware of it. Neither did Mrs Cowan expressly refer to it by its section number, but the outcome for which she contends is only explicable in light of this provision and we conclude that she must have had it in mind at paragraph 15(e) of her written submissions (quoted above).

111. The meaning of s.451(5)(b) is somewhat cryptic. In our view, it means that for the purposes of the control test in s.450 Corporation Tax Act 2010 and its related provisions, in relation to any person ("A"), the rights and powers of an associate of that person ("B") do not include the rights and powers attributed to that associate by an associate of theirs ("C"), as contended for by Mrs Cowan.

112. Our interpretation is helpfully corroborated by paragraph D3.103 of *Simon's Taxes*:

> …certain other rights and powers can be attributed to a person (P) in order to determine the control of a company [CTA 2010, ss 451(4), 1069(3)]:
>
> …
>
> (3) all the rights and powers of any associate or associates of that person, including those possessed by their nominees as above
>
> The rights and powers of an associate which can be attributed under… (3) above *do not include the rights and powers of an associate of an associate [CTA 2010, ss 451(5)].*
>
> *Example 1*
>
> *XYZ Ltd has an issued share capital of £10,000. Its shareholders include John (1,000 shares), John's wife Jill (800 shares) and Jill's brother James (700 shares). Jill's rights can be attributed to John, but the rights of James cannot be attributed to John as they are not direct associates. However, the rights of both John and James can be attributed to Jill.*
>
> [our emphasis]

113. Though Mrs Cowan did not direct us to it, we note that HMRC's Corporation Taxation Manual at CTM60140 also expresses the same construction.

114. In this case, our decision at [111] means that as regards Mr Hume-Kendall ("A", in our explanation), those rights and powers attributed to Mrs Hume-Kendall ("B") by virtue of her association with the trustees of the ALGH Settlement ("C") are *not* attributed to him.

115. Mrs Hume-Kendall's 50% shareholding in the appellant is attributed to Mr Hume-Kendall, but that is not sufficient of itself to confer control of the appellant, because even with Mrs Hume-Kendall's rights and powers attributed to him, he is still only treated as having 50% of the shares, whereas s.450(3)(a) Corporation Tax Act 2010 states that the "greater part" of the share capital is required for Mr Hume-Kendall to be associated with the appellant and so make the SLP 100.

116. We should make it clear that, contrary to Mr Cannon's warning, we do not intend to signal "a limitation on the spread of the net that Lord Hoffman said Parliament had intended to spread very wide". We respectfully agree with and adopt Lord Hoffman's formulation of attributed control in *Newfields*, of course, and the difference in outcome between that case and this has nothing whatsoever to do with an improper limitation on the meaning of "control" for s.450 on our part. It is because what is now s.451(5)(b) Corporation Tax Act 2010 was not relevant to the facts of *Newfields*, yet it is determinative in this case. The same is true of *Gascoines*. Were it not for the existence of s.451(5)(b), we should have applied *Newfields*, concluded that the trustees' rights should be attributed to Mr Hume-Kendall, and found for the appellant – which would have changed the entire outcome of this appeal.

Decision on the SLP Issue

117. As a result of our decision at [114]-[115], the correct SLP calculation is £1,250,000 x (100-50)% = £625,000 and the chargeable consideration on the acquisition of the Property by the appellant was consequently £625,000. As a result, SDLT of £93,750 was payable by the appellant in respect of that acquisition, as contended for by HMRC.

DISPOSAL

118. Pursuant to our decision at [117], we dismiss the appeal and confirm the Closure Notice, which we amend pursuant to our power under paragraph 42(4) of Schedule 10 by reducing the stated chargeable consideration from £1,250,000 to the correct amount of £625,000.

119. The 15% SDLT rate applies. Accordingly, the correct SDLT liability of the appellant on its acquisition of the Property was £93,750. With credit given for the SDLT of £68,750 originally paid, the appellant must pay additional SDLT in the amount of £25,000.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

120. 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.

JAMES AUSTEN

TRIBUNAL JUDGE

RELEASE DATE: 13 OCTOBER 2020