[2017] UKFTT 0246 (TC)

TC05726

Appeal number: TC/2015/02718

VAT – whether Appellant a non-profit making body for the purposes of the sporting exemption – Kennemer considered and applied – whether accountant a shadow director – whether Sports Order* ultra vires *the PVD - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STOKE BY NAYLAND GOLF AND LEISURE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS JANET WILKINS

Sitting in public at the Royal Court of Justice, Strand, London on 12-15 December 2016

Mr Victor Cramer, of KPMG LLP, for the Appellant

Ms Arpana Nathan of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Stoke by Nayland Golf and Leisure Ltd is a company limited by guarantee. It operates a golf club and fitness centre as the tenant of Stoke by Nayland Club Ltd, a commercial business. The parties referred to the former as "Leisure" and the latter as "Club". We have adopted the same abbreviations, although it is Leisure and not Club which runs the golf club.

2. The main issue in dispute ("the Main Issue") was whether Leisure was an "eligible body" so that its supplies were exempt as being within Value Added Taxes Act 1994 ("VATA"), Schedule 9, Group 10, item 3 ("the VAT sporting exemption").

3. On 7 February 2014 HM Revenue & Customs ("HMRC") decided that Leisure did not satisfy the VAT sporting exemption because it was not a non-profit making body and/or was subject to commercial influence. Leisure appealed HMRC's decision on the basis that it was a non-profit making body and not subject to commercial influence.

4. Leisure went on to argue that the "commercial influence" test contained in the Value Added Tax (Sport, Competitions and Physical Education) Order 1998 ("the Sports Order") should in any event be disregarded as inconsistent with EC Regulation 2006/112/EC, the Principal VAT Directive ("the PVD"). We have dealt with this at the end of our decision, under the heading "the Sports Order Issue".

5. HMRC subsequently assessed Leisure to VAT for the period from 1 January 2009 to 30 September 2013. The Tribunal had no information as to whether that assessment had been appealed, but HMRC accepted that if Leisure succeeded in this appeal, the assessment would be vacated. Because of the period covered by that assessment, it was common ground that this appeal relates to the period from 1 January 2009 onwards. Leisure had also been issued with a late registration penalty, but its appeal against that penalty was not before this Tribunal.

6. We decided that Leisure was a non-profit making body not subject to commercial influence and allowed the appeal.

7. We also decided that the Sports Order was not inconsistent with the PVD. Given our decision on the Main Issue, that finding is *obiter*.

The evidence

8. Leisure provided helpful bundles of documents, which included:

   (1) the correspondence between the parties and between the parties and the Tribunal;

   (2) other background correspondence and meeting notes related to the matters under appeal;

   (3) Leisure's Board Minutes from 15 August 2000 to 5 May 2011, and for 20 May 2015;

(4) Club's Board Minutes from 5 January 2005 to 11 August 2011;

(5) leases between Club and Leisure from 2003 through to 2013;

(6) various invoices between Club and Leisure, and between Leisure and Club;

(7) Leisure's financial statements and related documents for 1991 to 2014, and its management accounts for 2014 and 2015;

(8) Club's financial statements for the year ended 31 March 2009 through to the year ended 31 March 2014.

9. The following individuals provided witness statements, gave oral evidence and were cross-examined:

(1) Mr Ivan McCallin, director of Leisure since 1999 and Chairman of the Board since May 2012. Mr McCallin was an impressive witness, who answered questions in a measured and thoughtful manner. We found him to be wholly credible.

(2) Mr Andrew Cracknell, Leisure's accountant from mid-2002. He was a nervous and uneasy witness who was unable to answer some of the questions asked by Ms Nathan and by the Tribunal. We find that this was caused by his relatively subordinate role within Leisure, not because he was being evasive. We make further comments on his evidence at §178.

(3) Mrs Susanna Rendall, managing director of the Boxford Group Ltd ("the Boxford Group"), Club's parent company, was a straightforward and honest witness.

(4) Mr Richard Hughes and Mrs Amanda Howlett, two of the HMRC Officers involved in the decision under appeal. Both had a genuine and honest belief in the accuracy of their evidence, although we decided after careful consideration that it was not entirely reliable.

10. From the evidence listed above we find the facts set out in the next part of this decision. These are not in dispute, except where indicated. We make further findings of fact later in our decision.

The facts

The Boxford Group

11. The Boxford Group was set up by Mrs Devora Peake, working with Mr Bernard Loshak, her first husband and with Mr Bill Peake, her second husband. Mr and Mrs Peake were Mrs Rendall's parents.

12. In 1938 the Boxford Group started trading as growers of fruit, and in 1969 began selling apple juice under the Copella brand. In the 1970s the Boxford Group converted some of its agricultural land into two golf courses, called Constable and Gainsborough (together, "the golf course"), which were operated via Club.

13. Mr Jonathan Loshak, Mrs Rendall's brother, had responsibility for the golf course. He put enormous effort into making it successful, but found the task very stressful. In 1993 he suffered a serious heart attack. Mrs Peake stepped in to run the golf course as

well as the rest of the Boxford Group, but she was elderly and before long was also diagnosed with a life-threatening illness.

14. In around 1995 Mrs Rendall agreed to take over as managing director of the Boxford Group, including responsibility for the farm, the Copella business, the golf course and the Stoke by Nayland hotel ("the Hotel") next to the golf course. The Hotel provides conference facilities and wedding receptions as well as more standard accommodation and food.

15. Soon after taking control of the Boxford Group, Mrs Rendall began negotiations for the Boxford Group to expand by purchasing another business, Peake Fruit Ltd. After that business was acquired, it required relocation and significant investment. At about the same time, Mrs Rendall began the process of floating the Copella business on the stock market.

16. She needed to focus on these important business issues, rather than on the golf club. Moreover, the golf course took up a disproportionate amount of time and was emotionally draining. She described the experience:

> "it was like having a thousand green-keepers on site…every second…a member would have either a complaint or a suggestion. It was just impossible to get on with any other work."

17. Mrs Rendall also blamed her brother's health issues at least in part on having to deal with the stress of running the golf course, and she was anxious to avoid the same experience. However, she did not want to sell the golf course, as her brother had put so much effort into making it successful. In her oral evidence she said:

> "I didn't want to destroy the membership. The membership needed to be looked after, and nurtured and taken forward, so they could enjoy playing golf on those courses."

18. HMRC accepted Mrs Rendall decided to separate the golf course from the rest of the Boxford Group for the reasons set out above, but submitted that she also had a VAT planning motivation. That was disputed and we return to it later in our decision.

Setting up Leisure in 1996

19. On 17 October 1996, Mrs Rendall met Mr Khan, an accountant at Thornton & Co ("Thorntons"), a firm of chartered accountants in Colchester. Thorntons subsequently arranged for Leisure to be incorporated as a company limited by guarantee. Clause 3 of its Memorandum of Association sets out its objects, which are:

> "1. To carry on business as a golf club and to acquire by purchase, lease or licence, land/premises suitable for golf members' gatherings and for other purposes of the Company and to lay out and prepare such premises for golf related activities and for other purposes of the Company, and provide meeting rooms, office accommodation, seating, lavatories, exhibition stands and all other conveniences and amenities in connection therewith.
>
> 2. To promote the club and members interests generally and golf related activities, and in particular (but without prejudice to the generality of the

> foregoing) to employ persons in connection with the sport whether as professionals or otherwise; to establish and maintain a membership scheme, whether by subscription or otherwise; and to organise, conduct and promote membership activities particularly meetings, tournaments and competitions.
>
> 3. To use or permit the use of grounds, clubhouses, facilities and other property of the Company for any golf sport activity and for all forms of public and private meetings or functions, deemed appropriate by the Company, whether by the Company or not.
>
> 4. To subscribe to any association, federation or union formed to serve or promote the interests of any golf related activity, to join in and promote competitions, and to contribute to an award prizes for golf endeavour
>
> 5. To buy, sell and deal in goods and equipment of all kinds in connection with golf.
>
> 6. To deal generally in any activity for the furtherance of golf sport [sic]"

20. Clause 4 reads:

> "The income and property of the Association shall be applied solely towards the promotion of its objects as set forth in this Memorandum of Association and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit, to members of the Association and no member of its Council of Management of Governing Body shall be appointed to any office of the Association paid by salary or fees, or receive any remuneration or other benefit in money or money's worth from the Association."

21. Leisure's first directors were Mrs Rendall, her brother Mr Jonathan Loshak and her sister Ms Tamara Unwin. All three were members of the company. However, Mr Loshak and Ms Unwin had negligible involvement in Leisure's business, so Mrs Rendall was the only active director.

22. She hired a golf consultant, Mr Derek Howe, to work for Leisure, and referred any questions about the running of the golf course to him, and he did most of the management work. Mrs Rendall also engaged Mr Eddie Hickman to take care of the financial side of the golf club. Her unchallenged evidence was that by using Mr Howe and Mr Hickman she was able to establish distance between herself and the golf club members, and thereby devolve day-to-day responsibility for its operations.

The Sports Order

23. In 1999 the Sports Order was placed before Parliament. The English Golf Union ("the EGU") wrote to its member clubs, advising that the effect of the order "might change the eligibility of some affiliated clubs' exemption from charging VAT on membership subscriptions". It went on to say that it was "essential that clubs take proper advice on this matter" and attached guidance from HM Customs & Excise ("HMC&E").

24. Annex A to that guidance was entitled "does your club need to take action NOW to ensure exemption from 1 January 2000". Under that heading HMC&E set out a list of

questions relating to the commercial influence test in the Sports Order, of which question (b) began:

> "has your club during the period commencing 14 January 1999 leased land from anyone who is currently an officer [of the club]…"

25. It continued by saying that, if this was the position, the club should follow the guidance in Annex B "to ensure you meet the conditions for exemption". Annex B is headed "what you need to do NOW if the answers to the questions in Annex A suggest your club will not satisfy the conditions for exemption from 1 January 2000".

26. Annex B stated that if the answer to question B was "yes", then "the officer tied in with the supply will need to resign from the committee…no later than 31 December 1999."

27. Mrs Randell took advice from Hargreaves, a local firm of solicitors. She was told that the sharing of directors between Leisure and Club would mean that Leisure was deemed to be subject to Club's commercial influence and so would not benefit from the VAT exemption.

28. She and her siblings therefore resigned as directors and members of Leisure, and Mr Hickman and Mr Howe were appointed as directors and became members. These appointments were temporary, while Mrs Rendall looked for other directors.

29. On 17 December 1999 Mr Hickman and Mr Howe were replaced as directors and members of Leisure by Dr Robert Bruce, Mr McCallin and Mr David Anderson. Dr Bruce was Chairman of the Board; he had previously been the head of agricultural lending at Midland Bank, and was a keen golfer. Mr Anderson was a former member of the golf club and was the sales director at Philips UK Ltd. Mr McCallin had been at university with Mrs Rendall. He was from a farming background but later became part of an "angel investor" group supporting start-up businesses. When Dr Bruce stepped down as Chairman in May 2012, Mr McCallin took on that role. The parties disagreed on whether the directors acted independently of Mrs Randell and Club, and we return to this later in our decision.

The Lease

30. Club leased to Leisure the land on which the golf course had been developed, together with the buildings from which the golf club operated (together described as "the Demised Premises") under a lease ("the Lease").

31. The wording of the Lease has remained substantially unchanged since 1999, other than in relation to the amount of the licence fee. By Clause 1 read with Schedule 2, the lease is "non-exclusive", because Club retains the right "to share all or part of the Demised Premises with other authorised users". Clause 1 also provides that the licence fee is payable annually in advance, and Clause 4 states that if Leisure is in arrears by 21 days, Club may take possession of the Demised Premises.

32. By Clause 1, Leisure agreed to pay any "rates, taxes assessments outgoings and impositions…payable in respect of the Demised Premises" including "a due proportion"

of any such rates etc which had been charged both on the Demised Premises and on property which remained with Club.

33. By Clause 3(ii), Club agreed to insure the Demised Premises and to produce to Leisure "on written demand but not more than once a year reasonable evidence of the terms of the policy and of payment of the last premium". By Clause 2(2), Leisure agreed to repay Club on demand "the premium expended by [Club] in insuring the Demised Premises or a due proportion thereof." By Clause 2(3), Leisure agreed to pay Club on demand "a fair proportion to be determined by [Club] in respect of making repairing renewing altering and cleansing the Demised Premises".

34. Since 1999 the licence fee has been as follows:

Year	£
1999-2002	550,000
2003	475,000
2004-2008	450,000
2009-2013	725,000

35. In 2001, Club granted Leisure a one-off rebate of £50k. In 2003 and 2004 there were further reductions of £75k and £25k respectively. The increase in 2009 followed the transfer of the green fee income stream; see the next section of this decision.

The transfer of the green fees

36. Non-members who pay a green fee are allowed to play on the golf courses. Until 2009, the right to receive the green fees remained with Club. This was possible under the Lease because under its terms Leisure had a non-exclusive licence to use the golf course.

37. On 7 May 2009, Leisure's Board agreed to increase the licence fee payable to Club in exchange for the transfer of the green fees. The transfer was retrospective to 1 January 2009.

38. Mrs Rendall and Mr McCallin's evidence was that a number of factors lay behind the transfer:

(1) a general market shift away from fixed membership of a single club to people preferring to play as visitors at different clubs, which had led to a decline in membership subscriptions;

(2) Dr Bruce had advised Mrs Rendall that this decline was putting pressure on Leisure's income stream. If membership fees increased to cover the licence fee, it was likely that this would trigger a further decline in numbers. Dr Bruce had suggested that the licence fee payable to Club would therefore have to decrease;

(3) Club had been working to increase the green fee income, and the growing number of visitors was increasing conflict between them and golf club members;

(4) Club had recently spent some £2m on improving facilities for golf club members, including constructing a new clubhouse, changing rooms, a snooker room and structural improvements. These costs were not reflected in the existing licence fee; and

(5) Mrs Rendall had been contacted by a VAT consultancy, VATability, about helping to fund an appeal being brought by the Chipping Sodbury Golf Club as to whether VAT could be reclaimed for periods before 1 January 1990. During discussions with Club, VATability expressed surprise that the green fees had remained with Club in 1996 and had not been transferred to Leisure, pointing out that the green fees therefore remained subject to VAT.

39. That evidence was not in dispute other than point (2), being Dr Bruce's negotiations about reducing rents, to which we return later in our decision.

40. As is shown in the Table at §34, on transfer of the green fees, the licence fee payable under the Lease increased from £450k pa to £750k pa. The extra licence fee was calculated as 75% of Club's green fee income, net of VAT, plus a 3% interest charge on the £2m spent on the improvements to the golf club.

Leisure's day to day operations and management

41. Leisure's Board meets around three times a year at the golf club. Between those meetings the directors are in contact with each other, and with employees, as necessary. From 2001 onwards, the Board was provided with monthly management accounts

42. Leisure's Board meetings are attended not only by the directors, but also by the company accountant, the company secretary and the golf and leisure administrator ("the Administrator"), who is an employee of Club.

43. Mr Jones was Leisure's accountant until mid-2002, when he was replaced by Mr Cracknell. Until 2005, Mr Cracknell also worked for part of his time as an accountant for Club. In November 2005, he was appointed as Club's Finance Director. He continued as Leisure's accountant until shortly before this hearing, when a full time accountant was appointed. The parties disagreed on the role played by Mr Cracknell in relation to Leisure, and we return to this later in our decision.

44. Mr Keith Pritchard was the company secretary for the relevant period; Mr Peter Barfield was the Administrator. His role was to prepare agendas, collate reports of Leisure's activities and provide those to the directors for each Board meeting.

45. Leisure is split into two sections, the gym/leisure areas and the golf courses. Each section has its own manager. Leisure employs around 30 staff across both sections.

46. The members of the golf club operate a committee which meets monthly ("the golf club members' committee"). Meetings are attended by the golf manager and the golf secretary, who are employees of Leisure and part of its management team. The golf club members' committee discuss matters such as the state of the course, the clubhouse and

issues with staff and facilities. The golf manager reports the outcome of these meetings to the Board, either immediately if there is an urgent issue to address, or at regular Board meetings.

47. Each September the golf club members' committee makes a recommendation to the Board as to what the membership fee should be for the following year. This is considered at the September Board meeting in good time for the golf club members' annual general meeting in November. The Board do not always accept the recommendations put to them: in September 2009 the committee recommended an increase of 5% on subscription fees, but the Board resolved to increase fees by 2%. In September 2010 the committee suggested 3%, but the Board resolved to increase fees by 2%.

48. The membership fees are more or less the same as those charged by other nearby clubs, but golf club members benefit from having access to two courses rather than one.

The turnover and profits

49. Leisure's accounts for the year ended 31 December 1999 show that turnover grew from £494k to £706k between 31 December 1998 and 31 December 1999, an increase of £212k. Of that figure, £178k was derived from the newly opened Peake Fitness, the name given to the gym and other leisure facilities.

50. In the years from 1999 to 2009, turnover from golf club memberships and gym/leisure memberships are broadly equal in amount. In 2009, Leisure's acquisition of the green fees caused its golf income significantly to increase. For example, in 2010 turnover was £1.4m, of which £910k came from golf, and the balance from Peake Fitness.

51. Leisure's annual profit/loss was as follows:

	£		£		£
1999	1,155	2003	5,570	2007	4,351
2000	2,018	2004	3,686	2008	4,867
2001	17,371	2005	(1,944)	2009	1,002
2002	(18,178)	2006	(5,344)	2010	5,074

52. In the years before 2009, wages and salaries were 50-60% of Leisure's costs; the licence fee represented around 40%, with other expenses, including rates, insurance, hire charges and print/postal costs, making up the balance.

Club's operations and the interface with Leisure

53. Club runs the Hotel, including the conference centre and wedding related events. It takes green fee bookings, but liaises with Leisure as to availability on the courses. From 2009 the green fee income has been passed to Leisure. Part of Club's revenue comes from sales of food and beverages, including to members of the golf club.

54. Other aspects of the interface between the two companies are in dispute and we return to these later in our decision.

HMRC's enquiries

55. At On 1 February 2011, Mr Hughes emailed Ms Suzanne Hill, the HMRC Officer with responsibility for Club, and copied Mrs Howlett. He said:

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

56. Ms Hill and Mrs Howlett conducted a site visit on 24 and 25 March 2011, and met Mr Cracknell. In a letter dated 25 May 2011, Mrs Howlett set out a list of further information and documents she required so as to allow her to "examine the liability in this case". Correspondence continued on a number of issues for some time.

57. On 7 June 2012, there was a meeting between Mr Hughes, Mrs Howlett, Mr McCallin, Dr Bruce, and a Mr Henry, from Constable VAT Consultancy LLP ("the June 2012 meeting"). On 7 August 2012 a further meeting took place between Mr Hughes, Mrs Howlett and Mrs Rendall ("the August 2012 meeting"). We return to both of these meetings later in our decision.

58. During these discussions, Leisure's Board agreed retrospectively to register for VAT with effect from 1 January 2009, pending the final outcome of:

(1) this appeal; and

(2) the dispute between HMRC and the Bridport and West Dorset Golf Club ("*Bridport*"), which concerned the VAT status of green fees paid by non-members. In December 2013 the CJEU decided that green fees paid by non-members to a golf club which came within Article 132(1)(m) of the PVD benefitted from the exemption (*Case C495/12*).

59. On 7 February 2014, HMRC issued the decision which is under appeal to this Tribunal.

The legislation

60. Chapter 2 of Title XI of the PVD is headed "Exemptions for certain activities in the public interest". The first Article under that heading is Article 132(1), which reads, so far as relevant to this appeal:

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

61. Article 133 includes the following provisions:

> "Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m), and (n) of article 132(1) subject in each individual case to one or more of the following conditions:
>
> a) The bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;
>
> b) Those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;…"

62. VATA s 31 reads:

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

63. Sch 9, Group 10 is headed Sports, sport competitions and physical education, and Item 3 of that Group reads:

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

64. The Notes to that Group incorporate the amendments which derive from the Sports Order. So far as relevant to this decision, the Notes read:

> "(2A) Subject to Notes (2C) and (3), in this Group 'eligible body' means a non-profit making body which-
>
> a) is precluded from distributing any profit it makes, or is allowed to distribute any such profit by means only of distributions to a non-profit making body;
>
> b) applies in accordance with Note (2B) any profits it makes from supplies of a description with in Item 2 or 3; and
>
> c) is not subject to commercial influence.
>
> (2B) For the purposes of Note (2A)(b) the application of profits made by any body from supplies of a description within Item 2 or 3 is in accordance with this Note only if those profits are applied for one or more of the following purposes, namely–
>
> a) the continuance or improvement of any facilities made available in or in connection with the making of the supplies of those descriptions made by that body;
>
> b) the purpose of a non-profit making body.
>
> …

(4) For the purposes of this Group a body shall be taken, in relation to sports supply, to be subject to commercial influence if, and only if, there is a time in the relevant period when–

a) a relevant supply was made to that body by a person associated with it at that time;

b) an emolument was paid by that body to such a person;…

(5) In this Group 'the relevant period', in relation to a sports supply, means–

a) where that supply is one made before 1st January 2003, the period beginning with 14th January 1999 and ending with the making of that sports supply; and

b) When the supply is one made on or after 1st January 2003, the period of three years ending with the making of that sports supply.

(6) Subject to Note (7), in this Group 'relevant supply', in relation to any body, means a supply falling within any of the following paragraphs-

a) The grant of any interest in or right over land which at any time in the relevant period was or was expected to become sports land;

b) The grant of any licence to occupy any land which at any such time was or was expected to become sports land;

…

e) The supply of any services consisting in the management or administration of any facilities provided by that body;

f) The supply of any goods or services for consideration in excess of what would have been agreed between parties entering into a commercial transaction at arm's length.

(7) …

(8) Subject to Note (10), a person shall be taken, for the purposes of this Group, to have been associated with a body at any of the following times, that is to say–

a) The time when a supply was made to that body by that person;

b) The time when an emolument was paid by that body to that person; or

c) The time when an agreement was in existence for the making of a relevant supply or the payment of emoluments,

If, at that time, or at another time (whether before or after that time) in the relevant period, that person was an officer or shadow officer of that body or an intermediary for the supplies of that body.

(9) Subject to Note (10), a person shall also be taken, for the purposes of this Group, to have been associated with a body at a time mentioned in paragraph (a), (b) or (c) of Note (8) if, at that time, he was connected with another person who in accordance with that Note–

a) is to be taken to have been associated at that time; or

b) would be taken to have been associated were that time the time of a supply by the other person to that body.

…

(16) in this Group–

'agreement' includes any arrangement or understanding (whether or not legally enforceable);…

'officer', in relation to a body, includes-

i) A director of a body corporate; and

ii) Any committee member or trustee concerned in the general control and management of the administration of the body;

'shadow officer', in relation to a body, means a person in accordance with whose directions or instructions the members or officers of the body are accustomed to act;

'sports land', in relation to any body, means any land used or held for use for or in connection with the provision by that body of facilities for use for or in connection with sport or physical recreation, or both;

'sports supply' means a supply which, if made by an eligible body, would fall within Item 2 or 3…"

Case law considering the term "non-profit making"

65. The leading authority on the meaning of the term "non-profit making" is *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (2002) Case C-174/00 ("*Kennemer*").

66. In giving his Opinion on that case, Advocate General Jacobs rejected an argument that Article 13A(l)(m) exempted non-profit making services, rather than non-profit making organisations, saying:

> "If the exemption were to apply only to non-profit making services. commercial sports undertakings could seek exemption for certain services they supply, a situation which could not be reconciled with the plain terms of the provision and which would inevitably - given the opportunities for shrewd cross-subsidising which would arise - lead to a distortion of competition."

67. He later said:

> "45. First, I agree with what appears to be the consensus of the Finnish and United Kingdom governments and the Commission, that the idea of profit-making in this context relates to the enrichment of natural or legal persons - in particular those having a financial interest in the organisation in question - rather than to whether in any given period the organisation's income exceeds its expenditure. The concept of a non-profit making organisation contrasts essentially with that of a commercial undertaking run for the profit of those who control and/or have a financial interest in it.

> 46. Second, in accordance with most of the language versions, the focus must be on the aims of the organisation concerned rather than on its results - the mere fact that an entity does not make a profit over any given period is not enough to confer non-profit-making status. Moreover, from the fact that 'non-profit-making' is used to qualify 'organisation', it would seem that the aims in question are those which are inherent in the organisation rather than those which it may be pursuing at a particular point in time.
>
> 47. When assessing those aims, therefore, it is necessary but not sufficient to look at the organisation's express objects as set out in its statutes. It is also necessary however to examine whether the aim of making and distributing profit can be deduced from the way in which it operates in practice. And in that context it is not enough to look simply for an overt distribution of profits in the form of, say, a direct return on the investment represented by contributions to the organisation's assets. Such distribution might also, at least in some circumstances, take the form of unusually high remuneration for employees, redeemable rights to increasingly valuable assets, the award of supply contracts to members, whether or not at prices higher than the market rate, or the organisation of sporting 'competitions' in which all the members won prizes. No doubt further methods of covert distribution can be devised.
>
> 48. On the other hand, as the Finnish and United Kingdom governments have also submitted, it would not be reasonable to define an organisation as profit-making simply because it sought to achieve a surplus of regular income over regular expenditure in order to budget for irregular but foreseeable expenditure…To deny it non-profit-making status simply because it accumulated a surplus for that purpose would be to discourage it from managing its affairs economically, with prudence and foresight, and to ignore the fact that no material benefit will accrue to any person as a result of the surplus. Organisations would moreover be liable to acquire and lose their right to exemption depending on where they stood in their budgeting programme, although their fundamental nature and aims would remain unchanged. That cannot in my view have been the intention of the legislature when it enacted the category of 'non-profit-making' organisations.
>
> 49. Clearly, in each case the assessment must be a matter for the national court, which is in a position to investigate the circumstances of the organisation…
>
> 50. The relevant part of the Hoge Raad's question may none the less be answered to the effect that a non-profit-making organisation within the meaning of art 13A(1)(m) of the Sixth Directive is one which does not have as its object the enrichment of natural or legal persons and which is not in fact run in such a way as to achieve or seek to achieve such enrichment; however, the fact that a body systematically aims to make a surplus which it uses for the services it supplies in the form of a facility to practise a sport does not preclude its classification as such a non-profit-making organisation."

68. The European Court of Justice ("CJEU") followed the approach set out by AG Jacobs, and found as follows:

> "19…all the exemptions listed in art 13A(1)(h) to (p) of the Sixth Directive cover organisations acting in the public interest in a social, cultural, religious or sports setting or in a similar setting. The purpose of the exemptions is therefore to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes.
>
> …
>
> 26…it must be observed first of all that it is clear from art 13A(1)(m) of the Sixth Directive that an organisation is to be classed as being 'non-profit-making' for the purposes of that provision by having regard to the aim which the organisation pursues, that is to say that the organisation must not have the aim, unlike a 'commercial' undertaking, of achieving profits for its members…
>
> 27. It is for the competent national authorities to determine whether, having regard to the objects of the organisation in question as defined in its constitution, and in the light of the specific facts of the case, an organisation satisfies the requirements enabling it to be categorised as a 'non-profit-making' organisation.
>
> 28. Where it is found that this is indeed the case, the fact that an organisation subsequently achieves profits, even if it seeks to make them or makes them systematically, will not affect the original categorisation of the organisation as long as those profits are not distributed to its members as profits. Clearly, art 13A(1)(m) of the Sixth Directive does not prohibit the organisations covered by that provision from finishing their accounting year with a positive balance. Otherwise, as the United Kingdom points out, such organisations would be unable to create reserves to pay for the maintenance of, and future improvements to, their facilities.
>
> 33…. it is not profits ('bénéfices'), in the sense of surpluses arising at the end of an accounting year, which preclude categorisation of an organisation as 'non-profit-making', but profit ('profit') in the sense of financial advantages for the organisation's members."

69. As the CJEU held at [27], whether or not an organisation is "non-profit making" is to be decided "in the light of the specific facts of the case". However, both parties sought to compare and contrast Leisure's position with that of other appellants, and we consider two of these cases at the end of our decision.

The parties' submissions on the Main Issue in outline

70. Ms Nathan, for HMRC, submitted that:

(1) Leisure had been set up by Mrs Rendall for commercial reasons, taking into account the VAT exemption. It was therefore not a body acting in the public interest whose activities are directed to non-commercial purposes.

(2) The way in which Leisure operates indicates that it is not a non-profit making body. Instead its affairs were managed to ensure that any surpluses or financial advantages were applied either directly or indirectly for the benefit of Club, and in reality Leisure was an integral part of Club's commercial operation.

(3) Leisure's Board was not independent. It had been appointed by Mrs Rendall, and the directors took "a passive role". The Board was instead influenced by, and habitually complied with, Mr Cracknell's advice, suggestions and recommendations. He was a "shadow director" of Leisure, which was thereby subject to Club's commercial influence.

71. Mr Cramer, for Leisure, submitted that none of this was correct. Leisure was a non-profit making body; when setting it up Mrs Rendall did not have a VAT planning purpose in mind; Leisure's Board was independent of Club and Mr Cracknell was not a shadow director.

72. Both parties agreed that the Tribunal's task was to make findings on the factual issues in dispute, and that those findings would be determinative of the Main Issue.

The factual disputes

73. The disputed factual issues were as follows:

(1) Mrs Rendall's purpose in establishing Leisure;

(2) the reasons why the directors were appointed to the Board;

(3) the reason(s) why the directors were not elected by members of the golf club;

(4) how the licence fee was decided, and how it was adjusted;

(5) the process of employing Mr Cracknell;

(6) Mr Cracknell's role in Leisure;

(7) whether the directors of Leisure took a passive role;

(8) how the cross-charging operated;

(9) how the Professional Golfers' Association ("PGA") event operated;

(10) whether Leisure and Club were part of a single commercial operation;

(11) the financial outcome for Leisure; and

(12) the financial outcome for Club.

74. We deal with each of these in turn. Under each heading we identify HMRC's challenges. Where no challenge is noted, the evidence is not disputed and we have accepted it as a fact.

(1) Mrs Rendall's purpose in establishing Leisure

75. Some of the facts relating to the establishment of Leisure have already been set out at §11ff. However, HMRC also say that Mrs Rendall took VAT planning advice before setting up Leisure, and that this submission is supported by their draft minutes of the August 2012 meeting, which state that "SR [Mrs Rendall] said that the family had received advice from Deloitte & Touche, the Club's auditors, who advised SR to set up a non-profit making company".

76. Mrs Rendall attended the August 2012 meeting accompanied by her own note-taker, Nicky, who worked as a personal assistant in a local professional firm. She had no role at the meeting other than to take notes. Nicky used her notes to check HMRC's draft minutes. In the sentence set out above, she replaced the words "the family had received advice from Deloitte & Touche" with the words "the family did not receive advice from Deloitte & Touche".

77. A number of other substantive changes were also made, and the amended minutes were then sent to HMRC. However, HMRC did not write back to Mrs Rendall to say whether, or to what extent, they agreed or disagreed with the amendments.

78. HMRC has not retained a copy of its original notes of the August 2012 meeting. Mrs Howlett told us that they had been accidentally destroyed and we accept her evidence. Mrs Rendall has also not kept a copy of Nicky's notes.

79. Under cross-examination, Mrs Rendall strongly denied that she had taken any advice on VAT planning whether from Deloitte & Touche or anyone else. Mrs Rendall's description of how she came to set up Leisure was as follows:

> "I asked [Mr Howe and Mr Hickman] to find out how the golf clubs were being run around the areas, what we needed to do to make it so that members felt that they were being looked after, because we didn't want to look after them anymore and that's what they came back with, that they were non profit-making clubs, and so we asked the auditors: how do you set up a non profit-making club?"

80. She said that when Leisure was set up in 1996, Deloitte & Touche[1] were not Club's auditors. They were interviewed for that role in March 1997 and appointed later that year. In 1996, Club's auditors were Thorntons. On 17 October Mrs Rendall met Mr Khan of Thorntons, and he wrote to her on the same day as follows:

> "I am writing to advise you of the areas in which we can assist as follows:
>
> 1. To prepare a Memorandum and Articles for your approval.
>
> 2. To assist you with the documentation required to set up such a company.
>
> 3. To assist you with the initial setting up of the accounting procedures for such a company.
>
> 4. To advising you of your tax and legal responsibilities.
>
> 5. To generally advising you in connection with the HM Customs & Excise rulings on the proprietary owned non-profit making organisations."

[1] It was accepted that around 1996 Touche Ross had merged with Deloitte, Haskins & Sells to become Deloitte & Touche. We were not provided with the date of that merger. Neither party sought to rely on the usage of the names "Deloitte & Touche" or "Touche Ross". Sensibly, both parties accepted that old usages continue after firms have merged.

81. Mrs Rendall accepted that she would have been told at some point that as a non-profit making company Leisure would not charge VAT on membership fees, but said this information did not part form part of her decision-making process.

82. We accept Mrs Rendall's evidence and find as a fact that she did not take VAT planning advice when setting up Leisure, and that its VAT position was simply a consequence of it being established as a non-profit company. It follows that we also find as a fact that HMRC's draft minutes are incorrect in that respect.

83. We come to those conclusions for the reasons set out in the next following paragraphs.

The reasons for our findings

84. If Mrs Rendall had been acting on advice from Deloitte & Touche, it would be reasonable to expect that Deloitte & Touche would have organised the incorporation, but Leisure was instead incorporated by Thorntons, a local firm of accountants.

85. The letter from Mr Khan makes no reference to VAT planning advice. Instead, he refers only to a standard package of services provided on incorporation, including information on HMRC rulings relating to non-profit companies.

86. The disputed minute begins "the family had received advice from Deloitte & Touche, the Club's auditors". However, Mrs Rendall's unchallenged evidence was that Deloitte & Touche did not become Club's auditors until 1997. They can therefore not have given advice in that capacity about the setting up of Leisure the previous year.

87. Although HMRC have chosen to concentrate on the disputed passage in the August 2012 minutes, both HMRC's version and Mrs Rendall's amended version of those minutes also record that:

> "RH [Mr Hughes] advised SR [Mrs Susanna Rendall] that when Leisure was formed in 1996 it coincided with changes to the sporting services VAT exemption for non-profit making bodies…SR said that the formation of Leisure in 1996 was not VAT orientated."

88. We also take into account the minutes issued by Mrs Howlett and Mr Hughes after the June 2012 meeting. These contained a number of mistakes, all of which were subsequently corrected after Mr Henry (who had attended the meeting with Mr McCallin and Dr Bruce) wrote to Mrs Howlett pointing out the errors. As an example, the minutes as originally drafted stated that Mr Barfield, Mr Manning and Mr Pritchard were directors of Leisure. Mr Henry said his letter to Mrs Howlett: "Peter Barfield, Matthew Manning and Keith Pritchard are not directors of Leisure and never have been". Those specific, detailed errors of fact do not inspire confidence in the accuracy of HMRC's minutes.

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

> "RH advised IM [Mr McCallin] and RB [Dr Bruce] that VAT appeared to be a significant reason for Leisure being set up. RH asked if either IM or RB had taken advice before joining the board of directors for Leisure –

> both confirmed that they had not taken any independent advice they had trusted the family. Neither were aware of the VAT arrangements."

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

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

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

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

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

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

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

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

96. The contested draft minutes of the August 2012 meeting also contain the following paragraph:

> "RH advised SR that in for [sic] period from 1995-2001 he'd looked at hundreds of non-profit making bodies. Later in the 90s advisers were widely selling structures in the format that Club has. SR said that she was good at running businesses and developing our family businesses she didn't pay for the structure."

97. Mrs Rendall's amended minutes delete the phrase "she didn't pay for the structure" and replaced it with "this wasn't based on any fee-paying structure". We find the original words give an erroneous impression of Mrs Rendall's statements in the meeting, just as the draft minutes of the June 2012 meeting gave an inaccurate impression of statements made by Dr Bruce and Mr McCallin. There is a big difference between "she didn't pay for the structure" and "this wasn't based on any fee-paying structure": the former implies acceptance of the existence of a structure, just as "neither were aware of the VAT arrangements" implies acceptance that such arrangements existed.

98. Although Mrs Howlett took the meeting notes for the August meeting, it was clear from Mrs Howlett and Mr Hughes's oral evidence that they both played a significant part in preparing the draft minutes. Mr Hughes said that they "compiled the bones of the notes" together in HMRC's Ipswich office, and that the final version "took a number of days to agree" and "was largely created by [Mrs Howlett] from her written notes and my comments on the notes". Thus, the meeting notes were written in part by Mr Hughes, who, as we have already found, had approached the meeting with the preconception that the formation of Leisure was motivated by VAT planning.

99. Under cross-examination Mr Hughes also accepted that there were significant differences between Leisure's position and the sort of VAT planning which was characteristic of businesses seeking to exploit the sports exemption. He said:

> "I have looked at several hundred of these structures over the years and very many of them follow a standard format. They are effectively a mass-marketed structure and the documents and agreements follow a very similar pattern, if not identical pattern. But I didn't see that in this one…
>
> There are in these structures a number that are virtually identical, and by looking at Companies House, there are certain promoters who use particular formation agents who you see time and time again. And indeed, up until Monday, I had never seen this formation agent before. Thornton & Co had never crossed my path in my many years of VAT history…many of the documents I've seen are from the same people and around them you can see very similar patterns. This one I openly admit did not exhibit that pattern, but the dates and the timings of certain events, particularly with the resignation and appointment of directors in 1999, exhibited that very typical pattern."

100. That passage is relevant for two reasons. First, in Mr Hughes' considerable experience, the arrangements put in place by Leisure did not fit the pattern which normally existed where the use of a non-profit company was part of a VAT planning structure. Second, the commonality which he did identify did not arise from Leisure's incorporation in 1996, but "the resignation and appointment of directors in 1999". We

find that he was reading backwards from those events and using them to colour his picture of the earlier incorporation.

101. Finally, had Mrs Rendall received VAT advice in 1996, it would be reasonable to expect that the planning would include the transfer of the green fees, even though the VAT-exempt status of those fees was not finally determined until the end of 2013, when the CJEU handed down its judgment in *Bridport*. That very point was made by VATability when they visited Club in 1999 to discuss the Chipping Sodbury case.

(2) The reasons why the directors were appointed to the Board

The appointments in 1999

102. HMRC submitted that the directors were appointed to Leisure's Board for the "pivotal" reason that they were personal acquaintances of Mrs Rendall or her family. By that submission we understand HMRC to imply that directors had been selected who would not be independent, but would instead be likely to comply with instructions given by Mrs Rendall.

103. Mrs Rendall's evidence was that she had tried to find people to run Leisure who would both give their time free of charge, and were also not interested in power but would run the club in the interests of the members. She said it was "tough" to find the right people, and took time. Mr McCallin's evidence was consistent with that: he said that when Mr Anderson had to resign from the Board because of illness, finding an appropriate replacement "was a very difficult proposition to put to friends and business colleagues, because this was a job without any remuneration and there wasn't a long list of people who are wanting to join our Board".

104. Mrs Rendall's evidence on the individual directors was as follows:

(1) She had not been personally acquainted with Dr Bruce, although her mother had met him in a business context on two or three occasions. She had approached him to be Chairman because he was known as a "very respected person in the industry" and was "at the top of his profession". She described him as someone who "would not say 'yes' to me" and who was "not a puppet". She referred to Dr Bruce's negotiations to reduce the licence fee as "negotiations against me", and said he was "a very firm person".

(2) Mr Anderson had been asked to join the Board because he had business experience from his senior role at Philips, and because he was familiar with the golf club (he was a former member and his son had been a junior captain), but as he had moved away from the area, he "wasn't going to be influenced by any of the members".

(3) Although Mrs Rendall had known Mr McCallin since university, he had been asked to join the Board because he had relevant experience: until 1997 he had been the managing board member of Newark Chamber of Commerce, a non-profit company, and by 1999 had been a managing board member of Nottingham Help the Homeless Association ("NHHA"), a registered charity, for some six years; in that year NHHA was working on a merger with Macedon, another Nottingham charity. NHHA and Macedon had over 60 full-time equivalent staff and a combined turnover of over £3m.

105. Mr McCallin's evidence was that between the early 1980s and 1999, he had met Mrs Rendall only at college reunions. More generally, he said that:

> "each of the three of us brought different expertise to the board. Clearly, my expertise would have been with an agricultural bent, so there's a certain similarity with golf courses and so on, with a relatively small business and employment, and so on; David Anderson's expertise was very much marketing, that was his profession; and Robert Bruce is legal and financial."

106. None of the evidence set out above as to the experience of these Board directors was in dispute. The only point in issue was whether they had been appointed because of that experience, or because they were known to Mrs Rendall.

107. We have no hesitation in finding as a fact that these directors were appointed because of their experience. They all had relevant expertise and, as Mr McCallin said, their skills were complementary. We also agree with Mrs Rendall that Dr Bruce, the Chairman of the Board, acted independently and in the interests of Leisure, as did the other directors, see our further findings at §§132-134; §147; §§176-177 and §§180-181.

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

The appointments of Mr Creeden

109. There was one subsequent change of director: in 2008, Mr Anderson resigned from the Board in 2008 following a serious operation and was replaced by Mr Creeden. Mr McCallin's evidence was that, when Mr Anderson resigned, he and Dr Bruce asked "everybody to try and find somebody" who would be willing to take on the role. Mrs Rendall suggested Mr Creeden, who was known to her brother-in-law as some one who "was brought in by banks to help companies" and so appeared to have relevant background experience, as well as being a golfer. Mr McCallin and the Board met Mr Creeden over dinner, where Mr McCallin "checked him out" and "was content, very content"; the Board then decided that Mr Creeden was "of sufficient worthiness, in the sense of his business acumen and his financial responsibility through that business acumen, to be asked [to join the Board]". Under cross-examination, Mrs Rendall said "I just suggested his name and they met him and, you know, they could have said 'no'. It's not my decision about whether they appoint someone to the board."

110. In relation to this appointment, HMRC sought to rely on Leisure's Board minute for 1 May 2008, which said that:

> "Mr Adam Creeden has been approached to replace [Mr Anderson]…Mr Creeden is a Company Chairman and holds directorships in other companies, is well known to the Landlords and has a good golfing knowledge."

111. Ms Nathan submitted that this supported HMRC's case, because it showed that a key criterion for appointment was being "well known to the landlords". Mr McCallin said it simply meant that, because Mr Creeden was known to the Peake family, his bona fides did not need to be checked in the same way as would otherwise have been necessary.

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

(3) The reason(s) why the directors were not elected by members of the golf club

113. HMRC sought to support their case by pointing to the fact that the directors were not elected by the members of the golf club, as is the position of many non-profit organisations.

114. It was not in dispute that the members did not elect the Board, and that Leisure's constitution gave the Board control over the running of the golf club. Mrs Rendall explained why she had decided Leisure should not be run by a Board elected by the members:

> "The important thing was that you had continuity of people who were caretaking the membership of [Leisure], and you wouldn't get that if every year you had a different set of members, with a different agenda, trying to push forward their own agendas. The whole idea of it is that these people who sit on the board have no personal interest in it. They can look at it on the basis of the overall membership."

115. She also said she had seen other golf clubs where a new person was in charge every year, and where that person acted not in the interests of the members, but in his own interest. She described this as "a nightmare".

116. Her own experience of the golf club members was that they lacked the business acumen necessary to run Leisure. By way of example she said that when she was running the golf club she had invited all the past club captains to meet the Boxford Group's specialist agronomist and land consultants. Her objective was to work with them to plan a future for the golf club, but:

> "The past captains spent the entirety of the meeting complaining about things like the catering, and that their portions of chips were too small and such like and they completely missed the opportunity to engage with the expert consultants I had brought in to try and help."

117. We accept Mrs Rendall's evidence, which was not seriously challenged. We find as facts that she decided that Leisure should not be controlled by individuals elected from among the golf club members, because they would be less likely to run the club well than those appointed for their experience, with no personal agenda, who would hold office for a number of years.

(4) How the licence fee was decided, and how it was adjusted

The position in 1996

118. Mrs Rendall said that in 1996 she took advice about setting the initial licence fee from a local firm called Barker Gotelee. Having done so, it was fixed at £280k, made up as follows:

(1) £184.5k, being 50% of the membership fee income before Leisure was established; and

(2) £95.5k, being a fee for the use of the facilities and the premises, both of which had been paid for by Club.

119. Ms Nathan did not explicitly put this evidence in issue, but as the heart of HMRC's case was that the licence fee was a means of extracting profits from Leisure, we have assumed an implicit challenge.

120. In assessing Mrs Rendall's evidence we note that when the green fees were transferred, their value was also calculated using the same two factors, being a percentage of the fees, plus a figure to reflect Club's capital expenditure. On the balance of probabilities we find that the same approach was used when the licence fee was set up. We also accept her evidence that the fee was set with the assistance of Barker Gotelee, because that is consistent with her reliance on local professional firms to deal with difficult technical issues: she sought professional help from Thorntons, a local firm of accountants, when incorporating Leisure, and from Hargreaves, a local firm of solicitors, about the implications of the Sports Order in 1999.

121. We therefore find as facts that in 1996 Mrs Rendall took professional advice on the quantum and the methodology of the licence fee, and that it was made up of the two components above.

122. Mrs Rendall also said:

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

123. HMRC did not accept that this was the position. Instead, Ms Nathan suggested that "the whole point" of the licence fee was to extract profits from Leisure to Club. This is, of course, a wider issue to which we return below. But in the context of the 1996 licence fee, we find that in 1996 the methodology and quantum of the fee were "fair and reasonable", being based on 50% of the membership fee income, plus a further £95.5k for the use of the premises and facilities. The balance of the membership fee income is £89k, which remained with Leisure to pay its other costs. There is no link between the licence fee and profits, so no mechanism was put in place to extract future profits and pass them to Club. Instead, the fee was based on Leisure's actual income and its costs.

The position in 1999

124. By 1999, the licence fee had almost doubled to £550k. Mrs Rendall said that the licence fee had been increased to reflect a percentage of Club's significant further investment in "the whole of the new leisure club", together with some other facilities and premises used by golf club members. In other words, what was being licensed now was not only the golf course, but the gym and other leisure facilities which had not existed in 1996.

125. Mrs Rendall's evidence is supported by Leisure's accounts for the year ended 31 December 1999. These show that between 31 December 1998 and 31 December 1999, turnover grew from £494k to £706k, an increase of £212k. Of that figure, £178k derived from the newly opened Peake Fitness, the name given to the gym and other leisure facilities. The Board minutes tell us that Peake Fitness began operations in May 1999.

126. Under cross-examination, Mr McCallin accepted that the directors did not obtain an independent valuation of the licence to see whether the higher fee of £550k was justified. However, he said there was no need for a valuation, because there was no problem with the quantum of the licence fee; that professional valuations were expensive and the Board would not spend Leisure's money unnecessarily.

127. Ms Nathan submitted that that the failure to obtain a valuation showed that the directors were not acting independently of Club, but were instead passively accepting a non-arm's length rental imposed by Mrs Rendall.

128. We do not accept that submission, because:

(1) the starting point for the licence fee in 1996 was fair and reasonable;

(2) Club had made significant further investment in the premises and facilities hired out by Leisure, and the investment was of such a scale that Leisure was able to increase its income by around 33% in 1999, even though this was the first period of the leisure facilities being open, and its period of operation was no more than eight months of that financial year;

(3) the directors had extensive and relevant business experience; and

(4) we accept Mr McCallin's evidence that the directors did not consider there to be any business justification for spending Leisure's income on an independent valuation of the licence fee charged by Club, because it was seen to be a fair and reasonable sum.

The reductions to the licence fee

129. In 2001 Club granted Leisure a one-off rebate of £50k. In 2003 and 2004 there were further reductions of £75k and £25k respectively. The existence of these reductions were not in dispute, but HMRC submitted that the reductions were not negotiated by the directors, but had instead been had been "determined" by Mrs Rendall, who had reduced the licence fee to prevent Leisure's insolvency. Ms Nathan said that there was no contemporaneous record of negotiations to reduce the licence fee.

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

(1) the minutes for 15 February 2001 record that "the Board will be negotiating an amended licence fee when the new lease is signed for next year, based on the projected budget figures";

(2) the minutes for 18 May 2001 record that the rental remains unchanged as the current Lease "is still under negotiation":

(3) the minutes for 20 May 2003 record that "it was agreed that the licence costs...would be negotiated downwards if necessary in line with the decline in membership numbers"; and

(4) the minutes for 23 July 2003 record that the directors had agreed the licence fee "should be reduced with the suggested figure to be re-negotiated at £475,000", and that the draft licence which was then before the Board "sets the licence fee at £580k and at the current levels of income and overheads this is an unsustainable rent"; in consequence the directors were looking to agree a further reduction to take effect from January 2004.

131. Mrs Rendall's evidence was that she met Dr Bruce each year, around December, to discuss the licence fee and that she hadn't wanted to agree these reductions. However, she had been persuaded by Dr Bruce, who made a reasonable case against a background of Leisure's net income being lower than expected. She strongly rejected Ms Nathan's suggestion that the licence fee had been reduced because Leisure would otherwise become insolvent, and because it suited Club to have a solvent tenant, saying that Leisure could have raised its membership subscriptions to cover the licence fee but had decided not to do so.

132. We have no hesitation in accepting Mrs Rendall's and Mr McCallin's evidence that Dr Bruce initiated and negotiated these reductions. Although Leisure's Board minutes do not set out the negotiations themselves, that is unsurprising: they are a record of the directors' meetings, not of the meetings between Mrs Rendall and the Chairman of the Board. But, as set out above, the minutes do reference the negotiations.

133. Mrs Rendall described Dr Bruce as a tough negotiator, and we accept her evidence that she agreed to these reductions with reluctance.

134. There is no evidence at all in support of Ms Nathan's submission that Mrs Rendall took the initiative in reducing the licence fee in order to prevent Leisure's insolvency. That appears to have been put forward because it is consistent with its overall case that (a) Leisure's directors took a passive role in relation to Club and (b) the licence fee was set so as to allow Club to extract profits from Leisure. We instead find that Dr Bruce's negotiations, together with the references in the minutes set out above to licence fee reductions, provide clear evidence that it was the directors who took the initiative in reducing the licence fee, and that in so doing they were acting on behalf of Leisure and independently of Club.

The minutes of May 2006

135. The minutes of the Board meeting on 4 May 2006 state:

> "the 2006 budget was presented to the meeting showing a projected profit of £49,000, again the PGA events will have an effect, other areas to address this could be a review of the licence fee with a suggested increase of £25,000."

136. The minutes of the next meeting, on 7 September 2006, show that the budget had been revised to reflect the increased payroll costs of Leisure's staff, and that in consequence the projected surplus had become a small loss of £251. Mr Cracknell and Mr McCallin were cross-examined on the final phrase in this Board minute, but neither could remember who made that suggestion, around a decade previously.

137. Mr Cracknell pointed out that Leisure had persuaded Club to reduce the licence fee by £100k over the previous two years and that Club had agreed to those reductions in good faith. In his closing submissions, Mr Cramer submitted that whoever made the suggestion at the Board meeting might have simply have been "playing fair" with Club, given Leisure's earlier negotiated reductions.

138. Mr McCallin said he would not have entertained the suggestion, because the directors were not at liberty to pay money out of the company other than for the benefit of the members, and that to act otherwise would breach the board's legal obligations and added that the licence fee was not, in fact, increased.

139. Ms Nathan relied heavily on this Board minute as providing support for HMRC's case that "any surpluses which did accrue were distributed to Club", at least in part by way of the licence fee. She suggested to Mr McCallin that the reference to increasing the licence fee "accorded with the way that the business was running, which was that the licence fee would be adjusted up and down, depending on whether there were profits that needed taking away". Mr McCallin said he "totally disagreed", pointing out that over the period from 2009 to 2013 there had been only one increase to the licence fee, which occurred when the green fees were transferred.

140. We start from the position that, as Mr McCallin said, the licence fee did not increase at any point between 1999 and 2013, except when the green fees were transferred. Instead, it was reduced three times. When we consider what actually happened, the licence fee was not "adjusted up and down, depending on whether there were profits that needed taking away" as Ms Nathan invited us to find. We do not know who made the suggestion in the meeting of 4 May 2006: it could have been one of the directors, or one of the other attendees. We also do not know why the suggestion was made: Mr Cracknell put forward one possible reason, but this was only "a guess". The most we can say is that someone at a Leisure board meeting suggested that the recently reduced licence fee might be increased, but the suggestion was not taken up. That does not provide any sort of sound evidential basis for a finding of fact that the licence fee was adjusted in order to transfer surpluses to Club, and we decline to make such a finding.

The transfer of the green fees

141. The parties disagreed on the following:

(1) whether the transfer of the green fees was imposed on Leisure by Mrs Rendall;

(2) whether the directors had obtained an independent valuation of the increased licence fee, and if not, whether their failure to do so was because they were not acting independently of Club; and

(3) whether the directors had taken independent advice on the VAT position, and if not, whether their failure to do so was because they were not acting independently of Club.

142. In relation to the first of those issues, Ms Nathan suggested to Mr McCallin that the Board had no choice as to whether to accept the green fees, and that was why the minutes simply record the transfer itself, and not any discussion of the reasons for the transfer.

143. Mr McCallin robustly rejected that suggestion. He said that, after Mrs Rendall had raised the possibility of a transfer with Dr Bruce, Dr Bruce raised the issue with the Board outside of a Board meeting. All the directors subsequently met Mrs Rendall at a meeting convened by Dr Bruce, at which the directors "quizzed" Mrs Rendall on how the quantum of the proposed new licence fee had been calculated, and were also made aware of the advice given by VATability.

144. Mr McCallin said that as a result of the meeting, the Board was "content" that the basing 75% of the increased rent on green fee income was "clear and logical" and that the 3% was "fair". He said it was "quite obvious" to the directors that they should accept the green fees, because that income was growing over time. He described paying a fixed 75% of current green fees to obtain that future revenue stream as "a no-brainer". After those discussions, the Board formally confirmed the position at its meeting on 7 May 2009.

145. In relation to the second and third issues, Mr McCallin said that there was no need for an independent valuation of the increased licence fee, because the position was clear to the directors on the facts provided. They did not take independent advice on the VAT position, because the problem facing Leisure was how to manage its declining revenue from members, not the VAT consequences of the transfer.

146. Ms Nathan invited the Tribunal to find that the Board's failure to obtain either an independent valuation and/or independent advice on the VAT position demonstrated that the directors were "passive" and had simply accepted what had been determined by Mrs Rendall.

147. We do not agree. The directors met Mrs Rendall and "quizzed" her as to the calculation of the new licence fee. That meeting, as Mr McCallin said, preceded the formal Board meeting at which the transfer was recorded. We find as facts that:

(1) the directors properly considered the transfer of the green fees, and made their decision in the context of their knowledge of Leisure's business and of the golf industry generally;

(2) it was entirely reasonable for the directors not to obtain an independent valuation: they could clearly see, as Mr McCallin said, that Leisure was "being offered the opportunity to have additional income reflecting the trend in greater numbers of green fee visitors whilst at the same time struggling to find ways of increasing member numbers"; and

(3) the issue for the Board was Leisure's declining revenues, not VAT planning, and against that background it was reasonable for the Board to have relied on the advice Club had obtained from VATability.

The 2013 and 2014 valuations

148. In 2013 Club asked Christie & Co to provide a professional valuation of the licence fee for banking purposes. That valuation states that that the terms of the licence were positive for Leisure and that the market rent was £735k. This is 1.4% more than the £725k currently being paid.

149. In 2014, in the context of these proceedings, Leisure's Board obtained a valuation from Stanfords, a firm of chartered surveyors. Stanfords said that the market rental was £700k, 3.5% lower than the current rent.

150. If the two valuations had been added together, so as to split the difference, the rent would have been £717.5k, a reduction of £7.5k or 1%.

151. Ms Nathan asked Mr McCallin why Leisure's Board did not seek to negotiate the licence fee downwards from £725k to £700k in line with the valuation it had received. Mr McCallin said that:

(1) there was only around a 2% difference between the two valuations;

(2) Club's valuation was higher, at £735k. If Leisure had sought to reduce the licence fee based on its valuation, Club could reasonably have responded by asking for an increase;

(3) given the small difference, it was not worth the aggravation of a negotiation, plus the legal costs of obtaining a new lease; and

(4) the Board had considered the licence fee in the context of the valuation and decided £725k was reasonable.

152. In her closing submissions, Ms Nathan said that, having identified the £25k difference between the current licence fee and Stanford's valuation "it should have behoved the Leisure directors to do something about it, instead of acceding to the same £725k that persisted before the valuation". She submitted that this indicated the Board were not acting independently, but were instead simply acquiescing in a licence fee fixed by Club.

153. We instead find that the difference is well within an acceptable margin of error for professional valuations, and, as Mr McCallin said, if Leisure had sought to reduce the

licence fee to bring it into line with Stanford's valuation, Club would have responded by seeking to rely on the higher valuation provided by Christie & Co. We also agree with Mr McCallin that the legal costs of drawing up a new lease were an appropriate and relevant consideration. It follows that in deciding not to renegotiate the lease, the directors were acting independently of Club, and on behalf of Leisure.

The payment terms

154. Clause 1 of the Lease states that the licence fee is payable annually in advance; Clause 4 provides that if Leisure is in arrears by 21 days, Club may take possession, see §31.

155. Mrs Rendall's evidence was that, in the early years of Leisure, members paid their membership fees at the beginning of the year in a single lump sum. However, over time the members moved to monthly direct debit. Mrs Rendall said that she and Dr Bruce had agreed to an oral variation of the Lease, by which Club would accept that there had been no default as long as the licence fee was paid in full during the year. Mrs Rendall also said that the Boxford Group rented parts of its landholdings under sixteen separate leases, and that oral variations had been agreed to other leases, some with household name companies.

156. Ms Nathan submitted that Leisure's failure to adhere to Clause 1 of the lease would have rendered it "null and void" in an arm's length scenario, and that, as a minimum, Leisure would have been subjected to some form of sanction, such as interest for late payment. She asked the Tribunal to find that Club's willingness to allow the licence fee to be paid over the course of the year, supported HMRC's case that it was not at arm's length.

157. However, Ms Nathan did not challenge Mrs Rendall's evidence that the Boxford Group had agreed oral variations to leases with other tenants, including household name companies, and she also accepted that an oral variation had been agreed between Mrs Rendall and Dr Bruce.

158. We agree with Mrs Rendall that the oral variation of the Lease is not an indicator that the parties are operating on other than arm's length terms. This can be seen from Mrs Rendall's evidence about the Boxford Group, and also from the numerous disputes about the oral variation of contracts which are brought to the courts by third parties operating at arm's length. For example, in *Globe Motors v TRW* [2016] EWCA Civ 936, the Court of Appeal found that an oral variation is valid even where the deed itself contains a clause barring such variations, and *MWB v Rock Advertising* [2016] EWCA Civ 553, that Court applied the same principle in the context of a licence fee.

Whether the licence fee was an overvaluation

159. Ms Nathan also submitted that the licence fee:

> "is not the subject of independent valuation or evidenced by any negotiations, so it cannot be said to be at arm's length. It is in fact a payment from one company to the other and to the extent of any overvaluation it must be a financial benefit [to Club from Leisure]."

160. However, Ms Nathan did not put the overvaluation point to either Mr McCallin or Mrs Rendall. It is, rather, her own conclusion from points set out in the immediately preceding parts of this decision. HMRC did not lead any evidence on valuation. Mr Cramer invited the Tribunal to find that the two valuations obtained in 2013 and 2014 showed that the licence fee had been set at a reasonable rate. He submitted:

> "Whilst neither of these valuations is put forward as expert evidence *per se,* in the absence of any other evidence from HMRC as to a reasonable market rental figure, it is submitted that they must be afforded significant weight."

161. We agree. The two independent valuations show that the licence fee was set at fair and reasonable level in 2013 and 2014. We have already found that the licence fee was also set at a fair and reasonable level in 1996, following advice from Barker Gotelee. It follows that the start and end points are clearly established. In the intervening years, and contrary to Ms Nathan's submission, Dr Bruce negotiated strongly with Mrs Rendall to agree reductions to the licence fee when Leisure's revenues failed to match expectations.

162. Taking into account all relevant evidence, and giving it due weight, we find as a fact that Leisure was paying an arm's length licence fee from 1996 onwards.

(5) The process of appointing Mr Cracknell

163. Mr Cracknell was appointed as the accountant for both Leisure and Club because neither company needed a full time accountant. He was interviewed for the posts by Mrs Rendall, Mr Loshak and Mr Hickman.

164. Mrs Rendall's evidence was that she had asked Dr Bruce to be part of the interview panel but he had declined, saying he trusted the interviewers to make the selection. She also stated that had Dr Bruce not been happy with the selection, Mr Cracknell's appointment as Leisure's accountant would not have been confirmed.

165. Mr McCallin said that Mr Cracknell was appointed for a trial period of at least three months, and had he not proved satisfactory, he would have been asked to leave. None of this evidence was challenged and we accept it.

166. Ms Nathan nevertheless submitted that the absence of any Leisure directors from Mr Cracknell's interview panel indicated that they were taking a passive role *vis à vis* Club. We do not agree, for the following reasons:

(1) the interview panel included Mr Hickman. He was responsible for the financial side of Leisure between 1996 and 1999 (see §22) and was a director of that company for part of that period. Mr Hickman would have been more than capable of knowing whether or not the interview candidates were able to carry out the tasks which would be required of them by Leisure;

(2) there was no assumption by Club that the interview panel would be made up only of people associated with Club. Not only was Mr Hickman on the panel, but Dr Bruce was also asked to attend;

(3) Mr Cracknell was not imposed on Leisure. Instead there was a trial period during which his appointment could have been terminated; and

(4) Mr Cracknell had a functionary type role at Leisure, see the following section, and so this was not a post which required the input of the Chairman of Leisure's Board.

167. It follows that the process of Mr Cracknell's appointment does not indicate that the directors of Leisure were operating other than independently.

(6) Mr Cracknell's role at Leisure

Mr Cracknell's evidence

168. Mr Cracknell's evidence was that he carried out the following tasks for Leisure:

> "On a day to day basis I keep the books, I manage payroll, accounts payable and other such similar activities. The role is a financial reporting and financial controller role. In the past, on an annual basis I have sat down with the Golf Manager (Roly) and the Leisure Manager (Chris) to help them draw up their budgets for the year, but that has only involved helping them work out their spreadsheets for the likely costs for their part of the business and checking they haven't missed out anything obvious. Once Roly and Chris have put their budgets together and sent them to me, I combine them with the other regular costs and circulate them to the board as a budget pack. This tends to happen around September every year…In addition to this I prepare the statutory accounts and deal with the accounts payable function, so I pay invoices, tax payments and the like.

169. Ms Nathan did not challenge Mr Cracknell's evidence that he carried out the day to day book-keeping for Leisure, but suggested that he also had a "more responsible role than simply book-keeping", saying "you are the one who actually goes along to the Board and tells them this is what's happening on the ground in these other areas".

170. Mr Cracknell denied that, saying that the Golf Manager and Leisure Manager reported to the directors and produced operational reports which were included in the papers provided for the regular Board meetings and he was not responsible for those operational reports. He made a similar point in relation to the annual budget, saying "it's not my budget. It's effectively their budget that I have pulled together on their behalf to present to the Board". He also gave clear evidence that the budgets were sometimes challenged by the Board and subsequently revised.

171. Ms Nathan also suggested to Mr Cracknell that his role at Leisure was essentially the same as his role at Club, where he was Finance Director and sat on the Board. Mr Cracknell disagreed, saying that at Club he ran a team of six people, so had to oversee their work and make sure they were doing their jobs. In contrast, at Leisure he was a book-keeper responsible for all the detailed accounting work, with no staff working for him; that was a very different role from being Finance Director of Club.

Mr McCallin's evidence

172. Mr McCallin described Mr Cracknell's role as follows:

> "The role that Andrew is performing is one of qualified trusted accountant, so a professional role of providing the board with an amalgam of figures that our managers have produced, and most importantly, at the end of the year taking the auditors through our books."

173. Mr McCallin confirmed Mr Cracknell's evidence that the financial information supplied to the Board had been collated from the figures provided by the business managers. He added that those managers would have made sure that the figures were accurate, because they had their own targets to meet.

174. Ms Nathan suggested to Mr McCallin that Mr Cracknell was "the only person on the Board who had any idea of the financials". Mr McCallin rejected this, saying that the company secretary, Mr Pritchard, who attended the Board meetings, was a qualified accountant, and that Dr Bruce was extremely financially knowledgeable, given his banking background.

175. Ms Nathan also asked Mr McCallin whether the Board had concerns about a potential conflict of interest in that Mr Cracknell would be "eyes and ears for Club at the Board meetings of Leisure". Mr McCallin said that Mr Cracknell was simply providing Leisure with numerical information, much of which had been collated from the business managers; in doing so he was not acting as "eyes and ears" for Club, but performing his professional role as an accountant.

Findings of fact

176. We accept the evidence given by Mr Cracknell and Mr McCallin, which we find to be entirely credible in itself, as well as being consistent with the Board minutes, which show Mr Cracknell as simply presenting the information he has collated from the managers.

177. We find as facts that:

(1) Dr Bruce and Mr Pritchard were financially literate and well able to examine the budgets and other financial information;

(2) the budgets were on occasion challenged by the Board and subsequently revised; and

(3) Mr Cracknell's role was as he and Mr McCallin described it. In short, he was Leisure's book-keeper and no more.

178. Our findings are consistent with Mr Cracknell's clear inability, when in the witness box, to answer many of the questions put to him. This was in striking contrast to Mr McCallin's comprehensive grasp of the issues facing Leisure. For the avoidance of any possible doubt, we record that we found Mr Cracknell's performance in the witness box to be entirely genuine. He was trying to respond to Ms Nathan, but found many of the questions beyond his knowledge, recollection or experience, and was embarrassed and discomforted by his failures to respond.

(7) Whether the directors had a passive role

179. We have already found as facts that:

(1) the directors were appointed for their relevant business experience;

(2) Dr Bruce robustly and effectively challenged Mrs Rendall so as to secure reductions to the licence fee;

(3) Mr Cracknell was Leisure's book-keeper and did not have a more influential or wider role; and

(4) Dr Bruce and Mr Pritchard were financially literate and well able to examine the budgets and other financial information.

180. Those findings all point to the directors actively managing Leisure. The Board Minutes contain other examples. Mr Cramer drew our attention to the Board's discussions about appointing an external company, Fitness Express, to run the gym and leisure centre and subsequently revoking that appointment because of performance issues. He said in his closing submissions that:

> "deciding to whom to outsource the running of one whole side of your business is a significant decision. If it is genuinely the case that Leisure is subject to outside influence, you would expect to see someone else's fingerprints all over that, and you simply don't."

181. Under cross-examination, Mrs Rendall said that the directors "weren't puppets; they weren't people who would say 'yes' to me…they could stand up on their own". We agree, and find as a fact that Leisure's Board were actively managing its affairs.

(8) How the cross-charging operated

182. Cross-charging was operated between Leisure and Club, and between Club and Leisure. It was common ground that until 2012, when HMRC suggested that Leisure should be registered for VAT, cross-charging was dealt with by journal entries in both sets of books, rather than by the issuance of invoices.

183. HMRC's case was that, along with the licence fee, the cross-charging was a key mechanism by which Club stripped any profit out of Leisure. Leisure's position was that all cross-charges were at cost and on a fair and reasonable basis.

184. The main cross-charges in issue were:

(1) Mr Cracknell's salary;

(2) other salaries;

(3) insurance;

(4) hire charges for equipment; and

(5) business rates.

185. We consider each of these in turn below, followed by submissions on other cross charges and our overall conclusion on this point.

Mr Cracknell's salary

186. Mr McCallin's uncontested evidence was that on Mr Cracknell's appointment, a 50:50 split of his salary had been agreed between Dr Bruce (for Leisure) and Mrs Rendall (for Club).

187. However, the Board minute of the meeting held on 3 February 2004 refers to "part of the Accounts salary" being recharged from Leisure to Club. The minutes of the

following Board meeting record that half the management accountant's time is now being charged by Leisure to Club, and that comparative numbers in the statutory accounts were adjusted to reflect this.

188. Ms Nathan suggested that these minutes demonstrated that Leisure's Board considered Mr Cracknell's salary to be capable of readjustment on an *ad hoc* basis. Mr Cramer responded by saying that it had always been intended that Mr Cracknell would work for both Leisure and Club, and all that was happening here was that the accounting records and the cross-charging were being corrected to reflect that previously agreed position.

189. We agree with Mr Cramer that this is the only finding consistent with Mr McCallin's uncontested evidence. We find as a fact that from 2004 onwards Mr Cracknell's salary was charged 50:50 between Club and Leisure.

190. We also considered the position for the period between Mr Cracknell's appointment in mid-2002 and the end of 2003. Although the 2003 comparatives in the accounts were adjusted, there is no information as to whether Leisure also sought to recover from Club the amounts it was owed for Mr Cracknell's time. However, the same Board minutes show that Leisure's income was falling, with a loss predicted for 2004. Taking those background facts into account, we find on the balance of probabilities that Leisure adjusted its inter-company balance with Club so as to recover the uncollected amount relating to the recharge of Mr Cracknell's salary for that first eighteen month period.

191. Ms Nathan also relied on a Board minute of 12 October 2004, which records that Leisure was facing a projected loss of around £20k and that one way of addressing this loss would be "to reduce the proportion of the accountant's salary charged to Golf and Leisure, currently 50%, reduce to 25%". She submitted that this demonstrated that Mr Cracknell's salary was not set on any "objectively ascertainable basis but was adjustable".

192. Mr Cracknell could not remember this suggestion, made over ten years previously, that the amount of the recharge be reduced. It was common ground that no action was taken and the recharge remained the same.

193. We find that this passage in the Board minute cannot bear the weight which Ms Nathan asks us to place on it. We do not know whether the suggestion was made by one of the directors, or by another attendee. In any event, it was not acted upon and the percentage remained the same.

194. We therefore find as a fact that throughout the relevant period, 50% of Mr Cracknell's time was charged to Leisure. The next question is whether that 50% charge fairly represented the work he carried out for Leisure. Mr Cracknell's witness statement says that:

> "In 2009, because the nature of my role had changed and I was doing more work for Club Limited than for Leisure, my employment changed and was transferred over to Club Limited. Since then my salary has been paid by Club Limited, but Leisure has paid Club for my time."

195. Despite this statement that he was "doing more work for Club Limited than for Leisure", Mr Cracknell's oral evidence was that the 50/50 split remained "a reasonable approximation" of the value he had contributed to both companies. He said that, although his Club role was more senior, his work for Leisure was more time consuming: he was doing the bank reconciliations, the management accounts, paying all the bills, and operating the "nuts and bolts" of a payroll for over 30 employees.

196. We find that the 50/50 split is reasonable, as being linked to both value and time, albeit on a rough and ready basis. We also take into account that Mr Cracknell has recently been replaced as Leisure's accountant by a full time member of staff. That supports his evidence as to the time-consuming nature of his role.

197. As the 50:50 split remained unchanged throughout the period, it is also clear that these recharges are not being manipulated on an annual basis in order to siphon profits out of Leisure and into Club.

Other salaries

198. HMRC put in issue two other salary-related cross-charges.

199. Ms Nathan cross-examined Mr Cracknell on a Board minute which referred to commissions for fitness instructors being reallocated to Club. Mr Cracknell's evidence was that this minute referred to the correction of an accounting error. He said that Leisure employs fitness instructors but does not pay them commissions. Some fitness instructors do other work for Club, for which they are paid a commission. It was therefore incorrect to charge commissions against Leisure's income. Ms Nathan did not challenge that response and we accept Mr Cracknell's evidence.

200. Ms Nathan had stated in her skeleton argument that the £75k licence fee reduction in 2003 was balanced by the fact "the amounts paid by the appellant by way of recharges to the Club increased by a similar figure". In other words, this was a submission that Club had recovered the shortfall resulting from the reduced licence fee by increasing cross-charges. Mr Cramer said that this was "simply factually incorrect", being based on a misreading of the relevant Board minute. We agree with Mr Cramer that the minute does not refer to an increase in recharges to Club, but instead to an increased wage bill for Leisure.

Insurance

201. The insurance for the companies operating on land owned by the Boxford Group is arranged by one of its subsidiaries, Boxford (Suffolk) Farms Ltd. As already noted, Clause 2(2) of the Lease requires that Leisure pay "a due proportion" of that insurance.

202. Mrs Rendall's evidence was that there were a number of policies. In relation to the building insurance, Leisure was charged 25% of the cost; she had agreed this with Dr Bruce in 2009 and it remained unchanged. Ms Nathan did not seek to argue that this 25% share was other than an arm's length share of the total cost. In any event, as the percentage had remained the same since 1996, it was clearly not being adjusted so as to strip profits from Leisure to Club, which was HMRC's overall case.

203. For all other insurance policies, Leisure was charged the exact cost relating to that company; it was not an approximation or an average. For example, the insurer was provided with a list of the equipment used by Leisure, and the amount then charged by the insurer for providing cover for that equipment was billed to Leisure. The premium for other policies was also linked to specific factual information such as turnover, staff numbers etc. None of this evidence was challenged and we accept it. It is clear that all these costs were calculated on an arm's length basis by the insurers, so again there can have been no manipulation.

204. We find as a fact that all insurance recharges from Club to Leisure were on an arm's length basis and were not a mechanism by which profits were stripped out of Leisure and passed to Club.

Business rates

205. Mrs Rendall said that in 2009 she took specialist advice from Hargreaves (which had a rating department) on how to apportion business rates to Leisure. Hargreaves advised that a fair figure would be around 25%. Mrs Rendall discussed and agreed that percentage with Dr Bruce, and the business rates recharge has remained at roughly that figure ever since. However, Mrs Rendall explained that the annual payment pattern was uneven because of numerous re-ratings, and appeals against the re-ratings, and that some of these changes were linked to improvements made to the premises used by Leisure. The year-on-year recharge, on a cash paid basis, varied between 21% and 28%.

206. Ms Nathan did not accept that the business rates had been calculated on the basis set out above. She instead submitted that business rates and other outgoings were carefully monitored by Leisure, so as to maintain a relatively stable level of low or negligible surpluses. In the context of business rates, she relied on a sentence in the Board minutes for 21 May 2002 which read:

> "The Profit and Loss account at December 2001 showed a profit of £49,000, the rates recharge would negate this profit."

207. Mr Cracknell's evidence was that he had located the financial detail behind the figures reported to the Board in May 2002, and these showed that the £49k did not include the rates recharge. In other words, properly understood, the Board minute meant that the £49k profit shown on the face of the document should not be relied on, because it had been stated before deducting the charge for business rates.

208. We accept Mrs Rendall's evidence, and find that she was advised by Hargreaves that 25% was a fair percentage; we also accept her explanation for the variances around that figure, which we find to be entirely credible.

209. We also prefer Mr Cracknell's interpretation of the word "negate" as used in the Board minute. The contemporaneous evidence to which he referred (the existence of which was unchallenged) showed that the £49k reported profit did not include business rates. In context, therefore, the word "negate" meant that the profit would be eliminated once business rates had been included.

210. On the basis of those findings, we make the further finding that business rates are recharged to Leisure on a fair and reasonable basis.

Equipment hire

211. Club also charged Leisure for the use of certain items of equipment by way of a hire charge. Mr Cracknell said that hire charges were made for the use of an irrigation system on the golf courses, and for gym equipment: items which were not in place when the Licence was agreed, and rather than changing the Licence, Dr Bruce and Mrs Rendall had decided that a hire charge was appropriate. Mrs Rendall said the hire charges subsequently increased four times: once when the irrigation system was installed; when some new golf course equipment was purchased, and twice when the gym equipment was upgraded.

212. Ms Nathan challenged this evidence, suggesting that equipment hire was "a fluid cost…a moveable feast. It could go up or down, and be reallocated and moved in order to make sure that any excess was taken out of Leisure and pushed up into Club". In making her submissions she relied on the absence of any written agreement supporting the calculation of the hire charges, and the fact that for many years the cross-charges were settled by journal entries rather than by payment of invoices.

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

Other cross-charges

214. Clause 2(3) of the Lease requires Leisure to pay "a fair proportion" of the costs of cleaning the premises used by Leisure. Mr Cracknell's evidence was that the Leisure Manager, an employee of Leisure, informed him as to the actual hours worked by the cleaners; that Mr Cracknell used that information, together with the cleaners' hourly rate, to identify the total sum to be charged. On the basis of that unchallenged evidence we find that the costs of the cleaners were calculated on an arm's length basis.

215. Club also charges Leisure a fixed rate of 80p per member for the printing and postage costs of mailings to members. This has been unchanged since at least 2003, when Mr Cracknell first worked for Leisure. That fixed fee covers three mailings a year. Again, Ms Nathan did not challenge that evidence. We find that the charge is well below the actual cost, given the increases to postal charges since 2003. It cannot therefore be a route by which profits are extracted from Leisure.

Conclusion on cross-charges

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

(9) How the PGA event operated

217. The PGA regularly hold events on the golf courses. These produce no direct income, although some revenue is received from sponsors. Club is responsible for hosting the event, for which it hires extra staff; it also receives the sponsorship income. Club also benefits indirectly, because some participants and spectators stay at the Hotel.

218. The PGA events make a net loss. This is borne by Club and/or by members of Mrs Rendall's family. In 2007, for example, Leisure's Board minutes record that "the family [was] personally paying £80,000 a year to stage the PGA event". Members of the golf club act as marshals for the PGA event on a voluntary basis.

219. The greenkeepers, who are employed by Leisure, ensure that the greens are at the requisite standard for the PGA event. Ms Nathan submitted that the cost of the greenkeeper's time had been borne entirely by Leisure, although the event itself was being hosted by Club, and it must therefore follow that Leisure was paying its staff to work for Club's benefit. She referred to the minutes of the Board meeting on 4 May 2006, which say the PGA event would cause an increase in Leisure's staff cost.

220. Mr McCallin said that the golf club members benefitted from the improvement in the course, both before and after the PGA event, and Ms Nathan did not dispute that this was the case.

221. We do not think there is anything in this point. The greenkeepers are employees of Leisure. Their task is to maintain and improve the courses. The high standard required by the PGA event benefits the members of the golf club, and so benefits Leisure. The fact that the trigger for this improvement comes from an event organised and hosted by Club does not mean that a part of the costs of the greenkeepers should have been apportioned to Club.

222. Ms Nathan also relied on other extracts from the Board minutes. Those for 7 September 2006 say that the golf club members' committee:

> "has recommended a subscription renewal increase for 2007 of 3% which is in line with inflation. With the family personally paying £80k to stage the PGA event and with the view of staging this event again next year, the Directors agreed to the 3% increase plus £20 from all membership categories to go towards this staging fee."

223. The minutes for the following Board meeting say:

> "the Directors recommended a membership subscription increase of 3% plus £20 towards staging the PGA Seniors Tour event, but following the Company secretary's presentation of this to the [golf club members' committee] they thought it would be better received if it was presented to the members as a straight 6% increase. There were no questions from members when presented at the AGM."

224. Mr McCallin's evidence was that the members gained "kudos" because the PGA event was held on the golf course. Ms Nathan did not dispute this and we find it to be a fact. Mr McCallin also pointed out that the golf club members' committee had agreed that it was appropriate for Leisure to make some contribution to the staging of the event.

225. In reliance on the minutes of 4 May 2006 to which we refer above, we find as facts that:

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

(2) the golf club members benefitted reputationally;

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

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

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

(10) Whether Leisure and Club were part of a single commercial operation

227. Ms Nathan submitted that Leisure and Club were only "nominally separate" enterprises, and the way they operated in practice should cause the Tribunal to find that they were "regarded as a single enterprise". She relied on the following:

(1) both companies use the same physical buildings;

(2) Hotel guests are not barred from the members' bar or the clubhouse;

(3) both companies use the golf course (for instance Club runs the PGA event on the golf course);

(4) conferences and golf breaks are sold by Club, and included on a single invoice to the customer. Although green fee income from conference attendees or those on golf breaks is paid over to Leisure, those customers would be unaware that it was Leisure which was providing that service;

(5) there were commercial synergies between the golf courses and the Hotel, in that guests stayed at the Hotel in order to play golf;

(6) in order to co-ordinate tee-times as between golf club members and those on golf breaks at the Hotel, a Leisure employee and a member of Club's staff sit in the same office, but there is no written agreement as to whether golf club members or Club's customers have priority;

(7) food or drink for golf club members is provided by Club, which receives the related income;

(8) Leisure does not have its own website, so its golf club and fitness centre are accessed via Club's website;

(9) although Leisure and Club have different letterheads, they have the same addresses, telephone and fax numbers.

228. The following evidence was given by Mrs Rendall:

(1) Club and Leisure each have their own sales and marketing staff;

(2) members of the golf club are able to come into the premises, play on the courses, use the showers etc and leave again without paying anything to Club. It is their choice if they buy drinks or food;

(3) provision of drinks and food is a key part of Club's business; it is not part of Leisure's business;

(4) most golf clubs franchise out the sales of food and drink because it is "costly to have somebody standing there giving out food and beverage intermittently through the day";

(5) when a Hotel guest wants to play golf, it is Leisure's employee who dictates whether that is possible, having first considered existing bookings by members for tee-times, so she "controls who can play on the course";

(6) the money paid by a Hotel guest for the use of the golf course is remitted by Club to Leisure;

(7) HMRC was informed of the single invoicing in earlier correspondence and confirmed that there were no problems with that approach; and

(8) members of the golf club have access to their own website, which is password protected. It was at the request of the golf club members that their website was set up by way of a link on Club's home page.

229. None of the points set out in the two immediately preceding paragraphs was disputed and we find them to be facts. We further find that Leisure and Club are not merely "nominally separate" but are in fact separate businesses, because:

(1) Leisure is supplying the golf club members with access to the golf courses as part of its business of running a golf club; it provides visiting players, including Hotel guests, with similar access following its acquisition of the green fee business. Those activities are clearly demarcated and the income therefrom is paid to Leisure, which has its own sales staff. It is irrelevant that a Hotel guest may not realise there are two businesses: that is a question of perception only.

(2) Club is supplying food, drink and accommodation to club members and to Hotel guests. None of these activities are carried out by Leisure. Most golf clubs franchise out the sales of food and beverages to other companies, and what has happened here is no different.

(3) Golf club members and visitors paying green fees have a choice as to whether or not to buy food and/or drinks, and/or stay overnight in the Hotel. They can, as Mrs Rendall says, simply use the facilities, including the showers, and leave the premises without making any payment to Club.

230. Furthermore, had the two companies been run as a single business, one would have expected Mr Cracknell to delegate the day to day minutiae of Leisure's book-keeping to his team of staff. Instead, Mr Cracknell carried out those routine tasks for Leisure personally.

231. We find that none of the following facts is relevant to deciding whether there is a single business:

(1) the golf club members accessing their own website via Club's website, because this was at the request of those members;

(2) the commercial synergies between the two businesses, because this does not mean that they are the same business in all but name;

(3) the absence of a written agreement as to priority of tee-times, because it is Leisure's employee who "controls who can play on the course"; and

(4) the two businesses having the same address, telephone numbers and fax numbers: this is because they are essentially co-located.

(11) The financial outcome for Leisure

232. Part of HMRC's case was that Leisure's financial results were carefully managed so as to "achieve a relatively stable level of low or negligible surpluses". For example:

(1) in 2001 turnover was £956k and profit £17,371;

(2) in 2002 there was a loss of £18,178 on turnover of £957k; when added to the retained profit brought forward, the retained profit carried forward was £490;

(3) In 2003, turnover was £951k and the profit £5,570.

(4) In 2004, turnover was £936k and the profit £3,685.

233. Ms Nathan asked Mr McCallin whether this rebalancing of profits and losses each year was "too much of a co-incidence" and suggested it was "not a happenstance". Mr McCallin said that it was not only the profit that was similar, but so too was the turnover, and the main item of cost was essentially stable or had reduced. Given all those factors, it was not surprising that the financial results for each year were essentially similar. We agree with Mr McCallin for the reasons he gave.

(12) The financial outcome for Club

234. Mrs Rendall said that had Club retained the golf club and the green fees, it would have been "better off" compared to the current position. She said:

> "We haven't made money from this. What we've done is we've facilitated the fact that we can continue with the business that we want to be in, and that we can concentrate on that business, and somebody else who is the right people to run the membership companies are running the membership company, so that…the members are being benefited."

235. Ms Nathan did not challenge Mrs Rendall's evidence that Club would have been better off had it retained the golf club membership fees and the green fees, rather than transferring them to Leisure, and we find that to be a fact.

Whether Mr Cracknell was a shadow director of Leisure

236. For a company to be an eligible body, it must be a non-profit making body which is not "subject to commercial influence" (VATA Sch 9, Group 10, Note 2A (c)).

237. A body is subject to commercial influence if a person "associated with" the body made a relevant supply to the body, or received an emolument from the body; and a person is associated with a body if he is a "shadow officer" of that body (VATA Sch 9,

Group 10, Notes 4 and 8). A "shadow officer" is "a person in accordance with whose directions or instructions the members or officers of the body are accustomed to act".

238. Essentially the same definition occurs in s 22 of the Company Directors Disqualification Act 1986. In *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340, Morritt LJ said of that definition:

> "[36] ...What is needed is that the board is accustomed to act on the directions or instructions of the shadow director. As I have already indicated such directions and instructions do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them. Further, in my view, it is not necessary to the recognition of a shadow director that he should lurk in the shadows…"

The submissions

239. The parties accepted that:

(1) Leisure will not be an eligible body within the meaning of the exemption if it receives a "relevant supply" from a body associated with Leisure;

(2) Club had made supplies to Leisure, including the licence to occupy the golf course. These would be "relevant supplies" if Club was a body associated with Leisure; and

(3) Club would be associated with Leisure if, in the relevant period, a director of Club was also a shadow director of Leisure.

240. HMRC's case was that Mr Cracknell, who was appointed as the Finance Director of Club in November 2005, was a shadow director of Leisure. Ms Nathan submitted that:

(1) the Board had no independent knowledge of the finances or operation of Leisure and relied on Mr Cracknell for information and advice; and

(2) the Board was influenced by his advice, suggestions and recommendations and habitually complied with them.

241. Leisure's case was that neither of these two submissions was correct.

242. We have made detailed findings of fact about Mr Cracknell's role at Leisure, and in particular that he was "Leisure's book-keeper and no more" and that Dr Bruce and Mr Pritchard were financially literate and well able to examine the budgets and other financial information (see §177); we have also found that Leisure's Board were actively managing that company's affairs, see §§132-134; §147 and §180-181. It follows that we also find that Mr Cracknell was not a shadow director of Leisure.

Whether Leisure is a non-profit making body

The submissions

243. We first set out what was not in issue. Ms Nathan did not allege that the arrangements were in any way abusive; neither did she submit that Leisure failed to be

an eligible body because of its express objects as set out in the Memorandum, or because it was established by Mrs Rendall and her family, who are the major shareholders in Club.

244. HMRC's case was that Leisure was not a non-profit making body because:

(1) its affairs were managed so as to ensure that any surpluses or financial advantages could be, and were in fact, applied, whether directly or indirectly, for the benefit of Club and in effect, to Club's shareholders;

(2) any surpluses that did accrue were distributed to Club by way of the Licence fee or recharges, so Leisure did not distributed its profits only to a non-profit making body;

(3) it operated as an integral part of a commercial operation of which Club also formed part; and

(4) as the infrastructure was owned by Club, it is not possible for Leisure to claim that it applied any surplus to the continuance or improvement of the facilities. Although Leisure spent money on the upkeep of the green and making sure that its payroll costs were paid, that was insufficient to meet the statutory test.

245. Leisure's case was that all the tests as described in *Kennemer* were met and that this was clear from the facts.

Discussion and decision

246. Our findings of fact mean that HMRC's submissions set out at (1) to (3) of §244 are not accepted.

247. Taking (1) and (2) together, we have found that the licence fee was set at an arm's length figure; the directors acted independently and in the interests of Leisure; that there was no manipulation of the cross-charges so as to covertly distribute profits to Club; and that Leisure was not bearing costs relating to the PGA event which should properly have been charged to Club.

248. Our conclusion is consistent with the judgment of Lightman J in *Longborough Festival Opera v HMRC* [2006] EWHC 40 (Ch) where he considered the meaning of non-profit making body in the context of the cultural services exemption and said:

> "In this condition the word "profits" means surplus or profit on the bodies' activities. The condition precludes any dilution of such surplus or profit by the entry into contracts not in the best interests of the body or on terms other than the best reasonably obtainable, but does not preclude the entry into contracts by the cultural body with members, staff or third parties provided that by their true character or terms they are not a method of distribution of profit to another party. If the contract is for goods or services (or in this case the use of the opera house or equipment) needed by the body at the best price reasonably obtainable and is not made with the member, employee or third party because he is such and for his benefit, the provisions of [the exemption] are complied with."

249. Here, we have found that the licence fee and the cross-charging were not methods of distributing profit, or for the benefit of Club, but were on arm's length terms.

250. In relation to submission (3) we also found that Leisure does not operate as an integral part of a single commercial operation with Club, see §229.

251. That leaves only (4), being Ms Nathan's submission that as the infrastructure was owned by Club, Leisure cannot show that it had applied any surplus to the continuance or improvement of the facilities. That submission is based on Article 133, which provides that "the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied".

252. We begin by emphasising the opening words of Article 133: "the bodies in question must not systematically aim to make a profit". The fact that Leisure does not systematically make profits, but aims to break even as between income and expenditure (see §§232-233) is exactly what the Article requires. The second part of the provision directs how any surplus which nevertheless arises must be used.

253. HMRC rightly accept that Leisure spent its money on "the upkeep of the green and making sure that its payroll costs were paid". Those sums are self-evidently for "the continuance or improvement of the services supplied. Leisure also paid its arms-length licence fee, and a fair and appropriate share of the charges for overheads such as business rates and insurance, again on an arm's length basis.

254. The fact that Club provides the infrastructure, for which Leisure makes an arms-length payment, is no different from the position of any other non-profit making body paying a third party to provide the capital infrastructure used for the delivery of its services. For example, a theatre company might rent its building, and apply any surplus to improving its props, or in hiring a better orchestra. A zoo might pay an arm's length rent for the use of a park owned by a landowner, and then use any surplus to recruit more staff, or improve the visitor experience. The fact that neither the theatre nor the zoo spend their surplus on capital infrastructure owned by a third party does not prevent them benefitting from the exemption. This can be clearly seen in *Longborough*, where the opera house and equipment was not owned by the opera company, but by Mr Graham, who incorporated the company in question. The High Court found that this was not relevant: what mattered was that the body "must be legally incapable of distributing its profits, or diluting its profits in favour of its directors or members, and must not do so" (see [50] of the judgment).

255. Returning to *Kennemer*, we find as a fact, based on our detailed findings, that Leisure does not have an overt or a covert aim of achieving profits for Club, as HMRC submitted. Instead, it is a body which meets the requirements of Article 132 of the PVD and of Group 10, Sch 9, Item 3 of VATA, including the relevant Notes.

Other cases

256. We have come to our decision on the basis of our findings of fact in the light of the statutory provisions as interpreted by *Kennemer*. However, the parties cited many other

cases. For completeness we have explained below, in relation to the two cases on which the parties placed most weight, why they can be differentiated from the facts of this case.

Messenger

257. In *Messenger Leisure Developments v HMRC* [2005] EWCA Civ 648 ("*Messenger*") the appellant was a subsidiary of Messenger Group Ltd, a commercial company owned by Mr and Mrs Shah. Mr Shah established the appellant on a non-profit basis in order to benefit from the fiscal advantage conferred by the VAT exemption. The appellant had no business purpose separate from the commercial group of which it formed a part, and had accumulated significant surpluses because other group members allowed it free use of their facilities; the appellant was therefore not dealing at arm's length with connected parties. Moreover, Mr Shah was able at any time to change its constitution so as to allow it to distribute its profits. Arden LJ said that this was "a contingent entitlement" to distributions of profits, and so a financial advantage within the meaning of paragraph 47 of the AG Jacob's Opinion in *Kennemer*. When all these surrounding circumstances were taken into account, the Court found that the appellant was not a non-profit making company and so could not benefit from the exemption.

258. The differences between the facts of this appeal and those in *Messenger* are clear: Leisure is not part of the Boxford Group; it was not set up to benefit from the VAT exemption; it has a clear business purpose – the running of the golf club for the benefit of the members – which is not part of Club's commercial enterprise ; it does not deal on non-arm's length terms with Club and it would be impossible for Mrs Rendall (who is not a member of Leisure) to change its constitution so as to distribute any profits.

Hilden Park

259. In *Julian and Beryl Massey t/a Hilden Park Partnership and Hilden Park LLP v HMRC* [2013] UKFTT 391 (TC) ("*Hilden Park*"), the partnership operated by Mr and Mrs Massey had transferred their golf-related business to two companies, which were said to be non-profit making. The partnership retained ownership of the golf courses and the premises on which the golf-related facilities were situated, and charged rent to the companies. Although HMRC attacked the structure on the basis that it was abusive within the meaning of *Halifax plc v Customs and Excise Comrs* (Case C-255/02) [2006] STC 919, Judge Mosedale decided that the abuse question raised exactly the same issues as *Kennemer*, see [158] and [193] of that decision.

260. She found at [201]-[206] and [247] that:

(1) the directors were Mr Massey's friends and he was "comfortable" with them. They exercised no real independence and in practical terms they were ciphers;

(2) the lease and other agreements was not negotiated in any meaningful way by the directors;

(3) while legally the landlord and tenant were not connected parties, the directors considered their interests to be identical with the landlords' and there was no haggling over terms;

(4) the rent was agreed by the directors without regard to whether it was a commercial rent, and was fixed so as to leave at best a small surplus in the companies;

(5) the directors' only concern was that the lease costs should not be so high that it made the companies insolvent, or charge so much that the company would become insolvent, suggesting that the directors knew that the objective was to strip out the profits (but no more) and were content with this situation;

(6) the rent charged to the companies was four times higher than would have been charged to an arms-length tenant;

(7) the partnership could unilaterally increase prices once a year;

(8) in practice, Mr Massey remained in control of the companies;

(9) the legal agreements were very one-sided in favour of the partnership, allowing Mr Massey to collapse the arrangements and regain control if the directors did not follow his wishes;

(10) the arrangements were put in place in accordance with VAT planning advice; and

(11) none of the agreements reflected what actually happened in practice.

261. It followed that the rental payments made by the companies were covert distributions of profits and also abusive, see [216]. The FTT's judgment was later upheld by the Upper Tribunal in its entirety, see [2015] UKUT 405 (TCC).

262. There are again clear differences between *Hilden Park* and the facts of this case:

(1) although the directors were known to Mrs Rendall, they were selected for their experience; they acted independently and were not puppets, see for example §181;

(2) Club charged an arm's length rent to Leisure, see §162;

(3) Dr Bruce negotiated with Mrs Rendall on behalf of Leisure so as to reduce the rent payable under the Lease, see §132;

(4) the directors of Leisure acted independently of Club both in relation to those negotiations and more generally, see §§132-134; §147; §§176-177 and §§180-181; Mrs Rendall agreed to the reduced rent with reluctance, see §133;

(5) the rent was a commercial rent, and Leisure spent more on staff costs and other expenses than it did on the rent, see §52;

(6) the objective was not to strip out profits from Leisure and pass them to Club, see §216;

(7) it follows from the above that Mrs Rendall was not in control of Leisure;

(8) HMRC rightly did not seek to argue that the Lease was very one-sided in favour of Club; instead, it was a normal commercial lease; and Mrs Rendall had no wish to regain control of Leisure; instead, she had set up that company so as to divorce the golf club from the Boxford Group, see §§16-17;

(9) Mrs Rendall did not take VAT advice when she set up Leisure, see §82ff;

(10) There was no formal or informal agreement which allowed Club unilaterally to increase other amounts paid by Leisure; all cross-charges are on a fair and reasonable basis, see §216; and

(11) the Lease reflected what actually happened in practice other than in relation to the timing of the rental payments, which were the result of an oral variation and in line with normal commercial practice, see §§155-158.

Other cases

263. We were also referred to *South Herefordshire Golf Club v HMRC* [2006] VTD 19653; *Lumar Developments Ltd v HMRC* [2006] VTD 19729; *Burghill Valley Golf Club* [2009] UKFTT 119; *Atrium Club v HMRC* [2009] VTD 20933 and [2010] EWHC 970 (Ch); *North Weald Golf Club v HMRC* [2013] UKFTT 2880(TC) and [2014] UKFTT 130 and *Hearn t/a Hennerton Golf Club Ltd v HMRC* **[**2014] UKFTT 1115(TC).

The Sports Order Issue

264. We have decided the Main Issue in Leisure's favour, so the Sports Order Issue falls away. But as it was argued, we deal with it briefly.

265. It can be summarised as follows. Note (2A) to VATA Sch 9, Group 10 provides that a non-profit making body which is subject to commercial influence is not an eligible body for the purposes of the exemption. By Note (4) read with Notes (8) to (10), there is "commercial influence" if a shadow director of that body is associated with a supply made to the body.

266. Mr Cramer submitted that this was *ultra vires* the PVD because it:

> "…goes beyond the permissible restrictions which Member States may impose on the exemptions as set out in Article 133. Both Articles 132(1)(m) and 133 clearly focus on the aim of the organisation, and this is also the view taken by *Kennemer*. The key issue is the aim of the not for profit organisation, and that aim cannot be determined solely by reference to the connections between the organisation and its suppliers. To determine whether or not an organisation is non-profit making, one must look at the aims of that organisation, objectively identified. The existence of 'commercial influence' or a shadow officer is of course one relevant criteria to be considered when looking at the totality of the facts, but if all the other facts suggest that the organisation does not distribute profits, then the mere fact of the existence of a shadow officer should not prevent exemption from applying."

267. Ms Nathan submitted that the amendments to VATA introduced by the Sports Order "are proportionate and in any event fall within the wide margin of appreciation afforded to Member States when implementing taxation measures".

268. It seems to us that the answer to this point lies in Article 133, which allows Member States to make any one or more of the exemptions conditional on one or more of conditions (a) to (d) there set out. Condition (b) is that the bodies in question

> "…must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned."

269. That provision gives the *vires* for the "shadow director" provisions in the Sports Order, because if the directors are accustomed to act in accordance with the instructions of a person who is associated with a supplier, that supplier has an indirect interest in the company's results. HMRC therefore succeed on the Sports Order Issue.

The Tribunal's decision and appeal rights

270. For the reasons given above, Leisure's appeal succeeds on the Main Issue, because it is an eligible body for the purpose of the exemption in VATA, Schedule 9, Group 10, item 3. The Sports Order Issue therefore falls away, and our conclusion on that issue is *obiter*.

271. The Tribunal is grateful to both Counsel for their clear and helpful submissions.

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

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 3 APRIL 2017