[2017] UKFTT 494 (TC)

TC05948

Appeal number: TC/2016/05242
TC/2016/05239
TC/2016/05235
TC/201605240

CORPORATION TAX – Consortium relief - application for closure notice - whether reasonable to continue enquiries - existing information notices - whether information required relevant -whether decision on point of law would determine the application - whether Tribunal has jurisdiction to decide points of law - whether Tribunal should decide points of law

FIRST-TIER TRIBUNAL
TAX CHAMBER

EASTERN POWER NETWORKS PLC	**Applicant**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVNUE AND CUSTOMS	**Respondents**
LONDON POWER NETWORKS PLC	**Applicant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVNUE AND CUSTOMS	**Respondents**
SOUTH EASTERN POWER NETWORKS PLC	**Applicant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**
UK POWER NETWORKS (TRANSPORT) LIMITED	**Applicant**
- and -	

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

Sitting in public at Fox Court , 30 Brooke Street, London on 14 and 15 March 2017

Mr Jonathan Peacock QC instructed by Baker McKenzie for the Applicant

Ms Marika Lemos, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The four Applicants, which are trading subsidiaries of UK Power Networks Holdings Limited (UKPNHL), have applied for closure notices in relation to enquiries opened by HMRC into their Corporation Tax returns for the periods ended 31 December 2011 to 2013 inclusive. The relevant enquiries were opened in December 2013, July 2014 and November 2015 and have been the subject of extensive correspondence between the Applicants, their advisors and HMRC.

2. The enquiries relate to claims, by the Applicants, for consortium relief. The total relief claimed in the periods which are the subject of the present applications is £939,000,000, with tax at stake of £220,000,000.

3. UKPNHL is owned by a consortium which was formed by three independent investors for the purpose of acquiring the power transmission services business previously owned by the EDF Energy Group. As in any transaction of this nature, the arrangements entered into by the parties are complex and HMRC's enquiries have been directed at ascertaining the nature of the transactions carried out and the reasons for them in the light of what it considered to be a disparity between the economic interests of the investors and the amounts of relief claimed.

4. As part of their enquiries HMRC issued information notices to UKPNHL and to CKI Number 3 Limited (CKI3), one of the consortium members, in November 2015 and August 2016. These notices were appealed and it was subsequently agreed that these notices had been invalidated by the closure of the enquiries which were being conducted into those companies' returns.

5. There are, however, outstanding information notices: one issued on 20 December 2016 to UKPNHL, which has been appealed and third party notices issued on 16 February 2017 to CKI Number 1 Limited (CKI1), CKI Number 2 Limited (CKI2) and CKI3, which Mr Peacock indicated would be appealed. HMRC contend that they need the information requested in these notices before they can close the enquiry. The Applicants contend that the information requested is not relevant to the issues between the parties and that HMRC should now be in a position to accept or deny or limit the claims and a closure notice should be issued as the claims are the only matters in dispute

6. References to section numbers below are to sections of the Corporation Tax Act 2010, unless otherwise specified and references to "the Act" are to the Corporation Tax Act 2010 unless otherwise specified.

The law on Closure Notices

6. Paragraph 24 of Schedule 18 to Finance Act 1998 provides that an officer of Revenue and Customs may enquire into a company's tax return and paragraph 25 provides that an enquiry may extend to any claim included in the return.

7. Paragraph 31A allows a joint referral to the Tribunal of questions relating to the enquiry by HMRC and the company. The Applicants invited HMRC to make a joint referral in relation to the questions of law which arise in this matter, but HMRC declined.

8. By paragraph 32, "*an enquiry is completed when an officer of Revenue and Customs by notice (a "closure notice") informs the company they have completed their enquiry and state their conclusions*".

9. The Applicants apply to the Tribunal under paragraph 33 of schedule 18 which provides that "*(1) The company may apply to the tribunal for a direction that an officer of Revenue and Customs give a closure notice within a specified period…(3) the tribunal shall give a direction unless satisfied that an officer of Revenue and Customs have reasonable grounds for not giving a closure notice within a specified period"*.

10. So I must direct the issue of a closure notice unless HMRC persuade me, and the burden of proof is on them, that they have reasonable grounds for continuing the enquiry.

Meaning of consortium

11. Before considering the background facts, it may be convenient to set out the definition of a consortium.

12. The definition of a consortium is contained in section 153 Corporation Tax Act 2010:

"*(1) For the purposes of this Part a company is owned by a consortium if—*

(a) the company is not a 75% subsidiary of any company, and

(b) at least 75% of the company's ordinary share capital is beneficially owned by other companies each of which beneficially owns at least 5% of that capital.

(2) The other companies each owning at least 5% of the share capital are the members of the consortium for the purposes of this Part.

(3) If—

(a) a trading company is a 90% subsidiary of a holding company and is not a 75% subsidiary of any company apart from the holding company, and

(b) as a result of subsection (1), the holding company is owned by a consortium,

then for the purposes of this Part the trading company is also owned by the consortium."

13. The basic conditions for "consortium relief " as it is usually called (it is really just a form of group relief) as it applies in this case is set out in section 133(2) of the Act.

"*(2) Consortium condition 3 is met if—*

(a) the claimant company is a trading company or a holding company,

(b) the claimant company is owned by a consortium,

(c) the surrendering company is not a member of the consortium,

(d) the surrendering company is a member of the same group of companies as a third company ("the link company"),

(e) the link company is a member of the consortium, . . . [and]

[(f) the surrendering company and the claimant company are both UK related. . ."

Background facts

14. UKPNHL was incorporated as a shell company in June 2010. It had three shareholders, who, at that time, owned the company in equal shares. All the shareholders had some connection with the Hutchison Whampoa group.

15. The Hutchison Whampoa Group, a Hong Kong based group with many business interests around the world had a significant interest in the Cheung Kong group of companies. One of the Cheung Kong companies is called CKI Number 1 Limited (CKI1) and CKI1, in turn, has an interest in a power company now called Power Asset Holdings, but then called Hong Kong Electric Holdings (HEH). The Third investor was the Li Ka-Shing Foundation, also based in Hong Kong which was connected with Mr Li, a significant shareholder in the Hutchison Whampoa group.

16. The three initial shareholders in UNPNHL were, Devin International Limited (Devin), a company owned by HEH, Eagle Insight International Limited (Eagle), a company owned by the Li Ka-Shing Foundation and CKI1, which was owned by CKI2, which was owned by CKI3 which was ultimately owned by the holding company of the Cheung Kong group.

17. The final pieces of the jigsaw, for present purposes, are Hutchison 3G UK Holdings Limited which owned Hutchison 3G UK Limited (Hutchison 3G) and which were also members of the Hutchison Whampoa group. The Hutchison 3G business provides mobile phone services under the 3 brand and developed the 3G mobile network in the UK. It incurred very significant expenditure in so doing and made considerable losses. Those losses are, in principle available to set off against its future profits, or could be surrendered to other members of its group or to other companies with which it is connected for the purposes of consortium relief.

18. On 11 September 2010, the various parties entered into a Shareholders' Agreement. The agreement set out who was to subscribe for what shares. There were to be different classes of ordinary and preference shares. The interests in the new holding company were to be 40% for each of Devin and CKI1 and 20 % for Eagle. Devin and CKI1 were able to appoint two directors and Eagle was to appoint one. The three parties still held one third each of the ordinary shares. The Articles of Association provided that a majority (more than 50%) shareholder vote was needed to pass resolutions. Under the Shareholders' Agreement the parties agreed to exercise their votes in such a way that certain reserved matters, such as the amendment of the Articles or the issue of shares required unanimity of the shareholders and other matters required approval by 80% of the votes of the Board. The agreement also provided that votes at Board level were to be 49.5% to CKI1, 16.8% to Eagle and 33.7% to Devin.

19. Negotiations between the parties were ongoing at this time. A letter from UKPNHL to HMRC of 29 July 2015 set out the key considerations for the negotiations which included:

- the amount to be invested by each party and the economic returns
- the governance structure and in particular ensuring that the financial investment of each party was appropriately reflected in the ownership structure
- the future dividends to be received by each funding entity
- No one party was to be able to control UKPNHL on its own
- access to losses arising from acquisition debt and other losses of the consortium members. Ensuring access to the losses of Hutchison 3G and the amount to be paid for the surrender of relief.

20. So at this point, before the acquisition, Devin, CKI1 and Eagle are all members of the consortium. Between them, they own UKPNHL. The surrendering company is Hutchison 3G (or members of that group) and the link company is CKI1.

21. On 29 October 2010, the consortium, via UKPNHL, completed the acquisition of the power transmission services business owned by EDF.

22. The parties entered into a new Shareholders' Agreement (October SA) which replaced the September one. The October SA provided for a new share structure in which there were A and B ordinary shares, A fixed rate preference shares (which do not count as "ordinary share capital" for Corporation Tax Act purposes) and B floating rate preference shares (which do count as "ordinary share capital" for this purpose). The A preference shares were divided between Devin and Eagle in the proportions 2:1, CKI1, CKI2 and CKI3 owned the B preference shares in equal shares and the A and B ordinary shares were divided between the parties in such a

way that the ordinary share capital of UKPNHL was owned 97.6% by the CKI companies together, 0.8% by Eagle and 1.6% by Devin.

23. The provisions regarding votes for board members and the reserved matters were essentially the same as in the September document.

24. As a result of the new share structure, the CKI companies between them own 97.6% of the ordinary share capital of UKPNHL, Eagle owns 0.8% and Devin owns 1.6%. As Eagle's and Devin's holdings of ordinary share capital had dropped below 5%, they could no longer be members of the consortium (see section 153(1) of the Act). UKPNHL was now owned by a consortium consisting of CKI1, CKI2 and CKI3. As a result of section 153(2), the trading subsidiaries of UKPNHL are also treated as owned by the consortium and they are the "claimant companies" for the purposes of section 133(2). Each of CKI1, CKI2 and CKI3 is a "link company" for the purposes of that section and the companies in the Hutchison 3G group are the surrendering companies.

25. A new set of Article of Association were also adopted (the October Articles). The most important change for present purposes was that the voting threshold to pass shareholder resolutions was increased to 75% (from 50% under the original Articles). At this point, the shareholder votes were exercisable as to 49.6% by the CKI companies, as to 16.8% by Eagle and as to 33.6% by Devin.

26. The proportion of profits to which the parties were entitled by virtue of their direct and indirect shareholdings were: 40% for the CKI companies, 40% for Devin and 20% for Eagle.

27. Their respective entitlements to assets on a winding up were: 62.5% for the CKI companies (through direct and indirect holdings), 12.5% for Eagle and 25% for Devin.

28. The quorum for board meetings required at least one director appointed by each ultimate shareholder.

29. The quorum for General Meetings required the presence , in person or by proxy, of each member who held 20% or more of the nominal value of the ordinary shares. "Ordinary shares" for this purpose means ordinary shares for Companies Act 2006 purposes. The Companies Act ordinary shares were owned by the CKI companies, Devin and Eagle in the proportions 4:4:2, so in effect, General Meetings required all the ultimate shareholders to be present.

30. Two further relevant events happened on 30 December 2010. First, the Articles of Association of UKPNHL were further amended (becoming the "December Articles") and the voting rights of the parties were again amended so that:

- CKI1 had 25.2% of the votes
- CKI2 had 24.7%

- CKI3 also had 24.7% giving the CKI companies 74.6% in total
- Eagle had 8.5% and
- Devin had 16.9%

30. The second important event was that CKI3 and HEH entered into a Voting Agreement (the December Voting Agreement or DVA) by which CKI3 contracted with HEH that it would not exercise its votes in UKPNHL without the prior written consent of HEH. HEH's consent could be granted at its absolute discretion and "*may be withheld or delayed for any reason including unreasonably*".

31. CKI3 could not transfer its shares unless the transferee undertook an identical obligation.

32. Third party rights were excluded.

33. The contract was governed by English law.

34. So this was the situation on 1 January 2011 which is the first day of the periods in dispute.

Consortium relief in more detail

35. I will now consider the detailed legislative provisions which gave rise to the dispute. The provisions are contained in Part 5 of the Act. Section 97 sets out what group relief is:

"97 Introduction to Part

(1) This Part—

(a) allows a company to surrender losses and other amounts, and

(b) enables, in certain cases involving groups or consortiums of companies, other companies to claim corporation tax relief for the losses and other amounts that are surrendered.

(2) The corporation tax relief mentioned in subsection (1) is called "group relief".

36. So group relief, of which consortium relief is a special instance, allows losses to be transferred by one company to another company provided there is the right kind of relationship between the companies and the transferee company can then use the losses to gain relief against its own corporation tax liability.

37. Section 130 sets out the basic conditions for a claim for group relief:

"130 Group relief claims on amounts surrenderable under Chapter 2

(1) This section applies in relation to the surrendering company's surrenderable amounts for the surrender period under Chapter 2.

(2) A company ("the claimant company") may make a claim for group relief for an accounting period ("the claim period") in relation to those amounts (in whole or in part) if the following requirements are met.

Requirement 1

The surrendering company consents to the claim.

Requirement 2

There is a period ("the overlapping period") that is common to the claim period and the surrender period.

Requirement 3

At a time during the overlapping period—

(a) the group condition is met (see section 131),

(b) consortium condition 1 is met (see section 132),

(c) consortium condition 2 is met (see [section 133(1)][, (3) and (4)]), or

(d) consortium condition 3 is met (see [section 133(2) to] [(4)]).

(3) More than one company may make a claim for group relief in relation to any surrenderable amounts (but the giving of group relief in relation to any claim is subject to the provisions of this Chapter)."

38. It is not disputed that requirements 1 and 2 are satisfied in this case. Paragraphs 12 and 13 above set out the definition of a consortium and the requirements of consortium condition 3.

39. It is common ground that these conditions are satisfied and the relevant "*dramatis personae*" are

- CKI1, CKI2 and CKI3: the members of the consortium
- The Applicants: the claimant companies being treated as owned by the consortium as they are trading subsidiaries of UKPNHL
- Hutchison 3G companies: the surrendering companies
- CKI1, CKI2 and CKI3 again: each of them a link company.

40. In principle therefore, the losses of the Hutchison 3G companies can be used by the Applicants to reduce their taxable profits through a claim for consortium relief.

41. The issue between the parties is as to whether the relief is available and, if so, the quantum of that relief.

42. Part 5 of the Act set out limits on the amount of relief which can be claimed. Section 146, so far as relevant, provides:

43. "(4) If the claimant company makes a claim for group relief based on consortium condition 3, the amount of group relief to be given on the claim is limited by subsections (5) to (7).

(5) There is a limit on the amount of group relief that can be given, in total, to the claimant company for the claim period on consortium claims made in relation to losses and other amounts surrendered by the link company and group companies.

(6) That limit is the same as the limit that, as a result of section 144(2), would apply for the purposes of a consortium claim made by the claimant company for the claim period in relation to losses or other amounts surrendered by the link company[, assuming that the link company was UK related].

(7) In determining the limit that would apply as a result of section 144(2) it is to be assumed that the accounting period of the link company is the same as the accounting period of the claimant company."

44. The limit in section 144(2) to (4) are as follows:

"(2) The group relief to be given on the claim is limited to the ownership proportion of the claimant company's [available total profits] of the overlapping period (see section 140(2) to determine the [available total profits] of the overlapping period).

(3) The ownership proportion is the same as the lowest of the following proportions—

(a) the proportion of the ordinary share capital of the claimant company that is beneficially owned by the surrendering company,

(b) the proportion of any profits available for distribution to equity holders of the claimant company to which the surrendering company is beneficially entitled (see Chapter 6), . . .

(c) the proportion of any assets of the claimant company available for distribution to such equity holders on a winding up to which the surrendering company would be beneficially entitled (see Chapter 6)[, and

(d) the proportion of the voting power in the claimant company that is directly possessed by the surrendering company].

(4) For the purposes of subsection (3)—

(a) the proportions mentioned in [paragraphs (a) to (d)] of that subsection are those prevailing during the overlapping period, and

(b) if any of those proportions changes during that period, use the average of that proportion during that period."

45. So the consortium relief claim is limited by reference to a percentage of the profits of the claimant company and this, in turn, is determined by the "ownership proportion" of the link company in the claimant companies.

46. The ownership proportion is the lowest of four measures of the interest of the link company in the claimant company. They are: the proportion of the ordinary share capital of the claimant company which the link company owns, the profits to which the link company is entitled, the proportion of the assets to which the link company would be entitled on a winding up of the claimant and "the proportion of the *voting power* in the claimant company which is *directly possessed* by the link company" (emphasis added).

47. We are concerned with paragraph (3)(d) as that produces the lowest percentage. Paragraph (d) was introduced by the Finance (No. 3) Act 2010 with effect for the first accounting period following 12 July 2010, in our case, the period beginning 1 January 2011.

48. The Applicants argue that, as the three link companies directly possessed 74.6% of the votes between them, that is the proportion of the profits of the claimant companies eligible for relief. HMRC argue that the DVA resulted in CKI3 not "directly possessing" its votes so that the proportion is, in fact lower.

49. Section 146B imposes a further limitation on the amount of consortium relief.

50. So far as relevant, it provides:

"(2) This section also applies if—

(a) the claimant company makes a claim for group relief based on consortium condition 3, and

(b) during any part of the overlapping period, arrangements within subsection (3) are in place which enable a person to prevent the link company, either alone or together with one or more other companies that are members of the consortium, from controlling the claimant company.

(3) Arrangements are within this subsection if—

(a) the company, either alone or together with one or more other companies that are members of the consortium, would control the claimant company, but for the existence of the arrangements, and

(b) the arrangements form part of a scheme the main purpose, or one of the main purposes, of which is to enable the claimant company to obtain a tax advantage under this Chapter.

(4) The group relief to be given on the claim is to be determined as if the claimant company's total profits for the overlapping period were 50% of what they would be but for this section (see section 140(2) to determine the total profits for the overlapping period).

(5) In this section "the overlapping period" is to be read in accordance with section 142.

(6) Section 1139 ("tax advantage") applies for the purposes of this section.]"

51. A "tax advantage" for this purpose includes obtaining a relief, or increased relief, from tax.

52. The definition of "control" is that set out in section 1124-

"control" means the power of a person ("P") to secure—

(a) by means of the holding of shares or the possession of voting power in relation to that or any other body corporate, or

(b) as a result of any powers conferred by the articles of association or other document regulating that or any other body corporate,

that the affairs of company A are conducted in accordance with P's wishes."

53. Much of the information required by the information notices is directed to the purpose and intentions of the various companies in structuring the arrangements in the way they are structured. Mr Peacock for the Applicants argues, in essence, that the purposes of the parties are irrelevant to the application of the legislation, as purpose is only in issue if the other conditions of the section are satisfied and he argues that they are not. I will return to this later.

54. If section 146B does apply, the amount of relief available is reduced to 50% of what it otherwise would be.

55. The final provision which is in issue is section 155. This is aimed at the situation where a person or persons appear to have control of a the claimant company, but there are arrangements in place which enable others to obtain control.

56. The particular element of that section which is in contention is "Effect 2".

57. Section 155 provides, so far as relevant,

"(1) This section applies if, apart from this section, a trading company would be owned by a consortium.

(2) The trading company is not owned by the consortium if—

(a) for an accounting period ("the current period") the trading company or a member of the consortium has surrenderable amounts, and

(b) arrangements within subsection (3) are in place.

(3) Arrangements are within this subsection if they have any of the following effects [(but see sections [155A] and 155B)]….

Effect 2

Any person who owns, or any persons who together own, less than 50% of the ordinary share capital of the trading company—

(a) has, or together have, control of the trading company, or

(b) could obtain such control at some time during or after the current period."

58. HMRC seek to argue that Effect 2 applies because the effect of the DVA is that the voting rights of CKI3 are transferred to HEH. The Applicants say that is not right.

The information notices

59. I will return to the technical arguments later, but I will begin by considering the actual information HMRC are seeking under the information notices. HMRC say that they reasonably need this information to determine the Applicants' entitlement to the consortium relief claimed and it would be premature to order the issue of a closure notice until the information has been provided. The Applicants argue that the information sought is irrelevant to the quantum of the claim as well as being onerous to provide, and the Respondents are in a position to make any assessments they wish to make so that I should order the closure notices requested.

60. HMRC have, of course, requested a great deal of information and numerous documents in the course of the enquiry and the Applicants have provided them with a great deal of information and numerous documents, but not all the information nor all the documents requested. HMRC therefore issued formal information notices under schedule 36 Finance Act 2008. These included Group Notices to UKPNHL and third party notices to CKI1, CKI2 and CKI3.

61. For completeness, we note that other information notices had been issued in connection with other enquiries into the group's tax affairs, but HMRC accepted that closure notices should be issued in relation to those enquires and the previous information notices have been treated as discharged or withdrawn. I will focus on the extant information notices. They are a Group Notice (GN) issued to UKPNHL on 20 December 2016 and third party notices issued to CKI1, CKI2 and CKI3 on 16 February 2017 (TPNs). Some of the information requested was common to the GN and the TPNs, some requests were contained in the GN or the TPNs alone.

Information requests common to the GN and the TPNs

62. Information explaining any and all purposes intended to be brought about by the shareholders and directors of UNPNHL in proposing and implementing the resolutions changing the type and number of shares issued and the rights attaching to each share and their allocation to each Member of UNPNHL.

63. Documentation to explain the reasons for the resolutions changing the rights including:

- all communications/correspondence (both internal and external) including Board papers and presentations relating to the proposed issue of shares, re-designation of shares and alteration of voting rights

- any tax and/or any commercial advice received relating to the proposed issue of shares re-designation of shares and alteration of voting rights

- any tax and/or commercial analyses prepared relating to the proposed issue of shares re-designation of shares and alteration of voting rights

- UNPNHL Minutes of Directors' and Members' meetings and ancillary notes relating to the period 1 September 2010 to 31 December 2010.

64. Copies of all correspondence, meeting notes and e-mails surrounding the decision taken by CKI3 and its subsidiary CKI2 to acquire and hold shares in UKPNHL to include an analysis of the investment rationale and investment risk assessment. Copies of the Minutes of the Board and Shareholder meetings held during this period, and information about the activities carried out by each company during the same period (1 September 2010 to 31 December 2010)

65. An explanation of all purposes for the inclusion of the 75% majority vote clause at para 7.5 of the October Article of Association …and a demonstration of how the clause operated in practice to affect all resolutions and other decisions passed by the Members of UKPNHL in the account periods to 31 December 2011 and 31 December 2012.

66. Documents evidencing the decision making behind the introduction of the clause at paragraph 7.5 of the October Articles of Association including all proposals and recommendations made.

Information requests in the GN only

67. Copies of the Board Minutes of A preference shareholders detailing the reasons for the acceptance of the amended Articles together with the advice given to them detailing why this resolution should be accepted.

68. All communications/correspondence (both internal and external) including board paper, presentations and e-mails relating to:

- The proposed written resolutions of the 14 August 2012 and [20 June] 2013, and

- the administrative processes and authorisations undertaken prior to the issue of the proposed written resolution.

69. UNPNHL Minutes of the Members meetings and ancillary notes relating to all meetings held in respect of these resolutions.

70. The written authority provided by the Ultimate Shareholders in respect of the original proposed resolution, and the rectifying share premium reduction resolutions as required by the Shareholders' Agreement.

Information requests in the TPNs only

71. Documents containing all proposals and recommendations given to the members of CKI3 that informed their decision to implement the Voting Agreement of 30 December 2010.

72. Information as to why CKI3 agreed to surrender consent of its votes to a company that is not its parent.

73. The information set out in paragraphs 63 to 68 and paragraphs 72 and 73 are all concerned with the purposes and reasons for various actions ("the purpose information"). The information set out in paragraphs 69 to 71 related to certain special resolutions which were not passed by the required majority and accordingly lapsed ("the resolution information").

74. The Applicants' position in relation to the purpose information is that the information is not reasonably required in connection with their tax positions and that is the ground of their appeal against the notice.

75. The Applicants' position in relation to the resolution information is that it is not relevant. They say that one of the shareholders was not notified of the resolutions as a result of company secretarial error and the resolutions were not therefore validly passed. Once this was realised, the situation was corrected.

76. A company can only appeal against a third party notice on the grounds that it would be unduly onerous to comply with the notice. HMRC can only issue a third party notice with the consent of the taxpayer or the approval of the tribunal. In this case, the applicants consented to the issue of the notices. HMRC contend that this amounts to an acknowledgement that the information is reasonably required and that this must also apply to the GN. Mr Peacock for the Applicants disputes this and I return to this later.

HMRC's reasons as to why the information is required

77. I now turn to HMRC's arguments as to why the information requested is required. I heard evidence from Ms Rachel White, the HMRC officer who is conducting the enquiry and who made a comprehensive witness statement, and I was also taken to various letters in which these matters were discussed.

78. Very broadly, the information was requested in order to determine whether the quantum of the claim to consortium relief was correct or whether the anti-avoidance provisions set out above applied in order to reduce or negate the claim. Initially, only CKI1 was a link company, but the restructuring which, among other things, introduced CKI2 and CKI3 into the structure resulted in there being three link companies. A letter from UNPNHL to HMRC of 28 April 2014 explains how the amount of consortium relief available can be calculated by reference to all three link companies.

79. HMRC is therefore concerned to examine whether the purpose of the restructuring was to exploit the consortium relief rules so as to maximise the relief available and whether, applying those rules, the right amount of relief has been claimed on a technical analysis of the legislation.

80. The genesis for the enquiry was HMRC's perception that there was a mismatch between the economic interests of the parties in UNPNHL and the amount of consortium relief claimed. As mentioned, the intended economic interests on the three investors was 40% for each of the CKI companies and Devin and 20% for Eagle. This was the position as regards ordinary shares (for Companies Act purposes as opposed to ordinary share capital for Corporation Tax purposes) and in relation to profits. As we have seen, the proportions of ordinary share capital, entitlement to assets on a winding up and votes were different.

81. The possibility that the interests of consortium members might have different elements is reflected in the legislation.

82. Ms Lemos took me to the Upper Tribunal case of *BUPA Insurance Ltd v HMRC* [2014] UKUT 262 (TCC) where the tribunal considered the purpose and nature of the consortium relief provisions , by reference to the predecessor provisions of section 144. The tribunal said at paragraph 48 onwards:

"…we must identify the nature and purpose of the provisions contained in Section 403C.

49. The purpose of the group relief provisions and thus the consortium relief provisions (since consortium relief is merely a form of group relief: see above) is readily apparent from their terms. These provisions recognise a "substantial measure of identity" between surrendering companies with losses on the one hand and claimant companies with profits on the other, which identity is sufficient, so far as the draftsman is concerned, to permit the surrender of losses by the former to the latter.
…
50. As we have observed above, the draftsman of the consortium relief provisions sets out the conditions to establish the required level of "identity", or connection, for consortium relief to be available, at two levels:-

> *(i) The trading company ("the consortium company", here CX Re) must have a share capital "beneficially owned" by the "members of the consortium", as to at least 75% (TA 1988, Section 413(6)).*
>
> *(ii) Then, as regards each consortium member, the quantum of relief available to each member is restricted by Section 403C (as supplemented by Schedule 18) to the lowest "relevant fraction" of the consortium member's "beneficial ownership" of ordinary share capital of the consortium company (Section 403C(2)(a)), its "beneficial entitlement" to income distributions made by the consortium company on the notional "profit distribution", (Section 403C(2)(b)) and its "beneficial entitlement" to the assets of the consortium company on a notional winding-up (Section 403C(2)(c)).*
> *(i) The trading company ("the consortium company", here CX Re) must have a share capital "beneficially owned" by the "members of the consortium", as to at least 75% (TA 1988, Section 413(6)).*

(ii) Then, as regards each consortium member, the quantum of relief available to each member is restricted by Section 403C (as supplemented by Schedule 18) to the lowest "relevant fraction" of the consortium member's "beneficial ownership" of ordinary share capital of the consortium company (Section 403C(2)(a)), its "beneficial entitlement" to income distributions made by the consortium company on the notional "profit distribution", (Section 403C(2)(b)) and its "beneficial entitlement" to the assets of the consortium company on a notional winding-up (Section 403C(2)(c))."

83. Mr Peacock also relied the *BUPA* case, and also the Upper Tribunal case of *Gemsupa Ltd v The Commissioners for HMRC* [2015] UKFTT 0097 (TC) to support the proposition that there is no overarching purpose test or economic substance test in the group relief rules. In Gemsupa, the tribunal said:

"Mr Ghosh relied in particular on sub-paragraph (vi) of the conclusions of Lewison J in Berry. Parliament has closely defined the availability of group relief in setting conditions, in particular the definition of an effective 51% subsidiary. Those conditions seek to prevent the manipulation of share rights in paragraphs 4 and 5 Schedule 18. He submitted that in those circumstances there is little if any room for an appeal to a purpose which is not within the literal meaning of the words.

121.

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

122.

In light of the authorities I do not accept Ms Nathan's overarching submission that group relief is only available where there is some form of commercial economic unity above and beyond the conditions set out in the literal words. So the legislation, now contained in section 144 requires an element of "involvement" or "identity" between the claimant company with profits and the members of the consortium. But the legislation does not frame the test in that abstract way. Instead it restricts relief by reference to specific tests relating to the beneficial ownership of ordinary share capital, profits, assets on a winding up and voting power. It recognises that these different measures of "identity or connection" may be beneficially owned in different proportions so the relief is restricted by reference to the lowest of these proportions. Paragraph 144(3)(d) was inserted by the Finance Act 2009 to include a new limiting factor of voting power…"

84. Ms White was concerned because the "economic interest" of the CKI companies as measured by their ownership of UKPNHL's ordinary shares was 40%, but the Applicants had claimed relief of nearly 80% of profits in the first year, (which was not the subject of an enquiry, apparently through oversight). Lesser amounts were claimed in the later years. Ms White had focussed on the

interests in the ordinary shares, rather than the interests in the ordinary share capital which is the measure which is relevant for Corporation Tax purposes.

85. It is clear from the *BUPA* and *Gemsupa* cases, which are binding on me, that the the application of section 144 does not depend on any general concept of economic identity or connection between the consortium companies and the claimant companies. The required connection is defined solely in terms of the four tests set out in section 144(3) and the quantum of relief is to be ascertained by a mechanical application of those tests with the relief limited to the lowest proportion produced by that process.

86. There may be (and as we shall see, is) a debate about the construction of the tests, but that is a different matter.

87. Ms White's evidence deals with HMRC's submissions as to why they have reasonable grounds for continuing with the enquiry.

88. In essence, Ms White contends that the technical position can be considered only in the light of all the facts as the facts are relevant to the application of the provisions and their construction. She asserts that HMRC are still in the process of investigating those facts and so it would be premature to terminated the enquiry at this stage. She argues that therefore, HMRC have reasonable grounds for continuing the enquiry.

89. I was taken through the history of the enquiry. It is unnecessary to consider this is detail, but there are two matters worth setting out at this stage. The first is a telephone conference between HMRC and UNPNHL and their advisors Ernst & Young on 22 June 2015. I saw both HMRC's note of the conversation and UKPNHL's version. HMRC's note records that the December 2010 restructuring was carried out simply in order to advance the utilisation of the wider group losses and "The issue of voting rights was purely and solely to facilitate the group relief claim, therefore CKI1 and CKI2 were indifferent to the question of control that they may have been given or not".

90. The Applicant's account records that "the mechanics allowed a more rapid claim[to group relief]…There is never a tax motive. There is a massive investment at stake. The tax is merely a factor." And upon being asked for the commercial and tax rationale: "There were several factors including tax reasons".

91. Both accounts agree that questions about motive and purpose are relevant to section 146B.

92. For that section to apply, there must be a scheme the main purpose, or one of the main purposes, of which is to enable the claimant company to obtain a tax advantage. A "tax advantage" is wider than "tax avoidance". The definition is section 1139 of the Act includes obtaining an increased relief from tax as being a tax advantage. The telephone conference establishes, at the least, that tax was a consideration in structuring the deal. It would be astonishing if it were not. The question is whether the transaction resulting from those considerations gives rise to a proper claim for consortium relief permitted by the legislation or whether it falls

foul of the anti-avoidance provisions which can operate to limit or negative a claim.

93. There was also a meeting between the parties on 3 November 2016 and again I saw two notes of the meeting. The meeting dealt , among other things, with the proposal for a joint referral on the questions of law, but HMRC declined on the basis that they did not want to resolve the technical issues before they had all the facts of the case as the facts would affect the application of the provisions. The meeting also highlighted HMRC's view that the claims were at odds with what HMRC considered to be the "economically correct" answer, i.e. 40%.

94. Ms White's witness statement set out the reasons for the questions asked in the Group Notice and the Third Party Notices. This is central to HMRC's case. These are the enquiries which remain outstanding. If HMRC have good reasons for seeking the answers to these questions, I should refuse the Closure Notice Application. If, as the Applicants argue, the answers to those questions are not reasonably required to ascertain their tax position or they are not relevant to their tax position, I must order the Closure Notice.

95. The questions set out at paragraphs 62 to 64 above relate to the changes made to the type and number of shares, the variation of the share rights, the introduction of CKI1 and CKI2 and why Devin and Eagle agreed to the changes to their voting position.

96. Ms White's witness statement explains:

"*The reason for requesting this information is that a series of transactions were undertaken that appear to have directly and specifically facilitated the creation of a structure which is at odds with the commercial priorities laid out in the accounts and in the letter of 29 July 2015 [set out at paragraph 19 above] and which appear instead to have been undertaken solely to enhance a claim to consortium relief by way of artificially increasing voting rights, but then negating the control to the members that those rights should bring.*

In order to determine therefore whether whether all these transactions mean that s146B should apply, I need a full understanding of the reasons why they were undertaken."

97. She then comments on the changes made by the October and December restructuring which had the results that:

- CKI2 and CKI3 became consortium members and Devin and Eagle ceased to be consortium members

- Devin's and Eagles' combined share of the vote reduced from 50.4% to 25.4% and the voting rights of the new consortium members (CKI1, CKI2 and CKI3) increased from 49.6% to 74.6%

98. Ms White went on to say:

"We need to clarify why the share changes, and in particular, the issue of the preference shares were required as part of the ownership structure of UKPNHL. We also need to understand why some, but not all of those preference shares were issued as participating preference shares.

We also need to understand why the votes assigned to each share were altered in the way they were in the December Articles.

The reason is that the introduction of the preference shares, their categorisation and the alteration of the rights attached to each shares have a significant bearing on the figures that are arrived at using the tests at s144.

We therefore need to establish if the main or one of the main purposes of these actions was to affect the figures arrived at using the tests at section 144 in order to access higher amounts of group relief, and therefore whether or not they form part of an arrangement or scheme under s146B(3)."

99. Ms White then turns to the questions set out in paragraphs 65 and 66 above about the increase of the voting threshold to 75%. She comments that the new structure grants CKI1, CKI2 and CKI3, voting rights totalling 74.6% of the company. They also hold, between them, 97.6% of the ordinary share capital but the applicants say these companies do not have control of UKPNHL. The principal reason is stated to be the inclusion of the 75% voting threshold in the October Articles. The CKI companies do not have control as they only have 74.6% of the votes.

100. Ms White says:

"My reasons for requesting the information around the 75% voting threshold is that I need to test whether the insertion of this condition into the Articles of Association at paragraph 7.5 constitutes part of the arrangements designed to deny control for the purposes of s146B(2) and (3). I can only do this by asking why it was inserted and what was intended by its insertion.

101. So the questions which were common to the Group Notice and the Third Party Notices are all directed at the reasons and purposes for the transactions in order to ascertain whether certain "arrangements' were part of a scheme with the purpose of obtaining a "tax advantage".

102. The Applicants' response is that this information is not reasonably required in order to check their tax position. As we shall see, the Applicants' position is that on their interpretation of section 146B it is not necessary to consider the purpose of the arrangements, because they are not of the kind which are the subject of the section. So section 146B cannot apply in any event and purpose is irrelevant.

103. Questions on the December Voting Agreement were contained only in the Third Party Notices.

104. Ms White argues that she needs this information in relation to section 144(3)(d) which limits relies by reference to the "voting power..directly possessed"

by the link company in relation to the claimant company. HMRC consider it possible that the DVA has had the effect of causing the voting power which would otherwise attach to the shares held by CKI1 to be transferred to HEH.

105. The Applicants' letter of 3 June 2016 indicates that, in practice, CKI1 never formally sought HEH's consent; permission was simply presumed because the relationship between Devin and HEH and the need for Devin and the CKI companies to vote in the same way for business to be carried meant that there was no realistic situation where it would have been in HEH's interests to deny CKI3 permission to vote.

106. The Applicants contend that the DVA does not, as a matter of law give HEH the power to control CKI3's votes and the question of why it was entered into does not change the legal effect of the agreement.

107. Ms White states:

"I consider that given that the terms of the DVA appear to have the potential to impact the test at s144(3)(d), I need to understand clearly why it was put in place, and what restrictions it has in fact placed upon CKI3's right to vote in order to test whether it does as fact (sic) or should affect the calculation of relief."

108. The questions regarding the DVA are also relevant to the arguments on section 155 as to whether persons owning less than 50% of the ordinary share capital of the claimant companies have control of the claimants. In this context, it is necessary for HMRC to argue that the DVA not only deprives CKI3 of its "voting power" but also empowers HEH to exercise those votes.

109. Ms White states:

"My grounds for keeping the enquiries open are…I consider that the terms of the DVA may enable persons that are not consortium members to control the company in the place of the consortium members. In order to determine whether this is the case…I need to understand clearly why the DVA was put in place, and what restrictions it placed on CKI3's right to vote in order to test whether the DVA does affect the control of UKPNHL… The question whether the DVA gives HEH the power to control CKI3's votes is a question of fact. Given the specific terms of the DVA, it is difficult to see what other outcome could result from the terms.

In respect of the commercial drivers…the increase in voting rights granted to CKI3 is the action that resulted in distorting the commercial power balance away from the 40:40:20 originally intended…It is possible that placing [the voting power] in the hands of HEH was a necessary step in restoring the balance of power…

It is critical therefore that HMRC fully understands why the DVA was entered into, and in practice, what restrictions it brings to CKI3's ability to cast its votes."

110. The Applicants contend that the DVA does not deprive CKI3 of its voting power and even if it did, it does not vest that voting power in HEH. Moreover, the construction of the DVA and its effect is a question of law and not, as HMRC

contend, a question of fact. The provision of further information about the reasons for entering into the DVA is not therefore relevant to the legal effect of the document.

111. Mr Peacock also observed that the questions actually contained in the TPNs are directed to the reasons why CKI3 decided to implement the DVA and the reasons why CKI3 agreed to surrender consent of its votes to a company that is not its parent. If HMRC consider that the question how the agreement operated in practice is relevant, they have not asked for that information. In any event, it seems to have been dealt with in the 3 June 2016 letter.

112. The final category of notice is the GN which related to certain resolutions which purported to be passed on 14 August 2012 and a further resolution in 2013.

113. The majority required to pass a resolution of UKPNHL was 75% . A Resolution was "passed" on 14 August 2012. Notice of the Resolution was not circulated to CKI3, although the company was entitled to receive notice. The Resolution was passed with only 50.6% of the votes being cast which was below the relevant threshold. A similar situation arose in 2013.

114. Ms White states:

115. *"The reason for requesting this information is because UKPNHL has consistently asserted that the 75% voting threshold is a key reason why control of the UKPNHL group is denied to the consortium members such that s146B will not apply to the claims to relief. If the provisions of the governing documents are followed, it follows that the passing of a resolution with only 50.6% of the votes being cast should not therefore have been possible. I wish to understand what processes the company has in place to ensure that its own governance processes are followed and why they were not followed on these occasions. An understanding of how the resolution came to be passed in this circumstance may give me an understanding of how the group was controlled, and how therefore the provisions of s146B may or may not apply to the claim."*

116. The Applicants, by a letter of 29 January 2016 explained that the two resolutions had not been validly passed under either the Companies Act 2006 (as they were special resolutions) or the company's Articles and that this was due to a company secretarial oversight. The effect of the resolutions not being passed with the requisite majority is that they lapsed. The issue of the 2012 Resolution was discovered and rectified and the 2013 invalid resolution is being dealt with.

117. So the Applicant's position is that the resolutions were not passed in a manner contrary to the company's governing documents, but that they were not passed at all, owing to an administrative error. Those errors have been or will be corrected so that the Resolutions are passed in conformity with the requirements of the Articles. The Applicants say the questions asked in the GN are not relevant as there is no governance issue or attempt or ability to pass resolutions otherwise than in accordance with the company's governing documents; there was an error which has now been or is being corrected.

Does the issue of the information notices preclude a closure notice?

119. Ms Lemos' next submission was that the mere existence of information notices which have not been complied with, appealed or otherwise dealt with, determines this application. The Tribunal's jurisdiction on a closure notice application is limited to ordering the closure of the enquiry within a specified period. Until the appeals against the information notices are heard, the Tribunal cannot set a timeframe for the closure of the enquiries and if the Tribunal cannot specify a period, it cannot direct closure.

120. Ms Lemos took me to HMRC's letter of 6 February 2017 which explained why HMRC had issued the information notices after the closure notice application had been made, especially as the Applicants had consented to the TPNs on the basis that HMRC would not do so. Essentially, HMRC's position was that unless and until closure notices were in fact issued, HMRC was entitled to continue with their enquiry and, where appropriate, exercise their information powers. In addition, they considered the issue of a closure notice premature and to wait until the closure notice application hearing would cause unnecessary delay.

121. Ms Lemos found support for this in Mr Justice Park's decision in *HM Revenue & Customs v Vodafone 2* [2005] EWHC 3040 (Ch). This case also concerned an application for a closure notice and we will return to it in another context later. The First Tier Tribunal had decided that in order for it to determine the matter, it needed to refer certain questions to the Court of Justice of the European Community (CJEC). HMRC objected and one of the grounds was that a referral to the CJEC would bring the enquiry to an end.

122. Park J. said:

"I also believe that there is nothing unreasonable, unworkable or disruptive in the result of the Special Commissioners' decision and in my agreement with it. Dr Plender said to me that the Special Commissioners' decision would have alarming consequences, but I do not agree. His submissions seem to assume that a result of the Special Commissioners' act in referring the question to the CJEC would be that the enquiry was brought to an end. …However, it is important to remember that the Commissioners did not accede to Vodafone 2's application for a closure notice to be issued. Rather the Commissioners adjourned the application, as they expressly stated in para 76 of their decision. It follows that the enquiry is still in existence. Whatever the Revenue were doing, or could have done, by reason of the enquiry being in progress, they can still do. In that connection I spell out three specific points.

[40] *First, the Revenue can serve an information notice under para 27 on Vodafone 2, and the reference which the Special Commissioners have made to the CJEC makes no difference. It is perfectly true that if the Revenue do serve a para 27 notice, Vodafone 2 will almost certainly appeal under para 28 and will advance in support of the appeal its argument that the CFC provisions cannot apply by reason of being incompatible with the EC Treaty. The Commissioners make observations to precisely that effect in para 65 of their decision. However, that would have been the position if the Revenue had served a para 27 notice before the Special Commissioners made the*

reference and it is still the position after the Special Commissioners have made the reference. The reference has made no difference to the ability of the Revenue to invoke their powers under para 27 if they want to do so….
[43] *I was told that the Revenue are worried about what the Commissioners did in this case, because they fear that many other corporate taxpayers in whose case enquiries have been commenced by notices under para 24(1) will attempt to bring the enquiries to an end by making para 33 applications to the Commissioners, and submitting that there is a point of law which shows that they cannot be taxable in any event. I ask: what is so wrong about that? para 33 is meant to be a protection to a taxpayer, by giving it a procedure whereby, if it believes that an enquiry is being inappropriately protracted and pursued by the Revenue, it can bring the matter before the independent and specialist tribunal. The Special Commissioners can, I believe, be relied upon to spot cases where the procedure is being abused and to give short shrift to applications in such cases. And I repeat the point that the making of a para 33 application does not halt the enquiry, either temporarily or permanently. Only a decision of the Commissioners to accede to a para 33 application can have that effect…. Sch 18 is, I believe, constructed so as to produce a reasonable balance. It imposes obligations on companies to make self-assessments of their own Corporation tax liabilities. It gives to the Revenue substantial powers to investigate returns and self-assessments which companies make. Conversely one would expect, and in my view one finds in para 33, a protection for companies that wish to question whether in their particular circumstances the use by the Revenue of some of their Sch 18 powers is, or continues to be, justified."*

118. This passage does indeed confirm that the fact that a closure notice application has been made does not halt the enquiry and HMRC can continue to use their information powers.
119. HMRC also argue that most of the questions in the information notices, those relating to the reasons and purpose of the various transactions, are directed to the application of section 146B and the Applicants have, in principle, conceded that these questions are relevant, subject to their arguments about the construction of section 146B.
120. In response to the last point, Mr Peacock observed that the key issue is that, on the Applicants' construction of section 146B, it is unnecessary to consider the Applicant's purpose and so the information requested is not relevant, although they agree that if that construction is wrong, purpose might be relevant.
121. Ms Lemos pointed out that the Third Party Notices can only be appealed on the basis that the burden on the taxpayer of providing the information would be unduly onerous. She argues that that the notices are to be appealed and that when those appeals are heard, the notices may be dismissed or varied and made less burdensome. She therefore says that the Tribunal is not in a position to take the burden of complying with the notices into account as part of the required balancing exercise, as the level of burden has not yet been finally determined.
122. She also referred to *Eclipse Film Partners 35 LLP v HMRC* [2009] STC (SCD)293where it was suggested that a taxpayer would reasonable require an enquiry to be concluded as expeditiously as possible where it was being denied a claim for repayment or relief for a substantial amount. In the present case, she

argued, effect has been given to the taxpayer's claim because it has been included in their tax return and stands unless and until it is denied, so the taxpayer is not out of pocket and HMRC should be allowed to ensure that their enquiries are properly completed.

123. Mr Peacock submitted that as a matter of principle, it cannot be right that an outstanding information notice always blocks the issue of a closure notice. The closure notice provisions are designed to provide a balance between the taxpayer's right to certainty and finality and HMRC's right to make legitimate enquiries into a taxpayer's tax position. To say that the issue of an information notice automatically bars the taxpayer from seeking a closure notice would negate that balance as it would enable HMRC to thwart a closure notice application by issuing an information notice as soon as the application is made.

124. In *Eclipse*, the company had applied for a closure notice and there were at the time, outstanding information notices under section 20 Taxes Management Act 1970 (the precursor to schedule 36) which had been issued to Barclays and one of its subsidiaries. There were also outstanding enquiries that HMRC had made of the IRS in the United States.

125. The special commissioner was considering whether the information requested was relevant and concluded that it was not and ordered that a closure notice should be issued. Mr Peacock relied on this as authority that the existence of an information notice does not automatically preclude the issue of a closure notice.

126. Both parties referred to different parts of the following passage from Vodafone 2 in their submissions on how the Tribunal should strike the balance between the taxpayer's need for certainty and HMRC's right to make legitimate enquiries and it is useful to set it out here.

"It is understandable, therefore if the commissioners are somewhat cautious as to when their enquiries may be regarded as sufficiently complete to enable them to issue a closure notice…

17. The taxpayer, on the other hand, has a legitimate concern that the enquiry is concluded as soon as it is reasonable so to expect, so that he has the certainty of knowing either that his return is accepted unamended, or that he may appeal so as to determine any matter of dispute identified in the closure notice. His right to apply to the general or special commissioners for a direction requiring that a closure notice be issued within a specified period is his protection against undue delay or caution on the part of the officer in bringing the enquiry to a close.

18. Self-evidently, the more complex the affairs of the taxpayer, the more detailed, wide-ranging, and, in practice, the longer will be the enquiry conducted by the commissioners before they are in a position to reach the conclusions required to issue a closure notice. Miss Wakefield also argued that where there is a very large amount of tax at risk (in this case in the order of £117m) that in itself requires the enquiry to be thorough, extensive and completed to their entire satisfaction before the commissioners issue a closure notice. …

19. The provisions of s 28B TMA 1970 are (as with the corresponding provisions relating to companies discussed in the case of Revenue and Customs Comrs v Vodafone 2 [2005] EWHC 3040 (Ch) at [44], [2006] STC 483 at [44]) 'constructed

so as to produce a reasonable balance', given these different interests of the commissioners and the taxpayer. It is implicit in the powers given to the general or special commissioners to give a direction requiring the issue of a closure notice, and is part of that 'reasonable balance', that a closure notice can be required notwithstanding that the officer has not pursued to the end every line of enquiry or investigation—what is required is that he should have conducted his enquiry to a point where it is reasonable for him to make an informed judgment as to the matter in question, so that, exercising such judgment, he can state his conclusions and make any related amendments to the taxpayer's return. The exercise of that judgment may require the officer to express his conclusions in broad terms, or even express alternative conclusions (see the observations made in the case of D'arcy v Revenue and Customs Comrs [2006] STC (SCD) 543, para 12)—which should at the practical level allow an officer of the commissioners to avoid the pitfalls identified in the Tower MCashback case of a closure notice too restrictively drafted in its conclusions."

127. Mr Peacock also took me to the decision in J*ade Palace Limited v Revenue and Customs Commissioners* [2006] STC (SCD0 419. In that case, HMRC had issued precursor letters, threatening to issue information notices, but had deferred the issue of the notices pending a closure notice hearing. The Special Commissioner said:

128. *"I accept that it was appropriate to defer the s 20 notice pending this hearing. It is not for me to decide whether consent will be given. Four months will in my view allow enough time to make a s 20 application and, if consent is given, for the information to be provided and considered. I have concluded that the enquiry into 2003–04 should also be closed within four months."*

129. So here it was contemplated that information notices might be issued even after the closure notice had been issued.

130. The closure notice procedure is part of a balancing exercise between allowing HMRC to pursue legitimate enquires and giving the taxpayer certainty and finality. If HMRC could prevent the issue of a closure notice by issuing an information notice, that would deprive the taxpayer of the protection intended to be afforded by paragraph 33 of Schedule 18.

131. Mr Peacock pointed to *Eclipse* and *Jade Palace* as cases where a closure notice had been directed even though there were outstanding or proposed information notices.

132. In the passage from *Vodafone 2* cited at paragraph 122, Park J contemplates that, during the period of the referral to the European Court (which was made in the course of a closure notice application) HMRC were entitled, among other things, to issue information notices. An *application* for a closure notice does not terminate the enquiry and whilst an enquiry is continuing HMRC can exercise all their relevant powers; this reflects a balanced system under which HMRC is entitled to pursue the enquiries they believe they need to make and the taxpayer is entitled to say that the continuance of the enquiry is unnecessary and it should be

brought to a close. It is then for the Tribunal to weigh all the relevant considerations and decide whether it is reasonable for the enquiry to continue or not.

133. The grounds on which an information notice may be appealed cannot affect the question whether the mere existence of the notice precludes the issue of a closure notice. The burden of complying with the information notice might be a factor in the overall consideration whether to direct the issue of a closure notice, but but that is not the point here.

134. The legislature cannot have intended that the protection afforded to the taxpayer by the closure notice procedure could automatically be negatived by the issue of an information notice and the authorities cited support this. Until the matter has been determined, HMRC are entitled to continue with their enquiries and this may involve the issue of information notices, but equally, the taxpayer is entitled to seek finality by applying for a closure notice. Even though it might be said that "effect" has been given to the claims for relief because they have been included in the tax return, that is the effect of any entry in a tax return. Until the claims have been allowed or denied, the taxpayer does not know how much money is available for investment or other purposes of the business which creates undesirable commercial uncertainty. A taxpayer who claims a relief and wants to know whether it is going to have to pay more tax than it anticipated or not is just as deserving of an expeditious conclusion to an enquiry as a taxpayer awaiting a claim for repayment.

135. I therefore conclude that the existence of the information notices in this case does not prevent my directing the issue of a closure notice.

The consent issue

136. Paragraph 3 of Schedule 36 Finance Act 2008 provides that HMRC can only give a Third Party Notice if the taxpayer agrees or the Tribunal approves it.

137. UKPNHL did indeed consent to the issue of the Third Party Notices to CKI3 and did not resile from that consent when HMRC asked for confirmation of the consent. Ms Lemos argues that by giving that consent, the Applicants have conceded that the information requested is required to check their tax position and that that is, accordingly, determinative of the application.

138. Paragraph 2 of Schedule 36 provides that an officer of HMRC can only issue a third party notice if *"the information or document is reasonably required by the officer for the purpose of checking the tax position of [the taxpayer]"*.

139. Paragraph 30 of schedule 36 provides: *"Where a person is given a third party notice, the person may appeal . . . against the notice or any requirement in the notice on the ground that it would be unduly onerous to comply with the notice or requirement."* So there is no right to challenge the contents of the notice.

140. This contrasts with a taxpayer information notice, where the taxpayer may appeal on any grounds against the issue of the notice or any of the requirements of the notice.

141. Paragraph 30(3) is also relevant in that it provides that there is no right of appeal against a third party notice if the Tribunal has approved the giving of the notice. So the right of appeal applies only where the taxpayer has consented to the notice.

142. The Group Notice has been appealed on the grounds that the information and documents are not reasonably required by an officer for the purpose of checking the tax position of any trading subsidiaries. Also, UKPNHL contended that the issue of the notices was premature in the light of the impending hearing.

143. I understand that the TPNs had not been appealed at the date of the hearing, but that they would be appealed and the Applicant's representative wrote to HMRC on 17 February 2017 explaining why the provision of the information would be onerous especially as the information would be redundant if it were decided that section 146B did not apply.

144. Had UKPNHL not consented to the issue of the TPNs, paragraph 3 of the schedule lays down certain requirements which must be met if the Tribunal is to give approval.

145. Subparagraph (3) provides:

"(3) The [tribunal] may not approve the giving of a taxpayer notice or third party notice unless—

(a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,

(b) the [tribunal] is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

(c) the person to whom the notice is [to be] addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,

(d) the [tribunal] has been given a summary of any representations made by that person, and

(e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents."

146. As noted, a TPN can only be challenged on the basis that it would be unduly onerous to comply with. It cannot be challenged on the grounds that the information is not reasonably required.

147. Ms Lemos submitted that by giving their consent to the issue of the notices they had accepted that the information requested in them is reasonably required. She argues that otherwise, it would enable the Applicants to appeal on grounds wider than the limited grounds provided in the legislation.

148. She then took me to the case of R (on the application of *Derrin Brother Properties Ltd and others) v Revenue and Customs Commissioners* [2014] EWHC 1152, a case on an application for judicial review of a third party information notice.

149. Simler J observed

150. "there is no statutory appeal against notices such as those presently in issue. The only available avenue of challenge generally open is judicial review. However, these are investigative powers and Parliament has in effect decided that once the officer and, on application to it, the tribunal, is satisfied that use of Sch 36 para 3(3) as a tool of the investigation is appropriate, it is not appropriate to provide an avenue of appeal about how the investigation should proceed. The courts should therefore be careful to avoid giving by the avenue of judicial review what is, in reality, an appeal against the tribunal's decision."

151. Ms Lemos suggested that by analogy, I should resist the Applicants' attempt to use these applications to constitute an indirect avenue for appeal.

152. Ms Lemos also referred to the case of *Joshy Matthew v HMRC* [2015] UKFTT 139(TC) and to certain obiter remarks which might indicate that the burden of proof in relation to an information notices appeal is on the Applicant.

153. Although consent was only relevant to the TPNs, Ms Lemos submitted that, to the extent that the GNs required the same information, the Applicants had implicitly acknowledged that the information was also reasonably required in that context.

154. In response, Mr Peacock strongly denied that the fact of consent to the issue of the notices amounted to an agreement that the information was reasonably required. The consent had been given on the basis that the information notices would not be issued until after this hearing when, he said, they would be shown to be not relevant. As we have seen, HMRC issued them anyway.

155. Mr Peacock further submitted that, by giving consent, the Applicants were giving themselves wider options to challenge the notices. Had they not consented, HMRC could have applied to the Tribunal for permission and the Applicants could only make representations, but they could not attend the hearing nor appeal if the Tribunal gave permission.

156. If, as they have done, they consented, they can, as they propose to do, appeal on the basis that they notices are unduly onerous to comply with. If the Tribunal confirms the notices and the Applicants do not comply, HMRC are likely to issue a penalty and the recipients can then appeal against the penalty. In the course of that appeal, they could challenge the validity of the notice, which will enable them to test the relevance off the information sought before the Tribunal. Mr Peacock relied on the case of *PML Accounting Limited* [2015] UKFTT 440 (TC). The Tribunal said:

"HMRC submit that any challenge to the validity of the Information Notice can only be made in an appeal under paragraph 29 of Schedule 36. The time limit for making such an appeal is limited by paragraph 32(1)(b), which provides that notice of appeal must be given within 30 days of the issue of the notice (subject to provisions for late appeals with the consent of HMRC or this Tribunal under section 49 TMA). HMRC submit that if PML wish to challenge the validity of the Information Notice, they should now submit a late appeal in accordance with the requirements of s49 TMA. HMRC will consider the late appeal, and if HMRC should decide not to accept it, PML would have the right to refer the matter to this Tribunal.

181.

We disagree with HMRC's submissions. This is an appeal by PML against penalties, and the onus of proof is on HMRC to demonstrate that the penalties have been assessed in accordance with the law. If PML can show that the Information Notice to which the penalties relate was not valid, it follows that the penalties are also invalid, and the appeal must succeed."

157. I observe that HMRC appealed PML Accounting to the High Court, which held, in a judgement released on 7 April 2017, after the date of the hearing in this case, that the Tribunal did not have jurisdiction in a penalty appeal to consider the validity of the notice. That, perhaps, does not matter; at the time when the decision to consent to the notices was made, the argument was available.

158. In any event, it is clear that the Applicants did not and do not agree that the information requested in the TPNs is reasonably required. The Group Notices are to be appealed. The questions relating to the invalid resolutions (which were not replicated in the TPNs) are agued to be not relevant. The rest of the questions addressed in the GNs are replicated in the TPNs and the Applicants' argument here is that the information is not reasonably required to determine its tax position. There are two additional questions in the TPNs relating to the DVA which are not included in the GNs, but I do not see that that affects the principle.

159. The Applicants have never conceded that the information required by the TPNs is reasonably required, but they recognise that their ability to appeal those notices is limited. The fact that they prefer to challenge the notices on the grounds available at a full hearing rather than simply making representations and taking their chances on an unappealable Tribunal decision is understandable. To have that opportunity to challenge, they needed to consent to the issue of the notices. Although they stood by their consent, it was always under sufferance and cannot, in my view, be regarded as an implicit admission that the information is reasonably required.

160. Nor do I consider that the consents in some way "tainted" the Applicants' proposed appeals in relation to the equivalent questions in the GN on the basis that the information is not reasonably required.

161. I accordingly find that the consents given by the Applicants to the issue of the TPNs do not amount to an admission that the information requested in them is reasonably required.

Can the Tribunal decide a point of law as part of a closure notice application?

162. The Applicants submit that on their interpretation of the consortium relief provisions and, specifically, section 144(3)(d), section 146B and section 155 Effect 2, the information requested in the information notices is not relevant and therefore HMRC do not have reasonable grounds for pursuing this information and I should direct the issue of the closure notice. Mr Peacock seeks to persuade me that the Tribunal has jurisdiction to decide the points of law in these circumstances. and that I should do so. Ms Lemos argues that even if the Tribunal has jurisdiction to decide points of law, it should not do so if it is not necessary or if it cannot or if certain other factors are present.

163. Mr Peacock began by taking me back to the *Estate 4*, case which is referred to above, as an example of a case in which the Tribunal decided a point of law in order to dispose of the closure notice application. Ms Lemos pointed out that it was not a particularly difficult point of law, but nevertheless, it was an example.

164. The principal authority on the Tribunal's jurisdiction to decide points of law in a closure notice application is *Vodafone 2 v HM Revenue and Customs* [2005] STC (SCD) 293. That case too was an application for a closure notice. HMRC were arguing that a particular company was a CFC. The applicant in that case argued that the UK's CFC legislation was incompatible with EU law and that the CFC rules were therefore not relevant to the company's liability, HMRC accordingly had no reasonable grounds for pursuing the enquiry and the Tribunal should issue a closure notice. The Tribunal decided that in order to determine the closure notice application, they needed to address the underlying legal question: were the CFC rules in breach of EU law and in order to ascertain the answer, they needed to refer the question to the European Court which they did.

165. The Special Commissioners said:

"We have no doubt that the issue of compatibility of the CFC legislation does need to be determined to enable us to give judgment on the application for a closure notice. If the CFC legislation is not compatible with Community law there are no reasonable grounds for not giving a closure notice. The enquiry in relation

to VIL's residence has no relevance to the applicant's tax liability apart from in relation to a possible liability under the CFC legislation."

166. HMRC appealed to the High Court on the basis, essentially, that the Commissioners should not decide points of law. If HMRC held a view of the law that was reasonable, that was sufficient to enable them to pursue their enquiry on that basis.

167. Park J. did not agree.

"Dr Plender's main ground of appeal is that the Special Commissioners had no power to make a reference to the CJEC at the stage in the dispute between the Revenue and Vodafone 2 which had been reached when the Commissioners did make the reference…. Dr Plender nevertheless submits that, a decision on that question was not necessary to enable the Special Commissioners to give judgment on the

application which they had before them. The application was made under the Finance Act 1988 Sch 18 para 33, which I have already quoted…
[35] *Dr Plender's case is that, because it was not known whether the CFC provisions in their application to CFCs resident in other member states were invalidated by articles of the EC Treaty, and because the Revenue's contention was that they were not so invalidated, the Special Commissioners ought to have been satisfied that the Revenue had reasonable grounds for not giving a closure notice. On the basis of that analysis it was submitted that Vodafone 2's application raised no question of Community law. There was therefore no power to make a reference. Rather the Commissioners should have dismissed Vodafone 2's application on the ground that, whatever the Community law position might eventually turn out to be, at the time of the hearing before them the Revenue did have reasonable grounds for not giving a closure notice.*
[36] *I understand Dr Plender's argument, but for myself I see the matter differently, and essentially in the same way as the Commissioners saw it. When the question is asked: "Did the Revenue have reasonable grounds for not giving a closure notice?" Dr Plender would answer: "Yes, because they did not know what the legal position on validity of the CFC provisions was." The Commissioners' answer, which in my judgment is an entirely appropriate one, is:*
"It depends on whether the CFC provisions are valid or not. We need to know the answer to that question, and when we do we will know whether the Revenue have reasonable grounds for not giving a closure notice. We cannot decide Vodafone 2's application now, but we will be able to decide it once we know whether the CFC provisions are valid or not."
[37] *In my judgment it is important not to be led astray by the special feature of this case that the question of the validity or otherwise of the CFC provisions could not be answered without a reference to the CJEC. Imagine a case where that is not so. Suppose that the Revenue have given notice under Sch 18, para 24 of an enquiry into a self-assessment tax return of a company. There is a critical issue of United Kingdom law with no Community law aspect to it. The company says that the law is ABC, on the basis of which there is no tax liability. But the Revenue says that the law is XYZ, on the basis of which there is a tax liability, or at least there might be. The Revenue therefore says that they consider in the fullest of good faith that they need to pursue their enquiry. The company applies under para 33 for a direction that the Revenue give a closure notice. At the hearing of the application, let it be assumed that the parties make entirely frank but opposing statements of their positions, as follows:*
The Company: "We agree that, if the law was XYZ, the Revenue would have reasonable grounds for not giving a closure notice, but we say that the law is ABC, and on that basis the Revenue have no reasonable grounds for not giving a closure notice."
The Revenue: "We agree that if the law was ABC, we (the Revenue) would have no reasonable grounds for not giving a closure notice, but we say that the law is XYZ, and on that basis we do have reasonable grounds for not giving a closure notice."
So it depends on whether the law is ABC or XYZ. Suppose further that the Commissioners consider themselves perfectly capable of hearing submissions on the law and deciding for themselves whether the law is ABC or XYZ. What are the Commissioners to do? The logic of Dr Plender's position is that they should say that

they are not going to decide whether the law is ABC or XYZ. Provided only that the Revenue think in good faith that it is XYZ, the Commissioners must dismiss the company's application. I do not believe that that is the true effect of para 33(3). If the reasonableness of the grounds for not issuing a closure notice depends on a question of law which the Commissioners can decide, surely the right course is for them to decide it. Or at the very least it must be open to them to decide it.
[38] *The special feature that the point of law in this case cannot be decided by the Commissioners, but has to be referred to the CJEC, cannot in my view make any difference. Conceptually the reference is the mechanism through which the Commissioners decide the point of law….*

[45] *Without para 33 a company might, perhaps, be able to ventilate its complaint through an application for judicial review, but modern systems of tax administration are likely to be complete in themselves…. I would expect a fair and balanced set of administrative provisions to provide a mechanism for Vodafone 2 to make its point and to have it heard. If a para 33 application is not that mechanism, it would appear that no mechanism (other than perhaps a judicial review application) exists. It would, in my view, be unsatisfactory if Sch 18 did not provide any recourse to Vodafone 2 at this stage"*

168. I have set out this passage at length because it makes two important points. First, if the outcome of the closure notice application depends on. a point of law, the Tribunal has jurisdiction to determine that point and the right course may well be for them to decide it. Secondly, para 33 is part of a system of fair and balanced provisions intended to protect the taxpayer by enabling it to challenge HMRC's continued use of its enquiry powers.

169. Lady Justice Arden in the Court of Appeal (*HMRC v Vodafone 2* [2006] EWCA Civ 1132) agreed:

"Paragraph 33 on its face, however, would seem to confer on the Commissioners a power to do anything that the Commissioners reasonably consider necessary to enable them to be satisfied as to the matters required by that paragraph. That interpretation also promotes the effectiveness of paragraph 33, which it may be presumed Parliament wished to achieve. On that basis it is legitimate to put the question in the following way, that is to ask whether there is anything in the wording of paragraph 33 to suggest that it does not confer jurisdiction to decide incidental points of law, that is points of law that need to be resolved in order to decide whether there are reasonable grounds for not giving a closure notice.
22. It is, however, relevant to ask whether the conclusion thus far that paragraph 33 confers jurisdiction on the Commissioners to decide incidental points of law is in some way inconsistent with the statutory scheme in the provisions of schedule 18 which I have set out above. If it is inconsistent, that may indicate that the conclusion thus far is wrong and that some other interpretation should be adopted. However, I do not consider that the statutory scheme mandates a different conclusion. On the contrary, it is difficult to see why Parliament should wish to limit the protection given to taxpayers by paragraph 33 to situations where the Revenue is pursuing enquiries into the facts which it can be shown are unfounded as a matter of fact, and not wish to

extend the same protection to cases where the Revenue is proceeding on the basis of a particular view of the law, to which the taxpayer raises a serious challenge which the Commissioners can conveniently deal with at that stage."

170. Mr Peacock pointed out that Arden LJ referred to the ability of the Tribunal to decide "points" of law. That is, the jurisdiction was not confined to the situation where the case turned on a single point of law.

171. Ms Lemos, rightly in my view, accepted that, in principle, the Tribunal does have jurisdiction to decide points of law, but argues that it must not exercise that jurisdiction if it is not necessary to do so or if it cannot, or if certain other circumstances apply.

Should the Tribunal exercise its jurisdiction to decide a point of law in this case?

172. The passage quoted above from *Vodafone 2* in the Court of Appeal refers to the requirement that the decision on the law must be "necessary". Ms Lemos submits that the existence of the information notices and in particular the fact that consent was given to the third party notices means that it is not necessary for me to decide the points of law that Mr Peacock invites me to decide (because the consent means that the Applicants accept that the information is reasonably required). It might also be unnecessary for the Tribunal to decide the point if HMRC have a settled view on all aspects of the law (which she says they do not).

173. Ms Lemos referred to Park J.'s comments in Vodafone 2 *"If the reasonableness of the grounds for not issuing a closure notice depends on a question of law which the Commissioners can decide, surely the right course is for them to decide it. Or at the very least it must be open to them to decide it."*. She emphasised that this indicates that the point must be one which the Tribunal *can* decide, and contends that in the present case, the Tribunal cannot decide the law in the absence of the relevant factual context.

174. In support of this, she referred to the House of Lords case of *Barclays Mercantile Business Finance Ltd. v Mawson* [2004] UKHL 51. Lord Nicholls of Birkenhead restated the "Ramsay Principle" as follows:

"The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found."

175. Ms Lemos submits that the points of law in this case and in particular, section 146B raise novel issues and involves difficult concepts such as what constitutes an "arrangement", what constitutes a "scheme" and how the "but for" test is to be

applied in the particular context which cannot be analysed in the abstract, but require highly specific, highly detailed enquiries into the facts. Accordingly, the Respondents must be permitted to conclude their investigation into the facts, as the facts themselves will assist in the correct construction of the statute.

176. Ms Lemos also referred to *Vodafone 2* in the Court of Appeal and to Arden L.J.'s remarks indicating that the fact that the Tribunal has jurisdiction does not mean that it has to exercise it and giving some guidance on the exercise of the jurisdiction. *"…the Commissioners will be in a position to prevent paragraph 33 being used by taxpayers improperly as a means of delaying Revenue enquiries"*. So the Tribunal should not exercise the jurisdiction if it considers that the taxpayer is seeking, improperly, to delay HMRC's enquiries.

177. Lady Justice Arden goes on to say "*a point of law for the purposes of paragraph 33 would in general have to be so fundamental as to be capable of bringing the enquiry to a halt if determined in a particular way"*.

178. It follows from this that the Tribunal should not decide one of the points of law if it is not decisive: the Tribunal can only order a closure notice in respect of the whole enquiry and cannot determine one point if there are other issues outstanding. This is supported by the obiter comments of the First Tier Tribunal in *Finnforest UK Limited v Commissioners for HMRC* [2011] UKFTT 342 (TC).

179. In the context of the Tribunal being in a position to prevent abuse, Lady Justice Arden says (in *Vodafone 2*) *"In the present case, the Commissioners took into account that the burden on the taxpayer of investigating the facts would be considerable …I agree that that is a relevant consideration in a decision whether to determine a preliminary point of law before dealing with a para 33 application."* Ms Lemos interprets this to mean that there is a presumption that the Tribunal will not decide the point of law unless the taxpayer can prove that the burden of investigating the facts will be considerable. In the present case, it is intended to appeal the relevant notices and the only ground on which they can be appealed is that compliance imposes an unduly onerous burden. As the TPNs may be varied on appeal to make them less onerous, Ms Lemos submits that this Tribunal is not in a position to include that factor in the balancing exercise.

180. Ms Lemos also submits that the amount at stake, more than £220 million with other claims in the pipeline, is highly relevant. She referred back to the passage from *Eclipse* referred to in paragraph 122 above and in particular, the comment that a taxpayer who is denied a claim for relief may be substantially out of pocket if a closure notice is delayed. She argues that that does not apply here as effect has been given to the Applicants' claims in that they have submitted their tax returns on the basis that the relief is due.

181. Ms Lemos also points out how exceptional *Vodafone 2* is and seeks to distinguish that case on the basis that no information notices had been issued in *Vodafone 2,* it was necessary and found possible for the point of law to be decided in order to decide the application, the point of law was fundamental to the whole enquiry, it could be decided by reference to hypothetical facts and there was a compelling reason for the reference to the European Court as it was desirable for the judges in the *Cadburys Schweppes* case to be aware of the reference. HMRC

argue that in this case, the existence of the information notices has an impact on the Tribunal's role, the legal issues cannot be decided on the basis of hypothetical facts and HMRC's ongoing enquiries are objectively justifiable.

182. In response, Mr Peacock submitted that the lack of an information notice in *Vodafone 2* was not a factor relied on by Lady Arden. There was at least one other reported case where the Tribunal had decided a point of law because it was fundamental to the enquiry; *Estate 4.* Ms Lemos argued that it made a difference that *Vodafone 2* was about European Law and involved a reference to the European Court. Mr Peacock pointed out that both the High Court and Court of Appeal in that case had made it clear that the same approach would be adopted in relation to a domestic matter. Mr Peacock further argues that in this case also, the basic facts have been agreed and this is a sufficient basis on which to apply the law, taking account of the "Ramsay Principle" as enunciated in the *BMBF v Mawson* case which requires a purposive construction of the law to be applied to the "facts viewed realistically".

183. He further argues that the legal issues in this case are fundamental to the enquiry and that HMRC had formed a settled view of the law as is stated in their skeleton argument. He also suggests that Lady Arden's comments referred to in paragraph 179 above simply means that the severity of the burden of compliance is a relevant factor, not that the Tribunal can only decide a point of law if it is proved that the burden would be considerable.

184. As to effect having been given to the Applicants' claims, Mr Peacock says claims are normally made on the assumption that they are good and if HMRC wish to challenge them they can do so by issuing a closure notice.

185. Whilst he accepts that tax was a factor in structuring this complex deal, he expressly denied Ms Lemos' suggestion that the Applicants had a tax advantage purpose, such as to satisfy the requirements of section 146B.

186. Other matters raised by Ms Lemos such as the identification of the "arrangements" and the application of the "but for" test are questions of law and so not relevant to an investigation of the facts.

187. I have already determined that the existence of the information notices does not preclude the issue of a closure notice and I do not consider that the absence of information notices in *Vodafone 2* is material in considering whether the Tribunal can decide a point of law in this case.

188. I have also decided that the fact that the Applicants gave consent to the issue of the TPNs does not amount to an agreement that the questions asked are reasonably required. As to the relevance of the burden of compliance, I understand Lady Arden to be saying that it is a factor to consider, in that a decision on a particular point of law may render it unnecessary to proceed with an onerous investigation of the facts. I do not believe she intended to imply that the Tribunal could only decide the point of law if it were proved that the burden of compliance would be unduly onerous.

189. Ms Lemos argued that HMRC must be allowed to continue its enquiry into the detailed facts in order to apply the "Ramsay Principle" as the facts will assist

in the construction of the legislation. However, the focus of the information notices are not *what* happened-facts, but *why* things happened-which goes to reasons and purposes. The Applicant's Skeleton Argument included a schedule of "background facts" which were essentially agreed facts-what actually happened-which I have set out above. I therefore consider that the factual context is sufficiently well established to enable the legislation to be applied to it.

190. The crux of this matter is whether the legal point or points are fundamental to the determination of the enquiry. That is to say, would a decision, one way or the other enable me to conclude either that HMRC did have reasonable grounds for continuing the enquiry, or alternatively, that they did not.

191. In approaching this question, I take as the starting point the GN and TPNs themselves. These set out what HMRC say they still need to know in order to conclude the enquiry. Ms Lemos said on several occasions that HMRC still needed to know the "facts" but is is unclear what specific information was required. She did say that the Respondents wanted to know how the DVA had operated in practice, but they had not asked this and, in any event, they had already been told the answer: consent was never even sought, it was simply assumed. The questions in the GN and TPNs are all concerned with the reasons and purposes behind certain actions.

192. It is now appropriate to consider what the points of law at issue are, in order to determine the relevance of the information notices and, accordingly, whether I should decide any or all of those points of law.

Summary of the technical arguments

193. I summarise the technical arguments on each of the relevant provisions below.

Section 144(3)(d)

194. Section 144(3)(d) is set out in paragraph 44 above. It enumerates a series of tests to determine the amount of consortium relief which may be claimed by a claimant company. One has to compute certain "proportions" by reference to ordinary share capital (for taxation rather than company law purposes), profits available for distribution, assets available on a winding up and "the proportion of the voting power in the claimant company that is directly possessed by the surrendering company". The claimant company's claim is limited by reference to the lowest of these proportions.

195. It is common ground that it is the last of these proportions which is relevant.

196. The question to be addressed is whether the effect of the December Voting Agreement is to deprive CKI3 of its "voting power" in UKPNHL so that so that the proportion is reduced from 74.6%.

197. Mr Peacock argues that there is no overarching requirement for "identity" between the claimant and surrendering companies. The level of involvement needed is determined only by the statutory tests. In that context, he argues that the effect of the DVA is a question of law (which he invites the Tribunal to decide) and that, as a matter of law, the "direct possession of the voting power" remains

with CKI3. Even if CKI3 is deprived of its voting power (which he argues is not the case) that power does not go anywhere else but remains in limbo so that the CKI companies have 49.86% of 75.26% of the votes, that is 66.25% as CKI3's votes are simply ignored.

198. Ms Lemos, first draws a distinction between voting "power" and voting "rights" and submits that the effect of the DVA is to deprive CKI3 of its voting power. She submits further that the question whether the DVA does have that effect is a matter of fact and degree and that is why HMRC need to conduct further enquires. If as the Applicants have stated, there is no practical likelihood of HEH exercising its powers under the DVA, HMRC wish to know what its purpose is. Ms Lemos acknowledged that HMRC have a settled view of the legislation, but do not yet know how it applies to the facts of the case. The requests for information are directed to understanding how the DVA operated in practice as, she submits, this ultimately determines the question whether CKI3 was dispossessed of its voting power.

199. She argues it is necessary to look at the beneficial as opposed to the legal entitlement to vote and that the use of the expression "directly possesses" voting power requires one to go beyond seeing who has the legal right to vote and examine whether the ability to vote has been neutered by the DVA or otherwise.

200. She goes on to say that the effect of the DVA is not only to deprive CKI3 of the voting power, but to confer that power on HEH, so that the CKI companies' share of the votes is reduced to 49.86% and that is the "ownership proportion for the purposes of section 144.

Section 155 Effect 2

201. The section is set out at paragraph 58. It applies where there are arrangements which have the effect that persons owning less than 50% of the ordinary share capital of the trading company have control of it.

202. It is common ground that this "Effect" can only come about if, in addition to CKI3 being stripped of its voting power, that power is transferred to HEH.

203. This requires one to add the interests in the ordinary share capital of Eagle (0.8%), Devin (1.6%) and CKI1 (33.6%) to HEH's 0%, which gives 36%. If one then treats HEH as being entitled to CKI3's 24.7% of the votes, the total votes exercisable by HEH, Devin, Eagle and CKI1 becomes 75.3%. As the voting threshold for resolutions is 75%, that gives that grouping of companies control of UKPNHL.

204. Mr Peacock argues that that is simply not right. The effect of the DVA is a question of law, and even if it could be argued that it deprived CKI3 of its voting power, the consent requirement in the DVA cannot operate to transfer the power to the party whose consent is needed.

205. Ms Lemos argues that the effect of the DVA does confer CKI3's votes on HEH and that this is not just a matter of construing the document, but HMRC need to know about the purpose of the DVA, the facts known to the parties when it was agreed, any other parallel understandings or agreements so that they can understand how the agreement operates in practice.

Section 146B

206. Section 146B is set out at paragraph 50.

207. There are three elements which must be satisfied before the section applies:

1. there must be arrangements which enable a person to prevent consortium members (including the link company) from controlling the claimant;

2. those arrangements must be such that consortium companies would, but for the arrangements, control the claimant; and

3. the arrangements form part of a scheme, one of the main purposes of which is to enable the claimant company to obtain a consortium relief advantage.

208. All three conditions must be satisfied for the section to apply.

209. Ms Lemos clarified that the elements that HMRC argue constitute the "arrangements" are the increase in the voting threshold to 75% and the DVA.

210. Initially, Ms Lemos also suggested that a quorum requirement in the October Articles which would have required Devin, CKI1 and Eagle to be present to achieve a quorum was also part of the arrangements. Mr Peacock pointed out that their absence did not necessarily prevent a resolution being passed and their presence did not necessarily mean it would be passed and it was agreed that the quorum requirement was not significant. Ms White, in her witness statement, also indicated that the increase in the voting rights of the CKI companies through the restructuring of the share rights and issue of the preference shares were part of the "arrangements" to be considered.

211. Mr Peacock submits that conditions 1 and 2 are not satisfied and it is therefore unnecessary to enquire whether a main purpose was to obtain a tax advantage. He argues that the arrangements identified do not enable another person to prevent the CKI companies having control.

212. A further point of disagreement between the parties is the meaning of the "but for" test. Mr Peacock submits that this requires a loss of pre-existing control. As the CKI companies never had control, because they had only 49% of the votes when the voting threshold was 50% and 74% of the votes when the voting threshold was 75%, the arrangements did not cause a loss of control.

213. Ms Lemos argues that the "but for" test does not require there to be pre-existing control. It is a snapshot test: one has to identify the arrangements and see whether, if those arrangements are stripped away, the CKI companies would have control. She submits that if the increase in the voting threshold and the DVA are taken away, it leaves the CKI companies with 74% of the votes in circumstances where control, being the ability to pass resolutions, can be achieved with 50% of the votes.

214. She goes on to argue that by virtue of the 75% threshold, the CKI companies cannot pass a resolution without the involvement of Devin or Eagle so that Eagle or Devin is enabled to prevent the CKI companies from controlling UKPNHL. Ms

Lemos further submits that if the DVA operates so as to deprive CKI3 of voting power, then HEH is enabled to prevent the CKI companies exercising control as they would otherwise possess 74.6% of the votes and could pass an ordinary resolution, (with a 50% threshold) but HEH could prevent that by denying consent. If it did so, the CKI companies would have only 49.9% of the votes. Ms Lemos concedes that the DVA is not a relevant part of the arrangements if the Applicants are right about the way the DVA operates.

215. In summary, Ms Lemos contends that conditions 1 and 2 are satisfied and therefore HMRC are entitled to pursue enquiries which are directed to establishing whether the third condition is satisfied, that is, whether there is a main tax advantage purpose to the arrangements.

216. So we have a situation where both parties agree that if conditions 1 and 2 are satisfied, condition 3 is relevant and the information required by the information notices (or at least, most of it) is relevant to the enquiry. If this is the position, HMRC have reasonable grounds to continue the enquiry and I should not direct the issue of a closure notice. If they are not satisfied, questions relating to purpose are not relevant.

217. Ms Lemos submits that conditions 1 and 2 are satisfied but Mr Peacock contends that they are not.

Discussion

Section 144(3)(d)

218. The provisions of section 144, on their face, require a mechanical application of a series of tests to a series of prescribed relationships between the link company and the claimant company. Whilst those measures may well be indicia of the level of connection between those companies, as we have seen from the *BUPA* and *Gemsupa* cases, there is no overarching requirement that there be a particular kind of involvement or connection. Parliament has chosen to define the required level of involvement, purely by reference to the arithmetical tests. It may also be that Parliament considered that the section needed strengthening and so added paragraph (d) to sub-section (3), but that still does not introduce any additional requirement over and above the application of the tests themselves.

219. I consider that the construction of the December Voting Agreement is a question of law. It does not seem to me that a further understanding of how it applies in practice will assist in determining what it means as a matter of law. In any event. the questions about the DVA contained in the TPNs concern the reasons for making the relevant decisions and not the practical operation of the agreement.

220. I therefore conclude that in relation to section 144(3)(d), the Respondent's continuing enquiries as set out in the TPNs are not reasonably required to enable it determine the Applicants' tax positions. Ms Lemos acknowledged that HMRC have a settled view on this piece of legislation and the proper place for that view of the law to be tested is in any substantive appeal which may follow the conclusion of the enquiry.

221. It is not, accordingly, "necessary" for me to decide the construction of section 144(3)(d) in order to dispose of the closure notice application and I do not do so.

Section 155 Effect 2

222. Section 155 Effect 2, essentially raises the same issues of law as section 144(3)(d) except that the Respondents must argue that, in addition to depriving CKI3 of its voting rights, the DVA also has the effect of transferring those rights to HEH. Ms Lemos submits that this is a highly fact-dependent issue and does not necessarily turn on the construction of the voting agreement in isolation. It seems to me that the question whether CKI3's votes have been transferred to HEH by the DVA is a matter of law, not fact. If the Respondents are concerned that there may be parallel agreements or understandings which affect the operation of the DVA, they have not asked questions which are relevant to that matter and I do not agree that the questions they have asked about the reasons for the DVA would assist.

223. For these reasons and those set out above in relation to section 144, I do not consider that the questions asked in the TPNs are reasonably required in order to determine whether section 155 Effect 2 applies.

224. I therefore conclude, in relation to section 155 also, that I do not need to decide the issue of law in order to decide whether to direct the issue of the closure notice and that the outstanding questions in relation to that section do not give HMRC reasonable grounds for not giving a closure notice.

Section 146B

225. The questions asked in the information notices, except for those contained only in the Group Notice, are all directed to understanding the reasons for the implementation of the various transactions comprised in the structuring and the restructuring of the deal between the parties.

226. Before considering section 146B, it is convenient to deal with the questions in the GN which were directed to the invalid written resolutions in 2012 and 2013. The Respondents were concerned that UKPNHL was ignoring its own governance documents and passing resolutions in a way not contemplated by the Articles. The concern was that this might indicate that other aspects of the governance and administrative procedures might also be operated otherwise that in accordance with the company's constitution.

227. I am satisfied that those resolutions were not, in fact, passed and that omission to notify all members and pass them by the required majority meant that they were invalid. I also accept that this arose as a result of administrative error and not through an attempt to circumvent or ignore the company's constitution. I understand that, on discovering the errors, the situation was rectified.

228. On this basis, I do not consider that these questions provide reasonable grounds for not giving a closure notice.

229. Which leaves the questions about the purpose of the transactions as the only ones which might constitute reasonable grounds for continuing with the enquiry.

230. Section 146B *does* include a purpose test. If the arrangements are of the prescribed sort, one has to ask whether those arrangements form part of a scheme the main purpose or one of the main purposes of which is to obtain a Group Relief advantage. So the critical question is whether the "arrangements" in the present case are of the prescribed sort. If they are, then HMRC are entitled to to continue their enquiries in order to ascertain whether the purpose of the arrangements is to obtain a tax advantage. If the arrangements are not of the relevant sort, then further enquiries are unnecessary and HMRC should give the closure notice.

231. Ms Lemos says the arrangements are of the relevant sort. Mr Peacock says they are not. But both agree that if the purpose test is applicable, the enquiry should be allowed to continue.

232. I have concluded that none of the other issues discussed above provide reasonable grounds for the Respondents to continue with their enquiries which means that this issue: the relevance of purpose, is fundamental to the enquiry. If the Applicants' construction of section 146B is correct, purpose is not relevant. If the Respondent's interpretation is correct, purpose is relevant. This is precisely the sort of question which Park J had in mind in *Vodafone 2*. If the Tribunal decides the question of law, it will determine the application for the closure notice.

233. I therefore conclude that this is one of those rare cases where the Tribunal not only has jurisdiction to decide the law, but can and should do so.

234. Section 146B applies if the following conditions are met:

"(2)…(b) during any part of the overlapping period, arrangements within subsection (3) are in place which enable a person to prevent the link company, either alone or together with one or more other companies that are members of the consortium, from controlling the claimant company.

(3) Arrangements are within this subsection if—

(a) the company, either alone or together with one or more other companies that are members of the consortium, would control the claimant company, but for the existence of the arrangements, and

(b) the arrangements form part of a scheme the main purpose, or one of the main purposes, of which is to enable the claimant company to obtain a tax advantage under this Chapter."

235. Sub-section (3) sets out the type of arrangements which are the subject of the section. There are two elements to this. First, the arrangements must be such that the CKI companies would control the claimant companies "but for" the existence of the arrangements. Secondly, the arrangements must be part of a scheme which has as a main purpose, the securing of a tax advantage.

236. If both those elements are present, one must then ask, as required by sub-section (2)(b), whether the effect of the arrangements is to enable a person (or persons) to to prevent the CKI companies from controlling the claimant companies.

237. The definition of "control" is that set out in section 1124 of the Corporation Tax Act 2010, which provides:

"In relation to a body corporate ("company A"), "control" means the power of a person ("P") to secure—
(a) by means of the holding of shares or the possession of voting power in relation to that or any other body corporate, or
(b) as a result of any powers conferred by the articles of association or other document regulating that or any other body corporate,
that the affairs of company A are conducted in accordance with P's wishes."

238. The starting point is therefore the ability to pass an ordinary resolution which, under the terms of the December Articles, requires a 75% majority.

239. Ms Lemos drew my attention to the case of *Steele v EVC International NV* [1996] STC 786 which held that this was the case even though the law required a 75% majority to pass a special resolution.

240. There were submissions about the impact of the "reserved matters" provided for in the Shareholders' Agreement which required an 80% majority or unanimity in relation to certain commercially critical decisions. Mr Peacock queried how it could be said that voting control was "control" for these purposes in the light of the Shareholders' Agreement. Ms Lemos' position was that to the extent that those agreements might be said to affect control, they too were part of the arrangements and so could be discounted in considering who had control,

241. At all events, the arguments on the control issue for section 146B purposes focussed on the voting thresholds and I will assume that the relevant test is that of voting control in a general meeting.

242. Section 146B(3) requires one to consider a hypothetical situation: would the CKI companies control the claimants "but for" the existence of the arrangements?

243. So the first question is: what are the arrangements? Ms Lemos submitted that they consisted of the increase in the voting threshold from the original 50% to 75% and the December Voting Agreement. There had been a suggestion that the changes to the quorum requirements were also part of the arrangements, but Ms Lemos agreed that they were not in fact relevant. Ms White had also submitted that the increase in the voting rights was also part of the arrangements, but this was not further discussed in argument. Mr Peacock framed his submissions on the two elements identified. If the increase in the consortium's voting rights was part of the arrangements this would, if anything, be favourable to the Applicants.

244. Ms Lemos says that the enquiries needed to identify the arrangements are not yet complete and there may be arrangements, understandings or practices not yet disclosed. If that is so, the information notices do not address the point. HMRC have had ample time to raise any further questions they consider they need answered.The enquiries have, in relation to the earliest period, been going on for well over three years. HMRC have only recently issued the information notices. They should, by now, have identified any additional aspects of the case they wish to know more about and could have included them in the information notices which they have issued.

245. The arrangements identified for present purposes are the increase in the voting threshold to 75% and the December Voting Agreement and I will proceed

on this basis. Ms Lemos relies on the House of Lords case of *Pilkington Bros v Inland Revenue* [1982] 1 W.L.R. 136 to establish that articles of association can constitute an arrangement. That does not, of course, mean that they must be an arrangement in every case.

246. Each party's approach to the relevance of the DVA as an element of the arrangements assumes that their interpretation of the way in which it operates is right. The arguments on section 144 are relevant here, but the question is not quite the same. Ms Lemos concedes that if the Applicants are right about the effect of the voting agreement it is not a relevant arrangement.

247. HMRC argue that the mere existence of the DVA does indeed deprive CKI3 of its votes (and gives them to HEH). That argument was used in relation to the question whether CKI3 "directly possessed the voting power" in relation to its shares. A different question must be asked in the current context. The mere existence of the DVA does not prevent CKI3 from voting. If HEH consents, it can vote as it wishes. Mr Peacock argues that even if HEH does not consent, CKI3 can still vote as it wishes.

248. In relation to the ability of CKI3 to vote in the light of the DVA, Mr Peacock took me to several authorities and in particular, *Russell v Northern Bank Development Corp Ltd and others* [1992] 3 All E R 161, a House of Lords case, and *J Bibby & Sons Ltd. v Commissioners of Inland Revenue* 29 TC 167, also a House of Lords case. *Russell* concerned a situation where the shareholders were constrained by shareholders' agreement and the question was whether that was a fetter on the ability of the company to increase its share capital. *Bibby* turned on whether votes which directors held in a trustee capacity counted in determining whether a company was a "director-controlled" company. The House of Lords held in each case that the external obligations were not binding on the company itself and votes exercised in breach of those obligations were still to be taken into account in determining control.

249. Lord Russell, in Bibby said:

250. "*For the purpose of such a test, the fact that a vote-carrying share is vested in a director as trustee seems immaterial. The power is there, and though it be exercised in breach of trust or even in breach of an injunction, the vote would be validly cast vis-a-vis the company, and the resolution until rescinded would be binding on it."*

251. Lord Macmillan, quoting Sir George Jessell MR in the Court of Appeal said

252. " *a shareholder may be bound under contract to vote in a particular way …But with such restrictions the company has nothing to do. It must accept and act upon the shareholder's vote, notwithstanding that it may be given contrary to some duty which he owes to outsiders. The remedy for such breach lies elsewhere."*

253. And Lord Simonds added (though there seen to be some words missing in the report):

"*…the Crown's contention cannot be sustained. chose who by their votes can control the company do not the less control it because they may themselves be amenable to*

Some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation, whether of conscience or of law."

254. These authorities make it clear that for the present purposes, that is, determining who has control of UKPNHL, CKI3 remains capable of exercising its votes and UKPNHL must count those votes if cast, even if the votes were cast in breach of the December Voting Agreement.

255. The DVA is not therefore a relevant part of the arrangements.

256. The relevant arrangement is accordingly the increase in the voting threshold to 75%.

257. The next, and perhaps most difficult question, is: what does "but for" mean.

258. Mr Peacock argued that the test requires a loss of pre-existing control. He says that the natural reading of sub-section (3)(b) requires one to look at the control that was in place and then consider the effect of the identified arrangements and consider the hypothetical question of who would control without those arrangements. Or to put it the other way round, one has to look at the actual arrangements which are in place and analyse who would control in the absence of those arrangements. So one removes the arrangements from the analysis in order to identify who did, and who would otherwise continue to, control the company if the arrangements had not been put in place that is to say, who would control "but for" the arrangements.

259. If that is the correct construction, our "arrangements" do not fall within the type of arrangements contemplated by section 146B(3) because the CKI companies did not have control at the outset, nor was there any point when they did have control, so they could not have lost control they never had.

260. Ms Lemos' submits that there is nothing in the wording of section 146B which requires there to have been pre-existing control. The "but for" test does not require an enquiry into whether it is the arrangements which have caused a loss of control. All that has to be shown is that, absent the arrangements, "but for" the arrangements, control would exist. So the analysis involves identifying the arrangements and then stripping them away to see who has control.

261. Ms Lemos also submits that section 146B is an anti-avoidance section and should not be narrowly construed.

262. Ms Lemos' position is that, with the arrangements in place, the CKI companies have 74% of the votes (if Mr Peacock is right about the DVA) and 49% of the votes (if she is right) and the voting threshold is 75%. So the consortium companies do not have control.

263. If one takes away the arrangements, whether the increase in the threshold alone or that increase and the DVA, the consortium companies have 74% of the votes and the voting threshold is only 50% so the CKI companies have control. It follows, she submits, that they "would control the claimant, but for the arrangements".

264. To summarise, HMRC's view is that one must consider a world in which the voting threshold was not increased, so the voting threshold remains at 50% and then ask, "who controls UKPNHL?"

265. Whatever view is taken of the operation of the DVA, CKI3 can exercise its votes in this scenario, either because the DVA does deprive CKI3 of its votes and so must be ignored or because it is not a relevant arrangement as it did not deprive CKI3 of its votes for this purpose in any event.

266. But for the arrangements, the consortium companies would have 74% of the votes and the voting threshold would be 50%, so the consortium companies would have control.

267. I agree with Ms Lemos that the language of section 146B(3)(a) does not require pre-existing control. The purpose of section 146B is to prevent consortia and others implementing arrangements of the prescribed kind which confer a tax advantage. The arrangements may be put in place at the outset, before anyone had any control to lose. The enquiry demanded by section 146B(3)(a) is whether there are arrangements, and if so, whether the consortium would control the claimant if the arrangements were not there.

268. But that is not the end of the matter. Even if the arrangements fall within sub-section 3(b), sub-section (2) must also be satisfied. This requires that the arrangements in question *"enable a person to prevent the link company, either alone or together with one or more other companies that are members of the consortium, from controlling the claimant company"*. In our terms, do the arrangements enable someone to prevent the CKI companies from controlling UKPNHL?

269. Ms Lemos' position is that HEH and Devin or HEH and Eagle are able to prevent the CKI companies from having control by virtue of certain provisions of the October Articles. By virtue of the 75% threshold, no resolutions may be passed by the consortium companies without the involvement of Devin or Eagle. So Ms Lemos argues that the increase in the voting threshold prevents the link companies (the CKI companies) from controlling UKPNHL.

270. In addition, on the Respondents' interpretation of the DVA, HEH is always a person who can prevent control because it can prevent CKI3 from exercising its votes, which reduces the consortium votes to 49% so they cannot pass a resolution even where the threshold is 50%. The involvement of either Devin or Eagle is still required. She submits that the reference to "person" in section 146B(2) can, on the basis of authority and the Interpretation Act 1978 be construed to include "persons" in the plural. I do not think that is a controversial point.

271. Mr Peacock submits that the arrangements, even if one includes the DVA on the basis of the Respondents' view of it, do not *enable* any person or persons to *prevent* the consortium controlling the claimant. One has to look at the world as it is, with the arrangements in place and ask whether the arrangements enable a person to prevent the consortium exercising control. Whatever action HEH and/or Devin or Eagle take, together or singly, they cannot *prevent* the CKI companies

from exercising control because, in the real world, the CKI companies do not have, and never had, control in the first place.

272. I agree with Mr Peacock that section 146B(2) does require one to look at the circumstances as they exist, including the arrangements. So the CKI companies have 74% of the votes and the threshold for passing a resolution is 75%. The consortium does not have control of UKPNHL.

273. If either Eagle or Devin vote with the CKI companies they could pass a resolution. But this does not mean that if both Eagle and Devin vote against the consortium it can be said that the arrangements (the increase in the threshold) have "enabled them to prevent" the CKI companies exercising control because they simply do not have control. That is the position in any company where a shareholder has, or group of shareholders have, a minority interest under the Articles of Association. By definition, they cannot control the company. It is pushing the language of subsection (2) too far to say that the ability of the other shareholders to vote against the minority enables them to prevent the minority from controlling the company.

274. For the same reason, HEH is not enabled to prevent the consortium from controlling the claimant. As set out above, I have decided that for the purpose of determining who controls UKPNHL, the existence of the DVA would not prevent CKI3 from exercising its votes. On this basis, the CKI companies together do not have control in the circumstances as they exist, as they only have 74% of the votes and the threshold is 75%.

275. Even if the effect of the DVA is to enable HEH to deprive CKI3 of its votes, it would not enable HEH to prevent the consortium controlling the claimant because the consortium does not have control before HEH takes any action. On this assumption, HEH could only prevent control if the threshold was still 50% and it is not. The "arrangements" are the increase in the threshold to 75% and one must take those arrangements as being "in place" for the purposes of subsection (2) i.e. one must consider whether someone is enabled to prevent control where the voting threshold is 75%.

276. Whether one considers the increase in the voting threshold alone, or together with the DVA, no person or persons is or are enabled to prevent the CKI companies from exercising control of the claimants.

277. I therefore conclude that the requirements of section 146B(2) are not satisfied.

278. Although the arrangements are of the type required by section 146B(3)(a), they do not have the effect required by section 146B(2). So section 146B as a whole cannot apply. This makes it unnecessary to enquire into the purposes of the arrangements.

279. The Respondents have been enquiring into these matters for some time. It is right that they should conduct thorough enquiries in order to determine whether a relief which is claimed is indeed due, especially as very substantial amounts of tax are at stake.

280. They have asked many questions and the Applicants have provided much information. HMRC considered that they need more information and they issued

their information notices accordingly, even though the Applicants had already made the present application for a closure notice. They must therefore be taken to have included in those information notices any matters which they consider are relevant to enable them to conclude their enquiry. I have dealt with the questions about the invalid resolutions above and I do not consider that further investigation of this is reasonably required. The remaining questions relate to the Applicants' and the consortium companies' reasons and purposes for doing various things and this can only be relevant in the context of section 146B(3)(b) and establishing whether the arrangements were part of a scheme the main purpose or one of the main purposes of which was to enable UNPNHL and its subsidiaries to achieve a tax advantage.

281. I have determined that section 146B does not apply to the arrangements and accordingly, the Respondents cannot reasonably require information about the purposes of the arrangements. Such information cannot be relevant to the enquiry and cannot constitute reasonable grounds for not issuing the closure notice sought by the Applicants.

Decision

282. For the reasons set out above, I am not satisfied that HMRC have reasonable grounds for not giving a closure notice within a specified period.

283. Accordingly, I direct that an officer of the Commissioners issue a closure notice within 30 days of the date of release of this decision, informing the Applicants that she has completed her enquiries into the periods of account ended 31 December 2011, 2012 and 2013 and stating her conclusions.

284. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE
RELEASE DATE: 13 June 2017