Neutral Citation: [2025] UKFTT 00703 (TC)

Case Number: TC09551

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sitting at Taylor House, London EC1

Appeal reference: TC/2023/07750-07753

CORPORATION TAX – Corporation Tax Act 2010 - consortium relief – Issue 1 concerned the ownership proportions in s144(3)(b) and (c), read with s165, 166 and 167(2)(b) – how to apply the provisions where there are three "link companies" and the first owns the second and the second owns the third ("tower" structure) – Held: provisions to be applied to multiple link companies collectively (as opposed to computing ownership proportion on strictly solus basis and aggregating results, leading to double counting and proportions in excess of 100%) – s6 Interpretation Act 1978 applied – purposive interpretation applied – Issue 2 concerned s146B - whether article establishing 75% voting threshold formed part of a scheme with tax avoidance main purpose – Held: the scheme of which the article formed part was the whole corporate structure and obtaining enhanced consortium relief was a main purpose of the corporate structure – appeal dismissed.

Heard on: 17-19 and 25-27 March 2025
Judgment date: 10 June 2025

Before

TRIBUNAL JUDGE ZACHARY CITRON

Between

(1) EASTERN POWER NETWORKS PLC
(2) SOUTH EASTERN POWER NETWORKS PLC
(3) LONDON POWER NETWORKS PLC
(4) UK POWER NETWORKS (TRANSPORT) LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nicola Shaw KC and Nicholas Macklam, instructed by ADE Tax

For the Respondents: David Ewart KC, Marika Lemos KC, Aparajita Arya and Josh Neaman of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. References in what follows to

(1) **sections** (or **s**) and **Parts** are to sections, and Parts, of Corporation Tax Act 2010 ("**CTA 2010**")

(2) **CKI 1** are to CKI Number 1 Limited

(3) **CKI 2** are to CKI Number 2 Limited

(4) **CKI 3** are to CKI Number 3 Limited

(5) the **CKI companies** are to CKI 1, 2 and 3

(6) **Devin** are to Devin International Limited

(7) **Eagle** are to Eagle Insight International Limited

(8) the **UKPNH shareholders** are to the CKI companies, Devin and Eagle.

THE ISSUES IN THIS APPEAL

2. There were two issues in this appeal. Before setting them out, I briefly present the essential facts and law, to make the issues more intelligible.

The essential facts and law

3. The appellants were, as a result of an acquisition (the "**2010 acquisition**") that occurred in 2010, wholly owned subsidiaries of UK Power Networks Holdings Limited ("**UKPNH**"), a consortium company owned by the UKPNH shareholders. The appellants made claims for consortium relief from companies (the "**surrendering companies**") with losses available for surrender, which were in a different corporate group, that parented by Hutchinson Whampoa Limited ("**HW**"). The appellants sought, via consortium relief, to set the surrendering companies' losses off against 74% of their (respective) profits for corporation tax in accounting periods between 2011 and 2016 (the "**relevant accounting periods**"). HMRC opened enquiries into these claims and concluded that the appellants were limited to offsetting the surrendering companies' losses against only 20% of their profits. The appellants appealed to the Tribunal against those assessments.

4. Consortium relief has a concept of the "link company", being (in this case) a company that is both a member of the HW corporate group, and a "member of the consortium" (for consortium relief purposes) that owned UKPNH. In this case, all three CKI companies met the definition of "the link company".

5. The consortium relief to be given is limited by s144(2) to the "ownership proportion of the claimant company's total profits" (since 1 July 2013, "available total profits") of the relevant period. The "ownership proportion" (as applied to the facts of this case) is the same as the lowest of the following proportions:

(1) the proportion of ordinary share capital of UKPNH beneficially owned by "the link company";

(2) the proportion of any profits available for distribution to equity holders of UKPNH to which "the link company" is beneficially entitled;

(3) the proportion of any assets of UKPNH available for distribution to such equity holders on a winding up to which "the link company" would be beneficially entitled; and

(4) the proportion of the voting power in UKPNH directly possessed by "the link company".

6. In addition, s146B applies to consortium relief claims like the ones here if (again, as applied to the facts of this case), during the relevant accounting periods, there were arrangements in place which

(1) would 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 appellants, and but for which they would control the appellants

(it was common ground that this was the case here, the arrangements being Article 7.5 of the articles of association of UKPNH during the relevant accounting periods; this article required a majority of 75% on any resolution of the company or of the members of the company; this point was decided by the Court of Appeal in earlier litigation between the parties: *Eastern Power Networks PLC and ors v HMRC* [2021] EWCA Civ 283; [2021] 1 WLR 4742 at [52]); and

(2) form part of a scheme the main purpose, or one of the main purposes, of which is to enable the appellants to obtain a tax advantage under Chapter 4 (*claims for group relief*) of Part 5.

7. If s146B applies then the entitlement to consortium relief is essentially halved: s146B(4).

The two issues in this appeal

Issue 1

8. Applying s144 (as modified by sections 145 and 146) to the facts of this case, is the lowest ownership proportion 40% (HMRC's case) or 74.64% (appellants' case)?

Issue 2

9. In the circumstances of this case, does s146B apply, so the appellants' consortium relief claims in the relevant accounting periods fall to be determined as if the appellants' total profits for those periods were 50% of what they would be, but for s146B?

The decision the Tribunal is asked to make

10. The parties asked that the Tribunal make an in principle decision on the two issues set out above. Following this, the parties would seek to agree figures. If they could not agree on quantum, they would apply to the Tribunal for a determination of that aspect. I am content in this case to do as the parties ask.

SUBMISSIONS, EVIDENCE AND THE HEARING

11. The parties provided a statement of agreed facts and issues. Issue 1 was a purely legal issue; issue 2 involved both legal and factual issues. Skeleton arguments were provided before the hearing; during the course of the hearing, but after the oral evidence of the four witnesses put forward by the appellants, both parties provided written submissions on the evidence.

12. There was a "main bundle" containing closure notices, notices of appeal, directions of the Tribunal, and witness statement of the four witnesses. There were three "documents bundles" (A ("contemporaneous documents"), B ("versions of certain contemporaneous documents as originally disclosed over which appellants claim inadvertent disclosure of partially privileged material") and C ("certain contemporaneous documents as originally disclosed over which appellants claim inadvertent disclosure of partially privileged material"), all with documents very largely from dates in 2010; and a "correspondence bundle". The bundles altogether came to about 13,000 pages. Certain public documents (circulars) issued by Cheung Kong Infrastructure Holdings Limited and Hong Kong Electric Holdings Limited in August 2010 were put into evidence in the course of the hearing.

13. The evidence, both written and oral, was almost entirely about the events of 2010, when UKPNH was set up a vehicle to bid for, and then to acquire, the appellants.

14. The four witnesses gave oral evidence under cross examination at the hearing. They were:

(1) Andrew Hunter, who was the deputy managing director of Cheung Kong Infrastructure Holdings Limited (the parent of the CKI companies), a board director of Hong Kong Electric Holdings Limited (the parent of Devin) and the chairman of UKPNH; he was in charge of overseeing the 2010 acquisition; he presented the acquisition opportunity to, and sat on, the investment committee chaired by Victor Li (of whom more at [37] below and following) at which the decision to make the bid was made; of all the witnesses, he had most interaction with Victor Li;

(2) Basil Scarsella, who was the de facto leader of the bid/acquisition team in 2010 and became the chief executive of UKPNH following the 2010 acquisition;

(3) Joanna Chen, who sat on the executive committee of Cheung Kong Infrastructure Holdings Limited and its investment committee; she was present when Mr Hunter presented the acquisition opportunity to the investment committee and was part of the discussion, and the decision, in relation to making the bid and the price of that bid;

(4) David Waite, who was head of tax and corporate services at Northern Gas Networks (which was owned by Cheung Kong Infrastructure Holdings Limited and Hong Kong Electric Holdings Limited); he was the lead for tax (as well as other) issues in the bid/acquisition team led by Mr Scarsella in 2010.

15. I would like to thank both parties, their representatives, and their counsel, for the very helpful way in which the case was prepared and presented.

THE CORPORATE STRUCTURE OF UKPNH DURING THE RELEVANT ACCOUNTING PERIODS

16. In this section, I make findings about the corporate structure of UKPNH during the relevant account periods. By 'corporate structure', I mean the rules of governance of UKPNH as well as its membership (who its shareholders were and what rights they had). This is obviously required to determine issue 1, but is also important, for reasons given in the "Decision on issue 2" section below, to determining issue 2.

Shareholdings in UKPNH

A ordinary shares

17. UKPNH's A ordinary shares gave a right to distribution of 60% of the profits available for distribution (subject, in the usual way, to the board recommending payment), but after making provision for payment of a preference dividend of 1% of the amount credited as paid up on UKPNH's preference shares.

18. Devin held 4 million of these shares; Eagle held 2 million.

B ordinary shares

19. UKPNH's B ordinary shares gave a right to distribution of 35% of the profits available for distribution (subject, in the usual way, to the board recommending payment), but after making provision for payment of a preference dividend of 1% of the amount credited as paid up on the preference shares.

20. CKI 1 held 4 million of these shares.

A and B preference shares

21. UKPNH's preference shares (being the £1 A preference shares and the £1 B preference shares) conferred a right to a cumulative fixed cash dividend, referred to as the "preference dividend", equal to 1% of the amount credited as paid up on the preference shares

22. The £1 B preference shares had an additional entitlement to distribution of 5% of the profits available for distribution (subject, in the usual way, to the board recommending payment).

23. The CKI companies each held 80 million £1 B preference shares.

24. Devin held 240 million £1 A Preference shares; Eagle held 120 million of these.

Voting rights in UKPNH

25. Voting rights in respect of any resolution proposed at a general meeting or in respect of a written resolution were as follows:

(1) each A preference share gave no vote;

(2) each B preference share gave three votes;

(3) each A ordinary share gave 41 votes;

(4) each B ordinary share gave one vote.

26. The voting rights in UKPNH were therefore held as follows

(1) CKI 1: 25.15%

(2) CKI 2: 24.74%

(3) CKI 3: 24.74%

(4) Devin: 16.91%

(5) Eagle: 8.45%

(6) rounding: 0.01%

27. The total voting rights held in aggregate by the CKI companies was therefore 74.64%.

Voting agreement between CKI 3 and Devin's parent

28. Hong Kong Electric Holdings Limited (the ultimate shareholder of Devin) and CKI 3 were parties to an agreement which provided that CKI 3 would not, without the prior written consent of Hong Kong Electric Holdings Limited, exercise any votes attaching to the (80 million) B preference shares held by it (and which gave CKI 3 its 24.74% voting share).

Voting threshold

29. Save to the extent not permitted by the Companies Act 2006, any resolution of UKPNH or its members required a majority of 75% in order to be validly passed; this was Article 7.5.

Shareholders' agreement in respect of UKPNH

30. There were 13 parties to a shareholders' agreement (originally entered into on 11 September 2010, and amended on 29 October 2010) in respect of UKPNH: Cheung Kong Infrastructure Holdings Limited, Excel Champ Holdings Limited, Express Train Limited, the CKI companies, Li Ka Shing (Overseas) Foundation, LKSFL, Eagle Frame Limited, Eagle, Hong Kong Electric Holdings Limited, Framework Investments Limited and Devin.

31. Broadly, the relationship between these parties was as follows:

(1) The CKI companies, Express Train Limited and Excel Champ Holdings Limited were associated with Cheung Kong Infrastructure Holdings Limited. CKI 1 was wholly owned by CKI 2, which itself was wholly owned by CKI 3.

(2) Devin and Framework Investments Limited were indirectly owned by Hong Kong Electric Holdings Limited.

(3) Eagle, Li Ka Shing (Overseas) Foundation and Eagle Frame Limited were indirectly owned by the Li Ka Shing Foundation.

32. The shareholders' agreement made provision for, among other things:

(1) the classes and numbers of shares for which the UKPNH shareholders would subscribe and the subscription price to be paid by each shareholder for those shares;

(2) the appointment of directors by each of the "**ultimate shareholders**" (Cheung Kong Infrastructure Holdings Limited, Hong Kong Electric Holdings Limited and the Li Ka Shing Foundation);

(3) the process by which decisions of the board would be made;

(4) the votes exercisable by the directors appointed by the ultimate shareholders.

Board decisions under the shareholders' agreement

33. Under the shareholders' agreement:

(1) each ultimate shareholder was entitled to appoint one director of UKPNH in respect of each complete 10% of the ordinary shares (A and B) which each ultimate shareholder, directly or indirectly, owned;

(2) directors' resolutions were carried by a simple majority of the directors present and entitled to vote; but any director was entitled to demand a poll; and on a poll, the directors appointed by an ultimate shareholder who were present at the meeting were together entitled to exercise a number of votes equal to the number of votes which were exercisable in respect of the issued shares held directly or indirectly by that ultimate shareholder. A board decision taken by such a poll required approval by at least 80% of the votes cast on such a poll;

(3) on a poll at a board meeting:

(a) the directors appointed by Cheung Kong Infrastructure Holdings Limited were deemed entitled to exercise 49.90% of the votes exercisable in respect of the issued shares; and they were deemed entitled to exercise the remaining 24.74% of the votes exercisable in respect of issued shares held by CKI 3, subject to having received the prior written consent of Hong Kong Electric Holdings Limited;

(b) the directors appointed by Li Ka Shing Foundation were deemed entitled to exercise 8.45% of the votes exercisable in respect of the issued shares;

(c) the directors appointed by Hong Kong Electric Holdings Limited were deemed to be entitled to exercise 16.91% of the votes exercisable in respect of the issued shares.

Matters requiring 80% board approval on a poll

34. The shareholders agreed to exercise their rights so as to procure that UKPNH would not transact certain business (including, in broad terms: amending any licence of the acquired group; entering into an obligation or commitment to Ofgem; changing the nature of the business of the company; changing the auditors or accounting reference date; giving a guarantee; changing dividend policy; changing a tax election or grouping; purchase of own shares; disposal of intellectual property rights; acquisition of an unrelated business; entering into a contract involving payments of more than £50 million; borrowing money in excess of that sum; appointment of senior key employees; adopting or amending its business plan) unless board approval was obtained by at least 80% of the votes cast on a poll.

Matters requiring approval of all the ultimate shareholders

35. The shareholders agreed to exercise their rights so as to procure that UKPNH would not transact certain other business (such as, in broad terms, amending the articles, creating new shares or share options, or commencing a winding up) without the prior written approval of all the ultimate shareholders.

Conflict between shareholders' agreement and articles

36. In the event of any conflict, ambiguity or discrepancy between the provisions of the agreement and the articles of association, the shareholders agreed to procure that the articles of association were altered to accord with the provisions of the shareholders' agreement.

THE BACKGROUND TO UKPNH'S CORPORATE STRUCTURE DURING THE RELEVANT ACCOUNTING PERIODS – WHY IT WAS AS IT WAS

37. UKPNH was set up in 2010 as the corporate vehicle by which three entities in the "family" of companies over which Mr Li Ka Shing ("**Mr Li**") and his family had significant influence, jointly bid for, and then acquired, EDF's UK electricity distribution business (the "**acquired business**"); the entities were the "ultimate shareholders" as described in the shareholders' agreement, namely:

(1) Cheung Kong Infrastructure Holdings Limited ("**CKI**") (the ultimate shareholder of the CKI companies),

(2) Hong Kong Electric Holdings Limited ("**HEH**") (the ultimate shareholder of Devin) and

(3) the Li Ka Shing Foundation (the "**Foundation**") (the ultimate shareholder of Eagle).

38. The acquired business consisted of three UK regional electricity operators in London, the South-East and the East of England.

The three ultimate shareholders and the relationship between them

39. CKI and HEH were Hong Kong listed entities. Mr Li indirectly held a significant interest in both:

(1) CKI owned a 38.9% stake in HEH;

(2) over 75% of CKI's shares were owned by HW, another Hong Kong listed entity;

(3) HW was part of a worldwide group of companies in which Mr Li held a significant but not a majority interest.

40. The Foundation was a charitable foundation established by Mr Li.

41. The 2010 acquisition was made only with Li "family" companies (as opposed to a joint venture between Li "family" companies and unrelated third parties) because Mr Li and Victor Li, his son, considered that they needed a high level of operational control over the acquired business.

42. The fact that CKI and HEH were listed (in Hong Kong) meant that material dealings between them needed to be disclosed to their shareholders and, in certain cases, transactions between them could only be voted on by 'unrelated' investors. Dealings between the listed groups had to be on what the witnesses described as a 'proper' basis. As the witnesses said, non-Li "family" shareholders in CKI and HEH relied, for the protection of their interests, on the boards of the Li "family" companies, the combination of Mr Li and Victor Li, and the Hong Kong listing rules: they trusted the Li family to set fair terms and stick to them.

43. The investment by the three ultimate shareholders in the acquired business was made by them a 40-40-20 percentage basis (with the Foundation making the smaller investment), as regards the contribution to be made and the economic stake to be held; this split between the three ultimate shareholders in their participation in the investment was an important, high-level decision taken by the Mr Li and Victor Li in 2010, and formally approved by the relevant company boards.

44. As Ms Chen said in her evidence, because the three ultimate shareholders were related, the "governance arrangements" between them were of less practical important than they would have been if it had a been a joint venture between unrelated parties. However, there were some key commercial drivers that affected the relationship between the three ultimate shareholders, and why they invested in the proportions they did, as follows:

> (1) CKI and HEH were holding companies of substantial businesses that had significant commercial overlap with the acquired business; the Foundation, in contrast, did not have this kind of experience and expertise;
>
> (2) It was important that HKE and CKI were able to account for their investments using the 'equity' basis (as opposed to either of them 'consolidating' the acquired business) for accounting purposes. Mr Waite explained the reasons why the 'equity' method of accounting was critical in his witness statement:
>
> > "If CKI or HKE had to consolidate their interest in [the 2010 acquisition], which was a very significant transaction, funded in part by debt, they would have had to show 100% of that debt on their respective balance sheets (and not just their share of the debt). That would not have been acceptable."
>
> (3) The Foundation did not want to be in the position of, in effect, being the decision-maker in the event of disagreement between CKI and HKE. That was motivated by the Foundation not wanting to give an 'ultimate controller' undertaking to Ofgem (the regulator) or be regarded as having 'decisive influence' for the purposes of an EU merger approval process. The Foundation was not a public or listed entity; it preferred not to release sensitive information into the public domain. Giving an 'ultimate controller' undertaking would have required a detailed analysis of the Foundation's decision-making and control processes; the Foundation did not wish to be put in that position. The Foundation preferred to be a non-influential shareholder, to avoid potentially complicating the EU merger approval process;
>
> (4) The outcome of the above 'drivers' was that the investment was to be jointly controlled by CKI and HEH, the two 40% stakeholders; neither was to be able to force the other to do something it did not want to do; the Foundation's role was as passive minority stakeholder.

Outline of the 2010 acquisition

45. The sale of the acquired business was by way of a competitive bidding process: indicative bids were required by March 2010; a shortlist of bidders was then selected and given access to further information; final offers were made in July 2010.

46. In order to inform the decision-making as to the price at which the ultimate shareholders would jointly bid, an investment bank was engaged to prepare a financial model to value the acquired business. In simple terms, the financial model assembled projected cashflows for the acquired business over 20 years, on the basis of assumptions across a range of areas that affected cashflow; the cashflows were then discounted by the investors' desired "internal rate of return" (or "IRR"), to come up with a present day discounted value; the model thus indicated that, if that amount was successfully bid for the business, and the business performed according to the assumptions in the model, the ultimate shareholders would achieve that particular IRR on their investment.

47. The decision to bid and acquire the acquired business, and the price to be bid and paid, was taken by CKI's investment committee and subsequently ratified by the relevant boards. It is clear that Victor Li's voice on that committee as its chair was, in essence, what mattered, but nonetheless the decision was made by the committee. Victor Li, as well as being Mr Li's son, was executive chair of CKI and executive director of HKE.

48. The ultimate shareholders made their final bid of £3,180 million for the acquired business in late July 2010, based on an enterprise value of £5,780 million, which EDF accepted. They were announced as the successful bidder on 30 July 2010.

49. Approval was needed (and duly obtained) from HKE's independent shareholders. This required a circular to shareholders disclosing details of the transaction, the holding of an extraordinary general meeting of shareholders to approve the transaction (at which CKI could not vote), and uncertainty surrounding whether HKE's independent shareholders would approve.

50. The shareholder circular describes the participation of the ultimate shareholders in the bidding vehicle as being on a 40-40-20 percentage basis (this ratio is specifically stated with respect to: funding the investment; shareholding in the bidding vehicle; distribution of profits; and board appointments).

51. A sale and purchase agreement was entered into on 10 September 2010 between EDF companies (as vendors), UKPNH (as purchaser) and the ultimate shareholders (each as guarantor). The agreement provided for, inter alia, the acquisition by UKPNH of the shares of eight companies (including the appellants). The total consideration payable (subject to post-completion adjustments) was £3,180 million, which was deemed to comprise £2,668 million in respect of the "regulated business" (and all but £1 million of this was in respect of the appellants) and £512 million in respect of the "non-regulated business".

52. The acquisition was completed on 29 October 2010.

53. To fund the acquisition, the UKPNH shareholders subscribed for shares in UKPNH as follows:

(1) CKI 1 paid £471.2 million for its 4 million B Ordinary shares, and £80 million for its 80 million £1 B Preference shares.

(2) CKI 2 paid £80 million for its 80 million £1 B Preference shares.

(3) CKI 3 paid £80 million for its 80 million £1 B Preference shares.

(4) Eagle paid £235.6 million for its 2 million A Ordinary Shares, and £120 million for its 120 million £1 A Preference shares.

(5) Devin paid £471.2 million for its 4 million A Ordinary Shares, and £240 million for its 240 million £1 A Preference shares.

54. The total amount subscribed for shares in UKPNH was £1,778 million, which UKPNH then used to part-fund the consideration paid to EDF.

55. The remainder of the consideration paid to EDF was funded by loans made to UKPNH by the ultimate shareholders (or associated entities) and by banks.

56. The total consideration paid (post completion adjustments) by UKPNH to EDF in respect of the "regulated business" was £2,910.4 million.

How UKPNH's corporate structure was affected by the desire to enable the appellants to obtain enhanced consortium relief

57. Had UKPNH's corporate structure during the relevant accounting periods simply reflected the underlying 40-40-20 ratio in which the ultimate shareholders invested, the effect of s144 would have been to restrict the proportion of the appellants' profits against which the surrendering companies' losses could be offset by consortium relief, to 40% (CKI's stake in the investment). The aim of certain features of UKPNH's corporate structure was to "enhance" the percentage of the appellants' profits against which the surrendering companies' losses could be offset. The key provision whose application these features were intended to affect, was s144. The intention of the features in question was to increase the four "proportions" in that section as much as possible, with the effect that the lowest of the four proportions would be as much as possible in excess of 40%. The intended effect of the features was that the lowest of the proportions in s144 would be s144(3)(d) (proportion of voting power, etc), and that this would be just under 75%.

58. The features of UKPNH's corporate structure I am referring to, were these:

(1) the "tower", or "staircase", structure of CKI's ownership in UKPNH i.e. three CKI UK companies each being shareholders in UKPNH, with one of them (CKI 3) owning another (CKI 2), and that one owning a third (CKI 1) - as opposed to a single CKI UK company holding CKI's stake in UKPNH; the reason for this feature of UKPNH's corporate structure was to (seek to) enhance, beyond 40%, CKI's ownership proportions under s144(3)(b) (proportion of profits, etc) and s144(3)(c) (proportion of assets etc); (whether this has the desired legal effect is issue 1 in this appeal);

(2) UKPNH's share classes having unusual rights attached to them (as opposed to having ordinary shares held in a 40-40-20 proportion, to reflect the economic stakes of the three ultimate shareholders); the reason for this feature of UKPNH's corporate structure was to (seek to) enhance, beyond 40%, CKI's ownership proportion under s144(3)(a) (proportion of ordinary share capital etc);

(3) the combined voting power of the CKI companies being just under 75% (as opposed to 40%, which would reflect CKI's economic stake in UKPNH); the reason for this feature of UKPNH's corporate structure was to (seek to) enhance, beyond 40%, CKI's ownership proportion under s144(3)(d) (proportion of voting power etc).

59. Article 7.5 (requiring a majority of 75% on any resolution of the company or of the members of the company) was not, in and of itself, required in order to achieve the objective of enabling the appellants to obtain enhanced consortium relief. However, it, together with the voting agreement between CKI 3 and HEH (see [28] above), had the effect of ensuring that CKI's 'outsized' voting rights (of just under 75%) did not disturb the key commercial objectives of the three ultimate shareholders (see [44] above), namely, that CKI and HEH would jointly control the investment, and that the Foundation would not be in the position of a 'kingmaker' as between CKI and HEH (i.e. able to give one or other of CKI and HEH control, if it joined forces with them). The 80% threshold (for directors' decision on a poll on important business matters) in the shareholders' agreement had like effect.

How important was the objective of enabling the appellants to obtain enhanced consortium relief, in the context of the 2010 acquisition

60. Enabling the appellants to obtain enhanced consortium relief was a relatively small part of the 2010 acquisition, both in terms of its anticipated monetary value (£104 million over 5 years; or about 1.5% of the total anticipated discounted cashflows (of £5,719 million at 12% IRR) and the time and effort devoted to it during 2010 (even for Mr Waite, who was looking after tax aspects of the 2010 acquisition, it occupied only a small minority of his time – 5 or 10%). The three ultimate shareholders' participation in the 2010 acquisition, and the price they agreed to pay, was not dependent on the appellants successfully claiming enhanced consortium relief post-acquisition: enhanced consortium for the appellants following the acquisition was a "nice to have", or an "upside", or a "cushion" (in other words, possible extra cash flow that would counter the effect of the possibility of other cash flows, being relied on for the pricing of the bid, not, in the future, materialising); but Mr Li and Victor Li would have gone ahead with the 2010 acquisition, even if obtaining enhanced consortium relief had been ruled out. Equally, it was not a purpose of the 2010 acquisition to enable the appellants to obtain enhanced consortium relief.

61. I make this finding on the basis of the witness' evidence, which was both persuasive on this point, and corroborated by contemporaneous evidence; in particular, a presentation prepared by the advising bank and called "Project Eclipse Acquisition opportunity presentation" dated 20 July 2010, which was put before the CKI investment committee at a meeting chaired by Victor Li, for approval prior to the final bid. This indicated an "equity IRR" of 12% was achieved on an implied enterprise value of £5,719 million (slide 9). The next slide (slide 10) indicated that consortium relief at 40% was part of the "base case" for an IRR of 12%; whereas consortium relief at 74.7% was "upside".

THE PURPOSES OF UKPNH'S CORPORATE STRUCTURE DURING THE RELEVANT ACCOUNTING PERIODS

62. Based on the findings in the previous section of this decision, I find that the UKPNH's corporate structure had the following purposes during the relevant accounting periods:

(1) to maintain the fundamental 40-40-20 split between the three ultimate shareholders, all of which were in the Li "family" of companies, in terms of their substantive economic stake in UKPNH;

(2) to give CKI and HEH joint effective control over UKPNH; this meant that

(a) neither CKI nor HEH had to "consolidate" their investment in UKPNH for accounting purposes; they both accounted for it using the equity method;

(b) the Foundation could not act as a "kingmaker" as between CKI and HEH, in the event of disagreement between them; the Foundation's role was fundamentally passive; and

(3) to enable the appellants to obtain enhanced consortium relief i.e. to set off consortium relief against just under 75% of an appellant's profits, as opposed to (only) 40%.

AGREED TAX ANALYSIS

63. The tax analysis in this section of this decision was common ground; it applies to all relevant accounting periods.

64. The A preference shares (held by Devin and Eagle) did not meet the definition of "ordinary shares" in s160 because:

(1) "ordinary shares" for those purposes are "shares other than restricted preference shares" (s160(1)); and

(2) the A preference shares were "restricted preference shares" because they met each of conditions A to E in s160(3) to (7).

65. All the other shares in UKPNH (whether described as ordinary or preference shares) met the definition of "ordinary shares" in s160.

66. It follows that the CKI companies held 244 million of the 250 million ordinary shares in issue (over 97%).

67. UKPNH was a company owned by a consortium within the meaning of s153; and the members of the consortium were the CKI companies, being the shareholders who held 5% or more of the ordinary share capital as defined by s160. Devin and Eagle did not have sufficient ordinary share capital to meet the definition of 'member' in s153(2).

68. For the purposes of consortium relief, the appellants were all treated by virtue of s153(3) as though they were owned by the UKPNH consortium members (i.e. by the CKI companies) in view of the appellants being 90% subsidiaries of UKPNH.

69. The surrendering companies (Hutchison 3G Limited, Hutchison 3G UK Holdings Limited and Telecoms UK Investments Limited) and the appellants were linked by reference to each of the CKI companies.

70. Each of the CKI companies met the definition of 'link company' in s133(2)(d) in the sense that they were members of the consortium and also in the same group of companies as the surrendering companies.

71. The appellants made claims under consortium condition 3 (s133(2)) to group relieve losses surrendered by the surrendering companies. The surrendering companies had the ability to surrender the losses claimed by the appellants and they properly consented to do so.

72. The following claims for consortium relief were made (and are the subject of the appeals):

Eastern Power Networks PLC	**Accounting periods ended**	**Amount of consortium relief claimed**
	31 December 2011	£34,452,461
	31 December 2012	£51,700,959
	31 December 2013	£30,036,324
	30 December 2014	£37,965,624
	30 December 2015	£125,500,000
	31 March 2016	£6,896,000
		Total: £286,551,368
London Power Networks PLC	**Accounting periods ended**	
	31 December 2011	£45,451,219
	31 December 2012	£55,521,886
	30 December 2015	£99,000,000
	31 March 2016	£4,023,000
		Total: £203,996,105
South Eastern Power Networks PLC	**Accounting periods ended**	
	31 December 2011	£20,096,320
	31 December 2012	£20,411,266
	30 December 2015	£60,500,000
	31 March 2016	£5,249,045
		Total: £106,256,631
UK Power Networks (Transport) Ltd	**Accounting period ended**	
	31 December 2012	£1,052,215
		Total: £1,052,215

Consortium relief changes in 2010

73. CTA 2010 received royal assent on 3 March 2010. Its relevant provisions concerning consortium relief came into force on 1 April 2010.

74. The March 2010 Budget statement, delivered on 24 March 2010, included the following in relation to "Consortium relief rules" at A.66:

> "The Government intends to introduce legislation soon as possible in the next Parliament to amend those aspects of corporate tax group relief rules that cover Consortium Relief so that EU and EEA-resident companies engaged in UK consortia will be allowed to pass on the losses of those consortia to their UK-resident subsidiaries. At the same time, legislation will be introduced to strengthen rules designed to ensure that access to consortium relief is given only in proper proportion to the member company's involvement in the consortium. (-)"

75. On 12 July 2010, a consultation draft with draft clauses in relation to consortium relief was published. The draft clauses included the provisions that became s144(3)(d) and s146B.

76. On 16 December 2010, Schedule 6 to the Finance (No.3) Act 2010 came into force, which inter alia inserted s144(3)(d) and s146B into CTA 2010, with effect in relation to accounting periods beginning on or after 12 July 2010.

DECISION ON ISSUE 1

77. As mentioned at the start of this decision, the consortium relief to be given is limited by s144(2) to the "ownership proportion" of the relevant appellant's total profits (since 1 July 2013, "available total profits") of the relevant period. The "ownership proportion" (as applied to the facts of this case – which includes applying s145(3) and substituting "the link company" for "the surrendering company") is the same as the lowest of the following proportions:

(1) the proportion of ordinary share capital of UKPNH beneficially owned by "the link company";

(2) the proportion of any profits available for distribution to equity holders of UKPNH to which "the link company" is beneficially entitled;

(3) the proportion of any assets of UKPNH available for distribution to such equity holders on a winding up to which "the link company" would be beneficially entitled; and

(4) the proportion of the voting power in UKPNH directly possessed by "the link company".

78. Chapter 6 (*Equity holders and profits or assets available for distribution*) of Part 5 "applies for the purposes of" (see s157(1)) (inter alia) the middle two of the proportions listed immediately above (the "profits" proportion and the "assets" proportion). In particular:

(1) s165

(a) applies "for the purpose of determining the proportion to which a company ('company A') is, at any time, beneficially entitled to any profits available for distribution to the equity holders of another company ('company B')"; and

(b) provides that "the proportion is the proportion to which company A would, at any time, be beneficially entitled on a distribution in money to equity holders of company B … of

(i) an amount of profits equal to company B's total profits of the relevant account period …, or

(ii) if there are no such profits, profits of £100";

(2) s166, in very much parallel terms,

(a) applies "for the purpose of determining the proportion to which a company ('company A') would, at any time, be beneficially entitled of any assets available for distribution to the equity holders of another company ('company B') on a winding up"; and

(b) provides that "the proportion is the proportion to which company A would, at that time, be beneficially entitled if company B were to be wound up and on that winding up … the value of assets available for distribution to company B's equity holders were equal to

(i) the assets amount minus the liabilities amount, or

(ii) if the assets mount does not exceed the liabilities amount or …., £100"; and

(3) s167(2) provides that "references to a company being beneficially entitled to profits or assets are references to the company being so entitled –

(a) directly,

(b) through another company or companies, or

(c) partly directly and partly through another company or companies".

79. In applying these provisions (as to the "profits" and "assets" proportions) to the facts of this case, the first point to observe is that where s144(3), read with s145(3), refers to the proportion "the" link company is (or would be) beneficially entitled to, this must "include" (and so *mean*, in a case like this one where there are three link companies), the proportion the link compan<u>ies</u> are beneficially entitled to. This is a straightforward application of s6 Interpretation Act 1978, about which the parties agree. So: the "profits" proportion is the proportion of profits to which *the link companies* are beneficially entitled; and the "assets" proportion is the proportion of assets to which *the link companies* would be beneficially entitled.

80. It is on how to read in s165 and s166, both as read with s167(2), to these formulations, that the parties disagree.

81. The appellants argue that the correct approach is to apply these provisions to each link company on a strictly solus basis, and then add the results together. The outcome – because two of the link companies (CKI 3 and CKI 2) had beneficial entitlements in UKPNH "through" another link company (CKI 2 and CKI 1) (which, on the appellants' approach, were to be treated as "other" companies for s167(2) purposes) – is that

(1) CKI 1's beneficial entitlement to both "profits" and "assets" of UKPNH is counted not once, but three times:

(a) once in respect of its direct entitlement as a holder of "ordinary shares" in UKPNH (and so an "equity holder" per s158(1)(a)),

(b) once in respect of CKI 2's entitlement through CKI 1; and

(c) once in respect of CKI 3's entitlement through CKI 2 and CKI 1; and

(2) CKI 2's beneficial entitlement to "profits" is counted twice:

(a) once in respect of its direct entitlement; and

(b) once in respect of CKI 3's entitlement through CKI 2.

82. The effect of this can be seen numerically in the following tables, summarising the appellants' position, in the column headed "aggregate"; in sum, on the appellants' argument, the proportion of "profits" to which the link companies were beneficially entitled, was 115%; and the proportion of "assets" to which the link companies would have been entitled, was 120%:

Entitlement to profits s144(3)(b)

	CKI 1	CKI 2	CKI 3	Aggregate
Direct entitlement	36.67%	1.67%	1.67%	
Indirect entitlement (through CKI 1)	n/a	36.67%	36.67%	
Indirect entitlement (through CKI 2)	n/a	n/a	1.67%	
Total	36.67%	38.34%	40%	115%

Entitlement to assets s144(3)(c)

	CKI 1	CKI 2	CKI 3	Aggregate
Direct entitlement	40%	0	0	
Indirect entitlement (through CKI 1)	n/a	40%	0	
Indirect entitlement	n/a	n/a	40%	

(through CKI 2)				
Total	40%	40%	40%	120%

83. (The figures in the tables above reflect the agreed tax analysis to the effect that only the ordinary shares and B preference shares were "ordinary shares" for consortium relief purposes, combined with the definition of "equity holder" in s158(1) as a person who holds such "ordinary shares". The figures also reflect s170, which has the effect of ignoring the "limited by reference to amount" (i.e. preferential) rights attached to the B preference shares held by the CKI companies.)

84. Thus, on the appellants' formulation, the four s144 proportions were as follows (and the lowest was that for "voting power"):

s144(3) proportions	**CKI 1**	**CKI 2**	**CKI 3**	**Aggregate**
(a) ordinary share capital	33.6%	32%	32%	97.6%
(b) profits available for distribution	36.67%	38.34%	40%	115%
(c) assets available on a winding up	40%	40%	40%	120%
(d) voting power directly possessed	25.15%	24.74%	24.74%	74.64%

85. HMRC's position was that the correct approach is to apply ss165, 166 and 167(2) to the link companies, collectively; on this approach, the link companies, collectively, did not have any beneficial entitlements "through another company or companies" for the purposes of s167(2). The effect of this is that the proportion of both "profits" and "assets" to which the link companies were entitled, was 40%: as none of the link companies had beneficial entitlement "through" other companies (apart from each other), this figure represents the direct beneficial entitlement of each link company as shown in the tables in [82] above, added together.

86. In my view, HMRC's is the correct reading of the statutory provisions; and so (in answer to issue 1) the lowest ownership proportion per s144 in each of the relevant accounting periods was 40%.

87. The parties' arguments on this issue tended towards reducing their dispute to the question of whether or not s6 Interpretation Act 1978 applies to s165 and s166.

88. I do not accept the appellants' submission that the references to "a" company, "company A" in ss165 and 166 comprise a "contrary indication" for the purposes of s6 Interpretation Act 1978, such that these provisions do not include the plural. The slightly abstract style of drafting ("a" company) is a natural and understandable one where the provision is intended to slot into six other pieces of statutory drafting – set out at s157(1), two of which are the provisions of s144 with which this case is concerned – each of which is itself expressed in the singular ("the" claimant company, "the" surrendering company, "the" subsidiary). Moreover, given that the parties (rightly) agreed that relevant references in the singular in s144 *do* include the plural (and so apply where there is more than one link company), it would be very anomalous if singular references in s165 and s166 – enacted for the purposes of s144 – did not include the plural. What is clear, in my view, is that there is no contrary indication to the usual position that that the singular includes the plural.

89. Simply concluding that singular words in s165 and s166 include the plural does not, in my view, entirely answer the question as to how these provisions work where there is more than one link company. One must still, as the case law has made abundantly clear, apply the statutory words purposively. HMRC's reading of ss165, 166 and 167 is in my view in line with their statutory purpose, being to determine the proportion of something of fixed quantity (an amount of a company's profits, or assets) to which another company – or more than one other company – is or are beneficially entitled. The statutory purpose is to arrive at a genuine, "real world" proportion of that fixed amount. By applying the provisions to the link companies collectively, HMRC's interpretation avoids double (or more than double) counting the same beneficial entitlement, which, in my view, would clearly be contrary to the statutory purpose. The fact that the appellants' approach results in proportions of a fixed amount that exceed the fixed amount (i.e. proportions of over 100%) – an impossibility and an absurdity – is a strong indicator that it is contrary to the statutory purpose.

90. I now briefly explain why I have not accepted other of the appellants' submissions to the contrary:

(1) I do not accept that, at least with regard to the facts of this case, s144, read with Chapter 6 of Part 5, is "highly prescriptive" – and so must be applied literally, even if it gives rise to a result that appears at odds with the statutory purpose; it seems to me that, on the contrary, that statutory provisions are non-prescriptive about how to determine the required proportions where there is more than one link company; in particular, the appellants' approach of calculating each proportion on strictly solus basis, and then adding the results together, is not something that is "prescribed" in the statutory language; rather, it is, like HMRC's approach, a filling-in of a gap in "prescription" within the statutory code;

(2) I am not persuaded that the references to "aggregation" at [49] of *Eastern Power Networks PLC and ors v HMRC* (referred to at [6] above) support the appellants' case; the Court of Appeal there was not turning its mind to the issue in this case, being how the provisions of Chapter 6 of Part 5 operate where there is more than one link

company (and at least one link company owns another link company): rather, the court was discussing the "voting power" proportion in s144, which, on its terms, is restricted to such power "directly possessed" (and there is no cross reference to Chapter 6);

(3) I do not accept that, because

(a) the two other proportions in s144 (ordinary share capital beneficially owned, and voting power) did not exceed 100%, and

(b) s144 operates by reference to lowest of the four proportions,

that the outcome for which the appellants argue is not contrary to the statutory purpose; in my view, it is the clear statutory purpose that each of the proportions in s144 is a genuine proportion (of a fixed amount), such that double counting (of the same beneficial entitlement) with regard to any of the proportions, is contrary to the statutory purpose;

(4) I am unpersuaded either that, for the purposes of construing s144 and Chapter 6 of Part 5, it is appropriate to consider the "predecessor" legislation (that was "rewritten" as part of the Tax Law Rewrite project into CTA 2010) or that, if I did, it would lead to any different result:

(a) I was referred to *R (Derry) v HMRC* [2019] STC 926 at [10], where the Supreme Court, considering interpretation of statutes written under the Tax Law Rewrite project, endorsed (at [9-10]) the following guidance of Sales J (read with Lady Arden's comments (at [84]–[90]) on the relevance of prior case law) in an earlier case:

> 'When construing a consolidating statute, which is intended to operate as a coherent code or scheme governing some subject matter, the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law, without any need for reference back to the same provisions as they appeared in earlier legislative versions. … An important part of the objective of a consolidating statute or a project like the Tax Law Rewrite Project is to gather disparate provisions into a single, easily accessible code. That objective would be undermined if, in order to interpret the consolidating legislation, there was a constant need to refer back to the previous disparate provisions and construe them …'

Lady Arden at [86] referred to a "presumption, in relation to consolidating statutes, that Parliament did not intend to change the law"; she then went on to say:

> [87] It would often be laborious for a court to investigate what provisions had been consolidated in any particular provision of a consolidating statute. It would be wrong in general for it to do so. The process of drafting a consolidation statute requires specialist techniques and skills and can be very complex.
>
> [88] But the position is different in relation to prior case law. The restraint required by the House of Lords in *Farrell v Alexander* [1976] 2

> All ER 721, [1977] AC 59 relates to legislative history, and not to relevant antecedent case law …

(b) I was not referred to any relevant case law on the provisions of Income and Corporation Taxes 1988, which were "rewritten" as sections 144, 165, 166 and 167. I conclude that the present case is one where *Farrell v Alexander* 'restraint' is required; as was said there at 726b:

> "… self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve."

(c) As I explain above, it is in my view reasonably possible to interpret those sections without recourse to antecedents; there is not real and substantial difficulty in doing so in line with the purposive approach to statutory interpretation supported by numerous case law authorities.

(d) Even if I am wrong about that, I see no material difference in the way the relevant provisions were written prior to the "rewrite" in CTA 2010 – the fact that paragraphs 2 and 3 Schedule 18 Income and Corporation Taxes 1988 used the drafting technique of referring to "one company" and "another" does not persuade me that the provisions did not also apply to more than one company, in circumstances where there was one more than one link company (any more than the parallel drafting technique – referring to "a" company, "company A" – used in s165 and s166).

DECISION ON ISSUE 2

Conclusions

91. I first state my conclusions on this issue, and then give my reasons.

(1) I find that the relevant arrangements that were in place during the relevant accounting periods – Article 7.5 of the articles of association of UKPNH, requiring a majority of 75% on any resolution of the company or of the members of the company (see [6(1)] above) – formed part of a scheme, one of whose main purposes was enabling the appellants to obtain enhanced consortium relief (which, the parties agreed, was a tax advantage under Chapter 4 of Part 5).

(2) The scheme of which those arrangements formed part was the corporate structure of UKPNH during the relevant account periods, about which I have made factual findings at [16-36] above. I explained what I mean by 'corporate structure' of UKPNH at [16] above; it covers the whole of the relationship between the UKPNH shareholders during the relevant accounting periods.

(3) I have made findings about the purposes of that scheme at [62] above. I find that all those purposes were "main" purposes.

The correct approach to deciding whether arrangements formed part of a scheme with a main purpose of tax avoidance

92. It seems to me, on the well-known authorities, that deciding whether certain arrangements formed part of a scheme with a main purpose of tax avoidance during a given period, is a matter of applying the law, interpreted purposively, to the facts, viewed realistically (the oft-cited dictum in *Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454* at [35] refers to the "transaction" viewed realistically – but as the Supreme Court said in *Rossendale BC v Hurstwood Properties* [2021] UKSC 16 at [14], the principle is not confined to cases where a *transaction* is the object of the tax).

93. As regards interpreting the statutory language purposively – a relevant recent authority, *Delinian Ltd (formerly Euromoney Institutional Investor plc) v HMRC* [2023] EWCA Civ 1281, was concerned with similar statutory language (there, in the context of tax on chargeable gains). Apart from making it clear that the statutory words require that the *whole* of the (in this case) arrangements, form part of the *whole* of the relevant scheme, it seems to me that the judgement in that case was deliberately unprescriptive about how to go about identifying the parameters of "the scheme" that is required to have a tax advantage main purpose – it is striking, I would say, that [45] of the judgement, which comes closest to this topic, recites the statutory wording not once, but twice, within a relatively short paragraph. On my reading, the core instruction of the Court of Appeal is – *apply the statutory language*, which, as is said at [42], is "*not complicated*".

94. In response to arguments advanced by the appellants, I acknowledge

(1) that in *Delinian* at [8], the Court of Appeal said that the scheme or arrangements that must be considered (in the context of this case, the parallel words are "the scheme") are "*the whole* of the scheme or arrangements undertaken by the taxpayer in question, not a selected part or selected parts of them" (emphasis in the original); but this, in my view, is not an instruction to identify the broadest possible scheme of which (in this case) Article 7.5 could possibly be said to form part; rather, the instruction is to apply the uncomplicated statutory words, by realistically identifying the scheme of which Article 7.5 formed part, and then having regard to *the whole* of that scheme; and also

(2) the authorities about the "need to avoid tunnel vision" and the injunction to look at the facts "in the round" (*Rossendale v Hurstwood Properties* at [16-17]); but for the same reasons as just given, this is not an instruction to identify the broadest possible scheme of which Article 7.5 could possibly be said to form part; rather, it is an injunction to look at all the facts in the round, and then determine, on a realistic view of those facts, what (if any) scheme Article 7.5 formed part during relevant periods.

95. I have not accepted HMRC's arguments, based on *Delinian* at [45], that it is wrong to identify a 'scheme' of which the arrangements form part, and then to consider whether that scheme has a main purpose of avoiding tax. HMRC argued that this would be to undertake the freestanding exercise to identify an appropriate or relevant 'scheme' from a number of candidates which, according to HMRC, *Delinian* held is not the correct approach. As I have observed above, *Delinian* was not in my view prescribing exactly how the Tribunal is to go

about ascertaining whether arrangements form part of a scheme with a main purpose of tax avoidance; in particular, it was not deciding that a two-step approach (first, what scheme did the arrangements form part of? second, did that scheme have a main purpose of tax avoidance?) – which indeed was the approach of the Upper Tribunal in *Euromoney Institutional Investor plc v HMRC* [2022] UKUT 205 (TCC) at [44], the decision which *Delinian* upheld – was wrong in law. The sentence in question in [45] merely said that it was not *necessary* to conduct the "free-standing exercise …" etc which HMRC sought to argue was an error of law.

Reasons for my finding as to the scheme of which the arrangements formed part during the relevant accounting periods

96. I was presented with two competing versions of the scheme of which Article 7.5 formed part during the relevant accounting periods:

(1) the appellants submitted that the scheme of which Article 7.5 formed part was that of acquiring and operating the acquired business;

(2) HMRC submitted that the scheme of which Article 7.5 formed part was, in essence, any steps taken in order to enable the appellants to obtain enhanced consortium relief (in particular, UKPNH's unusual share capital structure, such that the CKI companies held over 97% of the "ordinary shares" in UKPNH for the purposes of consortium relief; the use of three CKI companies as direct shareholders in UKPNH (rather than just one), with the one owning the other, and the second holding the third; and the giving of nearly 75% of the voting power in UKPNH to the CKI companies, with offsetting commercial safeguards in the form of 80% and 75% voting thresholds in the shareholders' agreement and articles respectively, and the voting agreement between CKI 3 and HEH).

97. In my view, and based on the evidence before the Tribunal, neither of these versions of the scheme of which Article 7.5 formed part, during the relevant accounting periods, is a realistic view of the facts. I say that for the following reasons:

(1) Article 7.5 was a specific provision of the corporate governance of UKPNH. As such, it addressed an important aspect of the relationship between the three ultimate shareholders. To say that it formed part of a scheme comprising the entire venture of acquiring and operating the acquired business, is in my view a "forced" view of the facts. Article 7.5 had little or nothing to do with the *operating* of the acquired business; and its role in the *acquisition* was, similarly, of no material consequence: it was important to regulating the ongoing relationship between the ultimate shareholders, all of whom were members of the Li "family" of companies, but it did not, materially, touch on the acquisition as such.

(2) On the other hand, Article 7.5 was woven into the fabric of the relationship between the ultimate shareholders, one of whose aims was to ensure that HEH and CKI controlled UKPNH *jointly* in the way described at [62(2)] above; this meant that the voting threshold needed to be above 60% (given the 40-40-20 in-substance split between the ultimate investors – see [43] above); and setting it somewhat higher, at 75% (in the articles of association) and 80% (in the shareholders' agreement, which

was expressed to take priority over the articles), equally achieved that goal. In the circumstances, it seems to me a "forced" and so unrealistic view of the facts, to regard Article 7.5 as forming part of a scheme comprised exclusively of the steps taken to enable the appellants to obtain enhanced consortium relief.

(3) In short, on a realistic view of the facts, I find that during the relevant accounting periods Article 7.5 was an integral part of the corporate structure of UKPNH as a whole, and important to all of its purposes (see [62] above), and so it formed part of a scheme comprising that structure.

(4) For the avoidance of doubt, I am of the view that UKPNH's corporate structure during the relevant accounting periods was, as a matter of ordinary English usage, a "scheme": it was a planned and designed system of things, with obvious coherence and integrity. I am aware that in *Snell v HMRC* [2007] STC 1279, a case (like *Delinian*) concerned with similar statutory language in the context of tax on chargeable gains, the Chancellor of the High Court (at [28]) adopted the *Shorter Oxford English Dictionary* "ordinary meaning" of "scheme", being 'a plan of action devised in order to attain some end'; however, that was in a different statutory and factual context; in my view, the *Snell* meaning of "scheme" is apposite where the statutory question is whether a *transaction* formed part of a scheme (or arrangements); here, where the statutory question is whether certain arrangements that continued over several accounting periods – specifically, a provision of a company's articles – formed part of a scheme, the statutory context evokes the slightly different, but commonplace and well-understood, meaning of "scheme" that speaks more to the *outcome* or *legacy* of a 'plan of action', than to the plan itself.

Reasons for my finding that enabling the appellants to obtain enhanced consortium relief was a main purpose of UKPNH's corporate structure during the relevant accounting periods

98. I have made findings at [62] above about the purposes of UKPNH's corporate structure (and so the scheme of which Article 7.5 formed part, as I have found it) during the relevant accounting periods. In making those findings, I have had regard to the authorities to which I was referred, in particular the following summary by the Court of Appeal in *JTI Acquisition Company (2011) Ltd v HMRC* [2024] STC 1179:

> [27] The principles relating to 'unallowable purposes' have more recently been considered by this Court in *BlackRock HoldCo 5, LLC v Revenue and Customs Commissioners* [2024] EWCA Civ 330, [2024] STC 740 ('BlackRock') and *Kwik-Fit Group Ltd v Revenue and Customs Commissioners* [2024] EWCA Civ 434 ('Kwik-Fit'). In *BlackRock*, Falk LJ, with whom Peter Jackson and Nugee LJJ agreed, summarised some key points relating to 'unallowable purposes' in these terms in para 124:
>
> > 'a) Save in "obvious" cases, ascertaining the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor.

> b) Object or purpose must be distinguished from effect. Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes.
>
> c) Subjective intentions are not limited to conscious motives.
>
> d) Further, motives are not necessarily the same as objects or purposes.
>
> e) "Some" results or consequences are "so inevitably and inextricably involved" in an activity that, unless they are merely incidental, they must be a purpose for it.
>
> f) It is for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker.'

> [28] Earlier in her judgment in *BlackRock*, having noted that it was not disputed that what mattered was the company's subjective purpose or purposes in being a party to the loan relationship in question, Falk LJ had said in para 107:
>
> 'The parties were quite right not to dispute the fact that what matters is the company's subjective purpose or purposes in being a party to the loan relationship in question. The purpose or purposes for which a company is a party to a loan relationship may or may not be the same as, for example, the purpose or purposes for which the company exists, or the purpose or purposes of a wider scheme or arrangements of which the loan relationship forms part. Those other purposes may, for example, encompass the purposes of other actors.'

99. In this case, the evidence before the Tribunal was overwhelmingly concerned with the events of 2010, during which the corporate structure of UKPNH in the relevant accounting periods was devised and created; it was a matter a straightforward inference to make findings, on the basis of what happened in 2010, about the ongoing purposes of UKPNH's corporate structure during the relevant accounting periods. Nor was it in dispute that one of the purposes of the steps taken in 2010 when devising and creating UKPNH's corporate structure – and so, by inference, of UKPNH's corporate structure during the relevant accounting periods – was to enable the appellants to obtain enhanced consortium relief; hence my finding, at [62(3)] above, that enabling the appellants to obtain enhanced consortium relief was "a" purpose of UKPNH's corporate structure. The key question is whether that purpose – to which I will refer, as shorthand, as the "consortium relief" purpose – was a "main" purpose.

100. The authorities to which I was referred on this matter included:

(1) *Travel Document Service v HMRC* [2018] STC 723, where Newey LJ said at [48]:

> [48] I would add, however, that I do not accept that, as was submitted by [counsel for HMRC], 'main', as used in para 13(4) of Sch 9 of FA 1996, means 'more than trivial'. A 'main' purpose will always be a 'more than trivial' one, but the converse is not the case. A purpose can be 'more than

> trivial' without being a 'main' purpose. 'Main' has a connotation of importance.

(2) In *IRC v Trustees of the SEMA Group Pension Scheme* [2002] STC 276, Lightman J, considering whether the obtaining of a tax advantage was the main object of a transaction, referred at [53] to "the need … to consider with care the significance to the taxpayer of the tax advantage":

> The tax advantage may not be a relevant factor in the decision to purchase or sell or in the decision to purchase or sell at a particular price. Obviously if the tax advantage is mere 'icing on the cake' it will not constitute a main object. Nor will it necessarily do so merely because it is a feature of the transaction or a relevant factor in the decision to buy or sell. The statutory criterion is that the tax advantage shall be more than relevant or indeed an object; it must be a main object.

The Court of Appeal endorsed this: see [2003] STC 95 at [119].

(3) *Travel Document Service* at [46] considered whether a taxpayer company's holding in a subsidiary company had a main purpose of tax avoidance, when that shareholding pre-dated a later transaction (the "swap" and "novations") involving those shares (which was admitted to have a tax avoidance purpose). The Court of Appeal said this at [46]:

> … While, therefore, there is no question of [the taxpayer] having had the tax advantage in mind when it acquired the shares, it was evidently intending to use them in the tax avoidance scheme during the currency of the Swap. Had the tax advantage in view been small, there might have been scope for argument as to whether an intention to use the shares to achieve it implied that obtaining the advantage was now a main purpose of holding the shares. In fact, however, the hoped-for gain was large both in absolute terms (more than £70m) and relative to the apparent value of [the taxpayer] (some £280m). That being so, I agree with [counsel for HMRC] that the inescapable inference was that securing the advantage had become a main purpose of holding the shares. The prospective advantage was of such significance in the context that gaining it must have become a main purpose of holding the shares as well as of the Swap and Novations.

101. There is no question but that the other purposes of UKPNH's corporate structure – those at [62(1) and (2)] above (to which I will refer, as shorthand, as the "non-tax" purposes) – *were* main purposes of that structure; I say that not because there are large, specific monetary amounts that can be assigned to them, but simply because they were (obviously) important (fundamental, even) to UKPNH's corporate structure during the relevant accounting periods.

102. The question is whether the "consortium relief" purpose, in the context of those other, "non-tax" main purposes, was, during the relevant accounting periods, a main purpose in its own right, or whether it paled into relative insignificance when placed beside those other purposes.

103. It seems to me clear, on the evidence before the Tribunal, that the ultimate shareholders very much wanted UKPNH's corporate structure to enable the appellants to obtain enhanced consortium relief following the acquisition, *provided that* doing so did not interfere with their other, "non-tax" objectives for the structure; the reasons for that were readily apparent:

(1) the ultimate shareholders were all members of the Li "family" of companies;

(2) as found at [44] above, the "non-tax" purposes of the corporate structure were relatively simple and straightforward (and not subject to the hard-fought negotiation that might be expected in a venture between unrelated parties);

(3) the expected financial benefit of enhanced consortium relief (some £104 million in a 5-year period) was significant in absolute terms; and so

(4) it made obvious commercial sense for the ultimate shareholders to cooperate to achieve the "consortium relief" purpose for the greater good of the Li "family" of companies, provided it did not interfere with the other main purposes of the structure.

104. The result was a corporate structure during the relevant accounting periods that was, quite obviously, designed to enable the appellants to obtain enhanced consortium relief. I say "obviously" because, as found at [57-59] above, that was the only explanation for:

(1) CKI, as one of the ultimate shareholders, having three legal entities (the three CKI companies) as UKPNH shareholders, rather than one (as was the case for the other two ultimate shareholders),

(2) the holding structure of the three CKI companies i.e. why CKI 3 wholly owned CKI 2, and CKI 2 wholly owned CKI 1,

(3) the highly unusual share rights of the issued shares of UKPNH, and

(4) the disproportionate voting power in UKPNH given to the CKI companies (and, as a consequence, to preserve the "non tax" main purposes of the corporate structure, the high voting thresholds and the voting agreement between CKI 3 and HEH).

105. The fact that the ultimate shareholders wanted to achieve the "consortium relief" purpose through the corporate structure, only if it did not interfere with the fundamental "non-tax" purposes, does not mean that the "consortium relief" purpose was not a main purpose: the corporate structure that emerged from the work done in 2010 was one designed to achieve the "consortium relief" purpose without compromising the "non-tax" purposes.

106. The fact that, in the context of all the activity that took place in 2010 to achieve the 2010 acquisition, relatively little time and effort was devoted to devising the aspects of UKPNH's structure that reflected its "consortium relief" purpose, does not show that the "consortium relief" purpose was not a main purpose *of that structure*: the appropriate comparator would not be the time and effort taken to achieve the 2010 acquisition as a whole, but the time and effort devoted specifically to devising UKPNH's corporate structure (which was a relatively minor part of the 2010 acquisition activity as a whole); viewed thus, it seems clear to me from the evidence that the time and effort taken in 2010 in devising the aspects of UKPNH's structure that reflected its "consortium relief" purpose *was* a significant portion of the time and effort devoted to devising UKPNH's corporate structure.

107. Finally, I do not think the relative importance to the ultimate shareholders of the "consortium relief" purpose of UKPNH's corporate structure is diminished by the fact that £104 million was a very small percentage of the expected cashflows of the 2010 acquisition as a whole (and obtaining enhanced consortium relief was an "upside", rather than "deal critical", in the 2010 acquisition itself – see [60] above) as

(1) the comparator is not the cash flows of the 2010 acquisition, but the value of the other, "non-tax" purposes of UKPNH's corporate structure;

(2) there was no clear monetary value to be assigned to those other, "non-tax" purposes;

(3) it would not be right to assign the value of the entire acquired business (i.e. of UKPNH as a whole) to those other, "non-tax" purposes: those purposes were concerned with a much narrower matter: regulating the relationship between the three ultimate investors; and

(4) £104 million is a significant sum in its own right.

108. I conclude that the "consortium relief" purpose of UKPNH's corporate structure was not one that paled into insignificance when set alongside that structure's "non-tax" purposes, but rather that it, too, was a main purpose of that structure.

CONCLUSION

109. My conclusion on issue 1 is as set out at [86] above; my conclusion on issue 2 is as set out [91(1)] above. The effect is that the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

110. 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.

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