Neutral Citation: [2025] UKFTT 01353 (TC)

Case Number: TC09685

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2019/05280
TC/2019/05281

Corporation Tax – deductions for purchased goodwill – were accounts drawn up in accordance with generally accepted accounting practice ("GAAP") – no – appeal dismissed.

Heard on: 5-9 February 2024
Judgment date: 14 November 2025

Before

TRIBUNAL JUDGE GERAINT WILLIAMS
SONIA GABLE

Between

MILTON PARK HOLDINGS LTD (1)
MILTON PARK LTD (2)

Appellants

and

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr Laurent Sykes KC of counsel, instructed by Haslers Chartered Accountants.

For the Respondents: Mr Michael Jones KC and Mr Harry Winter of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against closure notices amending the Appellants' tax returns to deny Corporation Tax deductions for the amortisation of purchased goodwill and consequent group relief. The Second Appellant, Milton Park Limited ("MPL") is the wholly owned subsidiary of the First Appellant, Milton Park Holdings Ltd ("MPHL").The central issue in dispute is whether the accounts of MPHL for the periods in issue were drawn up in accordance with generally accepted accounting practice ("GAAP") for the purposes of Schedule 29 to the Finance Act 2002 ("FA 2002") (for accounting periods ending before 1 April 2009) and Part 8 of the Corporation Tax Act 2009 ("CTA 2009") (for accounting periods ending on or after 1 April 2009), specifically whether it was in accordance with GAAP for MPHL to recognise any amount in respect of goodwill in those accounts on the facts of this appeal.

2. The valuation of the goodwill, if it was in accordance with GAAP for MPHL to recognise an amount in respect of it, has been agreed between the parties.

3. It is agreed that if GAAP compliant accounts of MPHL would not have recognised any goodwill on the facts of these appeals then:

> (a) There should have been no amortisation or impairment of goodwill recognised in those accounts.
>
> (b) No debits for goodwill amortisation or impairment are allowed to MPHL for corporation tax purposes, nor was MPL entitled to any group relief in respect of the debits claimed.

4. It is further agreed that if GAAP compliant accounts of MPHL would have recognised goodwill on the facts of these appeals then:

> (a) £173m was too high a value to recognise as goodwill and that the correct amount was £51.936m. On this basis, GAAP-compliant accounts would have recognised goodwill but in that lower amount.
>
> (b) Where non-GAAP compliant accounts have been drawn up, the statutory provisions allowing for debits for amortisation have effect as though there were GAAP-compliant accounts. Accordingly, the debits allowable to MPHL for corporation tax purposes for the amortisation or impairment of that goodwill should be commensurately reduced.
>
> (c) The group relief which MPL would be entitled to claim in respect of those debits would likewise be reduced accordingly.

5. The parties were agreed that if the Tribunal rejects HMRC's primary case on the acquisition of a business and is of the view that there was an impairment of previously recognised good will on entering into the arrangements, the Tribunal should give a decision in principle with valuation to be agreed between the parties.

PRELIMINARY ISSUE

6. On 24 January 2024, the Appellants made an application to the Tribunal to admit two further witness statements of Janice Ash ("JA") dated 15 January 2024 and Michael McInery ("MM") dated 15 January 2024 ("the Application"). The Application stated that the two witness statements were relevant to the issues in dispute. The two witness statements were provided to HMRC on 16 January 2024 with a request that HMRC confirm whether they would object to their inclusion. HMRC responded on 22 January 2024 confirming that they were considering their position and on 29 January 2024, emailed their objection to the

Appellants' application. HMRC's objection, in summary, was that it was simply too late: Direction 6 of the Tribunal Directions dated 1 July 2022 provided that any witness statements must be served on 29 November 2021 and the statements were therefore some two years late.

7. Having considered the Application and HMRC's objection together with oral submissions from the parties we were satisfied that the additional evidence was relevant to the issues that we had to determine and the evidence contained in the two witness statements would probably be referred to by the witnesses in oral evidence. We did not consider the lateness of the evidence was a compelling reason not to admit the evidence. We did confirm to the parties that it was open to the parties to make submissions as to what weight, if any, should be attached to the two witness statements.

BURDEN OF PROOF

8. The burden of proof rests with the Appellants to show that the Closure Notice conclusions are wrong. The ordinary civil standard of the balance of probabilities applies.

TRANSCRIPT

9. The hearing was transcribed and we were provided with a transcript at the end of each hearing day. References to the transcript in the decision are in the format Day/Page/Line Number.

EVIDENCE

10. The written evidence before us consisted of a main hearing bundle of 6,168 pages, a supplementary bundle of 331 pages and an authorities bundle of 4,378 pages.

11. The Appellants relied upon the following witness evidence:

(1) Witness statements of Janice Ash ("JA") dated 29 November 2021 and 15 January 2024 who was involved with the tax and accounting of the Appellants.

(2) A witness statement from Lesa McAnulty ("LM") dated 26 October 2022 who worked as Chief Operating Officer for a company connected to the Appellants between 2000 and 2015.

(3) Witness statements from Michael McInerney ("MM") dated 29 November 2021, 15 January 2024 and 1 February 2024, who, together with his wife Eunice McInerney ("EM"), had a variety of roles in the care home businesses in question at the relevant times.

12. JA's witness statements set out her role since early 2013 in different entities owned by MM and EM. Prior to her employment in entities owned by MM and EM, she was employed by Haslers Chartered Accountants ("Haslers") from 1987 to 2013 where she was a Tax Manager looking after a portfolio of clients culminating in her role as Tax Practice Manager at Haslers. As such, she claimed to have first-hand knowledge of the events forming the background to the appeals as well as first-hand knowledge of the business of the Appellants.

13. LM's witness statement set out her role as Chief Operating Officer for Brookdale Healthcare and her involvement with Milton Park Hospital from its inception to its sale. LM's role was largely dealing with regulatory matters and registration with the various regulatory bodies such as the Healthcare Commission. LM was not cross-examined and her answer to Mr Sykes supplementary question was all hearsay. Beyond her confirmation that the Care Quality Commission had no issues with BHL or her role as nominated "responsible individual" we did not derive any material assistance from her witness statement and note that paragraph 11 of her witness statement states "As a senior manager with a clinical and care focus I personally had little interest in the corporate structure unless there was a direct impact on care provision which there was not."

14. MM, together with EM, were the sole directors and shareholders of the Appellants until the sale of the business to Tracscare in July 2015. MM's first witness statement dealt with the background to the business and the Transactions. His second witness statement provided further details on the profit share allocation of the Milton Care Partnership ("MCP") and explained why his son, Sean McInerney ("SM"), was unable to give evidence. Exhibited to the witness statement was a letter from SM's GP setting out the diagnoses which meant it was inadvisable for SM to attend the hearing and give evidence. MM's third witness statement corrected an error identified in paragraph 60 of his first witness statement.

15. JA and MM gave evidence and were cross-examined. We have largely accepted their evidence save where otherwise stated.

EXPERT EVIDENCE

16. The parties adduced expert evidence on GAAP.

17. The Appellants' expert, Peter Chidgey ("PC"), provided a report dated 18 July 2022 and a further report dated 3 October 2022. PC is an independent consultant and a Fellow of the ICAEW and was a partner in BDO LLP until his retirement from the firm in 2013.

18. HMRC's expert, Dr Elizabeth Alford ("EA"), provided a report dated 18 July 2022, a further report dated 3 October 2022, and an addendum to that further report dated 19 January 2023. Dr Alford is a Fellow of the ICAEW and employed by HMRC as an Advisory Accountant in the Large Business area.

19. The experts provided a joint statement ("JS") dated 5 December 2022.

20. We were satisfied that both experts were qualified to provide expert evidence in this appeal.

GENERAL APPROACH

21. In this decision we have not dealt with every single point made by either side in more than 90 pages of submissions and comprehensive oral submissions. It is not necessary for us to do so. We are satisfied that we have considered all of the key issues and have taken into account all the materials to which we were referred.

FINDINGS OF FACT

22. The parties provided an agreed Statement of Facts and Issues. Having considered the evidence we have made findings of fact which we have set out below. The findings of fact incorporate the agreed facts; for ease of reference our findings of fact are in italics.

23. These appeals concern the corporation tax consequences of various transactions and agreements entered into between MM and EM and/or various persons connected with them. They relate to the affairs of a care home named the Milton Park Hospital, together with a further facility, Pathways Latham House, on the same campus, located in Bedfordshire.

24. Over the course of the periods in issue, MM, EM and/or various persons connected with them also entered into two materially similar transactions and agreements were entered into in respect of two other partnerships operating care homes using the names "Brookdale" and "Brookdale Care", namely:

(a) Kemble & Oakley Partnership.

(b) Brookdale Healthcare Partnership.

2004 – Formation of the Milton Park Partnership

25. MM and EM executed a deed dated 1 August 2004 entitled Deed of Partnership (the "MPP Deed of Partnership"), which recited that MM and EM operated a care home business

trading under the style "Milton Park" and that they wished to record their partnership in the deed. The partnership contemplated by this deed is hereafter referred to as the Milton Park Partnership (the "MPP"). The MPP Deed of Partnership provided, inter alia, that:

(a) The MPP was deemed to have commenced on 1 August 2004 (clause 3.1).

(b) Each partner was entitled to draw a monthly sum on account of their profit share, as may be agreed by the partners from time to time. The profit share was subject to review, with MM in his capacity as Managing Partner having the final decision with respect to the amount of any revision (clause 8).

(c) The goodwill of the Partnership was to be jointly owned by MM and EM (clause 9).

26. Partnership returns were provided to HMRC in the name of the MPP. No HMRC enquiries were opened into the partnership returns.

2005

27. Brookdale Healthcare Limited ("BHL"), a company controlled by MM and EM, executed a deed dated 1 January 2005 entitled Deed of Admission (the "BHL Deed of Admission to MPP") together with MM and EM. The BHL Deed of Admission to MPP provided, inter alia, that:

(a) With effect from 1 January 2005, BHL was to be a partner in the MPP with MM and EM upon and subject to the terms of the MPP Deed of Partnership, as varied by the BHL Deed of Admission to MPP (clause 1).

(b) BHL was to provide the services of full time and temporary personnel to the MPP (clause 2).

(c) The personnel were to undertake "all general supervisory and management duties, planning and decision making, the review of financial data and accounts, sales and marketing on behalf of [the MPP] (the "Services") as and when required by [the MPP], provided that the [personnel] or any of them are at that time available and free to undertake the Services" (clause 3).

(d) MM in his capacity as Managing Partner reserved the right to review the provision of administrative and management services to the MPP by BHL, and BHL agreed to adopt and implement any recommendations that may be prescribed by MM in his capacity as Managing Partner as a result (clause 4).

(e) Clause 8 of the MPP Deed of Partnership was replaced in full. The new wording provided that the monthly sum which a partner was entitled to draw on account of their profit share was to be agreed by MM in his capacity as Managing Partner from time to time (clause 6).

(f) Clause 9 of the MPP Deed of Partnership was replaced in full. The new wording provided that BHL's admission would not entitle BHL to any right or entitlements whatsoever to the goodwill, Capital Account, benefit, assets or property of the partnership.

28. *BHL was a limited company operated to provide essential back-office services across the various partnership businesses and BHL was always a partner in each of the partnerships. MM viewed BHL as a central services function that included the regulatory functions, IT, HR, sales and marketing, training and accounting*.

29. BCSL, a company controlled by MM, executed a deed dated 1 April 2005 entitled Deed of Admission (the "BCSL Deed of Admission to MPP") together with MM, EM and BHL.

The BCSL Deed of Admission to MPP recited, inter alia, that BCSL was supplying personnel to the care home sector generally and also to the MPP in accordance with the terms and conditions of a Supply of Employees Agreement dated 1 March 2005 which was stated to be between MM, EM and BCSL. [This document was stated to be no longer available and was not in evidence.] The BCSL Deed of Admission provided, inter alia, that:

> (a) With effect from 1 April 2005, BCSL was to be a partner in the MPP with MM, EM and BHL upon and subject to the terms set out in the BCSL Deed of Admission to MPP (clause 1).
>
> (b) The supply by BCSL of employees to the MPP was to commence on 1 April 2005 and was to continue subject to termination on the terms of the BCSL Deed of Admission to MPP (clause 2).
>
> (c) The MPP agreed to procure all of its requirements for the engagement of employees, save for the MPP's own executive offices and administrative staff, exclusively from BCSL but could procure employees from any other source in the event BCSL was unable on reasonable notice to fulfil the MPP's requirements (clause 3).
>
> (d) Clause 8 of the MPP Deed of Partnership was replaced in full. The new wording modified clause 8 so that, in the case of BCSL, its profit share was to be equal to the cost of employee emoluments plus a mark-up of 35%, provided it was agreed by MM in his capacity as Managing Partner that the level of profit of the MPP as a whole was sufficient to satisfy the BSCL profit share (clause 11).
>
> (e) Clause 9 of the MPP Deed of Partnership was replaced in full. The new wording provided that BCSL's admission would not entitle BCSL to any right or entitlements whatsoever to the goodwill, Capital Account, benefit, assets or property of the partnership (clause 12).

30. In July 2005, the Milton Park Hospital was opened at premises at The Lane, Wyboston, Bedfordshire MK44 3AS, the freehold of which was owned by MM and EM.

31. Milton Park Hospital was operated as a care home using the names "Brookdale" and "Brookdale Care".

2006

32. On 16 January 2006, the Health and Safety Executive served an Improvement Notice on BHL as the registered person under the Care Standards Act 2000 in respect of Milton Park Hospital. This was a result of a member of staff being injured by a disturbed patient. The notice was complied with. This was confirmed following a further visit from the Health and Safety Executive in April 2006. No further action was required.

2007

33. In early 2007, MM and EM began discussions with Haslers about a possible restructure of their various operating partnerships. The assets of each partnership were owned by MM and EM. The restructure proposal presented to MM and EM by Mr Martin Anderson of Haslers would result in the partnerships of MPP and the others being incorporated by MM and EM into limited companies.

34. The discussion paper dated 27 March 2007 confirmed:

> *(1) MPP operates the Milton Park Independent Hospital. The current partners are MM, EM, BHL and BCSL.*

(2) The goodwill of the business and the freehold property are owned by MM and EM. Both BHL and BCSL are profit sharing corporate partners only. BCSL provides all of the staff working at Milton Park in return for a profit share flexed to cover the costs of the staff plus a mark-up of 35%. This structure was put in place for VAT reasons.

(3) The objectives of the proposed transactions were to ensure that the level of disclosure provided by the filed accounts is the level that applies to small companies (i.e. abbreviated accounts) and the VAT efficient structure involving BCSL continues.

35. The proposed transactions were as follows:

(1) Both corporate partners will be removed from the partnership immediately prior to incorporation. This ensures strict compliance with Section 162 TCGA 1992, which refers to partnerships that do not include companies.

(2) MM and EM will transfer the partnership business to a newco – Milton Park Holdings Limited (MPHL) – under the s162 procedure. The position in relation to the freehold property remains under consideration but this is not a major issue in terms of achieving the objectives referred to above.

(3) Immediately after the s162 transaction, MPHL enters into arrangements with newly incorporated subsidiary company – MPL – to operate the Milton Park business under annual licence. The proposed annual licence was not pursued.

(4) MPL then, in turn, enters into a partnership agreement with BCSL. The new Milton Park partnership then conducts the business on a day-to-day basis, with annual profit shares then being awarded to both MPL and BCSL (this is a very similar structure to that presently applying to the care homes operated by Brookdale Healthcare Limited).

36. The analysis section of the paper set out the bases for why MPHL and MPL would satisfy the tests for "small" companies for disclosure purposes:

(1) MPHL will have significant net assets (circa £80m), but only a very low level of turnover (any licence fees in relation to the property/goodwill licensed to the subsidiary) and no employees.

(2) MPL will have minimal net assets, a turnover level that is effectively its profit share from the underlying partnership (under £5.6m) and no employees.

(3) It follows from the above that MPHL plus MPL will pass the two out of three test.

(4) A key point is that the partnership turnover (which will be in excess of £15m) will not be attributed to either of the partners for disclosure purposes (or indeed, to MPHL itself).

(5) It follows from the above that both MPHL and MPL will be "small" companies for disclosure purposes. two out of three test for disclosure by a small company:

(6) The VAT position would remain unchanged.

37. The proposals were presented to MM and EM. MM confirmed in oral evidence that the proposed transactions accorded with his instructions to Haslers, he further confirmed that the transactions were as recorded in the Statement of Agreed Facts and Issues.

38. The "Brookdale" name and logos were registered as trademarks by BHL as of 24 May 2007. *The name "Brookdale Care" was not registered. The Brookdale name had been used*

since the 1990s and was used across all of the care home businesses prior to registration of the name and logos by BHL on 24 May 2007.

39. On 10 August 2007, Milton Park Limited ("MPL") was incorporated in the UK with MM as the sole shareholder.

40. MM served notices of withdrawal dated 20 November 2007 on BHL and BCSL respectively.

(a) The notice to BHL stated that:

(i) Notice to withdraw pursuant to clause 8 of the BHL Deed of Admission was given to BHL, commencing with effect from 20 November 2007;

and

(ii) The MPP was to continue with the "Continuing Partners" in accordance with the MPP Deed of Partnership as varied by the BHL Deed of Admission.

(b) The notice to BCSL stated that:

(i) Notice to withdraw pursuant to clause 7 of the BCSL Deed of Admission was given to BCSL, commencing with effect from 20 November 2007;

and

(ii) The MPP was to continue with the "Continuing Partners" in accordance with the MPP Deed of Partnership as varied by the BCSL Deed of Admission.

41. Minutes of a meeting of the board of BCSL recorded as taking place on 30 November 2007 stated, inter alia, that:

(a) BCSL's membership of the MPP was to cease on or after 20 December 2007 (para.2(i)). *This reflected the notice dated 20 November 2007 from MPP pursuant to Clause 7 of the Partnership Agreement dated 1 April 2005.*

(b) The meeting was to consider the proposal to "continue to provide specialist staffing services for" Milton Park Holdings Limited ("MPHL") which was described as "the incorporated body who intends to purchase and operate the business under the name Milton Care Partnership" (para.2(ii)).

(c) It was further proposed that "invitation to join Milton Care Partnership would later be extended to [BCSL] and that [BSCL's] profit share would be calculated to provide a percentage uplift on employment costs incurred" (para.2(iii)).

(d) It was agreed "to approve the proposals and to continue to provide specialist staffing services to Milton Care Partnership" (para.4).

42. Minutes of a meeting of the board of BHL recorded as taking place on 30 November 2007 stated, inter alia, that:

(a) BHL's membership of the MPP was to cease on or after 20 December 2007 (para.2(i)). *This reflected the notice dated 20 November 2007 from MPP pursuant to Clause 7 of the Partnership Agreement dated 1 April 2005.*

(b) The meeting was to consider the proposal to "continue to provide specialist staffing services for" Milton Park Holdings Limited ("MPHL") which was described as "the incorporated body who intends to purchase and operate the business under the name Milton Care Partnership" (para.2(ii)). *MM explained at paragraph 59 of his first witness statement that BHL did not provide employees and that the minutes were not correct as BHL simply provided administrative and support services to all the businesses.*

(c) It was further proposed that "invitation to join Milton Care Partnership would later be extended to [BHL] and that [BHL's] profit share would be calculated to provide a percentage uplift on employment costs incurred" (para.2(iii)). *This minute was incorrect for the reasons recorded above: BHL did not provide employees.*

(d) It was agreed "to approve the proposals and to continue to provide specialist staffing services to Milton Care Partnership" (para.4).

43. The accounts for MPP for the period ended 28 December 2007 show that BHL and BCSL became creditors of the partnership on cessation of membership of the MPP. There was no formal agreement that covered how BCSL would be paid for the staff it provided during the period when it had ceased to be a member of the MPP, it was left open. The same position applied in respect of BHL until the beginning of April 2008. No separate fee was paid to BCSL for the period between 21 December 2007 when BCSL left the MPP and 3 January 2008 when it joined MCP.

44. The share of profits allocated to BCSL and BHL covers the period to the cessation of MPP i.e. the period 1 April 2006 to 28th December 2007.

45. On 20 December 2007, Milton Park Holdings Limited ("MPHL") was incorporated in Jersey, with MM and EM who were UK residents being the sole shareholders and directors. MPHL then registered a branch in the UK on 29 May 2009.

46. MM, EM, and MPHL executed a deed dated 28 December 2007 entitled "Transfer of Partnership Assets & Liabilities Agreement" ("Transfer Agreement"). This deed provided, inter alia, that:

(a) MM and EM agreed to sell and MPHL agreed to buy the "Business" (defined as "the partnership assets and business of [the MPP] as more particularly detailed in Schedule 2") as a going concern. MPHL also agreed to assume the liabilities of the Business on the "Completion Date" (as defined) (clause 2.1). Schedule 2 to the deed listed:

(i) Three items of "Partnership Freehold Property" (Milton Park, Latham, and Manor Farm, all at The Lane, Wyboston, MK44 3AS) at a total value of £9,740,000;

(ii) "Business Goodwill" at a total value of £173m; and

(iii) "All Other Assets as at the Agreement Date, including debtors" at a total value of £858,525.

Schedule 2 also listed "Creditors as at the Agreement Date" at a value of £9,517,207.

(b) In addition to the "Business defined in Schedule 2", MM and EM also agreed to vest in MPHL various other "assets used in the conduct of the Business" (clauses 2.2 and 6).

(c) Management accounts were to be prepared as at the Completion Date, along with other documents, to show the assets and liabilities of the Business (clause 6.1).

(d) The consideration was to be the allotment to MM and EM of 10,000 ordinary shares of £1 each in MPHL, credited as fully paid up, and the assumption by MPHL of "the liabilities of the Business" (clause 4). 5000 shares each were allotted to MM and EM on 28 December 2007.

47. *In addition to the above assets, the following documents were transferred to MPHL: bespoke care plans for person being cared for, medication records, advocacy files and Mental Health documentation, documentation concerning deprivation of liberty and risk assessments, pre-admissions assessments, daily logs, relative's contact details, social worker details, records of funding, money handed in for safekeeping, placement review records, accident records, Health and Safety files, operating policies and procedures, documents relating to the care home properties (maintenance, insurance etc), staff training records and staff rotas including attendance and holiday records. In addition, medical assets, equipment and fixtures and computer equipment were transferred to MPHL at net book value*.

48. On 31 December 2007, MPHL acquired the entire shareholding of MPL from MM for no consideration.

49. Minutes of a directors' meeting of the board of MPHL recorded as taking place on 31 December 2007 stated, inter alia, that *"the purpose of the meeting was to consider and if deemed fit, to approve documents relating to the acquisition of the partnership assets and liabilities of a care home business called the Milton Park partnership (the "Partnership") by the Company and to consider how and by whom, the general day to day management and execution of the partnership will be conducted. (para 2)* and "MPL … will be instructed to conduct the general day-to-day management and execution of the care home business acquired by [MPHL] (the "Business") and it is agreed that MPL shall have full autonomy with regard to the conduct of the Business" (para.6).

50. Minutes of a directors' meeting of the board of MPL recorded as taking place on 31 December 2007 stated, *inter alia*, that:

(a) the purpose of the meeting was to consider and if deemed fit, to approve an arrangement with Milton Park Holdings Limited, the Company's parent company ("MPHL"), whereby, on behalf of MPHL, the Company will conduct the day to day management and execution of a care home business recently acquired by MPHL.

(b) It was noted that MPHL had recently acquired the partnership assets and business of the Milton Park partnership pursuant to a Transfer of Partnership Assets Agreement dated 23 December 2007 and made between the partners of the said partnership namely [MM] and [EM and MPHL

(c) "MPHL has instructed [MPL] to conduct the general day-to-day management and execution of the care home business acquired by MPHL (the "Business") and it is agreed that MPL shall have full autonomy with regard to the conduct of the Business" (para.4).

(d) It was resolved that MPL "would seek to enter into partnership with others in order to carry on the Business of the care home" (para.7).

2008

51. MPL and SM, executed a deed dated 1 January 2008 entitled Deed of Partnership (the "MCP Deed of Partnership"), which recited that MPL and SM operated a care home business trading under the name Milton Care and that they wished to record the terms of their partnership in the Deed. The MCP Deed of Partnership provided, inter alia, that:

(a) The Definitions in clause 1 stated:

(i) "Managing Partner" means Sean McInerney.

(ii) "Outgoing Partner" means a Partner who ceases to be a Partner by his death or otherwise ceases to be a Partner in accordance with any provision of this Agreement

(iii) "Partnership Bank Account" means the Brookdale Care bank account held at National Westminster Bank plc, Harrow Town Centre, 315 Station Road, Harrow, Middlesex, HA1 2AD

(b) SM and MPL were to carry on the business of a care home (clause 2.1).

(c) The MCP was to be deemed to have commenced on 1 January 2008 (clause 3.1).

(d) Each partner was entitled to draw a monthly sum on account of their profit share, as agreed by SM from time to time. The profit share was subject to review, with SM in his capacity as Managing Partner having the final decision (clause 8).

(e) The goodwill of the MCP shall be owned solely by MPHL (clause 9).

(f) Clause 12 is headed "Departure of Partners" and states:

(i) Notwithstanding Clause 13 below, the Managing Partner reserves the right to withdraw a Partner from the Partnership upon giving the Partner one month's written notice of the said withdrawal. (clause 12.1)

(ii) If any Partner ceases to be a Partner then the Partnership shall not be dissolved as between the Continuing Partners. (clause 12.2)

(iii) *If any Partner ceases to be a Partner leaving only one Continuing Partner the Partnership shall be dissolved in accordance with section 14 below. (clause 12.2)*

(g) Clause 16 is headed "Partnership Property" and states:

(i) All correspondence, documents, specifications, computer programs, disks, notes and memoranda of any trade secrets or any confidential information of or concerning the Partnership made or received by an Outgoing Partner whilst being a Partner and/or whilst being employed by the Partnership shall be the property of the Partnership and shall be surrendered by the Outgoing Partner to the Partnership at the Termination Date. (clause 16.1)

(ii) *An Outgoing Partner shall surrender to a Continuing Partner at their Termination Date any other property of the Partnership. (clause 16.2)*

52. The 2008 accounts of MCP do not show any assets being contributed by the partners. The Partners' Current Accounts record a share of profit in respect of MPL, BCL and SM.

53. MM accepted that SM had autonomy and was the Managing Partner of MCP. JA accepted that SM had autonomy over the partnership.

54. MPL, SM and BCSL executed a deed dated 3 January 2008 entitled Deed of Admission (the "BCSL Deed of Admission to MCP"). The BCSL Deed of Admission to MCP recited, inter alia, that:

(a) "Effective Date" means 3rd January 2008

(b) "Term" means 8 years from the Effective Date

(c) MPHL acquired the assets and liabilities of a partnership that operated a care home business trading under the name of Milton Park pursuant to a Transfer of Partnership Assets and Liabilities Agreement dated 28 December 2007 between MPHL, MM and EM.

(d) MPL and SM decided to form their own partnership in order to conduct the business of the old partnership and duly executed a Deed of Partnership dated 1 January 2008.

(e) BCSL supplied personnel to the care home sector generally and also to the MPP in accordance with the terms and conditions of a Supply of Employees Agreement dated 1 April 2005, which was stated to be between MM, EM and BCSL.

(f) MPL and SM wished to admit BCSL to join the MCP and "to continue supplying the Services" (as defined) to the MCP.

55. The BCSL Deed of Admission to MCP provided, inter alia, that:

(a) With effect from 3 January 2008 BCSL was to be a partner in the MCP (clause 1).

(b) The MCP would engage BCSL to supply "the Services", being the supply by BCSL of employees to the MCP engaged by the MCP in its business, in consideration of the payment of a profit share (clause 2).

(c) The supply of employees to the MCP was to commence on 3 January 2008 and was to continue for a period of eight years subject to termination on the terms of the BCSL Deed of Admission to MCP (clause 3).

(d) The MCP agreed to procure all of its requirements for the engagement of employees, save for the MCP's own executive offices and administrative staff, exclusively from BCSL, but could use other sources in the event that BCSL was unable on reasonable notice to fulfil the MCP's requirements (clause 4).

(e) In the event of a disposal of the goodwill of the MCP, SM reserved the right in his capacity as Managing Partner to withdraw BCSL from the partnership on 30 days' notice in writing (clause 7).

(f) Clause 8 of the MCP Deed of Partnership was amended by the insertion of a new sub-clause 8.4, which provided that, in the case of BCSL, its profit share was to be equal to the cost of employee emoluments plus a mark-up of 35%, provided it was agreed by SM in his capacity as Managing Partner that the level of profit of the MCP as a whole was sufficient to satisfy the BSCL profit share (clause 12).

(g) Clause 9 of the MCP Deed of Partnership was amended to provide that (clause 13):

(i) The goodwill of the MCP would continue to be owned by MPHL.

(ii) BCSL agreed with MPL and SM that BCSL's admission to the MCP would not afford BCSL any right or entitlements to the goodwill, capital account, benefit, assets or property of the MCP; that any consideration or compensation arising in connection with a disposal of the business to an unconnected third party or a change of control of the partnership would belong only to MPL and SM (the "Existing Partners"); and that BCSL (the "New Partner") would not be entitled to any such consideration or compensation.

56. MPL, SM, BCSL and BHL executed a document dated 4 April 2008 entitled Deed of Admission (the "BHL Deed of Admission to MCP"). The BHL Deed of Admission to MCP recited, inter alia, that BHL supplied, on a non-exclusive basis, administration support services to the care sector generally; and that MPL, SM and BCSL wished to admit BHL to join the MCP and "to continue to supply the services" to the MCP. The BHL Deed of Admission to MCP provided, inter alia, that:

(a) With effect from 4 April 2008, BHL was to be a partner in the MCP with MPL, SM and BCSL upon and subject to the terms set out in the BHL Deed of Admission to MCP (clause 1).

(b) The MCP was to engage BHL to supply employees to the MCP in consideration of the payment of a profit share by the MCP and upon the terms and conditions of the BHL Deed of Admission to MCP (clause 2).

(c) The supply of employees to the MCP was to commence on 4 April 2008 and was to continue for a period of seven years subject to termination on the terms of the BHL Deed of Admission to MCP (clause 3).

(d) The MCP agreed to procure all of its requirements for the engagement of employees, save for the MCP's own executive offices and administrative staff, exclusively from BHL, but could use other sources in the event that BHL was unable on reasonable notice to fulfil the MCP's requirements (clause 4).

(e) In the event of a disposal of the goodwill of the MCP, SM reserved the right to withdraw BHL from the partnership on 30 days' notice in writing (clause 7).

(f) Clause 8 of the MCP Deed of Partnership was amended by the insertion of a new sub-clause 8.4, which provided that, in the case of BHL, its profit share was to be "*equal to the residual profit following the calculation of agreed profit sharing ratios*" provided it was agreed by SM in his capacity as Managing Partner that the level of profit of the MCP as a whole is sufficient to satisfy the BHL profit share (clause 12).

(g) Clause 9 of the MCP Deed of Partnership was amended to provide that (clause 13):

(i) The goodwill of the MCP would continue to be owned by MPHL.

(ii) BHL agreed with MPL, SM, and BCSL that BHL's admission to the MCP would not afford BHL any right or entitlements to the goodwill, capital account, benefit, assets or property of the MCP; that any consideration or compensation arising in connection with a disposal of the business to an unconnected third party or a change of control of the partnership would belong only to MPL, SM and BCSL (the "Existing Partners"); and that BHL (the "New Partner") would not be entitled to any such consideration or compensation.

57. On various dates in May 2008 the Healthcare Commission undertook visits to Milton Park Hospital following an incident involving a patient of the hospital. A statutory notice was served on BHL as the registered person under the Care Standards Act 2000 by the Healthcare Commission on 12 May 2008. The Healthcare Commission provided its report summarising the outcome of its investigation in September 2008. The report was aimed at BHL as the registered person and referred to the hospital as owned by BHL. The report stated: "The supporting evidence provided by the hospital, together with the visits we made to site where we examine documents, conducted a visit to units on site and spoke to a range of staff, demonstrated that the hospital had taken action to address the issues identified in the notices and had remedied the breaches. The action taken by the hospital in response to the statutory notices have been assessed and notices deemed complied with."

2009

58. On various dates in 2009 and 2010 the Care Quality Commission ("CQC") undertook visits to Milton Park Hospital. The report issued by the CQC was addressed to BHL as the registered person and referred to the hospital as owned by BHL.

59. Notes of a meeting of the board of MPHL recorded as taking place on 31 March 2009 stated that MPHL had appointed MPL to assume its role in the Milton Park Hospital business and that it was resolved that MPHL would assume the role within the business previously undertaken by MPL with effect from 1 April 2009. *Paragraph 2 of the Minutes under the heading "Purpose" records:*

> *(1) Purpose The Company is the sole owner of the Partnership Goodwill of Milton Care Partnership (MCP) by virtue of clause 9 of the Partnership Deed dated 01 January 2008 and appointed its wholly owned subsidiary Milton Park Limited (MPL) to assume its role within the business. The Chairman reported that the purpose of the meeting was to consider and if deemed appropriate, arrange for the Company to assume the role within the business of MCP previously undertaken by MPL.*

Paragraph 4 of the Minutes under the heading "Documents" records:

> *(2) A copy of a Partnership Agreement dated 01 January 2008 together with all subsequent papers (Deed dated 03 January 2008 admitting Brookdale Care Services Limited to the partnership and Deed dated 04 April 2008 admitting Brookdale Healthcare Limited to the partnership) were considered and it was agreed that the Company would stand in the place of MPL with effect from 01 April 2009 and will be responsible for the general day-to-day management and execution of the care home business.*

60. MM and EM executed TR1 forms dated 24 September 2009 as deeds to effect the following transfers:

> (a) The transfer of Latham House, Wyboston, MK44 3AS from MM and EM to MPHL.
>
> (b) The transfer of The Manor, the Lane, Wyboston, MK44 3AS from MM and EM to MPHL.
>
> (c) The transfer of "Land and buildings to the south side of The Lane, Wyboston, now known as Milton Park" from MM and EM to MPHL.
>
> (d) The transfer of 10 Bushmead Road, Eaton Socon, St Neots, PE19 8BP "(Now known as Oakley House)" from MM and EM to Kemble Holdings Limited.

(e) The transfer of 23 Priory Villas, Colney Hatch Lane, London N11 3DB from MM and EM to Kemble Holdings Limited.

61. The TR1s stated, in the box headed "Consideration", and under the entry "Insert other receipt as appropriate", as follows: "Finance Act 2003 Schedule 15 Part 3 Incorporation of a Partnership Business to a Connected Company".

2013

62. A "written resolution of the Partners of Milton Care Partnership", signed and dated 17 January 2013, stated, inter alia, that it was resolved that:

(a) In order "to formalise our agreement following the expiry of the agreement under which Brookdale Care Services Limited benefits from the company's entitlement to it's [sic] partnership share, it is agreed that the arrangement shall continue until notice of thirty days is served".

(b) "The partnership share shall be calculated as full salary costs incurred together with an addition to represent an increase on the salary costs of between zero percent and thirty five percent."

(c) "The addition to the salary costs is to be agreed between the partners annually".

63. The written resolution was required as a refinancing process was undertaken to release capital owed to MM and EM to enable them to progress with a new care venture. Haslers advised on the process and through discussions with the bank's solicitors it was highlighted that the partnership agreement with BCSL dated 3 January 2008 had an expiration date (January 2016). This was effectively before the end of the term of the loan. The bank's solicitors drew up paperwork to satisfy their clients that the agreement would at least extend throughout the period that the funding was expected to run.

2015

64. On 7 July 2015, EM and MM sold their shares in MPHL to Tracscare, a third-party UK care-provider.

The Operation of Milton Park Hospital

65. At all material times from its opening in July 2005:

(a) The business was operated from properties held by MM and EM with no rental charge being levied. Those properties were transferred from MM and EM's ownership to MPHL on 24 September 2009.

(b) BCSL provided staff to work at the Milton Park Hospital.

(c) BHL provided administrative and support staff for the business.

(d) All end-customer agreements and all invoices used the "Brookdale" name and logo, which were registered trademarks of BHL from 24 May 2007, and also carried the name "Brookdale Care".

(e) All end-customer agreements and all invoices also carried the registered address of BHL (14 Parkway, Welwyn Garden City, Hertfordshire, ALB 6HG) and provided that payments should be made to the bank account of BHL.

(f) Marketing material identified the business as "Brookdale Care" with a single address (being BHL's address referred to above), a single website, a single telephone number, and a single email address for all activities conducted.

Regulatory matters

66. BHL was the entity that dealt with all regulatory matters. Under the Care Standards Act 2000 there had to be a registered manager and responsible individual and neither was required to be employed by the registered provider. BHL was registered as the registered provider as it carried on the central function entity on behalf of the business at Milton Park and the other care home partnerships. MM's evidence was that this was done for administrative simplicity as "having these central functions in one place covering all the four businesses and homes meant we could control the businesses efficiently". MM viewed BHL as the group registration holder and this position was not questioned or challenged by the CQC.

MPHL's Financial Statements

67. MPHL's accounts for the period 28 December 2007 to 31 March 2009 stated that they were approved by the board of MPHL on 11 January 2010. On the basis of the "Transfer of Partnership Assets & Liabilities Agreement" dated 28 December 2007, MPHL recognised "goodwill" as an intangible fixed asset in those accounts at a cost of £173m.

68. The accounts for the period ended 31 March 2009 stated in note 9 that "On the date of incorporation, the company issued 10,002 ordinary shares for a total consideration of £174,081,320 representing a nominal value of £10,002 and a share premium of £174,071,318. The shares were issued as a result of the acquisition of the Milton Park Partnership on 28 December 2007". Those accounts also stated that the goodwill was being amortised on a straight-line basis over 20 years, recording amortisation for the period of £10,812,500. That figure for amortisation was included as part of a "loss on ordinary activities before taxation" of £9,663,568 shown in the profit and loss account of the company.

69. In its accounts for the period ended 31 March 2010, MPHL recognised "goodwill" as an intangible fixed asset at a figure of £129,750,000 after an "impairment charge" of £32,437,500. The "impairment charge" was included as part of a "loss on ordinary activities before taxation" of £32,408,270 in the profit and loss account of the company.

70. In its accounts for the period ended 31 March 2011, MPHL recognised "goodwill" as an intangible fixed asset at a figure of £122,541,667 after amortisation for the period of £7,208,333. That figure for amortisation was included as part of a "loss on ordinary activities before taxation" of £7,519,967 shown in the profit and loss account of the company.

71. In its accounts for the period ended 31 March 2012, MPHL recognised "goodwill" as an intangible fixed asset at a figure of £115,333,334 after amortisation for the period of £7,208,333. That figure for amortisation was included as part of a "loss on ordinary activities before taxation" of £6,814,733 shown in the profit and loss account of the company.

72. In its accounts for the period ended 31 March 2013, MPHL recognised "goodwill" as an intangible fixed asset at a figure of £108,125,001 after amortisation for the period of £7,208,333. That figure for amortisation was included as part of a "loss on ordinary activities before taxation" of £6,911,957 shown in the profit and loss account of the company.

73. In its accounts for the period ended 31 March 2014, MPHL recognised "goodwill" as an intangible fixed asset at a figure of £100,916,668 after amortisation for the period of £7,208,333. A figure of £7,208,333 in respect of amortisation was included as part of a "loss on ordinary activities before taxation" of £7,391,805 shown in the profit and loss account of the company.

74. In its accounts for the period ended 31 March 2015, MPHL recognised "goodwill" as an intangible fixed asset at a cost of £93,708,335 after amortisation for the period of

£7,208,333. That figure for amortisation was included as part of a "loss on ordinary activities before taxation" of £6,827,433 shown in the profit and loss account of the company.

75. In MPHL's accounts for the period ended 31 March 2016 it was stated that "a prior period material error was identified following the change of ownership of the company" and that "the carrying value of goodwill and investments as at 31 March 2015 was overstated as impairment suffered in previous financial years had not been recognised". The accounts recognised "goodwill" as an intangible fixed asset at a cost of £51,936,412. The accounts also stated that the goodwill was being amortised on a straight-line basis over 10 years. They recorded amortisation for the period of £5,193,641 and that figure for amortisation was included as part of a "loss for the financial year" of £4,561,931 shown in the profit and loss account of the company.

76. In MPHL's accounts for the period ended 31 March 2017, it was stated that "[d]ue to an administrative error the goodwill cost and accumulated amortisation was misstated in the prior period accounts in the note to the accounts…. There was no adjustment to either the profit and loss or net assets as the correction to cost is offset by a corresponding correction to accumulated amortisation". MPHL recognised "goodwill" as an intangible fixed asset at a cost of £140,562,500 and recorded amortisation for the period of £5,193,641. That figure for amortisation was included as part of a "loss for the financial year" of £3,727,210 shown in the profit and loss account of the company.

77. In its accounts for the period ended 31 March 2009, MPHL did not recognise any turnover in its profit and loss account. Administrative expenses of £11,843,615 comprised mainly amortisation (£10,812,500) and depreciation (£678,700). The only income recognised was described as "income from investments in group companies" on the face of the profit and loss account and note 11 to the accounts stated that "the company received dividends from Milton Park Limited amounting to £2,180,047". Under "Principal Activity" in the Directors' Report for this period, it is stated that MPHL "acquired the business of Milton Park Partnership on 28 December 2007 and operates this through its subsidiary, Milton Park Limited. It continues to act as a holding company."

78. MM had approved MPHL's accounts for the period 28 December 2007 to 31 March 2009. He confirmed that he was satisfied that the accounts gave a true and fair view.

79. In subsequent periods from 2010 to 2015 nil or a nominal amount of turnover was recognised, and administrative expenses comprised mainly amortisation and depreciation. Under "Principal Activity" in the Directors' Report for the period ended 31 March 2010, it is stated that MPHL "acquired the business of Milton Park Partnership on 28 December 2007 and operates this as a trading entity".

MPL's Financial Statements

80. MPL's financial statements reported net assets of £1 in all periods from 2008 to 2012 inclusive. It reported in its abbreviated accounts for the period ended 31 March 2008 an investment in "the Milton Care Partnership" as costing £nil, with the carrying value of the investment subsequently increasing to reflect MPL's profit share of £2.1m for the three months from commencement. MPL's accounts stated at note 1.2: "Turnover comprises the profit share that the company receives from the partnership it holds as an investment" and at note 2: "The fixed asset investment stated above [being £2.1m] represents the current account of Milton Park Limited in the trading partnership of Milton Care Partnership".

Tax Consequences Claimed by MPHL and MPL

81. In respect of each of its accounting periods from 2008 to 2017, MPHL took the goodwill amortisation/impairment into account when computing its profit/loss for corporation tax purposes.

82. In respect of its accounting period ended 31 March 2009, MPL made a trading profit of £932,358. It claimed group relief equal to the full amount of that trading profit based on the corporation tax loss computed by MPHL as a result of the goodwill amortisation recognised in its accounts.

HMRC Enquiries and Conclusions

83. On 18 January 2010 and 5 January 2010 respectively, personal tax enquiries were opened into the self-assessment tax returns of MM and EM for the year ended 5 April 2008. For capital gains purposes MM and EM were treated as having disposed of the business of the MPP during the year ended 5 April 2008 with no gains arising due to the provisions of s162 TCGA 1992. The enquiries were closed without adjustment to the returns.

84. On 11 October 2010, HMRC opened an enquiry into the corporation tax return of MPL for the accounting period ended 31 March 2009.

85. On 16 December 2010, HMRC opened enquiries into the corporation tax returns of MPHL (for accounting periods ended 27 December 2008 and 31 March 2009) and of MPL (for the accounting period ended 31 March 2009).

86. Between 2011 and 2018, HMRC subsequently opened enquiries into the corporation tax returns of MPHL for all periods from 2010 to 2017.

87. On 8 March 2019, HMRC closed those enquiries. In respect of MPHL's returns, HMRC concluded that the following amendments ought to be made:

Accounting Period Ended	Amendments made	Tax due following amendment
27/12/2008	Disallowance of goodwill amortisation, £8,609,028	£0.00 (losses reduced)
31/3/2009	Disallowance of goodwill amortisation, £2,203,472	£0.00 (losses reduced)
31/3/2010	Disallowance of goodwill amortisation, £32,437,500	£76,083.84
31/3/2011	Disallowance of goodwill amortisation, £7,208,333	£0.00 (losses reduced)
31/3/2012	Disallowance of goodwill amortisation, £7,208,333	£57,231.20
31/3/2013	Disallowance of goodwill amortisation, £7,208,333	£101,769.12
31/3/2104	Disallowance of goodwill amortisation, £7,208,333	£0.00 (losses reduced)
31/3/2015	Disallowance of goodwill	£121,545.90

	amortisation, £7,208,333	
31/3/2016	Disallowance of goodwill amortisation, £7,208,333	£0.00 (losses reduced)
31/3/2017	Disallowance of goodwill amortisation, £2,364,032	£78,764.80

88. In respect of MPL's return for the accounting period ended 31/03/2009, HMRC concluded that the following amendment ought to be made:

Accounting Period Ended	Amendments made	Tax due following amendment
31/03/2009	Reduction of losses available to claim through group relief (£738,927) as a result of disallowance of goodwill amortisation (as shown in the accounts of MPHL)	£206,899.56

89. These conclusions were upheld by HMRC on review, as notified to the Appellants by letter of 15 July 2019.

EXPERT EVIDENCE

90. In evidence before us was extensive expert accounting evidence from EW and PC which was explored in great detail in cross-examination.

Mr Chidgey

91. PC's view of the transactions was set out in his two expert reports dated 18 July 2022 and 3 October 2022 which he had summarised as follows:

Expert report dated 18 July 2022

> Was a Business (as defined) in Accounting standards acquired?
>
> In summary, … MPHL acquired assets in the sense of a fully functioning registered care home, access to the branding and trademarks, to the trained employees, to the provider of administrative assistance and the registered individuals and to the processes, for example patient care plans, together with access to all the other records and systems. The existing patients continued to be provided with care. MPHL therefore not only did acquire the assets and inputs required to run the business but also acquired the processes and outputs which enabled the acquisition to be classified as the acquisition of a business under UK GAAP.
>
> Who assumed the risks and rewards of operating the business?
>
> … MPHL did acquire control over access to the principal risks and rewards. The fact that it set up a structure (MCP) to operate the business did not mean that it had given up the rights to the principal benefits from the business,

which were the proceeds of any future sale of the business and the profits arising from it. The access to the future sale proceeds was tightly controlled via the various admission deeds to admit new partners to MCP and the profit sharing was controlled in such a way that MPHL had access to an overwhelming majority of residual profits. It was MPHL who had the access to the greatest benefits and was therefore most at risk of losing them should the business be a failure. For example, if in the event of a severe economic downturn then it would ultimately be MPHL which would suffer as its property assets would ultimately bear any losses.

Did the subsequent way the business was run through MPL lead to the derecognition of goodwill?

… I understand that MPL was at all stages acting under the control of and on behalf of MPHL and it cannot be argued that at any time it had control over the rights or other access to future economic benefits of the business. Therefore, the instruction from MPHL to MPL to manage the business would not be an event which caused a derecognition of the goodwill in MPHL

Was the business conducted in a materially identical fashion before and after the transfer to MPHL

In my view this is not a relevant question in terms of the accounting treatment. A business may be transferred from one owner to another but continue to be run in an identical fashion on a day-to-day basis. … below I give the example of a hotel with separate owners and operators. It is quite possible for the owners to change but the hotel to keep the same operator. In that case the business will continue to be run in an identical fashion, for example from the point of view of a guest. The only thing which will have changed will be the entity with access to the principal benefits. In this case the original owners have incorporated but the new entity has kept the same business inputs and processes as those used by the original owners. It is therefore not surprising that the experience of a patient in the Care Home is identical to that experienced previously. The question here as referred to above is whether access to the benefits and risks has changed not whether the business is run in an identical manner. As stated above MPHL did directly assume the principal rewards and risks of the Milton Park Hospital care home business.

Expert Report dated 3 October 2022 in response to Dr Alford's Expert Report.

92. His principal conclusions were:

In regard to her view that the operations passed to MCP rather than MPHL. In my opinion this is not valid as

(a) It is based on applying FRS 5 without an assessment of benefits and risks.

(b) The business consisted of an integrated set of assets, inputs and processes and it is not logical to split the assets and operations.

(c) The reasons given to support the transfer of commercial substance to MCP relate to the management and the day to day running of the business rather than where the benefits and risks lie.

(d) It is MPHL which acquired the benefits from the business and did not relinquish them to MCP.

In regard to the issue of whether the goodwill should be subject to partial or full derecognition raised by Ms Alford. I refer to my First Report where in

respect of the instruction to MPL to conduct the day-to-day business I concluded that MPL was:

(a) either an undisclosed agent of MPHL in which case MPHL should have accounted for the profit share for the period up until it revoked the instruction; or

(b) MPHL had effective control of the benefits from the business as it had the right to revoke the instruction to MPL and to step into its shoes at any time without notice as it, in fact, did on 31 March 2009.

As the value of goodwill relates to future profits and gains which MPHL can access at any point by terminating its arrangement with MPL there is no event requiring a partial (or full) derecognition and in my view depreciation should be charged in MPHL as normal for the period that MPL receives the profit share.

Dr Alford

93. AE's view of the transactions was set out in her expert reports dated 18 July 2022 and 30 October 2022. Dr Alford's views are summarised below.

Expert report dated 18 July 2022

The report addresses whether the accounts of Milton Park Holdings Limited (MPHL) for the periods ending between 2008 and 2017 were prepared in accordance with Generally Accepted Accounting Practice (GAAP), focusing on two key issues:

(1) Whether it was in accordance with GAAP for MPHL to account for the transaction under the "Transfer of Partnership Assets & Liabilities Agreement" (dated 28 December 2007) as an acquisition of a business.

(2) Whether it was in accordance with GAAP for MPHL to recognise goodwill in its accounts for the same periods.

1. Acquisition of a Business under GAAP

… under FRSSE 6.11, positive purchased goodwill can only be recognised if a business is acquired and acquisition accounting is applied. Therefore, whether MPHL's treatment was GAAP-compliant depends on whether it actually acquired a business.

Dr Alford defers to the Tribunal on the factual determination of whether a business was acquired but offers guidance on how GAAP applies depending on that finding. She uses FRS 6 as the relevant standard, which defines an acquisition as a business combination that is not a merger and concludes that MPHL could only account for the transaction as a business acquisition if it met the FRS 6 definition of a business combination and not a merger.

Dr Alford opines that the transaction was not a merger because MPHL was portrayed as the acquirer, failing the first criterion of FRS 6.6. Assuming the Transfer Agreement was executed as written and the witness statements of Michael and Eunice McInerney and Janice Ash are complete, she believes MPHL gained control over the freehold properties (excluding Manor Farm) and the net assets of Milton Park Partnership (MPP), excluding cash and tax-related balances.

However, she distinguishes between two possible interpretations of the transaction:

Option 1: MPHL acquired the operations of the Milton Park hospital business and transferred them to MPL.

Option 2: MCP, not MPHL, took control of the operations.

Dr Alford favours Option 2, concluding that the substance of the transaction was that MCP, not MPHL, gained operational control. If the Tribunal agrees, then MPHL did not acquire a business, and the transaction would not meet the FRS 6 definition of a business combination. Consequently, it would not be GAAP-compliant for MPHL to account for the transaction as a business acquisition.

Alternatively, if the Tribunal finds that MPHL did acquire the operations (Option 1), then Dr Alford considers it would be GAAP-compliant to treat the transaction as a business acquisition.

2. Recognition of Goodwill

Dr Alford states that if MPHL did not acquire a business, it was not in accordance with GAAP to recognise any goodwill. In that case, the accounts from 2009 to 2017 would not comply with GAAP.

If MPHL only acquired net assets (not a business), it should have recognised those assets and liabilities at cost plus acquisition expenses, excluding Manor Farm, cash balances, and tax-related amounts. Creditors should have been recognised at their carrying amounts in the MPP cessation accounts.

If the Tribunal finds that MPHL did acquire a business, Dr Alford provides two alternative valuations for goodwill:

£174.59 million, based on the Transfer Agreement (adjusted for Manor Farm), which would mean the goodwill was understated by £1.59 million in the 2009 accounts.

£51.94 million, based on a later agreed valuation, which would mean the goodwill was overstated by £121.06 million.

If the latter valuation is accepted, and assuming no derecognition or impairment was required, the goodwill and amortisation figures in MPHL's accounts from 2009 to 2017 were overstated. Specifically, amortisation was overstated by £60.46 million (subject to assumptions about disallowance in 2016 and 2017). Therefore, the accounts for those years would not be GAAP-compliant.

Dr Alford also notes that if MPHL acquired the business but quickly transferred operations to MPL, it should have derecognised all or part of the goodwill under FRS 5. She lacks sufficient information to quantify the derecognition or any impairment that might have been required under FRS 10.

Dr Alford's supplementary report dated 3 October 2022

94. Dr Alford's second report responds to two specific questions posed in light of Mr Chidgey's expert report:

Question 1: At paras 5.2.12 to 5.2.15 of his report, Mr Chidgey addresses the issue of registration under the Care Standards Act 2000 and concludes that, having regard to the aspects he mentions, the arrangements did not "prevent MPHL from operating as a care home". Could you please provide your comments on the statement made by Mr Chidgey in this part of his report."

Dr Alford reiterated that it is for the Tribunal to determine the factual question of whether MPHL acquired the business and gained control over the net assets and operations of the Milton Park hospital. She acknowledges that the Tribunal must also consider whether BHL's continued involvement

precluded a business transfer and whether the arrangements prevented MPHL from operating as a care home.

Dr Alford states that she has seen no evidence contradicting Mr Chidgey's assertions that BHL's continued service provision was not an impediment to a business transfer and that the arrangements did not prevent MPHL from operating as a care home.

Question 2: In your report, at paragraph 6.48 you state: "I do not have sufficient expertise to assess whether BHL being the registered person would affect the ability of MPP, MPHL or MCP to carry on the business of Milton Park hospital so I have not relied on this in considering the commercial effect of this transaction.

Dr Alford is asked to consider a hypothetical situation in which MPHL would have been required to register under regulatory rules to operate the hospital, and failure to do so would have constituted a criminal offence and exposed MPHL to potential injunctive relief by the Healthcare Commission.

She clarifies that she is not offering an opinion on the regulatory position but is instead applying GAAP principles to this hypothetical scenario.

Dr Alford maintains that it is the Tribunal that must determine whether MPHL acquired the business. If the Tribunal finds that MPHL did acquire the business, then her original opinion stands: the transaction met the definition of a business combination (but not a merger) under FRS 6, and it was in accordance with GAAP for MPHL to account for the transaction as a business acquisition and to recognise goodwill – either at £174.59 million or £51.94 million, depending on the valuation accepted.

Conversely, if the Tribunal finds that MPHL did not acquire a business, then it was not GAAP-compliant for MPHL to recognise goodwill, and the accounts from 2009 to 2017 would not comply with GAAP.

Dr Alford explains that the hypothetical regulatory requirement could influence the Tribunal's factual determination. If the Tribunal concludes that the registration requirement prevented MPHL from acquiring or operating the business, then MPHL should not have accounted for the transaction as a business acquisition or recognised goodwill. However, she also notes that under FRSSE 2.2 and FRS 5.14, even illegal transactions must be accounted for if they give rise to new assets or liabilities. Therefore, the substance of the transaction— – its legality – determines the accounting treatment.

Dr Alford opines that the hypothetical scenario does not, in itself, present a barrier to MPHL or MCP acquiring and operating the business. If the Tribunal agrees, her original conclusions remain unchanged.

If, however, the Tribunal finds that the registration requirement did prevent MPHL from acquiring the business, then it would not be GAAP-compliant to treat the transaction as a business acquisition or to recognise goodwill. Similarly, if MCP was also prevented from acquiring the business, her opinion regarding MCP's role would change accordingly.

Dr Alford further considers how the hypothetical regulatory risk should be reflected in the accounts:

> If MPHL or MCP acquired the business, they should have considered the potential regulatory consequences when valuing goodwill.
>
> Any liabilities arising from regulatory action (e.g. for failure to register) would relate to the predecessor (MPP), not MPHL, and would affect the net assets acquired.

Such liabilities would reduce the net assets acquired, thereby increasing the amount of goodwill recognised and the associated amortisation.

Any regulatory action against MPHL or MCP would be a post-acquisition event and not affect the initial accounting treatment.

Dr Alford concludes that while she cannot quantify the potential liabilities or impairments, any such adjustments would affect the goodwill calculation and increase the amortisation charge in MPHL's accounts.

LEGISLATION

95. The relevant legislation was not disputed by the parties. The treatment of goodwill for Corporation Tax purposes is governed by the following statutes:

(1) For Accounting Periods ending before 01/04/2009, Schedule 29, Finance Act 2002 ("FA 2002").

(2) For Accounting Periods ending on or after 01/04/2009, Part 8 of the Corporation Tax Act 2009 ("CTA 2009").

96. The two statutes are materially to the same effect. Accordingly, Schedule 29 FA 2002 is cited below but references given to the corresponding provision in CTA 2009.

97. Paragraph 1(2) provided as follows (see s.711 CTA 2009):

> "This Schedule also has effect for determining how a company's losses in respect of intangible fixed assets are brought into account for the purposes of corporation tax."

98. Paragraph 4 provided as follows (see s.715 CTA 2009):

> "(1) Except as otherwise indicated, the provisions of this Schedule apply to goodwill as to an intangible fixed asset.
>
> (2) In this Schedule "goodwill" has the meaning it has for accounting purposes."

99. Paragraph 5 provided as follows (see s.717 CTA 2009):

> "(1) If a company does not draw up accounts in accordance with generally accepted accounting practice ("correct accounts")—
>
> (a) the provisions of this Schedule apply as if correct accounts had been drawn up, and
>
> (b) the amounts referred to in this Schedule as being recognised for accounting purposes are those that would have been recognised if correct accounts had been drawn up.
>
> (2) If a company draws up accounts that rely to any extent on amounts derived from an earlier period of account for which the company did not draw up correct accounts, the amounts referred to in this Schedule as being recognised for accounting purposes in the later period are those that would have been recognised if correct accounts had been drawn up for the earlier period.
>
> (3) The provisions of this paragraph apply where the company does not draw up accounts at all as well as where it draws up accounts that are not correct."

100. Paragraph 9 provided as follows (see s.729 CTA 2009):

> "(1) Where in a period of account a loss is recognised in determining the company's profit or loss in respect of capitalised expenditure on an intangible fixed asset—

(a) by way of amortisation, or

(b) as a result of an impairment review,

a corresponding debit shall be brought into account for tax purposes.

(2) The reference in sub-paragraph (1) to an "impairment review" does not include the valuation of an asset for the purpose of determining the amount of expenditure to be capitalised in the first place.

(3) The amount of the debit for tax purposes in respect of expenditure on an asset is, in the period of account in which the expenditure is capitalised:

Accounting Loss x Tax Cost / Accounting Cost

where—

Accounting Loss is the amount of the loss recognised for accounting purposes,

Tax Cost is the amount of expenditure on the asset that is recognised for tax purposes, and

Accounting Cost is the amount capitalised in respect of expenditure on the asset.

(4) Subject to any adjustment required for tax purposes, the amount of the expenditure on the asset that is recognised for tax purposes is the same as the amount of expenditure on the asset capitalised by the company.

(5) The amount of the debit for tax purposes in respect of expenditure on an asset is, in a subsequent period of account:

Accounting Loss x Tax Value / Accounting Value

where—

Accounting Loss is the amount of the loss recognised for accounting purposes,

Tax Value is the tax written down value of the asset immediately before the amortisation charge is made or, as the case may be, the impairment loss is recognised for accounting purposes, and

Accounting Value is the value of the asset recognised for accounting purposes immediately before the amortisation charge or, as the case may be, the impairment review.

(6) In this paragraph "capitalised" means capitalised for accounting purposes."

101. Paragraph 27 provided materially as follows (see s.742 CTA 2009):

"(1) For the purposes of this Schedule the tax written down value of an intangible fixed asset to which paragraph 9 applies (writing down on accounting basis) is given by:

Tax Cost – Debits + Credits

where—

Tax Cost is the cost of the asset recognised for tax purposes;

Debits is the total amount of the debits previously brought into account for tax purposes in respect of the asset; and

Credits is the total amount of any credits previously brought into account for tax purposes in respect of the asset.

(2) Subject to any adjustment required for tax purposes, the cost of the asset recognised for tax purposes is the same as the amount of the expenditure on the asset that is capitalised for accounting purposes."

102. Paragraph 31 provided materially as follows (see s.747 CTA 2009):

"Credits and debits to be brought into account in any accounting period in respect of an asset held by the company for the purposes of a trade carried on by it in that period are given effect by treating—

(a) credits as receipts of the trade, and

(b) debits as expenses of the trade,

in calculating the profits of the trade for tax purposes."

103. Paragraph 134 provided as follows (see s.716 CTA 2009):

"(1) References in this Schedule to an amount recognised in determining a company's profit or loss for a period are to—

(a) an amount recognised in the company's profit and loss account or income statement, a statement of total recognised gains and losses, statement of changes in equity or other statement of items brought into account in computing the company's profits and losses for that period; and

(b) an amount that would have been so recognised if a profit and loss account or other such statement as is mentioned in paragraph (a) had been drawn up for that period in accordance with generally accepted accounting practice.

(2) An amount that in accordance with generally accepted accounting practice is shown as a prior period adjustment in any such statement as is mentioned in sub-paragraph (1) shall be brought into account for the purposes of this Schedule in computing the company's profits and losses for the period to which the statement relates.

This does not apply to an amount recognised for accounting purposes by way of correction of a fundamental error."

RELEVANT REGULATORY MATERIAL

104. We were referred to various regulatory and Financial Reporting Standards (FRS") in force (as amended and updated) during the period in dispute namely: FRS 5 "Reporting the Substance of Transactions", FRS 6 "Acquisitions and Mergers", FRS 7 "Fair Value in Acquisition Accounting", FRS 10 "Goodwill and Intangible Assets", FRS 9 "Association and Joint Ventures", FRS 11 "Impairment of Fixed Assets and Goodwill", Financial Reporting Exposure Draft (FRED) 36 "Business Combinations (IFRS 3)", Financial Reporting Standard for Smaller Entities ("FRSSE") and International Financial Reporting Standard (IFRS) 3 "Business Combinations".

105. In the interest of brevity we have not set out in full the various regulatory and FRSs, the relevant sections are stated in the Discussion below.

PARTIES' SUBMISSIONS

Appellants' submissions

106. Mr Sykes KC, on behalf of the Appellants, submitted that the central issue in dispute is whether the accounts of MPHL were prepared in accordance with GAAP, specifically in relation to the recognition of goodwill following the acquisition of the MPP care home business. MPHL did acquire a business and was entitled to recognise goodwill in its accounts.

MPHL retained the risks and rewards of the business, and no derecognition of goodwill was required at any subsequent stage.

107. The MPP business had originally been operated by a partnership comprising MM and EM, together with BHL and BCSL. BHL provided administrative services and BCSL supplied staff. In December 2007, MPHL was incorporated and entered into a Transfer Agreement with MM and EM to acquire the business and its assets, including goodwill valued at £173 million.

108. Following this acquisition, MPHL acquired MPL, which entered into a new partnership, MCP, initially with SM and subsequently with BHL and BCSL. MPHL's accounts recognised goodwill and amortised it over time, resulting in tax deductions and claims for group relief. MPHL retained ownership of the business assets and MCP was a vehicle for managing the business, not for transferring economic benefits away from MPHL.

109. The Appellants rely on UK GAAP, including FRS 5, FRS 6, FRS 10 and FRS 11, as well as advisory sources such as IFRS 3 and FRED 36. These standards support the recognition of goodwill where a business is acquired, even if the acquirer subsequently operates the business differently. Under FRS 6, a business combination occurs when one entity obtains control over the net assets and operations of another. Control, as defined in FRS 5, involves the ability to obtain future economic benefits and restrict others' access to those benefits. MPHL obtained such control through the Transfer Agreement and retained it throughout the relevant periods.

110. MPHL retained the risks and rewards of the business, both in terms of capital and income. MPHL owned the business assets and was entitled to the proceeds of any sale. Clause 9 of the MCP Deed of Partnership expressly stated that goodwill belonged to MPHL, and this clause should be given effect. MPHL could revoke the arrangement with MPL at any time and did so after 15 months. The partnership was structured so that, after BHL and BCSL received their costs and mark-up, MPHL received the residual profits. MPL acted as agent for MPHL, and the board minutes of 31 December 2007 confirmed that MPL was instructed to manage the business on MPHL's behalf.

111. HMRC's alternative argument that goodwill should have been derecognised following the formation of MCP is rejected. The arrangements did not transfer all significant rights or risks away from MPHL and therefore did not meet the criteria for derecognition under FRS 5. Even if derecognition were required, it would have been reversed when MPHL resumed direct control. HMRC's current position is inconsistent as it had previously accepted that MPHL acquired a business for the purposes of s162 TCGA 1992, allowing rollover relief on the transfer, That position lacks credibility, particularly given the extensive enquiries conducted over many years.

112. In conclusion, MPHL acquired a business and was entitled to recognise goodwill in its accounts. The arrangements with MPL and MCP did not deprive MPHL of the risks and rewards of the business. The goodwill clause should be given effect, and no derecognition was required. The appeal should be allowed.

HMRC's submissions

113. Mr Jones KC and Mr Winter, on behalf of HMRC, submitted that MPHL's accounts were not prepared in accordance with UK GAAP, and goodwill should not have been recognised. The central issue is whether MPHL acquired a business within the meaning of GAAP. HMRC's primary position was that MPHL did not acquire a business for accounting purposes and should not have recognised purchased goodwill. In the alternative, even if

goodwill was properly recognised initially, subsequent events required its derecognition, either in full or in part.

114. If MPHL did not acquire a business, the appeals must be dismissed. If a business was acquired, the value of goodwill should have been £51.936 million rather than £173 million, and the associated tax deductions and group relief should be reduced accordingly.

115. HMRC relied on UK GAAP, particularly FRSSE and FRS 5. Under FRSSE, purchased goodwill may only be recognised where a business is acquired and accounted for as an acquisition. FRS 6 defines a business combination as the bringing together of separate entities into one economic entity, requiring control over both the net assets and the operations of the business.

116. HMRC accepts that MPHL may have acquired control over the net assets of MPP, including the freehold properties. However, MPHL did not acquire control over the operations of the business, which were instead conducted by MCP. MCP, through its partners, managed staffing, administration, customer contracts and marketing, and assumed the risks and rewards of the business.

117. HMRC rely upon the accounting principle of "substance over form". Although the Transfer Agreement and Corporate minutes suggest that MPHL acquired the business and delegated its operation to MPL, the substance of the arrangements shows that MCP was the true operator of the business. MCP, through its partners, controlled staffing, administration, customer contracts and marketing. Profit-sharing arrangements were determined by SM (as managing partner of MCP) and BHL and BCSL provided essential services

118. MPHL did not have control over the economic benefits of the business. The profits were allocated within MCP and MPHL's accounts did not record turnover from the care home business. Instead, MPHL received dividends from MPL, which in turn received profit shares from MCP. This structure demonstrates that MPHL did not control the operations or benefit directly from the business.

119. The approach of the Appellants' expert, PC, who relies on IFRS 3 to define "business." is not accepted. UK GAAP does not permit reliance on IFRS 3 in this context and FRSSE and FRS 5 provide sufficient guidance. PC's reliance on IFRS 3 is misplaced and that his conclusions are inconsistent with the substance of the transactions.

120. PC's assertion that MPHL retained the risks and rewards of the business is not accepted. The MCP Partnership Deed shows that profit allocation and control rested with MCP and its Managing Partner. The goodwill clause in the MCP Deed of Partnership, which states that goodwill is owned by MPHL, is legally ineffective as the goodwill cannot be separated from the business and must follow the entity that operates it. A distinction can be made between "legal goodwill" and "accounting goodwill". Legal goodwill, under case law, is inseparable from the business and cannot be assigned independently. Goodwill follows the business and cannot be retained by an entity that does not operate the business, see *IRC v Muller & Co's Margarine Ltd* [1901] AC 217 ("*Muller*") and *Tin Tin Yat Pao v Tin Tin* [2000] IP & T 1109 ("*TTYP*").

121. Even if the MCP Deed purports to assign goodwill to MPHL, this is ineffective because MPHL did not operate the business. The goodwill belonged to MCP, and MPHL had no basis on which to recognise purchased goodwill in its accounts.

122. In the alternative, even if MPHL initially acquired the business and recognised goodwill, subsequent events required its derecognition. Under FRS 5, goodwill must be derecognised if all significant rights or exposure to risks are transferred. The delegation of operations to MPL and the formation of MCP constituted such a transfer.

123. HMRC's expert, EA, explained that if MPHL transferred control of the operations to MPL or MCP, then goodwill should have been partially or fully derecognised. MPHL failed to do so, and the continued recognition and amortisation of goodwill was not in accordance with GAAP.

124. In conclusion, MPHL did not acquire a business for accounting purposes and should not have recognised purchased goodwill. The substance of the arrangements shows that MCP operated the business and assumed the risks and rewards. MPHL's role was that of a holding company, and its accounts did not reflect direct involvement in the business operations.

125. Alternatively, if goodwill was properly recognised, subsequent events required its derecognition. In either case, the tax deductions claimed by MPHL and the group relief claimed by MPL were not allowable.

DISCUSSION

COMMON GROUND

126. The JS set out the areas of agreement and disagreement. A copy of the JS is attached to this decision. The JS confirmed the following relevant areas of agreement:

> Applicable UK GAAP: FRSSE was applicable for the 2009 accounts of MPHL. FRSSE (effective April 2008) was applicable for the 2010 to 2015 accounts and FRS 102 was applicable for each set of accounts from 2016 to 2017.
>
> "Purchased goodwill" is defined in FRSSE Chapter C as "goodwill that is established as a result of the purchase of a business accounted for as an acquisition. It represents the difference between the cost of the acquired business and the aggregate of the fair values recorded for the identifiable assets and liabilities acquired".
>
> Fair Value: Under the FRSSE, fair value is the amount at which an asset or liability could be exchanged in an arm's length transaction between informed and willing parties other than in a forced liquidation sale.
>
> An "acquisition" is defined in FRS 6 as "A business combination that is not a merger".
>
> A "business combination" is defined in FRS 6 as "the bringing together of separate entities into one economic entity as a result of one entity uniting with or obtaining control over the net assets and operations of another".
>
> FRS 6.4 headed "Scope" states "Although the FRS is framed in terms of an entity becoming a subsidiary undertaking of a parent company that prepares consolidated financial statements, it also applies where an individual company or other reporting entity combines with a business other than a subsidiary undertaking".
>
> "Control of another entity" is defined in FRS 5 Reporting the Substance of Transactions at 5.8 as "The ability to direct the financial and operating policies of that entity with a view to gaining an economic benefit from its activities".
>
> "Control in the context of an asset" is defined at FRS 5.3 as "The ability to obtain future economic benefits relating to an asset and to restrict the access of others to those benefits"
>
> IFRS 3 defined a Business as "An integrated set of activities and assets that is capable of being conducted and manged for the purpose of providing a return in the form of dividends, lower costs or other economic benefits directly to investors or other members owners or participants".

APPLICABLE ACCOUNTING STANDARDS

127. The Appellants' expert adopted a markedly different analytical approach from that of HMRC's expert. Rather than commencing with the applicable UK accounting standards, specifically FRSSE and FRS, PC sought to interpret the concept of a "business" by reference

to international accounting standards, namely IFRS 3 and FRED 36, which proposed the implementation of IFRS 3 into UK GAAP.

128. PC's rationale for this approach was that the FRSSE, while applicable to the Appellants' financial statements, permits reference to "other accounting standards and UITF abstracts" in respect of transactions not specifically addressed within the FRSSE. He interpreted this provision as authorising recourse to international accounting standards, including IFRS 3. However, he accepted in cross-examination that the FRSSE defines "other accounting standards" as UK issued Statements of Standard Accounting Practice and Financial Reporting Standards, and "UITF abstracts" as pronouncements of the UK's Urgent Issues Task Force. Accordingly, we agree with HMRC that the FRSSE does not, on its face, justify reliance upon international accounting standards such as IFRS 3.

129. Further, PC acknowledged that IFRS 3 and FRED 36 were not in force at the relevant time and that FRS 6 remained the applicable standard until its supersession in 2015. PC accepted that, where a conflict arises between a FRED and an extant standard, the latter must prevail. Specifically, he agreed that if the application of a definition from FRED 36 yields a different result from that under FRS 6, the outcome prescribed by FRS 6 must be followed.

130. PC also conceded that both IFRS 3 and FRED 36 expressly exclude from their scope combinations involving entities under common control, such as the transaction between MPP and MPHL. He nonetheless maintained that the absence of a definition of "business" within FRSSE and FRS 6 necessitated reference to IFRS 3 and FRED 36, which define a business as "an integrated set of activities and assets capable of being conducted and managed for the purpose of providing a return."

131. However, we observe that the applicable UK standard, FRS 6, does not require a definition of "business" per se, but rather defines a "business combination" as the acquisition of control over the net assets and operations of another entity. The term "business" is not used in the operative definition, and we accept HMRC's submission that the need to import a definition from IFRS 3 or FRED 36 does not arise. PC's reliance on the "Basis for Conclusions" accompanying IFRS 3 and FRED 36 was also scrutinised in cross-examination. He accepted that this material is explicitly stated not to form part of the standard itself. Moreover, he acknowledged that international accounting standards are advisory rather than mandatory sources of GAAP, and that mandatory sources, such as FRSSE, FRS 5 and FRS 6, take precedence where they address the relevant issue.

132. In conclusion, PC's justification for relying upon IFRS 3 and FRED 36 rather than FRSSE and FRS 5 and 6 was predicated on a perceived lacuna in the UK standards regarding the definition of "business". However, we agree with HMRC's expert that the applicable UK accounting standards do provide a sufficient framework for determining whether a business combination has occurred, and that PC's reliance on international standards was neither required nor supported by the hierarchy of GAAP sources applicable to the Appellants' financial reporting obligations.

BUSINESS COMBINATION

133. An "acquisition" is defined in FRS 6 as "A business combination that is not a merger". It was agreed by the parties and their respective experts that the issue of a merger did not arise on the facts of this appeal.

134. HMRC submitted that in order to determine whether MPHL acquired a business and there was a "business combination" under FRS 6 it is necessary to consider whether as a result of the Transactions, MPHL "*obtain*[ed] *control over the net assets and operations of MPP*". We agree with HMRC and did not understand it to be disputed that this is the nub of

the dispute: the essential question is whether MPHL "*obtain*[ed] *control over the net assets and operations of MPP*". Again, it was not disputed that MPHL needed to satisfy both elements: control over the net assets of MPP and control over the operations of MPP. PC confirmed in cross-examination that it was the operations of MPP that were to be tested as opposed to operations in the abstract [Day2/38/19-24 and 43/2-14] and accepted that this was the key question. [Day2/20/5-12].

CONTROL IN GAAP

135. HMRC submitted that the starting point is to consider the various statements of what GAAP considers "control" in this context. We agree. The Appellants relied upon the same statements and it is useful to set out the various GAAP statements on "control" in this context.

136. FRS 5.8 defines control of another entity as:

> "the ability to direct the financial and operating policies of that entity with a view to gaining economic benefit from its activities"

137. FRS 5.54 states:

> "control is the means by which the entity ensures that the benefits accrue to itself and not to others. Control can be distinguished from management (i.e. the ability to direct the use of an item that generates the benefits) and, although the two often go together, this need not be so"

138. FRS 5.56 states:

> "the entity that has access to the benefits will usually also be the one to suffer or gain if these benefits turn out to be different from those expected. Hence, evidence of whether an entity has access to benefits (and hence has an asset) is given by whether it has the risks inherent in those benefits"

139. The Accounting Standards Board's Statement of Principles for financial reporting (SOP) at 2.3 states:

> "… the reporting entity is held to account for all the things it can control – and it gives the reporting entity a determinable boundary – because activities are either within its control or outside its control".

140. SOP 2.6 states:

> "Direct control is used to determine the boundary of the reporting entity that prepares single entity financial statements. Those financial statements will therefore deal with the gains, losses, assets and liabilities directly controlled or borne by the entity but no other gains, losses, assets or liabilities."

141. SOP 2.7 states:

> "It may be that, although an entity can influence another entity, it does not control it. Such entities do not comprise a single reporting entity."

142. SOP 2.8 states:

> "Control has two aspects: the ability to deploy the economic resources involved and the ability to benefit (or to suffer) from their deployment. To have control, an entity must have both these abilities."

OBTAINED CONTROL OVER THE NET ASSETS

143. We have proceeded first to first whether MPHL acquired control over the net assets.

144. EA at paragraph 6.33 of her first report stated:

> 6.33 If I assume that the Transfer Agreement was executed as written and the witness statements of [MM] and [JA] contain all necessary facts surrounding the transfer of the net assets, it is my opinion that MPHL gained control over:

(a) the Freehold properties from [MM] and [EM] with the exception of the property named as Manor Farm; and

(b) separately the net assets of MPP, with the exception of the cash balances and the amounts payable and recoverable by [MM] and [EM] in respect of taxation in the Transfer Agreement.

6.34 If my assumption, ie that the Transfer Agreement was executed as written and the witness statements of [MM] and [JA] contain all necessary facts surrounding the transfer of the net assets, is wrong in any aspect, my opinion may change depending on the facts to be determined by the Tribunal."

145. It was accepted by HMRC in their skeleton argument at paragraph 41 that "The "control over net assets" of MPP element of the "business combination" definition therefore appears met in favour of MPHL. However, this is subject to a substance-over-form view." HMRC did not challenge either MM or JA in cross-examination that the Transfer Agreement was not executed as written nor that their witness statements did not contain all the necessary facts surrounding the transfer of assets. We have proceeded to consider "substance over form" below.

SUBSTANCE OVER FORM

146. As stated at paragraph 145 above, HMRC submitted that GAAP requires that the Transactions must be accounted for based on their substance rather than their legal form. The Appellants agreed that the Transactions must be assessed in accordance with their commercial substance rather than their legal form. PC's view was that MPHL acquired a functioning care home business and retained the risks and rewards associated with that business, notwithstanding the subsequent formation of the MCP and the involvement of other entities as partners.

147. Both parties relied upon FRSSE 2.2 and FRS 5.14:

FRSSE 2.2: "The directors of a company must, in determining how amounts are presented within items in the profit and loss account and balance sheet, have regard to the substance of the reported transaction or arrangement … To determine the substance of a transaction it is necessary to identify whether the transaction has given rise to new assets or liabilities for the reporting entity and whether it has changed the entity's existing assets or liabilities."

FRS 5.14: "A reporting entity's financial statements should report the substance of the transactions into which it has entered. In determining the substance of a transaction, all its aspects and implications should be identified and greater weight given to those more likely to have a commercial effect in practice. A group or series of transactions that achieves or is designed to achieve an overall commercial effect should be viewed as a whole."

148. Both parties' experts were agreed on this point. PC stated in his Second Report at 4.17.2:

"4.17.2 To conclude on the required accounting, it is therefore necessary to analyse the arrangements as a whole to determine which party has access to the risks and rewards. It is only by following this process that it is possible to decide which steps in a series of transactions are relevant to determining whether assets or liabilities may be recognised."

149. EA agreed in the expert Joint Statement at page 13 under the heading of "Who assumed the risks and rewards of operating the business?" that:

"it is necessary to analyse the arrangements as a whole to determine which party has access to the risks and rewards (EA1 paragraphs 6.23 and 6.45)."

150. FRS 5.14 states that "A group or series of transactions that achieves or is designed to achieve an overall commercial effect should be viewed as a whole". HMRC submitted that,

as identified by EA, most of the main transactions happened over the course of only five days and, in reality, nothing on the ground changed. The purpose of the series of transactions was to move the business from MPP (the former partnership) via MPHL to MCP (the new partnership). That is the substance of the transactions. We agree. The Appellants did not dispute that the transactions were all pre-ordained and were the result of much discussion with Haslers. The purpose of the transactions is set out in the discussion paper dated 27 March 2007 at paragraphs 33 to 36. MM and JA both accepted in cross-examination that the purpose of the transactions was to move the business from MPP to MCP (MM at Day1/19/19-20/3, Day1/23/23-24/2 and JA at Day1/106/14-17). That objective was achieved; the care home business moved from being carried on by MPP to being carried on by MCP. The application of that principle is considered below.

FRS 5.14

151. Both parties relied on FRS 5.14, which provides that "in determining the substance of a transaction, all its aspects and implications should be identified and greater weight given to those more likely to have a commercial effect in practice." Mr Sykes submitted that the Tribunal should give effect to the commercial intention behind the arrangements, which, he argued, was that MPHL would continue to benefit from the income and capital value of the business, including the goodwill. He relied upon the MCP Deed of Partnership and the Transfer Agreement, as well as the evidence of MM and JA, to support the proposition that the arrangements were designed to preserve MPHL's economic interest in the business. In particular, he emphasised that Clause 9 of the MCP Deed of Partnership expressly provided that the goodwill was to be owned solely by MPHL, and that this clause should be construed purposively and in accordance with commercial common sense.

152. HMRC submitted that FRS 5.14 undermines, rather than supports, the Appellants' case. EA emphasised that FRS 5.14 requires an objective assessment of the commercial effect of the arrangements, not a retrospective reconstruction of the parties' intentions. HMRC argued that the commercial substance of the arrangements, when viewed as a whole, was that control over the business operations and economic benefits passed to MCP and its Managing Partner, SM. They pointed to the MCP Deed of Partnership, which vested control over profit allocation and operational decisions in SM and to the financial statements of MCP, which recorded all turnover and operating expenses. HMRC submitted that these features demonstrated that the commercial effect of the arrangements was to transfer the business to MCP, notwithstanding any contrary declarations in the legal documentation.

153. We accept HMRC's submission that FRS 5.14 requires the Tribunal to assess the commercial substance of the arrangements, giving greater weight to those aspects that are more likely to have a practical effect. The evidence demonstrates that the formation of MCP and the delegation of operational control to SM were not incidental or theoretical features, but central to the functioning of the business following the transfer. The MCP Deed of Partnership expressly provided that the partners would carry on the business of a care home for their mutual benefit, and that SM, as Managing Partner, would have the final say on profit allocation. The financial statements of MCP recorded all turnover and expenses, while MPHL's accounts recorded no trading income and described its role as that of a holding company. These features are consistent with the conclusion that the commercial effect of the arrangements was to transfer the business to MCP.

154. While the Appellants placed weight on Clause 9 of the MCP Deed of Partnership, which purported to reserve the goodwill to MPHL, we have found that this clause referred to legal goodwill and did not confer control over the economic benefits of the business for accounting purposes. As we conclude below, legal declarations of ownership cannot override the objective assessment of control required under GAAP. The Tribunal must assess who had

the ability to direct the financial and operating policies of the business with a view to obtaining economic benefits. On the evidence, that power rested with MCP and its Managing Partner, SM. Accordingly, the application of FRS 5.14 supports the conclusion that MPHL did not acquire or retain control over the business and was not entitled to recognise goodwill in its accounts.

CONTROL OF THE BUSINESS

155. It was common ground between the experts that the two key areas for analysis in order to determine whether MPHL acquired control of the business are: (i) who assumed the risks and rewards of operating the business and (ii) did the operations pass to MCP? As identified by HMRC, these are connected questions because the analysis of risks and rewards affects whom GAAP views as controlling the business operations. We have first considered whether the operations passed to MCP.

DID THE OPERATIONS PASS TO MCP?

156. The Appellants rely upon the MCP Deed of Partnership in support of the submission that "MCP was a partnership to manage, rather than to own, the business assets of MPHL". FRS 5.54 states that control is to be "distinguished from management (i.e. the ability to direct the use of an item that generates the benefits) and, although the two often go together, this need not be so." We do not agree with the Appellants' submission and prefer HMRC's submissions for the following reasons.

157. Under the heading of "Background" in the MCP Deed of Partnership at (A) is stated: "The Partners [MPL] and [SM] operate a care home business under the name Milton Care". At (B) it is stated: "The Partners wish to record the terms of their Partnership in this Deed."

158. "Business" is defined as the "business of Milton Park or such other business as may be carried on by the Partnership from time to time". "Corporate Partner" is defined as a "Partner who is a body corporate and who is not directly or indirectly involved in the management of the Partnership and for the avoidance of doubt, MPL is a Corporate Partner". "Managing Partner" is defined as "means [SM]". Clause 2 headed "Basis of Agreement" states at clause 2.1 "The Partners shall during this Agreement carry on the business of a care home for their mutual benefit as provided in this Agreement." No reference is made anywhere in the MCP Deed of Partnership that it is for the benefit of anyone other than the Partners. MM was taken during cross-examination to clause 2.1 of the MCP Deed of Partnership and confirmed that MCP was carrying on the business of the care home [Day1/43/19-20]:

> "Q. Well, I think there is a distinction that is sometimes drawn between these two things. If you look at the partnership agreement, going back to clause 2.1 that we looked at, 6082 is the page: "The partners are to carry on the business of a care home for their mutual benefit as provided in this agreement." So they aren't acting as managers, they are carrying on the business of the care home, aren't they?
>
> A. They are."

159. MM confirmed in respect of the case home business that it was operated by MCP [Day1/84/25-85/2]:

> "Q. That business, the care home business is run by MCP?
>
> A. It's operated by MCP, yes."

160. The same point was put to PC in cross-examination which he accepted [Day3/33/25-34/7]:

> "Q. Yes? So we have that in the bundle at 6079. So it is dated 1 January 2008, it is between MPL and Sean McInerney. Then it recites on the next page that the partners operate a care home business trading under the name Milton Care. I would note that

> it doesn't say there they are acting as managers for somebody else. The partnership is said to operate a care home business.
>
> A. Yes. It is a bold factual statement. Yes."

and [Day3/34/11-24]:

> "Q. Under the recital the partners wish to record the terms of the partnership in this deed. Then if we look at clause 2.1, which is on page 6082: "The partners shall, during this agreement, carry on the business of a care home for their mutual benefit as provided in this agreement." So, again, it does not say that they are managing a care home for the benefit of somebody else. They are carrying on the business of a care home for their mutual benefit. Again, that suggests, doesn't it, that the partnership is operating the care home business not for somebody else, but for the partners. Would you agree with that?
>
> A. Yes."

161. It was not suggested by any of the Appellants' witnesses in oral evidence or in the Appellants' submissions that the MCP Deed of Partnership did not reflect what the parties had agreed. No suggestion of "sham" is made by HMRC.

162. In our judgment, the conclusion that MCP was operating the business is reflected in the accounts of MCP, which recorded all of the turnover from the care home business and related operating expenses. The Partners' Certificate in the 31 March 2008 accounts was signed by MPL, BCSL and SM and confirmed that "We approve the accounts set out on pages 2 to 6 disclosing a profit of £2,542,132 and confirm that we have made available all relevant records and information for their preparation." The Accountants' Report confirmed that:

> "In accordance with the engagement letter dated 28 January 2009 we have compiled the financial information of Milton Care Partnership which comprises the Trading and profit and loss account, the Balance sheet and the related Notes from the accounting records and information and explanations you have given to us.
>
> …
>
> You have approved the financial information for the period ended 31 March 2008 and have acknowledged your responsibility for it, for the appropriateness of the accounting basis and for providing all information and explanations necessary for its compilation.
>
> We have not verified the accuracy or completeness of the accounting records or information and explanations you have given to us and we do not, therefore, express any opinion on the financial information."

163. MM accepted in cross-examination that MCP's accounts gave a true and fair view and that he had signed the accounts [Day1/95/17-96/8]:

> "Q. … That's turnover from running the care home, isn't it?
>
> A. I don't ... I don't recognise this. I didn't get that heavily involved to read all the notes, to be honest with you.
>
> Q. I think you'd signed the accounts --
>
> A. Yes, I certainly did.
>
> Q. -- on 5227.
>
> A. Yes, I signed lots of things. I'm relying on Haslers. We talked about global figures of profits and said the overall performance of the various partnerships, and they presented this level of accounts. This is beyond my skill set. So I don't read all the notes.
>
> Q. Were you satisfied that these accounts gave a true and fair view?
>
> A. Yes, I would have trusted them to give a true and fair view, exactly."

164. The MCP accounts for the period ended 31 March 2008 record turnover and costs of sale. When the cost of sales under "Notes to the Accounts" is examined, it is clear that costs relate to the costs of running a care home and not the costs attributable to MCP being a manager of a care home. The accounts do not record MCP being remunerated with a management fee, salary, commission or remuneration that one would expect to see if MCP were acting as a manager of the care home.

165. EA, in the JS, highlighted as significant the fact that MCP's financial accounts recorded the turnover generated by the care home business, rather than MPHL's accounts doing so. In accordance with SOP 2.6, this accounting treatment indicates that MCP, and not MPHL, was the entity exercising control over the economic outcomes of the business – namely its profits, losses, assets and liabilities. AE in the JS at page 16 under the heading of "Did the operations pass to MCP?" attached weight to the fact that the business turnover was reported by MCP rather than MPHL:

> "Dr Alford does not agree with Mr Chidgey's view that the reasons she quoted to support the transfer of commercial substance to MCP are only concerned with the management and day to day running of the business.
>
> She notes that:
>
> (a) All turnover arising from the business was reported by MCP rather than MPHL. This implies that MCP was the entity able to control the gains, losses, assets and liabilities of the business (SoP 2.6, EA1 paragraph 5.97);
>
> (b) MPHL's instruction to MPL also gave full autonomy to MPL with regards to the conduct of the business.
>
> (c) MPL subsequently formed MCP with Sean McInerney to conduct the business with Sean McInerney having the final decision on profit sharing arrangements."

166. PC variously stated in cross-examination ([Day3/105/25] – [Day3/109/4]) that MCP's accounts were not necessarily inconsistent with the notion that MPHL had control over the care home business, but it is difficult to see how that could be so when looking at the substance of the matter: MPHL simply recognised no part of the turnover or costs of a business which, on the Appellants' case, it is supposed to wholly own and control. That does not accord with the terms of SOP 2.6 that "*Those financial statements will therefore deal with the gains, losses, assets and liabilities directly controlled or borne by the entity but no other gains, losses, assets or liabilities*" nor present a true or fair view. When asked if he agreed that the way in which the accounts were drawn up suggested that MCP had control of the business he responded:

> "No … Because I know what happens around it. So it could, but it doesn't necessarily indicate that, because the important thing is where the profit goes, not the fact of who accounts for the turnover." [Day3/106/15-24].

167. When asked how the MCP accounts showed a true and fair view when they showed its profits and losses as being the profits and losses of a business that he said it did not control he answered:

> "Well, they show the profit and loss accounts of the limited business which they were instructed to carry on, which was to look after the day-to-day operations of the Milton Care Hospital, within the bounds of the way that the partnership was set up." [Day3/108/14-22]

168. In our judgment, the opinion expressed by PC is difficult to reconcile with the substance of the arrangements. MPHL did not record any of the income or expenditure associated with the care home business, despite the Appellants' assertions that it both owned and had control of the business. We consider that this omission from the accounts is

inconsistent with the requirements of SOP 2.6 and undermines the notion that MPHL presented a true and fair view of its financial position.

169. HMRC submitted that it was relevant that the trademarks used in operating the business were registered to BHL and it was BHL's address that featured on marketing material. Likewise, all end-customer agreements and invoices carried the address and trademarks of BHL, not of MPHL, and provided payments should be made to BHL's bank account [SOAFI/33/d-f]; and it was BHL, not MPHL, which was the registered person under the Care Standards Act 2000 and was thus the recipient of a statutory notice and reports. We do not consider that the fact that BHL held the trademarks, all end-customer agreements etc. and was the registered person to be determinative when considering whether MCP operated or managed a care home. It is clear from JM's witness statement and from MM's evidence that the CQC did not have any objection to BHL being the registered person for the purposes of the Care Standards Act 2000. Similarly, we accept MM's evidence at paragraph 73 of his first witness statement dated 29 November 2021 which stated:

> "I did not and still do not see any problems that the same brand was being used by all businesses in common ownership and this seems typical with lots of groups that I can think of that are similarly organised like Virgin, the Priory, and Bupa for example."

170. What we do consider to be determinative is that BHL along with BCSL were admitted to the MCP as partners. It was MCP, through its managing partner, SM, which had control over the staff and administrative services supplied by BHL and BCSL. The Statement of Agreed Facts records that it was agreed that MCP controlled the staff, see paragraph 65 above under the heading "the Operation of Milton Park Hospital".

MPL AN AGENT OF MPHL

171. Mr Sykes submitted that MPL acted as agent for MPHL. No assets were transferred to MPL and it acted on bare instructions to manage the business on a day-to-day basis. Reliance is placed on the minutes of a MPL Board meeting dated 31 December 2007 which stated at paragraph 2:

> "… the purpose of the meeting was to consider and if deemed fit, to approve an arrangement with Milton Park Holdings Limited, the Company's parent company ("MPHL"), whereby, on behalf of MPHL, the Company will conduct the day to day management and execution of a care home business recently acquired by MPHL." [emphasis added]

172. That, it is submitted, makes the agency relationship clear and that clear language is consistent with JA's evidence that MPL's role could be terminated at will: "*It would have been understood at the time that the role could be terminated at will. There would have been no reason to give MPL any greater right*." That view is reinforced by the decision to dispense with MPL being implemented by short minutes at the MPHL Board Meeting on 31 March 2009. The minutes stated that "*the purpose of the meeting was to consider and if deemed appropriate, arrange for the Company to assume the role within the business of MCP previously undertaken by MPL*." The fact that turnover was recorded in MPL's accounts rather than MPHL's does not alter the position, the rightness or wrongness of the accounting adopted in this point does not form part of the appeal.

173. PC considered that MPL was an undisclosed agent of MPHL as recorded under "4 Issue: Goodwill – continuing recognition" on page 20 of the JS at Appendix 2:

> "MPL was either an undisclosed agent of MPHL in which case MPHL should have accounted for the profit share for the period up until it revoked the instruction (and MPL accounted for commission if any) (See PC1 5.4.9);"

174. PC's First Report at 5.4.9 stated:

> "5.4.9 It is arguable that, given the inability of MPL to control the benefits coming from the business assets, it was in fact acting as a management agent for MPHL and it should not have accounted for the share of profits from the business. Application note G of FRS 5 although dealing with revenue requires that if an agent is acting on behalf of a principal, any amounts received or receivable from a customer which are payable to a principal should not be included in the agent's turnover. On this view the share of the profits should have been accounted for directly by MPHL rather than in MPL."

175. We note that the minutes of MPHL Board Meeting on 31 December 2007 (at paragraph 49 above) make no reference to MPL being appointed as or acting as agent of MPHL. We would have expected such an appointment to be recorded by MPHL.

176. We were referred by HMRC to *Bowstead & Reynolds on Agency* 23 edn. at 1-001 which states:

> "(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation."

177. HMRC submitted that here there is no such express or implied manifestation of assent to that effect and as there is no written agency agreement in evidence one needs to consider if such an agreement can be gleaned from the facts. HMRC relied upon the following facts as all pointing away from there being such an agency agreement:

(1) The absence of proposed remuneration or commission for MPL.

(2) The lack of any apparent benefit to MPHL.

(3) The absence of any apparent limitations on MPL's discretion.

(4) MPL's accounts for the period ended 31 March 2008 recorded turnover from MCP; MPHL's accounts for the period ended 31 March 2009 (MPHL's first accounting period) did not recognise any turnover from MCP but recorded "income from investments in group companies".

(5) The relationship between MPHL and MPL is more readily explained as parent company and wholly owned subsidiary rather than principal and agent.

178. We agree with HMRC's submissions. There are no documents recording any proposed remuneration or commission for MPL for acting as purported agent of MPHL and nor do the accounts record any such commission payments being made to MPL. No explanation or reason has been advanced as to the purported benefit that MPHL would derive from MPL acting as its agent. The Minutes of the MPL Board Meeting dated 31 December 2007 record at paragraph 4 (paragraph 50 above) that "it is agreed that MPL shall have full autonomy with regard to the conduct of the Business". In the absence of any limit on MPL's purported authority as agent, MPHL is bound by any legal rights or obligations that MPL entered into or created with third parties, a position that is clearly at odds with MPHL retaining control over the operations.

179. In respect of point (4) above, PC stated in the JS at page 20:

> "MPL was either an undisclosed agent of MPHL in which case MPHL should have accounted for the profit share for the period up until it revoked the instruction (and MPL accounted for commission if any) (See PC1 5.4.9)".

180. At 5.4.9 of PC's first report he stated:

> "It is arguable that, given the inability of MPL to control the benefits coming from the business assets, it was in fact acting as a management agent for MPHL and it should not have accounted for the share of profits from the business. *Application*

> *note G of FRS 5* although dealing with revenue requires that if an agent is acting on behalf of a principal, any amounts received or receivable from a customer which are payable to a principal should not be included in the agent's turnover. On this view the share of the profits should have been accounted for directly by MPHL rather than in MPL."

181. In our judgment, PC's view of the accounting treatment that should have been adopted by MPHL if MPL were its agent supports HMRC's submission that the facts point away from there being an agency agreement.

182. In respect of point (5) above, HMRC's submission accords with the evidence given by MM. MM was asked in cross-examination what he meant by "using MPL as an agent or the like?" and answered in terms of a subsidiary rather than an agent (Day1/49/7-17):

> "A. This, again, goes back to what I was talking about earlier, my concerns about the information that was going to end up in the public domain. As I recall, speaking to Haslers, they came up with the solution if we put a limited company as a subsidiary and then they can take profits which can be then passed up to MPHL, it would overcome this level of information problem that I had, being in the public domain.
>
> Q. Right. You refer to it being a subsidiary of, I infer, a subsidiary of MPHL. Is that --
>
> A. It was owned by MPHL. Yes."

That understanding was similarly confirmed by JA in her oral evidence, (Day1/116/13-18).

183. Even if MPL were acting as an agent, that would not establish that MPHL had control over the business for GAAP purposes. As FRS 5.8 makes clear, control requires the ability to direct the financial and operating policies of the entity with a view to obtaining economic benefits. The evidence does not support the conclusion that MPHL had such control. Accordingly, we reject the Appellants' submission that MPL acted as MPHL's agent in a manner that preserved MPHL's control over the business.

184. For all the reasons set out above, we find that the operations of MPL passed to MCP.

RISKS AND REWARDS OF OPERATING THE BUSINESS

185. The Appellants' position is that the substance of the transactions did not deprive MPHL of the risks and rewards of the business which it acquired. In the JS, beginning on page 13 under the heading of "Who assumed the risks and rewards of operating the business?", PC stated:

> "MPHL acquired control over access to the principal risks and rewards of the business through the Transfer of Partnership Assets & Liabilities agreement. The fact that MPHL then set up a structure (MCP) to operate the business did not mean it had not acquired the rights to the principal benefits in the first place. These rights were to the proceeds of any future sale of the business and the profits arising from it.
>
> The access to the future sale proceeds was tightly controlled via the various admission deeds to admit new partners to MCP, who were required to withdraw in the event of a sale and the profit sharing was controlled in such a way that MPHL had access to at least 90% of the residual profits. It was MPHL who had the access to the greatest benefits and was therefore most at risk of losing them should the business be a failure. For example, in the event of a severe economic downturn then it would ultimately be MPHL which would suffer. Its profits from the business and any prospective sales proceeds would be reduced and its property assets would ultimately bear any losses.
>
> Based on Mr Chidgey's analysis in his first report of the way the partnership operated (see PC1 Section 5.3) he concluded that from a commercial perspective the purpose of MCP appeared to be to secure economic inputs for the care home business and that it did not appear to be a vehicle to transfer the economic benefits,

> namely the benefits from an eventual sale and the residual profits, which rested with MPHL. Rather, it was a means of remunerating the various partners for their inputs to the business. For example, Sean McInerny was remunerated at the rate of £5,000 a year.
>
> It was MPHL which had control over the principal benefits and exposure to the principal risks and accordingly was entitled to recognise the goodwill arising from the acquisition of the business."

186. EA's stated view of who assumed the risks and reward of operating the business was:

> "… it is necessary to analyse the arrangements as a whole to determine which party has access to the risks and rewards. [She] agrees that the access to the future profits is a key factor in determining whether MPHL acquired control over the risks and rewards of the business. The admission deeds and profit-sharing clauses in the MCP partnership agreement show that:
>
> (a) Sean McInerney was the Managing Partner and the only Non-Corporate Partner listed in the MCP Partnership Deed. As Managing Partner, he determined the profit shares to be allocated to the partners.
>
> (b) The MCP Corporate Partners, MPL, BCSL and BHL, had no voting rights under the Partnership deed.
>
> (c) MPL was given full autonomy with regard to the conduct of the care home business.
>
> (d) MPHL was not a Corporate Partner in MCP at the time of the acquisition, so only appeared to have indirect control over any risks and rewards via its shareholding in MPL.
>
> [EA] agrees that MPHL would bear any losses on the property assets as these were retained by the company (EA1 paragraph 6.33(a)). [She] does not believe that this factor determines who assumed the risks and rewards of operating the business as the properties had previously been owned by [MM] and [EM when the previous partnership, MPP, was operating the business.
>
> [Her] view is that these factors suggest that MPHL did not assume the risks and rewards of operating the business operations discussed in the next section."

187. We have proceeded to consider the various factors identified by the experts in the JS to determine if MPHL retained the risks and rewards of the business.

FRS 5.25

188. The Appellants relied on FRS 5.25, which provides that, in assessing whether an entity retains "significant" benefits or risks, the analysis must focus on those that are "likely to occur in practice" rather than on all theoretical possibilities. Mr Sykes submitted that MPHL retained significant benefits and risks in relation to the care home business, including the right to receive the proceeds of any future sale of the business, the ability to terminate the arrangements with MPL, and the ownership of the real property from which the business was operated. He argued that these rights, when viewed in context, were commercially meaningful and likely to have practical effect. In particular, he contended that the arrangements were structured to ensure that MPHL would retain the economic benefits of the business, and that the retention of goodwill in Clause 9 of the MCP Deed of Partnership was evidence of such intention. PC, in his expert evidence, supported this view, stating that MPHL bore the principal risks of failure and retained access to the principal benefits, including the residual profits and sale proceeds.

189. HMRC submitted that the Appellants' reliance on FRS 5.25 was misplaced. AE emphasised that the relevant inquiry is not whether MPHL retained any rights in theory, but whether those rights were significant in practice. She noted that the rights relied upon by the Appellants were either contingent, incapable of practical enforcement, or subject to the

discretion of others – most notably the Managing Partner of MCP. HMRC further submitted that the ability to terminate the arrangements or to withdraw the use of the real property did not amount to control over the business or its economic benefits. Rather, such rights, even if exercisable, would not enable MPHL to direct the financial and operating policies of the business with a view to obtaining economic benefits, as required by FRS 5.8. Accordingly, HMRC contended that MPHL did not retain significant benefits or risks within the meaning of FRS 5.25.

190. We accept HMRC's submission that the rights retained by MPHL were not "significant" in the sense required by FRS 5.25. That provision requires the Tribunal to assess the significance of benefits and risks by reference to those "likely to occur in practice", not by reference to all possible or contingent outcomes. On the evidence before us, the rights relied upon by the Appellants, such as the ability to terminate the arrangements with MPL, the ownership of the real property and the purported entitlement to goodwill, were either contingent, subject to the discretion of others or incapable of practical enforcement. For example, the ability to terminate MPL's role did not confer on MPHL the ability to direct the financial and operating policies of MCP, which was the entity carrying on the business. Similarly, the ownership of the real property, while relevant to the operation of the care home, did not translate into control over the business itself, as the property was not a partnership asset and could be replaced or substituted.

191. Moreover, the MCP Deed of Partnership vested control over profit allocation and access to sale proceeds in the Managing Partner, SM, and not in MPHL. The evidence of MM and JA confirmed that SM had autonomy in determining profit shares, and that any informal family understanding was not documented and did not override the legal structure. The Tribunal is required to assess the substance of the arrangements, and we find that the economic benefits of the business were controlled by MCP, not MPHL. Accordingly, we conclude that MPHL did not retain significant benefits or risks in relation to the business following the formation of MCP, and that FRS 5.25 does not support the recognition or continued recognition of goodwill in MPHL's accounts.

PROCEEDS FROM ANY FUTURE SALE

192. FRS 5.3 defines "control in the context of an asset" as "the ability to obtain future economic benefits relating to an asset and to restrict the access of others to those benefits". PC's stated view in the JS is that MPHL "acquired control over access to the principal risks and rewards of the business", which he considers to be "the proceeds of any future sale of the business". HMRC submitted that by reason of the terms and effects of the transactions entered into, neither the proceeds of any future sale nor the profits arising from the business were, in fact, within MPHL's control. We agree with HMRC.

193. The MCP Deed of Partnership recorded that SM was the Managing Partner and that it was the Managing Partner that had control over the entitlement to share in any surplus on the sale of the business. Clause 14.2.3 of the MCP Deed of Partnership made the following provision:

> "paying any surplus rateably to the Partners in the same proportions in which they shared profits immediately prior to dissolution".

194. Clause 8.2 of the MCP Deed of Partnership stated:

> "The profit share of each Partner shall be reviewed by the Managing Partner at the end of each Accounting Period and in the absence of agreement between the Partners, the final decision shall be made by the Managing Partner."

195. As made clear by the MCP Deed of Partnership, the power to determine the profit shares and access to any proceeds of a future sale of the business lay solely with SM as

Managing Partner not MPHL. MM accepted in cross-examination that following the execution of the MCP Deed of Partnership, SM had control over the profits and proceeds of the business and that was consistent with the minutes of the MCP meetings where profit allocation was discussed and directed by SM [Day1/46/23-47/4].

196. Reliance was placed upon the minutes of the MCP meeting dated 11 January 2010 by the Appellants for the period ended March 2009 which recorded:

> "The profit allocation was discussed. After discussion and direction from M McInerney, it was agreed that the profit be allocated as follows:"

197. The Appellants submitted that in respect of all the profit share meetings of the MCP, MM is present representing MPL, then MPHL as well as BCSL and BHL, and the resolutions are agreed by all those present and not simply by SM. We do not accept that the minutes confirm that MM was exercising decision making power. We agree with HMRC's submission that the minutes confirm that it was MCP that was making the decisions and it was a partnership decision with MM present in his capacity as representative of the other partners. In respect of the minutes dated 11 January 2010, this is the only instance in which it is recorded that the profit shares were agreed "after discussion and direction from M McInerney". Whilst none of the witnesses were able to explain why this particular minute differed from the five other examples, we are satisfied that it is clear from the MCP Deed of Partnership that it was SM as Managing Partner who had the sole power to determine the profit allocation and, even if directed otherwise by MM, he was not required to give effect to that direction.

FAMILIAL CONTROL

198. MM's second witness statement stated at paragraph 3:

> "As regards the allocation of profits generally, nothing would have been done if I had not been in agreement and indeed the basis for profit allocation was clear and had been discussed upfront before the partnership was formed. I together with my wife had built up the business but with Eunice I was the shareholder and director of MPHL, the holder of the goodwill and assets of the business. I don't think it would have ever come to any disagreement but it seemed to me clear that MPHL was the entity with the assets and could withdraw from the Milton Care Partnership if it chose to and was also the entity holding the premises and the other business assets acquired from the Milton Park Partnership which meant that it was the key entity. I also was the director of BHL and BCSL. So the partnership was not something which stood any possibility of depriving MPHL of the profit share which it was expecting."

199. It was suggested by MM in the course of his evidence that there may have existed what was described as "a sort of informal family understanding" regarding the allocation of profits. This phrase was expressly acknowledged by MM during cross-examination as an apt characterisation of the arrangement. However, MM further accepted that this purported understanding was not documented in any form and was based solely on his personal recollection of events that had occurred nearly two decades prior. The existence of the "informal family understanding" was put to JA and she confirmed that she was unaware of the existence of any such document.

200. Notwithstanding the suggestion of an informal arrangement, MM accepted that, pursuant to the terms of the MCP Deed of Partnership, SM retained the ultimate authority in determining profit allocation. Moreover, any such informal understanding, even if it existed, was acknowledged by MM to be no more than a preliminary framework; the specific details of profit distribution were, in his own words, "left completely open" and subject to determination on an annual basis. He further conceded that "the final decision about allocation can only be made on a year-on-year basis."

201. HMRC submitted that the evidence establishes the MCP Deed of Partnership was drafted pursuant to MM's instructions and was subject to careful review. Accordingly, both objectively and subjectively, the Deed must be regarded as embodying the parties' intended arrangements, particularly in circumstances where an informal understanding is unclear and not evidenced. We agree with HMRC's submission and find that there is no evidence of any informal family understanding.

202. HMRC submitted that even if MM did exert control via an informal family understanding, that would not vest control in MPHL: MM's ability is not MPHL's ability and simply asserting that he was acting on the latter's behalf does not make it so. Rather, MM would have been exercising control personally as the owner of the whole corporate structure (MPHL, BHL, and BCSL – the shares of all of which he owned, together with his wife) who could pull all the strings of the various entities. He accepted in cross-examination that this was the control he had.

203. Whilst the Appellants placed some reliance on what was described as an "informal family understanding" regarding the allocation of profits or control of the business, such subjective expectations cannot displace the objective legal and accounting analysis required under GAAP. The applicable accounting standards, including FRS 5 and FRSSE, require an assessment of the substance of the arrangements as evidenced by the legal documentation and the actual conduct of the parties. The existence or absence of control must be determined by reference to the ability to direct financial and operating policies with a view to obtaining economic benefits, not by reference to informal or undocumented understandings. Even if Mr McInerney personally believed that MPHL would retain the economic benefits of the business, that belief cannot override the legal structure established by the MCP Deed of Partnership or the accounting treatment that follows from it.

PROFITS ARISING FROM INCOME

204. In the JS (at page 14) PC attributed the profits in question to MPHL on the basis that "the profit sharing was controlled in such a way that MPHL had access to at least 90% of the residual profits". This view was derived from an analysis of how, in practice, the Managing Partner of MCP exercised the power to allocate profits. This, HMRC submitted, overlooks a fundamental consideration, as highlighted by EA in the JS (also at page 14), namely that for the purposes of GAAP, the critical issue is not how profits were in fact distributed, but rather where the authority to control the economic benefits of the business resided.

205. Under cross-examination, PC accepted that the actual allocation of profits was not determinative for GAAP purposes. He acknowledged that the relevant question is who possesses the power to determine the distribution of future economic benefits arising from the business. As previously accepted by MM and PC above, the evidence clearly established that the authority to decide how the profits generated by the care home business were to be allocated among the partners of MCP rested solely with the Managing Partner, SM. Accordingly, we find that control over the profits arising from the business did not lie with MPHL, but rather with SM, acting in his role as Managing Partner of MCP and in accordance with the MCP Deed of Partnership.

206. The Appellants submitted that it was inherently improbable that MPHL would have entered into the arrangements in question without a prior agreement as to the allocation of profits, particularly given that a sale of the business was contemplated from the outset. While we accept that the transactions were carefully structured and that a sale was ultimately intended, this submission does not assist the Appellants. The relevant question for the purposes of GAAP is not whether the parties subjectively intended that MPHL would benefit from the business, but whether MPHL in fact obtained and retained control over the

operations and economic benefits of the business, as defined in FRS 5.8. As we have found, the legal structure established by the MCP Deed of Partnership vested control over profit allocation and the business operations in the Managing Partner of MCP, not in MPHL. The absence of a formal agreement securing MPHL's entitlement to profits or sale proceeds reinforces, rather than undermines, the conclusion that MPHL did not retain control. The suggestion that the parties would not have proceeded without such an agreement is speculative and cannot override the objective legal and accounting analysis required under GAAP.

ACCESS TO SALE PROCEEDS TIGHTLY CONTROLLED

207. The Appellants' expert's position was that as "the access to the future sale proceeds was tightly controlled via the various admission deeds to admit new partners to MCP, who were required to withdraw in the event of a sale" [JS/14], MPHL retained access to the risks and reward of the business. HMRC submitted that whilst it was correct that access to future sale proceeds was tightly controlled the key point was the location of that control: under the terms of the MCP Deed of Partnership, the partners' entitlement to share in any surplus on a sale of the business was determined by reference to their profit-sharing proportions immediately prior to dissolution – see Clause 14.2. Clause 14 of the MCP Deed of Partnership is headed "Dissolution" and relevantly provides as follows:

> 14.1 The Partnership may be dissolved by agreement of all the Non-Corporate Partners.
>
> 14.2 Upon the dissolution of the Partnership for any reason the Business and/or assets of the Partnership shall be sold or realised as soon as practicable and the proceeds applied:
>
> > 14.2.1 firstly in paying and discharging the debts and liabilities of the Partnership and the expenses of and incidental to the winding up of the affairs of the Partnership any deficiency being contributed rateably to the Partners in the same proportions in which they shared profits immediately prior to dissolution save that any sum realised from the disposal of the business goodwill shall accrue solely to MPHL.

208. As we stated at 194 above, Clause 8.2 of the MCP Deed of Partnership provided that it was SM as Managing Partner who had power to determine the profit share of each Partner:

> 8.2 The profit share of each Partner shall be reviewed by the Managing Partner at the end of each Accounting Period and in the absence of agreement between the Partners, the final decision shall be made by the Managing Partner.

209. Furthermore, as stated above, it was accepted by MM and PC that it was SM and not MPHL that controlled access to any proceeds of a future sale of the business.

PROPERTY ASSETS BEARING LOSSES

210. At pages 14-15 of the JS, PC stated:

> "… in the event of a severe economic downturn then it would ultimately be MPHL which would suffer. Its profits from the business and any prospective sales proceeds would be reduced and its property assets would ultimately bear any losses."

211. PC's expert view was that as MPHL held the fixed assets of the Milton Park business it was the property assets held by MPHL that would ultimately bear any losses"; this supported his view that MPHL assumed the risks and rewards of the business. It was not disputed that MPHL owned the real property from which the business was carried on. HMRC's expert submitted that whilst MPHL owned the real property from which the business was carried on it did not follow (at least following the events at the end of 2007 and the formation of MCP)

that the real property constituted assets of the business. HMRC relied upon the distinction accepted in the Appellants' skeleton at paragraph [43] which stated that:

> "There is no requirement for property used by a partnership to become partnership property and indeed no suggestion in the evidence (or by HMRC) that the assets acquired became partnership property. Lord Lindley in Lindley on Partnerships stated: '…it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all.' This has been quoted with approval in a number of cases as reported in *Lindley & Banks* at 18-51"

212. That distinction was not resiled from by Mr Sykes and we accept it is a correct statement of the legal position regarding assets used by a partnership. That being so, PC correctly accepted in cross-examination that in the event of any losses being incurred it would be the partners that would bear any losses and not the property assets held by MPHL. Accordingly, we find that the fact that MPHL held the fixed assets of the business does not support PC's view that MPHL assumed the risks and rewards of the business.

GOODWILL

213. The Appellants relied upon the provision in the Clause 9 of the MCP Deed of Partnership which provided under the heading of "Goodwill" that "The goodwill of the Partnership shall be owned solely by MPHL." The BCSL Deed of Admission to the MPP dated 1 April 2005 amended Clause 9 of the MCP Deed of Partnership as follows:

> i. The goodwill of the MCP would continue to be owned by MPHL.
>
> ii. BCSL agreed with MPL and SM that BCSL's admission to the MCP would not afford BCSL any right or entitlements to the goodwill, capital account, benefit, assets or property of the MCP; that any consideration or compensation arising in connection with a disposal of the business to an unconnected third party or a change of control of the partnership would belong only to the "Existing Partners" (defined in the parties clause as MPL and Sean); and that BCSL (the "New Partner") would not be entitled to any such consideration or compensation.

214. The BHL Deed of Admission to the MPP dated 1 January 2005 amended Clause 9 of the MCP Deed of Partnership in identical terms.

215. This, Mr Sykes submitted, confirmed that on the sale of the business, any amount referable to goodwill would belong to MPHL. This was MPHL retaining control of the rewards of the business. PC, in his first report, relied upon Clause 9 in support of this view that MPHL had retained a principal benefit of the partnership. Mr Sykes did not accept HMRC's position that Clause 9 is ineffective as it was making provision for legal goodwill rather than the GAAP concept of "purchased goodwill" and the ownership of the legal goodwill moved to MCP and remained there notwithstanding any contractual provision to the contrary. Clause 9 is intended to confer on MPHL the proceeds from a sale attributable to goodwill and the Tribunal should apply that construction. Furthermore, Clause 9 is required to be construed in the context is which it was written and a common sense approach applied, per *Lindley and Banks on Partnerships* (21st Edition) at 10-17: "the need for a commonsense approach when attempting to identify what the document would mean to a reasonable man."

216. *Lindley and Banks* at 10-100 provided further guidance:

> "Goodwill and domain names

> The agreement should establish whether or not goodwill is a partnership asset: although there is something akin to a presumption that it belongs to the firm, this will not always be the case. [Footnote 302] Thus, in *Hopton v Miller* [2010] EWHC 2232 (Ch) the goodwill built up was held to be a partnership asset, even though there was no agreement and it was not shown in the partnership accounts. If the goodwill is to be retained by a particular partner or partners, it should be decided whether any increase in its value will also belong to those partners or to the firm and, if the latter, how the firm's entitlement is to be ascertained and realised on a dissolution."

217. This, it was submitted, puts the position beyond doubt and MPHL would receive the proceeds allocable to goodwill. Footnote 302 stated: "See *Miles v Clarke* [1953] 1 W.L.R. 537; *Stekel v Ellice* [1973] 1 W.L.R. 191; *Bhayani v Taylor Bracewell LLP* [2016] EWHC 3360 (IPEC); cf. *Castledine v RSM Bentley Jennison* [2011] EWHC 2363 (Ch); see also infra, para.10-419, et seq., and paras 18-27, 18-28, 18-56, et seq." The Appellants relied upon the cases in the footnote in support of its submissions which should be preferred to those relied upon by HMRC which are irrelevant and drawn from very different contexts and are dealing with legal goodwill.

218. However, it was (and we say correctly) accepted by Mr Sykes during oral submissions that the reference to goodwill in Clause 9 could only be a reference to legal goodwill and not accounting goodwill. He stated "*In that event, the deed is clear that the proceeds attributable to goodwill belong to MPHL. Of course, we're talking about accounting goodwill and whether that should be recognised, and this is talking about legal goodwill*."

219. It was therefore common ground that what was referred to as "goodwill" in Clauses 9 and 14 of the MCP Deed of Partnership is legal goodwill. Mr Sykes submitted that the declaration of goodwill was intended to have commercial effect and meaning in context; what the clause is intended to do is ensure there is no dispute that the proceeds attributable to goodwill go on MPHL. Mr Sykes submitted that when faced with a choice between a construction that renders a clause void or ineffective and one which does not a Court should choose the latter, per Chitty on Contracts (35th Edition) at 16-091. which, under the heading of "Saving the document" states that when faced with two possible meanings, one which is void, in effect, or meaningless and the other one which would validate the instrument, then the former is to be preferred. We do not agree with the Appellants' submissions and agree with HMRC's submissions for the following reasons.

220. HMRC submitted that MPHL did not bear the risks and rewards of the business via the legal goodwill. Furthermore, even if MPHL did have access to the sale proceeds from or by reference to legal goodwill, the Appellants would need to have adduced evidence that the legal goodwill had monetary worth otherwise access to that element of sale proceeds derived from legal goodwill would be immaterial. The Appellants have not adduced any such evidence and no valuation of legal goodwill has been agreed. Therefore, one is left with speculation as to the worth or value of legal goodwill. We accept that there is no evidence before us as to the value, if any, of the legal goodwill of the business.

221. Mr Winter took us through the various cases relied upon by the parties in respect of goodwill. He pointed to the "unifying thread" running through the case law on legal goodwill: legal goodwill is inseparable from the business out of which it arises. That position is summarised in Halsbury's Laws of England Volume 80 at paragraph 809 titled "How far goodwill is a separate entity":

> "Goodwill is not a thing which can be separated and dealt with apart from the business out of which it arises".

222. We note that Clause 9.1 of the MCP Deed of Partnership states that "The goodwill of the Partnership shall be owned solely by MPHL." "Partnership" is defined in the MCP Deed of Partnership as "the partnership currently subsisting between the Partners including any partnership which is a successor to that partnership under whatever name". In our judgment, the reference to the goodwill of the partnership can only be a reference to legal goodwill relating to the business carried on in common by the partners of the MCP In accordance with the case law considered below, the legal goodwill relating to the MCP business belonged to MCP and not MPHL despite any provision to the contrary.

223. We agree with Mr Winter's submission that the case law on legal goodwill confirms that legal goodwill is inseparable from the business out of which it arises.

224. In *Wedderburn v Wedderburn (No 4)* (1856) 52 ER 1039, The Master of the Rolls (Sir John Romilly) considered the question of the entitlement of a deceased partner's estate in respect of goodwill of the partnership where the partnership deed provided that the executor of the deceased's estate would remain a partner for up to a year following his death and would then then cease to be a partner. The Master of the Rolls stated in terms at [104]-[105] that the goodwill of a partnership is partnership property, it cannot belong to anyone outside the partnership, it is inseparable from the business, and once the partner died he was not entitled to profits from goodwill as it belonged to partnership and he had left the partnership through death.

225. *Muller* concerned the sale of a manufacturing business and the question of whether, for stamp duty purposes, the legal goodwill was "*property locally situate out of the United Kingdom*". In the course of analysing the issue, the House of Lords made relevant comments about the nature of legal goodwill and emphasised that legal goodwill had no existence independent of the business to which it attached:

> "The goodwill of a business is one whole … goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business." (Lord MacNaghten at page 224)
>
> "And this business, locally situate out of the United Kingdom, has a goodwill attached to it. It is difficult to separate them – certainly out of the business the goodwill springs, and its value depends entirely upon the local existence of the premises and the manufactory, and the existence and action of more or less local customers." (Lord James at page 228)
>
> "Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value." (Lord Lindley at page 235)

226. *Star Industrial Co Ltd v Yap Kwee Kor (t/a New Star Industrial Co)* [1976] FSR 256 ("*Star Industrial*") was a Privy Council case on appeal from the Singapore Court of Appeal concerning passing-off in respect of toothbrushes. Privy Council decisions are not binding on courts in England and Wales, but they are considered highly persuasive. As confirmed by the Supreme Court in *Willers v Joyce* [2016] UKSC 44 in response to the question of the hierarchy between the Supreme Court (and previously, the House of Lords) and the Privy Council, Lord Neuberger stated the core principles that "*High Court Judges are bound by decisions of the Court of Appeal and the Supreme Court, and … the Court of Appeal is bound by decisions of the Supreme Court*" (at [5]). He went on to consider that "*There is no doubt that a court should not, at least normally, follow a decision of the (Privy Council), if it is*

inconsistent with the decision of a court which is binding in accordance with the principles set out (above)" (at [16]).

227. Lord Diplock at page 269 in *Star Industrial* stated that goodwill is "incapable of subsisting by itself" and referred with approval to the decision in *Muller*:

> "Goodwill, as the subject of proprietary rights, is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached. It is local in character and divisible; if the business is carried on in several countries a separate goodwill attaches to it in each. So when the business is abandoned in one country in which it has acquired a goodwill the goodwill in that country perishes with it although the business may continue to be carried on in other countries. (See: *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd*. [1901] A.C. 217, *per* Lord Macnaghten at p. 224; *per* Lord Lindley at p. 235.)"

228. *Geraghty v Minter* [1979] HCA 42 is a decision of the High Court of Australia (equivalent to the UK Supreme Court) A decision of the High Court of Australia is not a binding precedent in the UK; instead, it may be of persuasive authority, meaning we may consider it, but are not required to follow it. The decision concerned a non-compete clause in a partnership agreement. There was a subsequent contract by which some of the partners bought out the interests in the partnership business of the other partners, but in that contract, the vendor partners who were selling their interest purported contractually to retain their own interests in the partnership's goodwill. Chief Justice Barwick at [12] stated:

> "12. In any case, goodwill is not something which can be conveyed or held in gross: it is something which attaches to a business. It cannot be dealt with separately from the business with which it is associated: see, e.g. *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd*. [1901] UKLawRpAC 20; (1901) AC 217, at p 224, per Lord Macnaghten: 'For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business.' Goodwill in itself is indivisible, though its value, when realized, may be shared in proportions. (at p181)"

229. Stephen J at [17] similarly relied upon *Muller*:

> "Goodwill of a partnership business is an inseverable whole unless, of course, it consists in fact of a series of separate goodwills, each applicable to distinct areas in which the one business operates or to distinct business activities which the one business entity carries on. When sold, proceeds of goodwill may be divided up readily enough, but, because goodwill is 'the benefit and advantage of the good name, reputation and connection of a business' (*Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd.* [1901] UKLawRpAC 20; (1901) AC 217, at p 223), per Lord Macnaghten, it is inherently inseverable from the business to which it relates. It may cease to exist or may be purloined by one who falsely represents his own business as the original business, but it cannot be disposed of separately from the business which created it nor can it survive the cessation of that business. The reason is simple: since it reflects and is dependent upon the reputation of that business, to sever it from the business destroys it. (at p193)"

230. *TTYP* was a decision of the Hong Kong Court of Final Appeal ("HKCFA") in which Sir Anthony Mason (former Chief Justice of Australia) delivered the judgment. Historically, UK case law and judicial principles were highly influential, especially in areas like common law, in the HKCFA. Prior to the imposition of the National Security Law in 2022, UK judges sat

on the HKCFA. The *TTYP* decision predates the National Security Law by some 12 years and we accept it is of persuasive authority. *TTYP* concerned a dispute in relation to licences to publish a newspaper where the Respondent (licensee) sought to argue that at the relevant times the Appellant (licensor) had no legal goodwill in respect of the business of publishing the newspaper. At page 1114 Sir Anthony Mason cited what Lord Diplock said in *Star Industrial* at page 269 (at paragraph 227 above) and, having referred to *Muller*, stated at page 1114(j)-1115(b):

> "It follows from the proposition that goodwill is a right of property associated with the business to which it is attached. That goodwill, being personal property, is assignable and may be bought and sold in connection with the business to which it is attached. Indeed, a transaction which is intended to assign a business as a whole necessarily passes the goodwill to the assignee because the goodwill is attached to the business (see *Wood v Hall* (1915) 33 RPC 16).
>
> Fundamental to the law's recognition that goodwill is transferable in connection with the continuing business to which it is attached is the notion that goodwill attaches to the business, not to its proprietor nor to the person who happens to carry it on. Once this is accepted, it necessarily follows that the owner of a business may license another person to conduct the business, in which event the goodwill of the business, attaching to the business, passes to the licensee, most certainly when there is an express assignment of goodwill. In principle, there is no difference between this case and the sale and transfer of a business to another followed by a re-sale and transfer back to the original owner."

231. We accept Mr Winter's submission that in *TTYP*, Sir Anthony Mason was applying the "inseparability principle" expounded in the case law to which he had referred.

232. Mr Winter submitted that none of the authorities cited by the Appellants have the same status as the authorities relied upon by HMRC, nor do they deal with the position at issue here where goodwill of a partnership is said to be owned by someone who is not a partner. We agree with Mr Winter. At the time of the transactions MPHL was not a partner of the MCP and we accept that the case law to which we have been referred does not support the Appellants' submission that law allows goodwill of partnership to be owned by a non-partner.

233. In respect of the common sense approach urged upon us by Mr Sykes per *Lindley and Banks on Partnerships* (21st Edition) at 10-17 we do not accept that it supports the submission that Clause 9.1 should be construed as conferring upon MPHL a right to sale proceeds attributable to legal goodwill. Clause 9.1 of the MCP Deed of Partnership provides that the goodwill of the partnership "shall be owned solely by MPHL". HMRC challenged this submission on two grounds. Firstly, they argue that Clause 9.1 does not, on its proper construction, confer such a right. Rather, it states that "the goodwill of the partnership shall be owned solely by MPHL" which HMRC submits is a clear and straightforward declaration of ownership of the asset of legal goodwill, not a grant of entitlement to sale proceeds. While ownership of an asset may imply some entitlement, the clause itself is concerned with ownership, not with any specific entitlement to proceeds. In response to Mr Sykes' submission that HMRC's interpretation renders Clause 9.1 an abstract legal declaration devoid of commercial effect, HMRC maintains that the clause does have commercial significance: determining ownership of business assets is a fundamental commercial matter.

234. We agree that that on a natural and objective reading, Clause 9.1 does not confer any entitlement to sale proceeds. Ownership of an asset (here, legal goodwill) does not

automatically equate to a right to proceeds from a future sale of that asset, particularly in the absence of express language to that effect. In our judgment, HMRC's interpretation is consistent with the principles of contractual construction: the clause should be given its ordinary meaning unless there is a compelling reason to depart from it.

235. Secondly, HMRC submit that even if Clause 9.1 were construed as conferring a right to future sale proceeds attributable to legal goodwill, the nature of that right remains unclear. If a proprietary right is asserted there is no explanation as to how such a right arises under Clause 9.1, particularly given that MPHL is a volunteer and has provided no consideration. If the right is contractual, it is unclear why MPHL, rather than any other creditor with an uncertain claim, should be treated in preference to any other creditor. We agree with HMRC that even if Clause 9.1 were to be construed as conferring upon MPHL a right to sale proceeds there remains a critical ambiguity: is the right proprietary or contractual.

236. Accordingly, we do not accept that a commonsense reading of Clause 9.1 has the effect of conferring a right to any sale proceeds of the partnership's legal goodwill.

237. Clause 14 of the MCP Deed of Partnership makes provision for the dissolution of the MCP:

> 14. DISSOLUTION
>
> 14.1 The Partnership may be dissolved by agreement of all the Non-Corporate Partners.
>
> 14.2 Upon the dissolution of the Partnership for any reason the Business and/or assets of the Partnership shall be sold or realised as soon as practicable and the proceeds applied:
>
> > 14.2.1 firstly in paying and discharging the debts and liabilities of the Partnership and the expenses of and incidental to the winding up of the affairs of the Partnership any deficiency being contributed rateably to the Partners in the same proportions in which they shared profits immediately prior to dissolution save that any sum realised from the disposal of the business goodwill shall accrue solely to MPHL;
> >
> > 14.2.2 secondly in repaying to the Partners rateably their Capital Accounts; and
> >
> > 14.2.3 thirdly in paying any surplus rateably to the Partners in the same proportions in which they shared profits immediately prior to dissolution.

238. Clause 14.2.1 addresses the dissolution of the MCP and the subsequent distribution of sale proceeds. Under this clause, MPHL would only receive an amount from the sale proceeds after the partnership has been dissolved and after all debts, liabilities and incidental expenses have been discharged. We agree with HMRC that clause 14.2.1 does not confer on MPHL any entitlement to sale proceeds attributable to legal goodwill. Moreover, clause 14.2.1, and indeed any provision in the MCP Deed of Partnership, may be amended by the Managing Partner, SM, such that any proceeds from legal goodwill could be redirected to another party. There is no provision in the Deed that would enable MPHL to prevent such an amendment or to secure its entitlement to those proceeds. In such circumstances, it cannot be said that MPHL has access to the sale proceeds. HMRC submitted that Clause 14.2.1 primarily concerns the application of sale proceeds to discharge the debts and liabilities of the partnership. The reference at the end of the clause to goodwill or its proceeds creates a debt obligation in favour of MPHL, which accrues on dissolution. The language of "accruing" is characteristic of a debt obligation. If MPHL already owned the proceeds of goodwill, there would be no need to specify that anything accrues to it.

239. In our view, the use of the "accrue" in Clause 14.2.1 is significant. A right or obligation that accrues is one that arises or comes into existence upon the occurrence of a specified

event, in this case the dissolution of the partnership. It does not denote a present proprietary entitlement to the underlying asset or its proceeds. Rather, it signifies the creation of a contractual debt obligation, payable in the future and contingent upon the satisfaction of prior conditions, such as the discharge of the partnership's debts and liabilities. If MPHL already had a proprietary interest in the proceeds of goodwill, there would be no need for the clause to provide that an amount "shall accrue" to it. The language used is therefore consistent with the creation of a debt obligation, placing MPHL in the position of a creditor rather than an owner of the proceeds.

240. Mr Winter advanced the bold submission that the four High Court authorities cited at footnote 302 to paragraph 10-100 of *Lindley & Banks on Partnership* were incorrectly decided. He contended that those cases failed to apply what he described as the "inseparability principle – which, in his submission, is not merely a principle but a rule of law – and that they should be treated as *per incuriam* for failing to consider the earlier decision in *Wedderburn*, which he said established that goodwill is necessarily a partnership asset.

241. We do not accept that submission. Paragraph 10-100 of *Lindley & Banks* expressly recognises that, while there is "something akin to a presumption" that goodwill belongs to the firm, "this will not always be the case". That formulation reflects the position that the status of goodwill as a partnership asset is ultimately a question of construction, to be determined by reference to the terms of the partnership agreement and the surrounding factual matrix. The authorities cited in footnote 302 – *Miles v Clarke*, *Stekel v Ellice*, *Bhayani v Taylor Bracewell LLP*, and *Castledine v RSM Bentley Jennison* – are consistent with that approach. They do not purport to displace the general principle that goodwill is ordinarily a partnership asset but rather illustrate that this presumption may be rebutted in particular factual circumstances.

242. Moreover, paragraph 18.58 of *Lindley & Banks* (to which we were not taken but was in the Authorities Bundle) reinforces this interpretation. It acknowledges that while it is relatively rare for goodwill to be owned outside the firm, it is not conceptually or legally impossible:

> "Despite the finding in *Miles v Clarke*, it will, in fact, be relatively rare to find goodwill owned by individual partners outside the firm. Thus, in *Castledine v RSM Bentley Jennison*, HHJ Cooke was constrained to observe that "the idea of goodwill being owned by a person who does not operate the business is not without its conceptual difficulties." There the claimant was seeking to maintain that he retained a share of the goodwill of an accountancy practice notwithstanding his retirement. The argument was not upheld. Needless to say, there is nothing remarkable about goodwill being a partnership asset but held for the benefit of some but not all of the partners or in unequal shares." [Footnotes omitted]

243. Accordingly, we do not consider that the cited cases were wrongly decided, nor that they are *per incuriam*. They remain good authority and are properly relied upon in support of the proposition advanced in paragraph 10-100.

244. However, on the facts of this appeal, paragraph 10-100 of *Lindley & Banks* does not assist the Appellants. That paragraph acknowledges that, while there is "something akin to a presumption" that goodwill belongs to the firm, "this will not always be the case". The presumption is therefore rebuttable and contingent upon the terms of the partnership agreement and the surrounding factual context. In this case, clause 9.1 of the MCP Deed of Partnership does not expressly provide that MPHL is entitled to the proceeds of legal goodwill, nor does it confer a proprietary interest in that asset. Clause 14.2.1, which governs the distribution of sale proceeds on dissolution, is similarly silent as to any specific entitlement of MPHL to the proceeds of goodwill and is amendable at the discretion of the Managing Partner. These features of the agreement undermine any suggestion that the

goodwill was intended to be treated as a separate asset owned by MPHL outside the firm. Accordingly, the factual matrix does not support a departure from the general presumption that goodwill is a partnership asset. Paragraph 10-100, properly understood, does not establish a rule that goodwill may be freely allocated to non-partners; rather, it recognises that the position depends on the construction of the relevant agreement. On that basis, Mr Sykes' reliance on paragraph 10-100 is misplaced.

TERMINATION

245. The Appellants submitted, in various passages of their skeleton argument (see, for example, paragraphs [79], [88], [102], [113] and [119]), that MPHL retained control over the care home business because it could "terminate the arrangements" or "withdraw" from them at will. The thrust of the submission was that, had MPHL been dissatisfied with its profit share or other aspects of the partnership, it could have unilaterally ended the arrangements and resumed control of the business. In closing submissions, Mr Sykes developed this argument further, contending that MPHL's ability to terminate the arrangements effectively meant that it retained control over the business and its economic benefits.

246. We do not accept that submission. As stated above, in respect of Clauses 9.1 and 14.2.1 of the MCP Deed of Partnership, once the partnership was formed and the business was being carried on by MCP, control over the business rested with the partnership and, in particular, with its Managing Partner, SM. Clause 12.2 of the MCP Deed makes clear that the departure of a partner does not dissolve the partnership. Clause 16.2 requires any outgoing partner to surrender partnership property. As the Appellants themselves acknowledged at paragraph [41] of their skeleton, "the forfeiting of assets under clause 16 avoids the need for a dissolution". Accordingly, even if MPHL or its subsidiary MPL were to withdraw from the partnership, the business could and would continue to be operated by the remaining partners. MPHL could not unilaterally reclaim control of the business.

247. Moreover, the Appellants' suggestion that MPHL could terminate the arrangements by withdrawing the use of the real property is misconceived. While such a step might cause operational disruption, it would not amount to control of the business. The landlord of a property used by a business does not, by virtue of that fact alone, control the business or its economic outputs. Mr Chidgey accepted in cross-examination that "negative control", the ability to shut down a business, is not sufficient to constitute control for accounting purposes. Control, in the relevant sense, requires the ability to direct the financial and operating policies of the entity with a view to obtaining the economic benefits of its activities. The Appellants have not demonstrated that MPHL had such a power.

248. To the extent that the Appellants now rely on the proposition that MM, by virtue of his ownership of MPHL and other entities, and his familial relationship with SM, was in *de facto* control of the business, that argument is inconsistent with the legal structure established by the MCP Deed of Partnership. That deed was prepared on MM instructions, reviewed by him, and signed by him. It is the legal instrument that governs the relationship between the parties. Control exercised by MM in his personal capacity, or through other entities, does not equate to control by MPHL.

249. Finally, HMRC's reliance on the definition of "control" under FRS 5.8 is well founded. That standard defines control, in the context of an asset, as "the ability to obtain the future economic benefits relating to an asset and to restrict the access of others to those benefits". On the evidence, MPHL did not have such control over the care home business. The economic benefits of the business were controlled by MCP, and specifically by its Managing Partner, in accordance with the terms of the MCP Deed. We therefore accept HMRC's

submission that MPHL did not control the business do not accept that the ability to "terminate" or "withdraw" from the arrangements conferred such control.

CONCLUSION

250. For the reasons set out above, we find that MPHL did not acquire control over the operations of the Milton Park care home business and did not retain the risks and rewards of that business following the formation of MCP. The substance of the arrangements, when viewed as a whole, demonstrates that control over the business resided with the partnership and, in particular, with its Managing Partner, SM. MPHL did not have the ability to direct the financial and operating policies of the business with a view to obtaining the economic benefits arising from its activities, as required by FRS 5.8. Accordingly, we conclude that MPHL did not acquire a business for the purposes of UK GAAP and was not entitled to recognise purchased goodwill in its accounts.

251. In light of this finding, it is unnecessary for us to consider HMRC's alternative argument that, even if goodwill had been properly recognised initially, it should have been derecognised in whole or in part following the formation of MCP.

252. The appeals are therefore dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

253. 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.

Release date: 14th NOVEMBER 2025