SDLT – application for permission to make a late appeal – application by HMRC to strike-out for want of jurisdiction – preliminary issue directed – time limits for amendment of SDLT land transaction return - section 44 and paras 6, Sch 10, Finance Act 2003

FIRST-TIER TRIBUNAL **Appeal number: TC/2014/4645**
TAX CHAMBER **TC/2015/6378**

BETWEEN

CHRISTIAN PETER CANDY **Appellant**

-and-

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

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at Taylor House, London EC1 on 16 September 2019

Michael Thomas, counsel, instructed by Blick Rothenberg, for the Appellant

Christopher McNall counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for HMRC

DECISION on PRELIMINARY ISSUE

INTRODUCTION

1. The current dispute between the parties revolves around the question of whether there was a valid amendment, notice of enquiry, and closure notice, in relation to the Appellant's ("CC's") attempt to amend his SDLT return in April 2014. HMRC maintain there was not – on the basis that (a) the correspondence did not satisfy the formal requirements as explained by the Court of Appeal in *Customs and Revenue Commissioners v Raftopoulou* [2018] EWCA Civ 818; and (b) the attempt to amend his return was out of time, and therefore invalid (and in consequence, no enquiry into that amendment could be validly made).

2. CC has applied to the Tribunal for permission to make a late appeal. HMRC submit that as there is no right of appeal, there cannot be any basis for granting an extension of time for notifying the non-existent appeal to HMRC. HMRC therefore applied to strike-out CC's application.

3. On 9 January 2019, the Tribunal directed that HMRC's application to strike out CC's application be dealt with in two parts – the first part being dealt with at a separate preliminary hearing which shall decide the following issue, namely whether:

> (a) Any purported amendment by CC of his land transaction return was made within the relevant time limit (by reference to paragraph 6(3), Schedule 10, Finance Act 2003), and accordingly whether
>
> (b) Any rejection of such purported amendment by HMRC is capable of giving rise to a valid appeal to HMRC in respect of which the Tribunal's jurisdiction under paragraph 44, Schedule 10, Finance Act 2003 is capable of being engaged.

4. If, following this hearing of this first part, CC's appeal is not struck out, the directions go on to provide for the Tribunal to give directions to bring the remainder of HMRC's application to a later hearing, to include the issue of whether there was a valid enquiry and closure notice following *Raftopoulou*, and, if so, the merits of the application for permission to notify a late appeal.

5. This decision relates to the first part only.

6. At the hearing, Mr Thomas represented CC and Mr McNall represented HMRC.

7. At the conclusion of the hearing I directed that the parties file written submissions on the application of the phrase "except as otherwise provided" that appears in paragraph 6(3), Schedule 10, Finance Act 2003. This decision takes account of those written submissions.

8. All statutory references in this decision (unless otherwise stated) are to Finance Act 2003, and all references to paragraphs are to paragraphs of Schedule 10, Finance Act 2003.

9. For completeness I note that this application and this decision does not concern CC's claim for overpayment relief under paragraph 34(1) (where there is a four-year time limit). There, HMRC did open an (in time) enquiry and a closure notice was issued on 13 August 2015. That decision is the subject of a separate appeal under number TC/2015/6378.

THE UNDERLYING PROPERTY TRANSACTIONS

10. The preliminary issue before me is one of pure law, and I had no evidence in support of the facts of the underlying property transactions as set out in HMRC's statement of case, or in the respective skeleton arguments of the parties. The following is based on the summary of the facts taken from Mr Thomas's skeleton, but which draws from the chronology annexed to Mr McNall's skeleton. As no evidence was submitted in support of these facts, I expressly make no findings in respect of them, in case a dispute in respect of these facts arises in subsequent

hearings. However, my understanding is that description of the underlying property transactions as set out in HMRC's Statement of Case is not in dispute to any significant extent, and I consider that it is helpful to set out a summary of these facts as pleaded in order to set the preliminary issue in context.

11. On 9 August 2012, CC entered into two contracts with the Commissioners of the Royal Hospital Chelsea ("the Seller") and Major-General Archibald Peter Neil Currie CB and Justin Francis Quintus Fenwick QC in their capacity as intermediate landlords (the "Intermediate Landlords") in respect of a property known at that time as "Gordon House" (and referred to as "Gordon House" in this decision). Gordon House is a substantial house (with associated buildings and a garden) adjacent to the grounds of the Royal Hospital in Chelsea, London.

12. The first agreement was an agreement for a lease (the "Initial Lease") of Gordon House for a term of 25 years and was entered into together with a "Supplemental Deed" which governed the development of that property by CC. The premium for the grant of the Initial Lease was £20 million.

13. The second agreement was an agreement for the assignment to CC of another lease (the "Contracted-out Lease") of Gordon House for a term of 201 years from 1 October 2012. The purchase price for the Contracted-out Lease was £48 million, payable in four instalments. CC paid the first instalment payment of £7.39 million on 1 October 2013.

14. The Initial Lease was granted on 1 October 2012. The Contracted-out Lease was granted on 16 April 2019.

15. The reason for the two leases and the timing of their grants was to address enfranchisement rights. The transaction was structured so that an application for a court order to grant the Contracted-out Lease without enfranchisement rights would be made after a flat was constructed by CC as part of the development of the property. After the grant of the court order the Contracted-out Lease would be granted by the Seller to the Intermediate Landlords, who would then assign the Contracted-out lease to CC. This structure enabled the Contracted-out Lease to be excluded from the enfranchisement legislation which applies to long leases of residential premises and gives tenants the right to the extension of lease terms and, in certain cases, the right to acquire the freehold.

16. If the Contracted-out Lease had not been granted by a long-stop date of 26 January 2021 (four years after the date of practical completion of the flat), the Seller and CC each had put and call options for the sale and purchase of the freehold of the property for a total price of £53 million.

17. On 10 August 2012 CC's building contractors commenced work at Gordon House. This effected "substantial performance" of the agreement for the Contracted-out Lease for the purposes of s44(4).

18. On 1 April 2014, CC gifted his interests in Gordon House (being the Initial Lease and the benefit of the Contracted-out Lease agreement) to his brother, Nicholas Candy ("NC"), in consideration of natural love and affection. This was done prior to the completion of the development of Gordon House. No debt was secured on the property at the time of this transfer. The Initial Lease was assigned by CC to NC, whilst both the Supplemental Deed and the Contracted-out Lease agreement were novated by deed. The parties to the deed of novation of the Contracted-out Lease agreement (the "Deed of Novation") were the Seller, the Intermediate Landlords, CC, and NC. Under the Deed of Novation, the Seller and the Intermediate Landlords released and discharged CC from all obligations and liabilities which remained to be performed under the agreement for the Contracted-out Lease. The original parties to the agreement for the Contracted-out Lease acknowledged between themselves that the obligations and liabilities as

against each other under the agreement were extinguished. NC thereafter assumed the obligations and liabilities, as described above, which remained to be performed under the agreement for the Contracted-out Lease.

19. Upon execution of the Deed of Novation on 1 April 2014, NC took possession of Gordon House. NC paid the second and third tranches of the £48 million premium on 1 October 2014 and 1 October 2015, respectively.

20. The date of the practical completion of the flat referred to above was agreed as being 26 January 2017, the Court Order was obtained on 9 April 2019 and the grant of the Contracted-out Lease to the Intermediate Landlords was completed on 16 April 2019.

21. NC together with his family continue to reside in Gordon House under the Initial Lease, pending his acquisition of the Contracted-out Lease. When the assignment of the Contracted-out Lease to NC is completed, he will become liable to pay the final tranche of the consideration and the Initial Lease will expire.

THE BACKGROUND TO THE SDLT DISPUTE

22. SDLT was paid by CC in respect of both the completion of the Initial Lease and the substantial performance of the agreement for the Contracted-out Lease. The chargeable consideration was £20 million in respect of the Initial Lease and £48 million in respect of the substantial performance of the agreement for the Contracted-out Lease. CC submitted two land transaction returns on 8 October 2012, one in respect of each transaction, and the corresponding amounts of SDLT were duly paid.

23. NC, on taking possession of Gordon House on 1 April 2014, substantially performed the novated agreement for the Contracted-out Lease agreement for the purposes of s44(4). The chargeable consideration for this transaction is deemed to be the full purchase price of the Contracted-out Lease received by the Seller (£48 million) rather than the three outstanding instalments payable under the novated agreement for the Contracted-out Lease – even though it was only the liability for the three outstanding instalments that was assumed by NC pursuant to the Deed of Novation. This was a consequence of the subject-matter of the Deed of Novation being an uncompleted contract and the gift being between relatives, so that the special charging rules in paragraphs 12 to 14 Schedule 2A were engaged. A land transaction return was submitted by NC, and in it he duly self-assessed his liability to SDLT.

24. On 10 April 2014, CC applied to HMRC for repayment of the amount of SDLT paid on substantial performance (£1,920,000) under s44(9) by amending the SDLT return that related to the Contracted-out Lease agreement. This was on the basis that the original agreement for the Contracted-out Lease was extinguished as a result of the Deed of Novation, and therefore not carried into effect. CC also applied for a repayment of the same tax in the alternative under paragraph 34 (claim for relief for overpaid tax etc).

25. By a letter dated 16 May 2014 (following a meeting between the parties in April 2014), HMRC stated that they did not consider that CC could amend his return. His first basis of claim was accordingly rejected, and it is this decision which is the subject of this appeal.

26. I am told that CC was advised that the HMRC's decision was not capable of being appealed, and therefore he did not lodge any appeal against this decision at that time. On 17 June 2014, the Upper Tribunal handed down its decision in *Portland Gas Storage Limited v HMRC* [2014] UKUT 0270 (TCC) and CC became aware of that decision on the same day. Acting upon further advice, CC considered that *Portland Gas* confirmed that the letter of 16 May 2014 was a closure notice, and thus the conclusion stated in it was capable of being appealed.

27. By a letter dated 2 July 2014, HMRC gave notice of their intention to enquire under paragraph 7 Schedule 11A into CC's alternative claim for repayment of the tax under paragraph 34. HMRC rejected this claim by a separate decision dated 13 August 2015. This alternative claim is the subject of a separate appeal under appeal number TC/2015/06378.

28. By a letter dated 4 July 2014, CC requested HMRC's consent for him to appeal against the decision of 16 May 2014 after the expiry of the relevant time limit. HMRC responded in writing on 24 July 2014 and rejected the request.

29. It is the rejection by HMRC for permission to appeal outside the normal time limit that is the subject of this appeal. CC's application was made to the Tribunal on 29 July 2014.

30. The delay between the filing of CC's application and this hearing arose because the application was stayed by the Tribunal on 2 December 2014 pending the outcome of *Portland Gas* and subsequently *Raftopoulou*.

31. Following the Court of Appeal's judgment in *Raftopoulou* this appeal became active once more, and the Tribunal issued the directions summarised earlier.

THE ISSUE FOR DETERMINATION

32. The underlying substantive issue concerns a claim for repayment which was made by CC under s44(9). Section 44 imposes a charge to SDLT where substantial performance of a contract takes place prior to completion. It is common ground that such a charge arose in this case, and CC paid the tax. Section 44(9) provides that where tax has been charged on substantial performance but

> the contract is (to any extent) afterwards rescinded or annulled, or is for any reason not carried into effect, the tax […] shall (to that extent) be repaid by the Inland Revenue.

33. The functions of the Inland Revenue were vested in HMRC by s7, Commissioners of Revenue and Customs Act 2005.

34. Section 44(9) itself requires that "repayment must be claimed by amendment of the [relevant] land transaction return."

35. Paragraph 6 deals with the amendment of a land transaction by a purchaser. Paragraph 6(3) states that

> Except as otherwise provided, an amendment may not be made more than twelve months after the filing date.

36. "Filing date" is defined by paragraph 2 as the last day of the period within which the return must be delivered, namely before the end of the period of 30 days after the effective date of the land transaction (s76 as in force at the relevant time).

37. As noted above, possession was taken by CC on 10 August 2012 (the effective date) and the land transaction return was sought to be amended on 10 April 2014 – which is more than twelve months after the filing date.

38. HMRC's position is that the effect of paragraph 6(3) is that CC's amendment to his return was made out of time. Mr McNall submits that paragraph 6(3) imposes a time limit of twelve months following the filing date. If Mr McNall is correct, CC's time for filing an amendment expired in September 2013. Mr McNall further submits that because the amendment was made outside the statutory time limit, there could have been no valid notice of enquiry into the amendment, and, in turn, no closure notice. It follows that no appeal can therefore be made.

39. Mr Thomas submits that CC did amend his return in time. This is because paragraph 6(3) does provide otherwise than for a time limit of twelve months from the filing date for amending

the return, as s44(9) directs that tax must be repaid where "the contract is (to any extent) afterwards […] not carried into effect". Accordingly, says Mr Thomas, Parliament has expressly provided that a repayment can be claimed under s44(9) where at any time following the initial substantial performance the contract is not carried into effect.

40. It is common ground that if HMRC's interpretation is correct then the amendment to the return was made out of time, and that there is no provision for either HMRC or for this Tribunal to extend the time limit for making amendments to land transaction returns.

THE LAW

41. CC's repayment claim was made under s44, which is as follows:

> **44 Contract and conveyance**
>
> (1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
>
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
>
> (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.
>
> In this case the effective date of the transaction is the date of completion.
>
> (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.
>
> In this case the effective date of the transaction is when the contract is substantially performed.
>
> (5) A contract is "substantially performed" when—
>
> (a) the purchaser, or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or
>
> (b) a substantial amount of the consideration is paid or provided.
>
> (6) For the purposes of subsection (5)(a)—
>
> (a) possession includes receipt of rents and profits or the right to receive them, and
>
> (b) it is immaterial whether possession is taken under the contract or under a licence or lease of a temporary character.
>
> (7) For the purposes of subsection (5)(b) a substantial amount of the consideration is paid or provided—
>
> (a) if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided;
>
> (b) if the only consideration is rent, when the first payment of rent is made;
>
> (c) if the consideration includes both rent and other consideration, when—
>
> (i) the whole or substantially the whole of the consideration other than rent is paid or provided, or
>
> (ii) the first payment of rent is made.

(8) Where subsection (4) applies and the contract is subsequently completed by a conveyance—

(a) both the contract and the transaction effected on completion are notifiable transactions, and

(b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract.

(9) Where subsection (4) applies and the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of that subsection shall (to that extent) be repaid by the Inland Revenue.

Repayment must be claimed by amendment of the land transaction return made in respect of the contract.

[…]

(10) In this section—

(a) references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract; and

(b) "contract" includes any agreement and "conveyance" includes any instrument.

[…]

42. The provisions dealing with the amendment of a land transaction return and with overpayment of SDLT are set out in paragraph 6 of Schedule 10:

Amendment of return by purchaser

6—

(1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.

(2) The notice must be in such form, and contain such information, as the Inland Revenue may require.

(2A) If the effect of the amendment would be to entitle the purchaser to a repayment of tax, the notice must be accompanied by—

(a) the contract for the land transaction; and

(b) the instrument (if any) by which that transaction was affected.

(3) Except as otherwise provided, an amendment may not be made more than twelve months after the filing date.

SUBMISSIONS

Fairness

43. Mr Thomas notes that s44 is primarily a charging provision, which is very broad in scope, and that a charge can arise from the making of a single payment of rent, or the occupation of the property by the purchaser for a short period of time. Subsection (9), submits Mr Thomas, ameliorates the broad charging effect of s44. It provides the taxpayer with a right to repayment in circumstances where a contract which is substantially performed is not subsequently carried into effect. The right to repayment is widely worded, and Mr Thomas submits that this reflects the underlying mischief which s44 was enacted to address. If the underlying contract is substantially performed (so as to give rise to an SDLT charge), but is not subsequently

performed, the mischief behind s44 is absent. Mr Thomas submits that Parliament recognised the unfairness that would arise if there could be no repayment of tax in circumstances where a contract was not ultimately performed. The repayment mechanism also acts as a safeguard against a s44 charge being so easily triggered.

44. Mr McNall submitted that there was no element of unfairness, as the purchaser (who would have paid the SDLT) would have had the benefit of the use of the property until such time as the contract was rescinded. The mischief behind s44 was present for this period, and the provisions did not lead to any unfairness.

45. Mr McNall drew my attention to the explanatory notes issued at the time that the then Finance Bill 2003 was proceeding through Parliament. These state:

> 11. Paragraph 6 allows purchasers to amend their returns by notice to the Inland Revenue within 12 months of the filing date. It is based on section 9ZA TMA and Paragraph 15 of Schedule 18 Finance Act 1998.
>
> 12. If a purchaser discovers too much tax has been paid after the opportunity to amend the return has passed, he may claim relief for the mistake under paragraph 34.

Mr McNall submits that these Explanatory Notes (and the legislation as enacted) (a) expressly contemplate a 12 month time limit; (b) the passing of the opportunity to amend the return; and (c) the existence of overpayment relief if the opportunity to amend the return does pass. Mr McNall says that if Mr Thomas was right in his analysis of s44(9), then (b) makes no sense, because the time limit for a repayment claim by way of amendment would never pass.

46. If a contract was rescinded in circumstances where it was not possible to amend the land transaction return (for example, because the rescission took place more than one year from the original filing date), then, says Mr McNall the purchaser can claim relief under paragraph 34.

"Afterwards"

47. The opening sentence of s44(9) provides that a right to repayment is given where:

> the contract is (to any extent) afterwards rescinded or annulled or is for any other reason not carried into effect

Mr Thomas submits that the use of the word “afterwards” expressly deals with the timing aspects of the right to repayment.

48. Mr Thomas submits that "afterwards" must be given its normal or natural meaning. It is defined in the Shorter Oxford English Dictionary as meaning "at a later time", although I am aware that it is defined in the Oxford English Dictionary as meaning:

> a later or future time; later in time; subsequently

Mr Thomas submits that the right to repayment therefore arises where at any time following substantial performance, the contract is not carried into effect. This conclusion, says Mr Thomas, is reinforced by the use of the words “to any extent” because that includes the temporal extent – in other words subsection (9) applies where the agreement is not carried into effect at some point in the future.

49. Mr Thomas notes that if "afterwards" is deleted from s44(9), the provisions still make sense. As words in legislation cannot be otiose, "afterwards" must have been intended by the draughtsman or woman to have meaning, and this therefore supports his submission that "afterwards" must be given a temporal meaning.

50. Mr McNall cautioned against too great a reliance on dictionary definitions, and referred me to the case of *IRC v Longmans Green & Co* [1932] 17 TC 272, where Finlay J says (at 282):

> It was pointed out to me, and it was pointed out with truth, that you have got to get the charge imposed and you have got to get the necessary machinery for levying the tax. That is true, although, if you get the charge imposed, I see no reason why a specially rigorous construction should be imposed upon the machinery Section. I should have thought if there was any intendment in the matter it would be rather the other way, but the truth of the matter is that I do not think that these general rules with regard to construction help very much. What one has to do is to find out whether the charge is imposed and whether the machinery is adequate to support the charge and to enable the Crown to get its money. The question really, and the whole question, seems to me to be whether this undoubted remuneration paid to this French author in respect of what was regarded as a valuable right, namely, the right of translating his book into English, is or is not properly chargeable as a royalty. I doubt whether it really helps one much to consider dictionary definitions. Everybody knows in a general way what a, royalty is, and I think one has to make up one's mind on the construction of the particular Section whether the remuneration in the form in which it is paid is or is not a royalty. T

51. Mr McNall submits that the use of "afterwards" in subsection (9) relates not just to timing, but also to nexus, and that "afterwards" could mean not only "at a later time", but also "at any later time". He illustrated this with two examples:

(i) Today I am in court. Afterwards I went to the pub

(ii) In 1066 William conquered England. Afterwards Napoleon invaded Russia.

Mr McNall submits that "afterwards" in s44(9) is not used to establish a timeframe for the claiming of a refund, but merely indicates that the rescission etc. of the contract necessarily must have taken place following the effective date of the contract.

Paragraph 6(3): "Except as otherwise provided"

52. The second sentence of subsection (9) provides that the claim for repayment is made by amendment to the land transaction return originally filed in respect of the contract. Paragraph 6 of Schedule 10 governs the amendment of land transaction returns.

53. Mr Thomas notes that paragraph 6(3) states that amendments to land transaction returns may be made after the usual 12-month deadline where the statute provides otherwise. Mr Thomas submits that the statute does otherwise provide, as s44 permits claims for repayments to be made if a contract is *afterwards* rescinded, annulled, or otherwise not carried into effect.

54. Mr Thomas contrasted the provisions for repayment in s44(9), with claims for group relief or multiple dwelling relief, where there was no corresponding language. Mr Thomas submitted that these were examples of claims for relief (with a potential repayment of tax) where the time limit of 12 months would apply.

55. Mr McNall submitted that s44(9) does not "provide" for a different time limit, and referred me to the decision of this Tribunal in *Smallman v HMRC* [2018] UKFTT 0680 (TC), where the decision of this Tribunal was made on that basis. Paragraphs [27] to [32] discuss the interaction of s44(9) and paragraph 6(3):

> **Discussion**
>
> 27. There were two potential avenues for relief for Mr and Mrs Smallman. They could either file an emended return and claim a refund under the

provisions of s44(9) FA 2003 or they could make a claim under para 34 Sch 10 FA 2003. I will therefore look at the position under s44(9) first.

Relief under s44(9) FA 2003

28. As set out above, s44(9) provides relief "where subsection (4) applies and the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect." In other words, if the original charge to SDLT has been occasioned by the substantial performance of the contract but the contract has not for some reason been completed then s44(9) provides a mechanism for the repayment of that tax. It is common ground that this is what happened in this case. The contract was deemed to have been substantially performed because Mr and Mrs Smallman were already tenants in the Property such that when they entered into the contract they were already in possession of the Property and the contract was therefore deemed to have been substantially performed on the date of the contract. Subsequently, due to events outside their control, they decided that they could not complete the purchase, and instead they entered into alternative arrangements with the vendors such that their original contract was rescinded and the Property was sold to new purchasers.

29. Unfortunately, s44(9) provides that repayment of any tax due must be claimed by amendment of the SDLT return. It undoubtedly states that the Inland Revenue "shall" repay the tax but it also states equally clearly that the repayment must be claimed by amending the original SDLT return.

30. The process for amending the return is then set out in para 6 Sch 10 FA 2003 and this provides equally clearly, in sub-para (3), that:

> "Except as otherwise provided, an amendment may not be made more than twelve months after the filing date."

31. If therefore the return is not amended within 12 months of the filing date it is not possible to amend the return after that date. In this case the contract was deemed to have been substantially performed on 5 February 2014 and an SDLT return was made on that date. Section 76 (1) FA 2003 provides that an SDLT return must be made within 30 days of the effective date of the transaction, which in this case means that the return was required to be made before 7 March 2014, which was therefore the filing date, and therefore an amended return, in order to be validly made, would need to be made before 7 March 2015.

32. Miss Manzano, for Mr and Mrs Smallman, submitted that I should read the words in s44(9) stating that the Inland Revenue shall repay the tax as somehow overriding the equally clear words in that sub-section that the repayment must be claimed by amending the return. On this interpretation therefore, the time limit for amending the return would not be relevant. This seems to me to involve simply ignoring the second sentence in s44(9) and I do not understand how I can do this. I therefore reject this submission. In my opinion, the attempt to amend the return was out of time.

56. Mr Thomas submits that the decision of *Smallman* does not bind me. It was an unusual situation where the tenants in a flat agreed to buy the freehold, so they were already in occupation when the contract to acquire the freehold was signed. The point whether s44(9) provides for another time limit was not addressed in the *Smallman* case, so, at least as regards the issue before me, the decision was given *per incuriam*. As the appeal was allowed on other grounds, it was not appealed.

57. Mr McNall submits that "afterwards" in s44(9) is an inherent part of the language of that subsection, and is not intended to provide an exception to the time limit in paragraph 6(3). It cannot be interpreted as meaning "at any time afterwards", as that would open a Pandora's box, and cause chaos. The time limit in paragraph 6(3) provides a bright line test, with no discretion to vary it vesting in HMRC or in this Tribunal. Mr McNall acknowledged that there would be some cases which might fall foul of the time limit, but this is in the nature of any time limit.

58. During the course of the hearing I asked the parties for examples of where the SDLT legislation has "otherwise provided" for a time limit for the filing of an amended return, and I gave the parties an opportunity to file brief written submissions on this point after the hearing.

59. Neither party was able to provide any examples of the legislation "providing otherwise" at the time Finance Act 2003 was enacted. Mr McNall referred me to Schedule 9, and to paragraph 2(3) (Right to buy – election for market value treatment) and paragraph 4(3) (shared ownership lease – election where staircasing allowed) of that Schedule. But neither of these examples overrides the time limit in paragraph 6(3).

60. Mr McNall submitted that drafting was capable not only of referring to some other provision appearing in the legislation at the time it was enacted, but also capable of catching the possibility of future amendments – especially when Parliament anticipates that legislation may be amended rather than simply repealed. This makes particular sense where legislation is hastily drafted, as appears to have been the case with the SDLT provisions in Finance Act 2003, which were amended the following year by Finance Act 2004. The need for the "except as otherwise provided" phrase in paragraph 6(3) was demonstrated, says Mr McNall, by the enactment of paragraph 8(3) of Schedule 4ZA (which deals with higher rates of SDLT for dwellings), which was inserted into Finance Act 2003 by Finance Act 2016.

61. Mr McNall submits that the "Except …" language in paragraph 6(3) allowed Schedule 4ZA (and the different time limit in paragraph 8(3)) to be inserted into Finance Act 2003 without the need to amend Schedule 10 (to avoid a conflict between Schedule 10 and Schedule 4ZA). Similar points can be made in relation to s43(6), Finance Act 2019.

62. Mr McNall says that it would be an error for the Tribunal to make a "finding that the expression 'except as otherwise provided' could only have related to some other time limit appearing in FA 2003 at the time it was originally enacted". Although Mr Thomas does not dissent from this submission, he says that it does not assist me in deciding how s44(9) interacts with paragraph 6(3).

Interaction with paragraph 34

63. Mr McNall referred to the Explanatory Notes issued to the Finance Bill (referenced earlier), and submitted that if the time limit for the making of an amendment to the land transaction return had expired, it would be open to the purchaser to make a claim for overpayment relief under paragraph 34 – as CC had done.

64. Mr Thomas notes that HMRC have rejected CC's claim for overpayment relief under paragraph 34 and that CC's claim for overpayment relief would be denied on the basis of the arguments advanced by HMRC in the *Smallman* decision. It is therefore no answer to the issue before this Tribunal that CC has merely made a claim under the wrong provision – HMRC's case is that CC is not entitled to a repayment on any basis.

Hierarchy

65. Mr Thomas notes that the requirement to make a repayment claim is set out in the body of the statute, whereas the provisions relating to the making and amendment of land transaction returns are set out in a schedule – and that this therefore sets out a legislative hierarchy – with

the right to a repayment as set out in the body of the statute taking precedence over the mechanical provisions in the schedule.

DISCUSSION

66. It was not disputed that a purposive approach has to be taken to the interpretation of the legislation and I was referred by Mr Thomas to the decision of the Supreme Court in *Barclays Mercantile Business Finance v Mawson* [2005] STC 1, and the decision of the Hong Kong Court of Final Appeal in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46. But the parties differ fundamentally on the effect of a purposive approach.

Does "except as otherwise provided" refer back to "afterwards"?

67. The key issue before me is whether the phrase "Except as otherwise provided" in paragraph 6(3) refers back to the word "afterwards" in s44(9).

68. At the time Finance Act 2003 was enacted, there were no provisions to which "except as otherwise provided" could refer, other than "afterwards" in s44(9). Although Mr McNall cited the provisions relating to the elections under schedule 9, neither of these overrode the time limit in paragraph 6(3).

69. I am not persuaded by Mr McNall's submissions that "Except at otherwise provided" was included in the paragraph by the Parliament merely to make subsequent amendments to the legislation simpler to draft. Although subsequent amendments have been made to the provisions relating to amendment of land transaction returns, (including the insertion of Schedule 4ZA and s43 Finance Act 2019), these were made many years after the enactment of the legislation, and cannot have been within the contemplation of Parliament in 2003. Further, both Schedule 4ZA and s43 Finance Act 2019 use very different language. Paragraph 8(3) Schedule 4ZA provides an alternative time limit for amending a return (as currently in force):

> A land transaction return in respect of the transaction concerned may be amended, to take account of the application of paragraph 3(7), at any time within the period of 12 months beginning with—
>
> (a) the effective date of the subsequent transaction, or
>
> (b) if later, the filing date for the return.

70. I would also note that this provision relates to a "subsequent transaction", and the new time limit is driven from the occurrence of this subsequent transaction (or its filing date).

71. In contrast, s43(6) FA 2019 expressly disapplies paragraph 6 Schedule 10:

> Sub-paragraphs (2A) and (3) of paragraph 6 of Schedule 10 to FA 2003 do not apply in the case of an amendment of a land transaction return made for the purpose of making a claim under this section.

72. Given the express disapplication of the whole of paragraph 6 by s43(6), the "except as otherwise provided" language in paragraph 6(3) is overridden by s43(6) together with the rest of that paragraph. So, the "except as otherwise provided" cannot be a reference to s43.

73. I agree with Mr Thomas that the enactment of schedule 4ZA and s 43(6) Finance Act 2019 demonstrate that Parliament uses different language when providing for an alternative time period to that contained in paragraph 6(3) Schedule 10, and that the language used depends on a variety of factors, including the policy context of the particular provision, and there is certainly no uniform style.

74. I find that that "except as otherwise provided" in paragraph 6(3) would only have been included in the legislation by Parliament if it was making a reference to some provision

elsewhere in the legislation which provided for an exception. The only candidate for such an exception is the word "afterwards" in s44(9).

75. I also find that "afterwards" is used in s44(9) in a temporal sense. I make this finding because the subsection would also make sense if the word was omitted. Its inclusion in the drafting of the subsection must have been intended to add to the meaning of the provision – and I find that such meaning was a temporal one.

76. I therefore find that the 12-month time limit in paragraph 6(3) is overridden in circumstances where an amendment is made to a land transaction return under s44(9).

Fairness and legislative policy

77. Such a construction is, in my view, consistent with the underlying policy of SDLT and provides a "fair" outcome, not least because it avoids economic double taxation.

78. Such a construction ameliorates the broad charging effect of s44, and provides the taxpayer with a right to repayment in circumstances where a contract which is substantially performed is not subsequently carried into effect – particularly where the recession etc. of the contract occurs more than one year after the filing date. This can be of a particular concern (as noted by Mr McNall) in the case of development agreements, where the grant of a lease or assignment of a freehold is conditional upon (say) planning consent. If the purchaser undertakes a "soft strip" pending satisfaction of the condition, it would thereby be treated as having gone into occupation, triggering an SDLT liability.

79. Although Mr McNall says that paragraph 34 provides a remedy in such circumstances, I note that HMRC contend, in the separate appeal against CC's claim under paragraph 34, that he is not entitled to a repayment under that provision in the circumstances of this case.

80. I am not persuaded that this interpretation will lead to chaos, or to purchasers "gaming" the system. If purchasers attempted to return to using "resting on contract" structures to allow for a refund of SDLT when they sold the property after many years of ownership (by rescinding the original contract and creating a new one), the Tribunal is likely to find as a realistic view of the facts that the contract had actually been carried into effect. In any event, such arrangements would be likely to be counteracted by the operation of s75A.

81. Indeed, there is a risk, on HMRC's suggested interpretation, that purchasers might choose to deliberately delay filing their land transaction return until they are certain that the contract will not be rescinded etc - even though they may thereby subject themselves to late filing penalties. A taxpayer who is faced with the risk that a contract might never complete could consider, for example, bringing the situation to HMRC's attention through an appropriate letter and make a payment on account of the relevant SDLT, yet not file a land transaction return until the contract does complete.

Other issues

82. I am not persuaded that the fact that the time limit to file an amended return is included in a Schedule gives it a lesser status to the provisions included in the body of the Act.

83. As regards Mr McNall's reference to the Explanatory Notes to the Finance Bill 2003, I do not consider that it is entirely clear that such a reference can be made in the circumstances of this case as an aid to the construction of the exception to the 12 month time limit in paragraph 6. In any event, the purpose of this hearing is to determine whether or not "the opportunity to amend the return has passed" - so even if the Notes can be prayed in aid to the interpretation, they do not take us much further.

84. The decision made by this Tribunal in *Smallman* is not binding upon me. The decision does not address the possibility that the s49 does "otherwise provide" as regards time limits for

amending land transaction returns, and I therefore find that in this respect, at least, it was made *per incuriam*.

CONCLUSION

85. I therefore find that any purported amendment by CC of his land transaction return was made within the relevant time limit (by reference to paragraph 6(3), Schedule 10, Finance Act 2003). It therefore follows that any rejection of such purported amendment by HMRC is capable of giving rise to a valid appeal to HMRC in respect of which the Tribunal's jurisdiction under paragraph 44, Schedule 10, Finance Act 2003 is capable of being engaged.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

86. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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 Tribunal directs that the 56 days within which a party may send or deliver an application for permission to appeal against a decision that disposes of a preliminary issue shall run from the date of the decision that disposes of all issues in the proceedings. 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.

87. However, either party may apply for the 56 days to run instead from the date of this decision, but any such application must be received within 56 days of the date of this decision and shall be accompanied by the application for permission to appeal, and should be sent to the other party at the same time as it is sent to the Tribunal.

DIRECTIONS FOR FUTURE CONDUCT OF THIS APPEAL

88. The parties shall endeavour to agree directions for the future conduct of this appeal, and shall give consideration to a direction that the hearing of the appeal on the paragraph 34 issue (TC/2015/6378) shall take place together with and at the same time as the hearing of this appeal. Any such directions shall be based on the Tribunal's directions released on 15 September 2018. The parties shall submit such draft directions to the Tribunal for review within 30 days of the release of this decision, or shall notify the Tribunal by that date that they are unable to reach agreement.

NICHOLAS ALEKSANDER

TRIBUNAL JUDGE

RELEASE DATE: 26 FEBRUARY 2020

Cases referred to in skeleton arguments but not mentioned in the decision:
HMRC v Bristol and West plc [2016] BTC 18
Martland v HMRC [2018] UKUT 0178 (TCC)