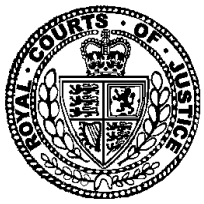

Neutral Citation Number: [2023] EWCA Civ 1193

Case No: CA-2022-001764

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE ADAM JOHNSON AND JUDGE THOMAS SCOTT
[2022] UKUT 178 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2023

Before:

LADY JUSTICE KING
LORD JUSTICE NEWEY
and
LADY JUSTICE FALK

- -

Between:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and –	
LG PARK HT1 LIMITED **UPS SGP LIMITED** **LG PARK HT3 LIMITED** **LG PARK HT4 LIMITED** **LG PARK HT5 LIMITED** **LG PARK HT6 LIMITED** **LG PARK HT7 LIMITED** **LG PARK HT8 LIMITED** **LG PARK HT9 LIMITED** **LG PARK HT10 LIMITED**	**Respondents**

- -
- -

Hui Ling McCarthy KC, Michael Ripley and Edward Hellier (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Appellants**
Rupert Baldry KC and Quinlan Windle (instructed by **Norton Rose Fulbright LLP**) for the **Respondents**

Hearing date: 5 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 17th October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This appeal concerns a case management decision of the First-tier Tribunal ("FTT") in a long running dispute between HMRC and the 10 respondent taxpayers (collectively "LG Parks"). The dispute relates to the stamp duty land tax ("SDLT") payable on grants of leases made in January 2010 over land forming part of the London Gateway port development in Essex. By its decision (the "FTT Decision"), the FTT refused LG Parks' application (the "Application") to refer the question of the market value of the leases to the Upper Tribunal (Lands Chamber) (the "Lands Chamber") pursuant to paragraph 45 of Schedule 10 to the Finance Act 2003 ("FA 2003"). The Upper Tribunal (TCC) (the "UT") allowed LG Parks' appeal against that refusal, and the decision was remade by a direction which referred the question of market value pursuant to paragraph 45 while confirming that all other aspects of the appeals remained with the FTT (the "UT Decision"). HMRC appeal against the UT Decision with the leave of this court. In the meantime, the FTT has continued to case manage the appeals, which are now due to be heard by the FTT at a four day hearing in late 2024, and has not proceeded with the reference.

2. It is important to note at the outset that, although the dispute has already proved to be a very lengthy one, the Application was made only very shortly after notices of appeal had been submitted to the FTT, before HMRC had been required to produce a statement of case and before any other case management steps had been taken. In short, enquiries into the relevant SDLT returns were first opened in August 2010. Although closure notices were issued on 31 December 2013, the parties continued to engage in further correspondence and discussion for over five years, culminating in a formal review by HMRC which completed on 15 March 2019 with a confirmation that HMRC's earlier decisions should be upheld. Appeals were lodged with the FTT on 14 April 2019 and the Application was made on 8 May 2019, less than a month later. The FTT Decision was made following a case management hearing to determine the Application on 11 February 2020.

Factual background

3. The factual background was summarised by the FTT as follows:

> "The following summary of the background to the application is taken from both LG Parks' and HMRC's Skeleton Arguments and the transaction documents. It does not represent agreed facts or my findings of fact. The evidence will be considered for this purpose if the matter progresses to a substantive appeal hearing.
>
> 3. On 4 September 2000, P&O Ports (Europe) Limited ("P&O Ports"), The Peninsular and Oriental Steam Navigation Company ("POSNCo") and several subsidiaries of Royal Dutch Shell plc ("Shell") entered into an agreement relating to the development of a deep-water port (the "Port") and a logistics site (the "Park"), which together would form the London Gateway. This Master Agreement was conditional on statutory consents for the development of the Port and the Park being obtained.

4. Under the Master Agreement P&O Ports was to acquire the land required to develop the Port (the "Port Land") by a Port Sale Agreement. The Port Sale Agreement would impose on P&O Ports the 'minimum port requirement' ("MPR"), which required P&O Ports to develop the Port, and if it did not, allowed Shell to re-acquire the Port Land for the sale price adjusted for inflation. Under the Master Agreement, if the statutory consents were obtained, Shell and POSNCo would enter into a Development Agreement to develop land (the "Park Land") into the Park.

5. In 2006, DP World acquired P&O Ports. At the times relevant to these appeals, the ten Appellants were all subsidiaries of DP World, a Dubai headquartered business. One of the Appellants, LG Park HT2 Limited, has since been sold and it is now called UPS SGP Limited. Fifty per cent of another Appellant has also been sold.

6. In 2007, the statutory consents were obtained for the development of both the Port and the Park. At this stage arbitration proceedings were entered into between Shell and DP World regarding a dispute about whether the relevant conditions had in fact been satisfied. This was in part prompted by a rise in the market value of both the Park Land and the Port Land.

7. On 28 February 2008, the Port Sale Agreement was exchanged between a subsidiary of DP World and Shell. The Port Sale Transfer set out (in paragraph 19) a covenant that the MPR had to be satisfied no later than 28 February 2013 and that if the transferee did not comply with the covenant, the transferor may, as agreed compensation and in substitution for a claim for damages, require the transferee to transfer the Port Land back to the transferor ("the MPR Call Option").

8. In June 2008, the arbitration proceedings relating to the development of the Park were put on hold and the parties began to discuss a buyout whereby DP World would acquire the Park Land from Shell. The removal of the MPR would have been one of the terms of any compromise of the proceedings. If the MPR had not been waived or satisfied Shell would have otherwise been entitled to reacquire the Port Land for a price below market value and without reimbursing DP World for the money spent developing the Port Land.

9. On 31 December 2009, a number of agreements were entered into, including the agreement for Shell to grant 200-year leases over ten plots of the developable part of the Park Land to the ten Appellants (the "Plot Leases"). The division into ten plots was to enable distinct areas of the Park to attract separate investments. The agreement provided that in consideration for the grant of the Plot Leases, the Appellants would (a) pay "the Price" (a total of £112,568,994 plus VAT) and (b) grant Shell land options over the part of the Park Land covered by their respective Plot Lease.

10. The Plot Leases were granted on 14 January 2010.

11. On 15 January 2010, an Omnibus Deed was entered into between Shell and various DP World companies, including LG Parks. The Omnibus Deed provides that with effect from the date of the deed, certain variations to the Port Sale Agreement and the Port Land Transfer should have effect. This includes a provision that paragraph 19 of the Port Land Transfer (summarised in paragraph 7 above) should cease to have effect. This released DP World from the MPR and the MPR Call Option (the "MPR Release"), meaning Shell's potential right to reacquire the Port Land fell away.

12. Land transaction returns were filed electronically [on] behalf of LG Parks on 12 February 2010. Copies of the returns are not included in the Tribunal's bundles. LG Parks state that the SDLT was calculated on the basis that they were granted the Plot Leases in consideration for, in part, their granting options over the land covered by the Plot Leases and that the transaction was therefore an exchange within the meaning of section 47 Finance Act 2003. Paragraph 5, Schedule 4, Finance Act 2003 (as it applied at the time) provides that the chargeable consideration for SDLT purposes is the market value of the Plot Leases.

13. King Sturge had been instructed to provide various valuations in November 2009, and these put the market value of the Plot Leases at £30.56m. SDLT was paid by reference to King Sturge's market valuation of the Plot Leases, totalling £1,227,636.

14. On 1 March 2010, Norton Rose Fulbright LLP ("NRF") wrote to HMRC setting out details of the transactions, explaining that the calculation of SDLT in the land transaction returns was by reference to the King Sturge market valuation. The letter went on to explain that the reason for the discrepancy between the consideration paid and the market value of the Plot Leases was that LG Parks were compelled to pay above market value because (i) "the price was the minimum price that Shell was prepared to accept after considerable negotiation" (ii) buying the Park Land was essential to deliver the Port as a viable operation (iii) it was not appropriate for LG Port to acquire the land.

15. On 27 August 2010, HMRC opened enquiries into the LG Parks' land transaction returns. There followed a period of extended correspondence and further discussions between the parties, including meetings between representatives of DP World and the Valuation Office Agency, and a revised valuation of £38.7m was put forward by DP World following advice from KMPG. It appears from the extracts of the correspondence provided to me that at some time between May and October 2013 DP World raised the claim that the price paid was "representative of a number of factors and not merely value of the subject property". Their letter of 28 October 2013 cites the removal of the MPR as one factor, which "coupled with the fact that Shell refused to sell the subject property for less than the price paid, resulted in us being held to ransom with regards to the acquisition price."

16. On 31 December 2013, HMRC issued closure notices ("the Closure Notices") to LG Parks stating:

> "I have concluded that the open market value of this land interest is equal to the [an amount that over all ten Closure Notices summed to £116,568,994[1]] plot lease premium and paid by [the respective Appellant] to the landlord, [Shell].
> I have amended your SDLT return to reflect my conclusion."

17. There was then a period of over five years of substantial correspondence and discussion between the parties before LG Parks appealed to the Tribunal on 12 April 2019. The final paragraph of the notice of appeal reads:

> "The question in this dispute is one of the market value of the Plot Lease, and in accordance with paragraph 45 of Schedule 10 Finance Act 2003, that question shall be determined on a reference to the Upper Tribunal. It is the intention of the taxpayer to seek an order for such a reference.""

4. As already indicated, the Application was then made seeking a direction that the proceedings in the appeals should be transferred to the Lands Chamber. It is common ground, however, that paragraph 45 neither requires nor permits the transfer of proceedings in this way, but rather is confined to referrals of questions of market value: see further below.

5. As the UT Decision points out, prior to the issue of the closure notices HMRC had considered a number of potential avenues of challenge, but the relevant HMRC specialist had written to DP World on 27 September 2012 in the following terms:

> "I understand that you are aware that I have received advice on the exchange treatment of the Plot Lease transactions.
>
> **Exchange treatment**
> Following that advice, HMRC's position is that the Plot Leases should be treated as exchanges for the purposes of s47 and that SDLT should be calculated on the market value of the land interests transferred by Shell to [LG Parks] on 14 January 2010.
> …"

6. In July 2020, following the release of the FTT Decision, HMRC issued protective discovery assessments in relation to the MPR Release, for which no land transaction return had been filed. The assessments were issued not only against LG Port (the acquirer of the Port Land and the apparent immediate beneficiary of the release) but against all of the LG Parks companies and two other entities in the DP World Group that had acquired Shell's reversionary interest in the Park Land pursuant to the Omnibus Deed arrangements. The amounts charged by the assessments were calculated as the difference between the SDLT paid on the Plot Leases and SDLT calculated by

[1] The difference between this figure and the £112,568,994 referred to above was a deferred consideration amount of £3.8m in respect of one plot.

reference to the aggregate consideration paid. The discovery assessments were appealed. The FTT is case managing those appeals jointly with the appeals against the closure notices and has directed that they be heard together.

Statutory framework

7. The SDLT regime is largely contained in Part 4 of and various Schedules to FA 2003. The statutory references that follow are to FA 2003 unless otherwise indicated.

8. In outline, SDLT is charged on a "land transaction", defined in s.43 as the "acquisition of a chargeable interest". "Chargeable interest" is broadly defined in s.48 to include estates or interests in land, together with certain other rights or benefits relating to land. The concept of "acquisition" is also effectively extended by s.43(3) to include both the creation and the surrender or release of a chargeable interest. It therefore includes, for example, the grant of a lease or an option over land and its respective surrender or release. However, "exempt interests" are not chargeable interests and so are not within the scope of the charge. One type of exempt interest is a security interest, defined in s.48(3)(a).

9. As a general rule, SDLT is charged on a percentage basis by reference to the consideration given for the land transaction, whether by the purchaser or by a person connected with him: paragraph 1 of Schedule 4. Under paragraph 4 of Schedule 4, consideration attributable to more than one land transaction, or in part to a land transaction and in part to something else, must be apportioned on a just and reasonable basis.

10. One of the exceptions to the rule that SDLT is charged by reference to the consideration given relates to a situation where a land transaction is entered into wholly or partly in exchange for another land transaction (an "exchange", within s.47). In that case, under paragraph 5 of Schedule 4 (as in force at the relevant time, and ignoring an irrelevant exception) SDLT was chargeable by reference to the market value of the interest acquired. As already indicated, LG Parks maintain that SDLT is chargeable by reference to the market value of the Plot Leases because they were granted partly in consideration for options granted to Shell.

11. The person liable for SDLT is the acquirer (purchaser) of the relevant chargeable interest. SDLT is subject to self assessment, so the purchaser is required to file a return and pay any tax due. Paragraph 12 of Schedule 10 permits HMRC to open an enquiry into a return, generally within nine months of the filing date. Paragraphs 23 and 35 deal with completion of enquiries and appeals to HMRC in the following terms:

> "*Completion of enquiry*
>
> 23 (1) An enquiry under paragraph 12 is completed when [HMRC] by notice (a "closure notice") inform the purchaser that they have completed their enquiries and state their conclusions.
>
> (2) A closure notice must either—
>
> (a) state that in the opinion of [HMRC] no amendment of the return is required, or

(b) make the amendments of the return required to give effect to their conclusions.

(3) A closure notice takes effect when it is issued.

Right of appeal

35 (1) An appeal may be brought against…

(b) a conclusion stated or amendment made by a closure notice…"

12. Paragraph 36 clarifies that an appeal under paragraph 35 is made to HMRC. The following paragraphs contain provisions governing procedures for the appeal to be notified to the FTT. An appeal can be notified to the FTT either without a prior review by HMRC or following a process under which HMRC give their view of, and then formally review, "the matter in question". In this case, as already indicated, a review was undertaken and the appeal was notified to the FTT following its conclusion pursuant to paragraph 36G, subparagraph (4) of which provides:

> "(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question."

The "matter in question" is defined by paragraph 36I(1) as "the matter to which an appeal relates".

13. Paragraph 45 of Schedule 10 provides:

> "*Questions to be determined by the relevant Upper Tribunal*
>
> 45 (1) Where the question in any dispute on any appeal under paragraph 35(1) is a question of the market value of the subject matter of the land transaction that question shall be determined on a reference by the relevant tribunal.
>
> (2) In this paragraph "the relevant tribunal" means—
>
> (a) where the land is in England … the Upper Tribunal…"

As explained in the UT Decision, the relevant chamber of the Upper Tribunal is the Lands Chamber, because responsibility for "the determination of questions of the value of land or an interest in land arising in tax proceedings" is allocated to it pursuant to the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655).

The FTT Decision

14. The gravamen of LG Parks' case before the FTT was that the scope of the appeals was determined by the scope of the conclusions in the closure notices. Those conclusions raised a single issue, namely the market value of the leases acquired. This reflected the fact that, by the time the closure notices were issued, HMRC had agreed that the

transactions in question should be treated as exchanges. Market value being the only issue, it should be referred to the Lands Chamber.

15. HMRC objected to this, arguing that it was not appropriate to seek to determine the scope of the appeals at a case management hearing at which only a limited selection of enquiry documents had been provided, that the only material conclusion was in any event the quantum of chargeable consideration and the amendment that flowed from that, and that the arguments had also continued to develop since the closure notices were issued. In particular, LG Parks appeared to be seeking to rely on an argument that part of the consideration paid was attributable to the release of the MPR Call Option and that that option was an exempt security interest for SDLT purposes. Unless these arguments were conceded (which they had not been) then they raised questions of tax law for the FTT.

16. The FTT framed the issue for decision in the following terms:

> "28. The issue to be determined in this application is whether the question in the dispute on the appeals is "a question of the market value of the subject matter of the land transaction" such that it is appropriate to make a reference for the question to be determined by the Upper Tribunal (Lands Chamber). I have considered this under two headings: (1) the questions in the dispute; and (2) the overriding objective."

As indicated, the FTT proceeded to deal with these issues under separate headings.

17. Having considered case law to which it had been referred (including *Tower MCashback LLP 1 v HMRC* [2011] UKSC 19, [2011] 2 AC 457 ("*Tower MCashback*"), *Fidex Ltd v HMRC* [2016] EWCA Civ 385, [2016] STC 1920 ("*Fidex*") and *Investec Asset Finance plc v HMRC* [2020] EWCA Civ 579, [2020] STC 1293 ("*Investec*")), the FTT declined to determine the scope of the appeals and instead considered "whether the taxpayers have raised questions in their appeals against the Closure Notices that should be determined by the FTT (or conceded as HMRC submit) before it is appropriate to refer the question of the market value to the Upper Tribunal" (para. 37). The FTT considered the grounds of appeal and a further explanation provided by Mr Baldry KC (for LG Parks) at the hearing. It determined that one of the issues raised in the grounds of appeal was a challenge to the conclusion that the market value equalled the price paid on the basis that part of the consideration was paid for something else, specifically for the MPR Release. The FTT said that that in turn raised the question of the identification of the subject matter of the land transaction and, if there was more than one matter, a question of apportionment. These were both issues of fact and tax law for the FTT.

18. Having concluded that "there is at least one other question" to be addressed by the FTT, the FTT concluded at para. 42 that this was sufficient to determine the Application without determining the scope of the appeal.

19. The FTT's consideration of the overriding objective starts at para. 43 with the following statement:

> "43. This application is made under a statutory provision and is not the exercise of the specific case management power under rule 5(3)(k) of the

> Tribunal Procedure rules [which deals with transfers of proceedings to other tribunals]. However, the principle embodied in the overriding objective should be applied by the FTT in considering the exercise of its powers and its duties more generally, and the parties must help the FTT to further the overriding objective..."

20. The FTT went on to consider the "practical and case management implications" of making a reference in the light of the overriding objective. It recorded the submissions of Ms McCarthy KC (for HMRC) querying how terms of reference to the Lands Chamber could be agreed in the absence of concessions in relation to the MPR Release, and that absent such concessions HMRC would issue discovery assessments. It found at para. 46 that a reference would not determine all the issues in dispute as far as HMRC were concerned, and would force HMRC to take steps that would result in "bifurcation of the appeals".

21. Having referred again to *Tower MCashback* and *Investec*, the FTT said this:

> "49. I have concluded above that the conditions for making a reference under paragraph 45 are not satisfied, but this decision is confirmed by having regard to FTT's duties, including the duty to further the overriding objective, when considering the circumstances of the application. It is consistent with this reading of paragraph 45 that I am not required to refer the question of the market value when there are still questions to be considered by the FTT in order to ensure an efficient, fair and just determination of the appeals, and possibly avoid a second set of proceedings or satellite litigation, and the consequent risks of costs, overlap and inconsistency, and delay."

22. The FTT's conclusion was expressed in the following terms:

> "50. I have concluded that the questions in the dispute in the substantive appeals are not limited to the market value of the subject matter of the land transaction. Questions of tax law relating to the subject matter of the land transactions for which the chargeable consideration is to be determined must be decided by the FTT before the valuation can be referred. The application for the referral to the Upper Tribunal in these circumstances does not satisfy the conditions of paragraph 45 or meet the requirements of the overriding objective."

The UT Decision

23. The grounds of appeal to the UT were that the FTT erred in law by (1) identifying the questions raised by the appeals without first considering the scope of the appeals, which had to be determined by reference to the closure notices; and (2) failing properly to understand how SDLT is calculated for exchanges.

24. Having directed itself to the approach to be taken on appeals against case management decisions, the UT noted that nothing in paragraph 45 required a reference to be made only where valuation was the sole (or sole remaining) issue, but the FTT nonetheless proceeded on that basis. On the first ground of appeal the UT considered that the preferable route would probably have been to determine the issues in the appeal by

construing the closure notices (directing the parties to provide any further information that the FTT needed to do that), but commented that the closure notices and relevant context appeared to be relatively clear and "on the face of it, supportive of the view that the only issue in scope under the Closure Notices is market value". However, the UT declined to find that the FTT's refusal to determine that question was outside its generous ambit of discretion such as to amount to an error of law.

25. Nevertheless, the UT decided that the FTT made an error of law in declining to make a reference. In reaching that conclusion it said this about the approach to take to paragraph 45:

> "39. In applying paragraph 45, we consider that the following principles should be borne in mind.
>
> 40. First, it is engaged only where an appeal which has been made, and in relation to that appeal. The particular appeal, and the FTT's jurisdiction in relation to it, therefore form the framework within which paragraph 45 falls to be applied.
>
> 41. Second, its effect is mandatory. Any question of the market value of the land transaction must be determined on a reference by the Lands Tribunal. That requirement applies where the question arises "in any dispute on any appeal". Thus the primary purpose and effect of paragraph 45 may be seen as jurisdictional.
>
> 42. Third, it is not the appeal which is transferred to the Lands Chamber but the question of valuation. The appeal remains with the FTT.
>
> 43. Fourth, although paragraph 45 is silent as to the precise stage when a reference should be made where a dispute has arisen as to market value in an SDLT appeal, the determination of that question must be guided by the three preceding points."

26. The UT determined that the closure notices "should have been the FTT's starting point". Their terms, read in the context of the letter dated 27 September 2012 (see [5.] above), "strongly suggest" that valuation was the issue raised. The fact that the FTT "might" decide to determine other issues and that there was disagreement over the scope of the closure notices were not sufficient grounds to refuse the Application, because on any reasonable basis valuation was "front and centre" (paras. 45 to 50).

27. The UT concluded that the FTT had wrongly failed to give any weight to the terms of the conclusion in the closure notice and that it had "frustrated the purpose and objectives of paragraph 45 as we have described them" in concluding that a disagreement as to apportionment was a question in the appeal requiring a tax law determination. Any issue of apportionment could most appropriately be determined by the Lands Chamber as an aspect of valuation (para. 52). The UT proceeded to remake the decision.

The grounds of appeal and Respondent's notice

28. The grounds of appeal are as follows:

(1) The UT incorrectly set aside the FTT Decision without identifying an error of law which was material to its conclusion.

(2) The UT derived from the wording of paragraph 45 a general and incorrect approach to applications for a reference to the Lands Chamber.

(3) When applying its own approach, the UT proceeded on a false assumption that the market value would at some stage inevitably have to be determined, overlooking that the whole transaction or price paid might be subject to SDLT, depending on how the security interest issue was resolved by the FTT.

(4) The UT failed to take account of factors which were highly relevant to whether a reference to the Lands Chamber was appropriate at this stage, including in particular the limited progress of the appeal to date, the broader litigation between the parties and the risk of a second reference needing to be made to the Lands Chamber at a future date in respect of the same transactions.

29. LG Parks have also filed a Respondent's notice seeking to uphold the reference to the Lands Chamber on the basis that the scope of the appeals against the closure notices is limited solely to the issue of the market value of the Plot Leases. Mr Baldry maintained this argument at the hearing, but the focus of his oral submissions was that the UT Decision was correct for the reasons given, and in particular that the UT was right to say that the issue of valuation was "front and centre" and should have been the subject of an immediate reference.

Approach to appeals: case management decisions and materiality

Case management decisions

30. The correct approach to appeals against case management decisions is well established. HMRC relied on Sales J's summary in *HMRC v Ingenious Games LLP* [2014] UKUT 62 (TCC), [2014] STC 1416 ("*Ingenious Games*") at [56], which was also referred to by the UT:

> "The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT: *Walbrook Trustees v Fattal* [2008] EWCA Civ 427, [33]; *Atlantic Electronics Ltd v HM Revenue and Customs Commissioners* [2013] EWCA Civ 651, [18]. The Upper Tribunal should exercise extreme caution before allowing appeals from the FTT on case management decisions: *Goldman Sachs International v HM Revenue and Customs Commissioners* [2009] UKUT 290 (TCC), [23]-[24]." (Emphasis supplied.)

31. The Court of Appeal has endorsed a cautious approach to challenges to case management decisions on a number of occasions: see for example *Jalla v Shell*

International [2021] EWCA Civ 1559 at [27]-[28], where Coulson LJ repeated Lewison LJ's comment in *Mannion v Ginty* [2012] EWCA Civ 1667 at [18] that it is "vital for the Court of Appeal to uphold robust, fair case management decisions made by first instance judges" and reiterated the high hurdle that must be overcome to challenge them successfully.

Materiality

32. An appeal to the UT lies only a point of law. Where an error of law is identified then the UT "may (but need not) set aside" the FTT's decision pursuant to s.12 of the Tribunals, Courts and Enforcement Act 2007. In *Degorce v HMRC* [2017] EWCA Civ 1427, [2017] STC 2226 ("*Degorce*") at [95] Henderson LJ accepted that this gave the UT a broad discretion, but continued:

> "That said, however, I consider that a test of materiality will still have a crucial, and usually decisive, role to play in the decision of the UT whether or not to set aside the decision of the FTT, and likewise in the decision of this court if an error of law by the UT is established."

Henderson LJ went on to explain that what he meant by "material" was a case where the UT was:

> "…satisfied that the error of law might (not would) have made a difference to that decision."

While justice would normally require a decision to be set aside where there had been a material error in that sense, there would be "no injustice" in leaving an appeal to stand where the UT was satisfied that the error was immaterial.

Paragraph 45: interpretation and approach

33. There is no difficulty with the first three principles set out by the UT in applying paragraph 45 (see [25.] above). Paragraph 45 obviously applies only where an appeal has been notified to the FTT and it requires any "question of the market value of the subject matter of the land transaction" to be transferred to the Lands Chamber. What is transferred is only that question. The appeal itself, including all other issues of fact and law, remains with the FTT.

34. Before the FTT it appears that HMRC proceeded on the basis that paragraph 45 would apply only if valuation was the only issue, or the only issue left. This was not effectively contradicted by LG Parks because their position is that valuation is in fact the only issue. HMRC's approach in the FTT was not pursued before the UT or this court. While Ms McCarthy accepted that, on a literal interpretation, the use of the definite article in paragraph 45 ("the" question in any dispute) could indicate that there was no jurisdiction to make a reference under paragraph 45 if there was any other question in the appeal (either remaining after other issues are resolved, or possibly at all), on further consideration HMRC preferred a purposive interpretation which would not preclude a reference as a matter of principle where other issues existed or remained. Rather, the question of the time at which a reference should be made is a matter of case management for the FTT.

35. I agree. Paragraph 45 simply requires questions of valuation to be referred to the Lands Chamber. It says nothing about the timing of a reference. It also cannot be right to interpret it in a way that would potentially exclude a reference where other issues also arise in the appeal. The clear intention is that issues of valuation should be dealt with by specialists in that area, with all other issues being dealt with by the FTT.

36. With that in mind, how should the FTT approach the question of when to refer an issue of valuation? I have no doubt that this must be a case management decision for the FTT and that, as with other case management decisions, it should exercise its powers in accordance with the overriding objective (set out in the FTT's rules) to deal with cases fairly and justly, having regard among other things to the need to deal with cases in a proportionate manner and to the need to avoid unnecessary delay.

37. I therefore do not consider that the UT's fourth principle (that when the reference should be made "must be guided by the three preceding points": see [25.] above) is helpful. Rather, the first three points do no more than set out what paragraph 45 provides, and as already explained it says nothing about timing. As Lord Justice Newey observed during submissions, by its fourth principle the UT appears to give the impression that there is some form of presumption in favour of an immediate referral. There is no such presumption.

38. I consider that the correct approach to paragraph 45 is as follows:

    a) Pursuant to paragraph 45, any question of the market value of the subject matter of a land transaction that arises on an appeal to the FTT must be referred to the Lands Chamber. All other matters are for the FTT.

    b) The question of the time at which a reference should be made is one of case management. As with other case management decisions the FTT should exercise its powers in a way that seeks to give effect to the overriding objective set out in the FTT's rules.

39. In some cases it may be clear that the most efficient and effective approach is to refer the question of market value at a relatively early stage. This will most obviously be the case where the parties are agreed that value is the only issue, or only material issue, that arises. However, in many other cases that would not be appropriate. Examples would include not only cases where market value may prove to be irrelevant once other issues are determined, but cases where an early referral might risk conflicting with the limited nature of the referral by requiring the Lands Chamber to form views on matters of fact or law that are properly within the sole jurisdiction of the FTT, or more generally cases where it is simply not yet clear to the FTT what the issues are in the appeal, so that it cannot properly decide not only whether to refer, but on what terms.

40. This last point is worth expanding upon a little. There is no format for the terms of a reference under paragraph 45. In some circumstances it might be straightforward: the Lands Chamber may simply be asked to value a particular parcel of land as at a specified date. But where there are transactions which are potentially relevant to determining market value and there is an actual or potential dispute about their terms or about their legal (including tax) effect, it will be for the FTT, not the Lands Chamber, to determine any such dispute, and it will need to incorporate any relevant findings into the reference.

41. A final general point to make is that the need to determine the issues arising on the appeal before a reference is made should not be taken as meaning that a preliminary hearing should be held for that purpose. The UT suggested that it would have been preferable for the FTT to have determined the scope of the closure notices and that it could have required further information for that purpose. That would amount to holding a hearing to decide a preliminary issue, rather than a case management hearing. As explained in the guidance given by the UT in *Wrottesley v HMRC* [2015] UKUT 637 (TCC), [2016] STC 1123 at [28], the power to order the hearing of a preliminary issue should be exercised sparingly, and generally only if there is a "succinct, knockout point" which can readily be separated from other issues in the case. In a case such as the present one, considerations such as the ones just mentioned, together with factors such as delay and expense, are in most cases likely to result in a conclusion that the scope of the appeal should be determined with other issues at the substantive hearing of the appeal.

This appeal

42. For the reasons already given I consider that the UT's approach to paragraph 45 involved an error of law. Further, for the reasons explained below I consider that the UT did not adhere sufficiently to the need for caution in interfering with case management decisions of the FTT and the importance of determining whether any error of law was in fact material in the sense described by Henderson LJ in *Degorce*. I would therefore set the UT Decision aside (reflecting grounds 1 and 2 of the appeal).

43. In my view, and read as a whole, the FTT Decision does not disclose a material error of law. I would therefore re-make the UT Decision by dismissing the appeal against the FTT Decision.

44. I accept that some parts of the FTT Decision might be construed as suggesting that a reference may only be made if valuation was the only remaining issue in dispute. This is not surprising given the parties' positions: see [34.] above. However, I do not consider that the FTT Decision is fatally flawed by any such error. Read as a whole, the emphasis is on whether it would be "appropriate" to refer the issue of valuation before other issues were decided, and see also para. 49 (set out at [21.] above) where the FTT refers to not being "required" to refer valuation while there were still questions to be considered by the FTT. But in any event, and importantly, the FTT decided that it would not be in accordance with the overriding objective to refer the question of valuation at that stage.

45. I disagree with Mr Baldry that the FTT's decision under the overriding objective heading was infected by an error of law. Rather, and with respect to the UT, the FTT reached an independent conclusion that a reference at that stage would not meet the requirements of the overriding objective, a conclusion which I consider to have been well within the ambit of the FTT's discretion.

46. The UT was right not to interfere with the FTT's refusal to determine the scope of the appeals (strictly the "matter in question", see [12.] above). Having been entitled not to do so I do not consider that the FTT should be criticised for failing to treat the conclusions in the closure notices as its "starting point" as the UT said it should. With respect, that tends to assume the answer to a question which the FTT was entitled not to decide.

47. Given that conclusion it would be wrong to elaborate at length on the topic of the scope of conclusions in closure notices and the implications of that on the scope of appeals, but I do need to make some observations to explain why, despite the apparent focus of the closure notices in this case on market value, the point may not be as simple to decide as LG Parks maintain that it is:

    a) In *Investec* Rose LJ considered the earlier case law in the context of a case that, like here, involved legislation which incorporated the potential for a formal review by HMRC and required the FTT to "determine the matter in question", defined as meaning "the matter to which an appeal relates". Rose LJ decided at [70] that "the matter to which an appeal relates" was the amendment to the return against which the appeal could be brought. That restricted the ambit of the appeal. (Rose LJ referred to an amendment rather than to a conclusion stated or amendment made because the legislation in *Investec* referred to an appeal being brought against an amendment to a return, rather than against a conclusion or amendment: see her judgment at [55] and compare paragraph 35 of Schedule 10 FA 2003, set out above at [11.].)

    b) However, Rose LJ confirmed at [71]-[72] that that the authorities did not establish a narrow construction of these phrases. The changes made by self assessment were "not intended dramatically to narrow the scope of appeals". There are protections for the taxpayer but a "narrow confinement" of the subject matter of the appeal was not intended to be one of them. Further, the "venerable principle" of tax law to the effect that there is a public interest in taxpayers paying the correct amount of tax also has a role to play.

    c) Rose LJ confirmed at [73] that it is for the FTT to determine is the scope of the matter in question. They are best placed to decide:

        > "… whether the context of the closure notice and the surrounding circumstances demonstrate that the subject matter is broader than the particular conclusion and adjustments addressed in the closure notice. If that is the case, it should be open to HMRC to put forward arguments in any appeal even if they result in a larger amount of tax being due, provided that the different arguments all deal with the same matters in question identified in the closure notice."

    d) Rose LJ approved the FTT's description of the scope of the matter in question in that case as a "useful and practical one" and explicitly recognised that the Court of Appeal's decision went beyond *Tower MCashback* and *Fidex*. The FTT's description referred in terms to the subject matter potentially being "slightly broader than the particular conclusion and adjustments addressed in the closure notice" and that it was open to HMRC to mount different arguments on appeal, "even for instance occasioning greater adjustments to the taxable profits", provided that the different arguments all dealt with the "same identified or obvious subject matter" (see *Investec* at [67]).

    e) The significance of this needs to be understood in the light of the facts of *Investec*. In that case the closure notices amended the returns on the basis that the relevant expenditure was of a capital nature rather than being deductible revenue expenses as claimed by the taxpayers, but warned that HMRC might advance

additional grounds "in support of amendment" to the returns. A covering letter set out an alternative analysis that would lead to more tax being due than would result from the amendments made to the returns, and HMRC subsequently sought to pursue that analysis. The taxpayers were seeking to establish that it was not open to HMRC to argue for a different (and higher) adjustment from the one made by the closure notices. That was the argument rejected by the Court of Appeal in *Investec*.

f) I would further observe that in this case the closure notices were followed by over five years of further correspondence, culminating in a formal review. It was during that correspondence that LG Parks raised an argument that went beyond the general relevance of other commercial factors to explaining why the premium paid for the Plot Leases was said to exceed market value, and specifically asserting that part of the premium was paid for the MPR Release and that that was not subject to SDLT. We were not referred to any case law discussing whether developments of that nature, after a closure notice has been issued but before an appeal is referred to the FTT, may be relevant to determining the scope of the "matter in question", or whether (as LG Parks effectively suggested) they are simply irrelevant.

48. I should reiterate that this is not the occasion to decide the scope of the appeals. As *Investec* makes clear, that is a matter for the FTT. The FTT was entitled not to determine that issue. *Investec* also shows that in some cases HMRC may not be restricted to advancing further reasons in support of conclusions reached in a closure notice but may be entitled to take a different approach from that taken on the face of the closure notice, including one which could result in more tax being due.

49. In this case, HMRC's position is that, despite what is said on the face of the closure notices and the context of the 2012 correspondence referred to at [5.] above, they are entitled to maintain on appeal that there was in fact no exchange for SDLT purposes. If that view prevailed and HMRC ultimately succeeded in arguing that the exchange provisions did not apply, then market value would be irrelevant. SDLT would simply be due by reference to the consideration paid (totalling £116,568,994 plus VAT: note that the addition of VAT makes the amount higher than that reflected in the closure notices).

50. Whether, as HMRC maintain, HMRC would in fact be entitled to argue that the exchange provisions have no application in this case is a question for the FTT in due course. Aside from the fact that the dispute on that issue itself shows that the appeal is not confined to a valuation question, its relevance at this stage is that, if the closure notices did not preclude that approach and HMRC succeeded in its argument, then no reference to the Lands Chamber would be required at any stage. This point is part of what lies behind ground 3 of the appeal, namely that the UT proceeded on a false assumption that a reference to the Lands Chamber was inevitably required.

51. I should also emphasise that the FTT was being asked to make a reference to the Lands Chamber at an extremely early stage of the proceedings, and before HMRC had even been required to produce a statement of case. In those circumstances the FTT cannot have been wrong to consider LG Parks' own grounds of appeal in seeking to gauge the likely scope of the dispute between the parties. Having concluded that the taxpayers wished to raise matters that were properly within the sole jurisdiction of the FTT, and

which HMRC were certainly not saying that the taxpayers were not entitled to raise, the FTT cannot be criticised for refusing to accede to the taxpayers' argument that market value was nonetheless the sole issue for the purpose of deciding whether an immediate reference should be made.

52. As already indicated, the FTT had relied among other things on the issue of apportionment being one for the FTT, whereas the UT found that it could most appropriately be determined by the Lands Chamber as an aspect of valuation. In doing so the UT relied on the approach taken in *Denning v HMRC* [2021] UKUT 76 (LC). Mr Baldry submitted that the UT was correct, arguing that although the UT decision in *Denning* has now been reversed by the Court of Appeal ([2022] EWCA Civ 909, [2022] STC 1223) there was no suggestion that the Lands Chamber should not have dealt with apportionment in that case.

53. I do not need to address this point in any detail. Apportionment may or may not prove to be a relevant issue. If it is, that is most likely to be the case where market value is not determinative, because what has to be apportioned for SDLT purposes is the consideration given (see [9.] above). The apportionment provision does not apply if SDLT is chargeable by reference to market value rather than the consideration. But in any event the facts of *Denning* (which concerned whether certain leasehold interests should be valued as including a goodwill element by reference to applicable RICS guidance) are very different from the facts of this case. It is obvious why the issue was accepted as being one for the Lands Chamber in *Denning*.

54. Further and more generally, any dispute about what the consideration ostensibly paid for the grant of the Plot Leases was actually paid for – for example whether it was paid to settle the arbitration in addition to acquiring the land interests, as well as whether any part of it was paid for the MPR Release or indeed anything else – will be a question of fact and (at least so far as it concerns contractual interpretation) law for the FTT. The Lands Chamber could not properly trespass on those questions, but it would require them to be determined in order properly to assess the relevance of the contractual price, agreed between unconnected parties, to determining market value: the existence of that agreed price was, after all, the nub of HMRC's case on market value when it issued the closure notices. This simply underlines the prematurity of the reference that the FTT was asked to make. Mr Baldry's submission that market value could be determined independently, and that once that is established it would become clear whether the consideration paid must have been paid in part for something else, conflicts with HMRC's case as it would inevitably be put if a reference was made.

55. One of the other points made by the UT was that the discovery assessments post-dated the FTT Decision and so could not be relevant to whether the FTT made an error of law. However, in exercising its case management discretion the FTT had in mind HMRC's indication of its intention to issue them (see [20.] above). It was appropriate for it to do so. The discovery assessments relate to the same transactions and clearly raise issues that are not limited to market value. It would have been obvious that the inevitable appeals against them should be considered alongside the appeals against the closure notices. Further, if it were established that part of the consideration paid by LG Parks was attributable to the MPR Release and the remainder for the Plot Leases, and the MPR Call Option were found to be a chargeable interest for SDLT purposes, then the issue of the market value of the Plot Leases might at least in practice prove less controversial, such that no reference to the Lands Chamber might ultimately be needed

for that reason. Alternatively, if the correct analysis is that there was an exchange, but one that encompassed a chargeable release of the MPR Call Option as well as the grant of the Plot Leases, then it might prove necessary to refer the question of the value of the MPR Call Option as well as the question of the value of the Plot Leases. A premature reference of the latter could result in the FTT subsequently having to make as further reference of the former. That would not accord with the overriding objective.

Conclusion

56. In conclusion, I would allow the appeal and remake it by dismissing the appeal against the FTT Decision.

Lord Justice Newey:

57. I agree.

Lady Justice King:

58. I also agree.