Neutral Citation: [2025] UKFTT 205 (TC)

Case Number: TC09428

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/12391,TC/2023/08397

VALUE ADDED TAX – land exemption – VATA 1994, Item 1, Group 1, Schedule 9 - appeals - VATA 1994, s83(1) – EU law - European Union (Withdrawal) Act 2018, para 3, Schedule 1, para 39(5), Schedule 8 – Retained EU Law (Revocation and Reform) Act 2023, s4 and s22(5) – Finance Act 2024, s28 – property management services – whether a direction to file a return is an appealable decision – no - whether appellant liable for output tax – whether appellant liable to be registered – whether HMRC failed to apply ESC 3.18 – whether the tribunal has the jurisdiction to apply extra statutory concessions as a matter of legitimate expectation and/or general principles of EU law and/or A1P1 – no jurisdiction - appeals dismissed

Heard on: 15 -19 July 2024
Further written submissions: 2 August 2024 and 30 August 2024
Judgment date: 12 February 2025

Before

TRIBUNAL JUDGE RICHARD CHAPMAN KC
MRS SONIA GABLE

Between

CHELSEA CLOISTERS MANAGEMENT LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Kieron Beal KC and Mr Tom Lowenthal of Counsel, instructed by BDO LLP.

For the Respondents: Miss Isabel McArdle of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs.

DECISION

INTRODUCTION

1. Chelsea Cloisters Management Limited ("CCML") is, as its name describes, a management company for a property known as Chelsea Cloisters. These appeals are in respect of CCML's liability or otherwise for VAT in respect of supplies made by CCML and the resultant requirement for VAT registration. By a decision dated 14 March 2022 (upheld by a review decision on 23 June 2022), HMRC decided that CCML had been making supplies of management services chargeable at the standard rate ("the Liability Decision"). On 25 April 2023, HMRC compulsorily registered CCML for VAT ("the Registration Decision"). By an email dated 12 May 2023, HMRC directed CCML to file a VAT return for the period from 1 November 2018 to 30 April 2023 ("the VAT Return Direction").

2. In essence, CCML's argument is that CCML's supplies should be zero-rated pursuant to HMRC's Extra Statutory Concession 3.18, entitled "VAT: exemption for all domestic service charges" ("ESC 3.18"). HMRC disputes that we as the First-tier Tribunal ("the FTT") have the jurisdiction to adjudicate upon this and, in any event, that an application of ESC 3.18 would still mean that the disputed supplies should be standard rated.

3. CCML appealed to the FTT against the Liability Decision by a notice of appeal dated 22 July 2022 (Appeal Reference TC/2022/12391) and against the Registration Decision by a notice of appeal dated 25 May 2023 (Appeal Reference TC/2023/08397). The appeal against the Registration Decision also included an appeal against the VAT Return Direction. These appeals (together "the Appeals") have been consolidated. Alive to the concern that the question might arise as to whether CCML's challenges to the decisions should be the subject of a judicial review, CCML issued a High Court claim for judicial review on 27 October 2022 ("the Judicial Review Claim"). The Judicial Review Claim (including the application for permission to apply for judicial review) was stayed by Mr Justice Dove by an Order dated 8 March 2023 pending the outcome of the Appeals.

ISSUES AND APPROACH

4. In summary, CCML relies upon following grounds of appeal (being the relevant headings in the consolidated grounds of appeal, with typographical errors corrected):

(1) Error in the characterisation of the supplies.

(2) Failure to apply ESC 3.18.

(3) The contested liability decision is vitiated by the frustration of a legitimate expectation.

(4) The failure to apply ESC 3.18 is incompatible with Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1" and "the ECHR").

(5) The contested decisions infringe general principles of EU law.

(6) The analysis if HMRC is right that there is a single supply to leaseholders.

5. The central issues within the Appeals are (as foreshadowed by the stayed Judicial Review Claim) whether we have jurisdiction to consider the operation of ESC 3.18 and, if so, whether HMRC should have applied ESC 3.18 in CCML's favour in the manner set out in CCML's grounds. The parties differ as to which end of the metaphorical swimming pool we should dive into first. Mr Beal KC and Mr Lowenthal invited us to consider the substantive position first, and the jurisdictional position second, referring us to *KSM Henryk Zeman SP Zoo v HMRC* [2021] UKUT 182 (TCC) as an example of doing so. Miss McArdle's approach (particularly in her skeleton argument) was to invite us to find that we have no jurisdiction to consider

grounds 2, 3 and 4, with the effect that her submissions as to the substantive position were in the alternative and without prejudice to those primary submissions.

6. In our view, the proper approach in the circumstances is to deal with all jurisdictional questions first (including any necessary statutory construction), and only then to consider the substantive aspects. This has the benefit of being the logical starting point. It also allows us to signpost any elements of our decision which are obiter, as will be the case for our consideration of the substantive submissions in areas where we find that we do not have jurisdiction (and so which we only consider in deference to the parties' care and effort in making submissions to us in that regard and in case we are wrong on any jurisdictional matters). This is of particular importance given the existence of the Judicial Review Claim.

7. We note that to some degree the direction of supply arguments in the first ground and (insofar as either side in fact pursues them) the single supply arguments in the sixth ground can be treated as independent of the other arguments. However, we treat these as part of the substantive issues as they either include a consideration of the application (or otherwise) and effect of ESC 3.18 or are only relevant for the purposes of ESC 3.18. We also note that whether the direction to file a return was an appealable decision is freestanding and so we deal with it as a discrete issue below.

FINDINGS OF FACT

8. It is convenient to set out our findings of fact at this stage. In doing so, we bear in mind that the burden of proof is upon CCML and that the standard of proof is that of the balance of probabilities. We also note that the only witness evidence was from Mr Colin Reilly, a director of CCML with responsibility for financial management. Mr Reilly's evidence in chief comprised a witness statement within this appeal, which incorporated a further witness statement in the Judicial Review Claim. Miss McArdle cross-examined Mr Reilly, which was (rightly, given the general lack of factual dispute as distinct from the application of those facts) limited to some short and discrete points. We have no hesitation in finding that Mr Reilly was an honest and credible witness who was doing his best to assist. Indeed, Miss McArdle did not submit to the contrary. We have also taken into account the documents to which we have been referred. There was a large amount of common ground between the parties.

9. Chelsea Cloisters is a property located on Sloane Avenue, London. From 29 July 1985 to 16 May 1989, the freehold title to Chelsea Cloisters was registered to Chelsea Cloisters Developments Limited ("CCDL"). Since 16 May 1989, the registered freehold owner has been Realreed Limited ("Realreed"). The transfer of the freehold to Realreed was pursuant to a sale and purchase agreement dated 16 May 1989, in respect of which a supplemental agreement placed obligations upon Realreed as to the grant of leasehold interests and ensuring consistency as to their terms. Realreed is a subsidiary of Chesterlodge Limited.

10. Chelsea Cloisters comprises 656 self-contained apartments with a variety of numbers of bedrooms, commercial space, and common parts. One of the apartments is not subject to any long leasehold interest and so Realreed owns the only relevant interest in it by way of its freehold title. It is the VAT treatment of the remainder of the apartments which is in dispute within these Appeals ("the Apartments").

11. The Apartments are all subject to long leases, typically for 125 years from 24 June 1985. Some of these leases have been extended upon substantially similar terms to the original leases.

12. On occasion, long leaseholders of the Apartments might wish to vacate their Apartment without having found a purchaser and so may sell their leasehold interest to Realreed. For example, by a TR1 dated 14 September 2022, the leaseholder of Apartment 947 transferred her leasehold interest in the Apartment to Realreed for the sum of £400,000. Realreed was then

registered with HM Land Registry as proprietor of the leasehold interest. Mr Reilly's evidence (which we accept) is that Realreed is in this manner the registered proprietor of the long leaseholds of 238 of the Apartments, which it then lets under assured shorthold tenancies or on a shorter term serviced basis. We deal with the legal effect of Realreed being both the owner of the long leasehold and the freehold to these 238 Apartments when considering substantive matters below.

13. CCML was incorporated on 10 September 1985. The long leaseholders of the Apartments ("the Leaseholders") hold a £1 ordinary A share in respect of each residential apartment ("the A Shares") and Realreed holds one £2 ordinary share ("the B Share"). The voting rights attaching to the shares are such that the holders of the A Shares between them have 25% of the voting rights and the holder of the B Share (and so Realreed) has the remaining 75%. CCML's accounts show that, as at 31 December 2021, the allotted, called up and fully paid share capital was 655 A Shares and 1 B Share, that none of the shares give a right to fixed income, and that (aside from the difference in voting rights) all shares rank *pari passu*. CCML's Articles of Association provide that, when the leasehold of the respective apartment is transferred, the respective A Shares are also to be transferred to such new Leaseholder. For completeness, we note that the Leaseholders are referred to as "Dwellingholders" in the Articles of Association.

14. The Apartments' leases (together "the Leases") are broadly similar. We were referred to the lease for Apartment 761 dated 21 September 1987 ("the Sample Lease") and were invited by both parties to treat it as typical of the Leases for all the Apartments, save for the named landlord prior to 16 May 1989 being CCDL and thereafter being Realreed. We agree with this approach, as later changes to the Leases do not materially alter the terms of relevance to these Appeals. This Sample Lease includes CCML as a party (referred to as "the Management Company"), which was the case for all the other Leases, irrespective of whether the landlord was CCDL or Realreed. To avoid confusion, we refer to the landlord as "Realreed" to denote Realreed or its predecessor in title, CCDL, irrespective of the identity of the landlord at the time of entering into the respective Lease.

15. The Sample Lease includes the following:

> "WHEREAS:
>
> A. In this Lease unless the context otherwise requires:
>
> ...
>
> (ix) "the Percentage" means 0.107 per centum per annum.
>
> ...
>
> D. The Landlord has previously granted Leases of or intends hereafter to grant Leases of Apartments within Chelsea Cloisters other than the demised premises and the Landlord has in every Lease imposed and intends in every future Lease to impose the restrictions set forth in the Fifth Schedule hereto to the intent that any Lessee for the time being of any Apartment within Chelsea Cloisters entitled under such a Lease may be able to enforce the observance of the said restrictions by the owners and occupiers for the time being of the other Apartments.
>
> NOW THIS DEED WITNESSETH as follows:
>
> ...
>
> 2. The Lessee HEREBY COVENANTS with the Landlord and the Management Company and separately with each of them to observe and perform the covenants conditions and restrictions specified in the Fifth and Sixth Schedules hereof.

3. The Management Company HEREBY COVENANTS with the Landlord and separately with the Lessee to observe and perform the covenants and obligations specified in the Seventh Schedule hereto.

4. The Landlord HEREBY COVENANTS with the Lessee and separately with the Management Company to observe and perform the covenants and obligations specified in the Eighth Schedule hereto.

5. The Landlord HEREBY GRANTS unto the Management Company its servants agents and all others authorised by it full and free right to enter into and upon any part of Chelsea Cloisters and the land described in the First Schedule hereto which is not demised or the subject of a tenancy for the purpose of fulfilling the covenants and obligations specified in the Seventh Schedule hereto

PROVIDED THAT:

(i) except in the case of an emergency when no notice shall be required the Management Company shall give to the Landlord's London Agents ten days previous notice in writing before entering into or upon any part of Chelsea Cloisters or the land described in the First Schedule hereto which is occupied for commercial purposes.

(ii) the Management Company shall at its own expense make good all damage occasioned during the exercise of the rights hereby granted and will indemnify and keep indemnified the Landlord against any damages losses claims demands proceedings suits or actions occasioned by or in any manner arising out of the exercise of such rights as aforesaid.

6. PROVIDED ALWAYS AND IT IS HEREBY MUTUALLY AGREED AND DECLARED as follows: -

(i) If any rents or service charges hereby reserved or any part thereof shall be unpaid for twenty one days after the same shall have become due (whether any formal demand therefor shall have been made or not) or if any of the covenants obligations or restrictions on the Lessee's part herein shall not be performed or observed it shall be lawful for the Landlord or any person authorised by it any time thereafter to re-enter the demised premises or nay part thereof in the name of the whole and to repossess and enjoy the same and thereupon this demise shall absolutely determine but without prejudice to any rights of action or remedy of the Landlord in respect of any breach or non-observance of the covenants on the part of the Lessee herein contained.

(ii) If the Management Company shall at any time hereafter make default in the performance and observance of any of the covenants or obligations imposed upon it and specified in the Seventh Schedule hereto or if the Management Company shall enter in to liquidation whether compulsory or voluntary save for the purposes of reconstruction or amalgamation the Landlord will undertake the performance of all or any of the covenants and obligations imposed upon the Management Company hereunder but without prejudice to any other right or remedy of the Landlord against the Management Company or the Lessee or any other person and the expenses thereof shall constitute a debt due from the Management Company to the Landlord and shall be repaid by the Management Company on demand or in lieu thereof and after notice in writing given by the Landlord to the Lessee the Lessee shall pay to the Landlord all sums due to the Management Company pursuant to the Sixth Schedule hereto until further notice which sums shall then be construed as rent due to the Landlord hereunder the purposes of Clauses 1 and 6(i) hereof.

16. The fourth schedule to the Sample Lease provides for various exceptions and reservations out of the demise. These include a right of entry for Realreed and CCML on notice (save for emergency) for the purpose of carrying out their covenants and obligations under the Sample Lease.

17. The fifth schedule to the Sample Lease provides restrictions to be observed by the Leaseholders. These include the permitted use, noise, and a prohibition on pets.

18. The sixth schedule to the Sample Lease provides for covenants and obligations to be observed and performed by the Leaseholder. Paragraph 1 comprises covenants with Realreed, including repairing obligations in respect of the demised apartment. Paragraph 2 comprises covenants with CCML, including provisions as to the payment of the service charge, the calculation of the service charge, and to observe and perform the restrictions in the fifth schedule and any other restrictions imposed by CCML with the consent of Realreed.

19. The seventh schedule to the Sample Lease provides for covenants and obligations to be performed by CCML. These are entered into with Realreed and the Leaseholders and include repairing obligations ("to repair and keep in a good and substantial state of repair maintenance and decoration and where necessary to renew") in respect of the exterior and structure of Chelsea Cloisters, common parts and any part of Chelsea Cloisters not for the time being comprised in any apartment or commercial unit.

20. The eighth schedule to the Sample Lease provides for covenants by Realreed and with the Leaseholders and CCML.

21. CCML provides the management services required of it by the Leases. Realreed also carries out work in respect of Chelsea Cloisters, but this relates to areas not demised by the Leases and areas which are not CCML's responsibility. CCML and Realreed employ staff on a joint basis to carry out work but these and associated costs are apportioned between the two companies depending upon the role. Where necessary, inter-company transfers are made in order to reflect the correct allocation between companies. This includes service charges in respect of the apartments which both CCML and Realreed treated Realreed as being the Leaseholder, such as apartment 947 (although in 2019 CCML began formally invoicing Realreed in this regard).

22. As at the date of Mr Reilly's witness statement, the position was that 65% of the costs of employees working in the maintenance department were allocated to CCML, all costs of employees working on "front of house" were allocated to CCML, and 33% of the costs of most of the employees in the finance department were allocated to CCML. The building manager was also jointly employed by CCML and Realreed, but his costs were all allocated to CCML. Mr Reilly said during his evidence in chief that the precise allocations had changed but did not set out what the updated percentages were.

23. The building manager has responsibility for repairs and maintenance at Cheslea Cloisters and is the point of contact for the Leaseholders if they have any repair and maintenance issues. He also leads a team of maintenance staff. CCML also pays for building materials for works to be carried out. If the building manager is not able to arrange for repairs and maintenance to be carried out in house, he will instruct contractors to undertake the work, who invoice (and are paid by) CCML.

24. CCML is not profit-making. Its costs and expenses are all recharged to the Leaseholders in accordance with the percentage in the respective Lease (which is itself calculated according to the size of the apartment or its position within Chelsea Cloisters). The service charges are paid on account twice per year. CCML discharges the costs that it incurs in providing repair

and maintenance from the sums held on account and any surplus is treated by CCML as held on trust for the Leaseholders.

25. We were shown various sample invoices from CCML to Leaseholders which are said to be and (in the absence of challenge or alternative evidence) which we accept were typical of CCML's approach. For example, an invoice dated 9 June 2022 charged the Leaseholder of Apartment 4 the sum of £860.14 for the period from 24 June 2022 to 29 September 2022. This was not accompanied by a breakdown of the charges. An invoice dated 10 December 2021 charged the Leaseholder of Apartment 26 the sum of £1,227.13 as the first half of the total amount payable on account for the year of £2,454.25. This was accompanied by a breakdown showing that the total amount payable was calculated as 0.107% of the anticipated expenditure of £2,293,695. The breakdown also showed that this anticipated expenditure comprised the following items: payroll (£948,769), staff costs (£11,444), IT and office supplies (£21,656), electricity (£142,807), heating (£223,065), repairs and maintenance (£198,524), security and fire protection including fire doors (£262,148), legal and professional (£20,000), audit and accountancy (£16,103), insurance (£107,514), cleaning and refuse collection (£39,098), council tax and miscellaneous expenses (£32,567), general management fee (£220,000), and a sinking fund (£50,000).

26. CCML was not VAT registered prior to the Registration Decision and so it follows that it did not charge any output tax on the supplies of its services and did not recover any input tax on its purchases. This was because CCML took the view that it was providing its supplies to the Leaseholders rather than to Realreed as freeholder.

27. By a letter dated 10 January 2020, HMRC asked CCML for its position as to whether CCML should be VAT registered. CCML's chartered accountants, Mazars LLP ("Mazars") responded by a letter dated 6 March 2020, stating that CCML treats its supplies relating to the maintenance and upkeep of Chelsea Cloisters as exempt from VAT by virtue of ESC 3.18. Further correspondence passed between HMRC and Mazars, which included further debate as to the applicability or otherwise of ESC 3.18.

28. The Liability Decision was made by a letter from Officer Miah dated 14 March 2022. In essence, HMRC were of the view that ESC 3.18 did not apply because it was not connected to an interest in land and that CCML was fulfilling its obligations to Realreed as freeholder rather than making supplies to the Leaseholders. CCML requested a review of the Liability Decision, which resulted in Officer Miah's decision being upheld by a letter dated 23 June 2022.

29. By an email dated 12 May 2023, HMRC informed Mazars that CCML was now VAT registered and stated as follows:

> "As per the VAT1 your client selected the following VAT stagger: Jan, April, July, Oct.
>
> Therefore, the first return (the long return) will be due by 7 June 2023 which should cover the VAT from 01 November 2018 to 30 April 2023.
>
> It is noted that there is ongoing litigation on whether CCML should be VAT registered but going forward HMRC's expectation is that CCML submits their first return (long return) and pays any VAT owed as normal. If CCML submit the first return and are unable to pay the VAT then a hardship application can be made.
>
> If CCML fail to render a return, then a VAT assessment will be raised in accordance.
>
> Obviously depending on the outcome of the appeal if in favour of you[r] client then any VAT paid now by CCML will be reversed."

30. CCML submitted a VAT return on 7 June 2023 for the long period from 1 November 2018 to 30 April 2023, resulting in net VAT due to HMRC in the sum of £970,183.31. This, and further returns, were filed without prejudice to CCML's position that CCML should not have been compulsorily registered for VAT.

31. CCML and Realreed formed a VAT group, which was approved by HMRC on 7 September 2023 with effect from 7 June 2023.

THE APPEALABLE DECISIONS

32. As set out above, a discrete issue arises as to whether the VAT Return Direction is an appealable decision (there of course being no dispute that the Liability Decision and the Registration Decision are appealable decisions, as distinct from the dispute as to our jurisdiction to determine various of the grounds of appeal raised).

Submissions

33. Mr Beal KC and Mr Lowenthal submitted that the VAT Return Direction is an appealable decision because the consequence was that CCML was obliged to file a return declaring VAT to be due on the assumption that the Liability Decision and the Registration Decision were correct. If CCML had not complied, HMRC would have raised assessments and CCML would have been exposed to the risk of penalties. As such, the appeal may be brought under section 83(1)(b) of the Value Added Tax Act 1994 ("VATA 1994").

34. Miss McArdle submitted that the VAT Return Direction was not an appealable decision. No legislation grants a right of appeal against this. Instead, it was a consequence of the Registration Decision and, in particular, the backdating of the registration.

Discussion

35. We find that the VAT Return Direction was not an appealable decision. This is for the following reasons.

36. First, sections 83(1)(a) and (b) of VATA 1994 provide as follows:

> "83. Appeals
>
> (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters –
>
> (a) the registration or cancellation of any person under this Act;
>
> (b) the VAT chargeable on the supply of any goods or service or, subject to section 84(9), on the importation of goods."

37. The VAT Return Direction was not itself the registration of CCML for VAT for the purposes of section 83(1)(a) or a decision as to the VAT chargeable on CCML's services for the purposes of section 83(1)(b). We find that, on its proper construction, HMRC's email was not a freestanding decision (or, indeed, a decision at all). It did no more than to explain HMRC's stance as to the consequences of the Liability Decision and the Registration Decision and CCML's selection of the months for the VAT stagger. It did not create any liability and did not change CCML's rights and obligations.

38. Secondly, the VAT Return Direction itself envisages that the need for a VAT return (and whether any payment should be reversed) will be determined by the outcome of CCML's appeal against the Liability Decision and the Registration Decision. This reinforces our finding that the VAT Return Direction is not a freestanding decision and instead sets out the consequences of the Registration Decision.

39. Thirdly, it is right that the consequence of not acting in accordance with HMRC's email may well have been that HMRC would have issued an assessment and potentially penalties.

Those would have been appealable decisions in their own right and would not require (or allow for) appeals against the VAT Return Direction.

40. It follows that we dismiss the appeal against the VAT Return Direction at this stage upon the basis that it is not an appealable decision and so we have no jurisdiction in respect of it.

41. Insofar as we are incorrect in this regard, our findings below in respect of the Liability Decision and the Registration Decision are equally applicable to the VAT Return Direction notwithstanding that we make no further reference to the VAT Return Direction. This is because the VAT Return Direction (even if, contrary to our findings, it is a freestanding decision) is a direct result of the Liability Decision and the Registration Decision and so would stand or fall with those decisions. We also note that CCML does not take any other issue with the VAT Return Direction such as the length and dates for the long return referred to in it.

THE LAND EXEMPTION AND THE EXTRA STATUTORY CONCESSION

42. Section 31 of VATA 1994 provides that:

> "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9."

43. The relevant part of Item 1 of Group 1 of Schedule 9 to VATA 1994 provides the following exemption (the remaining parts of which exclude various interests or rights which are not of relevance in the present case or which relate to land in Scotland):

> "The grant of any interest in or right over land or of any licence to occupy land ...."

44. It is common ground that the supplies are not exempt supplies when looking only at the statutory exemptions. This is because both parties accept (albeit for different reasons) that CCML is not itself granting any interests in or rights over land and is not itself granting any licence to occupy land.

45. HMRC recognised that the strict application of the exemption gave rise to the anomaly that the VAT treatment of service charges paid by an occupier depended upon the tenure of that occupation. The supplies giving rise to the service charges would be exempt if made to (and paid for by) leaseholders pursuant to a lease but would be standard rated if made to freeholders and so not as consideration for any supply of land. This was addressed as follows in HMRC's Business Brief 3/1994, dated 15 February 1994:

> "An Extra-Statutory concession, effective from 1 April 1994, will exempt various mandatory service charges paid by the occupants for residential property from VAT.
>
> The charges exempted are for the upkeep of the common areas of caretakers or people performing a similar function connected with the day to day running of that estate of dwellings or blocks of flats, and the general maintenance of the exterior of the block of flats of individual dwellings (e.g. painting and window cleaning) if the residents cannot refuse this.
>
> *Removal of anomaly*
>
> Service charges relating to the upkeep of the common areas of dwellings, or the common areas of a domestic dwelling if it is multi-occupied, are exempt from VAT under the general exemption for land, if they are paid by leasehold owners of property under the terms of the lease, or by people renting the property, and these charges are paid to the lessor or the ground landlord.
>
> Previously charges paid by freehold owners of domestic property, and by anyone for services which are not supplied by or under the direction of the

lessor or ground landlord, have been taxable. This was because they could not be consideration for any supply of land.

This has led to an anomaly for the occupants of residential property, since the liability of the service charges they pay towards the upkeep of the common area does not depend on the services provided, but instead on the tenure of their residence and on the status of the supplier.

The new concession means that the liability of the service charge will no longer depend upon the tenure of the residence or on the status of the supplier. What will be important is whether each resident is obliged to accept the service because it is supplied to the estate of buildings or blocks of flats as a whole.

Optional services provided personally to a resident, such as carpet cleaning and shopping continue to be taxed in their own right."

46. The extra statutory concession referred to in this Business Brief, and which is at the heart of the dispute within these Appeals, is ESC 3.18. The version relied upon by the parties in respect of the relevant period of time is contained within a printout of VAT Notice 48 dated 18 October 2022 and provides as follows (any changes since being to correct typographical errors and removing both the link to the current legislation and the reference to the previous legislation):

"3.18. VAT: exemption for all domestic service charges.

The concession exempts form [sic] 1 April 1994 all mandatory service charges or similar charges paid by the occupants of residential property towards the upkeep of the dwellings or block of flats in which they reside and towards the provision of a warden, caretakers, and people performing a similar function for those occupants. The concession does not exempt service charges paid in respect of holiday accommodation as defined in paragraph 1(e) of and Notes 11 13 [sic] to Group 1, Schedule 9, VAT Act 1994 (http://www.legislation.gov.uk /ukpga/1994/23/contents) (formerly paragraph 1(d) of and Notes (10) (10A) and (10B) to Group 1, Schedule 6, VAT Act 1983)."

47. On 29 May 2012, HMRC published guidance in VAT Notice 742. This was then amended prior to September 2018 and then again in 2020. As the amendments in 2020 are not material to the present appeal, we set out below the guidance in its form as at September 2018.

"1.2. What's changed

Section 12 has been updated to provide improved guidance on the use of Extra Statutory Concession (ESC) 3.18 VAT: exemption for all domestic charges.

...

12. Service charges and residential accommodation

12.1 The basic position

Service charges payable by a holder of a residential lease or tenancy are further payment for an exempt supply of an interest in land by the landlord to the leaseholder or tenant. These periodic charges represent the cost to the landlord of fulfilling his contractual obligations, including the provision of various services, as required under the lease or tenancy agreement.

Landlords usually contract out the supply of goods and services they are contractually obliged to provide to an occupant. They will also allow a property management company, or someone similar to collect the periodic charges from the occupant on their behalf. This supply by the property

management company or similar is a taxable supply to the landlord, not to the leaseholder or tenant.

A property management company cannot treat supplies made direct to an occupant of a building (whether a leaseholder, tenant or freeholder) as exempt supplies, see paragraph 12.4.

In the case of supplies made in Scotland see paragraph 12.6.

12.2. If you provide services to freehold owners of residential accommodation

If you are a landlord and provide services to a freehold owner of residential accommodation, your supply is taxable at the standard rate of VAT because there is no actual supply of residential accommodation being made to the freehold owner.

However, if you are obliged to provide any of the following to the freeholder:

(a) upkeep of the common areas of a housing estate, such as paths, driveways and communal gardens

(b) upkeep of the common areas of a block of flats, such as lift maintenance, fire alarms, corridors, stairwells and general lounges, and so on

(c) general maintenance of the exterior of the block of flats or individual dwellings, such as painting

(d) provision of an estate warden, house manager or caretaker

on an estate shared by leaseholders and freeholders, you can apply an extra-statutory concession to treat these supplies to freehold owners as being exempt from VAT - see paragraph 3.18 of VAT Notice 48: Extra Statutory Concessions.

If you do choose to apply this concession and treat the periodic charges as exempt, your right to recover any associated input tax may be restricted. This may also have an impact on your eligibility to remain registered for VAT.

A property management company is not entitled to use the concession to treat supplies made direct to a freehold owner as exempt, see paragraph 12.4.

12.3. Landlord or property management company supplying additional services to occupants

If, as a landlord, you make a separate charge for un-metered supply of gas and electricity used by occupants, this should be treated as further payment for the main supply of exempt domestic accommodation. However, if you operate a secondary credit meter this is a separate supply of fuel and power so the charges to the occupants for the gas and electricity are subject to VAT at the reduced rate.

Optional services supplied by landlords or property management companies direct to occupants, (such as shopping, cleaning or internal decoration of a dwelling), are fully taxable. These supplies are not normally linked to the grant of a residential lease or tenancy and the supplier should account for the relevant tax.

12.4 Services to occupants on behalf of a landlord, as part of the landlord's contractual obligations

If you, as a property management company or similar, agree to collect payments from the occupants of a property, on behalf of the landlord, the following will be consideration for a taxable supply of management services to the landlord, any monies:

- you collect from occupants on behalf of the landlord and retain to cover the cost of your services
- paid direct to you by the landlord for your services

You cannot:

- treat your own supplies as being exempt to a leaseholder or tenant
- use the extra statutory concession described in paragraph 12.2, to treat supplies made direct to a freehold owner as exempt

You may also purchase goods and services that are directly related to the landlord's contractual obligations to the occupant. Any costs incurred should be passed back to the landlord in one of 2 ways:

(a) Recharge the gross costs to the landlord using the invoicing procedures outlined in section 23 of the VAT guide (VAT Notice 700). This means that any VAT recovered by you on these costs must be balanced by an onward charge to the landlord in the same accounting period, or

(b) treat the costs you have incurred on behalf of the landlord as 'disbursements' for VAT purposes. This means you do not charge VAT on these costs when you invoice the landlord, and cannot claim back any VAT on them. For more information on disbursements and the conditions needed to meet them, read section 25 of the VAT guide (VAT Notice 700).

..."

48. HMRC's policy towards the application of ESC 3.18 was supplemented with effect from 1 November 2018 as follows in "Revenue and Customs Brief 6 (2018): VAT exemption for all domestic service charges" published on 7 September 2018:

"3. Background

Customs and Excise Brief 03/94 issued February 1994 introduced ESC 3.18. The concession applies only when residential leaseholders and freeholders pay a mandatory service charge for the same common services on a common estate. Its purpose is to allow the same VAT treatment of these service charges for all of those living on the estate.

The concession came into effect from 1 April 1994. If a landlord is contractually obliged to provide services to all occupants of a common estate, they may choose to use the concession to treat these supplies, when made to a freeholder, as exempt from VAT.

Leaseholders and tenants are exempt from paying VAT on these charges as the charge is directly linked to an exempt supply of an interest in land. Freeholders do not have this link, so for them, these charges are normally taxable at the standard rate of VAT.

Landlords often use property management companies or companies offering similar services, to fulfil their legal obligations to the occupants of an estate. The property management company obtains goods and services on behalf of the landlord and charges a management fee for providing such a service. This management fee is taxable at the standard rate of VAT and is not covered by ESC 3.18. Property management companies, or similar, cannot use the concession.

The Upper Tribunal (Lands Chamber) decision of 15 September 2015 in the case of Mrs Janine Ingram (2015) UKUT 0495(LC) confirmed HMRC's view of how the concession operates.

HMRC knows of a number of property management and similar service companies who provide goods and services to landlords of residential buildings, but are not correctly accounting for VAT. These companies cannot use the concession to:

- treat their supplies as if made to the occupant rather than the landlord
- recharge costs borne on behalf of the landlord, back to the landlord
- recharge staff or personnel costs to the landlord

..."

49. HMRC also published a VAT information sheet entitled "Applying the correct VAT liability on residential domestic service charges (VAT information sheet 07/18)" which includes the following:

"2.2. Services covered by the concession

The services covered are the:

- upkeep of the common areas of the estate, dwellings or blocks of flats where the occupants live and where these charges are mandatory for all the occupants
- provision of a warden, superintendent, caretaker or those performing a similar function connected with the day-to-day running of that estate, dwelling or blocks of flats, for those occupants
- general maintenance of the exterior of a block of flats or individual dwelling where the residents cannot refuse this

This concession does not apply to any management fees charged by a management company, or similar, for its services.

2.3. Mrs Janine Ingram (2015) UKUT 0495 (LC)

The Upper Tribunal (Lands Chamber) released a decision on 15 September 2015 confirming that the concession applies in the circumstances outlined in paragraph 2.1.

The decision also confirmed that if a landlord is contractually obliged to provide services to the occupant of a property, and uses a property management company or similar, to provide these services, the property management company cannot use the concession.

This is because the management company is providing a standard-rated supply of services to the landlord, not the occupant, even though they're collecting payment on behalf of the landlord directly from the occupant (see sections 3 and 4).

The Upper Tribunal was content that paragraphs 12.2 and 12.4 of Land and property (VAT Notice 742), as extant at that time, were consistent with the original Customs and Excise Brief 03/94. However, it was considered that the wording could be clearer.

This information sheet and the updated section 12 of Land and property (VAT Notice 742) (https://www.gov.uk/guidance/vat-on-land-and-property-notice-742#section12), are intended to provide that clarity.

...

4. Property management companies or similar

Residential landlords will usually engage a management company, or similar, to enable them to fulfil their contractual obligations to the occupant. If you are such a management company, you will deal directly with both the occupants of the building and with the landlord.

(a) Dealings with the occupants of a building by you on behalf of a landlord Where a landlord allows you to collect periodic payments of mandatory service charges on their behalf, from the occupants of a building, the monies you collect and retain for your use, together with any payments received from the landlord are consideration for your supply of services to the landlord. This is a taxable service you provide to the landlord, so ESC 3.18 does not apply.

(b) Services you provide on behalf of the landlord You may pay for the goods and services required by the landlord (and you may use the monies collected on behalf of the landlord from the occupants of the building to do so). You then have 2 choices:

1. if you recover input tax on these goods and services which you acquire on behalf of the landlord, you should use the invoicing procedure as outlined in section 23 of the VAT guide (VAT Notice 700) (https://www.gov.uk/guidance /vat-guide-notice-700#section23) and charge the same amount of tax to the landlord in the same VAT accounting period, or

2. you can treat the recharge of the costs you incur on behalf of the landlord, as a disbursement providing the relevant conditions are met - for more information on disbursements, see section 25 of the VAT guide (VAT Notice 700) (https://www.gov.uk/guidance/vat-guide-notice-700#section25).

...

6. Common errors

HMRC has identified the following common scenarios where people have failed to apply ESC 3.18 correctly:

(a) Property management companies, or similar treating their supply as being to the occupant, rather than the landlord

As outlined in sections 3 and 4, if you’re a management company, or similar, providing services to the landlord so that their contractual obligations to the occupants are met, then this supply is from you to the landlord and is taxable at the standard rate of VAT.

You cannot treat your supplies as VAT exempt supplies, made to the occupant. So ESC 3.18 does not apply.

This type of error usually arises because management companies wrongly assume that as they’re collecting periodic payments directly from the occupant, they must be making their supply to the occupant and not the landlord. However, the monies collected are contractual payments due to the landlord for their supply.

Any collected monies kept by management companies, or similar, and not used to meet the contractual obligations of the landlord, will be payment for the services provided by the management company, for acting on behalf of the landlord. These services are taxable at the standard rate of VAT.

(b) Not recharging costs borne on behalf of the landlord back to the landlord

> As outlined in section 4(b), If you're a management company, or similar, and bear the initial cost of the goods or services acquired on behalf of the landlord, you can recover these costs from the landlord.
>
> Some management companies however, are recovering input tax on bought-in supplies and then recharging them directly to the occupant exempt from VAT. They have been relying on ESC 3.18 to do so and this has led to their fees also being incorrectly treated as exempt.
>
> (c) Supply of staff
>
> As outlined at section 5, the recharge of staff or personnel costs by a management company, or similar, is a taxable supply to the landlord. In some cases, management companies have wrongly relied on ESC 3.18 to recharge staff or personnel costs direct to the occupant, exempt from VAT."

JURISDICTION

Legitimate Expectation as a Matter of Domestic Public Law

50. We will deal first with legitimate expectation in the context of domestic public law. By "domestic public law", we mean legitimate expectation which may exist irrespective of any EU law, whether such EU law is now to be treated as part of domestic law or not.

Submissions

51. Mr Beal KC and Mr Lowenthal submitted that the tribunal has jurisdiction to hear and determine public law arguments (specifically as to legitimate expectation) in the Appeals pursuant to section 83(1)(b) of VATA 1994. He referred us to the following case law, noting that there were inconsistencies between the authorities as to the extent to which legitimate expectation could be considered: *KSM Henryk Zeman Sp Zoo v Revenue and Customs Commissioners* [2021] STC 1706, *Oxfam v Revenue and Customs Commissioners* [2009] STC 686, *Noor v Revenue and Customs Commissioners* [2013] STC 998, *C&E Comms v National Westminster Bank* [2003] STC 1072, *RT Rate v HMRC* [2020] UKFTT 0392 (TC), *Queenscourt Ltd v HMRC* [2024] UKFTT 00460 (TC), *Metropolitan International Schools Ltd v Revenue and Customs Commissioners* [2019] 1 WLR 5473, *Trustees of the BT Pensions Scheme v Revenue and Customs Commissioners* [2016] STC 66, *Hok v Revenue and Customs Commissioners* [2013] STC 225, *Birkett v HM Revenue & Customs* [2017] UKUT 0089 (TCC), and *Cantina Levorato Sprl v HMRC* [2021] UKFTT 461 (TC).

52. Mr Beal KC and Mr Lowenthal rightly also drew our attention to *Caerdav v HMRC* [2023] UKUT 00179 ("*Caerdav*"), in which the Upper Tribunal held that section 83(1)(b) VATA 1994 did not give the Tribunal the jurisdiction to consider or determine legitimate expectation arguments. They said that *Caerdav* was not binding on us as it was to be distinguished (and that legitimate expectation can be considered) because it related to correspondence from and with HMRC rather than extra statutory concessions. In particular, they make the following points:

> (1) Extra statutory concessions are a special species of discretion which Parliament authorises HMRC to make. They are an exercise of HMRC's care and management discretion pursuant to sections 5 and 9 of the Commissioners for Revenue and Customs Act 2005 and paragraph 1 of Schedule 11 to VATA 1994.
>
> (2) HMRC were also exercising a discretion to register CCML for VAT from a given date.
>
> (3) "Chargeable" is the same as payable. Tax exempted by an extra statutory concession is neither chargeable nor payable.

(4) "With respect to" within section 83(1)(b) is not restricted to a statutory basis for the charge or payment.

(5) The Upper Tribunal (Land Chamber) applied ESC 3.18 in *Janine Ingram v Church Commissioners for England* [2015] UKUT 495 (LC) ("*Ingram*").

(6) Allegations that VAT is not chargeable by virtue of an extra statutory concession are different to other public law matters such as procedural fairness or non-discrimination. As with agreements as to the amount of credit for input tax to be given, the application of an *intra vires* extra statutory concession relevant to the chargeability of VAT under the VAT legislation. Mr Beal KC and Mr Lowenthal rely upon *Noor v Revenue and Customs Commissioners* [2013] STC 998 ("*Noor*") in this regard.

(7) The drafting and application of extra statutory concessions goes to the amount of tax due rather than whether a specific amount of tax was payable by a particular taxpayer, relying upon *Xerox v HMRC* [2022] UKFTT 00092 (TC) ("*Xerox*").

53. Miss McArdle submitted that the Tribunal does not have the jurisdiction to consider legitimate expectation. She submitted that *Caerdav* is binding upon us and that CCML are unable to distinguish it. Whether VAT is chargeable depends upon whether the requirements for chargeability are met not the discretion as to whether a concession should be granted. She responded to Mrs Beal KC and Mr Lowenthal's submissions as follows:

(1) Extra statutory concessions are not to be treated differently to any other legitimate expectation. This is reinforced by the Court of Appeal's judgment in *Trustees of the BT Pension Scheme* v *Revenue and Customs Commissioners* [2016] STC 66 ("*BT Pension Scheme*").

(2) In the context of section 83(1)(b) of VATA 1994, whether the conditions for the charge arise is different to whether HMRC are required to apply their policy of not enforcing the charge.

(3) Miss McArdle relied upon *Whitney v Commissioners for the Inland Revenue* [1926] AC 37 for the proposition that whether tax is chargeable is different to that of the enforcement of payment. "With respect to" adds nothing to the section 83 list.

(4) *Ingram* does not assist in relation to jurisdiction because the Lands Chamber was considering a different matter based upon different legislation.

(5) Agreements as to the tax due are different to extra statutory concessions.

(6) *Xerox* adds nothing because it is dealing with an entirely different context.

Discussion

54. We find that we do not have the jurisdiction to consider legitimate expectation as a matter of domestic law in the circumstances of the Appeals. This is for the following reasons.

The Statutory Context

55. The proper approach is to consider the statutory context in order to determine whether the appeal is against HMRC's exercise of discretion or alternatively against whether the prescribed conditions for a charge have arisen and the amount of such charge. This approach is set out by the Upper Tribunal as follows in *R & J Birkett v HMRC* [2017] UKUT 89 (TCC) at [30] to [33]:

> "[30] The principles that we understand to be derived from these authorities are as follows:

(1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].

(2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].

(3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.

(4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.

(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction.

[31] Some cases are relatively straightforward. *Hok* is a good example. The appeal to the FTT was against fixed penalties of £100 per month. The FTT's jurisdiction was given by s. 100B TMA (set out above at paragraph [27]). That only entitled it to determine if the penalties had been incurred and if the amounts were correct. The issue which was sought to be raised (was it unfair of HMRC to levy the penalties because of delay?) did not go to either issue. Hence the FTT had no jurisdiction to consider it.

[32] In other cases the Court may have to construe the statutory provision conferring jurisdiction on the FTT to decide the scope of it. An example is *BT Trustees*. Here the appeals were against closure notices. The FTT's jurisdiction was given by para 9(7) of sch 1A TMA (set out above at paragraph [29]). That entitled the FTT to determine if the claims for tax credits "should have been allowed". The Court of Appeal held that that was limited to the question whether the claims should have been allowed as a matter of tax law, and as not extending to the question whether the taxpayers should have been allowed the benefit of the extra statutory concession. That must on analysis

have been because that was the true construction of para 9(7). Similar decisions have been made in relation to other cases where taxpayers have sought to argue that they should have had the benefit of an extra statutory concession: examples to which we were referred included *Prince v HMRC* [2012] UKFTT 157, *Shanklin Conservative & Unionist Club v HMRC* [2016] UKFTT 0135 (TC).

[33] However we do not read the Court of Appeal in *BT Trustees* as having laid down any general rule as to the FTT's jurisdiction applicable in all cases. It is noticeable that in relation to Sales J's judgment in *Oxfam* they said (at [141]):

> 'We have heard no argument about s. 83(1) VATA and therefore express no view about the correctness or otherwise of the judge's interpretation of that section.'

That confirms that they viewed the question whether Sales J was correct on s. 83(1) VATA as a question of interpretation of that section. His view that s. 83(1) was wide enough to include the question of public law argued before him (had HMRC acted in breach of a legitimate expectation?) is to be contrasted with the view of the UT in *Noor* that the jurisdiction of the FTT under s. 83(1) was limited to the amount of input tax as a matter of the VAT legislation. Like the Court of Appeal in *BT Trustees* we do not propose to express a view on the jurisdiction of the FTT under s. 83(1), which does not arise in the present appeal; but it can be seen that what is in issue is the correct interpretation of that provision."

56. As set out above, section 83(1)(b) of VATA 1994 provides for an appeal to the FTT in relation to "the VAT chargeable on the supply of any goods or service or, subject to section 84(9), on the importation of goods". In *Caerdav* the Upper Tribunal held that there was no discretion involved in respect of a decision relating to the "importation of goods" element of section 83(1)(b). The Upper Tribunal stated as follows at [152] to [155]:

"[152] The starting point is therefore that appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the FTT. However, we, like the FTT, accept that the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depending on the statutory provisions under consideration.

[153] Thus, the statutory context is key, as the UT in *Henryk* explains.

[154] In this appeal, the taxpayer appeals under s.83(1)(b) VATA, which permits appeals to the FTT with respect to "the VAT chargeable… on the importation of goods from a place outside the member States." Like the right of appeal under s.83(1)(c) VATA, the VAT chargeable on the importation of goods is not a matter of discretion but is mandatory and in an appeal the FTT is concerned with whether the conditions prescribed for a charge to arise under the legislation are present and the amount of the charge.

[155] This is in contrast to the manner in which s.83(1)(p) VATA provides a right of appeal against the discretion of HMRC whether to make an assessment under section 73(1). Hence there is a distinction drawn between subsections 83(1)(c) and (p) VATA set in the authority on which the Appellant relies – *Henryk*:

> 'We note one point immediately, which is that on the face of it, the scope of section 83(1)(p) is broader than the scope of section 83(1)(c) (the provision in issue both in *Oxfam* and *Noor*), because an appeal lies only with respect to the amount of an assessment but instead with

> respect to "an assessment… under section 73(1)." And the wording of section 73(1), on the face of it, is permissive not mandatory – 'the Commissioners may assess the amount of VAT due to the best of their judgment and notify it.'

> There is a discretion inherent in s.83(1)(p) VATA read together with section 73, which were the statutory provisions considered in *Henryk* which led it to decide public law arguments could be pursued in the FTT appeal. However, there is no discretion conveyed by subsections 83(1)(b) or (c) VATA which are the mandatory provisions concerning the appeals applicable in this case and in *Noor* respectively."

57. In *Caerdav,* the lack of jurisdiction is therefore because the right of appeal is limited to the VAT chargeable, and the VAT which is chargeable on the importation of goods is mandatory rather than being a matter of discretion. Although *Caerdav* deals with section 83(1)(b), it relates to a different source of the charge. It is therefore only binding on us to the extent that the Upper Tribunal held that section 83(1)(b) grants no wider jurisdiction than HMRC had in respect of the underlying decisions. Further, *Caerdav* does not deal with section 83(1)(a).

58. Nevertheless, the outcome in the present case is the same as in *Caerdav* because the liability for VAT on the supply of goods and services is also mandatory rather than being a matter of discretion, as is the requirement to be registered.

59. The chargeability to VAT is mandatory by virtue of section 1(a) of VATA 1994, which provides as follows.

> "(1) Value added tax shall be charged, in accordance with the provisions of this Act
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply) ..."

60. Similarly, registration for VAT is mandatory by virtue of paragraph 1(1) of Schedule 1 to VATA 1994 (in its form at the time of the Registration Decision):

> "1(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule
>
> (a) at the end of any month if the person is UK-established and the value of his taxable supplies in the period of one year then ending has exceeded £85,000; or
>
> (b) at any time, if the person is UK-established and there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed £85,000."

61. We do not accept, therefore, that HMRC was exercising a discretion in registering CCML for VAT or as to the date from which such registration has effect. The obligation to register is mandatory pursuant to paragraph 1(1) of Schedule 1 to VATA 1994 and compulsory registration is the enforcement of that obligation.

Extra Statutory Concessions

62. Extra statutory concessions are not to be treated differently to other forms of legitimate expectation as regards jurisdiction. In *BT Pension Scheme*, the Court of Appeal treated an extra statutory discretion as a form of legitimate expectation. Patten LJ stated as follows at [142] and [143]:

> "[142] The statutory jurisdiction conferred upon the FtT by s 3, TCEA 2007 is in our view to be read as exclusive and the closure notice appeals under Sch 1A, TMA do not extend to what are essentially parallel common law challenges to the fairness of the treatment afforded to the taxpayer. The extra-statutory concession is, by definition, a statement as to how HMRC will operate in the circumstances there specified and its failure to do so denies the legitimate expectation of taxpayers who had been led to expect that they would be treated in accordance with it. We are not concerned as in these statutory appeals with the direct application of the taxing instrument modified, or otherwise, by any relevant principles of EU law. The sole issue in relation to ESC B41 is whether it was fairly operated in accordance with its terms.
>
> [143] We therefore consider that the reasoning of Sales J in *Oxfam v Revenue and Customs Comrs* has no application to the statutory jurisdiction under s 3, TCEA 2007 in the sense of giving to the FtT and the Upper Tribunal jurisdiction to decide the common law question of whether HMRC has properly operated the extra-statutory concession. The appeals are concerned with whether the Trustees are entitled under s 231 to claim the benefit of the credits on FIDs and foreign dividends. Not with what is their entitlement under ESC B41. This reading of TCEA 2007 is strengthened by s 15, TCEA 2007 which gives the Upper Tribunal jurisdiction to decide applications for judicial review when transferred from the Administrative Court. It indicates that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear. There are no similar provisions in the case of the FtT."

63. The Court of Appeal expressed no view about section 83(1) of VATA 1994. However, it follows from *BT Pension Scheme* that extra statutory concessions are to be treated in the same way as other forms of legitimate expectation for this purpose. As such, as we find that we have no jurisdiction to consider legitimate expectation, this includes legitimate expectation said to arise from extra statutory concessions.

The Nature of the Legitimate Expectation

64. The Upper Tribunal state as follows in *Noor* at [87] to [90]:

> "[87] In our view, the FTT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle is correct in his submission that the right of appeal given by s 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation. Within the rubric 'VAT legislation' it may be right to include any provision which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide the point. Thus, if HMRC have power (whether as part of their care and management powers or some other statutory power) to enter into an agreement with a taxpayer and that agreement, according to its terms, results in an entitlement to a different amount of credit for input tax than would have resulted in the absence of the agreement, the amount ascertained in accordance with the agreement may be one arising 'under the VAT legislation' as we are using that phrase. In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s 83. As Mr Mantle puts it, the jurisdiction of the FTT is appellate (ie on appeal from a refusal of HMRC to allow a claim). The FTT has no general supervisory jurisdiction over the decisions of HMRC. That does not mean that under s 83(1)(c) the FTT cannot examine the exercise of a discretion, given to

HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had been exercised reasonably (see eg *Best Buys Supplies Ltd v Customs and Excise Comrs* [2011] UKUT 497 (TCC) at [48]–[53], [2012] STC 885 at [48]–[53]—a discretion under reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which the legislation clearly confers on HMRC. That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers.

[88] In our view, the subject matter of s 83(1)(c) ('the amount of input tax which may be credited to a person') is the input tax which is ascertained applying the VAT legislation. Input tax is a creature of statute under the VATA 1994, reflecting the provisions of, now, EC Council Directive 2006/112 of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p 1) (the principal VAT Directive). Similarly, the crediting of an amount of input tax is a matter of statute. The appellate jurisdiction of the FTT is formulated, in the case of s 83(1)(c), by reference to those concepts. The FTT is not, expressly at least, given jurisdiction under this provision to decide the amount of something which is not input tax and which is not to be credited in accordance with the statutory provisions.

[89] Suppose then that a taxpayer had received express representations from HMRC sufficient to give rise to a legitimate expectation that certain amounts of VAT paid by the taxpayer would be allowed as input tax notwithstanding that those amounts are not input tax for which credit could be given pursuant to the legislation. Suppose that the Administrative Court were prepared to grant a remedy in order to give effect to that legitimate expectation. We are not clear precisely what such a remedy would be, but one thing it could not do would be simply to order that HMRC give credit for the input tax. Take the present case as an example. Obviously the Administrative Court could not declare the VAT on the invoices to be allowable input tax—it clearly was not. Indeed, it would not have been input tax even if Mr Noor had claimed it within the six-month time limit since it would only have been counted (s 24(6)(b)) or treated (reg 111(1)(a)) as input tax. Nor, we consider, could the Administrative Court order HMRC to authorise Mr Noor to treat the VAT on the invoices as if it were input tax for the purposes of reg 111(1): that would fly in the face of reg 111(2). What we think the Administrative Court could do is to order HMRC to treat Mr Noor as entitled to a credit of an amount equal to the VAT on the invoices. But that amount it not itself input tax nor is it treated as input tax. The credit which Mr Noor would receive is not a credit for input tax but is a financial adjustment to give effect to his legitimate expectation. Indeed, it is not a 'credit' within the meaning of the legislation since such a credit is only given for input tax. Instead, it is, as we have described it, a financial adjustment to be reflected in the account between the taxpayer and HMRC.

[90] We can put this point in a slightly different way. The amount of input tax (or of any other VAT which can be treated as input tax) which may be credited to a person is, prima facie, to be determined in accordance with the statutory provisions. If the taxpayer has a legitimate expectation to be credited with input tax of a different amount, he may be given a remedy by the appropriate court or tribunal to reflect that legitimate expectation in financial terms. But that right does not affect what is 'input tax' (or what can be counted or treated under the legislation as input tax eg under s 24 or reg 111) or what can be 'credited' for input tax in accordance with the statutory provisions. The financial adjustment sits outside the amount of 'input tax which may be

> credited' to a person. The FTT has no jurisdiction to effect that financial adjustment since its jurisdiction under s 83(1)(c) relates only to 'input tax which may be credited' to a person."

65. The distinction in *Noor* is therefore between a legitimate expectation as to the amount of credit for input tax (for which there is jurisdiction) and a legitimate expectation as to the amount of something that is not input tax (for which there is no jurisdiction). It is the agreement in accordance with the VAT legislation (including care and management powers and any other statutory powers) which ascertains the amount of credit for input tax and so is brought within section 83(1)(c). However, in the present case, the legitimate expectation contended for is that supplies which are not exempt should be treated as exempt notwithstanding that they are not exempt supplies in accordance with the legislation. In the context of the dichotomy in *Noor*, this is akin to, as the Upper Tribunal put it at [89] "express representations from HMRC sufficient to give rise to a legitimate expectation that certain amounts of VAT paid by the taxpayer would be allowed as input tax notwithstanding that those amounts are not input tax for which credit could be given pursuant to the legislation".

66. It is also of note that the relevant dichotomy here is between the application of mandatory provisions and the exercise of discretion. Mr Beal KC and Mr Lowenthal suggest an alternative dichotomy between where the challenge is that an amount of VAT is not due and where the challenge is that the amount is due but is said to be repayable for an extraneous reason and rely upon the First-Tier Tribunal decision in *Xerox* in which Judge Rachel Short stated as follows:

> "[93] Finally, HMRC suggest that since Xerox cannot rely on s 127 FA 1999 for its interest rate claim, its only claim is in equity or restitution, both of which are outside the remit of this Tribunal. The scope of this Tribunal's jurisdiction, when a claim relating to a tax appeal overlaps with a non-statutory remedy has been reviewed very recently by the Upper Tribunal in its extensive obiter comments in the 2021 *Zeman* decision. The relevant principles which I take from *Zeman* are;
>
> (1) The extent of the Tribunal's jurisdiction is in the first instance a question of statutory construction 'We have no doubt that the nature of the FTT's jurisdiction depends on the proper construction, in the context of the statutory provision to which it relates, of the statutory provision by which it is given' [27].
>
> (2) There is a distinction between cases in which the nonstatutory legal principle concerns the amount of tax due (when nonstatutory principles can be applied) and cases where the nonstatutory legal principle is being used to argue about something other than whether a specific amount of tax was payable by a particular taxpayer. [46] and 's 83(1)(t) … conferred an appeal jurisdiction only where the challenge was that an amount of VAT was not in fact due. It did not confer jurisdiction in a case where the relevant VAT amount was due, but was said to be repayable for an extraneous reason' [48]
>
> (3) The FTT does not have a general supervisory jurisdiction; the question is whether the statutory scheme expressly or by implication excludes the ability to raise a public law defence. [70]. By reference to the VAT legislation under consideration in *Zeman*, this comes down to considering the scope of the Tribunal's jurisdiction 'not by reference to any particular legal regime or type of law, but instead by reference to the subject matter of the subsection'."

67. However, this in fact reinforces the absence of jurisdiction in the present case, as it highlights that the distinction is between situations where there is a dispute as to whether VAT is due (where there is jurisdiction) and situations where there is a dispute as to whether, even though the VAT is due, there is an extraneous reason why it should not be treated as due (where

there is no jurisdiction). It is of note that in *Xerox,* Judge Short was drawing from *Zeman.* The full context of [43] to [48] of the Upper Tribunal's decision in *Zeman* highlights this distinction as follows:

> "[43] In a later case, *HMRC v Abdul Noor* [2013] UKUT 071 (TC), the Upper Tribunal took exactly the opposite view of the same issue under section 83(1)(c), i.e. whether there was jurisdiction on an appeal with respect to "the amount of any input tax which may be credited to a person", to consider a taxpayer's claims based on the public law concept of legitimate expectation.
>
> [44] The Upper Tribunal concluded not. It considered that the right given by 83(1)(c) is in respect of a person's right to credit for input tax "under the VAT legislation". The subject matter of s 83(1)(c) was the "amount of input tax"; input tax was a creature of the statute and the FTT's jurisdiction was formulated by reference to that statutory concept. The claim based on legitimate expectation was not a claim under the VAT legislation.
>
> [45] The Tribunal did not agree with Sales J's view that as a matter of ordinary language in context the words "with respect to" were wide enough to cover any legal question relevant to the issue of the amount of input tax attributable to the taxpayer. Any result of giving effect to the legitimate expectation would not affect the "amount of input tax". It went too far in the context of a section focussed on decisions relating to rights and obligations under the VAT legislation to include a right arising from a legitimate expectation in the words "input VAT" as Sales J's reasoning implicitly required.
>
> [46] This approach – which draws a distinction between determining of the amount of tax due (which falls within the appeal jurisdiction), and other matters (which do not) echoes that in other decisions. An example involving section 83 is *C&E Comms v National Westminster Bank* [2003] EWCA 1822 (Ch), a case involving section 83(1)(t). The Commissioners had invoked the defence of unjust enrichment against the appellant's claim for repayment of VAT, but had not invoked that defence in relation to the claims by other parties. Jacob J considered whether the appellant's complaint of unfair treatment was within the jurisdiction of the tribunal under section 83(1)(t). He concluded not, because the essence of the unfair treatment case was not that the VAT was not due, but that even though it was due, it should be repaid because the appellant's trade rivals had been repaid. That was outwith section 83(1)(t).
>
> [47] Another, earlier example from a different context is *Aspin v Estil* [1987] STC 723. This case concerned a taxpayer who claimed that he had relied on information given to him by the Revenue over the telephone that certain income would not be subject to tax in the United Kingdom. He argued that as a result it was unfair and oppressive for the Revenue to assess him to tax on the income. The context was a claim for income tax where section 31 TMA 1970 provided for an appeal against an assessment, but section 50 provided that if it did not appear to the tribunal that the appellant was overcharged or the assessment excessive the assessment should "stand good." The Court of Appeal held that the General Commissioners' jurisdiction was only "to see whether the assessment has been properly prepared in accordance with [the] statute". Nicholls LJ drew the following distinction:
>
> 'The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that

> liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review.'
>
> [48] We think it is inappropriate to generalise, however. Cases are likely to differ depending on the statutory language in question. In *Aspin*, given the limitation in section 50 on the actions the General Commissioners could take, it is not surprising that Nicholls LJ considered that they had no power to set aside a liability which arose under the legislation. Likewise in NatWest, Jacob J's reading of section 83(1)(t) was that it conferred an appeal jurisdiction only where the challenge was that an amount of VAT was not in fact due. It did not confer jurisdiction in a case where the relevant VAT amount was due but was said to be repayable for an extraneous reason."

68. There is a clear parallel between the present case and the Upper Tribunal's comments at [46]. The essence of CCML's legitimate expectation case is not that the supplies are exempt in accordance with the legislation but that they should not be registered or liable to VAT because ESC 3.18 says that the supplies should be treated as exempt.

ESC 3.18

69. Further, there is nothing within ESC 3.18 which gives rise to jurisdiction in respect of whether VAT is "chargeable" for the purposes of section 83(1) of VATA 1994. ESC 3.18 does not modify the legislation; the very nature of the concession is that whilst VAT is chargeable, HMRC set out in the concession how they will operate in defined circumstances. HMRC's power to make extra statutory concessions is pursuant to their care and management powers under section 1 of the Taxes Management Act 1970 and relates to the collection of tax rather than the chargeability of tax. In *R (ex parte Wilkinson) v IRC* [2005] 1 WLR 1718 ("*Wilkinson*"), Lord Hoffman stated as follows at [20] and [21]:

> "[20] The next question is whether the commissioners had power under section 1 of TMA to make an extra-statutory allowance to all widowers. On this point the judgment of the Court of Appeal is in my opinion unanswerable. The commissioners are not "the Crown", owners of the consolidated fund and able to deal with its property like any other owner (see *Secretary of State for Trade and Industry v Frid* [2004] 2 AC 506, para 27). In that respect, this case is different from *Hooper's* case. The commissioners are a statutory body created by the Inland Revenue Regulation Act 1890. They are charged by section 13(1) of that Act to "collect and cause to be collected every part of inland revenue." Section 1 of TMA gives them what Lord Diplock described in *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 636 as 'a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.'
>
> [21] This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time. The commissioners publish extra-statutory concessions for the guidance of the public and Miss Rose drew attention to some which she said went beyond mere management of the efficient collection of the revenue. I express no view on whether she is right about this, but if she is, it means that the commissioners may have exceeded their powers under section 1 of TMA. It does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and on

> grounds not of pragmatism in the collection of tax but of general equity between men and women."

"Chargeable"

70. We do not agree that "chargeable" has the same meaning as "payable". An amount is chargeable if there is a liability to a charge. An amount is payable if a payment must be made in respect of that charge. It might well be that in many cases the two concepts apply together, but that does not mean that the two are the same. Where ESC 3.18 operates, the VAT is chargeable because (as a matter of statute) it is to be charged whereas it is not payable because HMRC will not require it to be paid. In accordance with *Wilkinson*, paragraphs ESC 3.18 cannot remove the statutory charge to VAT but can regulate how HMRC collects it (or requires it to be payable). This marks the difference between tax being chargeable and payment being enforced. This is reinforced by *Whitney v Commissioners of Inland Revenue* [1926] AC 37 (which was relied upon by Miss McArdle), in which the House of Lords marked a distinction between liability, assessment and recovery of tax. Lord Dunedin stated as follows at 52:

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

71. Mr Beal KC and Mr Lowenthal rely upon *Stroud's Judicial Dictionary* and *The Direct Spanish Telegraph Company Limited v Shepherd* (1884) 13 QBD 202 ("*Shepherd*"). However, *Shepherd* deals with the construction of a leasehold covenant, does not establish that "chargeable" and "payable" are interchangeable for present circumstances, and does not bind us in the present case.

"With Respect To"

72. We agree with Mr Beal KC and Mr Lowenthal that "with respect to" in the introductory part of section 83(1) does not itself identify or limit the circumstances or reasons for which VAT is or is not chargeable. However, we do not accept that this introduces a jurisdiction for us to consider ESC 3.18, as the limitation upon our jurisdiction is as a result of the proper construction of sub-paragraphs 83(1)(a) and (b) as set out above. In this regard, we follow (and are bound by) the Upper Tribunal's decision in *Noor* at [93]:

> "[93] So far as concerns the words 'with respect to', we do not agree that those words are wide enough 'to cover any legal question capable of being determinative of the issue of the amount of input tax which should be attributed to a taxpayer' at least not in relation to the 'amount of input tax' which should be attributed to a taxpayer. As we have said, we do not see any financial credit to which Mr Noor may be entitled by way of recognition of his legitimate expectation as 'input tax'. But clearly Sales J is including such financial adjustment within the phrase 'amount of input tax'. On that basis, Sales J's reading goes too far, in our view. It departs from the natural meaning of s 83(1)(c) which, reading the subsection as a whole, is focused on the large number of decisions on rights and obligations under the VAT legislation which HMRC have to make and in respect of which a specialist tribunal is provided. Quite apart from that, Sales J's reasoning applies to all of the paragraphs of s 83(1) and would be to give the FTT, as we have said, an extensive if not comprehensive judicial review jurisdiction. For reasons already given and with respect to Sales J, we do not consider that it is plausible to suppose that that is what Parliament intended."

Ingram

73. It is right that the Upper Tribunal applied ESC 3.18 in *Ingram*. However, this does not assist with the question as to whether we have jurisdiction (and, importantly, does not establish that we do have jurisdiction). The Upper Tribunal was of the Lands Chamber not the Tax Chamber and did not say that the Tax Chamber had jurisdiction to apply ESC 3.18 in an appeal against a decision by HMRC. The Upper Tribunal considered the meaning of ESC 3.18 and considered whether VAT could be passed on to tenants by landlords through a service charge on the facts of the case. This therefore considers the impact of the proper construction and application of ESC 3.18 in a landlord and tenant context. As set out below, both HMRC and CCML rely upon the Upper Tribunal's construction in this regard. However, the Upper Tribunal did not consider the proper forum for a taxpayer to challenge HMRC for an allegedly wrongful failure to apply ESC 3.18 (unsurprisingly as it was not relevant to its decision).

EU Law General Principles

74. The parties made various submissions as to the applicability of general principles of EU law (which, at this stage, we refer to as "the EU Law General Principles" and do not distinguish from "retained general principles of EU law", "retained EU law", or "assimilated law") in the light of the European Union (Withdrawal) Act 2018 ("EUWA 2018") and subsequent legislation. As this goes to whether CCML have enforceable rights in respect of its supplies, this is of greater relevance to the substantive Appeals than jurisdiction (or, at least, is rendered academic if we find that we have no jurisdiction).

75. As such, we propose to deal with the extent to which the EU Law General Principles give rise to enforceable rights in the context of the substantive Appeals (as set out below) and instead assume at this stage for the purposes of the consideration of our jurisdiction that the General Principles can be relied upon in respect of the entirety of the supplies in question and in respect of each of the Decisions.

Submissions

76. Mr Beal KC and Mr Lowenthal submitted as follows with regards to our jurisdiction to consider ESC 3.18 in the context of the General Principles:

(1) EU law requires the FTT to adopt an EU compliant construction of section 83(1) of VATA 1994. *Hodgson v CCE* [1997] 3 CMLR 1082 ("*Hodgson*") is relied upon in this regard, especially at [33] to [36].

(2) Legitimate expectation exists as a principle of EU law separately from its application within domestic law, as provided for by the CJEU in *Netto Supermarket GmbH v Finanzamt Malchin* [2008] ECR I-771, [2008] STC 3280 at [26] and [27] (and the Advocate General's Opinion at [30] and [31], [34] and [42].

(3) Fiscal neutrality requires that a taxpayer should not pay more VAT than is properly due, whether as a matter of domestic law or EU law, as set out by the CJEU *Marks & Spencer v HMRC* [2008] ECR I-02283 at [32] to [36].

(4) CCML has a right to effective protection of its EU law rights, as set out in *Répertoire Culinaire Ltd v Revenue and Customs Commissioners* [2017] EWCA Civ 1845. This includes preventing procedural disadvantages, such as requiring a taxpayer to vindicate its rights in two different jurisdictions (or bifurcated jurisdiction as it was referred to during submissions), as explored by the CJEU in *Impact v Minister of Agriculture and Food* [2008] ECR I-02843 at [42] and [43], [51], and [54]. CCML also has a right to the protection of legal certainty and proportionality.

77. Miss McArdle submitted that EU law gives the FTT no wider jurisdiction in the present case. We summarise her submissions as follows:

(1) EU law does not provide rights to be treated in accordance with extra statutory concessions as these are not directly effective rights.

(2) Fiscal neutrality requires that materially similar supplies should be treated in the same way. It is an interpretative tool and does not widen an exemption. *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* [2012] STC 1951 was relied upon in this regard. As such, it does not assist in establishing that the FTT has jurisdiction to consider EU general principles.

(3) Effective protection does not require the FTT to have jurisdiction. It is not excessively difficult for there to be two processes in the different streams.

Discussion

Legitimate Expectation

78. For the reasons set out below, we find that we do not have the jurisdiction to consider legitimate expectation deriving from the General Principles for the same reasons as regards legitimate expectation as a matter of domestic law.

79. We have not had a binding authority cited to us which expressly provides either that we do have jurisdiction to consider legitimate expectation arising from EU law or that we do not.

80. In *Caerdav,* the Upper Tribunal noted at [116] that the appellant's argument was as to "whether the FTT was right to conclude that it had no jurisdiction to consider the EU law concept of legitimate expectation as part of the question of special circumstances for the purpose of Article 120." At [126], the Upper Tribunal dismissed the appellant's ground of appeal upon the basis that, "there was no material error in the FTT's ruling". However, the Upper Tribunal did not expressly determine the jurisdictional point, as the ground of appeal failed even assuming that there was such a jurisdiction. The Upper Tribunal stated as follows at [122] to [125]:

> "[122] It is the inevitable consequence of the FTT's factual findings when applying the domestic law concept of legitimate expectation that the statements made in HMRC's October and November 2017 letters: (1) did not give precise, unconditional and consistent assurances; (2), were not such as to give rise to a legitimate expectation on the part of the person to whom they were addressed; (3), were not consistent with the applicable rules on the imposition of customs duty and VAT which mandated their payment.
>
> [123] Therefore, there could be no legitimate expectation created by HMRC for the purposes of EU law which would entitle the Appellant to remission of the duty pursuant to Article 120 (ie. there was not legitimate expectation which could give rise to special circumstances or otherwise lead to the remission of duty).
>
> [124] Further, any error as to the applicability of legitimate expectation to Article 120 would be immaterial given that it was not (and could not) be shown that there was "no obvious negligence" (see our conclusion on Ground 2, above). So even if the Appellant were right that (a) it had a legitimate expectation, (b) the FTT had jurisdiction to consider it and (c) it ought to have done so, and (d) if it had then it would have concluded that 'special circumstances' exist, this would only ever satisfy part of the Article 120 test.
>
> [125] It is important to note that Grounds 2, 3 and 4 overlap. All concern the question whether the customs debt ought to have been remitted under Article 120 of the UCC. Therefore, the difficulties we have identified above in relation to the application of Article 120 to this question are fatal to Grounds 3 and 4."

81. In *RT Rate Limited v HMRC* [2022] UKUT 00118 (TCC), the Upper Tribunal (Edwin Johnson J and Judge Jonathan Richards as he then was) expressly declined to deal with the point, having found that no legitimate expectation existed. The Upper Tribunal stated as follows at [47]:

> "[47] We have carefully considered whether it would be right for us to deal with Ground 1 so as to give guidance to the FTT on the scope of its jurisdiction to deal with further claims of this nature. We have concluded, however, that this would not be the appropriate course to follow. We are concerned that any guidance we give to the FTT in a situation where, in our judgment, there was quite clearly no legitimate expectation of the kind that EU law would protect, would be answering a purely academic and theoretical question. We do not think that an issue of this kind is best addressed in a case where, on the facts, it does not actually arise. In short, we consider that the scope of the FTT's jurisdiction is best addressed by a binding statement from this Tribunal only in a case where such a statement is necessary. We will not, therefore, address Ground 1."

82. Although not binding upon us, the First Tier-tribunal decision in *RT Rate Limited v HMRC* [2020] UKFTT 0392 (TC) (Judge Jonathan Cannan) ("*RT Rate FTT*") was cited to us. Judge Cannan stated as follows at [80] to [85]:

> "[80] It is clear, as one would expect that the EU law principle of legitimate expectation is very similar to the UK domestic public law principle. It is not necessary for me to say whether the principles are identical in practical terms. In the absence of detailed submissions, I prefer not to do so. It also seems to me that the remedy, on the present facts would also be the same. HMRC would be required to treat the appellants' claims as open or to disapply the time limit for new claims on whichever basis the appellants put their claim. Whether that is by applying a conforming construction, disapply the offending procedural provision or directing HMRC to treat the claim as open makes no difference to the parties.
>
> [81] Mr Puzey pointed to the procedural requirements must be satisfied before judicial review proceedings can be brought to enforce a public law remedy. In particular, domestic law requires permission to bring a claim, places time limits on bringing a claim, and requires detailed disclosure of the grounds of claim and the grounds of objection to the claim. Those are the requirements referred to by the Court of Appeal in *Metropolitan International Schools* at [21] as one reason why as a matter of statutory construction Parliament cannot have intended section 84(10) VATA 1994 to give jurisdiction to the FTT in relation to claims based on legitimate expectation. The same might be said in relation to the construction of section 83(1)(t).
>
> [82] Mr Firth submitted that there was no reason to have any jurisdictional distinction between a claim based on legitimate expectation and a claim based on equal treatment. HMRC do not challenge the jurisdiction generally in relation to equal treatment, and yet the EU principle of equal treatment also has a public law equivalent in the form of consistent treatment and rationality. It is not clear to me that such claims are comparable and I had no detailed submissions as to the extent to which they may be considered comparable.
>
> [83] In *Marks & Spencer II*, the VAT Tribunal had considered the question of jurisdiction but the issue fell away when the matter reached Moses J (as he then was) in the High Court reported at [1999] STC 205. The VAT Tribunal had found that it did not have jurisdiction to consider a claim based on equal treatment or a claim based on legitimate expectation. Moses J made the following observations on these findings:

> 'If Marks and Spencer had mounted sufficient evidence to establish that the provision in s 80(4) was discriminatory and thereby impeded competition then I would have thought it was within the jurisdiction of the tribunal. However in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the commissioners then it is clear the tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the commissioners and it has no jurisdiction in relation to supervision of their conduct. It is unnecessary to develop my reasoning any further. No submission was advanced before me in oral argument as to the commissioners' conduct. No submission in writing was made in relation to the commissioners' conduct giving rise to legitimate expectations over and above the arguments, in law, in relation to legal certainty.'
>
> [84] It is clear therefore, that Moses J did not consider that the VAT Tribunal had any jurisdiction in relation to arguments based on the EU law principle of legitimate expectation, certainly where what was being challenged was the conduct of the commissioners, which is the challenge in the present appeals. I acknowledge that he did not set out his reasoning for that conclusion, but it remains persuasive.
>
> [85] This is a difficult issue, and as I have said there is force in Mr Firth's submissions. Those submissions were not put forward in *Noor*, indeed the Upper Tribunal in *Noor* acknowledged that their decision was reached without the benefit of full argument on behalf of Mr Noor. I am satisfied however that I am bound by the decision in *Noor*. In the light of *Noor*, and what has been said by the Court of Appeal in *Metropolitan International Schools* and by Moses J in *Marks & Spencer II*, I do not consider that section 83(1)(t) gives the FTT jurisdiction to consider and give effect to the EU law principle of legitimate expectation. The appellants' remedy for any breach of that principle must be pursued by way of judicial review.

83. We agree with Judge Cannan's conclusions and find that they are equally applicable to sections 83(1)(a) and 83(1)(b).

84. Further, we find that the source of the right to rely upon the legitimate expectation does not change the construction of sections 83(1)(a) and 83(1)(b). The reasoning set out above in relation to the absence of jurisdiction for legitimate expectation as a matter of domestic law is equally applicable to legitimate expectation deriving from EU law.

85. We note that the Upper Tribunal in *Noor* set out at [75] to [77] their reasoning for finding that Parliament did not intend the FTT to have in effect an extensive judicial review jurisdiction.

> "[75] We are in full agreement with Sales J that two factors which he identified indicate that it would have been desirable for the VAT Tribunal to have the wide jurisdiction which he held to exist. But we do not agree with his speculation about what Parliament intended. Sales J did not restrict his interpretation to para (c) of s 83(1). His approach to the 'ordinary and natural' meaning of s 83 applies to all its paragraphs; there is no hint in his reasoning that it turned somehow on the particular wording of para (c).
>
> [76] That approach, in effect if not name, would have been to give to the VAT Tribunal a power of judicial review in relation to the matters covered by s 83(1). Although not exhaustive of all areas in which HMRC is amenable to judicial review in relation to VAT, it would have conferred a very extensive judicial review jurisdiction. It would have done so, moreover, without any of the procedural safeguards, in particular the filter of permission to bring

judicial review, and time-limits to which ordinary applications for judicial review in the Administrative Court are subject.

[77] In any case, we disagree with the suggestion concerning the plausibility of what Parliament can be supposed to have had in mind. There are several reasons for this, including these:

(a) If Parliament had intended to confer this jurisdiction on the VAT Tribunal, we would have expected it to say so clearly. Even as late as the passing of the VATA 1994, a fortiori when the VAT Tribunal was first set up and given a statutory appellate jurisdiction, it would have been exceptional for an inferior tribunal to have a judicial review jurisdiction or an appellate jurisdiction allowing it to adjudicate on public law issues other than in the course of its statutory jurisdiction. The VATA 1994 does not use words which clearly confer such a jurisdiction, reliance instead having to be placed on the words 'with respect to'.

(b) In cases where an inferior tribunal is intended to have a judicial review function, express provision has been made. See, for instance, the powers given to the newly-created (and now abolished) Charity Tribunal under s 8 of the Charities Act 2006.

(c) We have referred to the structure of the tribunal system put in place by the TCEA 2007 at [29], above. Parliament decided that the FTT should not have a judicial review function; and although the Upper Tribunal does have a judicial review function, its jurisdiction usually comes into play on the transfer of a case commenced in the Administrative Court. It is only in a very limited class of case that a judicial review application can properly be commenced in and heard by the Upper Tribunal. It is well known that there was significant opposition even to these powers being conferred on the Upper Tribunal. It is simply inconceivable that Parliament would have contemplated conferring a similar power on the FTT notwithstanding the two factors which Sales J identified and of which legislators were well aware.

(d) Just as it was inconceivable that the FTT should be given a judicial review jurisdiction, so to it was not plausible, in our view, that Parliament, when enacting s 83 of the VATA 1994, intended to confer a judicial review function on the VAT Tribunal.

(e) We are bound to say that, if it was plausible in the way which Sales J suggests, it is very surprising that the point was not raised in litigation or otherwise many years before *Oxfam* came before the court. In fact, it was not raised as a plausible result before the VAT Tribunal even in *Oxfam* itself. As Sales J acknowledged, he was departing from a widely held view, a view which, on his approach, was entirely at odds with what Parliament is to be supposed to have wished to achieve. Although Sales J describes the view as widely held (and we do not know on what he based that description) we ourselves know of no contrary view being promoted as a correct view prior to the decision of Sales J himself.

(f) Further, if Parliament's intention had been as Sales J suggests, we would have expected the same Parliament to have introduced secondary legislation in the form of suitable tribunal rules to govern the procedure (and in particular rules concerning permission to bring judicial review and time-limits) applicable to public law claims."

86. Although the Upper Tribunal was dealing with legitimate expectation as a matter of domestic law, we find that the reasoning set out above applies with equal force to legitimate expectation as a matter of EU law. Mr Beal KC and Mr Lowenthal are correct to say that

legitimate expectation as a matter of domestic law and as a matter of EU law are in principle separate. However, this goes to the source of the substantive cause of action and does not say anything about the forum given the jurisdiction to consider it.

Effective Protection

87. We do not agree that the principle of effective protection requires that sections 83(1)(a) and 83(1)(b) are to be read in a way which grants the FTT a jurisdiction to consider legitimate expectation as a matter of EU law.

88. We note that *Hodgson* is a decision of Mr S Oliver QC (as he then was) and Dr Ball in the VAT Tribunal (as it then was) and preceded the developments in the jurisprudence leading to *Noor*. In any event, the decision's consideration of the relationship between tribunal proceedings and judicial review proceedings highlights the lack of effective protection where neither forum is able to enforce or protect the relevant rights. The Tribunal stated as follows at [33]:

> "[33] Mr Hodgson's problem is this. No matter how impeccably the Customs officers act in the process of reaching their decisions under Article 5(3), the likes of Mr Hodgson, who exercise their Community law rights and bring tobacco into the U.K. for their own use but fail to satisfy the Commissioners that it is not held for a commercial purpose. [sic] have no recourse to the national courts to ensure proper application of the law. Judicial review would allow an applicant such as Mr Hodgson to put before the Court written or affidavit evidence bearing on the " reasonableness" of the Commissioners' decision. But it still would not enable the Court to review the merits of his claim to be exercising his Community law rights. We recognise that not every rule that prevents a court giving relief in a particular case is to be regarded as making the enforcement of rights impossible; the REWE case indicates. for example. that time-limits are not necessarily to be so regarded. But Article 5(3) as construed in CARRIER goes much further than that."

89. This is different to the argument that the FTT is able to enforce or protect relevant rights which can be protected by judicial review. There is no suggestion that the High Court would be unable to consider legitimate expectation as a matter of EU law within the Judicial Review Claim, even assuming that this would add anything different to legitimate expectation as a matter of domestic law. It follows that CCML is able to achieve effective protection of its rights as (if it makes out its case in the Judicial Review Claim) it is able to do so by way of judicial review in the High Court.

90. Further, we do not agree with the central premise that effective protection is prevented by the FTT not having jurisdiction to enforce extra statutory concessions. CCML has not suggested that it is not in a financial position to pursue the Judicial Review Claim. Further, we do not accept that CCML was obliged to pursue remedies in two separate sets of proceedings. As set out in this decision, we do not have the jurisdiction to consider the substantive Appeals and so the only set of proceedings which CCML ought to pursue is that of the Judicial Review Claim.

Other EU Law General Principles

91. CCML's reliance upon EU Law General Principles as to legal certainty, preventing retrospectivity, achieving proportionality, and fiscal neutrality are all based upon holding HMRC to (on CCML's case) an application of ESC 3.18. We find that this would therefore require us to consider the same arguments as for legitimate expectation and that (for the same reasons as set out above in respect of legitimate expectation) we do not have the jurisdiction to do so.

92. Mr Beal KC and Mr Lowenthal highlight the centrality of ESC 3.18 to CCML's case on legal certainty and retrospectivity in their skeleton argument, submitting that, "The existence and evident application of ESC 3.18 means that there was no, or no sufficient, legal certainty that the service charges would be subsequently considered not to be exempt from VAT." This therefore presupposes that CCML can rely upon ESC 3.18, which is in essence the enforcement of a legitimate expectation.

93. Similarly, CCML's case as to proportionality is that it is for HMRC (as Mr Beal KC and Mr Lowenthal put it in their skeleton argument) "to justify the proportionality of its conduct in resiling from ESC 3.18 to impose a retrospective tax burden, the burden being on HMRC to do so ... HMRC has failed to advance any justification in this case for resiling from ESC 3.18, resisting this ground only on the (incorrect) basis that ESC 3.18 does not apply to CCML's supply". Again, this is in essence the enforcement of a legitimate expectation as it expressly goes to the extent to which HMRC can resile from ESC 3.18.

94. Fiscal neutrality faces the same difficulties as any comparison between the effects of applying ESC 3.18 and not applying ESC 3.18 presupposes that CCML has an entitlement to require HMRC to apply ESC 3.18. That therefore presupposes an enforceable legitimate expectation that that ESC 3.18 will be applied.

95. We have considered the authorities relied upon by Mr Beal KC and Mr Lowenthal. However, whilst these all establish the existence of the relevant rights as a matter of EU law, they do not establish that the FTT has jurisdiction to apply them.

A1P1

Submissions

96. Mr Beal KC and Mr Lowenthal submitted that the FTT has jurisdiction to consider A1P1, as enforceable pursuant to the Human Rights Act 1988 (which we refer to as the "A1P1 Ground") for the following reasons:

> (1) They note in their submissions that the A1P1 Ground, "is dependent upon the existence of an ESC."
>
> (2) Pursuant to section 6 of the Human Rights Act 1998, tax which could only be levied incompatibly with the Convention would not be tax "chargeable" within the meaning of section 83(1)(b) of VATA 1994.
>
> (3) The FTT is obliged under section 6 of the Human Rights Act 1998 to construe VATA 1994 in a manner compliant with the ECHR.
>
> (4) They rely upon *IDT Card Services v HMRC* [2006] STC 1252 *per* Arden LJ (as she then was) at [86] to [92], *Gora v HMRC* [2003] EWCA Civ 525, [2004] QB 93, *Safe Cellars Ltd v HMRC* [2017] UKFTT 78 (TC), and *Royal County Down Golf Club v HMRC* [2021] UKFTT 0070 (TC).

97. Miss McArdle submitted that whilst A1P1 can be raised in the FTT, the present case turns upon the entitlement to rely upon ESC 3.18.

Discussion

98. We find that whilst in principle we have the jurisdiction to consider A1P1 in the context of the Appeals, we do not have the jurisdiction to enforce ESC 3.18.

99. We agree with Mr Beal KC and Mr Lowenthal that in principle we can consider rights under A1P1 in the context of assessing whether tax is chargeable within the meaning of section 83(1)(b). However, the question is whether we have the jurisdiction to give effect to ESC 3.18 in doing so. We find that we do not for the reasons set out in paragraphs 70 and 71 above as to

the meaning of "chargeable". As such, the framework for what we consider A1P1 against is what is chargeable under VATA 1994, not what would be payable if ESC 3.18 is applied in accordance with CCML's contention.

100. We also agree that we must construe VATA 1994 in a manner compliant with the ECHR. However, the essence of the A1P1 Ground is that HMRC have not applied ESC 3.18 in place of VATA 1994. The alleged breach of A1P1 is therefore that HMRC have not given effect to the legitimate expectation created (on CCML's case) by ESC 3.18. Indeed, it is of note that CCML's case is that HMRC have interfered with CCML's A1P1 rights by imposing a retrospective obligation to register for VAT and to pay VAT, and by (as Mr Beal KC and Mr Lowenthal put it in their skeleton argument), "By depriving CCML of the benefit of a legitimate expectation." The second of these is in terms a question of legitimate expectation. We find that the first of these also requires consideration of legitimate expectation, because it is only because of ESC 3.18 that the obligations would be retrospective; without ESC 3.18, CCML was obliged to register for and pay VAT at the time of the supplies and the Decisions are the enforcement of those obligations. Again, for the reasons set out above, we do not have the jurisdiction to consider such legitimate expectation.

THE SUBSTANTIVE APPEALS

Context

101. It follows from the above that we find that we do not have the jurisdiction in respect of the substantive Appeals. As such, all that follows is obiter and represents what we would have found if we had jurisdiction. Our reason for doing so is in case we are wrong as to jurisdiction and in deference to the careful submissions of all Counsel. However, given that this is obiter, we set out the submissions and our findings in a more summary fashion than if we had found that we did have jurisdiction.

The Supplies

102. The key dispute in this regard is the direction of the supplies. The significance of this is that CCML accepts that if the supplies are to Realreed as freeholder rather than the Leaseholders (including Realreed as a Leaseholder), then ESC 3.18 cannot apply. This is aside from HMRC's separate argument discussed below that ESC 3.18 does not apply even if the supplies are to the Leaseholders.

103. This ground is set out as follows in the consolidated grounds of appeal:

> "Based on the straightforward construction of the tripartite lease agreement between CCML, RRL and the lessee, there exist separate enforceable obligations owed by the lessee to CCML as the management company, and by CCML to the lessee. CCML says the contractual position clearly dictates that the direction of the supply of services being provided by it is to the lessee. This position is supported by the decision of the Tribunal in *Canary Wharf Ltd* (Decision of VAT Tribunal, Sir Stephen Oliver QC, [1996] V&DR 353, (VTD 14513)). Therefore, HMRC's conclusion that CCML is supplying the services to RRL is incorrect ('Ground 1')."

Submissions

104. Mr Beal KC and Mr Lowenthal submitted as follows:

> (1) The proper approach is to consider who supplied what to whom in return for what consideration. The first stage of this is to determine the contractual position and then consider whether this reflects the economic reality. We were referred to *HMRC v Reed Personnel Services Ltd* [1995] STC 588, *HMRC v Plantiflor plc* [2002] UKHL 33, [2002] 1 WLR 2287, *ING Intermediate Holdings Ltd v HMRC* [2017] EWCA Civ 2111, [2018] STC 339, *HMRC v Airtours Holidays Transport Ltd* [2016] STC 1509

(*"Airtours*"), *Adecco UK Ltd v HMRC* [2017] UKUT 113 (TCC), and *HMRC v Secret Hotels 2 Limited* [2014] STC 937.

(2) CCML supplied property management services directly to the residents rather than Realreed, both as a matter of contractual interpretation and economic reality.

(3) The Leases provide for direct covenants between CCML and the Leaseholders.

(4) The economic reality matches this. CCML and Realreed invoice Leaseholders separately and separate out their costs.

(5) CCML's case is supported by *Canary Wharf Ltd v HMRC* [1996] V & DR 353 (Sir Stephen Oliver QC).

(6) Any supplies made to Realreed are in its position as Leaseholder.

105. Miss McArdle submitted as follows:

(1) CCML makes supplies of property management services to Realreed, which allow Realreed to fulfil its obligations to the Leaseholders.

(2) The legal framework is not in dispute insofar as it is relevant to the present case (issue was taken as to whether it is possible to go behind contractual arrangements which are held not to be a sham but in any event HMRC does not seek to do so).

(3) The contractual position is that the Leaseholders receive a single supply from Realreed as freeholder of the right to occupy the relevant Apartment, with ancillary elements including property management services. CCML separately supplies property management services to Realreed, by which Realreed complies with its obligations to the Leaseholders.

(4) Leaseholders have no choice other than to accept that CCML will be performing the property management activities.

(5) The property management services are part of a package of rights received from Realreed pursuant to the Leases.

(6) If the Leaseholders fail to pay service charges, Realreed as landlord can repossess the Apartments. As such, the payment of service charges is part of the consideration for Realreed's supply to the Leaseholders of an interest in land.

(7) HMRC accept that the terms of the Leases reflect the commercial and economic reality.

(8) HMRC does not accept that as a matter of law Realreed can be a Leaseholder as well as the freeholder.

Discussion

106. We agree that (as is common ground) we must identify the recipient of the supplies and that we should do this initially by considering the contractual position and then by considering whether this reflects the commercial and economic reality. We note that a failure to reflect the commercial and economic reality might be for a variety of reasons, including that the contract is a sham or that the contract is not an exhaustive statement of the arrangements between the parties. Lord Neuberger stated as follows in *Airtours* at [47]:

> "[47] This approach appears to me to reflect the approach of the Supreme Court in the subsequent case of *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24, [2013] 2 All ER 907, [2013] STC 943 where at [27], Lord Reed said that '[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these

> arrangements, but it is the most useful starting point'. He then went on in paras [30]–[38] to analyse the series of transactions, and in para [39], he explained that the tribunal had concluded that 'the reality is quite different' from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs* [2014] UKSC 16, [2014] 2 All ER 685, [2014] STC 937 (at [35]), when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts."

107. The central question is whether the Leaseholders received the supplies directly from CCML or whether the supplies were instead discharging Realreed's obligations to the Leaseholders, effectively meaning CCML's supplies were to Realreed (in its capacity as freeholder). We note that neither party submitted that CCML was making supplies to *both* the Leaseholders and Realreed (or the effect of such a finding) as instead both parties focussed upon whether CCML was making supplies to the Leaseholders *at all*. Particularly given our findings on jurisdiction, we will therefore not stray beyond the question of whether CCML was in principle making any supplies to the Leaseholders. Indeed, on the evidence before us, we would be unable to make findings as to any apportionment between the Leaseholders and Realreed of the supplies actually made during the periods in question (as distinct from whether, in principle, the obligations owed by CCML to the Leaseholders and to Realreed in the Seventh Schedule could give rise to supplies both to CCML and to Realreed).

108. We find that CCML did make direct supplies of management services to the Leaseholders rather than solely making supplies to Realreed in its capacity as freeholder. This is for the following reasons.

109. First, we agree that the acceptance of CCML's services is itself a requirement under the Leases. However, this acceptance is an obligation owed both to Realreed and to CCML. Whilst it is right that Realreed is therefore entitled to enforce that obligation (including by way of forfeiture or repossession in appropriate circumstances) this is because of Realreed's entitlements under the Lease. It therefore says nothing about who the recipients of CCML's supplies were.

110. Secondly, the framework of the Leases is such that Realreed, CCML and the Leaseholders each enter into direct covenants with each of the others to ensure that they are all bound by, and all entitled to enforce, the relevant covenants. CCML's obligations are therefore owed directly to the Leaseholder and enforceable by the Leaseholder (as well as owed to and enforceable by Realreed). CCML covenanted as follows:

> "3. The Management Company HEREBY COVENANTS with the Landlord and separately with the Lessee to observe and perform the covenants and obligations specified in the Seventh Schedule hereto."

111. CCML's obligations to Realreed and the Leaseholders therefore entitle both Realreed and the Leaseholders to enforce those obligations. However, the framework of the Lease provides that it is the Leaseholders who pay for all of these management services by way of the service charges.

112. *Airtours* highlights the significance of identifying to whom the contractual obligation is owed. Lord Neuberger stated as follows at [22] and [31]:

> "*The first question: was there a contractual obligation to supply?*

> [22] The first question, then, is whether, on the true construction of the Contract, PwC contracted to supply services to Airtours. There is no doubt that the Contract imposes an obligation on PwC to supply services to the Institutions. The issue is whether PwC agreed, in addition, with Airtours that they would supply those services. Thus, it is enough for Airtours' purposes if it can establish that PwC were under a contractual obligation to Airtours to supply services, such as providing the Report, to the Institutions. Airtours does not have to show that PwC were under a contractual obligation to supply any services directly to Airtours.
>
> ...
>
> [31] Confining myself for the moment to the express words of the Contract, it appears to me that the Commissioners are correct, and there is no obligation on PwC, as a matter of contract, to Airtours to provide the Services whether to the Institutions or to Airtours. The position appears pretty clear if one confines oneself to the Letter: PwC's obligation to provide the Services set out in the Appendix is owed solely to the Institutions, and Airtours is only a party for the purpose of agreeing to pay PwC's fees, to provide PwC with an indemnity, and to acknowledge the cap on any damages for which PwC may be liable. The Terms are, without doubt, less clear, but there is nothing in them which supports the notion that they were intended to widen PwC's duties beyond what was in the Letter. In any event, the notion that the Terms can give the meaning of 'you' in the Letter any different meaning from that which it naturally has on the face of the Letter is fatally undermined by the fact that the Terms are contained in a standard form, and, even more, by the fact that 'you' in the Terms clearly has different meanings in different places."

113. As set out above, CCML did owe a contractual obligation both to Realreed and to the Leaseholders.

114. Thirdly, and crucially, the Leases do not treat CCML as discharging Realreed's obligations, as the obligations are owed by CCML to Realreed and separately to the Leaseholders. CCML's obligations are set out in the Seventh Schedule. In particular:

(1) Pursuant to paragraph 1 "to repair and keep in a good and substantial state of repair maintenance and decoration and where necessary to renew" the exterior and structure, utilities, the common parts, the boundary and fences, and all other parts not comprised in any Apartment or commercial unit.

(2) Pursuant to paragraph 2, to paint the exterior as often as required but not more than once every seven years.

(3) Pursuant to paragraph 3, to paint and decorate the common parts as often as required but not more than once every five years.

(4) Pursuant to paragraph 4, to maintain and repair various miscellaneous items such as carpeting, lifts and associated machinery, central heating and hot water system, and a television programme service.

(5) Pursuant to paragraph 5, to pay the Landlord's expenditure incurred in the Landlord performing its insurance obligations.

(6) Pursuant to paragraph 6, to pay rates and taxes of any part not comprised in any Apartment or commercial unit.

(7) Pursuant to paragraph 7, to take action to enforce the Leaseholders' restrictions and covenants.

(8) Pursuant to paragraph 8, to apply the services charges as follows:

"8. To expend the Service Charge paid by the Lessee for the following purposes only and to do all such acts and things as may be necessitated thereby:

(a) the cost of observing and performing the covenants and obligations on the part of the Management Company contained in this Schedule

(b) the payment of all rates taxes and outgoings (if any) payable in respect of any part of Chelsea Cloisters which is not comprised in any Apartment or commercial unit

(c) without prejudice to the generality of paragraphs 2 and 3 of this Schedule the cost of painting and decorating the exterior and common parts of Chelsea Cloisters including cleaning the external brick and stone work thereof

(d) the cost of insurance of Chelsea Cloisters and of maintaining such further insurance in connection with Chelsea Cloisters as the Management Company or the Landlord from time to time deem necessary

(e) the cost of the employment of any managing agents legal or professional firms or of any other company or person in connection with the collection of service charges on the Apartments within Chelsea Cloisters (whether on behalf of the Landlord or the Management Company) or in connection with the general management and maintenance thereof or in connection with the preparation and maintenance of the statutory books and accounts of the Management Company

(f) the cost of the purchase maintenance renewal and insurance of such furniture fittings equipment machinery plant apparatus fire electrical or aerial installations carpets and such other items as the Management Company may from time to time deem necessary in the performance of its obligations

(g) the establishment and maintenance of a Sinking Fund to facilitate the renewal and replacement of any of the items referred to in the immediately preceding sub-clause and for periodic repairs and decorations or improvements if such Sinking Fund shall at the discretion of the Management Company appear desirable

(h) all costs charges and expenses incurred in the abatement of any nuisance or for securing compliance by the occupiers of Apartments within Chelsea Cloisters with their covenants and obligations to the Landlord or the Management Company or for executing all such works as may be required to comply with any notice served by a local or other authority so far as the same is not the responsibility of the Lessees and occupiers of Chelsea Cloisters

(i) without prejudice to the foregoing matters the costs of doing all such other acts matters and things as the Management Company may consider to be necessary or advisable for the proper maintenance and administration of Chelsea Cloisters as a high class residential block of Apartments.

115. Realreed's obligations are set out in the Eighth Schedule to the Sample Lease and do not establish any primary liability for CCML's obligations in the Seventh Schedule. For example, Realreed is not under a repairing obligation which it then passes to CCML – instead, it is CCML that has the repairing obligation which Realreed is only obliged to fulfil if CCML fails to do so. The effect of this is that in those circumstances Realreed would be carrying out management services on behalf of CCML rather than the other way round. This is true of all CCML's services as set out in clause 6(ii) of the Sample Lease as follows:

"(ii) If the Management Company shall at any time hereafter make default in the performance and observance of any of the covenants or obligations

> imposed upon it and specified in the Seventh Schedule hereto or if the Management Company shall enter into liquidation whether compulsory or voluntary save for the purposes of reconstruction or amalgamation the Landlord will undertake the performance of all or any of the covenants and obligations imposed upon the Management Company hereunder but without prejudice to any other right or remedy of the Landlord against the Management Company or the Lessee or any other person and the expenses thereof shall constitute a debt due from the Management Company to the Landlord and shall be repaid by the Management Company on demand or in lieu thereof and after notice in writing given by the Landlord to the Lessee the Lessee shall pay to the Landlord all sums due to the Management Company pursuant to the Sixth Schedule hereto until further notice which sums shall then be construed as rent due to the Landlord hereunder for the purpose of Clauses 1 and 6(i) hereof."

116. Similarly, paragraph 7 of the Eight Schedule to the Sample Lease provides as follows:

> "7. That if at any time the Management Company shall make default in the performance and observance of any of the covenants or obligations imposed upon it and specified in the Seventh Schedule hereto or if the Management Company shall enter into liquidation whether compulsory or voluntary save for the purposes of reconstruction or amalgamation the Landlord will undertake the performance of all or any of the said covenants imposed upon the Management Company hereunder."

117. Further, paragraph 4 of the Fifth Schedule to the Sample Lease seeks to avoid any liability for the Management Company's obligations, which would not make any sense if CCML were only discharging Realreed's obligations. Paragraph 4 provides as follows:

> "4. The Landlord shall not be liable in respect of any obligations assumed whether hereunder or otherwise by the Management Company save as hereinafter provided."

118. Miss McArdle noted that CCML's obligation to enforce the Leaseholders' covenants in the Leases was on behalf of Realreed as CCML had no interest of its own in such enforcement. However, it is in the interest of each Leaseholder that the other Leaseholders abide by these covenants (an example being not causing a nuisance). As such, even this is an example of a supply to the Leaseholders.

119. We note that paragraph 8(5) of the Seventh Schedule obliges CCML "to pay to the Landlord on demand all sums incurred by the Landlord in connection with its obligation to insure contained in the Eighth Schedule hereto". This does not delegate Realreed's obligations to CCML and is not an example of CCML performing obligations on behalf of Realreed; instead, it is an example of CCML utilising the service charges to reimburse Realreed for Realreed's performance of its own obligations.

120. Fourthly, CCML's obligations pursuant to the Seventh Schedule (and the supplies involved in performing them) are primarily aimed at the Leaseholders as they focus upon the maintenance and administration of Chelsea Cloisters, which is of particular significance to the Leaseholders as they (as occupants) make use of those services. That is not to say that Realreed does not obtain any benefit at all. For example, Realreed's freehold interest means that it obtains a benefit from Chelsea Cloisters being in good and substantial repair. However, that benefit must be seen through the prism of Realreed's interest being an interest in the reversion of the long leases rather than everyday use as occupants.

121. Fifthly, we do not accept that it is not possible for Realreed to receive supplies from CCML as a Leaseholder in respect of the Apartments for which Realreed is the registered

proprietor. Realreed's beneficial interest as a freeholder and as a leaseholder cannot have merged or extinguished because the two interests are not the same; the freehold is over the whole of Chelsea Cloisters whereas the leasehold interests are only over specific Apartments.

122. Further, we note that the uncontested evidence is that Realreed purchased the relevant leaseholds. We were shown a TR1 to this effect in respect of Apartment 947 dated 14 September 2022 as an example of such a purchase. Realreed were therefore assignees of those Leases. This is to be contrasted with the relevant Leaseholders surrendering their Leasehold interests. Realreed's purchases of the relevant leasehold interests also makes it tolerably clear that Realreed did not intend the freehold interest and the leasehold interest to merge.

123. The need for such an intention reflects the position of the Court of Equity which prevailed over the position at law, as explained as follows by Cozens-Hardy LJ in *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631 at 652:

> "Now, as to the first question, there was prior to the Judicature Act, 1873, a great difference between the Courts of Law and the Courts of Equity on the subject of merger. The rule of the former was rigid, that whenever a term of years and a freehold estate, whether for life or in fee, immediately expectant upon the term, vested in the same person in his own right, the term was merged in the freehold, whatever may have been the intention of the parties to the transaction which resulted in the union. The Courts of Equity, on the other hand, in many cases treated the interest which merged at law as being still subsisting in equity. They had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place. Perhaps the commonest application of these principles was when a tenant for life paid off a charge upon the inheritance. The charge was considered to be still kept alive for his benefit, or for the benefit of his executors, although, if an owner in fee had paid off the charge, no such consequence would have followed. These principles were applicable equally to the merger of estates in land as to merger of charges on land. It was well established that, according to the strict rules of the common law, there would be merger, notwithstanding that one of the two estates might be held in trust, and the other beneficially, by the same person, or one might be held on one set of trusts and the other on another set of trusts. But it was equally well established that equity would interfere, and would, if necessary, decree the execution of such deeds as would replace the parties in their proper position: see *Saunders v. Boumford* (1), where Lord Nottingham L.C. decreed that, notwithstanding the merger of a term, the plaintiff should hold possession of the premises during the remainder of the term, and that the defendant should make a further assurance of the remainder of the term. The merger was treated as an accident prejudicial to the real beneficial interests of the parties: see also *Attorney General v. Kerr* (2), a remarkable instance of the application of the equitable doctrine. I think the decision of Farwell J., or rather his dictum to this effect, in *Ingle v. Vaughan Jenkins* (3), is consistent with principle and is supported by authority. A Court of Equity had regard to the intention of the parties, to the duty of the parties, and to the contract of the parties, in determining whether a term was to be treated as merged in the freehold.
>
> This being the state of the law prior to the Judicature Act, 1873, it was enacted by s. 25, sub-s. 4, of that Act that "there shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.'"

124. Section 185 of the Law of Property Act 1925 now provides for this as follows:

> "185. Merger
>
> There is no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity."

125. In any event, Realreed is registered as proprietor of the relevant Leases on the Land Register, which is to be treated as conclusive evidence of the existence of such interests pursuant to sections 10 and 58 of the Land Registration Act 2002.

126. Sixthly, the economic reality corresponds with the Sample Leases. Neither party suggests that the Sample Leases are shams. On the face of it the invoices are for the provision of services by CCML pursuant to the Leases. The payments by tenants are to CCML rather than to Realreed. There is no evidence that CCML, Realreed, or the Tenants treated either the services as being on behalf of Realreed or the payments being made to CCML on behalf of Realreed. Indeed, the notes to CCML's financial statements for the year ended 31 December 2021 set out the position as follows to the effect that CCML acts as principal in providing services and receiving payment (which we accept as accurate in the absence of any evidence to the contrary).

> "1.2 Basis of preparation
>
> The directors have assessed the company to be a residents' management company as defined by Technical Release TECH 03/11 issued by the Institute of Chartered Accountants in England and Wales, whereby the company acts as principal in its dealings with third parties. Relevant service charge transactions arising from contracts to purchase goods and services are recorded in the profit and loss account and service charge income is recognised by drawing from service charge cash balances. The cash balance representing contributions received from lessees in accordance with the terms of their leases is held on statutory trust and is not treated as an asset of the company in accordance with s42 of the Landlord and Tenant Act 1987.
>
> ...
>
> 1.4 Turnover
>
> Turnover comprises the amounts charged to the lessees of apartments and commercial units within Chelsea Cloisters for services provided during the year. The company is owned by and run for the benefit of the tenants of the property. The costs of managing and operating Chelsea Cloisters are passed onto tenants by periodic charges."

127. Seventhly, we are reinforced in our views by the VAT Tribunal's decision in *Canary Wharf Limited v HMRC* [1996] V & DR 323 (Stephen Oliver QC, as he then was, and TW Chappell) which, whilst not binding upon us, is an illustration of the treatment of a tripartite lease. The VAT Tribunal stated as follows:

> "We accept that the management company has, throughout the duration of the Management Agreement, been making supplies to the headlessee of 10 Cabot Square (eg CWL). CWL has its repairing obligations to perform under its own headlease from Investments in respect of the whole of the demised premises. There are still parts of the buildings in the Canary Wharf Estate that are unlet; so far as the management company's services relate to these, they are supplied exclusively to, eg, CWL and CWL bears its share of the service charge expenses. So far as the buildings and floors that are actually the subject of underleases, CWL still has the obligation to comply with its covenants as landlord. But do those features mean that the management company must be regarded as supplying the services to CWL and not to the occupational

underlessee (which in this case is Barclays Bank)? If so, then the only relevant supplies to Barclays Bank will be CWL's single and exempt supply of a major interest in land.

A feature that points to the supplies of all three classes of services being supplied direct from the management company to Barclays Bank as occupational underlessee is the wording and the structure of the underlease. Clause 5, as we have noted, contains the covenant of the management company with Barclays Bank, as tenant, (separately from the management company's covenant with CWL) to perform the services; that covenant is specifically guaranteed by CWL as 'landlord'. By Clause 3(c) Barclays Bank is personally obligated to pay its due percentage of the service charge to the management company. In short, the documentation unambiguously states that the management company is to provide the services to Barclays Bank and Barclays Bank has to pay the management company for these. In this connection we bear in mind that the management company is a substantial company with its own staff, premises and functions. It invoices the occupational sublessees for the service charges quite separately from any invoices that may be raised on them (under Clause 3(a)) for the rent.

Another feature pointing to the same conclusion is that the services required of the management company by the underlease are of their nature services to be used and paid for by Barclays Bank. The majority of the services are admittedly ones that CWL needs as landlord to enable it to comply with its landlords' covenants to repair and to give quiet possession; but they are also directed separately at Barclays Bank's under leashed interest, providing the occupant with a much wider range of facilities than simply the benefit of, for example, quiet enjoyment. Many of the services are personal in nature; as such they have little or nothing to do with CWL's interest as landlord. We have in mind the surveillance and visitor control services (see Sch 6 Pt A item 7), the refuse service (item 12) and the transportation services (item 16). Many of the services are left to the management company's discretion, such as the provision of signage (item 8) landscaping (item 9) and window cleaning (item 11).

Looking both at the documentation and at the way in which the arrangements for management services have been carried out and paid for, it is in our view impossible to conclude that the management company has not provided the services of all three categories to Barclays Bank as occupational underlessee. The fact that the management company's provision of the services confers a real benefit on CWL as landlord does not in our view displace the real as well as the contractual flow of services from the management company to Barclays Bank. In this connection we bear in mind Laws J's observation in *Commissioners of Customs and Excise v Reed Personnel Services Ltd* [1995] STC 588 at page 595 where he said:

'Where the facts involve only two parties there is necessarily little or no room for argument over who supplies what to whom. Where there are three (or more), the position may be very different. It should in my judgment be recognised that in that situation the parties' contractual arrangements, even though exhaustive for the purposes of their private law? obligations, may not - as indeed they need not - define and conclude issues arising as to supplies under the 1983 Act; and where they do not, the resolution of such issues remains a questions of fact for the tribunal.'

Our conclusion appears to be in line not just with the reality of the situation but also with the statutory definition of 'supply' which, as we noted in para 37 above, includes all forms of supply but 'not anything done otherwise than for

> a consideration'. Here the consideration for the management services is derived from Barclays Bank as occupational underlessee; the things 'done' in return are the services provided by the management company to or for the benefit of Barclays Bank."

Single Supplies

128. Before leaving the question of supplies, we note that both parties dealt with an alternative case if the tenants are to be treated as receiving a single supply of the right to occupy land and management services (Ground 6). However, both parties agree as their primary case that it is not possible in the present circumstances to fuse supplies by CCML and supplies by RRL into a single supply (albeit that they do so for different reasons). Further, given our findings above that CCML makes its supplies directly to the Leaseholders, there is no room (or need) for this alternative argument. As such, we say no more about Ground 6.

The Proper Construction of ESC 3.18 and Associated Guidance

Submissions

129. The central feature of CCML's various challenges to the Decisions is that, on CCML's case, the supplies are brought within ESC 3.18. By contrast, HMRC's position is that, even on CCML's factual case, ESC 3.18 is not applicable to property management companies.

130. The parties agree that extra statutory concessions should be construed objectively according to what would have been reasonably understood by the ordinarily sophisticated taxpayer. We were referred to *First Alternative v HMRC* [2022] EWCA Civ 249 and *Murphy v HMRC* [2023] EWCA Civ 497, [2023] STC 944. The dispute was as to how ESC 3.18 is to be construed.

131. Mr Beal KC and Mr Lowenthal submitted as follows:

(1) CCML's service charge is mandatory, it is paid by occupants of residential property, and it goes to the upkeep of Chelsea Cloisters. This is as provided for by ESC 3.18.

(2) CCML's case is supported by *Ingram*.

(3) The guidance does not detract from the wording of ESC 3.18.

(4) It is wrong to say that ESC 3.18 can only apply where natural freeholders occupy the common estate.

(5) Section 42 of the Landlord and Tenant Act 1987 ("LTA 1987") and section 18(1) of the Landlord and Tenant Act 1985 ("LTA 1985") supports a broad definition of service charges.

132. Miss McArdle submitted as follows:

(1) ESC 3.18 and the guidance ought to be treated as a whole without "cherry picking".

(2) The anomaly being addressed was that of freehold owners occupying residential property and paying service charges. That is not the situation here.

(3) The guidance is unambiguous in not applying to property management companies.

(4) ESC 3.18 only applies where there are natural persons residing on a common estate, some of whom are leaseholders and other freeholders, all of whom pay mandatory service charges.

(5) Mandatory service charges paid by tenant occupiers are in the nature of rent.

(6) *Ingram* supports HMRC's case as it notes that the concession does not apply to charges paid by the landlord to third parties and passed on to tenants through a service charge.

(7) Section 42 of the LTA1987 and section 18(1) of the LTA 1985 supports HMRC's position that a service charge is payable by a tenant as part of or in addition to the rent.

Discussion

133. On the basis of our findings as set out above (including the direction of supply) we find that the service charges paid by the Leaseholders to CCML are within the exemption provided by ESC 3.18 and the associated guidance. This is for the following reasons.

134. First, we agree that the proper approach is to construe the concession (including its guidance) objectively according to the understanding of an ordinarily sophisticated taxpayer. In *First Alternative v HMRC* [2022] EWCA Civ 249, Zacaroli J (as he then was) stated as follows at [34]:

> "[34] The parties were agreed that in order for an extra-statutory concession to be capable of giving rise to a legitimate expectation on the part of a taxpayer, it must be clear and unambiguous, and that the question is how, on a fair reading of the concession, it would have been reasonably understood to those to whom it was addressed (ie the ordinarily sophisticated taxpayer): *Re Finucane's application for judicial review (Northern Ireland)* [2019] UKSC 7, [2019] 3 All ER 191, [2019] NI 292, per Lord Kerr at [62]; *Paponette v A-G* [2010] UKPC 32, [2011] 3 LRC 45, [2012] 1 AC 1, *per* Lord Dyson at [30]."

135. Secondly, looking at this stage only at ESC 3.18 itself, the concession involves the following components:

(1) Mandatory service charges or similar charges.

(2) Payment by the occupants of residential property.

(3) The payments are towards the upkeep of the dwellings or block of flats in which they reside and towards the provision of a warden, caretakers, and people performing a similar function for those occupants.

(4) The concession does not exempt service charges paid in respect of holiday accommodation.

136. These components are fulfilled in the present case. Mandatory is not defined. We find that a reasonably sophisticated taxpayer would treat "mandatory" as meaning that it is a payment that tenants are obliged to make. Given the express reference to the payees being "occupants of residential property", we find that an ordinarily sophisticated taxpayer would also treat the obligation as being a requirement of the respective occupant's interest in land and so a term of the occupant's lease or licence. However, this does not mean that the payment must be in the nature of rent or even payable only to the landlord; ESC 3.18 defines what the mandatory payment is for but does not state who the mandatory payment is to. In the present case, the payments to CCML are mandatory as Leaseholders are required to pay them by the Lease, both by way of a direct covenant with Realreed and by way of a direct covenant with CCML. It is therefore clear in the present case that the payments are by the occupants as they are paid by the Leaseholders. Further, the payments are for the supplies envisaged by ESC 3.18 in that they are towards the upkeep of Chelsea Cloisters.

137. We note that ESC 3.18 does not state that occupants must only be natural persons. An ordinarily sophisticated taxpayer would consider that a company can occupy a property (even

a dwelling) as it can be present physically through its servants or agents. Further, an ordinarily sophisticated taxpayer would not understand ESC 3.18 to be restricted to freeholders as it expressly refers to "occupants" rather than limiting its operation to any particular interest or tenure.

138. Thirdly, the guidance does not exclude from ESC 3.18 service charges paid by tenants to a property management company where the property management company itself makes the supplies to the tenants rather than discharging the landlord's obligations.

139. The Business Brief 3/1994 does not explain the introduction of ESC 3.18 *only* by reference to an anomaly for freehold occupants. The tenure of the residence and the status of the supplier are presented as two separate causes of the anomaly and so the anomaly can still arise where the occupant is a tenant but where the supplier is someone other than the landlord. This is clear from the Business Brief noting that, "Previously charges paid by freehold owners of domestic property, *and by anyone for services which are not supplied by or under the direction of the lessor or ground landlord*, have been taxable. This was because they could not be consideration for any supply of land," (our italics).

140. At first sight, VAT Notice 742 does exclude all property management companies. It states that, "A property management company cannot treat supplies made direct to an occupant of a building (whether a leaseholder, tenant or freeholder) as exempt supplies, see paragraph 12.4." However, this must be read in the context of VAT Notice 742 as a whole rather than in isolation, which reveals this as referring to the situation where a property management company is acting on the landlord's behalf rather than (as here) pursuant to a direct covenant with the occupiers. Indeed, the sentence we have quoted above is immediately preceded by the statement that landlords usually contract out the supplies that they are contractually obliged to supply to the occupants, and so is dealing with the situation where the management company's supply is to the landlord not to the occupants. Further, paragraph 12.4 expressly refers to the situation where the property management company is acting on behalf of the landlord and so does not deal with a situation where there is a direct covenant between the property management company and the occupant.

141. Revenue Customs Brief 6 (2018) takes the matter no further. Again, it expressly deals with the situation where, "Landlords often use property management companies or companies offering similar services, to fulfil their legal obligations to the occupants of an estate. The property management company obtains goods and services on behalf of the landlord and charges a management fee for providing such a service." As we have found above, CCML was making supplies directly to the Leaseholders rather than fulfilling Realreed's obligations to the Leaseholders.

142. VAT information sheet 07/18 takes the same approach, as the emphasis throughout is upon the situation where a property management company is fulfilling the landlord's obligations.

143. It follows, therefore, that the guidance does nothing to qualify the breadth of ESC 3.18, as it is referring to property management companies in different circumstances to the present. If the guidance stood alone, then we would accept that property management companies in a tripartite lease such as the present are not expressly said to be within the exemption. However, the guidance does not stand alone and must be seen alongside ESC 3.18 itself.

144. Fourthly, we are reinforced in our views by the construction given by the Upper Tribunal in *Ingram* (albeit in different circumstances) at [44] (particularly at sub-paragraph (2) which includes the present position where CCML does not supply accommodation but where the Leaseholders' payments are towards the upkeep of Chelsea Cloisters):

> "[44] To summarise:
>
> (1) Mandatory service charges paid by a residential occupier to the landlord which are in the nature of rent, being directly related to the tenant's right of occupation, are exempt from VAT by virtue of s.31 and Sch.9, Pt II, Group 1 of the 1994 Act and it is not necessary to rely on the Concession.
>
> (2) Mandatory service charges paid by a residential occupier which are not in the nature of rent because they are owed to a person who does not supply any accommodation fall within the Concession and are therefore exempt from VAT provided they are paid "towards the upkeep of the dwellings or block of flats in which they reside and towards the provision of a warden, caretakers and people performing a similar function for those occupants" but not otherwise.
>
> (3) The Concession does not apply to optional services supplied by a landlord, managing agent or anyone else to a residential occupier.
>
> (4) The Concession does not apply to any charges paid by the landlord (or other person levying the service charge) to third parties for the supply of services even though the cost of those services is passed on to a residential occupier through a service charge."

145. Fifthly, Section 42 of the LTA 1987 and section 18(1) of the LTA 1985 do not detract from our construction as set out above.

146. Section 42 of the LTA 1987 provides for service charges to be held on trust "where the tenants of two or more dwellings may be required under the terms of their leases to contribute to the same costs". This does not limit service charges to where they are supplied by the landlord. Indeed, "the payee" is defined in section 42(1) as meaning, "the landlord or other person to whom any such charges are payable by those tenants, or that tenant, under the terms of their leases, or his lease."

147. Section 42 of the LTA 1987 defines "service charge" (save for an exclusion of no relevance to the present case) by reference to section 18(1) of the LTA 1985, which provides as follows:

> "18. Meaning of "service charge" and "relevant costs".
>
> (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent –
>
> (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management and
>
> (b) the whole or part of which varies or may vary according to the relevant costs."

148. This does not restrict service charges to expenditure by the landlord (the "landlord's costs of management" is preceded by "or") and says nothing about who the supplier of the services may be or to whom the payments must be paid. It does not, therefore, exclude service charges payable by a tenant to a property management company where there are direct covenants in the lease between the tenant and the property management company.

149. In any event, the wording of ESC 3.18 is, "all mandatory service charges or similar charges." As such, even if we had found that "service charges" had a specific and restrictive meaning, the reference to "similar charges" would not restrict the charges only to those that met a strict statutory definition of "service charges". However, this is academic given our finding that the statutory definition does not exclude the present case.

Legitimate Expectation as a Matter of Domestic Public Law

150. We approach our analysis upon the basis of the findings that we have made above as to the direction of supply and our construction of ESC 3.18 and associated guidance. We have already addressed the submissions relevant to those issues and so at this stage only deal with how those findings are to be treated as a matter of domestic legitimate expectation.

Submissions

151. Mr Beal KC and Mr Lowenthal submitted as follows:

> (1) HMRC are to be held to a clear and unambiguous statement as to how HMRC will exercise its powers unless there are good, objective reasons to depart from it. *R (Davies and Gaines-Copper) v HMRC* [2011] UKSC 47, [2011] 1 WLR 2625 ("*Davies and Gaines-Cooper*") and *R (ZLL) v Secretary of State for Housing, Communities and Local Government and others* [2022] EWHC 85 (Admin) were relied upon in this regard.
>
> (2) No proportionate (or any) reason has been given for departing from ESC 3.18.
>
> (3) There is no need for detrimental reliance upon an extra statutory concession for the purposes of legitimate expectation.

152. Miss McArdle submitted as follows:

> (1) HMRC recognises that detrimental reliance is not always required but the absence of it is relevant to the fairness of departing from it. *Finucane* was relied upon in this regard.
>
> (2) CCML did not act to its detriment in reliance upon ESC 3.18 or associated guidance. There is no explanation as to how the concession is said to have influenced CCML's business. It would be fair to depart from the alleged legitimate expectation in the present case due to the absence of detrimental reliance.
>
> (3) In any event, as Miss McArdle put it, "There are powerful public policy reasons for the correct amount of tax to be enforced and for those liable to be registered for VAT to be so registered."

Discussion

153. We find that HMRC was not entitled to resile from ESC 3.18, with the effect that, had we found that we had jurisdiction to consider the matter, we would have found that the Decisions were unlawful. This is for the following reasons.

154. First, there was no dispute as to the legal framework. Lord Kerr stated as follows in *Re Finucane's Application for Judicial Review (Northern Ireland)* [2019] UKSC 7, [2019] HRLR 7 ("*Finucane*") at [62]:

> "[62] From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment."

155. Secondly, it is clear from *BT Pension Scheme* (our analysis of which is set out above and which we also adopt at this stage) that extra statutory concessions are capable of giving rise to a legitimate expectation.

156. Thirdly, we accept that there is no evidence that CCML was aware of or had in mind ESC 3.18 when making its supplies or when entering into the Leases. It follows that there is no evidence that CCML relied upon ESC 3.18, whether to its detriment or at all. However, we find that this does not make it fair for CCML to be denied the benefit of ESC 3.18. ESC 3.18 and its associated guidance is a clear and unambiguous statement to the public of how HMRC will act in circumstances which are brought within the concession. Indeed, the concession's very premise is that the strict legal position operates unfairly as it creates the anomalies set out in the guidance. HMRC have not provided any basis for resiling from it other than that the correct amount of tax should be enforced and that those liable for it should be registered. However, this in fact supports upholding ESC 3.18, as ESC 3.18 is HMRC's statement as to its approach to ensuring that liability for the correct amount of tax is enforced.

Availability of General Principles of EU Law

157. There is a dispute between the parties as to the extent to which EU general principles of legitimate expectation (in common with general principles of EU law as a whole) can be enforced within UK law. CCML maintains that they can be relied upon for the entirety of the relevant supplies and period of registration. HMRC maintain that they cannot now be relied upon at all.

Submissions

158. Mr Beal KC and Mr Lowenthal submitted that CCML is entitled to rely upon accrued EU rights for supplies in the period from 2018 to 31 December 2020 (being IP Completion Day ("IPCD")) pursuant to paragraph 3 of Schedule 1 to the European Union (Withdrawal) Act 2018 ("EUWA 2018") and thereafter for supplies between IPCD and 1 January 2024 pursuant to paragraph 39(5) of Schedule 8 to EUWA 2018. In summary, this is for the following reasons:

(1) The Supreme Court held (albeit obiter) in *Lipton v BA Cityflyer* [2024] UKSC 23, [2024] 3 WLR 474 ("*Lipton*") that EUWA 2018 provides a "Complete Code" for retained EU law. This has two effects; first, to retain a "snapshot" of EU law as at IPCD to carry forward and, secondly, to retain accrued rights under EU law as applied prior to IPCD. Each of these is subject to any limitations within EUWA 2018.

(2) General principles of EU law were retained. This was originally pursuant to a general retention in section 4 of EUWA 2018. That general retention was abolished by the Retained EU Law (Revocation and Reform) Act 2023 and replaced with a VAT specific retention by section 27 of the Finance Act 2024. However, neither the abolition of the general retention nor the retention for VAT purposes is relevant to the present case as they have effect from 1 January 2024, whereas all relevant supplies in the present case were before then.

(3) Supplies prior to IPCD are to be considered in accordance with EU law because CCML obtained rights in that regard prior to IPCD which were retained thereafter. The fact that the appealable decisions were made after IPCD does not preclude CCML from relying upon its retained rights arising prior to IPCD.

(4) Supplies made after IPCD but before 1 January 2024 are also to be considered in accordance with EU law. Although paragraph 3 of Schedule 1 to EUWA 2018 removes any right of action in domestic law after IPCD based on a failure to comply with any of the general principles of EU law, the present case falls within the exception at paragraph 39(5) of Schedule 8 to EUWA 2018 which relates to proceedings within three years of IPCD, "so far as the proceedings involve a challenge to anything which occurred before IP completion day." This is broad language and the present case involves matters which pre-date IPCD, even where the supplies were afterwards.

159. Miss McArdle submitted that CCML is not entitled to rely upon general principles of EU law in the present case for the following reasons:

(1) EUWA 2018 has been amended by the Retained EU Law (Revocation and Reform) Act 2023 ("REULA 2023") and the Finance Act 2024 ("the FA 2024"), with the effect that no general principle of EU law is part of domestic law for the purposes of the Decisions and general principles of EU law are only relevant for the purpose of interpreting VAT and excise law.

(2) In any event, paragraph 3 of Schedule 1 to EUWA 2018 removes the availability of a cause of action based on a failure to comply with the general principles of EU law after IPCD (although this is subject to transitional provisions).

(3) No cause of action accrued before IPCD on the current facts and so the transitional provisions do not apply. This is because all the decisions under challenge are after completion day and so CCML had no right to bring an appeal before IPCD.

(4) *Lipton* supports HMRC's case as it confirms that there is no cause of action based upon a failure to comply with general principles of EU law after IPCD. *Lipton* does not address the transitional provisions.

Discussion

160. Had we found that we had the necessary jurisdiction, we would have found that CCML would be entitled to rely upon general principles of EU law (including legitimate expectation) in respect of all the disputed supplies.

The relevant version of the legislation

161. Section 4 of REULA 2023 and section 28 of FA 2024 do not apply in respect of these Appeals as they were commenced prior to 31 December 2023.

162. Section 4(2)(a) of REULA 2023 adds the following to section 5 of EUWA 2018:

> "(A4) No general principle of EU law is part of domestic law after the end of 2023."

163. Further, section 4(7) of REULA 2023 omits sub-paragraphs (5) and (6) of Schedule 8 to EUWA 2018 (which, as set out below, is the basis for CCML's submission that it continues to be entitled to rely upon general principles of EU law).

164. However, these amendments (and so, crucially in the present circumstances, the omission of the transitional provisions in paragraph 39(5) of Schedule 8 to EUWA 2018), "do not apply in relation to anything occurring before the end of 2023" (see section 22(5) of REULA 2023, which also applies to sections 2 and 3 of REULA 2023).

165. Section 4 of REULA 2023 is now qualified by section 28 of FA 2024 which restores a limited role for general principles of EU law as follows:

> "(5) Retained general principles of EU law –
>
> (a) continue to be relevant (despite the provision made by section 4 of REULA 2023) for the purpose of interpreting VAT and excise law in the same way, and to the same extent, as they were relevant for that purpose before the coming into force of that section, but
>
> (b) otherwise have effect for that purpose subject to the provision made by that Act (including, in particular, the amendments made by section 6 of that Act (role of courts))."

166. By virtue of section 28(8) of REULA 2023, this is treated as having come into force on 1 January 2024. The qualification to section 4 of REULA 2023 is of course only relevant to the extent that section 4 applies in the light of section 22(5).

167. We find that section 4 of REULA 2023 does not remove any right that CCML has (which we deal with below) to rely upon general principles of EU Law. The saving for "anything occurring before the end of 2023" is in broad terms and is in our view applicable to the supplies, the Decisions (all of which occurred prior to 31 December 2023) and these Appeals (both of which were issued prior to 31 December 2023 and so the engagement of the transitional provisions also occurred prior to 31 December 2023).

168. As such, we consider and apply the relevant legislation below in the form preserved by these savings. It is for this reason that we also refer to "retained" law rather than "assimilated" law.

The legislation

169. Section 4 of EUWA 2018 (as at 31 December 2023) provides for the continuation after IPCD of (amongst other things) rights which are recognised and enforced immediately before IPCD.

> "4. Savings for rights etc under section 2(1) of the ECA
>
> (1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day -
>
> (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
>
> (b) are enforced, allowed and followed accordingly,
>
> continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
>
> (2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they—
>
> (a) form part of domestic law by virtue of section 3,
>
> (aa) are, or are to be, recognised and available in domestic law (and enforced, allowed and followed accordingly) by virtue of section 7A or 7B, or
>
> (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case).
>
> (3) This section is subject to section 5 and Schedule 1(exceptions to savings and incorporation) and section 5A (savings and incorporation: supplementary)."

170. As an exception to section 4 of EUWA 2018 (as at 31 December 2023), paragraph 3 of Schedule 1 provides that there will be no right of action after IPCD in respect of the general principles of EU law.

> "3 (1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.
>
> (2) No court or tribunal or other public authority may, on or after IP completion day —
>
> (a) disapply or quash any enactment or other rule of law, or
>
> (b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law."

171. However, paragraph 39(5) of Schedule 8 to EUWA 2018 includes the following transitional provisions for three years after IPCD.

> "(5) Paragraph 3 of Schedule 1 does not apply in relation to any proceedings begun within the period of three years beginning with IP completion day so far as—
>
> (a) the proceedings involve a challenge to anything which occurred before IP completion day, and
>
> (b) the challenge is not for the disapplication or quashing of—
>
> (i) an Act of Parliament or a rule of law which is not an enactment, or
>
> (ii) any enactment, or anything else, not falling within sub-paragraph (i) which, as a result of anything falling within that sub-paragraph, could not have been different or which gives effect to, or enforces, anything falling within that sub-paragraph."

Lipton

172. The Supreme Court held that rights and causes of action under direct EU legislation which were accrued prior to Brexit can be enforced after Brexit as retained EU law. The Supreme Court in *Lipton* set out the position as follows by reference to the regulation in question in the proceedings before it at [81] to [87] *per* Lord Sales and Lady Rose (with whom Lady Simler agreed):

> "(f) Bringing forward an accrued cause of action
>
> [81] The question of why pre-Brexit accrued causes of action are not extinguished by the repeal of section 2(1) of the ECA 1972 has been considered in a number of cases and academic articles. This topic has been bedevilled by unhelpful labelling of the different choices, in particular treating "accrued EU rights" as being one option as contrasted with "retained EU rights". There is no doubt that, putting aside Cityflyer's defence of extraordinary circumstances, what the Liptons had as at IP completion day was an accrued cause of action arising from the EU text of Regulation 261. That remains the case regardless of the route by which that accrued cause of action can be enforced post-Brexit even though section 2(1) of the ECA 1972 has been repealed. Describing the cause of action as an "accrued EU law right" does not therefore help to answer the question.
>
> [82] We preface the following analysis by saying that in the light of our conclusion on the proper construction of "extraordinary circumstances" discussed below, the adoption of the Complete Code analysis or the Interpretation Act analysis does not make any difference to the outcome of the present case. What follows is therefore strictly obiter, like the discussion of this issue in the Court of Appeal. But we recognise that courts and tribunals at all levels of the judiciary are increasingly going to be grappling with cases like the Liptons' where causes of action under EU law accruing pre-Brexit are being adjudicated upon post-Brexit. It is important that they and the parties to those disputes know the status of CJEU case law.
>
> [83] Our conclusion is that the Complete Code analysis and not the Interpretation Act analysis is the right one, according to the true construction of the Withdrawal Act 2018. Section 3 of the Withdrawal Act 2018 is effective not only to bring forward into domestic law as "retained EU law" the text of Regulation 261 itself as it was "operative immediately before IP completion day", that is to say in the form of the EU text of the Regulation. It also brings

forward accrued causes of actions such as the Liptons' arising under direct EU legislation within the meaning of section 3.

[84] Regulation 261 is an EU regulation and so, according to section 3(2)(a), "as it has effect in EU law immediately before IP completion day" it falls within the definition of "direct EU legislation". According to EU law, EU regulations have direct effect without the need for a Member State to enact any implementing legislation. Regulation 261 "has effect in EU law" in the period up to immediately before IP completion day in two ways: (i) by stipulating the law to be applied to any new fact situations arising between the date the Regulation comes into force and the precise point of time referred to; and (ii) by conferring causes of action and requiring any causes of action accruing under that Regulation by reason of fact situations arising in that period to be recognised and enforced by the domestic courts.

[85] Section 3(1) provides that, as direct EU legislation, "so far as operative immediately before IP completion day", Regulation 261 forms part of domestic law on and after that day. Section 3(3) defines what it means for direct EU legislation to be "operative" at that time. Subparagraph (a) has no application in this case. It contemplates that there may be a small and specific subset of EU regulations which may be "in force" (in the language of subparagraph (a)) and "[have] effect in EU law" immediately before IP completion day (so as to qualify as direct EU legislation under section 3(2)(a)), in the sense that they have been validly promulgated by that time by the EU legislator, but which are not operative at that time because they are "stated to apply" only after that time. EU regulations in that specific category do not qualify as being operative at that time and so are not given continued effect in domestic law after IP completion day under section 3(1); and it should be noted that there could be no question of anyone having accrued a cause of action by the time of IP completion day under such an instrument precisely because it has no application before then. But Regulation 261 is not in that category. Subparagraph (b) also has no application in this case. It refers to relevant decisions which have effect in EU law and stipulates that they only qualify as "operative" immediately before IP completion day, so as to be given continued effect in domestic law under section 3(1), if they had actually been notified to the addressee by that time; otherwise, they have no such continued effect. Subparagraph (c) is the provision which applies in the present case. It aligns the meaning of "operative" with what it means for an EU instrument to be "in force immediately before IP completion day" in a straightforward sense, without the complication of a later stipulated date of application as provided for in subparagraph (a). An EU instrument is "in force" before IP completion day to the extent that it has effect in EU law and hence in domestic law (by virtue of section 2(1) of the ECA 1972), that is as explained in para 84, above.

[86] Regulation 261 was therefore operative immediately before IP completion day in two ways which correspond with the ways in which it had effect in EU law at that time as set out in para 84, above: (i) by stipulating the law to be applied to any new fact situations which happened to arise at that time; and (ii) by requiring any causes of action which had accrued under that Regulation by reason of fact situations arising in the period of its application up to and including that time to be recognised and enforced by the domestic courts. If, notionally, the Liptons had brought their claim and it had been determined at the point in time immediately before IP completion day, Regulation 261 would have been operative to require recognition and enforcement of their accrued cause of action under that Regulation. Therefore section 3(1) has the effect that both (i) and (ii) continue to form part of domestic law after IP completion day. It follows from point (i) that the EU

> text of Regulation 261 continues to have prospective effect to govern new fact situations arising on and after IP completion day, subject of course to any changes introduced by domestic regulations such as the Air Passenger Regulations 2019. It follows from point (ii) that causes of action which have arisen under Regulation 261 by IP completion day continue to form part of domestic law – and so are required to be enforced – on and after that day.
>
> [87] In addition to the natural meaning of the language used in section 3 there are several indications that the Complete Code analysis is the correct construction of the statute. The first is that it respects what we see as the fundamental purpose of the Withdrawal Act 2018, which is to provide comprehensively for the post-Brexit legal landscape. In particular this construction makes clear how a court dealing with an accrued cause of action should apply CJEU case law, because under the Complete Code analysis the accrued cause of action counts as "retained EU law" within the meaning of section 6."

173. Lord Burrows also summarised the position as follows at [175]:

> "[175] I also agree with Lord Sales and Lady Rose on ground 2 (ie which law applies and why?). However, given their disagreement with Lord Lloyd-Jones on ground 2, this judgment sets out in my own words why I consider that Lord Sales and Lady Rose are correct. I agree that what they call the "Complete Code analysis" (but which I shall refer to as the "retained EU law analysis") is to be preferred to what they refer to as the "Interpretation Act analysis" (but which I shall refer to as the "not retained EU law analysis"). At root, my reasoning is that the former analysis is to be preferred because, after IP completion day (31 December 2020), accrued EU law rights fall within what is referred to as "retained EU law" in the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020 (which I shall refer to compendiously as the "EU (Withdrawal) Act 2018"). Accrued EU law rights continue to exist, and have not been retrospectively removed, but do so as part of retained EU law. Accrued EU law rights do not exist as a valid body of law separate from retained EU law."

174. It is of note, however, that the Supreme Court was dealing with directly effective rights under EU legislation which had not been excluded whether retrospectively or otherwise. The Supreme Court noted at [21] the express exclusion of various EU laws from the scope of what was carried forward by EUWA 2018 (including, as referred to by the parties, *Francovich* damages, which had retrospective effect subject to certain qualifications). Lord Sales and Lady Rose also noted at paragraph [21] (b) the exclusion of general principles of EU law from the scope of the law that was carried forward as follows:

> "[21] Some EU laws were expressly excluded from the scope of what was carried forward by the Withdrawal Act. For example,
>
> ...
>
> b. Para 2 of Schedule 1 to the Withdrawal Act 2018 effectively prohibited any further recognition of general principles of EU law in cases decided after Brexit. Further, para 3 limited the application of such general principles which had been recognised before IP completion day by providing that there is no right of action in domestic law after IP completion day based on a failure to comply with those general principles. It also precluded any reliance on general principles to disapply or quash any enactment or rule of law or to decide that any conduct was unlawful."

175. However, the Supreme Court did not (as it did not need to) refer to the transitional provisions in relation to the general principles of EU law. In the context of the present Appeals,

therefore, CCML will only be entitled to enforce its accrued rights as retained law in the same way as *Lipton* if (and to the extent that) those rights fall within the saving at paragraph 39(5) of Schedule 8 to EUWA 2018 as the rights (or at least their enforcement) would otherwise be excluded by paragraph 3 of Schedule 1 to EUWA 2018.

Application of the transitional provisions to the present Appeals

176. The dispute between the parties is therefore as to whether CCML had accrued rights prior to IPCD, which it can now enforce pursuant to the transitional provisions. In essence, this turns on whether the Appeals "involve a challenge to anything which occurred before IP completion day" for the purposes of paragraph 39(5)(a) of Schedule 8 to EUWA 2018. We note for completeness that neither party suggested that paragraph 39(5)(b) had a bearing upon this Appeal.

177. Had we found that we had the jurisdiction to do so, we would have found that CCML did fulfil the requirements of paragraph 39(5)(a) and so (in principle, subject to whether made out substantively) would be entitled to enforce its rights in respect of all the supplies (and period of registration) in dispute. This is for the following reasons.

178. First, we do not accept HMRC's submission that the determinative feature is that the Decisions were after IPCD. It is right that the Appeals are against the Decisions. However, if CCML had the right to treat their supplies as exempt then this is a right which exists irrespective of (and existed prior to) the Decisions. It was the Decisions which denied CCML the rights contended for rather than the Decisions giving rise to those rights.

179. Secondly, paragraph 39(5)(a) refers to a "challenge to anything" which occurred before IPCD. It does not say that the challenge must be against an appealable decision before IPCD ("anything" being particularly broad) or by whom the challenge must be. Here, the "challenge" is by HMRC to (on CCML's case) CCML's right to treat its supplies as exempt. That right (again, on CCML's case) arose prior to IPCD as it arose from ESC 3.18 and the associated guidance.

180. Thirdly, paragraph 39(5)(a) refers to "proceedings which involve" such a challenge. Again, this is broad and is not on its face limited to situations where the right to bring the proceedings arose prior to IPCD, as distinct from the underlying rights involved in the proceedings arising prior to IPCD (the significance being that, in principle, a taxpayer can have a right for its supplies to be treated a certain way but cannot bring an appeal in respect of that right until HMRC has made an appealable decision).

181. Fourthly, this is particularly clear in respect of the supplies which took place prior to IPCD, as the challenge is to how those supplies are to be treated. However, this does not prevent the general principles being applicable to post-IPCD supplies or period of registration. This is because the legitimate expectation relied upon is from ESC 3.18 and the associated guidance rather than anything said or done by HMRC at the time of the supplies. Further, "proceedings which involve" is broad and only requires an involvement of a challenge to anything occurring before IPCD rather than being limited, for example, *to the extent that* the proceedings involve a challenge to anything occurring before IPCD. Even if a distinction can be made between pre-IPCD and post-IPCD supplies and periods of registration, these proceedings would still involve pre-IPCD supplies and so the gateway would be fulfilled. In any event, we note that neither party submitted that the transitional provisions applied to supplies or the period of registration before IPCD but not thereafter.

Application of General Principles of EU Law

182. There is no suggestion that legitimate expectation as a matter of EU law would (if we had jurisdiction to consider them) operate differently in the present case. In those

circumstances, we (like Judge Cannan in *RT Rate FTT*) prefer not to make any determinations as to any differences. It follows, therefore, that the substantive outcome in respect of EU legitimate expectation should be the same as for domestic legitimate expectation as set out above.

183. CCML also relies upon legal certainty and retrospectivity, proportionality, and fiscal neutrality. However, each of these focuses upon establishing that HMRC are not entitled to resile from ESC 3.18 and the associated guidance. We have already made findings in respect of legitimate expectation and so these other general principles do not add anything. Given the context that this section of this decision is obiter, we do not propose to deal with these points further in those circumstances.

A1P1

184. For the same reasons as set out above in respect of legal certainty, proportionality, and fiscal neutrality, CCML's reliance upon A1P1 adds nothing to (and is reliant upon) the submissions made as to legitimate expectation and so we do not propose to deal with this further.

DISPOSITION:

185. It follows that we dismiss the Appeals for the reasons set out above.

186. We wish to record our thanks to all Counsel for the helpful and comprehensive manner with which they have approached this case.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

187. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD CHAPMAN KC
TRIBUNAL JUDGE

Release date: 12th FEBRUARY 2025