



Neutral Citation Number: [2022] EWCA Civ 1447

Case No: CA/2021/000120

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
Mr Justice Mellor and Judge Andrew Scott
[2021] UKUT 170 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2022

Before:

LADY JUSTICE SIMLER
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

Between:

CHRISTIAN PETER CANDY **Appellant**
- and -
THE COMMISSIONERS FOR HM REVENUE & CUSTOMS **Respondents**

Michael Thomas and Quinlan Windle (instructed by **Joelson LLP**) for the **Appellant**
Imran Afzal (instructed by **General Counsel and Solicitor for HMRC**) for the **Respondents**

Hearing date: 12 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 3 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Lady Justice Simler :

Introduction

1. This appeal by Christian Candy, the taxpayer, is brought with the permission of the Upper Tribunal. It raises a short question of statutory construction concerning the interaction of section 44(9) and paragraph 6(3) of Schedule 10 to the Finance Act 2003 (“the FA 2003”) and whether a claim for repayment of stamp duty land tax (“SDLT”) made by amendment on 14 April 2014, to a return filed on 8 October 2012, was made in time.
2. The repayment claim was made in circumstances where there was an initial liability to SDLT (in the sum of £1,920,000) triggered by substantial performance of a contracted-out lease. This liability was declared in his return and paid by the taxpayer. The contract was subsequently (by novation in favour of Nicholas Candy, the taxpayer’s brother) “rescinded or annulled, or for any other reason not carried into effect” *after* the expiry of the normal 12 month time limit for amending the return. The question in those circumstances is whether the claim for repayment of the SDLT had to be made within the normal 12 month time limit nonetheless, or whether it could be made at any time after the initial substantial performance of the contract was not carried into effect, however long a period that was.
3. His Majesty’s Revenue and Customs (“HMRC”) rejected the taxpayer’s claim for repayment on the basis (among others) that the amendment of the return was made out of time. The taxpayer appealed.
4. Judge Nicholas Aleksander sitting in the First-tier Tribunal, (“the FTT”), held that the claim for repayment under section 44(9) could be made at any time and was not therefore out of time. The Upper Tribunal, Mellor J and Judge Andrew Scott (“the UT”), reversed that decision, holding that the taxpayer’s claim for repayment was not made within the 12 month period for amendment provided for by Schedule 10, paragraph 6(3) FA 2003 and was accordingly out of time. Since there is no discretion afforded by the statutory scheme to extend time, that meant the claim for repayment failed.
5. On this appeal, Michael Thomas, who acts on behalf of the taxpayer as he did below, contended that the FTT was correct: the time limit of 12 months in paragraph 6(3) applies “except as otherwise provided” and on a proper reading of section 44(9), it makes alternative provision by expressly providing that a repayment can be claimed where, at any later time after the initial substantial performance, the contract is not carried into effect. In other words, the claim for repayment is not subject to the normal 12 month time limit, or indeed any time limit, in these circumstances. This is consistent with the literal reading of the clause and the purpose of section 44(9). It mitigates potential unfairness where unforeseen circumstances outside the parties’ control lead to a contract for a land transaction going off, wholly or partly, after the 12 month time limit has elapsed. Mr Thomas conceded that the UT’s construction is tenable; but submitted that the taxpayer’s construction is better.

6. For HMRC, Imran Afzal contended that the taxpayer's interpretation of the legislation is untenable. SDLT, in common with other self-assessed tax, has hard-edged deadlines which are unambiguously expressed. In the present case, the obligation was on the taxpayer to complete a return containing a self-assessment within a specified period. The return was itself subject to Schedule 10 FA 2003 which makes provision for amending a return within a time limited period and for opening an enquiry within a further specified period. The imposition on the taxpayer of a hard-edged time limit to amend a return in Schedule 10, paragraph 6(3) sits alongside and is counter balanced by the imposition of a hard-edged time limit on HMRC for opening an enquiry. In short, the statute requires an amended return to be filed within 12 months, and section 44(9) FA 2003 cannot be read as making alternative provision.

The statutory scheme

7. SDLT was introduced by Part 4 FA 2003 to replace stamp duty charged under the predecessor legislation, which was abolished. It is a self-assessed charge on land transactions (section 42(1) FA 2003). The statute defines land transactions as the acquisition of a chargeable interest (section 43(1)), defined to include "an estate, interest, right or power in or over land" other than an exempt interest (section 48(1) FA 2003). The charge arises whether or not the acquisition is documented in a way that brings about formal completion or documented or evidenced in writing at all (section 42(2) FA 2003).
8. Section 44 FA 2003 identifies the distinction between contract and conveyance in a land transaction and makes provision as to which transaction counts for SDLT purposes. In general, the section treats contract and completion by conveyance as part of a single transaction, and the date of completion is the effective date of the land transaction (subsection (3)). However, special rules apply where a contract is "substantially performed" without having been completed. Thus, at times material to the land transaction in this case, section 44 provided:

“44 Contract and conveyance

(1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.

(2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but following provisions have effect.

(3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.

In this case the effective date of the transaction is the date of completion.

(4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.

In this case the effective date of the transaction is when the contract is substantially performed.

- (5) A contract is “substantially performed” when –
- (a) the purchaser, or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or
 - (b) a substantial amount of the consideration is paid or provided.
- (6) For the purposes of subsection (5)(a) –
- (a) possession includes receipt of rents and profits or the right to receive them, and
 - (b) it is immaterial whether possession is taken under the contract or under a licence or lease of a temporary character.
- (7) For the purposes of subsection (5)(b) a substantial amount of the consideration is paid or provided –
- (a) if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided;
 - (b) if the only consideration is rent, when the first payment of rent is made;
 - (c) if the consideration includes both rent and other consideration, when –
 - (i) the whole or substantially the whole of the consideration other than rent is paid or provided, or
 - (ii) the first payment of rent is made.
- (8) Where subsection (4) applies and the contract is subsequently completed by a conveyance –
- (a) both the contract and the transaction effected on completion are notifiable transactions, and
 - (b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract.
- (9) Where subsection (4) applies and the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of that subsection shall (to that extent) be repaid by the Inland Revenue. Repayment must be claimed by amendment of the land transaction return made in respect of the contract.
- (9A) Where –
- (a) paragraph 12A of Schedule 17A applies (agreement for lease), or

(b) ...

it applies in place of subsections (4), (8) and (9).

(10) In this section –

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

(b) “contract” includes any agreement and “conveyance” includes any instrument.

(11) Section 1122 of the Corporation Tax Act 2010 (connected persons) has effect for the purposes of this section.”

9. Section 76 FA 2003 deals with the requirement to deliver a land transaction return to HMRC before the end of the period of 30 days after the effective date of the transaction. It provides that the land transaction return must include a self-assessment of the SDLT that, on the basis of the information contained in the return, is chargeable on the transaction:

“76 Duty to deliver land transaction return

(1) In the case of every notifiable transaction the purchaser must deliver a return (a “land transaction return”) to the Inland Revenue before the end of the period of 30 days after the effective date of the transaction.

(2) The Inland Revenue may by regulations amend subsection (1) so as to require a land transaction return to be delivered before the end of such shorter period after the effective date of the transaction as may be prescribed or, if the regulations so provide, on that date.

(3) A land transaction return in respect of a chargeable transaction must –

(a) include an assessment (a “self-assessment”) of the tax that, on the basis of the information contained in the return, is chargeable in respect of the transaction, and

(b) be accompanied by payment of the amount chargeable.”

10. Section 78(1) FA 2003 provides that Schedule 10 has effect with respect to land transaction returns, assessments, and related matters. Part 1 of Schedule 10 contains general provisions about returns: in particular, a land transaction return must be in the prescribed form (paragraph 1(1)) and there are penalties provided for failure to deliver a return.

11. Schedule 10 FA 2003, paragraph 6 provided as follows at the material time:

“Amendment of return by purchaser

6(1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.

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

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

(a) the contract for the land transaction; and

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

(3) Except as otherwise provided, an amendment may not be made more than 12 months after the filing date.”

12. Part 6 of Schedule 10 provides for relief in the case of excessive assessments. Schedule 10, paragraph 34 provided on enactment and until 1 April 2011, for relief in case of a mistake in a return as follows:

“34(1) A person who believes he has paid tax under an assessment that was excessive by reason of some mistake in a land transaction return may make a claim for relief under this paragraph.”

13. Paragraph 34 was substantively amended by Schedule 12, paragraph 2 Finance (No.3) Act 2010. The paragraph now applies where a person has paid an amount by way of tax but believes that the tax was not due. It is subject to Schedule 10, paragraph 34A FA 2003 (as amended), which sets out cases where HMRC are not liable to give effect to such a claim.

The underlying facts

14. Although this appeal turns on the proper construction of the relevant legislation, it is helpful to have some understanding of the facts underlying the property transactions to provide the context for some of the arguments advanced by the taxpayer.
15. The facts were summarised by the FTT at [10] to [21] (and adopted by the UT) by reference to HMRC’s statement of case, which was not materially in dispute. The FTT made clear that it was making no findings of fact in doing so. I gratefully adopt that summary on the same basis.
16. On 9 August 2012, the taxpayer entered into two separate contracts with the Commissioners of the Royal Hospital Chelsea (the seller) and other persons as intermediate landlords.
17. The first contract was an agreement for a lease of the property for a term of 25 years for a premium of £20 million (the initial lease). This contract was accompanied by a deed governing the development of the property by the taxpayer. On 10 August 2012, the taxpayer’s building contractors commenced construction work at the property. The initial lease was granted on 1 October 2012.
18. The second agreement entered into on 9 August 2012 was an agreement for the assignment of a separate lease (the contracted-out lease) of the property for a term of

201 years from 1 October 2012 for a price of £48 million, payable in four instalments. The first instalment of £7.39 million was paid on 1 October 2013 by the taxpayer.

19. On 1 April 2014, the taxpayer made a gift of his interests in the property (the initial lease and the benefit of the agreement for the assignment of the contracted-out lease) to his brother, Nicholas Candy. The initial lease was assigned by the taxpayer to his brother. The seller, the intermediate landlords, the taxpayer and his brother entered into a deed of novation discharging the taxpayer from all of his obligations remaining to be performed under the agreement for the contracted-out lease. The original parties to that agreement acknowledged that the obligations as against each other under that agreement were extinguished. Instead, Nicholas Candy assumed the liability to perform the obligations that remained to be performed by the taxpayer. The supplemental deed (governing the development of the property) was also novated.
20. On the same date on which the deed of novation was entered into (1 April 2014), Nicholas Candy took possession of the property. Nicholas Candy paid the second instalment of the £48 million purchase price on 1 October 2014 and the third instalment a year later.
21. A court order was obtained on 9 April 2019 permitting the grant of the contracted-out lease without enfranchisement rights. The contracted-out lease was granted to the intermediate landlords a week later, on 16 April 2019.
22. At the time of the FTT's decision (26 February 2020) it was recorded that Nicholas Candy was still residing in the property under the initial lease but had yet to acquire the contracted-out lease. When that happens, the final instalment of the £48 million purchase price will become payable and the initial lease will expire.
23. The taxpayer made a land transaction return dated 8 October 2012 in respect of the initial lease. He paid the SDLT chargeable on the consideration of £20 million. No further SDLT was payable on the assignment of the initial lease because, as a gift, there was no chargeable consideration on which SDLT could be assessed.
24. On 8 October 2012, the taxpayer also made a land transaction return in respect of the contracted-out lease. SDLT was chargeable on the consideration of £48 million. The liability to SDLT (£1.92 million) had been triggered in respect of that lease as a result of the taxpayer's building contractors starting work on the property. That was sufficient to constitute the taking of possession of the property and amounted to "substantial performance" of the contract under section 44(4) FA 2003, which triggered the liability to SDLT.
25. When Nicholas Candy subsequently took possession of the property on 1 April 2014, that also counted as "substantial performance" of the agreement for the contracted-out lease under section 44(4) FA 2003. The effect of the deed of novation was that he became liable to perform the remaining obligations under the agreement of the contracted-out lease, namely the payment of the three remaining instalments (£40.61 million) of the £48 million purchase price. However, the chargeable consideration for SDLT purposes for this transaction remained the full £48 million purchase price. This was because the subject-matter of the deed of novation was an uncompleted contract and, since there was a gift between two brothers, special charging rules in Schedule 2A, paragraphs 12 to 14 FA 2003 applied.

26. On 10 April 2014, the taxpayer made an application to HMRC under section 44(9) FA 2003 for repayment of the SDLT he had paid on 8 October 2012 in respect of the contract for the contracted-out lease. The application for repayment of the SDLT was made by way of an amendment of the land transaction return he had submitted on 8 October 2012. HMRC rejected the taxpayer's amendment of the return as having been made out of time and the taxpayer appealed. It is unnecessary to set out the detail of the route by which the appeal found its way to the FTT.
27. The taxpayer also made a separate alternative claim for repayment of the SDLT payable in respect of the contracted-out lease under Schedule 10, paragraph 34 FA 2003. HMRC have rejected that claim as well and the rejection is the subject of a separate appeal by the taxpayer.

The decision of the FTT

28. The FTT accepted HMRC's submission that Part 4 of FA 2003 (which introduced SDLT) was "hastily drafted". Section 109 FA 2003 contained a wide power to vary Part 4 by regulations. Moreover, the SDLT code as originally enacted in 2003 was, in fact, subject to significant amendment by Finance Act 2004.
29. The FTT identified the critical issue in the appeal as whether the phrase "Except as otherwise provided" in Schedule 10, paragraph 6(3) FA 2003, referred back to the word "afterwards" in section 44(9) FA 2003. The FTT gave three main reasons for concluding that it did and that, accordingly, claims for repayment under section 44(9) are not subject to the normal 12 month time limit for amending a return. These reasons can be summarised shortly.
30. First, the words in paragraph 6(3) would only have been included by Parliament in the legislation if they were intended to refer to an extant provision elsewhere in the legislation providing for an exception. The only possible provision was the word "afterwards" in section 44(9). Secondly, "afterwards" is used in section 44(9) in a temporal sense because the subsection would also make sense if the word was omitted. It followed that its inclusion must have been intended to add to that meaning of the provision, and that meaning "was a temporal one." It followed that this in itself was enough to constitute "other provision" displacing the normal time limit in Schedule 10, paragraph 6(3) FA 2003. Thirdly, the FTT considered this conclusion to be consistent with the underlying policy of SDLT and to provide for a fair outcome by avoiding economic double taxation. The FTT expressed the view that allowing section 44(9) to operate without a time limit would not lead to chaos or purchasers "gaming" the system.

The decision of the UT

31. In a detailed and comprehensive decision, the UT concluded that the FTT was in error in assuming that the words "Except as otherwise provided" in paragraph 6(3) had to be referring to another provision on enactment. The UT identified examples in Part 4 FA 2003 of "except as otherwise provided" provisions which, on the enactment of FA 2003, did not engage any other provision in Part 4 and did not have any immediate substantive legal effect. The UT observed that it is not uncommon for Parliament to include provision, in generic terms, pointing out that a wide general proposition could be countermanded by other provisions. The function in that case is often no more than a warning to the reader to read on. In the light of the rushed circumstances in which Part

4 FA 2003 was enacted, the UT concluded that this was the most likely explanation for their inclusion: Parliament included the words because they might be useful in the future.

32. Instead, the UT held that the focus should have been on whether section 44(9) could be read as providing for no time limit for amending a return, and in particular, whether the inclusion of the first sentence in section 44(9) gave the taxpayer a right, without time limit, to require a repayment to him of the SDLT that had been paid on substantial performance.
33. The UT analysed the structure and meaning of section 44(9), holding that the first sentence of section 44(9) imposes a duty on HMRC to repay the SDLT. The second sentence provides that for a repayment of SDLT to be made, a claim must be made by the taxpayer; and also requires the claim to be made by way of amendment to the land transaction return. The UT found it impossible to construe the first sentence in section 44(9) as containing a provision for a different or no time limit. Having reached the conclusion that section 44(9) FA 2003 does not operate as an exception to the normal time limit for amending land transaction returns given by Schedule 10, paragraph 6(3), the UT was fortified in its conclusion by considering other contexts in Part 4 FA 2003, where claims for repayment of SDLT are made; and by considering the predecessor (stamp duty) provisions.
34. The UT concluded that this outcome was well within the bounds of reasonable outcomes that Parliament could have intended. Parliament was intending to strike a balance between the need to bear down on avoidance and the need to relieve innocent transactions. The risk of people gaming the system without a time limit is the sort of risk that Parliament would have wished to avoid. A charge that could be unwound without any time limit could be open to abuse.

The appeal

35. There are five inter-related grounds of appeal, and these were developed by Mr Thomas. His essential submission was that the UT erred in law by reversing the FTT decision. In summary, he argued:

(1) First, there was a failure by the UT to fully identify and give effect to the statutory purpose underlying section 44(9) FA 2003. That purpose is to ensure that SDLT charges do not arise in circumstances where a contract for a land transaction is substantially performed but subsequently not carried into effect. Section 44 is easily triggered – a single payment of rent can trigger substantial performance – and could easily produce a charge to SDLT in situations where an entirely innocent purchaser does not obtain the substantial benefit of the contract and there is no question of any attempt at avoidance. Accordingly, subsection (9) gives taxpayers a wide, unqualified right to reclaim SDLT paid on substantial performance where the contract is to any extent “afterwards” not carried into effect and gives relief to that extent. The key word is “afterwards” which means at a later time. It is the word “afterwards” that engages the exception to the general time limit and means that a claim for repayment can be made “at any time afterwards.” It is inconsistent to apply a general time limit in these circumstances, especially where, after a contract has been substantially performed, unpredictable or unforeseen circumstances arise and mean it is not carried into effect more than 13 months (or 12 months and 14 days) after the date of substantial performance.

(2) This interpretation best fits the statutory wording which gives a broad right to repayment matching the broad right to tax. By contrast, the UT wrongly adopted an interpretation which gives rise to unfair results which do not fit the scheme of the SDLT code. Here, the effect is that two SDLT charges arise on a single consideration in circumstances where the sellers receive a single purchase price, and the taxpayer (the original purchaser) gifted his interests to his brother. But at a more general level, the arbitrary time limit that results from the UT's construction means that there are unfair consequences in the real world when a contract for a land transaction goes off to any extent after the 12 to 13 month period from substantial performance has elapsed.

(3) The UT was wrong to adopt an interpretation that effectively renders both the word "afterwards" in section 44 (9) FA 2003 and the opening words of Schedule 10, paragraph 6(3) FA 2003 redundant at the time of their enactment. On the UT's construction, these words had no substantive effect on enactment and for years subsequently. The presumption that every word in a statutory provision has meaning should have been applied.

(4) The UT wrongly placed undue weight on the drafting style used in the relevant provisions and in comparing this with other provisions, both in the SDLT code and elsewhere, including the predecessor provisions.

(5) Finally, the UT was wrong to conclude that section 44(9) would be vulnerable to tax avoidance if the taxpayer's arguments prevailed. Mr Thomas developed this argument by reference to the *Ramsay* doctrine and the likelihood that a realistic view of the facts would be taken if purchasers attempted to argue that contracts had not been carried into effect many years later, by rescinding the original contract and creating a new one.

36. I have summarised Mr Afzal's essential submission above. He supported the reasons and conclusions reached by the UT. I intend him no disrespect in not summarising further the helpful submissions he made.

Discussion and conclusions

37. I do not accept the arguments on statutory construction advanced by Mr Thomas and agree with Mr Afzal that the taxpayer's argument on construction on this appeal is untenable. My reasons for reaching that conclusion follow.
38. As is well established, the court's task is to ascertain and give effect to the meaning of the words used by Parliament. This was explained by Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 at [8]:

"8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Every statute other than pure consolidating statute is, after all, enacted to make some change, or address some problem ... The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be

read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”

39. External aids to interpretation play a secondary role. Explanatory Notes prepared under the authority of Parliament may be considered on this basis, particularly where they cast light on the purpose of the particular statutory provision in question.
40. I therefore start, as the UT did, with the purpose of section 44 FA 2003 and the function of Schedule 10, paragraph 6(3) FA 2003, as part of a self-assessment system of taxation.
41. There is no dispute that at least one of the purposes of section 44 FA 2003 was to deal with an avoidance technique known as “resting on contract” that was prevalent under stamp duty, where a person acquired the beneficial ownership of land by performing the obligations under the sale contract without formally completing the contract. Under the stamp duty regime, so long as a transfer was not executed, no stamp duty would be payable. The predecessor legislation contained provisions designed to prevent or frustrate such arrangements (see for example, the provision made by Schedule 9 Finance Act 1999 and section 115 Finance Act 2002).
42. This particular avoidance purpose is clear from the terms of section 44 itself, and reinforced by the passage in the Explanatory Notes to the Bill that became FA 2003, dealing with section 44 as follows:

“This clause ensures that, in the majority of cases, stamp duty land tax will arise on completion. But it is also designed to prevent avoidance of postponement of tax by the technique of “resting on contract.” In such cases the clause ensures that a transaction is only charged to stamp duty land tax once.”
43. Section 44 introduced the concept of “substantial performance” as the means of preventing resting on contract schemes from having the effect of deferring the tax point for the charge to SDLT on a potentially indefinite basis (section 44(4)). Section 44(5) identified two ways in which a contract could be “substantially performed”. First, where the purchaser takes possession of the whole, or substantially the whole, of the subject-matter of the contract ((5)(a)); and secondly, where a substantial amount of the consideration is paid or provided ((5)(b)). For the application of subsection (5)(a) it does not matter whether possession is achieved under the contract in question: possession under a licence or lease of a temporary character is enough (see subsection (6)(b)).
44. However, it is clear from subsections (8) and (9) in particular, that Parliament recognised the potential for section 44(4) to operate unfairly to taxpayers charged to SDLT on substantial performance without completion of the contract.
45. Section 44(8) deals with a case where, following substantial performance without completion, subsequent completion of the contract does occur, but further consideration is payable. It requires the completion to be a notifiable transaction even if no further SDLT is payable ((8)(a)); and makes clear that tax is chargeable on the latter transaction only to the extent that it exceeds the tax already chargeable on the contract ((8)(b)).

46. Section 44(9) deals with the case where the contract is never completed: either because it ends by rescission or some form of declaration of invalidity (annulment), or because it is for any other reason not carried into effect. It is understandable that Parliament decided to provide this safeguard: in the absence of completion following substantial performance, the full benefits under the contract are unlikely to be obtained by the purchaser. In some cases, and rescission may be an example, where each contracting party is returned (to the extent possible) to the position they were in before the contract was entered into, the purchaser may not obtain any benefit under the contract. In other cases, while some benefit may be obtained, the closer the contract terminates after substantial performance occurs, the less the benefits are likely to have been.
47. The SDLT scheme operates as a self-assessed tax: section 76 FA 2003. Taxpayers are required to complete a return and include a self-assessment to tax in the return. There are strict time limits for delivering returns: at the material time returns had to be submitted 30 days after the effective date of the transaction (that period is now 14 days). Returns must comply with the requirements of Schedule 10 FA 2003, including the time limits imposed for amending returns in paragraph 6(3), and those imposed on HMRC for opening an enquiry in paragraph 12. As Mr Afzal emphasised, the self-assessment system imposes hard-edged deadlines, both on taxpayers and HMRC, for the sound administration of the tax system and to achieve certainty and finality. If HMRC make no enquiry and a taxpayer has not amended his or her return once the time limits have expired, the self-assessment return becomes final. So, if HMRC fail to open an enquiry in time, the correct amount of tax will not be recoverable by HMRC in respect of an insufficient self-assessment (unless the case falls within the exceptions in Part 5 Schedule 10 FA 2003, which has its own time limits). Likewise, if a taxpayer has mistakenly overpaid tax or been subject to an excessive assessment but made no in-time amendment, the tax cannot be reclaimed unless Part 6 Schedule 10 FA 2003 provides a remedy.
48. Returning to the words used by section 44(9), the first sentence affords a taxpayer an unqualified, substantive right to repayment of SDLT, while the second sentence makes clear that repayment must be claimed by amendment of the land transaction return. In other words, the first sentence provides the substantive right, and the second sentence provides the process for enforcing that right. Logically any timing aspects of the right to claim repayment could have been expected to be addressed in or after the second sentence. However, there is nothing in the second sentence that expressly does so. Instead, Mr Thomas relies on the word “afterwards” in the first sentence to disapply the general time limit governing amendments to returns, leaving it open to a taxpayer to make a claim for repayment (on his case) at any time after substantial performance, even decades later. If “afterwards” does not have effect as an exception as he submitted, nothing does, and his argument must fail.
49. In my judgment, the word “afterwards” does not have the effect contended for by Mr Thomas. Afterwards is an ordinary English word. It indicates a sequence of events. It has the same sequential meaning as the ordinary word “subsequently” used in section 44(8). Further, the grammatical structure of section 44(9) demonstrates that Parliament intended “afterwards” to be no more than an indication of the sequence of events, and otherwise attached very little weight to this word. That is clear from an ordinary reading of the first sentence: by virtue of the repetition of the verb “is” and the placement of the comma, the word “afterwards” attaches only to the first limb (rescission and annulment)

and does not go with the second limb (the contract for any other reason not being carried into effect). If Parliament had intended the word “afterwards” to have the significant effect of disapplying the generally applicable time limit, it would surely have been expressed as applying to both limbs.

50. Nor can I see any rational reason why Parliament would have wished to dispense altogether with the generally applicable time limit in paragraph 6(3), enabling taxpayers to make claims for repayment without any time limit, even decades later when memories may have faded and documents relating to the original land transaction may have been lost. There is nothing inconsistent in Parliament providing a right to reclaim tax paid as a safeguard for innocent taxpayers caught by the widely worded charge in section 44(4), but at the same time making that right subject to clear procedural rules, including time limits on the right to reclaim payment. It is of the essence of a self-assessment system that tax effects can be undone by administrative failure and merely meeting the substantive conditions for the grant of a relief is rarely enough to secure that a taxpayer receives the relief in question. Where the relief requires a claim, and the claim is not made in accordance with any procedural requirements, the taxpayer will not be given the relief.
51. Moreover, hard-edged time limits are a common feature of the self-assessment scheme. Where they govern the availability of a relief, they have the inevitable potential to cause hardship. In the case of section 44(9), a balance between the competing objectives of preventing tax avoidance on the one hand, and relieving innocent transactions caught by section 44(4) on the other, was clearly intended by Parliament. Since the longer the period of substantial performance lasts without completion of the contract, the more likely it is the purchaser will have obtained benefits under the contract in a way that justifies maintaining the SDLT charge, it was rational to strike that balance with a time limit of 13 months for amending the return from the effective date of the transaction giving rise to substantial performance (in other words, 12 months after the filing date). This limits the scope for avoidance but is simple to operate (for both HMRC and taxpayers). I can see no good reason why the unambiguous, hard-edged time limit in paragraph 6(3) should yield to section 44(9) as Mr Thomas contended. The consequence of Mr Thomas’ construction is to dispense with certainty and finality in the sound administration of SDLT. That would be a surprising result.
52. Moreover, although as Mr Thomas submitted, the charge in section 44(4) FA 2003 can be easily triggered, substantial performance requires a positive act by the purchaser (or person connected with the purchaser). Taking possession of a property is not something that happens by accident. Once substantial performance occurs, the purchaser is at risk if completion does not take place within the time limit prescribed. The risk is no different however, from other commercial risks. It is known and can be catered for in the ordinary way.
53. Accordingly, in my judgment the word “afterwards” does not provide an (otherwise unarticulated) exception to the time limit generally applied by paragraph 6(3) for making amendments. It has nothing to do with time limits at all. Once the duty to repay arises, the second sentence of section 44(9) requires a claim to be made by way of amendment of the original return. That can only be done in the period specified by paragraph 6(3).

54. I recognise that the consequence of this conclusion is that the words in paragraph 6(3) “Except as otherwise provided” had no substantive effect on enactment. The presumption that all words in a statutory provision should have substantive effect is a presumption that can be displaced. In any event Mr Thomas does not dispute that those words could have been intended to be forward looking only, to account for future amendments. While that may be regarded as an odd drafting technique since a future amendment could have inserted those words when a subsequent exception was introduced, I agree with the UT that the words are likely to have been included in Part 4 FA 2003 as a helpful aid to the reader, to point out for the future, that the generally applicable time limit might be countermanded elsewhere.
55. The UT was fortified in reaching its conclusions about the effect of section 44(9) by considering other provisions in Part 4 FA 2003 where claims for repayment of SDLT are provided for, and by considering the predecessor stamp duty provisions. Mr Thomas was critical of that approach. He submitted that this comparative review did not support the UT’s conclusions, not least because Parliament uses different language, dependent on a variety of factors, in different provisions of the statutory scheme, and does not adopt a uniform approach. Little can accordingly be gleaned from other provisions dealing with time limits in different contexts. Moreover, he placed particular emphasis on section 80(4) (as originally enacted, and after amendment by the Finance Act 2004, and until 1 April 2011) which contained no time limit within which subsequent events had to occur to give rise to a right to reclaim tax said to have been overpaid by the taxpayer. This provision in particular, demonstrates that Parliament was content for there to be no time limit in a similar context.
56. I see nothing wrong in the UT’s reference to certain provisions in the predecessor stamp duty legislation, also designed to address “resting on contract” arrangements where, so long as a transfer of property was not executed (since stamp duty was payable only on instruments transferring legal title) no stamp duty would be payable. The UT referred in particular, to section 115(6) Finance Act 2002 which provided:

“(6) The ad valorem duty paid upon a contract or agreement under this section shall be repaid by the Commissioners if the contract or agreement is afterwards rescinded or annulled or is for any other reason not substantially performed or carried into effect.”

The simple point made by the UT was that the strikingly similar drafting of section 115(6) which also contained the word “afterwards”, cannot have been drafted with the intention that the word “afterwards” should be understood as overriding any time limit, since there was no requirement to file a return or make a claim in that legislation, and hence, there was no time limit to disapply.

57. As for the examples of other provisions referred to by the UT as expressly displacing an otherwise generally applicable time limit, they do so, for example in Schedule 18 FA 1998 (paragraphs 72(3), 74(3) and 82(3)), by expressly disapplying the time limit; or in Schedule 4ZA FA 2003 (paragraph 8(3)), by expressly providing for a different time limit. Parliament could quite easily have done the same in section 44(9) on enactment, or subsequently when a series of amendments were effected by Finance Act 2004, but plainly chose not to do so.

58. Moreover, if, as Mr Thomas submitted, Parliament intended no or an extended time limit in section 44(9), the obvious course would have been for Parliament to have adopted the approach it adopted in amended section 80(4) FA 2003. As originally enacted, section 80(4) FA 2003 provided:

“(4) If the effect of the new information is that less tax is payable in respect of a transaction than has already been paid, the amount overpaid shall on a claim by the purchaser be repaid together with interest as from the date of payment.”

This provision did not prescribe how (or when) the claim was required to be made. However, section 80(4) was amended by section 299(4) Finance Act 2004 to insert a new subsection (4) as follows:

“(4) If the effect of the new information is that less tax is payable in respect of a transaction [...] than has already been paid –

(a) the purchaser may, within the period allowed for amendment of the land transaction return, amend the return accordingly;

(b) after the end of that period he may (if the land transaction return is not so amended) make a claim to the Inland Revenue for repayment of the amount overpaid.”

In other words, on amendment in 2004 express provision was made in subsection (b) to enable a claim for repayment to be made after the expiry of the period allowed for amendment. Section 44(9) FA 2003 could have been similarly amended in 2004 to enable claims for repayment to be made after the expiry of the period allowed for amendment. However, it was not amended then or subsequently to make such provision.

59. Like the UT, I consider the irresistible inference to be that Parliament was, by requiring the claim for repayment in section 44(9) to be made only by amendment of the return, intending to attract the generally applicable time limit in Schedule 10, paragraph 6(3) FA 2003.
60. Contrary to Mr Thomas’ submissions, I do not regard this result as unfair in this case or more broadly. As the UT pointed out, if the taxpayer had sub-sold the property to someone for £48m (or indeed £41m), he would not have been entitled to any repayment of SDLT. Tax would then have been charged on two different people by reference to different periods as a natural incident of the SDLT scheme. In effect, the taxpayer sub-sold the property to his brother, Nicholas Candy, for about £41m, although the transaction was structured as a novation under which the taxpayer’s remaining obligations were extinguished and replaced with new obligations undertaken by Nicholas Candy. I see no reason why the taxpayer should be entitled to a refund in the circumstances. Moreover, if his argument is correct, he could enjoy the property for 20 years, never completing and leaving a small balance outstanding, then novate the uncompleted contract to someone else and still reclaim the SDLT.

61. Nor is there any basis for criticising the UT's conclusion that an avoidance charge that could be unwound without any time limit could be open to abuse. The point it made was that the absence of a time limit *could* permit arrangements where the enjoyment of the property could extend to lengthy periods during which the contract had been substantially performed. If SDLT could then be reclaimed when the ownership of the property changed hands, the system of SDLT would be undermined. I agree with the UT that this was the sort of risk that Parliament would have wished to avoid. To do so by means of a hard-edged time limit that avoids the need to resolve time-consuming disputes along *Ramsay* lines is much easier to operate for HMRC and promotes certainty and finality for all involved.
62. Accordingly, for the reasons set out above, which are the same as the reasons given by the UT, section 44(9) FA 2003 does not operate as an exception to the generally applicable time limit imposed by Schedule 10, paragraph 6(3) FA 2003 for amending land transaction returns. I would therefore dismiss this appeal.

Arnold LJ:

63. I agree.

Nugee LJ:

64. I also agree.