Neutral Citation Number: [2022] EWCA Civ 910

Case No: CA-2021-000734

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
MR JUSTICE MEADE and UPPER TRIBUNAL JUDGE RICHARDS
[2021] UKUT 0157 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BAKER
and
LORD JUSTICE DINGEMANS

- -

Between :

NORTHERN GAS NETWORKS LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Jonathan Peacock QC, Nikhil Mehta and **Sarah Black** (instructed by **Enyo Law LLP**) for the **Appellant**
David Yates QC (instructed by **HMRC Solicitor's Office**) for the **Respondent**

Hearing date : 23 June 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30am on 1 July 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether Northern Gas Networks Ltd ("NGN") is entitled to land remediation relief under Schedule 22 to the Finance Act 2001. Both the FTT (Judge Beare and Mr Adrain) and the UT (Meade J and Judge Jonathan Richards) decided that it was not. The decision of the FTT is at [2020] UKFTT 0101 (TC); and that of the UT is at [2021] UKUT 0157 (TCC), [2021] STC 1776.

2. If NGN is entitled to land remediation relief, then it is entitled to a deduction of 150% of the relevant expenditure in the computation of its profits for the purposes of corporation tax. If it is not, then the deduction is limited to 100% of the expenditure. Since the expenditure in issue exceeded £100 million; and the issue is also relevant to other utility providers, the UT granted permission to appeal.

The facts

3. The facts are not in dispute and NGN accepts that the UT accurately summarised them.

4. NGN owns and operates one of the eight regional gas distribution networks in the UK. It acquired that network in 2005 and thereby obtained, and became responsible for, some 37,000 kilometres of gas pipeline much of which was made of iron. Iron pipes are liable to corrode or fracture over time and thus gave rise to the risk of escaping gas and gas explosions. In consequence, the Health and Safety Executive has, since 2001, introduced a compulsory requirement for gas distribution companies, such as NGN, to update and improve their networks of iron pipes. That programme was known as the "30/30 Programme" because it required the replacement or improvement, over a 30-year period, of "at risk" mains pipelines located within 30 metres of a building. Following its acquisition of the network in 2005, NGN complies with this requirement by replacing certain of its iron pipes with high density polyethylene ("HDPE") pipes or lining existing iron pipes with HDPE pipes.

5. NGN acquired its gas distribution business by means of a purchase of assets (referred to as the "hive down") from National Grid Transco plc ("NGT") in 2005. At the time of the hive down, NGN was a subsidiary of NGT. The relationship of parent and subsidiary is a "relevant connection" for the purposes of land remediation relief. A few months after the hive down, the shares in NGN were sold out of the NGT group with the result that, at that point, NGN ceased to be a subsidiary of NGT.

6. One category of assets that NGN purchased from NGT consisted of the pipes comprising a gas distribution network. Those pipes were laid underneath various pieces of land, some privately owned (including by NGN itself) and some publicly owned. It was common ground both before the FTT and the UT that the pipes themselves remained chattels and had not become part of the land. Although I have some doubts whether that common ground was correct, I do not seek to disturb it.

7. Accordingly, when NGN acquired its business and assets from NGT, it also obtained certain rights to locate those pipes on land owned by others, and to access those pipes. In relation to pipes located on private land (though not pipes located on private

streets) NGN took an assignment of private law land rights that NGT had previously obtained from owners of the relevant land. In relation to pipes located on public land, NGN obtained its rights under Schedule 4 to the Gas Act 1986.

8. No new iron pipes have been laid since the 1970s for the purposes of transporting gas. It was common ground that neither NGN, NGT or any company connected with either of them had themselves originally laid the iron pipes that were the object of the expenditure in dispute.

9. The 30–30 Programme imposed statutory obligations on NGN to replace or renew its network of iron pipes. It was common ground that, when performing work on a particular pipe, NGN would ensure that the flow of gas through that pipe was suspended. It was also common ground that it would not have been practicable for NGN to pause all transmission of gas through iron pipes until those pipes were satisfactorily renewed or replaced. Such a pause would have lasted for several years at least, would have prevented many households in the North and North East of England from obtaining gas during that period, and would have caused NGN to be in breach of its statutory and regulatory obligations where necessary.

The legislation

10. The FTT explained that land remediation relief is now governed by the Corporation Tax Act 2009 (as amended). Although we were not taken to the details, it was common ground that the conditions that would now need to be satisfied are more stringent than they were at the time of the events with which we are concerned. At the relevant time, the relevant parts of Schedule 22 to the Finance Act 2001 (now repealed) provided:

> "2 **Qualifying land remediation expenditure**
>
> (1) For the purposes of this Schedule "qualifying land remediation expenditure" of a company means expenditure of the company that meets the conditions in sub-paragraphs (2) to (6).
>
> (2) The first condition is that it is expenditure on land all or part of which is in a contaminated state (see paragraph 3).
>
> (3) The second condition is that the expenditure is expenditure on relevant land remediation directly undertaken by the company or on its behalf (see paragraph 4).
>
> (4) The third condition is that the expenditure is incurred–
>
> (a) on employee costs (see paragraph 5), or
>
> (b) on materials (see paragraph 6),
>
> or is qualifying expenditure on sub-contracted land remediation (see paragraphs 9 to 11).

(5) The fourth condition is that the expenditure would not have been incurred had the land not been in a contaminated state (see paragraph 7).

(6) The fifth condition is that the expenditure is not subsidised (see paragraph 8).

3 **Land in a contaminated state**

(1) For the purposes of this Schedule land is in a contaminated state if, and only if, it is in such a condition, by reason of substances in, on or under the land, that–

(a) harm is being caused or there is a possibility of harm being caused…

4 **Relevant land remediation**

(1) For the purposes of this Schedule relevant land remediation, in relation to land acquired by a company, means–

(a) activities falling within sub-paragraph (2), and

(b) if there are such activities, preparatory activity falling within sub-paragraph (4) which satisfies the condition in sub-paragraph (5).

(2) The activities referred to in sub-paragraph (1)(a) are the doing of any works, the carrying out of any operations or the taking of any steps in relation to–

(a) the land in question,

(b) any controlled waters affected by that land, or

(c) any land adjoining or adjacent to that land,

for the purpose described in sub-paragraph (3).

(3) The purpose referred to in sub-paragraph (2) is that of–

(a) preventing or minimising, or remedying or mitigating the effects of, any harm, or any pollution of controlled waters, by reason of which the land is in a contaminated state; or

(b) restoring the land or waters to their former state. …

12 **Entitlement to relief**

(1) This paragraph applies if–

> (a) land in the United Kingdom is, or has been, acquired by a company for the purposes of a Schedule A business or a trade carried on by the company,
>
> (b) at the time of acquisition all or part of the land is or was in a contaminated state, and
>
> (c) the company incurs qualifying land remediation expenditure in respect of the land.
>
> (2) A company is entitled to land remediation relief for an accounting period if the company's qualifying land remediation expenditure is deductible in that period.
>
> (3) The company's qualifying land remediation expenditure is deductible in that period if it is allowable as a deduction in computing for tax purposes the profits for that period of a Schedule A business or a trade carried on by the company.
>
> (4) A company is not entitled to land remediation relief in respect of expenditure on land all or part of which is in a contaminated state, if the land is in that state wholly or partly as a result of any thing done or omitted to be done at any time by the company or a person with a relevant connection to the company.
>
> 31 **Interpretation**
>
> In this Schedule–
>
> (1) "harm" means–
>
> (a) harm to the health of living organisms,
>
> (b) interference with the ecological systems of which any living organisms form part,
>
> (c) offence to the senses of human beings, or
>
> (d) damage to property…
>
> "land" means any estate, interest or rights in or over land…
>
> "substance" means any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour."

11. It was thus common ground that NGN is entitled to land remediation relief if all the following conditions were met:

    i) NGN acquired "land" in the UK.

    ii) The land was acquired for the purposes of NGN's trade.

iii) At the time of acquisition, all or part of the land was in a "contaminated state".

iv) NGN incurred qualifying land remediation expenditure in respect of the land.

v) The qualifying land remediation expenditure was allowable as a deduction in computing the profits of NGN's trade.

vi) The land must not have been in a contaminated state wholly or partly as a result of anything done or omitted to be done at any time by NGN or a person with a relevant connection to NGN.

The decisions below

12. It was common ground before the FTT that Conditions (2) and (5) were satisfied. The FTT determined, contrary to HMRC's submissions, that Conditions (1) and (3) were satisfied. For the purpose of Condition (1), although NGN only acquired a right to pass gas through the pipes (which was in the nature of an easement), it was a right in land and thus fell within the definition of "land". For the purpose of Condition (3), however, "land" meant the physical land over or under which the right subsisted (the servient land). That interpretation was necessary because it cannot be said that an incorporeal hereditament is contaminated; nor can one spend money on an incorporeal hereditament, as opposed to the servient land. That, in turn, meant that the word "land" could not, or could not necessarily, be given a consistent meaning throughout the schedule. The FTT also decided, contrary to NGN's submissions, that Condition (4) was not satisfied. That was enough to dispose of NGN's claim for land remediation since NGN needed to satisfy all of Conditions (1) to (6). However, the FTT went on to conclude that Condition (6) was not satisfied either.

13. On appeal, the UT decided that Condition (6) was not satisfied with the result that the claim to land remediation relief failed. But they went on to express the view that Condition (4) was not satisfied either.

14. NGN challenges the UT's decision on Conditions (4) and (6). HMRC wish to challenge the decision of the FTT on Condition (3).

Condition (6)

15. Condition (6) is:

> "A company is not entitled to land remediation relief in respect of expenditure on land all or part of which is in a contaminated state, if the land is in that state wholly or partly as a result of any thing done or omitted to be done at any time by the company or a person with a relevant connection to the company"

16. The FTT's relevant findings of fact were:

i) The main problem with iron pipes is their potential to fracture. If a pipe fails while there is gas flowing through it then there is a risk of gas escaping and causing an explosion: paragraph [12] (11).

ii) The iron pipes themselves pose no risk to persons or property; instead it is the presence of gas within those pipes that does so: paragraph [12] (12); and

iii) The gas which flows through the pipes does not increase the risk of fracture or cause or contribute to the corrosion of the pipes: paragraph [12] (11).

17. NGN's argument is that the contamination (i.e. the possibility of harm due to an escape of gas) is not attributable to the iron pipes alone or to the gas alone. It is the combination of the two that gives rise to the harm. The possibility of harm arises from the fact that if the iron pipes are corroded or fractured the gas could escape. At [36] the UT proceeded on the assumption that that was correct. Nevertheless, the UT reasoned that the land was contaminated at least partly because gas was being pumped through the pipes. NGN pumped the gas through the pipes and the harm was, therefore, partly a result of acts of NGN, namely the pumping of the gas through the pipes. Since Condition (6) is not satisfied if the land is in a contaminated state "wholly or partly" as a result of anything done or omitted to be done by the company, Condition (6) was not satisfied.

18. They went on to say that Condition (6) is not concerned with the reason why NGN acted as it did. It is simply concerned with the question whether the land is in a contaminated state wholly or partly as a result of NGN's actions.

19. Mr Peacock QC, for NGN, argues that this is an over-literal approach to the legislation. Condition (6) is intended to express the principle that "the polluter pays". Relief should only be denied where the claimant or a related entity is the true original underlying cause of the contamination itself or has increased the contamination. In the present case neither NGN nor NGT installed the iron pipes; and the continued flow of gas through the pipes did not exacerbate the risk of harm. NGN acquired land that was already contaminated because it acquired land in which there were iron pipes and gas was being pumped through them. Neither NGN nor NGT was responsible for the land becoming contaminated. At best, NGN's action in pumping gas through the pipes continued the contamination that already existed at the date of acquisition. It did not in any sense add to the contamination. Indeed, as its replacement programme took effect, the level of contamination was progressively reduced. The real question is whether NGN (or before it NGT) was responsible for the combined state of affairs consisting of the transport of gas through the iron pipes. The logical outcome of the UT's analysis is that if a company acquires contaminated land and does not immediately rectify the contamination; or if it only mitigates the contamination, then it is denied relief. That is inconsistent with the definition of relevant land remediation in paragraph 4 which expressly includes work for the purpose of "minimising … or mitigating the effects of, any harm."

20. I do not accept this argument.

21. The principle that "the polluter pays" is a broad general statement of policy. It is no substitute for the words of the Finance Act itself. Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by

which meaning is ascertained: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] 1 UKSC 3, [2022] 2 WLR 343 at [29]. Thus statutory interpretation is an exercise which requires the court to identify the "*meaning borne by the words in question in the particular context*" (*R v Secretary of State for the Environment ex p Spath Holme Ltd* [2001] 2 AC 349, 396). An appeal to a purposive interpretation of an enactment is of particular utility where there is no obvious meaning of the words that Parliament has used (*IRC v McGuckian* [1997] 1 WLR 991, 999) but it still requires the court to interpret the language that Parliament has used (*Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 753, [2013] 1 WLR 3785 at [24]). In this case, I cannot see that the words that Parliament has used leave room for doubt.

22. Condition (6) is not satisfied if the land is in a contaminated state wholly or partly as a result of any thing done or omitted to be done at any time by the company. Land is in a contaminated state if there is a "possibility of harm". The purpose of land remediation relief is to give relief against tax where there is expenditure on land which "is" in a contaminated state: paragraph 2 (2). That directs attention to the condition of the land at the date when the expenditure is incurred. That land must also have been in a contaminated state at the date when it was acquired: paragraph 12 (1) (b). So one is required to consider the state of the land both at the date of acquisition and at the date when the expenditure was incurred. The use of the words "at any time" in paragraph 12 (4) also mean that it is not correct to concentrate on the moment when the pipes were laid. On the facts found by the FTT the reason why the land was contaminated both at the date of acquisition and at the date when the expenditure was incurred was because gas was being pumped through the iron pipes. The entity responsible for the pumping of gas at the date of acquisition was NGT (which had a relevant connection with NGN) and the entity responsible for pumping gas between the date of acquisition and the date of the expenditure was NGN itself.

23. The iron pipes themselves (whether or not corroded) do not give rise to any harm. The harm (or, more accurately the possibility of harm being caused) arises because NGN, and before it NGT, pumps gas through them. If no gas had been pumped, the land would not have been contaminated. NGN has done that since it acquired the land, and continues to do so; and it is the continuing pumping of the gas through the pipes that gives rise to the need for the works. The reason why the land "is" contaminated is NGN's continued pumping of the gas. That is an "act" of NGN which gives rise to (or causes) the contamination. I accept that because NGN did not itself lay the iron pipes the contamination is not "wholly" as a result of its acts or omissions. But I cannot escape from the conclusion that it is "partly" the result of its acts or omissions. Even on NGN's argument it is continuing the contamination that existed when it acquired the land. So if one poses Mr Peacock's question: is NGN responsible for the combined state of affairs, namely the combination of iron pipes and the transmission of gas, I consider that the only possible answer is that it is partly responsible for that state of affairs. Mr Peacock also argued that the "thing done" which caused the contamination was the laying of the iron pipes. But that seems to me to be inconsistent with the finding of the FTT that the iron pipes themselves pose no risk to persons or property; instead it is the presence of gas within those pipes that does so.

24. The facts of this case are quite different from a factual situation in which land is contaminated at the time of its acquisition and the new owner simply does nothing for

a while. That is a situation in which the new owner is passive in the face of existing contamination, as opposed to a situation where the new owner actively perpetuates the contamination. One example canvassed during argument was a petrol filling station from which hydrocarbons had been leaking into the ground. If it were acquired by a developer who wished to use it for, say, housing, the land would have been acquired in a contaminated state, for which the developer would not have been responsible. Mr Peacock argued that if the developer did not immediately remedy the contamination, but undertook a programme of investigation while considering what to do, it might be said against him that his omission to act was partly responsible for the continuing contamination. That example would, I think, call for a purposive interpretation of the word "omission" in paragraph 12 (4). In that context it would, I think, bear the first of the meanings given to it in the Oxford English Dictionary, namely:

> "The non-performance or neglect of an action which one has a moral duty or legal obligation to perform"

25. The same would be true even if during the period of investigation hydrocarbons under the land migrated into the aquifers. In neither case would the developer have caused the contamination. If, on the other hand, the petrol filling station were acquired by an oil company which continued to store hydrocarbons which leaked onto the land, there would then be a causal connection between the acts of the land owner and the contamination.

26. In addition, I do not consider that an appeal to the principle that "the polluter pays" is of any real help to NGN. On the findings of the FTT it is not unfair to describe NGN as the polluter, since the contamination would not exist but for its pumping the gas.

27. Mr Peacock made the fair point that on this interpretation a company in the position of NGN, that is to say a gas transporter, could never claim the enhanced deduction. That may well be right, but that is because NGN continued to pump gas through the pipes. Had it ceased to pump the gas, then the likelihood is that at the time when the expenditure was incurred it would not have been possible to say that the land "is" contaminated, as required by paragraph 2 (2).

28. In short, I agree with the conclusion of the UT at [43]:

> "We quite accept that imperfect or partial land remediation is capable of attracting relief. However, we think it is a quite different issue from that which confronts us. The question before us is whether para 12(4) is engaged in NGN's factual situation. Paragraph 12(4) is concerned to ensure that a company should not obtain enhanced relief where the harm or risk of harm results, wholly or partly, from the actions of the company or a person with a relevant connection. In this case, NGN is seeking enhanced relief for expenditure incurred on remedying a 'harm' that results quite clearly in part from its activity, and the activity of NGT before it, of distributing gas. NGT is entitled to an ordinary trading deduction for that expenditure. However, both the policy behind the legislation and the clear words of para 12(4) disqualify it from entitlement to the enhanced deduction. There is no anomaly in a company

> having no responsibility for the contaminated state of land obtaining enhanced relief for imperfect remediation, while a company which had at least partial responsibility for the contamination obtains no such enhanced relief."

29. Because, in my judgment, NGN fails to satisfy Condition (6), the appeal fails. That conclusion is enough to dispose of the appeal. Anything else I say would be *obiter* and would not bind any subsequent tribunal. As Mummery LJ said in *Housden v Conservators of Wimbledon and Putney Commons* [2008] EWCA Civ 200, [2008] 1 WLR 1172 at [31]:

> "In general, it is unwise to deliver judgments on points that do not have to be decided. There is no point in cluttering up the law reports with *obiter dicta*, which could, in some cases, embarrass a court having to decide the issue later on."

Condition 4

30. The FTT held that the expenditure did not qualify because whether it was spent on lining an iron pipe with HDPE or was spent on replacing an iron pipe with an HDPE pipe, the expenditure was incurred in order to improve a chattel, rather than being expenditure on land. The UT did not find it necessary to deal with Condition 4 although they did make "some brief remarks" about it. Their discussion proceeded on the basis that the pipes remained chattels. They considered that although the (assumed) fact that the pipes remained chattels did not rule out the possibility of the expenditure being qualifying expenditure, the expenditure had to have "some real world" connection with land. The expenditure in this case was incurred with a view to providing NGN with safe, durable pipes which it could use in its business of transporting gas. Consequently, the requisite connection with land was not present. Since satisfaction or otherwise of Condition 4 is not relevant either to the appeal before the UT or the appeal to this court, and I have some doubt whether the basis of the discussion is correct, I prefer not to express a view about it. I should not be taken as endorsing the reasoning of the UT on this point.

31. NGN also applied to adduce fresh evidence on this point; but because I do not need to deal with the substantive point, I do not need to deal with that either.

Condition 3

32. For the same reason I prefer not to express a view about Condition 3, especially since we do not have the considered views of the UT on that issue, although my impression is that the reasoning of the FTT on this point is persuasive.

Result

33. I would dismiss the appeal.

Lord Justice Baker:

34. I agree.

Lord Justice Dingemans:

35. I also agree.