[2021] UKUT 170 (TCC)

Appeal number: UT/2020/00359

STAMP DUTY LAND TAX – repayment of tax under s. 44(9) of Finance Act 2003 – whether time limit provided by para. 6(3) of Sch.10 to Finance Act 2003 applies – yes – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
-and-	
CHRISTIAN PETER CANDY	**Respondent**

TRIBUNAL: **MR JUSTICE MELLOR**
JUDGE ANDREW SCOTT

Sitting in public by way of video hearing on 18 May 2021

Dr Christopher McNall, counsel, instructed by the General Counsel and Solicitor for HM Revenue & Customs, for the Appellants

Mr Michael Thomas, counsel, for the Respondent

DECISION

Introduction

1. This appeal, brought with the permission of the First-tier Tribunal (Tax Chamber) (the FTT), is about the time-limit that is relevant to the making of a claim for repayment of stamp duty land tax (SDLT) in circumstances where the substantial performance of a contract triggered an initial liability to the tax and the contract concerned was subsequently rescinded or annulled or otherwise not carried into effect.

2. Section 44 of the Finance Act 2003 (referred to in this decision as "FA 2003" and references to other Finance Acts are abbreviated in the same way) operates to impose a charge to SDLT where substantial performance of a contract takes place prior to completion. In this case, a charge to tax arose at that time. However, under subsection (9) of that section, if the contract "is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect," the tax must (to that extent) be repaid by HMRC. The repayment must be claimed by amendment of the relevant SDLT return.

3. Paragraph 6(3) of Sch.10 to FA 2003 imposes a time-limit of 12 months in which an SDLT return can be amended with the time running from the filing date for the return. But, by the opening words of that sub-paragraph, that strict time-limit is subject to an exception if or where another (unspecified) provision has "otherwise provided".

4. In this case, the contract was (by way of novation) rescinded or annulled or otherwise not carried into effect after the expiry of the normal 12 month time-limit for amending the return relevant to the original chargeable transaction.

5. The taxpayer was successful before the FTT in his submission that the terms of s.44(9) of FA 2003 were such that it operated as an exception to the normal 12 month time-limit. The taxpayer was not out of time to amend his return. Indeed, there was no time-limit at all. It is against that decision that HMRC appeal. HMRC's view is that repayment claims authorised by s.44(9) of FA 2003 can only be made by amending returns subject to the normal 12 month time-limit.

6. The litigation relating to this case is complicated by the fact that the taxpayer has made his claim for repayment of SDLT on two alternative bases. Those separate claims are the subject of separate appeals before the FTT. The decision of the FTT subject to the appeal to this Tribunal was on a single preliminary issue concerned only with the proper construction of s.44(9) of FA 2003 and para.6(3) of Sch.10 to that Act. The other basis on which the taxpayer has sought a repayment of SDLT was by way of a claim for overpayment relief under para. 34 of Sch.10 to FA 2003.

The facts

7. The FTT did not have an agreed set of facts but it expressed its understanding that the description of the underlying property transactions in HMRC's statement of case was not in dispute to any significant extent. The tribunal set out a summary of those

facts as so pleaded to set the preliminary issue in context whilst expressly not making any findings of fact.

8. We consider that the FTT was right to do so, and, as we explain below, some of the submissions made by Mr Thomas in defending the FTT's decision rest on the proposition that economic double taxation would arise if HMRC are right in their view of the law. It is difficult to make any sense of that submission without an understanding of the particular facts relevant to the taxpayer's case.

9. The FTT set out its summary of the underlying property transactions at [10] to [21] of its decision. The relevant transactions related to a property known at the time as Gordon House, a substantial house in London.

10. The transactions involved two separate leases. This was so as to secure that the second of the leases did not engage the right for a tenant under a long lease of residential premises to extend the lease or acquire the freehold. The aim was instead for the tenant to contract out of those enfranchisement rights. In essence, an application for a court order was intended to be made to grant the second lease without enfranchisement rights but only after the property had first been developed by the taxpayer. Once the court order was made, the second lease would be granted by the seller to intermediate landlords who would then assign the lease to the taxpayer.

11. The relevant facts were as follows.

12. 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.

13. 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 work at the property to construct a flat. The initial lease was granted on 1 October 2012.

14. 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, which was payable in four instalments. The first instalment of £7.39 million was paid on 1 October 2013.

15. 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, Mr 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, the taxpayer's brother 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.

16. On the same date on which the deed of novation was entered into (1 April 2014), the taxpayer's brother (Mr Nicholas Candy) took possession of the property. Mr Nicholas Candy paid the second instalment of the £48 million purchase price on 1 October 2014 and the third instalment a year later.

17. 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.

18. At the time of the FTT's decision (26 February 2020) it was recorded that Mr 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.

The SDLT dispute

19. The taxpayer made a land transaction return on 8 October 2012 in respect of the initial lease paying the SDLT chargeable on the consideration of £20 million. Although nothing was said about this in the FTT decision, it is our understanding that no further SDLT was payable on the assignment of the initial lease on the basis that, as a gift, there was no chargeable consideration on which SDLT could be assessed.

20. On 8 October 2012 the taxpayer also made a land transaction return in respect of the contracted-out lease with the SDLT 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 enough to constitute the taking of possession of the property and that in turn was sufficient to be "substantial performance" of the contract under s.44(4) of FA 2003, which triggered a liability to SDLT.

21. The subsequent taking of possession of the property by the taxpayer's brother (Mr Nicholas Candy) on 1 April 2014 also counted as "substantial performance" of the agreement for the contracted-out lease under s.44(4) of 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 was the full £48 million purchase price. This was because the subject-matter of the deed of novation was an uncompleted contract and, as there had been a gift between two brothers, the special charging rules in paras. 12 to 14 of Sch.2A to FA 2003 applied.

22. On 10 April 2014 the taxpayer made an application to HMRC under s.44(9) of FA 2003 for the repayment of the SDLT that he had paid on 8 October 2012 in respect of the contract which he had entered into for the contracted-out lease. That application for repayment of the SDLT was made by way of an amendment of the land transaction return that he had submitted on 8 October 2012. HMRC rejected the taxpayer's amendment of the return as made out of time and the taxpayer appealed.

23. By a somewhat involved route the details of which are set out at [1] to [5] and [26] to [31] of the FTT's decision the appeal found its way before the FTT.

24. The taxpayer also made a separate claim for repayment of the SDLT payable in respect of the contracted-out lease under para. 34 of Sch. 10 to FA 2003. HMRC have rejected that claim. That rejection is subject to a separate appeal by the taxpayer.

Relevant legislation

25. Stamp duty land tax is a tax charged on land transactions (s.42(1) of FA 2003), which is defined as any acquisition of a chargeable interest (s.43(1) of FA 2003). A "chargeable interest" means any estate, interest, right or power in or over land other than an exempt interest see (s. 48(1) of FA 2003).

26. Section 44 of FA 2003 provided as follows at the material time:

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

(b) if the only consideration is rent, when the first payment of rent is made;

(c) if the consideration includes both rent and other consideration, when—

(i) the whole or substantially the whole of the consideration other than rent is paid or provided, or

(ii) the first payment of rent is made.

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

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

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

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

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

(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."

27. In Sch. 10 to 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 twelve months after the filing date."

28. Para. 34 of Sch.10 to FA 2003 provided, on enactment and until 1 April 2011, for relief in case of a mistake in a return. Sub-paragraph (1) provided as follows:

> "(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."

29. That paragraph was substantively changed by para. 2 of Sch.12 to the F(No.3)A 2010. The paragraph now applies where a person has paid an amount by way of tax but believes that the tax was not due; but this is subject to para. 34A of Sch.10 to FA 2003, which sets out cases where HMRC are not liable to give effect to a claim.

30. Section 80(4) of FA 2003 provided as follows on enactment:

> "(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."

31. That subsection was amended by s.299(4) of FA 2004 to provide 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."

Relevant background to FA 2003: the Explanatory Notes

32. In the House of Lords case of *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 Lord Steyn held at [5] that a court can consider Explanatory Notes as an admissible aid to construction in so far as they "cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed". Because the starting point in an exercise of statutory construction is that the language "conveys meaning according to the circumstances in which it was used", the context "must always be identified and considered before the process of construction or during it". Accordingly, the Explanatory Notes to the bill for FA 2003 are a relevant aid to construction in determining the context.

33. The Explanatory Notes said (in the overview) this about section 44:

> "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 or 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."

34. And the Notes said this about para. 6 of Sch.10:

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

35. It is also helpful to refer here to the reference made at [60] of the FTT's decision to the submission by HMRC that Part 4 of FA 2003 was "hastily drafted". We note that that Part 4 contained a wide power to amend its provisions (s. 109) for a temporary period and that the SDLT code as originally enacted was subject to significant amendment by FA 2004: the amendments made by that Act ran to over 70 pages.

Relevant background to s.44 of FA 2003: predecessor legislation

36. There were certain features of s.44(4) and (9) of FA 2003 that had featured in the predecessor legislation dealing with stamp duty.

37. In Schedule 9 to the Finance Act 1999, the following provisions had effect:

> "**Contracts or agreements chargeable as conveyances on sale**
>
> 7.(1) A contract or agreement for the sale of—
>
> (a) any equitable estate or interest in property, or
>
> (b) any estate or interest in property except—
>
> (i) land,
>
> […]
>
> is chargeable with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold.
>
> […]
>
> 9. The *ad valorem* duty paid upon a contract or agreement by virtue of paragraph 7 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 so as to operate as or be followed by a conveyance or transfer."

38. And s.115 of the Finance Act 2002 provided as follows:

> "**115 Contracts for the sale of an estate or interest in land chargeable as conveyances**

(1) This section applies to a contract or agreement for the sale of an estate or interest in land in the United Kingdom where—

(a) the amount or value of the consideration exceeds £10 million, or

(b) [...]

(2) If, in the case of such a contract or agreement that is not otherwise chargeable to stamp duty, a conveyance or transfer made in conformity with the contract or agreement is not presented to the Commissioners for stamping with the *ad valorem* duty chargeable on it—

(a) within the period of 90 days after the execution of the contract or agreement, or

(b) within such longer period as the Commissioners may think reasonable in the circumstances of the case,

the contract or agreement shall be chargeable with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate or interest contracted or agreed to be sold.

(3) […] (4) […]

(5) Where an instrument is chargeable with duty under this section—

(a) section 14(4) of the Stamp Act 1891 (c 39) (inadmissibility of unstamped instruments) does not apply in relation to it until after the end of the period mentioned in subsection (2) above, and

(b) sections 15A and 15B of that Act (late stamping: interest and penalties), apply in relation to it as if it had been executed at the end of that period.

(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.

(7) […] (8) [...]"

The FTT decision

39. Having noted at [66] of its decision that it was not in dispute that a purposive approach should be taken, the FTT began its discussion by identifying the key issue as whether the words "Except as otherwise provided," in para. 6(3) of Sch.10 to FA 2003 referred back to the word "afterwards" in s.44(9) of that Act.

40. The FTT gave three principal reasons for its determination that those words in para. 6(3) of Sch.10 did have that effect, and accordingly, s.44(9) was not subject to the normal 12 month time-limit for amending a return.

41. First, it held at [74] that those words "would only have been included in the legislation by Parliament if it was making a reference to some provision elsewhere in the legislation which provided for an exception. The only candidate for such an

exception is the word "afterwards" in s44(9)". The FTT rejected HMRC's submission that paras. 2(3) and 4(3) of Sch.9 were relevant as neither of the provisions operated to override the time-limit. So far as para. 8(3) of Sch.4ZA to FA 2003 and s.43 of FA 2019 were concerned, the FTT noted that, as they were enacted many years after FA 2003, neither provision could have been within the contemplation of Parliament in 2003; but what those provisions did show was that different language was used by Parliament in providing for alternative time-limits. The FTT also rejected the argument that the words "Except as otherwise provided," might have been included in para. 6(3) of Sch.10 to FA 2003 merely to make subsequent amendments simpler to draft.

42. Second, the FTT concluded at [75] "that 'afterwards' is used in s44(9) in a temporal sense […] because the subsection would also make sense if the word was omitted. Its inclusion in the drafting of the subsection must have been intended to add to the meaning of the provision – and I find that such meaning was a temporal one." The reasoning adopted here would seem to rely on the submissions made on behalf of the taxpayer by Mr Thomas, which were set out more fully at [47] to [49] of the decision.

43. Third, the FTT explained at [77] to [81] why it considered that its view of the relationship between para.6(3) of Sch.10 and s.44(9) was consistent with the underlying policy of SDLT and provided for a fair outcome by, among other things, avoiding economic double taxation. In reaching that view, the FTT relied on the following:

> (1) its construction "ameliorates the broad charging effect of s.44": the risk of a contract not being carried into effect was of particular concern in the case of development agreements where the transaction is conditional upon (say) planning consent because the purchaser might undertake a 'soft strip' triggering an SDLT liability;
>
> (2) whether or not para. 34 of Sch.10 to FA 2003 (overpayment of relief) could be relied on to mitigate any unfairness, HMRC were contending in a separate appeal that the taxpayer was <u>not</u> entitled to use that mechanism in the circumstances of this case;
>
> (3) despite HMRC's submission to the contrary, the interpretation favoured by the FTT would not lead to chaos or to purchasers "gaming" the system: if purchasers returned to "resting on contract" structures by selling the property after many years of ownership by means of a rescission of the original contract and the creation of a new one, a tribunal "is likely to find as a realistic view of the facts that the contract had actually been carried into effect", and, in any event, such arrangements "would be likely" to be counteracted by the operation of s.75A of FA 2003; and
>
> (4) there was, in fact, a risk in the other direction: purchasers might choose to delay filing their returns (accepting the possibility of late payment penalties) until they could be sure that the contract would be carried into effect, and, without actually filing a return, could pay the SDLT and advise HMRC of what they had done (so that there would never be a need to amend the land transaction return).

44. The reference in (1) above to a 'soft strip' was, we think, a reference to the submissions made on behalf of the taxpayer by Mr Thomas and recorded at [43] of the

FTT's decision, namely that substantial performance of a contract could be constituted by a single payment of rent or the occupation of the property by the purchaser for a short period of time (in which, for example, some internal works might be undertaken, stripping out fittings, but before any substantial redevelopment work commenced). In these circumstances, Mr Thomas submitted that, if the contract is not subsequently performed, no mischief arose and Parliament had then prevented any unfairness from arising by providing for a repayment of any SDLT previously paid on substantial performance. The repayment mechanism also acted as a safeguard against the charge to SDLT being so easily triggered.

The grounds of appeal and submissions of the parties

45. HMRC's ground of appeal is a simple one. The FTT had misunderstood the relationship between s.44(9) of FA 2003 and para. 6(3) of Sch.10 to FA 2003: there is nothing in s.44(9) to indicate that the normal time-limit provided for by para. 6(3) of Sch.10 does not apply. Para. 6(3) of Sch.10 sets out a determinate time-limit for amending land transaction returns and plays a key role in a self-assessment regime where time-limits (which are not capable of being extended) are included to provide certainty to both HMRC and taxpayers alike. That is borne out by other provisions in the SDLT code such as s.80 of FA 2003, which provides that a taxpayer must make a further return within 30 days of a contingency ceasing or consideration becoming payable (which could be many years after the initial transaction).

46. In response, Mr Thomas on behalf of the taxpayer submitted that the FTT's decision should be upheld for the reasons that the tribunal gave.

47. In addition, Mr Thomas contended that the effect of HMRC's construction would be to introduce an arbitrary rule where no tax could be claimed more than 12 months after the filing date; and that could operate to produce very unfair results – as, indeed, it had in this case, an example, says Mr Thomas, of economic double taxation that Parliament could not have intended. That arises in this case because not only is the taxpayer's brother (Mr Nicholas Candy) charged to SDLT on the full amount payable to the seller in respect of the contracted-out lease but so is the taxpayer. The result is that, contrary to the general SDLT scheme, there is a charge to SDLT on a gift with the sale price paid to the seller being charged twice to SDLT. More generally, it would be wrong for a would-be buyer to be deemed to continue holding the subject-matter of an acquisition in circumstances where it is never consummated by a real-world acquisition.

48. Mr Thomas submitted that the strict time-limit is intended to prevent taxpayers who fail to claim various reliefs in their original returns from subsequently changing their minds. Examples of such reliefs are s.62 of FA 2003 (group relief) and s.58D (multi-dwellings relief). In those cases, the relevant facts will be known at the effective date of transaction. By contrast, in a case dealt with by s.44(9), a taxpayer could not be expected to know at the effective date of the transaction whether the contract would be carried out.

49. So far as s.80 of FA 2003 is concerned, it is more relevant to point to the rules in subsection (4) of that section for the reclaiming of SDLT and to the direct predecessor

to s.44 of FA 2003, namely para. 9 of Sch.13 to the Finance Act 1999, which provided that where *ad valorem* stamp duty was paid on a contract which was afterwards not carried into effect, the duty was to be repaid. There was no time-limit for that repayment.

Discussion

Relevant principles of statutory interpretation

50. The general principles relevant to the exercise of statutory construction are not in dispute.

51. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, Lord Bingham put matters pithily at [8]:

> "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."

52. The words of an Act are the primary source from which the intention of Parliament should be inferred: see *Lambeth LBC v S of S for HCLG* [2019] UKSC 33 per Lord Carnwath. Ascertaining the statutory context involves the court in a legal determination of the purpose of the Act and the court must "favour an interpretation of legislation which gives effect to its purpose rather than defeating it" (*Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47, para 155, per Lord Reed and Lord Hodge).

53. In determining Parliament's purpose, there is a general presumption that Parliament does not intend to legislate in a way that produces an unfair or unreasonable outcome. In *R (on the application of Edison First Power Ltd) v Central Valuation Officer and another* [2003] 4 All ER 209, a case alleged to constitute double taxation, Lord Millett put matters in the following terms at [116] and [117]:

> "[The presumption against double taxation] is … a species of a wider genus, viz. the presumption that Parliament intends to act reasonably … The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.
>
> But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it. … I do not, therefore, find it profitable to discuss whether the effect of the [Order] amounts to "double taxation"… I would prefer to go straight to the real question: whether the scheme established by the [Order] is so oppressive, objectionable or unfair that it could only be authorised by Parliament by express words or necessary implication."

54. There is a presumption that every word in an Act is to be given meaning: see *Densham v Charity Commission for England and Wales* [2018] UKUT 402 at [61]. At [21.2] of the current edition of *Bennion, Bailey and Norbury on Statutory Interpretation*, the authors explain that "given the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of an enactment ... this applies a fortiori to a longer passage, such as a subsection or section."

55. But this is no more than a presumption. And, even in a case where a longer passage such as a subsection in an Act has been before a court, it is not uncommon for the courts to arrive at the conclusion that the subsection was included for reasons other than producing a substantive effect. Indeed, in a well-known passage in *Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] UKHL 23, [2000] 2 All ER 589, Lord Hoffmann observed at [595] that:

> "I seldom think that an argument from redundancy carries great weight, even in a Finance Act. It is not unusual for Parliament to say expressly what the courts would have inferred anyway."

56. Similar sentiments were expressed by Nourse LJ in *Omar Parks Ltd v Elkington* [1992] 1 WLR 1270 where he held at [1273] that:

> "It is perfectly true … that if that is the only function of the words … they could just as well have been omitted. If a long experience of legislative drafting had brought with it a conviction that an Act of Parliament never included words of surplusage, that would no doubt have been a persuasive point. But that is not our experience and I for one do not complain of it. An emphasis of the obvious, unnecessary to a judge who has had the benefit of argument, may yet be welcome to a busy practitioner who has not."

Purpose of provisions

57. We start, therefore, with the purpose of the relevant provisions, namely s.44 of FA 2003 and the function of para.6 of Sch.10 to FA 2003 as part of a self-assessment system of taxation.

58. As to the purposes of s.44 of FA 2003, a contract of a type set out in subsection (1) of that section would, by reason of its being entered into, lead to the acquisition by the purchaser of an equitable interest in the land. That would constitute a land transaction. But the subsequent completion of the contract would also constitute a further land transaction, namely the acquisition of the legal interest in the land.

59. The decision of the Court of Appeal in *The Commissioners for Her Majesty's Revenue and Customs v DV3 RS Limited Partnership* [2013] EWCA Civ 907 highlighted at [20] the role played by s. 44 of FA 2003 in determining which transaction should count as the land transaction.

60. But one of the purposes of s.44 was also to deal with a technique adopted to avoid stamp duty known as a "resting on contract" arrangement. That was an arrangement where the contract did not itself amount to or incorporate a transfer but the purchaser

typically paid the contractual price and was allowed into full possession. So long as a transfer was not executed, no stamp duty would be payable (as stamp duty was payable only on instruments transferring legal title). As highlighted above, attempts to frustrate these arrangements were made by Parliament: see the provision made by Sch.9 to FA 1999 and s.115 of FA 2002.

61. The solution adopted by s.44 to deal with these issues was to construct a rule that was, broadly, intended to charge SDLT when, for all practical purposes, the transaction was carried out from a commercial perspective. In a straightforward case of a contract which was completed, the land transaction that would otherwise have been triggered by the entering into of a contract was ignored and the SDLT was instead payable on completion: see subsection (3). The provision made by subsection (4) was intended to deal with "resting on contract" arrangements, as is made clear in the Explanatory Notes. The concept chosen to identify cases where, for all practical purposes, the transaction was carried out from a commercial perspective was that of "substantial performance".

62. One way in which a contract could be "substantially performed" was if a substantial amount of the consideration was paid or provided, which was further explained in subsection (7). But s.44 goes further than that. Subsection (5)(a) secures that possession of the whole, or substantially the whole of, the subject-matter of the contract suffices. Moreover, it does not matter whether possession is achieved under the contract in question: possession under a licence or lease of a temporary character would be enough (see subsection (5)(b)).

63. When it was enacted in 2003, s.44 contained, however, at least three possible avenues to avoidance each of which was removed by FA 2004.

64. The first two concerned the way in which possession was defined: the section as originally enacted had focused only on the receipt of rents or other profits (or an entitlement to rents or other profits) and it failed to anticipate that possession could be taken by a person connected with the purchaser: hence the amendments made by para.15 of Sch.39 to FA 2004, which provided that possession included such a receipt (and, therefore, was capable of covering other matters as well) and covered acts of a person connected with the purchaser, defined in an expansive way by adopting the definition now found in s.1122 of the Corporation Tax Act 2010.

65. The third concerned 'building licences', an arrangement the fiscal advantages of which were sought to be removed by para.4(1) of Sch.39 to FA 2004, which inserted s.44A into FA 2003 (see [196] and [197] of the decision of the FTT (Judge Andrew Scott) in *Ladywalk LLP v HMRC* [2020] UKFTT 207 for a discussion of the section).

66. Section 44 of FA 2003 also anticipated two consequences that could follow from the charging of SDLT on substantial performance without completion of the contract. The first was where, on the subsequent completion of the contract, further consideration was payable. Subsection (8)(b) deals with that case but subsection (8)(a) also requires the completion to be a notifiable transaction even if no more SDLT is payable.

67. Subsection (9) deals with the opposite case where the contract is not carried into effect. The first case dealt with by subsection (9) is the rescission or annulment of the contract. Neither expression is defined but they would, in our view, be apt to cover a case where the contract is put to an end with each contracting party being returned (so far as possible) to the position they were in before the contract was entered into. In such a case, it is easy enough to see why the SDLT payable on substantial performance of the contract should be repaid to the purchaser.

68. The provisions of s.44(8)(a) and (9) of FA 2003 were intended to operate as part of a self-assessment tax system. In such a system the obligation falls on the taxpayer to complete a return and include a self-assessment to tax in the return: see s.76 of FA 2003. There are strict time-limits for delivering returns and, at the time relevant to this appeal, a taxpayer had 30 days after the effective date of the transaction to submit one (since reduced to 14 days).

69. Once submitted, a return was subject to the provision made by Sch.10 to FA 2003. Among other matters, that Schedule makes provision for amending a return and for enquiries into a return. It is a feature of a self-assessment system that there are hard-edged deadlines. So, the power of HMRC to enquire into a return is limited by reference to the enquiry period as defined by para. 12 of Sch.10 to FA 2003. One consequence of that is, if HMRC fail to open an enquiry in time and if a return self-assesses the wrong amount of tax, the correct amount of tax will not be recoverable by HMRC unless the case falls within Part 5 of Sch.10. The rules in that Part come with further time-limits (see para.31) that are intended to produce finality. Finality also works in the opposite direction: if a taxpayer has mistakenly overpaid tax or been subject to an excessive assessment, Part 6 of Sch.10 provides a remedy for the taxpayer but, of course, subject to the detailed provision made there.

"Except as otherwise provided"

70. The first reason that the FTT gave in reaching its decision that para. 6(3) of Sch.10 to FA 2003 was referring back to "afterwards" in s.44(9) of FA 2003 was that the only provision to which those words could be directed was s.44(9). As the FTT put it, that provision was the "only candidate". It would seem that the FTT reached this conclusion on the premise that all words included in a statute must always have a substantive meaning.

71. In our view, that is, as is shown by the authorities cited above, a proposition that goes too far. It is by no means uncommon for words to be included in an Act merely to help readers navigate their way around the Act even where the words, clearly, have no substantive effect. There is, indeed, an example of such a provision in FA 2003 itself: s.122 does nothing more than contain a list of the places in FA 2003 where particular expressions are defined or otherwise explained. It plays no substantive role.

72. Navigational tools in Acts are not confined to helpful devices such as those. In a complex code where a general provision is qualified by one or more particular provisions found elsewhere (including in other Acts), 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.

73. Whether or not a reference in this way to other provisions capable of countermanding a general proposition has a substantive legal effect is a question that can be decided only by reference to the particular provisions concerned. But it would, in our view, be an error to assume that they necessarily would.

74. And this is, in our view, demonstrated by the way in which FA 2003 uses the words "Except as otherwise provided," and also by a consideration of s.9ZA of the Taxes Management Act 1970 (TMA 1970) and para.15 of Sch.18 to FA 1998 (the provisions referred to in the Explanatory Notes for FA 2003 as the statutory provisions on which para. 6 of Sch.10 to FA 2003 was based).

75. Para. 6 of Sch.10 to FA 2003 was not the only place in Part 4 of FA 2003 to use the words "Except as otherwise provided,". Those words were also found in ss. 43(2), 113(1), 114(1) and (3) and 119(1) of that Act. We asked Counsel in the hearing to identify provisions in Part 4 of FA 2003 to which those words might be referring.

76. In the hearing, Mr Thomas submitted that s.43(2) might be intending to refer to s.60 (compulsory purchase facilitating development). We doubt that is the case; but, assuming that it is, it is obvious that the "Except as otherwise provided," wording in s.43(2) has no substantive effect in relation to s.60. That section confers an exemption from charge in clear terms. It would have precisely that effect whether or not s.43(2) included the "Except as otherwise provided," wording. Dr McNall contended that the words were linked to s.48 because that section was referred to in s.43(1). But we cannot see how those words could have any bearing on the meaning of s.48.

77. Neither Counsel was able to identify, in the case of s.113(1), a provision outside that section for which the definition needed to be qualified.

78. In the case of s.114(1) and (3), neither Counsel was able to identify any provision to which FA 2003 was referring. It was considered that the relevant words might have been included to deal with subsequent enactments (which were referred to in s.114(1) and (3)). That might be so; but, if a future enactment provided (say) for a power of the Treasury to make an order to be exercisable otherwise than by statutory instrument, it would have effect in accordance with its terms. To hold otherwise would be to deprive the subsequent Act of any legal effect. Again, the inclusion of the words "except as otherwise provided" are not required to produce that outcome.

79. In the case of s.119(1) (meaning of "effective date"), Parliament referred to the fact that the general definition gives way to more particular instances where the expression is defined in a different way in Part 4 of FA 2003. It then goes on to set out where those particular instances occur. Included in the list in s.119(2) is s.44(4). In our view, the listing of the places where "effective date" was defined to mean something other than completion was intended to be a helpful navigational aid to the reader. In s.44(4) itself, the entire point of the second sentence was to bring forward the effective date of the transaction to a date earlier than completion. If it did not do that, it did nothing at all;

and that would result in the nonsensical outcome that Parliament had included a provision that was a dead letter rendering the rest of s.44(4) an incoherent mess.

80. As mentioned above, we also consider that it is relevant to consider para.15 of Sch.18 to FA 1998 and s.9ZA of TMA 1970.

81. Like para. 6(3) of Sch.10 to FA 2003, para. 15(4) of Sch.18 to FA 1998 provided a rule for when a company tax return could be amended and was expressed to apply "[e]xcept as otherwise provided". There were examples in Sch.18 to FA 1998 that, on enactment, did provide for a different time limit. They include paras. 34(1) (the second sentence), 72(3), 74(3) and 82(3). In each case, a proposition about amending a company tax return was followed by a provision that, in terms, dealt with its relationship to the normal rules. The approach was to say that "the time limits otherwise applicable to amendment of a company tax return" do not apply in the given case.

82. Section 9ZA of TMA 1970 contains rules for amending personal or trustee returns for the purposes of income tax and capital gains tax. It contains a time-limit for making the amendments. But it does not contain the "except as otherwise provided" qualification. That does not, however, mean that another enactment could not make provision about the time-limits for amending personal or trustee returns in circumstances where the new rule was intended to prevail over the general rule. And that is what Parliament did do when enacting the provisions in Chapter 2 of Part 4 of FA 2014 (follower notices): see s.208(9), which provides that no enactment limiting the time during which amendments may be made to returns prevents a person from taking the very steps required to comply with the follower notice.

83. Finally, it is worth considering the approach taken by para. 8(3) of Sch.4ZA to FA 2003 to time limits. Ignoring the possibility of para. 6(3) of Sch.10 to FA 2003, it is the only example currently in Part 4 FA 2003 that operates as a qualification to the normal time-limits. Like the FTT, we do not think that para. 2(3) or 4(3) of Sch.9 to FA 2003 are relevant: those provisions are intended to bring about the result that the amendment, once made, is irrevocable.

84. Para. 8(3) of Sch.4ZA provides that a return can be amended at any time within—

> "[..] whichever of the following periods expires later—
>
> (a) the period of 3 months beginning within the effective date of the subsequent transaction, and
>
> (b) the period of 12 months beginning with the filing date for the return."

85. The effect of this is to extend the period beyond the normal 12 month time-limit (para. (b)) to the period ending 3 months after the subsequent transaction. As is evident from its terms, the relevant provision is a direct provision about time-limits.

86. We consider that the following four conclusions can be drawn from the above analysis:

(1) there are examples in Part 4 of FA 2003 of "except as otherwise provided," provisions which, on the enactment of FA 2003, did not engage any other provision in that Part;

(2) the words "except as otherwise provided," in Part 4 of FA 2003 do not have a substantive legal effect, and, as s.9ZA of TMA 1970 and s.208(9) of FA 2014 show, the correct legal result can be produced without those words;

(3) the words were included in Part 4 of FA 2003 as a helpful aid to the reader to point out that a general proposition might be countermanded elsewhere, and we think that, in the light of the rushed circumstances in which Part 4 of FA 2003 was enacted, the most likely explanation for their inclusion was that Parliament included the words because they might be useful in the future; and

(4) in cases in Part 4 of FA 2003 and Sch.18 to FA 1998 where a general time-limit is qualified by another provision, the other provision has either in terms provided for the applicable time-limits not to apply or has set the time-limit, and, in other cases in that Part such as s.119, Parliament has operated directly by setting out a different proposition from the one that would otherwise apply.

87. It follows from these conclusions that we find the FTT fell into error in assuming that the "except as otherwise provided" had to be referring to another provision on enactment of FA 2003 and that the formulation necessarily had a legal effect. Rather, the true question is whether, properly understood, s.44(9) can be read in the way contended for by the taxpayer as providing for no time limit for amending a return. It is to that question that we now turn.

Analysis of s.44(9)

88. The reasoning for holding that s.44(9) of FA 2003 contained no time-limit was shortly put by the FTT. It focused on the fact that the word "afterwards" was used in a temporal sense and that, as the provision would also make sense if the word was omitted, it must have been intended to achieve something. It was then said to follow that this was, in itself, enough to constitute "other provision" displacing the normal time-limit in para. 6(3) of Sch.10 to FA 2003.

89. In our view, it is plain that "afterwards" is being used in a temporal sense. It has no other sense. As explained above, it is significantly to overstate matters to say that every word in a statute must be capable of producing its own substantive legal effect. It is true to say that Acts are often drafted in a sparse or economical style but they are, of course, intended to convey meaning by expressing matters in ordinary English. As a matter of ordinary English, the use of the word "afterwards" in s.44(9) is usefully underlining (in a way that aids comprehension) the fact that one event is following on from another. In that context, the inclusion of the word "afterwards" is simply indicating that the contract which has been identified is, later or subsequently or afterwards (these are mere synonyms), rescinded or annulled.

90. It is noticeable that the immediately preceding subsection of s.44 (subsection (8)) is also expressed to operate where subsection (4) applies and the contract is "subsequently" completed by a conveyance. Although Mr Thomas sought to justify the inclusion of the word subsequently there as dealing with cases other than those of simultaneous exchange and completion, we think that the explanation is a far simpler one: it is, like subsection (9), merely providing for a sequence of events.

91. In our view, the grammatical structure of s.44(9) also makes it clear that no weight is being attached to "afterwards". The FTT in its decision (as did the parties in their submissions) referred interchangeably to the contract being afterwards rescinded or annulled or to its being afterwards not carried into effect. But that is not how s.44(9) is expressed: it provides that "the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect,". The subsection reads, therefore, as referring to a case where "the contract […] is for any other reason not carried into effect". It does not say "is afterwards for any other reason not carried into effect". And nor does it need to.

92. All of this is, in our view, a distraction from where the true focus should be. The inclusion or otherwise of the word "afterwards" in s.44(9) is nothing to the point. The true focus should be on whether the inclusion of the first sentence in s.44(9) has given the taxpayer a right, without time-limit, to require a repayment to him of the SDLT. That sentence is expressed in an unqualified way: it sets out a case where one event has happened after another and places a duty on HMRC to repay the SDLT previously paid. The first sentence clearly does not contain a further requirement for the second event to happen within a certain period of time from the occurrence of the first event.

93. The question then is whether, once the duty to repay has been imposed on HMRC by the first sentence, the inclusion of the second sentence operates to produce the result that the subsequent act (the rescission or annulment of the contract or its not being carried into effect) has to take place within a certain period of time. In our view, the inclusion of the second sentence was, indeed, intended to have that effect. That is for the following reasons.

94. The second sentence in s.44(9) does two separate things. First, it provides that the duty on HMRC to make the repayment of SDLT requires a claim to be made to them by the taxpayer. The second thing that it does is require the claim to be made by way of amendment of the land transaction return.

95. As to that second thing, as at the time of the enactment of FA 2003, that brought with it a number of possible consequences: (1) the notice of the amendment had to be in such form, and contain such information, as HMRC may require (para. 6(2) of Sch.10); (2) HMRC were entitled, as a result of para.12 of Sch.10 to FA 2003, to enquire into the amendment (with a resulting closure notice being subject to an appeal); and (3) the amendment had to be made within 12 months after the filing date. By a later amendment, sub-para. (2A) was inserted into para. 6 of Sch.10 to require the notice of amendment to be accompanied by the contract and by the instrument (if any) by which the transaction was effected.

96. Of those three things, the first two unquestionably follow from requiring the claim to be made by way of amendment of the return. The third would also follow unless there is another provision somewhere providing for a different or no time-limit.

97. We find it impossible to construe the first sentence in s.44(9) as containing such a provision. It certainly does not do so in terms. It merely sets out the conditions for the repayment. Logically, a proposition seeking to displace the time-limit that would otherwise follow by requiring the amendment to be made to the return would come after the proposition for the claim to be made in that way rather than before it.

98. All the examples mentioned above in Part 4 of FA 2003 or Sch.18 to FA 2003 displacing what is otherwise a general time-limit do so by expressly saying that the time-limits that would otherwise apply do not (see paras. 72(3), 74(3) and 82(3) of Sch. 18 to FA 1998) or by expressly setting out another time-limit (see para. 8(3) of Sch.4ZA to FA 2003). It would have been remarkably easy for Parliament to have done something similar in s.44(9) but it did not.

99. We consider that this conclusion is fortified by considering other contexts in Part 4 of FA 2003 where claims for repayment of SDLT are made and also by considering the predecessor stamp duty provisions to s.44(9) of FA 2003 (para. 9 of Sch.9 to FA 1999 and s.115(6) of FA 2002).

100. We referred above to the terms of s.80(4) of FA 2003, both on enactment and as amended by FA 2004. That subsection entitled a taxpayer to claim a repayment of SDLT. In its original incarnation, nothing more was said about the claim: there was no provision about the form of the claim or when it was to be made; and there was no provision dealing with enquiries into the claim.

101. All of those matters were fixed by FA 2004. That Act inserted a new Sch.11A into FA 2003, which dealt with claims not made in a return (see para.1). The new Schedule then made provision about, among other things, the making of claims (para. 2) and enquiries into claims (paras. 7 to 14). It was in that context that a new subsection (4) was inserted into s.80. That subsection permitted the taxpayer to amend the return so as to claim the repayment of tax if the period allowed for amending the return had not expired and, if that period had expired, entitled the taxpayer to make a free-standing claim for the repayment (which would then be governed by the general rules in Sch.11A).

102. FA 2004 also amended s.44 by inserting a new subsection (9A). That subsection provided for para. 12A of Sch.17A (agreement for lease) to apply in place of subsections (4), (8) and (9) of s.44. Para.12A contained a provision, at sub-para. (4), in the same terms as s.44(9). And FA 2004 also – as mentioned above – inserted a new s.44A into FA 2003, which at subsection (4) also included provision to the same effect as s.44(9).

103. It is clear, therefore, that a number of defects in the original SDLT code were corrected by FA 2004, including those relating to the making of claims otherwise than in a land transaction return. For claims made outside a return, Sch.11A allowed HMRC

to make provision about the form of claims and, crucially, allowed them to enquire into claims. In that context, it seems to us to be unsustainable to hold that Parliament included s.44A(4) and para. 12A(4) of Sch.17A (the precise analogues to s.44(9)) intending to switch on only the matters that would in any event be covered by claims outside the return (via Sch.11A) but intending not to switch on the ordinary time-limits for amending returns. If, as Mr Thomas submitted, there was to be no or an extended time-limit in s.44(9) and comparable provisions, the obvious thing for Parliament to have done was to have adopted the approach of the new s.80(4). Pointedly, Parliament did not amend s.44(9) in 2004 to contain a similar provision to s.80(4) but it did reproduce the same provision in s.44A(4) and in para. 12A(4) of Sch.17A. In our view, the irresistible inference is that Parliament was, by requiring the claim to be made by amendment of the return, intending to attract the general time-limit in para. 6(3) of Sch.10 to FA 2003.

104. We also think that the predecessor stamp duty provisions to s.44(9) of FA 2003 (para. 9 of Sch.9 to FA 1999 and s.115(6) of FA 2002) support our analysis.

105. Section 115 of FA 2002 sought to deal with "resting on contract" arrangements. Its broad effect was to charge stamp duty on the underlying contract if the consideration exceeded £10 million. The way in which stamp duty operated was not otherwise disturbed by this provision. Unlike a typical tax, there was no immediate consequence if the stamp duty was paid. Rather, the consequence was that the unstamped document was inadmissible in legal proceedings, and s.115(5)(a) of FA 2002 made express provision about that.

106. Subsection (6) of s.115 of FA 2002 provided for the repayment of the stamp duty "if the contract or agreement is afterwards rescinded or annulled or is for any other reason not substantially performed or carried into effect". The drafting of the provision is noticeably similar to s.44(9) of FA 2003 and contains the same reference to "afterwards". However, it cannot be said that "afterwards" is included to override any further proposition about the way in which the obligation to repay the stamp is to be discharged. The terms of s.115(6) of FA 2002 were, plainly, not intended to constitute "other provision" for displacing a rule attracted by requiring a claim (not provided for in the subsection) to be made in a non-existent stamp duty return.

Fair outcome

107. In making his submissions before us, Mr Thomas placed much weight on the fact that the construction favoured by HMRC produced economic double taxation and an unfair outcome. We do not accept that is the case. In our view, applying the test set out in *Edison First Power* referred to above, the situation produced is well within the bounds of reasonable outcomes that Parliament could have intended.

108. In the circumstances of this appeal, it was the taxpayer, and the taxpayer alone, who was in possession of the property for a significant period of time. The taxpayer then entered into arrangements where the contracted-out lease was novated in favour of his brother, a different taxpayer who then proceeded to enjoy the property. We note that the initial lease was simply assigned for no consideration by the taxpayer to his brother.

But the mechanism chosen in relation to the contracted-out lease was different, and the effect was, of course, for a new contract to come into being with the taxpayer's brother as a party to the new contract.

109. But, in the world of SDLT, charging tax on two different persons by reference to different periods is a natural incident of the system. It seems to us that the circumstances of the taxpayer in this case are, in truth, no more economic double taxation than a case where a property is sold to person A and then to person B and then to person C in quick succession for the same price of £x. Assuming that the contract is completed before the subsequent sale (and, therefore, is not subject to the special rules in s.45 of, and Sch.2A to, FA 2003), SDLT would be payable by each of A, B and C on the same consideration of £x.

110. Moreover, a transaction such as that undertaken by the taxpayer is, in our view, far from the typical case to which s.44(9) was addressed. That subsection was principally aimed at cases where there was 'single' taxation in circumstances where it was unfair for the single taxation to remain in charge. The simple case is one where the original contract is not carried into effect rather than one where it is novated so that another contract operating in favour of a different person takes its place.

111. In seeking to determine how far the relief under s.44(9) should go, we consider that Parliament was intending to strike a balance between the need to bear down on avoidance and the need to relieve more innocent transactions in a simple way. One obvious way of achieving that objective is to condition the relief by reference to the period during which the contract had been substantially performed. The longer the period of substantial performance lasts the more likely it becomes that, for all practical purposes, the purchaser has been enjoying the fruits of the contract in a way that should result in SDLT remaining in charge. In that context, an effective period of 13 months (30 days from the effective date of the transaction plus 12 months for amending the return) is consistent with producing a fair system which limits the scope for avoidance and is simple to operate (for both HMRC and taxpayers).

112. It is of the very essence of a self-assessment system that tax effects can be undone by administrative failure. Mr Thomas correctly pointed out that, in other contexts where SDLT reliefs were available such as s.58D or 62 of FA 2003, the relevant facts would be known at the effective date of the transaction (and so a return could include a claim for relief). That may be so; but it does not follow that merely meeting the conditions for the relief is enough to secure that the taxpayer actually gets the relief. The relief requires a claim; and if the claim is not made in the return, the taxpayer will not get it. And nor can para. 34 of Sch.10 to FA 2003 (as it currently stands) ride to the taxpayer's rescue in such a case: see para. 34A(2)(b).

113. Mr Thomas was also at pains to point out that the charge to s.44(4) was easy to trigger. We agree; but, as explained above, that was a clear purpose in Parliament enacting provisions with an avoidance purpose. However, the charge to SDLT under s.44(4) still required a positive act by the purchaser or a person connected to him. Taking possession of the subject-matter of the contract is not something that happens by accident.

114. At [80] of its decision the FTT referred to its view that allowing s.44(9) to operate without a time-limit would not lead to chaos or purchasers "gaming" the system. The point here was that the absence of a time-limit could, conceivably, permit arrangements where the enjoyment of the property could extend to long periods during which the contract had been substantially performed. If SDLT could then be repaid (with interest) when the ownership of the property changed hands, the system of SDLT would be undermined.

115. We consider that this was, in fact, just the sort of risk in 2003 that Parliament would have wished to avoid. An avoidance charge that could be unwound without any time-limit could be open to abuse. And at the time of both the passing of FA 2003 and FA 2004 (when, as described above, the rules were tightened up), the House of Lords had yet to deliver their seminal judgment in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51. At the material times, the "commercial" versus "legal" distinction described by Lord Hoffmann in *MacNiven v Westmoreland Investments Ltd* [2001] UKHL 6 was part of the *Ramsay* case law. Moreover, it would not, in the light of Lord Hoffmann's comments about stamp duty in that judgment at [38] and [58], have been unreasonable to consider that provisions such as s.44(9) might be immune from a *Ramsay* approach. Indeed, the distinction between "legal" and "economic" concepts has, perhaps, only been put to bed by the recent Supreme Court decision in *Hurstwood Properties (A) Ltd and others v Rossendale Borough Council and another* [2021] UKSC 16 at [53] to [56].

116. We also note that avoidance concerns continued to dog the SDLT regime until the enactment in 2006 of the new s.75A.

117. In that context, we cannot accept what was said at [80] of the FTT's decision. Section 75A (only enacted in 2006) is of no relevance to what Parliament intended in 2003 in enacting the original SDLT provisions or in 2004 when materially amending the provisions. The prevailing *Ramsay* case law was uncertain as well. We also consider that it is somewhat optimistic to think that "a realistic view of the facts" is a 'silver bullet' for HMRC. In this respect, we endorse the comments made by this Tribunal at [57] in *M&M Builders (Norfolk) Ltd v HMRC* [2021] UKUT 0103 (TCC) and also note that it is considerably easier for HMRC, as the tax collector, to operate simple time-limits such as that provided by para. 6(3) of Sch.10 to FA 2003 rather than time-consuming and evidentially difficult cases relying on "a realistic view of the facts".

118. The FTT also referred at [81] of its decision to how purchasers might themselves play fast and loose with the system if HMRC were right in their view of the law. Quite apart from the fact that there was no evidence to suggest that anything like the convoluted arrangements suggested there had ever taken place, the anticipated scenario failed to acknowledge the various tools in HMRC's armoury to deal with it such as paras. 5 and 25 of Sch.10 to FA 2003.

119. Finally, we note that, in the case of the predecessor stamp duty provisions, s.115(6) of FA 2002 provided for the repayment of the stamp duty "if the contract or agreement is afterwards rescinded or annulled or is for any other reason not substantially performed or carried into effect" (our emphasis). The underlined words are part of the

machinery of s.44(4) of FA 2003 itself. But that is a key difference between the two codes and goes to the very point of fairness. In the stamp duty provisions, there was a more generous system for repayment of the duty because the contract had not even been substantially performed.

Overpayment relief

120. Finally, we consider that the FTT was right at [79] in its decision not to attach any weight to para. 34 of Sch.10 to FA 2003. The FTT noted that HMRC's submission that a claim for overpayment relief under that paragraph might be available was undermined by the fact that HMRC were, in a separate appeal, contending that there was no entitlement in the circumstances of this case.

121. We consider that, in principle, it is possible that the existence of another relief has a bearing on the extent to which another relief might, or might not, operate in a fair way even if the relief might not be available in any given case. However, it is clear that, on enactment in 2003 and until 1 April 2011, para. 34 of Sch.10 to FA 2003 did not confer a right on the taxpayer to make a separate claim that could be relevant to the operation of s.44(9). That was because the terms of para. 34 required a mistake to have been made in a return. In a s.44(9) case, it cannot be said that there was a mistake in the return as submitted to HMRC. The terms of para. 34 of Sch.10 are now in a materially different form and we express no view on whether they are currently capable of operating in a s.44(9) case.

Disposition

122.We consider that, for the reasons set out above, s.44(9) of FA 2003 does not operate as an exception to the normal time-limit for amending land transaction returns given by para. 6(3) of Sch.10 to that Act.

123.The appeal is, therefore, allowed.

Signed on original
MR JUSTICE MELLOR
JUDGE ANDREW SCOTT

RELEASE DATE: 8 July 2021