[2017] UKUT 0320 (TCC)

Appeal number: UT/2016/0213

STAMP DUTY LAND TAX (SDLT) – Project Blue scheme - enquiries into land transaction returns – FA 2003, Sch 10 - applications for closure notices – refused by the First-tier Tribunal on ground that HMRC had not been provided with information and documents – provision of information and documents in sample cases – invitations to settle

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) ADAM FROSH & RACHEL JOYCE
(2) DAVID GORING-THOMAS AND PAULA GORING-THOMAS **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER
JUDGE JONATHAN CANNAN

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 3 July 2017

Julian Hickey, instructed by Cornerstone Tax Advisors, for the Appellants

Hui Ling McCarthy, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an appeal by the appellants against the refusal of the First-tier Tribunal ("FTT") (Judge Amanda Brown) to direct the issue of closure notices in respect of enquiries into SDLT returns made by the appellants.

The law

2. The FTT's jurisdiction to make (or refuse) such a direction is conferred by paragraph 24 of Schedule 10 to the Finance Act 2003 ("FA 2003"). It is in a familiar form, largely replicating similar powers that apply, for example, to enquiries into self assessment returns for individuals, partnerships, trustees and companies.

3. Paragraph 24 provides:

> "(1) The purchaser may apply to the tribunal for a direction that [HMRC] give a closure notice within a specified period.
>
> (2) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(b) of that Act).
>
> (3) The tribunal hearing the application shall give a direction unless satisfied that [HMRC] have reasonable grounds for not giving a closure notice within a specified period."

4. Although paragraph 24 cross-refers to Part 5 of the Taxes Management Act 1970, nothing turns on those provisions.

The Upper Tribunal's jurisdiction

5. The jurisdiction of the Upper Tribunal is on points of law arising out of the decision of the FTT (see s 11(1) of the Tribunals, Courts and Enforcement Act 2007). In the context of the exercise by the FTT of its jurisdiction under FA 2003, Sch 10, para 24, the issue to be determined by the FTT is whether it is satisfied that HMRC have reasonable grounds for not giving a closure notice.

6. The determination of the FTT in that respect is accordingly a value judgment. In a context also requiring consideration of reasonableness, that of an award of costs by the FTT where the power to make such an order was confined to a case where a party's conduct had been unreasonable, the Upper Tribunal, in *Market & Opinion Research International Ltd v Revenue and Customs Commissioners* [2015] STC 1205 ("*MORI*"), considered the nature of the tribunal's jurisdiction, and said (at [16] – [17]):

> "[16] A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of a discretion, but a matter of value judgment. An appeal against such a judgment, on a question of law, needs to be approached with appropriate caution. As Jacob LJ observed in *Proctor & Gamble UK v Revenue and Customs*

Comrs [2009] EWCA Civ 407, [2009] STC 1990 (at [7]) it is the FTT which is the primary maker of a value judgment based on primary facts. Unless the FTT has made a legal error (for example by reaching a perverse finding or failing to make a relevant finding or misconstruing the statutory test) it is not for the appeal court or tribunal to interfere. Furthermore, as Lord Hoffmann said in *Biogen Inc v Medeva plc* (1996) 38 BMLR 149 at 166, [1997] RPC 1 at 45:

'Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.'

[17] Lord Hoffmann returned to the same theme in *Designer Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, [2000] 1 WLR 2416, a case concerning whether one company had infringed another's copyright by copying a fabric design. The judge at first instance had found that there had been such copying. The Court of Appeal conducted its own analysis and came to a different view. The House of Lords reversed the decision of the Court of Appeal, holding that they had adopted the wrong approach. Lord Hoffmann said, [2001] 1 All ER 700 at 707, [2000] 1 WLR 2416 at 2423:

'… because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle …'"

7. In *MORI*, at [49] – [50], the tribunal also made certain observations in relation to the test of reasonableness, which are equally apt to the consideration of an appeal of this nature on a point of law:

"[49] It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates. It would not be right for this tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT Rules.

[50] We derive some support in that respect from what Lewison J (as he then was) said in *Davy's of London (Wine Merchants) Ltd v The City of London Corpn* [2004] EWHC 2224 (Ch), [2004] 3 EGLR 39, [2004] 49 EG 136. That case concerned, in part, what notice period for a break clause inserted into a new tenancy of business premises would be reasonable. At [34], Lewison J said:

'What is reasonable in the circumstances of a particular case is a value judgment upon which reasonable people may differ. Since judges are

> people, their views may differ, but some degree of diversity is an acceptable price to pay for the flexibility enshrined in the statute …'
>
> The threshold test in r 10(1)(b) is one of unreasonable conduct, which mandates a value judgment on which views may differ. The flexibility, and diversity, inherent in such a test must therefore be respected."

8. Mr Hickey referred us to the well-known tests in *Edwards v Bairstow* [1956] AC 14, in particular to the oft-quoted passage of the speech of Lord Radcliffe at p 36. We agree that part of the test we have described above, which is summarised as the making by the FTT of a perverse finding, is more eloquently referred to by Lord Radcliffe in terms of "no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal" and "one in which the true and only conclusion contradicts the determination".

9. Those are the principles that fall to be applied on this appeal. We must consider whether the FTT made any error of principle which bore upon its decision, and whether on the evidence the FTT made a determination which was contradicted by the true and only conclusion the tribunal could have reached.

The decision of the FTT

10. We will describe the background facts in more detail below, but the broad context in which the applications for closure notices were made is that the HMRC enquiries were in relation to SDLT returns concerning transactions which were planned to avoid stamp duty land tax. Those planning arrangements were widely used; similar arrangements have been the subject of litigation in *Project Blue Ltd (formerly Project Blue (Guernsey) Ltd) v Revenue and Customs Commissioners* [2016] STC 2168 ("*Project Blue*"), and an appeal by HMRC to the Supreme Court is, we understand, due to be heard in 2018.

11. The arrangements with which these appeals are concerned were promulgated by SDLT advisers, Cornerstone Tax Advisors ("Cornerstone"), under the generic name of "Brawn Residential Planning". There are a considerable number of participants in that planning (the FTT estimated that there might have been as many as 700), and by agreement, which we will describe later, there was full disclosure of only a sample (some 70 in number), which did not include the appellants in this appeal. There were outstanding documents and outstanding information with respect to the particular circumstances of the transactions undertaken by the appellants which had been requested by HMRC from the appellants, but not provided.

12. In essence, though we shall go into the FTT's reasoning in more detail when considering the appellants' grounds of appeal, the FTT decided that the absence of the information and documents relating to the appellants' own transactions provided reasonable grounds for HMRC not to give a closure notice. The FTT declined to direct that a closure notice be given within any specified period.

The appellants' grounds of appeal

13. The broad submission of the appellants is in two parts. First, it is argued that HMRC were no longer conducting an enquiry into the appellants' SDLT returns in that they had positively and consistently stated to the appellants that they should withdraw from the SDLT planning arrangements, and that failure to withdraw would involve a hearing before the FTT because HMRC did not accept that the SDLT scheme worked. Secondly, it is submitted that HMRC have conducted a review of the SDLT planning arrangements based on full disclosure by approximately 70 users of the arrangements, which has been facilitated by Cornerstone, who also act for the appellants. It is argued that the SDLT arrangements are straightforward and unsophisticated, each step relying, so the argument goes, on the application of s 71A FA 2003 (alternative finance relief). In terms of implementation, it is said, HMRC has knowledge of the parties involved, the property subject to the planning and the consideration involved by reference to the SDLT returns filed by the appellants.

14. The grounds of appeal resolve themselves into three:

(1) Ground 1. This is essentially the appellants' *Edwards v Bairstow* challenge. It is submitted that the FTT erred in law because the only reasonable conclusion to be drawn from HMRC's investigation into the SDLT planning was that they had sufficient information and knowledge to give a closure notice to each of the appellants. That will require a review of the facts and circumstances.

(2) Ground 2. This ground is that the FTT erred in law in interpreting FA 2003, Sch 10, para 24 as excluding any discretion on the part of the FTT unilaterally to set a "specified period" for HMRC to issue a closure notice. The FTT should have decided that it had the power to set a specified period of its own choice.

(3) Ground 3. It is argued that the FTT erred in law in deciding that it could not direct the issue of a closure notice because it had no power at that stage to direct the disclosure of documents. It is submitted that the FTT misdirected itself on the law, and that the inability of the FTT to direct disclosure of documents is not a valid consideration in determining whether HMRC have discharged the legal burden to show that they have reasonable grounds for not giving a closure notice.

Grounds 2 and 3

15. We consider first Grounds 2 and 3, as they raise questions of principle. Each of them concerns the approach taken by the FTT to the matter of the directing of a "specified period" for the issue of a closure notice, but the grounds relate to different elements of the FTT's decision.

Ground 2

16. At [47] of its decision, the FTT described its task on the appellants' application in the following terms:

> "The application is for the 'immediate' closure of the enquiry. The Tribunal is to determine whether the Respondents [HMRC] have reasonable grounds for not issuing a closure notice within the time specified i.e. immediately. The Tribunal heard no submission on whether there should be any other period specified."

17. This paragraph of the FTT's decision is rather unsatisfactory, as it appears unclear as to what is meant by a "specified period", in other words how a period is to be specified. On the one hand, the FTT appears to be saying that the only period to be taken into account in its determination is the period specified by the applicant for a closure notice direction. But on the other hand, the FTT also appears to leave open the possibility of alternative specified periods to be considered, depending on the submissions of the parties.

18. To the extent that the FTT was directing itself that the only period for the issue of the closure notice that had to be taken into account in its determination was that specified by the appellants, in our judgment that was an error of law. It is clear that the reference to "a specified period" in paragraph 24(3) is a reference to such period as the tribunal itself may specify, and that the tribunal has a discretion in this regard irrespective of any period specified in the application. That is the only sensible construction of paragraph 24. To find otherwise would be to impose an unwarranted constraint on the direction a tribunal could make, which must, in the context of the closure of an enquiry, depend on the particular circumstances found by the tribunal.

19. We respectfully agree with the special commissioner (Mr Theodore Wallace) in *Jade Palace Ltd v Revenue and Customs Commissioners* [2006] STC (SCD) 419, at [44], when considering the analogous provisions in relation to company tax returns contained in Schedule 18 to the Finance Act 1998 ("FA 1998):

> "Both parties accepted that it is for the tribunal giving a direction to specify the period. It is not necessary for the company making the application to specify the period in the application, although this may help to focus the application. Paragraph 33(3) refers to 'a specified period' using the indefinite article and does not therefore refer back to a period to be specified in the application."

20. That error of law does not mean that we shall set aside the FTT's decision. As will become apparent, the error was not material to the conclusion reached by the FTT that it was in any event premature to direct that a closure notice be issued. The real question is whether that conclusion is vitiated by an error or errors of law on the part of the FTT.

Ground 3

21. Ground 3, although also concerned with what the FTT said about the specifying of a period for the issue of a closure notice, relates to a separate consideration of that issue by the FTT.

22. Having concluded, at [61], that to order a closure notice in the absence of the documentation requested would result in the inappropriate shifting of matters properly

to be determined by HMRC (in the course of an enquiry) to case management for the tribunal (on an appeal which would follow the issue of a closure notice), the FTT, at [62], said this:

> "The Tribunal's jurisdiction is limited to directing a closure notice to be issued within a specified period. The tribunal has no jurisdiction (absent an application from [HMRC] under Schedule 36 Finance Act 2008) regarding the disclosure of the information and documents. The Tribunal therefore has no jurisdiction to set a time frame for closure pending the requested disclosure."

23. We do not consider that this conclusion displays any error of law on the part of the FTT. What the FTT was saying here, essentially, is that having concluded that it was reasonable for the enquiry not to be closed at that stage because of the outstanding documents and information, there was no scope for the tribunal to set a time frame which depended on the production of such material. That was, in our view, the correct approach. A contingent, or open-ended period, such as would be required in those circumstances, would not in our judgment represent a "specified period" for the purpose of paragraph 24. Nor, in our view, could it conceivably be reasonable, in circumstances where the documents and information reasonably required for HMRC to be able to close their enquiry had not been made available (and may continue not to be provided), for a tribunal to form the view that a period could be specified which would render it at the end of that period unreasonable for HMRC not to issue a closure notice.

Ground 1

24. We turn to consider what must be regarded as the appellants' principal ground of appeal. To examine whether the FTT's decision was perverse, in the sense of being one that was not reasonably available to the tribunal, we must first summarise the material facts.

The facts

25. As the FTT noted, it is not necessary, for the purpose of this appeal, for the SDLT arrangements to be examined in detail. We can confine ourselves to the broad description provided by the FTT, at [4] – [5], from which it can be seen that the planning relied both on s 71A FA 2003 and on the then s 45 FA 2003:

> "4. … (1) The intending purchaser of the property (in this case the Applicants) entered into a contract to purchase residential property from a vendor.
>
> (2) As part of the purchaser's financial arrangements for funding the acquisition, they enter into alternative finance arrangements with a qualifying financial institution ("QFI") using a sale and leaseback alternative finance contract.
>
> (3) On completion of the purchase from the vendor the purchaser simultaneously executed the financing arrangement, selling the

> property to the QFI and receiving back a long leasehold interest together with an option to acquire the freehold title.
>
> 5. The efficacy of the planning relies on the provisions of s45(3) Finance Act 2003 to exempt from SDLT the purchase of the property from the vendors and s71A Finance Act 2003 to exempt the sale and leaseback transaction."

26. Part of the planning involves the use of a special purpose vehicle in the form of a Guernsey Protected Cell company ("PCC"), which enables the segregation of assets and liabilities attributable to individual participators or owners.

27. Planning of this nature has been the subject of judicial determination in the case of *Project Blue*, to which we referred above. In that case, Project Blue Limited ("PBL") was the purchaser of a property, the Chelsea Barracks, from the Ministry of Defence. PBL was an entity controlled by the sovereign wealth fund of the State of Qatar. The QFI in that case was Qatari Bank Masraf al Rayan ("MAR"), a Qatari financial institution, specialising in Islamic finance, which provided and syndicated the finance for the purchase of the property.

28. The decision of the First-tier Tribunal in *Project Blue*, reported at [2013] UKFTT 378 (TCC), was released on 5 July 2013. The FTT decided that PBL was chargeable to SDLT under s 75A FA 2003 on the basis of consideration "given" by MAR of £1.25 billion, and not the price paid by PBL of £959 million. The Upper Tribunal, in its decision of 18 December 2014, [2015] STC 745, agreed with the FTT that PBL was chargeable to SDLT, but only on the basis of a chargeable consideration of £959 million. A different analysis was applied in the Court of Appeal, at [2016] STC 2168. In a judgment issued on 26 May 2016, the court held that PBL was not liable to SDLT; instead it was MAR that had in principle been liable under s 45(3) FA 2003 (with no exemption for MAR under s 71A). HMRC had, however, issued a closure notice to MAR which had accepted MAR's claim to exemption under s 71A. The Supreme Court gave HMRC permission to appeal on 8 December 2016.

29. Having entered into the arrangements with respect to the purchase of the respective properties, each of the appellants submitted land transaction returns (SDLT1s) to HMRC, in relation to the transactions involving them and the PCC. In the case of Mr and Mrs Goring-Thomas, the SDLT1s were filed on 26 April 2010, and in the case of Mr Frosh and Ms Joyce they were submitted on 13 October 2010. Letters written by their respective conveyancing solicitors to HMRC and which accompanied the submission of the SDLT1s explained, in the same terms, the view that neither of the appellants, nor the PCC, was liable to SDLT.

30. HMRC opened enquiries into Mr and Mrs Goring-Thomas' returns on 24 January 2011, and into the returns of Mr Frosh and Ms Joyce on 10 June 2011.

31. There then followed correspondence between Cornerstone and HMRC with respect both to the appellants and a significant number of other persons who had implemented the SDLT saving arrangements. On 13 November 2012, there was a meeting between HMRC, Cornerstone and the solicitors, RPC to discuss the effective management of the significant number of enquiries that had been opened into returns

relating to the SDLT arrangements. In order to save resources for both Cornerstone and HMRC, it had been agreed that HMRC would not call for documents and information in relation to all cases. Instead, sample cases would be identified and full documentation would be provided for those cases.

5 32. A concern with such a sampling approach was identified at the meeting. HMRC raised the issue of applications being made by scheme users for closure notices in cases for which documents or information had not yet been requested. It was agreed that it would be likely in such a case that HMRC could request from the FTT further time to call for such documents and information. At HMRC's request, 10 this understanding was confirmed in correspondence between HMRC and RPC (HMRC's letter dated 15 November 2012 and RPC's reply dated 21 November 2012).

33. In accordance with these agreed arrangements, a sample of some 70 users of the scheme was identified, and full disclosure was made to HMRC in respect of those cases. As the FTT found, at [18], one of those cases involved a company by the name 15 of Milltown Limited and a PCC, Albert House Property Finance PCC Limited. HMRC issued closure notices in relation to that matter to all the participants, including the PCC, and that case is currently the subject of an appeal to the FTT. Since the issue of the FTT's decision in the present appeals (8 August 2016), there has been a case management decision in *Milltown Limited and another v Revenue and* 20 *Customs Commissioners* [2016] UKFTT 0640 (TCC) by which the FTT has directed that the case be stayed pending the final resolution of *Project Blue*.

34. The FTT made no specific findings as to the nature of the sample documentation and information that was provided to HMRC. We were referred in this connection to the witness statement of Mr David Hannah of Cornerstone, which 25 was unchallenged before the FTT where, at para 21, his evidence in relation to the sample cases was:

> "… in a typical case, documents provided to HMRC in the Brawn enquiries would have included the agreement for sale of the property from the vendor, a copy of the agreement for sale to the alternative 30 Finance Company ('QFI'), a copy of the agreement for lease and lease to the purchasers, Land Registry transfer forms, copies of bank statements evidencing payments relating to the transactions and solicitor's ledgers, report and valuation on the property acquired (where available), copies of cornerstone's engagement letter with the 35 purchaser and related documents and copy of the office of Fair Trading licence issued to the QFI."

35. Following the issue by the FTT of its decision in *Project Blue*, on 23 October 2013 HMRC wrote to the appellants in essentially identical terms to make what was termed as a "Settlement Invitation". The material part of those letters was set out by 40 the FTT at [19], as follows:

> "A recent Tax Tribunal judgment has supported HMRC's interpretation of Stamp Duty Land Tax ('SDLT') law and decided that the scheme used in the case of Project Blue Limited v Commissioners of HMRC does not work.

> Cornerstone Tax Advisors has informed us that you have used the same scheme as Project Blue Limited to reduce SDLT on your property purchase. HMRC's view is that the scheme that you have used does not work and that tax and interest is due on this transaction.
>
> **What you need to do now**
>
> **I invite you to withdraw from the scheme and make payment of £[*relevant amount*]**
>
> …
>
> **What will happen if you do not withdraw from the scheme?**
>
> Our intention is to bring all similar cases before the Tribunal. … If you do not withdraw from the scheme, in preparation for a Tribunal hearing, I need you to supply all the documentation detailed in the attached schedule by **29 November 2013**."

36. The schedule referred to in the letter ("the 2015 schedule") listed 18 categories of documents including transactional documents, information in connection with the PCC, evidence concerning the flow of funds and the Cornerstone steps plan.

37. Neither appellant provided a substantive response to the Settlement Invitation, and no documents or information was provided.

38. On 11 August 2015, HMRC wrote to each of the appellants, again in materially identical terms. The FTT set out the material parts of those letters at [22]:

> "I am writing to you as a user of a Stamp Duty Land Tax (SDLT) avoidance scheme. I am now offering you an opportunity to put this issue behind you …
>
> If you choose not to take advantage of this opportunity, your case will be progressed towards litigation at the Tax Tribunal. To help you make your mind up you should be aware that:
>
> **We do not believe that your scheme works and we remain committed to challenging it.**
>
> …
>
> We do not believe the scheme works in the way it was intended and are committed to challenging your use of this scheme. If necessary we will seek information from you and ultimately take your case to the Tax Tribunal but we would rather talk to you about settling the case.
>
> …
>
> If you choose not to settle then our challenge will inevitably involve litigation of this scheme …"

39. It was following the receipt of those letters that on 14 December 2015 the appellants submitted their applications for closure notices.

40. There was then further correspondence between Cornerstone and HMRC regarding the provision of information and documents. On 22 January 2016, HMRC wrote to the appellants personally, with a copy to Cornerstone, to say that if the

documentation and information that had been requested was not provided, HMRC intended to make an application to the FTT for permission to issue an information notice pursuant to Schedule 36 of the Finance Act 2008. A schedule ("the 2016 schedule") of the required documents and information was attached.

41. After Cornerstone had challenged the period given for response by the appellants, HMRC agreed to extend the time for the provision of the information and documents. However, although there was continuing correspondence, the informal request for information and documents was not complied with.

42. The FTT found, at [27], that the only information and documents that had been provided by the appellants was that contained in the files prepared for the hearing of the closure notice applications before the FTT. The FTT found that this did not meet the requirement of either of the 2013 schedule or the 2016 schedule in full; though there had been some partial disclosure. Reliance was sought to be placed by the appellants on information with respect to the PCC that had been disclosed in the course of the sampling exercise.

Discussion of Ground 1

43. Although we were referred to a number of cases where the FTT, and its predecessor the special commissioners, have considered applications for closure notices in the circumstances at issue in those cases, there is little authoritative guidance. That, however, is not surprising given the nature of the FTT's jurisdiction and the value judgment that is called for in each case. Every case depends on its own facts and circumstances, and is concerned with a question of reasonableness. Although reference to such cases may be helpful in identifying relevant factors to be taken into account, and thus to promote some uniformity of approach, it is, we consider, unhelpful to seek to derive legal principles from cases which turn on their own facts. If a review of those individual cases shows anything, it is that the value judgment required of the FTT in addressing a particular case should not be subjected to any kind of straitjacket. The only relevant legal principle to be applied by the FTT is to consider whether HMRC have reasonable grounds for not giving a closure notice within a specified period. It is for the FTT to consider the question of reasonableness without any further gloss on that concept.

44. Nonetheless, regard should be had to the context in which an application for a closure notice might fall to be made. That context was explored by Park J in *Revenue and Customs Commissioners v Vodafone 2* [2006] STC 483, in a case concerning the analogous provisions with respect to enquiries and closure notices that apply to company tax returns by virtue of Schedule 18, FA 1998. At [44], Park J said:

> "… Schedule 18 is, I believe, constructed so as to produce a reasonable balance. It imposes obligations on companies to make self-assessments of their own corporation tax liabilities. It gives to the Revenue substantial powers to investigate returns and self-assessments which companies make. Conversely one would expect, and in my view one finds in para 33, a protection for companies that wish to question

> whether in their particular circumstances the use by the Revenue of some of their Sch 18 powers is, or continues to be, justified."

45. The nature of that protection had been described by Park J at [43] in the following terms:

> "Paragraph 33 is meant to be a protection to a taxpayer, by giving it a procedure whereby, if it believes that an enquiry is being inappropriately protracted and pursued by the Revenue, it can bring the matter before the independent and specialist tribunal."

46. It is equally relevant, in considering the question of reasonableness in the context of an open enquiry and the issue of a closure notice, to have regard to the legal nature of a closure notice. The requirements for a closure notice in relation to an SDLT enquiry are set out in paragraph 23 of Schedule 10 FA 2003, in similar terms to those which apply generally to closure notices. Thus, a closure notice must inform the purchaser that HMRC have completed their enquiries and state their conclusions. The notice must either (a) state that in the opinion of HMRC no amendment of the land transaction return is required, or (b) make the amendments of the return required to give effect to their conclusions.

47. Again in respect of the analogous provisions of Sch 18, FA 1998, the effect of a closure notice in defining the scope and subject matter of an appeal was considered by the Supreme Court in *Tower MCashback LLP v Revenue and Customs Commissioners* [2011] STC 1143. Having considered that case, in *Fidex Ltd v Revenue and Customs Commissioners* [2016] STC 1920, in a judgment with which the other members of the Court of Appeal agreed, Kitchin LJ, at [45], summarised the principles in the following way:

> "In my judgment the principles to be applied are those set out by Henderson J as approved by and elaborated upon by the Supreme Court. So far as material to this appeal, they may be summarised in the following propositions:
>
> (i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> (ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> (iii) The closure notice must be read in context in order properly to understand its meaning.
>
> (iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

48. The possibility, subject to considerations of fairness, of arguments not foreshadowed in the closure notice itself being advanced to support the conclusions set out in the notice does not mean that closure notices might routinely be issued in non-specific terms. The fact that a closure notice might be issued in such terms without prejudicing the possibility of further arguments being raised does not

delineate the extent of an enquiry that HMRC might reasonably be permitted to undertake before being directed to close an enquiry. As Lord Walker said in *Tower MCashback*, at [18], in a passage endorsed by all the Supreme Court Justices:

> "This should not be taken as an encouragement to officers of HMRC to draft every closure notice that they issue in wide and uninformative terms. In issuing a closure notice an officer is performing an important public function in which fairness to the taxpayer must be matched by a proper regard for the public interest in the recovery of the full amount of tax payable. In a case in which it is clear that only a single, specific point is in issue, that point should be identified in the closure notice. But if, as in the present case, the facts are complicated and have not been fully investigated, and if their analysis is controversial, the public interest may require the notice to be expressed in more general terms."

Further, as Lord Hope said at [85], uninformative closure notices, of the kind that had been issued in that case, should not be the norm. The HMRC officer should wherever possible set out the conclusions that he has reached on each point that was the subject of enquiry which has resulted in his making an amendment to the return.

49. Thus, although it is the case that a closure notice might, in certain circumstances, be in broad terms, that is not the norm, and it cannot therefore be taken as an appropriate yardstick for assessing the reasonableness of the grounds asserted by HMRC for not giving a closure notice at a particular stage in the enquiry process, or within a specified period from that time. Nor for that reason does it assist the appellants' case on this appeal.

50. The appellants' Ground 1 is that the FTT erred in law because the only reasonable conclusion to be drawn from HMRC's investigation into the SDLT planning was that they had sufficient information and knowledge to give a closure notice to each of the appellants. It is submitted that this follows from:

(1) the nature of HMRC's view of the substantial number of sample cases, based on full disclosure in those cases, in the context of the active participation of Cornerstone and its representatives. It is argued in this connection that the SDLT planning was unsophisticated and simply relied on the steps set out in s 71A FA 2003;

(2) the Invitation to Settle Letters (by which is meant the 2013 Settlement Invitation letters and the similar 2015 letters taken together), which are submitted to be as close to the boundary as is possible for constituting closure notices, without being closure notices as such;

(3) HMRC's understanding of the nature of the SDLT planning arrangements, having regard to the substantially similar planning in *Project Blue*, which has reached the Supreme Court; and

(4) the stay behind *Project Blue* that has been directed by the FTT in the sample case of *Milltown Limited*, a case in which, unlike in *Project Blue*, HMRC also assert that the party who is said to be the QFI does not have the correct licence to be a QFI.

51. Before us, Mr Hickey was disposed to agree that the appellants' appeal essentially turned on the terms of the Invitation to Settle letters. He submitted that those letters showed that:

(a) HMRC was in a position to quantify the amount of SDLT due and payable by the appellants in respect of the properties that were subject to the SDLT planning;

(b) HMRC had at that stage determined that the SDLT planning failed by reference to *Project Blue*, and they continue to hold the view that the SDLT planning fails by reference to s 71A FA 2003;

(c) from HMRC's perspective, there are no open issues in terms of the efficacy of the SDLT planning; their view, which has been communicated to the appellants, is that it simply does not work; and

(d) HMRC are no longer conducting an enquiry but are positioning themselves to litigate before the FTT.

52. In our judgment, nothing in the Invitation to Settle letters goes anywhere near demonstrating that the FTT's decision was one that it could not reasonably have made. The Invitation to Settle letters did no more than invite the appellants to concede or to move towards settlement. They did so on the basis that, at the stages at which they were sent, there had first been a decision of the FTT that the purchaser in *Project Blue* was liable to SDLT, and secondly that the Upper Tribunal in that case had dismissed the purchaser's appeal from that decision, whilst coming to a different view as to the amount of the chargeable consideration. In those circumstances, the approach of inviting the appellants to concede was one that could readily be taken on the basis of the confirmation from Cornerstone, recorded in HMRC's letters of 23 October 2013, that the appellants had used the same scheme. Such an approach did not require that HMRC had reached the stage at which a closure notice could be issued, nor in our view could it properly be inferred that such was the case. There is no necessary correlation between the circumstances in which an invitation to settle, or an invitation to concede and pay the tax without tribunal proceedings, may be made and the circumstances in which it would be unreasonable for HMRC to prolong an enquiry without issuing a closure notice. In these particular cases, in our judgment, there is no such correlation at all.

53. Mr Hickey argued that HMRC fully understood the nature of the SDLT planning that had been undertaken by the appellants, and that they had done so since at least October 2013. It is correct, as we have described, that there had been full disclosure in a sample of cases. But there is a material difference between understanding the generic nature of the arrangements that have been undertaken (which may enable HMRC to come forward with a settlement offer in appropriate cases), and having information concerning the individual case at hand which is of such a nature that it would be unreasonable not to close the enquiry.

54. Mr Hickey's argument that HMRC were able to quantify the amount of SDLT due is nothing to the point. That was nothing more than an arithmetical calculation which followed from the application of the appropriate rate of SDLT to the amount of

the consideration disclosed by the respective appellants in the SDLT1s and the explanatory correspondence at that time. It does not demonstrate that HMRC had formed a view on the actual transactions entered into by the appellants; as Ms McCarthy submitted, the view taken by HMRC was nothing more than a view on the limited information provided in relation to the appellants' cases.

55. It is also the case that the Invitation to Settle letters, both in 2013 and 2015, referred to the progression of the case to the FTT if the appellants failed to avail themselves of the settlement opportunity. The FTT described, at [59], the letters as "ill drafted" (a view we would not wish to endorse). It took the view, at [57], on the assumption that the appellants themselves had not been aware of the sampling exercise, that it would have been reasonable for the appellants to have understood those letters to be saying that HMRC were "able to draw a conclusion on the enquiry and state the amount by reference to which the SDLT return would be amended without the need for further information and evidence save in the circumstance that the user wished to appeal the matter rather than settle it".

56. This is the high point of the FTT's findings so far as the appellants' case is concerned. But on analysis, it cannot assist them. In our view, this finding by the FTT does no more than recognise the distinction we have identified between the circumstances in which an enquiry might be brought to an end by settlement or by concession, and one which is to be closed as a precursor to an appeal. That is why the FTT expressly excluded from the cases where no further information would be needed those cases which were not settled in accordance with the terms of the Invitation to Settle letters and which would go on to appeal. In those cases, as the letters themselves made clear, further information, specific to the cases of the appellants, would be required.

57. Nor can it properly be argued, as Mr Hickey sought to do, that the further information could be made available in the course of the tribunal proceedings, and that it was not therefore a reasonable requirement before the issue of a closure notice. The FTT rightly rejected such an argument in its conclusion at [61]:

> "… If a closure notice were ordered immediately as requested by the [appellants] it could do no more than preserve [HMRC's] position pending any appeal in Project Blue but could not conclude on any implementation matters which would open the [appellants] rather than the PCC open to a liability to SDLT. Particularly given the current position of the case law on the underlying technical issues on the application of s45A and [s]71A Finance Act 2003 the absence of the information and documentation requested is critical. To order a closure notice would result in the inappropriate shifting of matters properly to be determined by the Respondents to case management for the tribunal."

58. That is a strong conclusion, and one which in our judgment the FTT was perfectly entitled to reach. The FTT properly directed itself as to the applicable law. It recognised, at [46], that there is a statutory presumption that the FTT will make a direction for closure and that the burden rests on HMRC to show that they have

reasonable grounds for not issuing a closure notice within a specified period. It rightly noted, at [50], the significance of the issue of a closure notice and referred, at [51], to the balance identified in *Vodafone 2* between the interest of HMRC in making enquiries in the exercise of their responsibility for the proper assessment and collection of tax and the interests of taxpayers in achieving a timely resolution of such enquiries. In our judgment, in its consideration of the appellants' application, the FTT properly respected and applied that balance. The FTT was entitled to find that it was not unreasonable for HMRC, before closing their enquiries, to wish to establish the individual facts and circumstances pertaining to the appellants in circumstances where the appellants were not prepared to settle on the terms proposed by HMRC, and not to rely on sampled or generic information derived from other cases. The FTT made no error of law in that respect.

Decision

59. We dismiss the appellants' appeals.

UPPER TRIBUNAL JUDGE ROGER BERNER

UPPER TRIBUNAL JUDGE JONATHAN CANNAN

RELEASE DATE: 8 August 2017