UT Neutral citation number: **[2022] UKUT 00178 (TCC)**

UT (Tax & Chancery) Case Number: **UT/2020/000348**

Upper Tribunal
(Tax and Chancery Chamber)

Hearing dates:12 April 2022
Rolls Building, London

Judgment given on 07 July 2022

Before

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

Between

LG PARK HT1 LIMITED
UPS SPG LIMITED
LG PARK HT3 LIMITED
LG PARK HT4 LIMIED
LG PARK HT5 LIMITED
LG PARK HT6 LIMITED
LG PARK HT7 LIMITED
LG PARK HT8 LIMITED
LG PARK HT9 LIMITED
LG PARK HT10 LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS

Respondents

Representation:

For the Appellant: Rupert Baldry QC and Quinlan Windle, instructed by Norton Rose Fulbright LLP

For the Respondents: Michael Ripley and Edward Hellier, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. Where a taxpayer appeals against HMRC's determination of the stamp duty land tax ("SDLT") due on a land transaction, the legislation provides that any disputed question of the market value of the land shall be determined by the Upper Tribunal (Lands Chamber) on a referral by the tribunal. The Appellants applied to the First-tier Tribunal ("FTT") for such a referral of the question of market value in their appeals, and HMRC objected. Those appeals related to the SDLT chargeable on the grant of leases to the Appellants as part of the arrangements for the development of the London Gateway. The FTT refused the application, and this is the decision on their appeal against that refusal.

2. References in this decision to paragraphs in the form [x] are, unless stated otherwise, to paragraphs of the FTT's decision (the "Decision").

Background

3. The FTT set out the background as follows:

> **BACKGROUND**
>
> The following summary of the background to the application is taken from both LG Parks' and HMRC's Skeleton Arguments and the transaction documents. It does not represent agreed facts or my findings of fact. The evidence will be considered for this purpose if the matter progresses to a substantive appeal hearing.
>
> 3. On 4 September 2000, P&O Ports (Europe) Limited ("P&O Ports"), The Peninsular and Oriental Steam Navigation Company ("POSNCo") and several subsidiaries of Royal Dutch Shell plc ("Shell") entered into an agreement relating to the development of a deep-water port (the "Port") and a logistics site (the "Park"), which together would form the London Gateway. This Master Agreement was conditional on statutory consents for the development of the Port and the Park being obtained.
>
> 4. Under the Master Agreement P&O Ports was to acquire the land required to develop the Port (the "Port Land") by a Port Sale Agreement. The Port Sale Agreement would impose on P&O Ports the 'minimum port requirement' ("MPR"), which required P&O Ports to develop the Port, and if it did not, allowed Shell to re-acquire the Port Land for the sale price adjusted for inflation. Under the Master Agreement, if the statutory consents were obtained, Shell and POSNCo would enter into a Development Agreement to develop land (the "Park Land") into the Park.
>
> 5. In 2006, DP World acquired P&O Ports. At the times relevant to these appeals, the ten Appellants were all subsidiaries of DP World, a Dubai headquartered business. One of the Appellants, LG Park HT2 Limited, has since been sold and it is now called UPS SGP Limited. Fifty per cent of another Appellant has also been sold.
>
> 6. In 2007, the statutory consents were obtained for the development of both the Port and the Park. At this stage arbitration proceedings were entered into between Shell and DP World regarding a dispute about whether the relevant conditions had in fact been satisfied. This was in part prompted by a rise in the market value of both the Park Land and the Port Land.
>
> 7. On 28 February 2008, the Port Sale Agreement was exchanged between a subsidiary of DP World and Shell. The Port Sale Transfer set out (in paragraph 19) a covenant that the MPR had to be satisfied no later than 28 February 2013 and that if the transferee did not comply with the covenant, the transferor may, as agreed compensation and in

substitution for a claim for damages, require the transferee to transfer the Port Land back to the transferor ("the MPR Call Option").

8. In June 2008, the arbitration proceedings relating to the development of the Park were put on hold and the parties began to discuss a buyout whereby DP World would acquire the Park Land from Shell. The removal of the MPR would have been one of the terms of any compromise of the proceedings. If the MPR had not been waived or satisfied Shell would have otherwise been entitled to reacquire the Port Land for a price below market value and without reimbursing DP World for the money spent developing the Port Land.

9. On 31 December 2009, a number of agreements were entered into, including the agreement for Shell to grant 200-year leases over ten plots of the developable part of the Park Land to the ten Appellants (the "Plot Leases"). The division into ten plots was to enable distinct areas of the Park to attract separate investments. The agreement provided that in consideration for the grant of the Plot Leases, the Appellants would (a) pay "the Price" (a total of £112,568,994 plus VAT) and (b) grant Shell land options over the part of the Park Land covered by their respective Plot Lease.

10. The Plot Leases were granted on 14 January 2010.

11. On 15 January 2010, an Omnibus Deed was entered into between Shell and various DP World companies, including LG Parks. The Omnibus Deed provides that with effect from the date of the deed, certain variations to the Port Sale Agreement and the Port Land Transfer should have effect. This includes a provision that paragraph 19 of the Port Land Transfer (summarised in paragraph 7 above) should cease to have effect. This released DP World from the MPR and the MPR Call Option (the "MPR Release"), meaning Shell's potential right to reacquire the Port Land fell away.

12. Land transaction returns were filed electronically bon behalf of LG Parks on 12 February 2010. Copies of the returns are not included in the Tribunal's bundles. LG Parks state that the SDLT was calculated on the basis that they were granted the Plot Leases in consideration for, in part, their granting options over the land covered by the Plot Leases and that the transaction was therefore an exchange within the meaning of section 47 Finance Act 2003. Paragraph 5, Schedule 4, Finance Act 2003 (as it applied at the time) provides that the chargeable consideration for SDLT purposes is the market value of the Plot Leases.

13. King Sturge had been instructed to provide various valuations in November 2009, and these put the market value of the Plot Leases at £30.56m. SDLT was paid by reference to King Sturge's market valuation of the Plot Leases, totalling £1,227,636.

14. On 1 March 2010, Norton Rose Fulbright LLP ("NRF") wrote to HMRC setting out details of the transactions, explaining that the calculation of SDLT in the land transaction returns was by reference to the King Sturge market valuation. The letter went on to explain that the reason for the discrepancy between the consideration paid and the market value of the Plot Leases was that LG Parks were compelled to pay above market value because (i) "the price was the minimum price that Shell was prepared to accept after considerable negotiation" (ii) buying the Park Land was essential to deliver the Port as a viable operation (iii) it was not appropriate for LG Port to acquire the land.

15. On 27 August 2010, HMRC opened enquiries into the LG Parks' land transaction returns. There followed a period of extended correspondence and further discussions between the parties, including meetings between representatives of DP World and the Valuation Office Agency, and a revised valuation of £38.7m was put forward by DP World following advice from KMPG. It appears from the extracts of the correspondence provided to me that at some time between May and October 2013 DP World raised the claim that the price paid was "representative of a number of factors and not merely value of the subject property". Their letter of 28 October 2013 cites the removal of the

MPR as one factor, which "coupled with the fact that Shell refused to sell the subject property for less than the price paid, resulted in us being held to ransom with regards to the acquisition price."

16. On 31 December 2013, HMRC issued closure notices ("the Closure Notices") to L G Parks stating:

> "I have concluded that the open market value of this land interest is equal to the [an amount that over all ten Closure Notices summed to £116,568,994] plot lease premium and paid by [the respective Appellant] to the landlord, [Shell].
>
> I have amended your SDLT return to reflect my conclusion."

17. There was then a period of over five years of substantial correspondence and discussion between the parties before LG parks appealed to the Tribunal on 12 April 2019. The final paragraph of the notice of appeal reads:

> "The question in this dispute is one of the market value of the Plot Lease, and in accordance with paragraph 45 of Schedule 10 Finance Act 2003, that question shall be determined on a reference to the Upper Tribunal. It is the intention of the taxpayer to seek an order for such a reference."

Legislation

4. The SDLT legislation is largely found in the Finance Act 2003 ("FA 2003"). References below are to that Act unless otherwise stated. SDLT is charged on "land transactions" which are not exempt: section 49. A land transaction means the acquisition of a "chargeable interest", which in this context means an estate or interest in or over land: section 48. SDLT applies by reference to the "effective date" of the land transaction, which in relation to each of the Plot Leases was 14 January 2010. The legislation set out below is that in force as at that date.

5. One of the issues raised between the parties in correspondence was whether the SDLT due fell to be apportioned. The relevant legislation provides as follows:

> **4 Just and reasonable apportionment**
>
> (1) For the purposes of this Part consideration attributable—
>
> (a) to two or more land transactions, or
>
> (b) in part to a land transaction and in part to another matter, or
>
> (c) in part to matters making it chargeable consideration and in part to other matters,
>
> shall be apportioned on a just and reasonable basis.
>
> (2) If the consideration is not so apportioned, this Part has effect as if it had been so apportioned.
>
> (3) For the purposes of this paragraph any consideration given for what is in substance one bargain shall be treated as attributable to all the elements of the bargain, even though—
>
> (a) separate consideration is, or purports to be, given for different elements of the bargain, or
>
> (b) there are, or purport to be, separate transactions in respect of different elements of the bargain.

6. Another issue related to the application of the provisions dealing with SDLT on an exchange. So far as relevant, section 47 states as follows:

> **47 Exchanges**

(1) Where a land transaction is entered into by the purchaser (alone or jointly) wholly or partly in consideration of another land transaction being entered into by him (alone or jointly) as vendor, this Part applies in relation to each transaction as if each were distinct and separate from the other…

(2) A transaction is treated for the purposes of this Part as entered into by the purchaser wholly or partly in consideration of another land transaction being entered into by him as vendor in any case where an obligation to give consideration for a land transaction that a person enters into as purchaser is met wholly or partly by way of that person entering into another transaction as vendor.

(3) As to the amount of the chargeable consideration in the case of exchanges and similar transactions, see—

paragraphs 5 and 6 of Schedule 4 (exchanges, partition etc), . . .

7. Paragraph 5 of Schedule 4 provides as follows:

5 Exchanges

(1) This paragraph applies to determine the chargeable consideration where one or more land transactions are entered into by a person as purchaser (alone or jointly) wholly or partly in consideration of one or more other land transactions being entered into by him (alone or jointly) as vendor.

(2) In this paragraph—

(a) "relevant transaction" means any of those transactions, and

(b) "relevant acquisition" means a relevant transaction entered into as purchaser and "relevant disposal" means a relevant transaction entered into as vendor.

(3) The following rules apply if the subject-matter of any of the relevant transactions is a major interest in land—

(a) where a single relevant acquisition is made, the chargeable consideration for the acquisition is—

(i) the market value of the subject-matter of the acquisition, and

(ii) if the acquisition is the grant of a lease at a rent, that rent;

(b) where two or more relevant acquisitions are made, the chargeable consideration for each relevant acquisition is—

(i) the market value of the subject-matter of that acquisition, and

(ii) if the acquisition is the grant of a lease at a rent, that rent.

8. The relevant provisions concerning enquiries into land transaction returns and appeals against HMRC decisions are contained in Schedule 10 and are as follows:

12 Notice of enquiry

(1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—

(a) to the purchaser,

(b) before the end of the enquiry period.

(2) The enquiry period is the period of nine months—

(a) after the filing date, if the return was delivered on or before that date;

(b) after the date on which the return was delivered, if the return was delivered after the filing date;

(c) after the date on which the amendment was made, if the return is amended under paragraph 6 (amendment by purchaser).

23 Completion of enquiry

(1) An enquiry under paragraph 12 is completed when the Inland Revenue by notice (a "closure notice") inform the purchaser that they have completed their enquiries and state their conclusions.

(2) A closure notice must either—

(a) state that in the opinion of the Inland Revenue no amendment of the return is required, or

(b) make the amendments of the return required to give effect to their conclusions.

(3) A closure notice takes effect when it is issued.

35 Right of appeal

(1) An appeal may be brought against—

(a) an amendment of a self-assessment under paragraph 17 (amendment by Revenue during enquiry to prevent loss of tax),

(b) a conclusion stated or amendment made by a closure notice,

(c) a discovery assessment, . . .

(d) an assessment under paragraph 29 (assessment to recover excessive repayment), or

(e) a Revenue determination under paragraph 25 (determination of tax chargeable if no return delivered).

36D Notifying appeal to the tribunal

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

36I Other interpretation

(1) In paragraphs 36A to 36H—

(a) "matter in question" means the matter to which an appeal relates…

9. Where an appeal has been made under paragraph 35, the provision which this appeal relates to is engaged, namely paragraph 45, which provides as follows:

45 Questions to be determined by the relevant Upper Tribunal

(1) Where the question in any dispute on any appeal under paragraphs 34(6) or 35(1) is a question of the market value of the subject matter of the land transaction that question shall be determined on a reference by the relevant Upper Tribunal.

(2) In this paragraph "the relevant tribunal" means—

(a) where the land is in England and Wales, the Upper Tribunal…

10. Paragraph 45(1) does not specify which is "the relevant Upper Tribunal". However, although we were not referred to it by the parties, this is dealt with in the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655). This provides that there shall be allocated to the Lands

Chamber "the determination of questions of the value of land or an interest in land arising in tax proceedings"[1].

The decision of the FTT

11. The Appellants applied to the FTT for the proceedings in their appeals to be transferred to the Upper Tribunal (Lands Chamber). We note that this application was not within the terms of paragraph 45, as that provides only for the transfer of a discrete question (market value) not of the taxpayer's appeal. Having said that, the form of application doubtless reflected the taxpayer's argument that the Closure Notices against which they appealed only raised a single question, namely the market value of the land interest.

12. Mr Baldry, who, together with Mr Windle, also represented the Appellants before the FTT, argued that the scope of the appeals fell to be determined by the Closure Notices issued by HMRC, which he submitted raised only the question of market value. HMRC, represented before the FTT by Ms McCarthy and Mr Hellier, opposed the referral to the Lands Chamber. HMRC argued that any dispute as to the scope of the Closure Notices should be dealt with at a full hearing of the substantive appeals before the FTT, and not at a case management hearing. HMRC stated that the Appellants appeared to be raising arguments as to the applicability of both the apportionment provisions in the SDLT rules and also the exchange provisions, so issues other than market value were in dispute.

13. The FTT decided whether a reference to the Lands Chamber would be appropriate by considering (1) the questions in the dispute and (2) the overriding objective in the FTT Rules: [28][2].

14. Mr Baldry conceded that the Appellants had sought to argue that an apportionment of the consideration was required, but had done so in correspondence with HMRC subsequent to the issue of the Closure Notices. Under the Closure Notices, the only outstanding issue was market value. Ms McCarthy argued that the FTT had only a limited selection of documents before it, and was not equipped to determine the scope of the Closure Notices. In any event, she said, the dispute between the parties had changed since the issue of the Closure Notices.

15. The FTT rejected Mr Baldry's approach of looking solely at the Closure Notices. Rather, it considered the question to be "whether the taxpayers have raised questions in their appeals against the Closure Notices that should be determined by the FTT (or conceded as HMRC submit) before it is appropriate to refer the question of the market value to the Upper Tribunal". It approached this question by considering the Appellants' grounds of appeal as the first step to identifying the questions in dispute. It set out the final paragraphs of those grounds at [38]:

> "6. [LG Parks] disagrees with the open market value contended by HMRC in the closure notice for the various reasons, including:
>
> (a) A third-party professional valuer was instructed to provide a market value for the Plot Leases as at 31 December 2009 for SDLT purposes and [LG Parks] relied on this valuation for the purposes of assessing the SDLT due; and
>
> (b)The grant of the Plot Lease formed part of a wider commercial arrangement.
>
> 7. SDLT on the grant of the Plot Lease should be assessable by reference to the valuation obtained by [LG Parks] at the time of the transaction, and therefore no further SDLT is due.

[1] SI 2010/2655 paragraph 12(a)(iii).

[2] The overriding objective is set out in an appendix to this decision.

> 8. The question in this dispute is one of the market value of the Plot Lease, and in accordance with paragraph 45 of Schedule 10 Finance Act 2003, that question shall be determined on a reference to the Upper Tribunal. It is the intention of the taxpayer to seek an order for such a reference."

16. The FTT then considered Mr Baldry's explanation of the Appellants' case. It considered that their case raised "questions of both fact and law to be addressed by the FTT before a referral can be made under paragraph 45". In particular, it was necessary to determine the subject matter of the land transaction on which SDLT fell due (the apportionment question). The FTT concluded at [42]:

> My consideration of the grounds of appeal has identified that there is at least one other question raised by the taxpayer that should be addressed by the FTT, and that is sufficient to determine this application without requiring additional evidence of the context of the closure notices and the surrounding circumstances to determine the scope of the appeal.

17. The FTT then considered the application of the overriding objective and the practical and case management implications of making a reference to the Lands Chamber. It considered that the need to deal in the substantive appeal with the Appellants' arguments regarding apportionment and also the application of the exchange provisions meant that a referral of the valuation question would not further the overriding objective, and might result in further proceedings or satellite litigation.

Discovery Assessments

18. Subsequent to the Decision, on 30 July 2020 HMRC issued discovery assessments[3] to the Appellants in respect of the SDLT due on the Plot Leases (the "Discovery Assessments"). These assessments were described by HMRC as issued in order to protect HMRC's position in relation to the SDLT position in respect of the MPR Release. The Appellants have appealed against the Discovery Assessments. The FTT has directed that those appeals should proceed together and be heard together with the appeals against the Closure Notices.

19. HMRC applied to the Upper Tribunal for a stay of the proceedings to transfer the question of valuation to the Lands Chamber. The Upper Tribunal dismissed that application.

Approach to this appeal

20. The jurisdiction of this Tribunal in relation to an appeal such as this is limited to errors of law: sections 11 and 12 Tribunals, Courts and Enforcement Act 2007.

21. In addition, the decision to refuse the reference was an exercise by the FTT of its case management discretion. It is well established that this Tribunal will be slow to interfere with the proper exercise by the FTT of its discretion in case management decisions. The position was summarised by Sales J, as he then was, in *HMRC v Ingenious Games LLP* [2014] UKUT 0062 (TCC) ("*Ingenious Games*"), at [56]:

> The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT: *Walbrook Trustees v Fattal* [2008] EWCA Civ 427, [33]; *Atlantic Electronics Ltd v HM Revenue and Customs Commissioners*

[3] Issued under the powers in paragraphs 28 and 31(2A)(b) of Schedule 10 FA 2003.

> [2013] EWCA Civ 651, [18]. The Upper Tribunal should exercise extreme caution before allowing appeals from the FTT on case management decisions: *Goldman Sachs International v HM Revenue and Customs Commissioners* [2009] UKUT 290 (TCC), [23]-[24].

22. HMRC argued that the issue of the Discovery Assessments provided a strong additional reason not to make any reference of valuation to the Lands Chamber. However, those assessments were issued after the FTT issued the Decision, and so cannot be relevant to the question of whether the FTT erred in law in reaching its decision. That is the first question which we must determine. Only if we were to determine that there had been a material error of law would it become necessary to take into account the Discovery Assessments in the subsequent exercise of our discretion to set aside and remake or remit the decision.

The relevance of questions other than valuation

23. In our opinion, there is nothing in the wording of paragraph 45 which requires, either explicitly or by implication, that a reference to the Lands Chamber of a valuation question can or should be made only where that is the only question which remains to be determined in the appeal.

24. Somewhat surprisingly, the FTT nevertheless considered and determined the application on precisely this basis. We consider that the terms of the Decision indicate that the FTT likely took this approach for three reasons.

25. First, and perhaps most importantly, it appears to have been common ground before the FTT that this was the right approach to take. Indeed, in his skeleton argument in this appeal, Mr Baldry states that "it is no part of the Appellants' argument in [the application to the FTT for a reference] that the FTT had a discretion to refer the appeals to the Upper Tribunal (Lands Chamber) before all other matters in the appeals against the Closure Notices are determined". HMRC took no issue with that approach.

26. Second, the submissions of the parties before the FTT and the FTT's reasoning both betray a tendency to equate a reference on valuation with a transfer of the substantive appeal to the Lands Chamber. If it had been the appeal which was being transferred, then it would naturally have been sensible to consider whether issues other than valuation remained to be resolved. We return to this further below.

27. Third, the FTT considered that this approach, and the decision to refuse the referral, were consistent with the overriding objective; see, in particular, [49].

Discussion

28. The Appellants' grounds of appeal are as follows:

> (1) The FTT erred in law by identifying the questions raised by the appeals without first considering the scope of the appeals. The scope of the appeals must be determined by reference to the Closure Notices themselves.
>
> (2) The FTT erred in law by failing properly to understand how SDLT is calculated for exchanges.

29. Both grounds go to the same point. Did the FTT err in law in concluding that the scope of the appeals covered questions other than valuation, with the result that it would not be appropriate to grant the reference? We remind ourselves at the outset that it was apparently common ground that if there were other questions within the scope of the substantive appeals, then a reference should not be made.

30. Mr Baldry argued that:

> (1) The scope of an appeal against a closure notice is determined by the conclusion in that closure notice, construed in context.
>
> (2) So construed, the conclusions in the Closure Notices raise only one question, which is the market value of the land.

31. As to the determination of the scope of a closure notice, the parties appear to agree that the relevant principles are those summarised in decisions such as *Tower MCashback LLP 1 v HMRC* [2011] 2 AC 457, *B&K Lavery Property Trading Partnership v HMRC* [2016] UKUT 525 (TCC), *Fidex Ltd v HMRC* [2016] EWCA Civ 385 and *Investec Asset Finance PLC v HMRC* [2010] EWCA Civ 579. However, the nuances of the law as to the construction of closure notices, which the parties continued to debate in the hearing before us, are not material to whether the FTT erred in law. That is because the FTT decided that it would determine the reference application not by determining the scope of the closure notices but by considering the questions which had been raised in the appeal by the parties (or at least by the Appellants). That is clear from the following passages:

> 36. I have concluded that in order to decide whether it is appropriate to make the reference under paragraph 45, I should consider whether the appeals against the Closure Notices raise one or more questions that should be decided by the FTT before the remaining question of the market valuation can be referred to the Upper Tribunal to determine the appeals. This is not the same question as identifying the scope of the appeals…
>
> 37. In contrast, the question on the facts of this application is whether the taxpayers have raised questions in their appeals against the Closure Notices that should be determined by the FTT (or conceded as HMRC submit) before it is appropriate to refer the question of the market value to the Upper Tribunal.

32. Before turning to the results of the FTT's approach, the first question is whether the FTT erred in law in taking this approach rather than determining the scope of the Closure Notices.

33. We accept Mr Baldry's general proposition that the scope of the issues in a tax appeal is determined by the conclusions in the relevant closure notice, construed in context. In relation to the application in this case, we consider that the preferable route would probably have been for the FTT to determine the issues in the appeal by construing the Closure Notices. The FTT recorded HMRC's concern that the FTT did not have all the information which it would have needed to review the context: [24] and [34][4]. In that event, it could have directed the parties to produce that information. The Closure Notices and the relevant context appear to us to be relatively clear and, on the face of it, supportive of the view that the only issue in scope under the Closure Notices is market value; the exercise of construing the Closure Notices should not, therefore, have been unduly time-consuming.

34. However, we do not consider that the FTT's decision to decline to follow this course was an error of law. It is important to bear in mind the caveats summarised in *Ingenious Games* regarding the approach to be taken by this tribunal on an appeal against a case management decision. The positions taken by the parties placed the FTT in a position where it had to determine some methodical way of deciding what the "questions in the appeal" were in order to decide whether they were restricted to valuation. HMRC made it plain that they did not accept Mr Baldry's construction of the conclusions in the Closure Notices. HMRC also argued that a case management hearing was an inappropriate forum in which to determine the scope of the Closure Notices. Taking all factors into account, we

[4] It appears from the decision of the FTT refusing permission to appeal that the FTT shared this concern.

consider that a decision not to take the approach of determining the questions in the appeal by construing the Closure Notices was within the generous ambit of discretion.

35. However, that is not the end of the matter. The next question is whether the FTT nevertheless erred in law when applying the alternative approach which it adopted to the facts before it.

36. In considering this question, it is instructive to begin with a brief consideration of the purpose and construction of paragraph 45.

37. The question of the valuation of land may arise in a tax appeal in various contexts. The clear intention of the legislation is that such a question should be determined by the Lands Chamber, and not by the FTT. The rationale is obvious; the Lands Chamber is best placed in terms of technical and practical expertise, experience and resource to determine the valuation of land.

38. The SDLT code is not the only area in which this intention is spelt out. There are equivalent provisions, albeit with slight differences in wording, in section 46D Taxes Management Act 1970 and section 222(4)-(4B) Inheritance Act 1984.

39. In applying paragraph 45, we consider that the following principles should be borne in mind.

40. First, it is engaged only where an appeal which has been made, and in relation to that appeal. The particular appeal, and the FTT's jurisdiction in relation to it, therefore form the framework within which paragraph 45 falls to be applied.

41. Second, its effect is mandatory. Any question of the market value of the land transaction must be determined on a reference by the Lands Tribunal. That requirement applies where the question arises "in any dispute on any appeal". Thus the primary purpose and effect of paragraph 45 may be seen as jurisdictional.

42. Third, it is not the appeal which is transferred to the Lands Chamber but the question of valuation. The appeal remains with the FTT.

43. Fourth, although paragraph 45 is silent as to the precise stage when a reference should be made where a dispute has arisen as to market value in an SDLT appeal, the determination of that question must be guided by the three preceding points.

44. As we note below at [58], we do not agree with the proposition that a reference under paragraph 45 can only be made when the FTT has determined all other issues other than valuation. Even if that were correct, however, it would only reinforce the conclusion that a party seeking to resist an application for referral to the Upper Tribunal (Lands Chamber) should have to satisfy the FTT that there are in fact material issues other than valuation within the scope of the appeal. To approach matters otherwise would result in the referral being delayed merely in the hope that some other issue might emerge in the future. In the meantime, the FTT would retain control for an indefinite period over an issue as to which it had no jurisdiction. That seems to us undesirable and contrary to principle. We say that because (a) it is the appeal which engages paragraph 45 and frames the questions, and (b) a dispute as to valuation being outside the FTT's jurisdiction, a transfer must be made at some stage.

45. As we have said, in an appeal against a conclusion in a closure notice, the starting point in determining the scope of the issues in the appeal is the closure notice, construed in context. That should have been the FTT's starting point in this case, even on its alternative approach.

46. The Closure Notices each stated as follows:

> I have concluded that the open market value of this land interest is equal to the £[*x*] plot lease premium and paid by [the Appellant] to the landlord [Shell].
>
> I have amended your SDLT return to reflect my conclusion.
>
> - It previously showed that you were due to pay £[*y*].
> - It now shows that you are due to pay £[x].
> - The difference is £[*x-y*].

47. In relation to the context of that Closure Notice, it is clear that before it was issued the parties had been in dispute on issues other than valuation which were material to the SDLT analysis of the land transactions. In particular, HMRC had considered whether the arrangements fell within the so-called anti-avoidance provisions of section 75A FA 2003. HMRC had also disputed whether, as the Appellants claimed, the arrangements amounted to an exchange within section 47 and paragraph 5 Schedule 4 FA 2003. Following numerous meetings and discussions, HMRC wrote to the Appellants on 27 September 2012 stating as follows:

> I understand that you are aware that I have received advice on the exchange treatment of the Plot Lease transactions.
>
> **Exchange treatment**
>
> Following that advice, HMRC's position is that the Plot Leases should be treated as exchanges for the purposes of s47 and that SDLT should be calculated on the market value of the land interests transferred by Shell to [the Appellants] on 14 January 2010.
>
> **Commercial purpose**
>
> …We do believe that HMRC has an argument to contend that the options were included as an artificial step simply to avoid paying SDLT, however we also concur with KPMG that, by virtue of s75C(7) the exchange provisions will apply and any tax on a notional value imputed by s75A would be charged on the market value of the land. Therefore the critical issue remains "Market Value" and we will therefore not be pursuing the avoidance line of enquiry.
>
> **Valuation**
>
> This leaves us with the negotiation of the open market value of the Plot Leases.

48. HMRC argue that the *conclusion* in the Closure Notice was not that the open market value of the land was the amount stated by HMRC, but rather that the amount of SDLT due was the amount restated in the Notice. As will become clear, we are not determining the scope of the Closure Notice in this appeal. However, in relation to the alternative approach taken by the FTT we do consider that the terms of the Closure Notice read in the context of the letter of 27 September 2012 strongly suggest that valuation was the issue raised by the conclusion of the Closure Notice.

49. In evaluating against this background whether there were other questions in the appeal, taking into account the observations we have made about the purpose and operation of paragraph 45 it was not a sufficient ground to refuse the application that the FTT might decide in the substantive hearing to determine issues other than valuation.

50. Nor was it a sufficient ground in itself to justify a refusal that the parties disagreed on the scope of the Closure Notice. On any reasonable basis, valuation was clearly front and centre of both the Closure Notice and the appeal against it. It was for the party opposing the reference application to identify and establish that specific questions in addition to valuation arose in the appeal.

51. HMRC argued before the FTT that by referring in their grounds of appeal to the fact that "the grant of the Plot Leases formed part of a wider commercial arrangement", the Appellants had raised issues other than valuation in the appeal: [25]. The FTT framed the relevant question as "whether the taxpayers have raised questions in their appeals" other than valuation: [37]. It considered the Appellants' grounds of appeal "as the first step in identifying the questions in dispute": [38]. The reference to a wider commercial arrangement was explained by Mr Baldry as relating to the possible apportionment of part of the consideration paid not to the land but to the MPR Release, said to be an exempt interest for SDLT: [39]. That argument raised the issue of the "subject matter" of the land transaction and the question of the potential apportionment of the consideration. The FTT stated as follows:

> 41. These are questions of both fact and tax law to be addressed by the FTT before a referral can be made under paragraph 45. Even if these were not questions that prevented the reference under the terms of paragraph 45, it is difficult to envisage how the Upper Tribunal (Lands Chamber) could consider the market value without the prior tax law determination of subject matter of the land transaction for which the chargeable consideration is to be determined for SDLT purposes.
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> 42. Having reached this conclusion that there is at least one other question within the jurisdiction of, and to be addressed by, the FTT before it would be appropriate to refer the valuation question to the Upper Tribunal, I have not gone on to consider what further questions are raised by the appeals.

52. We consider that this conclusion was an error of law and outside the generous ambit. First, it effectively gave no weight to the terms of the conclusion in the Closure Notice. Second, in concluding that a disagreement as to apportionment was a "question in the appeal" which raised the need for a "prior tax law determination" the FTT frustrated the purpose and objectives of paragraph 45 as we have described them. Third, we agree with Mr Baldry that in any event any issue as to apportionment could most appropriately be determined by the Lands Chamber as an aspect of determining the valuation of the Plot Leases.

53. A recent decision of the Lands Chamber on a reference both for the purposes of capital gains tax (under section 46D Taxes Management Act 1970) and SDLT bears out the latter point. In *Denning v HMRC* [2021] UKUT 0076 (LC), a reference was made to the Lands Chamber to determine the market value of freehold and leasehold interest in two care homes in the context of an appeal to the FTT. The structure of the relevant arrangements meant that a central question which arose was whether a particular element in the market valuation of the leasehold interests was attributable to business goodwill or to the leasehold interests. As the Upper Tribunal put it, "the question is, the market value of what?": [92] of the decision. The question was considered in detail and fed into the Tribunal's determinations of value.

54. For the reasons given, the FTT erred in law in reaching its conclusion that the question of apportionment which arose meant that the application for a reference should be refused.

Disposition

55. Having reached this conclusion, we may but do not need to set aside the Decision. Since it involved a material error of law, it is appropriate to set it aside, and we do so.

56. Having set it aside, we may remake or remit it. We have concluded that we have the necessary facts and information to remake it, and we will now do so.

57. In considering whether the Appellants' application for a reference should be granted, it may be helpful to expand on two points we have already raised.

58. First, in our opinion there is nothing in the terms of paragraph 45 which requires or has the result that a reference can be made only when the FTT has determined all issues or questions in the appeal other than valuation. When paragraph 45 refers to "the question in any dispute on any appeal" being market value, it is not restricting the requirement for a reference to a situation when that is the *only* question in dispute. That would be inconsistent with the principles which we have identified as underpinning paragraph 45. All that the reference to "dispute" is doing is to make clear that it is only where valuation is not agreed between the parties (and is therefore a question in dispute) that a reference is required to determine that question.

59. It follows that we do not consider that paragraph 45 requires the FTT to identify "the questions in…dispute" on an appeal where they are not questions of market value of the subject matter of the land transaction. Paragraph 45 is engaged when there is an appeal, and an appeal is against "the matter in question". The scope and subject-matter of an appeal against a closure notice depend on the closure notice properly construed. The legislation does not introduce a free-standing concept, left entirely undefined, of the "questions…in dispute" in an appeal.

60. Second, paragraph 45 operates to refer only the question of valuation. It does not transfer the appeal to the Lands Chamber. That is so even where valuation is the only substantive point in dispute.

61. This fundamental distinction has been unfortunately blurred in this case. The application for a reference made by the Appellants was an application for a direction that "the proceedings in the ten appeals shall be transferred to the Upper Tribunal (Lands Chamber)". Both parties referred at points in their submissions to the appeals being transferred to the Lands Chamber. The FTT records Mr Baldry's submission that if the only question raised by the conclusions in the Closure Notices was valuation, "then HMRC's other arguments are outside the scope of the appeals and the appeals should be transferred to the Upper Tribunal (Lands Chamber) pursuant to paragraph 45": [20].

62. If the appeals were to be transferred from the FTT to the Lands Chamber, then the question of whether issues other than valuation remained to be resolved would necessarily fall to be considered. However, that is not what is required or permitted by paragraph 45, and indeed questions other than land valuation would fall outside the jurisdiction of the Lands Chamber.

63. Since the Decision, the Discovery Assessments have been issued and a direction made that the appeals against the Closure Notices should be heard together with the appeals against the Discovery Assessments. HMRC argue that "the combined proceedings unarguably raise questions of fact and tax law which are wider than mere valuation and any issue of valuation should not be transferred to the UT (LC) before the other issues are resolved first for essentially the same reasons that it would be inappropriate to direct such a transfer if those issues arose in the CN Appeals alone". HMRC also point out allowing the Closure Notice appeals and Discovery Assessment appeals to become separated would risk delay and inconsistency, particularly since the Appellants appeared to be adopting inconsistent positions in the two sets of appeals in relation to attribution.

64. HMRC also argue that a reference on the basis that valuation is the only question in dispute in the Closure Notice appeals would effectively determine the argument between the parties as to the scope of the Closure Notices prematurely.

65. We consider that HMRC's concerns can be addressed by the directions which we set out below. Those directions refer the question of valuation to the Lands Chamber but leave the construction of the Closure Notices and the case management of the two sets of appeals to the FTT.

66. We have considered whether in remaking the Decision we should determine the scope of the Closure Notices. However, we note the comments in the authorities which suggest that the construction of a closure notice in its context should normally be a matter for the fact-finding tribunal, and we have concluded that the FTT should determine this issue. Doubtless in doing so the FTT will take into account our comments above, and can choose to issue directions requiring further evidence and/or submissions if it considers it appropriate to do so.

67. In relation to the two sets of appeals, our decision does not decouple the appeals against the Closure Notices from the appeals against the Discovery Assessments and they can still be heard together. In terms of the risk of inconsistencies we consider that a resolution of the market value of the land transactions should in fact bring greater certainty to an issue relevant to both sets of appeals. We expect that the FTT might wish to consider exercising its case management powers to stay the two sets of appeals until the Lands Chamber has produced its valuation.

68. In our opinion, the question of the market value of the land transactions should now be referred to the Lands Chamber under paragraph 45. Insofar as issues of apportionment arise, they may sensibly be determined by the Lands Chamber in its determination of that valuation. On any reasonable reading, valuation is front and centre of the appeals against the Closure Notices, and it must be resolved by the Lands Tribunal at some stage. The FTT may issue directions dealing with the agreement between the parties of the terms of the reference.

69. However, the appeals against the Closure Notices should in all other respects, including resolution of the scope and subject matter of those appeals, remain with the FTT, to be heard together with the appeals against the Discovery Assessments.

70. We therefore direct that:

(1) The question of the market value of the subject matter of the land transactions in the appeals against the Closure Notices shall be referred for determination by the Upper Tribunal (Lands Chamber).

(2) The appeals against the Closure Notices shall in all other respects remain with the FTT.

SIGNED ON ORIGINAL

MR JUSTICE ADAM JOHNSON

JUDGE THOMAS SCOTT

RELEASE DATE: 7 July 2022

APPENDIX

Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273)

2 Overriding objective and parties' obligation to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.