



Neutral Citation: [2026] UKUT 00109 (TCC)

Case Number: UT/2025/000023

**UPPER TRIBUNAL
(Tax and Chancery Chamber)**

The Royal Courts of Justice, Rolls Building,
London

PROCEDURE – interpretation of terms of a Court of Appeal order – determining the scope of remitter – appeal refused.

Heard on: 30 January 2026

Written submissions: 4 and 11 February 2026

Judgment date: 6 March 2026

Before

**JUDGE AMANDA BROWN KC
JUDGE ANDREW SCOTT**

Between

LONDON LUTON HOTEL BPRA PROPERTY FUND LLP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Malcolm Gammie KC of counsel instructed by DWF Law LLP

For the Respondents: Mr Jonathan Davey KC, Mr John Brinsmead-Stockham KC (not appearing), Nicholas Macklan and Sam Chandler of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal by London Luton Hotel BPRAs Property Fund LLP (**LLH**) against a case management decision of the First-tier Tribunal (**FTT**) reported at [2024] UKFTT 001104 (TC) (**FTT24**).
2. That case management decision arises in the context of an earlier decision of the FTT (reported [2019] UKFTT 212 (TC)) (**FTT19**) concerning a closure notice (**Closure Notice**) issued by HM Revenue and Customs (**HMRC**) on 5 February 2016 denying elements of LLH's claim to business premises renovation allowances (**BPRAs**) in its 2010–11 tax return. Following an appeal to the Upper Tribunal (**UT**) (reported [2021] UKUT 147 (TCC)) (**UT21**) and the Court of Appeal (**CA**) (reported [2023] EWCA Civ 362) (**CA23**), the matter was remitted back to the FTT pursuant to the CA's Order dated 4 April 2023 (**CA Order**).
3. By an application dated 22 March 2024 (**Application**) HMRC applied for a case management hearing to obtain procedural clarification of the scope of paragraph 8 of the CA Order. FTT24 determined that the sole matter remitted by the CA was a mathematical calculation of an amount qualifying for BPRAs. LLH appeals that decision.
4. BPRAs had been claimed by LLH in full on the sum (**Development Sum**) paid by it under a development agreement between it and the developer of a property known as Blush House on the basis that there was a single item of expenditure to which the BPRAs provisions should apply. The conclusion stated in the Closure Notice was that the correct approach to determining entitlement to BPRAs was to look behind the Development Sum and consider individually the component elements of expenditure. Seven individual heads of expenditure were then denied as not representing expenditure incurred on, or in connection with, the conversion of Blush House. As the Development Sum exceeded the total of the individual component costs, HMRC also denied a proportion of that balancing sum (**Residual Amount**). The return was adjusted by denying £6,478,201 of the total £12,478,201 BPRAs claimed. The denial was revised down to £5,255,761 following the provision of further information.
5. The proportion of the Residual Amount which HMRC denied was calculated by reference to the proportion of costs on which BPRAs were available to the total costs associated with the development, including both the sum payable under the development agreement and the purchase price of the land.
6. LLH appealed the Closure Notice and notified the appeal to the Tribunal. The case was heard over 16 days in April, May, and August 2018. By its decision in FTT19 the FTT determined that LLH was not entitled to claim BPRAs by reference to a wholistic view of the development agreement but rather entitlement was to be determined by reference to the component elements of expenditure by the developer. The decision considered independently each of the specific component elements which had been denied by HMRC. Some aspects were favourable to LLH and some were favourable to HMRC. From [228] to [231] of FTT19, the FTT made its determination in relation to the Residual Amount.
7. On appeal, UT21 reformulated the legal test as to qualifying expenditure and, as regards the Residual Amount, held that no apportionment was required. Both parties appealed. CA23 allowed HMRC's appeal on the Residual Amount, set aside UT21, and held that "the issue of the correct apportionment of the Residual Amount is remitted to the First-tier Tribunal (Tax Chamber) (if not otherwise agreed) to be addressed in the manner referred to at [231] of the [FTT19]'s decision ..." (paragraph 8 CA Order; [175(c)] of CA23).
8. Following the CA Order, the FTT made directions for the case management of the remittal. The directions assumed that further documentary and witness evidence would be

required. In response to the issue of those directions, HMRC made the Application. HMRC submitted that FTT19 had already determined, as a matter of principle, the correct methodology for apportioning the Residual Amount and that only matters of calculation remained unresolved. LLH contended that it remained open to it to lead evidence and make submissions on the correct methodology for apportionment.

FTT24

9. FTT24 concluded that the methodology for apportioning the Residual Amount had already been determined by the FTT in FTT19 and that the CA's remittal did not reopen that question. The FTT held that three distinct issues had arisen in FTT19 in relation to the Residual Amount: (1) whether apportionment was required; (2) the method of apportionment; and (3) the calculation. It was common ground that FTT19 had decided that apportionment was required and that the calculation was left to the parties. The critical issue was whether FTT19 had also resolved the method of apportionment.

10. FTT24 held that it had. It found that, in FTT19, LLH had advanced submissions and evidence challenging HMRC's proposed methodology, particularly the inclusion of the land acquisition cost, and that those submissions had been considered and rejected by the FTT. By agreeing with HMRC's submissions at [228] – [231] of FTT19, the FTT had adopted HMRC's pro-rata method of apportionment by reference to the total project expenditure, including the costs of acquiring the land.

11. FTT24 rejected the contention that references in FTT19 to "further analysis" indicated that the methodology remained open. It held that those references related only to the mechanics of calculation, in particular the treatment of legal fees, and not to the underlying approach to apportionment. It considered that, properly construed, the CA Order remitted only the arithmetical implementation of the methodology (which the FTT had determined in FTT19) if agreement could not be reached.

12. Finally, FTT24 refused to reopen the methodology on grounds of fairness. Given the extensive prior litigation and the absence of any intervening change in law requiring reconsideration, allowing a further hearing on methodology would be inconsistent with finality of litigation. The remitted proceedings were therefore confined to the calculation alone.

13. Having determined the scope of the remittal, the FTT issued directions to ensure that the parties would proceed to complete the necessary arithmetical calculation of the apportionment. As in FTT19 it indicated that, if the parties were unable to agree the calculation, a short hearing could be convened to resolve the calculation, but any such hearing would not extend beyond the application of the established methodology.

LLH'S GROUNDS OF APPEAL

14. The grounds of appeal on which permission to appeal were granted are, in our view, somewhat difficult to discern from the application for permission to appeal. There is an articulation of them in the grounds of appeal submitted to this Tribunal. HMRC have taken no issue that the submitted grounds do not reflect the basis on which permission was sought.

15. The submitted grounds can be summarised as:

- (1) FTT24 failed to address the principal issue of law raised by HMRC's application to limit the scope of CA23's remitter and failed to give adequate reasons.
- (2) The method of apportionment of the Residual Amount was not a matter before FTT19, which considered only the principle of apportionment so that the methodology for the apportionment remains to be determined by the FTT.

(3) FTT24's conclusion that FTT19 had approved HMRC's method of apportionment was contrary to a straightforward reading of FTT19, LLH's appeal to the UT and the statutory principles concerning a tax appeal (as provided in Taxes Management Act 1970 (TMA)).

(4) It was incorrect to conclude that the effect of CA23 was to reinstate any conclusion in FTT19 as to methodology as there was no such conclusion and a remittal on that basis cannot be discerned from CA23.

(5) When interpreting CA23, it is relevant to consider the terms of HMRC's appeal and the submissions made, all of which demonstrate that the methodology of apportionment had not yet been determined and remained in issue.

(6) To deny LLH the ability to adduce evidence and make submissions on alternative methods of apportioning the Residual Amount would be a denial of the overriding objective that the FTT should determine the appeal fairly and justly.

LLH'S SUBMISSIONS

16. LLH's case, as advanced through its skeleton argument and the oral submissions of Mr Gammie, is that the Application, and FTT24, represent a fundamental misconstruction of the CA23 remitter, a distortion of the procedural history of the litigation, and an attempt to secure, through case management, a substantive determination which CA23 had expressly remitted for a future hearing. LLH submits that the core question arising from CA23 was the determination of the correct and precise apportionment of the Residual Amount following the appellate clarification of the law, and that FTT24 erred in law by purporting to treat the apportionment methodology as already determined in FTT19. LLH argues that the methodology had not been resolved and that HMRC's attempt to recast FTT19 as a final determination of method is an abuse of process and contrary to the entire procedural history of the case.

17. According to LLH, HMRC's position before the CA supported a conclusion that the question of methodology was an open issue as HMRC's appeal solely concerned, whether, as a matter of principle, the Residual Amount should be apportioned at all. LLH contend that, as UT21 set aside FTT19, the terms on which HMRC brought its appeal to the CA could not revive a supposed FTT methodological decision.

18. LLH submitted that, on the basis of HMRC's appeal to the CA, CA23, properly read, demonstrates that the only issue before it was the principle of apportionment and that the court intentionally left open the methodology to be determined by the FTT following remittal. LLH points out that CA23 not only declined to determine the apportionment but expressly stated that the matter was to be addressed by the FTT in accordance with the process contemplated at paragraph [231] of FTT19, namely by agreement or, if not agreed, by application to the FTT. LLH emphasises that this plainly presupposes that there is something substantive to determine: if the methodology had been determined in FTT19, there would have been no reason for the CA to remit the issue, let alone contemplate the possibility of an application to the FTT in default of agreement.

19. LLH relies on the statutory framework governing appeals from closure notices, emphasising that, under section 50 TMA, the FTT is required to determine the correct amount of the taxpayer's liability in accordance with the law as it stands at the time of determination. Under section 54 TMA any issue that has not been determined by the Tribunal may be agreed between the parties before the appeal is finally disposed of. LLH stresses that FTT19 could not have finally determined how the Residual Amount should be apportioned: the appeal at that time involved numerous unresolved issues concerning which elements of the Development Sum qualified for BPRA. LLH submitted that it had made clear in its grounds of appeal against

the Closure Notice that, until the disputed items were conclusively determined, it was impossible to advance a final apportionment methodology.

20. It is said that, during the hearing in 2018, LLH adduced evidence and made submissions on the principle of apportionment and on whether it was appropriate to attribute any of the Residual Amount to the purchase of Blush House; but it had consistently reserved the methodology for later determination. LLH's decision not to advance evidence on every scenario was, in its submission, not only practical but consistent with the FTT's own approach, which similarly recognised that further analysis would be required after the FTT had reached its conclusions on the disputed items. LLH submits that the references to "further analysis" in FTT19 cannot be reconciled with HMRC's position that everything had been determined except the calculation. LLH also contends that the FTT's approach to legal fees, which expressly required a granular attribution exercise after FTT19 was released, confirms that the Residual Amount was to undergo a similar factual and evaluative exercise.

21. LLH submits that its approach was vindicated by events: the law governing BPRA was not clarified until CA23. Once finality on issues of principle was reached, it was both necessary and appropriate for LLH to advance evidence and submissions on methodology at the remitted hearing. LLH argues that FTT24 fell into legal error by preventing LLH from doing so, on the basis that LLH "could and should" have advanced those submissions in 2018, even though the CA's conclusions were, at that time, unknown (and, indeed, unknowable), and the disputed items were unresolved.

22. LLH also contends that HMRC's submissions to the CA were framed in a way which meant that the CA had been misled into thinking that methodology was an issue yet to be determined and it was now wrong for HMRC to seek to argue the opposite.

23. For all of these reasons it is said that any interpretation of paragraph 8 of the CA Order which precludes further argument and evidence as to methodology is an error of law.

24. In the alternative, LLH argues that, in the event that FTT19 *did* determine methodology, it is legitimate and necessary for the issue to be reopened. This is partly on the basis that it is not possible to revive a decision that had been wholly set aside by the UT. LLH submits that FTT19 was superseded by the UT21, and that under orthodox principles of appellate hierarchy, CA23 replaced both. Further, and relying on *Larner v Warrington* [1985] STC 442 (*Larner*), it is contended that, as CA23 represents an appellate clarification of law, the position on methodology must be reconsidered.

HMRC'S SUBMISSIONS

25. HMRC submitted that FTT24 had correctly concluded that the methodology for apportioning the Residual Amount had already been determined by the FTT in FTT19 and that paragraph 8 of the CA Order remitted nothing more than the calculation of the apportionment. HMRC characterised LLH's attempt to reopen methodology as an impermissible attempt to relitigate matters that were fully contested at the 2018 hearing and subsequently addressed through the appellate process.

26. HMRC submitted that the Residual Amount had always been within the scope of the dispute, as reflected in the Closure Notice. From the outset HMRC's position was that the Residual Amount represented the developer's return for delivering a single, integrated "cradle-to-grave" package, encompassing both qualifying and non-qualifying elements. Because the package contained both qualifying and non-qualifying expenditure, apportionment of the Residual Amount was, in HMRC's view, inevitable.

27. HMRC contended that FTT19 determined both the principle of apportionment and its methodology. The FTT had accepted HMRC's case that the Residual Amount should be

apportioned by reference to the total project expenditure (including land costs) and had rejected LLH's challenges to that approach. The only matter left unresolved was the application of that methodology once the FTT's findings on the qualifying status of individual expenditure items were known.

28. HMRC relied on the established principles summarised in *San Souci Ltd v VRL Services Ltd* [2012] UKPC 6 (*San Souci*) and *Coward v Phaetos Limited and others* [2021] EWHC 9 (Ch) (*Coward*) governing the construction of court orders, namely, that an order must be construed objectively in the light of the accompanying judgment. On that basis, paragraph 8 of the CA Order, which directed apportionment to be addressed "in the manner referred to at [231] of FTT19", could only be understood as referring to the methodology referred to in that paragraph, namely HMRC's pro-rata approach. The CA had remitted the matter only because precise figures had not yet been finalised.

29. HMRC submitted that there was no basis for reopening methodology under principles set out in cases such as *Larner*. There had been no supervening change in the law affecting methodology, and CA23 had simply reinstated the FTT's conclusions. To permit LLH to advance new evidence or arguments would undermine the finality of litigation and amount to an abusive attempt to secure a second opportunity to contest issues already decided.

30. HMRC strongly denied that its conduct had misled the CA. The appeal to the CA was a challenge to UT21. That decision had determined that no apportionment was necessary and the UT had, therefore, expressed no view on the FTT's decision so far as concerning the methodology of the apportionment.

THE ISSUES TO BE DETERMINED

31. The issues we need to determine in this appeal are:

- (1) Did the FTT err in law in FTT24 in construing paragraph 8 of the CA Order?
- (2) If not, did the FTT err in law in deciding not to re-open FTT19 in respect of the Residual Amount?

DID FTT24 MAKE AN ERROR CONSTRUING PARAGRAPH 8 OF THE CA ORDER?

Interpreting paragraph 8 CA Order

32. There was no dispute as to the approach for interpreting a court order. That is set out at [13] - [16] of *San Souci*:

- (1) an order should be construed objectively;
- (2) the question to focus on is what a reasonable person, having all the background knowledge available to the maker of the document, would understand the judge to be using the language in the document to mean; and
- (3) an accompanying judgment is admissible in construing an order: the judgment is an "overt and authoritative statement" of the circumstances the court regarded as relevant when making the order and the issues the order was supposed to resolve.

33. Thus, we start with paragraph 8 of the CA Order, which provides:

"The issue of the correct apportionment of the Residual Amount is remitted to the First-tier Tribunal (Tax Chamber) (if not otherwise agreed) to be addressed in the manner referred to at [231] of the [FTT19]'s decision ...".

34. What did the CA mean by this? Both parties submit that the meaning of the Order is clear.

35. LLH say that the reference to [231] of FTT19 recognises that HMRC’s apportionment should be varied but, as per Mr Gammie’s skeleton argument, the order “cannot sensibly mean that the apportionment should reflect the FTT’s reasoning and conclusions, from which the CA had departed”. Fairly read, it can only be read as an *apportionment* exercise and not as a *calculation* exercise.

36. By contrast, HMRC say that the order is clear both as to *what* was being remitted (“the correct apportionment of the Residual Amount”) and *how* the FTT was to approach what was being remitted to it (“to be addressed in the manner referred to at [231] of [FTT19]”).

37. In our view paragraph 8 of the CA Order cannot be properly understood without considering the accompanying judgment. Whether or not – as Mr Gammie put it – it can or cannot “sensibly” mean something is an exercise that necessarily directs us to the judgment. Put another way, this is not a case where a reasonable person, having all the background knowledge available to the CA, could rely only on the terms of the CA Order alone to determine its meaning.

Understanding derived from CA23

38. The discussion by the CA in CA23 in relation to the Residual Sum is set out at [161] – [173] of CA23 but those paragraphs must be read in the light of what is noted at [16] of CA23: LLH’s primary case was that it was entitled to BPRAs on the whole of the Development Sum and that both FTT19 and UT21 were “wrongly focussed on how [the developer] was to spend the Development Sum”. This was labelled “Issue 1”. The second issue arose if LLH were unsuccessful on Issue 1. Where Issue 2 arose, entitlement in respect of five separate components of the Development Sum were in dispute. These heads no longer included legal fees: the UT had determined that issue in HMRC’s favour and leave to appeal had not been given. However, Issue 2 did include the Residual Amount.

39. Paragraph [18] of CA23 notes that the dispute concerning the Residual Amount had been determined against HMRC in UT21, and [19] of CA23 records that “of the amounts listed in Issue 2” the UT had reversed the FTT’s disallowance of “part of the Residual Amount”. Pausing here, this, at the very least implicitly, recognises that the CA considered that the FTT had determined the basis or means by which “the amount” was to be calculated even if it had not identified the exact calculation.

40. On Issue 1 CA23 held that both FTT19 and UT21 had erred in their construction of the requirement that expenditure be incurred “on or in connection with” the conversion.

41. At [161] – [173] of CA23 the CA records that FTT19 accepted HMRC’s characterisation of the Residual Amount as consideration for the developer’s delivery of a single, “cradle-to-grave” package and concluded that it should be apportioned between qualifying and non-qualifying elements of that package, including the land purchase. The CA also records that UT21 took a different view, holding that the Residual Amount did not represent a right or asset acquired by LLH and was not properly characterised as profit. The parties’ competing submissions are noted: HMRC maintained that FTT19 was correct and LLH contending that HMRC’s apportionment was wrong in principle.

42. CA23 concluded that UT21 had erred in reversing FTT19. CA23 further confirmed that the land acquisition formed part of the overall package, notwithstanding its arm’s length nature, and that UT21 was wrong to treat the Residual Amount as wholly incurred on, or in connection with, the conversion where only some components qualified for BPRAs. At [171] of CA23, the CA expressly rejected LLH’s argument for excluding particular categories of non-qualifying expenditure from any apportionment, holding that there was no principled basis for distinguishing between different forms of non-qualifying expenditure and that all such

elements formed part of a single, indivisible package. In doing so, it noted that, in its alternative case, LLH was contending that “if some apportionment was required, then it should exclude” identified items of expenditure, including the land purchase.

43. It is necessary to quote [172] – [173] and [175(c)] of CA23 in full:

“172. The precise apportionment was a matter for the FTT, as it recognised when leaving the matter to the parties to attempt to agree it with provision for either party to apply to the Tribunal if agreement was not reached ([FTT19] decision at [231]). We therefore do not need to determine it. However, we would observe that we did not detect any real objection to HMRC’s proposal that it can be done straightforwardly by identifying the percentage of the total expenditure (excluding the Residual Amount) that has been found to be non-qualifying and applying that percentage to the Residual Amount.

173. We therefore conclude that HMRC’s appeal on Issue 2(e) should be allowed.

...

175. ...

(c) The issue of the correct apportionment of the Residual Amount is remitted to the FTT (if not otherwise agreed), to be addressed in the manner referred to at [231] of the FTT decision.”

44. Having identified in [171] of CA23 that LLH’s case involved submissions on excluding expenditure from the apportionment calculation, our view is that CA23 considered that, at least to some extent, the issue of methodology was before it. The way in which the CA expressed itself at [172] of CA23 also suggests that it was anticipating that it was for the FTT to determine the “precise apportionment”. The use of the words “*precise* apportionment” (our emphasis) can be read as either a reference to a calculation exercise or as requiring methodology to be considered (or re-considered).

45. However, it is, in our view, clear that, whatever else it was deciding, the CA was expecting the FTT to proceed in accordance with [231] of FTT19. That is evident from [172] of CA23 but is also plain from the closing words of [175][c] of CA23. We do not think that the CA merely – as Mr Gammie submitted before us – remitted (without more) the apportionment to the FTT (unless the parties agreed). If that is what the CA meant, there would have been no need to refer in terms to the remittal of the issue “to be addressed in the manner referred to at [231] of the FTT decision” – which already included the possibility of a hearing before the FTT if the parties could not agree.

46. What we think the CA was doing by including those words at the end of [175][c] was, in effect, saying to the FTT that, in the light of the CA’s decision in CA23, it was back to the FTT to pick up the baton where it had left off in 2019. The pitch is, however, somewhat muddled by the fact that the CA went on to observe that it did not detect any “real objection” to HMRC’s “proposal”. On its own, that way of expressing itself does tend to suggest that the CA had left open the possibility of an “objection” to the apportionment sought by HMRC.

47. Whether or not that is so depends, in our view, on what the FTT had, or had not, determined in FTT19. It is to that issue that we turn next.

WHAT FTT19 DECIDED

Analysis of FTT19

48. As explained above, FTT19 concerned an appeal against the Closure Notice which, as regards the Residual Amount, concluded that, because the correct approach to determining entitlement to BPRA was to “look behind the [Development Sum]”, “the [Residual Amount]

has been apportioned in accordance with the proportions of known costs allowable and not allowable.” The associated amendment was to deny BPPA in the sum of £1,427,703.

49. The FTT’s jurisdiction in respect of the conclusions set out in a closure notice is framed by section 31 TMA. On an appeal, pursuant to section 50 TMA, it was for LLH to establish that a pro-rata apportionment of the Residual Amount resulted in an overstatement of tax. Unless they did so the assessment would stand.

50. The FTT recorded at [229] of FTT19 LLH’s challenge relating to the Residual Amount: it disputed HMRC’s apportionment methodology as misconceived in principle. LLH argued that the Residual Amount was paid as part of the “Development Sum” and represented an amount paid over and above the individual component costs incurred by the developer. It could not therefore have a connection with the separate price paid for land bought from an unconnected vendor. As such, HMRC’s “base” wrongly included acquisition of the freehold; and using a “base” covering both land and works would make BPPA depend arbitrarily on whether a project was structured as freehold or leasehold. LLH further submitted that, even if apportionment was appropriate, the “base” should exclude sums it would have paid directly (such as IFA fees, promoter fees, licence fees or interest), thereby shrinking the denominator used to spread profit. LLH also contended more generally that the developer’s profit arose as a result of the delivery of qualifying conversion and renovation and should not be eroded by pro-rating across non-qualifying items.

51. HMRC’s submissions are recorded at [230] of FTT19. HMRC treated the developer’s remuneration as part of the “entire package” supplied to deliver a trading, branded hotel. On that footing, HMRC argued that profit should be apportioned pro-rata across all components comprised in that package. Because the package included securing and transferring the freehold, HMRC’s allocation “base” included the cost of acquiring the freehold as well as development and ancillary costs. HMRC further argued that this approach was in accordance with commercial reality: the profit was priced by reference to the overall stabilised value, which assumed freehold title, so it must be spread across all constituent elements proportionately (FTT19’s summary is at paragraphs [229] and [230]).

52. The FTT accepted at [230] of FTT19 HMRC’s core proposition that profit should be apportioned across the package that generated it, including the freehold acquisition. It considered that the developer “assembled a package” for LLH and that the Residual Amount related to all elements of that package. The FTT was unpersuaded that including land in the apportionment “base” was wrong in principle simply because the vendor was unconnected or because different tenure structures could produce different percentage outcomes, observing that a case-by-case apportionment would always be necessary.

53. The FTT did not, however, confirm the Residual Amount component of the adjustment in the Closure Notice because its analysis of which costs qualified for BPPA differed from the approach taken by HMRC in the Closure Notice (allowing, for example, the licence/interest amount; IFA and promoter fees; most of the fixtures, fittings and equipment; and certain franchise fees; but disallowing the £2m Capital Account and some legal costs, and excluding the £248k Sanguine payment). The FTT therefore required the apportionment to be recalculated to reflect the decisions it had made on what qualified for BPPA. The FTT directed the parties at [231] and [234] of FTT19 to undertake the required recalculation with liberty to apply to the FTT if agreement could not be reached.

54. We interpret [231] of FTT19 as accepting HMRC’s pro-rata apportionment methodology rather than a determination that an apportionment of some kind was required. In our view, the FTT determined that there should be a pro-rata apportionment of the developer’s profit across all elements of the economic package supplied by the developer, using as the denominator the

entire cost base generating that profit (including the freehold acquisition), and dividing that profit between qualifying and non-qualifying expenditure in accordance with the FTT's own decisions as to what qualified for BPRA. There are three reasons why we have come to that conclusion.

55. Firstly, that was the express and clear basis of the Closure Notice and therefore the decision that was challenged in the appeal. As recorded by the FTT, the challenge by LLH addressed both the requirement for an apportionment as a matter of principle and the rationale for what components of expenditure were appropriately included in the calculation. The FTT expressly reflected the arguments summarised in [229] of FTT19.

56. Secondly, [231] of FTT19 states "the apportionment *sought by HMRC* will have to be varied" (emphasis added). In our view, much the most obvious reading of this part of the judgment is a direction for the parties, in the light of the FTT's conclusions on the amounts qualifying for BPRA, to apportion the Residual Amount between qualifying and non-qualifying amounts by reference to the respective proportion of such amounts to the total expenditure on the "cradle-to-grave" package (including the acquisition of the land). If it was deciding *only* that, in principle, there should be an apportionment (but was anticipating a further hearing on methodology), the words it chose to use were, in our view, peculiarly inapt.

57. Thirdly, we consider it most unlikely that, after a hearing lasting 16 days, the FTT would have left open such a critical issue without an express statement to that effect.

58. We are also satisfied that the FTT had, in the light of the other matters that it had decided, little option but to leave what was *substantially* a mathematical calculation to the parties for agreement. That is because, as set out at [204], [205] and [234] of FTT19, the FTT had left it to the parties to undertake further analysis of the legal costs to determine which amounts were qualifying and which were not. Plainly, the apportionment of the Residual Amount could not be done *before* the legal costs had been analysed.

59. Although the FTT referred at [234] of FTT19 to "further analysis" in respect of *both* the legal costs and the Residual Sum, we do not think that Mr Gammie is right to say that, so far as relating to the Residual Sum, it showed that the FTT had left open alternative ways of apportioning it. In our view, all that the FTT meant in [234] of FTT19 was that the final amount of tax due could not be calculated until: (1) the qualifying amount of legal costs had been determined; and (2) the apportionment of the Residual Amount had been made between amounts qualifying for BPRA and those not qualifying by reference to the total cost of the "cradle-to-grave" package.

60. Further, it is, in our view, commonplace for the FTT to determine issues of principle and leave the parties to undertake the mathematical computation to determine the correct amount of tax. In our experience quantum is more commonly determined either where parties are unrepresented or where all arguments by the taxpayer are rejected such that the assessment is upheld in full. Where final calculations are left to the parties, it is appropriate to provide for them to return to the FTT if they are unable to agree quantum: ultimately, on an appeal to the FTT, it is the responsibility of the FTT to determine whether the appellant has been overcharged by the closure notice subject to the appeal. There can be no real criticism of the FTT in adopting the approach set out at [234] of FTT19, which, in our view, and contrary to Mr Gammie's submissions, is wholly consistent with the statutory framework for tax appeals.

61. We also note that leaving what was to a large extent a mathematical calculation to the parties in FTT19 is also consistent with the directions given by the FTT in FTT24 in which the possibility of an FTT hearing was expressly contemplated (see [36] and the Appendix) despite the fact that the FTT clearly considered that only a mathematical computation remained to be done.

Testing the conclusion

62. We now consider whether what the FTT decided in FTT19 was, as Mr Gammie submitted, inconsistent with the way in which the issues for decision were presented to the FTT. In our view, and for the reasons that follow, that is not so: the way in which the FTT approached those matters was wholly in keeping with the case presented to it by both parties.

63. LLH's grounds of appeal challenged HMRC's interpretation of how entitlement to BPRAs was determined in the context of the arrangements between LLH, the developer and other contractual parties. It advanced an alternative proposition that, even if the Development Sum was not considered to be a single amount, the heads of expenditure qualified for BPRAs. The individual position on each head was then set out.

64. Paragraph 9.1 of LLH's grounds of appeal addressed the Residual Amount in this way:

“This amount is in dispute and how it shall be finally determined will depend upon the outcome of the above headings. Nevertheless[,] the Appellant questions how this amount was calculated and believes that the Respondent's basis for its calculation is seriously flawed.”

65. We interpret that ground as a challenge to the amount of the adjustment and how that amount was calculated. Whilst it acknowledges that the calculation of the amendment, on the alternative hypothesis that any amount is non-qualifying, is dependent on whether the other challenged components were qualifying, we do not consider, as invited by Mr Gammie, that it reserved LLH's position to challenge the whole basis of calculation until after all the substantive points on qualification were determined. The basis of calculation *was* challenged.

66. HMRC's statement of case also addressed the dispute on the Residual Amount, restating the basis on which the adjustment was determined in the Closure Notice.

67. LLH's reply to the statement of case was lengthy. It set out LLH's primary case that LLH paid the developer to carry out the refurbishment of the property and that it was inappropriate to consider the expenditure funded by the Development Sum. The introduction to LLH's alternative case stated:

“31. Further, and in the alternative, even if it were appropriate (contrary to [LLH's] primary case) for the Tribunal to carry out an investigation into the individual components of the contractual sum that [LLH] agreed to pay [the developer] to convert the Property by looking at each item upon which [the developer] spent the money that it received from [LLH] in fulfilling its contractual obligation to carry out the conversion, each one of those items of expenditure constitutes expenditure incurred on or in connection with the conversion of, renovation of or repairs to the Property and therefore qualifying expenditure for BPRAs purposes. It is convenient to address each of the contentious items of expenditure in turn.”

68. Paragraphs 47 – 49 addressed the Residual Amount. They contended that an apportionment of the Residual Amount was “incorrect”. This was articulated on the basis that the Residual Amount (as a balancing figure, described as “profit”) did not “call into question the quantum of expenditure on which BPRAs are available”. Secondly, it was contended that an apportionment of the sum was misconceived for “particular” reasons. Reasons (1) and (2) challenged the inclusion of the purchase price of the land when undertaking an apportionment. Reason (3) sought to exclude further identified components of expenditure from an apportionment calculation.

69. Thus, by its reply, LLH set out its stall that: (1) all expenditure was qualifying by reference to its principal case; and (2) any apportionment required should exclude identified components of expenditure. It did not, in our view, reserve its position to argue at a later point

that a pro-rata calculation itself was inappropriate and that a different way of apportioning should be preferred. Rather, we consider that what was in issue was *how* the pro-rata calculation was formulated and, in particular, what amounts should be left out of account. We consider that to be a question of methodology and an issue that the FTT was asked to determine.

70. LLH relied on evidence given by Mr Lewis. Paragraphs [137] – [142] of LLH’s reply addressed “the proportion of unspecified [Residual Amount]” or, in other words, the appropriate apportionment of profit between qualifying and non-qualifying expenditure.” Despite being a witness of fact, Mr Lewis expressed his opinion that the methodology of apportionment used by HMRC in the Closure Notice was “not logical and [was] plainly wrong.” He considered it inappropriate to include the cost of purchasing the property in the calculation. He also considered that any apportionment should be determined as a ratio of qualifying and non-qualifying costs attracting a risk premium for the developer (these costs were identified). The asserted absurdity of HMRC’s approach was said to be demonstrated by examples set out in the statement. Again, the evidence relied on by LLH demonstrated that methodology of the apportionment was in issue.

71. Whilst we were only provided with Appendix C to LLH’s skeleton argument, it is apparent that LLH’s primary case was articulated together with their two alternative positions regarding the Residual Amount. Those alternatives made clear that, even if the proper approach to determining qualification for BPR was to look at the underlying expenditure, the Residual Amount should not be apportioned or, if an apportionment was required, the purchase price of the property and other components of expenditure should be excluded from any apportionment calculation.

72. In the excerpt provided of HMRC’s skeleton argument it is expressly stated at [314] that “there is an issue between the parties as to the correct methodology to be applied to the apportionment of [the Residual Amount]”: there is, in our view, no realistic way of reading this as anything other than what it says, namely, that methodology was an issue for the FTT to decide. That dispute is then particularised as concerning the incorporation of the acquisition cost of the property and “how the transaction would have taken place in the event that HMRC’s tax treatment of the scheme [was correct]” (we understand that to summarise LLH’s arguments regarding risk premium). The skeleton then defended the methodology and calculation of the non-qualifying portion of the Residual Amount as provided for in the Closure Notice.

73. LLH’s position as provided in the reply to the statement of case was repeated in its written closing submissions with references to evidence given to the FTT. In their closing submissions HMRC invited the FTT to make certain findings concerning the nature of the Residual Amount. They submitted that the Residual Amount could not be attributed to any one part of the overall package of the development and thereby needed to be attributed by way of apportionment to the various component elements. They contended that the purchase price of the land was an integral part of the package purchased and, as such, the apportionment of the Residual Amount had to reflect the whole package. The Residual Amount was attributable to all components of the package including the purchase of the freehold such that it “necessarily follow[ed] that the [Residual Amount] should be apportioned by reference to the total purchase price of the package, and that there [was] no basis whatsoever for stripping out the costs of acquisition ...”. The submissions also addressed the consequence for the calculation were the FTT to find against HMRC regarding specific component elements of expenditure. It is, in our view, clear that HMRC were justifying in their closing submissions *all* aspects of the Closure Notice, which, plainly, included the method for disallowing a part of the Residual Amount.

74. We reject Mr Gammie’s submission that it was impossible or impracticable for LLH to make a further submission to deal with the possibility that the FTT might accept only part of

either party's case (which was, in substance, the actual outcome). If LLH considered that an alternative to the pro-rata calculation was more appropriate, we would have expected this to have been made plain.

75. We also consider it is relevant to ask ourselves what would have happened if the FTT had concluded that the Closure Notice was right in all respects. Mr Gammie said in the hearing before us that he would have considered that, if the FTT had done so, it would have made an error of law in denying LLH the opportunity to contend for a basis of apportionment other than HMRC's pro-rata one. In the light of how the case was put by both parties to the FTT, we are unable to accept that. It was, in our view, incumbent on LLH to anticipate the possibility of defeat on all counts. After all, the appeal was against the conclusions set out in the Closure Notice. LLH challenged the principle of any apportionment and, in the alternative, disputed the elements to be included in an apportionment. That was as far as LLH went.

REVIEW OF CA23 IN LIGHT OF OUR CONCLUSION ON WHAT FTT19 DECIDED

76. Having reached the conclusion that both on the face of the judgment and by reference to the wider background, FTT19 had determined that the Residual Amount was to be apportioned pursuant to a pro-rata calculation as advanced by HMRC before the FTT, we return to considering what CA23 intended when stating that "the precise apportionment was a matter for the [FTT]" such that "the correct apportionment" was to be remitted to the FTT.

77. We recognise that, if the remitter were purely arithmetic, why remit at all? In our view, the answer lies in the architecture of the decision in CA23. The court determined issues of principle, reinstated the FTT19 approach, and left "the precise apportionment" to the FTT in the manner already contemplated at [231] of FTT19.

78. Our view is that, on an appeal from UT21 on terms which challenged the UT's conclusion that no apportionment of the Residual Amount was required, the CA's jurisdiction was to determine that question of principle. Having done so, it was not required to assume the task of performing the numerical apportionment itself because: (1) that was a matter properly for the FTT; and (2) FTT19 had – as we explain above – determined the *manner* in which the apportionment was to be determined, namely, a pro-rata allocation across the entire economic package, using the revised determinations of what was qualifying and non-qualifying. Whilst the CA could have remade the decision, it had not been invited by either party to do so and was not required to do so. Remitting ensured that the methodology approved by the FTT was then applied by it in the light of CA23's determination on the issues of principle: the calculation of the apportionment would then finally determine the appeal (as the correct amount of tax could then be worked out).

79. We recognise that there is tension between our conclusion and the CA's observation at [172] of CA23 that it "did not detect any real objection to HMRC's proposal that [the precise apportionment] can be done straightforwardly". Those words must, of course, be read in the wider context of CA23, including the actual issues before it on appeal and the true meaning of FTT19. Those few words should not, in our view, bear more weight than is appropriate in all the circumstances.

80. Consequently, despite this tension, the purpose of the remittal was, in our view, not to resolve any underlying uncertainty in the methodology to be applied. It was instead to allow the FTT to apply the methodology it had *already determined* in FTT19 but to make the apportionment in the light of the conclusions set out in CA23. In doing so, we consider it is important that CA23 stated that "the precise apportionment was a matter for the FTT" and that it was not a matter that CA23 "need[ed]" to determine. Rather, and as reflected in [175(c)] of CA23, the CA said in terms that the apportionment should be "addressed in the manner referred

to at [231] of [FTT19]”. We therefore consider that CA23 reinstated FTT19’s decision that the apportionment should be in accordance with the methodology “sought” by HMRC.

81. Otherwise, and as explained above, it is hard to understand why there is any reference at all to [231] of FTT19 in CA23. Properly understood, the CA was really just asking the FTT to pick up where it had left off in 2019. That necessarily requires a consideration of the terms of FTT19. We have considered that decision (as well as the background) at some length and, in our view, the decision permits of only one fair reading. If the CA had really intended to disturb the determination of the FTT in relation to methodology, it would surely have done so in much more transparent terms.

82. Accordingly, we consider that, subject to the consideration of the way in which the issues were put to the CA at the hearing before it (discussed below), FTT24 was correct in its conclusion as to the scope of the remitter.

DOES HMRC’S CONDUCT IN CA23 AFFECT OUR CONCLUSION

83. Mr Gammie submitted that, if FTT24 were right in its conclusion that the pro-rata methodology had been determined by FTT19, it called into question how HMRC had conducted the appeal before the CA. His view was that the CA had been misled about the basis on which it subsequently made the remittal. We were invited to consider the terms of HMRC’s CA appeal as well as excerpts from the CA transcripts. This in turn led to unsolicited further submissions by both parties after the hearing in relation to HMRC’s conduct before the CA.

Our approach in determining HMRC’s conduct

84. In determining this issue, we consider it appropriate to consider the CA pleadings which framed the dispute before the CA.

85. As regards the use of transcripts, paragraph [57] of *Coward* states:

“57. I do not consider that the court is entitled to have regard to a transcript of discussions between counsel and the judge in order to establish the proper meaning of the order where there is no ambiguity on the face of the order. The position might be different if the application was to correct the order under the slip rule to reflect what is said to be the true intention of the judge. Where the issue is of construction, there is a good reason why the transcript should not be considered because counsel’s submissions made are more apt to reveal what the advocates had in their minds rather than what the judge was thinking. The judge may or may not intervene during those submissions and any intervention may merely reflect initial thoughts testing the submissions. Applying the general approach to construction, discussion between the court and counsel is analogous to negotiations between the parties which are, as a matter of policy, not admissible as an aid to construction.”

86. We are, nonetheless, prepared to assume (without deciding) that it is appropriate in this case for us to consider the transcripts. Mr Davey did not object to our doing so.

UT21

87. In order to understand the scope of HMRC’s appeal to the CA, we set out briefly the basis of the parties’ respective appeals to the UT and the conclusions of UT21.

88. LLH’s application for permission to appeal (granted by the FTT) challenged the FTT’s conclusion “that the [Residual Amount] ... should be apportioned in some way between expenditure qualifying for BPRA and the nonqualifying expenditure”. LLH’s primary contention before the UT remained as before the FTT, namely that BPRA should be allowed in full on the Development Sum without considering the underlying expenditure incurred. Secondary contentions were made concerning the component elements that FTT19 had

considered to be non-qualifying in whole or in part. The UT proceeded to consider whether an apportionment was required at all, noting that if no apportionment was required “the differences between the parties as to the basis of apportionment will be academic”. The UT determined that no apportionment was required and, having done so, did not then consider how an apportionment should be done.

CA appeal

89. HMRC’s appeal stated that they were appealing the UT’s decision in respect of, among other things, the Residual Amount. The order sought was stated to be that “the Residual [Amount] is ineligible (in part) for BPR and ought to be apportioned in the matter [sic] contended for by HMRC”.

90. HMRC’s skeleton argument advanced the submission that, on the facts as found by FTT19, the Residual Amount was paid in connection with the package of acquiring and converting Blush House, which involved expenditure only part of which qualified for BPR. As such, it was contended that part of the Residual Amount was not incurred on, or in connection with, the conversion and required to be apportioned. Paragraph [58] of the skeleton argument said:

“The apportionment method contended for by HMRC, ... is also straightforward. It is simply a matter of identifying what percentage of the total £15.5 million development cost is non-qualifying, and then applying that percentage to the Residual [Amount] in order to determine what proportion of OVL’s fee is non-qualifying. This is illustrated, using notional figures, in the Appendix: Scenario 1.”

91. After explaining the errors of the UT in concluding that no apportionment was required, paragraph [65] of the skeleton argument submitted that the Residual Amount “should be apportioned in the manner contended for by HMRC”.

92. We have reviewed the transcript extracts to which we were referred by Mr Gammie. Whilst we accept that Mr Davey could (and possibly should) have made HMRC’s position clearer that they understood the FTT to have accepted the pro-rata methodology advanced by HMRC, we consider that their submissions are consistent with the position that, as we have found, FTT19 had conclusively determined the issue of methodology in favour of the one sought by HMRC at the hearing before the FTT in 2018.

93. We reach that view principally on the basis that the submissions must be read in the context of the litigation as a whole, including, in particular, the terms of the FTT19 judgment, which would inevitably have been considered in some detail by the CA in the appeal. We consider that, whilst Mr Davey’s submissions were confined to the principle of apportionment, the request for the remitter had to be considered in the light of the grounds of appeal before the CA and HMRC’s skeleton argument. At no point did Mr Davey indicate that HMRC’s pleaded case had changed, namely, that the basis of apportionment was anything other than as set out in the Closure Notice. Mr Davey’s submissions were, in our view, consistent with the FTT’s statement at [231] of FTT19 that the Residual Amount should be apportioned to the constituent elements of the development package as determined in the Closure Notice.

94. Our conclusion is not undermined by the exchange between Mr Bremner and Lewison LJ to which we were referred by Mr Gammie. In our view, the focus of that exchange was the requirement for apportionment as a matter of principle. Further, in our view, Mr Davey’s illustrative appendix, and his engagement with Lewison LJ in the hearing, is best regarded as a response to UT21’s scepticism that any kind of apportionment was possible.

95. Having carefully considered the transcripts, we do not regard anything in them as reason to alter the conclusions we have stated above about the proper meaning of the CA Order.

DID THE FTT MAKE AN ERROR OF LAW IN DECIDING NOT TO RE-OPEN FTT19 IN RESPECT OF THE RESIDUAL AMOUNT?

96. We can deal with this challenge more quickly.

97. We accept LLH's submissions on the law relating to the circumstances in which an issue decided by the FTT may be reconsidered by the same tribunal. We accept that, until the FTT has issued a final decision disposing of the appeal, it remains within its jurisdiction to reopen an issue. This is because, in the context of a Closure Notice, the amount by which (if at all) a taxpayer has been overcharged is only finally determined in accordance with section 50 TMA. In this case, as FTT19 had expressly provided for the amount of tax due under the Closure Notice to be determined by agreement and for there to be a further hearing if agreement could not be reached, the issue of quantum remained open.

98. The key question under this ground of appeal is whether, in refusing to allow LLH to argue that a pro-rata calculation is inappropriate and that some other methodology should be adopted, FTT24 erred in law. Before the FTT in the 2024 hearing LLH relied on *Larner* to contend that the FTT should set aside its conclusion that the pro-rata calculation be used: CA23 had so changed the context that, without a rehearing on the appropriate methodology of apportionment, the correct amount of tax may not be collected from LLH. LLH contended that, as the Residual Amount represented part of the consideration paid for the package received from the developer, the proper methodology for apportioning required a realistic and principled appraisal of what that residual expenditure in fact funded, applying the approach mandated by the CA in CA23. This approach would avoid arbitrary results and give effect to the law as interpreted by the CA.

99. *Larner* was a case before the General Commissioners concerning the year in which a sale on the sale of shares in a property company was to be recognised. The Commissioners reached a decision in principle on an appeal in the taxpayer's favour and adjourned the appeal to allow for agreement or determination of the valuation of shares. Before the matter was restored for hearing, the High Court issued a judgment in another appeal, which, if applied to the *Larner* case, would have allocated the loss to a different tax year. When the hearing was restored, the General Commissioners allowed the Inland Revenue to rely on the intervening and binding decision, resulting in the appeal being dismissed and the claimed loss being disallowed. The taxpayer appealed that decision. The High Court held that, as the disputed tax had not been finally determined, it was not only open to the General Commissioners to remake the decision but, in the circumstances, it was obliged to do so.

100. In our view, and as determined in FTT24, *Larner* is plainly distinguishable from the case before us. FTT19 reached its conclusion on the entitlement to claim BPRA in respect of each of the heads of expenditure, including the Residual Amount. It did not determine the precise apportionment of the Residual Amount because it had accepted LLH's position on some of the heads of expenditure and that consequently required a reattribution of expenditure within the pro-rata calculation. The substantive effect of CA23 was to confirm that the Closure Notice had been correct in almost every regard. As we have found, it then remitted the calculation of the tax due to the FTT.

101. We cannot see how it would have been appropriate for the FTT to decide to allow an issue that the FTT had already determined to be relitigated. As the FTT observed in FTT24 by reference to *AIC Limited v Federal Airports Authority of Nigeria* [2022] UKSC 16, the principle of finality in litigation precludes the parties from having a second bite at the cherry.

102. In the proceedings leading to FTT19, LLH had challenged the component elements of the pro-rata calculation, but, subject to that, it had not contended that a pro-rata calculation would result in an inappropriate apportionment of the Residual Amount to qualifying and non-qualifying amounts. Given that the effect of CA23 was, in substance, to uphold nearly all of the conclusions in the Closure Notice, that is an outcome that was reasonably foreseeable at the outset. It is therefore reasonable to have expected LLH, had it wished to do so, to contend that a pro-rata methodology produced an inappropriate outcome when it first appealed to the FTT. It had its chance to do so in the 16-day hearing in 2018. And it failed to take it.

DISPOSITION

103. The appeal is dismissed. FTT24 did not err in law in its construction of the CA Order, nor in refusing to reopen methodology. The remitter requires the parties to undertake the calculation of the non-qualifying proportion of the Residual Amount by applying the method indicated at [231] of FTT19, taking account of the now settled position on qualifying items. Accordingly, FTT24 stands together with the directions the FTT issued.

**JUDGE AMANDA BROWN KC
JUDGE ANDREW SCOTT**

RELEASE DATE: 6 March 2026