[2018] UKFTT 0111 (TC)

TC06368

Appeal number: TC/2015/00602

VALUE ADDED TAX – purchase of land in respect of which option to tax exercised – transfer of a business as a going concern – article 5 Value Added Tax (Special Provisions) Order 1995 - notification of option to tax by purchaser after payment of deposit – meaning of "relevant date" in article 5(3) Value Added Tax (Special Provisions) Order 1995 – section 6(4) Value Added Tax Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLARK HILL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public in London on 21 June 2017 and 15 February 2018

Geraint Jones QC, counsel, instructed by Rainer Hughes LLP, for the Appellant

Christopher Shea, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by the appellant, Clark Hill Limited ("**Clark Hill**"), against a decision of the respondents, HMRC, made in a letter dated 16 December 2014 confirming an assessment made by HMRC on 25 June 2014 for value added tax ("**VAT**") and related interest in the total amount of £920,128.90 for the period ended 31 January 2014 (the "**01/14 period**").

2. The matters under dispute relate to the sales of four properties by Clark Hill. Details of the properties and the circumstances surrounding their sales are set out later in this decision. In summary, the point at issue in relation to each sale is whether or not the conditions in Article 5 of the Value Added Tax (Special Provisions) Order 1995 (the "**1995 Order**") were met so that the sale could be treated as a transfer of a business as a going concern (and accordingly as neither a supply of goods nor a supply of services for VAT purposes). I have referred to these provisions as the "TOGC provisions" in this decision.

The hearings and the evidence

3. I was provided with a bundle of documents for the hearing on 21 June 2017. It included several witness statements and supporting documents. The witness evidence was not challenged.

4. At the hearing on 21 June 2017, Mr Jones, for Clark Hill, advanced an argument to the effect that even if the sale of the relevant property could not be treated entirely as neither a supply of goods nor a supply of services under terms of the 1995 Order, it could, in appropriate circumstances, be treated in part as falling within the terms of the 1995 Order. This argument was reflected in his skeleton argument which had been made available to HMRC in advance of the hearing. Mr Shea, for HMRC, did not respond to that argument at the hearing because, he said, the argument had only been presented to HMRC shortly before the hearing. Having permitted Mr Jones to raise his additional argument, I allowed Mr Shea to make written submissions on this point following the hearing. I also allowed Mr Jones to respond to those submissions.

5. Following receipt of those submissions, I requested further written submissions on a particular point regarding the effect of the novation agreement relating to the sale of the Henley property (as defined in [24] below). Clark Hill responded to that request in a written submission dated 22 August 2018. HMRC responded to the request in a letter to the Tribunal dated 7 September 2018. In that letter, HMRC also sought to introduce new evidence relating to the effective date of the exercise of the option to tax the Henley property. Clark Hill objected to the application to introduce the new evidence.

6. A further hearing was held on 15 February 2018 to hear HMRC's application to adduce the new evidence, which comprised a copy of the option tax made by the

purchaser of the Henley property. At that hearing, I granted permission for HMRC to introduce the new evidence but subject to an order for HMRC to bear Clark Hill's costs of that hearing. I also heard the submissions of the parties consequent upon the introduction of that evidence.

The application to introduce new evidence

7. At the hearing on 15 February 2018, I said that I would give reasons for granting permission to adduce late evidence in this decision notice. I will first set out, in summary, the arguments put forward by the parties.

HMRC's submissions

8. Mr Shea made the following submissions for HMRC.

(1) HMRC accepted that it was unsatisfactory that it had sought to introduce this evidence at such a late stage in the proceedings. There were various reasons why this had happened, but ultimately it was an oversight.

(2) It was clear that the form of option to tax was admissible: it was probative of one of the issues before the Tribunal. The Tribunal had power (in rule 15 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Tribunal Rules**")) to admit the evidence. The question for the Tribunal was whether it would be unfair to do so (*HMRC v. IA Associates Limited* [2013] EWHC 4382 (Ch) ("***IA Associates***") per Nugee J at [35]).

(3) In the context of the conduct of the proceedings and, in particular, Clark Hill's failure to progress the proceedings at an earlier stage, it was not unfair to admit the evidence.

Clark Hill's submissions

9. Mr Jones made the following submissions for Clark Hill.

(1) The Tribunal had a discretion whether or not to admit new evidence. That discretion had to be exercised judicially.

(2) HMRC had breached the directions given by the Tribunal in relation to the production of evidence in this case. Its application was in essence an application for relief from sanctions. It should be treated as such.

(3) The principles that should be taken into account in the exercise of the discretion for relief from sanctions should be based on those that would apply under the Civil Procedure Rules, in particular, CPR 3.9. As a result, the Tribunal should adopt the stricter approach to compliance with rules and directions which was evidenced in cases such as *BPP Holdings Limited v. HMRC* [2017] UKSC 55.

Costs

10. I had asked the parties in advance of the hearing on 15 February 2018 to be prepared to make submissions regarding whether or not it would be made appropriate to make an order for costs in the event that the application for permission adduce new evidence was granted.

11. On that question, Mr Shea, for HMRC, said that it would not be appropriate to make an order for costs in these circumstances. HMRC was entitled to apply to introduce the new evidence. In the context of the proceedings as a whole, HMRC's conduct should not be regarded as unreasonable in the light of Clark Hill's previous failures to progress the proceedings.

12. Mr Jones, for Clark Hill, said that it was open to the Tribunal to grant the application for permission to adduce late evidence conditional upon an order for costs. If it were to do so, the Tribunal did not need to make a finding of unreasonable conduct of the proceedings within rule 10(1)(b) of the Tribunal Rules. In any event, it was clear that HMRC's failure to produce evidence at the time of the initial hearing and subsequent application to adduce late evidence should be regarded as unreasonable conduct within rule 10(1)(b). HMRC's reference to the previous conduct of proceedings was simply an attempt to deflect attention from the conduct in question, namely the failure to disclose evidence prior to the initial hearing. In such circumstances, Clark Hill was entitled to compensation for the additional costs that it had incurred.

13. Mr Jones also presented a schedule of costs in support of his application. I heard argument on the quantum of costs that should be awarded.

Reasons

14. The powers of the Tribunal to admit or exclude evidence are set out in rule 15 of the Tribunal Rules. Those provisions are expressed to be without restriction to the Tribunal's general powers of case management in rule 5.

15. Rule 15(2)(a) gives the Tribunal discretion to admit evidence whether or not the evidence would be admissible in a civil trial in the UK. Rule 15(2)(b) allows the Tribunal to exclude evidence that would otherwise be admissible where: (i) the evidence was not provided within the time allowed by direction or a practice direction; (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or (iii) it would otherwise be unfair to admit the evidence.

16. The parties agreed that the form containing the option to tax would be admissible in evidence: it was clearly relevant in that it was potentially probative of one of the issues before the Tribunal. So the question becomes what factors should the Tribunal take into account in deciding whether or not to exclude the evidence.

17. I was referred by Mr Shea to the decision of Nugee J in *IA Associates*. On the basis of the decision in that case, he suggested that it was only permissible for me to exclude evidence where it would be unfair to admit the evidence.

18. In my view, the comments of Nugee J in *IA Associates* to which I was referred are not directly in point. In that case, Nugee J was not dealing with evidence that had not been provided within the time allowed by a direction (see *IA Associates* [32]). He was referring (at [35]) to the exercise of discretion to admit evidence on the basis of rule 15(2)(b)(iii). In the present case, the evidence had not been provided within the time allowed by a direction and so the case clearly falls within rule 15(2)(b)(i).

19. That having been said, it is clear that rule 15(2)(b) permits the Tribunal a discretion as to whether or not to admit evidence in such circumstances. That discretion has to be exercised in accordance with the overriding objective set out in Rule 2(1) to deal with cases of "fairly and justly".

20. In dealing with this application "fairly and justly", I have taken into account the following issues.

(1) The breach is significant. The initial hearing proceeded on certain assumed facts and the new evidence has been introduced at a very late stage.

(2) The overriding objective is to deal with the case fairly and justly. That requires me to take account of all the available evidence in order to be able to come to a just and fair result. The form containing the option to tax is clearly probative of an issue before the Tribunal and to exclude it would risk the Tribunal reaching a decision on incorrect facts.

(3) There may be prejudice to Clark Hill as a result. That prejudice can be mitigated to an extent by an award of costs in relation to the application.

21. I decided to grant the application to admit the new evidence. I also decided to make an award of costs in relation to the hearing for the application in favour of Clark Hill. The award of costs will be set out in a separate order.

The facts

22. I have set out my findings of fact in the following paragraphs.

Clark Hill and its VAT position in relation to the properties

23. Clark Hill's main business activity was property investment. At the time of the transactions to which these appeal relates, it was registered for VAT.

24. On 8 March 2007, Clark Hill notified HMRC that it had exercised the option to tax under Schedule 10 to the Value Added Tax Act 1994 ("**VATA**") in relation to properties at: North East Side, Union Road, Byker, NE6 1EH (the "**Byker property**"); Pizza Hut, Lombardy Retail Park, Coldharbour Lane, Hayes, Middlesex, UB3 9EX (the "**Hayes property**"); 28-30 West Street, Havant, PO9 1PG (the

"**Havant property**"); and 9-11 Bell Street, Henley-on-Thames, RG9 2BA (the "**Henley property**"). On 12 March 2007, HMRC wrote to Clark Hill to acknowledge the notifications of the options to tax.

The sale of the Byker property

25. On 4 December 2013, Clark Hill entered into an auction underwriting agreement with LSG Real Estate Limited ("**LSG**") in respect of the Byker property. Under that agreement, subject to a purchaser offering a higher price at auction, LSG agreed to purchase the Byker property for £450,000 (exclusive of VAT).

26. LSG, through its solicitors, paid the deposit of £45,000 plus VAT of £9,000 to Clark Hill's solicitors. Under the terms of the agreement, the deposit was held as agent for Clark Hill.

27. The property proceeded to auction on 5 December 2013, but no higher bid was forthcoming and accordingly Clark Hill became obliged to sell the Byker property to LSG pursuant to the underwriting agreement.

28. On 7 January 2014, LSG exercised an option to tax the Byker property and notified HMRC that it had opted to tax the Byker property with effect from that date.

29. On 16 January 2014, the sale and purchase completed. LSG paid the balance of the purchase price together with VAT on that amount to Clark Hill. Clark Hill transferred the freehold of the Byker property to LSG.

30. On 17 January 2014, Clark Hill issued an invoice to LSG for the sale of the Byker property for £450,000 plus VAT of £90,000. The invoice was dated 4 December 2013.

The sale of the Hayes property

31. On 4 December 2013, Clark Hill entered into an auction underwriting agreement with LSG in respect of the Hayes property. Under that agreement, subject to a purchaser offering a higher price at auction, LSG agreed to purchase the Hayes property for £1,280,000 (exclusive of VAT).

32. LSG, through its solicitors, paid the deposit of £128,000 plus VAT of £25,600 to Clark Hill's solicitors. Under the terms of the agreement, the deposit was held as agent for Clark Hill.

33. The property proceeded to auction on 5 December 2013, but no higher bid was forthcoming and accordingly Clark Hill became obliged to sell the Hayes property to LSG pursuant to the underwriting agreement.

34. On 7 January 2014, LSG exercised an option to tax the Hayes property and notified HMRC that it had opted to tax the Hayes property with effect from that date.

35. On 16 January 2014, the sale and purchase completed. LSG paid the balance of the purchase price together with VAT on that amount to Clark Hill. Clark Hill transferred the freehold of the Hayes property to LSG.

36. On 17 January 2014, Clark Hill issued an invoice to LSG for the sale of the Hayes property for £1,280,000 plus VAT of £256,000. The invoice was dated 5 December 2013.

The sale of the Havant property

37. On 3 December 2013, Clark Hill sold the Havant property at auction for £750,000 (exclusive of VAT).

38. The property was sold "subject to the Common Auction Conditions (Edition 3)" as published by RICS. Those conditions include General Conditions and Extra General Conditions. Under the General Conditions (condition G2.2), the auctioneers hold any deposit as stakeholder (and not as agent for the seller) unless special conditions provide otherwise. Condition G2.2 provides:

> "The deposit:
>
> (a) must be paid in pounds sterling by cheque or banker's draft drawn on an APPROVED FINANCIAL INSTIUTION (or by any other means of payment that the AUCTIONEERS may accept);
>
> (b) is to be held as stakeholder unless the auction conduct conditions provide that it is to be held as agent for the seller."

39. The General Conditions then provide in condition G2.3 that:

> "G2.3 Where the auctioneers hold the deposit as stakeholder they are authorised to release it (and interest on it if applicable) to the seller on completion, or, if completion does not take place, to the person entitled to it under the sale conditions."

40. There is an alternative condition G2.3 contained in the Extra General Conditions (which are in paragraph G.30 of the General Conditions). The alternative condition G2.3 is as follows:

> "G2.3 Where the auctioneers hold the deposit as stakeholder:
>
> (a) they are entitled with the consent and irrevocable authority of the buyer (which the buyer hereby acknowledges and grants) to release such deposit to the seller's solicitors upon receipt by the auctioneers of written confirmation from the seller's solicitors that completion had taken place and, for the avoidance of doubt upon the auctioneers releasing the deposit, their liability as stakeholder shall be discharged;
>
> (b) if completion does not take place, the auctioneers are authorised (and the seller and buyer acknowledged and irrevocably confirmed their agreement to such authority) to release it to the person entitled to it under the sale conditions."

41. These Common Auction Conditions were stated to apply to any contract arising from the auction expect to the extent that they were varied by any special conditions.

42. The special conditions for the sale of the Havant property stated that the sale of the property would be subject to VAT. The special conditions also provided for a deposit of 10% of the purchase price (exclusive of VAT) to be held by the seller's solicitors as agent for the seller. The relevant provision states:

> "Deposit: 10% of the PRICE to be held by the Seller's solicitors as Agents for the Seller"

43. The special conditions also contained a provision to the following effect:

> "The property is sold subject to the Common Auction Conditions Edition 3 and the Common and Extra Auction Conditions (as contained as the back of the auction catalogue for the December 2013 auction) and subject to these special conditions which will prevail over and override any other conditions whether in the common conditions, the common and extra auction conditions, the auction catalogue or otherwise."

44. On the same date, the purchaser, Lawess Pension Fund ("**Lawess**"), paid a deposit of £75,000 to the auctioneers (i.e. 10% of the VAT exclusive price).

45. On 4 December 2013, Lawess notified HMRC that it had opted to tax the Havant property with effect from 25 March 2014.

46. On 16 December 2013, Clark Hill's solicitors received the payment of the deposit from the auctioneers.

47. On 9 January 2014, Lawess wrote to HMRC and sought to amend the date of the option to tax the Havant property to 3 December 2013.

48. The completion of the sale and purchase took place on 14 January 2014. The balance of the purchase price and VAT was paid on the same day.

49. On 16 January 2014, Clark Hill sent a sales invoice to Lawess for the sale of the Havant property for £750,000 plus £150,000 VAT. The invoice was dated 3 December 2013.

50. On 21 January 2014, HMRC wrote to Lawess to confirm that the option to tax was effective from 3 December 2013 and that the notification of that option to HMRC had been made on 4 December 2013.

The sale of the Henley property

51. On 27 November 2013, Mr Ivan Saltzman exercised an option to tax the Henley property with effect from that date. He notified HMRC of the exercise of the option.

52. On 29 November 2013, Clark Hill entered into a contract (the "**original contract**") with Mr Saltzman for the sale and purchase of the Henley property for £2,085,000 (exclusive of VAT).

53. The conditions of sale provided for a deposit of 10% of the purchase price (with the amount of the deposit being calculated by reference to the price exclusive of VAT), but also stated that the sale of the property would be subject to VAT.

54. On 2 December 2013, Mr Saltzman paid the deposit of £208,500. The deposit was held by Clark Hill's solicitors as agent for Clark Hill.

55. On 6 January 2014, Martian Properties Limited ("**Martian Properties**") exercised an option to tax the Henley property with effect from 10 January 2014. Martian Properties notified HMRC of the option to tax on 7 January 2014.

56. On 9 January 2014, Mr Saltzman, Clark Hill and Martian Properties entered into a deed of novation in relation to the original contract to Martian Properties.

57. Under that deed:

> (1) Martian Properties undertook, "from the date of [the deed], to observe and perform the [obligations of Mr Saltzman under the original contract] (including any obligations not yet performed) and to observe and be bound by the terms of the [original contract] as if [Martian Properties] had been a party to the [original contract] in place of [Mr Saltzman]";
>
> (2) Clark Hill released and discharged Mr Saltzman "from all obligations and liabilities whatsoever" under the original contract and accepted the liability of Martian Properties in place of the liability of Mr Saltzman.

58. The deed made no specific provision in relation to the funds placed on deposit by Mr Saltzman under the terms of the original contract and held by Clark Hill's solicitors under the terms of the original contract. As a practical matter, the relevant funds remained in the bank account of Clark Hill's solicitors and were used to discharge part of the purchase price at completion. There was no evidence before the Tribunal of any other arrangement between Martian Properties and Mr Saltzman under which, for example, Martian Properties paid any amount to Mr Saltzman to procure his entering into the deed of novation.

59. On 10 January 2014, Clark Hill transferred the freehold of the Henley property to Martian Properties. Martian Properties paid the balance of the purchase price together with an amount in respect of VAT of £417,000.

60. On 16 January 2014, Clark Hill issued an invoice to Martian Properties for the sale of the Henley property for £2,085,000 plus £417,000 VAT. The invoice was dated 29 November 2013.

The background to these proceedings

61. Clark Hill did not account for output tax in respect of the sale of the properties on the due date for the 01/14 period.

62. HMRC issued a notice of assessment dated 4 June 2014 for output tax of £913,000 for the 01/14 period on the sale of the four properties together with interest of £7,128.

63. On 16 July 2014, Clark Hill's solicitors, Rainer Hughes LLP ("**Rainer Hughes**"), wrote to HMRC. In that letter, Rainer Hughes noted that VAT had been charged to the purchasers of the properties, but stated that they had reviewed the position and now believed that the sales of the four properties should be treated as falling within the TOGC provisions. Rainer Hughes asked HMRC to reconsider the assessment or to treat the letter as a request for a review.

64. On 26 August 2014, HMRC wrote to Clark Hill to confirm that HMRC would reconsider the assessment and requested a meeting.

65. There followed a period in which HMRC sought to ascertain the facts surrounding the sales of the four properties. Having obtained little further information, HMRC wrote to Clark Hill on 16 December 2014 to inform Clark Hill that it would be issuing the assessment and cancelling Clark Hill's request for a further review.

66. On 29 January 2015, Clark Hill appealed to the Tribunal.

The relevant legislation

67. The grant, assignment or surrender of a major interest in land (which includes a fee simple (section 96 VATA)) is treated as a supply of goods for VAT purposes by virtue of paragraph 4 Schedule 4 VATA.

68. Subject to certain exceptions, that supply is an exempt supply for VAT purposes under item 1, Group 1 Schedule 9 VATA. Item 1 includes:

> "the grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right".

Item 1 then lists a number of exceptions, but none of those exceptions is relevant for present purposes.

69. A taxable person can, however, exercise an option to tax land for VAT purposes. The relevant provisions are found in Schedule 10 VATA. Where a taxable person opts to tax a given property, a sale or letting of that property, which takes place after the option takes effect, will not fall within the exemption in item 1, Group 1 Schedule 9 VATA and the taxable person must charge VAT on it.

70. Paragraph 2 of Schedule 10 provides:

> **2. Effect of the option to tax: exempt supplies become taxable**
>
> (1) This paragraph applies if—

(a) a person exercises the option to tax any land under this Part of this Schedule, and

(b) a grant is made in relation to the land at any time when the option to tax it has effect.

(2) If the grant is made —

(a) by the person exercising that option, or

(b) by a relevant associate (if that person is a body corporate),

the grant does not fall within Group 1 of Schedule 9 (exemptions for land).

71. Paragraph 19(1) of Schedule 10 sets out the day from which an option has effect. It provides:

19. The day from which the option has effect

(1) An option to tax has effect from—

(a) the start of the day on which it is exercised, or

(b) the start of any later day specified in the option.

72. But an option to tax only has effect if it is notified to HMRC within the allowed time. Paragraph 20 of Schedule 20 provides, so far as relevant:

20. Requirement to notify the option

(1) An option to tax has effect only if—

(a) notification of the option is given to the Commissioners within the allowed time, and

(b) that notification is given together with such information as the Commissioners may require.

(2) Notification of an option is given within the allowed time if (and only if) it is given—

(a) before the end of the period of 30 days beginning with the day on which the option was exercised, or

(b) before the end of such longer period beginning with that day as the Commissioners may in any particular case allow.

73. HMRC sets out in VAT Notice 742A the information which a taxpayer is required to provide with a notification of an option to tax. Paragraph 4.2.2 of VAT Notice 742A provides:

"Your notification must state clearly what land and buildings you are opting to tax, and the date from which the option has effect."

74. The VAT legislation contains provisions which prescribe the time at which a supply will be treated as being made for the purposes of the charge to VAT. Those rules are set out in section 6 VATA. In so far as it is relevant to supplies of goods (and so to supplies of land), section 6 provides:

6. Time of supply

(1) The provisions of this section shall apply, subject to sections 18, 18B and 18C, for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.

(2) Subject to subsections (4) to (14) below, a supply of goods shall be treated as taking place —

(a) ….

(b) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied;

(c) ….

(3)…

(4) If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.

75. The effect of section 6 is that a supply comprising the transfer of a major interest in land (and so a supply of goods for VAT purposes) will be treated as taking place at the time of transfer by virtue of sub-section (2)(b) except where the seller issues an invoice or receives payment in respect of the supply before the time of transfer. In such cases, sub-section (4) may apply to treat all or part of the supply as taking place at that earlier time.

76. Where assets are transferred as part of the transfer of a business or part of a business as a going concern, Article 5 of the 1995 Order provides that transfers of assets that might otherwise be treated as supplies of goods or services for VAT purposes are to be treated as giving rise to neither a supply of goods nor a supply of services for VAT purposes.

77. Paragraph (1) of Article 5 provides, so far as relevant:

(1) Subject to paragraph (2) below, there shall be treated as neither a supply of goods nor a supply of services the following supplies by a person of assets of his business -

(a) their supply to a person to whom he transfers his business as a going concern where –

(i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor, and

(ii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person …;

(b) their supply to a person to whom he transfers part of his business as a going concern where –

(i) that part is capable of separate operation,

(ii) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor in relation to that part, and

(iii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person ….

78. Where the assets that are transferred are or include transfers of interests in land, paragraph (2) of Article 5 provides that certain additional conditions must be met before the TOGC provisions can apply to the transfer. Paragraph (2) provides:

(2) A supply of assets shall not be treated as neither a supply of goods nor a supply of services by virtue of paragraph (1) above to the extent that it consists of -

(a) a grant which would, but for an option which the transferor has exercised, fall within item 1 of Group 1 of Schedule 9 to the Act; or

(b) a grant of a fee simple which falls within paragraph (a) of item 1 of Group 1 of Schedule 9 to the Act,

unless the conditions contained in paragraph (2A) below are satisfied.

79. The relevant conditions are set out in paragraph (2A) of Article 5. It provides:

(2A) The conditions referred to in paragraph (2) above are that the transferee has, no later than the relevant date –

(a) exercised an option in relation to the land which has effect on the relevant date and has given any written notification of the option required by paragraph 20 of Schedule 10 to the Act; and

(b) notified the transferor that paragraph (2B) below does not apply to him.

80. No issue has been raised in this case regarding the notice required by paragraph (2)(b) (that paragraph (2B) does not apply).

81. The references to an "option" in paragraphs (2) and (2A) are to "an option to tax any land having effect under Part 1 of Schedule 10 to the Act" (Article 5(3)). The effect of paragraph (2A)(a) in the case of a transfer of a property in respect of which an option to tax has been exercised by the seller is therefore that the purchaser must exercise the option to tax, notify HMRC of the exercise and the option must have taken effect, no later than the "relevant date".

82. The definition of "relevant date" for these purposes is found in paragraph (3) of Article 5. It provides:

> "relevant date" means the date upon which the grant would have been treated as having been made or, if there is more than one such date, the earliest of them.

The issues before the Tribunal

83. The parties agree that, in the case of the transfers of all four properties, all of the requirements for the transfers to be treated as falling within the TOGC provisions are fulfilled other than the condition in sub-paragraph (a) of paragraph (2A).

84. The issue between the parties in respect of the transfers of all of the four properties in this case is whether or not the requirements sub-paragraph (a) of paragraph (2A) were met no later than the "relevant date". This issue presents itself in different guises in relation to the four properties. However, there is a central issue between the parties which potentially affects all of the transfers. I have described this as the "main issue". I have dealt with the main issue first in this decision notice, before addressing the specific issues which arise in relation to individual properties - in particular, the Havant property and the Henley property.

The main issue

85. The main issue between the parties concerns the interpretation of the definition of "relevant date" in Article 5(3) of the 1995 Order and the relevance (or otherwise) of the rules which govern the time of a supply in section 6 VATA to that definition.

The time of issue of the invoices

86. Before I proceed to set out the arguments on the main issue, I should deal at the outset with one particular point.

87. As I have explained at [75] above, section 6(4) VATA can apply to treat a supply as taking place when the person making the supply receives a payment in respect of it or issues an invoice in respect of it. There was some uncertainty surrounding the time of issue of the relevant invoices in this case. At the hearing, HMRC accepted that the date of issue of the invoice is the date when it is sent to the purchaser of the relevant property and not the date on the invoice. All of the invoices were, on that basis issued, for the purposes of section 6(4), after the completion of the relevant transaction. As a result, the date of issue of the invoice is not relevant to the issues in this case and I have not referred to it further in the discussion below.

88. For the purposes of the consideration of the main issue, I have considered circumstances in which: a seller sells the freehold of an elected property to a purchaser; and the purchaser pays a deposit which is held by the seller's agent as agent for the seller at the time of contract and the balance of the purchase price at completion.

Clark Hill's arguments on the main issue

89. Clark Hill made two arguments on the main issue.

(1) The first was that the "relevant date" for the purposes of Article 5(3) in cases where a deposit was paid to the seller's agent as agent for the seller at the time of the contract should be the date of completion of the sale and purchase.

(2) The second was that, in relation to any transfer of real property where a deposit is paid to the seller's agent as agent for the seller, there were two potential "relevant dates" for the purposes of Article 5(3): one at the time of the deposit; and one at the time of completion. If and to the extent that the condition in paragraph (2A)(a) was met before the time of completion, then to that extent the supply could be treated as falling within TOGC provisions, even if the condition in paragraph (2A)(a) had not been met at the time of the deposit and so the TOGC provisions could not apply to that extent.

90. I have dealt with these two arguments separately below.

Clark Hill's first argument.

(a) Clark Hill's submissions

91. As an initial point, Mr Jones, for Clark Hill, says that "the relevant date" in the context of the sale of real property can only be the date of the actual grant of the interest in the property.

92. He makes the following points:

(1) The relevant provisions, in paragraphs (2), (2A) and (3) of Article 5 deal only with transfers of real property. When Parliament used the word "grant" in those provisions, it can only have been referring to the meaning of "grant" in that context. A "grant" of a fee simple is made on completion or transfer and a "grant" of a term of years is made on completion or execution of the lease or, if the transfer is of an unexpired term of years, upon assignment. In that context, it is inappropriate to describe a grant as having been made when the matter was subject to contract or when contracts had been exchanged at any time prior to completion or transfer.

(2) To the extent that HMRC rely upon the decision of Moses J in *Higher Education Statistics Agency Limited v Commissioners of Customs and*

Excise [2000] STC 332 ("***HESA***"), the decision in that case was wrong. There could only be one "grant" of real property. The deeming provisions in Section 6(4) were not relevant for the purposes of the application of Article 5(3) and therefore for the purposes of Article 5(2) and (2A). The effect therefore was that, in the present case, it was only necessary for the option to tax to have been made and notified to HMRC before completion of the sale and purchase of the property for the provisions of Article 5(1) to apply to the transfer.

(b) HMRC's submissions

93. Mr Shea, for HMRC, makes the following points.

(1) The reference in the definition of "relevant date" in Article 5(3) to "the date upon which the grant would have been treated as having been made" is a clear reference to a deeming provision. The relevant deeming provision is in the rules which govern the time of supply which are contained in section 6 VATA.

(2) Section 6(2)(b) VATA provided that, in relation to a sale of goods, the supply was to be treated as made "when they are made available to the person to whom they are supplied". In the context of a supply of land that would be at completion. However, Section 6(4) provided that where the person making the supply issued a VAT invoice in respect of it or received a payment in respect of it, then, to that extent, the supply would be treated as taking place at the time at which the invoice is issued or the payment is received.

(3) In the case of the transfers of the four properties, therefore there were two potential times of supply: the date on which the deposit was received; and the date on which the transfer completed. In such circumstances, Article 5(3) provided that the relevant date was the earlier of the two dates, in this case, when the deposit was received.

(4) The point had been decided by Moses J in *HESA*. That decision is binding on the Tribunal.

Discussion

94. I have been referred by the parties to the decision of Moses J in *HESA*. That case involved the sale of a freehold property at auction. The seller had exercised the option to tax the property. The purchaser paid the deposit to the seller's solicitors on the date of the auction. The deposit was held as agent for the seller. The purchaser exercised the option to tax the property and notified HMRC before the date of completion, but after the date on which the deposit was paid. In reaching the conclusion that the TOGC provisions could not apply to the transfer, Moses J decided that the relevant date was the date on which the deposit was received.

95. In the *HESA* case, the purchaser sought to argue that the "relevant date" in Article 5(3) should be the date of the actual grant. The purchaser raised various arguments in support of this submission. They were all dismissed by Moses J.

96. In particular, the purchaser sought to argue that the legislation distinguished between the grant of an interest in land and a supply for VAT purposes (*HESA* [8]). In dismissing this argument, Moses J said (*HESA* [9] and [10]):

> "9. I reject the contention that there is a distinction to be made between the concept of a supply and the grant to which the definition in Article 5(3) refers. Article 5(2) refers to a:—
>
> "a supply of assets … to the extent that it consists of (a) a grant …" [my emphasis]
>
> The reference to grant refers back to Schedule 9 Group 1 Item 1 which identifies a specific supply which is exempt.
>
> 10. Moreover to construe the relevant date as being the date upon which the actual grant was made fails to give sufficient effect to the hypothesis provided by the Order. Since the words must be construed without reference to subsequent insertions, the only statutory provisions which treat a specific date as the date on which the grant was made are the time of supply provisions contained within Section 6 of the 1994 Act. Section 6 is a deeming provision and the words of the definition in Article 5(3) of the 1995 Order, are, in my view, a clear reference to a deeming provision."

97. Notwithstanding the view expressed in [10] of Moses J's judgment set out above, the purchaser also sought to argue that there was no basis for treating the reference in the definition of "relevant date" in Article 5(3) to a deeming provision as being a reference to section 6 VATA. This argument was based in part on the grounds that section 6 could only apply if there had been a supply and so could not apply to a situation where no supply has taken place (as hypothesised by Article 5(1)) (*HESA* [13]).

98. Once again, Moses J rejected the argument (*HESA* [19]):

> "19. Mr. Baldry argued that these words have no application in this case and only apply where, as will frequently happen, the supply of assets of an ongoing business consists of a number of grants of land. If there had been a number of grants then an election must be made on or before the earliest. I disagree. The important feature of the closing words of the definition is that it admits of the possibility that there is more than one date upon which a single grant could be treated as having been made. The only circumstance upon which a single grant could have been treated as having been made on more than one date is the circumstance set out within Section 6(4) namely when a VAT invoice is issued or the supplier receives a payment in respect of the supply. The supply to the extent covered by the payment is treated as having taken place at the time payment is received. Thus, when deposit is received by a transferor in respect of a supply, the supply will be treated as having taken place on more than one date. The earliest date is the date on which the deposit is received. I accept that the supply is only treated for the purposes of Section 6(4) as having taken place to the extent covered by the invoice or payment. However, neither side contended that it made any sense to

construe the definition as requiring an election to be made in respect of part of the total contract price.

For those reasons I conclude that the relevant date is the date when the deposit was paid."

99. Mr Jones's first argument is essentially the same as that raised in the *HESA* case. In essence, he says that a distinction has to be made between the concept of a supply and the grant to which Article 5(3) refers and the use of the word "grant" therefore excludes any reference to the timing rules in section 6 VATA. As Mr Shea points out, that point has been determined by Moses J in *HESA*. I am bound by his decision and, in any event, I agree with it.

100. I reject Clark Hill's first argument for the reasons given by Moses J in *HESA*.

Clark Hill's second argument

101. Clark Hill's second argument is that when section 6 VATA is applied for the purposes of the definition, its effect is that there are two supplies, each of which can have a relevant date.

Clark Hill's submissions

102. In summary, Mr Jones says that even if the decision of Moses J in *HESA* on the first point – that it is necessary to take into account the provisions of section 6 VATA for the purposes of the definition of relevant date in Article 5(3) – is correct, when section 6 is applied it gives rise to two relevant dates. The first is the date on which the deposit is received. The second is the date on which the balance of the proceeds is received, at completion. Each of these relevant dates applies to the supply to the extent that is treated as made on that date.

103. He makes the following points.

(1) The definition of relevant date suggests that, if there is more than one date on which a grant may be treated as being made, it is necessary to take the earliest of them. But he says that the wording of section 6(4) provides for a statutory deeming of a supply at the time of the receipt of the deposit so that there are, in effect two supplies: one at the time of the receipt of the deposit and one at the time of completion.

(2) This is clear from the wording of section 6(4). Section 6(4) treats a supply as taking place where a deposit is received by the seller. This would include where the seller receives the deposit itself or where the deposit is received by an agent on behalf of the seller. It will not include circumstances where a deposit is received as stakeholder. However, section 6(4) only deems a supply to take place "to the extent that" the payment is received. In a case where a deposit is received, section 6(4) only applies to the deposit, it does not apply to the balance of the proceeds until the balance is paid, usually at completion.

> (3) For the purposes of applying Article 5 of the 1995 Order, in relation to the sale of an elected property, if the purchaser makes an election under Schedule 10 and notifies HMRC after a deposit is received by the seller, but before completion (at which point the balance of the purchase price is paid), the condition paragraph (2A)(a) is met in relation to the part of the supply that is made at completion, albeit that in relation to that part of the supply which is treated as taking place when the deposit is received remains taxable.

104. Mr Jones says that the point is not decided by Moses J in *HESA*. He says that it is clear from the passage at [19] in Moses J's judgment in *HESA* to which I have referred at [98] above that the point was agreed between the parties and not one of the matters which Moses J decided in that case.

HMRC's submissions

105. HMRC rejects this analysis. Mr Shea says that this point is dealt with by Moses J in the *HESA* case. He refers in particular to the passage at [19] in that judgment, to which I have referred at [98] above, where Moses J says:

> "However neither side contended that it made any sense to construe the definition as requiring an election to be made in respect of part of the total contract price".

106. On this basis he says there can only be one relevant date for a supply for the purposes of Article 5(2A). If there is more than one date on which a supply could be treated as made, an option to tax must be exercised by the purchaser and notified to HMRC before the first of those dates if the supply is to be treated as falling within the TOGC provisions. That date is the date on which the deposit is received.

Discussion

107. As a starting point, I agree with Mr Jones that Moses J did not decide this issue in *HESA*. His judgment proceeds on the assumption – because it had been agreed between the parties – that there could only be one relevant date in respect of any given grant for the purposes of Article 5(2). It is therefore open to me to decide this point.

108. That having been said, I have come to the conclusion that there can only be one relevant date for each grant. My reasons are set out in the following paragraphs.

109. The relevant date (as defined in Article 5(3) of the 1995 Order) is the date on which "the grant would have been treated as having been made or if there is more than one such date the earliest of them".

110. As mentioned at [99], there is no distinction between the concept of a supply and the grant to which paragraph (3) refers (see Moses J in *HESA* at [9]). The "grant" to which this definition refers is the grant which would otherwise be treated as a supply for VAT purposes on the assumption that Article 5(1) does not apply.

111.This definition therefore requires us to consider a hypothetical supply – namely a supply consisting of the grant in question (see Moses J in *HESA* at [16]) – and then to determine the time or times at which it would have been treated as made for VAT purposes.

112.In the present case, the grant in question is the sale of the freehold of the relevant property, the grant of a fee simple in the terms of item 1 Group 9 Schedule 9 VATA, in respect of which the seller has exercised an option to tax the property. In each case, the purchaser has paid a deposit and, at some point before completion of the transfer of the property, the deposit has been received by the seller or the seller's agent.

113. It is then necessary to consider the time at which that supply would be treated as being made if Article 5(1) of the 1995 Order did not apply. This brings in to consideration the provisions of section 6 VATA.

114.Section 6(2) provides that a supply of goods (which includes a supply of a major interest in land) is treated as made when the goods "are made available to the recipient" of the supply. In the context of a supply comprising a grant of a major interest in land, that will occur when the transfer, lease or assignment is executed.

115.Section 6(2) is, however, subject to section 6(4). In short, section 6(4) provides that in a case where an invoice is issued by the seller or a payment is received by the seller before the date specified in section 6(2), then to the extent covered by the invoice or the payment, a supply will be treated as made for VAT purposes on the date when the invoice is issued or the payment is received.

116.In the case in question, there are therefore two dates on which a supply is treated as taking place in respect of the relevant grant: first, the date on which the deposit was received by the seller, but only to the extent of the deposit; and second, in respect of the remainder of the grant, the date on which the transfer is completed (and the balance of the purchase price is received).

117.Mr Jones does not quite put it this way, but the implication of his argument is that the result of the application of section 6(4) is that there are two separate grants – one at the time of the deposit and one at the time of completion of the sale and purchase – each of which might have a relevant date for the purposes of Article 5 of the 1995 Order. On this analysis the words at the end of the definition, which apply where there is more than one date on which a grant would be treated as being made, do not have any effect because there is only one relevant date for each grant.

118.I disagree. Section 6 VATA is a timing rule. It does not apply to determine whether or not a supply has been made or the characteristics or the nature of the supply. It only has effect to determine the time of a supply after it has been determined whether the criteria for deciding whether or not a supply has been made have been fulfilled (see the decision of the Court of Appeal in *B J Rice v Commissioners of Customs and Excise* [1996] STC 581).

119. Section 6 does not therefore apply to treat a single grant as two separate grants. There remains only one "grant" of an interest in land in relation to the transfer of each of the four properties. The effect of section 6 is simply that the supply consisting of that grant is treated as taking place at two points in time for the purpose of charging VAT.

120. In my view, therefore, the words at the end of the definition of "relevant date" are apt to apply. There are two dates on which the grant is treated as having been made – in part on the date on which the deposit was received and in part on the date on which the transfer was completed – and so the relevant date is the earliest of those two dates, that is the date on which the deposit is received by the seller.

121. For these reasons, I reject Clark Hill's second argument on the main issue.

The sales of the Byker property and the Hayes property

122. My conclusions regarding Clark Hill's arguments on the main issue decide this case in relation to the transfer of the Byker property and the transfer of the Hayes property.

123. In each case, the seller's solicitors received a deposit as agent at the time of the contract (on 4 December 2013), the purchaser (LSG) exercised the option to tax the relevant property and notified HMRC after the time at which the deposit was paid but before completion. The "relevant date" for the purposes or Article 5(3) of the 1995 Order was, in each case, the date on which the deposit was received by the seller's solicitors, that is on 4 December 2013. The purchaser did not notify HMRC of the exercise of the option to tax until 7 January 2014, after the relevant date, and so the condition in paragraph (2A)(a) of Article 5 was not fulfilled.

124. For these reasons, the transfers of the Byker property and the Hayes property do not fall within the TOGC provisions.

The sale of the Havant property.

125. As I have mentioned above, the facts relating to the sale of the Havant property give rise to some additional considerations. I have dealt with them in this part of the decision notice.

Comments on the facts surrounding the sale of the Havant property

126. In the case of the Havant property, the purchaser paid the deposit to the auctioneers at the time of the contract. The purchaser notified HMRC that it had exercised the option to tax after the payment of the deposit to the auctioneers but before the auctioneers accounted for the deposit to the solicitors for the sellers. The original exercise of the option to tax was expressed to be effective from a date which was after the date on which the deposit was received by the seller's solicitors. However after that date, the purchaser sought to amend the option so that it would become effective from the date on which the option was originally exercised.

127. HMRC confirmed, at the time, that the option would be treated as exercised and effective from 3 December 2013 and as having been notified to HMRC on 4 December 2013. Notwithstanding the subsequent change in the date on which the option was to be effective, HMRC has argued its case on the basis the option to tax should be treated has having been exercised on and effective from 3 December 2013 and as having been notified to HMRC on 4 December 2013. It has not sought in these proceedings to argue that at the time at which the deposit was received by the seller's solicitors the option to tax was not effective. I have proceeded on that basis.

The parties' submissions

(a) Clark Hill's submissions

128. Mr Jones for Clark Hill says:

> (1) Even if the relevant date for the purposes of Article 5(3) is the date on which the deposit was received by the seller, the option was exercised, treated as taking effect and the purchaser had notified HMRC before the deposit was received by the seller's solicitors. Accordingly the requirements of paragraph (2A)(a) of Article 5 are fulfilled.
>
> (2) The deposit was first paid to the auctioneers. The auctioneers held the deposit as stakeholder under the terms on which the auction was conducted. At that point, the deposit was not "received" by the seller as required by section 6(4) VATA.
>
> (3) It was not until the deposit was received by the seller's solicitors as agent for the seller on 16 December 2013 that the deposit was received by the seller for the purposes of section 6(4). So the requirements of paragraph (2A) were met before the relevant date.
>
> (4) It may well be that the auctioneers had breached the terms of the contract by releasing the deposit or that the auctioneers had been separately authorized to release the deposit monies to the seller's solicitors, but that should not change the capacity in which the auctioneers held the deposit monies.

(b) HMRC's submissions

129. Mr Shea for HMRC says:

> (1) If the Common Auction Conditions were intended to apply to the deposit when it was held by the auctioneers, the parties would have followed a very different course of action. The General Conditions specified in condition G2.2(b) that any deposit was to be held by the auctioneers as stakeholder unless the special conditions provided otherwise. The Extra General Conditions went on to provide in the alternative condition G2.3 that where the auctioneers held the deposit as stakeholder they were entitled to release the deposit to the seller's

solicitors upon receipt by the auctioneers of written confirmation from the seller's solicitors that completion had taken place.

(2) The fact that the auctioneers released the deposit to the seller's solicitors before completion demonstrates that the Common Auction Conditions were not regarded as applying to the arrangements regarding the deposit.

(3) The special conditions for the auction provided that the deposit would be held by the seller's solicitors as agent for the seller. In such a case, it is appropriate to infer that the auctioneers were, in reality, holding the deposit as agent for the sellers before the date on which they accounted for the funds to the seller's solicitors.

Discussion

130. I have set out the terms of the auction conditions in so far as they refer to the terms on which the deposit was held at [38] to [43] above. Subject to the application of any special conditions, the auction was governed by the Common Auction Conditions published by RICS.

131. The General Conditions to the Common Auction Conditions provide (in General Condition G2.2) that the deposit is to be held by the auctioneers as stakeholder unless the special conditions provide otherwise.

132. The Common Auction Conditions go on to provide for the circumstances in which the auctioneers (when holding the deposit as stakeholder) are entitled to release the deposit to either party. Two alternative provisions are set out in the Common Auction Conditions: a basic provision in the standard General Condition G2.3 and a more complex provision as an alternative General Condition G2.3 in the Extra General Conditions. The special conditions for the sale made no reference to the substitution of the alternative General Condition G2.3 for the standard General Condition G2.3. So, subject to the application of the special conditions, in my view, the standard General Condition G2.3 should apply.

133. The special conditions for the sale of the Havant property simply provided for the deposit to be held by the seller's solicitors as agent for the seller.

134. In fact the deposit was paid to the auctioneers on 3 December 2013 and then released to the seller's solicitors on 16 December 2013. It is clear that the deposit was received by the seller for the purpose of section 6(4) VATA at the latest on 16 December 2013. The question is whether the seller could be treated as receiving the deposit before that date. That question turns on the status in which the auctioneers held the deposit.

135. Mr Shea says that the auctioneers held the funds as agent for the seller and so Clark Hill should be treated as having received the deposit on 3 December 2014 when the auctioneers received the deposit. He does so on the basis that the payments which were actually made did not conform to the provisions of the Common Auction Conditions. He did not put it this way, but, in essence, he says that the provisions in

the special conditions relating to the deposit must be treated as overriding the terms of the Common Auction Conditions relating to the deposit. Given the terms of the special conditions, in the absence of an express term governing the basis on which the auctioneers held the deposit, he says that the natural inference must be that the auctioneers held the deposit as agent for the seller.

136. Mr Jones, for Clark Hill, disagrees. He says that there is nothing to support the inference that Mr Shea seeks to draw from the contractual arrangements. The only basis on which the auctioneers agreed to hold the funds was as stakeholder. The fact that a payment may have been made in breach of contract should not affect the status in which the auctioneers held the deposit monies.

137. On the basis of the evidence before me, on balance, I agree with Mr Jones, although not for the reasons that he has given.

138. The auction was governed by the Common Auction Conditions. The only capacity in which the auctioneers hold the funds under the terms of the Common Auction Conditions is as stakeholder. The special conditions override the terms of Common Auction Conditions but only to the extent necessary to give effect to the special conditions.

139. The special conditions do not determine the basis on which the auctioneers hold the deposit; they only apply to prescribe the basis on which the deposit was held once it was received by the seller's solicitors. It is not necessary to infer that the auctioneers held the deposit as agent for the seller in order to give effect to that condition. It may well be that the special condition provides a justification for the release of the deposit to the seller's solicitors in advance of completion (in a manner which is not provided for by General Condition G2.3), but that does not affect the capacity in which the auctioneers held the deposit monies. In my view, the auctioneers held the deposit as stakeholder until the funds were transferred to the seller's solicitors on 16 December 2013.

140. In that case, the relevant date is the date on which the deposit was received by the seller's solicitors as agent for the seller. As I have mentioned above, HMRC has accepted that the notification of the exercise of the option the tax was received before that date and has not sought to argue that that option was not effective on or before that date. On that basis, the condition in paragraph (2A)(a) of Article 5 of the 1995 Order was fulfilled in relation to the sale of the Havant property.

141. For these reasons, the sale of the Havant property fell within the TOGC provisions.

The sale of the Henley property

142. Once again, the facts relating to the sale of the Henley property give rise to some additional considerations. I have dealt with them in this part of the decision notice.

Comments on the facts surrounding the sale of the Henley property

143. I will first recap briefly the order of events in relation to the sale of the Henley property.

(1) On 27 November 2013, the initial purchaser of the property (Mr Saltzman) exercised an option to tax the property.

(2) On 29 November 2013, Clark Hill and Mr Saltzman entered into a contract for the sale and purchase of the Henley property (which I have referred to as the "original contract").

(3) On 2 December 2013, Mr Saltzman paid the deposit to Clark Hill's solicitors. The deposit was held as agent for the Clark Hill.

(4) On 6 January 2014, Martian Properties exercised an option to tax in respect of the Henley property with effect from 10 January 2014.

(5) On 7 January 2014, Martian Properties notified HMRC of the option to tax.

(6) On 9 January 2014, Mr Saltzman, Martian Properties and Clark Hill entered into a deed of novation under which Mr Saltzman was released from his obligations under the original contract and Martian Properties became obliged to purchase the property.

(7) On 10 January 2014, the contract was completed. Clark Hill transferred the property to Martian Properties. Martian Properties paid the completion monies to Clark Hill.

The parties' submissions

144. The parties' submissions in relation to the transactions involving the Henley Property were affected by the disclosure of late evidence by HMRC.

(a) Clark Hill's submissions

145. At the hearing and in subsequent written submissions, Mr Jones had made the following points.

(1) The effect of the novation of the original contract was to create an entirely new agreement between the new purchaser, Martian Properties, and the seller, Clark Hill. The original contract between Mr Saltzman and Clark Hill was extinguished.

(2) The effect of the novation on the deposit was that the purchaser under the original contract, Mr Saltzman, was entitled to the repayment of his deposit from the Clark Hill because that contract would not be completed. However, the new purchaser, Martian Properties, at the same time became obliged to pay the deposit under the new contract.

(3) As a practical matter, the seller's solicitors continued to hold the deposit monies. In legal terms, at the time of the novation, Clark Hill lost the right to retain the deposit paid by Mr Saltzman under the original

contract. At the same time, the new purchaser, Martian Properties became obliged to pay the deposit to Clark Hill under the new contract. However, the obligation of Martian Properties to pay the deposit was satisfied when Clark Hill was released from its obligation to repay the original purchaser, Mr Saltzman. That was achieved by the new purchaser, Martian Properties, discharging the chose in action under which the seller was obliged to pay Mr Saltzman under the original contract. The effect of the discharge was the creation of a new contingent chose in action in favour of the new purchaser. At that point the deposit was, in effect, received from Martian Properties under the new contract.

(4) The sale of the Henley property was made pursuant to the new contract. That was the only supply of the property that was actually made. When the definition of relevant date in Article 5(3) was applied to those facts, the relevant date was the date on which the deposit was received by the seller or the seller's agent in respect of that new agreement.

(5) This could be seen from the wording of section 6(4) VATA. Section 6(4) refers to the time at which the seller receives a payment "in respect of it" (my emphasis). That was a reference to the supply in question. That is the supply of the property to the new purchaser, Martian Properties under the new contract. The only date on which a deposit was received in respect of that contract was the date of the novation, 9 January 2014.

146. On the facts as they were understood at the time of the hearing, prior to the introduction of the new evidence, Mr Jones then said that the relevant date was therefore after the date on which the option to tax was exercised, had taken effect and had been notified to HMRC. So the condition in paragraph (2A)(a) was satisfied. Following the introduction of the new evidence, he amended his argument. He made the following points:

(1) Paragraph 19(1) Schedule 10 provides that an option to tax has effect either (a) from the start of the date on which it is exercised, or (b) from the start of any later day specified in the option. Those two start dates are alternatives. It is not provided in sub-paragraph (b) that the date in (b) is to be the governing date "if later".

(2) That was not a surprising outcome. It was intended to protect a seller in circumstances where the purchaser wishes the effective date to be later for its own purposes. Without the provision, the vendor would have no protection unless specific contractual protection is sought.

(3) On that basis, Clark Hill was entitled to treat the option to tax as having been effective from the date on which it was exercised. That date was 6 January 2014. On that basis, even if the relevant date was 9 January 2014 (i.e. the date of novation), the requirements of paragraph (2A)(a) were fulfilled before that date.

(b) HMRC's submissions

147. At the initial hearing, Mr Shea made the following points for HMRC.

(1) The actual payment of the deposit was received by the seller's solicitors on 2 December 2013. This was the relevant date for the purpose of the transfer of the property.

(2) This was clear from the terms of the novation agreement, which provided that the new purchaser, Martian Properties, was to be treated as bound by the terms of the original contract as if it had been a party to the original contract.

(3) The original purchaser, Mr Saltzman, had exercised an option to tax and notified HMRC before that date. But the exercise of the option by Mr Saltzman was not relevant as he had not purchased the property. The ultimate purchaser, Martian Properties, had exercised the option to tax on 6 January 2014. That was after the relevant date and so the condition in paragraph (2A)(a) of Article 5 was not fulfilled.

148. Following the introduction of the new evidence, Mr Shea made the following alternative argument:

(1) Even if, as Clark Hill submitted, the deposit was received from Martian Properties at the time of the novation agreement on 9 January 2014, the evidence now showed that effective date of the option to tax made by Martian Properties was 10 January 2014. That was after the relevant date and so the condition in paragraph (2A)(a) of Article 5 was not fulfilled.

(2) The effective date of the option to tax is required to be set out in the notice given pursuant to paragraph 20 Schedule 10 VATA and paragraph 4.2.2 of VAT Notice 742A. It is shown in the form submitted by Martian Properties. That is the only effective date.

Discussion

149. Once again, the issue between the parties concerns the meaning of "relevant date" in Article 5(3) of the 1995 Order.

150. In the case of the sale of the Henley property, the position is complicated by the fact that the parties to the original contract entered into a deed of novation between the date on which the deposit was paid and the date on which completion of the original contract was anticipated to take place.

151. The deed of novation was in relatively standard form. The effect of a novation is to rescind the original contract and to substitute a new contract in which the same acts are performed by different parties: in this case, the original contract between Clark Hill and Mr Saltzman was extinguished and replaced with a new contract between Clark Hill and Martian Properties.

152. The deposit had already been paid by Mr Saltzman under the original contract before the novation. In relation to the deposit, the novation acted as a rescission of the original contract by agreement: immediately before the novation, Mr Saltzman

had a contractual right to the return of the deposit if Clark Hill failed to complete the contract, but that right was extinguished by the novation.

153. As regards the new contract, Martian Properties was not obliged to pay the deposit, it was treated as if it had already done so. It acquired a right under the new contract for the return of the deposit if Clark Hill failed to complete the transfer. The deposit was taken into account in determining the price which Martian Properties had to pay at completion.

154. How does the relevant VAT legislation apply against that contractual background?

155. The first step is to identify the relevant supply or supplies.

156. The view of other Tribunals that have considered the effect of a novation of a contract for the sale of a property appears to be that where a contract is novated there is only one supply of the underlying property by the seller (in this case, Clark Hill) to the ultimate purchaser (in this case, Martian Properties) (see for example, the obiter comment in the decision of the VAT Tribunal in *Kwik Save Group plc* (MAN/93/11) [1994] VATTR 457 and the decision of the First-tier Tribunal in *Hanuman Commercial Limited v HMRC* [2017] UKFTT 0854 (TC) at [61], to which I was not referred). This supports Mr Jones's submission and I did not understand Mr Shea to disagree.

157. If that is correct, there is only one grant of the real property in this case. That is the transfer of the freehold interest in the Henley property by Clark Hill to Martian Properties. That grant took place on 10 January 2014.

158. The next step is to determine the "relevant date" of that supply.

159. The relevant date is date upon which the grant would have been treated as having been made or, if there is more than one such date, the earliest of them (Article 5(3) of the 1995 Order). As I have described in relation to the main issue, section 6 VATA applies for the purpose of determining the dates upon which a grant would have been treated as being made for the purpose of this definition.

160. By virtue of section 6 VATA, there are two possible dates on which the supply consisting of that grant could be treated as having been made: the date on which the transfer took place and the date on which a payment (i.e. the deposit) was received by the seller in respect of the supply.

161. The date on which the transfer of the freehold to Martian Properties took place is on 10 January 2014. So the question is whether there is an earlier date on which deposit in respect of that supply should be treated as having been received by Clark Hill.

162. It seems to me that there are three possibilities. There are difficulties with all of them.

163. The first is that the deposit should be treated as received on the date on which the Clark Hill's solicitors received the deposit as agent for Clark Hill from Mr Saltzman, i.e. on 2 December 2013

164. This is HMRC's case. It is consistent with the treatment of the transaction as involving a single supply of the interest in the property by Clark Hill to Martian Properties. From the seller's point of view, it accounts for all of the consideration received by Clark Hill for that supply: the deposit may not have been received from the ultimate purchaser, but it was received as consideration for the supply that Clark Hill ultimately makes.

165. The difficulty with this approach is that it does not fit with the contractual analysis. As Mr Jones points out, the grant is made pursuant to the new contract between Clark Hill and Martian Properties. But the deposit was paid by Mr Saltzman under the original contract, which was extinguished by the novation.

166. Furthermore, in the context of the TOGC provisions, the effect is that it will be very unlikely that a new purchaser following a novation will ever be able to acquire a property with the benefit of no supply treatment under the 1995 Order as it will rarely be the case that the new purchaser would have been able to exercise an option to tax before the date on which the original contract was entered into and the deposit paid. Indeed, if this approach is correct, a transaction involving a novated contract in relation to an elected property is unlikely to fall within the TOGC provisions even if at all material times there was in place a valid option to tax made by the relevant purchaser in respect of the property.

167. The second is that the deposit should be treated as received by Clark Hill on the date of the novation, i.e. on 9 January 2014.

168. This is the case put by Mr Jones on behalf of Clark Hill. He says that the deposit should be treated as received under the new contract at the date of the novation because on that date Martian Properties discharged the obligation of Clark Hill to repay the deposit under the original contract and in that way discharged its own obligation under the new contract to pay the deposit.

169. For my own part, I would not describe the effect of the novation in quite the same terms as Mr Jones. As I understand it, and as I have described at [151] to [153] above, the effect of the novation was that the original contract was rescinded by agreement. The contingent obligation of the seller (Clark Hill) under the original contract to repay the deposit in the event of a default was extinguished. Under the new contract, Martian Properties became obliged to perform the outstanding obligations, but the deposit had been paid. So that was not an obligation that it was required to perform. It did, however, become entitled to repayment of the deposit if Clark Hill failed to perform the new contract.

170. The deposit was not therefore actually received by Clark Hill at this point. So this construction requires a view to be taken that, for the purposes of section 6 VATA, the seller should be treated as receiving the deposit at the time of a novation because, at

that point, the rights and obligations in relation to the deposit become due from and to the new purchaser.

171. This interpretation leaves open the possibility that the VAT treatment of the supply might change because the attributes of the purchaser change at the time of the novation.

172. The third possibility is that the deposit is not treated as received in respect of the supply made pursuant to the new contract. On this analysis, the only payment made in respect of the supply is the payment of the completion monies at the time of the transfer, i.e. on 10 January 2014.

173. This analysis seems to accord with the legal analysis of the novation. The only payment that is actually made under the new contract is the completion payment. It does not however easily account for the whole of the consideration for VAT purposes. It leaves open the question: what is the VAT treatment of the deposit? It is a payment made in respect of a contract that is never completed and, if this analysis is adopted, is never taken into account in the consideration for the final supply (even though it is taken into account in determining the payment that is made by the new purchaser at completion).

174. I have rejected the third option for these reasons.

175. As between the first option (2 December 2013) and the second option (9 January 2014), I do not need to reach a conclusion for the purpose of this decision because of the decision that I have reached on the final point to which I will now turn. However, having heard argument on the point and received written submissions, and in case it should be relevant at later point on this appeal, I will express my view.

176. On balance, I prefer the interpretation put forward by Mr Jones for Clark Hill, namely that the deposit should be treated as received at the time of the novation as it is at that point that the deposit is, in effect, held for the purpose of the new contract and it is pursuant to the new contract that the supply is actually made. Notwithstanding its limitations, this interpretation fits more appropriately with the contractual analysis. On that basis, in my view, the relevant date in this case was 9 January 2014.

177. That leads to the final step, which is to determine whether or not the requirements of paragraph (2A)(a) of Article 5 were met no later than the relevant date.

178. As I have described, HMRC introduced evidence at a late stage in these proceedings. That evidence – the option to tax exercised by Martian Properties – showed that the option to tax was exercised on 6 January 2014, notified to HMRC on 7 January 2014, but stated to have effect from 10 January 2014.

179. Sub-paragraph (a) of paragraph (2A) requires that the transferee must have exercised an option to tax and given written notification to HMRC of the option no later than the relevant date, but also that the option must "have effect on the relevant date".

180. At first sight, this requirement was not satisfied in the case of the transfer of the Henley property: even if the relevant date was the date of novation, 9 January 2014, the option to tax was not expressed as taking effect until 10 January 2014, the date of completion.

181. Mr Jones, for Clark Hill, submitted that the effect or paragraph 19(1) Schedule 10 VATA was that the seller was entitled to treat the option as having effect either on the date on which it was exercised (sub-paragraph (a)) or on the date specified in the option (sub-paragraph (b)). He points to the wording of paragraph 19(1) and in particular the absence of the words "if later" between the two sub-paragraphs. On that basis, he submitted, Clark Hill was entitled to treat the option as having effect on the date on which it was exercised and the requirements of paragraph (2A)(a) were fulfilled on the relevant date.

182. I disagree. In my view, paragraph 19(1) provides alternative dates on which an option to tax might take effect. They are mutually exclusive. If the option falls within sub-paragraph (b) because a later day is specified in the option, it cannot fall within sub-paragraph (a). The inclusion of the words "or, if later" between the two sub-paragraphs would be superfluous.

183. Any other conclusion would be chaotic. The reason that the person making the election is given the ability to specify in the option to tax a later effective date than the date of exercise is to provide some flexibility for the person exercising the option, for example, so that a property owner can tie the date on which the option takes effect to date of expiry of a lease or the grant of a new one. It is, however, important for all parties and HMRC to know the date on which the option takes effect and for that for that date to be a single date. It is for this reason that paragraph 4.2.2 of VAT Notice 742A requires a person making an election to specify the date on which the election is to take effect.

184. For this reason, in my view, the option had effect on the date specified in the option, 10 January 2014. That date was after the relevant date and so the requirements of paragraph (2A)(a) were not satisfied on the relevant date. The transfer of the Henley property could not therefore fall within the TOGC provisions.

Decision

185. For the reasons that I have given above:

(a) I dismiss Clark Hill's appeals in relation to the transfers of the Byker Property, the Hayes Property and the Henley property;

(b) I allow Clark Hill's appeal in relation to the Havant property.

Rights of appeal

186. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax

Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ASHLEY GREENBANK
TRIBUNAL JUDGE

RELEASE DATE: 6th MARCH 2018