Neutral Citation: [2023] UKFTT 00906 (TC)

Case Number: TC08974

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal references: TC/2022/12735
TC/2022/12736

VAT – strike out application – HMRC ruling on the nature of supplies made to a housing association under a sample contract – ruling unfavourable and appealed – appeal then withdrawn – extent of deemed determination – fresh decisions and appeals made in respect of supplies by and to different counterparties – are these new appeals attempts to relitigate the same issue decided by the deemed determination of the first appeal – cause of action estoppel issue estoppel and abuse of process considered – application dismissed

Heard on: 3 October 2023
Judgment date: 23 October 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

VISTRY HOMES LTD (1)

LINDEN WATES (WESTBURY) LTD (2)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mitchell Moss of Ernst & Young

For the Respondents: Gareth McKinley litigator of HM Revenue and Customs' Solicitor's Office

VATA DECISION

INTRODUCTION

1. On 22 March 2022 the respondents (or "**HMRC**") issued VAT assessments to each of the appellants ("**Vistry**" and "**Linden**" respectively). The assessment for Vistry was for £882,412. The assessment for Linden was for £74,768. Following statutory reviews of the decisions to issue those assessments, which were unsuccessful (the decisions were upheld on review) the appellant's appealed against those assessments on 29 July 2022.

2. The appellants, and members of the Vistry VAT group, make supplies of (in their view) construction services to housing associations. It is the appellants' view that where those construction services are supplied after the first brick is laid above foundation level ("**golden brick**"), the appellants make a single zero rated supply of the construction of residential property. They have submitted their VAT returns on this basis. It is HMRC's view, however, that whether the appellants supply services before or after golden brick, the appellants are making two supplies, one of which is an exempt supply of land and the other a zero rated supply of construction services.

3. On 16 December 2022 HMRC applied ("**the application**") for directions that the appellants' grounds of appeal should be amended to remove any reference as to whether there was a single zero rated supply of construction services or whether there were two supplies, namely an exempt supply of land and a zero rated supply of construction services.

4. The application is based on F-tT Tribunal Rule 8(3)(c). This gives the tribunal a discretion to strike out the whole or a part of proceedings if the tribunal considers there is no reasonable prospect of an appellant's case, or part of it, succeeding.

5. It is HMRC's view, as set out in the application, that the principles of cause of action estoppel, issue estoppel, and abuse of process apply in respect of these appeals.

6. The basis for this view is that in January 2018, Linden Limited, the previous representative of the VAT group of which Vistry is the current representative member had written to HMRC for a ruling seeking clarification concerning the treatment of supplies made by Linden Limited (and its group and associated companies) of land with a back-to-back supply of construction services. In July 2018 HMRC ruled that the sale of land with a clause for the seller to construct properties comprised two separate supplies, one of exempt land and the other of zero rated construction services. Following a review of that decision, which was upheld, Linden Limited appealed to the tribunal. It then, however, withdrew its appeal in February 2022. In HMRC's view, the appellants in these appeals are seeking to relitigate the identical issue which was resolved following the withdrawal of that 2018 appeal.

7. I am grateful to Mr Moss and to Mr McKinley for their clear submissions both written and oral which were of considerable assistance to me. I have not, however, found it necessary to refer to each and every argument advanced or all of the authorities cited in reaching my conclusions.

THE LAW

8. The authorities which are relevant to the issues of cause of action estoppel, issue estoppel and abuse of process are dealt with in the discussion section of this decision.

9. The rules, case law, and legislation which is relevant to striking out, the nature of supplies for VAT purposes and the impact of withdrawing an appeal are set out in the appendix. Words and phrases defined therein have the same meanings in the body of this decision. However, in a nutshell:

(1) When considering whether the appellants' case has a reasonable prospect of succeeding, I need to consider whether they have a realistic as opposed to a fanciful prospect of success i.e. the claim must carry some degree of conviction and is more than merely arguable.

(2) When considering the legal relationship between the appellants and their counterparties, a tribunal should start by considering the meaning and effect of the relevant contractual terms but it then needs to consider whether those contractual terms reflect economic and commercial reality.

(3) Where an appellant withdraws its appeal before the determination of that appeal has been made by the tribunal, then the appellant and HMRC are deemed to have come to an agreement that the decision under appeal should be upheld without variation.

THE ISSUES DEALT WITH IN THIS DECISION

10. The directions sought by the application essentially asked me to strike out parts of the appellants' appeals. As such, strictly speaking, my role is restricted to considering whether the appellants have a realistic position as regards the assertions that cause of action estoppel or issue estoppel and abuse of process apply so as to prevent them, ab initio, from raising the argument that the supplies are a single supply of the construction of residential property.

11. And since I should not conduct a mini trial, I need only consider these issues on a comparatively superficial basis.

12. But it seems to me that, given that the issues were fully argued before me, it is a better use of court time for me to decide whether these appeals must fail on the basis of the arguments raised by HMRC. I am fortified by the fact that both Judge Manyarara in *Waterloo Car Hire* [2023] UKFTT 549 and Judge Redston in *Telent Technology* [2022] UKFTT 00147, in similar situations, adopted this approach.

13. I have therefore considered each of the issues raised by HMRC. For the reasons given later in this decision it is my view that neither cause of action estoppel, nor issue estoppel, nor abuse of process apply. I have therefore dismissed the application.

THE FACTS

14. I was provided with a bundle of documents from which I make the following findings of fact:

(1) Vistry is the current representative member of a VAT group with VRN 108 2587 15 ("**the Vistry VAT group**"). The previous representative member of this VAT group was Linden Limited.

(2) Linden is not part of the Vistry VAT group and is separately registered for VAT under VRN 275 8463 61. I understand that Linden is 50% owned by the Vistry group, and 50% owned by an arm's length third party.

(3) Vistry is one of the UK's leading housebuilders and construction groups, and Linden is part of the Vistry group of companies (although as set out above, it is separately registered for VAT). These appeals are solely concerned with the appellants' supplies to housing associations.

(4) Housing associations enter into agreements with the appellants for the provision of dwellings. These agreements allow housing associations to acquire dwellings that can be supplied to housing tenants.

(5) In agreements with housing associations, where construction services have begun and the first brick is laid above foundation level (i.e., golden brick) before contracts are executed, the appellants historically treated their supplies as single zero rated supplies of the dwellings. However, where construction services have not reached that stage at the date of the contract, the appellants historically accounted for VAT on the basis of making two separate supplies: an exempt supply of land and a zero rated supply of construction services.

(6) Following consideration of this position and taking advice from its advisors, Linden Limited (the previous representative member of the Vistry VAT group), considered that it made single zero rated supplies in the case of "golden brick supplies" and also where construction services had not yet reached that stage. Therefore, on 16 January 2018, Linden Limited sought a ruling from HMRC to this effect.

(7) In that letter ("**the ruling letter**"), Linden Limited expressed its view that it made supplies consisting of land with a back-to-back supply of construction services so closely linked that they formed one single indivisible supply, and consequently the supply was of a single zero rated supply of a completed dwelling.

(8) That ruling letter was written on behalf of members of the Vistry VAT group, and also on behalf of a number of other "VAT Registrations" including Linden.

(9) The ruling letter also enclosed an "example agreement", namely an agreement with Merlin Housing Society Ltd of 26 June 2017 ("**the Merlin agreement**"). This is referred to in the ruling letter: "When Linden [Limited] enters into an agreement to build homes for a housing association, such an arrangement is provided for in one single "development agreement", an example of which has been provided as an attachment to this letter".

(10) HMRC issued a ruling on 4 July 2018 which confirmed that they considered there to be a separate exempt supply of land and a separate taxable supply of construction services. This ruling was based on guidance set out in HMRC's manuals. HMRC upheld this ruling in a review decision dated 21 December 2018 and, as a result, Linden Limited lodged a notice of appeal on 18 January 2019 ("**the Linden appeal**").

(11) HMRC filed a Statement of Case on 12 April 2019. In paragraph 4. of that Statement of Case, HMRC acknowledged that the appellant had provided HMRC with the Merlin agreement. And in paragraph 16. HMRC have expressed the view that there were two separate supplies, one of land and one of construction services, and go on to say that in support of that position, HMRC rely, "inter alia, on the [Merlin agreement] which the Respondents argue demonstrates that there are two separate supplies"

(12) In response to the Statement of Case Linden Limited requested further and better particulars in an application dated 29 April 2019. HMRC filed a response to that application on 25 June 2019 stating that:

> “**1. Do the Respondents accept that the agreement with Merlin Housing Society Limited (‘Merlin’) of 26 June 2017 (‘the Agreement’) is representative of all the contracts covered by this appeal?**
>
> 1. The Appellant’s request for clarification of 16 January 2018 was made by reference to the agreement dated 26 June 2017 between the Appellant and Merlin Housing Society Limited (identified in the Amended Statement of Case as ‘the Example Agreement’). The Appellant has never provided any other contract, and HMRC a) do not consider that the instant appeal extends beyond a determination of the proper characterisation of the Example Agreement; and b) in any case cannot agree or disagree with the suggestion that the Example Agreement is representative of other contracts”.

(13) In an email dated 17 February 2022, Ernst & Young notified the tribunal and HMRC that they had received instructions from Linden Limited to withdraw its appeal and that the hearing scheduled for 22 March 2022 could be vacated.

(14) On 28 February 2022, the appellants wrote to HMRC telling them that they had recovered input tax for the periods June 2018 to December 2019 on the basis that when they entered into agreements with housing associations, they were making a single taxable supply for the construction of dwellings which included land on which the dwellings were built.

(15) That letter identified nine projects which Vistry had entered into with housing associations all of which involved different properties, and two projects with which Linden had been involved (which appear to be in respect of the same property).

(16) On 22 March 2022, HMRC issued the VAT assessments set out at [1] above. The appellants applied for statutory reviews which upheld the decision to issue the assessments. The appellants then filed notices of appeal with the tribunal on 29 July 2022 (“**the 2022 appeals**”). Those appeals deal, in the case of Vistry with the nine projects identified in the letter of 28 February 2022, and in the case of Linden, with the two projects identified in that letter.

(17) At some time after the issue of the assessments, someone on behalf of the appellants sent copies of contracts between the appellants and housing associations to HMRC. In March 2023, HMRC asked for copies of further contracts but to date these have not been supplied. These supplementary contracts were contained in a bundle, but do not comprise all of the contracts entered into between the appellants and housing associations.

(18) It is clear that whilst, in many cases, the wording in these supplementary contracts is similar, and in some cases identical to, wording in the Merlin agreement, it is equally clear that many of the agreements (and in many cases the supplier construction services are not contained in a single agreement but in a separate agreement) the provisions, whilst HMRC might argue are of the same effect, are differently worded from each other and from the Merlin agreement.

WHAT WAS DETERMINED ON THE WITHDRAWAL OF THE LINDEN APPEAL?

15. Sections 85(1) and 85(4) VATA both include deeming provisions. When an appeal is withdrawn, the parties are deemed to have “come to an agreement…that the decision under appeal should be upheld without variation”, and a tribunal is then deemed to have “determined the appeal in accordance with the terms of the agreement”.

16. The question at the heart of this application is the precise determination that the tribunal is deemed to have reached following the withdrawal of the Linden appeal.

17. In the application, HMRC expressed the view that "it is deemed that the Tribunal have decided that supplies consisting of land, with a back-to-back supply of construction services consist of two separate supplies...".

18. However, in their skeleton argument they state in paragraph 7, that the "impact of HMRCs response to point 1 of the request for [further and better particulars] is that this decision relates to supplies as described in the [Merlin agreement]". This sentiment is restated in paragraph 8.

19. HMRC therefore appear to accept that the issue which the tribunal would have had to determine had the matter been fully aired at a hearing, was not restricted to the "theoretical" circumstances described in the ruling letter in which Linden Limited sought a ruling relating to the supply of land to a housing association with a back-to-back supply of construction services; instead, the issue was whether the supply of those services on the terms of the Merlin agreement comprised a single zero rated supply of completed dwellings, or two supplies, one of exempt land and the other of zero rated construction services.

20. This is not, frankly, very different from the appellants' submission that the deemed decision is limited to supplies made under the Merlin agreement. The appellants make the further submission that the decision is restricted to the specific period in which those supplies were made.

21. I have set out in the appendix extracts from *Newey CA*, and *Newey CJEU*. Neither party referred me to either case. However, to my mind for a tribunal to determine the nature of the supplies made between counterparties to a contract, it needs to consider, in detail, both the precise contractual terms on which the supplies were made, and also whether those contractual terms reflected the economic and commercial reality of the transactions. In the circumstances of the Linden appeal, those contractual terms were contained in the Merlin agreement.

22. By withdrawing from the Linden appeal, the tribunal is deemed to have upheld, without variation, the decision under appeal. And the evidence shows (and HMRC now appear to accept) that the decision sought by the ruling letter, and the ruling set out in HMRC's letter of 4 July 2018, was that the supplies made under the Merlin agreement comprised two supplies, one of exempt housing and the other of zero rated construction services. It was a specific ruling based on the terms of that agreement, and had the matter gone to tribunal, it is the terms of that agreement and the surrounding economic and commercial reality which would have been considered in detail.

23. I do not think as, contended orally by HMRC and as set out in the application, that the deemed decision extends beyond supplies made under the Merlin agreement. It was not a ruling in the abstract. It was a specific ruling relating to those supplies.

24. Whilst HMRC were able to consider the terms of that agreement, they were not able to forensically test whether the terms of that agreement reflected commercial and economic reality relating to the specific transaction. However, they were given some of that information in the ruling letter, and to my mind, when Linden Limited withdrew its appeal, it was tacitly accepting that the terms of the Merlin agreement reflected economic and commercial reality.

25. I find, therefore, both as a fact and as a matter of law that the deemed decision which arose as a result of the withdrawal of the Linden appeal was that supplies made under the Merlin agreement comprised two supplies, one of exempt housing and one of zero rated construction services.

CAUSE OF ACTION ESTOPPEL

The principle

26. In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 104 ("***Arnold***"), Lord Keith explained cause of action estoppel as follows:

> "Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened…The principles upon which cause of action estoppel is based are expressed in the maxims. *nemo debet bis vexari pro una et eadem causa* and interest *rei publicae ut finis sit litium*. Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action".

27. Those principles were considered and reaffirmed in *Virgin Atlantic v Zodiac* UKSC 2013 ("***Virgin***"), in which Lord Sumption gave the only judgment. After discussion of the principles, he confirmed that cause of action estoppel operated as an absolute bar to new proceedings, saying at [26]:

> "Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims".

Privity

28. In *Littlewoods Retail Ltd and others v HMRC* [2014] EWHC 868 (Ch) ("***Littlewoods***") *Henderson J* determined that, as regards privies:

> "…there must be a sufficient degree of identity between the successful defendant and the third party…having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party…".

Discussion

29. In summary Mr McKinley submits:

(1) The cause of action in the Linden appeal is identical to the relevant causes of action in these appeals. The cause of action in the Linden appeal was whether HMRC's decision that, where there is a supply of land with a back-to-back supply of construction services there are two separate supplies, is correct. In the present appeals the relevant causes of action are whether

HMRC's decision is correct that there are two separate supplies where there is a supply of land and a back-to-back supply of construction services.

(2) The decision in the Linden appeal therefore applies to all supplies consisting of land with a back-to-back supply construction services.

(3) The Merlin agreement was submitted for information purposes only and did not relate to supplies covered by the 2022 appeals.

(4) Linden Limited was the previous representative member of the Vistry VAT group and Vistry is the current representative member of that group. Linden Limited and Vistry are therefore privies.

(5) Linden was included in the appendix to the ruling letter. It is a company associated with Linden Limited. It is clear from the terms of the ruling letter that all companies mentioned in that appendix, whether members of the VAT group or simply associated companies, would be bound by, and benefit from, the ruling sought by that letter. There is therefore sufficient identification between Linden Limited and Linden, to make it just that they should be treated as privies.

30. In summary Mr Moss submits:

(1) The cause of action in the Linden appeal was whether the supplies made under the Merlin agreement comprised a single supply of completed dwellings, or two supplies, one of exempt land and the other of construction services. It did not extend to any VAT consequences of supplies made under other agreements with housing associations. The deemed decision, therefore, is limited to supplies made under the Merlin agreement for the specific periods in which those supplies were made. The deemed decision, therefore, cannot extend to any supplies in respect of the projects which are the subject of the 2022 appeals.

(2) The only companies which could be privies are those in the Vistry VAT group. It would not be just for Linden, an associated company which is 50% owned by an unconnected third party, to be bound by the deemed decision in the Linden appeal.

31. My view is:

(1) On the point regarding the cause of action I agree with Mr Moss. I have already concluded, at [15]-[25] of this decision, for the reasons expressed in those paragraphs, that the deemed determination which arose as a result of the withdrawal of the Linden appeal was limited to supplies made under the Merlin agreement. That determination was that there were two supplies, one of exempt housing and one of zero rated construction services. It did not determine that all supplies made by the Vistry VAT group to housing associations comprise two such supplies.

(2) The trial judge who will hear the 2022 appeals will need to decide the nature of the supplies made under the contracts which are in issue in those appeals. The principles the trial judge will need to follow, I respectfully suggest, are those set out in [5] – [7] of the appendix. In simple terms, he or she will need to undertake a rigourous analysis of the contractual terms in respect of each transaction. But more than that. There will need to be a detailed consideration of the commercial and economic circumstances surrounding each transaction. And then a final analysis of whether the contractual terms reflect the economic and commercial reality of the transactions.

(3) It is not possible for me to say that those matters have all been decided by the determination of the Linden appeal. Whilst that determination was that the terms of the Merlin agreement reflected commercial and economic reality of the arrangements between the counterparties in that transaction, that principle is limited to that particular transaction. It does not extend to the 2022 appeals. And that is the case even where the terms of the Merlin agreement are very similar, if not identical to, the terms of the contracts which are the subject of the 2022 appeals. Those contractual terms must be tested against commercial and economic reality in the particular circumstances of each transaction. It is not possible to say that the commercial and economic reality surrounding the Merlin agreement is identical to the commercial and economic reality surrounding each and every one of the projects which are the subject of the 2022 appeals. The cause of action in the 2022 appeals (the nature of the supplies under the specific agreements between those counterparties) is not identical to the cause of action in the Linden appeal (the nature of the supplies made under the specific arrangements between Vistry and Merlin under the Merlin agreement).

(4) In my view therefore cause of action estoppel does not apply in these circumstances. I do not therefore have to decide whether the appellants are privies. But if I needed to, I would decide that there is privity between Linden and Linden Limited. It is clear that Linden would have benefited from a positive ruling. It is therefore just that Linden should be bound by any decision in respect of that ruling.

ISSUE ESTOPPEL

The principle

32. In *Arnold* at p 105, Lord Keith defined issue estoppel as follows:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue".

33. In *Littlewoods* Henderson J said at [152]:

> "Issue estoppel is a well-established part of the law of *res judicata*. It is common ground that, in order for an issue estoppel to arise, three conditions need to be satisfied:
>
> (i) the same question must previously have been decided;
>
> (ii) the judicial decision which is said to create the estoppel must have been a final decision of a court of competent jurisdiction; and
>
> (iii) the parties to the prior judicial decision (or their privies) must have been the same persons as the parties to the subsequent proceedings in which the estoppel is raised (or their privies)".

34. In tax there is a more limited role for issue estoppel, following the Privy Council judgment in *Caffoor v Income Tax Commissioner* [1961] AC 584 ("***Caffoor***"). In the words of the headnote:

> "A question of liability to tax for one year was always to be treated as inherently a different issue from that of liability for another year…even though there might appear to be similarity or identity in the questions of law on which they respectively depended, and the principle of *res judicata* did not apply".

35. In *Littlewoods,* having first considered the case law, Henderson J concluded at [175] that there was:

> "no doubt that the *Caffoor* principle remains good law in England and Wales, at least in relation to income tax, corporation tax, capital gains tax and other annually assessed (or, nowadays, self-assessed) taxes, where the basic question for determination is the correct amount of tax payable for the relevant year or period of assessment".

36. At [190] he said:

> "I can see no good reason why the *Caffoor* principle, with suitable modifications, should not apply to [VAT] in a similar way, at least where the dispute relates to the amount of VAT chargeable on supplies of goods or services in one or more (usually quarterly) periods, or to assessments (whether of VAT, interest, penalties or surcharges) made for particular periods, or to claims for the repayment of VAT originally paid in respect of particular periods".

Discussion

37. In summary Mr McKinley submits:

(1) He repeats his submission set out at [29 (1)] above namely that the cause of action which was the subject of the Linden appeal, and thus which was dealt with by the deemed determination of that appeal, was that a supply of land together with a back-to-back supply construction services, comprised two supplies one of exempt land and the other of zero rated construction services. And this deemed decision extends to all such supplies made by those entities identified in the ruling letter.

(2) As regards privity, he repeats his submission set out at [29(5)] above.

(3) The Caffoor principle does not apply. The Linden appeal did not involve an assessment to VAT and therefore did not concern the liability for VAT in a specific period. It involved HMRC's determination of how supplies consisting of land with a back-to-back supply of construction services should be treated. This does not change from one year to another. Issue estoppel, therefore, applies in these circumstances and should be applied to the 2022 appeals.

38. In summary Mr Moss submits:

(1) He repeats his submissions at [30] above.

(2) In his view the Caffoor principle does apply. Issue estoppel should not apply to the 2022 appeals. Case law suggests that issue estoppel has a very limited application in tax cases as a particular decision only applies to the amount of tax chargeable for the particular period of assessment. There is no basis in law for treating the ruling as to the VAT due on specific supplies differently from an assessment of the VAT due on those supplies.

39. My view is:

(1) For the same reasons I have given at [31], I agree with Mr Moss on this point too. The particular issues which form a necessary ingredient for the determination of the 2022 appeals have not been litigated and determined by the deemed determination of the Linden appeal. The necessary ingredients for determination in the 2022 appeals will involve a detailed analysis of

the individual contractual terms of all the transactions in issue in those appeals, a similar analysis of the commercial and economic realities surrounding those transactions, and the final analysis as to the consequential nature of the supplies made in respect of those transactions. These have not been resolved by the ruling and deemed determination of the supplies made under the Merlin agreement.

(2) Given this conclusion, I do not need to determine the privity or Caffoor issues. However, as regards privity, I have already expressed my views at [31] above. As regards the application of the Caffoor principle, I can see no reason, as a matter of principle, why it should apply, and thus shut out the possibility of issue estoppel, in circumstances similar to those which I am considering. If there is a deemed determination relating to a ruling on the nature of supplies made under a particular contract (for example the Merlin agreement) for, for example, three VAT periods, it would seem bizarre if an appellant was able to claim that it was not bound by issue estoppel if it sought to litigate the nature of a supply under that contract in a subsequent VAT period. That ruling would apply to supplies made under that agreement and should apply to all subsequent periods.

ABUSE OF PROCESS

The principle

40. The principle of abuse of process was first crystallised in *Henderson v Henderson* (1843) 3 Hare 100, and was restated by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("***Gore Wood***") at page 31 as follows:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not….".

41. Lord Bingham continued at p 34 by rejecting a subsidiary argument made on behalf of Gore Wood that the rule in *Henderson v Henderson* did not apply, because the first action had ended in a compromise and not a judgment. He said:

> "An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing".

42. Lord Millett concurred, saying at p 59:

> "I agree that [abuse of process] is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding".

Discussion

43. In summary Mr McKinley submits:

(1) He repeats his submissions made in respect of cause of action estoppel and issue estoppel. The appellants are seeking to relitigate the same issues which were determined when Linden Limited withdrew the Linden appeal.

(2) What was determined then was the issue of whether supplies of land together with a back-to-back supply of construction services should be treated as a single supply of construction services rather than two separate supplies. This is identical to the issue being raised by the appellants in the 2022 appeals.

(3) If I were to reject the application, then HMRC will be vexed twice. Allowing the appellants a further bite at the cherry in relation to what is a settled issue flies in the face of the public policy interest of finality of litigation.

44. In summary Mr Moss submits:

(1) He repeated his submissions made in respect of cause of action estoppel and issue estoppel. The deemed determination which arose when Linden Limited withdrew the Linden appeal was limited to the nature of the supplies made under the Merlin agreement for the particular periods in question. It was not a general ruling that all supplies made by Linden Limited (and those entities identified in the appendix to the ruling letter) to housing associations comprised two supplies.

(2) The trial judge who deals with the 2022 appeals will need to consider each of the agreements between the various counterparties to determine the nature of the supplies made in respect of those agreements. Those agreements were not in issue in the Linden appeal.

(3) It would not be in the public interest to prevent the appellants from having the nature of those supplies determined, on a case-by-case basis, by a trial judge. It is in the public interest to ensure that taxpayers pay the correct amount of tax. HMRC are not being vexed twice in respect of the same matter nor are they being harassed.

45. My view is:

(1) Once again, for the reasons already given in this decision, I agree with Mr Moss. HMRC are not being vexed with the same matter twice. They have yet to be vexed by the new matters which will arise in the 2022 appeals. They are not being harassed. To my mind it would be

inequitable to prevent the appellants bringing their 2022 appeals before a trial judge who can consider the contractual arrangements, and commercial and economic realities surrounding those arrangements in detail and can come to a conclusion regarding the nature of the supplies made under those arrangements.

CONCLUSION AND DECISION

46. For the reasons given above, I have concluded that neither cause of action estoppel, nor issue estoppel, nor abuse of process apply to prevent the appellants bringing the 2022 appeals.

47. Given that these were the only grounds for the application, I dismiss the application, save that I agree that the two appeals should be joined and heard together.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 23rd OCTOBER 2023

APPENDIX

STRIKE OUT

The F-tT Rules

1. The relevant Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**") are Rules 2 and 8:

2. Rule 2(3) requires me to give effect to the over-riding objective when exercising any power under the Rules. The over-riding objective, as set out in Rule 2(1), is as follows:

> "The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly".

3. Rule 8 deals with strike out:

> **"8. Striking out a party's case**
>
> (1) …
>
> (2) …
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
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> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
>
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out…".

Strike out – case law

4. The legal principles which I must consider have been neatly set out in the Upper Tribunal in *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396:

> **"Approach to applications to strike out - legal principles**
>
> 31 At [30] of the decision, the judge applied the summary of principles set out by the Upper Tribunal in *HMRC v Fairford Group plc* [2014] UKUT 329; [2015] STC 156 ('*Fairford Group plc*'). The Upper Tribunal held (at [41]) that:
>
> > "In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to

summary judgment under Pt 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all".

32. It was common ground that the application should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Part 24).

33. Although the summary in *Fairford Group Plc* is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a fanciful prospect of success: *Swain v Hillman* [2001] 1 All ER 9;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the

case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725"".

VAT

Relevance of contractual terms

5. The approach which a court should adopt when considering the nature of a supply is set out in the Court of Appeal decision in ***HMRC v Newey*** [2018] EWCA Civ [2018] STC 1054 ("***Newey CA***"):

"WHEN IS A SUPPLY OF SERVICES EFFECTED FOR CONSIDERATION?

[38] It has long been established that a supply of services (such as advertising) is effected 'for consideration', within the meaning of art 2(1) of the Sixth Directive, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, and the remuneration received by the provider of the service constitutes the value actually given in return for the service supplied to the recipient: see the judgment of the CJEU in the present case at para 40, referring to *Macdonald Resorts Ltd v Revenue and Customs Comrs* (Case C-270/09) EU:C:2010:780, [2011] STC 412, [2010] ECR I-13179, at para 16 and the case law there cited. It follows that the concept of a supply of services is 'objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person': ibid, at para 41.

[39] It does not, however, follow from the requirement for there to be a 'legal relationship' between the supplier and the recipient of a supply of services that the relationship must be contractual, or (if it is) that the terms of the contract are necessarily conclusive. As the CJEU put it (again in the present case) at para 42:

'As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities

is a fundamental criterion for the application of the common system of VAT …'.

The Court cited as authority for this proposition *Revenue and Customs Comrs v Loyalty Management UK Ltd, Baxi Group Ltd v Revenue and Customs Comrs* (Case C-53/09) EU:C:2010:590, [2010] STC 2651, [2010] ECR I-9187, at paras 39 and 40.

[40] Thus the contractual arrangements agreed between the parties cannot, by themselves, be determinative of the VAT analysis, although they will usually provide the starting point, and are likely to be conclusive unless shown to be inconsistent with underlying economic and commercial realities: see *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24, [2013] STC 943, [2013] 2 All ER 907, at [27] per Lord Reed JSC, and *Revenue and Customs Comrs v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] STC 1509, [2016] 4 WLR 87, at [47] per Lord Neuberger PSC".

6. This reflects the view of the court in ***HMRC v Newey*** (Case C-653/11) [2013] STC 2432 ("***Newey CJEU***") where one of the questions referred was:

"In circumstances such as those in the present case, what weight should a national court give to contracts in determining the question of which person made a supply of services for the purposes of VAT? In particular, is the contractual position decisive in determining the VAT supply position?"

7. The answer to that question was given in paragraphs 42 to 44 of the CJEU's decision as follows:

"42 As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 Loyalty Management UK and Baxi Group [2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).

43 Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.

44 It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.

45 That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions…".

Effect of withdrawal

8. Section 85 VAT Act 1994 ("**VATA**") is headed "Settling appeals by agreement" and reads:

"(1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, HMRC and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated

(a) as upheld without variation, or

(b) as varied in a particular manner, or

(c) as discharged or cancelled,

the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement.

(2) …

(3) …

(4) Where

(a) a person who has given a notice of appeal notifies HMRC, whether orally or in writing, that he desires not to proceed with the appeal; and (b) 30 days have elapsed since the giving of the notification without HMRC giving to the appellant notice in writing indicating that they are unwilling that the appeal should be treated as withdrawn, the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and HMRC had come to an agreement, orally or in writing, as the case may be, that the decision under appeal should be upheld without variation...”.