[2017] UKFTT 664 (TC)

TC06091

Appeal number: TC/2009/13528
TC/2009/10688
TC/2009/10815
TC/2009/14530

VALUE ADDED TAX –claim for repayment of overpaid tax refused – preliminary issue – whether right to make claim retained by the appellants or transferred by them on the sale of their respective businesses

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) CHALLACOMBE'S LIMITED **Appellant**
(2) LINDOP BROTHERS (QUEENSFERRY) LIMITED
(3) LINDOP BROTHERS (WREXHAM) LIMITED
(4) MILLS PARKES AND COLLEDGE LIMITED

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 21 June 2017

Mr Timothy Brown of counsel instructed by The VAT People appeared for the Appellants

Mr Barry Sellers of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. This decision concerns preliminary issues which arise in relation to these four appeals. The preliminary issues have been heard together because the Appellants share the same representatives and the principles to be applied in each case are the same.

2. In each appeal the Appellant was a motor dealer and claims to be entitled to a refund of overpaid VAT. The claims arise out of the historic treatment of supplies of demonstrator cars and the output tax accounted for by the Appellants. They are all "Fleming Claims" prompted by the decision of the House of Lords in *Michael Fleming t/a Bodycraft) and Conde Nast Publications Ltd v Commissioners of Revenue & Customs [2008] UKHL 2*.

3. The circumstances of each claim are different, but they share certain common features. In particular each claim was made following the decision in Fleming and prior to the deadline of 31 March 2009 introduced following that decision. Each claim was refused by the Respondents on the ground that the Appellants had transferred their right to make the claim on a sale of the underlying business prior to making the claim.

4. By a direction released on 12 September 2016 a preliminary issue was directed to be heard in relation to each appeal. The preliminary issue was formulated as follows:

> "…whether the Appellants have retained the right to bring the claims which are the subject matter of the appeals and/or to pursue the present appeals."

5. I set out below my findings of fact in relation to each appeal under separate headings. Those facts are based on a statement of undisputed facts, the documentary evidence before me and the oral evidence of the decision-making officers in relation to each Appellant, Mr Paul Jarvis, Mr Leo Donovan and Ms Yvonne Chester.

6. The decision in each appeal turns on whether as a matter of fact and law the right to make a claim was transferred prior to the claim being made. The answer to that question depends on the proper construction of the individual sale agreements. Before considering the facts and the decision on each appeal I shall set out the principles of construction to be applied in determining whether or not the Appellants did retain the right to bring the claims they have made.

Principles to be applied

7. It was common ground that the right to make a claim for overpaid VAT pursuant to section 80 Value Added Tax Act 1994 can be the subject of an assignment or transfer (see *Midlands Co-operative Society v Revenue & Customs Commissioners [2008] EWCA Civ 305*). The issue in each case is whether or not the right was assigned or transferred as part of a sale of the business.

8. In each case there was a written sale agreement whereby each appellant sold its business. For the principles of construing those agreements I was referred in detail to the decision of the Court of Appeal in *Crystal Palace FC (2000) Ltd v Paterson [2005] EWCA Civ 180*, and to the decision at first instance of the deputy High Court Judge. The issues in that case arose out of the liquidation of Crystal Palace FC 1986 Ltd ("CP 1986") and whether certain sums were payable by Crystal Palace FC 2000 Ltd ("CP 2000") to the liquidator of CP 1986. It was necessary therefore to construe the sale agreement whereby CP 1986 sold certain assets to CP 2000. Clause 2.1 of the agreement listed the assets which were included in the sale and clause 2.2 listed the assets which were not included.

9. At first instance the judge sought to construe the meaning of certain words used in the Agreement. He summarised the position as follows:

> "31. In my judgment, the first matter to note is that the term "other debts" and "outstanding" are not terms of art. My task, therefore, is to determine what was the intention of the parties in their use of the terms in the context in which they used them in clause 2.2(ix) of the Business Sale Agreement."

10. It seems to me that is the most that one can derive by way of principle from the High Court decision and it is not controversial. The Court of Appeal expanded upon that statement and identified the approach to construction of contracts as follows:

> " 17. As already indicated, the question is whether the contingent fees, or more accurately the rights to the contingent fees, were sold to CP 2000 or not. That depends upon the true construction of the agreement. Like any contract, the agreement must be construed in its context having regard to its surrounding circumstances or factual matrix. I accept Mr Marshall's submission that the relevant context is important and indeed that the court should avoid literal interpretation of the words.
>
> 18. The most recent statement of that principle in the House of Lords can be seen in paragraphs 18 and 19 of the judgment of Lord Steyn in Sirius International Insurance Co (Publ) v FAI General Insurance Ltd and others [2004] UKHL 54, 2004 1 WLR 3251 where he said this:
>
> > '18. The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.
> >
> > 19. There has been a shift from literal methods of interpretation towards a more commercial approach. In *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201, Lord Diplock, in an opinion

concurred by his fellow Law Lords, observed: 'if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.' In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771, I explained the rationale of this approach as follows:

> 'In determining the meaning of the language of a commercial contract ... the law ... generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.'

The tendency should therefore generally speaking be against literalism. What is literalism? It will depend on the context. But an example is given in *The Works of William Palely* (1838 ed), vol III, p 60. The moral philosophy of Palely influenced thinking on contract in the 19th century. The example is as follows: the tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process. This approach was affirmed by the decisions of the House in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 775 E-G, per Lord Hoffmann and in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913 D-E, per Lord Hoffmann.'"

11. The Court of Appeal were seeking to determine whether a certain asset, namely contingent transfer fees, were included in the assets sold by CP 1986 to CP 2000. However, I do not consider that it is a worthwhile exercise for present purposes to look and see how the judge and the Court of Appeal construed the particular contract that they were considering. The statements of principle described above must be applied to the particular contract of each Appellant in present appeals.

12. I was referred to HMRC's guidance to officers on historical Fleming Claims in the context of the transfer of a going concern which states as follows:

> "As a general rule of thumb, it is not unreasonable to work on the basis that if the SPA [share purchase agreement] purports to transfer all of the assets, liabilities, rights and property, it is probably fair to conclude that the right to make any output tax claims will have been transferred. If, on the other hand, the SPA contains what appears to be an exhaustive list of what was transferred and the right to make output tax claims is not on that list (whether explicitly or implicitly), you can reasonably conclude that it has not been transferred."

13. It does not seem to me that this passage adds anything to the principles of law described by the Court of Appeal. I will consider the position in each appeal separately, including my findings of fact in relation to each appeal, with those principles in mind.

14. I can conveniently deal at this stage with submissions of Mr Brown based on the Supreme Court decision in *Commissioners for HM Revenue & Customs v Secret Hotels2 Ltd [2014] UKSC 16*. That case was concerned with the importance of contractual terms in categorising a transaction for VAT purposes. In particular the importance of economic and commercial realities in identifying the supplier and the recipient of a supply of services. As I understand Mr Brown's submission it was to the effect that the commercial and economic reality could somehow override would otherwise be the true construction of the contract.

15. In my view Secret Hotels2 Ltd has no application in the present case which involves determining whether, as a matter of law, a VAT registered person has transferred the right to make a claim for a refund of VAT. That involves construing the terms of the contract as a matter of domestic law. Having said that, I accept that the factual matrix against which the contract is to be construed includes the fact that there existed or potentially existed at the time of the contract a claim for repayment of VAT which as a matter of law could be transferred to another person. As Arden LJ stated in Midlands Co-operative Society at [9]:

> " 9. …VATA and the regulations thereunder take effect subject to the general law unless the general law is excluded. Under the general law, the right to a repayment of monies overpaid to HMRC is a chose in action. Under the general law, choses in action are assignable under section 136 Law of Property Act 1925."

16. The Court of Appeal went on to hold that VATA 1994 and the regulations did not exclude the general law. At [31] Arden LJ stated as follows:

> "31. In those circumstances, I come to the same conclusion as the judge that there is nothing to exclude the ordinary law to the effect that a claim under s 80 may be assigned."

17. The Supreme Court in Secret Hotels2 Ltd did however helpfully summarise the extent to which the behaviour or statements of the parties subsequent to a written agreement may legitimately be taken into account in construing that agreement. At [33] Lord Neuberger stated as follows:

> " 31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.

32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J said in *A1 Lofts Ltd v Revenue and Customs Commissioners* [2010] STC 214, para 40, in a passage cited by Morgan J:

> 'The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.'

33. In English law it is not permissible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement – see *FL Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. The subsequent behaviour or statements of the parties can, however, be relevant, for a number of other reasons. First, they may be invoked to support the contention that the written agreement was a sham – ie that it was not in fact intended to govern the parties' relationship at all. Secondly, they may be invoked in support of a claim for rectification of the written agreement. Thirdly, they may be relied on to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract (agreed by words or conduct). Fourthly, they may be relied on to establish that the written agreement represented only part of the totality of the parties' contractual relationship."

18. None of the appeals before me involve the four situations where regard may be had to the subsequent behaviour or statements of the parties. For present purposes therefore the subsequent behaviour or statements of the Appellants or their contracting counter-parties cannot be used as an aid to interpreting the various sale agreements. For the sake of completeness however I have recorded such behaviour or statements where it was relied upon by Mr Brown.

Challacombe's Limited

19. On 27 January 1998, Challacombe's Limited ("CL") made a claim for repayment of output tax on supplies of demonstrator vehicles. The claim was limited to the period from 1 November 1994 in line with the three year cap which appeared to

be in force at that time, but reserving the right to go back further if it transpired that the three year cap was not effective. It is not clear from the evidence what happened to that claim.

20. In or about October 1999 CL entered into a written agreement for the sale of its business and certain assets to Challacombe's (Bury) Limited. There was no signed copy of the sale agreement in evidence but there was no dispute that the terms of the sale were evidenced by an unsigned version simply dated "October 1999". The following were relevant terms of the sale agreement:

> " **DEFINITIONS**
>
> 1. In this Agreement the following terms shall have the following meanings:
>
> | | |
> |---|---|
> | 'Business' | means the business carried on by the Vendor as a Daihatsu Dealership … |
> | 'Debts' | means all books and other debts due to the Vendor at the Completion Date … |
> | 'Sale Assets' | means all the Vendor's assets used by them in connection with the Business at the Completion Date but for the avoidance of doubt does not include any motor vehicles. |
>
> **SALE**
>
> 2.1 The Vendor agrees to sell and the Purchaser agrees to buy the Business and the Sale Assets
>
> …
>
> **DEBTS**
>
> 9. The Purchaser shall discharge all the liabilities and shall adopt and perform all contracts outstanding at the Completion Date binding on the Vendor and shall at all times compensate the Vendor in full on demand for all liability in respect of such liabilities and contracts."

21. It was agreed by all parties that the reference to "books" in the definition of "Debts" was a typographical error, and it ought to have referred to "book", as in book debts. However, the term "Debts" was used in the written contract only in clause 9 which was a reference to debts owed by CL so in any event it is not clear why the contract defined debts due to CL.

22. There is no connection between CL and Challacombe's (Bury) Ltd. The sale price was £90,000. On 4 October 1999 accountants on behalf of CL wrote to HM C&E explaining that it was selling the business and asking for confirmation that the

transaction would properly be regarded as the transfer of a going concern ("TOGC"), in which case no VAT would be chargeable on the sale price. HM C&E confirmed on the basis of the information provided that the transfer would be a TOGC.

23. On 2 November 1999 CL wrote to all its customers in a standard letter which included the following:

> "Nick and Carol have sold the assets and goodwill of the business to Peter and Tracey West who will trade from 1st November 1999 as Challacombe's (Bury) Limited…
>
> How will this affect you? Well Nick and Carol hope not at all, except that all monies due on this statement are due to Challacombe's Ltd, **NOT** Challacombe's (Bury) Ltd."

24. This letter is not on the face of it consistent with the sale agreement. There is nothing in the sale agreement to indicate that books debts were retained by CL. It was only the stock of motor vehicles that was excluded from the sale assets.

25. On 3 March 2008, CL submitted a claim for overpaid VAT pursuant to section 80 Value Added Tax Act 1994 in respect of supplies of demonstrator vehicles. On 15 September 2008, the claim was agreed by HMRC and a repayment of £41,138 was made, together with interest of £49,977.

26. On 25 March 2009, prior to the Fleming claim deadline of 31 March 2009, CL submitted an additional claim for overpayment of VAT on demonstrator vehicles. The additional claim was made on the basis that calculation of the previous claim by reference to certain guidance tables had been incorrect. Such a claim is commonly referred to as an "Italian Uplift Claim". HMRC refused that claim and the present appeal was notified to the Tribunal. It was then stayed for a long period behind other motor trader appeals before the Tribunal.

27. The guidance tables used by HMRC to calculate Italian Uplift Claims were subsequently revised and on 19 February 2015 CL set out revised details of their claim, together with an adjustment for input tax known as a "Nordania adjustment". The claim pursued by CL in the present appeal is £19,674 plus interest. There was then correspondence between CL and HMRC directed towards the issue as to whether CL retained any right to make the Italian Uplift Claim following disposal of the business in 1999.

28. It is common ground that Challacombe's (Bury) Ltd has not made any claim for repayment of VAT in relation to periods prior to 1 November 1999 when it purchased the business of CL. Further, the Respondents accept that if their arguments are right, then the claim made in 2008 should never have been paid to CL.

29. Mr Sellers submitted that the business and all assets used in the business save the motor vehicles were sold to Challacombe's (Bury) Ltd. There was no express exclusion from the assets sold of the right to make a claim for overpaid VAT. It

followed that the right to make a claim was transferred to Challacombe's (Bury) Ltd and CL retained no such right.

30. Mr Brown relied on what was said in Secret Hotels2 and submitted that the subsequent behaviour of Challacombe's (Bury) Ltd and of HMRC could be taken into account in construing the written agreement. In particular the fact that Challacombe's (Bury) Ltd did not make any claim for repayment of VAT referable to the period when the business was owned by CL and that HMRC paid the subsequent claim of CL made in 2008. I do not accept that this evidence can be taken into account. It is not evidence that the written agreement represented only part of the totality of the contractual relationship and Mr Brown did not rely on it as such. The written agreement was clearly intended to be the whole agreement between CL and Challacombe's (Bury) Ltd. In relying on this material I consider that Mr Brown is effectively seeking to re-write the agreement.

31. The context of the sale agreement was a straightforward sale of the business of a VAT registered motor trader in an arm's length transaction. CL was aware and Challacombe's (Bury) Limited may be taken to have been aware that there were or might be potential claims for repayment of VAT. The transaction was intended to be the transfer of a going concern for VAT purposes, but that in itself shines no light on whether the parties intended that the right to make claims for repayment of VAT would remain with the vendor or be transferred to the purchaser. It was common ground that the transfer of a going concern for VAT purposes does not require all the assets to be transferred.

32. It is clear from the sale agreement that the Business and the Sale Assets were to be transferred to the purchaser. The only form of excluded asset was the stock of motor vehicles held by the vendor at the completion date. The Sale Assets were defined as all assets used in connection with the Business.

33. I am satisfied that the right to make a claim for repayment of overpaid VAT was an asset used in connection with the business. It was an asset that was capable of assignment in the same way as any other chose in action used in connection with the business. The sale agreement did not attempt to specifically identify any assets or class of assets to be included in the sale. It did identify assets to be excluded from the sale, but limited those to the motor vehicles in stock at the completion date. A reasonable commercial person would construe the sale agreement as including all business assets save the stock of motor vehicles.

34. Mr Brown submitted that no-one was contemplating future claims, but that cannot be inferred from the sale agreement. On the basis of the evidence as to context at the time of the agreement I am not satisfied that it was the case. Mr Brown also relied on the fact that the business was sold for £90,000 when the claims eventually made were worth approximately £60,000 plus significant amounts of interest. I do not consider that those facts assist CL where nothing is known from the evidence before me as to what view the parties might have taken to the merits or quantum of any potential claim or as to what liabilities the purchaser took on pursuant to clause 9 of the sale agreement.

35. In my judgment the words of the contract properly construed in the context of the surrounding circumstances have the effect that the right to make a claim for repayment of overpaid VAT was transferred by CL to Challacombe's (Bury) Ltd.

Lindop Brothers (Queensferry) Limited

36. In or about May 2003, Steve Hopewell Holdings Ltd bought 100% of the shares of D & K Lindop Holdings Ltd which itself owned 100% of the shares of Lindop Brothers (Queensferry) Limited ("LBQL") and Lindop Brothers (Wrexham) Ltd. The latter two companies were trading subsidiaries and each was separately registered for VAT. Immediately after the purchase, on 19 May 2003 LBQL entered into an agreement to sell its business to Steve Hopewell Holdings Limited. The following were relevant terms of the sale agreement:

"1. Definitions and Interpretation

1.1 In this Agreement the following words and expressions shall have the following meanings:

'Assets' all the property, assets and rights of the Vendor used or for use exclusively in connection with the Business including the Business Intellectual Property, the Permits, the benefit of the Contracts, the Fixed Plant and Machinery, the Goodwill, the Books and Records, the Business Information, the Loose Plant and Machinery and the Prepayments Cash and Debtors, all as sold to the Purchaser pursuant to clause 2;

'Business' the business carried on by the Vendor at the Premises as at the Completion Date;

'Debtors' all debts owing to the Vendor at the Completion Date (whether or not due and payable) for any goods or services supplied in the course of trading in the Business prior to the Completion Date.

2. Sale and Purchase of Business

2.1 The Vendor shall sell with full title guarantee and the Purchaser shall purchase the Business as a going concern and the Assets as at the Completion Date on and subject to the terms and conditions of this Agreement.

8. Transfer of Further Assets

8.1 The Vendor undertakes to the Purchaser to procure that if it owns any assets which are used by the Vendor in connection with the Business but which for whatever reason do not fall within the definition of the Assets, then the Vendor shall:

8.1.1 (if such assets are used by the Vendor exclusively in connection with the Business) transfer gratuitously such assets absolutely to the Purchaser; or

> 8.1.2 (if such assets are not used by the Vendor exclusively in connection with the Business) grant to the Purchaser a gratuitous, perpetual, worldwide licence to use such assets for the purpose of the Business."

37. The completion date was the date of the agreement, namely 19 May 2003. The sale agreement was signed by the same two individuals as director and director/secretary of both LBQL and the purchaser. One signature appears to be that of Steve Hopewell, signing on behalf of both companies. After 19 May 2003, LBQL ceased to trade and VAT on supplies referable to what had been its business was accounted for under the VAT registration of Steve Hopewell Holdings Ltd.

38. The material before me included a letter dated 6 July 2015 from a director of Steve Hopewell Holdings Ltd to LBQL's representative. The director stated that LBQL retained the right to make claims for overpaid VAT, and it did so in the light of "talk within the industry at the time". I take that to be a reference to May 2003. The director stated in his letter that the companies had received specific advice that the claims had to be made in the name of the individual trading companies and not the name of the holding company. I have not seen any direct evidence as to the content of any such advice, who gave it or when it was given. In those circumstances it is not something that I should take into account as part of the surrounding circumstances in which the sale agreement was made.

39. Shortly after completion of the sale agreement, on 29 June 2003 LBQL submitted a claim to HM C&E for repayment of overpaid output tax on supplies of demonstrator vehicles pursuant to section 80 VATA 1994. HM C&E repaid a sum in respect of that claim on 24 August 2004. It is not clear how much was repaid, the Statement of Undisputed Facts states it was £60,823 but Mr Brown for the Appellants stated that it might have been approximately £98,000. Nothing turns on the precise amount. Interest amounting to £74,362 was also paid on 25 October 2004.

40. On 24 August 2005, LBQL lodged a form VAT 7 *Application to Cancel Your Registration* with HM C&E. LBQL has stated that this was done at the request of HM C&E because the company was no longer trading but nothing turns on what prompted it to be sent. The VAT 7 stated that the reason for cancellation was that LBQL had transferred its business as a going concern to Steve Hopewell Holdings Ltd. The transaction was described as the "hive up of trade and assets to new holding company". In response to question 6(v) on the VAT 7 LBQL stated that all stocks and assets were transferred. Question 7 asked for an estimate of the total gross value including VAT of the stocks and assets on hand for which VAT is due. The box was left blank and no estimate was given.

41. On 24 March 2009, LBQL submitted a further voluntary disclosure in the nature of an Italian Uplift Claim in the sum of £14,642. The claim was rejected by HMRC by letter dated 6 May 2009. LBQL notified the present appeal to the Tribunal on 3 June 2009. The appeal was then stayed for a long period behind other motor trader appeals proceeding before the Tribunal.

42. On 19 February 2015, LBQL set out revised details of their claim, together with an adjustment for input tax known as a "Nordania adjustment". The claim pursued by LBQL in the present appeal is £38,712 plus interest. There was then correspondence between LBQL and HMRC directed towards the issue as to whether LBQL retained any right to make the Italian Uplift Claim following disposal of the business in 2003.

43. It is common ground that Steve Hopewell Holdings Ltd has not made any claim for repayment of VAT in relation to periods prior to 19 May 2003 when it purchased the business of LBQL. Further, the Respondents accept that if their arguments are right then the claim made in 2003 should never had been paid to LBQL. However these are matters subsequent to the agreement which for reasons set out above cannot be taken into account in construing the agreement.

44. Mr Brown referred me to VAT Notice 700/11 which gives guidance as to cancelling a VAT registration. Section 7 of the Notice refers to business assets and stock on hand at the time of deregistration. It states as follows:

> "**7.1 What do I have to do about my stocks and assets?**
>
> When you deregister, you usually make what is known as a deemed supply of the goods you have on hand.
>
> This means you may have to account for VAT on some of your business assets and stock on hand …
>
> **7.2 What must I include?**
>
> You must include assets such as:
>
> - interests in land …
> - tangible goods … on which you claimed VAT when you bought them
>
> You do not have to include intangible assets such as patents, copyrights and goodwill."

45. HMRC relied on the fact that the VAT 7 indicated that all assets of the business were transferred. Mr Brown suggested in the light of Notice 700/11 that Box 7 of the VAT 7 only required a vendor to include tangible assets and that was why Box 7 had been left blank. However, the way in which the VAT 7 works is that if Box 6C is ticked to indicate that the business has been transferred as a going concern and then Box 6(v) is ticked to indicate that all stocks and assets were transferred, then the person completing the Form VAT 7 is directed to "go to question 8", thus bypassing question 7. The absence of any response to Box 7 therefore provides no indication as to whether or not the right to make a claim for overpaid VAT was retained by LBQL.

46. In any event, the completion of Form VAT 7 is behaviour subsequent to the agreement and for the reasons given above it cannot be used as an aid to construing the sale agreement.

47. Mr Sellers submitted that the right to claim overpaid VAT was an asset used or for use exclusively in the business of LBQL. It therefore formed part of the "business" and the "assets" sold to Steve Hopewell Holdings Ltd. Even if there was any doubt about that, the claim was covered by clause 8.1 which he described as a "catch all".

48. Mr Brown submitted that Steve Hopewell was a signatory for all parties so that he must have known exactly what was being transferred from LBQL to Steve Hopewell Holdings Limited. The fact that the latter company made no claim for repayment indicated his intention that the right to make a claim was not transferred.

49. I accept as part of the context in which the sale agreement was executed that this was not an arm's length transaction. The vendor and the purchaser were under common ownership at the time of the transaction. However, both were VAT registered and the fact of common ownership does not indicate either way what was intended in relation to claims for repayment of VAT. The fact that the claim was subsequently made by LBQL is subsequent behaviour which is not to be taken into account in construing the words of the contract.

50. A claim for repayment was made to HM C&E in June 2003, only 7 weeks after completion of the sale agreement. Again, that is subsequent behaviour which cannot be taken into account in construing the sale agreement.

51. Mr Brown focussed his arguments on the subsequent conduct which as a matter of law I am unable to take into account. He did not argue that the natural and ordinary meaning of the words "used or for use exclusively in connection with the Business" was not apt to cover the right to make a claim for repayment of VAT. Nor did he suggest that commercial common-sense favoured a different construction.

52. It seems to me that the words of the contract are clear. The definition of "Assets" is all assets and rights of LBQL used or for use exclusively in connection with the business. The list of assets which follows in the definition are said to be included in those assets but on any fair reading the listed assets cannot be said to be exhaustive (cp Crystal Palace FC (2000) Limited where the list of assets sold was held to be exhaustive). Clause 8 of the agreement supports that conclusion. As Mr Sellers said, it is a "catch all" provision so that any assets not specifically identified were intended to be transferred to the purchaser.

53. In my judgment the words of the contract properly construed in the context of the surrounding circumstances have the effect that the right to make a claim for repayment of overpaid VAT was transferred by LBQL to Steve Hopewell Holdings Limited.

Lindop Brothers (Wrexham) Limited

54. There is no material difference between LBQL and Lindop Brothers (Wrexham) Limited ("LBWL") in relation to the issues which arise. I will simply record that there was an identical sale agreement to Steve Hopewell Holdings Limited dated 19 May 2003. In June 2003 LBWL made a claim pursuant to section 80 VATA 1994 and

received a refund of £28,545 on 24 August 2004 together with interest of £32,408 on 25 October 2004. A further voluntary disclosure on 24 March 2009 claimed a sum of £7,536. The claim presently pursued by LBWL is £17,411.

55. Both parties approached the appeal of LBWL on the basis that it was identical to that of LBQL and that the same result would follow. In the circumstances and for the reasons given in relation to LBQL I am satisfied that the words of the contract properly construed in the context of the surrounding circumstances have the effect that the right to make a claim for repayment of overpaid VAT was transferred by LBWL to Steve Hopewell Holdings Limited.

Mills Parkes & Colledge Limited

56. At some stage in 2003 Mills Parkes & Colledge Ltd ("MPC") entered into an agreement to sell its business to South Cleveland Garages Limited. This was an arm's length transaction. There was no signed copy of the sale agreement in evidence. The front page and interpretation section of a draft agreement dated 6 August 2003 was available although the transfer date was expressed to be 1 August 2003. The following were relevant provisions in that draft and it was not disputed that they were contained in a final signed version of the sale agreement:

> "1. **INTERPRETATION**
>
> 'Business Assets'means all the rights and assets used in the Business at the Transfer Date, including:-
>
> (a) the contracts;
>
> (b) the Goodwill;
>
> (c) the Intellectual Property;
>
> (d) the Plant and Equipment;
>
> (e) the Vehicles;
>
> (f) the Commercial Information;
>
> (g) the Selected Stock; and
>
> (h) the benefit of Prepayments
>
> except for any such which are Excluded Assets
>
> 'Debtors' means all debts invoiced and owed to the Vendor in connection with the Business at the Transfer Date or (as the context requires) any person indebted to the Vendor in respect of any such debt
>
> 'Excluded Assets' means:-
>
> (a) cash in hand or at bank
>
> (b) the Debtors;…
>
> (f) the benefit of any right or claim of the Vendor exclusively relating to or arising from any Excluded Asset "

57. MPC made a claim for repayment of overpaid VAT pursuant to section 80 VATA 1994 on 27 June 2003. I find that it was made prior to the disposal of the business. The claim was settled on 8 September 2008 and HMRC repaid £19,219 plus interest of £23,696 to MPC.

58. On 16 February 2004 MPC submitted a form VAT 7 applying to cancel its registration on the basis that its business had been transferred as a going concern to South Cleveland Garages Ltd. The date of transfer was stated to be 31 July 2003. On 2 March 2004 HMRC cancelled MPC's VAT registration with effect from 31 July 2003.

59. On 24 March 2009 MPC submitted a further voluntary disclosure in the nature of an Italian Uplift Claim in the sum of £4,104. The claim was rejected by HMRC by letter dated 23 September 2009. MPC notified the present appeal to the Tribunal on 30 September 2009. The appeal was then stayed for a long period behind other motor trader appeals before the Tribunal.

60. On 17 February 2015 MPC set out revised details of their claim, together with an adjustment for input tax known as a "Nordania adjustment". The claim pursued by MPC in the present appeal is £12,580 plus interest. There was then correspondence between MPC and HMRC directed towards the issue as to whether MPC retained any right to make the Italian Uplift Claim following disposal of the business in 2003.

61. In the course of that correspondence on 15 September 2015 MPC provided page 7 of what appears to be a draft sale agreement last saved on 6 August 2003. That page simply provided various definitions, including the definition of "excluded assets" quoted above. On 16 September 2015 MPC provided pages 4 to 9 of the draft sale agreement containing the extracts quoted above.

62. It is common ground that South Cleveland Garages Limited has not made any claim for repayment of VAT in relation to periods prior to 1 August 2003 when it purchased the business of MPC. Further, the Respondents accept that if their arguments are right, then the claim made in 2003 should never have been paid.

63. Mr Sellers submitted that the right to reclaim overpaid VAT fell within the definition of "business assets" because it was an asset used in the business which did not fall within the definition of "excluded assets".

64. It is unfortunate that no complete copy of the sale agreement is available, but both parties were content for me to determine the preliminary issue on the basis of extracts from the draft agreement.

65. The position in relation to MPC is similar to that in relation to LBQL. I am satisfied that the definition of "Business Assets" is apt to include claims for repayment of overpaid VAT. Such claims do not fall within any of the specific assets listed at (a) to (h) of the definition but the reference to those specific assets is inclusionary and not exhaustive. I am satisfied that claims for repayment of overpaid VAT are "rights and assets used in the Business" according to the natural and

ordinary meaning of those words. Neither the context of the agreement nor commercial common-sense favours any different construction.

66. Mr Brown did not seek to argue that the right to make a claim for repayment of VAT was an "Excluded Asset" as defined in the sale agreement. In correspondence MPC had contended that the right to claim repayment of overpaid VAT was a Debtor and therefore an Excluded Asset. No arguments were addressed to me in relation to that proposition but I doubt very much whether an unquantified and at that stage unidentified Italian Uplift Claim could be fairly described as a debt at the time of the agreement. If there was no debt then if follows that there could be no right or claim of the vendor arising out of a debt within paragraph (f) of the definition of Excluded Assets.

67. For the reasons given I am satisfied that the terms of the sale agreement properly construed in the context of the surrounding circumstances have the effect that the right to make a claim for repayment of overpaid VAT was transferred by MPC to South Cleveland Garages Limited.

Conclusion

68. For the reasons I have given the answer to the preliminary issue in each appeal is that the Appellants did not retain the right to bring the claims which are the subject matter of the appeals and/or to pursue the present appeals. On that basis all parties should make written submissions within 28 days of the release of this decision as to whether the appeals should be struck out pursuant to Rule 8 of the Tribunal Rules.

69. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 05 SEPTEMBER 2017