



Neutral Citation: [2023] UKFTT 736 (TC)

Case Number: TC08919

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

London

Appeal reference: TC/2022/01100
TC/2022/01177

STAMP DUTY LAND TAX—Options and rights of pre-emption (s 46 FA 2003)—Whether a reservation agreement is an option or right of pre-emption—If so, whether linked transactions consisting of (1) the acquisition of an option or right of pre-emption to acquire a lease in respect of land that is residential property, and (2) the acquisition of that lease, are subject to Stamp Duty Land Tax at the mixed rate rather than at the residential rate (ss 55(1C) and 108 FA 2003)

Heard on: 23 – 24 May 2023
Judgment date: 3 August 2023

Before

TRIBUNAL JUDGE CHRISTOPHER STAKER

Between

(1) LANDMASTER INVESTMENT LIMITED

and

(2) WADHA TURJEM S AL ZOEBI

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Patrick Boch, counsel, instructed by Goldstone Tax Limited

For the Respondents: Michael Farrell, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

1. The Appellants' application dated 12 July 2023 for permission to make further post-hearing written submissions "on the issue of the status of the purchasers' rights in connection with property that has not yet been constructed" is refused, and if the Appellants have applied for a direction that certain HMRC arguments be excluded from consideration, or for permission to adduce additional evidence, that application is also refused.
2. In appeal number TC/2022/01100, the appeal is dismissed, and the closure notice dated 12 October 2020 is confirmed.
3. In appeal number TC/2022/01177, the appeal is dismissed, and the closure notice dated 3 November 2020 is confirmed.

REASONS

SUMMARY

4. In each of these designated lead appeals, a potential purchaser entered into a "reservation agreement" with a vendor, expressing the wish to purchase a specified apartment in a new-build residential property development for a specified price. In each case, the reservation agreement provided that the potential purchaser was to pay a specified reservation fee to the vendor, which was some 0.2% to 0.3% of the purchase price. Each reservation agreement stated that the reservation period was for a specified number of days (10 working days in appeal number TC/2022/01100 (the "first appeal"), and 21 days in appeal number TC/2022/01177 (the "second appeal")), after which the reservation agreement would be automatically extended until ended by the vendor on giving 5 days' notice. The reservation agreement in the second appeal also provided that it could be ended by the prospective purchaser.
5. The reservation agreement in the first appeal expressly provided that credit would be given for the reservation fee when the balance of the purchase price was paid on completion. In the second appeal, the subsequent contract of sale so provided.
6. In the first appeal, the reservation agreement provided that the vendor would be entitled to retain the reservation fee in full if the reservation agreement expired or was terminated without the sale proceeding. In the second appeal, the reservation agreement provided that if it was cancelled by one of the parties, the vendor would refund the reservation fee but could deduct reasonable administrative costs and legal fees.
7. In the first appeal, construction of the apartment had already been completed at the time that the reservation agreement was signed. In the second appeal, the apartment was yet to be constructed at the time that the reservation agreement was entered into.
8. Each Appellant subsequently acquired a 999-year lease of the apartment in question, and submitted to HMRC an SDLT return indicating that that transaction was chargeable to SDLT at the "residential" rate. In each appeal, the Appellant's agent subsequently submitted an amendment to the SDLT return, indicating that the transaction was instead chargeable at the "non-residential or mixed" rate, resulting in a lower amount of tax. Both Appellants contended that (1) the reservation agreement was an "option" and/or "right of pre-emption" within the meaning of s 46(1) of the Finance Act 2003, (2) the acquisition of the option and/or right of pre-emption was a separate land transaction chargeable at the "non-residential or mixed" rate, (3) the acquisition of the option and/or right of pre-emption, and the acquisition of the 999-year lease, were linked transactions, and (4) both of the linked transactions were therefore chargeable at the "mixed" rate.

9. Each Appellant appeals against a closure notice issued by HMRC, concluding that the original SDLT return was correct.

10. In this decision, the Tribunal finds that the original SDLT returns were correct. The Tribunal finds that the reservation agreements were not options or rights of pre-emption, but that even if they were, they would be chargeable to SDLT at the residential rate.

FACTS

Appeal number TC/2022/01100

11. In mid-August 2019, Mr Wu Hao made an offer to Wainbridge Estates Belgravia Limited (the “**vendor**”) for the purchase of a newly-constructed residential property in a residential property development.

12. On 19 August 2019, the vendor’s sales agent e-mailed Mr Wu’s team, requesting that Mr Wu complete a “reservation form” attached to that e-mail, and further requesting that Mr Wu pay by the following day a “reservation fee” of a specified sum “in order to formally agree/secure this apartment”. The attached form was entitled “Reservation Agreement (Subject to Contract)”. The e-mail further stated that the vendor “would need to exchange by Friday 30th August and complete by Friday 20th September”, and requested confirmation that Mr Wu was able to do this.

13. The requested reservation fee equated to 0.2% of the amount for which Mr Wu had offered to purchase the apartment.

14. The reservation form set out the details of the purchaser, of the property to be purchased, of the agreed purchase price, of the amount of the reservation fee, and of the purchaser’s and vendor’s solicitors. The purchaser was stated to be Mr Wu. The reservation agreement went on to state:

1. I/We wish to purchase the Apartment for the Purchase Price and have agreed to pay the sum of [the amount of the reservation fee¹] by way of reservation fee.
2. I/We have been informed (and accept) the payment terms.
 - (a) 10% of the Purchase Price - payable on exchange of contracts, estimated to happen within 10 working days from signing
 - (b) 90% of the Purchase Price (less the reservation fee) - payable on legal completion (when possession is given). Estimated to happen in the first week of December 2019.
3. I/We understand that the reservation period is 10 working days from today, to be automatically extended until ended by Wainbridge Estates Belgravia Limited on not less than five days’ notice given to me/us.
4. I/We understand that, if this Reservation Agreement expires or is terminated by Wainbridge Estates Belgravia Limited, the said Wainbridge Estates Belgravia Limited shall be entitled to retain the reservation fee in full.
5. I/We understand that the only statements or representations on which I/we can rely are those which are made in writing by the solicitors for Wainbridge Estates Belgravia Limited.
6. This Reservation Agreement is governed by and shall be interpreted in accordance with English law.

¹ The specific amount of the reservation fee was stated here in the reservation agreement, but is not relevant to the Tribunal’s decision.

15. Pre-printed text on the form also stated that “A copy of the draft plot sale contract and lease/transfer are available on site for your reference. Should you wish to view these please inform a Sales Consultant”.
16. In a letter to its sales agent dated 20 August 2019, the vendor acknowledged receipt from the sales agent of Mr Wu’s offer, and stated that “We hereby accept on the terms set out in the Offer Letter, subject to obtaining the necessary bank consents”.
17. In an e-mail to Mr Wu’s team dated 20 August 2019, the vendor’s sales agent confirmed that the vendor had accepted Mr Wu’s offer on terms specified in that email. These terms included the purchase price offered by Mr Wu, payment of the stipulated “reservation deposit” by 20 August 2019, exchange of contracts by 5 PM on Friday 30 August 2019, and completion no later than 20 October 2019. The email went on to state: “It is very important that we move as quickly as possible on this tomorrow to secure the apartment as I know the Indian buyer will also buy if he learns the price is so low. This really is a fantastic offer for your client”.
18. On 27 August 2019, Mr Wu signed the reservation agreement.
19. At the time that the reservation agreement was signed, the apartment was in turnkey condition.
20. On 10 December 2019, the Appellant company, Landmaster Investment Limited (as lessee), and Wainbridge Estates Belgravia Limited (as lessor), entered into a lease in respect of the apartment, for a term of 999 years. HMRC does not dispute that Mr Wu was the sole director of the Appellant, a company incorporated in England and Wales on 31 October 2019, and that the shares of the Appellant were held by another company which Mr Wu controlled. Mr Wu and Landmaster are referred to below collectively and/or alternatively as the “prospective purchaser” in relation to this appeal.
21. On 12 December 2019, an SDLT return was submitted to HMRC in respect of the acquisition of the lease, in which the amount of SDLT due was calculated on the basis that the residential rate applied.
22. On 7 May 2020, the Appellant’s agent wrote to HMRC, requesting an amendment to the SDLT return and seeking a refund of part of the SDLT. The letter stated as follows. In the SDLT return, the property had been misclassified as “residential”. Upon reviewing the transaction, it was considered that the property was in fact “mixed use”, on the following basis. The reservation agreement was an option within the meaning of s 46(1)(a) of the Finance Act 2003 (“FA 2003”). The grant of an option is an acquisition of a chargeable interest which does not meet the definition of residential property under s 116 FA 2003, and must therefore be classed as “non-residential property”. The acquisition of the option and the acquisition of the apartment itself were linked transactions for purposes of s 108 FA 2003. The property was “mixed use” as the linked transactions contained elements of both residential and non-residential property.
23. The requested amendment to the SDLT return was processed by HMRC. On 12 June 2020, HMRC then opened an enquiry into the amendment.
24. On 12 October 2020, HMRC issued a closure notice, concluding that the SDLT return of 12 December 2019 was correct, that the amendment to the closure notice made by the letter dated 7 May 2020 was incorrect, and that the property type was wholly residential.
25. On 5 February 2021, the Appellant appealed to HMRC against the closure notice. On 12 March 2021, HMRC issued a view of the matter letter, maintaining the view as stated in

the 12 October 2020 closure notice. On 29 March 2021, the Appellant requested a review of the decision.

26. On 13 August 2021, HMRC issued a review conclusion letter, upholding the 12 October 2020 closure notice.

27. On 9 December 2021, the Appellant brought the present proceedings before the Tribunal, for the Tribunal to determine the matter in question.

Appeal number TC/2022/01177

28. On 9 October 2013, Mr Abdul Hadi Hamad Al Zoebi signed a pre-printed form issued by St James Group, which had been filled in with handwriting. The form was entitled “Reservation Agreement (Subject to change)”. The completed form identified a specific apartment in a particular development, and stated the purchase price. Pre-printed text on the form stated that “Purchase price will remain valid until the end of the Reservation Period”. The completed form added “Agreed exchange date within one month”. At the bottom of the form there had been added in handwriting “be registered in the name of Mrs Wadhah Al Zoebi [the Appellant]”.

29. Pre-printed text on the form stated as follows:

I/We wish to purchase the above property and have paid to you the sum of £
..... representing a reservation fee.

I/We understand that the Reservation Period is 21 days from today automatically extended until ended by St James Group on not less than 5 days’ notice or by me/us.

I/We understand that if this Reservation Agreement is cancelled by me/us or St James Group, St James Group reserves the right to deduct reasonable administrative costs and its legal fees from the Reservation Fee refunded to me.

I/we understand that only statements or representations that you or your agent make to me/us upon which I/we can rely are those made in writing by your solicitors.

I/we have received from St James Group a Reservation Pack including the Consumer Code for Home Builders and management/service charges details.

30. The space in the form where the amount of the reservation fee was to be added was left blank. However, it is not disputed that a reservation fee was paid on or around the time that the reservation agreement was signed by Mr Al Zoebi. The amount of the reservation fee represented slightly less than 0.3% of the stated purchase price.

31. On 19 November 2013, St James Group (as seller) and the Appellant (as buyer) entered into a contract for the sale of the apartment. The purchase price was as stated in the reservation agreement. The contract contained references to the reservation agreement and to the reservation deposit, and stated that when the buyer paid the balance of the purchase price, credit would be given for the reservation deposit.

32. At the time that the reservation agreement was signed, the apartment was still to be constructed.

33. On 6 December 2017, St James Group Limited (as landlord) and the Appellant (as tenant) entered into a lease in respect of the apartment, for a term of 999 years from 1 January 2013. Mr Al Zoebi and the Appellant are referred to below collectively and/or alternatively as the “prospective purchaser” in relation to this appeal.

34. On 7 December 2017, an SDLT return was submitted to HMRC in respect of the acquisition of the lease, in which the amount of SDLT due was calculated on the basis that the residential rate applied.
35. On 3 July 2020, the Appellant's agent wrote to HMRC making a claim for repayment of overpaid SDLT, on materially identical grounds to those in paragraph 22 above.
36. On 28 July 2020, HMRC opened an enquiry into the claim.
37. On 3 November 2020, HMRC issued a closure notice, concluding that the original SDLT return was correct, that the property type was wholly residential, and that there had been no overpayment of SDLT.
38. On 1 March 2021, the Appellant appealed to HMRC against the closure notice.
39. On 8 March 2021, HMRC issued a view of the matter letter, maintaining the view as stated in the 3 November 2020 closure notice. On 24 March 2021, the Appellant requested a review of the decision.
40. On 9 August 2021, HMRC issued a review conclusion letter, upholding the 3 November 2020 closure notice.
41. On 8 December 2021, the Appellant brought the present proceedings before the Tribunal, for the Tribunal to determine the matter in question.

Both appeals

42. On 4 July 2022, the Tribunal directed that appeal number TC/2022/01100 (the "**first appeal**") and appeal number TC/2022/01177 (the "**second appeal**") be joined (but not consolidated), and be case-managed and heard together.
43. On 31 March 2023, the Tribunal directed that the witness statements of Jim, Pak Keung (who says he was authorised by Mr Wu to handle all matters relating to the acquisition of the property with which the first appeal is concerned) and of Mohammed Alzoebi be admitted without the witnesses being required to attend the hearing either in person or by video link (the weight if any to be given thereto to be determined by the Tribunal), and that HMRC be permitted to make submissions in relation to them without putting such submissions to the witnesses in cross-examination.
44. The appeals were heard on 23 and 24 May 2023. At the hearing, the Appellants argued that considerable weight should be given to the witness statements, and HMRC argued that due to the witnesses' unavailability for cross-examination, little or no evidential weight should be given to them.
45. After the hearing, the Tribunal issued a direction dated 13 June 2023, inviting the parties' written submissions on two additional judicial authorities that had not been relied on by the parties at the hearing. In response to that direction, further written submissions were provided by HMRC dated 20 June 2023, and by the Appellants dated 12 July 2023. The Appellants' further written submissions contained an application for permission to make further written submissions "on the issue of the status of the purchasers' rights in connection with property that has not yet been constructed".
46. In each appeal, the Appellant accepts, in respect of the transaction for the acquisition of the 999-year lease, that the relevant land was residential property.
47. However, in each appeal, the Appellant maintained at the hearing as follows. The reservation agreement was an option and/or right of pre-emption within the meaning of s 46(1) FA 2003. In respect of the transaction for the acquisition of this option / right of pre-

emption, the relevant land was the option / right of pre-emption itself, which was non-residential property.

48. The Appellants further contend that these two transactions (the acquisition of the option/ right of pre-emption, and the acquisition of the 999-year lease) were linked transactions, and that the mixed rate therefore applied to the total of the chargeable consideration for both transactions (see paragraph 22 above).

49. The Appellants' primary contention is that the position in paragraphs 47 and 48 above pertains whether or not the residential property was constructed at the time of acquisition of the option / right of pre-emption. The second Appellant additionally argues in the alternative that even if this is not correct, the position in paragraphs 47 and 48 above nonetheless pertains in cases where the residential property has not yet been constructed at the time of acquisition of the option / right of pre-emption. In the second appeal, at the time that the reservation agreement was entered into, construction of the particular apartment subsequently purchased by the Appellant had not yet commenced. At that time, the physical apartment to which the option / right of pre-emption related could not have been residential property because there was nothing in existence at that time that was used or suitable for use as a dwelling.

50. The Appellants submit that the appeals should be allowed, and that the Tribunal should find in each case that the total of the chargeable consideration paid for the reservation agreement and for the 999-year lease is chargeable to SDLT at the mixed rate.

51. HMRC submit that the appeals should be dismissed, and that in each appeal, the closure notice should be confirmed.

52. HMRC contend as follows. The reservation agreements were not options and/or rights of pre-emption within the meaning of s 46(1) FA 2003, and were not linked transactions with the transactions for the acquisition of the leases of the apartments. In respect of the transactions for the acquisition of the leases of the apartments, SDLT is chargeable at the residential rate.

53. HMRC accept that if, contrary to their submissions, the reservation agreements were options and/or rights of pre-emption within the meaning of s 46(1) FA 2003, then the transactions for the acquisitions of these options / rights of pre-emption were linked transactions with the transactions for the acquisition of the leases. However, HMRC contend that in that event, in respect of the transaction for the acquisition of the option / right of pre-emption, the relevant land would be residential property, namely the apartment that each Appellant subsequently purchased. As the relevant land for both transactions would be residential property, the total consideration for both transactions would be chargeable to SDLT at the residential rate. That would be so, whether or not construction of the apartment in question had been completed at the time that the option / right of pre-emption was acquired.

54. HMRC accept that if, contrary to this submission, the relevant land in relation to the transactions for the acquisition of options / rights of pre-emption was non-residential property, then the total consideration for both transactions would be chargeable at the mixed rate.

LEGISLATION

55. Section 43(1) FA 2003 provides that a "land transaction" means "any acquisition of a chargeable interest".

56. Section 43(6) FA 2003 provides that references to the subject-matter of a land transaction are references “to the chargeable interest acquired (the ‘main subject matter’), together with any interest or right appurtenant or pertaining to it that is acquired with it”.

57. Section 46(1) FA 2003 provides:

- (1) The acquisition of—
 - (a) an option binding the grantor to enter into a land transaction, or
 - (b) a right of pre-emption preventing the grantor from entering into, or restricting the right of the grantor to enter into, a land transaction,

is a land transaction distinct from any land transaction resulting from the exercise of the option or right.

They may be “linked transactions” (see section 108).

58. Section 48(1) FA 2003 provides that “chargeable interest” means (a) “an estate, interest, right or power in or over land”, or (b) “the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power”, other than an exempt interest.

59. Section 55 FA 2003 sets out how the amount of tax chargeable in respect of a chargeable transaction is to be determined.

- (1) Section 55(1B) deals with the situation where the transaction is not one of a number of linked transactions. It contains two tables, Table A (Residential) and Table B (Non-residential or mixed). It provides that Table A is the appropriate table “if the relevant land consists entirely of residential property”, and that Table B is the appropriate table “if the relevant land consists of or includes land that is not residential property”.

- (2) Section 55(1C) deals with the situation where the transaction is one of a number of linked transactions. It provides that Table A in s 55(1B) is the appropriate table “if the relevant land consists entirely of residential property”, and that Table B in s 55(1B) is the appropriate table “if the relevant land consists of or includes land that is not residential property”.

- (3) Section 55(3) provides:

- (1) For the purposes of subsection (1B)—
 - (a) the relevant land is the land an interest in which is the main subject-matter of the transaction, and
 - (b) the relevant consideration is the chargeable consideration for the transaction.

- (4) Section 55(4) provides:

- (1) For the purposes of subsection (1C)—
 - (a) the relevant land is any land an interest in which is the main subject-matter of any of the linked transactions, and
 - (b) the relevant consideration is the total of the chargeable consideration for all those transactions.

60. Section 116(1) FA 2003 relevantly provides:

- (1) In this Part “residential property” means—

- (a) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, and
 - (b) land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land), or
 - (c) an interest in or right over land that subsists for the benefit of a building within paragraph (a) or of land within paragraph (b);
- and “non-residential property” means any property that is not residential property.

61. Section 116(6) FA 2003 relevantly provides that the word “building” “includes part of a building”.

62. Section 121 FA 2003 defines “land” to include “(a) buildings and structures, and (b) land covered by water”.

63. Section 108(1) FA 2003 provides that transactions are linked if they “form part of a single scheme, arrangement or series of transactions between the same vendor and purchaser or, in either case, persons connected with them”.

64. Schedule 4ZA to the FA 2003 substitutes a different Table A in s 55(1B) FA 2003, which has effect in certain cases involving additional dwellings and dwellings purchased by companies. In this decision, references to Table A in s 55(1B) FA 2003 include references to that table as amended in applicable cases by Schedule 4ZA to the FA 2003.

REASONS FOR DECISION

The Appellants’ application for permission to make further written submissions

65. The Appellants’ application for permission to make further written submissions (see paragraph 45 above) is refused.

- (1) An application for permission to make further submissions in an appeal after the hearing has concluded is expected to identify clearly the issues that the proposed further submissions will address, the importance of those issues for the decision in the case, and the reasons why the proposed further submissions could not have been made at the hearing.
- (2) The Appellants’ application does not do this.
 - (a) The Appellants’ application states (at paragraph 39) that the proposed further submissions would be “on the issue of the status of the purchasers’ rights in connection with property that has not yet been constructed”, but no further details are given.
 - (b) The Appellants’ application does not state that it is essential or important for the Tribunal to receive the proposed further submissions. Rather, it states that the Tribunal “is invited” to direct such further submissions, “If the Tribunal would be assisted by [them]”, and that “the Appellants will not say more unless invited by the Tribunal to do so” (paragraphs 39 and 33).
 - (c) Where the Tribunal invites post-hearing written submissions on specific judicial authorities that were not relied on by the parties at the hearing, this does not entitle the parties to expect that they can reopen argument in the case more generally. At the hearing, the parties’ arguments addressed the effect of the words “subject to contract”, and principles of implied terms in contracts. The two judicial authorities on which the Tribunal invited post-

hearing written submissions (*Joanne Properties Ltd v Moneything Capital Ltd* [2020] EWCA Civ 1541 and *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72) dealt with these matters respectively. The Appellants' application does not show that the proposed further submissions arise directly out of the additional authorities on which the Tribunal invited post-hearing submissions, or that the relevance of the proposed further submissions could not reasonably have been anticipated by the Appellants until the Tribunal drew the parties' attention to those additional authorities. The Appellants' application does not explain why the proposed further submissions otherwise could not have been made at the hearing.

66. To the extent that the Appellants have applied for a direction that certain HMRC arguments be excluded from consideration, or have applied for permission to adduce additional evidence in the appeal, that application is refused.

- (1) The Appellants' further written submissions dated 12 July 2023 (see paragraph 45 above) state (at paragraph 2) that "it would not be procedurally appropriate to put the Appellants in a position where new issues are raised after the time limit for submitting evidence has elapsed, and the Appellants disadvantaged due to an inability to adduce evidence on those new issues", and that "if or to the extent that new issue[s] invite further evidence to be resolved, it is suggested the Tribunal should resolve them in the Appellants' favour, effectively giving the Appellants the benefit of the doubt rather than finding they have not satisfied the evidential burden". This might be read as an implied application for a direction that certain new arguments made in the HMRC post-hearing submission be excluded from consideration, or, in the event that the Tribunal is not minded to grant such a direction, as an application for permission to adduce additional evidence.
- (2) Any application for such a direction or for such permission must be made clearly. The Tribunal cannot be expected to identify and deal with implied procedural applications made in written submissions on the substantive appeal. No clear application to exclude HMRC arguments or to adduce additional evidence has been made by the Appellants.
- (3) Any application to exclude consideration of new arguments made by the other side at a late stage is expected to identify clearly the new arguments in question, the reasons why they are new, and the reasons why it would be unfair for the Tribunal to consider them. Any application for permission to adduce additional evidence in an appeal after the hearing has concluded is expected to identify clearly the additional evidence that is sought to be adduced, the importance of that evidence for the decision in the case, and the reasons why the proposed additional evidence could not have been adduced earlier.
- (4) If the Appellant's are making such an application, the application does not do this.
 - (a) The only "new issue" apparently identified by the Appellants is the argument in the HMRC post-hearing submission that it is for the Appellants to establish the existence of implied terms in an agreement, and that the Appellants have not adduced sufficient evidence to establish the existence of implied terms in the reservation agreements (see paragraph 12(a) and (o) of the HMRC post-hearing submission, referred to in paragraphs 2 and 33 of the Appellants' post-hearing submission). It cannot be said that the

Appellants could not have foreseen at the hearing the relevance of all evidence establishing the existence of implied terms, and indeed, the Appellants state in their post-hearing submission (at paragraphs 15-21) that they in fact presented evidence on this issue at the hearing.

- (b) The Appellants do not identify any specific additional evidence sought to be adduced. Nor do they identify clearly any specific “new issues” said to have been raised after the conclusion of the hearing, to which proposed additional evidence would relate.
 - (c) The Appellants do not state that it is essential or important for the Tribunal to receive additional evidence. Rather, they state expressly that “The Appellants do not consider that the new issues require any such evidence”.
 - (d) Where the Tribunal invites post-hearing written submissions on specific judicial authorities that were not relied on by the parties at the hearing, this does not generally entitle the parties to expect that they can reopen the evidence in the case. The Appellants do not show that any need for any additional evidence arises directly out of the additional authorities on which the Tribunal invited post-hearing submissions, or that the relevance of any additional evidence could not reasonably have been anticipated until the Tribunal drew the parties’ attention to those additional authorities (see paragraph 65(2)(c) above). The Appellants do not explain why any additional evidence that might now be adduced could not otherwise have been adduced as part of the evidence at the hearing.
- (5) The Tribunal is not satisfied that the HMRC post-hearing submission has raised any new issue to which the Appellants have not had an adequate opportunity to respond.

Appeal number TC/2022/01100

67. The reservation agreement signed by Mr Wu on 27 August 2019 did not grant an option within the meaning of s 46 FA 2003.

- (1) The word “option” in s 46 FA 2003 refers to the concept of an option as it exists in general law.
 - (a) No definition of the term “option” is given in s 46 FA 2003.
 - (i) In s 46(1)(a) FA 2003, the words “binding the grantor to enter into a land transaction” do not define the preceding words “an option”. The words “binding the grantor to enter into a land transaction” merely specify a particular category of options to which that provision applies. These words make clear for instance that s 46 FA 2003 does not apply to options binding the grantor to enter into transactions other than “land transactions” as defined in s 43 FA 2003. However, these words do not define what is or is not an option in the first place.
 - (ii) Therefore, rights and obligations under an agreement between a vendor and a potential purchaser will not be an option for purposes of s 46 FA 2003 by reason alone that they “bind the grantor to enter into a land transaction”. For instance, a contract of sale binds the vendor to enter into a land transaction, but a contract of sale is not an option.
 - (b) No definition of the term “option” is given elsewhere in the FA 2003.

- (c) The word “option” in s 46 FA 2003 must therefore take its definition from general law.
- (2) At general law, a call option is a right granted by an owner of property to a potential purchaser, which can be exercised unilaterally by the latter during a specified period, and which when so exercised creates an immediate legal obligation for the owner to sell the property to the grantee of the option.
- (a) An option agreement imposes a positive obligation on the prospective vendor to keep an offer for sale open during the agreed option period, so that it remains available for acceptance by the optionee at any moment within that period. Notification by the optionee at any time during the option period of the optionee’s acceptance of that offer immediately converts the option into a contract. (*Pritchard v Briggs* [1980] 1 Ch 338 (CA) at 389G-H, 423E-F, adopting *Mackay v Wilson* (1947) 47 SR (NSW) 315, 325).
 - (b) The situation created by an option may be characterised as an irrevocable offer or conditional contract, even if, strictly speaking, an option is a category of legal relationship of its own (*Spiro v Glencrown Properties Limited* [1991] Ch 537, 544).
- (3) The reservation agreement in this case may well have been a legal agreement in its own right, intended to establish certain legal rights and obligations of the parties.
- (a) The clause in the reservation agreement, that “This Reservation Agreement is governed by and shall be interpreted in accordance with English law”, suggests that it was intended to create legal rights and obligations.
 - (b) At least one binding legal right intended to be conferred by the reservation agreement was presumably the right of the vendor to retain the reservation fee in full in the event that the reservation period ended before contracts were exchanged.
 - (c) Another provision of the reservation agreement intended to have binding legal effect was presumably the stipulation that the only statements or representations on which the prospective purchaser could rely were those which were made in writing by the vendor’s solicitors.
 - (d) However, the stipulation that “This Reservation Agreement is governed by and shall be interpreted in accordance with English law” does not mean that it was necessarily intended to create any particular legal obligations going beyond what was expressly stated in it. Indeed, this stipulation may have had the very effect that certain aspects of the reservation agreement would *not* give rise to legal obligations: it is theoretically possible that certain wording in the reservation agreement would have been sufficient under the law of another jurisdiction to create particular kinds of legal obligations, but insufficient under English law to do so.
 - (e) The extent of the legal rights and obligations arising under the reservation agreement in this case is a matter of interpretation of the reservation agreement in accordance with general principles of contract interpretation.
- (4) The wording of the reservation agreement did not confer on the prospective purchaser any right which the prospective purchaser could exercise unilaterally.

- (a) The reservation agreement contained no provision to the effect that a legally binding contract for the sale of the property could be brought into existence by a unilateral act of the prospective purchaser. Rather, it envisaged only that there would be an exchange of contracts within a stated time period.
 - (b) Communications surrounding the reservation agreement also contained references to contracts being exchanged (see paragraphs 12 and 17 above), and contained no reference to any possibility of a legally binding contract of sale being brought into existence through a unilateral act of the prospective purchaser.
 - (c) Whether or not a contract of sale was in fact concluded after the signing of the reservation agreement and before the 999-year lease was executed, this is what was expressly envisaged in the reservation agreement itself and in surrounding communications.
 - (d) Mr Jim, Pak Keung says in his witness statement that “Typically, for a purchase of a property of this magnitude, as potential buyer, we would want a reservation agreement to be signed, to give the buyer a fixed exclusive period in which *to exchange contracts* and consider the merits of the transaction [emphasis added]”. The Tribunal accepts this evidence, which confirms that typically, following a reservation agreement, it would not be unusual for a sale then to proceed by way of exchange of contracts. This witness statement does not refer to contracts of sale following a reservation agreement being effected through unilateral service of notice by the prospective purchaser on the vendor.
- (5) In particular, the wording of the reservation agreement did not state that a unilateral decision by the prospective purchaser to proceed with the sale would of itself immediately create a binding legal obligation for the vendor to proceed with the sale.
- (6) On the contrary, the reservation agreement stated that the proposed sale of the apartment was “subject to contract”, which indicates that both parties intended that neither would be legally bound to proceed with the sale until contracts were exchanged.
- (a) The words “subject to contract” in the reservation agreement were not intended to mean that the reservation agreement itself was subject to contract (see paragraph 67(3) above), but rather, that the sale of the property was subject to contract. The Appellants’ skeleton accepts that the words “subject to contract” were “referable not to the reservation, but to the envisaged sale”. The Appellants’ post-hearing submission also states that these words “must be seen as applying to the actual purchase of the property as opposed to the Reservation Agreement itself”.
 - (b) The words “subject to contract”, when used in relation to the sale of land, are generally understood to mean that neither party intends to be bound in either law or in equity unless and until the exchange of formal written contracts takes place, and that each party reserves the right to withdraw until such time as the contract is made. (*Joanne Properties Ltd v Moneything Capital Ltd* [2020] EWCA Civ 1541 (“*Joanne Properties*”) at [12]-[16], [36], [37]).

- (c) Furthermore, once negotiations have begun on a “subject to contract” basis, that basis generally continues to apply all the way through the negotiations until contracts are exchanged. Even if the parties subsequently become of one mind before formal contracts are exchanged, the original intention that there should be no formal contract in existence until the written contracts have been exchanged will generally still remain intact (*Joanne Properties* at [17]-[21], [36], [37]).
 - (d) While it is possible for the parties prior to exchange of formal written contracts to lift or waive the “subject to contract” formula expressly or by necessary implication, the courts will not lightly conclude that this has occurred. Once negotiations are expressed to be “subject to contract”, it cannot be inferred that the parties must have intended to expunge that qualification unless there is a clear factual basis for drawing such an inference. (*Joanne Properties* at [22]-[24], [31], [34], [36], [37].) Whether or not such an inference can be drawn will depend on the particular facts of the individual case (*Joanne Properties* at [23]-[24]). Even where performance of the terms of a “subject to contract” agreement has commenced, this will not necessarily mean that a legally binding contract has now been concluded (*Joanne Properties* at [22]).
- (7) Nothing in the facts of this case provides a clear factual basis for drawing an inference that the parties must have intended to expunge the “subject to contract” qualification at any time prior to the exchange of formal contracts of sale or (if there was no such exchange) the execution of the 999-year lease itself. Even if the parties had executed the lease without first exchanging contracts, that would not mean that they considered that they were bound to proceed with the sale at any time prior to the point in time at which the lease was actually executed. The Appellants’ post-hearing submission in fact states that “it is conceded that [the ‘Subject to Contract’ label] is inconsistent with there being an option, i.e. a right to purchase property without more”.
- (8) There is no basis for finding that it was an implied term of the reservation agreement that a unilateral decision by the prospective purchaser to proceed with the sale would of itself immediately create a binding legal obligation for the vendor to proceed with the sale.
- (a) Terms not included in the wording of a contract can only be found to be implied terms in limited situations, in particular (1) where the implied term is necessary to give business efficacy to the contract, such that the contract would not be effective without it, or (2) where the implied term is so obvious that “it goes without saying”. While these two situations are alternatives, it is unlikely in practice that there will be any case in which only one of these two situations pertains. (*Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72 at [18] and [21]).
 - (b) Although the wording itself of the reservation agreement imposes no obligations on the vendor at all, it may be presumed to have been intended to impose some legal obligation on the vendor (see paragraph 67(3) above). If it did not, the prospective purchaser would receive no consideration for the reservation fee, and the reservation agreement would not be a legally binding agreement.

- (c) However, even if there was an implied term in the reservation agreement imposing obligations on the vendor, that implied term was not to the effect that a unilateral decision by the prospective purchaser to proceed with the sale would of itself immediately create a binding legal obligation for the vendor to proceed with the sale. An implied term to that effect was not necessary to give business efficacy to the contract, nor so obvious that “it goes without saying”.
- (i) There are obvious alternative obligations that the reservation agreement could have been intended to impose on the vendor. In particular, the implied obligation of the vendor might have been an obligation, during the reservation period, not to negotiate with anyone other than the potential purchaser in relation to the sale of the property.
- (A) This is a common form of a “lock-out agreement” or “exclusivity” agreement. Such an agreement does not require the vendor to sell the property to the potential purchaser, but locks the vendor out of negotiations with anyone else during a specified period, leaving that one potential purchaser with the sole opportunity during that period to attempt to reach an agreement with the vendor (*Pitt v PHH Asset Management Limited* [1994] 1 WLR 327, 332-333, adopting *Walford v Miles* [1992] 2 AC 128, 139).
- (B) That is not the same thing as a positive legal obligation to sell to prospective purchaser at the price stated in the reservation agreement if the prospective purchaser wishes to proceed.
- (C) A document is not precluded from containing a lock-out agreement by the fact that the same document contains an agreement for the sale of the property subject to contract. Where parties agree on a sale subject to contract, they can simultaneously enter into a lock-out agreement to prevent the vendor from negotiating with other parties pending exchange of contracts. There is nothing to prevent the agreement for sale subject to contract, and the lock-out agreement, from being included in the same document.
- (D) The fact that the parties have agreed, subject to contract, on the sale of the property and on the sale price, and even all the terms of the contract itself, does not mean that a lock-out agreement would no longer serve any purpose in practice. If the potential purchaser has not yet decided whether or not to proceed with the purchase, it is of practical value to the potential purchaser for the vendor to agree to refrain from negotiating with anyone else for a period while the potential purchaser makes a decision.
- (ii) An implied term that a unilateral decision by the prospective purchaser would of itself immediately create a binding legal obligation for the vendor to proceed with the sale would be inconsistent with the “subject to contract” stipulation in the reservation agreement (see paragraph 67(6)-(7) above). The Appellants’ skeleton accepts that the words “subject to contract” were

“ there to show that even though the parties to the respective agreements had agreed on a provisional purchase price, and expected to exchange contracts, they had not entered into a binding contract for the sale of the relevant leasehold”.

- (iii) The fact that the wording of the reservation agreement would appear to enable the vendor to end the reservation period and keep the reservation fee, even if the prospective purchaser wished to proceed with the sale, does not mean that an implied term requiring the vendor to proceed with the sale if the prospective purchaser wished to do so was necessary to give business efficacy to the reservation agreement, or was so obvious that “it goes without saying”.
- (A) The reservation agreement contained no wording to the effect that the vendor would be required to refund the reservation fee in the event that the vendor decided not to proceed with the sale, even if the prospective purchaser was willing to do so within the reservation period. However, even if the vendor was under no such obligation, such that the prospective purchaser would have lost the whole of its reservation fee in this situation, this would not mean that the absence of a legal obligation on the part of the vendor to proceed with the sale would deprive the reservation agreement of business efficacy, or would be contrary to the obvious intention of the parties.
 - (I) Even in this situation, the prospective purchaser will still have obtained valuable consideration in return for the reservation fee, namely the exclusive opportunity to deal with the vendor during the reservation period, for so long as it lasted.
 - (II) Even if it might be considered imprudent of the prospective purchaser to have entered into a reservation agreement that would have allowed this situation to occur, it is not for a court or tribunal to re-write a contract “in an attempt to assist an unwise party or to penalise an astute party” (*Arnold v Britton* [2015] UKSC 36 at [20]).
 - (III) In any event, the likelihood of such a situation occurring in practice would appear to have been remote. It was the vendor’s business to sell the apartment in the new-build property development, and the vendor would have been motivated to complete sales quickly. The envisaged reservation period was short, and the vendor was locked out from negotiating with others during that period (see (9) below). It was therefore highly improbable that in that short period, the vendor would receive better offers, or have second thoughts about selling. In practice, the potential buyer would appear to have had little reason for concern about the vendor’s motivation to sell at the agreed price.
 - (IV) In this particular case, the evidence of Mr Jim, Pak Keung is as follows. The vendor was under financial pressure.

Construction of the apartment had been completed, with the final certificate having been dated 20 April 2018, over a year before Mr Wu made his offer. Mr Wu's single offer, which was substantially below the asking price, was accepted very quickly by the vendor. The Tribunal further notes as follows. The property was at the upper end of the market, and potential purchasers for such a property were presumably limited. Although it appears that there was another interested buyer, there is no evidence that that other buyer would have been willing to pay any higher price. The vendor's sales agent's e-mail of 9 November 2022 says only that the other buyer "will also buy if he learns the price is so low". The Tribunal is not satisfied on the evidence that Mr Wu's team would have had concerns about the vendor's willingness in practice to proceed with the sale on the terms set out in the reservation agreement.

- (B) It is therefore unnecessary to determine whether the vendor would have been entitled to keep the reservation fee in the event that the vendor had decided not to proceed with the sale, even though the prospective purchaser was willing to do so within the reservation period. Had the matter ever been litigated, it is possible that a court would have found that the reservation agreement contained an implied term requiring the vendor to refund the reservation fee in this situation. However, even if it did not, that would not mean that the reservation agreement must have contained an implied term to the effect that the vendor was obliged to proceed with the sale if the prospective purchaser wished to do so.
- (9) Rather, the Tribunal finds that under the reservation agreement in this case, the vendor was under an obligation, during the reservation period, not to negotiate with anyone other than the potential purchaser in relation to the sale of the property; that is to say, the reservation agreement was a form of "lock-out" agreement.
- (a) According to the witness statement of Jim, Pat Keung, the vendor's sales agent "reiterated verbally many times to confirm that ... no further viewings would take place by the Vendor while the reservation agreement being effective", and the vendor's sales agent "reiterated ... that the non-refundable Reservation Agreement prevented the Vendor from negotiating with other potential buyers during the reservation period". The Tribunal accepts this evidence that the vendor's sales agent made these statements, which is consistent with an obligation of the kind referred to in paragraph 67(8)(c)(i)(A) above. An obligation of this kind would not have been inconsistent with any of the express terms of the reservation agreement.
- (b) The Appellants' skeleton in fact states that it was "so obvious that ... it ought to go without saying [that] in exchange for the 'Reservation Fee', the vendor agreed ... not to dispose of the land to a third-party during the 'reservation period'". The Tribunal considers that if the vendor could not negotiate with others during the reservation period, there was no significant

possibility that it would in practice dispose of the property to a third party during the reservation period. However, the Tribunal finds that the reservation agreement did not go so far as to impose a positive legal obligation on the vendor to sell the property to the prospective purchaser during the reservation period if the prospective purchaser decided to buy. An obligation not to negotiate with others was sufficient to give the reservation agreement business efficacy. No greater obligation than this is set out in the terms of the reservation agreement. Nothing else provides any basis for suggesting that any greater obligation was so obvious that “it goes without saying”.

- (c) Mr Jim, Pak Keung states that “Mr. Wu ... presumed that the Reservation Agreement granted him an exclusive first right to buy ... i.e. the option to buy the Property”, and that “Our understanding is that Mr Wu could decide not to buy the Property but the Vendor could not back out of the offer accepted”, and that the reservation agreement was a “binding contract” under which the vendor was “obliged to sell” unless the potential purchaser backed out. However, even if this was as a matter of fact the understanding of the prospective purchaser, for the reasons given above, that understanding was incorrect. The ultimate question of what obligations were imposed on the vendor by the reservation agreement is a matter of contract interpretation for the Tribunal, not a question of fact to be established by witness evidence.

68. The reservation agreement signed by Mr Wu on 27 August 2019 did not grant a right of pre-emption within the meaning of s 46 FA 2003.

- (1) The expression “right of pre-emption” in s 46 FA 2003 refers to the concept of a right of pre-emption as it exists in general law.
 - (a) No definition of the term “right of pre-emption” is given in s 46 FA 2003.
 - (i) In s 46(1)(b) FA 2003, the words “preventing the grantor from entering into, or restricting the right of the grantor to enter into, a land transaction” do not define the preceding words “a right of pre-emption”. The words “preventing the grantor from entering into, or restricting the right of the grantor to enter into, a land transaction” merely specify a particular category of rights of pre-emption to which that provision applies. These words make clear that s 46 FA 2003 does not apply to rights of pre-emption preventing or restricting the grantor’s entry into transactions other than “land transactions” as defined in s 43 FA 2003. However, these words do not define what is or is not a right of pre-emption in the first place.
 - (ii) Therefore, rights and obligations under an agreement between a vendor and a potential purchaser will not be rights of pre-emption for purposes of s 46 FA 2003 by reason alone that they have the effect of “preventing the grantor from entering into, or restricting the right of the grantor to enter into, a land transaction”. For instance, a contract of sale, once concluded, will prevent and restrict the vendor’s ability to enter into a land transaction, because it prevents the vendor from selling the land to anyone other than the counterparty to the contract, but a contract of sale is not an right of pre-emption.

- (b) No definition of the term “right of pre-emption” is given elsewhere in the FA 2003.
 - (c) The term “right of pre-emption” in s 46 FA 2003 must therefore take its definition from general law.
- (2) In general law, a defining feature of a right of pre-emption is that it becomes exercisable by the grantee only upon the occurrence of a trigger event that the grantee can not of their own volition bring about.
- (a) Pre-emption agreements (and “first-refusal agreements” which may be regarded as a sub-category thereof) take a wide variety of different forms. What they have in common is that at the time that the pre-emption agreement is concluded, the grantee has no immediate rights. It is only upon the subsequent occurrence of a trigger event that the grantee will become entitled to exercise the rights under the pre-emption agreement. (See, for instance, *Barnsley’s Land Options* (7th edn., 2021), paras. 2-002, 6-011 to 6-016).
 - (b) Furthermore, a feature of a right of pre-emption is that the trigger event is within the volition of the grantor (*Barnsley’s Land Options*, paras. 2-002, 2-061, 2-062). A common example of a pre-emption agreement is one that stipulates that if the owner of land ever decides to sell the property, the owner must first make an offer to sell the property to the grantee, specifying a reasonable price at which the owner is willing to sell (see, for instance, *Manchester Ship Canal v Manchester Racecourse Company* [1901] 2 Ch 37). At the time that such a pre-emption agreement is concluded and thereafter, the grantee will have no certainty as to if, or when, the owner of the land ever will decide to sell the property, and will have no power to bring about the trigger event. This will be a matter entirely within the volition of the grantor.
 - (c) Characteristic features of a right of pre-emption are thus that the exercise of the right depends on a trigger event that the grantee of the right has no independent ability to bring about, and that the right of pre-emption therefore cannot be made exercisable by the grantee independently, of the grantee’s own volition. (See *Specialty Shops Limited v Yorkshire & Metropolitan Estates Limited* [2002] EWHC 2969 (Ch) (“**Specialty Shops**”) at [25]-[29]; *Bircham & Co Nominees (No.2) Ltd v Worrell Holdings Ltd* [2001] EWCA Civ 775 at [30]-[31]; *Taylor v Couch* [2012] EWHC 1213 (Ch) at [51]-[52]).
- (3) The reservation agreement did not confer any right on the prospective buyer, the exercise of which was contingent upon the occurrence of a trigger event that the prospective purchaser could not of their own volition bring about.
- (a) The Appellants’ case is that the signing of the reservation agreement itself, and the payment of the reservation fee by the prospective purchaser, created a binding obligation for the vendor to sell to the prospective purchaser if the prospective purchaser decided to proceed with the sale. However, where a bilateral agreement between the vendor and the prospective purchaser is said to create a right of pre-emption, that bilateral agreement cannot at the same time be the trigger event enabling the exercise of right.

- (b) The reservation agreement did not provide for any trigger event after the signing of that agreement and the payment of the reservation fee, that would have obliged the vendor to offer to sell the apartment to the prospective purchaser. Even before the reservation agreement was signed, the vendor and the prospective purchaser had reached agreement (subject to contract) on the sale of the apartment for an agreed price. This had occurred through the making of an offer by the prospective purchaser which had been accepted by the vendor. The only further steps that the reservation agreement envisaged would be taken after the signing of the reservation agreement and payment of the reservation fee consisted of an exchange of contracts between the parties and completion.
- (c) The only further event identified by the Appellants was the decision by the prospective purchaser to proceed with the sale. That was an event wholly within the control and volition of the prospective purchaser.
- (d) The Tribunal has found above that the reservation agreement did not in fact create a binding obligation for the vendor to sell if the prospective purchaser decided to proceed with the sale. The vendor had no binding obligation to sell to the prospective purchaser unless and until contracts were exchanged. The ordinary process between two parties of negotiating and concluding a contract of sale cannot be a trigger event for purposes of a right of pre-emption. If no contracts were exchanged before the lease was executed, then the vendor was under no legal obligation to execute the lease prior to the point in time that it did so.

69. The prospective purchaser's rights under the reservation agreement were not a chargeable interest within the meaning of s 48 FA 2003, and entry into the reservation agreement was therefore not a land transaction within the meaning of s 43(1) FA 2003. The Tribunal finds that the reservation agreement itself imposed no legal obligation on the vendor to sell the apartment to the prospective purchaser. It merely imposed a personal contractual obligation on the vendor not to negotiate with third parties during the reservation period. The reservation agreement did not create an estate, interest, right or power in or over land, or give rise to an obligation, restriction or condition affecting the value of any such estate, interest, right or power. The prospective purchaser's remedy for any breach of a reservation agreement by the vendor would have been a personal action against the vendor only.

70. It follows that entry into the reservation agreement was not a land transaction and therefore could not be a linked transaction with the acquisition of the 999-year lease of the apartment, within the meaning of s 108 FA 2003.

71. The appeal therefore fails.

72. In view of this finding, it is unnecessary for the Tribunal to determine the remaining issue in this appeal. However, for completeness, the Tribunal further finds as follows.

73. Even if it were the case, contrary to the findings above, that the reservation agreement conferred on the prospective purchaser a right that was an option or a right of pre-emption, and even if the transaction for the acquisition of this right (the entry into the reservation agreement) was a linked transaction with the transaction resulting from the exercise thereof (the acquisition of the 999 year lease of the apartment), SDLT would have been chargeable on the linked transactions at the residential rate.

- (1) Considered by itself, the acquisition of the option or right of pre-emption relating to the apartment would be chargeable at the residential rate.

- (a) The apartment is a building, or part of a building, that is used or is suitable for use as a dwelling, and as such is “residential property” (s 116(1) and (6)).
 - (b) The apartment, being a building or structure, is also “land” (s 121).
 - (c) The option or right of pre-emption would be an estate, interest, right or power in or over that land and would thus be a “chargeable interest” (s 48(1)).
 - (d) The transaction by which the option or right of pre-emption is acquired would thus be a “land transaction” (ss 43(1), 46(1)). The option or right of pre-emption would be the “main subject-matter” of that land transaction (s 43(6)).
 - (e) The apartment would thus be the land an interest in which is the main subject matter of the transaction by which the option or right of pre-emption was acquired (s 55(3)). The physical apartment is the “land”. The option or right of pre-emption is the interest in that “land” that is the main subject matter of the transaction (the entry into the reservation agreement) by which the option or right of pre-emption is acquired.
 - (f) The physical apartment is thus the “relevant land” for purposes of s 55(1B).
 - (g) Because the physical apartment is “residential property”, the relevant land thus consists entirely of residential property. In accordance with s 55(1B), the applicable table would be Table A (Residential).
- (2) This same analysis applies in circumstances where the transaction for the acquisition of the option or right of pre-emption is linked to the land transaction resulting from the exercise of that option or right of pre-emption.
- (a) Section 55(1C) deals with the amount of SDLT chargeable in respect of linked transactions.
 - (b) Section 55(4) provides that for purposes of s 55(1C), the relevant land is any land an interest in which is the main subject matter of any of the linked transactions.
 - (c) The physical apartment is the land an interest in which is the main subject matter both of the transaction by which the option or right of pre-emption is acquired, and of the transaction resulting from the exercise of that option or right of pre-emption (s 55(3)). In relation to both transactions, the relevant land consists entirely of residential property, and in accordance with s 55(1C), the applicable table is therefore Table A (Residential).
- (3) The Tribunal rejects the Appellants’ argument that an option or a right of pre-emption within the meaning of s 46 FA 2003 falls outside the definition of “residential property” in s 116.
- (a) This argument misses steps in the analysis above. The question is not whether the option or right of pre-emption is residential property, but rather, whether the option or right of pre-emption is *an interest in land which is residential property* (s 55(1B) and (1C) FA 2003).
 - (b) The Appellants contend that the main subject-matter of the transaction by which the option or right of pre-emption was acquired was not the physical

apartment, but rather, the option or the right of pre-emption itself. That argument is unsustainable. If it were correct, it would mean that the main subject-matter of the transaction by which the 999-year lease was acquired was not the physical apartment, but rather, the 999-year lease itself.

- (4) The Tribunal also cannot accept the Appellants' argument, to the effect that the "relevant land" for purposes of ss 55(1B) and/or (1C) consisted of the entire building in which the apartment was located, and that because this building included areas not used or suitable for use as a dwelling (such as communal areas), the relevant land did not consist entirely of residential property as defined in s 116.
- (a) An individual flat or apartment is of itself a "building" for purposes of s 116 FA 2003. If the individual flat or apartment would not otherwise be treated as a "building" in its own right for purposes of s 116, it would fall to be so treated by virtue of s 116(6). A flat or apartment is part of the overall building in which it is located, and the word "building" is defined in s 116 FA 2003 to include part of a building (s 116(6)). The individual flat or apartment itself is therefore of itself and in its own right "a building that is used or suitable for use as a dwelling" within the meaning of s 116(1)(a).
- (b) If, in a land transaction, a chargeable interest is acquired in an individual apartment or flat only, then it is only that apartment or flat that is the "relevant land" for purposes of s 55(1B), (1C), (3) and (4) FA 2003. The "relevant land" is not the apartment building as a whole, or other parts of the apartment building. For instance, many residential flats and apartments are in buildings which have shops or other commercial units on the ground floor. If a chargeable interest is acquired only in an individual apartment or flat in such a building, the "relevant land" for purposes of s 55 would consist of that flat only, and would thus consist entirely of residential property. The fact that the building in which the apartment or flat is located includes also non-residential commercial units would be immaterial.
- (c) It is true that the 999-year lease over the apartment acquired by the Appellant in this case included the right to use and/or pass over certain communal areas and other areas of the apartment building and its estate (referred to in the lease as "Building Common Parts" and "Estate Common Parts").
- (d) However, the Tribunal finds that the rights conferred on the Appellant by the lease to use or pass over the communal and other areas was an "interest or right appurtenant or pertaining to the main subject matter of the transaction that is acquired at the same time" (s 43(6)). That is to say, the *main* subject matter of the transaction consisted of the acquisition of the relevant right or interest (the option or right of pre-emption, or the 999-year lease) over the actual residential apartment itself. The rights or interests in relation to the communal and other areas were not part of that *main* subject matter of the transaction, but were rights appurtenant or pertaining to the main subject matter of the transaction that were acquired at the same time as part of the same transaction. The effect of s 43(6) FA 2003 is that the rights over the communal and other areas were part of the *subject-matter* of the transaction, but were not part of the *main* subject matter. For Table A in s 55(1B) to apply, only the *main* subject-matter of the transaction needs to

be residential property, and in this case it was. (Compare *Sexton v HMRC* [2023] UKFTT 73 (TC) (“*Sexton*”) at [26]-[32], [41(1) and (3)], [42]).

- (e) In view of this conclusion, it is unnecessary to determine whether the communal and other areas would themselves, if considered in isolation, fall within the definition of “residential property” in s 116. However, for completeness, the Tribunal finds that in this case they would.
 - (i) The communal and other areas are not part of the apartment itself, but under the terms of the lease, the apartment owner has a right to use and/or pass over them. The rights in relation to these other areas are therefore rights over land (that is, the communal and other areas) that subsist for the benefit of the apartment. These rights are therefore residential property within the meaning of s 116(1)(c). (Compare *Sexton* at [33]-[40], [41(2)], [42].)
 - (ii) Alternatively, the common and other areas are residential property within the meaning of s 116(1)(b) (read together with s 116(6) and the definition of “land” in s 121). These common and other areas are either (i) parts of a building (that is, the apartment building as a whole) that is on the land that forms part of the grounds of the apartment, or (ii) part of the garden or grounds of the apartment, or (iii) buildings or structures on land that is or forms part of the garden or grounds of the apartment.
 - (f) If the Appellants’ argument were correct, virtually no apartment or flat would be subject to SDLT at the residential rate, since most apartments and flats are in buildings that include areas such as communal areas that are not themselves used or suitable for use as a dwelling. That cannot be correct.
- (5) The Tribunal cannot accept the Appellants’ argument, to the effect that s 116(1)(c) FA 2003 establishes that the “relevant land” for purposes of s 55(1B) and (1C) FA 2003 can be something other than physical land or a physical building.
- (a) Section 116(1)(c) does not deal with the definition of “relevant *land*”. Rather, it is part of the definition of “residential *property*”. Section 116(1)(a) provides that certain types of physical buildings are residential property, and section 116(1)(b) provides that certain types of physical land are residential property. Section 116(1)(c) then provides that an interest in or right over *physical land* will be residential *property*, even if that physical land itself is not residential property, if the interest or right subsists for the benefit of a building or land that *is* residential property within the definition in s 116(1)(a) or (b).
 - (b) Physical land and physical buildings are referred to in the SDLT legislation as “land” and “buildings”. Legal rights and interests in and over physical land are not referred to in the legislation as “land”. Rather, they are referred to as “rights, interests [etc] ... in or over land”, as in s 48(1). See also for instance ss 48A(1), 71A(1)(a), 73(1)(a)(i), 77(1)(a) and (b), and 116(1)(c). Section 121, entitled “Minor definitions”, contains a definition of “land”, which states that “‘land’ includes—(a) buildings and structures, and (b) land covered by water”. Although that is not an inclusive definition of “land”, it is consistent with the conclusion that the word “land” in the SDLT legislation refers only to physical land and buildings.

- (c) Section 116(1)(c) does not indicate that the word “land” can ever mean anything other than physical land, or a physical building falling within the definition of “land” in s 121. It merely establishes that certain rights or interests in physical land can be “residential *property*” in certain circumstances.
- (d) The “relevant land” for purposes of s 55(1B) and (1C) FA 2003 will necessarily be physical land or a physical building. Where there is an acquisition of residential property falling within the definition of s 116(1)(c), the “relevant land” for purposes of s 55(1B) and (1C) will be the physical land or building for the benefit of which the relevant right or interest subsists. Although the physical land or building *over* which the right exists may not fall within the definition of residential property, that interest or right will be residential property by virtue of s 116(1)(c) because the physical building or physical land *for the benefit of* which that right or interest subsists does fall within the definition of residential property.
- (e) Thus, in the present case, even if the reservation agreements did fall within s 46 FA 2003, the “relevant land” was the physical apartment, which was entirely residential property.

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74. The reservation agreement signed by Mr Al Zoebi on 9 October 2013 did not grant an option within the meaning of s 46 FA 2003.

- (1) As to the definition of an option for purposes of s 46 FA 2003, see paragraph 67(1) and (2) above.
- (2) The reservation agreement was intended to establish certain legal rights and obligations of the parties. The extent of these rights and obligations is a matter of interpretation of the reservation agreement in accordance with general principles of contract interpretation. Paragraph 67(3) and (4) above applies generally by analogy to the second appeal. In the second appeal, unlike in the first appeal, the reservation agreement did not contain a provision stating what was the governing law of the reservation agreement, and provided that the prospective purchaser was entitled to recover the reservation fee less the vendor’s expenses if the reservation agreement was cancelled. The Tribunal concludes that the right of the prospective purchaser to obtain repayment of the reservation fee after deduction of the vendor’s expenses in the event that the reservation agreement was cancelled, and the right of the vendor to deduct reasonable expenses in that situation, were binding legal rights and obligations.
- (3) However, the wording of the reservation agreement did not confer on the prospective purchaser any right which the prospective purchaser could exercise unilaterally.
- (4) In particular, the wording of the reservation agreement did not state that a unilateral decision by the prospective purchaser to proceed with the sale would of itself immediately create a binding legal obligation for the vendor to proceed with the sale. The reservation agreement refers to an “agreed exchange date”, which clearly means a date for the exchange of contracts. Paragraph 67(4)(a) and (5) above applies to the second appeal.

- (5) Furthermore, the Tribunal finds that the intended meaning of the expression “subject to change” as used in the reservation agreement was the same as the established meaning of the term “subject to contract”.
- (a) The Appellant’s skeleton accepts that the words “subject to change” applied to the proposed sale of land and not the reservation agreement itself. The Appellants’ skeleton states that both expressions “were there to show that even though the parties to the respective agreements had agreed on a provisional purchase price, and expected to exchange contracts, they had not entered into a binding contract for the sale of the relevant leasehold”.
 - (b) If there was any reason for using the expression “subject to change” rather than the established term “subject to contract”, the Tribunal finds that it was to make even clearer that not only would there be no legally binding agreement until contracts were formally exchanged, but that until then there could be no expectation that the terms of the proposed sale as set out in reservation agreement would not change.
 - (c) The Tribunal finds that there is no basis for inferring that the words “subject to change” were intended to give one party only the right to seek changes.
 - (d) The Tribunal does not accept the argument in the Appellants’ post-hearing submission that the words “subject to change” were there because the property had not yet been constructed, and that these words merely envisaged that the precise layout of the property might be subject to change due to matters unforeseen by the developer at the time of the reservation agreement.
- (6) The Tribunal finds that under the reservation agreement in this case, the vendor was under an obligation, during the reservation period, not to negotiate with anyone other than the potential purchaser in relation to the sale of the property. The terms of the sale of the property reflected in the reservation agreement as having been agreed between the parties were subject to change (or subject to contract) and were not binding on either party unless and until contracts were formally exchanged. The reservation agreement did not itself contain any obligation of the vendor to sell the property, and was not an option.
- (a) Paragraph 67(7) to (9) above applies generally by analogy to the second appeal (except that the evidence of Mr Jim, Pak Keung is not taken into account in relation to the second appeal).
 - (b) In the second appeal, the witness statement of Mr Alzoebi states that “The vendor was not entitled to sell the property to anyone else during the reservation agreement” and that “the vendor confirmed that the property was secured meaning it would not be offered to anyone else”. That is consistent with the reservation agreement being a lock-out agreement.
 - (c) Mr Alzoebi states that “The vendor’s obligation was to complete the property and serve legal completion”. However, even if this was as a matter of fact the understanding of the prospective purchaser, for the reasons given, that understanding was incorrect. The ultimate question of what obligations were imposed on the vendor by the reservation agreement is a matter of contract interpretation for the Tribunal, not a question of fact to be established by witness evidence.

75. The reservation agreement signed by Mr Al Zoebi on 9 October 2013 did not grant a right of pre-emption within the meaning of s 46 FA 2003. Paragraphs 68-70 above apply also in relation to the second appeal.

76. The appeal therefore fails.

77. Paragraphs 72 and 73 above apply also in relation to the second appeal. For completeness, the Tribunal makes the following additional finding.

78. Even if it were the case that the reservation agreement conferred on the prospective purchaser a right that was an option or a right of pre-emption, and even if the transaction for the acquisition of this right (entry into the reservation agreement) was a linked transaction with the transaction resulting from the exercise thereof (the acquisition of the 999 year lease of the apartment), SDLT would have been chargeable on the linked transactions at the residential rate. This is so notwithstanding that, at the time that the reservation agreement was entered into, construction of the apartment had not yet commenced.

- (1) Where an option or right of pre-emption is acquired, the effective date of the transaction is when the option or right of pre-emption is acquired (s 46(3)). The focus is therefore on the time at which the reservation agreement was entered into.
- (2) An option or a right of pre-emption for purposes of s 46(1) FA 2003 must relate to a specific land transaction. An option must bind the grantor “to enter into a *land transaction*” (s 46(1)(a) FA 2003, emphasis added). A right of pre-emption must prevent the grantor from entering into, or restrict the right of the grantor to enter into, a *land transaction* (s 46(1)(b) FA 2003).
- (3) It is therefore necessary to identify what was, at the time that the reservation agreement was entered into, the specific land transaction which the option required the grantor to enter into in the event that the option was exercised, or which the right of pre-emption prohibited or restricted the grantor from entering into. It is then necessary to identify the particular land to which that land transaction related. That land is the land in which the option or right of pre-emption gave the Appellant an interest.
- (4) In the present case, the land transaction which the Appellant claims resulted from the exercise of the option or right of pre-emption was the acquisition by the Appellant from the vendor of the 999-year lease of a specific physical apartment. That specific physical apartment was the land an interest in which was the subject-matter of the land transaction referred to in s 46(1)(a) or (b).
- (5) The reservation agreement gave a specific plot number of the property to which it related. The contract of sale, which was entered into on 19 November 2013, less than a month and a half later, specified a particular apartment number in the development, the last two digits of which were the same as the plot number stated on the reservation agreement. The witness statement of Mr Alzoebi indicates that at the time that the reservation agreement was entered into, the development in which the apartment was to be located was under construction. The reservation agreement states that “I/we wish to purchase *the* above property” (emphasis added), indicating that it related specifically to a particular apartment. The 999-years lease, which was executed on 6 December 2017, related to the same apartment as that specified in the contract of sale. The Tribunal finds on the evidence, and the parties do not appear to dispute, that the reservation agreement, contract of sale, and lease, all related to the same specific apartment, all relevant

details of which were known by both parties at the time that the reservation agreement was entered into, even if the apartment has not yet been constructed.

- (6) The contract of sale, entered into on 19 November 2013, stated that the construction period for the apartment was to be May-October 2017, that completion would take place after service in writing by the vendor's solicitors specifying the date for completion, and that the property will have been substantially completed by then (clause 4.1). The contract further indicates that at that time, the apartment was registered at the Land Registry with a title number.
- (7) The Tribunal cannot accept the Appellant's argument that because the apartment had not been constructed at the time that the reservation agreement was concluded, the potential purchaser at that time acquired an interest in, or option over, bare land, which was non-residential. At the time that the option or right of pre-emption was acquired, the subject-matter of the land transaction within the meaning of s 46(1)(a) and/or (b) FA 2003 was an interest in a specific apartment, namely the apartment in respect of which the Appellant subsequently acquired a 999-year lease.
 - (a) Although the effective date of transaction in respect of the acquisition of an option or right of pre-emption is the date on which the option or right of pre-emption is acquired, not the date on which it is exercised, it is necessary to look at what the grantee of the option or right of pre-emption acquired on the date that the option or right of pre-emption was acquired.
 - (b) The word "land" in the SDLT legislation includes a building (definition of "land" in s 121 FA 2003). On the date that an option or right of pre-emption is acquired, the subject-matter of the land transaction referred to in s 46(1)(a) and (b) FA 2003 can be a building that will exist in the future.
 - (c) If, on the date that an option or right of pre-emption is acquired, the grantee acquires an interest in an apartment that will only exist in the future, then, even on the very date that the option or right of pre-emption is acquired, that future apartment will be the land an interest in which is the subject-matter of the land transaction referred to in s 46(1)(a) and (b) FA 2003.
 - (d) The reservation agreement did not relate to bare land, or to anything else apart from the specific apartment that was to be constructed. The contract which it is said the Appellant could have brought into existence by exercising the option or right of pre-emption conferred by the reservation agreement was the contract of sale entered into on 19 November 2013. That contract related only to the specific apartment about to be constructed, by reference to its specific Land Registry title number. That contract did not relate to anything else. If the reservation agreement was an option, then in the event that the option was exercised, it bound the vendor to enter into a land transaction in respect of that specific apartment. If the reservation agreement was a right of pre-emption, then it would have permitted the prospective purchaser, on the occurrence of the relevant trigger event, to exercise the right of pre-emption in relation to that specific apartment. The reservation agreement did not bind, prevent or restrict the right of the vendor to enter into a land transaction in respect of bare land or anything else.
- (8) Paragraph 73 above therefore applies also to the second appeal.

Additional matters

79. There is no suggestion that the reservation agreements in these cases were concluded for the purpose of reducing the amount of SDLT payable, and it was common ground that reservation agreements are a common practice, particularly in the sale of new-build residential property developments. Nevertheless, if the Appellants' arguments in these appeals had been accepted, that might have led to the question whether any purchaser of any residential property could avoid having to pay SDLT at the residential rate, through the simple device of entering into a reservation agreement shortly before contracts are exchanged. In reaching the conclusions above the Tribunal has not taken this question into account. At the hearing, the parties suggested that the anti-avoidance provisions in ss 75A to 75C FA 2003, or the General Anti-Abuse Rule in Part 5 of the Finance Act 2013, might possibly apply in any case where a reservation agreement is used specifically for the purpose of reducing the amount of SDLT, but no arguments in respect of these provisions were presented.

80. There may be a question whether an option or a right of pre-emption, in order to fall within s 46 FA 2003, must comply with s 2 of the Law of Property (Miscellaneous Provisions) Act 1989. No determination of this question is made in this decision. However, if the arguments of the Appellant had been accepted, it may have been necessary to address this question.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

81. 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.

**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

Release date: 03rd AUGUST 2023