Neutral Citation Number [2024] UKUT 00385 (TCC)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appellant: Edward Newfield	**Tribunal Ref: UT/2024/000047**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL
ORAL RECONSIDERATION

DECISION NOTICE

JUDGE JONATHAN CANNAN

Introduction

1. The Appellant seeks permission to appeal a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 26 January 2024 ("the Decision"). The FTT refused permission to appeal in a decision notice released on 28 March 2024. The Appellant renewed his application to the Upper Tribunal and permission was refused on paper on 29 August 2024. The Appellant requested an oral reconsideration of that decision and the hearing took place on 13 November 2024. Mr Newfield attended in person and Mr Max Simpson attended on behalf of HM Revenue & Customs ("HMRC").

2. *Section 11(1) Tribunals, Courts and Enforcement Act 2007* provides for a right of appeal to the Upper Tribunal "*… on any point of law arising from a decision made by the First-tier Tribunal…*". I should only grant permission to appeal on a particular ground if I am satisfied that it is arguable that there is a material error of law in the Decision.

3. In limited circumstances, a finding of fact by a tribunal can involve an error of law. The circumstances in which such an error of law can arise were summarised by the Upper Tribunal in *HM Revenue & Customs v Anna Cook* [2021] UKUT 15 (TCC) at [18] and [19]. Essentially there may be an error of law where there was no evidence to support a finding, where the evidence contradicted the finding or where the only reasonable conclusion contradicted the

finding. The position is similar in relation to inferences drawn from primary facts and evaluative judgments based on primary facts as summarised in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114] where Lewison LJ also noted that *"[T]he trial is not a dress rehearsal. It is the first and last night of the show*".

4. Given the nature of the ground of appeal for which the Appellant seeks permission, it is necessary to consider the Decision in more detail than usual.

The Decision

5. The FTT dismissed the Appellant's appeal against an assessment to capital gains tax in the sum of £26,305. The assessment was made in relation to a disposal of land in London N12 ("the Property"). The FTT made extensive findings of fact at [3] of the Decision, including findings in relation to the acquisition and disposal of the Property and findings in relation to the Appellant's dealings with HMRC in relation to the tax, if any, due on the disposal. The Appellant's grounds of appeal, as recorded by the FTT at [5] and [6], were as follows:

(1) That he should be liable to capital gains tax in respect of his disposal of the Property only on any increase in value arising while he was the beneficial owner of the Property. This was described as the "Legislative Issue".

(2) That the Respondents are estopped from assessing him to capital gains tax on any gain arising in respect of the Property because of certain assurances which the Respondents gave to him in the course of correspondence. This was described as the "Estoppel Issue".

6. The Appellant seeks to challenge the FTT's conclusion on the Legislative Issue. I need not say anything further about the Estoppel Issue.

7. The principal findings of fact relevant to the Legislative Issue may be summarised as follows:

(1) The Appellant inherited the Property from his mother on 31 July 1997. He was the sole registered owner of the Property prior to his bankruptcy.

(2) The Appellant was made bankrupt and beneficial ownership of the Property vested in his trustee in bankruptcy on 21 February 2000.

(3) The Appellant was discharged from bankruptcy on 21 February 2003.

(4) The Appellant granted an option to purchase the Property to Choiceplace Properties Limited ("CPL") on 4 May 2016. The consideration for the option was £1 and the option price was £215,000.

(5) CPL exercised the option on 28 September 2016.

(6) In October and November 2016, the Appellant had correspondence with HM Land Registry about removing certain bankruptcy entries from the registered title. The FTT was not provided with the relevant correspondence, but it found that the Appellant's

letters referred to the Property being held in trust. The Land Registry indicated that if the Property was held in trust then the register ought to include a restriction that a sole proprietor could not give a valid receipt for capital monies received on sale. Only two trustees could give a valid receipt.

(7) There was evidence that by 7 November 2016 the Land Registry had updated the register to show the trust restriction referred to above and that the Appellant's wife had been appointed as a co-trustee. No copy of the registered title was provided to the FTT.

(8) The sale to CPL was completed on or about 10 November 2016. No copy of the land transfer was provided to the FTT, but the Appellant's evidence was that it was completed by himself and his wife as co-trustees.

(9) The Appellant's tax return for 2016-17 did not declare any capital gain and on 16 April 2019 HMRC opened an enquiry into the return and requested information in relation to property disposals.

(10) The Appellant's representative informed HMRC that the Appellant did not have the ability to sell the Property until late 2016 because the title had been "locked into bankruptcy restrictions"; the Property had been sold at a loss and therefore it had not been included in the Appellant's tax return.

8. It is clear from the FTT's findings in relation to HMRC's enquiry that the Appellant's position was that he was the beneficial owner of the Property, having inherited it from his mother. It had vested in his trustee in bankruptcy when he was declared bankrupt. His case was that he was not liable for any capital gain because there was no increase in value between May 2016 and November 2016. HMRC's position was that he was the beneficial owner from July 1997 to November 2016. During the course of the enquiry there was extensive correspondence between HMRC and the Appellant in which HMRC sought further information from the Appellant, including the circumstances in which the Property became vested in the Appellant and a co-trustee and whether the co-trustee had a beneficial interest in the Property.

9. The assessment was issued on 23 October 2020. The Appellant appealed against the assessment on the basis that as a result of the bankruptcy rules and because the Property had not been vested in him until a few days before the disposal in November 2016 there was no capital gain.

10. The FTT began its consideration of the issues by setting out its conclusions as to the beneficial ownership of the Property as a matter of general law. The FTT records at [8] – [12] as follows:

> 8. It is common ground that, immediately before his bankruptcy commenced, the Appellant was the sole beneficial owner of the Property as a matter of general law. That has never been in dispute.
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> 9. However, there has been some dispute over whether the Appellant remained the beneficial owner of the Property as a matter of general law once the bankruptcy commenced. In that regard, we agree with the Appellant that, as a matter of general law, the Appellant's bankruptcy would have resulted in the automatic loss of beneficial ownership by the Appellant of the

> Appellant's assets, including the Property, by virtue of Section 306 of the Insolvency Act 1986. Those assets became part of the bankruptcy estate automatically so that the trustee in bankruptcy would be able to deal with the assets freely in the course of the bankruptcy.
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> 10. The precise location of the beneficial ownership of the Property as a matter of general law from time to time following the Appellant's discharge from bankruptcy is not entirely clear. The only thing that we can say for certain is that, at the point when the Appellant finally completed his disposal of the Property in November 2016, he was the sole beneficial owner of the Property as a matter of general law. We say that because the Appellant candidly accepted at the hearing that he had received the sale proceeds for the Property from CPL on his own account and that CPL had acquired beneficial ownership of the Property as a matter of general law as a result of completion. Moreover, the trustee in bankruptcy did not play any role in the disposal to CPL, which means that the Property clearly did not form part of the bankruptcy estate at that time.
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> 11. At the start of the hearing, we asked the parties to confirm that the conclusion set out in paragraph 10 above was common ground – confidently expecting an affirmative answer from both parties - and were somewhat taken aback when the Appellant sought initially to deny that he agreed with it, saying that beneficial ownership of the Property as a matter of general law had never re-vested in him. Our surprise stemmed from the fact that the correspondence summarised in paragraph 3 above is replete with instances where the Appellant clearly accepted that that re-vesting had occurred by the time that he completed the disposal – see, for example, the Appellant's letters of 9 July 2019, 5 August 2019, 10 September 2019, 1 November 2019, 2 November 2020, 7 December 2020 and 25 May 2021.
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> 12. We believe that, during the course of the hearing, the Appellant came to accept that, as a matter of general law, he was the beneficial owner of the Property as a matter of general law by the time that he completed the disposal of the Property to CPL but, in any event, to the extent that he did not, we find that this was the case for the reasons set out in paragraph 10 above. It is perfectly apparent that, regardless of the precise date when beneficial ownership of the Property as a matter of general law was re-vested in the Appellant, the relevant process had occurred by the time that the disposal of the Property was completed.

11. In those circumstances, the FTT did not need to identify precisely when and how the Appellant re-acquired beneficial ownership of the Property following his discharge from bankruptcy and prior to the disposal. However, the FTT went on to note at [14] – [16] that the Appellant's discharge from bankruptcy did not have the effect of automatically re-vesting beneficial ownership of the Property in the Appellant. Whilst the evidence provided by the Appellant was far from complete, the FTT inferred that the trustee in bankruptcy had entered into a deed of settlement with the Appellant which had that effect. This finding was made despite the Appellant's contention in correspondence with HMRC that there had been no such deed of settlement.

12. The FTT also noted at [17] – [19] that there was no evidence as to how the Land Registry had been persuaded to enter a trust-related restriction on the title, and surmised that there must have been some confusion on the part of the Appellant as to the trusteeship of the trustee in bankruptcy. However, given the FTT's findings in relation to beneficial ownership, the legal ownership of the Property at the time of disposal was not relevant. The FTT stated at [19]:

> 19. All that we can say is that we have seen no evidence whatsoever that the Property was subject to a trust before the start of the Appellant's bankruptcy and nor had HM Land Registry,

> certainly at the time of its letter to the Appellant of 1 November 2016. On the contrary, such evidence as we have seen suggests that the Appellant was the sole legal owner of the Property at that time, in addition to being the sole beneficial owner of the Property. That is what the registered title said and no trust deed has been produced to suggest that, prior to his bankruptcy, the Appellant's legal ownership was as trustee or that there was a co-trustee. Indeed, the fact that the Appellant was the sole registered owner of the Property prior to his bankruptcy, coupled with the fact that, by his own admission, the Appellant was the sole beneficial owner of the Property as a matter of general law prior to his bankruptcy, means that there could of necessity be no trust of the Property in existence prior to that date.

13. The FTT then went on to address the two grounds of appeal. In relation to the Legislative Issue, the FTT found that the position was clearly covered by section 66 Taxation of Chargeable Gains Act 1992 ("TCGA") which provides as follows:

> 66(1) In relation to assets held by a person as trustee or assignee in bankruptcy or under a deed of arrangement this Act shall apply as if the assets were vested in, and the acts of the trustee or assignee in relation to the assets were the acts of, the bankrupt or debtor (acquisitions from or disposals to him by the bankrupt or debtor being disregarded accordingly), and tax in respect of any chargeable gains which accrue to any such trustee or assignee shall be assessable on and recoverable from him.

14. The FTT held at [44] that the Appellant was the sole beneficial owner of the Property prior to the bankruptcy and at the time of disposal. Further, the effect of section 66 was to deem the Appellant to be beneficial owner of the Property whilst it was vested in the trustee in bankruptcy.

15. The result was that the appeal fell to be dismissed unless the Appellant succeeded on the Estoppel Issue. The FTT found for HMRC on the Estoppel Issue but that ground is not relevant for present purposes. The Appellant does not allege any error of law in the FTT's finding that the Appellant did not succeed on the Estoppel Issue.

Ground of appeal

16. The Appellant essentially relies on one ground of appeal in his application for permission to appeal. He says that the FTT erred in law in finding that he was the beneficial owner of the Property. In fact, he says that he had executed a trust in favour of his daughter in 1991 and since then he had owned the Property as trustee subject to the trust. As such, he had not been the beneficial owner of the Property and beneficial ownership of the Property never vested in his trustee in bankruptcy. In support of that ground of appeal the Appellant has produced a copy of a declaration of trust.

17. It is clear therefore that the Appellant's ground of appeal cannot succeed unless he is able to adduce new evidence, both oral and documentary evidence, as to the existence of the trust. As the FTT noted, there was no evidence before it as to the existence of any trust of the Property. The question I must consider for present purposes is whether there is any realistic prospect that the Appellant would be granted permission by the Upper Tribunal to adduce new evidence to support the existence of a trust.

18. The question of whether the Upper Tribunal can admit new evidence in order to found an appeal against a decision of the FTT which otherwise discloses no error of law has previously

been considered by the Upper Tribunal. It is clear from the discussion in *Ketley v HM Revenue & Customs* [2021] UKUT 218 (TCC) at [52] – [69] that even if there is discretion to admit such evidence, regard should be had to the three-part test for the admission of new evidence set out by Denning LJ, as he then was, in *Ladd v Marshal*l [1954] 1 WLR 1489 at page 1491:

> … first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

19. The Upper Tribunal in *Ketley* held that even if it could in principle admit new evidence to found a ground of appeal, it was clear that the application had to be refused. It would not be fair and just to admit the new evidence.

20. The Appellant's case on the present application is as follows:

(1) He was misled by the Land Registry, the trustee in bankruptcy and HMRC as to the beneficial ownership of the Property.

(2) The question of a pre-existing trust did not arise until the Appellant received HMRC's skeleton argument in the summer of 2023. He raised the issue at that stage but was "fobbed off" by HMRC and the FTT clerks were "disinclined to take the matter further, seriously, or at all".

(3) He had failed to grasp the significance of the trust.

(4) The original trust may have been sent to the Land Registry, but a true copy has been produced.

(5) At the time of the bankruptcy, the trustee in bankruptcy requested to see the trust document and required the two witnesses to attend its offices to confirm the position. One of the witnesses died some years ago, but the other is still alive. The trustee in bankruptcy confirmed the existence of the trust.

(6) He tried to raise this matter before the hearing on 12 January 2024 and subsequently by email prior to the Decision being released but it is not referred to in the Decision.

(7) If HMRC had ever asked to see a copy of the trust, he would have provided a copy immediately.

21. I note that the Appellant's evidence in his witness statement before the FTT was that the Property had become vested in his trustee in bankruptcy in 2000 because he was the beneficial owner of the Property at that time. The Appellant's correspondence with HMRC between July 2019 and May 2021 was to the same effect. There were opportunities within that correspondence for the Appellant to provide evidence as to the existence of a trust, but he did not take those opportunities. Further, the Appellant's evidence at the FTT hearing was that he had received the sale proceeds on his own account.

22. The Appellant seeks to completely change the case which he put to the FTT. Not simply the legal arguments he relied on but the evidential basis of his case. This is despite the fact that the Appellant had numerous opportunities to put evidence before the FTT to support a case that the Property was subject to a trust of which he was simply a trustee and not a beneficiary.

23. The Appellant says that it did not become apparent to him that the existence of a trust was relevant until he received HMRC's skeleton argument in the FTT. The skeleton argument is dated 11 July 2023 and addressed the Appellant's correspondence with the Land Registry in November 2016. That correspondence referred to the existence of a trust, although as noted it was not complete. HMRC pointed out in their skeleton argument the absence of any evidence to support the existence of a trust.

24. The FTT appeal had been due to be heard in July 2023 but was postponed. In the event it was not heard until January 2024. In the meantime there was lengthy correspondence between the Appellant, HMRC and the FTT. HMRC noted in that correspondence that the Appellant was not relying on any further documentary evidence relating to the existence of a trust. HMRC made clear that they would object to any application to adduce further evidence.

25. The Appellant served a short skeleton argument on 21 September 2023. His case was that beneficial ownership of the Property had vested in the trustee in bankruptcy. At the same time, he also contended that there was a trust of the Property and that "*the aforesaid trust named others (not myself) as beneficiaries*". He also asserted that HMRC was now out of time to assess the trustees or the beneficiaries in relation to capital gains tax on disposal of the Property.

26. This was yet another opportunity for the Appellant to provide evidence as to the existence of a trust. He must have realised the significance of the existence of a trust because he referred to it in his skeleton argument. He could easily have provided a copy of the trust deed on which he now seeks to rely. He could easily have given evidence as to the meeting with the trustee in bankruptcy involving the individuals who are said to have witnessed the execution of the trust deed, and the fact that the trustee in bankruptcy accepted the existence of a trust.

27. The Appellant candidly accepted that he had no explanation as to why he had not provided evidence as to the existence of the trust prior to this application. He recognised, albeit with the benefit of hindsight, that it would obviously have been a sensible thing to do.

28. Immediately after the FTT hearing in January 2024, the Appellant emailed HMRC asking HMRC to consider the effect for capital gains tax purposes of the existence of a trust. The FTT had also invited the Appellant to provide further written submissions on the Estoppel Issue. The Appellant provided his further submissions on 24 January 2024. At this stage, the Appellant believed he was going to be unsuccessful on his arguments before the FTT. Therefore, he also raised what he described as "the trust issue", stating that "*there was an informal trust in place naming my children as beneficial owners*" and that the trustee in bankruptcy had accepted the validity of the trust. He did not provide any copy of the trust deed.

29. The FTT decision was released on 26 January 2024. It does not refer to the Appellant's email dated 24 January 2024 but there is no reason to think that the FTT had not seen the email.

30. The Appellant has sought to blame HMRC for his failure to adduce the evidence on which he now seeks to rely. That criticism is unfair. The Appellant had numerous opportunities to

adduce the evidence. He only sought to rely on the existence of a trust when it became apparent that he was likely to lose on the grounds of appeal he had been relying on. It is only now that he has produced a copy of the trust deed.

31. I do not consider that there is any reasonable prospect of the Appellant being permitted to adduce new evidence to establish his proposed ground of appeal. As Lewison LJ stated, the hearing is the first and last night of the show. Evidence as to the existence of a trust may well have had an important influence on the outcome of the appeal. I am also prepared to accept that the evidence is apparently credible. HM Land Registry appear to have been provided with the original trust deed and accepted it as valid. However, the evidence was clearly available to the Appellant throughout HMRC's enquiry and throughout the FTT proceedings. There is no satisfactory explanation as to why the Appellant did not produce the evidence during the enquiry or prior to the FTT hearing. Even after the hearing, the Appellant only referred to an "informal trust" and did not provide a copy of the trust deed.

32. Further, there is a real risk that HMRC would be prejudiced if the Appellant was now permitted to rely on the existence of a trust. As one of the trustees, he would seek to argue that HMRC are now out of time to assess the trustees for capital gains tax on the disposal of the Property. At the time the FTT proceedings commenced, HMRC would certainly have been in time to assess the Appellant as trustee rather than as beneficial owner.

33. I do not consider that there is any reasonable prospect of the Appellant being permitted to adduce evidence as to the existence of the trust. It follows that he has no realistic prospect of establishing any error of law in the decision of the FTT.

Conclusion

34. For the reasons given above, I must refuse permission to appeal.

Signed: Jonathan Cannan **Upper Tribunal Judge**
Issued to the parties on: 27 November 2024