[2020] UKFTT 0121 (TC)

TC07615

CORPORATION TAX – land remediation relief - did the replacement or improvement of iron gas mains satisfy the conditions in paragraph 12 of Schedule 22 Finance Act 2001 to qualify for relief for remediation of contaminated land - no – in certain cases, the Appellant had not acquired rights in or over land in the United Kingdom whilst, in other cases, although the Appellant had acquired such rights and the land was in a contaminated state at the time of acquisition by virtue of the gas in the pipes at that time, the expenditure incurred by the Appellant was not "on" or "in relation to" the land and was therefore not "qualifying land remediation expenditure" and, in any event, the land was in a contaminated state by virtue of something done or omitted to be done by a person with a "relevant connection" to the Appellant

FIRST-TIER TRIBUNAL Appeal number: TC/2018/03156 TAX CHAMBER

BETWEEN

NORTHERN GAS NETWORKS LIMITED Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS Respondents

TRIBUNAL: JUDGE TONY BEARE MR JOHN ADRAIN

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 28 January 2020

Mr Nikhil Mehta, instructed by Enyo Law, for the Appellant

Mr David Yates, QC, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision relates to an appeal by the Appellant against three partial closure notices dated 9 February 2018. In those notices, the Respondents denied the Appellant's claim for

land remediation relief ("LRR") under Schedule 22 of the Finance Act 2001 ("Schedule 22") in respect of expenditure incurred by the Appellant in its accounting periods ending 31 December 2007, 31 December 2008 and 31 December 2009. The amounts of expenditure for which the Appellant claimed LRR in each of those accounting periods is as follows:

(1) accounting period ending 31 December 2007 - £41,207,560;

(2) accounting period ending 31 December 2008 - £50,203,905; and

(3) accounting period ending 31 December 2009 - £18,055,133.

2. The Appellant owns and operates one of the eight regional gas distribution networks in the UK. In 2005, it acquired some 37,000 kilometres of gas pipelines as part of the acquisition of its gas distribution network. A significant portion of the pipelines acquired comprised iron pipes. By the time that the acquisition occurred, iron as a material had been recognised by the Health & Safety Executive ("HSE") as giving rise to serious safety issues. The issues arose from the potential for the pipes to fracture as a result of corrosion by effluxion of time and inherent ground conditions. This meant that the pipes gave rise to the risks of escaping gas and gas explosions. The gravity of these risks resulted in the HSE's introducing a compulsory programme in 2001 for the replacement or improvement of iron pipes by gas distribution operators such as the Appellant, which is known as the "30/30 Programme". (The reason for this name is that the programme requires the replacement or improvement, over a 30 year period, of "at risk" mains pipelines located within 30 metres of a building). Following its acquisition of its gas distribution network, in addition to its normal responsibilities regarding safety, the Appellant was required to comply with the 30/30 Programme either by replacing iron pipes with high density polyethylene ("HDPE") pipes or by lining existing iron pipes with HDPE pipes.

3. The expenditure which is the subject of this appeal is the expenditure which was incurred by the Appellant in the accounting periods in question in complying with its obligations under the 30/30 Programme. The reason why the amount of the Appellant's claim to LRR in respect of the accounting period ending 31 December 2009 is so much lower than the amount of the Appellant's claim to LRR in respect of the two accounting periods which preceded that accounting period is that there was a change in law which took effect from 1 April 2009 the result of which was that the Appellant accepts that the expenditure which it incurred in replacing or improving the iron pipes after the first three months of 2009 does not qualify for LRR. The change in law to which we have just referred was the re-enactment in Part 14 of the Corporation Tax Act 2009 (the "CTA 2009") of the provisions which were formerly set out in Schedule 22, coupled with an amendment to the conditions which needed to be satisfied in order for LRR to apply which was introduced by the Finance Act 2009 (the "FA 2009"). The upshot of those changes together means both that the relief is now governed by the provisions in the CTA 2009 instead of Schedule 22 and that the issue to which this appeal gives rise is of historic interest only. However, as the Appellant is just one of a number of regional gas distributors who incurred expenditure under the 30/30 Programme before the change in law took effect, it is likely to be of some interest to those distributors as well as the Appellant.

LRR

4. Schedule 22 provided for different types of relief for expenditure incurred on land acquired in a contaminated state for the purposes of a trade depending on whether the expenditure in question was capital or revenue in nature. In this case, we are concerned with the relief which was provided under Part 2 of the schedule – relief for land remediation

expenditure which was of a revenue nature and was therefore deductible as a trading expense. In the rest of this decision, all paragraph numbers refer to paragraphs in Schedule 22 unless indicated otherwise.

5. The main relieving provision in Part 2 of Schedule 22 was paragraph 12, which provided as follows:

"*Entitlement to relief*

12(1) This paragraph applies if—

(a) land in the United Kingdom is, or has been, acquired by a company for the purposes of a Schedule A business or a trade carried on by the company,

(b) at the time of acquisition all or part of the land is or was in a contaminated state, and (c)

the company incurs qualifying land remediation expenditure in respect of the land.

(2) A company is entitled to land remediation relief for an accounting period if the company's qualifying land remediation expenditure is deductible in that period.

(3) The company's qualifying land remediation expenditure is deductible in that period if it is allowable as a deduction in computing for tax purposes the profits for that period of a Schedule A business or a trade carried on by the company.

(4) A company is not entitled to land remediation relief in respect of expenditure on land all or part of which is in a contaminated state, if the land is in that state wholly or partly as a result of any thing done or omitted to be done at any time by the company or a person with a relevant connection to the company."

6. It can be seen that the way in which LRR operated in the context of Part 2 of the schedule was to provide for a weighted deduction of 150% of the expenditure incurred on qualifying land remediation in the computation of profits for corporation tax purposes. The Respondents accept that the expenditure in respect of which the Appellant has claimed LRR in this case was trading expenditure of a revenue nature and was therefore deductible in computing the Appellant's taxable profits. However, the Appellant is seeking relief for 150% of that expenditure on the basis that the expenditure satisfied the conditions set out in paragraph 12 and it is in relation to that question that the parties disagree.

THE CONDITIONS FOR LRR TO APPLY

7. It can be seen from the terms of paragraph 12 as set out in paragraph 5 above that, in order for the Appellant to succeed in this appeal, it must establish that it has satisfied each of the following six conditions in relation to the expenditure in question:

(1) land in the UK was acquired by the Appellant;

(2) that land was acquired for the purposes of the Appellant's trade;

(3) at the time of acquisition all or part of the land was in a contaminated state;

(4) the Appellant incurred qualifying land remediation expenditure in respect of the land;

(5) the qualifying land remediation expenditure was allowable as a deduction in computing for tax purposes the profits of a trade carried on by the Appellant; and

(6) the land must not have been in a contaminated state wholly or partly as a result of anything done or omitted to be done at any time by the Appellant or a person with a relevant connection to the Appellant.

8. There are various other provisions in Schedule 22 which define or expand upon some of the terms set out in paragraph 7 above but, in order to make this decision easier to read, we will set out those provisions at the stage when we address the relevant condition.

9. Before proceeding further, however, we should say that there is no dispute between the parties in relation to the conditions which are set out in paragraphs 7(2) and 7(5) above. The Respondents accept that the Appellant was acting in the course of its trade in acquiring the land on which the relevant iron mains pipes were located and that the expenditure in replacing or improving the pipes was revenue in nature and therefore qualified for relief as expenditure incurred in the course of the Appellant's trade. The parties are apart only in relation to the other conditions which are set out in paragraph 7 above. In that regard, it is worth observing that, in order for the Appellant to succeed in this appeal, it needs to demonstrate that the expenditure in question meets each of those conditions. If, in relation to any of the expenditure, it fails to clear any one or more of the relevant hurdles, then its appeal in respect of the relevant expenditure must fail.

10. In this decision, we will address, in turn, each of the conditions set out in paragraph 7 above other than the two conditions in respect of which the parties are agreed. However, before doing that, we should elaborate on the salient facts in this case, as determined from the evidence with which we were presented at the hearing.

THE FACTS

11. That evidence took the form of witness statements and related exhibits from three witnesses, together with oral evidence from those witnesses at the hearing. The three witnesses were:

(1) Mr Scott Wood, the head of commercial finance at the Appellant at the time when the expenditure which is the subject of this appeal was incurred;

(2) Mr Michael Gregory Ashworth, the legal director and company secretary of the Appellant at the time when the expenditure which is the subject of this appeal was incurred; and

(3) Mr Martin Alderson, the asset risk management and safety director of the Appellant at the time when the expenditure which is the subject of this appeal was incurred.

12. We should start by observing that all three witnesses were credible, helpful and coherent and that their evidence was not disputed by the Respondents. Accordingly, we have no hesitation in adopting the following (which emerged from their evidence) as our relevant findings of fact in this case:

(1) the expenditure to which this appeal relates is expenditure on the replacement or improvement of gas mains made of iron which were acquired by the Appellant in 2005 on completion of the hive down of the part of the gas distribution business which the Appellant acquired from its then parent company, National Grid Transco ("NGT");

(2) in order to carry out its gas distribution business, the Appellant is required to be licensed by the Gas and Electricity Markets Authority ("GEMA") pursuant to the powers granted to GEMA by the Gas Act 1986 (the "GA"). The Appellant is a licensed "gas transporter" for the purposes of Section 7 of the GA (a "gas transporter"). Sections 9 and 10 of the GA impose a series of general obligations on a gas transporter which include the duty to develop a safe, efficient and economical pipeline system for conveying gas to premises;

(3) the Appellant is also subject to a whole body of safety legislation which includes:

(a) its obligation to replace and improve iron pipes under the 30/30 Programme;

(b) its obligations under the Health and Safety at Work Act 1974, which provides that all gas transporters owe a duty of care not to expose either their employees or the general public to undue risks;

(c) its obligations under the Gas Safety (Management) Regulations 1996, which covers gas composition, the safe management of gas through a network and the duty to minimise the risk of a gas supply emergency, the arrangements for dealing with gas supply emergencies and reported gas escapes and gas incidents; and

(d) its obligations under the Pipeline Safety Regulations 1996 (as amended with effect from 3 November 2003 by the Pipeline Safety Amendment Regulations 2003), which include an obligation to ensure that pipelines are composed of suitable material, are sound and fit for purpose and are maintained in an efficient state and good repair.

These mean that the Appellant, like other gas transporters, is required to prepare (and update every 3 years) a "safety case" for provision to, and approval by, the HSE and submit to the HSE at specified intervals a programme outlining the details of the pipes which are to be replaced. At the time when the expenditure which is the subject of this appeal was incurred by the Appellant, that programme was required to be provided to the HSE on an annual basis. The safety policy and legislation described in this paragraph governs and informs the circumstances in which work was carried out on the iron mains pipes owned by the Appellant in the accounting periods in question;

(4) at the time when the expenditure which is the subject of this appeal was incurred by the Appellant, the Appellant was subject to a business plan which took into account the expenditure which it was expected to incur in complying with its safety obligations. The anticipated extent of that expenditure was taken into account by The Office of Gas and Electricity Markets ("Ofgem") in setting the maximum level of the Appellant's income from time to time. However, as things transpired, during the period in question, the Appellant out-performed expectations by carrying out its obligations more cheaply than had been anticipated, with the result that the Appellant made a greater profit than had been anticipated;

(5) all of the Appellant's operational activities, including those in relation to the 30/30 Programme, were, at the time when the relevant expenditure was incurred, and remain, outsourced to United Utilities Operations Limited ("UU") under an asset service agreement dated 1 June 2005. Under that agreement, UU is required to report separately to the Appellant for the work which it carries out in relation to the different categories of maintenance, repair and replacement of pipes, including the work which it carries out in relation to the 30/30 Programme;

(6) the iron mains pipes which are the subject of this appeal fall into four categories, as follows:

(a) those laid within private land not owned by the Appellant to connect to areas outside that land ("private land");

(b) those laid within public streets – ie the public highway – ("public land");

(c) those laid within private streets to connect to private land on those private streets ("private streets"); and

(d) those laid within land which the Appellant itself owned ("owned land").

Approximately 95% of the expenditure on replacing or improving the iron mains pipes which are the subject of this appeal were laid within public land and only a very small percentage of that expenditure related to iron mains pipes which were laid within each of the other three categories of land;

(7) in relation to private land, the Appellant and each of its predecessors, as a gas transporter, was and is able compulsorily to purchase land of that type (or rights over land of that type) pursuant to powers granted to it under Schedule 3 of the GA. Where private land (or rights over private land) is or are purchased in that way, and pipes are laid under the land, the gas transporter can do whatever is necessary for the maintenance of the pipes without the need for any grant of further rights by the owner of the land. However, in practice, the process of compulsory purchase can be expensive and prolonged and therefore we were asked to assume that, in this case, none of the private land within which the iron mains pipes which are the subject of this appeal were located fell within this category. Instead, we were asked to assume that the Appellant's interest or rights in or over the relevant land had all been acquired by a predecessor of the Appellant, pursuant to a deed of grant executed by that predecessor and the owner of the relevant private land, and then transferred to the Appellant in the course of the hive down from NGT mentioned above. We were shown a standard form deed of grant which would typically have been used in such cases and that standard form conferred on the gas transporter the rights set out in clause 4.1 of the deed, which included the right to lay, construct, inspect, maintain, protect, replace or remove pipes, to use the pipes for the transmission of gas and to enter the grantor's land in order to gain access to the pipes;

(8) in relation to public land, the Appellant's rights in relation to the relevant land were and are governed solely by statute. The principal provision is Section 9.3 of, and Schedule 4 to, the GA and this confers on a gas transporter the right, inter alia, to place pipes and other apparatus in or under any street and from time to time to repair, alter or remove such apparatus. The schedule also provides for the licenced gas transporter to execute any works requisite for or incidental to those works, including opening up the street and removing or using all earth and materials in or under the street. The material parts of Schedule 4 are set out in the Appendix to this decision. In addition, the Appellant was and is subject to, and had and has rights under, the New Roads and Streetworks Act 1991, which provides for utilities and other licensed bodies to provide notifications of an intention to commence works and plans identifying the location of, and the nature of, the apparatus which it has installed on public land;

(9) in relation to private streets, the Appellant and each of its predecessors did and does not customarily obtain formal rights to enter the relevant land. Instead, it relied or relies on the fact that, by obtaining informal consent to carry out the work in question from the landowners abutting the private street, it had or has the tacit consent of those landowners to the relevant works;

(10) in relation to owned land, the Appellant obviously had or has, the right to do as it wished on the relevant land, subject to complying with any relevant planning laws and regulations;

(11) as set out in the enforcement policy document which was issued by the HSE in 2001 and which introduced the 30/30 Programme, there was at that time a high level of societal concern about the potentially serious consequences – a risk of harm to people and damage to property - of a gas mains failure when gas was being transported through iron gas mains. The main problem with iron pipes is their potential to fracture either as a result of corrosion or as a result of pressure exerted by changes in the surrounding ground. Even ductile iron pipes – which are more flexible than cast iron or spun iron

pipes and therefore better able to absorb stress from the surrounding ground – are susceptible to corrosion in certain circumstances. The gas which flows through the pipes does not increase the risk of fracture or cause or contribute to corrosion of the pipes. However, if a pipe fails while there is gas flowing through it, then there is a risk of gas escaping and causing an explosion. Since the 1970s, when the risk of iron pipes' failure was discovered, HDPE instead of iron has been used for all new installations and the Appellant has not itself laid any new iron gas pipes since it acquired its gas distribution business; and

(12) there are 3 ways in which the risks posed by an iron mains pipe can be addressed. These are as follows:

(a) a new HDPE pipe can be installed alongside the old iron pipe with the result that the latter pipe is abandoned;

(b) if the old iron pipe has sufficient diameter, a new HDPE pipe can be inserted into the old iron pipe, effectively lining the old iron pipe. (This is what is meant by "improving" the iron pipe); or

(c) the gas can be transported along another route and the old iron pipe can be abandoned.

In all three cases, the old iron pipe remains in the ground as an asset of the Appellant and therefore still needs to be managed. However, the risks associated with it will have been reduced significantly by the works in question because of the absence of gas flow through the iron pipe alone. In other words, the iron pipes themselves pose no risk to persons or property – instead, it is the presence of the gas within those pipes which does so. In 80% to 90% of cases, the option described in paragraph 12(12)(b) above is adopted;

DISCUSSION

13. We now turn to examine each of the disputed conditions which are set out in paragraph 7 above. In each section of this discussion, we will set out:

(1) any additional legislative provisions which may be relevant to our consideration of the condition in question;

(2) the parties' respective arguments in relation to the Appellant's ability to satisfy the condition; and

(3) our conclusion in relation to whether or not the Appellant has satisfied the condition.

<u>Paragraph 12(1)(a) - did the Appellant acquire land in the UK?</u>

Additional legislative provisions

14. For the purposes of Schedule 22, "land' is defined in paragraph 31(1) as meaning "any estate, interest or rights in or over land". This definition is slightly different from the definition of "land" in the Interpretation Act 1978 (the "IA"), which provides, at Section 5 and Schedule

1, that, unless the contrary intention appears, "land" "includes building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land".

The arguments of the parties

15. It was common ground in this appeal that the iron mains pipes the expenditure on whose replacement or improvement was the subject of this appeal were at all times chattels which remained in the ownership of the Appellant. In other words, the pipes never

became fixtures attaching to the land within which they were located and therefore never left the ownership of the Appellant and became vested in the owner of the relevant land.

16. It was also common ground that:

(1) to the extent that the Appellant had "acquired land" as a result of the hive down from NGT, all of the "land" was in the UK.

(2) when the hive down from NGT occurred, the Appellant acquired, in addition to the pipes, ownership of the owned land and, to the extent that they did not transfer automatically with the transfer of the business, all of the rights appurtenant to the business which related to the pipes (including, without limitation, all rights of installation, retention, maintenance and/or use of the pipes) which had until then been vested in NGT, whether by statute, grant, agreement, lease, licence, wayleave or other contractual arrangement – see the definition of "Pipeline Rights" in the hive down agreement);

(3) in relation to the private land, the rights in relation to that land under the deeds of grant which were acquired by the Appellant pursuant to the hive down were "rights in or over" the relevant land; and

(4) this meant that, as regards the pipes which were laid within the owned land and the private land, the Appellant acquired "an estate, interest or rights in or over" the owned land and private land by virtue of the hive down.

17. We understood that it was also common ground that, as regards the pipes which were laid in private streets, the hive down did not give rise to an acquisition by the Appellant of any "estate, interest or rights in or over" the land comprising the private streets because the informal consent given by the owners of the properties abutting each private street to allow the Appellant's relevant predecessor to lay the pipes in that private street clearly did not amount to a transferable estate or interest in or over the private street and was insufficient to amount to a transferable right in or over the private street. In any event, even if the Appellant did not formally concede this point, it chose to provide no evidence at the hearing to the effect that it had acquired by virtue of the hive down any estate, interest or rights in or over the private streets and therefore we are bound to conclude that no such rights were acquired by the Appellant in relation to the private streets. It follows that, to the extent that the Appellant's claim to LRR in this case is in respect of expenditure which the Appellant incurred in replacing or improving the iron mains pipes under the private streets, the Appellant's claim fails at the first hurdle.

18. Given the position in relation to the private land, the owned land and the private streets referred to in paragraphs 16 and 17 above, we confine ourselves in this part of our decision to the question of whether, when it acquired, pursuant to the hive down from NGT, the pipes which were laid within the public land, the Appellant thereby acquired an estate, interest or rights in or over that land. As noted in paragraph 12(6) above, expenditure in this category amounted to approximately 95% of the aggregate expenditure which is the subject of this appeal.

19. In relation to the public land, it was common ground that the Appellant became, as a result of the hive down from NGT, a gas transporter and that this meant that it became subject to the obligations of a gas transporter as set out in the GA and entitled to the rights of a gas transporter as set out in the GA and, in particular, as set out in Section 9.3 of, and Schedule 4 to, the GA.

20. On behalf of the Appellant, Mr Mehta submitted that, by becoming entitled to the rights set out in Schedule 4 to the GA in relation to the public land as a result of the hive down from

NGT, the Appellant "acquired land" for the purposes of paragraph 12(1)(a). He said that this was for the following reasons:

(1) the rights under Schedule 4 to the GA to which the Appellant became entitled when the hive down from NGT occurred and it became a gas transporter amounted to "land" for the purposes of paragraph 12(1)(a) because those rights were "rights in or over land" for the purposes of the definition of "land" in paragraph 31(1). Although the definition of "land" in paragraph 31(1) was difficult to reconcile with all the uses of the word "land" in the operative parts of Schedule 22 - as we discuss further in the sections of this decision which follow - paragraph 12(1)(a) was one provision in Schedule 22 where the use of the word "land" was entirely consistent with that definition in that what was being addressed in that paragraph was the nature of the non-physical incorporeal assets which had been acquired. In this case, the rights to which the Appellant became entitled arose under a statute, as opposed to a contract, but rights which arose under a statute were still rights. It was not necessary for rights to arise by virtue of a contract in order to be rights;

(2) those rights were "acquired" by the Appellant when it became entitled to them as a result of taking over the gas distribution business – a necessary consequence of the acquisition of that business was that the Appellant assumed the statutory obligations and became entitled to the statutory rights which were inherent in carrying on that business and, when it became entitled to those rights, it "acquired" those rights;

(3) in support of the proposition that the statutory rights to which the Appellant became entitled as a result of the hive down amounted to "rights over land", Mr Mehta referred us to:

(a) Section 34 of the Road Traffic Act 1988, which defined an interest in land as including any right over land "(whether exercisable by virtue of the ownership of an estate or interest in land or by virtue of a licence or agreement)";

(b) Section 44 of the Civil Aviation Act 1982, which enabled the Secretary of State for Civil Aviation to obtain orders creating legal rights over land in connection with matters regarding the safety of aircraft traffic and sub-section (2) of which expressly stated that "[such] an order may provide for the creation… of easements or servitudes over land or of other rights in or in relation to land, including rights to carry out and maintain works on any land and to install and maintain structures and apparatus on, under, or across any land";

(c) *Taylor & Taylor v North West Water* (1995) 70 P. & C.R. 94 ("*Taylor*"), where the Lands Tribunal held:

(i) in reliance on decisions in the earlier cases of *Taylor v Oldham Corporation* (1876) 4 Ch. D. 395 ("*Oldham*") and *Thurrock Grays and Tilbury Joint Sewerage Board v Thames Land Company* (1925) 90 J.P. 1 ("*Thurrock*"), that a sewer laid under land by a utility company pursuant to a statutory power which was vested in the utility company "was an acquisition of land, namely the stratum of subsoil comprising the sewer" - see page 107; and

(ii) in the alternative, that, even if that was incorrect, "the laying of the sewer through the claimants' land gave the respondents an "interest or right in or over land" sufficient to bring it within the definition of land in [the relevant statute]" – see page 108. In reaching this conclusion, the Lands Tribunal stated that a power under a particular statute to insert and repair gas pipes - which had been held by the Court of Appeal in *Newcastle-under-Lyme Corp v Wolstanton* [1947] Ch. 427 ("*Newcastle*"), at page 456, to confer an

exclusive right of occupation of the space occupied by the gas pipes – gave rise to an "interest or right in or over land"; and

(d) Brett LJ in *Re Corporation of Dudley* [1881] 8 QBD 86 at page 93, who held that, where a public body was empowered to do anything on land of a public character by statute, the statute also conferred on that public body all rights without which it would be unable to carry out its statutory functions;

(4) Mr Mehta added that, in their VAT Notice 742 in relation to Land and Property ("Notice 742"), the Respondents clearly accepted that, for the purposes of the language used in Item 1 of Group 1 of Schedule 9 to the Value Added Tax Act 1994 – which referred to "the grant of any interest in or right over land" - the phrase "right over land" included rights of precisely the same nature as the Appellant's rights in this case – namely, rights of entry onto someone else's land to perform a specific task and/or to lay pipes or cable over or under someone else's land – see paragraph 2.4 in Notice 742. Mr Mehta submitted that, leaving aside the fact that this was, in his view, an accurate description of the sorts of rights which amounted to "rights over land", it was not open to the Respondents to treat the same rights in a different way for the purposes of corporation tax; and

(5) in support of the proposition that rights over land conferred on a person by statute could be said to have been "acquired" by that person, Mr Mehta submitted that, as a matter of plain English, a right to which a person became entitled for any reason – whether as a result of a statutory provision or by way of purchase - could properly be said to have been
"acquired" by that person. He also referred us to certain judicial statements which clearly assumed that to be the case. For example, in *Newcastle*, Somervell LJ stated that "[a] right of support for buildings or works can be acquired by grant, prescription, or statute" (see page 462) and Morton LJ said that "a cavity cannot have attached to it a natural right to support – it is merely an empty space; nor can a gas pipe, although a right to have it supported may be acquired in other ways, e.g., by statute or by prescription" (see page 457).

21. On behalf of the Respondents, Mr Yates responded as follows:

(1) the Appellant's rights in relation to the public land, as set out in Schedule 4 to the GA, did not amount to "land" for the purposes of paragraph 12(1)(a) and, even if they did, they had not been "acquired" for the purposes of that paragraph;

(2) turning first to the question of whether the rights conferred on the Appellant by Schedule 4 to the GA amounted to "land" for the purposes of paragraph 12(1)(a), Mr Yates made the following points:

(a)in this case, the only relevant rights in relation to the public land to which the Appellant became entitled as a result of the hive down from NGT were the rights granted under Schedule 4 to the GA to the Appellant as a gas transporter. Those rights did not constitute an "interest or rights in or over land" within the meaning of paragraph 31(1) because they merely entitled the Appellant to place its pipes in the space or cavity which were occupied by its pipes and to exercise certain rights of access to those pipes. The rights were not in any meaningful sense an "interest or rights in or over land";

(b) Mr Yates conceded that the argument set out in paragraph 21(2)(a) above had failed before the Lands Tribunal in *Taylor* but he said that *Taylor* was wrongly decided and that it was not binding on us;

(c) in construing the definition of "land" in paragraph 31(1), it was necessary to take into account the fact that Parliament had chosen to use the word "land" as the relevant defined term and therefore treat that choice as throwing light on the sorts of interests and rights which the definition was meant to be covering – see the words of Lord Hoffmann in *MacDonald (Inspector of Taxes) v Dextra Accessories* [2005] STC 1111 at paragraph [18]. Construing the definition of "land" on that basis in this case, the draftsman could not sensibly have intended that either the right to occupy the space or cavity which was occupied by the Appellant's pipes or the rights of access in relation to the pipes should fall within the definition of "land" by virtue of being an "interest or rights in or over land"; and

(d) even if *Taylor* had been rightly decided and a right held by the Appellant by virtue of Schedule 4 to the GA could properly be regarded as "land" for the purposes of paragraph 31(1) by virtue of being an "interest or rights in or over land", that did not mean that that definition necessarily applied to its full extent in the context of paragraph 12(1)(a). In that regard, there was authority in the House of Lords decision in *Payne (Inspector Taxes) v Barratt Developments (Luton) Limited* [1985] 1 WLR 1 ("*Payne*") for the proposition that a definition should not slavishly be applied where the context required otherwise. In *Payne*, the House of Lords recognised that, when the word "land" was used in the phrase "the construction or substantial reconstruction of buildings on the land in question" in Section 29(3) of Schedule 5 to the Finance Act 1976, that word must necessarily be confined to such land as was capable of being developed by the construction or reconstruction of buildings on it and therefore the general definition of "land" in Schedule 1 to the IA did not apply in that context. In the present case, Mr Yates submitted, LRR had relevance only to those types of "land" which were capable of being contaminated and this would obviously exclude rights such as those which were held by the Appellant pursuant to Schedule 4 to the GA. Therefore, by parity of reasoning with the approach in *Payne*, the word "land" when it was used in paragraph 12(1)(a) should be construed in such a way as to disregard such rights, notwithstanding the general definition of "land" in paragraph 31(1);

(3) moreover, even if the rights under Schedule 4 to the GA to which the Appellant became entitled by virtue of the hive down from NGT were such as to amount to "land" for the purposes of paragraph 12(1)(a), those rights could not be said to have been "acquired" by the Appellant. The rights had not been acquired by the Appellant under the hive down agreement or pursuant to any other purchase contract. Instead, the Appellant's entitlement to the relevant rights stemmed solely from the fact that the Appellant was a gas transporter and had acquired a gas distribution business from NGT. In other words, the rights in question were merely a consequence of becoming a gas transporter and had not in any meaningful sense been "acquired" by the Appellant; and

(4) in this context, Mr Yates noted that paragraph 1(2) of Schedule 3 to the GA – which conferred on a gas transporter the power compulsorily to purchase land and rights over land – expressly distinguished between the creation of new rights over land and the acquisition of existing rights over land. In Mr Yates's view, it would not be accurate to say that the gas transporter in whose favour rights had been "created" had thereby "acquired" those rights.

Conclusion

22. We consider that it is clear that the rights to which the Appellant became entitled in relation to the public land when the hive down from NGT occurred and the Appellant became

a gas transporter amounted to "land" for the purposes of paragraph 12(1)(a). We say this for the following reasons:

(1) the starting point is to consider the rights to which the Appellant became entitled in relation to the public land under the terms of Schedule 4 to the GA. Those rights included the right to retain its iron mains pipes in or under the land, the right to repair, alter and remove those pipes, the right to carry out any works which might be incidental to those rights (including the right to open or break up any sewers, drains or tunnels in or under the land and to remove or use all earth or materials in or under the land) and the right to erect structures for the purpose of housing apparatus on the land. Whilst some of those rights were expressed to be subject to limited restrictions – such as the need to obtain the consent of other authorities which was not to be unreasonably withheld – we believe that, as a matter of plain English, the rights described above can properly be described as amounting, at the very least, to "rights in or over" the public land in question, even if they did not confer on the Appellant any "interest in or over" that land;

(2) turning then to the relevant authorities, and accepting as we do the parties' agreement that the iron mains pipes were chattels and were not themselves part of the land which they traversed, we think that the Court of Appeal decision in *Newcastle* points to the conclusion that the rights to which the Appellant was entitled in this case in relation to the public land amounted to "rights in or over" the public land. In *Newcastle*, Morton LJ said as follows, at page 457:

"To sum up, accepting as I do the reasoning of Evershed J. with the one vital exception which I have mentioned, we agree: (a) That the corporation have no right of ownership or proprietorship of the soil in which their pipes are laid; (b) that they are not the tenants of any part of that soil; (c) that no easement is vested in the corporation; (d) that the corporation have no title, legal or equitable, in that soil; and (e) that the corporation are not the inheritors of the right to support admittedly vested in the owners of the surface land. Further, in my view, and here I differ from the judge, the corporation have not the exclusive right to occupy any portion of that soil, as distinct from the space or cavity occupied by their pipes…As I have said, all that the corporation have the right to occupy, and do occupy, is a cavity in the ground, which is entirely filled by the pipes in question."

(3) in the above extract, Morton LJ, whilst stating that an authority which was entitled to rights which were very similar to the rights held by the Appellant in this case did not thereby hold any estate, interest or easement, legal or equitable, in or over the soil in which the pipes were laid, confirmed that those rights included a right to occupy the space or cavity within the land which was occupied by the authority's pipes. Somervell and Cohen LJJ reached the same conclusions in that case (see pages 461, 463, 464 and 466).

We consider that those rights of occupation, albeit merely of a space or cavity, were "rights in or over" the land in question because the space or cavity was located within the land. It follows that, in our view, the equivalent rights of occupation which were held by the Appellant in this case amounted to "rights in or over" the public land, even before taking into account the other rights conferred on the Appellant in relation to the public land under Schedule 4 to the GA, such as the right to repair, alter and remove the pipes, the right to carry out any works which might be incidental to those rights and the right to erect structures for the purpose of housing apparatus on the land. Moreover, those additional rights, in and of themselves, seem to us to have amounted to "rights in or over" the land;

(4) the interpretation of *Newcastle* which we have set out in paragraph 22(3) above is supported by the Lands Tribunal decision in *Taylor*. In that case, at page 108, the

Lands Tribunal reached the conclusion that the words of Morton LJ in *Newcastle* were authority for the proposition that rights such as those to which the Appellant was entitled in this case conferred on their holder an "interest or right in or over land". In the light of the passage from the judgment set out above, we cannot agree with the Lands Tribunal that *Newcastle* is authority for the proposition that those rights amounted to an "interest…in or over land". On the contrary, it seems to us that Morton LJ was saying explicitly that the relevant rights did not amount to such an interest. However, we do agree with the Lands Tribunal that, in *Newcastle*, Morton LJ was saying that the rights held by the authority in question amounted to "rights in or over" the relevant land and thus we consider that the rights in relation to the public land to which the Appellant became entitled in this case were such as to amount to "rights in or over" the public land;

(5) for completeness, we should mention that there are other decisions which might be taken to suggest that the above conclusion understates the extent of the Appellant's interest in relation to the public land. As noted by the Lands Tribunal in *Taylor*, in each of *Oldham* and *Thurrock*, the relevant court held that rights of this nature gave the holder an "interest" in the stratum of land which was occupied by the sewer in question. If those decisions were to constitute good law, then the Appellant would have had an "interest in or over" the public land and not simply "rights in or over" that land;

(6) the decisions in *Oldham* and *Thurrock* have never formally been overruled and they were not cited or referred to in the *Newcastle* decision. However, they are clearly inconsistent with that decision, as was noted by the Lands Tribunal in *Taylor*. Moreover, the decisions in those two cases are of some age and were first instance decisions. The decision in *Newcastle* is of more recent provenance and is a decision of the Court of Appeal. It is therefore arguable that the decisions in those two cases are no longer good law. However, in the context of this decision, we see no value in trying to determine whether the two decisions can possibly be reconciled with the decision in *Newcastle* or should be regarded as having been overruled by that decision because, ultimately, it is not necessary to reach a conclusion on whether the Appellant's interest in relation to the public land amounted to an "interest in or over" that land or merely "rights in or over" that land. It is merely necessary for the Appellant to have held the latter in order for its interest in relation to the relevant land to have fallen within the definition of "land" in paragraph 31(1) and we have already concluded that, on the basis of the Court of Appeal decision in *Newcastle*, the Appellant's interest in the public land following the hive down amounted to "rights in or over land" and therefore "land", as defined in paragraph 31(1);

(7) we do not agree with Mr Yates's contention that the choice of the word "land" as the relevant defined term in paragraph 31(1) should in some way exclude from the definition the statutory powers of access to which a gas transporter is entitled. The fact is that Parliament chose to define "land" in the broad way that it did and it clearly intended that all forms of estates, interests and rights in or over land – and not just major interests in land such as freeholds and leaseholds - should be included. Any attempt to exclude the rights in or over the public land to which the Appellant was entitled from the scope of the definition would be entirely arbitrary and unjustified by the language used in the definition. After all, there is no difference in principle between those rights and a more substantial estate or interest in land in this context. Each of those interests in land is nonphysical and incorporeal in nature and does not equate to the physical land itself. It follows that, as we discuss in the next following section of this decision, none of them can technically be contaminated;

(8) similarly, we do not agree with Mr Yates's contention that the word "land" when it was used in paragraph 12(1)(a) should be construed on a basis which excluded those

rights. Parliament chose to define "land" in paragraph 31(1) as any one of a number of estates, interests and rights, ranging from a freehold estate in land down to rights in or over land. In each case, the relevant estate, interest or rights to which reference was made in the definition were incorporeal in nature, as we have mentioned in paragraph 22(7) above. The definition did not refer to the physical asset which was the land itself. In our view, since none of the categories of incorporeal estates, interests or rights which were mentioned in the definition of "land" was technically capable of being contaminated, it follows that, in our opinion, it is not appropriate to exclude any of those categories – including the least material category (of rights in or over land) - from the word "land" when that word was used in paragraph 12(1)(a) merely because those rights themselves were incapable of contamination. After all, precisely the same point could be made about all of the categories, including a freehold estate in land;

(9) we are also not persuaded by Mr Yates's suggestion that the decision in *Payne* can be prayed in aid to support the proposition that the meaning of the word "land" when it was used in paragraph 12(1)(a) should be treated as having been limited to major interests in land such as freeholds and leaseholds;

(10) the main reason for saying this is that, in our view, there was nothing in the context of paragraph 12(1)(a) which would justify limiting the word "land" when it was used in that paragraph to estates or interests in land which were more material than those of mere rights in or over land. On the contrary, as we have noted in paragraphs 22(7) and 22(8) above, there was nothing generically different about rights in or over land which distinguished them from estates or interests in land for this purpose. All of those assets were incorporeal in nature and incapable of being contaminated as such;

(11) a second reason for finding the decision in *Payne* to be unpersuasive in this regard is that, in *Payne*, the relevant defined term – the definition of "land" in Schedule 1 to the
IA – was expressed to apply "unless the contrary intention appears" (see Section 5 of the IA) whereas no such limitation was contained in paragraph 31(1) in relation to the use, elsewhere in Schedule 22, of the defined terms set out in that paragraph. However, in the light of our conclusion in the next following section of this decision - to the effect that the word "land" when used in a number of paragraphs of Schedule 22 other than paragraph 12(1)(a) must have meant something other than the estates, interests and rights in or over land to which the definition of "land" in paragraph 31(1) referred – we prefer to base our conclusion in relation to the non-applicability of the decision in *Payne* on the point made in paragraph 22(10) above; and

(12) finally on this issue, although we did not understand Mr Yates to challenge this proposition, we think that it is clear that rights in or over land can arise by virtue of a statute as well as pursuant to a contract – the legislation and cases cited by Mr Mehta and set out in paragraph 20(3) above make that clear.

23. We also consider that it is clear that the "land" to which the Appellant became entitled when it became entitled to the rights in or over the public land pursuant to Schedule 4 to the GA were "acquired" by the Appellant within the meaning of paragraph 12(1)(a). We say this essentially for the reasons given by Mr Mehta – namely that:

(1) as a matter of plain English, when a person becomes entitled to an asset such as a right in or over land, that person can be said to have "acquired" that asset. There is no need for the asset to have been purchased in order for it to have been "acquired". It is merely necessary that the relevant person has become entitled to something to which it was not previously entitled; and

(2) the above view is supported by the dicta of Somervell LJ and Morton LJ in *Newcastle,* which are set out in paragraph 20(5) above.

24. We also disagree with the argument put forward by Mr Yates to the effect that the distinction drawn in paragraph 1(2) of Schedule 3 to the GA between the creation of new rights over land and the acquisition of existing rights over land supports his contention that rights over land to which a person becomes entitled under a statute have not been "acquired". On the contrary, that paragraph refers to the "power to authorise the acquisition of rights over land by creating new rights as well as acquiring existing ones". In our view, this language is clearly contemplating that the creation of new rights over land amounts to an "acquisition" of those rights just as readily as an acquisition of existing rights over land.

25. For the reasons set out in this section of this decision, we have concluded that, in relation to each of the private land, the owned land and the public land, the Appellant "acquired land" in the UK by virtue of the hive down from NGT. We have not been provided with any evidence to support a similar conclusion in relation to the private streets, with the result that we do not consider that the Appellant "acquired land" when it became the owner of the iron mains pipes beneath the private streets on completion of the hive down.

Paragraph 12(1)(b) - was all or part of the land in a contaminated state at the time of acquisition?

Additional legislative provisions

26. Whether or not all or part of land which was acquired was in a contaminated state at the time of acquisition for the purposes of Schedule 22 turns on the definition in paragraph 3(1). The part of that provision which is relevant to this appeal is as follows:

"*Land in a contaminated state*

3(1) For the purposes of this Schedule land is in a contaminated state if, and only if, it is in such a condition, by reason of substances in, on or under the land, that—

(a) harm is being caused or there is a possibility of harm being caused…".

27. There were two further definitions which are relevant in this context. The first is the definition of "harm" and the second is the definition of "substance". Both of those definitions were set out in paragraph 31(1) and were as follows:

"In this Schedule—

"harm" means—

(a) harm to the health of living organisms,

(b) interference with the ecological systems of which any living organisms form part,

(c) offence to the senses of human beings, or

(d) damage to property;…

"substance" means any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour."

The arguments of the parties

28. Mr Mehta submitted that the language in paragraph 3(1) was satisfied by the Appellant in each case where it had acquired "land" for the purposes of paragraph 12(1)(a) – which is to say, in relation to the private land, the public land and the owned land – because:

    (1) when the Appellant had acquired the relevant rights in or over land which amounted to "land" for the purposes of the definition in paragraph 31(1), there was a possibility that the existence beneath the land of the iron mains pipes filled with gas could give rise to an explosion which would cause harm to people and damage to property;

    (2) harm to people and damage to property were both forms of "harm" as defined for the purposes of Schedule 22 in paragraph 31(1); and

    (3) each of the iron mains pipes and the gas were "substances" as defined for the purposes of Schedule 22 in paragraph 31(1).

29. Mr Yates accepted that any explosion which arose from a combination of the iron mains pipes and the gas could give rise to "harm" as defined in paragraph 31(1). However, he said that, nevertheless, the Appellant had not met the conditions in paragraph 3(1) because:

    (1) in the case of the private land and the public land, even if it could be said that the Appellant had acquired "land" for the purposes of paragraph 12(1)(a) by virtue of the rights of access which it enjoyed - either by reason of the rights which it acquired contractually on the hive down or as a gas transporter under Schedule 4 of the GA - those rights of access, as distinct from the land itself, were incapable of being contaminated; and

    (2) in any event, in the case of all three categories of land – ie the private land, the public land and the owned land - the "harm" in question did not arise by reason of "substances".

30. Turning to the first of those disputed points, Mr Mehta submitted that the starting point in the analysis was to note that, when paragraph 12(1)(b) referred to the requirement that "at the time of acquisition all or part of the land is or was in a contaminated state", the word "land" when used in that context must mean something different from the word "land" in the context of paragraph 12(1)(a). The latter provision was referring to "land" in the sense defined in paragraph 31(1) – that is to say, an estate, interest or rights in or over land and therefore a nonphysical, incorporeal asset as distinct from the physical land itself - whereas the former provision was necessarily referring to the physical land itself (because it was impossible for a non-physical, incorporeal asset, as distinct from the physical land itself, to be contaminated).

31. In that regard, Mr Mehta went on to note that the definition of "land" in paragraph 31(1) was circular in that the word "land" appeared within the definition itself. This meant that the word "land", when it appeared within the definition must mean something different from the defined term. This was the case as a matter of common sense, in and of itself. However, an alternative, more legalistic, approach would be to apply the definition of "land" from Schedule 1 of the IA to the word "land" when it appeared within the definition in paragraph 31(1). The definition in Schedule 1 to the IA was apt to include physical land and buildings on the land, as well as non-physical, incorporeal interests in that land.

32. In either case, Mr Mehta submitted, the word "land" when it appeared within the definition of "land" in paragraph 31(1) must be taken to refer to the physical land itself, as opposed to the non-physical, incorporeal estates, interests and rights which were the

subject of the definition. Thus, the definition of "land" in paragraph 31(1) should be read as referring to "any (non-physical, incorporeal) estate, interest or rights in or over (physical) land".

33. More significantly, it was plain that the operative provisions in Schedule 22 repeatedly used the word "land" in the sense of the physical land and not in the non-physical, incorporeal sense which resulted from applying the definition. For example, as noted in paragraph 30 above, the word "land" when it was used in paragraph 12(1)(b) must be taken to mean land in the physical sense. The same was necessarily true of the use of the word "land" in paragraphs 3(1) and 4(2). The former referred to land's being in a contaminated state (as was the case in paragraph 12(1)(b)) and to substances being "in, on or under" the land and it was impossible for a non-physical, incorporeal asset (as distinct from physical land itself) to be contaminated or to have substances in, on or under it. The latter defined the activities which could qualify as "relevant land remediation" in relation to land acquired by a company as "the doing of any works, the carrying out of any operations or the taking of any steps in relation to…[inter alia] the land in question". Thus, in both of those provisions, the references to "land" had to be to the physical land in question, as opposed to the non-physical, incorporeal estate, interest or rights in or over land which the company had acquired as mentioned in paragraph 12(1)(a).

34. It followed that the paragraph 31(1) definition of "land" had necessarily to be confined to the use of the word "land" in paragraph 12(1)(a) – which referred to the acquisition of land – because there was no difficulty in referring to the acquisition of a non-physical, incorporeal estate, interest or rights in or over physical land. In all other cases, the word "land" when used in the schedule should be construed as referring to the underlying physical land. In this respect, Mr Mehta compared the inadequacy of Schedule 22 in failing to deal with the differences between the two distinct concepts of "land" with other statutory provisions which did do so. He referred in this context to the language used in each of the Capital Allowances Act 2001 and Part 14 of the CTA 2009 (as amended by the FA 2009), where a clear distinction was drawn between land as a physical asset and land as a non-physical, incorporeal asset.

35. In response, Mr Yates submitted that there was no basis for applying a different definition of "land" in the context of paragraphs 12(1)(b), 3(1) and 4(2) from the definition used in paragraph 31(1). In other words, in relation to the private land and the public land, the Appellant was required to show that the "land" which it held – namely the rights of access which it held by virtue of the contractual rights which it had acquired in the hive down and the rights of access which it held as a gas transporter by virtue of Schedule 4 to the GA – was the asset which was contaminated and capable of remediation. In this case, those rights of access were incapable of being contaminated or of being remediated. On the other hand, a major interest in land, such as a freehold or leasehold, was much closer to the physical land itself and therefore could be said to be capable of contamination and remediation.

36. As for the second area of dispute in relation to paragraph 3(1), Mr Mehta submitted that both iron and gas were natural substances. The former was in solid form and the latter was in the form of a gas. Hence, both of them were demonstrably "substances", as defined in paragraph 31(1). As a matter of statutory construction, therefore, it was clear on its face that the iron mains pipes and the gas were "substances" which could give rise to "harm". In that regard, there was no basis for limiting the plain words of the statute by reference to external material such as ministerial statements. Such extraneous material could be used as an aid to construction only in circumstances where the words of the

legislation were obscure or ambiguous – see the decision of the First-tier Tribunal in *Dean & Reddyhoff Limited v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 367 (TC) ("*Dean*"), citing, at paragraphs [61] and [62], the words of Lord Nicholls to that effect in *R v Secretary of State for the Environment, Transport and Regions, ex parte Spath Holme Limited* [2001] 2 AC 349. The First-tier Tribunal in *Dean* considered that the LRR provisions were a little complex but not obscure or ambiguous and did not give rise to any absurdity, with the result that there was no reason to look beyond the plain words in Schedule 22 to discern the purpose of Parliament in enacting them.

37. Mr Yates accepted that:

(1) the gas in the iron mains pipes was a "substance"; and

(2) the iron out of which the iron mains pipes were made was also a "substance",

38. However, he considered that:

(1) the iron itself did not give rise to any "harm" or possibility of "harm". Instead, it was the presence of the pipes as a form of infrastructure which gave rise to the possibility of "harm". The clear and obvious purpose of the LRR regime was to encourage – in the form of providing additional tax reliefs – the remediation of contaminated brownfield sites. That was why the legislation used the word "substance" and included a requirement that the contaminating substance had to be "in, on or under" the land;

(2) moreover, it was implicit in the choice of the words "state" and "condition" in paragraph 3(1) that the draftsman had in contemplation situations where the risk of harm arose because of the existence or presence of the contaminating substance in, on or under the land, as opposed to because of the use of the relevant substance. Both of those words strongly suggested that the substances in question must be capable of causing harm merely by their presence, and before any activity was undertaken on the relevant land; and

(3) whilst gas was clearly a "substance" if one were to adopt a literal interpretation of the definition, a more purposive interpretation would exclude from the definition gas which was being moved through a transporting infrastructure as opposed to gas which existed permanently under the land itself.

Conclusion

39. We should start this section of our decision by saying that we agree with Mr Mehta that the word "land" when it was used in each of paragraphs 12(1)(b), 3(1) and 4(2) cannot possibly bear the meaning which was set out in relation to "land" in paragraph 31(1) for the simple reason that it is impossible for an incorporeal asset, no matter how material it may be, to be contaminated or remediated. Instead, the references to "land" in those provisions must have been intended by the draftsman to refer to the physical land in respect of which the incorporeal rights existed. This was quite obviously an error in the drafting of Schedule 22 which has been remedied in the drafting of Part 14 of the CTA 2009, as amended by the FA 2009. It follows that the only way to construe the relevant provisions on a purposive basis is to treat them as referring to the physical land in respect of which the estate, interest or rights in or over land which were acquired by the taxpayer existed and therefore not to apply the definition of "land" in paragraph 31(1) when construing those provisions.

40. We do not accept Mr Yates's proposition that major interests in land such as freeholds and leaseholds can somehow be equated to the physical land itself in a way which more minor interests or rights in or over land cannot be, with the result that the references to "land" in those paragraphs should be construed as incorporating the definition of "land" in paragraph 31(1) but

only to the extent that it included estates or interests in land which were major interests and excluding more minor interests or rights in or over land. We do not see any justifiable basis for that approach.

41. Given the above, we consider that whether or not the Appellant satisfied the condition in paragraph 12(1)(b) at the time when it acquired the estate, interest or right in or over land which constituted "land" for the purposes of paragraph 12(1)(a) turns on whether the physical land in or over which the Appellant acquired that estate, interest or right – that is to say, the private land, the public land or the owned land – was in a "contaminated state" at the time of acquisition. Pursuant to paragraph 2, that will have been the case if the possibility of "harm" - which both parties agree would have arisen as a result of a gas explosion following the acquisition - can properly be said to have existed "by reason of substances in, on or under the [physical] land" (see paragraph 3(1)).

42. In that regard, we think that it is clear that the gas which was in the relevant iron mains pipes at the time of acquisition was a "substance", as defined in paragraph 31(1). We can see no basis for excluding it from the definition given the clear wording of the definition.

43. It is somewhat less clear that the iron mains pipes themselves were "substances" for the purposes of the definition. Obviously, iron, as a "natural… substance… in solid… form" is capable of falling within the language used in the definition when read literally. However, Mr Yates made some telling points when he observed that:

> (1) it was not the iron itself which was capable of causing harm to persons or damage to property but rather the fact that the pipes in question were made of iron and therefore more liable to fracture than pipes made out of a different material such as HDPE; and
>
> (2) even that increased risk of fracture posed no risk of harm to persons or property unless gas were to be running though the pipes.

We therefore have considerable sympathy with the view that, in relation to the pipes, the risk of harm to persons and damage to property stemmed more from the fact that the pipes had gas within them than from the fact that the pipes were a "substance".

44. On the other hand, the fact that the pipes in question were made of iron was not wholly irrelevant to the risk of "harm" in this case because it was the fact that the pipes were made of iron which rendered the pipes more likely to fracture than if the pipes had been made out of HDPE. So, in a very real sense, the risk of "harm" in this case was attributable to the fact that the pipes were made out of iron – which is a "substance" – as opposed to simply being that the pipes had gas within them.

45. We have decided that, ultimately, we do not need to reach a final determination on the above question. This is for the reasons which follow.

46. As we have noted above, the gas which was in the pipes at the time of acquisition was a "substance" and it was that gas which gave rise to the risk of an explosion which could cause harm to people or damage to property. That gas was "in, on or under the land" in that it was located in the pipes beneath the soil at the time of acquisition. The fact that the gas was in pipes and not directly in the soil itself, that the gas was not stationary but was instead moving through the pipes and that any such explosion would arise only if the pipes were to fracture seems to us to be neither here nor there. Even though it was not sitting in its natural state in the soil and was instead moving through the pipes, at the very moment in time when the Appellant acquired the "land", the gas which was within the pipes at that time was still "under" the land and its presence there gave rise to a risk of "harm". As such, we believe that the presence of the gas

within the pipes at that time meant that the land was in a "contaminated state" at that time. 47. Moreover, we do not see any issue with the fact that paragraph 3(1) referred to "substances" in the plural whereas the gas in this case was but a single "substance". Section 6 of the IA makes it apparent that, in any Act, unless the contrary intention appears, references to the plural include the singular. In the case of paragraph 3(1), we can see no reason why the reference to "substances" in the plural was intended to exclude a single "substance". There would be no logic in confining the application of the schedule to circumstances where the risk of harm to persons or damage to property arose from a combination of two "substances" as opposed to just one "substance".

48. For the above reasons, we consider that, when the Appellant acquired the "land" comprising the private land, the public land and the owned land, the physical land in respect of which the Appellant acquired its incorporeal rights was in a "contaminated state" within the meaning of paragraph 3(1) because of the risk of harm to persons and damage to property posed by a "substance" – ie the gas – which was in the iron mains pipes beneath the ground at the time of acquisition and that therefore paragraph 3(1) is satisfied in this case regardless of whether the iron mains pipes can also properly be regarded as being a "substance" in addition to the gas.

Paragraph 12(1)(c) - has the Appellant incurred qualifying land remediation expenditure in respect of the land?

Additional legislative provisions

49. Satisfaction of this condition turns on whether the Appellant met each of the conditions in paragraph 2. That paragraph stipulated as follows:

"*Qualifying land remediation expenditure*

2(1) For the purposes of this Schedule "qualifying land remediation expenditure" of a company means expenditure of the company that meets the conditions in sub-paragraphs (2) to (6).

(2) The first condition is that it is expenditure on land all or part of which is in a contaminated state (see paragraph 3).

(3) The second condition is that the expenditure is expenditure on relevant land remediation directly undertaken by the company or on its behalf (see paragraph 4).

(4) The third condition is that the expenditure is incurred—

(a) on employee costs (see paragraph 5), or

(b) on materials (see paragraph 6),

or is qualifying expenditure on sub-contracted land remediation (see paragraphs 9 to 11).

(5) The fourth condition is that the expenditure would not have been incurred had the land not been in a contaminated state (see paragraph 7).

(6) The fifth condition is that the expenditure is not subsidised (see paragraph 8)."

50. There is no dispute between the parties in relation to either of the third condition or the fifth condition in paragraph 2. However, as there is a dispute between them in relation to the other three conditions, it is necessary to set out in this decision the paragraphs of Schedule 22 to which reference was made in paragraph 2.

51. The first condition referred to paragraph 3, which we have already set out in paragraph 26 above.

52. The second condition referred to paragraph 4, which provided as follows:

"*Relevant land remediation*

4(1) For the purposes of this Schedule relevant land remediation, in relation to land acquired by a company, means—

(a) activities falling within sub-paragraph (2), and

(b) if there are such activities, preparatory activity falling within sub-paragraph (4) which satisfies the condition in sub-paragraph (5).

(2) The activities referred to in sub-paragraph (1)(a) are the doing of any works, the carrying out of any operations or the taking of any steps in relation to—

(a) the land in question,

(b) any controlled waters affected by that land, or

(c) any land adjoining or adjacent to that land,

for the purpose described in sub-paragraph (3).

(3) The purpose referred to in sub-paragraph (2) is that of—

(a) preventing or minimising, or remedying or mitigating the effects of, any harm, or any pollution of controlled waters, by reason of which the land is in a contaminated state; or

(b) restoring the land or waters to their former state.

(4) The preparatory activity referred to in sub-paragraph (1)(b) is the doing of anything for the purpose of assessing the condition of—

(a) the land in question,

(b) any controlled waters affected by that land, or

(c) any land adjoining or adjacent to that land.

(5) Preparatory activity satisfies the condition referred to in sub-paragraph (1)(b) if it is activity connected to such activities falling within sub-paragraph (2) as are undertaken by the company (whether directly or on its behalf).

(6) For the purposes of this paragraph, controlled waters are "affected by" land in a contaminated state if, and only if, the land in question is in such a condition, by reason of substances in, on or under the land, that pollution of those waters is being, or is likely to be, caused."

53. The fourth condition referred to paragraph 7, which provided as follows:

"*Expenditure incurred because of contamination*

7(1) Without prejudice to the generality of paragraph 2(5), this paragraph has effect for the purpose of determining whether expenditure would or would not have been incurred had not all or part of the land been in a contaminated state.

(2) If expenditure on the land is increased by reason only that the land is in a contaminated state, the amount by which such expenditure is increased shall be considered to be expenditure satisfying the condition in paragraph 2(5).

(3) If any works are done, operations are carried out or steps are taken mainly for the purpose described in paragraph 4(3), expenditure on such works, operations or steps shall be taken to satisfy the condition in paragraph 2(5)."

The arguments of the parties

54. Mr Mehta submitted that:

(1) in relation to the first condition – the one set out in paragraph 2(2) – since this contained a reference to paragraph 3, as long as the land was in a "contaminated state", as defined in that paragraph, then expenditure meeting each of the other conditions in paragraph 2 would satisfy this condition. There was therefore no need for the expenditure to be on the land itself;

(2) in relation to the second condition – the one set out in paragraph 2(3) –the expenditure in this case was "relevant land remediation" as defined in paragraph 4 because the activities carried out by UU on behalf of the Appellant under the 30/30 Programme involved the carrying out of operations and the taking of steps in relation to the land which was in the contaminated state for the purpose of preventing or minimising, or mitigating the effects of, any harm – see paragraphs 4(2) and 4(3); and

(3) in relation to the fourth condition – the one set out in paragraph 2(5) – the expenditure which the Appellant had incurred would not have been incurred were it not for its obligations as a licence-holder under the 30/30 Programme and, more generally, in order to avoid the risk of harm to persons or damage to property which might be caused by the fracture of the iron mains pipes whilst gas was within them. Thus, the expenditure which the Appellant had incurred had been increased because the land was in a contaminated state – see paragraph 7(2) – and therefore the expenditure satisfied the condition.

55. In his response in relation to all three conditions, Mr Yates said that the expenditure which the Appellant had incurred in this case was the replacement or improvement of chattels which it owned – namely, the iron mains pipes. That was expenditure on chattels and not on, or in relation to, land. Accordingly, the first condition was not satisfied because the expenditure in question was not "expenditure on land" (see paragraph 2(2)), the second condition was not satisfied because the expenditure in question was not incurred in carrying out any operations or taking any steps which were, in either case, "in relation to land" (see paragraph 4(2)) and the fourth condition was not satisfied because the expenditure in question was not "on the land" (see paragraph 7(2)). By way of a comparator, Mr Yates gave the example of a faulty car, which was at risk of exploding and which was located in a car park by virtue of a licence to occupy the car park. If expenditure were to be incurred in fixing the car or removing the car from the car park, that would be expenditure which was wholly attributable to the car – ie the chattel. It would not be expenditure on or in relation to the land itself.

Conclusion

56. By way of summarising this section of our decision in advance, it is our view that it is in relation to the various conditions in paragraph 2 that the Appellant's attempt to apply the LRR regime to the expenditure which it incurred on the replacement or improvement of the iron mains pipes ultimately founders. We say this because we do not see how the expenditure which the Appellant incurred in replacing or improving the pipes can properly be said to have been

"on land" (for the purposes of paragraph 2(2)), incurred in carrying out any operations or taking any steps which were, in either case, "in relation to land" (for the purposes of paragraph 4(2)) or "on the land" (for the purposes of paragraph 7(2)).

57. The starting point is to reiterate that, as we have observed in the next preceding section in relation to paragraphs 12(1)(b), 3(1) and 4(2), and for precisely the same reason, the references to "land" in each of paragraphs 2(2), 2(5), 4 and 7 – at least where the word "land" does not appear as part of a composite phrase which is defined in and of itself, such as "relevant land remediation" - must be construed as referring to the physical land in or over which the relevant person acquired an estate, interest or right. In other words, the word "land" in those provisions meant the physical land and not the incorporeal rights in or over land which were acquired by the relevant person.

58. This means that, in our view:

(1) in order to satisfy the first condition in paragraph 2, the expenditure in question needed to be "on land" (see paragraph 2(2));

(2) in order to satisfy second condition in paragraph 2, the expenditure in question needed to be "in relation to land" (see paragraphs 2(3) and 4(2)); and

(3) in order to satisfy the fourth condition in paragraph 2, the expenditure in question needed to be "on the land" (see paragraphs 2(5) and 7(2)).

59. We consider that the expenditure which is the subject of this appeal did not fall within any of the above phrases.

60. If we start first with the situations where the Appellant lined an existing irons mains pipe with an HDPE pipe, we consider that that expenditure clearly related in its entirety to the improvement of a chattel – being the iron mains pipe through which the new HDPE pipe ran – and cannot properly be said to be expenditure "on land", "in relation to land" or "on the land" through which the chattel ran. As such, none of the first, second or fourth conditions in paragraph 2 was met in relation to that expenditure, which amounted to 80% to 90% of the expenditure which is the subject of this appeal.

61. The same is true in our view where an old iron mains pipe was replaced by a new HDPE pipe. In that situation, the position was a little more complicated because the new HDPE pipe will have been placed in a different location within the physical land from the location of the old mains pipe, which means that the Appellant's right to occupy the physical land will have been exercised over a different part of the physical land from the part which was previously subject to the exercise of the Appellant's right to occupy. However, although this difference has given us pause for thought, we have concluded that it ultimately doesn't lead to a different conclusion from the one reached above. This is because the key question in this context is not whether the Appellant exercised a right in or over land in order to carry out the replacement but rather whether the expenditure which was incurred in effecting the replacement was incurred on or in relation to a right in or over land and, in that regard, when one examines the expenditure itself, that

expenditure was still "on" and "in relation to" the chattel comprising the new pipe. It was not "on" or "in relation to" the right in or over the land itself.

62. For the reasons set out above, we have concluded that none of the expenditure which is the subject of this appeal was "qualifying land remediation expenditure" within the meaning of paragraph 2 and that therefore the Appellant has not satisfied the condition in paragraph 12(1)(c) in respect of any of that expenditure.

63. There is one final point which we should mention in this context for the sake of completeness. This stems from the fact that, as we have mentioned in paragraph 57 above, the word "land" when it appeared in certain references to "land" in the provisions to which we have referred in this section of our decision were merely part of a composite phrase which was itself defined elsewhere in the schedule. At the hearing, Mr Mehta sought to persuade us that the word "land" when it appeared in the references in those provisions to land's being in a contaminated state or being in a contaminated state as to all or part (see paragraphs 2(2), 2(5), 4(3)(a), 7(1) and 7(2)) should be regarded in that way. In other words, he submitted that paragraph 3 was defining the composite term "land in a contaminated state" and not simply defining the composite term "contaminated state" and therefore that those references should be construed accordingly.

64. The relevance of this is that construing those references in that way tends to downplay the importance of the word "land" when it appeared in that context so that more emphasis is inevitably placed on the state of the land than on the land itself. We are not convinced that this approach would necessarily change the way in which the terms "on" or "in relation to" should be applied in this context, but we should record that we do not agree with Mr Mehta's interpretation of the subject matter of paragraph 3. Instead, we believe that the fact that such references sometimes referred to all or part of the land's being in a contaminated state (see paragraphs 2(2) and 7(1)) and at other times simply referred to the land's being in a contaminated state suggests to us that the term which was being defined in paragraph 3 was not "land in a contaminated state" but simply "contaminated state". This means that where, in paragraphs 2(2), 2(5), 4 and 7, there were references to "land" which was, or all or part of which was, in a "contaminated state", we think that those references to "land" should be construed in isolation in the manner described in paragraph 57 above and not as forming part of the composite term which was defined in paragraph 3. As such, we do not regard this as a reason to depart from the conclusion which we have set out above to the effect that, in order to satisfy the first, second and fourth conditions in paragraph 2, the expenditure in question needed to have been "on" and "in relation to" the physical land.

<u>Paragraph 12(4) - Was the land in a contaminated state wholly or partly as a result of anything done or omitted to be done at any time by the Appellant or a person with a relevant connection to the Appellant?</u>

65. The conclusion set out in paragraphs 56 to 64 above means that this appeal fails in its entirety and that therefore, strictly speaking, we do not need to address this final question. However, for completeness, we will briefly summarise the respective arguments of the parties and our conclusions in relation to the question.

The arguments of the parties

66. Mr Mehta submitted that the principle set out in paragraph 12(4) – which is commonly termed the "polluter pays" principle – was not in point in this case because:

(1) the land in question was already in a contaminated state when the Appellant acquired the land because of the existence of the iron mains pipes and the gas in those pipes at the time of acquisition. The Appellant had done nothing since the acquisition to

increase that contamination. For instance, it had not laid down any new iron mains pipes. On the contrary, it had reduced the level of contamination by replacing or improving the existing iron mains pipes in accordance with the 30/30 Programme;

(2) the risk of harm arose out of the potential fracturing of the iron mains pipes which were on the land already. The pumping of gas through those pipes did not increase the risk of fracture, as the witness evidence had made clear. Thus, it could not be said that the land was in a contaminated state as a result of the fact that the Appellant had continued to pump gas through the pipes after it acquired the land;

(3) in any event, if the pumping of gas could be said to be an action which created or worsened the contamination, then the result would be that the UK Government would be encouraging the Appellant to be a polluter and that would be an odd proposition; and

(4) the Appellant was effectively obliged to continue to pump gas through the pipes - as a gas transporter, the Appellant would face severe penalties, both contractually and under the terms of its licence, if it were to fail to do so. Moreover, if the Appellant were to stop pumping gas through the pipes, that would cause harm to the homeowners who relied on the gas for warmth and cooking and would give rise to a further risk of harm to the homeowners when reconnection occurred.

67. In response, Mr Yates submitted that:

(1) the LRR legislation was not concerned with the wider question of whether or not it was desirable for the Appellant to fulfil its duties as a gas transporter under the terms of its licence and under the contracts with its customers. Thus, the points made on behalf of the Appellant in paragraphs 66(3) and 66(4) above were simply irrelevant; and

(2) in this case, there would be no possibility of harm to persons or damage to property if the Appellant did not use the iron mains pipes to transport gas because, without the presence of gas in the pipes, there would be no risk of an explosion. Thus, the activities of the Appellant were the sole reason why the risk of harm arose and this meant that, pursuant to the "polluter pays" principle, no LRR could be due to the Appellant.

Conclusion

68. In our view, even if we had concluded that the expenditure which is the subject of this appeal, to the extent that it related to the private land, the public land and the owned land, was "qualifying land remediation expenditure" as defined in paragraph 2, and that therefore the condition in paragraph 12(1)(c) was satisfied in relation to that expenditure, with the result that LRR would prima facie be available for that expenditure before the exclusion in paragraph 12(4) fell to be taken into account, we would have gone on to conclude that LRR in respect of that expenditure was precluded by paragraph 12(4).

69. The reason for saying this is as follows:

(1) paragraph 12(1)(b) makes it quite clear that the time to gauge whether land is in a "contaminated state" is "at the time of acquisition";

(2) as we have explained in paragraphs 39 to 48 above, we consider that it was the gas which was in the iron mains pipes at the time when the Appellant acquired the rights in or over land amounting to the "land" which meant that that the physical land to which those rights related was in a "contaminated state";

(3) that state existed before the Appellant carried out any gas distribution operations – instead it was inherent in the state of the land at the point of acquisition;

(4) however, that state existed as a result of the gas distribution operations which had been carried out by NGT immediately prior to the completion of the hive down;

(5) NGT had a "relevant connection" to the Appellant for the purposes of paragraph 12(4) because it was the parent company of the Appellant at the point when the Appellant acquired its rights in or over the land as a result of the hive down (see the definition of "relevant connection" in paragraphs 31(3) and 31(4)); and

(6) it therefore follows that the physical land in question was in a "contaminated state" wholly as a result of something done or omitted to be done by a person with a "relevant connection" to the Appellant, namely NGT.

CONCLUSION

70. In conclusion, for the reasons set out above:

(1) in relation to the private land, the public land and the owned land, the Appellant acquired land in the UK for the purposes of paragraph 12(1)(a);

(2) at the time of the acquisition, all or part of that land was in a contaminated state for the purposes of paragraph 12(1)(b);

(3) however, the expenditure which the Appellant incurred in replacing or improving the iron mains pipes within that land was not qualifying land remediation expenditure for the purposes of paragraph 12(1)(c); and

(4) in any event, that land was in a contaminated state wholly as a result of something done or omitted to be done by NGT, a person with a relevant connection to the Appellant, as described in paragraph 12(4),

with the result that this appeal fails.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

71. 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 Firsttier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TONY BEARE TRIBUNAL JUDGE

RELEASE DATE: 02 MARCH 2020

APPENDIX

Schedule 4 to the GA

1(1) Subject to the following provisions of this Schedule, a gas transporter may execute the following kinds of works, that is to say—

(a) placing pipes, conduits, service pipes, cables, sewers and other works, and pressure governors, ventilators and other apparatus, in or under any street; and

(b) from time to time repairing, altering or removing any such works or apparatus placed in or under any street (whether by him or by any other person).

(2) Subject as aforesaid, a gas transporter may execute any works requisite for or incidental to the purposes of any works falling within sub-paragraph (1) above, including for those purposes—

(a) opening or breaking up any street or any sewers, drains or tunnels within or under any street; and

(b) removing or using all earth and materials in or under any street.

(3) A gas transporter shall do as little damage as possible in the exercise of the powers conferred by this paragraph and shall make compensation for any damage done in the exercise of those powers.

(4) The Secretary of State shall by regulations provide that, in such cases and to such extent as may be provided by the regulations, a public gas transporter shall pay, by way of compensation for any loss sustained by any person in consequence of the exercise of those powers, such sum as may be determined in accordance with the regulations.

(5) No regulations may be made under sub-paragraph (4) above which amend, or re-enact with modifications, regulations previously made under that sub-paragraph.

2(1) The powers of a gas transporter under paragraph 1 above shall include power to erect in any street one or more structures for housing any apparatus, but only with the consent, which shall not be unreasonably withheld, of the street authority.

(2) Any question whether or not consent to the erection of such a structure is unreasonably withheld shall be determined by a single arbitrator to be appointed by the parties or, in default of agreement, appointed by the Director.

(3) For the purposes of this paragraph the withholding of consent shall, to the extent that it is based on the ground that the structure ought to be erected elsewhere than in a street, be treated as unreasonable if the transporter either that there is no reasonably practicable alternative to erecting it in a street, or that all such alternatives would, on the balance of probabilities, involve greater danger to life or property.

3(1) Subject to sub-paragraph (2) below, nothing in paragraph 1 above shall empower a gas transporter to lay down or place any pipe or other works into, through or against any building, or in any land not dedicated to the public use.

(2) A gas transporter may exercise the powers conferred by paragraph 1 above in relation to any street which has been laid out but not dedicated to the public use only for the purpose of conveying gas to any premises which abut on the street.

4(1) Except in cases of emergency arising from defects in any pipes or other works, a street which—

(a) does not constitute for the purposes of the Highways Act 1980 a highway or part of a highway maintainable at the public expense; and

(b) is under the control or management of, or maintainable by, any railway authority or navigation authority,

shall not be opened or broken up under paragraph 1 above except with the consent, which shall not be unreasonably withheld, of that authority.

(2) Any question whether or not consent to the opening or breaking up of such a street is unreasonably withheld shall be determined by a single arbitrator to be appointed by the parties or, in default of agreement, appointed by the Director.

5(1) . . . . . .

(2) Nothing in paragraph 1 above shall effect the application to any operation of sections 34 to 36 of the Coast Protection Act 1949.

6 In this Schedule—

. . .

"navigation authority" means any person or body of persons, whether incorporated or not, authorised by or under any enactment to work, maintain, conserve, improve or control any canal or other inland navigation, navigable river, estuary, harbour or dock;

"railway authority" means any person or body of persons, whether incorporated or not, authorised by any enactment to construct, work or carry on a railway; and

"street" and "street authority" have the same meaning as in Part III of the New Roads and Street Works Act 1991.

7 In its application to Scotland this Schedule shall have effect with the following modifications—

(a) in paragraphs 1 to 4, for the word "street", wherever it occurs, there shall be substituted the word "road";

(b) in paragraph 2(1) for the words "street authority" there shall be substituted the words "road works authority";

(c) in paragraphs 2(2) and 4(2), for the word "arbitrator" there shall be substituted the words "arbiter";

(d) in paragraph 4(1), for the words "for the purposes of the Highways Act 1980 a highway part of a highway maintainable at the public expense" there shall be substituted the words "a road within the meaning of the Roads (Scotland) Act 1984";

(e). . . . . .

(f) in paragraph 6, for "street" and "street authority" substitute "road" and "road works authority" and for "Part III" substitute "Part IV".