[2022] UKFTT ** (TC)**

TC ***

CAPITAL GAINS TAX – whether release of obligation contained in lease deductible expenditure for the purpose of s 38 (1)(b) TCGA – no qualifying expenditure – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01108/V

BETWEEN

THE WAKELYN TRUST **Appellant**

-and-

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

TRIBUNAL: JUDGE GERAINT WILLIAMS

Sitting in public on 30 June 2020 by way of remote video hearing on the Tribunal video platform. A face-to-face hearing was not held because of the Covid-19 pandemic.

Representation

Mr Patrick Cannon, counsel, instructed by Kreston Reeves LLP, for the Appellant

Dr Jeremy Schryber, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by The Wakelyn Trust ("the Trust") against the closure notice issued under s 28A of the Taxes Management Act 1970 ("TMA") by HM Revenue and Customs ("HMRC") on 29 November 2018 charging Capital Gains Tax ("CGT") of £175,114 on the part-disposal by the Trust on 14 October 2011 of the freehold land at Nigg ("the Property") by way of the grant of a 60 year lease to Global Energy Nigg Limited ("GE").

2. In summary, the Trust's tax return for 2011-12 claimed a loss in respect of the grant of the lease of the Property to GE. The computation of that loss was in error as it treated the grant of the lease as a full disposal, the closure notice included a revised computation of a part-disposal of land calculated in accordance with s 42 Taxation of Chargeable Gains Act 1992 ("TCGA"). The revised computation is not disputed save for whether the element of loss claimed by the Trust consisting of the value in money's worth of the release of the previous tenant from the conditions in the lease relating to the restoration of the Property is an allowable expense in the Trust's computation of gains under s 38(1)(b) TCGA.

ISSUES

3. The parties are agreed that the issues to be determined are whether the value of the reinstatement provisions from which the previous tenant was released are an allowable expense in the computation of the Trust's gains under s 38(1)(b) TCGA. The legal burden of proof falls on the Trust in relation to all issues.

EVIDENCE AND FINDINGS OF FACT

4. I was provided with an electronic hearing bundle of 1,276 pages ("EHB") containing the Notice of Appeal, HMRC's Statement of Case, correspondence between the parties and between the parties and the Tribunal, copies of the leases together with plans and Land Register Certificates, Deeds of Guarantee, Minute of Extension and Variation of Lease, Deed of Renunciation and Bidwells Valuation Report and an authorities bundle of 35 pages. Together, these contained the written evidence, legislation, guidance and case law relevant to the hearing.

5. I received witness statements from:

   (1) Mr Strang FRICS (adviser to the Trust) appeared as a witness of fact and gave oral evidence on the reasons for the Trust releasing B&R from the lease, details of negotiations with the District Valuer and opinion evidence of the value/cost of the reinstatement obligation.

   (2) Mr Hunter (a solicitor who is a consultant at Anderson Strathern LLP) provided a detailed summary of all the transactions and agreements made in respect of the Property relevant to this dispute.

6. Mr Hunter's evidence was accepted without challenge by HMRC. Mr Strang's witness statement stood as his evidence in chief and he gave oral evidence. He was cross-examined on his evidence by Dr Schryber.

7. Based on Mr Strang's evidence and the documentary evidence before me I make the findings of fact set out below. I have first set out the relevant background facts which were not in dispute.

BACKGROUND FACTS

8. Details of the all the relevant transactions and agreements made in respect of the Property set out below are taken from Mr Hunter's evidence. Appended to his witness statement was a schedule containing copies of all the documents referred to in his witness statement.

The Property Transactions and Agreements

9. The Trust has owned the freehold of the land at Nigg, Tain, Ross-shire on the north side of the Cromarty Firth ("the Property") since 30 July 1947. The land extends to 243.9 acres. On 23 January 1976 and the subsequent dates of 12 February, 1 March, 22 March and 30 March the Trust executed a 30 year lease comprising in total 75.73 acres ("the B&R Lease") to Brown & Root-Wimpey Highland Fabricators Limited ("B&R") for the construction of the Nigg dock and fabrication yard partly on the land contained in the B&R Lease, partly on B&R's own land to the North and partly from former seabed acquired from the Crown Estate.

10. The B&R Lease commenced on 1 January 1972 (the date of entry by B&R to the Property) and expired on 31 December 2001. Clause Eight of the B&R Lease required B&R, if so requested by the Trust not less than five years prior to the expiry date to remove all building and structures on the leased land and fill in at its own expense the graving docks or other excavations to a sufficient sound level to enable it to support buildings for light industrial purposes within the meaning of the Town and Country Planning (Scotland) Act:

> "Eighth The Tenant shall be bound during the currency of the Lease to keep all buildings and structures (including boundary fences) on the subjects of let in good order and repair entirely at its own expense but may remove it any time during this Lease and shall remove if requested to do so by the Landlords not less than five years prior to the expiry date, all such buildings and structures other than the roads on the subjects of let, the bulkheads and sea walls and breakwaters on the boundaries of its development and all sluices another site works controlling water levels, all of which shall be left in good order and repair at the expiry of this Lease. The tenant may also fill in, and shall fill in at its own expense if requested by the Landlords to do so not less than five years prior to the expiry date any graving dock or other excavation on the subjects of let should be required to leave such graving dock or other excavation on the subjects of let and should be required to leave such graving dock or other excavation in a sufficiently sound level condition to enable it to support buildings for light industrial purposes within the meaning of the Town and Country Planning (Scotland) Acts and approximately to the present level of the road to the east of the subjects of let: Declaring that no compensation should be paid to the tenant by the Landlords/Landlords for any buildings, structures, bulkheads, sea walls and breakwaters, sluices or site works controlling water levels left on the subjects of let, nor shall the Landlords be required to contribute towards the cost of their demolition or removal or the filling in of the said graving dock: And it is hereby declared and agreed that the foregoing obligations incumbent upon the Tenant should apply to all buildings, bulkheads, breakwaters, graving docks, excavations, sluices and other site works and structures from time to time erected and forming part of the development shown on the said drawing No. SK 300 656 whether the same are situated on the subjects of let or on other subjects owned or acquired by the Tenant in accordance with Clause NINTH hereof."

11. Clause Nine of the B&R Lease required B&R to use their best endeavours to acquire from the Crown Estate the area of Crown seabed and foreshore comprising 24 acres and, at the expiry of the B&R Lease, transfer free of charge the Crown seabed and foreshore to the Trust.

12. On 23 August 1991 Brown & Root-Wimpey Highland Fabricators Limited by virtue of a Certificate of Incorporation on Change of Name changed its name to Brown & Root Highlands Fabricators Limited ("B&R").

13. In December 1996 the Trust and B&R agreed a Minute of Extension and Variation of Lease ("Extension and Variation") whereby (a) the B&R Lease was extended for a further

period of 30 years from 1 January 2002 to 31 December 2031, (b) the additional 24 acre site (referred to at [8] above) was included in the leased subjects, (c) an onerous environmental liability clause was inserted in the B&R Lease and provision made for the Tenant to have the option to break the lease on 31 December in the years 2001, 2011 and 2021 provided that a minimum of five years written notice was given.

14. The Extension and Variation was executed by B&R on 13 December 1996 and by the Trust on 15 December 1996. The Extension and Variation renewed and strengthened the stipulation in the B&R Lease that B&R, upon being given prior notice, remove all buildings and structures and fill in the graving dock at the expiry of the lease. The clause stated:

> "Clause EIGHTH shall be amended as follows:-
>
> (a) The words "five" where they appear in lines 4 and 9 are deleted and the words four and a half' are substituted therefor
>
> (b) The words "In the event of the Landlords requiring the Tenant to remove such buildings and structures and/or to fill in such graving dock or other excavation and the Tenant failing for whatever reason to do so by the date of expiry, the Tenant shall pay to the Landlords on demand an amount equal to the costs of such works. Such costs shall be the amount agreed between the Landlords and the Tenant or failing agreement such amount as shall be fixed by a single arbiter mutually chosen, or in default of agreement by an arbiter experienced in such matters appointed by the Chairman for the time being of the Royal Institution of Chartered Surveyors, Scottish Branch, and the decision of such arbiter so agreed upon or appointed shall be binding on the Landlords and the Tenant. The costs of such arbitration shall be met as determined by the arbiter or failing such determination equally by the Landlords and the Tenant" shall be added at the end"

15. The environmental liability clause stated:

> "Clause TWELFTH is deleted and the following Clause TWELFTH is
>
> substituted therefor:-
>
> …
>
> (Three) The Tenant shall at the expiry or sooner termination of this Lease make good the subjects of let and restore them to level ground and shall remove from all parts of the subjects of let (including without limitation the soil, sub-soil, foreshore and seabed) all Substances which are or may be injurious to human health or to the Environment; and the Tenant undertakes to indemnify and to re-imburse to the Landlords any and all losses, damages, liabilities, claims, costs and expenses (including, without limitation, fines, penalties, judgements and awards, costs of clean up activities and obligations, statutory or other official contributions, legal and technical fees and costs and expenses of obtaining or retaining Consents or otherwise complying with Environmental Law (but only insofar as (i) any such Consents may require to be obtained or retained by the Landlords for any purpose or activity carried on or intended to be carried on by the Landlords on the subjects of let after the expiry or sooner determination of this Lease and/or (ii) any such Consents are required by the Tenant in order to enable it to comply with its obligations under this Clause) which may be paid, incurred, suffered or sustained by the Landlords arising out of or in connection with or resulting from anything done at or in relation to the subjects of let during the period of this Lease."

16. The break clause stated:

> "(Two) Clause THIRD shall be amended as follows:-

…

(c) The second sentence shall be deleted and there shall be

substituted therefor:-

"The Tenant shall have the option to break the Lease on 31st December in each of the years 2001, 2011 and 2021 provided that a minimum of 5 years prior written notice is given by the Tenant to the Landlords of the exercise of said option""

17. B&R's obligations under the B&R Lease, as varied by the Extension and Variation, were guaranteed by B&R's parent company, the Halliburton Company, in a deed of guarantee dated 16 June 1997 and 31 August 1997.

18. In 2011 B&R reached agreement to sell the fabrication yard to Global Energy Nigg Limited ("GE") and consequently sought a surrender of the B&R Lease. Accordingly, the following connected transactions were entered into:

(1) The Renunciation (surrender), executed on 6 October 2011 by B&R and on 11 October 2011 by the Trust, of the B&R Lease which stated:

"Renunciation Date: 14 October 2011

2 RENUNCIATION

2.1 The Tenants for no consideration renounce the Lease to the Landlords with effect from the Renunciation Date.

2.2 The Landlords accept this Renunciation and discharge the Tenants of all obligations under and in terms of the Lease and that whether arising before, on or after the Renunciation Date

…

4 WARRANDICE/POSSESSION

The Tenants grant warrandice and give to the Landlords vacant possession of the Property with effect from the Renunciation Date"

(2) The Discharge dated 11 October 2011 of the Halliburton Company guarantee of B&R's obligations under the B&R Lease.

(3) A new lease dated 11 and 14 October 2011 for a term of 60 years of 95.06 acres of land was granted by the Trust to GE with Global Energy (Holdings) Limited as guarantor with a date of entry 14 October 2011. The lease was drawn on full repairing and insuring terms, GE's repairing obligation was limited by the inclusion of a Schedule of Condition:

"4.4 Repair, cleaning, etc,

To accept the Premises at the commencement of this Lease as in the condition and state of repair as shown on the Schedule of Condition and at all times:-

4.4.1 To maintain and keep the Premises (which for the avoidance of doubt includes all sea walls, dry dock, dock quay, the dock gate, dolphins, excavations, sluices and other site works and the Building but for the purpose of this clause excludes all buildings erected by the Tenant's during the Period and the fixtures and fittings therein) in a state of repair and condition that is no worse than that which they were in at the Date of Entry (as shown on the Schedule of Condition) suitable for the use permitted in terms of this Lease and where necessary for this purpose renew, reinstate and rebuild the Premises irrespective of the cause of damage necessitating any repair, reinstatement, renewal or rebuilding (including any repair or decoration required as a result of any latent or inherent defect) to the intent and effect that at all times during

the Period the Premises shall be in a state of repair and condition that is no worse than that which they were in at the Date of Entry (as shown on the Schedule of Condition)"

(4) The lease included an obligation on GE under clause 7.19, if so requested by the Trust, to convey to the Trust the "Additional Subjects", namely the area of land coloured pink on the Plan forming Part 7 of the schedule to the lease.

(5) The transfer of parcels of land between the Trust and B&R to tidy up the land ownership of the yard and adjacent land. The conveyances involved were as follows:

(a) The Trust nominated Dunskaith Property Company Limited to take title to the parcels of land transferred by B&R.

(b) The Trust conveyed to B&R the area shown coloured blue on Plan 1 attached to Disposition and Agreement between the Trust and B&R.

(6) The terms of the missives [contracts] for the lease between the Trust and GE comprising letters exchanged by Anderson Strathern and Dundas & Wilson dated 8, 16 and 22 August and 5 and 13 October both months of 2011 included payment by GE to the Trust of a premium [grassum in Scotland] comprising (a) £1 million exclusive of VAT for the grant of the lease and (b) a share option in respect of GE shares.

(7) The missives between the Trust and B&R (comprising letters exchanged by Anderson Strathern and Paull & Williamson dated 8 August, 16 August, 22 August, 5 October and 13 October 2011) and between the Trust and GE stipulated that all the transactions were dependent and inter-conditional upon each other.

The course of the dispute

19. The Trust's 2011-12 tax return was received by HMRC on 18 December 2012. The return included a capital loss claim. The details of the loss were:

Proceeds of sale	£1,000,000
Less market value at 31 March 1982	£2,367,000
Loss	£1,367,000

20. On 13 November 2013, HMRC opened an enquiry into the Trust's 2011-12 tax return.

21. On 28 November 2013, Reeves & Co (the Trust's then agents) responded to the enquiry. They provided a capital gains tax calculation and a valuation provided to the Trustees by Bidwells. The author of the Bidwells LLP valuation report dated 18 April 2012 was Mr Strang. In their letter Reeves & Co confirmed that the whole of the land had been disposed of with no part disposal calculation required. This was incorrect and it was acknowledged by Reeves & Co on 9 May 2014 that it was a part disposal.

22. 'Without prejudice' discussions between the parties followed. By 16 March 2017, the following values had been agreed between the Trust's valuer, Mr Strang, and the District Valuer:

Main Site (98.19 Acres) (1982 value)	£1,600,000
95.06 acres subject to lease (2011 value)	£2,350,000
Blue Area 3.13 acres (2011 value)	£650,000
Reversion to vacant possession (2011 value)	£7,500
Pink Option area (3. 13 acres)	£10,000

Orange land (26.343 acres)	£140,000

23. During correspondence in 2016 the Trust advanced the argument that the release of B&R from the onerous reinstatement provision contained in the B&R Lease was allowable expenditure when calculating the Trust's capital gains tax position. No agreement was reached and therefore no valuation was provided or agreed by the parties. On 21 February 2018, Kreston Reeves LLP, the Trusts' representative, gave notice to HMRC that they intended to apply to the Tribunal to request closure of the enquiry.

24. On 21 August 2018, the Trust made an application to the Tribunal to direct HMRC to issue a closure notice.

25. HMRC agreed to issue a closure notice and this was issued to the Trust on 29 November 2018. The closure notice included a revised computation of a part disposal of an interest in land:

"Main Site (98.19 Acres) (1982 value)	£1,600,000
95.06 acres subject to lease (2011 value)	£2,350,000
Blue Area 3.13 acres (2011 value)	£650,000
Reversion to vacant possession (2011 value)	£7,500
Pink Option area (3. 13 acres)	£10,000
Orange land (26.343 acres)	£140,000
Cost of surrender of KBR lease to trust	£956,000

Decision

The loss of £1,367,000 claimed on the trustee's 11/12 return in relation to the grant of a lease to Global Energy is amended to a gain of £625,409.84. The revised tax is £175,114.75

Reasoning

- The original CGT computation did not apply the part disposal formula which is required by s42 TCGA92. I have now applied the part disposal formula using the values shown above. A copy of the revised computation is enclosed.
- The March 1982 value shown in the original computation was £2,367,000. A revised value of £2,350,000 has been agreed with the VOA.
- The deduction of £956,000 claimed during the enquiry is not allowable expense because:
  • The trustees have not incurred any expenditure in relation to KBR surrendering the lease. Therefore, the £956,000 is not an allowable deduction under any sub-section of s38 TCGA92
  • Even if the trustees had incurred expenditure, the expenditure was neither incurred to acquire the asset held by the trustees (the freehold) nor was it an incidental cost of acquisition or disposal so it is not allowable under either s38(1)(a) or s38(1)(c). For the avoidance of doubt, we do not believe that the trustees have incurred any expenditure."

26. It was common ground between the parties that the grant of the lease to GE by the Trust required a part disposal computation of the allowable base cost be made under section 42 TCGA. The revised calculation is not disputed by the Trust save for whether in addition to the 1982 value of £1,600,000 as the base cost, the Trust is also permitted to bring in the cost of releasing B&R (referred to as "KBR" in the closure notice) from the reinstatement provisions

of the lease as this represented "money's worth" and should be treated as enhancement expenditure under s 38(1)(b) TCGA.

27. HMRC had included a value of £956,000 as the cost to the Trust of the surrender of the B&R lease but not allowed that deduction under s 38 TCGA. That figure was not accepted by the Trust who, in their letter dated 21 December 2018 to HMRC appealing the closure notice, confirmed that "we are at a loss to understand the figure of £956,000". HMRC in their letter to the Tribunal dated 14 January 2019 confirmed that they had issued a closure notice to the Trust and that they no longer intended to resist the Trust's closure notice application. They noted the Trust's objection to the use of the figure of £956,000 and confirmed that an independent review would be offered.

28. On 15 January 2019, HMRC confirmed that their view remained as set out in their decision letter dated 29 November 2018 and offered a review of their decision. A review was offered to the Trust on 15 January 2019 and on 13 February 2019 the Trust filed a Notice of Appeal.

29. It is clear from the documents provided in the EHB and from the parties' oral submissions that there had been 'without prejudice' discussions between the parties in an attempt to resolve the dispute. The discussions concluded without agreement. As previously stated, those discussions were on a 'without prejudice' basis and accordingly, I have not taken into account the documents and evidence in the EHB referring to the 'without prejudice' discussions and negotiations.

Evidence of Mr Strang

30. Mr Strang appeared before this Tribunal as a witness of fact and not as an expert witness. HMRC, in their skeleton argument, said at [57]:

> "In his witness statement dated 7 October 2019, Mr Strang states that the value of rent foregone from the surrender of the KBR lease is £956,000 and states that this is substantially lower than the different costs/value of reinstatement which he estimates to be in the region of £22m to £42m. HMRC note in passing that Mr Strang appears as a witness of fact in this matter".

31. That point was not pursued by HMRC in the hearing and Dr Schryber proceeded to cross-examine Mr Strang on his evidence, both factual and opinion.

32. In the event that HMRC had objected to the inclusion of Mr Strang's opinion evidence I would have permitted its inclusion. Rule 15(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 allows the Tribunal to "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom". Rule 15(2)(a) must be construed and applied having regard to the overriding objective of dealing with cases fairly and justly, Rule 2(3). In *Megantic Services Limited v The Commissioners for HM Revenue and Customs* [2010] UKUT 464 (TCC) Arnold J at [80], stated:

> "Secondly, rule 15(2)(b) stated: "It follows that the tribunal is entitled to admit evidence which would not be admissible in a court and give it such weight, if any, as the tribunal considers that it is worth. What weight should be given to the evidence is a matter for the tribunal to decide in the light of all the evidence at the hearing. Even if Mr Downer is not qualified to give expert evidence, that would not prevent his opinion evidence being received by the tribunal."

33. The weight to be given to Mr Strang's opinion evidence is a matter for me to decide in light of all the evidence at the hearing. I have set out Mr Strang's evidence in detail and stated where I have accepted his evidence. In the section following his evidence I have set out further findings of fact in respect of his evidence.

34. I have not referred to, nor taken into consideration, the chronology and details that Mr Strang provided of the 'without prejudice' discussions and negotiations with HMRC and the District Valuer that were contained in his witness statement and the EHB. In his witness statement he said the following:

(1) He commenced his career in commercial property in 1972 and retired from full-time employment as a partner in Bidwells LLP and as a Fellow of the Royal Institution of Chartered Surveyors ("FRICS").

(2) He had acted for the Trust since 2002 in respect of various issues cumulating in the negotiations for the terms of the early surrender of the B&R Lease and the granting of the new lease by the Trust to GE in October 2011. Since that date he had provided valuation advice to the Trust and had attempted to agree various valuations with the District Valuer.

35. He had assessed the value of the rent foregone by the Trust in accepting the surrender of the lease as £956,000. This was calculated on the basis that, as at October 2011, the B&R Lease had just over 20 years remaining (31 December 2031) with a passing rent of £116,900 per annum with RPI rent increase due every five years from 1 January 2021. This calculation was unchallenged and I accept it as mathematically correct.

36. His evidence was that there was a substantial difference in value to the Trust of the obligations owed by B&R and GE under the two leases. He had prepared the Bidwell's Report-Comparison of Lease dated 2 May 2019 ("BRCL"). The relevant main differences between the two leases identified in the BRCL were not challenged and which I accept were:

> "1.1 Lease to KBR
>
> 1.1.1 Lease between the Wakelyn Trust and Brown & Root Highlands Fabricators Limited … and guarantee by Halliburton Company …
>
> 1.1.2 Lease of 75.73 acres of land and seabed at Nigg with various alterations and additions from 1 January 1972 until 31 December 2031. There were Tenant's break options at 2001, 2011 and 2021 but no notice was served.
>
> 1.1.3 At clause EIGHTH of the lease the tenant was obliged to, "if requested by the Landlord, … fill in at their expense … any graving dock or other excavation … approximately to the level of the road to the east of the subjects."
>
> 1.1.4 The lease was otherwise effectively of full repairing and insuring terms.
>
> 1.2 Lease to Global
>
> 1.2.1 Lease between Wakelyn Trust and Global Energy Nigg Limited with guarantee from Global Energy Holdings Limited for 60 years from 14 October 2011. The subjects of lease being effectively the same area of land and sea-bed in the KBR lease.
>
> 1.2.2 This lease is drawn on modern full repairing and insuring terms and the repairing terms and the repairing obligation is somewhat restricted by the inclusion of a Schedule of Condition.
>
> 1.3 Lease Obligations
>
> 1.3.1 There are many minor differences between the leases especially in wording and drafting style. …
>
> 1.3.2 Both are generally prepared on a full repairing and insuring basis.

1.3.3 The main difference is the lack of obligation in the 2011 lease to in-fill the dock and other excavated areas and lack of a parent guarantee from a financially substantial company."

37. The BRCL report continued as follows:

"1.4 Cost of infill

A report on the cost of infilling the "graving dock and … other excavations" was prepared by Royal Haskoning 6 February 2006 to specifically investigate the costs of in-filling the excavations and to return the site in accordance with the provisions of the KBR lease as in para 1.1.3 above

…

1.4.4 The costs have been indexed by RPI from February 2006 until October 2011 being the date of entry to the new lease when the tenant's obligation expired.

SOURCE	FEB 2006	OCT 2011
Locally sourced material	£17,996,000	£22,146,059
Firth of Forth	£34,265.625	£42,167,625

Discount Rates

1.5.1 There is an argument that the effective date when the lease difference would take effect should be deferred to the termination of the KBR lease i.e. 31 December 2031 a period of just over 20 years from the grant of the new lease. However, the Trust incurred the loss at the grant of the new lease in October 2011 when the lease terms altered, and the quality of the parent company guarantee diminished. It is the costs as at October 2011 that should be applied.

1.5.2 Choosing a discount rate presents problems given the length of terms and nature of the obligation and property. However, discount rates have been agreed with District valuer when valuing the new lease at Nigg so I would argue that similar rates should apply to discounting the cost of the lease obligations.

1.5.3

DISCOUNT RATE	10%	12%	15%
PPV £1 for 20 years	0.1486	0.1036	0.0611
£22,146,059	£3,290,904	£2,294,332	£1,353,124
£42,167,625	£6,266,109	£4,368,566	£2,576,442

1.5.4 The above figures do not take account of any inflation on the basic costs. There is an argument that RPI or some other suitable index should be applied from 2011 until 2031. Currently applying RPI from October 2011 to March 2019 (the last available figure) would increase all the above by almost a further 20%. Any prediction of inflation until the end of 2031 would be pure speculation but if inflation remains at the low rates since October 2011 the above costs may increase by approximately 52% by the end of 2031."

The Royal Haskoning report dated 6 February 2006 ("RH") was not exhibited to Mr Strang's witness statement, only two extracted pages from the report were exhibited.

38. His unchallenged additional evidence-in-chief was that:

(1) The Property had been unused, or substantially unused, for a number of years. The Property had been advertised for sale for a number of years without success.

(2) B&R did not own the front part of the site and "any big metal thing" required access to the sea. The Trust owned the front of the site that was required to access the sea. The Trust had been criticised in the local community as preventing economic development of the Property.

(3) There had been many discussions between the Trust and B&R regarding the release of B&R from their reinstatement obligations under the B&R Lease. These discussions continued for a number of years. B&R had, during those discussions, consistently refused to make any payment to the Trust in order to be released from the B&R lease, the term of which continued until December 2031.

(4) The Trust was under pressure from the local community and politicians to "do a deal". Politicians were continually getting involved and were threatening a compulsory purchase order of the Property if agreement were not reached. The Trust was seen as stopping development of the Property. GE is a local company and, being local, there was increased pressure on the politicians to begin the compulsory purchase order process. If the Trust had resisted the pressure to reach agreement with B&R then a large sum was expected to be paid by B&R to be released from the reinstatement obligation; however, that approach risked the Trust being seen as the reason why agreement had not been reached which prevented the Property from being in economic use and creating local jobs. The threat of a compulsory purchase order was the reason why a deal was done with GE, the rent increased significantly. The payment of the £1m should have come from B&R and not GE.

(5) The area of land shown as the "blue land" in revised closure notice computation sits in front of the main shed and had been built in the wrong place but straddled the leasehold land. GE had insisted that the "blue land" be transferred to them. This, together with the lack of a parent company guarantee from a "financially substantial company" was another area that was conceded by the Trust.

(6) If the Trust had declined to release B&R from the reinstatement obligation then a deal would not have been done. No payment was forthcoming from B&R and regrettably the Trust had to cave in and accept a smaller payment from GE. It was important to the Trust and part of its social responsibility that the Property was let to GE as it was a local business. The Trust did not want to fall out with GE who had opposed a compulsory purchase order.

39. In cross-examination and re-examination, Mr Strang explained as follows:

(1) If the Trust had not released B&R from the lease then a "deal would not have been done".

(2) The Trust's position was that B&R should have "put money on the table" to be released from the B&R Lease but that was not forthcoming and the Trust had to "cave in" and accept a smaller payment from GE.

(3) The two figures of £22m or £42m represented the cost to B&R of the reinstatement works and that the costs were as they would have been in 2011.

(4) He accepted that if B&R had vacated the site admitting their reinstatement obligations there would have been a figure agreed for the costs of the reinstatement works which represented the costs of B&R's reinstatement obligations but that no physical reinstatement works would have been carried out as the incoming tenant, GE, wanted the dry dock.

(5) The values at October 2011 represented the cost in 2011 and that B&R had not had to carry out the reinstatement works in 2011. He confirmed that if B&R were leaving the Property and admitting their responsibilities "there would have been negotiations and a figure agreed but no physical work carried out" as the incoming tenant wanted the dry dock but not the onerous reinstatement provisions. In re-examination he confirmed that if the B&R lease had continued, the works would have been carried out in 2031 and he did want to second guess inflation when calculating what the cost would be in 2031.

(6) He explained that the discount rates that he had applied to the reinstatement cost estimates were an attempt to establish in 2011 what the reinstatement costs would be in 2031 and those figures had been "bandied around" with the District Valuer but had not been accepted by HMRC.

(7) He accepted that the valuation costs were the valuation costs of B&R's obligations under the lease and confirmed that it was a valuation of part of the interest of the Trust in the land and it was his expectation that negotiations would have taken place at the termination of the lease to either physically fill in the graving dock and restore the site or come to an agreement.

40. Based on Mr Strang's evidence and the documentary evidence I make the following additional findings of fact:

(1) No physical reinstatement works were carried out at the Property prior to or upon the surrender of the B&R Lease.

(2) No payment was made by B&R to the Trust for the surrender of the lease.

(3) No payment was made by the Trust to B&R for the surrender of the lease.

(4) The incoming tenant, GE, wanted the dry dock.

(5) The estimated costs of either £22m or £42m represented the cost to B&R of any the reinstatement works.

(6) The figures provided by RH and relied upon by Mr Strang, were a broad estimate of the reinstatement costs as at 6 January 2006, those figures had been indexed by RPI by Mr Strang from that date until October 2011. The two-page extract from the RH report that was exhibited to Mr Strang's witness statement stated that a budget estimate for the fill material had been obtained from Westminster Dredging and was contained in Appendix C to the RH report (not included in the EHB); however, the budget rates did not include Crown Estate Royalties, aggregate tax or the costs of consolidation and levelling to form a stable reclamation. Estimates of these costs were included in RH's calculations and the final sentence on the second page of the RH report stated "It should be stressed that this is a broad estimate at present, and excludes the costs of investigation and research and design involved in obtaining licensing for any new aggregate borrow site".

41. Mr Strang, in his BCRL report, confirmed that "choosing a discount rate presented problems" and the discount rate used was based upon his opinion that similar discount rates to those agreed with the District Valuer when valuing the GE lease should be applied. In addition, no account had been taken of inflation which Mr Strang argued should be RPI or some other suitable index. I considered that Mr Strang's evidence on discount rates was purely speculative and I attached no weight to his opinion evidence of the discount rates.

RELEVANT LEGISLATION AND HMRC PRACTICE

42. The statutory provisions relevant to this appeal are set out below. All statutory references are to the TCGA unless otherwise stated.

21 Assets and disposals

…

(2) For the purposes of this Act—

(a) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and

(b) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of.

38 Acquisition and disposal costs etc

(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to—

(a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,

(b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,

…

42 Part disposals

(1) Where a person disposes of an interest or right in or over an asset, and generally wherever on the disposal of an asset any description of property derived from that asset remains undisposed of, the sums which under paragraphs (a) and (b) of section 38(1) are attributable to the asset shall, both for the purposes of the computation of the gain accruing on the disposal and for the purpose of applying this Part in relation to the property which remains undisposed of, be apportioned.

(2) The apportionment shall be made by reference—

(a) to the amount or value of the consideration for the disposal on the one hand (call that amount or value A), and

(b) to the market value of the property which remains undisposed of on the other hand (call that market value B), and accordingly the fraction of the said sums allowable as a deduction in the computation of the gain accruing on the disposal shall be—

$$\frac{A}{A+B}$$

and the remainder shall be attributed to the property which remains undisposed of.

(3) Any apportionment to be made in pursuance of this section shall be made before operating the provisions of section 41 and if, after a part disposal, there is a subsequent

disposal of an asset the capital allowances or renewals allowances to be taken into account in pursuance of that section in relation to the subsequent disposal shall, subject to subsection (4) below, be those referable to the sums which under paragraphs (a) and (b) of section 38(1) are attributable to the asset whether before or after the part disposal, but those allowances shall be reduced by the amount (if any) by which the loss on the earlier disposal was restricted under the provisions of section 41.

(4) This section shall not be taken as requiring the apportionment of any expenditure which, on the facts, is wholly attributable to what is disposed of, or wholly attributable to what remains undisposed of.

(5) It is hereby declared that this section, and all other provisions for apportioning on a part disposal expenditure which is deductible in computing a gain, are to be operated before the operation of, and without regard to, section 58(1), sections 152 to 158 (but without prejudice to section 152(10)), section 171(1) or any other enactment making an adjustment to secure that neither a gain nor a loss occurs on a disposal.

Schedule 8

2—

(1) Subject to this Schedule where the payment of a premium is required under a lease of land, or otherwise under the terms subject to which a lease of land is granted, there is a part disposal of the freehold or other asset out of which the lease is granted.

(2) In applying section 42 to such a part disposal, the property which remains undisposed of includes a right to any rent or other payments, other than a premium, payable under the lease, and that right shall be valued as at the time of the part disposal"

43. HMRC's internal guidance to Officers in the Capital Gains Manual, CG15210, states in so far as relevant to this appeal:

> "CG15210 – Expenditure: enhancement expenditure: money's worth
>
> To the extent that money's worth is given for the purpose of enhancing the value of an asset, the money's worth so given constitutes expenditure incurred. See *Chaney v Watkis*, 58TC707.
>
> However, the following do not qualify as enhancement expenditure:
>
> payments of rent and service charges in respect of a property held on lease - *Emmerson v Computer Time International Ltd* (in liquidation) 50TC628.
>
> the value of an individual owner's own labour on alterations and improvements to an asset - *Oram v Johnson*, 53TC319."

CASE LAW

44. Both parties relied upon *Oram (Inspector of Taxes) v Johnson* [1980] STC 222 and *Chaney v Watkis (Inspector of Taxes)* [1986] STC 89.

45. In *Oram* the taxpayer had purchased a freehold property in 1968 for £2,250. It was in a poor state of repair. By his own labour, the taxpayer improved and enlarged the property and in 1975 he sold it for £11,500. Much of the enhanced value was the result of the taxpayer's personal work and he claimed to deduct £1 per hour for his labour in computing the chargeable gain on the sale of the property. This was estimated as the value of his own work. Walton J considered the word "expenditure" and how use of that word limited what may be deducted from consideration in a capital gains computation. Having considered that "expenditure" is

something which is passing out from the person who is making the expenditure he disallowed the taxpayers claim for notional expenditure on the work that the taxpayer had carried out himself. At 226 g, h and j and 227 a and b Walton J stated:

> "So I return basically to para 4(1)(*b*), 'the amount of any expenditure'. It seems to me that, although one does in general terms talk about expenditure of time and expenditure of effort, having regard particularly to the opening words of para 4(1), where the expenditure is to be 'a deduction', the primary matter which is thought of by the legislature in para 4(1)(*b*) is something which is passing out from the person who is making the expenditure. That will most normally and naturally be money, accordingly presenting no problems in calculation; but that will not necessarily be the case. I instance the case (it may be fanciful, but I think it is a possible one and tests the principle) of the taxpayer employing a bricklayer to do some casual bricklaying about the premises the remuneration for the bricklayer being three bottles of whiskey at the end of the week. It seems to be that that would be expenditure by the taxpayer, because out of his stock he would have to give something away to the person who was laying the bricks, and I do not think that that would present any real problems of valuation or other difficulty.
>
> But when one comes on to his own labour, it does not seem to me that this is really capable of being quantified in this sort of way. It is not something which diminishes his stock of anything by any precisely ascertainable amount; it is something which would have to be estimated. It seems to me that three would undoubtedly have to be found in the end some machinery for translating into money terms the work put in by the owner of the asset himself, if that was to be allowable. But it seems to me that that does not fall into the ordinary meaning of 'the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf'. The wording, to my mind, just does not fit that sort of situation.
>
> It is perhaps a matter of first impression based on the impression that the word 'expenditure' makes on one, but I think that the whole group of words, 'expenditure,' 'expended,' 'expenses' and so on and so forth, in a revenue context, mean primarily money expenditure and, secondly, expenditure in money's worth, something which diminishes the total assets of the person making the expenditure, and I do not think that one can bring one's own work, however skilful it may be and however much sweat one may expend on it, within the scope of para 4(1)(b)."

[Para 4(1)(b), Schedule 6, Finance Act 1965 referred to above has been re-enacted as s 38(1)(b) TCGA in the same terms.]

46. In *Chaney* Nicholls J (as he then was) considered the CGT treatment of the sum agreed to be paid by the taxpayer to a protected tenant (the taxpayer's mother-in-law) to obtain vacant possession of the house. The taxpayer agreed to sell the house with vacant possession and in order to obtain such possession agreed to pay the tenant £9,400 to give up her tenancy. Subsequently, the taxpayer and the tenant varied the agreement and, in lieu of the payment, the taxpayer agreed to provide the tenant with rent-free accommodation for the rest of her life and for that purpose constructed an extension to his house at an approximate cost of £25,000. Nicholls J in allowing the taxpayer's appeal stated at 94 c, d, and e:

> "Given, then, that regard is to be had to post-contract events, what one finds in this case is that the debt of £9,400 was never paid. Instead, the taxpayer agreed with Mrs Williams that in lieu of paying that sum he would provide her for life with rent-free accommodation in Pope's Cottage. I can see no reason in principle why the obligation thus undertaken by the taxpayer is not

> capable of being valued in money terms. It is not suggested that because of the domestic nature of the arrangement there was not a genuine, legally binding contract for provision of the rent-free accommodation. That being so, I would have thought that, equally as if this accommodation arrangement had been made at arm's length with a stranger, a figure, albeit of a very approximate nature, could be placed on this agreement as the measure in lump sum terms of the cost of such an agreement. So I think that incurring this obligation is capable of passing the test enunciated by Walton J in *Oram (Inspector of Taxes) v Johnson* [1980] STC 222 at 226, [1980] 1 WLR 558 at 561–562 of expenditure in s 32 meaning expenditure in money or money's worth.
>
> Nor am I attracted by the Crown's further argument that here the only sum of money spent by the taxpayer was the outlay of £25,000, not on the property but on another property of his; namely Pope's Cottage. Obviously, the expenditure of £25,000 on physical improvements to Pope's Cottage does not negative, and is not inconsistent with, expenditure also being incurred by the taxpayer in enhancing the value of his interest in the property by obtaining vacant possession.
>
> Again, the fact that the taxpayer's obligation to Mrs Williams related to another property of his, in that she was to be provided with accommodation there and he was to spend money on improving it, is, in my view, beside the point. Argument based on this seems to me to be apt to confuse the benefit which Mrs Williams acquired at the expense of the taxpayer with the benefit which the taxpayer acquired in exchange. The obligation to pay £9,400 was the price of obtaining vacant possession of the property. If payment in cash of that sum for that purpose by the taxpayer would have been expenditure wholly and exclusively incurred on the asset by the taxpayer for the purpose of enhancing its value, so must have been payment by the taxpayer for the like purpose made not in cash but by providing money's worth at his expense, regardless of the precise nature of the benefit provided in lieu of money.
>
> Where I think the Crown was on stronger ground was with a further submission that there was no evidence before the commissioners quantifying the amount of the expenditure represented by the financial detriment suffered by the taxpayer in undertaking the obligation to provide rent-free accommodation. On this it is important to keep in mind that it was in order to get the price at which the property was sold that the taxpayer agreed to pay £9,400 to his protected tenant. What happened thereafter was that the obligation to pay that sum was replaced by an obligation to provide an alternative benefit to the tenant. If the parties had been at arm's length I might have been attracted to the view that unless evidence to the contrary were forthcoming it could and should be assumed that the cost to the taxpayer of providing the alternative benefit was of the order of £9,400."

47. In addition, HMRC's Statement of Case referred to *Trustees of FD Fenston Will Trusts v Revenue and Customs Commissioners* [2007] STC (SCD) 316 and *Blackwell v The Commissioners for HM Revenue & Customs* [2017] EWCA Civ 232. Dr Schryber did not refer to either case in his submissions.

48. In *Blackwell* the taxpayer paid £17.5m to be released from certain obligations he had undertaken in 2003 in relation to his shares in Blackwell Publishing (Holdings) Limited. Following disposal of the shares he sought to deduct the £17.5m under s 38(1)(b) TCGA from the gains made on the sale of the shares on the basis that the payment had been necessary to be released from the 2003 obligations to allow the sale to proceed. Briggs LJ (as he then was) when considering the approach to be taken when applying the provisions of s 38 TCGA said:

"22. While I accept that the capital gains tax legislation, and words, phrases and concepts used in it, including those in s.38, are generally to be interpreted on a basis consistent with business common sense, it by no means follows that there will in any particular instance be a conflict between business common sense and a careful juristic analysis of particular provisions. Even if there is, the clear language of statutory provisions by which gains are to be computed, and deductions allowed, may nonetheless prevail, even where the outcome might appear to be one which a businessman might find surprising."

23. The Aberdeen case, as analysed in the Court of Session, is a case in point. The taxpayer wished to sell its shareholding in its wholly owned subsidiary, which was indebted to it in the sum of £500,000. It agreed to sell the shares to a third party buyer for £250,000, on terms that it waived that debt. Corporation tax was assessed on the basis that the whole of the £250,000 had been received for the disposal of the shares. One of the ways in which the taxpayer sought to mitigate the severity of that analysis was by claiming that the waiver of the debt was expenditure "on" its shareholding in its subsidiary within the meaning of what is now s.38(1)(b), then paragraph 4(1)(b) of Schedule 6 to the Finance Act 1965. The submission made good business sense, because the waiver of the debt plainly increased the value of the shares being sold, and they might otherwise have been worthless.

24. In rejecting that submission, the Lord President (Emslie) said this, at (1978) 52 Tax Cases 281, 290:

> "To describe the making of the loans, or their waiver, as expenditure within the meaning of para 4(1)(b) of Sch6 is however, quite unacceptable. The making of the loan created rights and obligations and the waiver constituted an abandonment of the rights but in neither case was there the kind of expenditure with which para 4(1)(b) is concerned. In any event, by no reasonable stretch of the imagination is it possible to classify the making of the loans or their waiver as expenditure wholly and exclusively incurred "on" the shares and I find it impossible to say that either were reflected in the state or nature of the shares which were sold. The waiver of the loans may well have enhanced their value but what para 4(1)(b) is looking for is, as the result of the relevant expenditure, an identifiable change for the better in the state or nature of the asset, and this must be a change distinct from the enhancement of value."

…

27. Again, a businessman might well think it strange that the £1 million paid to Mr Blackwell for entering into the 2003 agreement constituted a part disposal of his shares, whereas the £17.5 million paid for his exit from the fetters imposed by that agreement could not be deducted upon his subsequent disposal of the shares in favour of Wiley. The lack of symmetry between the two may well be considered remarkable, but it derives from the very different language, on the one hand in s.21 and s.22 about part disposals and, on the other, in s.38 about allowable deductions. S.21 and s.22 are drafted in very wide all-embracing terms so as to capture a range of transactions which might not at first sight appear to amount to part disposals. By contrast s.38 is couched in cautiously restrictive terms, plainly designed to ensure that not all forms of expenditure which a businessman might think should be taken into account in identifying his chargeable gain are in fact permitted deductions."

PARTIES' SUBMISSIONS

49. Mr Cannon made the following submissions on behalf of the Trust:

50. There was a part-disposal of the freehold interest by the Trust when it granted the 60 year lease to GE. The element of loss claimed by the Trust consisting of the value in money's worth of the release of the previous tenant, B&R from the onerous conditions in the B&R Lease relating to the restoration of the Property is an allowable expense in the computation of capital gains tax under s 38(1)(b) TCGA arising from the grant of the lease to GE.

51. It is common ground that the grant of the lease by the Trust to GE required that a part-disposal computation of the allowable base cost be made under s 42 TCGA. HMRC have allowed the 1982 value of £1,600,000 as the base cost but in addition to that value the Trust are also permitted to include the cost incurred by them in releasing B&R from the onerous restoration provisions of the B&R lease because this represented money's worth and should be treated as enhancement expenditure under s 38(1)(b) TCGA. HMRC had wrongly attributed the figure of £956,000 to this value which the Trust had always maintained was either £22m or £42m.

52. The term "expenditure" in s 38(1)(b) TCGA embraced the release of a valuable right, support for this proposition can be found in *Oram*. In *Oram,* Walton J emphasised that "expenditure" in s 38(1) TCGA may cover many types of "expenditure" provided that in each case the item of expenditure in question is capable of being translated into money terms. Mr Strang's evidence confirmed the cost of reinstatement in money terms – either £22m or £42m. HMRC's published internal guidance, CG15210, reflects this principle and HMRC accept that the giving of money's worth can be "expenditure" for the purpose of s 38(1)(b) TCGA – "To the extent that money's worth is given for the purpose of enhancing the value of an asset, the money's worth so given constitutes expenditure incurred. See *Chaney* v Watkis 58 TC 707".

53. The release of B&R by the Trust from the onerous obligation in the B&R Lease to reinstate the let Property was "money's worth given for the purpose of enhancing the value of an asset" and as such was "expenditure" by the Trust for the purpose of s 38(1)(b) TCGA because it enhanced the value of its freehold by achieving vacant possession of the Property to enable the Trust to let the Property to GE. The expenditure was reflected in the state or nature of the freehold at the time of its part disposal because without that expenditure in the form of the release of B&R from its reinstatement obligation, vacant possession of the freehold could not have been obtained.

54. Dr Schryber confirmed that he did not intend to follow HMRC's skeleton argument as it contained a lot of background and agreed points. He made the following submissions on behalf of HMRC:

55. There was no enhancement expenditure, the B&R lease was surrendered for no expenditure. Section 38(1)(b) requires that expenditure is incurred on the asset and the Trust did not incur any expenditure. *Oram* confirms that must be actual expenditure and not notional expenditure.

56. In relinquishing its right to require B&R to reinstate the let Property the Trust had failed to make the case that the right had any value. When you looked at the evidence before the Tribunal the right had no material value. Even if the right did have value, relinquishing that right could not have been expenditure.

57. Achieving vacant possession does not equate to enhancing the value of the freehold. HMRC accept that where a payment is made by the Landlord to the Tenant to obtain vacant possession this would be an enhancement if it was reflected in the value at a later sale. HMRC's primary position is that the lease was surrendered for no consideration and there was no obligation on the Trust to give any money or money's worth to B&R. HMRC's approach is consistent with its published guidance, CG15210 and *Chaney*. In *Chaney* the court looked at

what was given: the taxpayer took on a new obligation which was subsequently varied and it was that new obligation that was represented in money's worth.

58. The B&R Lease was a "bundle of rights" with rights and obligations on both sides and there is no right for one party to break up the details and attribute a value to one isolated right that was given up.

59. If HMRC are wrong, then it needs to be considered if there was a valuable right that was disposed of. No evidence has been provided of the value of the right surrendered, only the cost of B&R carrying out the work. All the circumstances suggest that the right to reinstatement had no material value to the Trust in 2011. Even if the right did have some value, it could not have enhanced the value of the asset. The right was to require B&R to restore the land. Relinquishing that right must by definition have decreased the value of the asset.

Discussion

60. Section 38(1)(b) TCGA falls into two limbs. The first limb is relevant to this appeal and states:

> "The amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal".

61. Therefore, the relevant question is whether the cost attributed by the Trust to the reinstatement right falls within s38(1)(b) TCGA. It was not disputed that only expenditure which falls into the categories defined in s 38(1)(b) TCGA can be allowed as a deduction on calculating the amount of a gain or loss on disposal. Therefore, the following questions need to be considered:

(1) Does the term "expenditure" in s 38(1)(b) include the release of a valuable right?

(2) Given that it does so include, was it expenditure incurred on the asset for the purpose of enhancing the value of the asset?

(3) Was the expenditure reflected in the state or nature of the asset at the time of disposal?

(1) Does the term "expenditure" in s 38(1)(b) include the release of a valuable right?

Payment for the surrender of the lease.

62. It was not disputed that no payment had been made by either the Trust or B&R for the surrender of the lease. The evidence of Mr Strang and the findings of fact confirmed that position. It was accepted that if the Trust had paid a sum to procure the surrender of the B&R Lease that payment would qualify as allowable expenditure under s 38(1)(b) TCGA provided that it was reflected in the state or nature of the property at the date of its disposal by the Trust. HMRC's internal guidance CG71262 confirmed that position, I consider that HMRC's guidance on that point is a correct statement of the law.

Valuation of the right

63. The Trust submitted that as the right to reinstatement had been valued by Mr Strang, the release of that right was clearly the giving of money's worth by the Trust, per *Oram*. Dr Schryber submitted that what had been provided was the cost to B&R of complying with the reinstatement obligation and not a valuation of the right and the facts of this appeal were very different to those in *Oram*. Putting aside for one moment the issue of whether the release of the right was expenditure, the Trust's submission was not borne out by the facts.

64. Mr Strang's evidence was that the figures of £22m or £42m (depending on where the infill materials were sourced from) were the cost to B&R of the reinstatement work. The

extracts from the RH report which Mr Strang relied upon as the basis for his calculation of the costs as either £22m or £42m confirmed that the figures contained in the RH report were "a broad estimate" and had been calculated on the basis of the cost to B&R, if so requested by the Trust, of complying with the reinstatement obligation contained in the lease. The accepted evidence and the findings of fact made at paragraphs 34-41 above confirmed that what had been provided by Mr Strang was a broad estimate of the cost to B&R of carrying out the reinstatement work, not a valuation of the value of the reinstatement right to the Trust. Mr Cannon submitted that there was no other way to value the right foregone by the Trust which must approximate to the cost of the reinstatement work. It is a truism that cost and value are not the same and I do not accept that the estimated cost to B&R of the reinstatement works must approximate to the value of the right to reinstatement foregone by the Trust.

65. Dr Schryber submitted that when the background and circumstances of the lease surrender were considered it was clear that the right to require reinstatement of the Property was of no value to the Trust. I agree with Dr Schryber. The accepted evidence and the relevant findings of fact at paragraphs 38-40 above confirmed, contrary to the Trust's position, that the right to require reinstatement of the let Property had no material value to the Trust at the date of the surrender of the lease. Mr Strang's evidence at paragraph 38(4) above was that the Trust accepted the surrender of the lease without receiving any payment from B&R to avoid any possibility of a compulsory purchase order being made in respect of the Property. His accepted evidence was that as GE was a local business, politicians faced increased pressure from the local community to commence the compulsory purchase process to ensure that the Property would be returned to economic use and jobs created. The incoming tenant, GE, required the dry dock and any reinstatement works would have infilled the dry dock and removed other infrastructure from the Property that was valuable to GE and necessary for its business.

66. Mr Cannon submitted that the requirements of GE were irrelevant to the existing B&R Lease obligations and may be just happenstance but that submission was not supported by the documentation in evidence before the Tribunal and the accepted evidence of the Trust's witness, Mr Hunter. Mr Hunter confirmed at paragraph seven of his unchallenged witness evidence (set out at paragraph 18 above):

> "In 2011 B&R reached agreement to sell the fabrication yard to Global Energy Nigg Limited ("GE") and consequently sought a surrender of the B&R Lease. Accordingly, the following connected transactions were entered into …" and at paragraph 18(7) above: "The missives [contracts] between the Trust and B&R … and between the Trust and GE stipulated that all the transactions were dependent and inter-conditional upon each other."

Oram

67. Mr Cannon relied upon *Oram* in support of his submission that the Trust's release of B&R from the reinstatement obligation was the giving of money's worth. Dr Schryber submitted that the facts of this appeal were very different to those in *Oram*. In *Oram*, Walton J considered the word "expenditure" and how use of that word limited what may be deducted from consideration in a capital gains computation. Having stated that expenditure for the purposes of what is now s 38(1)(b) TCGA meant primarily money expenditure and secondly, expenditure in money's worth, something which was passing out from the person who was making the expenditure which diminished his asset by a precisely ascertainable amount he confirmed that no deduction was available in respect of a purely notional item of expenditure as, in such cases, an expense has not actually been incurred. Mr Cannon submitted that Walton J's illustration of the three bottles of whiskey given as remuneration to a bricklayer was analogous to the Trust's release of B&R from the reinstatement obligation. I disagree. Walton J explained that three bottles of whiskey would be expenditure as they would be given away

by the taxpayer out of his stock (his assets would be diminished by a quantifiable amount) and there would be no difficulty in valuing the money's worth of three bottles of whiskey. That was not the position with the reinstatement right.

68. As stated in paragraph 65 above, the evidence and findings of fact were that the figures of either £22m or £42m were a broad estimate of the cost to B&R of the reinstatement works and, as such, were not a "precisely ascertainable amount". In addition, neither figure of £22m or £42m was a valuation of the value of the right foregone by the Trust, no work was carried out and no expenditure was incurred by the Trust such that its assets were diminished by either amount.

69. None of the features referred to by Walton J in *Oram* were present on the facts of this appeal. Accordingly, any value that the Trust had attributed to the value of the reinstatement right that it had foregone represented purely notional expenditure, expenditure that was disallowed in *Oram*.

Expenditure

70. Mr Cannon submitted that the consideration given by the Trust for the surrender of the lease was the release of the reinstatement right which was the giving of money's worth for the purpose of enhancing the value of an asset and was expenditure, per *Chaney*. Furthermore, HMRC were seeking to re-litigate *Chaney* and had misapplied their internal guidance, CG15210. Dr Schryber submitted that HMRC had correctly applied *Chaney* and its internal guidance CG15210 as the facts relied upon in *Chaney* were not present in this appeal.

71. In *Chaney* the taxpayer assumed a new obligation by agreeing to pay the protected tenant £9,400 to obtain vacant possession. The obligation to pay £9,400 was varied by agreement to the provision by the taxpayer of rent-free accommodation to the tenant for life. The question that the court determined was whether the offer of rent-free accommodation by the taxpayer in satisfaction of the obligation to pay £9,400 represented full consideration. The court accepted at [94g] that:

> "incurring this obligation is capable of passing the test enunciated by Walton J in *Oram* "of expenditure in [38(1)(b) TCGA] meaning expenditure in money or money's worth" on the basis that the original obligation to pay £9,400 was the price of obtaining vacant possession of the house, which was a considerable enhancement of the asset. If payment in cash of that sum would have been wholly and exclusively incurred on the property for the purpose of enhancing its value, payment by the taxpayer by providing money's worth at his expense must also fall within that definition, regardless of the precise nature of the benefit being provided in lieu of money."

72. I do not accept Mr Cannon's submission as the features identified in *Chaney* above were not present in this appeal – no new obligation was assumed by the Trust nor was any payment made by the Trust to B&R for the surrender of the lease. The Deed of Renunciation dated 14 October 2011 at paragraph 18 above stated at clauses 2.1 and 2.2:

> "The Tenants for no consideration renounce the Lease to the Landlords … The Landlords accept this Renunciation and discharge the Tenants of all obligations under and in terms of the lease … whether arising before, on or after the Renunciation Date".

73. The lease surrender was a mutual agreement entered into by the Trust and B&R that the lease would determine before the end of the lease term and in a manner not set out in the lease. There was no suggestion by the Trust nor was it indicated in any of the evidence before the Tribunal that the Deed of Renunciation did not accurately record the terms that the parties had agreed for the surrender of the lease.

74. I accept Mr Cannon's submission that there was consideration passing in the surrender of the lease; however, the consideration passing was the mutual relinquishment by both parties of all their rights and obligations under the lease, it was surrendered for no expenditure. That was the evidence that was before the Tribunal. It is the value put upon the surrender of the lease *inter partes*, and not the estimated cost that the Trust has attributed to the value of one extinguished right, that has to be used for the purposes of s 38(1)(b) TCGA.

75. I do not agree with the submission that the Trust, having accepted the renunciation and agreed to the extinguishment of all the rights and obligations in the lease in exchange for B&R renouncing the lease, can then point to one of the many extinguished obligations and rights, the right to require reinstatement, as the consideration given by the Trust for the surrender of the lease and therefore "expenditure" within the meaning of s 38(1)(b) TCGA. Support for that conclusion can be found in decision of Lord Emslie in *Aberdeen Construction Group Ltd v Inland Revenue Commissioners* [1978] AC 885 cited with approval by Briggs LJ in the Court of Appeal decision in *Blackwell* at paragraph 48 above. Lord Emslie dismissed as "unacceptable" the notion that the making of a loan and its waiver was expenditure within the meaning of what is now s 38(1)(b). He considered that the making of the loan created rights and obligations and the waiver constituted an abandonment of the rights but "in neither case was there the kind of expenditure with which [s.38(1)(b)] is concerned."

76. The crucial word in s 38(1)(b) is "expenditure" and the use of that word imposes limits on what may be deducted in a CGT computation. Briggs LJ at [27] in *Blackwell* stated:

> "By contrast s.38 is couched in cautiously restrictive terms, plainly designed to ensure that not all forms of expenditure which a businessman might think should be taken into account in identifying his chargeable gain are in fact permitted deductions."

77. In my view, when the provisions of s 38(1)(b) and business common sense are applied to the facts it can only be concluded that the renunciation of the lease for no consideration was not expenditure. I do not consider that the surrender of the B&R Lease and the consequent release of B&R from the obligation to reinstate the Property was "expenditure" within the meaning of the term in s 38(1)(b) TCGA. Having reached that conclusion, none of the conditions set out in paragraph 60 above are met and it has not been necessary for me to consider the two further questions at paragraphs 61(2) and 61(3) above.

CONCLUSION

78. For the reasons set out above, I find that the Trust did not incur expenditure on the Property for the purposes of s 38(1)(b) TCGA and I therefore dismiss the appeal and confirm the gain and capital gains tax due in accordance with the closure notice dated 29 November 2018.

79. I apologise to the parties for the delay in providing this decision which has been caused by a lengthy period of illness.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

80. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GERAINT WILLIAMS
TRIBUNAL JUDGE

RELEASE DATE: 17 JANUARY 2022