[2017] UKFTT 0801 (TC)

TC06207

Appeal number: TC/2016/05028
TC/2016/05029

INCOME TAX – applications for closure notices under s28B TMA 1970 – lengthy enquiries – balance between ensuring HMRC can make an informed judgment, avoiding inappropriate shifting to litigation stage and preventing enquiries being protracted unnecessarily – applications allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) BENFICIAL HOUSE (BIRMINGHAM) REGENERATION LLP **Applicants**
(2) STANLEY DOCK (ALL SUITE) REGENERATION LLP

- and -

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

TRIBUNAL: JUDGE SARAH FALK

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 23 and 24 October 2017

Keith Gordon and Ximena Montes Manzano, instructed by Cubism Law, for the Applicants

Edward Waldegrave, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This decision relates to applications by Beneficial House (Birmingham) Regeneration LLP ("Beneficial House") and Stanley Dock (All Suite) Regeneration LLP ("Stanley Dock") that HMRC be directed to issue closure notices within a three month period in respect of their enquiries into partnership returns in respect of the tax year 2012-13 (in the case of Beneficial House) and 2011-12 (in the case of Stanley Dock). The applications were originally made in September 2016, but the hearing initially planned for April 2017 was postponed. The applications were eventually heard together in October 2017, along with an appeal by an individual member of Beneficial House against a notice served on him in March 2017 under Schedule 36 to the Finance Act 2008 ("Schedule 36"). The outcome of the appeal against the Schedule 36 notice was agreed by the parties by the conclusion of the hearing, and is recorded in a separate short decision.

Background

2. Both Beneficial House and Stanley Dock are limited liability partnerships established by what was then Chancery (UK) LLP. So far as relevant to these applications, Chancery's business has since been taken over by Valhalla Private Client Services LLP ("Valhalla"). The dispute relates to claims made to Business Premises Renovation Allowance ("BPRA") in respect of a property in Birmingham (in the case of Beneficial House) and Liverpool (in the case of Stanley Dock). BPRA is a form of capital allowance governed by Part 3A of the Capital Allowances Act 2001, which in general terms allows taxpayers to claim 100% allowances in relation to certain types of capital expenditure on the conversion or renovation of unused buildings for business use where the building is located in a designated "disadvantaged area" and certain conditions are met.

3. Individuals were invited to invest on the basis of an Information Memorandum. The Information Memorandum for Stanley Dock describes the property and the proposal. In summary, the LLP would pay £30.3m to a company called Stanley Dock Properties Limited ("SDPL"), a third-party owned entity that took the role of developer, under a contract for the regeneration of a building in the Liverpool docks area which would become a hotel. The individual investors would contribute an equity participation of £10.1m in total, with the balance of £20.2m financed by loans to the LLP. The building would be leased to a hotel operator. At the date of the Information Memorandum the tenant was to be a subsidiary of Macdonald Hotels Limited. In the event the proposals changed and the hotel was leased to a company in the same ownership as the developer. The hotel officially opened in July 2014 as the Titanic Hotel Liverpool.

4. The Beneficial House LLP also related to a proposed hotel conversion. According to the Information Memorandum the agreed cost of the regeneration works was £16.5m, of which the equity contribution was 40% (£6.6m). The LLP would pay the £16.5m to a company called Gethar Ventures (Beneficial House) Limited

("Gethar") as developer. Again this company was owned by a third party. Although the Information Memorandum refers to proposed tenancy arrangements the planned tenant dropped out around four months later. Alternative proposals were subsequently considered but also did not proceed. The current position is that the property has still not been converted, although a further scheme has now been approved by LLP members.

5. In the case of both LLPs the developer was a special purpose vehicle which entered into (or in the case of Beneficial House was at least intended to enter into) its own arrangements to procure the building work. For Stanley Dock the contractor was Abercorn Construction Limited ("Abercorn"), a company in the same ownership as SDPL.

6. The intention was that any losses arising as a result of the BPRA claims would be capable of being relieved by individual investors against other income in the relevant tax year, generally referred to as "sideways" loss relief. Among other things this requires the relevant LLP to be treated as a partnership for tax purposes under s863 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), rather than being taxed as a corporate entity (in which case no losses would be available to the individual investors). Under s863 an LLP is only treated as a partnership if it is carrying on a business "with a view to profit".

7. Both sets of arrangements were the subject of notifications to HMRC under the Disclosure of Tax Avoidance Scheme rules (DOTAS) contained in Part 7 of the Finance Act 2004.

8. Stanley Dock submitted a tax return for 2011-12 claiming BPRA in the sum of £26,109,339. HMRC's enquiry was opened in March 2013, under s12AC Taxes Management Act 1970 ("TMA"). Beneficial House submitted a return for 2012-13 claiming BPRA in the amount of £14,651,000. HMRC's enquiry was opened in January 2014.

9. It is fair to say that both enquiries have proceeded relatively slowly. Initially the parties agreed that Beneficial House would not be subject to an in-depth enquiry because it was agreed that it would be treated as following other similar arrangements, but during 2014 it was concluded that this was not appropriate. In summary, HMRC's position is that although information has been provided both enquiries have been characterised by a failure to respond to all their requests for information, and that while they accept that there have been some delays on their part the continued lack of what they consider to be relevant information has prevented them from concluding their enquiries. They also do not consider it possible to specify a time period within which they would be able to close the enquiries if all their currently outstanding requests were met, because the documents and information received could well give rise to additional questions.

10. Investors in both Stanley Dock and Beneficial House have received Partner Payment Notices under the Accelerated Payment Notice legislation in Part 4 of and Schedule 32 to the Finance Act 2014. Some of these are subject to judicial review

claims. In the case of at least some investors their initial claims to repayment of tax were also restricted or prevented. These features have led to a concern being expressed on behalf of the LLPs that HMRC have no incentive to close the enquiries.

11. In broad terms the position of the LLPs is that outstanding information requests relate either to documents or information that do not exist, or are not relevant or needed for HMRC to complete their enquiries.

12. I should also mention here that when the closure notice applications were originally made there were additional applications in respect of enquiries into two other BPRA arrangements. HMRC concluded that it was in a position to issue closure notices in respect of those other arrangements, but decided that it was not yet in a position to do so in respect of Stanley Dock and Beneficial House.

Relevant legal principles

13. Section 28B TMA provides:

> "(1) An enquiry under section 12AC(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.
>
> In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor.
>
> (2) A closure notice must either-
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (3) A closure notice takes effect when it is issued.
>
> (4) Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend-
>
> (a) the partner's return under section 8 or 8A of this Act, or
>
> (b) the partner's company tax return,
>
> so as to give effect to the amendments of the partnership return.
>
> (5) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period.
>
> (6) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).
>
> (7) The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period."

14. It is clear that the burden under s28B(7) is on HMRC: an application for a closure notice should be granted unless HMRC show that there are reasonable grounds for refusing it.

15. There was no dispute as to the relevant principles to apply. Both parties referred to my decision in *BCM Cayman LP and others v HMRC* [2017] UKFTT 0226 (TC), which reviewed the relevant case law. I would also refer to the subsequent Upper Tribunal decision in *Frosh and others v HMRC* [2017] UKUT 0320 (TCC). In summary:

(1) The procedure is intended as a protection to a taxpayer against enquiries being inappropriately protracted, providing a "reasonable balance" to HMRC's substantial powers to investigate returns *(HMRC v Vodafone 2* [2006] STC 483 at [33] and [34]) and protecting the taxpayer against undue delay or caution on the part of the officer in closing the enquiry (*Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 293 at [17]). The Tribunal is required to exercise a value judgment, determining what is reasonable on the facts and circumstances of the particular case (*Frosh* at [43]). This involves a balancing exercise.

(2) The reasonable grounds that HMRC must show must take account of proportionality and the burden on the taxpayer (*Jade Palace Limited v HMRC* [2006] STC (SCD) 419 at [40]).

(3) The period required to close an enquiry will vary with the circumstances and complexity of the case and the length of the enquiry: complex tax affairs and large amounts of tax at risk are likely to extend an enquiry, but the longer the enquiry the greater the burden on HMRC to show reasonable grounds as to why a time for closure should not be specified (*Eclipse Film Partners*, and *Jade Palace* at [42] to [43]). It may be appropriate to order a closure notice without full facts being available if HMRC have unreasonably protracted the enquiry: see *Steven Price v HMRC* [2011] UKFTT 264 (TC) at [40].

(4) A closure notice may be appropriate even if the officer has not pursued to the end every line of enquiry. What is required is that the enquiry has been conducted to a point where it is reasonable for the officer to make an "informed judgment" of the matter (*Eclipse Film Partners* at [19]).

(5) If it is clear that further facts are or are likely to be available or HMRC has only just received requested documents and may well have further questions, then a closure notice may not be appropriate: see for example *Steven Price*, and also *Andreas Michael v HMRC* [2015] UKFTT 577 (TC). The Tribunal should guard against an inappropriate shifting of matters that should be determined by HMRC during the enquiry stage to case management by the Tribunal. However, the position will turn on the facts and circumstances of each case: *Frosh*.

(6) The Supreme Court's comments on the subject of closure notices in *HMRC v Tower MCashback LLP* [2011] UKSC 19, [2011] 2 AC 457 are highly relevant. In particular, Lord Walker commented that whilst a closure notice can be issued in broad terms, an officer issuing a closure notice is performing an important public function in which fairness to the taxpayer must be matched by

a "proper regard for the public interest in the recovery of the full amount of tax payable", although where the facts are complicated and have not been fully investigated the "public interest may require the notice to be expressed in more general terms" (paragraph [18]). Lord Hope also said at [85] that the officer should wherever possible set out the conclusions reached on each point that was the subject of the enquiry. In *Frosh* the Upper Tribunal commented at [49] that a closure notice in broad terms is "not the norm" and so should not be taken as an appropriate yardstick for assessing whether HMRC's grounds for not closing the enquiry are reasonable.

Evidence

16. Four witnesses provided oral evidence and witness statements. The witnesses for HMRC were Kate Nash and Peter Massey, both of whom are officers in HMRC's Counter Avoidance Directorate. The witnesses for the applicants were William Stockler in respect of Beneficial House and Peter Nichols in respect of both Beneficial House and Stanley Dock.

17. Ms Nash's role relates specifically to BPRA claims. She was involved in both enquiries from their inception and provided witness statements in respect of each closure notice application in April 2017 (in preparation for the hearing that was postponed). She provided a further witness statement in respect of Beneficial House in October 2017 by way of update and in response to points made in Mr Stockler's witness statement. Mr Massey works in a different team to Ms Nash but became involved in September 2016 when he was asked to assume responsibility for the Stanley Dock enquiry. He provided a witness statement in respect of the Stanley Dock closure notice application in April 2017, and a further witness statement by way of update in October 2017. Ms Nash's oral evidence, and in particular her cross examination, focused on Beneficial House since she continues to have responsibility for that enquiry. Mr Massey's evidence related entirely to Stanley Dock.

18. Mr Stockler is a retired solicitor who is one of the investors in Beneficial House. He was not involved in the promotion of the arrangements or their administration prior to late November 2016. At that time he, together with two other individuals, were appointed as the "designated members" of Beneficial House, replacing Valhalla. Mr Stockler provided a witness statement in June 2017. He has no involvement with Stanley Dock.

19. Mr Nichols provided witness statements in respect of Stanley Dock and Beneficial House in December 2016 and a further witness statement in respect of Stanley Dock in September 2017. Mr Nichols originally worked as an Inspector of Taxes before going into private practice. He set up Chancery in May 1997 and formed Valhalla in March 2014. He currently works as a consultant to Valhalla. Valhalla is the tax adviser and administrator to Stanley Dock.

20. There was no issue as to the credibility of any of the witnesses and I accept their evidence as to matters of fact. The substantial differences between the parties are essentially matters of opinion, understanding and (to some extent) law.

Findings of fact

Stanley Dock

21. Stanley Dock was incorporated as a limited liability partnership on 16 February 2012. It completed the purchase of the property from SDPL on 5 April 2012 and on the same day entered into a development agreement with SDPL to carry out the development at a fixed price. This was funded by members' equity investments of £10.1m and a borrowing of £20.2m from SDPL. SDPL itself borrowed from a bank to fund its loan to Stanley Dock, and repaid the loan from the bank on the same day. As mentioned above the development was undertaken and the property is operating as a hotel. SDPL funded the development from the £10.1m of equity and other resources, including an amount of £5.5m borrowed from Liverpool City Council. Stanley Dock currently retains its interest in the property.

22. Following HMRC's enquiry being opened by Ms Nash in March 2013, she was sent a "bible" of documents and some additional records in April and June 2013. In July 2013 Ms Nash asked for additional information to be provided in September. A partial response was received in December 2013 to which Ms Nash responded in January 2014 with further questions. This resulted in some limited additional information being provided in March 2014. There was then something of a gap until a meeting in September 2014 which was arranged to discuss a number of BPRA cases, including the two the subject of these applications. During this period an internal review took place within HMRC, which included seeking advice from the Valuation Office Agency ("VOA"). The VOA confirmed that further information was required to enable them to review the costs of the renovation and the values assigned to the land and building. HMRC requested further information in a letter provided at the September 2014 meeting. Partner Payment Notices were issued in or around December 2014 on the basis that the amount claimed exceeded the amount due by 70%. Some of the information requested in September 2014 was supplied in March 2015 and in April 2015 Ms Nash wrote identifying outstanding information and documents required. A further HMRC officer became involved and chased Mr Nichols for information, but relatively little seems to have happened until Mr Massey took over the enquiry in September 2016, the same month in which Stanley Dock made its closure notice application. Whilst it is true that HMRC did not take steps actively to progress the enquiry in the 18 months or so before Mr Massey took over, it is also the case that Stanley Dock had not responded to the outstanding information request.

23. Mr Massey first wrote in November 2016 asking again for information requested by HMRC in letters sent during 2015. He wrote a second time in December 2016 asking for specific information relating to the capitalisation of Stanley Dock by individual members and their admission to membership of the LLP. Mr Massey made a formal information request under Schedule 36 to a member of the LLP in February 2017, which was not appealed against. Some information was provided in response but Valhalla also indicated that it was unable to obtain much of the information and documents requested. Mr Massey has also sought information from other sources, including obtaining information direct from Liverpool City Council. Although it was

made clear at the hearing that the loan by the Council was made to SDPL rather than to Stanley Dock, there continues to be some lack of clarity, not least because it seems that Stanley Dock has granted security over the loan. Mr Massey is keen to establish what part if any that funding from the Council played in the plans for the scheme. (There was also previously confusion over a suggestion that the Council had given a grant, which could have impacted the BPRA claim as constituting State Aid.)

24. Mr Massey considers that further work is needed to check that certain LLP members were indeed members at the relevant time, so that they would be entitled to share in any loss in proportion to the capital invested. In addition, Mr Massey considers that further information is required to enable him to establish whether Stanley Dock was carrying on a business with a view to profit. He also considers that he requires further information to determine precisely how the claim to BPRA was calculated, because he considers that the breakdown previously provided was at a very high level. There is a concern within HMRC that the nature of the loan finance might indicate that the claim was inflated.

25. Whilst Mr Massey agrees that a significant amount of information has been provided, from his perspective there are a number of areas where responses to HMRC's requests have not been provided. In addition, a separate enquiry into the Stanley Dock's 2015-16 return led Mr Massey to realise that the lease from the Stanley Dock to the company which rents the hotel premises is not the same document as the lease that had been presented to HMRC as the final lease (at the hearing Mr Nichols confirmed that the reason for this was that the proposed tenant changed). That later enquiry also indicated that the terms of the loan from SDPL might not be the same as those set out in the documents previously provided. In Mr Massey's view this has set the enquiry back and he wishes to establish the actual position. Mr Massey's general concern that he might not have been given the right documents is rather supported by the history of the enquiry: I was referred during the hearing to an email dating from February 2015 from the group that own SDPL and Abercorn, which notes that "it would appear [that HMRC] have been supplied with a lot of information which is either not relevant or is very outdated". (This email was sent at a time when a number of documents were provided on behalf of those entities, presumably addressing that particular criticism.)

26. Mr Massey confirmed, and I accept, that it is not the case that HMRC does not wish to pursue the enquiry simply because it has issued Partner Payment Notices. The impression I obtained was that Mr Massey wished to progress the enquiry to its conclusion but considered that he should obtain further information before he did so. He did not know whether the receipt of further information would prompt additional questions. He recognised that he could issue a closure notice immediately disallowing the entire claim but did not consider that that would be the appropriate thing to do because the Tribunal would not be in a position to arrive at an informed view of the correct amount of the claim, whether or not there was a loss and whether each person named as a partner in the return was entitled to a share of that loss. I accept that Mr Massey genuinely holds this view. Whilst there is some force in Mr Nichols' criticism that HMRC only increased their efforts in response to the closure notice application,

that needs to be balanced with the clear difficulty HMRC has had in obtaining information, and in particular accurate information, on a timely basis.

27. The current position in relation to outstanding information and documents is as follows:

(1) Mr Massey has identified 35 Stanley Dock members as individuals who might not have completed the paperwork in time to become members of the LLP by 5 April 2012 (such that they would be able to share in any available loss). This point is related to the fact that shortly before the proposal was implemented the intended hotel operator pulled out and proposed investors had to be contacted to check whether they still wished to go ahead. The correspondence includes some reference to unused capacity, suggesting that not all proposed investors might have responded in time. Valhalla provided information about two of these individuals and Mr Massey has contacted the others direct to ask them to provide evidence of their equity contributions to the LLP, on the basis that in practice this should also be a sufficient indication that the paperwork had been completed and that they had been admitted as members in time. Responses been received from around 10 so far, although some of these responses may require further enquiries. This is relevant to Stanley Dock's own return as well as to the returns of individual investors, because the partnership return includes an allocation of losses between members.

(2) Mr Massey has not yet had an opportunity properly to review several letters dated 28 September 2017 that he has received from Valhalla in respect of the enquiry.

(3) Mr Massey has obtained authority from John Fields at Valhalla, a designated member of Stanley Dock, to serve a third party notice under Schedule 36 on SDPL to obtain information about its loan to the LLP, in the light of the fact that SDPL's balance sheet for the year to 31 December 2014 suggests that some of the loan may have been written off. This notice was served around two weeks ago.

(4) Mr Massey has also drafted third party notices under Schedule 36 to be served on both SDPL and Abercorn. He sent these to Mr Fields under cover of letters dated 19 October, seeking his authorisation to those notices being served without Tribunal approval. By the end of the hearing they had still not arrived at Valhalla's offices but it was agreed on behalf of Stanley Dock that Mr Fields would provide the requested consents within one week. Much of the draft notices reflects advice that Mr Massey has received from the VOA about the information they consider is needed to determine a valuation of the cost of the build and the end product. The draft notice to Abercorn requests more details of the actual construction works, more detail on the allocation of expenditure, construction cost information and information relating to the price charged to SDPL. The draft notice to SDPL requests information about the funding SDPL obtained from Liverpool City Council, and broadly similar information to that requested from Abercorn about the works, the allocation of expenditure and construction cost information. In addition this notice requires information

relating to the ground lease of the land, including a valuation dating from 2010 and any subsequent valuations, and confirmation of the basis on which the final price of £30.3m was determined. Mr Massey confirmed that these requests are generally for documents or information which have been previously been requested from Stanley Dock but which Mr Massey has not managed to obtain from it.

28. Mr Nichols disagrees that any further information is needed. In his view the arrangements could not have proceeded unless all the investors had provided funds as anticipated. Investors made their investment decisions based on the Information Memorandum and not on the detailed information that HMRC is now seeking. As far as the LLP was concerned it had a fixed price contract with SDPL and it was not concerned with the terms on which SDPL arranged for the work to be done.

Beneficial House

29. Beneficial House was incorporated as a limited liability partnership on 6 February 2013. The precise timing of its acquisition of the site and entry into the development agreement with Gethar were unclear from the documentation available to me, but it seems that payment was made under the contract with Gethar on 4 April 2013. The total outlay by Beneficial House (inclusive of costs and fees) was £16.5m, funded by equity of £6.6m and debt of £9.9m, although £1.7m of this was for site acquisition.

30. At the time HMRC's enquiry was opened in January 2014 the Beneficial House arrangement was thought the similar to another LLP arranged by Chancery, and it was agreed that the Beneficial House return would not be selected for an in-depth review. A "bible" of documents was provided during January and limited further information was requested and provided in February and March 2014. In June 2014 Chancery wrote to say that the detail was unique to each scheme, and suggested a meeting. This resulted in the September 2014 meeting referred to at [22] above. A colleague of Ms Nash wrote to Valhalla in December 2014 requesting information and documents in respect of Beneficial House. Partner Payment Notices were issued in or around December 2014 on the basis that 50% of the claim was disallowed. Some but not all of the information requested in December 2014 was provided in March 2015 and HMRC requested further information and clarifications during April. Something of a hiatus followed, at least partly due to the fact that Mr Nichols developed serious health problems. Further information was eventually provided in November 2015. This confirmed among other things that works had not commenced on the building. It appears that the original planned tenant dropped out around four months after the arrangements were implemented. Further correspondence followed in which HMRC requested updates in relation to the works and received information about new proposed development plans. Beneficial House made its closure notice application in September 2016. Some correspondence continued until November 2016 when Ms Nash was informed by Mr Stockler that Valhalla was no longer acting for Beneficial House and that he and another individual, Joel Adams, would be designated members.

31. Ms Nash wrote to Mr Adams on 1 December 2016 requesting further documents and information and explaining that HMRC intended to oppose the closure notice application. This request was based on a review of the case and a new focus, following what would then have been the Upper Tribunal decision in *Samarkand Film Partnership No. 3 & others v HMRC* [2015] UKUT 211(TCC), on the question whether the activities of the LLP amounted to a business undertaken with a view to profit, and on concerns about whether the loan finance was circular in nature and had not been expended in a manner that qualified for BPRA.

32. Mr Stockler criticised this letter as being a wholly new request, his understanding being that all previous requests had been dealt with and there were no outstanding enquiries. Ms Nash disagreed that there were no outstanding enquiries, on the basis that she had been seeking updates regarding the project for a considerable period prior to the closure notice application. However, she did accept that she reviewed the papers following receipt of that application and sought specialist advice to consider whether a closure notice could be issued or whether further information was needed. This resulted in the 1 December 2016 letter, with a focus on the "with a view to profit" question. In oral evidence Ms Nash also stated that she was particularly concerned about the commerciality or artificiality of the arrangements, *Ramsay* issues and whether Beneficial House had in fact paid away £16.5m. No work had been done and she wanted to understand whether the money was real and what it had been spent on. She denied that her 1 December letter was a device to defeat the closure notice application: closure notices were issued in respect of two of the four arrangements the subject of the original applications, but she was not in a position to do so in respect of Beneficial House. I accept that Ms Nash genuinely holds this view.

33. The December 2016 letter led to a meeting at the request of the designated members at Ms Nash's office in Leeds, held on 16 March 2017. By this stage the designated members had received around 25 boxes of documents relating to Beneficial House from Valhalla. Some additional information was provided to HMRC at the meeting and it was indicated that further documents would be provided. Ms Nash asked at the meeting whether the designated members would consider withdrawing the closure notice application.

34. Mr Stockler's evidence was that the designated members had requested the meeting to try to move things forward, that they explained exactly what the position was as far as they were concerned and offered to supply any relevant documents and explanations that Ms Nash needed. Mr Stockler explained that Mr Adams held the boxes of documents at his office in Manchester and a team there were deployed to go through the documents to respond to specific requests. The impression Mr Stockler obtained from the meeting was that Ms Nash was trying to delay matters and was making it clear that whatever information they supplied she would simply have more questions.

35. Some additional information was provided in the two weeks after the meeting, but Ms Nash then issued a notice to Mr Stockler under paragraphs 1 and 2 of Schedule 36 on 30 March 2017 (this is the Schedule 36 notice referred to at [1] above). Mr Stockler responded in part to the notice and also appealed against it to the

Tribunal. Ms Nash's justification for issuing a formal notice was that she believed that she had received contradictory information on some issues, and was also conscious that the hearing of the closure notice application was planned for April. Although by this stage there was a lot of contact with Mr Stockler he had only recently become involved, and whilst he was able to locate some documents he was not in a position to provide any supporting explanation. She had offered in the alternative that she could review the files held by the designated members, but Mr Stockler had refused.

36. Ms Nash confirmed in cross examination, and I accept, that she was not under any instruction to progress the enquiry slowly in the light of the Partner Payment Notices, and that she would not do so. The enquiry related to a substantial claim in respect of a building which has not been refurbished, and where the transactions were unclear and were not in accordance with the description in the Information Memorandum. Ms Nash thought it reasonable to seek to understand exactly what had happened.

37. It is unnecessary for the purposes of this decision to deal in any detail with the individual items the subject of the Schedule 36 notice. Some of the information in the original list was provided prior to the hearing, and in respect of some other items it was confirmed that no such documents exist. In particular, it was confirmed that investors relied solely on the Information Memorandum and that underlying information, such as a business plan and steps taken to test data, could not be supplied by members. Mr Stockler's view was that additional correspondence requested by HMRC was simply not relevant and that it would it would take a significant amount of time to collate the information. The LLP was not prepared to accept Ms Nash's offer that she should come and review the boxes of documents held by the designated members, not least because they could include privileged information. Mr Stockler thought that Ms Nash was on a fishing expedition.

38. By the end of the hearing it was agreed that the remaining requests should be narrowed down to two items. These were as follows, and are limited to documents held by or on behalf of Beneficial House or available to it from Valhalla:

(1) Copies of correspondence, notes of meetings and telephone conversations between representatives of Beneficial House and representatives of Gethar in the period from 1 January 2013 to 1 January 2014.

(2) Copies of correspondence between representatives of Beneficial House and all lenders to it in the period from 1 January 2013 to the date that the relevant loan was made.

39. The original versions of these items in the Schedule 36 notice extended to all correspondence up to the date of the notice, and references to representatives of Beneficial House extended beyond Valhalla. Ms Nash considered that, because the transactions envisaged in the Information Memorandum did not take place, she needed to understand exactly what did happen and when in order to consider both the validity of the BPRA claim and the commerciality of the LLP's activities. Correspondence with lenders was requested because the claim was based on the premise that the development sum was paid in full in April 2013, and Ms Nash

considered that she needed to understand why further finance was required. She understood that additional expense had been incurred, particularly in removing an existing tenant, but queried why sums were not available from the original amount claimed to have been paid. Mr Stockler's response to this was that the position had been fully explained to Ms Nash. Significant expenditure had to be incurred in removing an existing tenant and the proposals changed more than once after the original proposed hotel tenant dropped out.

Submissions

40. Mr Waldegrave for HMRC submitted that there were reasonable grounds for not closing the enquiries. Further information was needed, and responses to existing requests could well prompt further questions. The LLPs were involved in legally and financially complex transactions in connection with what HMRC regarded as marketed tax avoidance schemes giving rise to claims to large amounts of tax relief. Apparently circular fund flows were involved and HMRC were concerned that this might be a device to inflate the claim for relief. The fact that HMRC had issued Partner Payment Notices did not mean that they must have reached conclusions enabling them to issue closure notices, because the tests were different. HMRC had not yet got to the stage where they could reach an informed judgment, and closing the enquiries now would simply shift HMRC's investigations inappropriately from the enquiry process to the litigation process. The LLPs could have enabled the enquiries to proceed much more quickly than they have by responding to requests in a prompt and co-operative way. It was entirely reasonable for HMRC to try to understand the transactions.

41. Mr Waldegrave also submitted that there was a wider scope of outstanding requests in relation to Stanley Dock, covering substantial areas including the "view to profit" issue, the calculation of the claim and the question of who was a member of the LLP. In addition, HMRC needed valuation input once further information was obtained, and the estimated turnaround time for that was about eight months.

42. Mr Gordon for the applicants submitted that HMRC's enquiries had on any definition been protracted, that enquiries were not pursued for over a year after Partner Payment Notices were issued, and that only the closure notice applications had spurred HMRC into wholly reactive information requests. The applicants did not agree with the "tax avoidance" epithet or its relevance. Outstanding questions were insufficient to justify the continued delay and at worst were a tactical distraction to delay resolution of the dispute. HMRC's desire for absolute certainty had to be balanced with other factors, for example the time taken up by the enquiry to date. If, as the Partner Payment Notices suggested, HMRC had already reached the view that the arrangements did not produce the claimed tax results then additional information would not change their minds. This was not a situation where the nature of the enquiry was open-ended, as might be the case for example when HMRC is considering whether profits have been undeclared. In this case the amount of the expenditure potentially in dispute was fixed. It was also important to bear in mind that once HMRC had issued closure notices denying all or part of the allowances claimed then in any subsequent appeal the burden of proof would be on the LLPs. If HMRC

did reasonably require further information at that stage then the Tribunal rules permitted it to be obtained.

43. Mr Gordon also submitted that some of HMRC's questions related to the current version of the BPRA rules, and not the version in force for the relevant periods. The parties clearly disagreed about the effect of the rules and HMRC's position was misconceived. But even if it was not HMRC had sufficient information to issue closure notices, bearing in mind that the burden of proof would be on the LLPs. In addition, some of the requests currently being pursued were for information or documents that were simply not relevant.

44. Mr Gordon's skeleton argument stated that closure notices should be required within 28 days (the original applications had said three months, but things had now moved on). Following discussions at the hearing, including discussions between the parties during an adjournment shortly before the end of the hearing, Mr Gordon's revised proposal was that the closure notice for Beneficial House should be issued by Christmas and that for Stanley Dock by 31 March.

Discussion

45. I have concluded that it is now appropriate to set dates by which closure notices should be issued in respect of both the Stanley Dock and Beneficial House enquiries. In doing so I have sought to balance the need for HMRC to be in a position to make an informed judgment of the extent of any disallowance of the claims and any other adjustments to the LLP returns with the other factors I need to take into account (see [15] above), which in this case include the length of the enquiry and the significance of the outstanding requests. My conclusion is that closure notices should be issued by 28 February in respect of Beneficial House and 30 April in respect of Stanley Dock. My reasons are set out in the following paragraphs.

46. The enquiries in both cases have been relatively lengthy, which in principle increases the burden on HMRC to show why closure notices should not be issued. The fact that HMRC considers that tax avoidance schemes have been implemented does not by itself justify an extension of the enquiries. However, the amounts at stake are substantial and the subject matter of the enquiries are relatively complex. Whilst HMRC have not always pursued the enquiries as promptly as they might have done, my overall impression is that the enquiries have been characterised by failures to respond promptly or fully to HMRC's requests, and by failures to ensure that HMRC have accurate information, including about whether documents do or do not exist. In the case of Beneficial House I think the position changed for the better once the designated members changed and Mr Stockler became involved, although he is clearly not able to assist with information (rather than documents) in relation to the establishment of the arrangements given his lack of involvement in the management of the LLP at the time, and his views about relevance are clearly different to those of Ms Nash.

47. As a result of the agreements reached at the hearing it should be case that outstanding information requests (as modified in the case of Beneficial House) are

met. Although it is possible that Abercorn or SDPL may appeal against the Schedule 36 notices served on them I have concluded that this is not a sufficiently material point by itself to justify the refusal of the closure notice applications. In view of the agreement that these requests may be pursued it is not necessary for me to express any specific views about relevance. However, I should make clear that as a general matter (and subject to the caveat explained further below) the scope of HMRC's enquiries does not appear to me to be unreasonable, and comments I heard expressed by Mr Stockler and Mr Nichols seemed to me to indicate too narrow a view of relevance.

48. In particular I do not think that HMRC can seriously be criticised for reviewing the position in detail after the closure notice applications were made, and it was certainly legitimate to raise questions relating to the "with a view to profit" issue. It was also reasonable in my view for Mr Massey to address concerns he had about individual membership of Stanley Dock. The view to profit issue is fundamental to the application of s863 ITTOIA. If the LLP should have been treated as a corporate entity rather than a partnership for tax purposes then its tax return was clearly made on an incorrect basis. The consequences of this were noted in *Ingenious Games LLP & others v HMRC* [2016] UKFTT 521 (TC) at [468], where it was suggested that if the test was not met then the Tribunal should either strike out the appeals or excise all the entries in the return. The question about individual membership is also relevant because it goes to the correctness or otherwise of entries made in the partnership return: s12AB(1)(b) TMA requires a partnership return to include an allocation of any income or loss between the partners.

49. There is however one particular caveat to my view that the scope of HMRC's enquiries is reasonable, which is reflected in the revised Schedule 36 notice to Mr Stockler in respect of Beneficial House. This relates to the extent of relevance of events after the arrangements were put in place. Evidence as to what happened after the tax year in question can clearly be of some relevance in indicating what the position was likely to have been at the time the arrangements were put in place, but there must be a sensible limit to this. I do not agree, for example, that Ms Nash is entitled to wait and see exactly what development proposal (if any) is implemented in respect of Beneficial House and on what terms. In contrast, finding out why the proposal that was referred to in the Information Memorandum fell away fairly shortly afterwards, and what happened to the money in the months after the arrangements were put in place, could well be relevant in assessing their effectiveness.

50. The dates I am setting for the issue of closure notices should in principle allow all outstanding information requests to be dealt with, and should also allow some time for HMRC to review the responses. I recognise that HMRC may have supplemental questions and that there may be insufficient time for them to be addressed (or the LLPs may refuse to co-operate in addressing them). However, a balance is needed. If the currently outstanding requests are dealt with then in my view that should sufficiently address the concern that matters might otherwise be inappropriately shifted from the enquiry stage to case management by the Tribunal. I think there is a distinction here between obtaining information and documents, which should if at all possible be dealt with during the enquiry stage, and undertaking all the detailed analysis that HMRC would like to undertake. Whilst it is clearly desirable that HMRC

develop a clear position which can be expressed both in the closure notices and in their Statements of Case, that needs to be balanced with the need to avoid the enquiries being unnecessarily protracted. I have endeavoured to ensure that HMRC are given adequate time to review the responses to express an informed judgment, even if they have not fully completed their analysis. I also do not think that it is reasonable for the closure of the enquiries to be delayed for reasons that are wholly related to HMRC's internal working practices, for example in respect of the time said to be required to obtain valuation input.

51. I agree with Mr Waldegrave that the fact that HMRC have issued Partner Payment Notices does not mean that they must have reached conclusions enabling them to issue closure notices. HMRC may issue a Partner Payment Notice if, among other things, an enquiry is in progress in relation to a partnership return made on the basis that a tax advantage has arisen, and the arrangements are within DOTAS (paragraph 3 of Schedule 32 to the Finance Act 2014). The payment required is the amount which the HMRC officer determines, to the best of his information and belief, to be the understated tax (paragraph 4 of Schedule 32). This has been interpreted as requiring the officer to reach the view that he is "not satisfied that as a matter of law and fact the claimed tax advantage is lawfully available and so should be allowed and so, in that sense, the … officer has determined that the claimed tax advantage is disputed" (*R (oao) Vital Nut Co. Limited & others v HMRC* [2016] EWHC 1797 (Admin), at [35]). Deciding that a claimed tax advantage is disputed is not the same as reaching an informed judgment about what the correct tax position actually is.

52. Both parties effectively accepted that the two enquiries were not at the same stage. The extent of the outstanding information requests in respect of Stanley Dock is significantly greater than for Beneficial House. This led me to consider whether it would be appropriate to require the Beneficial House enquiry to closed substantially earlier than the Stanley Dock enquiry. Ultimately however I concluded that an appropriate balance would be achieved by requiring the Beneficial House enquiry to be closed at the end of February and the Stanley Dock enquiry at the end of April. My overall impression is that, despite the more extensive outstanding information requests, Mr Massey is closer to forming an informed judgment of the position than Ms Nash currently is. I must leave it to HMRC to determine whether further specialist or senior level input would assist in forming an informed judgment of the position in relation to Beneficial House, but I consider that I have left sufficient time to enable that judgment to be reached.

53. One final point to add is as follows. Ms Nash made a number of references in her evidence to *Samarkand* and to her enquiries being been directed at the question whether the activities of Beneficial House were carried out on a commercial basis. This is possibly the source of some confusion. Whilst I can see that the question whether the activities were carried on with a view to profit is clearly relevant because of the terms of s863 ITTOIA, I do not see the specific relevance of commerciality, to the extent it connotes a different concept (a point discussed in some detail in *Samarkand* in the context of trade losses). As I understand it the business claimed to be carried on is a property business and not a trade. Unlike sideways loss relief for trade losses, the rules in ss120 to 124 Income Tax Act 2007 which govern sideways

loss relief for certain property business losses do not appear to incorporate a separate requirement that the business be carried on a commercial basis. (The corporation tax test for property losses is different: see s64 Corporation Tax Act 2010.) The reason for raising this point is that I had questioned at the hearing whether it was necessarily appropriate to continue the enquiry into the Beneficial House return to consider this issue, rather than enquiries into the individual returns of investors (which is where the sideways loss relief rules would be relevant). However, as far as I can see the point does not arise.

Disposition

54. The applications are accordingly allowed in part, and HMRC are directed to issue closure notices as follows:

(1) on or before 30 April 2018 to Stanley Dock in respect of the enquiry into its 2011-12 return; and

(2) on or before 28 February 2018 to Beneficial House in respect of the enquiry into its 2012-13 return.

55. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 7 November 2017