Neutral Citation Number: **[2025] UKUT 5 (TCC)**

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicant: Frances Delaney	**Tribunal Ref: UT/2024/000073**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

DECISION NOTICE

Background

1. The applicant, Frances Delaney, applies to the Upper Tribunal (Tax and Chancery) ("UT") for permission to appeal against the decision of the First-tier Tribunal ("FTT") (Tribunal Judge Amanda Brown KC and Tribunal Member Julian Sims released on 11 March 2024 ("the FTT Decision") and published as *Delaney v HMRC* [2024] UKFTT 214 (TC) following a hearing which took place on 14-15 November 2023.

2. The FTT subsequently refused Ms Delaney permission to appeal. Ms Delaney then renewed her application to the UT. I refused permission to appeal on the papers in a decision of 27 September 2024 that was sent to the parties. This is my decision following the oral renewal of the application heard on 22 November 2024. Ms Delaney was represented by Mr Roaul Downey, a barrister, but who represented Ms Delaney in his personal capacity as Ms Delaney's partner. HMRC, represented by Mr Charles Asuelimen, litigator, attended but did not make representations.

3. The FTT Decision concerned the applicant's appeal against an HMRC closure notice. This refused her claim for Entrepreneur's relief on capital gains tax charged on the disposal of her nursery school business, on 1 September 2015, to a limited company which she was the sole director and shareholder of. (The Entrepreneur's Relief, if allowed would have charged tax at the lower rate of 10% rather than 28%. HMRC's refusal had the effect of increasing the applicant's tax liability by £196,902.) Under the terms of the relevant statutory provisions in

the Taxation of Chargeable Gains Act 1992 ("TCGA 1992") (as amended by Finance Act 2015), eligibility for the relief depended on the contract giving rise to disposal being made before 3 December 2014. The FTT was not satisfied such contract for disposal was made before that date. It accordingly dismissed the appeal.

Upper Tribunal's jurisdiction on appeal

4. An appeal to the Upper Tribunal from a decision of the First-tier Tribunal can only be made on a point of law (s11 of the Tribunals, Courts and Enforcement Act 2007). It is therefore the practice of the Upper Tribunal in this Chamber only to grant permission to appeal where the grounds of appeal disclose an arguable error of law on the part of the FTT.

Grounds of appeal and Decision

5. The application raises the following grounds which Mr Downey addressed in more detail in his oral submissions and which I will go on to deal with in turn:

> (1) The FTT was wrong to determine the appeal by recourse to burden of proof rather than properly considering the case on the facts and determining the sole legal issue that arose in the appeal. The FTT could and should have been able to establish on the evidence before it what conduct gave rise to the necessary implied contract and when that contract was made.
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> (2) The FTT misdirected itself as to the applicable burden of proof on the appellant. This was to show HMRC's refusal of claim for Entrepreneur's Relief on the disposal was wrong, not to prove that there was such a contract. The burden lay on HMRC to prove the facts it alleged in refusing the appellant's claim.
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> (3) The FTT erred in law in determining that the relevant contract for the purposes of s28 TCGA had to be unconditional or legally enforceable.
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> (4) The FTT failed to focus on the conduct from which the necessary contract had to be implied instead focussing on whether the conduct justified the implication of a term of sufficient certainty to make the contract enforceable.
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> (5) The FTT was wrong to apply legal principles as to whether there was a valid contract as there was no issue between the parties on this.
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> (6) The FTT's conclusion that i) the incorporation of the company, ii) the entry into a lease of premises and iii) the agreement to employ a Head Teacher, were all steps preparatory to a contract to acquire the goodwill of the business, was not supported by any evidence. The conclusion was also inconsistent with a) the FTT's finding that there was never any written or oral agreement between the appellant and the company for the acquisition of the goodwill, and b) the evidence on the reasons why the steps were taken by the company as opposed to by the appellant personally.
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> (7) The FTT failed to properly consider the totality of the appellant's case. The FTT's decision to dismiss the appeal was perverse in the absence of any positive case being advanced by HMRC as to the contract disposal date together with the lack of evidence to support the dates HMRC relied on in their rejection of claim.

Ground 1 – Error in recourse to burden of proof and Ground 2 - Error in considering that the appellant had to show there was an enforceable contract for the business transfer prior to 3 December 2014

6. Mr Downey addressed these grounds together given their overlap. I deal with them in the order raised by Mr Downey at the hearing.

7. The first point of challenge is that the FTT misconstrued the burden of proof. Mr Downey accepts that burden lay on the appellant to disprove assessment but submits where HMRC's closure notice was based on and alleged certain facts (here that the implied contract was made on 31 August 2015) it was for HMRC to prove those facts. Mr Downey relies on *Kellog Brown & Root Holdings (UK) Ltd v HMRC* [2010] EWCA Civ 118 at [47]. Mr Downey's second challenge is that the FTT wrongly resorted to the burden of proof, when, as *Stephens v Cannon* [2005] EWCA Civ 222 points out, such resort is exceptional.

8. On the first point, the context to *Kellog Brown* was HMRC's denial of the taxpayer's setting off of a capital loss because the relevant transactions were between "connected persons" and the scope of the term "group" in the "connected persons" definition in s286(5)(b) TCGA 1992. One of the taxpayer's points against HMRC's natural language definition of "group" was a concern that because of the prevalence of institutional shareholdings in quoted companies "it could transpire that many apparently independent large companies… will turn out to be "connected"" ([37[). The Court of Appeal unanimously rejected the taxpayer's interpretation. The passage (at [47]) which the appellant relies on was in response to the taxpayer's concern (which Lord Neuberger MR as he then was, and Longmore LJ, but not Smith LJ were sympathetic to):

> "The problems which Mr Gardiner (*the taxpayer's counsel*) identifies may or may not exist in practice, and, even if they do, they may not have existed in the 1960s, when, we were told, these provisions were first introduced, and when the shareholdings in large publicly quoted companies may have been very differently held from how they are now. In any event, no such problems seem to have arisen until this case, and the facts of this case are very unusual. If HMRC seek to raise the point in relation to two companies which are, and long have been, independent, then it will be very much up to them to prove that section 286(5)(b) is satisfied. The fact that section 50(6) of the Taxes Management Act 1970 places an initial general onus on the taxpayer challenging an assessment does not affect the point that, if HMRC's assessment relies on the fact that two apparently independent companies are "connected" under the terms of section 286(5)(b), then that would be for HMRC to prove."

9. As explained in my decision refusing permission on the papers, this paragraph cannot be read as laying down any general proposition that facts relied on by HMRC in a closure notice must be proved by HMRC despite the burden of proof in challenging a tax assessment being placed on the taxpayer. The factual basis for the hypothetical scenario posed above was of two companies who "are" and "have long been" independent. The Court of Appeal's point simply reflected that where there is sufficient *prima facie* evidence from the circumstances that a fact underpinning a tax assessment is incorrect (and the taxpayer is as a result straightforwardly able to show that), the evidential burden on whether the fact is correct will then have shifted to HMRC. Interpreting this passage so as to require a starting point that HMRC must prove the facts underpinning the tax charge would render meaningless the clear and established authority

(for example *Brady (HMIT) v Group Lotus Car Companies* [1987] STC 635 as mentioned in the FTT's refusal of permission decision) that the burden for displacing the assessment lies on the taxpayer.

10. Mr Downey's submissions did not persuade me the above analysis was wrong and no other authority was advanced to support the argument that the burden was on HMRC to establish the facts relied on in a closure notice. There was not thus a burden on HMRC to show a contract made at 31 August 2015. The burden was on the taxpayer to show she had been overcharged. In this case, given the taxpayer's case in relation to the operation of the relevant legislative provisions, that entailed showing the relevant contract was made earlier than 3 December 2014.

11. As to the second point of challenge, the appellant's reliance on *Stephens v Cannon* as regards the exceptionality of resorting to burden of proof does not assist. The facts there concerned a Master who was unable to decide which of the parties' expert opinions he preferred on a disputed property valuation and where he then resorted to the burden of proof to decide the case. The facts illustrate that the situation where a court or tribunal is said to resort to the burden of proof refers to the situation where the court or tribunal is unable, on the evidence to reach a view either way on the relevant issue but then resolves the issue on the basis that the party upon whom the burden rests has not met it. That sort of situation is exceptional because normally the court or tribunal will be able to reach a conclusion on the relevant issue having evaluated all the evidence.

12. As I set out in my refusal of permission on the papers, the FTT quite clearly did not resort to the burden of proof in the kind of way the Master did in *Stephens v Cannon*. Rather, it decided the case in relation to the issue the parties had identified as being determinative in the conventional way: by examining and making findings on the evidence on that issue before it and reaching its conclusion on the disputed issue in the light of those.

13. Mr Downey's other oral arguments regarding the FTT's incorrect identification of the issue in respect of which the burden was applied are considered under the grounds below.

Ground 3 – Error in holding that relevant contract under s28 TCGA had to be unconditional or legally enforceable

14. Mr Downey points out it was never any part of Ms Delaney's case that the contract was conditional or enforceable and the FTT asked too much of her in requiring her to show that this was the case.

15. He refers to the FTT Decision's at [5] where it stated :

> "In this appeal, it is for the Appellant to show, on the balance of probability, that there was an enforceable contract for the transfer of business by the appellant to MDNSL prior to 3 December 2014".

16. The FTT also referred to the relevant contract being an unconditional one at [38] and [41] of its decision stating for instance at [38] that:

> "In order to succeed in this appeal the Appellant was required to evidence that there was an unconditional contract to dispose prior to that date which section 28 TCGA then deems to have been the date of disposal."

17. It is not possible to interpret the FTT as having wrongly identified the conditionality of the contract as a disputed issue or of misapprehending the appellant's case. Section 28(2) set out a separate timing provision where a contract was conditional based on the time at which the condition was satisfied. The FTT clearly understood that particular proviso was not in issue between the parties. The reason the FTT referred to the contract being unconditional simply reflected the fact that the proviso in s28(2) which applied to conditional contracts was not relevant.

18. As regards a requirement of enforceability Mr Downey submitted, that the legal enforceability of a contract was not part of the requirement under s28 and that such requirement was irrelevant given it was agreed that there had been an actual disposal. Section 28 was simply about when the contract which effected the disposal had been made. All that was required when the provision spoke of a contract having been made was acceptance of an offer supported by consideration. (The same point in relation to a superfluous enforceability requirement is in essence made under Ground 4).

19. It is wrong, in my view, however to read the FTT decision as imposing any separate requirement of legal enforceability before a court (over and above the question of whether a contract had been formed) in determining when a contract was made. The FTT rightly focussed on the issue of when the contract was made. Its reference to the contract needing to be enforceable was simply its way of expressing that a binding contract had to have been made according to the conventional principles of the law of contract.

20. The FTT did not thus rule out potential points in time at which a contract could be said to have been made on the basis of enforceability in court, but because no contract had been made in the first place. The FTT's reasoning (as explained at [48] was that no contract had been made before 3 December 2014 because there was insufficient certainty as to the terms of the purported agreement prior to that date and "…a lack of certainty that [the taxpayer's limited company] would acquire and at what price (or how such price would be determined)".

21. While Mr Downey referred to the emphasis in *Jerome and Underwood v HMRC* [2008] EWCA Civ 1423 on s28 TCGA being a timing provision in relation to which a disposal is assumed, that does not assist the appellant. The case is not authority for the proposition that the contract used for such timing provision does not have to be a valid binding contract in order to have been regarded as "made".

22. Similarly, the fact that it was agreed there had been a disposal did not mean that when it came to establishing *when* a contract had been made under s28 it would still not be relevant to apply the normal principles as to contract formation. That was all the FTT rightly required (and as already mentioned the reason it rejected the appellant's case was because lack of certainty as to critical uncertainty over price or price determination).

Ground 4 – The FTT failed to focus on the conduct from which the necessary contract had to be implied instead focussing on whether the conduct justified the implication of a term of sufficient certainty to make the contract enforceable.

23. Mr Downey argues that in the circumstances here where there was not a sale to a third party and the fact of disposal was agreed, the non-enforceability of *the terms* was irrelevant to the question of whether the contract had been formed.

24. Again this ground misconstrues the FTT's reasoning. As already discussed, the FTT did not reject the appellant's case on the basis the purported agreement had terms that were unenforceable but because it considered that as at the relevant time critical terms as to price had not been agreed. Its analysis was that that lack of certainty as to critical terms meant that a contract had not been formed (not that a contract had been formed but that certain terms were unenforceable for lack of certainty). The FTT remained focussed on the issue of contract formation not establishment of its terms. There was no error in its view that if certain critical terms such as price or price determination had not been agreed a contract had not been formed at a given point of time. The agreement that there had been a disposal did not address the question of when a contract effecting such disposal had come into existence. Also the fact the agreement in question was between the taxpayer and the company of which she was the director and sole shareholder would not make the lack of certainty as to the critical term of price / price determination any less relevant to the analysis of whether a contract had been formed at a given point of time.

Ground 5 – FTT wrong to apply legal principles as to whether there was a valid contract

25. Under this ground it is argued the FTT erred in wrongly taking account of principles from the UT's decision in *Roger Dyer and Jean Dyer v HMRC* [2016] UKUT 0381 (TCC) concerning whether there was a valid contract, given the different circumstances there. Mr Downey submits that there the dispute was over whether there was a contract of services. He also contrasts the appellant's case as being one where there was no issue between the parties regarding there being a valid contract in place.

26. The principles the FTT took (at [45]) from *Dyer* (intention to enter into a legally binding relationship, mutuality of obligation and certainty) were however general ones regarding "the essential characteristics" of the existence of a contract. They were not restricted to the question of whether there was a contract of employment or services or to the particular facts of that case.

27. Also, as already mentioned, although it was not in issue that there had been a disposal, it was clearly a disputed issue under s28 as to whether a contract transferring the business had been made before 3 December 2014. Even if it was accepted that there was a contract at some point it would still need to be asked when that contract came into existence and here that would entail establishing when a valid contract was made. There was accordingly no error in the FTT considering the question of contract validity and applying principles derived from an Upper Tribunal authority on such question.

Ground 6 - No evidence for conclusion certain matters were preparatory steps and inconsistency with other findings.

28. The FTT concluded at [48] that the incorporation of the company, entry into a lease agreement and employment of a head teacher were all steps which it took which were preparatory to any contract to acquire the goodwill of the appellant's business. It is argued the FTT erred in law because there was no evidence for this finding.

29. It is also argued the conclusion was also inconsistent with a) the FTT's finding that there was never any written or oral agreement between the appellant and the company for the acquisition of the goodwill, and b) the evidence on the reasons why the steps were taken by the company as opposed to by the appellant personally.

30. This challenge is in essence another way of attacking the FTT's conclusion that an agreement amounting to a contract had not been reached by the relevant date. As indicated in my refusal of permission on the papers there was evidence for the conclusion the various matters were preparatory acts to the conclusion of the contract. This was all the evidence advanced by the appellant in relation to which the FTT then made a number of findings of fact at 11(1) to (45) setting out the chronology of events at all the relevant junctures. On the basis of that it concluded no agreement on the critical matters of price and price determination had been reached. That coupled with the agreed fact that a disposal had taken place meant the FTTs' conclusion the acts were acts *preparatory* to any contract was one it was clearly entitled to reach.

31. Given it was agreed there was a disposal of some kind there was also nothing inconsistent with a finding the acts were preparatory to any contract and the finding there was no written or oral agreement between the appellant and the company for the acquisition of goodwill. The acts could be preparatory to an agreement that arose otherwise than orally or in writing e.g. by conduct.

32. Mr Downey suggested the acts were better viewed as preparatory to the actual disposal rather than to a contract (i.e. the contract to transfer on the appellant's case having already been made) but again that simply another way of challenging the FTT's conclusion that rejecting the appellant's case a contract was made before 3 December 2014, a conclusion that was, as discussed, open to the FTT on the evidence.

33. There was also no necessary inconsistency between the appellant's reasons advanced for things being done in the name of the company and a conclusion no agreement had been reached by the relevant time. None of the explanations put forward by Mr Downey based on the history to the negotiations with the church in relation to nursery premises and the intentions regarding incorporation of the business *required* a conclusion that a contract had been reached by 3 December 2014. The FTT explained why steps such as incorporation, entering into a lease and employing a head teacher did *not* show a contract had been made: planning consent to use the property as a nursery was awaited, as was the outcome of the OFSTED registration. The FTT explained (at [11(27)]) the significance of the lease having a break clause and the extension of the appellant's personal licenses as enabling the appellant to keep her options open until she had certainty she could transfer the business to a company who would then be able to operate it. And as mentioned there was, the FTT noted, crucially a lack of agreement of price /a price determination mechanism.

34. Reflecting his arguments on misapplication of the burden of proof under Ground 2, Mr Downey criticised the FTT for not making findings identifying the contract that underpinned HMRC's case on tax chargeability. But as discussed under that ground the FTT was correct to identify that the burden lay on the appellant to establish a contract had been made before the relevant date. It was not necessary for the FTT to make findings of fact on the matters underpinning HMRC's closure notice in order to determine the case.

Ground 7 - FTT's decision to dismiss appeal was perverse in absence of positive case by HMRC and lack of evidence for the dates relied on in HMRC's decision

35. Mr Downey explained this ground was linked in some respects to the other grounds. Because HMRC had not advanced any positive case on the contract underlying its assessment the only conclusion available to the FTT was that an earlier contract was made according to the dates put forward by the appellant. That was the conclusion that all of the appellant's evidence pointed to, there being no evidence adduced by HMRC (that had not been rejected) for an alternative contract date.

36. As already discussed, there was no requirement for HMRC to make a positive case. This point cannot accordingly form the basis for saying the FTT's conclusion was perverse. It was, as the FTT correctly identified, for the appellant to show a contract for disposal had been made before 3 December 2014.

37. It was submitted in any event that when the evidence was looked at in its totality, in circumstances where all the evidence pointed to the earlier contract which the appellant had put forward, and in the absence of any other contract the FTT's decision to dismiss the appeal was perverse.

38. I reject this submission. While the appellant might seek to argue that the evidence was such that the FTT *could have* found there was a contract by the relevant date it comes nowhere close to showing that the FTT was *bound to* find a contract was made before such date and that the FTT's decision was accordingly perverse. As can be seen from the FTT's detailed findings of fact at [11(1)] to [11(43)], including those already discussed under the ground above, the FTT considered the chronology of events, the evidence advanced on behalf of the appellant, and made findings regarding any intention to transfer the business at given points in time. The FTT was not satisfied, consistent with those findings that it could accept the appellant's case that a contract had been concluded by the relevant date. The appellant's ground does not challenge those underlying findings (by articulating how any such findings were ones made without evidence, contrary to the evidence, or were ones that no reasonable tribunal could have made). In the light of those findings it was clearly then open to the FTT to dismiss the appeal. There was also plainly nothing perverse or inconsistent arising from the fact no other contract was specifically identified (in circumstances where disposal was agreed) with a conclusion that the appellant had failed to show a contract had been made before 3 December 2014.

Conclusion

39. For the reasons set out above, I am not satisfied any of the grounds advanced disclose any arguable error of law in the FTT Decision.

40. **Permission to appeal is therefore refused.**

Signed: **SWAMI RAGHAVAN** **JUDGE OF THE UPPER TRIBUNAL**	**Date: 9 January 2025**
Issued to the parties on: 10 January 2025	