



Neutral Citation Number: [2024] EWCA Civ 92

Case No: CA-2023-000118

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
The Hon. Mr Justice Trower and Judge Timothy Herrington
UT-2021-000174

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2024

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE LEWISON
and
LORD JUSTICE MALES

Between :

MICHAEL BROWN
BRIDGET BROWN **Appellants**
- and -
THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE & CUSTOMS **Respondent**

Ross Birkbeck (instructed under **direct access**) for the **Appellants**
Ben Elliott (instructed by **HMRC Solicitors**) for the **Respondent**

Hearing date: 31/01/2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 08/02/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. Mr and Mrs Brown acquired the freehold of a house in Surrey as the last step in a series of pre-planned steps in a scheme which, it is said, allowed them to acquire the house without having to pay stamp duty land tax (“SDLT”). The scheme was marketed specifically for the purpose of avoiding SDLT. The question for us is whether the scheme achieved its objective. Both the FTT (Judge Hellier) and the Upper Tribunal (Trower J and Judge Herrington) said no, but for different reasons. The decision of the UT is at [2022] UKUT 00298 (UT), [2023] 4 WLR 11.

The scheme

2. Under this scheme the ultimate purchaser (“C”) acquires a property from an unconnected vendor (“A”) via an unlimited company (“B”). In summary the scheme works as follows:
 - i) C forms an unlimited company, B, and contributes cash to the unlimited company of a sufficient amount to purchase the target property. The contribution of funds is effected by subscribing for shares in B;
 - ii) A contracts to sell the property to B;
 - iii) B pays the agreed purchase price for the property to A. At the same time as the completion of the contract between A and B, B reduces its capital and makes a distribution in specie of the property to C. A executes a transfer to B, and B simultaneously executes a transfer to C.
3. The legal underpinnings of the scheme relied on the sub-sale relief then contained in section 45 of the Finance Act 2003. Thus, the theory was that by virtue of section 45 the contract between A and B is disregarded, and because there is no consideration for the distribution in specie from B to C, no SDLT is payable.
4. Premier Strategies Ltd put the scheme to Mr and Mrs Brown in a letter of 7 June 2007. The first step was to establish an unlimited company. The remaining steps were then described. Mr and Mrs Brown were to use “the deposit monies” to subscribe for shares. The company would then contract to buy the property. Following exchange of contracts, the company “will resolve to reduce its share capital by way of a distribution in specie” conditional on and simultaneous with completion. Before completion Mr and Mrs Brown would subscribe for further shares using a promissory note. They would then hold shares “equal in value to the price to be paid for the property”. On the day of completion, the solicitor would pay the mortgage monies to the vendor. At that point the distribution would take place “and the property will be transferred from the company to you”.
5. The intended tax consequences were set out in the proposal. On the question of SDLT it said:

“**SDLT** - provided that the transfer of the property from the unlimited company to yourself occurs simultaneously with the completion of the contract between the vendor and the unlimited company the consideration paid by the unlimited company should not be chargeable to **SDLT**. We have Counsel’s Opinion to say that in his view this should be the case provided that the first contract in which the vendor is involved is not connected to the second contract, of which the vendor is unaware. The transfer of the property to you by way of a distribution in specie will be a chargeable transfer, but because there will be no consideration paid in respect of this transfer no actual **SDLT** should be payable.”

The facts

6. The scheme was duly put into operation in the following steps.
7. On 2 July 2007, Earlswood (“the Company”) was incorporated as an unlimited company. Mr and Mrs Brown each subscribed for 47,751 £1 shares at par, paying £95,502 in total.
8. On 9 July 2007, the Company contracted with an unconnected third party (Mr Hamm) to purchase 9 Earlswood, Cobham, Surrey (“the Property”), for £955,000 and paid a deposit of £95,000.
9. On 8 August 2007, the Company issued to each of Mr and Mrs Brown a further 432,250 £1 shares at par (bringing the total nominal value of shares in issue to £960,002). The shares were subscribed for in return for promissory notes of £432,250 from each of Mr and Mrs Brown which were expressed to be payable on 15 August 2007 (the day of completion of the Company's purchase).
10. On 15 August 2007: (a) The Company resolved to reduce its share capital from £960,002 to £2 by way of a distribution in specie of the Property conditional on and simultaneous with the completion of its original property purchase contract. (b) The Company used the balance of the money deriving from the share subscriptions to complete the transfer of the Property to it and a transfer was executed in its favour. Specifically, the mortgage monies to fund the purchase of the Property were borrowed by Mr and Mrs Brown, paid to their conveyancing solicitor for the account of the Company and then paid by the conveyancing solicitor to the vendor, which thereby satisfied the promissory notes. The balance of the subscription monies after satisfaction of the purchase price for the Property were consumed in conveyancing costs. (c) A transfer of the Property from the Company to Mr and Mrs Brown was executed showing no consideration, and the Company’s share capital was reduced. The borrowings were secured on the freehold by a legal charge, under which Mr and Mrs Brown were the mortgagors.
11. All the above steps were taken in pursuance of the scheme described to Mr and Mrs Brown, and from the time that the Company contracted to purchase the Property, there was no practical likelihood that the remaining steps would not be taken (unless some problem with the conveyancing occurred such as a defect in title).

12. The Company filed a land transaction return claiming relief from SDLT. Mr and Mrs Brown made no land transaction return on the basis that no chargeable consideration had been given for the transfer of the Property to them, so none was required.
13. Mr and Mrs Brown were registered as proprietors of the Property at HM Land Registry on 11 September 2007. The register recorded: “the price stated to have been paid on 15 August 2007 was 955,000.”
14. On 8 August 2011, HMRC issued a notice of determination to Mr and Mrs Brown. The covering letter stated:

“I have examined HMRC, Land Registry and Companies House records and concluded that the acquisition of this land/property is a chargeable transaction, and accordingly a land transaction return should have been made. I hold no records of a Land Transaction return being submitted for your acquisition of this land/property.”
15. The determination itself stated:

“Revenue determination under paragraph 25 Schedule 10 Finance Act 2003 Acquisition of 9 Earlswood, Earlswood Corner, Fairmile Lane, Cobham Surrey, KT11 2BZ on 15/08/2007

This Revenue determination is being made as we have no record of a land transaction return being filed for your acquisition of this land/property. I have concluded to the best of my information and belief that there was a chargeable transaction and the appropriate consideration is as below.”
16. The stated consideration was £955,000 (i.e. the aggregate purchase price of the Property). The amount of SDLT was assessed at £38,200.

The appeal

17. With my permission Mr and Mrs Brown appeal. The appeal was very well argued on both sides, by Mr Birkbeck, appearing pro bono for Mr and Mrs Brown; and Mr Elliott appearing for HMRC. At the outset of his submissions, Mr Birkbeck candidly said that the scheme did not work for two substantive reasons, but that for procedural and administrative reasons, HMRC were not entitled to rely on either of those substantive reasons. I will come to both the substantive and the procedural reasons in due course.

SDLT

18. SDLT was introduced by Part 4 of the Finance Act 2003 in order to replace stamp duty, which had become notorious for the ease with which it could be avoided. As stated in the Explanatory Notes to the bill which eventually became the Finance Act 2003:

“A main driver for reform has been the increased use of avoidance devices to mitigate the charge to stamp duty. The Government is committed to preventing avoidance and the new legislation is designed to ensure all purchasers of property pay their fair share of tax.”

19. Whereas stamp duty was a tax on instruments, SDLT is a tax on transactions. All references to sections are to sections of the Finance Act 2003 as it stood at the time of the relevant events. It has since been amended.

20. Section 42 provides:

“(1) A tax (to be known as “stamp duty land tax”) shall be charged in accordance with this Part on land transactions.

(2) The tax is chargeable—

(a) whether or not there is any instrument effecting the transaction,

(b) if there is such an instrument, whether or not it is executed in the United Kingdom, and

(c) whether or not any party to the transaction is present, or resident, in the United Kingdom.”

21. A “land transaction” is defined by section 43:

“(1) In this Part a “land transaction” means any acquisition of a chargeable interest. As to the meaning of “chargeable interest” see section 48.

(2) Except as otherwise provided, this Part applies however the acquisition is effected, whether by act of the parties, by order of a court or other authority, by or under any statutory provision or by operation of law.

...

(4) References in this Part to the “purchaser” and “vendor”, in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction. These expressions apply even if there is no consideration given for the transaction.

(5) A person is not treated as a purchaser unless he has given consideration for, or is a party to, the transaction.

(6) References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the “main subject-matter”), together with any interest or right appurtenant or pertaining to it that is acquired with it.”

22. By virtue of section 48 a freehold is a chargeable interest. Section 49 provides that a land transaction is a chargeable transaction if it is not a transaction that is exempt from charge. Exemptions are contained in Schedule 3; but none of them applies to this case.
23. The person liable to pay the SDLT is the purchaser: section 85. The amount of SDLT payable is a percentage of the chargeable consideration. Chargeable consideration is itself defined by Schedule 4 paragraph 1 as follows:
- “(1) The chargeable consideration for a transaction is, except as otherwise expressly provided, any consideration in money or money’s worth given for the subject-matter of the transaction, directly or indirectly, by the purchaser or a person connected with him.”
24. It is common ground that Mr and Mrs Brown were “connected with” the Company.
25. Section 44 deals with the common situation where land is acquired under a contract for sale which is then completed by a transfer (although strictly speaking a disposition of registered land is completed by registration). At the relevant time it provided:
- “(1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
- (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
- (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction. In this case the effective date of the transaction is the date of completion.
- (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract. In this case the effective date of the transaction is when the contract is substantially performed.”
26. Section 45 was enacted to avoid double taxation particularly in the case of sub-sales. The success of the scheme which Mr and Mrs Brown used depended on the effect of section 45. At the relevant time it provided:
- “(1) This section applies where—
- (a) a contract for a land transaction (“the original contract”) is entered into under which the transaction is to be completed by a conveyance,

(b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and

(c)

References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and references to the transferor and the transferee shall be read accordingly.

(2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.

(3) That section applies as if there were a contract for a land transaction (a “secondary contract”) under which—

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is—

(i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and

(ii) the consideration given for the transfer of rights.

The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded...

...

(6) Section 839 of the Taxes Act 1988 (connected persons) applies for the purposes of subsection (3)(b)(i).

(7) In this section “contract” includes any agreement and “conveyance” includes any instrument.”

27. Section 75A is an anti-avoidance provision which applies to transactions after 6 December 2006. It provided:

“(1) This section applies where—

(a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,

(b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition (“the scheme transactions”), and

(c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

(2) In subsection (1) “transaction” includes, in particular–

(a) a non-land transaction,

(b) an agreement, offer or undertaking not to take specified action,

(c) any kind of arrangement whether or not it could otherwise be described as a transaction, and

(d) a transaction which takes place after the acquisition by P of the chargeable interest.

(3) The scheme transactions may include, for example–

(a) the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;

(b) a sub-sale to a third person;

(c) the grant of a lease to a third person subject to a right to terminate;

(d) the exercise of a right to terminate a lease or to take some other action;

(e) an agreement not to exercise a right to terminate a lease or to take some other action;

(f) the variation of a right to terminate a lease or to take some other action.

(4) Where this section applies–

(a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but

(b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.

(5) The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount)—

(a) given by or on behalf of any one person by way of consideration for the scheme transactions, or

(b) received by or on behalf of V (or a person connected with V within the meaning of section 839 of the Taxes Act 1988) by way of consideration for the scheme transactions.

(6) The effective date of the notional transaction is—

(a) the last date of completion for the scheme transactions, or

(b) if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed.

(7) This section does not apply where subsection (1)(c) is satisfied only by reason of—

(a) sections 71A to 73, or

(b) a provision of Schedule 9.”

28. Section 76 requires the purchaser to deliver a land transaction return in the case of a notifiable transaction. Notifiable transactions are defined by section 77. The acquisition of a freehold is notifiable unless the acquisition is exempt under Schedule 3 or:

“the land consists entirely of residential property and the chargeable consideration for the acquisition, together with that of any linked transactions, is less than £1,000.”

29. Section 108 (1) defines linked transactions:

“Transactions are “linked” for the purposes of this Part if they form part of a single scheme, arrangement or series of transactions between the same vendor and purchaser or, in either case, persons connected with them.”

30. Schedule 10 Part 4 deals with the case where no land transaction return is delivered. Paragraph 25 provides:

“(1) If in the case of a chargeable transaction no land transaction return is delivered by the filing date, the Inland Revenue may make a determination (a “Revenue

determination”) to the best of their information and belief of the amount of tax chargeable in respect of the transaction.

“(2) Notice of the determination must be served on the purchaser, stating the date on which it is issued.

“(3) No Revenue determination may be made more than six years after the effective date of the transaction.”

A purposive interpretation

31. The provisions of the Finance Act 2003, like any other Act of Parliament, must be given what is generally called a “purposive interpretation”. What this means was explained by the Supreme Court in *Rossendale BC v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690. That was the case of a scheme designed to avoid payment of rates on empty properties. Under the legislation the liability was imposed on the owner of a hereditament, defined as the person “entitled to possession” of it. The ratepayer granted leases of the hereditaments to special purpose vehicles, with no assets, which were then either voluntarily wound up or dissolved by striking off the register. In that way it was hoped to take advantage of the exemption from liability in the case of a company in the course of being wound up; or to rely on simple inertia on the part of the rating authority. The Supreme Court held that the scheme failed to achieve its objective. In the case of pre-ordained schemes designed to avoid tax, the purposive approach originated in *WT Ramsay Ltd v IRC* [1982] AC 300, but it is now seen as a principle of interpretation applicable to all statutes. The nub of the approach is described in the joint judgment of Lord Briggs and Lord Leggatt at [15]:

“In the task of ascertaining whether a particular statutory provision imposes a charge, or grants an exemption from a charge, the *Ramsay* approach is generally described—as it is in the statements quoted above—as involving two components or stages. The first is to ascertain the class of facts (which may or may not be transactions) intended to be affected by the charge or exemption. This is a process of interpretation of the statutory provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they “answer to the statutory description”.... This may be described as a process of application of the statutory provision to the facts. It is useful to distinguish these processes, although there is no rigid demarcation between them and an iterative approach may be required.”

32. The result of this approach in relation to tax legislation has “often been to disregard transactions or elements of transactions which have no business purpose and have as their sole aim the avoidance of tax”: [11]. Another aspect of this approach is that as stated at [12]:

“where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to

consider the scheme as a whole. Again, this is no more than an application of general principle.”

33. The particular charging provision must be interpreted in the context of the whole statutory scheme in which it is contained; and the facts must be looked at in the round.

34. It thus follows that no statute is excluded from this approach. Moreover, even where the statute uses concepts or phrases which have a general meaning in the law, such as (in *Rosendale*) “entitled to possession”, it is still necessary to apply a purposive interpretation. As Lord Briggs and Lord Leggatt explained at [47]:

“There can be no doubt that the definition of the “owner” of a hereditament in section 65(1) of the 1988 Act as “the person entitled to possession of it” is to be interpreted as denoting in a normal case the person who as a matter of the law of real property has the immediate legal right to actual physical possession of the relevant property.”

35. But, as they continued at [48]:

“In the unusual circumstances of this case, however, identifying “the person entitled to possession” in section 65(1) of the 1988 Act as the person with the immediate legal right to possession of the property would defeat the purpose of the legislation.”

36. Where this court went wrong was by sticking with the well settled meaning of the phrase in the law of real property: see [2019] EWCA Civ 364, [2019] 1 WLR 4567 at [71]. In the Supreme Court, their Lordships concluded at [61]:

“In any ordinary case the test will easily be satisfied by identifying the person who is entitled to possession as matter of the law of real property. The fact that the law of real property may not prove a reliable guide in an unusual case of the present kind is not in our view an objection to our preferred interpretation. The value of legal certainty does not extend to construing legislation in a way which will guarantee the effectiveness of transactions undertaken solely to avoid the liability which the legislation seeks to impose.”

37. Although both parties in this case referred to some of the case-law that preceded *Rosendale*, I do not think that it is necessary to go further than the authoritative exposition of the principle in *Rosendale* itself. Reference to different legislation and different fact situations is more likely to confuse than to enlighten.

The decision of the UT

38. The UT set out its conclusion at [44]:

“In our view the proper construction of section 45(3) in the context of the scheme of the legislation as a whole leads to the conclusion that in this case SDLT is chargeable in respect of the secondary contract that is deemed to occur by the operation

of section 45(3) and the chargeable consideration for that transaction is £955,000. In our view, that consideration arises under section 45(3)(b)(i) FA 2003. That is because the sum is such consideration under the original contract between the vendor and the Company as is referable to the subject matter of the secondary contract which is provided indirectly by Mr and Mrs Brown.”

39. They went on to elaborate on their reasons for that conclusion. It is notable that at [53] they said that their preferred analysis would have been to disregard the imposition of the Company on the basis that it existed only for a short time; it undertook no commercial activities and its only function was to act as a conduit through which the freehold passed from the original vendor to Mr and Mrs Brown. But because of the way in which the case was argued by HMRC (and is still argued) they felt unable to take that approach. They went on to say at [55]:

“In the context of a preordained scheme under which Mr and Mrs Brown provided funds to the Company which were used by the Company to purchase the Property from the vendor, it is our view that the funds provided by Mr and Mrs Brown constituted consideration under the original contract given “indirectly” by Mr and Mrs Brown and therefore fell within the scope of section 45(3)(b)(i).”

40. In so holding they approved what the FTT (Judge Poole and Mrs Hunter) in *Vardy Properties v HMRC* [2012] UKFTT 564 (TC), [2012] SFTD 1398 said at [98]:

“A preordained scheme has been established in which C, at an early stage, provides the cash to B which will ultimately be used by B to pay A for the purchase of the property. In those circumstances, we are satisfied that when, as a result of a later step in the scheme, there is a transfer of rights which ultimately entitles C to call for a conveyance of the property, it can be said that A’s purchase price, though it will be received from B, is ‘to be given indirectly’ by C within the meaning of section 45(3)(b)(i).”

41. The UT went on to say at [62]:

“Neither do we accept Mr Birkbeck’s submission, and disagreeing with the FTT in this respect, that in order for it to be said that C has provided the consideration under the contract between A and B, C must be making the payment with his own money. We see no reason to construe the words “given ... by the transferee” in section 45(3) narrowly. Construing the provision purposively, realistically the consideration in this case was given by Mr and Mrs Brown because the Company was a vehicle under their control and its only purpose and business was to implement the scheme and enable Mr and Mrs Brown to acquire the Property. Accordingly, the funds that were paid by the Company to the vendor of the Property were

provided by Mr and Mrs Brown through their subscription for shares in the Company, the sole purpose of which was to enable the Company to be put in funds to satisfy the purchase price for the Property.”

The approach to interpretation in this case

42. Mr Birkbeck argued, quite correctly, that the principle enunciated in *Rossendale* is not a “magic wand.” Nor, in a case involving tax, does it always resolve questions of interpretation in favour of HMRC. Nevertheless, I do not consider that it can be said that the SDLT code is exempt from the principle.
43. Mr Birkbeck pointed out that a number of expressions in the SDLT code are tightly defined: “chargeable interest”, “chargeable consideration”, “land transaction,” “linked transactions” and so on. Parliament cannot have intended their scope to be uncertain.
44. He submitted that the legislation contains a number of different provisions that deal with arrangements or schemes which involve multiple transactions. Where Parliament has chosen to legislate in prescriptive terms, it would be wrong for the courts to side-step them.
45. Part 4 of the 2003 Act, he said, is drafted in what he called “legalistic terminology” taken from the law of real property and the law of contract. It deals with legal rights in land. Parliament did not attempt to catch everything. The legislation in this case clearly refers to legalistic concepts of land law. It is not concerned with commercial reality; and it is not permissible to look beyond the legal formalities. It is the acquisition of an interest in land that is the chargeable event.
46. As an example, he referred us to the decision of this court in *Mayer v HMRC* [2011] EWCA Civ 407, [2011] STC 1269 which involved a pre-planned scheme involving the purchase by a non-resident of insurance policies, followed by their partial surrender and subsequent assignment to the taxpayer. The taxpayer then surrendered the policies. The overall scheme involved seven steps of which steps 3 and 4 were self-cancelling. Mummery LJ said at [78]:

“...it would be an error, which the judge did not fall into, to disregard the payment of a premium at step 3 and the partial surrender at step 4 simply because they were self-cancelling steps inserted for tax advantage purposes. It was right to look at the overall effect of the composite step 3 and step 4 in the seven step transaction in the terms of ICTA to determine whether it answered to the legislative description of the transaction or fitted the requirements of the legislation for corresponding deficiency relief. So viewed, step 3 and step 4 answer the description of premium and partial surrender. On the true construction of the ICTA provisions, which do not readily lend themselves to a purposive commercial construction, step 3 was in its legal nature a premium paid to secure benefits under the bonds and step 4 was in its nature a withdrawal of funds in the form of a partial surrender within the meaning of those provisions. They were genuine legal

events with real legal effects. The court cannot, as a matter of construction, deprive those events of their fiscal effects under ICTA because they were self-cancelling events that were commercially unreal and were inserted for a tax avoidance purpose in the pre-ordained programme that constitutes SHIPS 2.”

47. Mr Birkbeck argued that the same approach should be applied in this case. I do not agree. As I have said, no statute is immune from a purposive interpretation, and the very mistake that this court made in *Rossendale* was to focus on the accepted meaning of the statutory phrase as a matter of land law. While the Supreme Court accepted that in most cases that would be correct, it should not result in an interpretation in a way which will guarantee the effectiveness of transactions undertaken solely to avoid the liability which the legislation seeks to impose. In my judgment, as the Supreme Court said in *Rossendale*, it was both permissible and necessary to look at the scheme as a whole.
48. *Mayes* was concerned with different legislation which did not lend itself to a purposive commercial construction. I do not consider that a decision on different legislation can dictate the approach in this case, even if the decision itself has survived *Rossendale*.

Section 45

49. In a case to which section 45 applies there is a notional secondary contract. The original contract is the contract between Mr Hamm and Earlswood. The notional contract is one between Mr Hamm and Mr and Mrs Brown. The question is what, for the purposes of SDLT, is the chargeable consideration under that notional contract? The critical provision in play on this part of the appeal is section 45 (3) (b) which I repeat for convenience:

“(b) the consideration for the transaction is—

(i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and

(ii) the consideration given for the transfer of rights.”

50. Thus, the consideration under the original contract was the purchase price of the property (£955,000). Was that given (directly or indirectly) either by Mr and Mrs Brown or a person connected with them?
51. Contrary to the way in which the UT understood his argument, Mr Birkbeck does not suggest that the consideration indirectly provided by C is restricted to consideration that C is contractually bound to provide. His essential point is that consideration provided by C (here Mr and Mrs Brown) under the original contract between A and B (here Mr Hamm and Earlswood) must be C’s money. Where B is a company funding the A/B purchase with its own money it is B who gives the entirety of the consideration; and it does not matter how B has raised the money. What C got by

subscribing for shares was the shares themselves, and the subscription monies were no longer C's but became B's.

52. In my judgment, while this argument may prevent the conclusion that the consideration under the notional contract was given *directly* by Mr and Mrs Brown, it does not undermine the UT's conclusion that it was given by them *indirectly*. Not only does section 45 (3) (b) envisage consideration being given indirectly, so also does Schedule 4 paragraph 1:

“The chargeable consideration for a transaction is, except as otherwise expressly provided, any consideration in money or money's worth given for the subject-matter of the transaction, directly or indirectly, by the purchaser or a person connected with him”

53. In the course of his oral submissions, Mr Birkbeck explained what the word “indirectly” might capture. As he explained it, what it captures was payment by a lender for the account of a borrower acquiring a chargeable interest or the transfer of funds from the bank account of the purchaser's conveyancing solicitor to the account of the vendor's solicitor on completion. In other words, it was concerned only with the mechanics of payment. In any transaction financed in part by bank borrowing or where funds are routed through solicitors, the purchaser would not be giving consideration directly. Yet the purchaser would still be giving consideration. If that is all that the word means, then as Mr Birkbeck accepted, the phrase “directly or indirectly” would mean the same thing as “given by”. That is, in my judgment, a most improbable explanation of what Parliament must be taken to have meant by that phrase.

54. As *Rossendale* emphasises, the facts must be looked at in the round. Here, Mr and Mrs Brown parted with £955,000 and in return they acquired the freehold. The mechanics by which they acquired it do not undermine that fact. In the FTT Judge Hellier said at [26]:

“The monies that Mr and Mrs Brown paid (in cash or promissory notes) to the company were not part of a bargain with A or given as consideration for A's transfer, but they were given under a scheme under which plainly the “deal” was that these monies were the quid pro quo for the house.”

55. He added at [27]:

“Where a series of steps are put in train with the object of getting a property and which involve the purchaser paying out monies with the intention that at the end of the series of having the property, and no other significant rights ... for the purposes of paragraph 1 the amount paid is properly described as given “for” the property. The words “directly” or “indirectly” in para 1 add grist to the mill.”

56. I agree. In short, I also agree with the way the FTT put it in *Vardy*, and with the UT's view of the facts at [62]. I do not attempt to circumscribe the outer limits of what

might properly be described as consideration under the original contract indirectly given by someone who is not a formal party to it. As Mr Elliott submitted, that is a fact-sensitive question. The facts with which we are concerned involve the provision of funds to a wholly owned vehicle, for the sole purpose of buying a particular identified property at an identified price, with the ultimate objective that the property would be vested in the persons providing the funds simultaneously with completion by the sale contract. Indeed, the bulk of the funds were provided after the contract was made. All this was done under a pre-ordained scheme with no purpose other than the avoidance of SDLT.

Connected person

57. But even if that is wrong, Earlswood was connected with Mr and Mrs Brown. On the footing that it was Earlswood that gave the consideration under the original contract, it would still be the chargeable consideration under the notional contract, because it was consideration given by a person connected with the transferee under the notional contract.
58. Mr Birkbeck acknowledged that this was so (and that was the first reason why the scheme did not work). But he said (correctly) that HMRC had made a deliberate decision not to pursue that way of putting the case in the FTT; and he argued that because of that choice, they should not be entitled to do so now. He also submitted that HMRC had tried to raise the point before the UT, and the UT had refused to allow the new point to be introduced on the first appeal.
59. To take the second point first, that is not the way I read the UT's decision. Although it is not entirely clear, what I understand the UT to have said is that as it was not necessary to deal with the point, they would not do so. In fact, as we were told, the point was raised, contested, and fully argued before the UT. If the UT had refused to permit the point to be taken that would not have happened. In addition, if the UT had decided not to permit the point to be taken (which was a pure point of law causing no prejudice to Mr and Mrs Brown) they would have had to explain why they were exercising their discretion against allowing the point to be taken, which they did not do.
60. So, the question for us is whether HMRC are entitled to take the point. The outcome of the appeals (both before the FTT and the UT) is that the determination was upheld. The "connected persons" point is an additional reason for reaching the same result. It was a point raised in the UT and, as I have said, I do not consider that the UT refused to entertain it. It is, therefore, in my view a point which HMRC are entitled to raise in a Respondent's Notice without further permission: see, most recently, *Braceurself Ltd v NHS England* [2023] EWCA Civ 837, [2024] 1 WLR 669.
61. But even if permission were needed, I would give it. It is a pure point of law, it has wider implications for the proper assessment and collection of SDLT, it requires no further fact-finding and it is conceded to be correct. As Lord Diplock trenchantly observed in *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514, 1525:

"It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having

so decided it is his duty to apply it to the facts of the cases. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it was erroneous.”

62. That was a case in which the point was taken for the first time in the House of Lords: see the discussion in *Hudson v Hathway* [2022] EWCA Civ 1648, [2023] KB 345 at [33] to [38].
63. Having allowed the point to be taken, and on the basis that Mr Birkbeck (correctly in my judgment) concedes that it is correct, the chargeable consideration was £955,000.

Scope of the HMRC determination

64. Mr Birkbeck accepted that (if the claim to relief under section 45 succeeded) section 75A is in principle applicable to the series of steps under which Mr and Mrs Brown acquired the freehold in the Property. That was the second substantive reason why the scheme did not work. But, he said, if HMRC wished to rely on that section it was necessary to make a separate determination on that basis. Section 75A (1) applies where one person (V) (here Mr Hamm) disposes of a chargeable interest (here the freehold) and another person (P) (here Mr and Mrs Brown) acquires it and a number of transactions are involved in connection with the disposal and acquisition.
65. Where section 75A applies:
 - “(4)(a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but
 - (b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.”
66. Section 75A is in Part 4 of the Finance Act 2003. So, too, are section 76 (duty to deliver a land transaction return), section 77 (what are notifiable land transactions) and section 78 (which gives effect to Schedule 10). It follows, therefore, that the real-world acquisition of the freehold by Mr and Mrs Brown (which was both a scheme transaction and a land transaction) must be disregarded for the purposes of all those sections. Instead, the real-world transactions are replaced by a notional land transaction which deems the acquisition by Mr and Mrs Brown to be effected by a disposal to them by Mr Hamm.
67. I cannot see that this makes any difference. In the notional world prescribed by section 75A (4) Mr and Mrs Brown still acquire the freehold. That acquisition gives rise to a duty to deliver a land transaction return. Since Mr and Mrs Brown delivered no land transaction return, HMRC were entitled to make a determination of the amount of SDLT chargeable in respect of the transaction. The “transaction” is the notional transaction consisting of Mr and Mrs Brown’s acquisition of the freehold on a disposal by Mr Hamm. But it is still an acquisition of the same freehold. HMRC’s determination related to the acquisition of 9 Earlswood. That is precisely what Mr and

Mrs Brown acquired, either in the real world, or under the notional land transaction. Either way, I consider that it was within the scope of HMRC's determination.

68. Moreover, section 75A is clearly a provision of the type usually called a "deeming provision". The correct approach to such provisions was summarised by Lord Briggs in *Fowler v HMRC* [2020] UKSC 22, [2020] 1 WLR 2227 at [27] (cited in *Fanning v HMRC* [2023] EWCA Civ 263, [2023] 1 WLR 2853). In short, it is necessary to identify, if possible, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes. In the case of SDLT, the deeming provision does not mean that real-world events should be ignored for all purposes: *DV3 RS Ltd Partnership v HMRC* [2013] EWCA Civ 907, [2014] 1 WLR 1136 at [21]; *Fanning v HMRC* at [45].
69. In this case, I consider that the purpose of the notional transaction (and its only purpose) is to calculate the amount of SDLT properly due, in just the same way as the deeming provisions in *Fowler v HMRC* had the limited purpose of adjusting the taxpayer's liability to pay income tax without affecting the jurisdiction in which he would be taxed. I do not consider that the purpose of section 75A is such as to require the real-world acquisition of the Property by Mr and Mrs Brown to be ignored for all purposes. In this case (and no doubt in many others) HMRC is reliant on records at HM Land Registry to begin the process of assessing the proper amount of SDLT due. HM Land Registry will record a change of registered proprietor, but not the particular method by which proprietorship came to be transferred.
70. There is some (albeit slender) support for this approach in the decision of the Supreme Court in *Project Blue Ltd v HMRC* [2018] UKSC 30, [2018] 1 WLR 3169. One of the issues in the case was whether HMRC were entitled to amend an SDLT return in order to assert a different basis for the charge to SDLT. The argument was that since the (assumed) basis of charge was a notional transaction, HMRC had either to make a determination relating to that notional transaction (because no return had been lodged in relation to that transaction) or to make a discovery assessment. The Supreme Court rejected that argument. In the course of his discussion of the point Lord Hodge distinguished between the "sale" on the one hand and the "notional freehold acquisition" on the other. HMRC were entitled to enquire into "the sale" and then to amend the return to reflect the tax due under the notional acquisition. In other words, the focus was on the real-world transaction and not its legal analysis for the purposes of SDLT.
71. In the present case, the determination did no more than to identify the acquisition by Mr and Mrs Brown, the property acquired, and the date on which the acquisition took place. It did not set out any legal analysis; and in my judgment on the basis of this determination HMRC were free to advance any legal analysis which justified the determination. It may be that on different facts HMRC make a determination in prescriptive terms, which will cut down their options. But that will have to wait for a case in which it matters.
72. The UT dealt with this point at [85]:

"Paragraph 25 of Schedule 10 enables HMRC to make a determination of the SDLT payable in the case of a "chargeable

transaction” in respect of which no land transaction return had been given. We agree with Mr Elliott that in this case the “chargeable transaction” was the acquisition by Mr and Mrs Brown of the Property. As we have said, a “chargeable transaction” is a “land transaction” that is not exempt and the definition of a “land transaction” under section 43(1) is the “acquisition of a chargeable interest”. Therefore, in this case in the Determination, HMRC decided that SDLT was payable in respect of Mr and Mrs Brown’s acquisition of the chargeable interest, namely the Property. In our view, there is no requirement to specify whether the acquisition has resulted in SDLT being payable as a result of the application of section 45(3) or by reference to a notional transaction which arises as a result of the operation of section 75A. Whether or not the liability to SDLT arises by reference to an actual transaction or a notional transaction there is still only one transaction, namely the chargeable transaction which is the acquisition of the Property.”

73. I agree.

Result

74. I would dismiss the appeal.

Lord Justice Males:

75. I agree.

Sir Andrew McFarlane, President of the Family Division:

76. I also agree.