Trinity Term
[2018] UKSC 30
On appeal from: [2016] EWCA Civ 485

JUDGMENT

Project Blue Limited (Respondent) *v* Commissioners for Her Majesty's Revenue and Customs (Appellant)

before

Lady Hale, President
Lord Hughes
Lord Hodge
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

13 June 2018

Heard on 28 February and 1 March 2018

Appellant	*Respondent*
Malcolm Gammie QC Hui Ling McCarthy QC (Instructed by HMRC Solicitors Office)	Roger Thomas QC (Instructed by Clifford Chance LLP)

LORD HODGE: (with whom Lady Hale, Lord Hughes and Lord Lloyd-Jones agree)

1. This appeal is concerned with Stamp Duty Land Tax ("SDLT"), which was introduced by the Finance Act 2003 ("the FA 2003") to replace Stamp Duty, a tax on written instruments which had been the subject of many successful tax avoidance schemes. The principal question in the appeal is whether Project Blue Ltd ("PBL") is due to pay SDLT of £50m arising out of its purchase from the Ministry of Defence ("the MoD") of the former Chelsea Barracks in Chelsea Bridge Road, London. Since its enactment, the FA 2003 has been amended on several occasions. This appeal is concerned with that Act as it existed on 31 January 2008.

2. Two issues lie at the heart of the appeal. The first concerns the relationship between section 45 of the FA 2003, which provides what is often called "sub-sale relief" where there is a transfer of rights to a contract for a land transaction which is to be completed by a conveyance, and section 71A of that Act, which creates exemptions for alternative property finance which complies with the prohibition of usury in Shari'a law. The first issue does not arise in relation to transactions after 24 March 2011 because of an amendment to section 45(3) of the FA 2003 which was made by the Finance Act 2011, to which I refer in para 33 below. The second issue concerns the correct interpretation of the anti-avoidance provisions in section 75A of the FA 2003, which was introduced by the Finance Act 2007. If the anti-avoidance provisions do not apply to the transactions, PBL is not liable to pay the SDLT which HMRC claims; if they do apply, there is a dispute over the amount of SDLT which is due and who was or is liable to pay it.

3. PBL purchased the Chelsea Barracks through a sealed bid deadline tender process for the price of £959m and exchanged contracts with the Secretary of State for Defence on 5 April 2007. A 20% deposit was paid on exchange of contracts and the balance of the price was to be paid in four equal instalments. Completion of the purchase was postponed by the contract until 31 January 2008 to allow the MoD to re-house the troops from the barracks. The principal shareholder in PBL was Qatari Diar Real Estate Investment Company ("QD"), which was owned by the Qatari Investment Authority, a sovereign wealth fund owned by the Qatari government. QD provided the funding for the initial deposit but PBL required to obtain finance for the purchase of the barracks from Qatari Bank Masraf al Rayan ("MAR"), a Qatari financial institution which provided a portfolio of Shari'a-compliant products, and which syndicated the finance for the purchase.

4. Financial institutions, which seek to comply with the Islamic prohibition on usury, have adopted structures for financing deals which do not involve lending in return for interest and the taking of security for the repayment of the borrowed sums and interest by means of a mortgage. One such form of Shari'a -compliant financing, known as Ijara finance, was used to fund the purchase of the barracks. PBL's written case (paras 14 and 15) contains a convenient summary of the paradigm forms of Ijara arrangements, which I quote in full:

> "14. Such transactions are likely to occur in one of two categories of case. In the first, the counterparty wishes to acquire a property from a third party and requires funding to enable it to do so. The financial institution buys the property from the third party, leases it to the counterparty and, at the same time, grants the counterparty an option to acquire the financial institution's interest at a later stage. In the event that the counterparty has some, but insufficient, capital to acquire the property, each party can take an undivided share in the land; and the rent charged by the financial institution takes account of its reduced interest.
>
> 15. In the second case, the counterparty already owns the property but wishes to obtain funds to use for another purpose. In this case the Ijara involves the counterparty selling his own interest in the property to the financial institution and taking a lease back, together with an option to repurchase."

HMRC in para 44 of their written case described the two situations in which Ijara finance was used in essentially similar terms and stated (as is clearly the case) that section 71A was drafted with those situations in mind.

5. The funding of the purchase of the barracks was an adaptation of the first of the two categories. I set out the transactions in the following steps so as to assist understanding of the arguments which follow in relation to the tax consequences of the transaction:

(1) 5 April 2007: PBL and the MoD entered into a contract to purchase the barracks.

(2) 29 January 2008: PBL contracted to sub-sell the freehold to MAR.

(3) 29 January 2008: MAR agreed to lease the barracks back to PBL.

(4) 31 January 2008: On completion, (a) MAR and PBL entered into call and put options respectively entitling or requiring PBL to repurchase the freehold in the barracks; (b) the MoD conveyed the freehold in the barracks to PBL; (c) PBL conveyed the freehold in the barracks to MAR, and (d) immediately after that, MAR leased the barracks back to PBL.

On 1 February 2008 PBL granted a 999-year lease to its subsidiary, Project Blue Developments Ltd ("PBDL") with call and put options for the purchase of the freehold, but that transaction is not relevant to this appeal. As will be seen, it is not disputed that stages 4(b) and (c) brought into play the sub-sale relief provided by section 45 of the FA 2003, while it is contested whether stage 4(c) engaged the exemption for alternative property finance which section 71A(2) of the Act provides. This is the first of the two principal issues mentioned in para 2 above.

6. On 1 February 2008, Clifford Chance LLP submitted a notification "Disclosure of Tax Avoidance Scheme" in accordance with the Stamp Duty Land Tax Avoidance (Prescribed Descriptions of Arrangements) Regulations (SI 2005/1868). The notification stated:

> "No SDLT is payable by [PBL] on the sale from [the MoD] to [PBL] by virtue of sub-sale relief under section 45(3) Finance Act 2003. No SDLT is payable by [MAR] on the sale of the property from [PBL] to [MAR] by virtue of alternative property finance relief under section 71A(2) Finance Act 2003."

Such a notification is not an acknowledgement that the arrangements were entered into for the purpose of tax avoidance. Arrangements are notifiable under section 306(1) of the Finance Act 2004 if they enable, or might be expected to enable, any person to obtain a tax advantage and are such that one of the main benefits that might be expected to arise from the arrangements is the obtaining of that advantage. The focus of the statutory provision is on the consequences of the arrangements and not on the intention of the parties who enter into them.

7. On 22 February 2008 several land transaction returns were filed in relation to these transactions. Three are relevant to this appeal. First, a return lodged on behalf of PBL, which related to the completion on 31 January 2008 of the contract of 5 April 2007 between the MoD and PBL, claimed that there was no liability to SDLT because of the sub-sale relief in section 45(3) of the FA 2003. Secondly, a return lodged on behalf of MAR related to the completion on 31 January 2008 of the sale agreement between PBL and MAR dated 29 January 2008. The consideration was stated to be £1.25 billion, which was the Sterling equivalent of US$2,467,875,000 which was specified in the sale agreement. In the return MAR

claimed "alternative property finance relief" under section 71A of the FA 2003. Thirdly, a return was filed relating to the grant by MAR of a lease to PBL on 31 January 2008. Again, "alternative property finance relief" was claimed under section 71A. The consequence was that the taxpayers claimed that nobody incurred a liability to SDLT as a result of the completion of those transactions.

8. HMRC opened an inquiry into the SDLT returns which had been submitted in relation to these transactions. In relation to the first return, which was lodged on behalf of PBL, HMRC concluded the inquiry by a closure notice contained in a letter dated 13 July 2011, which amended that return by adjusting the amount of SDLT due from £0 to £38.36m. This sum is the SDLT which would be due on the completion of the sale by the MoD to PBL for the consideration of £959m if that were a chargeable transaction. PBL now argues that HMRC were not empowered to amend that return as they did. I discuss this challenge under the heading "The 'wrong return' challenge" in paras 81-84 below. HMRC did not require any amendment to the other land transaction returns as a result of their inquiry. But when PBL appealed the amendment of the return, HMRC successfully applied to amend its case to increase the amount of SDLT due from £38.36m to £50m. This was because the total consideration which MAR agreed to provide to PBL was £1.25 billion, and, at first sight at least, £50m would be the tax due on that transaction. I discuss those figures in greater detail below.

9. The sale contract which PBL and MAR entered into on 29 January 2008 involved payments by instalments which were subject to contingencies (clause 4.1 and 4.2). The fourth tranche of consideration, which was US$378,670,740 payable on 31 January 2011, was never paid because the arrangement was terminated on 1 March 2010. This is relevant to the dispute about the actual consideration and PBL's human rights challenge which I consider in paras 57-80 below.

The Finance Act 2003

10. Part 4 of the FA 2003 introduced SDLT into British tax law. It is a tax on land transactions (section 42(1)). A "land transaction" is "any acquisition of a chargeable interest" (section 43(1)); and a "chargeable interest" is defined (in section 48(1)) as including "an estate, interest, right or power in or over land in the United Kingdom" other than an exempt interest. A "security interest", which is "an interest or right (other than a rentcharge) held for the purpose of securing the payment of money or the performance of any other obligation" (section 48(3)), is an exempt interest (section 48(2)). Thus, in relation to land purchases and conventional property funding arrangements in the United Kingdom, the tax is levied on the acquisition of chargeable interests, such as freehold or leasehold interests in land, while security interests, including those which secure the financing of such acquisitions, are exempted.

11. When persons enter into a contract for a land transaction under which the transaction is to be completed by a conveyance, section 44(2) provides that they are not regarded as entering into a land transaction by reason of entering into the contract. Thus steps (1) and (2) in para 5 above would not of themselves give rise to any liability to SDLT. Instead, 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, whose effective date is the date of completion (section 44(3)). If the contract is not completed but is substantially performed (for example, if the purchaser takes possession of the subject matter of the contract or a substantial amount of the consideration is paid) the contract is treated as if it were the transaction provided for in the contract and its effective date is when the contract is substantially performed (section 44(4) and (5)).

12. It is common ground in this appeal that section 45, which creates sub-sale relief by modifying the operation of section 44, applies in relation to the completion of the two contracts for the sale of the barracks (steps (1) and (2) in para 5 above) to prevent a charge to tax on the completion of the contract between the MoD and PBL at step 4(b) in para 5 above. Section 45 (as amended by section 49 of and paragraph 2 of Schedule 10 to the Finance (No 2) Act 2005) provides:

> "(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 except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of subsection (3) of section 73 (alternative property finance: land sold to financial institution and re-sold to individual)."

The consequence of the tailpiece of section 45(3) was that the completion of the contract between the MoD and PBL for the purchase of the barracks was disregarded.

Section 71A

13. The FA 2003 as originally enacted contained an exemption for Ijara financing in section 72. Section 71A was added in April 2005 by section 94 of and paragraph 2 of Schedule 8 to the Finance Act 2005 and applies in place of section 72, except in relation to land in Scotland, to which sections 72 and 72A apply. Section 71A(1) sets out the scope of the section; it provides:

> "(1) This section applies where arrangements are entered into between a person and a financial institution under which -
>
> > (a) the institution purchases a major interest in land or an undivided share of a major interest in land ('the first transaction'),
> >
> > (b) where the interest purchased is an undivided share, the major interest is held on trust for the institution and the person as beneficial tenants in common,
> >
> > (c) the institution (or the person holding the land on trust as mentioned in paragraph (b)) grants to the person out of the major interest a lease (if the major interest is freehold) or a sub-lease (if the major interest is leasehold) ('the second transaction'), and

> (d) the institution and the person enter into an agreement under which the person has a right to require the institution or its successor in title to transfer to the person (in one transaction or a series of transactions) the whole interest purchased by the institution under the first transaction."

14. The section therefore has the scope to cover the contracts between PBL and MAR at steps (2), (3) and (4)(a) in para 5 above. The section then spells out the exemptions which it confers on Ijara arrangements as follows. First, subsection (2) exempts the first transaction (the institution's purchase of a major interest in land) if the vendor is the counterparty to the arrangement with the financial institution (or is another financial institution which has provided Ijara finance to that person). It provides:

> "(2) The first transaction is exempt from charge if the vendor is -
>
> (a) the person, or
>
> (b) another financial institution by whom the interest was acquired under arrangements of the kind mentioned in subsection (1) entered into between it and the person."

15. Secondly, subsection (3) exempts from charge the grant of the lease of the subjects to the counterparty by providing:

> "The second transaction is exempt from charge if the provisions of this Part relating to the first transaction are complied with (including the payment of any tax chargeable)."

16. Thirdly, subsections (4), (5) and (7) exempt from charge the re-conveyance by the financial institution of the major interest in land to the counterparty. They provide:

> "(4) Any transfer to the person that results from the exercise of the right mentioned in subsection (1)(d) ('a further transaction') is exempt from charge if -

(a) the provisions of this Part relating to the first and second transactions are complied with, and

(b) at all times between the second transaction and the further transaction -

(i) the interest purchased under the first transaction is held by a financial institution so far as not transferred by a previous further transaction, and

(ii) the lease or sub-lease granted under the second transaction is held by the person.

(5) The agreement mentioned in subsection (1)(d) is not to be treated -

(a) as substantially performed unless and until the whole interest purchased by the institution under the first transaction has been transferred (and accordingly section 44(5) does not apply), or

(b) as a distinct land transaction by virtue of section 46 (options and rights of pre-emption).

…

(7) A further transaction that is exempt from charge by virtue of subsection (4) is not a notifiable transaction unless the transaction involves the transfer to the person of the whole interest purchased by the institution under the first transaction, so far as not transferred by a previous further transaction."

17. Section 71A therefore reflects the two paradigm forms of Ijara finance set out in para 4 above. First, if the financial institution purchases the property from a third party, that transaction is not exempted under subsection (2) and the financial institution pays SDLT on completion or the substantial performance of that contract; but the lease to the party who is being financed and the eventual transfer of the interest by the financial institution to that party on repayment of the financing are

exempt under subsections (3) and (4) respectively. Secondly, if the financial institution purchases the property from the counterparty whom it is financing, subsection (2) applies to exempt the transfer of the major interest in land to the financial institution and subsections (3) and (4) exempt the second transaction (the lease) and the further transaction (the re-transfer of the major interest in land to the counterparty).

18. Because the arrangements for financing the purchase of the barracks involved PBL completing its purchase and its sale of the barracks to MAR on the same day in a connected transaction, PBL, as I have said, claimed sub-sale relief under section 45(3). Because MAR had purchased the barracks from PBL in the context of an Ijara arrangement, it claimed exemption under section 71A(2) for that purchase and a claim was also submitted on behalf of PBL for exemption under section 71A(3) for the lease to PBL.

19. When HMRC amended PBL's return to assert a liability to pay SDLT of £38.36m, PBL appealed to the First-tier Tribunal ("the FTT"). Before the FTT the parties agreed that the combined effect of sections 45(3) and 71A was to exclude any liability to SDLT on the part of PBL or MAR in relation to the transactions unless the anti-avoidance provisions of section 75A applied to the transactions. The arguments before the FTT therefore concentrated on the meaning and application of section 75A, to which I turn later in this judgment. But when the appeal came before the Upper Tribunal (the "UT"), PBL changed its position. It continued to argue that it was not liable for SDLT on its purchase of the barracks from the MoD because of its entitlement to sub-sale relief under section 45(3). But it now argued that MAR was not entitled to exemption on its purchase of the barracks under section 71A(2) (para 14 above) because, on a proper understanding of the related provisions of the FA 2003, PBL was not the "vendor" of the barracks to MAR under that subsection. The tailpiece of section 45(3) (para 12 above) required that the completion of the sale by the MoD to PBL be disregarded and that tax was due on the notional contract created by section 45(3). Giving effect to that disregard and the notional contract meant that the vendor of the barracks was the MoD, and not PBL. The exemption in section 71A(2) therefore did not apply and MAR would have been liable to pay SDLT on the purchase price of £1.25 billion, if HMRC had not failed to so determine or to assess MAR within the six-year time limit since the transaction.

20. This argument did not succeed before the UT (Morgan J and Judge Nowlan). Morgan J, with whom Judge Nowlan agreed in relation to section 71A held, at para 43, that the purpose of the section was "to equate the position of a provider of an alternative form of finance (such as MAR), who acquires a chargeable interest, with the position of a funder who acquires a security interest (which is an exempt interest)". He relied on section 45(5A) which I discuss in para 32 below, in interpreting "the vendor" in para 71A(2) as referring to PBL but also pointed out that his interpretation promoted the purpose of section 71A. If PBL were correct in

its submission, SDLT would be paid on the level of funding provided by the financial institution and not on the price paid by the "borrower" for the land. He acknowledged that his interpretation meant that neither PBL or MAR was liable to pay SDLT in respect of the transactions unless section 75A applied, but considered the legislation to be flawed at the relevant time because the tailpiece of section 45(3) did not contain an exception to the disregard where the sub-sale was exempt from a charge under section 71A.

21. The Court of Appeal (Patten, Lewison and Underhill LJJ) [2018] 1 WLR 368 disagreed with the Upper Tribunal's interpretation of the relationship between section 45(3) and section 71A. Patten LJ began by observing, at para 28, that HMRC's approach by its reliance on section 75A produced "a particularly inapt and harsh result" because PBL would have to pay SDLT on the larger sum which MAR provided to it rather than on the purchase price which it paid to the MoD. Secondly, he held that PBL could not be "the vendor" in section 71A(2) because, as a result of the disregard of the transaction between the MoD and PBL in the tailpiece of section 45(3), the only contract by which MAR acquired the barracks for SDLT purposes was the secondary contract under that subsection. He referred to the Court of Appeal's earlier judgment in *DV3 RS LP v Revenue and Customs Comrs* [2014] 1 WLR 1136 ("*DV3*") in support of his analysis: "vendor" in section 71A(2) must be a reference to the person from whom MAR purchased the barracks; that person could not be PBL as, by virtue of the disregard, it had no chargeable interest so as to be regarded as entering into the secondary contract, which under section 45(3) was a contract for a land transaction. He rejected Mr Gammie's submission on behalf of HMRC that section 71A was not addressing land transactions "in the SDLT world" but was framed to address transactions "in the real world", and also his submission relying on section 45(5A). Thirdly, he considered that the scheme of section 71A was to limit SDLT in all cases to a single charge on the acquisition of the property from the third party vendor, whether the acquirer was the financial institution or its customer. Fourthly, he thought that it was unlikely that Parliament had intended to leave transactions, which fell within both of sections 45(3) and 71A, exempt from any SDLT charge and to have dealt with the problem by the anti-avoidance provisions of section 75A, which was introduced over a year later. The "vendor" under section 71A(2) was therefore the MoD, and not PBL, with the result that that subsection did not exempt MAR from the charge.

22. Lewison LJ added two further points. First, he disagreed with the approach of the Upper Tribunal which equated the position of MAR with a traditional lender and saw the aim of section 71A as being that SDLT was to be paid by purchasers and not financiers. As under an Ijara arrangement the financial institution owned the asset for the duration of the lease, it was not surprising that it should be liable to pay SDLT on the purchase. Secondly, because section 75A did not apply until 20 months after section 71A had taken effect, the result of HMRC's approach was that no SDLT would have been payable on transactions which combined sub-sale relief and the

section 71A exemption in that period. This provided "a very strong context" which made it inappropriate to apply an extended meaning of "vendor" in section 45(5A): para 49.

23. I recognise the difficulty in interpreting the legislation which has been subjected to repeated incremental amendments and additions since 2003, as Parliament has struggled to optimise this new tax. But I have come to the conclusion that the Upper Tribunal was correct in concluding that PBL was "the vendor" under section 71A(2) and therefore that MAR's purchase of the barracks from PBL was exempt from SDLT for the following four reasons.

24. First, it is in my view significant that Parliament has chosen, when describing the alternative property finance transactions to be exempted from charge in section 71A, and also in sections 72, 72A and 73, not to use the language of "land transaction" and "chargeable interest" but to use what Mr Gammie described as the language of "real world" transactions. Parliament also adopted this practice in paragraphs 2-4 of Schedule 3, which exempt specified transactions from charge. Thus in section 71A(1)(a) the first transaction is described as the purchase of "a major interest in land" and in subsection (1)(c) the second transaction is described as the granting of "a lease" out of the major interest. This contrasts with the language of sections 42-45 which are concerned with the statutory constructs of land transactions, contracts for land transactions, and the acquisition and disposal of chargeable interests.

25. As descriptions of "real world" transactions the provisions of section 71A match the paradigm descriptions of Ijara arrangements in para 4 above so that in the first example, when the financial institution purchases the property from a third party and then finances its customer's acquisition by means of a lease and a contract to purchase, the institution pays SDLT on its purchase but not on the financing arrangements which follow, whereas in the second example, where the financial institution purchases the property from its customer, that purchase and the subsequent transactions are exempt. The distinctive treatment of the two examples is achieved by section 71A(2) which exempts "the first transaction" from charge if the vendor is the customer of the financial institution (or a financial institution which has previously provided Ijara finance to that customer). It appears to me that in enacting the section using "real world" terms, Parliament has sought to describe the two paradigms of Ijara finance. In the second example, in which subsection (2) exempts "the first transaction", the customer may have purchased the major interest in land and paid SDLT on that purchase, or he may have received the major interest in land as a gift or through inheritance and therefore have incurred no charge to SDLT. It is not relevant to the application of section 71A(2) to ask whether or not the customer has incurred a liability to pay SDLT before entering into the Ijara arrangement. Subsection (2) requires one only to ask the "real world" question: "who sold the major interest in land to the financial institution?" If the answer to

that question is "the customer", no charge to SDLT would arise. In the present case, if one asks, "who sold the barracks to MAR?", the answer is PBL.

26. Secondly, this approach is consistent with the aim of section 71A, which the UT identified, of seeking to equate Ijara financing with conventional lending in the United Kingdom by taxing the purchaser of the property and exempting the financier. In conventional lending, security interests are exempt in all circumstances (section 48(2)). Section 71A operates as a self-contained statutory regime to achieve this result. As was stated in the Explanatory Notes to the original clauses 72 and 73 of the Finance Bill 2003 the aim was to place the amount of tax due on purchases by means of Islamic financing "on a level footing with the amount due for purchases with 'conventional' mortgage products". Thus in the case where the financial institution purchases from its customer, the whole transaction may be seen as the equivalent of a security transaction. In the case where the financial institution purchases from a third party, that purchase may be seen as a precursor of the equivalent of a security transaction effected by the lease and the conferring on the customer of the right to buy the property from the financial institution.

27. Thirdly, there is nothing within section 71A which suggests that the exemption in subsection (2) will not apply when the sale by the customer to the financial institution is a sub-sale which takes place contemporaneously and in connection with the customer's purchase of the major interest in land. What Parliament appears to have overlooked at the outset is the possibility of the combination of sub-sale relief with the exemption of Ijara arrangements.

28. Fourthly, this interpretation has the benefit (subject to the operation in particular cases of section 75A which I discuss below) that, where the financial institution purchases the property from its customer, SDLT will not be charged on the amount which the financial institution provides its customer, which may in many circumstances be significantly less than the purchase price of the property, for example where the customer has provided a proportion of the purchase price of the land from its own resources. In some cases, as here, the amount which the financial institution contracts to provide may be significantly more than the purchase price of the property which the customer has paid. It is of note that the interpretation of section 71A(2) which the Court of Appeal has favoured in the context of a sub-sale has the effect of imposing a tax charge by reference to the amount which the financial institution provides the customer. This would not achieve the level footing which the section was designed to achieve.

29. In *DV3* the Court of Appeal was addressing relief under paragraph 10 of Schedule 15 to the FA 2003 which was available when a person transfers a chargeable interest to a partnership of which he is a partner. In that case the partner (A) purchased a lease from an insurance company (C) and transferred the lease to a

newly created partnership (B) of which A and four others were the partners. Both contracts were completed on the same day. A claimed sub-sale relief under section 45(3) and also relief for B (the partnership) under paragraph 10 of Schedule 15. The claim for the Schedule 15 relief failed because the section 45(3) disregard prevented A from acquiring a chargeable interest from C, and paragraph 10 of Schedule 15 applies only if a partner transfers a chargeable interest to a partnership. Lewison LJ, when discussing the definition of "land transaction" in section 43(1), stated, at para 23:

> "the fact that B acquires a chargeable interest as the result of an instrument giving effect to a transaction between him and A does not necessarily entail the proposition that the interest in A's hands was itself a chargeable interest. If there is no land transaction, there cannot have been the acquisition of a chargeable interest."

He continued at para 30:

> "Paragraph 10 of Schedule 15 to the 2003 Act is not so much concerned with the acquisition of a chargeable interest by a partnership as the transfer by a partner of a chargeable interest. It looks at a transaction from the perspective of the transferor. … It seems to me to be clear that a partner cannot transfer a chargeable interest to a partnership unless he has a chargeable interest to transfer."

30. HMRC accept as correct the Court of Appeal's analysis in *DV3* but argue that the case casts no light on the correct interpretation of section 71A(2) because it is irrelevant to the operation of that subsection whether the completion of the sale from the MoD to PBL was a "land transaction" for the purpose of SDLT with the result that PBL acquired a chargeable interest. Equally, it is irrelevant to the interpretation of section 71A(2) whether or not the transaction between the customer and the financial institution is a land transaction. When the FA 2003 spoke of "the vendor" in section 71A and in the equivalent subsections in the other sections exempting alternative property finance, it was referring to the vendor in the "real world" transaction of the sale of the major interest in land. It was not concerned with whether or not the "real world" transaction was a "land transaction" for the purposes of SDLT. Accordingly, HMRC submit that section 43(4), which defines "vendor" *in relation to a land transaction* in Part 4 of the FA 2003 as "the person disposing of the subject-matter of the transaction" is not in point. For the reason set out in paras 24 and 25 above, I agree. It follows that the disregard in the tailpiece of section 45(3) has no bearing on the operation of section 71A(2).

31. A consideration which influenced the Court of Appeal in reaching its view on section 71A(2) was that Parliament could not have intended to leave transactions which involved a sub-sale financed by an Ijara arrangement (and thus fell within both section 45(3) and section 71A) free of charge for over one year before it introduced the anti-avoidance provision of section 75A. I see the force of this point; it is without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results. But SDLT was a new tax created by the FA 2003 and, as I have said, required repeated amendments to make it effective. It is not surprising that lacunas may have existed in the early years of a new tax.

32. In the early years of the tax, Parliament enacted amendments to close identified lacunas caused by the combination of sub-sale relief and exemptions. Thus section 45(5A) was inserted into the FA 2003 by section 296 of and paragraph 5 of Schedule 39 to the Finance Act 2004. It provided:

> "In relation to a land transaction treated as taking place by virtue of subsection (3) -
>
> (a) references in Schedule 7 (group relief) to the vendor shall be read as references to the vendor under the original contract;
>
> (b) other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the transferor."

This provision would not have needed to define "the vendor" for the purpose of group relief in para (a) as it did if, consistently with the Court of Appeal's reasoning, the disregard in the tailpiece to section 45(3) operated already to make "the vendor" a reference to the vendor under the original contract. Similarly, the insertion by the Finance (No 2) Act 2005 into the tailpiece of section 45(3) of the words of exception (ie "except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of subsection (3) of section 73 (alternative property finance: land sold to financial institution and re-sold to individual)") would not have been required to impose a charge to SDLT. If the Court of Appeal were correct in holding that the "vendor" in section 71A(2) had to have a chargeable interest and that the tailpiece of section 45(3) prevented it from having such an interest, sections 72(2), 72A(2) and 73(2), which are similarly worded, would operate in the same way in the context of a sub-sale so that the "vendor" in each case could not be the customer.

33. The parties have not explained to the court what prompted each of the various amendments, but Parliament may have been responding to particular schemes which had the effect of avoiding SDLT. HMRC explained in their written case that section 75A, which the Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006 (SI 2006/3237) and section 71 of the Finance Act 2007 inserted into the FA 2003, was a response to the formulation of tax avoidance schemes which combined reliefs (including sub-sale relief) and exemptions in ways which Parliament had not intended. As will be clear when I turn to section 75A, it has a very broad ambit. The problem of tax avoidance by combining sub-sale relief and the exemptions for the various forms alternative property finance was capable of a more focussed resolution. While subsequent amendments are not a legitimate tool in ascertaining prior parliamentary intention, it is relevant to note that the problem of the combination of the sub-sale relief and those exemptions was eventually resolved by a simple expedient. In section 82 of and paragraph 2 of Schedule 21 to the Finance Act 2011 Parliament amended the exception in the tailpiece of section 45(3) to read: "except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of *any of sections 71A to 73 (which relate to alternative property finance)*" (new wording emphasised). This amendment, like those referred to in para 32, would not have been needed to create a charge to SDLT if the interpretation which the Court of Appeal favoured were correct.

34. The courts adopt a purposive approach to the interpretation of taxing statutes following the guidance of the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] 1 AC 684. In accordance with that guidance, summarised by Lord Nicholls of Birkenhead at para 32, the court asks itself two questions. First, it must determine the nature of the transaction to which a statutory provision is intended to apply; and secondly it must decide whether the actual transaction answers to the statutory description. If I am correct about the self-contained nature of the provisions of section 71A, the answer to the first question is that the exemption in section 71A(2) applies to the "first transaction" of the Ijara arrangement in section 71A(1) where the customer sells a major interest in land to the financial institution. The question whether PBL's sale of the barracks to MAR answers that description is answered in the affirmative. A purposive construction will not always operate in favour of HMRC and against the taxpayer as *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 shows. Similarly, if there are lacunas in a statutory regime which enable tax avoidance, a purposive interpretation may not always remove them as the Court of Appeal's judgment in *Mayes v Revenue and Customs Comrs* [2011] STC 1269 shows.

35. I therefore conclude that, but for section 75A, the combination of the operation of sub-sale relief under section 45(2) and (3) and the exemption under section 71A(2) relieved the sale by the MoD to PBL and exempted the sale by PBL to MAR from a charge to SDLT.

36. An argument against this approach, which has attracted Lord Briggs, is that section 71A(2) must be construed as exempting a transaction which would otherwise be a chargeable transaction under Part 4. The only transaction which is so chargeable, so the argument goes, is the completion of the notional secondary contract which section 45(3) creates, and section 45(5A)(b) gives instructions on the identification of the vendor in the notional land transaction. Because the identification of "the vendor" in section 45(5A)(b) depends on the context in which the word is used and that context would give rise to the avoidance of tax if "vendor" referred to the transferee because the combination of sub-sale relief and section 71A(2) would exempt both transactions, it is argued that "the vendor" in section 71A(2) must refer to the original vendor, ie the MoD. I do not agree. In relation to the first point, the statement that a transaction is exempt from charge, such as that in section 71A(2) referring to "the first transaction", is an unqualified statement that a transaction of that description is free from a liability to pay the tax. That exclusion of liability is not removed if, for some extraneous reason such as the operation of sub-sale relief under section 45, the transaction in question would not have imposed a liability to SDLT: viz the first of my four reasons (paras 24 and 25 above). If that is correct, the second argument does not arise because operation of the exemption does not depend on section 45(5A)(b).

37. In any event, if section 45(5A)(b) were relevant, (a) the context of the use of the word "vendor" was in relation to "real world" transactions and (b) the history of the amendment of the FA 2003 in the years before the transactions were carried out on 31 January 2008 suggests that HMRC were struggling to respond to schemes which exploited lacunas in the legislation. In that context the existence of a loophole in the tax legislation would not militate against the interpretation which I favour. This is not to say that a contextual construction of a statutory provision may not have regard to the consequences of a particular interpretation and lead one to prefer another interpretation, especially when the former interpretation would have absurd or unreasonable results. It is simply to say that in the early years of SDLT Parliament created a patchwork of provisions, which, for a while, allowed a transaction, which combined sub-sale relief and Ijara arrangements, what Lord Briggs correctly calls "an unintended tax holiday".

38. I recognise that the exclusion by the Finance (No 2) Act 2005 of the completion or substantial performance of the first contract from the section 45(3) disregard when the secondary contract would give rise to an exempt transaction under section 73(3) suggests that the draftsman in 2005 sought to impose a charge on the first transaction under section 73 while not addressing a similar problem in section 71A. But that indication of intention at that time is not sufficient in my view to outweigh the factors which have persuaded me to regard section 71A, which had been introduced earlier in 2005, as a self-contained statutory regime which confers exemption on "real world" transactions. Further, the different treatment in section 45(3) of the similarly-worded exemptions in sections 71A and 73 at the time of the

relevant transactions has the result, on Lord Briggs' approach which is focussed on avoiding tax loss, that "vendor" is interpreted differently under sections 71A(2) and 73(2). While section 45(5A)(b) may allow such an interpretation, I find HMRC's explanation of a patchwork of provisions and a lacuna a more persuasive explanation of the relevant provisions as they were then.

39. Because, as a result of the combination of sections 45 and 71A(2), there is no SDLT charge on the sales between the MoD and PBL and between PBL and MAR, it is necessary to consider the correct interpretation and application of section 75A, to which I now turn.

Section 75A

(i) Whether and if so how it applies

40. Section 75A is headed "Anti-avoidance" and provides:

> "(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;

…

(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."

41. The breadth of section 75A was implicitly acknowledged by Parliament which in section 75C(11) and (12) empowered the Treasury to make an order, including an order with retrospective effect, which provides that section 75A is not to apply in specified circumstances.

42. PBL's first argument, that section 75A could not apply because it had not been established that the parties entered into the transactions for the purpose of tax avoidance, failed before the FTT, the UT and the Court of Appeal. In my view the tribunals and the Court of Appeal reached the correct conclusion. The heading of the section, "Anti-avoidance", is the only indication in the section which could support PBL's contention. The heading is relevant to assist an understanding as to the mischief which the provision addresses, but it says nothing as to the motives of the parties to the scheme transactions. There is nothing in the body of the section which expressly or inferentially refers to motivation. The provision was enacted to counter tax avoidance which resulted from the use of a number of transactions to

effect the disposal and acquisition of a chargeable interest. It is sufficient for the operation of the section that tax avoidance, in the sense of a reduced liability or no liability to SDLT, resulted from the series of transactions which the parties put in place, whatever their motive for transacting in that manner. This is clear from subsection (1)(c) which compares the amount of SDLT payable in respect of the actual transactions against what would be payable under the notional land transaction in section 75A(4), by which P acquired V's chargeable interest on its disposal by V.

43. Section 75A does not identify who is V and who is P in relation to the transactions to which the section applies. As there is a number of transactions, it is possible that more than one person may be V and more than one person may be P. But Parliament has not conferred a discretion on HMRC to select whom they wish to treat as V or P. HMRC do not contend otherwise. In *Vestey v Inland Revenue Comrs (Nos 1 and 2)* [1980] AC 1170, in which the Revenue contended that they had a discretion to select whom among a class of beneficiaries it should assess as liable to tax, Lord Wilberforce identified the following principles as fundamental objections to that contention, at p 1172:

> "Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.
>
> A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle."

It is necessary therefore for the courts to analyse the words of a broadly-worded anti-avoidance provision to identify the persons on whom Parliament has imposed this charge to tax.

44. The words of section 75A by themselves do not disclose who is V and who is P in a particular case. But the mischief which the provision addresses and the context of the provision within Part 4 of the FA 2003 provide the answer. The court adopts the purposive approach which the House of Lords sanctioned in *Barclays Mercantile Business Finance Ltd*, to which I have referred in para 34 above. The explanatory notes on clause 70 of the Finance Bill 2007 explained that the provision was introduced to counter avoidance schemes which have been developed to avoid payment of SDLT. It appears to be drafted in deliberately broad terms to catch a wide range of arrangements which result in tax loss. The examples of scheme

transactions which are set out in subsection (3), although merely examples, give an indication of some at least of the targets of the provision. The task is to identify where the tax loss has occurred as a result of the adoption of the scheme transactions in relation to the disposal and acquisition of the relevant interest or interests in land. This in turn involves identifying the person on whom the tax charge would have fallen if there had not been the scheme transactions to which subsection (1)(b) refers and which exploited a loophole in the statutory provisions.

45. It is clear from (i) subsection (1)(a), which refers to P acquiring either V's chargeable interest "or a chargeable interest deriving from it", and (ii) subsection (3)(a), which refers to "the acquisition by P of a lease deriving from a freehold owned *or formerly owned* by V" (emphasis added), that the section may operate not only when P acquires the chargeable interest directly from V but also when P acquires a chargeable interest, such as a lease, which is derived from a chargeable interest which V formerly owned. Thus the section can cover a series of transactions by which V disposes of its chargeable interest which comes to be acquired by another person and P ultimately acquires a chargeable interest derived from it from that other person.

46. Turning to the application of the section to the transactions in this case, it is agreed by the parties that V in subsection (1)(a) is the MoD; its chargeable interest was the freehold in the Chelsea Barracks. I agree. In the course of the scheme transactions, PBL did not acquire a chargeable interest, the freehold, when the contract between the MoD and it was completed on 31 January 2008 because the transaction fell to be disregarded under section 45(3); on the same day MAR acquired a chargeable interest, again the freehold, when its contract with PBL was implemented as a result of the completion of the notional transaction in section 45(3); and, on the same day, PBL acquired a chargeable interest, the lease, from MAR. The put and call options were designed to enable PBL to re-acquire the freehold in the barracks, a result which was the ultimate aim of the series of transactions summarised in para 5 above. But those options did not result in the acquisition of a chargeable interest on 31 January 2008. They were nevertheless a "scheme transaction" within subsection (1)(b) because they were involved in connection with the disposal and acquisition of a chargeable interest and subsection (2)(d) includes within the definition of "transaction" under subsection (1) a transaction which takes place after P acquires the chargeable interest. They are part of the context in which the scheme transactions, which led to P's acquisition of a chargeable interest on 31 January 2008, fall to be analysed as they were the final stage of the transactions by which MAR was to finance PBL's acquisition of the freehold in the barracks.

47. If the court were to confine its attention to subsection (1)(a) alone, either MAR or PBL could be P, the former because it acquired a chargeable interest on its acquisition of the freehold in the barracks and the latter because it acquired the lease

of the barracks from MAR. But the court cannot so confine its attention. It must go on to analyse how the scheme transactions gave rise to the loss of tax.

48. In the real world the nature of the transaction is clear: PBL acquired the barracks with the benefit of finance from MAR. The sub-sale to MAR and the lease back to PBL were transactions "involved in connection with" the disposal by MoD of its chargeable interest, the freehold in the barracks, and the acquisition by PBL of its chargeable interest, the leasehold interest. The loophole which has enabled the avoidance of tax is the combination of sub-sale relief under section 45(3) with the exemption conferred on Ijara financing when the customer of the financial institution sells its freehold interest in land to the institution and then leases back the land. The simple means of removing the loophole, which Parliament eventually identified in 2011, was to exclude from the disregard in the tailpiece of section 45(3) a case where the secondary contract was exempt because of sections 71A to 73. Thus it was PBL which obtained the benefit of the avoidance of tax in relation to the completion of its contract with MoD.

49. I recognise that the method which Parliament subsequently chose to remove the tax loss cannot be decisive. There might have been other ways of removing the tax loss. For example, it might have been possible to amend section 71A(2) to remove the exemption of the sale transaction between the customer and the financial institution if the vendor had benefited from the section 45(3) disregard and thereby impose the burden on the financial institution. But, as Judge Nowlan stated in his impressive judgment (para 137), it is appropriate to have regard to the overall structure of SDLT which seeks to impose the tax on purchasers and not financiers. The amendment of section 45(3) rather than section 71A(2) had the advantage of preserving this structure by keeping intact the exemption of the two paradigms of Ijara financing to which I referred in para 4 above. If the opportunity for tax avoidance were removed by amending section 71A(2), the consequence would be that SDLT would be paid on the price which the financial institution paid its customer in the context of the Ijara financing which, as I have said, might differ significantly from the purchase price of the major interest in land. Thus I conclude, like Judge Nowlan, that the error obviously lay in the failure to disapply the section 45(3) disregard, an error which benefited PBL.

50. Taking a purposive approach to the interpretation of section 75A, therefore, I conclude that PBL is P; and, because the completion of the contract between the MoD and PBL is disregarded under section 45(3), the chargeable interest which PBL acquires in section 75A(1) is the lease which it received from MAR.

51. The parties advanced two alternative approaches to the identification of P, which I comment on briefly to explain why I cannot accept either approach.

52. First, PBL submits that the court should adopt a sequential approach and identify as P the first person who acquires a chargeable interest. As the completion of the MoD-PBL contract is disregarded under section 45(3), MAR is that person. But there is no justification in the wording of section 75A for the adoption of a sequential approach, when applying the section to the transactions which in fact took place, which stops the search at the first person to acquire a chargeable interest. One would thereby remove from consideration the leaseback and the grant of the options which were part of the contractual scheme which the section is designed to address. That approach appears to me to be inconsistent with the purpose of section 75A, which is to prevent a tax loss which otherwise would occur because of the totality of the connected transactions which have taken place in the real world.

53. Secondly, HMRC submit that MAR could not be P because section 75A(7) disapplies section 75A if subsection (1)(c) is satisfied only by reason of sections 71A to 73. HMRC argues that, *from MAR's perspective*, the only reason why MAR did not incur liability to SDLT on its acquisition of the freehold interest in the barracks from PBL was because of the exemption in section 71A. That may be so; but it is irrelevant. Subsection (1)(c) does not look at the question from the perspective of a party to one of the transactions. It sets up a comparison between the sum of SDLT payable on all of the connected transactions and that payable on the notional transaction. Subsection (7) would disapply section 75A in relation to the transactions in para 5 above only if the section 71A exemption were the sole reason why the amounts of SDLT payable on those transactions is less than the amount payable on the notional transaction. The first of those transactions was the completion of the MoD-PBL contract and the reason why the sum payable on that transaction was £nil was because of the section 45(3) disregard. Thus subsection (7) would not disapply section 75A.

54. PBL advanced a refinement of this approach in its written case, namely that if one adds up all of the SDLT which would have been charged if there had been no sub-sale relief and no exemption for the Ijara finance, it is only the section 71A exemption which takes the tax due on the scheme transactions below that due on the notional transaction in the subsection (1)(c) balance. Subject to its challenge on the quantum of the charge on the notional transaction, which I discuss below, PBL presents the sums payable on the four transactions in para 5 above, if there were no sub-sale relief and no section 71A exemption, as follows:

(i) £38.36m in respect of the MoD-PBL transfer;

(ii) £50m in respect of the PBL-MAR transfer;

(iii) £16.41m in respect of the lease granted by MAR to PBL; and

(iv) £0 for the option to purchase,

A total of £104.77m

If £50m is payable for the notional transaction, PBL argues that it is only the section 71A exemption (£50m plus £16.41m) which takes the sums payable in respect of those transactions below the sum payable on the notional transaction (ie £104.77m - £66.41m = £38.36m). I do not accept this approach. I consider that the purpose of subsection (7)(a) is to exclude the application of section 75A where the *only* cause of the tax loss which the section counters is the exemptions available under sections 71A to 73. Those alternative property finance provisions involve a series of transactions which otherwise might themselves be "scheme transactions" under section 75A(1)(b) and it is clearly not the purpose of the section to strike at transactions which go no further than to achieve the intended exemption of alternative property finance. Where, as here, the combined effect of section 45(3) and section 71A is to diminish the SDLT payable below that payable on the notional transaction, section 75A must take effect.

55. I conclude (i) that PBL is P under section 75A(1)(a), (ii) that the requirements of subsection (1)(b) also are met because the scheme transactions are those listed in para 5(4) above, and (iii) addressing the first side of the balance which subsection (1)(c) mandates, that the sum of SDLT payable in respect of the scheme transactions is £nil.

56. It is then necessary to consider the other side of the subsection (1)(c) balance. It will be recalled that subsection (4) requires that the scheme transactions which are land transactions be disregarded and establishes in their place a notional transaction by which P acquires V's chargeable interest on its disposal by V. That notional transaction involves PBL acquiring MoD's freehold interest in the barracks. Under subsection (6) the effective date of that notional transaction is 31 January 2008. I turn then to the chargeable consideration on this notional transaction.

ii) The actual consideration

57. Subsection (5) provides, so far as relevant, that the chargeable consideration on the notional transaction is the largest amount (or aggregate amount) given by any one person for the scheme transactions. HMRC assert that that sum is the £1.25 billion which was the purchase price which MAR contracted to pay to PBL for the purchase of the freehold in the barracks. SDLT, which is chargeable at 4% on that figure, results in a liability of £50m.

58. PBL contests this. It points out that the Ijara arrangement was brought to an end on 1 March 2010, at a time when the fourth tranche of the consideration under the PBL-MAR sale agreement (US$378,670,740) had not been paid. Before the FTT, PBL argued that MAR had therefore given consideration of only £970m and not the higher figure of £1.25 billion. PBL now asserts that the sterling equivalent of the amount which it had drawn down was approximately £847m, because paragraph 9 of Schedule 4 to the FA 2003 requires the sterling equivalent to be calculated at the effective date of the transaction (ie 31 January 2008). The higher figure of £970m was, PBL asserts, based on an erroneous calculation of the sterling equivalent of each of the US$ draw downs on its own draw down date. If the consideration which MAR actually paid to PBL for the conveyance to it of the freehold in the barracks was only £847m, the largest amount given by one person for the scheme transactions was the £959m paid by PBL to the MoD.

59. In my view it is not necessary for this court to determine what is the correct sterling equivalent of the sums which MAR actually paid to PBL as I am persuaded, for the reasons set out below, that HMRC are correct that the consideration for MAR's purchase of the barracks from PBL was £1.25 billion, but that PBL may claim a refund for the part of that consideration which was never paid. Mr Gammie does not dispute that it was open to PBL to make that claim. PBL asserts that it made that claim after the FTT handed down its decision.

60. The starting point is paragraph 1(1) of Schedule 4 to the FA 2003 which defines the "chargeable consideration" in these terms:

> "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."

This provision might appear, by itself, to support PBL's case. But section 51 addresses contingent consideration. It provides so far as relevant:

> "(1) Where the whole or part of the chargeable consideration for a transaction is contingent, the amount or value of the consideration shall be determined for the purposes of this Part on the assumption that the outcome of the contingency will be such that the consideration is payable or, as the case may be, does not cease to be payable. …

(4) This section has effect subject to -

section 80 (adjustment where contingency ceases or consideration is ascertained) …”

61. Section 80, which provides for the adjustment of a return where a contingency ceases or the consideration is ascertained, provides so far as relevant (as amended by sections 299 and 326 of and Schedule 42 to the Finance Act 2004):

“(1) Where section 51 (contingent, uncertain or unascertained consideration) applies in relation to a transaction and -

(a) in the case of contingent consideration, the contingency occurs or it becomes clear that it will not occur, or

(b) in the case of uncertain or unascertained consideration, an amount relevant to the calculation of the consideration, or any instalment of consideration, becomes ascertained,

the following provisions have effect to require or permit reconsideration of how this Part applies to the transaction (and to any transaction in relation to which it is a linked transaction).

(2) If the effect of the new information is that a transaction becomes notifiable, or that additional tax is payable in respect of a transaction or that tax is payable where none was payable before -

(a) the purchaser *must* make a return to [HMRC] within 30 days. …

(4) If the effect of the new information is that less tax is payable in respect of a transaction than has already been paid -

(a) the purchaser *may*, within the period allowed for amendment of the land transaction return, amend the return accordingly;

(b) after the end of that period he *may* (if the land transaction return is not so amended) make a claim to [HMRC] for repayment of the amount overpaid."

(Emphasis added in sections (2)(a) and 4(a) & (b))

62. PBL submits that because section 51 is subject to section 80 and section 80 requires reconsideration of the manner in which the SDLT code applies, it was incumbent upon HMRC or the courts to amend the land transaction return to reflect the actual chargeable consideration and thus the SDLT payable. On that basis PBL asserts that the FTT erred in allowing HMRC to amend their statement of case to claim that the amount of SDLT which was payable was £50m. But this is to mis-read section 80. Subsection (1) speaks of the following provisions having effect to "require or permit" reconsideration. The use of the disjunctive conjunction is significant. Subsection (2) *requires* the purchaser to make a return where tax has been underpaid; but subsection (4), which applies where tax is overpaid, *permits* the taxpayer to amend the return or to claim the repayment. This statutory asymmetry has the effect that section 51 operates to tax the contingent consideration and, under section 80, the taxpayer has to take the initiative to obtain repayment if new information shows that less tax is payable than has been paid.

63. There is no scope for the application of the *Bwllfla* principle, that where facts are available they are to be preferred to prophecies (*Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426), where Parliament has laid down the process by which the correct amount of SDLT which is payable is ascertained.

64. I conclude therefore that, subject to the human rights challenge, HMRC are correct in their assertion that the chargeable consideration for the notional transaction (section 75A(4) and (5)) is £1.25 billion and the SDLT due thereon is £50m. HMRC's calculation of that sum as the SDLT due is however subject to the right to claim under section 80. PBL recorded in its written case (footnote 134) that it made such a claim shortly after the decision of the FTT and that HMRC opened an inquiry into that claim, which has been left in abeyance pending the outcome of this appeal. As HMRC has not addressed this matter, I need say no more.

(iii) Section 75B and the human rights challenge

65. In the UT Morgan J interpreted section 75B, to which I will turn, as enabling the tribunal to determine that the chargeable consideration on the notional transaction under section 75A was the £959m which PBL had paid the MoD for the freehold of the barracks and not the £1.25 billion which MAR had contracted to pay to PBL. PBL accepts that "on a black-letter reading" of section 75B, where the financial institution provides more finance than the price which the customer pays for the land, the section 75A charge on the notional transaction will take account of the whole of the amount payable for the chargeable interest which the financial institution acquires. But it asserts that the manner in which section 75B is drafted indirectly discriminates against those of Islamic faith who may be expected to adopt Shari'a financing techniques. Under conventional mortgage financing, SDLT would have been payable on the consideration for PBL's acquisition of the freehold in the barracks from the MoD (£959m) and the security transaction would have been exempt, notwithstanding that the financial institution had provided additional finance. By contrast, if Shari'a compliant finance is obtained, the additional sums provided by the financial institution would be subjected to the SDLT charge.

66. PBL argues that the transactions fall within the ambit of article 9 of the European Convention on Human Rights ("ECHR") (in particular the freedom to manifest one's religion) and of Article 1 of Protocol 1 ("A1P1") (the entitlement to the peaceful enjoyment of one's property and the right not to be deprived of one's possessions except in the public interest). Article 14 of the ECHR requires public authorities to secure the enjoyment of such rights and freedoms without discrimination on a ground such as religion. PBL submits that section 3(1) of the Human Rights Act 1998 requires the court to interpret section 75B in a manner which is compatible with article 14 read with article 9 and A1P1, and so to eliminate discrimination against those of the Islamic faith.

67. Section 75B provides (so far as relevant):

> "(1) In calculating the chargeable consideration on the notional transaction for the purposes of section 75A(5), consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest from V to P.
>
> (2) A transaction is not incidental to the transfer of the chargeable interest from V to P -

(a) if or in so far as it forms part of a process, or series of transactions, by which the transfer is effected, … or

(c) if it is of a kind specified in section 75A(3).

(3) A transaction may, in particular, be incidental if or in so far as it is undertaken only for a purpose relating to -

(a) the construction of a building on property to which the chargeable interest relates,

(b) the sale or supply of anything other than land, or

(c) a loan to P secured by a mortgage, or any other provision of finance to enable P, or another person, to pay for part of a process, or series of transactions, by which the chargeable interest transfers from V to P.

(4) In subsection (3) -

(a) paragraph (a) is subject to subsection (2)(a) to (c),

(b) paragraph (b) is subject to subsection (2)(a) and (c), and

(c) paragraph (c) is subject to subsection (2)(a) to (c).

(5) The exclusion required by subsection (1) shall be effected by way of just and reasonable apportionment if necessary.

(6) In this section a reference to the transfer of a chargeable interest from V to P includes a reference to a disposal by V of an interest acquired by P."

68. Absent the question of ECHR compatibility, I am satisfied that section 75B does not assist PBL. Morgan J in the UT sought to use section 75B to avoid what he saw as an unreasonable result by two means. First, he accepted PBL's submission that subsections (1) and (6) refer to the acquisition by P of the chargeable interest disposed of by V and that interest in this case could only be the freehold as V (the MoD) did not dispose of the leasehold. Thus the only transfer which was relevant in section 75B was the transfer of the freehold from the MoD to PBL, to which the sub-sale by PBL to MAR was incidental. Secondly, he interpreted the words "in so far as" in subsection (1) as authorising the apportionment of the consideration which MAR provided to PBL for the freehold between (a) the sum which reimbursed PBL for the price which it paid the MoD for the freehold and (b) the sum which MAR agreed to provide to enable PBL to pay any SDLT which was due and to fund other expenditure. He referred to PBL's submission that one could achieve this by reading into subsection (1) after the words "in so far as" the additional words "the payment of the consideration or" but said that it was not necessary to do so. I disagree on both points, for reasons which are essentially the same as those which Judge Nowlan advanced.

69. In my view both section 75A and section 75B are difficult provisions to interpret and to apply to particular transactions. In summary, section 75A has been drafted in broad terms to catch a range of tax avoidance schemes and prevent unintended tax losses by the use within a series of transactions of a combination of reliefs and exemptions; and section 75B reduces the chargeable consideration of the notional transaction in section 75A(4) by excluding incidental transactions in that series of transactions from the section 75A(5) calculation. Looking at the matter in more detail, one starts with the chargeable consideration on the notional transaction in section 75A(5), which is calculated by reference to "the scheme transactions" which are the actual transfer or transfers by which a chargeable interest moves from V to P or P acquires a chargeable interest deriving from it (section 75A(1)(a)). That chargeable consideration, as I have said, is the largest amount (or aggregate amount) given by any one person by way of consideration for the scheme transactions. Section 75B is framed to remove from those actual transactions (ie "the scheme transactions" of section 75A(1)(b)) any transactions which in accordance with its provisions are to be treated as incidental. To achieve this, the reference in section 75B(1) to "the transfer of the chargeable interest from V to P" is a reference to the actual transfer or transfers which are the subject of section 75A(1)(a) and (b).

70. Support for this view comes from (a) subsection (6) and (b) subsection (2). Subsection (6) ("a reference to the transfer of a chargeable interest from V to P includes a reference to a disposal by V of an interest acquired by P") makes clear that subsection (1) covers a case where P acquires from another party the interest which V has disposed of. Thus section 75B could be applied to the circumstance where, within the scheme transactions, V sold the freehold in land to B who sold on that freehold to P. Subsection (2) is framed to place limits on the scope of subsection

(1). Subsection (2)(a), which provides that a transaction is not incidental "if or in so far as it forms part of a process or series of transactions, by which the transfer is effected", is a reference to the scheme transactions in section 75A(1)(b) in so far as they form part of the process by which the relevant disposal and acquisition or acquisitions are made. Subsection (2)(c) provides that a transaction is not incidental if it is of a kind specified in section 75A(3). That includes (in section 75A(3)(a)) "the acquisition by P of a lease deriving from a freehold owned or formerly owned by V" and (in section 75A(3)(b)) "a sub-sale to a third person". To give effect to subsection (2) and achieve coherence both within section 75B and between that section and section 75A, the transfer of the chargeable interest from V to P in section 75B(1) and (6) must extend to the transactions to which section 75A(1)(a) and (b) and (3) refer, including the sub-sale to the third person under section 75A(3)(b) (ie PBL's sale to MAR) and the acquisition by P of an interest derived from the chargeable interest which V has disposed of under section 75A(3)(a) (ie the leasehold interest which MAR gave to PBL). This interpretation is wholly consistent with the purpose of section 75B which is to reduce the consideration given for the transactions in section 75A(1)(b) which are to be taken into account in the section 75A(5) calculation of the consideration on the notional transaction.

71. I therefore conclude that the transactions which transfer the chargeable interest from V to P in section 75B(1) include both the sub-sale to MAR and the grant by MAR of the lease to PBL.

72. I am also not persuaded by the second argument which Morgan J favoured, namely that the words "in so far as" in section 75B(1) required the tribunal to apportion the £1.25 billion consideration which MAR paid between the purchase price of the barracks and other finance. Those words in subsection (1) appear to be addressing a composite transaction which in part is necessary for the disposal and acquisition, to which section 75A(1)(a) refers, and in part serves some other, incidental, purpose, such as any of those identified in subsection (3). That cannot assist PBL in this case because of the overriding effect of subsection (2). It is arguable that subsection (2)(a) may not provide an answer, for as PBL points out, it uses the same "if and in so far as" formulation as subsection (1). But subsection (2)(c) is unqualified and prevents the sub-sale to MAR from being incidental because that transaction was "of a kind specified in section 75A(3)", ie a sub-sale to a third person. Any appeal to the terms of section 75B(3)(c) is excluded by subsection (4)(c) which overrides it by the operation of the exclusion in subsection (2)(a) and (c).

73. I therefore conclude that the £1.25 billion consideration which MAR contracted to pay to PBL is the relevant consideration under section 75A(5)(a) unless section 3 of the Human Rights Act 1998 requires the court to adopt a more expansive interpretation of incidental transactions in section75B(1).

74. PBL's argument in support of its challenge under article 14 of the ECHR (para 66 above) is that if a conventional lender were to advance sums to its customer in excess of the purchase price of the land, the purchaser would pay SDLT on the purchase price and the financier's security interest would be disregarded under section 48. In a section 75A exercise, section 75B(3)(c) would treat the security transaction (a transaction "undertaken only for a purpose relating to - … a loan to P secured by a mortgage") as incidental to the transfer of the land from the seller to the customer and therefore outside the calculation of the chargeable consideration for the notional transaction under section 75A(5). But if, as in this case, the financial institution using an Ijara arrangement were to provide funds in excess of the purchase price, section 75A(5) would operate to penalise it by using the larger funding as the measure of the chargeable consideration on the notional transaction. This, says PBL, amounts to unjustified discrimination on the ground of religion contrary to article 14 read with article 9 of the ECHR and A1P1. As I have said, PBL invites the court to read into section 75B(1) the words "the payment of the consideration or" after "in so far as" so as to enable the consideration given by the financial institution for the purchase of land from its customer at the first step of an Ijara arrangement to be allocated proportionately between the funding of the land purchase on the one hand and the funding of other expenditure by the customer on the other so that only the former would count towards the chargeable consideration on the notional transaction under section 75A(5).

75. The FTT did not have to consider the merits of this challenge because it concluded that PBL had not established that it had entered into the Shari'a compliant financing for religious reasons and that it had therefore not proved that it suffered discrimination on the ground of religion. Neither the UT nor the Court of Appeal had to address the argument because the UT by the presiding member's casting vote held that the chargeable consideration was £959m and the Court of Appeal held that section 75A did not apply. I note in passing however that, but for the expiry of a time limit for HMRC, the Court of Appeal's decision would have imposed a liability on MAR of £50m on the chargeable consideration of £1.25 billion, and in accordance with standard practice in Ijara arrangements the charge would have fallen on PBL by means of a tax indemnity.

76. I have come to the view that this court does not need to consider the ECHR challenge in detail because the matter can be determined on the simple bases (a) that any discriminatory effect is objectively justified and (b) that, in any event, PBL is not a victim. There is in this case no need to delve into the question whether the FTT was correct in holding that it had not been established that there was any discriminatory treatment. If one were, for the sake of argument, to accept that section 75A had had the potential to give rise to indirect discrimination on the prohibited ground of religion, in cases where the financial institution using Shari'a compliant financing had provided funds to its customer beyond what was needed to fund the

purchase of land, one would still need to consider whether the provision giving rise to the discriminatory treatment was objectively justified.

77. HMRC advances as justification (a) the need to frame section 75A in broad terms to deal with the lacunas which were giving rise to tax loss and (b) the safety valve created by section 75C(11) and (12) which empowers the Treasury to disapply section 75A in specified circumstances, including making provision with retrospective effect. Thus HMRC argue that if the provision were shown to give rise to a systemic or frequent infringement of ECHR rights, Parliament had provided the mechanism by which such infringements could be avoided.

78. In addition, section 75A(7) disapplies section 75A where the requirements of subsection (1)(c) are satisfied only because of the use of alternative property finance. Paradigm forms of Ijara arrangements are therefore protected. It is the tax loss occasioned by the combination of sub-sale relief and the alternative property finance which has given rise to the section 75A(5) charge in this case. That circumstance cannot recur after section 45(3) was amended in 2011. There is no evidence of any widespread use before 2011 of Ijara arrangements by means of a sub-sale to the financial institution *and* involving the provision of funds in excess of the purchase price of the land, as occurred in this case. And it is that combination which is the basis of the allegation of discrimination. The fact that a broadly worded provision may on occasion have a harsh effect on an alternative property finance transaction which is structured in a particular way is not sufficient to establish unjustified discrimination under article 14 of the ECHR.

79. In any event, it is not disputed that PBL has a claim under section 80 for the repayment of any amount which is overpaid. If, as appears to be the case, the sterling equivalent of the consideration, which MAR actually paid to PBL for the barracks before the Ijara arrangement was brought to an end, was less than the £959m which PBL paid to the MoD, it is the latter figure which is the chargeable consideration under section 75A(5)(a). In that event, PBL is paying no more than it would have paid if it had used a conventional form of loan financing. It is therefore not a victim of discriminatory treatment.

80. I therefore do not accept that article 14 of the ECHR can support the interpretation of section 75B for which PBL argues.

Procedural challenges

(a) The "wrong return" challenge

81. PBL submits that HMRC are in any event not entitled to pursue their claim for the SDLT because they had no power to amend the SDLT return, lodged on its behalf, relating to the completion of the contract of 5 April 2007 between the MoD and PBL (para 7 above), because it was not a return relating to the notional transaction under section 75A.

82. PBL argues that the return, which referred to the section 45(3) disregard, was not strictly necessary but was submitted on its behalf in order to have the purchase of the barracks entered onto the Land Register. It submits that HMRC, while entitled to inquire into that return under section 76 of and paragraph 12 of Schedule 10 to the FA 2003 in relation to the sale by the MoD to PBL, had no power to amend the return in order to impose a liability to SDLT on the separate, notional transaction. The only avenues which had been open to HMRC to impose a liability to SDLT on the notional transaction, it submits, were to make a determination under paragraph 25 of Schedule 10, because no return had been lodged in respect of the notional transaction, or to make a discovery assessment under paragraph 28 of that Schedule. As the six-year time limit for either the determination or the assessment had now expired, HMRC could no longer seek payment of any SDLT due on a notional transaction.

83. I do not accept that submission. The answer lies in the terms of paragraph 13 of Schedule 10, which sets out the scope of the inquiry which HMRC can make under paragraph 12 of that Schedule, and HMRC's powers on completion of the inquiry under paragraph 23. Paragraph 13 provides so far as relevant:

> "(1) An inquiry extends to anything contained in the return, or required to be contained in the return, that relates -
>
> > (a) to the question whether tax is chargeable in respect of the transaction, or
> >
> > (b) to the amount of tax so chargeable. …"

The relevant information contained in the return included information about the sale of the barracks by the MoD to PBL. To my mind, the fact that the information in the return was provided to HMRC in relation to a transaction (the MoD-PBL sale), which was to be disregarded under both section 45(3) and section 75A(4), does not limit the scope of the inquiry. HMRC were entitled to inquire into the tax consequences of that sale. The powers of HMRC on completion of the inquiry are set out in paragraph 23 of Schedule 10 which provides:

> "(1) An inquiry under paragraph 12 is completed when [HMRC] by notice ('a closure notice') inform the purchaser that they have completed their inquiries and state their conclusions.
>
> (2) A closure notice must either -
>
> (a) state that in the opinion of [HMRC] no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to their conclusions. …"

HMRC were entitled to inquire into that sale and, on ascertaining that it was a part of a series of transactions which gave rise to a section 75A charge, to amend the return to reflect the tax due on the notional freehold acquisition under section 75A(5). Any obligation on PBL to submit a return in relation to the notional transaction does not limit the scope of HMRC's power to inquire into the MoD-PBL sale or their power to amend the return under paragraph 23.

84. I therefore reject this procedural challenge.

(b) Case management challenges

85. It is not the normal practice of this court to review case management decisions of the FTT which have been upheld by the Upper Tribunal as involving no error of law. Having rejected the argument that HMRC were not entitled to amend PBL's SDLT return in relation to the purchase of the freehold from the MoD, it is not necessary to decide whether the FTT should have granted PBL permission to amend its notice of appeal to put forward that argument.

86. The other procedural challenge is PBL's challenge to the FTT's decision to allow HMRC to amend its case to argue that the chargeable consideration was £1.25 billion and not £959m. It is hard to see how the FTT could have decided otherwise.

Under paragraph 22(3) of the Stamp Duty Land Tax (Appeals) Regulations 2004 (SI 2004/1363) the FTT is bound to increase the amounts of tax due if the taxpayer has been undercharged: see (by way of analogy in relation to section 50(7) of the Taxes Management Act 1970) *Glaxo Group Ltd v Inland Revenue Comrs* [1996] STC 191. But, again, having reached the view that PBL has a claim for repayment of overpaid SDLT under section 80, there is no need to address this case management decision.

A different approach?

87. Before the hearing, the court drew the attention of counsel to the Observations in Bulletin No 78 to *Emmet and Farrand on Title* (September 2016). The authors there suggested that the courts might have found a simpler solution to the issues raised in this case if they had had regard to the equitable maxim that "The test of a mortgage is in substance, not form. If a transaction is in substance a mortgage, equity will treat it as such, even if it is dressed up in some other guise, as by the documents being cast in the form of an absolute conveyance" (Megarry and Wade, *The Law of Real Property*, 8th ed (2012), para 25.085). The authors suggested that the transfer of the Chelsea barracks to MAR in the Ijara transaction should be viewed in English law as a mortgage, with the result that PBL should have been registered as proprietor of the freehold and have paid SDLT on its purchase and MAR should have been registered as the proprietor of a charge, a security interest exempt from SDLT under section 48.

88. Both HMRC and PBL submitted written observations in response to this request. Neither party disputed that Ijara was a method of financing PBL's purchase and development of the Chelsea barracks. Indeed, the Ministry of Defence had accepted that "the Ijara was in the nature of a mortgage" and this was reflected in the Deed of Clarification entered into between the Secretary of State for Defence, PBL and Qatari Diar Real Estate Investment Co. But the purpose of this clarification was to ensure that the provisions in the contract of sale between the MoD and PBL providing for overage in the event of a sale on by PBL would not apply to the sale to MAR.

89. Neither party accepts that, for this or any other reason, the transactions between PBL and MAR were in substance a mortgage and should be treated as such. They were real transactions, albeit inextricably linked, and intended to take effect in accordance with their terms, and there is no reason for this court to treat them any differently. In particular, there is no need to protect the interests of PBL, as there used to be to protect the interests of mortgagors who might otherwise be prevented from recovering their property. Furthermore, if the effect of treating these linked transactions as a mortgage were that the rental payments made by PBL were to be regarded as interest on money advanced to finance the purchase and development,

this would run counter to their whole purpose, which was to comply with the Islamic prohibition of lending money at interest.

90. As PBL argues, the issue of the substance of a transaction is a fact sensitive matter and the burden of proving that the substance is other than the form falls upon the party suggesting it. In the Upper Tribunal, Morgan J was alive to the possibility that "in some circumstances, a transaction which takes the form of an absolute transfer coupled with an option for the transferor to re-acquire the property from the transferee can be analysed as being in substance a funding transaction under which the transferee has advanced funds to the transferor and so that the transfer is by way of security only" (para 26). But no-one had suggested that before the tribunal and further evidence would have been necessary had they done so. In those circumstances, and where neither party supports the alternative approach, it would be quite unfair of this court to pursue it.

91. In any event, whatever might be the case in other contexts, it is clear from the terms of FA 2003 that Parliament did not intend to confer exemption from SDLT on an Ijara transaction by treating it as the creation of a security interest under section 48, but instead conferred exemptions under section 71A by recognising the substance of each of the three transactions within an Ijara. Thus, it would be contrary to the legislative scheme in FA 2003 to treat MAR as exempt under section 48 on the basis that it had acquired a security interest. That is a sufficient answer to the point.

Conclusion

92. I would allow the appeal.

LORD BRIGGS: (dissenting)

93. Stamp Duty Land Tax ("SDLT") is a relatively new tax, designed to generate broadly the same revenue stream as its venerable predecessor, Stamp Duty, which had become so easily avoided that it had acquired the unhappy reputation, among those who could afford skilled advice, of being a voluntary tax. Introduced in Part 4 of the Finance Act 2003, SDLT was designed around a wholly new conceptual approach to the identification of the chargeable event in a sale of land. Generally speaking it was no longer the stamping of a conveyance, but rather the completion or substantial performance of a contract for the sale of an interest in land in the UK, which Part 4 calls a land transaction. It was hoped that this new start would close off many of the loopholes through which advisers had previously been able to guide their clients. It is no surprise that, in its infancy, SDLT proved to have its own

unintended loopholes. During its first decade it has therefore been the subject of frequent tweaking and revision.

94. Land may be sold and purchased by a chain of contracts, all made before the completion of any of them. This may occur for example in a rising market, where the first buyer B "turns" the property to a subsequent buyer C, for an immediate profit derived from the higher price payable under the second contract. The second contract is usually called a sub-sale. The first and second contracts may be completed by a transfer by the original seller A to C, or by simultaneous transfers from A to B and from B to C. The second contract may be a separate contract of sale, or an assignment to C of B's rights under the first contract.

95. The SDLT scheme is designed to avoid double taxation of sub-sales, that is charging the completion of both the AB purchase and the BC purchase or assignment to a full charge to tax. It does so by taxing neither the AB nor the BC purchase separately, but rather by taxing an artificial deemed land transaction, constituted by the notional completion of what is called a secondary contract, which contains elements of both. This treatment of sub-sales appears in section 45. Using the ABC example, section 45(3) tells you that the purchaser under the secondary contract is C, and that the consideration is a combination of the consideration payable under the AB and BC purchases. Subsection (5A) rather enigmatically explains that the identity of the vendor under the deemed land transaction to which the secondary contract gives rise is either A or B, depending on the statutory context in which it matters.

96. It was never the objective of Stamp Duty, and is not the objective of SDLT, that it should tax the financing of the purchase of land. In the UK this is usually done by lending at interest on the security of a mortgage. Mortgages are exempt from SDLT. But an increasing number of the purchasers of land in the UK finance their acquisition by forms of finance which do not offend against the Shari'a prohibition of usury (a prohibition once applied in Christendom, but abolished in the UK in the early 19th century). This may be because the purchaser is an individual of the Muslim faith, or (as here) because the purchaser wished to use a finance institution which itself carries on its business in accordance with Shari'a principles.

97. Shari'a law does not prohibit the taking of security, but it does forbid the payment of interest in connection with the lending of money. Over time a variety of alternative financing structures were developed, in which the commercial return to the finance house was provided by something other than the payment of interest on a loan. In the present case the structure chosen, called Ijara, involved the acquisition of the freehold interest in property by the finance house ("the bank"), its lease to the finance customer ("the customer"), and the grant of put and call options which would enable the customer to acquire the freehold reversion from the bank. The

commercial return for the bank lay initially in the rentals payable under the lease, and then (once exercised) in the amount payable under the options, which in effect capitalised the outstanding rental stream under the lease. Originally the lease and the transfer of the freehold under the options were exempted from SDLT by section 72 of the Finance Act 2003, later replaced, for land in England, by section 71A.

98. The acquisition of the freehold by the bank was also exempted by section 71A(2), if but only if the vendor under that transaction was the customer. Thus if the customer had already purchased the property (and paid SDLT on that purchase), or inherited it, but wished to refinance by an Ijara structure, the first relevant finance transaction would be a sale of the property by the customer to the bank. It needed to be exempted from tax if the objective of making Ijara finance free from SDLT was to be achieved. Conversely, if the finance was being provided to fund the purchase, then the first relevant transaction would be the purchase of the property, usually by the bank direct from the third party seller. In that case there was no reason to exempt that purchase from SDLT. Although the bank had to pay the tax, the customer would indemnify the bank under a tax indemnity included in the terms of the Ijara financing.

99. Viewed separately, the provisions for relief from the double taxation of sub-sale chains and for the exemption of alternative Shari'a-compliant financing structures broadly achieved their objectives. All the intractable problems in the present case, which have divided the courts below, and divide the members of this court, derive from a structure for the simultaneous purchase of land and its Shari'a-compliant financing which also involves a sub-sale. For particular reasons concerned with the nature of the marketing of Chelsea Barracks, and the desire of its seller, the Ministry of Defence (MOD), for a delayed completion, the Shari'a compliant finance house (MAR) selected by the buying customer PBL could not make the original purchase from MOD. Instead PBL contracted to purchase from MOD, with MAR as a sub-purchaser.

100. The result of using a sub-sale in connection with Ijara financing was that, for SDLT purposes, the MOD / PBL and the PBL / MAR transactions were both replaced by a secondary contract by reason of section 45(3), the completion of which gave rise to a land transaction which would have been chargeable to SDLT, unless excluded from charge under section 71A(2) because it was part of Shari'a compliant alternative financing. That much is common ground. The critical question on this appeal is whether that land transaction was exempted from a charge to SDLT by section 71A(2) of the Finance Act 2003. Lord Hodge thinks that it was exempt, with the result that the series of transactions which began with the transfer by MOD to PBL and ended with the lease by MAR to PBL, coupled with the put and call options, was entirely tax-free, subject only to the effect of section 75A. If that were the effect of section 71A(2) then I would agree with all his conclusions as to the consequences,

and with all his reasons for those conclusions. I also agree with his conclusion that the transactions are not to be treated as giving rise to a loan on mortgage security.

101. In my view however the transfer to MAR was not exempt, because PBL was not the vendor under the relevant land transaction within the combined meaning of sections 45(5A)(b) and 71A(2). The vendor was MOD. Thus the condition in section 71A(2)(a) was not satisfied. MAR was therefore chargeable to SDLT on its purchase of Chelsea Barracks. In that respect I agree with the conclusion of the Court of Appeal, although my reasoning is not the same as theirs. In setting out my own reasons I gratefully adopt Lord Hodge's summary of the facts, and do not need to set out again the relevant statutory provisions.

102. The operative parts of section 71A are subsections (2), (3) and (4). Each of them exempts from charge to tax specific land transactions. Each has specific conditions which must be satisfied, even if the conditions of the gateway into section 71A, in subsection (1), are all satisfied, as they were in this case. But the common feature of subsections (2), (3) and (4) is that they apply, if at all, only to land transactions which would otherwise be chargeable under Part 4.

103. In an ordinary Ijara financing which satisfied the gateway conditions in subsection (1), the purchase of the major interest by the institution (called "the first transaction" in subsection (1)(a)) would itself be a chargeable land transaction, regardless whether the vendor was the "person" to whom the lease was to be granted, or a third party. It would then be exempted under section 71A(2) only if the vendor was that "person". The identity of the vendor would be readily apparent. It would be the person disposing of the subject-matter of the transaction: see section 43(4). In the context of a purchase effected (as here) by a Land Registry Transfer, it would be the transferor under that transfer. In the present case, but for the matter I am about to describe, that would have been PBL.

104. But where, as here, the purchase by the institution takes place under a contract by way of a sub-sale to which section 45(1) applies, then the institution is not treated as having entered a land transaction at all by virtue of that purchase, let alone a chargeable land transaction: see section 45(2). This is because the agreement to purchase is a "transfer of rights" within the meaning of the last sentence of section 45(1) and the institution is the transferee. The ordinary consequence of the completion of that purchase laid down by section 44(3) (namely that the contract and its completion is treated as a single land transaction) is displaced by section 45(2) and (3). The contract is replaced by the statutory construct called a "secondary contract" under which the transferee institution is the purchaser, but the vendor is not identified. The secondary contract is not, on its own, a land transaction but, when it is completed by a conveyance, the secondary contract and its completion are together treated as a land transaction: see again section 44(3). I will call it, for short,

the completed secondary contract. The identity of the vendor under that land transaction, wherever it matters elsewhere in Part 4, is regulated by section 45(5A)(b).

105. The reference to the vendor in section 71A(2) is plainly within the contemplation of the phrase "other references in this Part to the vendor" in section 45(5A)(b). Thus, where there is a sub-sale, the vendor under section 71A(2) is either the vendor under the original contract (here MOD) or the transferor under the transfer of rights (here PBL), depending on the context.

106. The relevant context, for present purposes, is a sub-sale under section 43, coupled with an Ijara finance structure compliant with section 71A(1), and the determination whether exemption is to be available under section 71A(2) for the completed secondary contract. In this context it is plain that this is the relevant land transaction, by analogy with the reference in the tail-piece to section 45(3) to exemption in section 73(3). It speaks of "a case where the secondary contract gives rise to a land transaction that is exempt from charge by virtue of subsection (3) of section 73". That section exempts another kind of alternative finance structure. In a section 45 context, the scheme of Part 4 treats the alternative contract, rather than the "real world" contract which it replaces, as giving rise to the land transaction qualifying (or not qualifying as the case may be) for exemption under section 73. The same must be true of section 71A, which confers exemption in a very similar way.

107. So, what choice, as between MOD and PBL is permitted by this context? There are considerations which may be said to pull both ways. In favour of PBL is the fact that it was the vendor under the real world contract by which MAR agreed to buy the Barracks, and the transferor under the Land Registry transfer by which the freehold interest was actually transferred to MAR. In favour of MOD is the fact that, if the completion of the original contract between MOD and PBL is to be disregarded under section 45(3), then PBL never received from MOD the chargeable interest which is deemed to be transferred to MAR by the completion of the secondary contract. Thus the person disposing of that chargeable interest (the "subject matter of the transaction" under section 43(4)) can only have been MOD, so that MOD is the only candidate as vendor in this context, under section 45(5A). The first of these considerations persuaded the Upper Tribunal, where the issue first arose for decision. The second persuaded the Court of Appeal. In this court the main battle between counsel has centred on the question whether the relevant context is one which calls to be resolved by a real world or an SDLT-world analysis. In my view neither of those ways of looking at the matter is decisively better than the other. The issue arises precisely at the point where the two worlds collide.

108. Treating either MOD or PBL as vendor may loosely be said to be "permitted" by the context, if the contest is simply between those parallel worlds. Section 71A(1) sets out what appear to be real world conditions for the exemption of Ijara finance structures from SDLT. But the land transaction which either is or is not to be exempted by section 71A(2) is a pure SDLT construct, namely that notional land transaction to which the secondary contract imposed by section 43 gives rise. But there cannot be two vendors, nor is the taxpayer or HMRC free to choose between two available permitted candidates. The application of section 45(5A) to the context of section 71A(2) must produce a single answer in each case, although the context will not always lead to the same result.

109. In my opinion there is a much more powerful third factor which provides a decisive answer to that question, namely an appreciation of the consequences. If the vendor is to be PBL then, subject only to section 75A, the combined sub-sale and Ijara financing means that the whole transactional structure by which Chelsea Barracks was purchased from MOD is exempted from SDLT. By contrast, if MOD is to be the vendor, there is a single charge to SDLT. The first outcome cannot have been one which Parliament intended. The second outcome accords with the overall purpose of Part 4 to charge SDLT on purchases of land in the UK, with the avoidance of double taxation on a sub-sale, and with the general objective of section 71A, namely to exempt those who use Shari'a compliant alternative finance from incurring SDLT where finance by a loan on mortgage security would not do so. A choice, under section 45(5A) which, in this context, produces an unintended tax holiday for all the participants in the purchase, viewed as a whole, is simply not one permitted by the context, where the alternative choice produces a result broadly in accordance with the purpose of the legislation.

110. I must now address some of the contrary arguments. The first is that a statutory requirement to have regard to the context does not permit regard to be had to the consequences. I respectfully disagree. A hallmark of the modern contextual approach to the construction of a contract is that a choice which produces a result which the parties cannot have intended is to be rejected if there is a less unsatisfactory alternative. I can see no reason why the same approach is inapplicable to the construction of a statute. On the contrary it is frequently used: see *Bennion on Statutory Interpretation*, section 9.6, *In re British Concrete Pipe Association's Agreement* [1983] 1 All ER 203, per Sir John Donaldson MR at p 205 and, in the context of a taxing statute, *Fry v Inland Revenue Comrs* [1959] Ch 86, per Romer LJ at p 105. The only distinction in the present case is that the need to make a contextual choice is expressly required by the plain meaning of the statute itself, namely section 45(5A)(b). But that is a distinction without a difference.

111. The second, and main, argument is that section 71A itself commands a real-world approach to the identification of the vendor, because the transaction looking for a vendor in subsection (2) is the "first transaction" described in real world terms

by subsection (1)(a). Since it is the same "first transaction" which is exempted by subsection (2) then any issue as to the satisfaction of the vendor condition must be addressed by a real world test as to who is the vendor, treating the first transaction as the real world sale by PBL to MAR, not the notional land transaction to which the secondary contract gives rise. This argument treats section 45(5A) as not being engaged at all, because it is not the completed secondary contract that is looking for a vendor. This is the argument which has persuaded Lord Hodge.

112. I agree that both subsections (1)(a) and (2) describe the same transaction. That is the clear purpose of linking them by a common definition. But in my view the use of that link works the other way. Subsection (2) is plainly designed, and is only of any use, to exempt from tax land transactions which would otherwise be chargeable to SDLT. Usually they will be real world transactions but, in the present case because of the sub-sale, the relevant land transaction is a statutory construct, namely the completed secondary contract. If subsection (2) is not dealing with that land transaction, but some different transaction, then it simply misses its target altogether. If that is right, then the effect of the linking definition is that section 71A(1)(a) must also be dealing in this context with the completed secondary contract, if its language will bear that construction.

113. There is nothing in the language of section 71A(1) which makes subsection (1)(a) inapposite as a reference to the completed secondary contract, where that is what section 45 requires. Subsection (1) speaks of arrangements under which certain transactions take place. Where (as here) the relevant arrangements include provision for a simultaneous sub-sale, then the first transaction to which SDLT might otherwise be chargeable is necessarily a completed secondary contract.

114. Focus on the very similar language of section 73 is compelling. Section 73(1) also speaks of arrangements under which transactions take place. In fact the second transaction there described always takes place by way of sub-sale (because the same interest is the subject matter of both), so that the second transaction being exempted from charge by section 73(3) will always be a completed secondary contract. And this is what section 45(3) says in unambiguous express terms when it refers to section 73(3).

115. For this real world argument to have real force it would be necessary to re-write section 71A(2) as follows:

> "The first transaction and any land transaction to which a secondary contract gives rise where the first transaction is by way of sub-sale is exempt from charge if the vendor under the first transaction is …"

But it makes no sense to re-write the subsection in that way just to produce a result which gives rise to an unintended tax holiday, if the ordinary meaning of the words enacted does no such thing.

116. The next argument is that there cannot be a choice of the vendor under the original contract (here MOD) because, where there is a simultaneous sub-sale, the effect of section 45(3) is to disregard the original contract altogether, including its vendor. There are in my view two objections to that argument. The first is that section 45(3) does not require the original contract itself to be disregarded, but only its substantial performance or completion. The contract itself remains visible, together with its vendor.

117. The second more serious objection is that section 45(5A) assumes that the vendor under the original contract remains an available choice, precisely where section 43(3) brings a completed secondary contract into deemed existence, and disregards the performance or completion of the original contract. Indeed it is only where there is a completed (or performed) secondary contract that it was thought necessary to provide a special means for the identification of its vendor. It may be suggested that, under section 45(3), there can be both a completed secondary contract and a performed or completed original contract which is not disregarded, for example where the two are not simultaneous and connected, or where section 73(3) applies, but this is not why section 45(5A) was introduced. Its main target was precisely the unintended potential tax holiday which would arise where there was a sub-sale, because of a disregard of the original completed contract and an exemption for the sub-sale, eg because of the simultaneous potential application of group relief.

118. It is next said that what I have described as the compelling consequences in terms of an unintended tax holiday do not arise, because section 75A comes to the rescue of the public purse. I accept that, if need be, it does so on the facts of this case, which occurred after it came into force. But 20 months passed between the introduction of section 45(5A) and section 75A, during which, if facts such as these did give rise to a tax holiday, the Revenue was entirely unprotected. There are in my view powerful reasons why the construction and application of section 45(5A) should be undertaken without reference to the fact that, much later, section 75A floated into view, as a plank in a shipwreck.

119. First, the exercise of construction and application of section 45(5A) ought to be based upon a perception of the intention of Parliament when enacting it. That is, by the same token, why the re-casting of section 45(3) in 2011, in a way that solved the present difficulties by removing the disregard of the completed original contract where the sub-sale was exempted by section 71A, cannot be prayed in aid in interpreting section 45 in its earlier form.

120. Secondly, the impetus for enacting section 75A was not a perception that sections 45(3) and 71A, working together, produced a tax holiday. Section 75A was, by its title, primarily designed to deal with tax avoidance schemes, although I accept that it was cast in wide enough terms to provide the Revenue with a rescue from the tax holiday to which linking Ijara finance to a sub-sale might give rise.

121. Thirdly it is counter-intuitive, to say the least, to adopt a construction and application of section 45(5A) which then gives rise to a further set of difficulties in the application of section 75A, when there is an alternative approach that does nothing of the kind. This is, in my view, an *a fortiori* case where section 45(5A) expressly requires that choice to be made.

122. Fourthly, if a construction of sections 45(5A) and 71A(2) before the introduction of section 75A does not produce an unintended tax holiday, then there is no reason why the earlier sections need be re-interpreted in the light of section 75A.

123. A rather different and more detailed objection to the identification of MOD as the vendor under section 71A(2) is that its effect is to charge the wrong taxpayer with the wrong amount of tax. By this the proponents mean that the policy objectives of a single charge to tax, based upon the real purchase price for the Barracks, with Ijara structures being altogether exempt, would only truly be satisfied if PBL rather than MAR was liable, and SDLT was payable as a percentage of the price paid to MOD, rather than the inflated price stated in the PBL / MAR agreement, which was driven by financing considerations. This is precisely what the amendments to section 45 made in 2011 now do achieve. Even the section 75A solution charges the right taxpayer, albeit still with the wrong amount of tax.

124. This objection has significant force at first sight but there are compensating matters which in my view largely deflate its effect. Dealing first with the identity of the taxpayer, an ordinary Ijara structure to finance a purchase imposes SDLT on the bank rather than on the customer. This is because the first relevant land transaction is a purchase by the bank from the third party seller. Section 71A(2) does not apply because the vendor is not the customer. There is no sub-sale, because (as is common ground) a purchase followed by a lease does not trigger section 45. In commercial reality, (as in the present case) the customer ends up footing the tax bill, because the bank takes a tax indemnity from the customer. The Ijara structure to which the exemption in section 71A(2) typically applies is a re-finance by a customer who has already purchased the property and paid SDLT on completion. There is, again, no sub-sale.

125. An interpretation and application of section 45(5A) in a sub-sale context so as to charge SDLT on the bank therefore imposes the same consequence of taxing the bank as does an ordinary Ijara structure to finance a purchase where there is no sub-sale. In both cases, the usual tax indemnity imposes the ultimate tax burden on the customer. In the present case the evidence suggests that the sub-sale route was chosen because MOD decided to use a sealed bid process in which MAR would have found it difficult to participate, and because MOD wanted a delayed completion, while it re-billeted the troops in the Barracks. These are relatively unusual fact-specific matters which ought not to affect the issues of construction.

126. The reason why, in the present case, the tax payable was (at least initially) greater than the specified percentage of the price payable to MOD is because MAR and PBL chose to include within the financing a large amount over and above that purchase price, structured as part of the purchase price payable by MAR to PBL on the sub-sale. The main element in the excess appears to have been the deferred payment of amounts needed by PBL to make early rental payments under the lease from MAR. Their commercial effect, in cash flow terms, was to give PBL an initial rent holiday, in broadly the same way as is often achieved under conventional mortgaged-backed finance by the bank lending an additional amount above the purchase price to fund early payments of interest.

127. It is possible, although the evidence does not so state in terms, that this at least could have been a reason for constructing the Ijara finance by way of sub-sale, because the excess finance amounts could hardly have been payable to MOD, if MAR had purchased directly. After 2011 it would attract no additional SDLT if achieved by way of sub-sale, because the original purchase (here between MOD and PBL) would not be disregarded, and section 71A(2) would exempt the completed secondary contract. Before 2011, taxation of this additional finance amount appears to have been inevitable, whether by treating MOD as the vendor under section 71A(2), or under section 75A.

128. This is, again, not an ordinary consequence of Shari'a compliant financing. Where the finance amount is less than the full purchase price, a shared ownership structure was usually adopted, with different tax treatment which the court did not need to investigate. The Ijara structure used here was applied where the whole purchase price was being financed. In such cases the amount of tax paid by the bank will not differ substantially from the tax which would have been payable on the price paid to the third party seller. Ironically, substantially the same result may yet ensue here, because the Ijara structure was terminated early, before most of the excess finance amount had been paid. In such circumstances it is common ground that Part 4 permits a claim for repayment of the excess tax from the Revenue. This is because SDLT is paid up-front on contingent consideration on an assumption that the contingency will occur, and then reclaimed if it does not.

129. In conclusion therefore, I have not been persuaded by any of the objections to construing and applying sections 45 and 71A of the Act in a way which, in the unusual context of a sub-sale coupled with an Ijara financing structure, leads to SDLT being payable by MAR on the consideration payable under the completed secondary contract by which it acquired a chargeable interest in the Chelsea barracks under a chargeable land transaction, and all the other transactional parts of the structure being either disregarded or exempt. Of the only two interpretations of the relevant statutory provisions (from which I would exclude section 75A for the reasons given), that is the one which broadly achieves, rather than wholly frustrates, what must have been the underlying purpose of Part 4 in the relevant context. If MAR cannot now be made to pay, which the Revenue do not accept, and this leads to the shocking consequence that the public purse gets nothing from this large transaction by way of SDLT, that will only be because, in the words of Mr Thomas QC for PBL, the Revenue have been relentlessly pursuing the wrong taxpayer. It is a sad irony that, at all stages until the appeal to the Upper Tribunal, both parties appear to have thought that the only candidate as the taxpayer was PBL, but it is of no consequence to the outcome. In my view the Court of Appeal reached the right answer, and I would therefore dismiss the appeal.