Case No: A3/2013/0269

Neutral Citation Number: [2013] EWCA Civ 907

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE HENDERSON
FTC482011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 25th July 2013

Before:

LORD JUSTICE MAURICE KAY, VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE LEWISON
and
LADY JUSTICE GLOSTER

- -

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellant**
- and -	
DV3 RS LIMITED PARTNERSHIP	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Malcolm Gammie CBE QC (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the **Appellant**
Roger Thomas (instructed by Olswang LLP) for the **Respondent**

- -

Judgment

Lord Justice Lewison:

Introduction

1. DV3 Regent Street Ltd ("the Company") claims to have devised a simple and elegant scheme to avoid stamp duty land tax ("SDLT"). The Upper Tribunal (Henderson J) agreed, despite thinking that HMRC's contentions produced a sensible result on the facts, and that Parliament would not consciously have intended the result for which the Company argued. His decision is at [2012] UKUT 399 (TCC) and is available on BAILII. The question for us is: was he right?

2. With the permission of the Upper Tribunal HMRC appeal. Their case was presented by Mr Malcolm Gammie QC. Mr Roger Thomas represented the taxpayer.

3. For the reasons that follow I have concluded that the Upper Tribunal was wrong. I would allow the appeal.

The facts

4. The facts are relatively straightforward. On 24 October 2006 the Company entered into a contract with Legal & General Assurance plc ("L & G") to buy the head leasehold interest in the Dickins & Jones building in Regent Street for £65.1 million. The contractual completion date was 4 December 2006. Just over one month later on 29 November 2006 a partnership called DV3 RS Limited Partnership ("the Partnership") was established. The Company was entitled to 98% of the partnership income. The remaining partners were all connected with the Company for the purposes of SDLT; but critically one of those partners was not a body corporate. On the following day the Company entered into a contract with the Partnership under which it agreed to sell to the Partnership the same head leasehold interest for the same price, with completion on the same day as the L & G contract. On 5 December 2006 L & G executed a transfer in favour of the Company, and the Company executed a separate transfer to the Partnership.

5. If there had been no Partnership, or if L & G had transferred the head leasehold interest directly to the Partnership it is common ground that SDLT of £2.6 million would have been payable. So it seems that the efficacy of the scheme turns on the significance of the intermediate transfer from L & G to the Company.

SDLT

6. SDLT was introduced by the Finance Act 2003 ("FA 2003") to replace the long-standing stamp duty. Stamp duty was a tax on documents. By contrast, SDLT is charged on land transactions: FA 2003 s. 42 (1). It is chargeable whether or not there is any instrument effecting the transaction: FA 2003 s. 42 (2) (a). A "land transaction" is defined as "any acquisition of a chargeable interest": FA 2003 s. 43 (1). An acquisition can take place without any act of the parties. It may take place by court order, by statutory provision or by operation of law: section 43 (2). A "chargeable interest" is any estate, interest, right or power in or over land in the United Kingdom, except an exempt interest: FA 2003 s. 48 (1). Sections 43 (4) and (5) provide:

> "(4) References in this Part to the "purchaser" and "vendor", in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction.
>
> These expressions apply even if there is no consideration given for the transaction.
>
> (5) A person is not treated as a purchaser unless he has given consideration for, or is a party to, the transaction."

7. A land transaction is a chargeable transaction if it is not a transaction that is exempt from charge: FA 2003 s. 49 (1). The amount of tax chargeable in respect of a chargeable transaction is a percentage of the amount of the chargeable consideration for the transaction: FA 2003 s. 55 (1). The percentage varies according to the amount of the relevant consideration; and according to whether the property consists entirely of residential property or not. The tax rate begins at 1 per cent. In relation to residential property the threshold is chargeable consideration of more than £125,000; and in relation to non-residential or mixed property it is chargeable consideration of more than £150,000. The rate increases in bands according to the amount of the chargeable consideration. The chargeable consideration for a transaction, unless otherwise expressly provided, is the 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: Schedule 4 para 1. The taxpayer's argument in this appeal is that the facts fall within a case in which the amount of the chargeable consideration is "otherwise expressly provided" for.

8. Section 44 is at the heart of the appeal, so I must set out large parts of it in full:

> "(1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
>
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
>
> (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.
>
> In this case the effective date of the transaction is the date of completion.
>
> (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.
>
> …
>
> (8) Where subsection (4) applies and the contract is subsequently completed by a conveyance –

(a) both the contract and the transaction effected on completion are notifiable transactions, and

(b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract.

…

(10) In this section –

(a) references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract; and

(b) "contract" includes any agreement and "conveyance" includes any instrument."

9. Section 45 is intended to deal with sub-sales and similar arrangements. It provides so far as material:

"(1) This section applies where –

(a) a contract for a land transaction ("the original contract") is entered into under which the transaction is to be completed by a conveyance,

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

(c) …

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

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

(3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which –

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is –

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

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

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

…

(5A) 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."

10. The final piece in the puzzle is Schedule 15 which deals with partnerships. One basic principle is that any separate legal personality of the partnership is to be disregarded: Schedule 15 para 2. Thus (i) a chargeable interest held by or on behalf of a partnership is treated as held by or on behalf of the partners; and (ii) a land transaction entered into for the purposes of a partnership is treated as entered into by or on behalf of the partners. As the Upper Tribunal rightly said: "a partnership is treated as transparent, even if as a matter of general law it has separate legal personality or corporate status."

11. As originally enacted, a transaction by which a partner transferred an interest in land to a partnership was excluded from SDLT: FA 2003 Sched 15 para 9 (1) and para 10 (1). A transaction that was excluded from SDLT in this way was treated as if it were not a land transaction: FA Sched 15 para 13. This was changed by the Finance Act 2004 (and subsequently further changed by the Finance Act 2006). The provisions in force at the time of the events with which we are concerned provided:

"(1) This paragraph applies where –

(a) a partner transfers a chargeable interest to the partnership,

or

…

> It applies whether the transfer is in connection with the formation of the partnership or is a transfer to an existing partnership.
>
> (2) The chargeable consideration for the transaction shall (subject to paragraph 13) be taken to be equal to –
>
> MV x (100 – SLP)%
>
> where –
>
> MV is the market value of the interest transferred, and
>
> SLP is the sum of the lower proportions.
>
> …
>
> (5) Paragraph 12 provides for determining the sum of the lower
>
> proportions."

12. We need not be concerned with the details of the formula, because it is common ground that if it applies its effect is to reduce the chargeable consideration to nil. It is this provision, according to the taxpayer, that "otherwise provides" for the chargeable consideration. There is provision for substitution of market value for the amount produced by the formula, but that only applies where all the partners are bodies corporate: Sched 15 para 13. It is common ground that that does not apply, because in our case one of the partners was not a body corporate. Hence the elegance of the scheme.

Approach to construction

13. Sections 44 and 45 are what are sometimes called "deeming provisions". The Upper Tribunal referred to the discussion of such provisions by Peter Gibson J sitting in this court in *Marshall v Kerr* [1993] STC 360. After citation of well-known authorities, including the speech of Lord Asquith in *East End Dwellings Co Ltd v Finsbury BC* [1952] AC 109, 132, Peter Gibson J said:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

14. Although the decision of this court was subsequently reversed by the House of Lords both sides in that case accepted the correctness of the principle stated by Peter Gibson J (although not its application): [1995] AC 148, 164. The Upper Tribunal described this as "limited deeming" (although in fact Peter Gibson J held that the consequences of the deeming provision considered in that case were wider than the House of Lords subsequently decided).

15. Although sections 44 and 45 are "deeming provisions" the fact that we are concerned with such provisions does not displace the ordinary principles of statutory interpretation: *HMRC v DCC Holdings (UK) Ltd* [2010] UKSC 58 [2011] I WLR 44. In my recent judgment in *The Pollen Estate Trustee Company Ltd v HM Revenue and Customs* [2013] EWCA Civ 753 I set out what I believe to be those principles. Mr Gammie placed some reliance on the relevant passage, and Mr Thomas did not say that it was wrong. I repeat it here for convenience:

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other: *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, 999; *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 AC 684 (§ 28). In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: *WT Ramsay Ltd v Commissioners of Inland Revenue* [1982] AC 300, 323; *Barclays Mercantile Business Finance Ltd v Mawson* (§ 29). The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found: *Barclays Mercantile Business Finance Ltd v Mawson* (§ 32)."

16. The taxpayer argues that the special provisions of Schedule 15 override the general provisions of sections 44 and 45. I do not consider that this correctly characterises the nature of the provisions in question. Although it may be said that Schedule 15 does deal with special situations, namely dealings involving partnerships, so also does section 45. The special situation with which that section deals is sub-sales and similar transactions. So both relevant provisions deal with special situations, and there is no

reason to prefer one over the other. I agree with the Upper Tribunal's conclusion at [44] that:

> "… schedule 15 should be read, construed and applied in the context of the SDLT legislation as a whole, and should not be treated as if it formed some sort of legislative island all by itself."

17. The Upper Tribunal repeated the point at [58] in dealing with an argument based on section 73 (which deals with means of raising finance).

18. The taxpayer's argument also has the consequence that in a case like this SDLT in effect reverts to being a tax on documents: in this case the intermediate transfer between the Company and the Partnership. But the whole point of SDLT was to get away from a tax on documents, and to replace it with a tax on land transactions. So in my judgment the taxpayer's argument runs against the grain of the legislation.

Discussion

19. The crux of the Upper Tribunal's decision was to fasten on the words in section 45 (2):

> "section 44 (contract and conveyance) has effect in accordance with the following provisions of this section…"

20. This showed that the deeming provisions in section 45 had a limited purpose. Its sole purpose was to modify the operation of section 44. Thus far I agree. But section 44 is one of a group of sections (sections 43 to 47) which define what is (and what is not) a land transaction. A land transaction is the acquisition of a chargeable interest. Thus section 44 is a key provision of the SDLT code which is applied generally in order to identify a land transaction; in other words what counts as the acquisition of a chargeable interest. In my judgment the Upper Tribunal did not give sufficient weight to the importance and centrality of section 44. The real question, in my judgment, is how section 44 operates, when you have made the modifications required by section 45.

21. Mr Thomas submitted, most convincingly in my judgment, that in the structure that existed in the present case it was illegitimate to ignore the reality of the contract between L & G and the Company and the contract between the Company and the Partnership; or the transfers that amounted to completion of each of those contracts. It was a precondition of the operation of section 45 (3) that there be simultaneous completion of both contracts. Completion as defined by section 44 (10) requires one to ascertain that each proposed land transaction had been completed between the same parties in substantial conformity with the contract. It would be impossible to decide whether there has been completion as defined without identifying the parties to each contract and the parties to each transfer. Thus it was impossible to construct a fictional contract between L & G and the Partnership. The Company occupied a real place in the transactions agreed in the real world, and that reality could not be ignored. Equally it would be impossible to determine whether a contract had been completed in substantial conformity with the contract without comparing the contract in the real world and the transfer which gave effect to it. I agree.

22. The Upper Tribunal was rightly concerned that the argument presented by HMRC should not distort the real world more than was necessary to give effect to the purpose of the deeming provisions in section 44 and 45. But in the real world parties enter into transactions dealing with interests in land as they exist under the general law of real property. The idea of a chargeable interest, on the other hand, is a construct which applies only in the world of SDLT.

23. Section 43 (1) defines a "land transaction" as "any *acquisition* of a chargeable interest". The focus is on what is acquired; not on what is disposed of. An acquisition can take place without any act of the parties. In my judgment, therefore, 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. Although the word "vendor" is defined by section 43 (4) it is notable that the word does not appear anywhere in section 44. Accordingly, I do not see any inconsistency between, on the one hand, accepting that the Company was entitled to an equitable interest (which is an interest in land in the real world) and, on the other, concluding that that equitable interest does not count as a chargeable interest for the purposes of SDLT while it is in the Company's hands.

24. That is not to say that the contracts in the real world have no part to play in the world of SDLT. They serve a number of functions. First they define what is the proposed land transaction. This is clear from section 44 (1) ("a contract *for* a land transaction") section 44 (10) ("completion of the land transaction *proposed*") and section 44 (3) ("the transaction effected on completion"). In our case the chargeable interest to be acquired under both contracts was the head lease held by L & G. Second, it is by reference to the terms of the contract in the real world that one can tell whether the contract has been completed for the purposes of section 44 (10) ("between the same parties and in substantial conformity with the contract"). Third, it is by reference to the terms of the contract that one can tell whether it has been substantially performed. Fourth, it is by reference to the terms of successive contracts that one can decide, for the purposes of section 45 (1), whether a person has become "entitled to call for a conveyance". But none of this, in my judgment, bears on the question whether the rights which a person has in the real world count as a chargeable interest for the purposes of SDLT.

25. Mr Gammie argued that the secondary contract for which section 45 (3) provides is a tripartite contract which, on the facts of this case, is a contract to which L & G, the Company and the Partnership were all parties. The Upper Tribunal discussed at some length whether the transferor under the secondary contract which section 45 (3) provides for was the Company or some other person. For reasons which it gave it decided that the transferor under the secondary contract was the Company. I agree with the Upper Tribunal that one cannot spell out of section 45 (3) the counter-factual assumption of a tri-partite contract. However, I do not regard the fictional existence of such a contract as necessary to the outcome of this appeal.

26. Mr Thomas placed some weight on the final part of section 45 (3). I quote it again for convenience:

> "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)*." (Emphasis added)

27. The argument is that the exception from the disregard of completion of the secondary contract in a case to which section 73 (3) applies would be unnecessary if HMRC's argument were correct. I did not find this argument of any real assistance either way. First, the exception from the disregard was brought in by amendment in 2005 before any court or tribunal had considered the true meaning of the disregard. Second, Mr Gammie was able to give examples of tri-partite transactions consistent with HMRC's more general argument for which the disapplication of the disregard was necessary. Third, the argument was chiefly deployed in order to counter HMRC's argument that section 45 (3) required the assumption of a tri-partite contract; an argument which I have rejected. Fourth, even if the argument had merit, it still does not overcome the clear statutory instruction to disregard completion of the original contract.

28. The Upper Tribunal then proceeded as follows at [60]:

> "All the points which I have so far considered seem to me to provide support, to a greater or lesser degree, for the Partnership's argument that the Company is to be regarded as the *vendor* under the secondary contract. *If that is right, the remaining steps in the argument are relatively straightforward. On completion of the secondary contract, there was a transfer of a chargeable interest by the Company to the Partnership*, so paragraph 10(1)(a) of Schedule 15 applies, albeit by reference to the deemed secondary contract rather than the actual facts of the sub-sale viewed in isolation. Section 45(3) says that the consideration (not, it should be noted, the chargeable consideration) for the transfer is £65.1 million. In order to ascertain the chargeable consideration it is necessary to turn to section 50(1), which states that Schedule 4 'makes provision as to the chargeable consideration for a transaction'. By virtue of paragraph 1(1) of Schedule 4, quoted above, the chargeable consideration is, 'except as otherwise expressly provided', the consideration in money or money's worth given for the subject-matter of the transaction by the purchaser or a person connected with him. In the present case, express provision to the contrary is made by paragraph 10(2) of Schedule 15, which therefore ousts and takes priority over the consideration for the secondary contract specified in section 45(3)." (Emphasis added)

29. It is at this point that I respectfully part company with the Upper Tribunal. First, section 45 does not provide for the Company to be regarded as the "vendor". The "vendor" is a defined term which means a person disposing of a chargeable interest.

The consequence of the Upper Tribunal's reasoning is not that the Company is to be regarded as the "*vendor*" but as the "*transferor*". That concept does not entail that the transferor has a chargeable interest. The Upper Tribunal did not explain how it got from its conclusion that the Company was the transferor to its conclusion that the Company was the vendor. If the Company is to be regarded as the transferor (rather than the vendor) under the secondary contract it does not follow that the Company was entitled to a *chargeable* interest in the world of SDLT, as opposed to an equitable interest in the real world. If it were entitled to a chargeable interest one would have to ask: when did it acquire that chargeable interest? Not on entering into the contract with L & G; because that is negated by section 44 (2). In ordinary circumstances it would have acquired a chargeable interest on completion of that contract. But on the facts of this case (having ascertained in the real world that completion took place between the same parties and in substantial conformity with the contract) section 45 (3) tells us to disregard that completion. There is, therefore, no point at which the Company can be said to have acquired a chargeable interest.

30. Paragraph 10 of Schedule 15 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. This contrasts with the general scheme of SDLT whose focus is on acquisitions, and looks at transactions from the perspective of the transferee. 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. But that is not to say that he cannot transfer an interest in land to a partnership; merely that it is not a chargeable interest in his hands. In the hands of the partnership, of course, it will be a chargeable interest and the time at which the partnership acquired that chargeable interest is ascertained by the application of section 44 (3) as modified by section 45 (3).

31. We know that in the real world the Partnership had a contract with the Company. We know that in the real world that contract was completed by the execution of a transfer. We know also that in the real world what the Partnership acquired by those two steps was (at least) the whole equitable interest in the head lease. That is a chargeable interest. We can therefore say with confidence that the Partnership acquired a chargeable interest as a result of those two steps, even if the equitable estate in the hands of the Company was not a chargeable interest.

32. Accordingly, in my judgment the correct analysis is as follows.

33. When the Company entered into the contract with L & G section 44 (2) applied. Thus the Company was not regarded as having entered into a land transaction. Because a land transaction is defined as any acquisition of a chargeable interest, it must also follow that the Company was not regarded as having acquired a chargeable interest. It would acquire a chargeable interest on completion if section 44 (3) applied. Section 44 is intended to apply generally to the SDLT code.

34. When the Company entered into the contract with the Partnership section 45 (2) applied. Thus the Partnership was not regarded as having entered into a land transaction and, just as in the case of the Company, was not regarded as having acquired a chargeable interest. However, it was regarded as having entered into a *contract* for a land transaction, the consideration for which was so much of the consideration under the original contract as is referable to the subject-matter of the

transfer of rights. In the jargon of the Act the contract between L & G and the Company is "the original contract"; and the contract between the Company and the Partnership is "the secondary contract". Section 44 takes effect subject to modifications made by section 45.

35. Both the contract between L & G and the Company and the contract between the Company and the Partnership were completed on the same day. Thus on the facts of this case completion of the original contract took place at the same time as, and in connection with, completion of the secondary contract. But in those circumstances section 45 (3) says that the completion of the original contract must be disregarded. This disregard must be made for the purpose of section 44. The inevitable consequence of the statutory instruction to disregard completion of the contract between L & G and the Company for the purpose of section 44 is that section 44 (3) does not apply to completion of that contract. Since section 44 (2) has the result that the Company did not acquire a chargeable interest by entering into the contract with L & G, and on the facts of this case section 44 (3) does not apply to completion of that contract, it must follow that the Company did not enter into a land transaction for the purposes of SDLT. Accordingly for the purposes of SDLT the Company never acquired a chargeable interest.

36. When the contract between the Company and the Partnership was completed, section 44 (3) applied to the latter's acquisition of a chargeable interest. Thus the effective date of its land transaction was the date of completion of its contract with the Company.

37. Paragraph 10 of Schedule 15 only applies if a partner transfers a chargeable interest to a partnership. Since, for the purposes of SDLT, the Company did not acquire a chargeable interest, that paragraph cannot apply. It follows, therefore that the Partnership is not entitled to rely on the exemption. It follows, therefore that the Partnership is liable to pay SDLT on the consideration which it gave for its own acquisition, as prescribed by section 50 and Schedule 4 paragraph 1.

38. In its essentials this is the analysis put forward by HMRC. The Upper Tribunal described it as simple, logically attractive, and productive of a sensible result on the facts. I agree. In accordance with the modern approach to construction we should adopt it. I would allow the appeal.

Lady Justice Gloster:

39. I agree.

Lord Justice Maurice Kay:

40. I also agree.