Case No: CO/12316/2013

Neutral Citation Number: [2014] EWHC 1848 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 June 2014

Before:

MRS JUSTICE ANDREWS DBE

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Between:

R (on the application of ST MATTHEWS (WEST) LTD and others)	**Claimants**
- and -	
(1) HER MAJESTY'S TREASURY **(2) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS**	**Defendants**

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- -

Jeremy Woolf (instructed by **PWT Advice LLP**) for the **Claimants**
Kieron Beal QC and Simon Pritchard (instructed by **General Counsel and Solicitor for HM Revenue & Customs**) for the **Defendants**

Hearing dates: 20-22 May 2014

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Judgment

Mrs Justice Andrews:

1. Benjamin Franklin famously identified tax as one of life's two certainties. However, the aphorism must be subject to some qualification; for as long as taxes have existed, people have been devising ways to avoid paying them without breaking the law.

2. The Claimants were participants in a tax avoidance scheme structured by advisers named Blackfriars Tax Solutions LLP ("Blackfriars") which was designed to minimise their exposure to Stamp Duty Land Tax ("SDLT"). I shall refer to the scheme as "the Blackfriars scheme", although HM Revenue and Customs ("HMRC") identified other promoters who were selling or intending to sell it.

3. The Claimants seek to challenge by way of judicial review the provisions of s.194(1)(a) and s.194(2) of the Finance Act 2013 which, by amending s.45 of the Finance Act 2003, with retrospective effect from 21 March 2012, made it plain that SDLT is chargeable in full on transactions structured in accordance with the Blackfriars Scheme. HMRC contends that the scheme was always ineffective, and the legislation merely confirms this; the Claimants contend that it was effective, and that the retrospective legislation has deprived them of the chance of establishing this before the First Tier Tribunal (Tax Chamber) (hereafter "FTT").

4. The claim was initially based upon alleged infringement of Article 1 of Protocol 1 ("A1P1") and Article 14 of the European Convention of Human Rights ("ECHR"). However, in recognition of the fact that on the present state of the law a claim based on Article 14 is bound to fail, Mr Woolf did not pursue his arguments on that aspect of the case, whilst expressly reserving the position in case this matter should ever reach the Supreme Court. Instead, the Claimants have belatedly raised the further argument that the retrospective changes to the legislation were contrary to Article 6 ECHR. Since the challenge is to primary legislation, the only permissible relief would be a declaration of incompatibility.

5. On 15 October 2013 Lang J ordered that the permission application be decided at a "rolled-up" hearing.

6. Although the Claimants' case was put in a number of ways, the essence of their argument is that the amount of tax lost to the Exchequer by the use of the Blackfriars scheme (on the evidence, in the order of £7 million) was too small to justify the use of retrospective legislation to close it down. However attractively that submission has been dressed up by Counsel, my conclusion that it is wholly without merit may come as little surprise.

Background

7. The Finance Act 2003 ("FA 2003") introduced an entirely new regime for the payment of stamp duty. The consultative document entitled "*Modernising Stamp Duty on land and buildings in the UK*" issued by the Inland Revenue in April 2002, explained that the Government was

> *"concerned about growing avoidance of stamp duty, by a minority, at the expense of the majority of taxpayers. In particular some companies are determined not to pay their full*

> *share of duty and structure property transactions in increasingly artificial ways to achieve that. This activity represents a significant threat to the tax base. We are determined to stop this abuse.”*

8. Many of the opportunities for avoidance arose from the fact that stamp duty had been charged on particular documents that transferred title to or interests in land. The new regime focused instead on the substantive underlying transactions. Section 42 of the FA 2003 provides for SDLT to be payable on “*land transactions*”, defined by s.43 as any acquisition of a chargeable interest in land. “*Chargeable interest*” is defined in s.48. The rates of SDLT payable vary depending on the consideration paid for the acquisition of a chargeable interest, and on whether the property is residential, non-residential, or mixed use.

9. Section 44 contains detailed provisions setting out the point at which a land transaction is treated as having been entered into, in circumstances where there is a difference in time between the entry into a contract for a land transaction and the conveyance by which that transaction is completed. “Completion” is defined in s.44(10)(a) as “*completion of the land transaction proposed, between the same parties, in substantial conformity with the contract*”. Thus the term is being used in the legislation in the sense in which it would be understood by any conveyancer.

10. The shift in focus to the substantive transactions gave rise to a risk that SDLT would be paid twice in circumstances in which A contracts to sell land to B and, prior to completion, there is a sub-sale, assignment or other transaction which results in a third party, C, becoming entitled to acquire all or part of the land at completion, (defined as a “transfer of rights”). This scenario occurs, for example, where B buys property “off plan” and sells or assigns his interest at a profit to C prior to completion, often with A, the developer, conveying the property directly to C.

11. The original proposal was that each transfer of rights (from A to B and from B to C) would be charged to SDLT, and that there would no longer be any general relief on sub-sales. However, in response to concerns about the fairness of double taxation in a scenario where the intermediary acquires no lasting interest in the property, and functionally there is only one transaction, the Chief Secretary to the Treasury gave assurances in Standing Committee that Clause 45 of the Finance Bill would be amended to make provision for transfer of rights relief. He explained that the proposed relief was designed to cover the scenario where there was no substantial performance of the first contract between A and B. An explanatory note to the amended Clause 45 spelled this out in no uncertain terms:

> *“1. These amendments (a) clarify the charge on a person who takes a transfer of rights under a contract for a land transaction and (b) give relief in certain circumstances to intermediate contracting purchasers where there is such a transfer of rights.*
>
> *2. Clause 45 deals with the situation where there is a contract for a land transaction and the contracting purchaser transfers his rights under the contract, whether by sub-sale or assignment, without himself completing. Under the Clause as*

originally drafted there was always a charge on the contracting purchaser, at the latest when the transferee completed.

3. These amendments provide that there is no charge on the contracting purchaser unless he himself completes or the contract between him and the vendor is substantially performed within the meaning of Clause 44(4). For this purposes an act of completion or substantial performance which takes place in connection with, and at the same time as, completion or substantial performance by the transferee is ignored…

4. ….

5. The amendments also clarify the charge on the ultimate purchaser. He is deemed to have entered into a contract for a land transaction under which the consideration is (in effect) the total consideration given by him, whether to the vendor or to the intermediate contracting purchaser. The transfer of rights is not itself a land transaction so he is chargeable only when the transaction is completed or, if earlier, when there is substantial performance of the deemed contract."

12. Thus the aim of what became s.45 of the FA 2003 was to place the taxation burden on the person who is going to have the use and enjoyment of the property.

13. Section 45(1) and (2) provide, so far as material, as follows:

"45 **Contract and conveyance: effect of transfer of rights**

(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….

….

References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction….

(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."

14. There then follow a series of complex provisions which are designed to afford tax relief to someone who has no more than a fleeting interest in the land, by eliminating or reducing the amount of SDLT that would otherwise be payable where there is a "transfer of rights" as defined. These provisions were structured so as to ensure that where a property transaction happens in stages, SDLT is paid on the full amount paid for the property by the person who actually acquires it. In its original form s.45(3) provided that:

> *"[Section 44] 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 its 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…"*

[Emphasis added]

15. Following the enactment of the FA 2003, HMRC and the Treasury became aware that the transfer of rights rules in s.45 were repeatedly being used in schemes designed to avoid SDLT on the purchase of property, particularly residential property. An SDLT anti-avoidance provision, s.75A, was brought into effect by regulations enacted in December 2006, but it proved to be insufficient deterrent. Tax avoidance schemes based on the transfer of rights rules continued to proliferate.

16. HMRC has been vigilant in challenging such schemes, issuing warning bulletins such as the June 2010 "Spotlight" on tax avoidance, and on occasion pursuing them to litigation, with considerable success – see e.g. Vardy Properties and another v Revenue and Customs Commissioners [2012] UKFTT 564 (TC); DV3 RS Ltd Partnership v Revenue and Customs Commissioners [2013] EWCA Civ 907. However, litigation takes time and costs money. In recent years, therefore, the Government has passed legislation targeting particular schemes, some of which, including the legislation that the Claimants seek to challenge, has operated retrospectively.

17. In March 2011 the Government introduced a Protocol on unscheduled announcements of changes in tax law in a document entitled "*Tackling tax avoidance.*" The alleged non-compliance with the Protocol is at the heart of the Claimants' case. The Executive Summary stated that the Protocol provides a set of criteria that Ministers will observe when deciding whether to announce a change to tax law that has

immediate effect. It was said to reinforce the Government's commitment to improve the stability of the tax system, at the same time as allowing decisive action when risks to the Exchequer are identified. The Protocol, therefore, is designed to affect the Minister's consideration of the necessity or desirability of introducing changes to tax legislation outside Budget. However, whatever the Minister may decide, it will be for Parliament to determine whether or not to accept any recommended changes either in the form presented, or with amendments.

18. The Protocol itself provides, so far as is material:

> *"The Government has made clear its aim to strike the right balance between restoring the UK tax system's reputation for predictability, stability and simplicity and preserving the ability to protect the Exchequer by making changes where necessary. In particular, changes to tax legislation where the change takes effect from a date earlier than the date of announcement will be wholly exceptional.*
>
> *1. Ministers undertake to observe the following criteria when considering a change to tax law which will*
>
> - *be announced other than at Budget; and*
> - *take effect before the legislation implementing the change is enacted.*
>
> Such changes to tax law will normally only be announced other than at Budget where:
>
> - *There would otherwise be a significant risk to the Exchequer*
> - *Significant new information has emerged to identify the risk or indicate its scale; and*
> - *Changing the law immediately is expected to prevent significant losses to the Exchequer.*
>
> *Announcements will usually take the form of a Written Ministerial Statement to Parliament before 2pm."*

19. One favoured type of avoidance scheme that was being marketed prior to the 2012 Budget was an "option scheme". The mechanics were as follows:

i) A would contract to sell a property to B by way of a normal contract of sale and conveyance, usually at the full market value.

ii) B would execute a deed which, on completion of the sale, granted C an option to call on B to transfer the property to him for a given price on a future date, typically in 35 years' time. A separate consideration would be set for the option.

iii) The value ascribed to the option would be significantly lower than the open market value of the property and lower than the applicable SDLT threshold. It was not intended that the option would be exercised. Therefore B would normally have a sufficient connection with C to protect against the risk of B having to part with his property at a fraction of its market value at some future date.

The premise was that the simultaneous grant of the call option was a transaction falling within s.45(1)(b) FA 2003 and thus a qualifying "transfer of rights". Thus the real purchaser, B, would claim he was not obliged to account for SDLT on the price of the property. C would not account for SDLT either, since the consideration for the option granted to him (or it) would be below the SDLT threshold. If the scheme worked, the effect would be the precise opposite of what Parliament had intended, because the tax burden would not fall on the true owner of the property, or indeed on anyone at all.

20. It was common ground before me that option schemes in that form did not work, because in order for the transfer of rights rules to apply, the two transactions must simultaneously complete or be substantially performed. A call option over land is not a transaction that "completes" in the sense defined in s.44(10)(a), nor would it be substantially performed until it was exercised.

21. On 21 March 2012, the Chancellor of the Exchequer presented the 2012 Budget to Parliament. One of the central themes was the Government's objective of reducing aggressive tax avoidance, which the Chancellor described as "morally repugnant". He said:

> *"A major source of abuse, and one that rouses the anger of many of our citizens, is the way in which some people avoid the stamp duty that the rest of the population pays, including by using companies to buy expensive residential property. I have given plenty of public warnings that this abuse should stop, and now we are taking action…*
>
> *We are also announcing legislation today to close down the subsales relief rules as a route of avoidance."*

22. The Budget itself, under the heading "Anti-avoidance", indicated that a consultation would take place in the summer with a view to bringing forward legislation in the Finance Bill 2013 to enact a general anti-abuse rule and extend it to SDLT. It stated that the Government was committed to ensuring that this legislation effectively tackled artificial and abusive tax avoidance schemes and that the supporting guidance was practical both for taxpayers and for HMRC. It then stated this:

> ***"2.199 SDLT avoidance schemes** – the Government will take action to close down future SDLT avoidance schemes, with effect from 21 March 2012, where appropriate.*
>
> ***2.200 SDLT sub-sales rules** – the Government will introduce legislation, with effect from 21 March 2012, to make clear that the grant or assignment of an option cannot satisfy the*

> *requirements of the SDLT sub-sales rule. The Government will consult on the SDLT sub-sales rules (Finance Bill 2012 and Finance Bill 2013)".*

23. It was therefore a matter of clear policy that whatever steps might be taken in due course to close down other types of SDLT avoidance schemes, those schemes based on an abuse of the transfer of rights rules in s.45 were to be stopped with immediate effect. Accordingly, the Finance Act 2012, which came into force on 17 July 2012, amended the FA 2003 so as to shut down a range of SDLT avoidance schemes based on the grant of a call option for the conveyance of land. The amendment, which introduced a new subsection 1A into s.45 of the FA 2003, with effect on transactions occurring on or after 21 March 2012, confirmed that the grant of an option did not constitute a "transfer of rights". It provides that:

> *"The reference in subsection 1(b) to an assignment, subsale or other transaction does not include the grant or assignment of an option."*

However, in its original form, s.45(1A) did not specifically refer to agreements for the grant or assignment of an option.

24. The Blackfriars scheme was a variant on the option scheme described above, although it was independently conceived. It operates in the following manner:

    i) A exchanges contracts to sell a property to B at market value.

    ii) B enters into an agreement by which, in return for a payment, B agrees to grant C an option to purchase the property on the date on which the contract of sale completes. The amount of the consideration varied, but it was typically a little higher than the SDLT threshold. The agreement for an option contained an express provision that it was not to be specifically enforceable. Thus, even if the agreement was legally enforceable (despite being an agreement to agree) there was no means by which C could compel B to grant C any rights in respect of the property.

    iii) The second agreement would be "substantially performed" by B granting the option (by executing an option deed) at the same time as the main contract of sale was completed. As in the original option schemes, the option would not be exercisable until a date many years in the future, and the intention was that it would never be exercised.

The Claimants contend that, but for the legislation under challenge, s.45(3) would operate so as to disregard the completion of the main contract for sale for the purposes of SDLT. SDLT would be payable (a) on the price paid for the option, rather than for the property and (b) on the exercise of the option, if and when that ever occurred.

25. When he presented the 2012 Budget, the Chancellor gave an unequivocal warning that the Government would not hesitate to introduce <u>retrospective</u> legislation to close down future SDLT tax avoidance schemes. He said this:

> *"Let me make this absolutely clear to people. If you buy a property in Britain that is used for residential purposes, we will expect stamp duty to be paid. This is the clear intention of Parliament, and I will not hesitate to move swiftly without notice and retrospectively if inappropriate ways around these new rules are found. People have been warned."*

26. The formal consultation on the introduction of the general anti-abuse rule to which the Chancellor referred took place in the summer and autumn of 2012. A Consultation Document entitled "*High Risk Areas of the tax code: the Stamp Duty Land Tax "transfer of rights" or "subsale rules*" was published on HMRC's website on 17 July 2012 and initiated a public consultation process. Links to the document were sent to the members of the SDLT Working Together Group, which included representatives from various professional groups and organisations including the Stamp Taxes Practitioners Group, the Chartered Institute of Taxation, and the Law Society.

27. Following consultation meetings which took place between July and September 2012, a summary of responses was published on HMRC's website on 11 December 2012, together with draft legislation. Further consultation meetings were then held on the draft legislation in advance of the final terms of that legislation being included in the Finance Act 2013 ("FA 2013"). The product of the consultations was the general anti-abuse rule set out in Part 5 of the FA 2013 and the prospective amendments to the transfer of rights rules in Schedule 39 to that Act, which it is common ground would render the Blackfriars scheme ineffective from the date on which the FA 2013 received Royal Assent.

28. Besides these changes, specific anti-avoidance legislation was announced in the 2013 Budget, targeting two particular "transfer of rights" schemes that had been identified by HMRC at that time. These schemes involved deferring the completion of a sale of the property to C, a trust or company normally connected with B, the true purchaser, for 125 years. C would pay the consideration to B, a price set below the SDLT threshold, at the time of completion of the main sale contract, thus "substantially performing" the contract between B and C. Like the original option scheme, but unlike the Blackfriars scheme, the object was to avoid payment of any SDLT.

29. These "deferred completion" schemes were to be outlawed with retrospective effect from 21 March 2012. A tax information impact notice ("TIIN") issued by HMRC on 20 March 2013 explained the policy objective in these terms:

> *"This measure supports the Government's anti-avoidance strategy and its fairness agenda by helping to ensure that everybody buying property pays their fair share of SDLT".*

Reference was made to the Chancellor's warnings in the 2012 Budget that he would not hesitate to use retrospective legislation to close down future SDLT avoidance schemes.

30. Although a similar scheme to the Blackfriars scheme had been notified to HMRC in 2011, the officer in charge of that notification failed to attribute any significance to its mechanics, and treated it as just another species of option scheme. At the time, this was understandable. The Blackfriars Scheme itself only captured the attention of

HMRC shortly after the publication of the 2013 Budget. The formal disclosure of the scheme under the disclosure of tax avoidance schemes ("DOTAS") rules was not made until 22 April 2013, although there had been some prior communications of an informal nature in March.

31. It was only on receipt of the DOTAS notification that HMRC became fully aware of the promoters' arguments as to why the scheme was not caught s.45(1A) and s.75A of the FA 2003 and of the significance sought to be attached to the fact that the second transaction was an agreement for an option, and thus capable of being "substantially performed" at completion of the main contract of sale. Blackfriars acknowledged in the DOTAS notification that the scheme would be blocked by the new transfer of rights rules to be introduced in what eventually became Schedule 39 to the FA 2013, as and when it came into force, and that its potential application was limited to transactions occurring before then.

32. Within a relatively short time after receiving the DOTAS notification, on 7 May 2013, a note was sent to the Exchequer Secretary from Ms Jane Ewart, an officer of HMRC's Corporation Tax, International and Stamps (CTIS) department, recommending the taking of action to close down the Blackfriars scheme with retrospective effect, by amending the clause in the Finance Bill designed to dispose of the two deferred completion schemes in like manner. The note made it clear that HMRC did not believe that the Blackfriars scheme was effective to avoid SDLT. It described it, correctly, as a variant of the scheme that was closed down at Budget 2012 (i.e. the "standard" option scheme), and similar to the other two schemes closed down by the new clause (i.e. the "deferred completion" schemes).

33. At that stage HMRC had identified five promoters of the Blackfriars scheme and users for three of the five. They expected these promoters, and possibly others, to continue to promote the scheme between then and Royal Assent. So far as Blackfriars itself was concerned, up to 30 users of the scheme it was promoting had been identified, with tax at risk of approximately £4 million. If HMRC had been aware of the scheme before the Budget, they would have proposed its inclusion in the retrospective legislation announced at Budget.

34. Ms Ewart then referred to the Protocol and set out features that she contended made this an exceptional case. She referred to the repeated abuse of this area of tax over a number of years and the clear warning given at Budget 2012 that this was unacceptable, and that if such abuse continued the Government would consider retrospective legislation to close down similar scheme in the future. She added:

> *"Given this warning and the announcement at Budget 2013 of retrospective legislation to close down two very similar schemes, it should have been obvious to both promoters and users of this scheme that it pushed on or beyond the boundaries of abusiveness and that the Government was likely to take further action."*

35. In terms of justification for recommending retrospective legislation, Ms Ewart said it would reinforce the message given at Budget 2012 that the Government was serious about tackling SDLT avoidance and that it would show that the Government was prepared to act quickly when it identified new schemes, to ensure that promoters and

taxpayers did not continue to benefit from promoting and using them. She pointed to evidence that retrospective legislation was changing people's behaviour, and said that if action were not taken to close down the scheme it was to be expected that it would continue to be promoted until the Finance Bill obtained Royal Assent. Failure to take action against this scheme could be seen as unfairly benefiting those who continued to promote and use this scheme, particularly against those who had acted on the Chancellor's warning and stopped selling and using such schemes.

36. The note pointed out that the amount of tax from these schemes was fairly small in absolute terms, but also that early evidence was that the combined effect of the announcements made at Budget 2012 and 2013 was causing taxpayers to become more risk averse. Promoters were finding it more difficult to sell these types of scheme.

37. The Government moved swiftly to act on that recommendation. Following a Ministerial announcement on 4 June 2013, the Finance Bill was amended to add a clause making a retrospective amendment to section 45(1A), so as to make it clear that SDLT would be payable by the purchaser if the transaction was structured in accordance with the Blackfriars scheme. The Exchequer Secretary set out the reasons for the amendments and for making them retrospective. He said:

> *"Because of repeated avoidance in this area, at Budget 2012 the Chancellor of the Exchequer made it clear that he would not hesitate to use retrospective legislation to close down future SDLT avoidance schemes.*
>
> *Acting on this warning it was announced at Budget 2013 that legislation will be introduced in the Finance Bill to close down two schemes, which use the transfer of rights rules, with effect from the date of the Chancellor's warning, 21 March 2012.*
>
> *Since then a further transfer of rights scheme has been identified. The Government do not accept that the scheme has the effect intended but to remove any doubt, prompt action is being taken to protect the Exchequer.*
>
> *Given the Chancellor's clear warning last year and the announcement at Budget 2013 of retrospective legislation to close down similar transfer of rights schemes, it should have been obvious to both promoters and users of this scheme that it could be subject to retrospective action."* [Emphasis added].

An updated TIIN and guidance note were published on the same date on HMRC's website.

38. The matter was debated in Standing Committee on 18 June 2013. The Exchequer Secretary was specifically asked to explain why retrospection was applied and considered to be necessary. He gave a cogent response. He pointed out that the Chancellor had given a clear warning; that anyone who participated in the arrangements and was advised on them should be aware that the arrangements were clearly contrary to Parliament's intention, and that for the vast majority of people who

pay SDLT it was right that the Government should address the behaviour concerned. The changes made by the clause would ensure that SDLT was paid by the true purchaser of the land.

39. The Minister was also asked whether the Protocol applied, and whether there really was a significant risk to the Exchequer if, as he had said, HMRC did not believe that the schemes were effective. He replied that the measure was consistent with the Protocol, that this was a wholly exceptional case in the light of the history of abuse and the clear warnings given, and that so far as the tax at risk from transfer of rights schemes (in general) was concerned, HMRC estimated that it was around £160 million over the next five years. He therefore believed that action in this case was justified, including retrospective action.

40. Parliament plainly agreed with him because in due course the changes were approved without amendment, and the legislation received Royal Assent. As a result of the retrospective change made by s.194(1)(a) and 194(2) of the FA 2013, s.45(1A) of the FA 2003 now reads:

> *"1A. The reference in subsection 1(b) to an assignment, subsale or other transaction does not include the grant or assignment of an option <u>or to an agreement for the future grant or assignment of an option</u>."* [Emphasis added]

41. I have set out the background at some length because it is of considerable importance when evaluating whether, on the assumption that A1P1 is engaged, its requirements have been satisfied.

<u>The Claim under A1P1</u>

42. A1P1 provides, so far as material, that

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary …. to secure the payment of taxes…."*

43. The first issue is whether A1P1 is engaged at all. It was common ground that the imposition of a tax upon an individual interferes with that person's enjoyment of a possession, namely, money. Thus the obligation to pay tax may engage A1P1, as for example it did in <u>Burden v United Kingdom</u> [2008] 47 EHRR 38, a case in which the survivor of two co-habiting siblings argued that it was unfair/discriminatory that she should have to pay inheritance tax, when tax relief would have been available to a surviving spouse or civil partner.

44. However, the FA 2003 established that SDLT is due on land transactions. The challenge in this case is <u>not</u> to those provisions of the FA 2003 (chiefly ss.42-44)

which impose SDLT on transactions, such as sales, which create a chargeable interest in land. The legislation under challenge does not impose a liability upon the Claimants to pay SDLT. It retrospectively removes an alleged, but not established, right to tax relief which has been asserted by the Claimants in their SDLT tax returns, in reliance on the "transfer of rights" provisions in s.45 FA 2003.

45. There can be no doubt that the assertion of entitlement to such relief and the question whether s.45 applies to these transactions is the subject matter of genuine dispute by HMRC and that it has not been adjudicated upon by any court or tribunal. Mr Beal submitted that the subject-matter of the dispute is therefore not a "possession" established under domestic law which is capable of engaging A1P1. The Defendants rely on a substantial line of Strasbourg cases, including Kopecky v Slovakia (2005) EHRR 43 and NKM v Hungary [2013] STC 1104, which establish that "possessions" can be either existing possessions or assets, including claims, in respect of which an individual can argue he has at least a "legitimate expectation" that they will be realised. However, in order to establish a "legitimate expectation" the claim must be based on a legal provision or legal act, such as a judicial decision, and not just an arguable claim or a genuine dispute. Thus in Kopecky the European Court of Human Rights ("ECtHR") stated at [52] that *"where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it."*

46. The Defendants draw additional support from the decision of the Court of Appeal in R (Huitson) v HMRC [2011] EWCA Civ 893, [2012] QB 489. The case concerned a complex tax avoidance scheme involving a partnership established in the Isle of Man, which was designed to make use of double taxation arrangements to avoid payment of income tax. HMRC had told the claimant that it was preparing a number of representative cases to take to the special commissioners regarding the validity of the claim to relief, but before the cases were listed, the Government enacted s.58 of the Finance Act 2008, which amended previous fiscal legislation with retrospective effect, so as to render the scheme ineffective.

47. The claimant brought a claim for judicial review seeking a declaration that the retrospective element of s.58 infringed and was incompatible with the peaceful enjoyment of his possessions guaranteed by A1P1. At first instance, ([2010] EWHC 97 (Admin), [2011] QB 174) the argument was based upon the claimant's alleged legitimate expectation that HMRC would carry out their promise to challenge the scheme before the special commissioners, and that the retrospective nature of the legislation had deprived him of the right to be heard. Kenneth Parker J rejected the argument that the efficacy of the arrangements to avoid tax was "practically assured" and that the legislation was enacted because HMRC thought they would lose. He held that the tax efficacy of the arrangements was far from clear-cut and that there were respectable arguments on both sides of the question.

48. However, he went on to find that the outcome of the claim for judicial review would have been no different even if it had been established that the claimant would have won. There was no obligation on the state to test the efficacy of the tax avoidance scheme in the courts before enacting retrospective legislation. The state was entitled to impose income tax on any person who resided there. The fundamental purpose of double taxation arrangements was to avoid double taxation, not to facilitate the

complete avoidance of tax in any jurisdiction. Such was the importance of this as a matter of public policy that in principle, retrospective legislation could be justified. The challenged legislation was in the circumstances proportionate and compatible with A1P1.

49. On appeal, the emphasis shifted, and it was argued that the claimant was deprived of a possession in the form of the alleged proprietary interest in the nature of his claim to tax relief. The claimant asserted that the value of the tax relief to him was in the region of £195,000, and that was a right to property of significant value. As in the present case, HMRC argued that the claimant was not being deprived of an asset or proprietary claim falling within A1P1, but rather, he was being deprived of asserting that he should not have to pay the same level of income tax as other taxpayers resident in the UK. The Court of Appeal agreed. Mummery LJ, at [69] said that the "claim" to tax relief was one which had neither been accepted by HMRC nor made out before any tribunal or court. All that had been established was the existence of a genuine dispute as to whether the scheme based on the claim for tax relief worked.

50. However, although the "legitimate expectation" argument was rejected, the Court of Appeal, like the judge, went on to dispose of the claim on the assumption that A1P1 was engaged. They unanimously upheld the decision of Kenneth Parker J. and approved his reasoning. The decision in <u>Huitson,</u> a case with many striking similarities to the present, that retrospective legislation to preclude the exploitation of a perceived tax loophole through the adoption of an artificial tax avoidance scheme (whether it worked or not) was not incompatible with A1P1, poses formidable obstacles for the Claimants.

51. Mr Woolf sought to distinguish these authorities on a number of bases, chiefly that he was not arguing that his clients' alleged right to tax relief (which he characterised as a "defence") was a possession. He put his case solely on the basis that the relevant possession was the money that the Claimants would be deprived of by payment of the tax.

52. I am not persuaded by that argument. The Claimants are all purchasers of land. The claim for judicial review does not seek to challenge the provisions of the FA 2003 which require purchasers of land to pay SDLT, any more than the claimant in <u>Huitson</u> was seeking to challenge the fiscal legislation that imposed income tax on earnings of all UK residents. In this case, as in <u>Huitson</u>, the Claimants are contending that a liability to pay tax has been imposed upon them by the legislation in circumstances where they would not otherwise have been liable to make such payment. However, the underlying premise, namely the absence of such liability until the retrospective legislation was enacted, and thus an entitlement to keep the money, <u>has not been established</u>, and depends on the application and interpretation of the pre-existing legislation, which has always been contentious. Unless the Claimants could establish that s.45 applied, they would be liable to pay SDLT like any other purchaser of land.

53. Sections s.194(1)(a) and s.194(2) FA 2013 do not impose a liability on the Claimants to make any payment. They deprive the Claimants of an argument that they were not liable to pay the tax, or of a defence to HMRC's claim. A legal argument, whatever its merits, is not a "possession" for the purposes of A1P1. The fact that the Claimants are not making a claim for a tax refund or some form of restitutionary claim is irrelevant to that analysis.

54. Both parties addressed me on the underlying merits of the dispute, whilst seeking to dissuade me from deciding them. I agree that such disputes are best left to the specialist tribunal to determine, and in any event the question whether the Claimants would have won the argument is irrelevant to the question whether the legislation is compatible with A1P1, as Kenneth Parker J. concluded in Huitson. However, I cannot help but observe that in seeking to cure the fatal flaw in the original option schemes by interposing an intermediate agreement, those who devised this variant may have created a different, but equally fundamental, problem. The agreement by the purchaser, B, to grant an option gives rise to no right on the part of the grantee, C, to call for a conveyance of the property to him, as required by s.45(1)(b). That is put beyond doubt by the express prohibition on seeking specific performance of the grant of the option. C derives any rights over the property from the third agreement in the chain, the option deed, which does not qualify as an "other transaction". At the very least, those factors severely undermine the argument that there has been a "transfer of rights" from B to C in consequence of the completion or substantial performance of the intermediate transaction. Thus, on the face of it, these Claimants appear to have been in a far worse position in terms of the strength of their legal argument that the scheme was effective, than the claimant was in Huitson.

55. Although I am not persuaded that A1P1 is even engaged, I shall adopt the same course as the Court of Appeal in Huitson and go on to consider the arguments on the merits on the assumption that it is.

56. A clear and comprehensive exposition of the relevant principles to be applied when considering the compatibility of any domestic law with A1P1 is to be found in the judgment of Lord Reed in AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868 at [116] to [124]. In summary, any interference with the peaceful enjoyment of possessions must be both lawful and proportionate. There may be a degree of overlap between the factors that are relevant to take into consideration in assessing whether these two requirements are met, but the requirements themselves are separate and cumulative.

57. The existence of a legal basis in domestic law (e.g. the fact that the law is contained in an Act of Parliament) does not suffice, in and of itself, to satisfy the requirement of lawfulness; the measure in question must be compatible with the rule of law. That means that it must have legal certainty (i.e. it must be clear and precise in its terms and it must be sufficiently foreseeable) and it must not operate in an arbitrary manner. A law cannot be castigated as arbitrary if it is founded on necessity, reason or principle. Absence of arbitrariness does not prohibit the exercise of discretion.

58. In the field of tax, states may be afforded some degree of additional deference and latitude of their fiscal functions under the lawfulness test: see NKM v Hungary [2013] STC 1104 at [50] citing, among other authorities, National & Provincial Building Society v UK [1997] STC 1466 at [75]-[83]. In NKM, at [51], the ECtHR expressly recognised that retrospective taxation can be applied to remedy technical deficiencies of the law, in particular where the measure is ultimately justified by public interest considerations.

59. Indeed, as was common ground before me, the fact that legislation is retrospective will not, in and of itself, render it incompatible with A1P1. The ECtHR has generally considered retroactive effects in its assessment of proportionality rather than when

considering the lawfulness of the interference. That was also the approach taken by the Supreme Court in the AXA case when considering (and upholding) the compatibility with A1P1 of legislation retrospectively overruling recent case law in Scotland that had precluded persons diagnosed with asymptomatic pleural plaques from bringing claims for damages for personal injury. The lawfulness of retrospective tax legislation has been upheld by the European Commission on Human Rights and by the ECtHR in several cases cited by the Defendants besides National & Provincial; however, each case must turn on its own facts and on the application of established principles to them. Apart from Lord Reed's masterly exposition of the principles in AXA to which I have already referred, the two cases which afford the most useful guidance, because they concern analogous situations, are National & Provincial and Huitson.

60. So far as proportionality is concerned, it is well established that in securing the payment of taxes, a national authority must strike a "fair balance" between the demands of the general interest of the community and the requirements of the individual's fundamental rights, including his right to peaceful enjoyment of his possessions: see e.g. National & Provincial (supra) at [80] to [82]. The contracting state enjoys a "wide margin of appreciation" in the framing and implementation of policies in the area of taxation, and the ECtHR will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene. It has been judicially observed more than once in this specific context that the hurdle for the claimants on A1P1 is "very high".

61. In Huitson [2011] QB 174 at [75] these principles were reiterated by Kenneth Parker J in the course of setting out a series of general propositions in relation to the effect of A1P1 in the sphere of retrospective tax legislation, all of which I gratefully adopt without further repetition. The final proposition, which is of some importance in the present case, is that depending on the circumstances it may be relevant to inquire whether the purpose of the retrospective legislation was to restore and reassert the original intention of the amended legislation.

62. Perhaps understandably in the light of the decision in Huitson, which focused on proportionality, Mr Woolf's arguments concentrated on the requirement of lawfulness. He pointed out that this requirement was not something that featured in the consideration of the relevant tax legislation by the courts in either the Huitson or National Provincial Building Society cases, nor indeed in many of the authorities (both domestic and European) relied upon by the Defendants, especially the older ones. He submitted that in this case, the retrospective legislation which put beyond doubt that the Blackfriars scheme was ineffective to achieve its purpose, failed to satisfy the requirement of lawfulness because it was insufficiently foreseeable and it was arbitrary. Therefore even if it was proportionate, it was incompatible with A1P1.

63. Unlike the other retrospective changes brought about by s.194(1)(b) of the FA 2013, these retrospective measures were not announced in the 2013 Budget. The Protocol set out the cumulative criteria that "normally" had to be satisfied before the Government would introduce retrospective tax legislation outside the Budget. Those criteria were not all satisfied in the present case, because the amount of tax in issue if the Blackfriars scheme were effective, a mere £7 million, could not be described as a "significant risk to the Exchequer". Mr Woolf therefore submitted that unless there

were exceptional reasons for departing from the Protocol, the Claimants were entitled to expect that the Government would adhere to it. Thus it was not, or not sufficiently, foreseeable that retrospective legislation would be passed adversely affecting participants in the Blackfriars scheme; further or alternatively any departure from the Protocol made the measures arbitrary.

64. Mr Woolf further submitted that there were no exceptional reasons for departing from the Protocol, because there were no doubt other equally artificial and aggressive tax avoidance schemes in operation at the time that were not targeted in the same way. Striking down one scheme rather than another was "inimical to the rule of law". As regards the express warnings given by the Government that it would not hesitate to strike down tax avoidance schemes, (including in particular those based on the transfer of rights provisions) if need be by passing retrospective legislation, Mr Woolf submitted that because the Government had made similar threats in the past to clamp down on tax avoidance schemes in other spheres, such as employment, and had failed to act upon them, it was insufficiently foreseeable that they meant what they said this time. Moreover the Chancellor had not said anything to indicate that the Government would not follow the Protocol. The 2012 Budget had indicated that retrospective legislation would be passed "where appropriate" but it would not be reasonable to regard a measure that was inconsistent with the Protocol as "appropriate".

65. In my judgment none of these arguments has any merit. In the wake of what was said by the Chancellor at the time of the 2012 Budget, any person who was well advised and who gave even cursory consideration to the issue must have appreciated that it was highly likely that once HMRC became aware of a variant on an existing tax avoidance scheme based on the transfer of rights rules in the FA 2003 which had been rendered ineffective as from the 2012 Budget, it would take swift action to put an end to the variant as from the same date. That approach would have the merit of consistency and send out an unequivocal message to those in the industry that it was no good trying to get around the prohibition by coming up with a slightly altered scheme because there would be no advantage to be gained by doing so. The Government could not have given clearer signals as to its policy and its intentions in that regard. The amount of tax likely to be avoided by each particular scheme was irrelevant to the objective that it was seeking to attain, which was to put paid to all such schemes, and ensure that the transfer of rights rules achieved the outcome for which they were originally intended.

66. The Government introduced s.45(1A) in its original form specifically to close down the existing schemes that involved the creation of call options over the transferred land, and the Chancellor said at the time "*I will not hesitate to move swiftly without notice and retrospectively if inappropriate ways around these new rules are found".* The Blackfriars scheme was structured in a way that its promoters claimed (rightly or wrongly) avoided its being caught by s.45(1A), which mentioned options but did not expressly refer to agreements to grant an option (even though an option cannot be created without an agreement). Therefore, the enactment of retrospective legislation to put it beyond doubt that this variant was caught by section 451A was entirely foreseeable. Anyone in the Claimants' position who entered into the Blackfriars scheme did so at their own risk.

67. There was nothing arbitrary about this legislation. The amendments to s.45(1A) were part and parcel of the overall package of measures designed to obliterate the abuse of

the transfer of rights rules. The legislation was enacted for good reason, and after proper consideration of all relevant factors. Critically, it ensured that s.45(1A) took effect in the way that it was always intended to, at and from the time of the 2012 Budget, and blocked the perceived loophole in s.45. The proposed amendments to that section were scrutinised in accordance with the normal democratic processes before the legislation was approved by Parliament.

68. All of the tax avoidance schemes which were being targeted by the Government were attempts to manipulate the transfer of rights rules to produce the opposite effect from that which they were intended to achieve. The Blackfriars scheme was just another example falling within that generic category. The deferred consideration schemes were dealt with in similar fashion and with effect from the same date, bringing home the clear message that this type of scheme would not be tolerated and that the Chancellor was not making idle threats.

69. If other tax avoidance schemes unrelated to SDLT were not the subject of similar legislation it does not follow that there was anything arbitrary or capricious about this legislation or about its operation. Mr Beal's riposte to that argument was that it is not open to the Claimants to seek to take advantage of an alleged failure by HMRC to apply the (same) correct tax treatment to someone else, because two wrongs do not make a right. I agree. Moreover since it is incumbent on Parliament to make decisions based on relevant facts and circumstances, no inferences can possibly be drawn from any decision not to make anti-avoidance legislation retrospective in unrelated areas, in which the relevant factors might well point towards a different conclusion being reached as to the proportionality of that approach.

70. In any event, as demonstrated by the history of the Government's attempts to combat tax avoidance in the specific area of SDLT set out at some length earlier in this judgment, HMRC and the Treasury have hardly been complacent or dilatory; on the contrary they have been astute to combat this type of abuse by taking swift measures against it. The fact that one similar scheme slipped under the radar in 2011 does not detract from their general vigilance.

71. There is an opportunistic aspect to the Claimants' case, which is largely dependent upon the alleged non-compliance with the Protocol. It cannot be seriously doubted that if the potential ramifications of the similar scheme notified in 2011 had dawned upon HMRC before the 2012 Budget, s.45(1A) would have been drafted in terms that made it crystal clear that agreements for options were caught. Likewise, if the Blackfriars scheme had been the subject of a DOTAS notification prior to the 2013 Budget it would have been treated in the same way as the deferred consideration schemes, as Ms Ewart's Note to the Minister made plain. In either of those events, it would not have been open to the Claimants to complain that the enactment of retrospective legislation was insufficiently foreseeable, and the only basis for contending that it was arbitrary would have been the specious argument that the Government had not taken threatened steps to outlaw tax avoidance schemes in totally different spheres. Thus the argument which is at the heart of the Claimants' case is only open to them because HMRC did not become fully aware of the Blackfriars scheme until after the 2013 Budget. It would be curious if the lawfulness of legislation to outlaw a tax avoidance scheme depended upon the date on which its promoters happened to bring it to the attention of HMRC.

72. Mr Beal submitted that the Protocol was adhered to, but that since the legislation was enacted by Parliament, upon which the Protocol was not binding, it would not have mattered even if there had been non-compliance with it. The Protocol has no legal force and its true operation is confined to the political sphere. Failure to adhere to it will result in the Minister concerned being held accountable to Parliament, but at the end of the day the decision whether or not to pass the legislation, with or without compliance with the Protocol, is a matter for Parliament. The Protocol is not a fetter on Parliament's discretion to enact such legislation as it sees fit. Those arguments seem to me to be plainly correct. In my judgment, any claimed lack of compliance with the terms of the Protocol does not in truth affect either the clarity or foreseeability of the legislation or the justification for Parliament's decision to make it retrospective.

73. As to compliance, Mr Beal contended that the specific criteria set out in the Protocol, including the "significant risk to the Exchequer" only applied to a situation in which the proposed legislation was intended to have effect as from the date of the Ministerial announcement, rather than from the date on which it received Royal Assent. He submitted that the only test to be applied under the Protocol so far as legislation taking effect from a date prior to the Ministerial announcement is concerned, was the "wholly exceptional" test and there is nothing in the Protocol to indicate what is meant by that phrase, for good reason (because one cannot cater for all exceptional circumstances). Ms Ewart had addressed that test, so had the Minister, and a cogent explanation had been given as to why this was a "wholly exceptional" scenario, which Parliament ultimately accepted.

74. That is indeed one possible construction of the Protocol. However, even if the criteria in the Protocol specifically apply to legislation which is to take effect immediately after the Ministerial announcement, without waiting for Royal Assent, one would naturally expect them to be at least equally relevant to a situation in which the legislation is backdated to take effect some time prior to the Ministerial announcement. Such legislation is obviously more likely to offend the principle of certainty and thus should be subject to at least the same, if not greater, justification.

75. Be that as it may, the Protocol is not to be regarded as a straitjacket, and the criteria are themselves qualified by the word "normally", which makes allowance for a departure from them in an otherwise appropriate case notwithstanding that not all the criteria are satisfied. In my judgment in the light of the history of abuse in this area, and the ample prior warnings, it would be absurd to castigate as unlawful a measure taken swiftly in response to the discovery of a variation on the types of scheme that were already the subject of anti-avoidance legislation, solely on the basis that the amount of tax lost to the Exchequer if the scheme was effective was too small – even making the assumption that it would ever be appropriate to look at each tax avoidance scheme individually instead of at the bigger picture, which in my judgment it is not. Agreements to avoid the payment of SDLT, taken generically, plainly do pose a significant risk to the Exchequer. The legitimacy of retrospective legislation to block such a scheme cannot turn upon the extent to which the scheme was promulgated and the number of people who happened to decide to subscribe to it.

76. Parliament was entitled to decide that this was a case in which there was justification for making the legislation retrospective. This was an exceptional situation in which, for the reasons I have stated, the amount of tax to be saved was of little or no

significance compared with the need to reinforce the strength of the deterrent message and to confine the operation of s.45 to transactions which would give effect to Parliament's original intention. There was already a history of warnings and of measures being taken to close down similar artificial and abusive schemes. In the six weeks remaining before the new transfer of rights rules came into effect, there was reason to fear that more people would jump on the bandwagon in order to avail themselves of the potential loophole before it closed down for good. It did not matter how many or few people would actually do so; the Government was seeking to change such behaviour and to promote fairness among taxpayers.

77. In these circumstances there was nothing capricious about the decision to take decisive action against this particular variant of the original option schemes, and do so with retrospective effect. Those who had heeded the Chancellor's warnings would have reason to feel aggrieved if those who failed to do so appeared to get away with it. For all those reasons the legislation meets the requirement of legality in substance as well as in form. It is certain, it was sufficiently foreseeable and it is not arbitrary.

78. So far as proportionality is concerned, Mr Woolf submitted that the desire to avoid time-consuming and costly litigation at the expense of all taxpayers was insufficient justification for retrospective legislation, which required strong grounds. He pointed out that there may still be litigation over the effectiveness of similar schemes entered into prior to 21 March 2012. Whilst that is true, that was not the basis on which the Defendants sought to justify making the legislation retrospective. The saving of possibly significant legal costs to the public purse was a welcome by-product of the certainty and clarity achieved by the legislation, but not the reason for it.

79. Again focusing upon the amounts at stake to the virtual exclusion of anything else of relevance, Mr Woolf submitted that the fact that the Blackfriars scheme would have come to an end in any event within six weeks, when the Finance Bill received Royal Assent, meant that it was unlikely to have any significant impact. The amount of tax to be saved was relatively insignificant, the scheme was small scale, and the tax planning was no more aggressive or artificial than a lot of other tax planning where similar warnings had been given but no action had been taken. Moreover, unlike the original option schemes and deferred consideration schemes the Blackfriars scheme did generate tax charges, actually or potentially (when the options are exercised), and no relief had been provided against the potentially unfair consequences of the retrospective provisions in this regard. Thus it was unfair to single Blackfriars out. He sought to distinguish the decision in National Provincial on the basis that the sums involved in that case were "truly astronomic" and that if the legislation had not been passed in that case the building societies would have ended up with a windfall, which meant that there was a greater public interest in making it retrospective.

80. In my judgment, the argument that the legislation is disproportionate comes nowhere near meeting the "very high hurdle" set in an A1P1 case for interference with the will of Parliament. This legislation was well within the wide margin of appreciation afforded to the State. The purpose of making it retrospective, as it was in Huitson, was to restore and reassert the original intention of the amended legislation. It did no more than to ensure that s.45 FA 2003 operated in the manner in which it was always intended to operate and that the tax burden fell on the purchaser of the land.

81. In the light of the many clear and repeated warnings given to taxpayers and their advisers, the Claimants had no legitimate expectation that they would be able to acquire property of substantial value, and pay only a fraction of the SDLT which would ordinarily have been due on the transfer of that property to them, whilst other taxpayers who acquired land of a similar value and who abided by the spirit of the original legislation paid the SDLT in full. The legislation did not impose an individual and excessive burden upon the Claimants, but rather, ensured that they paid SDLT in the same way as any other person acquiring a chargeable interest in land, just as the legislation challenged in Huitson ensured that the claimant paid income tax like any other British resident.

82. Mr Beal drew the Court's attention to a decision of the European Commission of Human Rights as long ago as 10 March 1981 to reject as inadmissible (on grounds that it was manifestly ill-founded) a remarkably similar complaint in the case of A, B, C and D v United Kingdom, request number 8531/79. In that case the UK Government had passed retrospective legislation to put an end to some highly artificial tax avoidance schemes which the Government believed to be ineffective. As in the present case, the applicants had sought to argue that the general interest did not require that legislation to have retrospective effect, and that there was an infringement of A1P1 as well as Articles 6 and 14 ECHR.

83. The Commission noted that the provision in question was enacted to counteract a specific form of tax avoidance, the effectiveness of which was already in doubt; that the applicants' tax liabilities for the relevant year had not yet been settled before the legislation was applied to them; and especially that the applicants' claim related to their entitlement to have an artificial loss taken into account in reducing their existing tax liabilities which in themselves they did not dispute. Taking those factors into account, together with the UK Government's explanation that retrospection was necessary if this form of avoidance was to be effectively prevented, the Commission concluded that the application of the legislation to the applicants was not even arguably a disproportionate interference with their rights under A1P1.

84. I have reached a similar conclusion in the present case. It was and is a legitimate and important aim of UK public policy in fiscal affairs to ensure that everybody buying property pays their fair share of SDLT. It was and is an equally legitimate and important aim that legislation that was designed to alleviate the unfairness of imposing a charge to SDLT twice on what was essentially a single transaction, by ensuring that the burden of taxation fell on the person who actually acquired the chargeable interest in land, should not be permitted to become an instrument by which that person avoids paying SDLT altogether (even if someone else pays some SDLT at a lower rate). It was therefore within the permissible area of discretionary judgment of Parliament to legislate, with retrospective effect, to prevent taxpayers from using, by wholly artificial arrangements, s.45 of the FA 2003 so as to produce an outcome which was the very opposite of what Parliament had intended. The legislature's assessment, far from being devoid of reasonable foundation, was well within the generous margin of appreciation afforded to it and strikes a fair balance between the various interests involved.

The Claim under Article 6

85. The Claimants' contention is that the retrospective nature of the legislation deprived them of any opportunity of defending the claim for SDLT before the FTT. The arguments deployed in respect of Article 6 were exactly the same as those in respect of A1P1, but the reason that the Claimants wished to rely on Article 6 is that the test is higher. In order to justify the proportionality of interference with their rights under that Article, the Defendants would need to establish "compelling grounds of the general interest" rather than simply demonstrating that the claim to be acting in the public interest is not "manifestly without reasonable justification".

86. Mr Beal submitted that tax imposed by legislation is a classic example of the exercise of public law prerogative and that Article 6 simply does not apply. He relied on Ferrazini v Italy [2006] STC 1314, Jussila v Finland [2009] STC 29 and on the decision of Simon J in R (ToTel Ltd) v First Tier Tribunal (Tax Chamber) [2011] EWHC 652 (Admin) in which those decisions of the ECtHR were considered and followed (despite the refusal of the FTT itself to do so in other cases). Simon J held that the right to challenge the assessment of tax and the imposition of surcharges in the specialist tax tribunal fell outside the scope of the civil law element of Article 6 save in egregious cases, but that if he was wrong about that, the Article 6 claim failed on the merits.

87. Mr Woolf sought to distinguish Ferrazini and Jussila on the basis that the states from which the appeals had emanated were both states which treated tax as falling squarely within the public law sphere. He submitted that matters had moved on since Ferrazini was decided, and that there was a domestic component to the test, relying on Stran Greek Refineries and another v Greece (1994) EHRR 293. In that case it was held that the concept of "civil rights and obligations" was not to be interpreted solely by reference to the respondent state's domestic law and that Article 6(1) applies where the outcome of the proceedings concerned are decisive for private rights and obligations.

88. Mr Woolf submitted that if the matter was treated as a matter of civil law in the home state, in principle Article 6 could be engaged, and that the question whether money was due to the state was regarded under English law as a private law, not a public law matter. However, the Stran Greek Refineries case goes no further than deciding that the way in which the proceedings concerned are classified under domestic law (e.g. as civil or criminal) is not decisive for the purposes of Article 6. It is not authority for the proposition that if the home state classifies tax as a civil law matter, the principles in Ferrazini will not apply.

89. This is not a case in which a state has legislated to deprive an individual of the fruits of litigation, after fighting and losing it. The Claimants' challenge to the impact of the retroactive tax legislation upon the right of access to the court to seek a ruling on the efficacy of the Blackfriars scheme, is based upon the fact that the legislation has deprived them of any prospect of winning such proceedings were they to be brought before a specialist tax tribunal, making such proceedings futile. However the proceedings in question are of the very type that Simon J decided do not engage Article 6. Although that decision by a court of co-ordinate jurisdiction is not binding upon me, the convention is that I should follow it unless I am satisfied that it is plainly wrong. On the contrary, I consider that the decision in R (ToTel) v FTT is plainly right.

90. It seems clear that the rationale of the approach in Ferrazini and Jussila has nothing to do with the way in which the respondent state in those cases classified the rights in question. In Ferrazini the Court stated at [29] that

> *"In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the convention was adopted, these developments have not entailed a further intervention by the state into the "civil" sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant…. Tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer."*

In Jussila the Strasbourg Court unequivocally reiterated at [20] that the assessment of tax and the imposition of surcharges fall outside the scope of Art 6 under its civil head. Article 6 was only held to be applicable in that case because the proceedings in question were of a quasi-criminal nature.

91. I agree with Simon J that on the basis of the Strasbourg jurisprudence, Article 6 is not even arguably engaged in a case such as the present. Moreover, even if Article 6 were capable of being engaged, there are considerable difficulties with the argument that retrospective legislation which manifestly satisfies the requirements of A1P1 could nevertheless be struck down as incompatible with Article 6 because of its higher threshold. In the AXA case at [80] Lord Brown said he had given consideration to the possibility that the undoubted and deliberate impact of the legislation upon pending claims might not of itself have vitiated it by virtue of Article 6 of the Convention, if not by reference to A1P1. However he went on to say that the Lord Ordinary had rejected the complaint under Article 6 and that the claimants had not sought to revive it "*understandably, I think, because a challenge of this nature must in reality stand or fall upon the effect of the legislation generally. It would be absurd to strike down legislation like this… merely because pending actions are included within its scope.*"

92. Those observations, made in a case in which the legislation was unrelated to tax, apply with even greater force in a case which does not involve any pending claims and where there is no question of any expropriation of assets or other obviously egregious behaviour by the State. I am not persuaded by Mr Woolf's argument that Lord Brown's observations were prompted by the fact that the legislation in question was both prospective and retrospective in effect (because it was designed to restore the interpretation of the relevant statutory provisions that had always been understood to be correct, until the court had decided it was wrong, unexpectedly depriving individuals of the ability to bring proceedings to obtain compensation). The point Lord Brown was making was surely that it would be wrong to subject the legislation to greater justification than that required under A1P1 merely because it could have an adverse impact on ongoing litigation.

93. A similar argument based on Article 6 was considered and rejected on its merits in the National & Provincial case, in which the claimant building societies had initiated proceedings to recover money that they had paid to the Revenue to discharge their investors' liability to income tax, following the success of the Woolwich Building Society in impugning the transitional provisions under which that money had been paid. The retrospective legislation put paid to any prospect of their success in those proceedings. In that case Article 6 was held to be applicable because the proceedings in question were claims for restitution, which were decisive for the determination of private law rights to quantifiable sums of money. That conclusion was not affected by the fact that the rights had their background in tax legislation.

94. The decision in the National & Provincial case cannot be treated as distinguishable on the basis that the grounds for retrospective legislation were more compelling on account of the larger sums involved and the huge windfall that the building societies would have stood to recover if the Government had taken no action. That was not the basis for the ECtHR's conclusion. The substantial amount of money involved is only mentioned in passing in the key passage at [105] to [113] in the context of discussing whether the Claimants could have anticipated that steps would be taken to cure the technical defects in the relevant regulations.

95. The reasoning of the Court for rejecting the Article 6 argument in that case apply with equal if not greater force to the present case, where there were no proceedings already on foot. What the building societies were attempting to do was to gain a monetary advantage for themselves by exploiting a technical loophole, and the legislation aimed to cure those technical defects and restore the original intention of Parliament. There is no difference in character between their behaviour and that of the Claimants in this case. The legal proceedings were just another step in a deliberate strategy to frustrate Parliament's original intention, just as any proceedings before the FTT (Tax Chamber) in this case would have been.

96. The Court inferred in the National & Provincial case that the building societies must reasonably be considered to have anticipated that retrospective legislation would have been forthcoming, but there were none of the express warnings that were given in the present case. Moreover, in National & Provincial the behaviour of the building societies was short-term opportunism; whereas in the present case the Blackfriars scheme was generated against a background history of sustained abuse of the transfer of rights rules over many years, even in the face of the enactment of s.75A and successful litigation by the Government against others; repeated warnings by the Government; and the closure of other similar schemes.

97. In the present case, even if Article 6 were engaged there is little difficulty in reaching the conclusion that the legislation easily satisfies the higher test of compelling grounds in the public interest. The interference with the Claimants' rights to air their arguments as to the effectiveness of this artificial tax avoidance scheme was proportionate and justified for all the reasons I have already given for reaching that conclusion in respect of A1P1. It was equally compelling justification for retrospective legislation that it would have the desirable effect that the relevant provisions of the FA 2003 would operate in the manner that Parliament originally intended, and that the small minority of people who sought to gain an advantage over other taxpayers who paid SDLT, by making use of similar artificial schemes, would

be deterred from doing so by the realisation that they simply would not be allowed to work to their advantage.

Conclusion

98. In order to obtain permission to bring judicial review the Claimants must establish that their arguments have a real prospect of success. In my judgment, and for the reasons I have set out in this judgment, they fall short of that threshold by a considerable margin. In consequence the application for permission is refused.