Neutral Citation Number: [2016] EWCA Civ 485

Case No: A3/2015/0908
A3/2015/0909

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mr Justice Morgan and Judge Howard Nowlan
FTC/119/2013
FTC/09/2014
FTC/24/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 May 2016

Before :

LORD JUSTICE PATTEN
LORD JUSTICE LEWISON
and
LORD JUSTICE UNDERHILL

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Between :

PROJECT BLUE LIMITED (formerly Project Blue (Guernsey) Limited)	**Appellant/ Respondent**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents/ Appellants**

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Roger Thomas QC (instructed by **Clifford Chance LLP**) for the **Appellant**
Malcolm Gammie CBE QC and **Hui Ling McCarthy** (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates : 10, 11 and 12 May 2016

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Approved Judgment

Lord Justice Patten :

Introduction

1. The issue for us on this appeal is whether Project Blue Limited ("PBL") is liable for stamp duty land tax ("SDLT") in respect of its acquisition of the former Chelsea Barracks in Chelsea Bridge Road in London ("the site") which was completed on 31 January 2008. PBL is controlled by the sovereign wealth fund of the State of Qatar. It agreed to purchase the site from the Ministry of Defence ("MoD") for £959m but the tax consequences of this transaction are complicated by the fact that it decided to obtain finance for the acquisition and development of the site in a way which was compliant with Shari'a law. A conventional loan at interest secured by a charge over the site would not of course be Shari'a-compliant. It therefore did this by contracting to sell the site to Masraf al Rayan ("MAR"), a Qatari bank, for the US$ equivalent of about £1.25bn. This sum was made up of the £959m required to complete the purchase from the MoD plus substantial additional amounts to cover SDLT and future development costs. As part of these arrangements, the contract with MAR was completed on 31 January 2008 contemporaneously with the completion of PBL's contract with the MoD. On the same day MAR granted to PBL a lease of the site for a term of 999 years and the parties entered into various put and call options which would entitle PBL in due course to re-acquire the freehold of the site from MAR. Subsequently PBL granted an underlease to Project Blue Development Limited ("PBDL"), a company in the same group.

2. The Upper Tribunal ("UT") (Morgan J and Judge Nowlan) in a decision released on 18 December 2014 have held that SDLT is payable by PBL in the sum of £38.36m based on a consideration of £959m. PBL says that this is wrong and that it has no liability for any SDLT on the transaction. It contends that the party liable for the tax was MAR but that HMRC is now out of time for making any determination or assessment in order to recover it. HMRC contends that PBL is the taxable party but that the chargeable consideration in respect of which SDLT is payable should be the £1.25bn paid by MAR to PBL rather than the £959m paid by PBL to the MoD. If right, this would result in an SDLT liability of £50m. There are also issues as to whether HMRC has adopted the correct statutory procedure in order to impose a charge to SDLT on PBL in this case and whether various points in the parties' respective arguments should have been allowed to be taken in the appeals to the First-tier Tribunal ("FtT") and then to the UT.

3. In order to understand why the parties take the positions I have summarised above and the conclusions reached by the UT, I propose for the moment to concentrate on the tax issues regardless of whether the assessment to tax was properly made or whether some of the arguments now relied on should or should not have been permitted to proceed below. I will then consider those procedural and other issues insofar as they remain relevant and necessary for the disposal of PBL's appeal and HMRC's cross-appeal.

SDLT

4. SDLT was introduced by the Finance Act 2003 ("FA 2003") as the replacement for stamp duty. Unless otherwise stated, the references which follow are to the provisions of that Act. The legislation has undergone a series of amendments since 2003 but on this appeal we are concerned with the legislation in force in January 2008 on the

completion of the various transactions and the quotations which follow are from that form of the legislation.

5. Unlike stamp duty, the focus of SDLT is on the acquisition of a qualifying interest in land rather than on the document by which the acquisition took place. So SDLT is chargeable under s.42(1) on "land transactions" which means "any acquisition of a chargeable interest": see s.43(1). The charge applies "however the acquisition is effected, whether by act of the parties, by order of a court or other authority, by or under any statutory provision or by operation of law" (see s.43(2)) and, as if to emphasise the break from stamp duty, "whether or not there is any instrument effecting the transaction": see s.42(2)(a). Section 43 also provides:

> "(3) For the purposes of this Part—
>
> (a) the creation of a chargeable interest is—
>
> (i) an acquisition by the person becoming entitled to the interest created, and
>
> (ii) a disposal by the person whose interest or right is subject to the interest created;
>
> …..
>
> (4) References in this Part to the "purchaser" and "vendor", in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction.
>
> These expressions apply even if there is no consideration given for the transaction.
>
> (5) A person is not treated as a purchaser unless he has given consideration for, or is a party to, the transaction.
>
> (6) References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the "main subject-matter"), together with any interest or right appurtenant or pertaining to it that is acquired with it."

6. A "chargeable interest" is defined by s.48 as meaning:

> "(1)…..
>
> (a) an estate, interest, right or power in or over land in the United Kingdom or
>
> (b) the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power,
>
> other than an exempt interest.

(2) The following are exempt interests—

(a) any security interest;…"

7. The legislation does not therefore apply to impose a charge to SDLT on the acquisition of what would otherwise be a chargeable interest by a mortgagee. The charge would apply (if at all) to the acquisition of a chargeable interest on the transfer of the freehold or leasehold interest to the mortgagor and not to the financing arrangements which would follow. "Security interest" is defined in s.48(3) as "an interest or right… held for the purpose of securing the payment of money or the performance of any other obligation". But the Ijara form of Shari'a financing transaction which was the method utilised in this case does not involve the holding of security by the financial institution in question in the conventional sense of a charge with a power of sale and the retention by the chargor of an equity of redemption enabling the recovery of the property free from the charge on repayment of the loan and any interest and costs. It respects the Islamic prohibition on usury by providing for the property in question to be acquired by the financial institution as its property and then leased to the person seeking the finance in exchange for agreed rental payments which give the financial institution a return on its money. The arrangements will also contain options enabling the property to be acquired by the customer at the end of the rental period or earlier upon terms which provide for the repayment of the balance of any consideration paid by the financial institution for the acquisition of the property and not recovered as rent.

8. The evidence before the FtT indicates that the Ijara transaction itself is comprised in the lease and the option agreement. The arrangement does not involve a loan by the financial institution to the lessee or the acquisition by the financial institution of only a limited interest in the relevant property. The acquisition of the property which is to be financed therefore takes the form of an outright purchase of the relevant interest from its then owner who may or may not be the person seeking the finance. So, in the present case, MAR acquired the site from PBL contemporaneously with PBL's own acquisition of the site from the MoD under the arrangements I have described and provided the £959m needed to complete PBL's own contract. The Ijara arrangements in the form of the lease and options were then put in place. But PBL could equally have acquired the site from MoD using its own money and then subsequently re-financed the transaction by selling the site to MAR for an equal or greater sum which would be repaid through the Ijara lease and the exercise of the option.

9. In SDLT terms either the direct acquisition of the property by the financial institution or its acquisition by the person seeking finance and its re-sale to the financial institution will constitute land transactions involving the acquisition by the financial institution of a chargeable interest. So, taking the facts of this case, the acquisition by MAR of the site from PBL will (without more) have qualified as a land transaction under s.43 and would not be exempt as the acquisition of a security interest under s.48(1). The same would apply had PBL completed its purchase of the site prior to the sale on to MAR save that in that case a charge to SDLT would also have arisen under s.43 on the completion of the sale from the MoD to PBL.

10. The separate charge to SDLT on the completion of the sale from the MoD to PBL would, of course, have been avoided by a direct transfer of the site to MAR had the bank been identified by the time of the contract between MoD and PBL on 5 April 2007 which was the result of a sealed bid tender process. The contract with the MoD

incorporated a delayed completion date of 31 January 2008 to give time for the MoD to re-quarter the troops then accommodated in the Barracks. The FtT found that PBL borrowed the £191.8m required for the deposit but had not yet arranged financing for the balance of the purchase price. The arrangements with MAR came later and PBL entered into a contract with MAR on 29 January 2008 under which PBL agreed to sell the site to MAR for US$2.467bn payable in four tranches on the completion date of 31 January 2008, 2 February 2009, 1 February 2010 and 31 January 2011. These totalled US$1.893bn which was equivalent at the time to the £959m purchase price. The payment dates corresponded to those in the contract between the MoD and PBL.

11. The completion of the contracts between the MoD and PBL and between PBL and MAR on 31 January 2008 engaged the provisions of ss.44 and 45 which deal with contracts for land transactions under which the contract is to be completed by a conveyance or transfer (s.44) and cases where the completion of the contract for a land transaction is effected by a "sub-sale 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": s.45(1)(b).

12. The effect of s.44 is that the contract is not treated as a land transaction unless completion does not in fact take place but the contract is nevertheless substantially performed. This will normally include the payment of most of the purchase price. But when, as in the present case, completion occurs in accordance with the contract then "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": s.44(3).

13. It is therefore common ground that the entry into the contract between the MoD and PBL was not a land transaction nor was the entry into the contract between PBL and MAR or the lease agreement between MAR and PBL. The put and call options were land transactions under s.46 but no charge to SDLT arose because they were granted for no consideration.

14. That leaves as potential land transactions the transfer of the site between the MoD and PBL, the transfer from PBL to MAR and the lease from MAR to PBL. There was some discussion during the hearing about the status and effect in SDLT terms of the sub-lease to PBDL but, as below, Mr Thomas QC for PBL accepted that it could be ignored for the purposes of determining PBL's liability.

15. Where s.45(1) applies (as it is common ground it does in this case in relation to the two contracts for the sale of the site) the provisions of s.44 which treat the contract and conveyance as a single land transaction taking effect on completion are modified in a way that prevents a charge to tax on both legs of the sub-sale or composite completion of the two contracts. Section 45 provides:

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

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

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is—

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

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

The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of subsection (3) of section 73 (alternative property finance: land sold to financial institution and re-sold to individual).

…"

16. The effect of s.45(3) has already been considered by this court in *DV3 RS LP v Revenue and Customs Commissioners* [2013] EWCA Civ 907; [2014] 1 WLR 1136 ("*DV3*"). The question in that case was whether a sale on by a company to a newly formed partnership comprising itself and four other partners of a lease which the company had already contracted to acquire could take advantage of paragraph 10 of Schedule 15 which would (in the circumstances of the case) have had the effect of reducing to nil the liability to SDLT on a transfer of a chargeable interest from the partner to a partnership. This court held that the paragraph 10 relief was not available because the statutory disregard of the completion of the first contract meant that the company which was the purchaser under the first contract with the original vendor never acquired a chargeable interest in the property which it was able to and did transfer to the partnership. Lewison LJ said:

"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.

…..

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) .

…..

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."

17. The issue of whether the purchaser under the first contract in *DV3* acquired a chargeable interest which it transferred to the partnership under the second contract is directly relevant to whether the completion of the contract between the MoD and PBL in the present case amounts to a land transaction within the meaning of s.43(1). The existence of the sale on to MAR means that under s.45(3) the substantial performance or completion of the sale to PBL is disregarded leaving the completion or substantial performance of the deemed secondary contract to MAR as the only possible acquisition of a chargeable interest. In conformity with this court's reasoning in *DV3*, there would (subject to any available reliefs) have been a land transaction in respect of the completion of the sale to MAR but none in respect of PBL's own acquisition of an interest on completion of the contract with the MoD. HMRC accepts that this was the effect of s.45(3) in the present case as a result of the statutory disregard I have referred to.

18. The next transaction to be considered is the acquisition of the site by MAR which is the first real point of controversy between the parties. As originally enacted, the legislation included the exemptions from charge contained in ss.72 and 73 for alternative property finance arrangements between an individual and a financial institution under which the institution purchases a "major interest in land" and then grants to the individual a lease with an option for the individual to acquire the major interest (s.72) or under which the institution purchases the major interest and then sells it to the individual who grants the institution a mortgage over that interest (s.73). In each case the purchase by the institution is exempt from charge "if the vendor is the individual": s.72(2), 73(2). The word "person" was substituted for the word "individual" by the Finance Act 2006.

19. In 2005 a similar exemption from charge was introduced by the Finance Act to cover alternative property financing arrangements under which the financial institution acquires the property interest in question and then leases it to the person seeking the finance in conjunction with an option or other agreement for the acquisition by that person of the major interest acquired by the financial institution. Section 71A provides:

> "(1) This section applies where arrangements are entered into between a person and a financial institution under which—
>
> (a) the institution purchases a major interest in land or an undivided share of a major interest in land ("the first transaction"),
>
> (b) where the interest purchased is an undivided share, the major interest is held on trust for the institution and the person as beneficial tenants in common,
>
> (c) the institution (or the person holding the land on trust as mentioned in paragraph (b)) grants to the person out of the major interest a lease (if the major interest is freehold) or a sub-lease (if the major interest is leasehold) ("the second transaction"), and
>
> (d) the institution and the person enter into an agreement under which the person has a right to require the institution or its successor in title to transfer to the person (in one transaction or a series of transactions) the whole interest purchased by the institution under the first transaction.
>
> (2) The first transaction is exempt from charge if the vendor is—
>
> (a) the person, or
>
> (b) another financial institution by whom the interest was acquired under arrangements of the kind mentioned in subsection (1) entered into between it and the person.

> (3) The second transaction is exempt from charge if the provisions of this Part relating to the first transaction are complied with (including the payment of any tax chargeable)."

20. It is common ground that s.71A accommodates Shari'a-compliant financing arrangements according to the Ijara model which depends upon the financial institution being the owner of the property in question. Section 71A(1)(a) can therefore apply both to a case where the property is acquired by the financial institution directly from a third party owner (such as the MoD in this case) or where the institution's own customer has already acquired the property and then sells it to the institution as part of an Ijara-based re-financing arrangement. But, as in the case of ss.72-3, the exemption from charge is limited to cases where "*the vendor*" under the first transaction as defined in s.71A(1)(a) is the person making the financial arrangements with the bank or other financial institution. Where that condition is satisfied then the exemption applies not only to the bank's own acquisition of the property but also to the lease to its customer as part of the Ijara transaction: s.71A(3).

21. Section 71A therefore provides a blanket exemption from a charge to SDLT in cases where the property already belongs to the customer seeking the finance and is then sold to the bank for the purpose of the Ijara. In such cases SDLT will ordinarily have been paid on the completed acquisition of the property by the customer and s.71A simply avoids a further charge on the financing arrangements thereby bringing their tax treatment into line with what would be the case if the property were re-financed using a conventional mortgage. But it is equally clear that the exemption for the first stage of the financing arrangement (consisting of the acquisition and ownership by the financial institution of the relevant property interest) does not extend to the institution's own acquisition of the property directly from a third party owner even when that is undertaken at its customer's request. In such cases the condition imposed by s.71A(2) is not satisfied and the financial institution will be liable for SDLT on the purchase price.

22. In this case both HMRC and PBL accepted at the hearing in the FtT that s.71A did apply to exempt the acquisition of the site by MAR from a charge to SDLT and both PBL and MAR had submitted land transaction self-assessment returns in respect of the transfers of the site from the MoD to PBL and then on to MAR and in respect of the lease from MAR to PBL specifying the tax due as nil and relying (in the case of MAR and the lease to PBL) on s.71A. The return filed in respect of the transfer from the MoD to PBL relied on "other relief" which Mr Thomas told us was an accepted shorthand for reliance on the effect of s.45(3). As explained earlier, HMRC accept, on the basis of the analysis in *DV3*, that PBL did not acquire a chargeable interest in the site so as to make the transfer to them a land transaction. But, for the same reason, PBL now submit (as they did in the UT) that the effect of what has been described as the tailpiece of s.45(3) is also to remove from the acquisition of the site by MAR the exemption claimed under s.71A. If PBL did not acquire a chargeable interest in respect of the site it cannot be "*the vendor*" for the purpose of s.71A(2) because, like the company in *DV3*, it was never able to dispose of a chargeable interest to MAR. Mr Gammie's response to this is that s.71A(1)(a) is not directed to the acquisition of a chargeable interest as such but rather to whether the financial institution has purchased from its customer "a major interest in land" which is defined in s.117 as meaning the freehold or a long lease. Since in the real world MAR did buy the freehold from PBL

s.71A(1)(a) is satisfied and, for the same reason, so is s.71A(2). If, on the other hand, the condition in s.71A(1)(a) falls to be considered by reference to the "secondary contract" which is deemed to exist under s.45(3) (which is PBL's case) then PBL rather than the MoD is still the vendor for the purposes of s.71A(2) because s.45(5A) applies. This provides:

> "(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."

23. In his judgment in the UT Morgan J considered that the context did permit PBL to be treated as the vendor for the purposes of s.71A(2) although he gave no reasons for this conclusion. PBL's case is that he was wrong and that the result is inconsistent with a correct understanding of the policy underlying the exemption in s.71A.

24. HMRC objected and still object to PBL being given leave to rely upon this argument as part of their grounds of appeal. The UT made no ruling on this because it accepted Mr Gammie's argument that s.71A was not displaced by the effect of s.45(3). I will return to this procedural issue later in this judgment. However, for present purposes, the importance of the s.71A issue lies in its relevance to s.75A. So far as material, this provides:

> "75A Anti-avoidance
>
> (1) This section applies where–
>
> (a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,
>
> (b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions"), and
>
> (c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.
>
> (2) In subsection (1) "transaction" includes, in particular–
>
> (a) a non-land transaction,

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

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

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

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

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

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

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

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

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

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

(4) Where this section applies–

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

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

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

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

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

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

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

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

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

(a) sections 71A to 73, or

(b) a provision of Schedule 9."

25. PBL's land transaction return in respect of the transfer of the site from the MoD was amended by HMRC on the completion of its enquiry into the return on 13 July 2011 to record a charge to SDLT of £38.36m based on a consideration of £959m which was the purchase price paid to the MoD. The enquiries in respect of the returns relating to the transfer to MAR and the lease to PBL were closed at the same time without any amendment of the nil returns. HMRC's position as set out in correspondence was that the combined effect of s.45(3) and s.71A was to exempt from charge both the sale of the site to PBL and its onward sale to MAR. On the basis that s.71A applied to exempt the acquisition of the site by MAR, it also applied to exempt the lease. But the resulting absence of any charge to SDLT on either of the two purchases was, they said, remedied by the application of s.75A. This has the effect, where the conditions for its application are satisfied, of disregarding any land transactions involved in the disposal and acquisition of the relevant chargeable interest and of substituting for them a notional land transaction between the vendor and purchaser of the chargeable interest at a consideration equal to the largest amount given by any one person by way of consideration for any of the transactions involved in the disposal and acquisition of that chargeable interest. HMRC's original position on the closure of the enquiry was that the consideration for the notional transaction under s.75A(4) was the £959m paid by PBL for its acquisition of the site. But in the FtT it advanced the argument that one of the scheme transactions under s.75A(1)(b) must have been the disposal to and acquisition of the site by MAR which meant that the consideration for the notional transaction under s.75(A)(5) was £1.25bn resulting in a charge to SDLT of £50m. The FtT accepted this but the UT in a split decision on the point decided that the consideration was £959m. Morgan J considered that s.75B applied to treat the sale to MAR as an incidental transaction and to dissect the consideration paid on the sale to MAR between what was paid for the acquisition of the property interests and what related to the funding of the SDLT liability and development expenditure. He used his casting vote to override Judge Nowlan who could see no way to avoid treating the disposal and acquisition of the site by MAR as one of the scheme transactions so as to bring in to account the whole of the £1.25bn payable by MAR under its contract with PBL.

26. HMRC's cross-appeal is directed to restoring the FtT's finding that £1.25bn was the correct amount of consideration under the notional land transaction. In response to it, PBL adopts the approach of Morgan J but has also raised an argument based on Article 14 and Article 1 of Protocol 1 to the European Convention on Human Rights to the effect that, insofar as s.75A imposes a charge to SDLT on the full amount of the finance provided under the Ijara arrangements, it has a disproportionately adverse effect on

persons of the Islamic faith when compared to the treatment of property transactions financed under conventional mortgage arrangements. In such cases any charge to tax will not exceed the purchase price (in this case the £959m) which the arrangements are intended to finance.

27. However, PBL's primary response to HMRC's reliance on s.75A is that it does not lead to any SDLT charge on PBL either because s.75A has no application on the facts of this case or because, if it is engaged by the sale to MAR and lease on to PBL, it is MAR and not PBL which constitutes P for the purposes of the notional land transaction imposed by s.75A(4). In short, its case is that if s.71A does not apply to exempt the purchase of the site by MAR it must follow that MAR acquired a chargeable interest for a consideration of £1.25bn and was liable to SDLT on that amount. If this is right then the condition for the operation of s.75A contained in s.75A(1)(c) is not satisfied because the total SDLT liability created by the scheme transactions is equal to or exceeds that which would exist on a notional land transaction between the MoD and MAR. Alternatively, it is said that even if the s.75A(1)(c) condition is satisfied because the sale to MAR was exempt under s.71A, that condition was "satisfied only by reason of s.71A" so that by the operation of s.75A(7) the provisions of s.75A have no application. If that is wrong and s.75A does apply then PBL contends that P is not PBL as lessee from MAR but is MAR as the purchaser of the site from the MoD (which is V). Again, this results in a tax liability on the part of MAR but not on PBL. We were also pressed by Mr Thomas with a submission that s.75A has no application unless it can be shown on the evidence that the object of constructing the transaction in the form it takes was the avoidance of tax. The heading and side-notes to s.75A indicate that it was intended to be an anti-avoidance provision and it should be construed as such. In this case, he submits, the sale and lease-back of the site were undertaken for commercial reasons and the FtT misdirected itself in requiring PBL effectively to prove that the transaction had no tax avoidance purpose. The UT rejected this construction of s.75A and I shall return to the point later so far as it becomes necessary to do so.

Section 71A

28. Because the s.71A argument was not run by PBL in the FtT and was given relatively short shrift by the UT, the decisions below are mostly concerned with the problems of interpretation and application created by s.75A. Mr Gammie himself accepts that the tax position for which he contends on the cross-appeal produces a not readily justifiable result insofar as it imposes tax not on the amount of the purchase price paid to the MoD but rather on the amount provided to PBL as finance for the purchase and redevelopment of the site This is a particularly inapt and harsh result if, as Mr Gammie submits, s.75A was intended to remedy the absence of any tax liability on the transfers of the site from the MoD to PBL and then from PBL to MAR. His construction of the legislation means that Parliament has chosen to resolve that particular difficulty by imposing the tax charge on PBL but not in the amount which PBL in fact paid to acquire the relevant interest. It was this anomaly which largely influenced Morgan J in his construction of s.75B so as to reduce the taxable consideration to the original purchase price of £959m. The first question, however, which we must decide is whether the purchase of the site by MAR was exempt under s.71A. This turns on whether PBL is to be treated as "the vendor" on the sale of the site to MAR or perhaps, more accurately, whether, on the facts of this case, the vendor in relation to MAR's

purchase is PBL under its actual contract with MAR or the MoD under the notional contract created by s.45(3).

29. As indicated earlier, HMRC's position is that they accept that the transfer of the freehold from the MoD to PBL is disregarded because it occurred "at the same time as, and in connection with ….. the completion of the notional secondary contract". In conformity with s.45(2), MAR was not treated as entering into a land transaction by virtue of its contract with PBL but instead was deemed to acquire the site under the secondary contract described in the tailpiece to s.45(3). As part of this exercise, the substituted performance or completion of the original contract between the MoD and PBL is disregarded and the secondary contract as defined displaces the contract between PBL and MAR. Therefore, in the SDLT world, MAR is deemed to purchase the site directly from the MoD for £1.25bn and the actual transfer to PBL drops out of charge.

30. Once one discards as irrelevant the completion of the contract between the MoD and PBL and is left with the s.45(3) secondary contract as the sole means by which MAR acquires the site for SDLT purposes, it becomes difficult, in my view, to give "vendor" in s.71A(2) anything but its s.43(4) meaning. "Vendor" must be a reference in the context of s.71A to the person from whom MAR "purchases" the site which, by dint of s.45(3), is not PBL. It has no chargeable interest so as to be regarded as entering into the secondary contract which, under s.45(3), is a contract for a land transaction. The architecture of the relevant transaction in a case covered by s.45(3) is part of what this Court identified in *DV3* as the central provisions of Part 4 of FA 2003 and in my view s.71A falls to be construed by reference to and in conformity with them. The alternative is that the exemption from charge which it confers falls to be determined in the non-SDLT world by reference to transactions which have no existence in relation to the creation of the charge to which the exemption relates. That seems to me to be an unlikely construction of s.71A(2).

31. Mr Gammie's alternative response is to rely on s.45(5A). This was introduced into the legislation by the Finance Act 2004 primarily in relation to group relief which is dealt with by Schedule 7 and exempts from charge transactions in which "the vendor and purchaser" are companies in the same group: Schedule 7, paragraph 1(1). Section 45(5A)(a) confirms that the references to "vendor" in Schedule 7 are to the vendor under what s.45(1) describes as the original contract but s.45(5A)(b) indicates that elsewhere in Part 4 the term is to be read as referring either to the vendor under the original contract or to the transferor under the sub-sale or sale on (in this case the sale from PBL to MAR) "where the context permits".

32. This is a familiar phrase adopted by draftsmen to accommodate the use of a single defined term to describe more than one possible person or object. The context is ordinarily provided by the provision in the legislation or instrument which will indicate by its own words and subject-matter whether the extended definition should apply. In this case the only context to be derived from s.71A is that of an arrangement between a person and financial institution under which the financial institution purchases a major interest from the "vendor". The choice between PBL and the MoD as vendor in relation to that purchase turns on a choice between the real and the SDLT world and, for the reasons I have explained, I can see nothing in the context of s.71A to encourage, let alone compel, an exit from the SDLT world in relation to an exemption from a charge to SDLT. But if one looks at the wider context in terms of the policy of the legislation

and, in particular, the operation of s.71A then the case for treating PBL as the vendor becomes even less convincing.

33. It is important to remember that s.71A does not operate so as to treat every purchase of a major interest in land by a financial institution as exempt. As I explained earlier in this judgment, the acquisition of such an interest will (without more) constitute a land transaction liable to SDLT whether the acquisition is made directly from the third party vendor or directly from the institution's own customer as part of a re-financing transaction. The latter enjoys the benefit of the s.71A exemption because the chargeable interest conveyed will already have borne SDLT on its acquisition from the third party vendor by the customer. But the direct acquisition of the chargeable interest by the financial institution, although a necessary preliminary to the carrying out of the Ijara transaction, is not SDLT free and enjoys no exemption under s.71A even though the lease to the customer will do. That obtains exemption either because the sale to the financial institution is exempt or because tax has been paid on that purchase: see s.71A(3). The scheme of s.71A seems to have been to limit SDLT in all cases to a single charge on the acquisition of the property from the third party vendor whether by the financial institution or its customer. It therefore seems strange that Parliament should, in the case of a sub-sale or similar arrangement to which s.45(3) applies, have decided that both the acquisition of the property by the customer and its later acquisition by the financial institution should be SDLT free. In relation to s.73, the problem of both the original purchase and the sale on falling out of charge was solved by an amendment to s.45(3) by the Finance (No. 2) Act 2003 to remove the disregard of the completion of the original contract in a case where the secondary contract was exempt from charge under s.73 and, in relation to transactions effective on or after 24 March 2011, the Finance Act 2011 further amended s.45(3) to provide the same tax treatment in relation to cases where the secondary contract in favour of the financial institution enjoys exemption under s.71A. But these amendments are of limited assistance in deciding how Parliament originally intended to deal with s.71A cases where s.45(3) also applies.

34. Mr Gammie submits that the imposition of a charge to SDLT in such cases was intended to be achieved by the operation of s.75A which, as I have described, displaces the land transactions by which V disposes and P acquires a chargeable interest in favour of a notional land transaction between the same parties for the consideration specified in s.75A(5). The obvious difficulty with this argument is that s.75A(5) is not tailored to limit the charge to the amount paid to the third party vendor in order to acquire the property. As the facts of this case starkly demonstrate, the whole amount of the development finance becomes subject to the charge. The reason is that s.75A, as its title and side-note confirms, was obviously drafted as an anti-avoidance provision and not as a means of preventing a double exemption from charge in cases like the present. This, I think, is confirmed by the fact that s.71A was introduced with effect from 7 April 2005 and that s.75A did not come into force in relation to disposals before 6 December 2006. Again it seems unlikely to me that, in the scheme of s.71A, Parliament intended to leave transactions falling within s.71A and s.45(3) free of all charge and to have dealt with the problem by a piece of anti-avoidance legislation introduced over a year later.

35. The much more obvious construction of s.71A, and one which I think respects the operation of the section I have described, is that cases falling within s.45(3) were

intended to be treated as direct acquisitions by the financial institution from the third party vendor in terms of their tax consequences. MAR was therefore liable for SDLT on completion of the secondary contract under s.45(3) and was not entitled to claim s.71A relief. Mr Gammie says that, even if correct, this argument does not assist PBL in this case because SDLT on the £1.25bn is not payable by MAR given that the enquiry into its land transaction return is now closed. I do not accept this argument. It seems to me that "payable" must mean payable on the completion of the transaction which gives rise to the charge. The availability of the relief cannot depend on how the claim for relief is subsequently determined or dealt with by HMRC. The s.75A(1)(c) condition was not therefore satisfied in this case.

36. It is therefore necessary to decide whether PBL should be permitted to rely upon this argument as part of its appeal. The UT made no case management decision about it because in their view the transfer to MAR was exempt under s.71A. We are not therefore called upon to review a proper exercise of discretion. It is for this Court to decide whether permission should be given for the point to be argued.

37. In my view we should grant permission. Although PBL made its land transaction returns and conducted its case before the FtT on the basis that s.71A did apply, Mr Gammie has not placed much reliance upon any particular prejudice that would be caused by its change of position. The applicability or not of s.71A is a pure question of statutory interpretation and does not require further evidence of any kind. It was for HMRC to consider as part of their enquiry how s.71A operated and decide which of the returns required amendment. It would also be undesirable for this Court to be asked to construe the relevant sections of Part 4 on the basis of a concession which in my view was wrongly made.

38. The s.71A point is decisive of the appeal and it is not therefore necessary to deal with all the many different arguments as to how s.75A would apply to this transaction or with PBL's subsidiary points about whether HMRC used the correct statutory procedure to enquire into the returns and HMRC's cross-appeal about the amount of chargeable consideration on the notional land transaction under s.75A(4). But I do propose to make two relatively brief observations about the operation of s.75A.

Section 75A

39. The first is that Mr Thomas was wrong in my view in his submission that s.75A has no operation unless it can be shown that the object of the relevant scheme transactions was the avoidance of tax. Although, as the side-note to s.75A makes clear, the provisions were clearly introduced to combat the avoidance of SDLT, they operate according to their terms and nowhere in s.75A is there any reference to the purpose of the scheme transactions being tax avoidance or any requirement to establish the existence of such a purpose or objective as a pre-condition to the operation of the section. The UT was right in my view to reject Mr Thomas's construction of s.75A and to treat avoidance as spelt out by the conditions for the application of s.75A contained in s.75A(1).

40. My second point relates to the identification of P. Both the FtT and the UT were understandably concerned by the apparent width of the provisions of s.75A and in particular by their ability on one view to attach the charge to SDLT to PBL in respect of the consideration paid by MAR which was intended in part to finance the development of the site. This led in the FtT and the UT to a considerable amount of theorizing about

which of the transferees in this particular chain of transactions (or any other) was the intended object of the legislation. The FtT thought that P should be the person who had in reality avoided SDLT. Judge Nowlan thought that the legislation was intended to charge the real purchaser of the site as opposed to the party (MAR) which was financing the transaction. Morgan J rejected both these views and thought that either PBL or MAR could be P.

41. In my view s.75A requires to be approached without regard to pre-conceptions of this kind about the scope of its operation. If it is applied according to its terms what has first to be identified is the disposal and acquisition of a chargeable interest or a chargeable interest deriving from it. Those and any other transactions involved in connection with the disposal and acquisition are then taken into account as part of the comparative exercise under s.75A(1)(c).

42. In the present case the only disposals and acquisitions of chargeable interests were the transfer of the freehold of the site to MAR and the grant of the lease to PBL. As explained earlier, the transfer to PBL from the MoD is disregarded. Since MAR acquired a chargeable interest from the MoD by virtue of the operation of s.45(3) and (on the basis that s.71A applies to exempt the purchase) the s.75A(1)(c) condition is satisfied even taking into account the subsequent lease to PBL as a scheme transaction, then I can see nothing in s.75A which excludes the application of s.75A(5) to the acquisition of the freehold at a price of £1.25bn. The lease to PBL is therefore disregarded under s.75A(4).

43. This sequential approach is criticised because the subsequent land transaction involving PBL also satisfies the condition in s.75A(1)(a). But the legislation was obviously drafted with the possibility in mind that more than one person in the chain would acquire a chargeable interest and it accommodates this by comparing all of the scheme transactions with the notional transaction between V and P in order to assess whether there is a loss of SDLT. Where a tax loss is identified then SDLT is recovered by reference to the largest amount of consideration payable under any one of the scheme transactions.

44. It is, however, important to observe that the notional land transaction imposed by s.75A(4) relates to P's acquisition of V's chargeable interest (in this case the freehold) and not a derivation from it. This reflects what I think is the order of priority imposed by s.75A(1). The condition in s.75A(1)(a) is satisfied if P acquires V's chargeable interest ("it") or an interest derived from it. If V's interest (and not a derivation from it) is acquired by a person in the chain then one need look no further. It would be very strange in my view to ignore the acquisition of V's freehold by MAR as an acquisition by P and instead to regard PBL as P by virtue of the lease. Much of the concern about the effect of s.75A centres on the imposition of a tax charge on PBL by reference to the amount advanced by MAR. But this is the consequence of refusing to recognise the purchase of the freehold by MAR as the primary and obvious acquisition of V's chargeable interest. It also ignores the fact that, under the Ijara finance arrangements, MAR has to be the owner of the relevant property asset and in many cases will bear the SDLT on the purchase. The anomaly disappears once one recognises that MAR is a real purchaser of the freehold and, for tax purposes, has to be treated as such. In my view it, rather than PBL, is P. If I am wrong about the application of s.71A to the transfer to MAR I would therefore allow the appeal on these alternative grounds.

Conclusion

45. I would therefore allow the appeal and dismiss the cross-appeal.

Lord Justice Lewison:

46. I agree with Patten LJ, for the reasons that he gives, that the appeal must be allowed. As we are differing from the Upper Tribunal, I add some observations only on the first question, namely whether MAR was entitled to exemption under section 71A.

47. To understand the issues that arise on this appeal it is first necessary to understand something about Shari'a compliant transactions. They are described in HM Treasury's Regulatory Impact Assessment for Alternative Finance products. Shari'a law prohibits the lending of money at interest. If, therefore, a person ("the customer") wishes to acquire an asset (in our case real property) from a third party vendor which he cannot buy outright, a different arrangement is necessary. The type of arrangement used in our case is called Ijara. Under an Ijara arrangement a bank or other financial institution buys the asset that the customer wishes to acquire and then leases that asset to him. The rent is calculated in such a way that the bank will receive a return on its investment. The customer will also have an option to buy the asset. However, it is critical to appreciate that the bank will be the real owner of the asset for the term of the lease, and the customer will not. Since the bank will be the real owner of the asset for the term of the lease, it will also be the real purchaser of the asset from the third party vendor. There is, therefore, nothing surprising in the bank rather than the customer being liable for payment of the SDLT on that purchase. The Upper Tribunal was concerned that in many cases the customer will have some money of his own which he can put towards the purchase, and that if SDLT is only charged on the amount provided by the bank there will be an undercharge. But in such a case the type of arrangement that will be used is what is called Musharaka financing. This is a form of partnership under which the partners jointly acquire an asset. The asset will be held by them as beneficial tenants in common in the proportions in which they contributed to the purchase price. Under that kind of arrangement both the bank and the customer will be liable for the SDLT. But there is no risk of an undercharge because both will have contributed to the purchase from the third party vendor. Accordingly I consider that the concern expressed by the Upper Tribunal at [141] was misplaced. A Musharaka arrangement may also be what is known as a diminishing Musharaka under which the customer makes periodic payments under a lease to the bank in return for proportionate increases in his own share in the asset. Under both types of arrangement the customer will have the ultimate right to acquire the asset in question. It is these types of arrangement that are described in section 71A (1).

48. An understanding of the nature of these transactions means that one must put to one side familiarity with the traditional means of financing by means of secured loans at interest. These arrangements are quite different and it is not surprising that they may lead to different tax consequences. It is thus clear, for example, that if MAR had contracted directly with the MoD and had then granted the lease to PBL MAR would have been liable for the SDLT. In my judgment, therefore the approach of Morgan J at [43], which was to equate the position of MAR with a traditional lender was the wrong starting point. I also disagree with Judge Nowlan's statement at [144] that the "plain aim" of section 71A is to ensure that SDLT is paid by purchasers and not financiers.

49. The second key point is that when section 71A was introduced into the Finance Act 2003 by amendment, it took effect in relation to transactions where the effective date of the first transaction fell on or after 7 April 2005. At that time there was no equivalent of section 75A, which applies only to disposals taking place on or after 6 December 2006. There was thus a period of some 20 months during which, if SDLT was not payable under section 71A, it was not payable at all. It cannot have been the intention of Parliament that where a third party vendor contracted with a customer, who then sub-sold to a bank which provided the purchase price and then granted a lease to the customer, no SDLT would be payable by anyone. That, in my judgment, is a very strong context in which it would be quite inappropriate to apply the extended definition of "vendor" in section 45 (5A) to that kind of arrangement. In my judgment, therefore, the Upper Tribunal was wrong at [42] to hold the contrary.

50. Mr Gammie QC analysed section 71A (2) as dividing arrangements into two categories which he called "a direct purchase" case (covered by section 71A (2)(a)) and "a financing" case (covered by section 71A (2)(b)). In a direct purchase case he accepted that the bank was liable to pay the SDLT; but in a financing case that liability fell on the customer. If therefore the third party vendor completed his contract with the customer, and the customer then sold on to the bank, the customer would pay the SDLT on his own purchase and the sale on to the bank would be exempt under section 71A. Why, he asked rhetorically, should a case cease to be a financing case merely because the sale to the customer and the onward sale to the bank completed simultaneously? The answer to that question, as it seems to me, is that the third party vendor would not complete the sale to the customer unless the customer had paid the purchase price. If the customer had paid the purchase price without recourse to the bank, then it must follow that the sale on to the bank was a pure financing arrangement. But the reason for simultaneous completion must surely be that without the money provided by the bank for transmission to the third party vendor, the customer would not be in a position to complete. There is therefore a difference in substance, rather than mere form, between the two situations.

51. I consider, therefore, that on our facts completion of the contract between the MoD and PBL must be disregarded under section 45 (3); and instead there is a notional secondary contract between the MoD and MAR. It is not permissible to read the reference to "vendor" in section 71A (2) as a reference to PBL (as "transferor") because the context does not permit. Accordingly when the contract between PBL and MAR was completed, it was treated as the completion of the secondary contract. The "person" with whom the arrangements were made (PBL) was not the "vendor" (MoD), with the consequence that the "first transaction" was not exempt under section 71A (2). The upshot is that MAR was liable to pay SDLT on the purchase on the consideration that it gave.

52. Since MAR's liability to pay SDLT was a liability to pay on the basis of a direct sale from the MoD to it, it also follows that that amount of SDLT was no less than the SDLT that would have been payable by any one person by way of consideration for any of the scheme transactions described in section 75A. It follows, therefore, that the condition in section 75A (1)(c) is not satisfied. Mr Gammie argued that the reference to SDLT "payable" in section 75A (1) (c) meant falling due for payment, and that since HMRC had issued a closure notice to MAR accepting its claim to exemption under section 71A there was no SDLT "payable", and therefore that condition was

satisfied. There are, I think, two answers to this point. The first, given by Mr Thomas QC, is that the question must be judged at the date of the notional transaction postulated by section 75A (4), whose effective date under section 75A (6) is the date of the last of the scheme transactions. That was long before HMRC issued its closure notice, with the result that the closure notice is irrelevant. The second is that "payable" does not have a single meaning. It may mean "due for payment", or "accruing due" or "liable to pay". In the context of section 75A (1)(c) I consider it means liable to pay (as that expression is used in section 85 (1)). I do not consider that a mistake by HMRC in issuing a closure notice to one taxpayer can of itself impose liability on a different taxpayer if that is the reason why section 71 (1)(c) is engaged.

53. I therefore agree with Patten LJ that because MAR was liable to pay SDLT on completion of its own contract, section 75A does not apply.

Lord Justice Underhill:

54. I agree with both judgments.

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