[2014] UKUT 0564 (TCC)

Reference nos: FTC/119/2013
FTC/09/2014
FTC/24/2014

Stamp Duty Land Tax - Sale and sub-sale of large development site – Application of Finance Act 2003, section 45(3), in the form current in 2007 and 2008 - Sub-sale to financial institution – Interpretation and application of Finance Act 2003, section 71A - Interpretation and application of anti-avoidance provisions in Finance Act 2003, sections 75A and 75B - Identification of "V" and "P" for the purposes of section 75A - Interpretation of section 75A(7) - The chargeable consideration pursuant to section 75B – Was the notional land transaction pursuant to section 75A notifiable under section 77? – Interpretation of land transaction return served by Appellant – Effect of closure notice served by HMRC - Procedural matters

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

PROJECT BLUE LIMITED
(formerly Project Blue (Guernsey) Limited)

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: MR JUSTICE MORGAN
JUDGE HOWARD M. NOWLAN

Sitting in public at the Rolls Building in London on 21 to 24 July 2014

Roger Thomas QC on behalf of the Appellant
Malcolm Gammie QC and Hui Ling McCarthy, counsel, on behalf of the Respondents

DECISION

Mr Justice Morgan:

Introduction

1. The Upper Tribunal which sat to hear the appeals in this case comprises myself and Judge Howard M Nowlan. The members of this tribunal agree on the result of most, but not all, of the matters which need to be decided to dispose of these appeals. In view of the disagreement between the members of the Upper Tribunal, I have decided that it is appropriate for me to set out my reasoning on all such matters and then Judge Nowlan will set out his reasoning in relation to matters where he does not agree with my reasoning.

2. The principal matter to be dealt with is an appeal by Project Blue Limited to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Brannan and Ms Watts Davies) ("the FTT") released on 5 July 2013. Project Blue Limited was originally known as Project Blue (Guernsey) Limited but I will refer to it throughout as "PBL". PBL was granted permission to bring this appeal (which I will refer to as "the principal appeal") by the FTT on 17 September 2013. There is also an appeal to the Upper Tribunal by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") brought with the permission of the FTT granted on 17 December 2013 and a further appeal by PBL brought with the permission of the FTT on 20 February 2014.

3. The principal appeal concerns whether SDLT is payable, under the Finance Act 2003, and if so, by whom and in what amount, on a series of transactions which involved the disposal by the Secretary of State for Defence ("SSD") of his freehold interest in Chelsea Barracks, Chelsea Bridge Road, London SW1 for the price of £959 million. The other participants in the series of transactions in question were PBL and a Qatari Bank, Masraf al Rayan ("MAR"). Later in this decision, I will describe the essential steps involved in the series of transactions. At this stage, I record that the series of transactions included a transfer of the freehold of the land by SSD to PBL for the price of £959 million and a transfer of the land by PBL to MAR for a price in US dollars, of which the then sterling equivalent was approximately £1.25 billion. The transfer to MAR was one of the steps by which MAR provided finance to PBL in a way which complied with sharia law. There were other steps introduced into the series of transactions for this purpose, in particular, a leaseback of the land by MAR to PBL

and the grant of put and call options designed to lead to the later re-transfer of the land by MAR to PBL.

4. I will give a brief outline of the rival positions of PBL and HMRC as to the operation of the statutory provisions. PBL contends: (1) it is not chargeable to tax in any amount; (2) it may be that MAR was taxable on a consideration of £1.25 billion. HMRC contends: (1) apart from section 75A of the Finance Act 2003, neither PBL nor MAR was chargeable to tax; but (2) under section 75A, PBL (but not MAR) is chargeable to tax; and (3) PBL is chargeable to tax on the sum of £1.25 billion and not £959 million.

5. Apart from these issues as to the operation of the statutory provisions, the appeals raise a number of other points. These points can be divided into two categories. The first category concerns the parties' operation of the statutory provisions dealing with notification of transactions and the assessment of the tax payable. The second category involves points of a procedural nature as to whether each party should be allowed to argue all of the points which it wishes to argue.

6. It could be said that I should decide the procedural points first so as to establish what it is that the parties should be permitted to argue on this appeal. However, it seems to me that I have to consider how the legislation works as a whole and in the first instance I will attempt to apply the legislation to the facts as found by the FTT. It will then be convenient to consider the points arising in relation to the notification and assessment provisions. Finally, I will address the procedural points and I will then be able to come to my overall decision.

7. At this stage, it is desirable to give a warning. This case involves the legislation (the Finance Act 2003) at the relevant time (essentially the period from 5 April 2007 to 31 January 2008). Since that time, the legislation has been amended in several material respects.

The essential facts

8. The FTT made full findings of fact as to the transactions entered into in this case. For the purposes of this appeal, it is possible to refer more succinctly to the facts by describing the essential steps in the transactions which were undertaken.

9. As at 5 April 2007, SSD was the freeholder owner of a substantial area of land and buildings known as Chelsea Barracks, Chelsea Bridge Road, London, SW1 and his freehold interest was registered at the land registry with Title Number NGL 774875 ("the land").

10. On 5 April 2007, SSD contracted to sell the land to PBL for the price of £959 million. The contract provided for PBL to pay 20% of the price (£191.8 million) on exchange of contracts. The contract was to be completed on 31 January 2008. Completion was to be by means of a land registry transfer in form TR1, in accordance with the form annexed to the contract, under which the transferor was to be SSD and the transferee was to be PBL. The balance of the price (after payment of the deposit) was to be paid by four instalments of £191.8 million each on 31 January 2008, 2 February 2009, 1 February 2010 and 31 January 2011. The payment of these four instalments was to be guaranteed by a UK clearing bank. The contract contained complicated provisions as to the possibility that PBL would become obliged to make overage payments to SSD and some of those provisions dealt with what was to happen if there were a disposition of the land by PBL.

11. On 29 January 2008, PBL contracted to sell the land to MAR for the price which was stated to be US $2,467,875,000 (subject to clause 4.2 of the agreement) to be paid as set out in clause 4 of the contract. The provisions of clause 4 in relation to the price were complicated. The price was divided into three elements.

12. The first element of the price was divided into four tranches. The First Tranche of US $757,341,480 was payable on the completion date of 31 January 2008, the Second Tranche of US $378,670,740 was payable on 2 February 2009, the Third Tranche of US $378,670,740 was payable on 1 February 2010 and the Fourth Tranche of US $378,670,740 was payable on 31 January 2011. The sterling equivalent of these four tranches was £959 million, i.e. the price payable by PBL to SSD under the earlier contract of 5 April 2007. These four tranches were payable direct by MAR to SSD save that, in view of the fact that PBL had already paid 20% of the price payable to SSD, that part of the First Tranche was to be paid by MAR to PBL.

13. The second element of the price was the SDLT Tranche of US $75,813,120. This sum was to be paid in instalments at PBL's request to discharge any SDLT liability on the

part of PBL. The second element was subject to clause 4.2 which provided that if PBL was satisfied that the amount of SDLT payable by it would be less than the SDLT Tranche, then it should notify MAR accordingly, leading to a reduction in the amount payable as the SDLT Tranche.

14. The third element of the price was the Additional Payment Tranche of $498,708,180 payable at the request of PBL by instalments on the Rental Payment Dates under the lease, which was to be granted by MAR to PBL. Each instalment of the Additional Payment Tranche was to be no greater that the aggregate of the rent due on the relevant Rental Payment Date under that lease together with fees, sums payable to any Finance Party, transaction costs and professional costs. Clause 7.3.3 provided that MAR was only liable to make future payments if, when such payments fell due, "neither a valid Sale Undertaking Notice nor a valid Purchase Undertaking Notice" had been served. As I understand it, instalments of this tranche were to be drawn down to enable PBL to pay to MAR the rent due under the lease so that MAR was paying to PBL an instalment of the price for the freehold and PBL would then pay that sum to MAR as rent under the lease. The existence of this tranche was relevant in another way in that when PBL re-acquired the freehold from MAR pursuant to the put and/or call options, PBL would then pay to MAR a price which reflected the instalments it had received in relation to this tranche.

15. Although the price payable by MAR was expressed in US Dollars, the SDLT1 submitted in respect of the transaction recorded the consideration payable as being £1.25 billion. This was on the basis that the exchange rate for the US dollar at the end of January 2008 was nearly two dollars to the pound. PBL was not required to transfer the Property otherwise than to MAR and MAR agreed not to sub-sell the Property prior to completion.

16. On 29 January 2008, MAR contracted to grant a lease of the land to PBL for a term of 999 years plus 2 days commencing on the date of grant of the lease, which was to be the date of the transfer of the freehold of the land from PBL to MAR. The rent payable by PBL to MAR was to be calculated in accordance with a formula. The most important ingredient in the formula involved the calculation of an amount by reference to a return on the sums which had been paid by MAR to PBL under the arrangements

by which PBL sold the freehold of the land to MAR and the return was expressed by reference to LIBOR plus a further margin for MAR.

17. On 29 January 2008, PBL and MAR and a number of other parties entered into a further agreement one term of which provided for PBL to indemnify MAR against any SDLT in respect of any transaction document which involved MAR.

18. On 31 January 2008, SSD executed a form TRI in favour of PBL in relation to the land. The consideration was expressed to be £383.6 million which had already been paid and a further £575.4 million which was to be paid in accordance with the contract of 5 April 2007. On the same date, SSD and PBL entered into what was described as "a Deed of Clarification" which stated that for the purpose of the definition of "disposition" in the overage provisions in the contract of 5 April 2007, restated in the TR1 from SSD to PBL, the transaction between PBL and MAR which was about to be undertaken would be a "mortgage or charge" within that definition and so it would not be a "disposition" which would trigger the consequences provided in the event of there being a disposition.

19. On 31 January 2008, PBL executed a form TRI in favour of MAR in relation to the land. The consideration was expressed to be US $757,341,480 million which had already been paid and a further US $1,710,533,520 million which was to be paid in accordance with the contract of 29 January 2008.

20. On 31 January 2008, in accordance with the earlier agreement for lease, MAR granted to PBL a lease of the land for a term of 999 years plus 2 days commencing on 31 January 2008.

21. On 31 January 2008, PBL and MAR entered into three further agreements providing for the grant of put and call options under which PBL was entitled to acquire the freehold of the land from MAR and MAR was entitled to require PBL to acquire the freehold of the land from MAR.

22. Although the following steps are not directly relevant to any of the issues arising on this appeal, I also record that on 1 February 2008, PBL granted to an associated company, Project Blue Developments Limited a lease of the land for a term of 999 years plus 1 day commencing on 31 January 2008 at a peppercorn rent and PBL and

Project Blue Developments Limited entered into put and call options relating to the freehold of the land (in the event that PBL again acquired the freehold of the land from MAR).

23. It is possible to describe the above transactions in different ways depending on the purpose for which the description is to be used. If I were to describe the above transactions in terms of their consequences as regards the various interests in the land, I would say that SSD sold the land to PBL who sub-sold it to MAR who then granted a lease of the land back to PBL. However, if I wished to describe the transactions by reference to the commercial consequences of the transactions, I could say that SSD sold the land to PBL which financed its purchase by borrowing from MAR on terms which involved MAR having a right to be repaid the sums advanced and further sums and which could lead to PBL becoming the unencumbered owner of the land on paying back to MAR all of the sums advanced and other sums.

24. It is clear from the findings of fact of the FTT that the form of the transactions as between PBL and MAR was the result of, or was certainly influenced by, principles of Sharia law. There was some evidence as to what these principles were in the form of a witness statement from Mr Qudeer Latif of Clifford Chance LLP, a solicitor acting for PBL. Although that evidence is not as detailed as I would have liked, in particular to enable me to consider the human rights arguments which emerged at a late stage before the FTT, the evidence makes it clear that Sharia law would not have permitted MAR to fund PBL's purchase on terms which involved a loan by MAR to PBL on conventional terms so that PBL would repay the loan together with interest to MAR and on terms that such payments would be secured by a conventional mortgage over the land granted by PBL to MAR. Conversely, it was felt that the transactions which were entered into by PBL and MAR which involved PBL making its payments to MAR by way of a rent under a lease did not involve the payment of interest to MAR and did not infringe Sharia law.

25. In this appeal, I am not concerned with any issue as to whether the transactions were or were not compliant with Sharia law. No one suggested that they were not compliant and in any event the question is not relevant to the issues in this case. The legal effect of the transactions and the tax consequences of that effect is a matter of English law.

26. In some circumstances, a transaction which takes the form of an absolute transfer coupled with an option for the transferor to re-acquire the property from the transferee can be analysed as being in substance a funding transaction under which the transferee has advanced funds to the transferor and so that the transfer is by way of security only for the repayment of those funds to the transferee. In the course of argument on this appeal, the matter was described (by reference to the commercial consequences of the transactions) as if MAR was only a funder of PBL's purchase of the land. However, nobody went so far as to submit that I should analyse the transactions as if they were in the law of real property a purchase of the land by PBL with funds lent by MAR, the repayment of which was secured by what was in law a mortgage by PBL to MAR. If such a submission had been made, it would have been necessary to refer to many more of the provisions of the documents which gave effect to the transactions but as the submission was not made, I have been able to describe the essential steps more succinctly as set out above.

27. The point in the last paragraph is important when applying the statutory provisions as to stamp duty land tax. The transfer of the freehold to MAR is just as much a transfer of an interest in land as was the transfer of the freehold to PBL. It cannot be said that the transfer of the land to MAR has some different status such as the creation of a security interest only to which different provisions might apply.

The legislation

28. The relevant legislation is Part 4 of the Finance Act 2003, as amended, but only as amended up to the time of the relevant transactions. I repeat that the legislation as it existed at the relevant time has since been further materially amended. All references hereafter to sections of an Act are to the sections of the Finance Act 2003 as at the relevant time (unless otherwise expressly stated).

29. By section 42(1), a tax to be known as "stamp duty land tax" is to be charged in accordance with Part 4 of the Finance Act 2003 on "land transactions". By section 43(1), a "land transaction" means any acquisition of "a chargeable interest". By section 48(1), "a chargeable interest" is defined so that it includes an estate or interest in or over land in the United Kingdom, other than an exempt interest. By section 48(2)(a), "any security interest" is an exempt interest. "Any security interest" is

further defined by section 48(3)(a). It is not contended by anyone in this case that MAR's interests amounted to "any security interest" and so I need not refer to the further definition. By section 49(1), a land transaction is a chargeable transaction if it is not a transaction that is exempt from charge. Schedule 3 and other provisions of the Act provide for certain transactions to be exempt from charge.

30. By section 42(2), the tax is chargeable whether or not there is an instrument effecting the transaction. In view of this provision and the fact that an equitable interest in land can be a chargeable interest, the legislation had to consider how to deal with the case of a contract for the sale of land (creating an equitable interest in the land in favour of the purchaser) followed by completion of that contract by the transfer of the legal estate (subject to any registration requirements) to the purchaser. This topic (and other points) is addressed by section 44 which is headed "contract and conveyance" and section 45 which is headed "contract and conveyance: effect of transfer of rights". I will describe the operation of these provisions by reference to the transactions in this case.

31. Section 44 applied to the contract of sale between SSD and PBL on 5 April 2007. Although PBL paid a 20% deposit on exchange of contracts, it is not said that this amounted to substantial performance of the contract within section 44(3). The consequence was, under section 44(3), that the contract of 5 April 2007 and the transaction effected on completion of that contract on 31 January 2008 are treated as a single land transaction, the effective date of which is 31 January 2008.

The operation of section 45

32. It is accepted by both parties to this appeal that this case is also governed by section 45. Under section 45(1), the contract of 5 April 2007 was "the original contract" within section 45(1)(a) and the contract of 29 January 2008 by PBL to MAR was a "subsale" within section 45(1)(b). This means that the subsale by PBL to MAR was "a transfer of rights" and PBL was "the transferor" and MAR was "the transferee". By section 44(2), MAR is not regarded as entering into a land transaction by reason of the contract of 29 January 2008 and section 44 has effect in accordance with the following provisions of section 45.

33. Section 45(3) provides:

> "(3) That section [*i.e 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 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)."

34. It is agreed between the parties that section 45(3) applies in this case in the following way. When applying section 44, there is a secondary contract under which MAR is the purchaser and the consideration is the sum stated in the actual contract of sale to MAR of 29 January 2008. This means that when the secondary contract is completed by the transfer to MAR on 31 January 2008, section 44 operates so that there is a single land transaction involving MAR on 31 January 2008. (I will consider later whether that land transaction involving MAR is exempt from charge under section 71A). It is also agreed between the parties that the second part of section 45(3), referred to in argument as "the tailpiece", has the effect that the completion of the contract of 5 April 2007 on 31 January 2008, i.e at the same time as, and in connection with, the completion of the secondary contract in favour of MAR on 31 January 2008, is "disregarded". It is agreed that this means that PBL is not liable to pay tax on its acquisition of the land on 31 January 2008 because that land transaction is disregarded.

35. The tailpiece of section 45(3) as it existed at the relevant time provided for an exception to the disregard which would otherwise have effect in a case where the secondary contract was exempt from charge under section 73. However, at the relevant time, this exception did not apply where the secondary contract was exempt under section 71A. The tailpiece was later amended so that that there was a further

exception to the disregard in a case where the secondary contract was exempt under section 71A. However, no one suggests that we can construe the tailpiece to section 45(3) as it stood before this amendment in order to override the disregard of the land transaction which occurred on completion of the contract of 5 April 2007. The result therefore is, as agreed by the parties, that PBL can take advantage of the tailpiece of section 45(3).

The operation of section 71A

36. It is now necessary to consider the effect of section 71A in relation to MAR. The first question which arises is whether one applies section 71A to the actual contract of 29 January 2008 and the actual completion of that contract on 31 January 2008 or whether one applies section 71A to the secondary contract identified in section 45(3). Section 45(2) provides that "section 44" has effect in accordance with the following provisions of section 45. Section 45(3) provides that "that section" (i.e. section 44) applies as if there were a secondary contract. Section 45(3) does not in terms say that all the provisions of Part 4 apply as if there were a secondary contract. That would suggest that when one applies a different section (for example, section 71A), one applies it to the actual contract of 29 January 2008 and the actual completion of that contract. Conversely, section 45(5A) 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."

37. Section 45(5A) suggests that the secondary contract which is treated as existing pursuant to section 45(3) is not just so treated for the purposes of section 44 but is also so treated for the purposes of other provisions in Part 4 (and schedule 7). Further, the scope of section 45(3) is clarified by the approach of the Court of Appeal in HMRC v DV3 RS Limited Partnership [2013] STC 2150, [2014] 1 WLR 1136 ("DV3"). At [20], Lewison LJ (with whom Kay and Gloster LJJ agreed) stressed "the importance

and centrality of section 44" so that the question was how section 44 operated when modified by section 45.

38. I therefore turn to the detailed provisions of section 71A, which was in these terms:

> "**Alternative property finance: land sold to financial institution and leased to person**
>
> (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) …,
>
> (c) the institution… grants to the person out of the major interest a lease (if the major interest is freehold) …("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).
>
> (4) Any transfer to the person that results from the exercise of the right mentioned in subsection (1)(d) ("a further transaction") is exempt from charge if—
>
> (a) the provisions of this Part relating to the first and second transactions are complied with, and
>
> (b) at all times between the second transaction and the further transaction—
>
> (i) the interest purchased under the first transaction is held by a financial institution so far as not transferred by a previous further transaction, and

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

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

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

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

(6) …

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

(8) In this section "financial institution" has the meaning given by section 46 of the Finance Act 2005 (alternative finance arrangements).

(9) …,

(10) ….”

39. At the risk of over-simplification, the purpose of section 71A is to attempt to produce the same result for the purposes of SDLT whether the finance provided for a property transaction is by way of conventional mortgage lending or by way of “alternative property finance”. If PBL had funded its purchase of the land by borrowing from a lender and had granted the lender a mortgage to secure repayment of the borrowing, then the mortgage in favour of the lender would not be a chargeable interest because, as a security interest, it would be an exempt interest by reason of section 48. As it was, PBL obtained “alternative property finance” which involved transferring the land to MAR. It was not contended that the interest acquired by MAR was a security interest within section 48 and therefore it was a chargeable interest. In the absence of section 71A, MAR would be obliged to pay SDLT on its acquisition of its chargeable interest. The question then is: is the acquisition of a chargeable interest by MAR exempt from charge by reason of section 71A?

40. It is agreed that MAR was a “financial institution” for the purposes of section 71A. PBL was “a person” who made arrangements with a financial institution within section 71A(1). It is also clear that for the purposes of section 71A(1), MAR

purchased a major interest in land ("the first transaction"), that MAR granted a lease to PBL ("the second transaction") and that MAR and PBL entered into an agreement under which PBL had a right to require the transfer to it of the whole interest purchased by MAR under the first transaction. The consequence is that section 71A applied to the transactions.

41. Section 71A(2) relevantly provides that the first transaction is exempt from charge if "the vendor" is "the person" i.e. PBL. If one ignored section 45(3) and simply applied section 71A(2) to the completion of the actual contract of 29 January 2008, the answer would be that PBL clearly was the vendor. However, PBL contended before the Upper Tribunal (but not before the FTT) that the effect of section 45(3) was to disregard the acquisition by PBL and therefore (for the purpose of the statutory provisions) PBL did not acquire the land and therefore PBL could not have been the vendor of the land to MAR. PBL submitted that the consequence was that section 71A(2) did not exempt MAR's acquisition from charge and so MAR had been liable to pay tax on the price it paid under the contract of 29 January 2008. PBL submitted that this interpretation of the legislation was supported by the Court of Appeal decision in DV3 and, moreover, produced a sensible result in that tax was payable on the transactions which took place in this case, albeit the tax was payable by MAR on £1.25 billion rather than PBL on £959 million.

42. I consider that PBL's submission as to the position under section 71A(2) is wrong as it fails to give effect to section 45(5A), which I have set out above. The effect of section 45(5A)(b) is that the reference to "the vendor" in section 71A(2) is to be read as a reference to either the vendor under the original contract or the transferor, where the context permits. In this case, the vendor under the original contract is SSD and the transferor is PBL. Accordingly, one can read section 71A(2) so that it requires that the vendor under the original contract (SSD) or the transferor (PBL) is the person (PBL). On this reading, the requirements of section 71A(2) are satisfied and the first transaction (the acquisition of the land by MAR) is exempt from charge. Of course, section 45(5A) only applies "where the context permits". I consider that the context does so permit.

43. I consider that my reading of section 71A, together with section 45(5A), not only gives effect to the ordinary meaning of the provisions but also appears to promote the

purpose of section 71A. The purpose of section 71A is to equate the position of a provider of an alternative form of finance (such as MAR), who acquires a chargeable interest, with the position of a funder who acquires a security interest (which is an exempt interest). PBL's submission would produce an unequal position as between the two different providers of finance. Further, PBL's submission would produce the result that SDLT is paid on the amount of the funding not on the price paid by the borrower for the land. In this case, the amount of the funding exceeded the price paid by the borrower for the land. It would be more typical for the amount of the funding to be lower (usually significantly lower) than the price paid by the borrower for the land.

44. I recognise that my interpretation of section 45(3) (which is in any event agreed) and our interpretation of section 71A(2), read together with section 45(5A), produces the result that (under these sections and ignoring section 75A) neither PBL nor MAR pays tax on the transactions. I would have expected that the legislation would not have produced that result. However, I have already identified the flaw in the legislation as it existed at the relevant time was that section 45(3) did not contain an exception to the disregard where the subsale was exempt from charge under section 71A. I have also expressed the view that this flaw cannot be overcome by any permissible construction of section 45(3) and the flaw had to be removed by amending legislation, which was what actually happened after the relevant events in this case.

45. Finally, in relation to section 71A, "the second transaction", the grant of the lease of PBL is exempt under section 71A(3) and any transfer which is "a further transaction" on the exercise of the put and call options entered into between MAR and PBL would also be potentially exempt under section 71A(4).

46. At this point, I have (at some length) reached the conclusion which was common ground before the FTT that the transactions in this case were not chargeable to tax unless the case can be brought within section 75A.

The operation of sections 75A to 75C

47. I begin my discussion of the operation of section 75A by setting out its provisions together with the supporting sections 75B and 75C which are in these terms:

"**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.

75B Anti-avoidance: incidental transactions

(1) In calculating the chargeable consideration on the notional transaction for the purposes of section 75A(5), consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest from V to P.

(2) A transaction is not incidental to the transfer of the chargeable interest from V to P–

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

(b) if the transfer of the chargeable interest is conditional on the completion of the transaction, or

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

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

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

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

(c) a loan to P secured by a mortgage, or any other provision of finance to enable P, or another person, to pay for part of a process, or

series of transactions, by which the chargeable interest transfers from V to P.

(4) In subsection (3)–

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

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

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

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

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

75C Anti-avoidance: supplemental

(1) A transfer of shares or securities shall be ignored for the purposes of section 75A if but for this subsection it would be the first of a series of scheme transactions.

(2) The notional transaction under section 75A attracts any relief under this Part which it would attract if it were an actual transaction (subject to the terms and restrictions of the relief).

(3) The notional transaction under section 75A is a land transaction entered into for the purposes of or in connection with the transfer of an undertaking or part for the purposes of paragraphs 7 and 8 of Schedule 7, if any of the scheme transactions is entered into for the purposes of or in connection with the transfer of the undertaking or part.

(4) In the application of section 75A(5) no account shall be taken of any amount paid by way of consideration in respect of a transaction to which any of sections 60, 61, 63, 64, 65, 66, 67, 69, 71, 74 and 75, or a provision of Schedule 6A or 8, applies.

(5) In the application of section 75A(5) an amount given or received partly in respect of the chargeable interest acquired by P and partly in respect of another chargeable interest shall be subjected to just and reasonable apportionment.

(6) Section 53 applies to the notional transaction under section 75A.

(7) Paragraph 5 of Schedule 4 applies to the notional transaction under section 75A.

(8) For the purposes of section 75A–

(a) an interest in a property-investment partnership (within the meaning of paragraph 14 of Schedule 15) is a chargeable interest in so far as it concerns land owned by the partnership, and

(b) where V or P is a partnership, Part 3 of Schedule 15 applies to the notional transaction as to the transfer of a chargeable interest from or to a partnership.

(9) For the purposes of section 75A a reference to an amount of consideration includes a reference to the value of consideration given as money´s worth.

(10) Stamp duty land tax paid in respect of a land transaction which is to be disregarded by virtue of section 75A(4)(a) is taken to have been paid in respect of the notional transaction by virtue of section 75A(4)(b).

(11) The Treasury may by order provide for section 75A not to apply in specified circumstances.

(12) An order under subsection (11) may include incidental, consequential or transitional provision and may make provision with retrospective effect."

(2) The amendment made by subsection (1) has effect in respect of disposals and acquisitions if the disposal mentioned in new section 75A(1)(a) (inserted by that subsection) takes place on or after 6th December 2006.

(3) But–

(a) the transitional provisions of sub-paragraphs (2) to (5) of paragraph 1 of the Schedule to the Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006 (S.I. 2006/3237) continue to have effect in relation to this section as in relation to that paragraph, and

(b) a provision of new section 75C (inserted by subsection (1) above) shall not have effect where the disposal mentioned in new section 75A(1)(a) took place before the day on which this Act is passed, if or in so far as the provision would make a person liable for a higher amount of tax than would have been charged in accordance with those regulations."

48. HMRC submit that section 75A applies to this case in the following way:

(1) SSD is "one person (V)" which disposed of a chargeable interest (the freehold of the land);

(2) PBL is "another person (P)" which acquired a chargeable interest (the lease) derived from the freehold;

(3) a number of transactions were involved in connection with the disposal and acquisition; the transactions involved were the sale of the freehold by SSD to PBL, the sale of the freehold by PBL to MAR and the grant of the lease by MAR to PBL; these transactions were "the scheme transactions";

(4) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is nil;

(5) the notional transaction referred to in section 75A(1)(c) and 75A(4)(b) is the acquisition of SSD's freehold interest by PBL on its disposal by SSD;

(6) the notional transaction would have been a chargeable transaction under sections 42, 43, 48 and 49;

(7) the chargeable consideration, pursuant to section 75A(5)(a) (rather than 75A(5)(b)) is the consideration given by MAR for the scheme transactions, namely the £1.25 billion paid for the sale of the freehold to MAR.

49. PBL raises a number of objections to this interpretation and application of section 75A. PBL submits:

(1) section 75A only applies where the relevant purpose of the transactions or the participants in the transactions is tax avoidance;

(2) there was no tax avoidance purpose in the present case; in so far as the FTT made adverse findings in relation to a tax avoidance purpose, those findings cannot stand;

(3) the result is that section 75A is inapplicable in this case;

(4) if section 75A applied, PBL is not "P";

(5) if section 75A otherwise applied, it was disapplied by section 75A(7);

(6) if section 75A applied, then it was an infringement of PBL's human rights to tax it on a notional consideration of £1.25 billion instead of the actual consideration it paid to SSD of £959 million;

(7) in any event, having regard to the detailed facts, the taxable consideration for the purposes of section 75A was not £1.25 billion but was £970,302,211.

50. Before I engage with these arguments, I will make some general comments on sections 75A to 75C. First, I confess I had an initial difficulty with the case for HMRC that it can overcome a defect in the legislation, created by the combined operation of section 45(3) and section 71A (a disregard combined with an exemption), which defect was later corrected by amending legislation, by relying on a group of sections which are described as dealing with "anti-avoidance". Secondly, the drafting of sections 75A to 75C leaves a lot to be desired. The facts of the present case are not complicated but the application of sections 75A to 75C to these uncomplicated facts has given rise to a number of points of statutory interpretation which are high up on the scale of difficulty. Thirdly, the difficulty of applying sections 75A to 75C to uncomplicated facts caused me to wonder whether there was some basic reason why these sections were not meant to apply to a case like the present, where the difficulty is caused by defective legislation. Fourthly, I was far from reassured by reading HMRC's guidance published on 1 March 2011 which contained the statement: " … HMRC will not seek to apply section 75A where it considers transactions have already been taxed appropriately". This suggests that section 75A confers on HMRC a discretionary power to tax a transaction in accordance with sections 75A to 75C. I can see no sign of the section conferring such a power. Section 75A applies in a mandatory way whenever the facts of the case come within the words of the section. Notwithstanding these concerns, I have considered the arguments for the parties and have reached my conclusions as to how these sections apply to the facts of the case.

51. In relation to the approach I should adopt to the construction of sections 75A to 75C, I found helpful the recent summary of the principles to be applied to the construction of statutes, including taxing statutes, in Pollen Estate Trustee Co v RCC [2013] 3 All ER 742, in particular, at paragraph [24]. That case concerned the Finance Act 2003 and SDLT. These principles were quoted and applied at in DV3 at [15]. The summary is as follows:

> "**[24]** The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other: see *IRC v McGuckian* [1997] 3 All ER 817 at 824, [1997] 1 WLR 991 at 999; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51 at [28], [2005] 1 All ER 97 at [28], [2005] 1 AC 684. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: see *WT Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 685 at 671; *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 All ER 97 at [29], [2005] 1 AC 684. The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found: see *Barclays Mercantile Business Finance Ltd v Mawson* at [32]."

52. I will deal first with the submission that section 75A only applies where the purpose of the transactions or of the participants is tax avoidance. I note that this was the only submission put forward in support of a conclusion that sections 75A to 75C simply do not apply to the present transactions. PBL is able to point to the headings, or side-notes, to all of sections 75A, 75B and 75C, which use or include the words "anti-avoidance". Further, section 75A refers to "the scheme transactions". Yet further, the

non-exhaustive list of possible scheme transactions includes transactions which might be considered to lend themselves to use, or misuse, for the purpose of avoiding tax.

53. However, I consider that the enacting words of section 75A do not contain any provision which limits its scope to a case where there is a relevant purpose of tax avoidance. The wording of section 75A can be contrasted with other provisions which clearly do impose a requirement that there be such a purpose. In the Finance Act 2003 itself, such examples exist in schedule 7, para. 2(4A) and schedule 8, para. 1(3). The first of these, dealing with group relief, refers to a transaction not being effected for bona fide commercial purposes or arrangements with the main purpose, or having one of its main purposes, the avoidance of liability to tax. The second of these, dealing with charities relief, refers to a transaction being entered into for the purpose of avoiding tax, whether by the purchaser or by any other person. There is nothing comparable to this language in sections 75A, 75B or 75C. I do not consider that the reference to "scheme transactions" or the list of examples in section 75A(3) goes anywhere near far enough to impose some limitation on the operation of section 75A so that it only applies in the case of there being a relevant purpose of tax avoidance.

54. The side notes to sections of an Act of Parliament are, in principle, admissible as an aid to interpretation of those sections but the significance to be attached to the side notes and the effect on the interpretation of the sections will vary greatly from one case to another. In the present case, the reference to anti-avoidance in the side notes is readily explained by the fact that section 75A itself spells out what is meant by a case of "avoidance". I consider that section 75A explains that a case which comes within section 75A(1)(c) is a case of "avoidance" and the sections are to operate to counter that avoidance. It is therefore neither necessary nor appropriate to read more into the side notes and to hold that the side notes are to be taken to refer to an unstated requirement that there be a purpose of tax avoidance. Further, even if I were minded to consider that the sections should be read down so that they only applied where there was a relevant purpose of tax avoidance, such a purpose could be expressed in a whole range of different ways (compare the language of the provisions as to group relief and charities relief referred to earlier) and it would not be possible to tell from the side note reference to "anti-avoidance" how the requisite purpose should be defined.

55. As against these considerations, if one holds that section 75A operates where there is no purpose of avoiding tax, then section 75A will potentially operate in a wide way. Take a case where the parties to a number of transactions have chosen the form of the transactions for commercial reasons wholly unconnected with their tax treatment and, further, that the parties would not have wished to enter into a transaction in the form of the notional transaction identified in section 75A(1)(c) and 75A(4)(b). In such a case, the effect of section 75A is not to tax the actual transactions which were entered into but to tax a notional transaction which the parties would not for commercial reasons have been prepared to undertake.

56. Notwithstanding my general doubts as to the scope of sections 75A to 75C, and their application to a case of defective legislation, I am unable to accept PBL's submission that the sections only apply where it is shown that the relevant purpose of the participants or of the transaction is tax avoidance. The language of the sections does not admit of a construction which imposes that limitation on their operation.

57. In the light of my conclusion that sections 75A to 75C are not confined to cases where there is a purpose of tax avoidance, I consider that I should not deal with PBL's submission that any findings, adverse to PBL, made by the FTT in relation to the purpose of tax avoidance cannot stand. The FTT held that if sections 75A to 75C were to be interpreted so that they only applied where there was an intention to avoid tax, the burden was on the taxpayer to prove that the avoidance of tax was not a factor in its decision as to the structure of the transactions. The FTT held that PBL had failed to discharge this burden of proof. I recognise that there may be further appeals in this case. If it becomes relevant for an appeal court to consider the FTT's ruling as to the burden of proof and its findings against PBL then that court can do so. It will have the FTT's findings and its reasons. I do not see it as appropriate to add comments of my own in relation to a point which is not determinative of the case at this level of appeal.

58. Having rejected PBL's submission as to the limitation on the operation of sections 75A to 75C, there is no alternative to applying those sections to the facts of this case. I will now attempt to do so with a view to seeing what questions arise which I will need to resolve. In carrying out this exercise following the oral hearing, it occurred to me that the sections presented difficulties which had not been addressed at the oral hearing and the parties were invited to make written submissions on these matters.

The detailed application of sections 75A to 75C

59. Section 75A(1)(a) provides that section 75A applies where: "one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it".

60. The first step therefore is to identify V. SSD disposed of a freehold in the land and so, prima facie, SSD could be V. Can it be said that PBL also disposed of a freehold in the land and so PBL could also, or alternatively, be V? Or, in the case of PBL, does one apply section 45(3) and the reasoning in DV3 and say that because the performance of the contract of 5 April 2007 in favour of PBL is disregarded, PBL cannot have disposed of a chargeable interest? Can it be said that MAR disposed of a leasehold interest in the land and so MAR could, also or alternatively, be V?

61. The second step is to identify P. PBL could be P (say, P1) on the basis that it acquired the freehold on completion of the contract of 5 April 2007, unless one applies section 45(3) and the reasoning in DV3 to say that PBL did not acquire the freehold. MAR could be P (say, P2) on the basis that it acquired the freehold on completion of the contract of 29 January 2008. PBL could be P (say, P3) on the basis that it acquired the lease derived out of the freehold.

62. If PBL when transferring the freehold to MAR is V, then MAR could be P. However, PBL who took a lease derived out of the freehold could not in this event also be P because P must be "another person".

63. If MAR when granting the lease is V, then PBL could be P.

64. In each of these cases, questions may arise as to which are the scheme transactions. The scheme transactions are not necessarily confined to those transactions which took place between the disposal by V and the acquisition by P. Paragraphs (b) and (c) of section 75A(3) plainly contemplate that the scheme transactions can involve persons in addition to V and P. Section 75A(2)(d) shows that a transaction which takes place after the acquisition by P can be relevant; this is subject to the other parts of section 75A and 75B which require that a scheme transaction is "involved in connection with" the acquisition. Section 75B(3)(c) shows that a transaction for the purposes of funding an acquisition can be part of the scheme.

65. The above discussion illustrates that the relatively uncomplicated facts of this case have given rise to the possibility that there might be a number of persons who could be V and a number of persons who could be P. It may be that the identity of V is not determinative but the identity of P is critical as it is P who will be liable to pay the tax. We note that the guidance published by HMRC on 1 March 2011 contained the statement (in relation to the process of identifying V and P):

> "In a complex scenario this process may need to be repeated with different parties being identified as V and P, with different results."

Neither side in this case contended for an analysis where there was more than one V and more than one P. Both sides submitted that SSD was V. HMRC submitted that PBL was P and PBL submitted that MAR was P. HMRC did not explain how they, or any tribunal or court, should proceed if it found that there were two or more persons who were P (apart from a case where the persons had the same joint interest). Would all such persons be liable to pay tax (remembering that the taxable consideration in each case is the largest consideration given by any one person involved in the scheme of transactions)?

66. I regard the possibility of there being more than one person who is V and more than one person who is P as being unsatisfactory and I would be reluctant to accept that interpretation of sections 75A to 75C. I will therefore continue my attempt to apply these sections to the facts of this case, concentrating on the submissions which were made.

Who is V?

67. Before the FTT, both sides proceeded on the basis that SSD was V. Accordingly, the FTT held that SSD was V. PBL has not challenged that finding on this appeal. PBL has not argued for another candidate as V, either in the alternative to, or in addition to, SSD. I am prepared to proceed on the basis of this common ground that SSD is V. I would not do so if I considered that the parties were wrong about this but, due to the difficulty in applying section 75A in this case, I cannot say that I consider the parties are wrong. I will therefore proceed on the basis that SSD is V, although I would have preferred to have been able to identify in the statutory provisions themselves a convincing reason for this choice of V.

Who is P?

68. Before considering the statutory provisions in detail, I confess that I have an instinctive reaction as to how they ought to operate. This case involved a sale of the freehold at its market value of £959 million to PBL and its purchase was funded by MAR. As part of the funding arrangements, MAR took a transfer of the freehold at a stated price of £1.25 billion. As a result of combining a disregard (section 45(3)) and an exemption (section 71A), no SDLT is otherwise payable but sections 75A to 75C potentially apply. I would expect to find that these sections produce the result that PBL (rather than MAR) is liable to pay SDLT on a consideration of £959 million (rather than £1.25 billion). Having confessed to that instinctive reaction, I recognise that I must put it on one side and conduct a conventional analysis of the detailed statutory language. I must therefore enter the labyrinth of sections 75A to 75C.

69. It seems to me that there is a preliminary matter as to the identity of P. Section 75A refers to P acquiring a chargeable interest. I have identified above the possibility of saying that PBL (as P1) acquired a chargeable interest from SSD. The question then is: is that possibility inconsistent with the reasoning in DV3? In that case, Lewison LJ held that where substantial performance or completion of a contract is disregarded by reason of section 45(3), then the purchaser under the contract does not acquire a chargeable interest for the purposes of SDLT generally: see, in particular, paragraphs [23], [33] and [35] of his judgment. If section 45(3) applies for the purposes of SDLT generally, the question is whether it also applies in the context of section 75A. I can see an argument that it should not. The parties' submissions appeared to proceed on the basis that completion of the contract of 5 April 2007 between SSD and PBL was not a land transaction. PBL proceeded on the basis that P was MAR (as P2). In that way, there appears to have been common ground that PBL (as a possible P1) was not P. I will therefore continue my analysis on the basis that this approach is correct.

70. As a refinement on the last question, I have considered whether the contract between SSD and PBL is part of the scheme transactions for the purposes of section 75A. "Transaction" is widely defined by section 75A(2). I do not interpret DV3 as going so far as saying that the contract of 5 April 2007 should be disregarded for all purposes and in all ways; indeed, the discussion in paragraph [24] of the judgment of Lewison LJ supports the contrary view.

71. The above reasoning leads to a choice between MAR (as P2) or PBL (as P3) as P. PBL contends for the first of these; HMRC contends for the second.

72. The parties, and the FTT, have identified a number of approaches to the selection of P. The FTT thought that one should identify the party who was otherwise avoiding tax. The FTT was also influenced by an approach which distinguished between the party who was acquiring the property and the funder of that party. PBL submitted that one should select the first candidate in the sequence of transactions who acquired a chargeable interest (i.e. MAR). HMRC said that the choice of PBL was "obvious" and in any case one should not select a party who acquired a chargeable interest part way through the relevant scheme transactions.

73. I do not find any of these approaches to be appropriate. As regards the suggestion that one should select the party who is avoiding tax, I have already held that the section is not restricted to a case where it is the purpose of any party to avoid tax. Therefore, this approach does not help where (as may be the case) no party has the purpose of avoiding tax; further, this approach does not help where two or more persons have the purpose of avoiding tax. As regards the suggestion that one can distinguish between a party acquiring the property and the funder of that party, there is no support in the statutory wording for making that distinction when identifying P. Section 75A(1)(a) refers to P as a person acquiring a chargeable interest. In the present case, both MAR and PBL acquired a chargeable interest. There is no distinction to be made between them for the purposes of section 75A(1)(a). Further, in so far as it is permissible to say that the transfer of the land to MAR and the leaseback to PBL were for the purpose of funding PBL, then the two transactions were part of the same funding exercise. Further, this group of sections (75A to C) make express provision for the case where a step in the scheme is for the purpose of funding: section 75B(3)(c). I consider that it is not permissible to hold that a party who participates in a scheme for the purpose of funding another party is, on that ground alone, disqualified from being P.

74. As to PBL's submission that P is the first person in the scheme who so qualifies and HMRC's submission that P is the last person in the scheme who so qualifies, I can see no warrant in the statutory language for either approach. Nor, unfortunately, am I able to agree with HMRC's submission that the choice of PBL as P is "obvious".

75. Thus far, I have identified the possibilities of MAR and/or PBL being P. In these circumstances, I will continue with the analysis of sections 75A to 75C in relation to both possibilities. I will consider the possibility of PBL being P before I consider the possibility of MAR being P. I do so because HMRC has assessed PBL to tax and has not assessed MAR. This appeal is by PBL and MAR is not a party to it.

If PBL is P

76. The first question (raised by section 75A(1)(c)) is whether the amount of SDLT payable on the scheme transactions is less than the amount which would be payable on a notional land transaction effecting the acquisition of SSD's chargeable interest by PBL on its disposal by SSD: see also section 75A(4)(b) and (5). Although PBL (as P3) acquired a lease derived out of the freehold, the notional land transaction involves PBL acquiring SSD's chargeable interest. In this case, the amount of SDLT payable on the scheme transactions was nil. That is less than the SDLT which would be payable on the notional land transaction.

77. The next question (raised by section 75A(7)) is whether section 75A(1)(c) is satisfied "only by reason of" section 71A; in that event, section 75A is disapplied. The comparison involved in section 75A(1)(c) in relation to PBL can be expressed as follows:

> "the sum of the amounts of stamp duty land tax payable [*by all the participants in the scheme transactions*] in respect of the scheme transactions is less than the amount that would be payable [*by PBL*] on a notional land transaction …"

78. I consider that it is clear that section 75A(1)(c) is not satisfied "only" by reason of section 71A. The reason why the SDLT paid by all the participants in the scheme transactions is nil is a combination of section 45(3), 71A(2) and (3). The outcome whereby the SDLT was nil was not "only" by reason of section 71A.

79. Proceeding on the basis that PBL is P, the next step is to identify the chargeable consideration for the notional transaction under which PBL acquires its chargeable interest. Section 75A(5) refers to the largest amount (or aggregate largest amount) given by or on behalf of any one person by way of consideration for the scheme transactions or received by or on behalf of V by way of consideration for the scheme transactions. Taking the second of these alternatives first, the amount received by SSD

was £959 million. As to the first alternative, it appeared to have been accepted at the hearing that the amount to be paid by MAR was £1.25 billion (the sterling equivalent of the price of $2,467,875,000 stated in the agreement between PBL and MAR), subject to the point that in the events which happened, MAR only paid some £970 million. I have already stated that this figure, approaching $2.5 billion, included three elements. The first element was the dollar equivalent of £959 million, the second element was the SDLT (if any) payable by PBL (up to $75.8 million) and the third element was additional funding expressed by reference to the rent payable by PBL to MAR under the lease granted by MAR to PBL together with various fees and costs. It seems to me to be very odd that the consideration for SDLT purposes, in order to calculate the SDLT payable by PBL, should be increased by the second element under which MAR was to reimburse PBL the sum of approximately $75m in relation to PBL's liability to SDLT (if any).

80. I will proceed for the time being on the basis that the consideration calculated in accordance with section 75A(5) is indeed £1.25 billion. Section 75A(5) is subject to section 75B. Section 75B(1) provides:

> "… consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest from V to P "

Section 75B(6) provides:

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

If one reads the wording of section 75B(6) into section 75B(1), then section 75B(1) provides:

> "… consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest from V to P or to a disposal by V of an interest acquired by P"

81. The FTT did not consider the possible application of section 75B in this case. In the course of the hearing, the parties did not address section 75B in any detail, save that PBL put forward a human rights argument which involved a suggested reading of section 75B in accordance with section 3 of the Human Rights Act 1998. It seemed to me that section 75B required a more thorough exploration and the parties were invited

to make written submissions on one particular aspect of section 75B. The parties' submissions were helpful although problems remain with the interpretation of section 75B and its application in this case.

82. There are two features of section 75B which are potentially significant. The first arises from the fact that section 75A(1)(a) refers to two different situations. The first situation is where V disposes of a chargeable interest and P acquires that chargeable interest. That situation is dealt with in section 75B both where there is a direct transfer from V to P (see section 75B(1)) and where there is not a direct transfer from V to P (see section 75B(6)). The second situation referred to in section 75A(1)(a) is where V disposes of a chargeable interest and P does not acquire that chargeable interest but acquires a chargeable interest derived from it. That situation is not mentioned in section 75B(1) or (6).

83. The second significant feature of section 75B(1) is that it refers to ignoring consideration "if **or in so far as** the transaction is merely incidental …" (my emphasis). The word "or" creates alternatives. One possible alternative is that "the transaction" is merely incidental. The other alternative is that "the transaction" is not merely incidental but yet it is possible to say that the transaction is incidental to an extent (i.e. "in so far as"). This second possibility would seem to allow one to say in the case of a compound transaction that a part of the transaction is incidental and another part is not. The existence of this possibility is consistent with section 75B(5) which provides:

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

84. HMRC contend that section 75B requires one to look at the actual scheme of transactions to see how PBL acquired a chargeable interest (the lease) derived out of the chargeable interest (the freehold) disposed of by SSD. Then one asks whether the transaction whereby PBL transferred the freehold to MAR for £1.25 billion was incidental to that scheme of transactions. HMRC submit that that transaction was not incidental to the scheme. HMRC rely in particular on section 75B(2)(c) and to the reference back to a sub-sale in section 75A(3). HMRC submit that even if the transaction between PBL and MAR was for the provision of finance within section 75B(3)(c), that paragraph is overridden by section 75B(2)(c): see section 75B(4)(c).

85. It seems to me that there are two problems with HMRC's approach. The first is that HMRC is treating section 75B(1) and (6) as covering a case where P derives a chargeable interest out of the chargeable interest disposed of by V. As explained, those subsections do not cover that case. Section 75B(1) is extended by section 75B(6) but HMRC are treating section 75B(1) as extended even further to cover the case of P deriving a chargeable interest out of the interest disposed of by V. The second problem with HMRC's approach is that it produces a surprising result which goes against the scheme of the legislation. The legislation imposes the liability to pay tax on the purchaser in respect of a chargeable transaction: see section 85. However, with the approach of HMRC, P (PBL) is paying tax on a sum which was not the sum paid by it, but the sum received by it and, further, which was not the sum received by V. I am therefore not attracted by HMRC's approach and I need to look for other possible interpretations of section 75B.

86. PBL put forward two approaches. I will summarise them in my own words. The first approach is to seek to find in the scheme of transactions, if possible, a transaction which involved a disposal of the freehold by V and the acquisition of the freehold by PBL. Such a transaction did indeed occur; it was the transfer from SSD to PBL for £959 million. Then one asks if the other parts of the scheme of transactions were merely incidental to that actual transaction. PBL submitted that the other parts of the scheme were incidental as they were not for the purpose of SSD transferring the freehold to PBL but were for the purpose of PBL raising funding for the purchase and for the development. I also consider that PBL could say that the arrangements between PBL and MAR come within section 75B(3)(c) and are not within section 75B(2)(c), cross referring to section 75A(3)(c), which refers to a subsale; although the transfer from PBL to MAR was undoubtedly a subsale it was not a subsale by which PBL acquired the freehold but was a subsequent subsale by which it disposed of the freehold.

87. Before addressing PBL's second approach, I consider that there may be a variation on PBL's first approach which should be mentioned. The wording of section 75B(1) and (6) is very similar to the way in which the notional transaction is described in section 75A(1)(c) and 75A(4)(b). This suggests the possibility that sections 75B(1) and (6) are dealing with the notional transaction rather than with the actual scheme of

transactions. I acknowledge that it is odd to ask whether an actual transaction is incidental to a notional transaction and, further, sections 75B(2) and (3) appear to deal with the actual transactions and not the notional transaction. However, if it were necessary to solve the difficulties of interpretation of section 75B and to avoid the unreasonable result contended for by HMRC, I would wish to explore further this possible interpretation of section 75B.

88. PBL's second approach relies on the words "in so far as" in section 75B(1). PBL submits that even if it is not possible to say that the transactions between PBL and MAR were merely incidental to the acquisition by PBL of the freehold, then the transactions between PBL and MAR can be apportioned. One can, and should, divide the transactions so that one separates the part of the transaction whereby MAR provided consideration to reimburse PBL for its acquisition of the freehold from the parts of the transaction whereby MAR provided consideration to PBL in relation to SDLT and by way of further funding. One could then hold that the part of the transaction whereby MAR paid £959 million to PBL was not incidental to PBL acquiring the freehold but that the parts of the transaction whereby MAR agreed to pay to PBL the sum which PBL was liable to pay by way of SDLT and to provide further funding were merely incidental to PBL's acquisition of the freehold. PBL submitted that one way of reaching this result was to read into section 75B(1) the words "the payment of the consideration or" after the words "if or in so far as". I do not think that reading in those words is necessary although reading them in would seem to produce the same result. Reading in words is not necessary because section 75B(1) expressly provides for the possibility that a compound transaction can be split so that the consideration for one part of it can be seen to be not incidental to the acquisition of the chargeable interest by P.

89. Having addressed the rival arguments, I prefer the approach of PBL. Although section 75B is particularly difficult to interpret and apply in a case like the present where P derives a chargeable interest out of the chargeable interest disposed of by V, I conclude that it is possible to arrive at an interpretation which produces a sensible answer consistent with the scheme of the legislation. Of the arguments put forward by PBL, I would rely, first, on the point that sections 75B(1) and (6) refer to the acquisition by P of the chargeable interest disposed of by V and that is the freehold

rather than the leasehold interest; this rules out HMRC's approach of looking at the whole scheme by which PBL acquired its leasehold interest. Alternatively, I would accept PBL's argument based on the words "in so far as" in section 75B(1).

90. The result of the above analysis is that the relevant consideration for the purposes of section 75A is £959 million and PBL as P is liable to pay SDLT on a chargeable consideration of £959 million.

If MAR is P

91. So far I have examined the operation of the statutory provisions in a case where PBL is P. Before reaching a conclusion as to whether PBL is indeed P, with the consequences I have described above, I need to consider the possibility that MAR might be P and if I were to conclude that MAR might be P, I will then need to consider whether I should revisit the possibility that PBL is P.

92. In relation to MAR as P, the first question (raised by section 75A(1)(c)) is whether the amount of SDLT payable on the scheme transactions is less than the amount which would be payable on a notional land transaction effecting the acquisition of SSD's chargeable interest by MAR on its disposal by SSD: see also section 75A(4)(b) and (5). In this case, the amount of SDLT payable on the scheme transactions was nil. The SDLT which would be payable on the notional land transaction described above would be the tax payable on the chargeable consideration payable by MAR to PBL. Section 75A(5) provides for the determination of the amount of the chargeable consideration on the notional transaction mentioned in section 75A(1)(c) and, prima facie, that amount is £1.25 billion. Therefore, the requirement in section 75A(1)(c) is satisfied.

93. The next question (raised by section 75A(7)) is whether section 75A(1)(c) is satisfied "only by reason of" section 71A; in that event, section 75A is disapplied. The comparison involved in section 75A(1)(c) in relation to MAR can be expressed as follows:

> "the sum of the amounts of stamp duty land tax payable [*by all the participants in the scheme transactions*] in respect of the scheme transactions is less than the amount that would be payable [*by MAR*] on a notional land transaction …"

94. On this way of expressing the comparison involved in section 75A(1)(c), the answer to the question posed by section 75A(7) is that section 75A(1)(c) is not satisfied only by reason of section 71A because it is satisfied by the combined operation of section 45(3) and section 71A. Accordingly, section 75A was not disapplied in relation to MAR.

95. It appeared to be common ground at the hearing that the comparison involved in section 75A(1)(c) was as expressed above. Nonetheless, I have considered whether that comparison could be expressed differently, as follows:

> "the sum of the amounts of stamp duty land tax payable [*by MAR*] in respect of the scheme transactions is less than the amount that would be payable [*by MAR*] on a notional land transaction …"

96. If that were the correct reading of section 75A(1)(c), then the answer to the question in section 75A(7) would be that section 75A(1)(c) was satisfied only by reason of section 71A and section 75A would be disapplied in relation to MAR. I can see the argument that this reading of section 75A(1)(c) is a better way of giving effect to the legislation as a whole and to sections 71A and 75A(7) in particular. MAR participated in the transaction to provide alternative property finance and to have the benefit of section 71A which provided that its acquisition of the freehold was to be exempt from charge. It could be argued that section 75A(7) was designed to preserve the exemption under section 71A and to prevent it being overridden by section 75A.

97. Having considered the alternative argument as to the interpretation of section 75A(1)(c) described above, I have reluctantly come to the conclusion that the language of the section simply does not permit me to accept that argument. I therefore apply the interpretation of section 75A(1)(c) which appeared to be common ground at the hearing. On that basis, section 75A is not disapplied in relation to MAR by reason of section 75A(7).

98. I can deal shortly with the possible application of section 75B to MAR as P. The actual transactions involved a transfer of the freehold from SSD to PBL for £959 million and a transfer of the freehold from PBL to MAR for a consideration of £1.25 billion. Under section 75A, the notional land transaction is a disposal by SSD and an acquisition by MAR. Applying my earlier reasoning as to the operation of section 75B where PBL was P, it cannot be said that the transaction, whereby the freehold was

transferred to MAR for £1.25 billion, or any part of that transaction was merely incidental to the acquisition of the freehold by MAR.

99. The result of the above reasoning is that if MAR is P, it is liable to pay SDLT on a notional land transaction whereby SSD transferred the freehold of the land to MAR for a chargeable consideration of £1.25 billion.

How to decide this appeal

100. Up to this point, my reasoning produces the result that: (1) PBL can be P and would be liable to pay tax on a consideration of £959 million; and (2) MAR can be P and would be liable to pay tax on a consideration of £1.25 billion. I am not satisfied that sections 75A to 75C should be construed so as to produce the result that two persons can separately be P. As will be seen, Judge Nowlan does not agree with my reasoning as to MAR being P. He has prepared a separate decision in which he gives his reasons for holding that MAR is not capable of being P and that the only P is PBL. In summary, this is because: (1) PBL was a purchaser of an interest in land and MAR was a funder of that purchase; and (2) the scheme of the legislation is that the tax should be paid by the purchaser of the interest in land and not by the funder. If Judge Nowlan's reasoning is sound then the result appears a sensible one. However, I am not able to agree with Judge Nowlan's reasoning. I accept that the scheme of the legislation is that SDLT should be paid by a person acquiring the chargeable interest but not by a funder: see the exemption of a security interest in section 48 and the various references to funders, in particular, in sections 71A and 73 and section 75B(3)(c). I have tried to give effect to all of these specific provisions. If a person acquires a chargeable interest in the capacity of a funder and if he cannot bring the case within these specific provisions, I cannot find in the legislation any general purposive provision which exempts such a person from SDLT.

101. In view of my reasoning in relation to MAR as P, I have revisited my reasoning in relation to PBL as P. I am unable to find any false step in that reasoning. I consider that I should give effect to that reasoning in relation to PBL even though I have separately reached the conclusion that MAR could also be P.

102. I now must reach a decision on the appeal before the Upper Tribunal. HMRC has not sought to levy tax on MAR. MAR is not a party to this appeal. Neither the FTT nor the

Upper Tribunal is required to make any formal determination of the position in relation to MAR. What is before the Upper Tribunal is an appeal by PBL. Both members of the Upper Tribunal are of the view that PBL is P. Accordingly, I will apply sections 75A to 75C to PBL on the basis that it is P. I will follow through my earlier reasoning that the chargeable consideration is £959 million even though Judge Nowlan has reached the conclusion that the chargeable consideration is £1.25 billion.

103. Where there are two members of the Upper Tribunal who do not agree on the result, the presiding judge has a casting vote: see First-Tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, art. 8. It is the unanimous decision of this tribunal that PBL is chargeable to SDLT as P under section 75A and I cast my vote as presiding member in favour of holding that the chargeable consideration is £959 million.

104. I will now identify certain matters which do not arise and then address the issues as to matters of machinery and procedure.

Matters which do not arise

105. FTT held that PBL was P and that the relevant chargeable consideration was £1.25 billion. This conclusion gave rise to a number of further arguments from PBL. The first was that this conclusion infringed PBL's human rights essentially because (it was said) it involved discrimination on the grounds of religion. The result arrived at by the FTT was compared with the result which would have come about if PBL had funded its purchase from SSD by borrowing on conventional terms which involved it acquiring the freehold of the land for £959 million and granting a mortgage over that freehold in favour of a funder to secure repayment of the sums due from PBL to its funder. PBL contended that under section 3 of the Human Rights Act 1998, it was necessary and possible to read the legislation so that the chargeable consideration was £959 million rather than £1.25 billion. I have already, for reasons unconnected with section 3 of the Human Rights Act 1998, construed the legislation so that the chargeable consideration is £959 million. Therefore, it is not necessary for the purposes of my decision to address PBL's further argument as to human rights. In these circumstances I will not deal with that further argument. I recognise that this case may proceed to a higher appellate court but, in that event, the appeal on this point

will be against the decision of the FTT which decided this human rights point against PBL. A further reason for my decision not to deal with the human rights argument is that the argument is far from straightforward and I found that the evidence dealing with the precise requirements of Sharia law as to which arrangements were permissible, and which were not, was fairly limited. I therefore consider that an obiter discussion by me of this question may not be particularly helpful in another case where the evidence was more comprehensive.

106. The FTT's decision that the chargeable consideration was £1.25 billion gave rise to a second argument from PBL. It pointed out that the sums payable by MAR to PBL were payable by instalments and that, as events unfolded, the sums paid by MAR to PBL did not amount to £1.25 billion but were only some £970 million. PBL submitted that the chargeable consideration was therefore £970 million rather than £1.25 billion (assuming that it was not in any event, £959 million). The FTT dealt with and rejected that argument. As I have held that the chargeable consideration is £959 million, it is not necessary for me to deal with this further argument. I have decided that I should not deal with it. If there is a further appeal to a higher appellate court, then the appeal will be against the decision of the FTT and the higher court will have to address the findings and reasoning of the FTT on this point.

The notification and assessment issues

107. PBL submitted that even if it had been, in principle, liable under the statutory provisions to pay tax in relation to the notional land transaction identified in section 75A(1)(c) and 75A(4)(b), it was not now, in the events which have happened, liable to pay such tax. PBL submitted that it did not deliver a land transaction return in relation to the notional land transaction. Indeed, PBL submitted that the legislation did not require it to submit a return in relation to the notional land transaction. PBL did submit land transaction returns in relation to the actual transfer of the freehold from SSD to PBL and in relation to the lease granted by MAR to PBL. However, PBL submitted that those returns could not be considered to be returns in relation to the notional land transaction. Although HMRC purported to enquire (pursuant to schedule 10, para. 12) into PBL's return in relation to the actual transfer from SSD to PBL and purported to exercise its power (pursuant to schedule 10, para. 23) to serve a closure notice amending that return so that it recorded tax payable of £38,360,000 (being 4% of £959

million), HMRC's actions had no legal effect because PBL's return in relation to the actual transfer from SSD to PBL was accurate in relation to that transfer and was not a return in relation to the notional land transaction. PBL submitted that it would have been open to HMRC to have proceeded on the basis that no return had been delivered in relation to the notional land transaction and to make a Revenue determination pursuant to schedule 10, para. 25. HMRC did not make such a determination and the time for doing so (within 4 years of the effective date of the transaction) had now expired.

108. I will summarise the statutory provisions which are relevant to this submission, describe the returns which were made and then give my reasons for my conclusion on this point.

109. As already explained, the actual transfer from SSD to PBL is (in effect) to be disregarded under section 45(3) and the transfer from PBL to MAR and the lease from MAR to PBL are land transactions which are exempt from charge under section 71A.

110. Section 77 specifies which land transactions are notifiable. In this case, the transfer from SSD to PBL was not notifiable because it was in effect to be disregarded. The transfer from PBL to MAR and the lease from MAR to PBL were notifiable. There is an issue as to whether at the relevant time the notional land transaction was notifiable; I will return to that question later in this decision.

111. Section 76 requires the purchaser to deliver a land transaction return to HMRC in the case of every notifiable transaction before the end of the period of 30 days after the effective date of the transaction. A return in respect of a chargeable transaction must include a self assessment of the tax chargeable in respect of that transaction.

112. Section 78(1) provides that schedule 10 has effect which respect to land transaction returns, assessments and other matters.

113. Section 86(1) provides that tax payable in respect of a land transaction must be paid not later than the filing date for the return relating to the transaction.

114. In schedule 10:

(1) para. 1 provides for the form and contents of a land transaction return;

(2) para. 2 provides that references in "this Part of this Act" to the filing date are to the last day of the period within which the return must be delivered; it is open to interpretation whether this phrase refers to Part I of schedule 10 or to all of schedule 10 or to Part 4 of the Finance Act 2003 (and all schedules relating thereto); on any view, the language is not wholly appropriate; it makes better sense to read it as a reference to (at least) all of schedule 10;

(3) paras. 3 and 4 provide for penalties where a person fails to deliver a return by the filing date;

(4) para. 12 gives HMRC power to enquire into a return;

(5) para. 13 provides for the permitted scope of the enquiry;

(6) para. 23 permits HMRC to serve a closure notice informing the purchaser of their conclusions and any amendment to the return to give effect to those conclusions; a closure notice takes effect when it is issued;

(7) para. 25 permits HMRC to make a Revenue determination of the amount of tax chargeable in respect of a transaction where no return is delivered by the filing date; such a determination may not be made more than 4 years after the effective date of the transaction;

(8) para. 28 allows HMRC to make a discovery assessment in certain circumstances, including where an amount of tax that ought to have been assessed has not been assessed;

(9) para. 31 provides that the general rule is that no assessment may be made more than 4 years after the date effective date of the transaction to which it relates; this period may be extended to 6 or 20 years in certain specified circumstances.

115. The following land transaction returns were filed on 22 February 2008:

(1) **307388936MC** – this return, filed on behalf of PBL, related to a land transaction consisting of a freehold transfer not subject to a lease; the effective date of the transaction was 31 January 2008 and the return referred to a contract dated 5 April 2007; the return stated that the vendor was SSD and the

purchaser was PBL; the return stated that the consideration was £959 million partly in cash and partly contingent consideration; the return claimed "relief" and the particular relief claimed was "other relief";

(2) **308727994ME** – this return, filed on behalf of MAR, related to a land transaction consisting of a freehold transfer not subject to a lease; the effective date of the transaction was 31 January 2008 and the return referred to a contract dated 29 January 2008; the return stated that the vendor was PBL and the purchaser was MAR; the return stated that the consideration was £1.25 billion partly in cash and partly contingent consideration; the return claimed "relief" and the particular relief claimed was "alternative property finance";

(3) **308876820MQ** – this return filed on behalf of PBL, related to a land transaction consisting of a lease with vacant possession; the effective date of the transaction was 31 January 2008 and the return referred to a contract dated 29 January 2008; the return stated that the vendor was MAR and the purchaser was PBL; the return stated that the consideration calculated in accordance with schedule 5, para. 3 was £1,640,799,863; the return claimed "relief" and the particular relief claimed was "alternative property finance".

116. HMRC duly gave notice of their intention to enquire into the land transaction returns. On 13 July 2011, HMRC wrote to PBL stating that they had completed their enquiry into a land transaction return "in respect of the transaction dated 31 January 2008". The letter was stated to be a closure notice under schedule 10 para 23 and it amended the return to show tax payable of £38,360,000. The letter also notified PBL of a liability to pay interest in a sum exceeding £5 million.

117. The first question is how to interpret the return numbered 307388936MC. Should that return be read as a return in relation to the actual transfer from SSD to PBL or as a return in relation to the notional land transaction whereby, pursuant to section 75A, SSD disposed of its freehold and PBL acquired that freehold for a consideration of £959 million? The principal, and perhaps the only, point in favour of reading it as a return of the actual transfer is that the return referred to a contract of 5 April 2007; a reference to that contract had no part to play in a return of the notional land transaction.

118. The return claimed "other relief". That claim was not appropriate whether the return related to the actual transfer to PBL or the notional land transaction. Strictly speaking, section 45(3) was not a "relief"; it was a disregard. Conversely, if the return related to the notional land transaction, then there would not seem to have been any relief which could have been claimed.

119. At this point, I will consider the submissions as to whether the notional land transaction was a notifiable transaction, in relation to which PBL had a duty to deliver a return. Shortly after the relevant events, the statutory position in this respect was clarified, or amended as the case may be, by the introduction of section 77(1)(d) which provided that a notional land transaction under section 75A was a notifiable transaction. The amendment had effect from 12 March 2008. The fact of the amendment does not preclude the possibility that the unamended legislation also had this effect. The amendment does indicate that the legislature considered that an obligation to deliver a return in relation to a notional transaction was an obligation that would be capable of being performed.

120. Section 77 refers to "land transactions". Does this phrase refer only to actual land transactions or can it include notional land transactions? Section 77(5) expressly provided that a transaction which a person was treated as entering into by virtue of section 44A(3) was notifiable. That subsection was an example of the legislature not relying on a reading of section 77 so that it applied to all notional transactions but making express provision to impose a duty to notify in relation to one such notional transaction. Conversely, section 79(2) referred to "every land transaction" other than certain transactions which are treated as taking place; this suggests that the words "land transaction" would otherwise include all notional transactions. Section 85 provides for the purchaser to be liable to pay tax in respect of "a chargeable transaction" and under section 49 a chargeable transaction must involve a land transaction. As it must have been intended that a notional land transaction would be a chargeable transaction, it must also have been intended that the words "land transaction" in section 49 would include a notional land transaction. Further, the same reasoning applies to section 86 which provides for the date of payment of tax in respect of a land transaction to be not later than the filing date for the return relating to that transaction. This suggests not only that a notional land transaction is within the

phrase “land transaction” but also that there is a duty to file a return in relation to a notional land transaction.

121. Turning to schedule 10, PBL submitted that it was not obliged to file a return in relation to a notional land transaction and what HMRC should have done was to make a Revenue determination under schedule 10, para. 25 as to the tax chargeable. However, HMRC’s power to make such a determination only arises if no return is delivered by the filing date. If there had not been a duty on PBL to deliver a return in relation to the notional land transaction, then there would not have been a filing date and it would not be possible to say that a return had not been delivered by a filing date. PBL did not suggest that schedule 10, para. 28 would allow HMRC to get around this difficulty.

122. I am persuaded by this review of the statutory provisions to conclude that the notional land transaction in this case was notifiable under sections 76 and 77. Nonetheless, I remain concerned that, because section 75A is a difficult section to interpret and apply, it may in some cases be difficult for a person to know whether that section does give rise to a notional land transaction and therefore difficult to know whether there is a duty to notify HMRC of such a transaction. However, as I have pointed out, section 77(1)(d), as amended, shows that the legislature considered that an obligation to deliver a return in relation to a notional transaction was capable of being performed.

123. Against this background, I return to the question whether the return delivered by PBL in relation to a transfer of the freehold by SSD to PBL should be considered to be a return of the actual transfer or a return of the notional land transaction. If the return related to the actual transfer, then it was an unnecessary return. Further, if the return related to the actual transfer, the result was that PBL failed to perform its statutory duty to deliver a return in relation to the notional land transaction.

124. With some hesitation, I consider that the return in question can be considered to be a necessary return, rather than an unnecessary return, and a return which performed PBL’s obligation under section 76 to deliver a return. On this basis, it was a return in relation to the notional land transaction in accordance with section 75A.

125. The above conclusion means that HMRC was entitled to amend that return in the way in which they did by their closure notice of 13 July 2011.

Procedural matters

126. Finally, I will address a number of procedural matters which were raised in the course of the appeals to the Upper Tribunal.

127. The first such matter concerned the decision by the FTT to grant permission to PBL to argue on the appeal to the FTT that HMRC was not able to serve a closure notice under schedule 10, para. 23 purporting to amend the amount of tax chargeable as stated in PBL's land transaction return. The FTT granted permission to PBL to amend its Notice of Appeal to the FTT to take this point. HMRC have appealed against that decision. I have considered PBL's argument in relation to this point and I have rejected it. Therefore, it is not material for me to decide whether the FTT should, or should not, have granted permission to PBL to amend its Notice of Appeal to put forward this argument. In these circumstances, I will not consider HMRC's appeal on this point. If the matter goes to a higher appellate court, that court will have to consider the decision of the FTT on this point and not any obiter comments which I might make.

128. The second procedural matter raised arose out of the fact that the FTT granted HMRC permission to appeal out of time against its decision to grant permission to FTT to amend its Notice of Appeal to the FTT, as described above. PBL appealed against the FTT's decision to allow HMRC to appeal out of time. In the course of the hearing before the Upper Tribunal, PBL indicated that it no longer wished to pursue its appeal. I therefore do not need to deal with it. HMRC indicated that it would apply for an order for costs in relation to this appeal by PBL. The Upper Tribunal will deal with all questions of costs comprehensively following the release of this decision.

129. The third procedural matter is an application by PBL to argue on the appeal to the Upper Tribunal a point which was not argued before the FTT. PBL wished to put forward the argument that MAR was not entitled to claim exemption under section 71A(2) because PBL was not "the vendor" for the purposes of section 71A(2). PBL contended that its desire to argue this point before the Upper Tribunal when it had conceded the point before the FTT was attributable to the decision of the Court of Appeal in DV3 which came after the decision of the FTT. Without making a formal decision as to whether to permit PBL to argue this point on the appeal to the Upper

Tribunal, and to amend its Notice of Appeal to the Upper Tribunal for that purpose, the Upper Tribunal invited PBL and HMRC to put forward their submissions on the point and they did so. Having heard those submissions, I have rejected PBL's argument. In these circumstances, I will not grant PBL permission to amend its Notice of Appeal to the Upper Tribunal to take this point. If PBL appeal to a higher appellate court and wish to argue this point before that court, it will of course make its own decision as to whether to permit that course.

The overall result

130. The overall result of my reasoning is that PBL was liable pursuant to section 75A and HMRC's closure notice of 13 July 2011 to pay tax at the rate of 4% on a chargeable consideration of £959 million in relation to a notional land transaction.

131. The parties should now seek to agree appropriate orders as to the disposal of the various appeals before the Upper Tribunal in order to give effect to the above conclusions.

Judge Howard M Nowlan:

132. As Morgan J. indicated in the first paragraph of his decision, we have agreed on everything in this Appeal with the exception of two matters. The first of those is the issue of how one should identify V and P (more relevantly P) when seeking to apply section 75A to the facts of this case. The second matter is whether, when PBL is treated as P for the purposes of section 75A, it is possible to interpret sections 75A and 75B so as to limit the consideration on which SDLT is chargeable to the figure of £959 million, or whether I feel compelled by the statutory wording, and notwithstanding the incoherence of the result, to treat the consideration as £1.25 billion, as HMRC contend that it should be. While these are the two matters on which we have failed to agree, it may be worth recording that we certainly agree that these matters are far from clear and that the relevant statutory drafting leaves very much to be desired, and I for one am pleased that Morgan J's decision on the quantum of consideration (in other words £959 million rather than £1.25 billion) will prevail. I feel compelled to explain why I consider that the statutory drafting drives me to the opposite conclusion, but I readily concede that I find the result incoherent.

How to identify P for the purposes of section 75A

133. Section 75A is drafted in an unsatisfactory manner because it imposes a charge to SDLT on P, where certain conditions are satisfied, but on the facts of the present case, and doubtless the same could apply in many situations, those conditions could be said to be satisfied by treating two different parties (PBL and MAR in this case) as P. HMRC's commentary on the section acknowledges that in applying section 75A it might be necessary to consider treating more than one party as P. The difficulty, however, is that the section and the legislation as a whole give no guidance as to how to identify P when there is more than one possible candidate to rank as P. Beyond that, there is the further issue, as illustrated by Morgan J's decision, that he computes the amount of consideration on which SDLT is chargeable at different figures according to whether he treats PBL or MAR as P. In the first case, the consideration is £959 million and in the second case £1.25 billion.

134. I should mention in passing that it is possible to contend in this case that there might even be other possibilities to the identification of SSD as V. Since both parties accepted that SSD was V and Morgan J. adopted that approach (albeit expressing some concern that there was still no statutory basis for confirming the choice), I will ignore that issue and adopt the common expectation that SSD is rightly regarded as V.

135. Various methods have been suggested, and some altogether rejected, for deciding how to identify P. Both parties rejected the possibility that was once floated, namely that HMRC could choose how to apply the section and which party should be identified as P.

136. PBL contended that one should proceed through the various transaction steps sequentially and treat as P the party whose particular transaction or transactions first satisfied the conditions of section 75A. Thus, while PBL in land law terms acquired the freehold from SSD before MAR subsequently acquired the freehold from SDL, PBL's acquisition was disregarded for SDLT purposes by section 45(3), so that the first non-disregarded transaction was MAR's purchase of the freehold so that MAR should be P. In response to this Mr. Gammie observed (realistically I consider) that it was inappropriate to make a selection part way through the transaction steps. Quite apart from this, there was anyway no logical support for the suggested approach.

137. The approach adopted by the FTT, and essentially that advanced by HMRC, was that since section 75A was an anti-avoidance section, it was appropriate to identify the nature of the avoidance, and then to apply section 75A if possible to reverse that advantage. It was equally appropriate to pay regard to the overall structure of SDLT, recognising therefore that it had long been the aim of the charge to stamp duty, and more recently the charge to SDLT, to impose duty on purchasers and not financiers.

138. This is the approach that seems to me to be based on some relevant principle.

139. Morgan J. has rejected the approach of trying to identify the nature of the avoidance because he considered that it was impossible to do that when we have both reached the conclusion that individual motivation to secure a tax advantage was irrelevant to identifying that there was an avoidance of tax under the primary provisions. Perversely it is this very factor that leads me to say that it is actually easy to identify the nature of the advantage.

140. In the present case it is presumably common ground that the combined effect of sections 45(3) and 71A occasioned some sort of tax advantage. The basic aim of section 45(3) is to preclude a double charge to SDLT in the case of a purchase and an immediate sub-sale. The purpose of section 71A is to equate the position of alternative, sharia-style, financing with ordinary lending, and therefore to eliminate SDLT on the sale by the buyer (i.e. PBL in this case) to the financier (MAR), the leaseback, and the eventual re-conveyance under the put and call options. Of those three intended exemptions for alternative financing provided by section 71A, the only one dis-applied by section 71A itself is the purchase by the financier if that is not a purchase from the party to whom the leaseback is granted. In other words if, in the present case, MAR had purchased directly from SSD and then leased to PBL, and the steps of SSD transferring to PBL, and PBL sub-selling to MAR had been omitted, then MAR would have been liable for SDLT. This obviously results from the fact that SDLT could not have been charged on any other purchaser, because there would have been no such "other purchaser". Reverting to the actual sub-sale facts of the present case, it obviously cannot have been the intention to disregard the first purchase under section 45(3) if the subsequent purchase by MAR was going to be exempt from SDLT, or it cannot have been the intention to provide the section 71A financing exemption

for MAR, had the fundamental purchaser's earlier purchase transaction been disregarded.

141. While at this stage one might observe that there was either an error in section 45(3) or in section 71A, it is actually perfectly obvious where the error lay. Had the conclusion been that the error lay in not dis-applying the exemption in section 71A, with then no objection being taken to still disregarding the original purchase (by PBL), the result then of dis-applying the section 71A exemption would have been that duty would almost always be charged on a completely irrelevant amount. This is because, taking the example of an initial purchase for 100, coupled in three examples of sub-sales to a sharia financier at 50, 100 and 150, if the duty was to be charged on the acquisition by the financier (by dis-applying the section 71A exemption), the duty would be wrongly charged in the first and third of those examples by reference to 50 and 150. It would only be charged on a coherent figure when by pure chance the purchase happened to be followed by a financing, precisely financing the entirety of the purchase price. The examples of sub-sales at 50 and 150 are also entirely realistic. In the case of the sub-sale at 50, those facts would mirror the common situation where the basic purchaser was effectively borrowing only half of the purchase price. In the case of the sale at 150, this may momentarily seem odd, rather as the sub-sale in the present case at £1.25 billion momentarily seems odd, but if the financier is financing both the purchase and all the development expenditure, the sub-sale at a price sufficient to finance the development expenditure makes obvious sense.

142. Identifying the avoidance of tax to consist in providing in section 45(3) that the first purchase will be disregarded when the sub-sale is to an exempt financier identifies the obvious error in the legislation. For by dis-applying that disregard in precisely the way in which it was anyway dis-applied when the sub-sale was to a purchaser exempt under section 73 inherently imposes the duty on the real purchaser and inherently by reference to the purchase price paid for the land. It completely ignores the irrelevant issue of whether the purchaser borrows 50, 100 or 150, and whether there is a sub-sale to a sharia financier for any of those amounts.

143. It is worth noting that the statutory change that was made when it became clear that there was a drafting error in providing the earlier double non-charge of the disregard of section 45(3) and the exemption of section 71A was of course to amend, in one way

or another (and several changes were made) section 45(3). My observation here is not an example of seeking to interpret earlier legislation by looking at a subsequent change. It is simply an observation that it was obvious that the error was in section 45(3), this being confirmed by the fact that it was that section, and not section 71A, that was amended by Parliament to remove the drafting error.

144. It is also highly relevant to note that it is far more consistent with the basic principles of both stamp duty and SDLT to impose the duty on the purchaser and not on the lender, or where alternative finance is involved, not on that financier. Section 71A itself is designed to preserve that fundamental principle, notwithstanding the required technicalities that sharia financing necessitates the purchase, lease and eventual sale back of the land. Save for the one inherently necessary qualification to the exemptions under section 71A mentioned in the second half of paragraph 140 above, the plain aim of section 71A is to ensure that SDLT is paid by purchasers and not financiers, and it is entirely fair to say that this results from the long-standing objectives of stamp duty law, currently enshrined in the SDLT provisions.

145. I therefore suggest that there are two glaring reasons why it is appropriate to treat PBL rather than MAR as P. Properly analysed, it is far more realistic to say that the drafting error and the avoidance that we are seeking to counteract under section 75A consisted in the disregard of PBL's purchase under section 45(3), with the exemption under section 71A being entirely consistent with principle. Secondly, it is consistent with a basic principle of SDLT that the duty should be imposed on the purchaser and not the financier.

146. While Morgan J. feels unable to apply what I would call these two general principles to assist in identifying P, I find it significant that his careful analysis of all the possibilities still ends up with identifying two, if not more than two, possible approaches to identifying P. He certainly ends up with the two possibilities of treating PBL as P, with the consideration then calculated as £959 million, or treating MAR as P with consideration of £1.25 billion. Following all the careful analysis, there seems then to be no tie-breaker test as between the two, and while I accept the compelling good sense of choosing PBL as P and treating the consideration as £959 million, I note that he does not explain why he makes this selection. Once one has identified P, I accept that under section 75A(5) one component in calculating the

consideration is the largest amount of consideration given by any one person. This rule however assumes that P has been identified. There is no rule that says that if A, B or even C might be P, then the party should be identified by taking the party whose facts occasion the highest, or the lowest amount of consideration, nor indeed is there any other tie-breaker. Without leaving this selection to the end of the complex analysis, I prefer to apply the rule that an anti-avoidance provision should most obviously seek to reverse the avoidance and once I have identified that the avoidance consists in PBL escaping SDLT on its purchase, by virtue of the drafting slip in section 45(3) the cogent answer seems to me to be, there being no other remotely credible basis of selection or allocation, that the duty should be imposed on PBL, and if possible in the amount of the duty realistically avoided. I accept that as I interpret the detailed provisions, I am going to fail to achieve the second limb of that objective, but I can achieve the object of treating PBL as P.

Whether PBL ranks as P by virtue of having purchased the freehold from SSD or, by having acquired a chargeable interest "derived from [the freehold disposed of by SSD]"

147. This is an important question because it governs how section 75A applies, and that in turn has very considerable relevance to the possible application of section 75B, and the identification in that section of which transactions can be regarded as "incidental", and whether some consideration can then be disregarded under section 75A(5)(a).

148. If it is possible to treat PBL as P by treating section 75A(1)(a) as satisfied by virtue of PBL having acquired the freehold disposed of by V (SSD), it becomes possible to ignore the sub-sale and the leaseback when considering the transactions that are "involved in connection with the disposal and acquisition", and one can equally conclude that none of the itemised transactions mentioned in sub-section (3) have been in point. All these other transactions post-date PBL's basic acquisition of the freehold and have no bearing on that acquisition. By contrast if we have to ignore PBL's acquisition of the freehold because that is a disregarded transaction under section 45(3), and within the wording of section 75A(1)(a) PBL cannot therefore be said to "acquire it (i.e. the freehold disposed of by SSD), so that PBL ranks as P by acquiring the leaseback ("a chargeable interest derived from [the freehold disposed of by SSD]" then the sub-sale and the leaseback are plainly "scheme transactions" within

the meaning of sub-section (1)(b), and similarly they are amongst the various possible "scheme transactions" mentioned in sub-section (3).

149. I consider it to be clear that section 45(3) precludes us from saying that PBL ranks as P by virtue of the acquisition of the freehold. That seems to me to follow from the Court of Appeal decision in *DV3*. When addressing the condition in section 75A(1)(a), we are at that stage considering the effect of the ordinary charging provisions, rather than anything notional. Under those provisions we are told to ignore PBL's acquisition. Furthermore to apply the anti-avoidance section by distorting the treatment of the basic transaction steps that have actually occasioned the avoidance in the first place, substituting a transaction that would have eliminated the very avoidance had PBL's acquisition of the actual freehold not been disregarded, seems an obvious absurdity.

150. I consider it clear therefore that PBL ranks as P, and it does so by virtue of acquiring the leaseback, i.e. "a chargeable interest derived from [the freehold disposed of by V]".

151. It therefore follows that sub-section (4) provides for 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". The chargeable consideration under sub-section (5)(a) is then "the largest amount … given by … any person by way of consideration for the scheme transactions". Since MAR's acquisition was for £1.25 billion, this is the largest amount paid for any of the scheme transactions. There is no need to consider the issue of whether PBL's disregarded acquisition of the freehold for £959 million should be taken into consideration. Obviously the definition of "scheme transactions" can include transactions that do not constitute acquisitions of chargeable interests, but whether they can include transactions that section 45(3) has provided should be disregarded may be debatable. These points are, however, obviously irrelevant since the largest amount of consideration is plainly £1.25 billion in any event.

Whether section 75B can operate to reduce the chargeable consideration under section 75A(5) to £959 million

152. Section 75B is the section that is designed to modify and reduce the consideration treated by section 75A(5) as constituting the consideration for the notional land transaction occasioned by section 75A. It does this in essentially two ways.

153. The first provides that consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest. The notion of what can be incidental is then expanded to indicate that a transaction may be incidental if it is undertaken for a purpose relating to the construction of a building on the property, the supply of anything other than land, or by way of a financing transaction.

154. The second crucial feature in the operation of section 75B is that where a transaction has been regarded as incidental under the provisions reflected in the previous paragraph, this treatment is undermined, such that the transaction cannot be regarded as incidental, if the transaction is part of the process of the scheme transactions by virtue of which the transfer was effected, or the transaction was "of the kind specified in section 75A(3)".

155. Considering those two fundamental matters that have to be considered when applying section 75B, it immediately becomes obvious that there may be some tension in the present case, or indeed in any case involving alternative, sharia-style, financing. For transactions may appear to be financing transactions in the manner indicated in paragraph 153 above, whilst the same transactions are highly likely to be ranked as "not incidental" by virtue of having been transactions amongst the scheme transactions when applying section 75A in the first place. It appears at least possible that there is a drafting error in the section in not in some way modifying the second rule that precludes transactions from ranking as incidental when, albeit that they ranked as the scheme transactions or were of the kind specified in section 45A(3), they were entirely effected for financing purposes.

156. Turning now to the detailed wording, the difficulties immediately arise under section 75B(1), which provides that:

> *"(1) In calculating the chargeable consideration on the notional transaction for the purposes of section 75A(5), consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest from V to P".*

Sub-section (6) then provides that:

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

157. The immediate difficulty in applying sub-section (1) is that on our facts there was no "transfer of the chargeable interest from V to P". Ignoring the SDLT treatment of transactions, there was of course the initial transfer of the freehold from SSD to PBL, but that has been disregarded by section 45(3). We have then applied section 75A itself by treating PBL as P by virtue of PBL acquiring "an interest derived from" the freehold transferred by SSD, and not by virtue of having acquired the freehold. And then there is the notional land transaction actually occasioned by section 75A, and that notional transaction did involve "the transfer of the chargeable interest from V to P".

158. In an effort to identify what is meant by "the transfer of the chargeable interest from V to P" in section 75B(1), it is worth considering whether section 75B(6) assists. This appears not to refer to indirect transfers, but to focus on the interest acquired by P (i.e. the leasehold interest), and so to refer to a disposal by V of the interest in fact acquired by P. Accordingly, inserting the wording into sub-section (1), the direction appears to be that:

> "*consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest [presumably the freehold] from V to P, or the disposal by V of the interest [i.e. the leasehold] in fact acquired by P.*"

That inserted wording still appears not greatly to assist unless the meaning is that V does in fact dispose of an interest that feeds and includes the interest that passes to P. That unlikely reading apart, SSD as V clearly does not dispose of the leasehold interest.

159. My conclusion is going to be that I can actually ignore precisely what is meant, in sub-section (1) by "the chargeable interest from V to P". Before explaining that, however, I will deal first with the two basic approaches that have been advanced for the proposition that section 75B can be read to delete from the consideration received by PBL on transferring the freehold to MAR the excess element of the consideration over £959 million.

160. The first of the approaches considered is that if in some way it is possible to regard the "transfer of the chargeable interest from V to P" as referring to a direct transfer from

SSD to PBL, this would render it far easier to regard subsequent steps (the sub-sale and the leaseback) as then having no role to play in the initial transfer of the freehold to PBL, and therefore not to constitute "scheme transactions". Putting the same point another way, if the transfer to V is completed by the actual conveyance by SSD to PBL it becomes far easier to treat later transactions as "incidental", if indeed not altogether irrelevant to the transfer from SSD to PBL.

161. The second approach that has been advanced is that because both section 75B(1) and section 75B(2)(2) contain wording that refers to a transaction being ignored "if or in so far as" the transaction is incidental, it may be possible to split the £1.25 billion. One might then treat MAR as having acquired the freehold for consideration of £959 million and as having paid the balance of the £1.25 billion for other matters. They would include the additional effective advances to fund the payment of the SDLT, the payment of rent under the leaseback, and possibly to some degree the development expenditure. The funding of the development expenditure might then be regarded as making part of the sub-sale of the freehold an incidental transaction for two reasons in that it would have related to development, and would also have ranked as a financing transaction.

162. Addressing the credibility of these two approaches, I immediately reject the first approach, namely the approach mentioned in paragraph 160. The reason why I said above that I felt able to ignore the meaning of the phrase "the transfer of the chargeable interest from V to P" in section 75B is that precisely the same wording appears in sub-section (2)(a) but there it appears in a far more illuminating context. Sub-section (2)(a) reads:

> *"A transaction is not incidental to the transfer of the chargeable interest from V to P .. if or in so far as it forms part of a process, or series of transactions, by which the transfer is effected".*

I consider that the reference to a transaction not being incidental if it forms "part of a process, or series of transactions, by which the transfer is effected" simply must be a reference to the scheme transaction steps identified when applying section 75A. It is inconceivable that the meaning of "the process or series of transactions by which the transfer is effective" can mean one thing in section 75A and something different in section 75B. In other words, having plainly come to the conclusion when applying

section 75A that PBL ranked as P, and it did so by acquiring the leaseback, i.e. the "chargeable interest derived from the freehold transferred by V", it then follows that the scheme transactions simply must include the sub-sale to MAR, and the leaseback. All that section 75B is seeking to do is to adjust the consideration given for the various scheme transactions that were material in section 75A, and taken into account when initially calculating the consideration under section 75A(5). Under section 75B, we cannot make the adjustments by picking a different set of scheme transactions when applying section 75B.

163. It follows that the reasoning in paragraph 160 above cannot be right. Amongst other failings, it first revives a transaction that has been disregarded (the direct transfer of the freehold from SSD to PBL). More relevantly it addresses the wording of section 75B(2)(a) by treating transactions as not being scheme transactions, and so being capable of being incidental, but it does that by re-writing section 75A and picking a quite different (and obviously more limited) number of "scheme transactions" than were plainly in point under section 75A itself.

164. While I have said that I was not compelled to decide how to apply the wording in section 75B(1) where reference is made to "the transfer of the chargeable interest from V to P", it does seem to me that the more illuminating context in which the same expression is used in sub-section (2)(a) indicates that it is the transfer that results from the process or the series of transactions addressed in section 75A(1)(b). That transfer is the "disposal of V's chargeable interest", and the acquisition by P of "either it or a chargeable interest deriving from it", both as mentioned in section 75A(1)(a). Consistently, section 75A(1)(b) elides the same transactions as is implicit in the wording of section 75B(1). The reference in section 75A(1)(b) to "the disposal and acquisition" must refer both to the case where the disposal and acquisition are of the same chargeable interest, and also to the case where the disposal is of one chargeable interest and the acquisition is of a derivative interest.

165. I will deal now with the other contention advanced on behalf of PBL, namely that the "if or in so far as" wording that appears in section 75B(1) and section 75(B(2)(a) enables us to dissect the sub-sale and say that part of it related to the acquisition of the interests, whilst other parts related to funding the payment of the stamp duty, pre-funding the rental expense and possibly funding the development expenditure. So far

as the provision (sub-section (3)(c)) that enables the provision of finance to be regarded as incidental is concerned, it could be argued that the sub-sale was entirely directed to the provision of finance, and so should arguably be wholly disregarded.

166. The difficulty with both these arguments is that they still fall foul of the fact that anything that suggests that some transaction might be regarded, wholly or in part, to be incidental is still qualified by the rules in sub-section (2). Sub-section (2)(c) simply refers to a kind of transaction specified in section 75A(3), and there is no relevant wording about the transaction being wholly or partly addressed in section 75A(3). The sub-sale in this case was clearly one of the scheme transactions, covered by section 75A in the first place, and plainly one of the transactions referred to in section 75A(3), and so it inevitably follows that it simply cannot be incidental. I consider that section 75B(2)(a) also precludes any of the transactions being regarded as wholly or partly incidental. The "in so far as" wording in sub-section (2)(a) is inapplicable in this case. The sub-sale from PBL to MAR, i.e. the conveyance of the freehold, constituted in its entirety a crucial step in the process or the series of transactions that led to P acquiring is relevant interest.

167. I accordingly conclude that none of the provisions of section 75B can require or permit any of the consideration paid by MAR for the sub-sale to be regarded as incidental, so as to be deleted from the measure of consideration under section 75A(5). Accordingly my decision is that the consideration for the notional land transaction, notionally received by PBL, was £1.25 billion.

168. I should add that I entirely accept that taxation provisions should be applied and construed purposively. Had the direction in section 75A been couched in quite different terms, requiring the amount of SDLT realistically avoided to be charged on the party that should have been charged, but for the avoidance, I would have had no difficulty in agreeing that duty in respect of £959 million should have been charged on PBL. Where however the terms of the anti-avoidance provision, and the related provisions, contain numerous strict and mechanical rules, which seem to me not to be capable of purposive interpretation, we seem to be left with the choice of just ignoring statutory provisions altogether, or of having to apply them. This seems to me to be a case where, unless we actually ignore section 75B(2)(c) and probably section

75B(2)(a) as well, the mechanical provisions generate an incoherent outcome that I cannot eliminate.

169. In terms of the effect of my conclusion, I cannot put it more aptly than Mr. Thomas did in one of the paragraphs of his response to the further questions that we put to counsel in relation to the application of section 75B. He said:

> *"It appears that the Upper Tribunal is quite reasonably concerned by the argument advanced by HMRC that in these circumstances PBL should be punished by the imposition of SDLT of £50 million, on chargeable consideration of £1.25 billion, despite the fact that PBL never paid that amount for the acquisition of any chargeable interest, let alone the leasehold interest which it in reality acquired; despite the fact that the only sum ever received by SSD for the sale of the property was £959 million, and despite the fact that the only person who might have been liable to pay that sum (MAR) never in fact paid it. It will be appreciated that the effect of the analysis is that PBL is treated as the purchaser under a transaction in which it in fact acted as the vendor; and is made liable for SDLT on a sum which it never paid as purchaser but was only ever to receive as vendor or borrower. Given the fundamental proposition in SDLT that it is the purchaser who is liable for the tax (and neither a vendor nor a borrower) this is a remarkable result."*

I agree. The only point that I add is that I am pleased to see a reflection of "the fundamental proposition in SDLT that it is the purchaser who is liable for the tax", which I consider supports the argument that I advanced in paragraph 144 above for the proposition that it is inherently and structurally appropriate to treat PBL, and not MAR, as P.

170. There is no need for me to address the remaining questions that would have been material had my decision in fact prevailed. My decision on the limited issues addressed here do not prevail and Morgan J's decision is the operative decision. That renders it unnecessary to consider all the subsequent issues that would have been material had we both concluded at this stage that the chargeable consideration for SDLT purposes was £1.25 billion.

The Honourable Mr Justice Morgan **Judge Howard M Nowlan**

Release Date: 18 December 2014