STAMP DUTY LAND TAX- avoidance scheme- arrangement under which house sold to unlimited company and then distributed to shareholders on reduction of share capital – application of s 45(3) FA 2003 to the scheme-whether determination of SDLT payable capable of imposing liability in relation to any liability arising under s 75A FA 2003

UT Neutral citation number: **[2022] UKUT 00298 (TCC)**

UT (Tax and Chancery) Case Number: UT-2021-000174

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
Fetter Lane
London
EC4A 1NL

Heard on: 5 October 2022
Judgment given on 14 November 2022

Before

MR JUSTICE TROWER
JUDGE TIMOTHY HERRINGTON

Between

MR MICHAEL BROWN
MRS BRIDGET BROWN

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Ross Birkbeck, Counsel, instructed by Blackfriars Tax Solutions LLP

For the Respondents: Ben Elliott, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

Introduction

1. This is an appeal of the appellants ("Mr & Mrs Brown") against the decision ("the Decision") of the First-tier Tribunal ("FTT") (Judge Charles Hellier) released on 7 June 2021. The FTT dismissed Mr and Mrs Brown's appeal against a determination ("the Determination") of the Respondents ("HMRC") issued under paragraph 25 of Schedule 10 Finance Act 2003 ("FA 2003") to impose on Mr and Mrs Brown a liability for the payment of Stamp Duty Land Tax ("SDLT") in relation to the acquisition of a house in Surrey.

2. Mr and Mrs Brown acquired the house ("the Property") pursuant to an arrangement under which the Property was first sold to an unlimited company ("the Company"), and then transferred by the Company to Mr and Mrs Brown on a distribution in specie by the Company. Under this marketed avoidance scheme the ultimate purchaser ("C") acquires a property from an unconnected vendor ("A") via an unlimited company ("B"). In summary, the scheme operates as follows:

> (1) C forms an unlimited company, B, and contributes cash to the unlimited company of a sufficient amount to purchase the target property. The contribution of funds is effected by subscribing for shares in B;
>
> (2) A contracts to sell the property to B;
>
> (3) B pays the agreed purchase price for the property to A. At the same time as the completion of the contract between A and B, B reduces its capital and makes a distribution in specie of the property to C, such that C acquires the property from A.

3. The scheme sought to take advantage of the "sub-sale relief" for SDLT contained in s 45 FA 2003 as it was then in force. Specifically, the taxpayer argues that the effect of s 45 FA 2003 is that (i) the contract between A and B is disregarded, and (ii) there is no consideration for the distribution from B to C and accordingly no SDLT is payable.

4. The FTT decided that s 45 FA 2003 did apply to the arrangements. It then held that the effect of s 45 (3) (b) (ii) FA 2003 was that the consideration given for the transfer of the Property to Mr and Mrs Brown by way of the distribution in specie, was the amount paid or to be paid on the issue of the shares in the Company, and the SDLT liability was to be calculated by reference to that sum.

5. In the alternative, the FTT held that if s 45 FA 2003 applied but it was wrong on its interpretation of s 45 (3) (b) (ii) FA 2003 so that the consideration was less than the amount of the purchase price of the Property, then the anti-avoidance provisions of s 75A FA 2003 applied and the consideration on the notional transaction provided for by the operation of that provision would be that amount. However, the FTT held that the Determination related only to the actual transfer of the Property to Mr and Mrs Brown and not to the notional transfer under s 75A FA 2003.

6. Mr and Mrs Brown now appeal to this Tribunal with the permission of the FTT on one of its two grounds of appeal, and the permission of this Tribunal (Judge Richards) on its remaining ground. Mr and Mrs Brown contend that the FTT erred in its interpretation of the words "consideration given for" in s 45 (3) (b) (ii) FA 2003 and, consequently, erred in law in holding that the consideration was the

amount paid or to be paid on the issue of the shares in the Company. In any event, they contend that in deciding that the consideration in relation to s 45 FA 2003 arose under s 45(3)(b)(ii) FA 2003 rather than, as was argued, s 45(3)(b)(i), the FTT decided an issue which was not argued or evidenced.

7. HMRC contend that the FTT was correct for the reasons that it gave in concluding that consideration was given for the transfer of the rights to acquire the Property from the Company to Mr and Mrs Brown which fell within the scope of s45 (3) (b) (ii) FA 2003 and that the FTT made no error of law in deciding the appeal on that basis.

8. In the alternative, HMRC contend that consideration for the transfer to Mr and Mrs Brown was given which fell within the scope of s 45(3)(b)(i) FA 2003 on the basis that the consideration payable by the Company for the Property was "given …indirectly.. by [Mr and Mrs Brown] or a person connected with [them]".

9. In the further alternative, HMRC challenge the FTT's conclusion that any liability arising under s 75A FA 2003 was not the subject of or capable of being included within the Determination. They contend that the FTT ought to have held that the Determination was capable of imposing liability in relation to any liability that arose under s 75A FA 2003.

The Law

10. At [10] to [14] of the Decision the FTT set out succinctly the key features of the relevant legislation relating to SDLT which we can repeat with some modifications as follows.

11. At the relevant time FA 2003 provided that SDLT was to be charged on "chargeable transactions". These were "land transactions" (s 43(1)) which were not exempt (s 49). A "land transaction" was defined by s 43 (1) as "any acquisition of a chargeable interest". A "chargeable interest" included the acquisition of a freehold title to a house (s 48). Where a contract to acquire land was completed by a conveyance and not "substantially performed" at an earlier time, the entry into the contract was not a land transaction but on completion, the contract and the conveyance were treated as a single land transaction taking place at the date of completion (s 44(1 to 3)).

12. The tax is charged by reference to the "chargeable consideration" which is defined by para 1 Sch 4 FA 2003 to be any consideration in money or money's worth given for the subject matter of the transaction directly or indirectly by the purchaser or a person connected with him.

13. The purchaser (the person acquiring the land (s 44(4))) is liable for the SDLT on the transaction (s 85) and must deliver an SDLT return to HMRC if the transaction is "notifiable". At the relevant time s 77 provided that the acquisition of a freehold was notifiable unless the transaction was exempt under Schedule 3. Para 1 of that Schedule provided that a land transaction under which the chargeable consideration was nil was exempt.

14. Section 45 (which we set out in full below) made provision for the situation in which land was contracted to be sold by A to B, but there was an assignment, sub-sale, or other transaction as a result of which C became entitled to call for a conveyance. Broadly, in such a case the section provided that the first contract between A and B was to be disregarded and SDLT was to be charged only by reference to C's acquisition under a notional ("secondary") contract. This provision could encompass (i) the assignment (whether or not for consideration) by B to C of B's rights under his contract with A so that on completion A would convey the property to C and C would pay A directly and perhaps pay B for the assignment, and (ii) the situation where, for example, in a rising market B sold the

property to C for an immediate profit derived from the higher price payable under the second contract, that second contract usually being called a "sub-sale".

15. At the relevant time, s 45 FA 2003 provided so far as relevant as follows:

> "(1) This section applies where--
>
> (a) a contract for a land transaction ("the original contract") is entered into under which the transaction is to be completed by a conveyance, ...
>
> (b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and
>
> (c) …
>
> References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and references to the transferor and the transferee shall be read accordingly.
>
> (2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.
>
> (3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which—
>
> (a) the transferee is the purchaser, and
>
> (b) the consideration for the transaction is—
>
> (i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and
>
> (ii) the consideration given for the transfer of rights.
>
> The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded …"

16. Section 75A FA 2003 (which we set out below) is an anti-avoidance provision cast principally in objective terms without regard to purpose or intent. It has the effect that if a number of transactions ("scheme transactions") are "involved" in connection with a disposal of land by a person, V, and an acquisition of the land by another person, P, then SDLT is payable on the higher of (i) the aggregate of that which would otherwise be payable by all the parties in the scheme transactions, and (ii) that which would be payable on a notional transfer from V to P for a consideration equal to the largest aggregate amount given by any one person or received by V as consideration under the scheme transactions.

17. At the relevant time s 75A provided:

> "(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) the variation of a right to terminate a lease…

(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.".

18. Pursuant to s 76 FA 2003, the purchaser in the case of a "notifiable transaction" must deliver a return. Section 77 provides that the acquisition of a major interest in land is notifiable unless the

acquisition is exempt or the land is residential property and the chargeable consideration is less than £1,000.

19. Where no return is delivered by the taxpayer in respect of a chargeable transaction then, pursuant to paragraph 25 of Schedule 10 FA 2003, HMRC may make a determination of the amount of SDLT chargeable in respect of the transaction. Paragraph 25 provides:

> "(1) If in the case of a chargeable transaction no land transaction return is delivered by the filing date, the Inland Revenue may make a determination (a "Revenue determination") to the best of their information and belief of the amount of tax chargeable in respect of the transaction.
>
> (2) Notice of the determination must be served on the purchaser, stating the date on which it is issued.
>
> (3) No Revenue determination may be made more than six years after the effective date of the transaction."

The Decision

20. References to numbered paragraphs in parentheses, [xx] unless stated otherwise, are references to paragraphs in the Decision.

The Facts

21. The relevant facts relating to the implementation of the scheme are set out by the FTT at [2] to [8] and are not in dispute. In summary:

(1) On 2 July 2007, the Company was incorporated as an unlimited company. Mr and Mrs Brown each subscribed for 47,751 £1 shares at par, paying £95,502 in total.

(2) On 9 July 2007, the Company contracted with an unconnected third party to purchase the Property, for £955,000 and paid a deposit of £95,000.

(3) On 8 August 2007, the Company issued to each of Mr and Mrs Brown a further 432,250 £1 shares at par (bringing the total nominal value of shares in issue to £960,002). The shares were subscribed for in return for promissory notes of £432,250 from each of Mr and Mrs Brown which were expressed to be payable on 15 August 2007 (the day of completion of the Company's purchase).

(4) On 15 August 2007:

(a) The Company resolved to reduce its share capital from £960,002 to £2 by way of a distribution in specie of the Property conditional on and simultaneous with the completion of its original property purchase contract.

(b) The Company used the balance of the money deriving from the share subscriptions to complete the transfer of the Property to it and a transfer was executed in its favour. Specifically, the mortgage monies to fund the purchase of the Property were paid by the conveyancing solicitor to the vendor, which thereby satisfied the promissory notes. The FTT found at [29] that the balance of the subscription monies after satisfaction of the purchase price for the Property were consumed in conveyancing costs.

(c) A transfer of the Property from the Company to Mr and Mrs Brown was executed showing no consideration, and the Company's share capital was reduced.

(5) The above steps were taken in pursuance of a plan described to Mr and Mrs Brown in a letter from Premier Strategies Ltd of 7 June 2007, and from the time that the Company contracted to purchase the Property, there was no practical likelihood that the remaining steps would not be taken (unless some problem with the conveyancing occurred such as a defect in title).

22. The FTT found at [26] that the monies Mr and Mrs Brown paid (in cash or promissory notes) were "given under a scheme in which plainly the 'deal' was that these monies were the quid pro quo for the house". At [28] the FTT held:

> "The scheme provided the overall bargain or arrangement which made what they paid "consideration" and their obvious intention meant that what they paid was "for" the transfer of the house."

23. Mr and Mrs Brown made no SDLT return on the basis that none was required because (purportedly) no chargeable consideration had been given for the transfer of the Property to them.

24. As found by the FTT at [118], on 8 August 2011, HMRC issued the Determination to Mr and Mrs Brown (jointly) in the amount of £38,200 (4% of £955,000). In a covering letter it was stated that HMRC had concluded that Mr and Mrs Brown's acquisition of the Property was a chargeable transaction. The Determination specified the amount of SDLT HMRC considered was payable by reference to the consideration they considered had passed. The Determination did not specify the basis on which HMRC had calculated the tax payable other than that it was by reference to consideration of £955,000.

The FTT's conclusions

Section 45 FA 2003

25. At [36] to [44] the FTT considered whether s 45 FA 2003 applied to the arrangements. It concluded that the provision did apply on the following basis:

> (1) Section 45(1) (a) was satisfied by the contract made on 9 July 2007 by which the Company agreed to purchase the Property;
>
> (2) Section 45 (1) (b) was satisfied because the resolution to reduce the Company's share capital by the distribution in specie of the Property was a "transaction" as a result of which following the completion of the transfer to the Company Mr and Mrs Brown rather than the Company became entitled to call for a conveyance to them of the Property; and
>
> (3) The provisions of the tailpiece to s 45 (3), which in order for the completion of the transfer from the vendor to the Company to be disregarded required the completion of the transfer from the Company to Mr and Mrs Brown to take place "at the same time" as the transfer to the Company, were satisfied because the two transfers took place on the same day within minutes of each other, as found by the FTT at [5].

26. At [45] the FTT held that as a result of the application of s 45 (3) the land transaction which was relevant for the purposes of SDLT consisted of the "secondary contract" referred to in that provision, in this case the notional contract between the Company and Mr and Mrs Brown which was completed by the transfer executed by the Company.

27. The FTT then considered the question as to what was the "consideration for the transaction" for the purposes of s 45 (3)(b) and whether it arose under s 45 (3) (b) (i) or (b)(ii).

28. At [60] the FTT held that the consideration provided by Mr and Mrs Brown (that is the subscription monies for the shares in the Company) was not "consideration given" by them for the purposes of s 45(3)(b)(i) because it was not given by them as consideration under the contract between the vendor and the Company. The FTT said:

> "That is the case even though paragraph (b)(i) refers to consideration given directly or indirectly by C. What is given by C must be "*consideration*" for the property whether it is given directly or indirectly."

29. The FTT went on to say at [61]:

> "On this basis, subject to what follows, the consideration for the notional, 'secondary', contract in the instant appeal comprises whatever was given for the transfer of rights under (b)(ii) and nothing under (b)(i) because Mr and Mrs B gave no consideration under the A-B contract."

30. However, the FTT expressed the view that s 45(3)(b)(i) could apply on the basis that the consideration was given to the vendor by a person connected with Mr and Mrs Brown, namely the Company. It said this at [64]:

> "In the instant appeal the company (B) was connected with Mr and Mrs Brown (C) so that the consideration given by it under its purchase contract would, on a literal reading, fall within (3)(b)(i) as consideration given by a connected person. Thus, if I am correct I [sic] my approach to (3)(b)(i) consideration of £955,000 would arise under the connected party limb of (3)(b)(i) in addition to any arising under (3)(b)(ii)."

31. Nevertheless, the FTT declined to decide the consideration issue on that basis, noting at [65] that HMRC did not wish to put their case on the basis of connection.

32. Therefore, the FTT went on to consider interpretation of the phrase "the consideration given for the transfer of rights" in s 45 (3) (b) (ii), noting at [66] that HMRC put its case on the basis of the consideration for the notional contract was under (b) (i) alone and that no consideration arose under (b) (ii). The FTT held that there was consideration that fell within the scope of (b) (ii). Its reasoning was set out at [68] to [72] as follows:

> "68. I find it difficult to reconcile [HMRC's] submission that, viewed realistically, the contribution paid by the Appellants was consideration given (indirectly) for the property within (b)(i) with his acceptance that it was not (realistically) consideration given for the resolution for the distribution of the property on the reduction of capital. I accept that (b)(ii) refers only to consideration given rather than to consideration "directly or indirectly" given, but in the context of a preplanned scheme if one asks why Mr and Mrs Brown paid £960,000 to the company, the sensible, realistic answer must be "to get the house" pursuant to the planned arrangement with the company. They may also have paid it to get the shares, but the question is what they paid "for", and that word looks to the reality of the purpose of those who paid it.
>
> 69. [Counsel for Mr and Mrs Brown] says that a distribution on a reduction in capital is a gratuitous transaction as a matter of company law, but the reference to the "transfer of rights" in section 45(1) is not of necessity to the actual conveyance but to the transaction which results in the person being entitled to call for a conveyance. The actual distribution may have been for no consideration but the resolution to make it followed from the share subscription, and would not have been possible without the share subscription: realistically the payment for the shares was also the quid pro quo for that resolution.

> 70. [Counsel for Mr and Mrs Brown] says that in the context of legislation designed to apply objective tests the application of a motive or intention test such as that inherent in treating preplanned transactions as satisfying a statutory concept when the individual transactions would not is inappropriate. I agree that the legislation generally appears to seek to apply objective tests. But the use of the word "for" in (3)(b) is to my mind an exception.
>
> 71. I therefore find that the consideration for the land transaction which resulted on the completion of the notional or secondary contract was the amount paid or to be paid on the issue of the shares being the amount under (3)(b)(ii) given by Mr and Mrs Brown in consideration for the resolution to reduce the company's share capital and convey the house.
>
> 72. That amount was £960,002, not £955,000. There is to my mind, no anomaly in that conclusion: if on a subsale C pays B £960,002 and B pays A £955,000 the object of section 45 is to tax C on an acquisition for £960,002."

Section 75A FA 2003

33. The FTT set out the legislative scheme around s 75A FA 2003, which is designed to prevent avoidance of SDLT. In brief, when the conditions of s 75A are satisfied, the actual chargeable land transactions are ignored for SDLT purposes, and a new "notional transaction" with a defined consideration is put in their place.

34. At [98] to [101] the FTT concluded that if it were correct in concluding that s 45(3) FA 2003 applied then if the consideration under s 45 (3) (b) FA 2003 were less than £955,000 then all the scheme transactions are ignored and Mr and Mrs Brown are chargeable under s75A on a notional transaction with consideration of £955,000.

35. However, the FTT concluded that any liability arising under section 75A FA 2003 was not the subject of or capable of being included within the Determination. The FTT's reasoning was set out at [109] to [124] and can be summarised as follows:

> (1) A determination may only be made in relation to one chargeable transaction;
>
> (2) Where section 75A applies, the actual transaction is disregarded for the purposes of Schedule 10 FA 2003 and replaced by the notional transaction;
>
> (3) Accordingly, a determination based on section 75A is a different determination to one relating to the same acquisition but made on the basis that section 75A does not apply; and
>
> (4) The determination in the present case was issued in relation to the actual acquisition of the property by Mr and Mrs Brown and not the notional transaction under section 75A.

Grounds of Appeal and issues to be determined

36. Mr and Mrs Brown were granted permission to appeal on the following two grounds:

Ground 1: The FTT's conclusion that the consideration for the land transaction which resulted in the completion of the notional or secondary contract was the amount paid or to be paid on the issue of the shares in the Company is a mistake in law.

Ground 2: In finding that the amount paid or to be paid on the issue of the shares in the Company was not only consideration under s 45(3)(b)(ii) FA 2003, but chargeable consideration, the FTT decided the case on a point that had not been pleaded nor (as a result) properly argued or evidenced.

This is contrary to the principles set down by the Court of Appeal in *Al-Medenni v Mars UK* [2005] EWCA Civ 1041 and recently confirmed in *Satyam Enterprises v Burton* [2021] EWCA Civ 287.

37. In their Response to the Notice of Appeal HMRC oppose the appeal in respect of both grounds advanced. They contend:

(1) The FTT was correct for the reasons that it gave in concluding that the "consideration given for the transfer of rights" within the meaning of s 45(3)(b)(ii) was £960,002;

(2) There is no error of law in the FTT deciding that section 45(3)(b)(ii) applied in the present case because during the hearing before the FTT some consideration was given to the applicability of s 45(3)(b)(ii) and in any event because of the scope of Ground 1 the point can be fully argued before the Upper Tribunal.

38. In addition, HMRC seek to uphold the FTT's decision that there is consideration under s 45(3)(b) for two alternative reasons as follows:

(1) The Company is connected with Mr and Mrs Brown and the Company gave consideration of £955,000 to the vendor under the original contract, and therefore the consideration is £955,000 under s 45(3)(b)(i) ("the Connected Person Argument"). The FTT appears to have accepted this argument at [64] but decided the appeal on the basis of s45(3)(b)(ii); and

(2) The funds paid to the Company for the subscription of the shares (or to be paid under the promissory notes) by Mr and Mrs Brown (£960,002) constituted "consideration under the original contract…referable to the subject-matter of the transfer of rights and…given indirectly" by the Appellants within the meaning of section 45(3)(b)(i). This analysis was adopted by the FTT in *Vardy v HMRC* [2012] UKFTT 564 (TC) and *Geering & ors v HMRC* [2018] UKFTT 233 (TC) ("the Vardy Argument").

39. There is no challenge to the FTT's conclusion that s 45 FA 2003 applies in this case. Neither is there any challenge to the FTT's analysis as to the applicability of s 75A FA 2003. However, if s 75A applies then HMRC challenge the FTT's conclusion that the Determination was not capable of imposing liability in relation to any liability that arose under s 75A.

40. Accordingly, there are three overall issues that we need to determine as follows:

(1) On the application of s 45(3)(b) FA 2003, what is the chargeable consideration?

(2) Did the FTT err in law in deciding that there was consideration under s 45(3)(b)(ii) in circumstances in which that issue was not expressly pleaded?

(3) If the chargeable consideration under section 45(3) is less than £955,000, such that section 75A applies to the transaction, was the Determination capable of imposing liability in relation to any liability that arose under section 75A?

Discussion

Issue 1: Application of s 45(3)(b) FA 2003

41. It was common ground that the purchase of the Property by Mr and Mrs Brown resulted from the implementation by them of a tax avoidance scheme involving a number of pre-ordained steps as described at [2] above. As we set out at [21 (5)] above, those steps were taken in pursuance of a plan

described to Mr and Mrs Brown by the promoters of the scheme and from the time that the Company contracted to purchase the Property, there was no practical likelihood that the remaining steps would not be taken. In other words, by deciding to adopt the scheme Mr and Mrs Brown decided to achieve the objective of acquiring the Property through the implementation of the steps set out in the description of the scheme.

42. In those circumstances, as the case law demonstrates, the application of s 45 (3) (b) to the various steps necessary to implement the scheme is to be ascertained by following the modern purposive approach to the interpretation of all legislation. The general principles to be applied in approaching the construction of both taxing statutes and legislation more generally was most recently set out by Lord Briggs and Lord Leggatt JJSC in the judgment of the Supreme Court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] 2 WLR 1125 ("*Hurstwood*") at [10] to [18]. In summary:

> (1) The court's task is to identify the purpose of the legislation in question and give effect to it.
>
> (2) The result of applying the purposive approach to fiscal legislation has often been to disregard transactions or elements of transactions which have no business purpose and have as their sole aim the avoidance of tax. It is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance.
>
> (3) Where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. The question whether the state of affairs or the transaction was part of a preconceived plan which included further steps may well be relevant to whether state of affairs or transaction falls within the statutory description, construed in the light of its purpose. In that regard, it is not necessary in order to justify taking account of later events to show that they were bound to happen – only that they were planned to happen at the time that the first transaction in the sequence took place and that they did in fact happen.
>
> (4) The essence of the 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. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.
>
> (5) In the task of ascertaining whether a particular statutory provision imposes a charge, or grants an exemption from a charge, the approach involves two components or stages. The first is to ascertain the class of facts (which may or may not be transactions) intended to be affected by the charge or exemption. This is a process of interpretation of the statutory provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they answer to the statutory description.
>
> (6) Both interpretation and application share the need to avoid tunnel vision. The facts must be looked at in the round. Sometimes looking at a composite scheme as a whole allows particular steps which have no commercial purpose to be ignored.

43. The essence of Mr and Mrs Brown's case, as submitted by Mr Birkbeck, can be summarised as follows:

(1) SDLT is calculated by reference to "chargeable consideration". That term must mean the consideration payable in respect of a land transaction, so that "chargeable consideration" must be consideration under a contract for the acquisition of a chargeable interest in land: see s 43 FA 2003. The purpose of the legislative use of the words "consideration for" is to capture value passing under a contract for the acquisition of land. The purpose of the legislation is to identify the amount chargeable to tax where there is an acquisition of a right over land.

(2) In that context, "consideration" must be given its normal technical, legal meaning, that is a payment or other provision of value under a contract. The legislation does not require a broader approach. It would be contrary to the technical and transactional nature of SDLT if "consideration" were to be given a broad and undefined meaning. "Consideration" is a technical term, and Parliament used it as such.

(3) This general rule is modified when, as was found by the FTT, s 45 applies. When this is the case, the consideration for the secondary contract chargeable under s 45 is defined as the combination of the sums identified under s 45 (3) (b) (i) and (ii). In both of those provisions the term "consideration" means consideration referable to a contract.

(4) In relation to s 45 (3) (b) (i) the FTT's analysis at [60] and [61], as set out at [28] and [29] above was correct. In this case, in relation to the secondary contract, no consideration was given by Mr and Mrs Brown under the contract between the vendor of the Property and the Company (whether directly or indirectly) and accordingly the amount of consideration given under s 45(3)(b) (i) was nil.

(5) The contrary view as to the interpretation of s 45(3)(b)(i), as found by a differently constituted FTT in *Vardy Properties Ltd v HMRC* [2012] SFTD 1398, ("*Vardy*") is wrong. In that case it was held that where funding for a property purchase is provided by a sub-buyer it is caught by s 45 (3) (b) (i) on the basis that it is provided indirectly by the purchaser under the sub-sale. That interpretation would undermine the intended relief in s 45 in cases where it was clearly intended to apply, namely where A contracts to sell a property to B, a dealer, who contracts to sub-sell to C and on simultaneous completion C transfers the money for the sale to B, who then passes it on to A (minus B's "cut"). In this situation there is a "pre-ordained scheme" by which C provides the cash to B which will ultimately be used by B to pay A for the purchase of the property. If that renders the money paid by B chargeable consideration under s 45(3)(b) (i), then the total chargeable consideration will be (roughly) double the true purchase price which is exactly the situation s 45 is designed to relieve.

(6) The Supreme Court has confirmed that *Vardy* is wrong by taking a different approach in *Project Blue Ltd v HMRC* [2018] UKSC ("Project Blue"), as discussed below.

(7) As far as s 45(3)(b) (ii) is concerned, that requires the consideration for the transfer of rights under the original contract to be consideration provided under a contract. The question is what is the consideration "for" the transfer and there is no difference between that concept and consideration provided "under" a contract. The question is what value did Mr and Mrs Brown provide in return for the right to call for a conveyance of the Property to them. The answer is they provided no value under a contract because the distribution of the Property in specie was a gratuitous transaction. The FTT erred in its finding that the monies provided by Mr and Mrs Brown to subscribe for the shares in the Company was "consideration" because that subscription did not give rise to a right to call for a conveyance, as required by s 45(3)(b) (ii).

(8) Section 45(3)(b) (ii) seeks to identify the consideration given for the "transfer of rights" which is a reference back to the "assignment, sub-sale or other transaction…" referred to in s 45 (1) (b). The legislation clearly intends to refer only to the single transaction which gives rise to the right to call for the conveyance, in this case the distribution in specie. The other steps in the scheme that precede it do not form part of the "transaction" in the absence of an overarching contract under which (i) both the subscription for the shares and the distribution in specie were made (ii) the former was consideration for the latter (iii) Mr and Mrs Brown had a right to call for the conveyance of the Property to them and (iv) the consideration was chargeable. The existence of such a contract would be contrary to the evidence, which clearly showed a common intention of the parties to give no more legal effect to the arrangements than each element had on its face. Furthermore, a contract for the sale of land must be made in one document and in writing: see s 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 and no such document exists.

(9) Consequently, by operation of the tailpiece to s 45 (3) the completion of the original contract is disregarded for SDLT purposes and there is no SDLT payable in respect of the secondary contract because there was no consideration given by Mr and Mrs Brown which fell within the scope of either s 45(3)(b) (i) or s 45(3)(b) (ii). That is because they gave none of the consideration under the original contract and no consideration was given for the transfer of rights because that was a gratuitous transaction and not one for value.

44. In our view the proper construction of s 45 (3) in the context of the scheme of the legislation as a whole leads to the conclusion that in this case SDLT is chargeable in respect of the secondary contract that is deemed to occur by the operation of s 45 (3) and the chargeable consideration for that transaction is £955,000. In our view, that consideration arises under s 45 (3) (b) (i) FA 2003. That is because the sum is such consideration under the original contract between the vendor and the Company as is referable to the subject matter of the secondary contract which is provided indirectly by Mr and Mrs Brown. Contrary to the findings of the FTT, we find that no chargeable consideration arose under s 45 (3) (b) (ii).

45. We now set out our reasons for that conclusion.

46. In our view, the purpose of the FA 2003 is to charge SDLT on any transaction which is the acquisition of a chargeable interest, which includes the acquisition of a freehold title to a house. That follows from s 43 (1) which provides that a "land transaction" is "any acquisition" of a chargeable interest. In order for SDLT to be payable there must be "chargeable consideration" for the land transaction in question which, as provided by paragraph 1 of Schedule 4, must be "any consideration in money or money's worth given for the subject matter of the transaction, directly or indirectly, by the purchaser or a person connected with him."

47. Therefore, a key question is whether the term "consideration" as used in this context is limited, as Mr Birbeck submits, to consideration provided under a contract.

48. In our view, the legislation is not to be read as limited in that way. Mr Elliott drew our attention to the Explanatory Notes to the Finance Act 2003 which stated that a main driver for reform of stamp duty on property transactions was the increased use of avoidance devices to mitigate the charge to stamp duty and that the new legislation was designed to ensure all purchasers of property pay their fair share of tax. Against that background, it is unlikely that Parliament wished to restrict the charge

to SDLT to property acquisitions where the value provided for the acquisition arose under the terms of a contract.

49. Indeed, it is clear from the legislation that acquisitions which do not result from the performance and completion of a binding and enforceable contract but in respect of which value in money or money's worth is provided by the purchaser attract SDLT. It is not necessary for there to be an antecedent contract for there to be chargeable consideration for a land transaction. For example, A orally promises to transfer Property X to B and effect that transfer to B on the understanding that in return B transfers Property Y to A. Those two transactions are completed by the execution of two separate conveyances. In these circumstances, it is clearly the case that B has given value in order to get something of value in return. In this situation, paragraph 5 of Schedule 4 FA 2003 applies to determine the chargeable consideration. That provision applies where one or more land transactions are entered into by a purchaser "in consideration of one or more land transactions being entered into by him… as vendor" and the chargeable consideration is calculated by reference to the market value of the relevant properties.

50. It is to be noted that references to the terms "purchaser" and "vendor" in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction: see s 43 (4). Again, there is no reference to the purchaser or vendor, as the case may be, having to be party to a contract of sale.

51. There are, of course, references to contracts of sale in s 44 and s 45, but those sections are only dealing with situations where there is a contract for a land transaction under which the transaction is to be completed by a conveyance. Section 44 does not provide that there must be a contract that precedes a conveyance for a charge to SDLT to arise. Likewise, s 45 only applies where there is a contract for a land transaction which is to be completed by a conveyance and which is followed by an "assignment, sub-sale or other transaction" relating to the whole or part of the subject matter of the original contract. Again, this provision does not restrict the operation of s 45 (3) (b) to circumstances where the consideration under the transaction is provided under a contract. What the provision does is to deem the sub-sale or other transaction to be a "secondary contract" whether or not the transaction is entered into pursuant to a contract and, in effect, to provide relief from SDLT in relation to the conveyance of the property pursuant to the original contract where the secondary contract is completed at the same time as the original contract. Consequently, it is clear that the term "consideration" is not to be restricted to value provided by a purchaser pursuant to a contract.

52. Indeed, were it not for the application of s 45 in this case, in common with the FTT, we would have considered that, notwithstanding the interposition of the Company between the vendor of the Property of Mr and Mrs Brown, that it was Mr and Mrs Brown who provided the whole of the consideration for the acquisition of the Property and that SDLT would be chargeable by reference to that consideration. Given the preordained nature of the steps in the transaction, the share capital contribution by Mr and Mrs Brown was consideration given indirectly for the Property and therefore consideration for the purposes of paragraph 1 of Schedule 4 FA 2003. As we have said, that provision defines "chargeable consideration" as any consideration in money or money's worth given for the subject matter of the transaction directly or indirectly by the purchaser or a person connected with him.

53. The reason that the consideration was given directly or indirectly by the purchaser for the purposes of paragraph 1 of Schedule 4 was that the interposition of the Company between the vendor of the Property and Mr and Mrs Brown was a step in a preordained scheme that served no commercial purpose. The Company's sole purpose was to enable Mr and Mrs Brown to avoid SDLT on the acquisition of the Property. As found by the FTT [26], the subscription monies paid by Mr and Mrs

Brown to the Company were given under a scheme in which plainly the "deal" was that these monies were the quid pro quo for the Property. The Company existed only for a short period of time and undertook no commercial activities. Applying the purpose of paragraph 1 of Schedule 4, which is to seek to tax the value of what the purchaser has had to provide in order to obtain the Property, the interposition of the Company between the vendor of the Property and Mr and Mrs Brown is to be disregarded. Viewed realistically, taking the steps in the scheme as a whole, the transaction resulted in Mr and Mrs Brown, who provided the funds to the Company, acquiring the Property in return for the value that they provided, albeit that value was provided indirectly through their subscription for the shares in the Company.

54. However, the case was argued before us on the basis that the parties agreed that s 45 did apply. We must therefore proceed on the basis that the interposition of the Company is not to be disregarded and that there was a contract between the vendor of the Property and the Company (the original contract) and a secondary contract between the Company and Mr and Mrs Brown which resulted in the transfer of the Property to them through the distribution in specie.

55. In the context of a preordained scheme under which Mr and Mrs Brown provided funds to the Company which were used by the Company to purchase the Property from the vendor, it is our view that the funds provided by Mr and Mrs Brown constituted consideration under the original contract given "indirectly" by Mr and Mrs Brown and therefore fell within the scope of s 45 (3) (b) (i). That was the conclusion reached in *Vardy* in respect of a similar scheme and we agree with it. In that case the FTT said at [98] to [100]:

> "[98] … A pre-ordained scheme has been established in which C, at an early stage, provides the cash to B which will ultimately be used by B to pay A for the purchase of the property. In those circumstances, we are satisfied that when, as a result of a later step in the scheme, there is a transfer of rights which ultimately entitles C to call for a conveyance of the property, it can be said that A's purchase price, though it will be received from B, is "to be given indirectly" by C within the meaning of section 45(3)(b)(i).
>
> [99] We recognise that the £7.4 million in this case was subscribed by VPT for shares in VP, but we consider that does not prevent it (or the relevant part of it) from being regarded as also indirectly given as consideration for the purchase of the Property. This is not, as [Counsel for the taxpayer] asserted, a "reattribution" of consideration from one thing to another; it is a recognition that the direct payment of consideration for an immediate purpose may also amount to the indirect provision of consideration for another.
>
> [100] It follows therefore that we consider the entire £7.25 million purchase price paid by VP and funded by VPT is to be regarded as consideration for the secondary contract arising under section 45(3)(b)(i)…"

56. Applying this analysis in the present case, the consideration given indirectly under s 45 (3) (b) (i) is £955,000, that is the purchase price payable under the original contract.

57. Mr Birkbeck submitted that this result might lead to double taxation in that the same consideration could be taken into account under both s 45 (3) (b) (i) and (b) (ii). We do not consider that to be the case. It is clear that the purpose of s 45 is to ensure that in a genuine sub-sale, where B has agreed to purchase a property from A and subsequently agrees to sell the property to C with the transactions being completed at the same time, there will be no double counting. That is apparent from the following simple example that Mr Elliott gave in his skeleton argument:

A and B enter into a contract for B to purchase property from A for £1 million. B then agrees to sub-sell the property to C for £1.1 million. B pays £1 million to A, C pays £1.1 million to B and A transfers the property to C.

Consideration under (b)(i): nil since C pays no consideration under the original contract, whether directly or indirectly.

Consideration under (b)(ii): £1.1m under the sub-sale agreement for transfer of rights.

Total consideration under s45(3)(b): £1.1m

58. We agree with Mr Elliott that any argument that C has indirectly given consideration under the original contract does not result in the total consideration being increased because there is a direct overlap between that consideration and the consideration given for the transfer of rights, which precludes double counting.

59. In other words, in our view it is clear that as a matter of construction, s 45 (3) operates so as to aggregate the amount paid by C to satisfy B's original contract and the amount paid by C to B. There is no scope to take into account the amount B has contracted to pay A under the original contract as well.

60. Applying this analysis to the present case, all of the consideration payable in respect of the transaction arises under s 45 (3) (b) (i). There is nothing extra to bring into account under s 45 (3) (b) (ii) as no further consideration is given for the transfer of rights under the secondary contract. Accordingly, the chargeable consideration in this case is £955,000, the amount payable under the original contract which represents the value provided by Mr and Mrs Brown indirectly, via their subscription for shares in the Company, to acquire the Property.

61. As the FTT said in *Vardy* at [87] and [88], when fixing the consideration to be attributed to the secondary contract, which as we have found, can be a transaction which is not a contract, the provision simply requires the aggregation of the consideration given by C (not necessarily to B) for the right to acquire the property and the consideration given by C (not necessarily to A) for the property itself. It is inherent in that dichotomy that any consideration given by C can only be attributed to one or the other of the two limbs of s 45 (3) (b), that is there can be no double counting of the same consideration as attributable to both the right to acquire the property and the conveyance of the property itself. To the extent that any amount is brought into account under s 45 (3) (b) (i) the same amount cannot be brought into account under s 45 (3) (b) (ii).

62. Neither do we accept Mr Birkbeck's submission, and disagreeing with the FTT in this respect, that in order for it to be said that C has provided the consideration under the contract between A and B, C must be making the payment with his own money. We see no reason to construe the words "given… by the transferee" in s 45 (3) narrowly. Construing the provision purposively, realistically the consideration in this case was given by Mr and Mrs Brown because the Company was a vehicle under their control and its only purpose and business was to implement the scheme and enable Mr Mrs Brown to acquire the Property. Accordingly, the funds that were paid by the Company to the vendor of the Property were provided by Mr and Mrs Brown through their subscription for shares in the Company, the sole purpose of which was to enable the Company to be put in funds to satisfy the purchase price for the Property. That is quite different to the normal situation where a bank or other finance provider advances funds to enable the purchaser to fund the acquisition of a property where there is no preordained scheme of the kind with which we are concerned in this case.

63. Neither do we consider that the Supreme Court's judgment in *Project Blue* casts any doubt on the analysis in *Vardy*.

64. *Project Blue* concerned the following transaction:

> (1) The purchaser, PBL, contracted to purchase a property ("the Barracks") from the Ministry of Defence ("MOD") for £959 million.
>
> (2) To fund the purchase, PBL turned to MAR, a Qatari bank, and a Shari'a compliant form of funding known as Ijara finance under which:
>
> > (a) PBL contracted to sell the Barracks to MAR (thereby providing financing) for £1.25bn;
> >
> > (b) MAR agreed to lease back the Barracks to PBL (thereby paying back the financing);
> >
> > (c) MAR and PBL entered into options entitling or requiring PBL to purchase the Barracks back from MAR (to ensure PBL ends up owning the property).

65. HMRC opened enquiries into the SDLT returns submitted in respect of these transactions. In relation to PBL's return, HMRC concluded the enquiry by amending the return from nil to £38.36 million on the basis that that was the SDLT due if the sale by the MOD to PBL was chargeable. They later amended this to £50 million on the basis that the amount paid by MAR to PBL was the relevant chargeable sum.

66. Most of the argument focused on the interaction of section 71A, which it was claimed relieved the purchase by MAR from SDLT, taken together with section 45.

67. The conclusion was that if the sub-sale was not chargeable, then s 45(3) relieved the purchase of liability even if the sub-sale was the means of funding the purchase. Lord Hodge in his judgment recognised that this was a "lacuna" that would (absent section 75A) result in "an unintended tax holiday" but accepted that the result was clear enough to be the correct one nonetheless. The following passages from Lord Hodge's judgment are relevant:

> "[18] Because the arrangements for financing the purchase of the barracks involved PBL completing its purchase and its sale of the barracks to MAR on the same day in a connected transaction, PBL, as I have said, claimed sub-sale relief under section 45(3). Because MAR had purchased the barracks from PBL in the context of an Ijara arrangement, it claimed exemption under section 71A(2) for that purchase and a claim was also submitted on behalf of PBL for exemption under section 71A(3) for the lease to PBL.
>
> …
>
> [35] I therefore conclude that, but for section 75A, the combination of the operation of sub-sale relief under section 45(2)(3) and the exemption under section 71A(2) relieved the sale by the MoD to PBL and exempted the sale by PBL to MAR from a charge to SDLT."

68. Mr Birkbeck submits that the Supreme Court did not conclude that the correct analysis was that, because MAR provided the funding for the original contract falling within s 45, that amount was treated as consideration under s 45(3)(b)(i) and that the Court's conclusion was inconsistent with that proposition.

69. However, it seems to us, as submitted by Mr Elliott, that no charge to SDLT arose in that case because of the application of two separate reliefs. The consequence of the tailpiece of s 45 (3) was that the completion of the contract between the MoD and PBL for the purchase of the Barracks was

disregarded. The sale by PBL to MAR did not attract SDLT because of the exemption for Ijara arrangements provided for by s 71A (2). Had that exemption not been available then MAR would have been liable for SDLT on the completion of the secondary contract between PBL and MAR.

70. It is therefore clear that the Supreme Court did not consider, and indeed did not need to consider, whether any consideration arose under s 45 (3) (b). There is nothing in Lord Hodge's analysis which touches on whether absent the availability of exemption in s 71A no consideration would fall within the scope of s 45 (3) (b) in respect of the secondary contract on the basis that no consideration was given by MAR for the purposes of s 45 (3) (b) (i).

71. Because all of the consideration in respect of which SDLT is payable arises under s 45 (3) (b) (i), for reasons different to those advanced by Mr Birkbeck in this case, it follows that there is no consideration to be brought into account under s 45 (b) (ii). Consequently, the FTT erred in finding to the contrary. All the consideration for the secondary contract arises under s 45 (3) (b) (i), and consists of the funds provided by Mr and Mrs Brown to the Company to enable it to complete the original contract.

72. Therefore, we conclude that in this case on the application of s 45 (3) (b) the chargeable consideration in respect of the secondary contract which arises pursuant to the terms of that provision is £955,000, being the amount of the consideration under the original contract which is referable to the subject matter of the secondary contract and which has been provided indirectly by Mr and Mrs Brown through their subscription for shares in the Company.

73. We have come to this conclusion without needing to consider HMRC's other alternative argument, namely the Connected Person Argument, as summarised at [38] above. Mr and Mrs Brown object to HMRC attempting to raise the Connected Person Argument in this appeal in circumstances where they had taken a considered policy decision not to run the argument before the FTT. Although the point is a pure point of law and we have the discretion to permit HMRC to raise the argument provided we are satisfied that there will be no prejudice in doing so to Mr and Mrs Brown, as it is not necessary for us to deal with the point in coming to our conclusion on the application of s 45 (3) (b) (i) we decline to do so.

Issue 2 : Decision based on a point not argued or pleaded

74. It follows from our conclusion on Issue 1 that Issue 2 strictly speaking does not arise. However, we will deal briefly with Mr Birkbeck's submissions to the effect that the FTT had acted unfairly by deciding the case on a point that had not been pleaded nor (as a result properly argued or evidenced).

75. As Mr Elliott submitted, the jurisdiction of the FTT is defined by the nature of the decision before it and its statutory powers in relation to that decision. In the present case, the matter before the FTT was the Determination and its jurisdiction included the power to uphold that decision. As was confirmed in *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2008] EWHC 2387 (Ch) (per Henderson J (as he then was)) in relation to similar powers in respect of closure notices in direct tax cases, in determining an appeal, the FTT is entitled to consider arguments raised on its own initiative. This was approved by Lord Walker in the Supreme Court in that case ([2011] UKSC 19; [2011] 2 A.C. where he said at [15]:

> "He [Henderson J] also observed (again, in my view, entirely correctly), at paras 115–116:
>
> > "115…There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public

> interest… For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and if the commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative.""

76. In terms of fairness to Mr and Mrs Brown, they have had the opportunity of arguing the merits of the proposition that there was chargeable consideration under s 45(3)(b)(ii) before us. Insofar as there may have been an error of law on the part of the FTT in deciding the case on that basis without giving Mr and Mrs Brown the opportunity of making submissions on the point, that error will in effect have been cured by the point being fully argued before this Tribunal. That is, of course, subject to there having been no prejudice to Mr and Mrs Brown, for example, as a result of them not having had the opportunity of adducing further evidence that would support their case.

77. Mr Birkbeck submitted that for s 45(3)(b)(ii) to have applied there would have to be an overarching contract under which it was agreed that all the steps in the scheme, including the distribution of the Property in specie to Mr and Mrs Brown, would be implemented. If such a contract had been alleged, it would have been disputed and that dispute would have involved addressing the factual position regarding Mr and Mrs Brown's intentions and agreement with regard to the Property. Mr Birkbeck submitted that the FTT would have had to consider whether there was a common intention that the subscription for shares in the Company gave rise to a contractual right to call for a conveyance. Without hearing evidence on that point, the FTT would have imposed that intention on Mr and Mrs Brown.

78. In our view there would have been no injustice to Mr and Mrs Brown had it been necessary to consider in this appeal whether s 45 (3) (b) (ii) applied. The FTT found that there was a preordained scheme involving a series of steps and that there was no practical likelihood that all steps in the scheme would not be taken. As was made clear in *Hurstwood*, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. That does not involve identifying whether or not there was an overarching contract to implement the scheme. Furthermore, as we have concluded at [51] above, there is no need for there to be an antecedent contract in order that "chargeable consideration" can arise that is subject to SDLT.

79. Accordingly, the question of whether there was evidence that Mr and Mrs Brown intended to enter into an overarching contract to implement the scheme is irrelevant. The only finding that the FTT needed to make was whether there was a plan to implement the scheme and whether Mr and Mrs Brown intended to carry it out. As we have indicated above, the FTT made those findings. We therefore do not consider that the case would have been conducted differently or different evidence would have been provided had HMRC pleaded reliance on s 45 (3) (b) (ii). Whether the case was being argued on the basis that s 45 (3) (b) (i) or s 45 (3) (b) (ii) applied, the evidence that Mr and Mrs Brown had agreed to implement a preordained scheme was the same and, as Mr Elliott submitted, it would be fanciful to say that any different evidence of intention would have been adduced had they been facing a case that s 45 (3) (b) (ii) applied rather than s 45 (3) (b) (i). Mr and Mrs Brown knew they were facing the Vardy Argument which presupposed a preordained scheme under which subscription monies were paid to satisfy the consideration payable under the original contract.

Issue 3: Scope of the Determination

80. As with Issue 2, It follows from our conclusion on Issue 1 that Issue 3 strictly speaking does not arise. However, we will deal briefly with the parties' submissions on this Issue.

81. Mr Birkbeck adopted the reasoning of the FTT on this issue, as summarised at [35] above. He submitted that the notional transaction that arises as a result of the application of s 75A is a separate transaction from the actual transaction that took place. In particular:

(1) Section 75A(4)(a) specifically disregards any scheme transactions that are a land transaction and (4)(b) replaces them with a new notional land transaction. The disregarded transactions include the s 45 "transfer of rights" on which the application of s 45 rests. So both transactions cannot exist at the same time, let alone be the same land transaction.

(2) The notional land transaction under section 75A is not even between the same parties.

(3) The wording of paragraph 25 of Schedule 10 FA 2003 makes it clear that a determination must be issued in respect of "the transaction", which where there is a notional transaction under s 75A must mean that notional transaction.

(4) Although it is possible for HMRC to issue two determinations in the alternative, it is clearly necessary to issue one determination for each land transaction they wish to assess. Not to do so would be contrary not just to the words of the legislation, but also to general principles of certainty for taxpayers when it comes to tax assessments by HMRC. It is incumbent on HMRC to tell a taxpayer what it is they are assessing to SDLT, because if they do not do so then a taxpayer will, crucially, not know their options regarding the filing of a return or making an appeal.

(5) In this case the Determination, as summarised at [24] above, does not make clear on its face which land transaction is being charged. However, it can be determined, sufficiently, from the surrounding correspondence that it was made under s 45 in respect of the acquisition of the Property by Mr and Mrs Brown from the vendor of the Property, and only under that section. HMRC accept that they never issued a determination under s 75A.

82. As found by the FTT at [118], HMRC's letter enclosing the Determination concluded that Mr and Mrs Brown's acquisition of the house was a chargeable transaction. The Determination specified the amount of SDLT HMRC considered was payable by reference to the consideration which they considered had passed, namely £955,000. Neither the letter nor the Determination specified the basis on which HMRC had calculated the amount payable.

83. In our view, the letter and the Determination taken together, met the requirements of paragraph 25 of Schedule 10 FA 2003. That is the case whether the SDLT was ultimately held to be chargeable by the application of s 45 (3) or whether it was chargeable by reference to a notional transaction arising as a result of the application of s 75A. Therefore, had it been relevant, the Determination would have been sufficient to impose any liability to SDLT that arose under s 75A.

84. Our reasons for that conclusion are as follows.

85. Paragraph 25 of Schedule 10 enables HMRC to make a determination of the SDLT payable in the case of a "chargeable transaction" in respect of which no land transaction return had been given. We agree with Mr Elliott that in this case the "chargeable transaction" was the acquisition by Mr and Mrs Brown of the Property. As we have said, a "chargeable transaction" is a "land transaction" that is not exempt and the definition of a "land transaction" under s 43 (1) is the "acquisition of a chargeable

interest". Therefore, in this case in the Determination, HMRC decided that SDLT was payable in respect of Mr and Mrs Brown's acquisition of the chargeable interest, namely the Property. In our view, there is no requirement to specify whether the acquisition has resulted in SDLT being payable as a result of the application of s 45 (3) or by reference to a notional transaction which is arises as a result of the operation of s 75A. Whether or not the liability to SDLT arises by reference to an actual transaction or a notional transaction there is still only one transaction, namely the chargeable transaction which is the acquisition of the Property.

86. As the FTT found, it was only later after provision of further information and documents by Mr and Mrs Brown that HMRC expressed the view that SDLT was payable because the distribution in specie was chargeable as a result of the application of s 45 (3) (b) and sometime later that there was a possibility that s 75A applied. We therefore consider that the FTT was wrong to conclude at [124] that the Determination had been made in relation to the actual transfer to Mr and Mrs Brown and not a notional transfer under s 75A, and that the Determination related only to that actual transfer. As is clear from the terms of the Determination and its covering letter, the Determination had been made purely on the basis of a chargeable transaction having taken place for a consideration of £955,000. As we have said, that was all the Determination was required to do. As Mr Elliott submitted, it is difficult to see how HMRC could have provided any further reasoning at that stage in the absence of the further information that was subsequently provided.

87. We do not accept that in this case the determination gave Mr and Mrs Brown insufficient information to enable them to consider their options, namely the filing of a return or the making of an appeal. They knew from the Determination that HMRC were challenging Mr and Mrs Brown's conclusion that no chargeable consideration arose in respect of the acquisition of the Property. They had all the information they needed to challenge that conclusion by making their arguments as to how s 45 (3) applied to the various transactions effected pursuant to the scheme.

88. This conclusion is consistent with the Supreme Court judgment in *Project Blue* where PBL filed a land transaction return in relation to its actual acquisition of the property and claimed relief under s 45 (3). HMRC opened an enquiry into the return and amended the return to impose SDLT on a notional transaction under s 75A. The Court rejected an argument that HMRC could not amend the return to impose liability in respect of the notional transaction arising under s 75A when the return had been submitted in relation to the actual transaction. The Court held at [83] that the return was provided to HMRC in relation to a transaction, namely the sale from the MoD to PBL and HMRC were entitled enquire into the tax consequences of that sale and, following the completion of their enquiries, to issue a closure notice making the amendments to the return which were required to give effect to their conclusions.

89. It is therefore clear, as Mr Elliott submitted, that the Supreme Court did not follow the narrow approach taken by the FTT in this case which would be to say that the only chargeable transaction in respect of which the return had been filed was the actual transaction and not the s75A notional transaction. Instead, it held that the closure notice could impose liability in respect of the notional transaction (as well as the actual transaction) because the subject of the return was the sale (i.e., acquisition) of the property by PBL. As Mr Elliott submitted, this approach is consistent with identifying the land transaction which is the subject of the relevant return, assessment, or determination by reference to the broad definition in s 43(1), being the acquisition of the chargeable interest (regardless of whether that acquisition is treated as being pursuant to an actual transaction or a notional transaction).

Conclusion

90. For the reasons set out above, we are satisfied that the FTT made an error of law in concluding that Mr and Mrs Brown were liable to pay SDLT in respect of their acquisition of the Property by reference to consideration of £960,002 as a result of the application of s 45(3)(b)(ii) FA 2003. In exercise of our powers under section 12 of the Tribunals, Courts, and Enforcement Act 2007, we set aside that conclusion and remake the Decision by finding that Mr and Mrs Brown are liable to pay SDLT in respect of their acquisition of the Property by reference to consideration of £955,000 as a result of the application of s 45(3)(b)(i) FA 2003.

Disposition

91. The appeal is dismissed.

MR JUSTICE TROWER **JUDGE TIMOTHY HERRINGTON**
UPPER TRIBUNAL JUDGES
RELEASE DATE: 15 November 2022