Neutral Citation Number: [2013] EWCA Civ 753

Case No: A3/2012/2784 & 2808

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL TAX AND CHANCERY CHAMBER
The President, Mr Justice Warren and Judge Timothy Herrington
FTC502011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 June 2013

Before :

LORD JUSTICE LAWS
LORD JUSTICE McFARLANE
and
LORD JUSTICE LEWISON

- -

Between :

(1) THE POLLEN ESTATE TRUSTEE COMPANY LIMITED **(2) KING'S COLLEGE LONDON**	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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Mr J Peacock QC (instructed by **Eversheds LLP**) for the **1st Appellant**
Mr A Hitchmough QC & Ms Zizhen Yang (instructed by **Mills & Reeve LLP, Cambridge**) for the **2nd Appellant**
Ms A Tipples QC (instructed by the General Counsel & Solicitor to HMRC) for the **Respondents**

Hearing dates : 12 and 13 June 2013

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Approved Judgment

Lord Justice Lewison:

Introduction

1. If a charity acquires property in furtherance of its charitable purposes, or as an investment, it is entitled to relief against liability to pay stamp duty land tax (SDLT) on the purchase price. The same applies if a non-charity buys the property as bare trustee for the charity. But if the non-charity also has a beneficial interest in the property, then the charity is not entitled to any relief at all; not even in respect of its share of the beneficial interest. That is the effect of the decision of the Upper Tribunal (Mr Justice Warren P and Judge Herrington) in this case. Their decision is at [2012] UKUT 277 (TCC) [2010] STC 2443 and is available on bailli. The question for us is: were they right?

2. We are concerned with two appeals raising this point: an appeal by The Pollen Estate Trustee Company Ltd ("PETCL"); and an appeal by King's College, London ("KCL"). PETCL were represented by Mr Jonathan Peacock QC; and KCL by Mr Andrew Hitchmough QC and Ms Zizhen Yang. Ms Amanda Tipples QC appeared for HMRC in both appeals.

3. PETCL and KCL criticise the decision of the Upper Tribunal in two respects:

    i) The Upper Tribunal identified the wrong interest in land as the basis for charge; and

    ii) The Upper Tribunal adopted an unduly literal interpretation of the relieving provision applicable to acquisitions by charities.

4. For the reasons that follow, in my judgment the Upper Tribunal correctly identified the interest in land as the basis for charge; but in the light of the different way in which the case was argued before us did adopt an unduly literal interpretation of the relieving provision. I would therefore allow the appeal on the second point alone.

The facts

The Pollen Estate

5. PETCL is the trustee of the Pollen Estate, a trust set up by the will of the Rev George Pollen who died in 1812. Shares in the trust are freely alienable. There are over 100 beneficiaries; but the major beneficiaries are the Church Commissioners and the Secretary of State for Defence, the latter as trustee for the Greenwich Hospital. Their shares (rounded) are 64 per cent and 10 per cent respectively. Both the Church Commissioners and the Greenwich Hospital are charities. The remaining beneficiaries under the trust are not. The Secretary of State of course is also a minister of the Crown.

6. The assets of the Pollen Estate consist of commercial property in London (principally in the Cork Street area of the West End). From time to time PETCL sells or buys property. This appeal concerns four commercial properties that PETCL bought on behalf of the trust between December 2006 and June 2008.

King's College, London

7. KCL is a well-known university institution, which is part of the University of London. It is a charity. KCL operates a shared equity scheme under which it is prepared to participate in the acquisition of homes for its employees, in return for an equitable interest in the property acquired proportionate to its contribution. In our case the employee in question was Professor Trembath. He bought a lease of a flat in Clink Street London SE1 with the help of a contribution by KCL to the purchase price. As part of the arrangements for the purchase Professor Trembath executed a declaration of trust by which he declared that he held the flat as to 46.3 per cent for KCL and 53.7 per cent for himself.

SDLT: an overview

8. SDLT was introduced by the Finance Act 2003 ("FA 2003") to replace the long-standing stamp duty. But whereas stamp duty was a tax on instruments, SDLT is a tax on transactions.

9. SDLT is charged on land transactions: FA 2003 s. 42 (1). It is chargeable whether or not there is any instrument effecting the transaction: FA 2003 s. 42 (2) (a). A "land transaction" is defined as "any acquisition of a chargeable interest": FA 2003 s. 43 (1). A "chargeable interest" is any estate, interest, right or power in or over land in the United Kingdom, except an exempt interest: FA 2003 s. 48 (1). Exempt interests need not concern us. Sections 43 (4) to 43 (6) provide:

> "(4) References in this Part to the "purchaser" and "vendor", in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction.
>
> These expressions apply even if there is no consideration given for the transaction.
>
> (5) A person is not treated as a purchaser unless he has given consideration for, or is a party to, the transaction.
>
> (6) References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the "main subject-matter"), together with any interest or right appurtenant or pertaining to it that is acquired with it."

10. In the paradigm case of a land transaction that takes the form of a contract which is subsequently completed, entry into the contract does not of itself count as a land transaction; but when the contract is completed there is a single land transaction whose effective date is the date of completion: FA 2003 s. 44.

11. A land transaction is a chargeable transaction if it is not a transaction that is exempt from charge: FA 2003 s. 49 (1). The amount of tax chargeable in respect of a chargeable transaction is a percentage of the amount of the chargeable consideration for the transaction: FA 2003 s. 55 (1). The percentage varies according to the amount of the relevant consideration; and according to whether the property consists entirely of residential property or not. The tax rate begins at 1 per cent. In relation to

residential property the threshold is chargeable consideration of more than £125,000; and in relation to non-residential or mixed property it is chargeable consideration of more than £150,000. The rate increases in bands according to the amount of the chargeable consideration. The chargeable consideration for a transaction is the consideration in money or money's worth given for the subject-matter of the transaction, directly or indirectly, by the purchaser or a person connected with him: Schedule 4 para 1.

12. Schedule 8 provides for relief from SDLT for acquisitions by charities: FA 2003 s 68 (1). The relevant provisions of Schedule 8 are as follows:

> "1. (1) A land transaction is exempt from charge if the purchaser is a charity and the following conditions are met.
>
> Relief under this Schedule is referred to in this Part as "charities relief".
>
> (2) The first condition is that the purchaser must intend to hold the subject-matter of the transaction for qualifying charitable purposes, that is—
>
> (a) for use in furtherance of the charitable purposes of the purchaser or of another charity, or
>
> (b) as an investment from which the profits are applied to the charitable purposes of the purchaser.
>
> (3) The second condition is that the transaction must not have not been entered into for the purpose of avoiding tax under this Part (whether by the purchaser or any other person).
>
> …
>
> 3. (1) This paragraph applies where—
>
> (a) a land transaction is not exempt from charge under paragraph 1 because the first condition in that paragraph is not met, but
>
> (b) the purchaser ("C") intends to hold the greater part of the subject-matter of the transaction for qualifying charitable purposes."

13. Section 77 introduces the concept of a notifiable transaction. A land transaction is notifiable if it is the acquisition of a major interest in land that is not exempt under section 77A; or it is the acquisition of a chargeable interest other than a major interest in land where there is chargeable consideration in respect of which tax is chargeable at a rate of 1 per cent or higher. A "major interest" is in turn defined as an estate in fee simple absolute or a term of years absolute, whether subsisting at law or in equity: FA 2003 s. 117 (2). Interests that are neither of these (e.g. an undivided share in land) are not major interests, although they can still be chargeable interests.

14. Section 103 applies to a land transaction where there are two or more purchasers who are or will be jointly entitled to the interest acquired. "Jointly entitled" means beneficially entitled as joint tenants or tenants in common: FA 2003 s. 121. In such a case the general rules are that:

> "(a) any obligation of the purchaser under this Part in relation to the transaction is an obligation of the purchasers jointly but may be discharged by any of them,
>
> (b) anything required or authorised by this Part to be done in relation to the purchaser must be done by or in relation to all of them, and
>
> (c) any liability of the purchaser under this Part in relation to the transaction (in particular, any liability arising by virtue of the failure to fulfil an obligation within paragraph (a)), is a joint and several liability of the purchasers."

15. However, if the transaction is a notifiable transaction only a single land transaction return is required: FA 2003 s 103 (3). In addition section 103 (8) says that section 103 has effect "subject to" Schedule 16.

16. Schedule 16 deals with trustees: FA 2003 s. 105. That schedule differentiates between two kinds of trust: settlements and bare trusts. A settlement is a trust that is not a bare trust. A bare trust is:

> "a trust under which property is held by a person as trustee—
>
> (a) for a person who is absolutely entitled as against the trustee, or who would be so entitled but for being a minor or other person under a disability, or
>
> (b) for two or more persons who are or would be jointly so entitled,
>
> and includes a case in which a person holds property as nominee for another."

17. It is common ground that both the trusts with which we are concerned are bare trusts as defined. Paragraph 3 of Schedule 16 provides so far as relevant:

> "where a person acquires a chargeable interest … as bare trustee, this Part applies as if the interest were vested in, and the acts of the trustee in relation to it were the acts of, the person or persons for whom he is trustee."

18. Finally, at this stage, section 107 (2) provides that a land transaction under which the purchaser is a Minister of the Crown is exempt from charge.

Common ground

19. In my judgment it is tolerably clear that:

i) If a charity acquires property in its own name as an investment, intending to apply the profits for its charitable purposes, it is entitled to relief from SDLT. This is the plain result of Schedule 8 para 1.

ii) If a charity acquires property in its own name and intends to apply the greater part (but not the whole) of the profits for its charitable purposes, it is entitled to relief from SDLT. This is the plain result of Schedule 8 para 3.

iii) If a non-charity acquires property as bare trustee for a charity which intends to apply the profits for its charitable purposes, it is entitled to relief from SDLT. This is the result of the combination of Schedule 16 para 3 and Schedule 8 para 1.

iv) If a non-charity acquires property as bare trustee for a charity which intends to apply the greater part (but not the whole) of the profits for its charitable purposes, it is entitled to relief from SDLT. This is the result of the combination of Schedule 16 para 3 and Schedule 8 para 3.

v) If two or more charities jointly acquire property intending to apply the profits for their respective charitable purposes, they are entitled to relief from SDLT. This is the result of the combination of section 103, Schedule 8 para 1, and section 6 of the Interpretation Act 1978.

vi) If a non-charity acquires property as bare trustee for two or more charities which intend to apply the profits for their respective charitable purposes, they are entitled to relief from SDLT. This is the result of the combination of section 103, Schedule 16 para 3, Schedule 8 para 1 and section 6 of the Interpretation Act 1978.

vii) If by an independent transaction a charity acquires an existing beneficial interest in property as an investment, intending to apply the profits for its charitable purposes, it is entitled to relief from SDLT, even if its co-owners are not charities. This is because the only chargeable interest acquired is the beneficial interest itself; and Schedule 8 para 1 applies to that acquisition.

Policy

20. What policy reason might there be for denying relief to a charity to the extent of its beneficial interest where it merely participates in a purchase with non-charities? Before the Upper Tribunal Ms Tipples explained at [19]:

> "We asked Miss Tipples what policy reason there might be for distinguishing the acquisition of an existing undivided share by a charity from the acquisition of an undivided share as the result of a joint purchase with a non-charity. After considering the point with her clients overnight she gave two reasons. The first was that was what the position was in relation to stamp duty. We do not see that as a satisfactory answer at all: SDLT is an entirely new tax invented to replace stamp duty because of the unsatisfactory nature of that tax. It is clearly not the case that the new tax carried with it any of the intellectual or other

> baggage of the old tax. The second reason given was that there was a policy concern that if relief was available where a charity contributed to the purchase price of a property that could lead to avoidance or abuse, for example the charity's contribution could result in the remainder of the purchase falling into a lower tax band. We bear that in mind but that policy is not clear from the wording of the legislation."

21. Ms Tipples maintained HMRC's position before us. I agree with the Upper Tribunal that the first of these suggested reasons is no reason at all. Ms Tipples did not attempt to justify the position under the stamp duty regime. It appears to have been no more than an anomaly. The fact that an anomaly existed under a previous tax regime provides no reason for replicating that anomaly under a new tax regime. The second reason is equally unconvincing; not least because the second condition that must be satisfied before there is any question of relief for charities is that the transaction must not have not been entered into for the purpose of avoiding SDLT (whether by the purchaser or any other person): see Schedule 8 para 1 (3). So anti-avoidance does not come into the picture.

22. The position then, in my judgment, is that no policy justification has been advanced for the anomalous position in which these three charities find themselves. The Upper Tribunal concluded at [20]:

> "We therefore approach the question of construction of the legislation on the footing that there was no policy of any sort which would have led Parliament deliberately to exclude exemption in the cases under appeal."

23. I agree. If Parliament did not deliberately exclude exemption in the cases under appeal, then it seems obvious that, if it did so, it did so by mistake.

Approach to construction

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

statute, upon its true construction, applies to the facts as found: (*Barclays Mercantile Business Finance Ltd v Mawson* (§ 32).

25. In *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592 Lord Nicholls said:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. …
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

26. This approach applies also to taxing statutes. In *Luke v IRC* [1963] AC 557, 576 Lord Reid said:

> "To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. This is not a new problem, though our standard of drafting is such that it rarely emerges. The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail."

27. Joint ownership of interests in land has often presented the courts with problems that the legislative draftsman did not foresee. Two examples will suffice. In *Lloyd v Sadler* [1978] QB 774 a tenancy of a flat was granted to two joint tenants. At the end of the contractual tenancy, only one of them remained in occupation. The question was whether the remaining occupier was entitled to a statutory tenancy of the flat under the Rent Act 1977. Section 3 of the Act provided that "the person who … was the

protected tenant of the dwelling house" would be entitled to a statutory tenancy. The argument for the landlord was that the remaining occupier was not "the protected tenant"; because "the protected tenant" was both joint tenants, not merely one of them. This court rejected that argument, despite finding the logic of the argument "unassailable". Megaw LJ said at 783:

> "There are various decided cases to which we were properly referred as providing guidance by analogy, or as illustrating the general rule as to a joint tenancy. Some of them, or dicta in them, certainly lend support to the submissions on behalf of the landlord, but I find the most helpful guidance in *Howson v Buxton*. It appears to me to decide that, where an Act of Parliament refers to "the tenant," and the letting is to two or more persons jointly, it is permissible for the court to hold, if so to do makes better sense of the relevant statutory provision in its particular context, that one of those persons, by himself, may for certain purposes be treated as being "the tenant"."

28. Having referred to a number of cases he concluded at 786:

> "… where the strict application of the doctrine of joint tenancy would lead to unreasonable results, or results which the legislature is unlikely to have intended, it is permissible for the court to conclude that the legislature did not so intend but that, instead, in such a case, the phrase "the tenant," where there is a joint tenancy, is to be read as meaning "the joint tenants or any one or more of them"."

29. Lawton and Shaw LJJ gave concurring judgments. Much the same approach has been applied where it is not the tenancy but the reversion that is jointly owned. In *Potsos v Theodotou* (1991) 23 HLR 356 there were joint landlords of property. They sought possession on the ground that the property was required for the son of one of them. The statutory ground for possession was that the property was reasonably required by the landlord for occupation as a residence for himself "or any son or daughter of his". This court held that this provision should be read as if it said "any son or daughter of theirs, or either of them". Parker LJ said at 359 that:

> "if the construction of the section put forward … would lead to unreasonable results or results which the legislature are unlikely to have intended, we are, in my view, permitted so to construe the section that those unreasonable results are avoided if that can legitimately be done without doing violence to clear language."

30. Sir George Waller agreed.

31. There are, of course, cases in which this approach has been rejected. Many of them are discussed in *Lloyd v Sadler* itself. *Solihull MBC v Hickin* [2012] UKSC 39 [2012] 1 WLR 2295 was another such case in which the Supreme Court divided 3:2 on the question of construction. But the essential difference between the majority and the minority was on the question whether there was what Lord Hope called a "policy

imperative" to justify a departure from the orthodox application of the common law consequences of the existence of a joint tenancy.

The relevant chargeable interest

32. SDLT is charged on a land transaction, which in turn is defined as any acquisition of a chargeable interest. It is critical, therefore, to identify the chargeable interest that is acquired and by reference to which the SDLT is charged. The appeal both before the Upper Tribunal and this court was argued both by PETCL and KCL on the principal basis that the only relevant chargeable interests that the charities acquired were their respective undivided shares in land; and that those acquisitions were to be treated as separate land transactions for the purposes of SDLT. It was that argument that the Upper Tribunal rejected, largely on the basis of their analysis of how SDLT operated in the case of a joint purchase of an interest in land where no relief was in play. HMRC's principal concern is that if that argument were to be accepted it would subvert the way in which, in the ordinary case, SDLT treats a joint acquisition.

33. Ms Tipples gave a cogent example to illustrate the point. Assume that ten unconnected friends club together to buy a residential property. It costs £1 million and they each contribute £100,000 in return for a one tenth undivided share. If PETCL and KCL are right then no SDLT is payable at all, because the chargeable consideration for each share is less than the threshold at which SDLT becomes payable. For the same reason none of the transactions would be a notifiable transaction, with the result that no land transaction return need be delivered to HMRC. I agree with Ms Tipples and the Upper Tribunal that this is a startling conclusion. If, on the other hand, there is only one chargeable interest acquired (albeit jointly) then SDLT will be payable at 4 per cent of the aggregate consideration.

34. All parties agreed that we are not concerned with the legal estate. This is largely because the effective date of a land transaction for the purposes of SDLT will be the date of completion of a contract; and in the system of registration of title the legal estate will not have passed until subsequent registration of the completed disposition.

35. Accordingly, we are concerned with the beneficial interests. Two candidates were advanced as being the relevant chargeable interest:

    i) (By HMRC): The entire equitable fee simple (or equitable term of years absolute) acquired collectively by the beneficiaries under the bare trust; and

    ii) (By PETCL and KCL): The undivided shares individually acquired by each of those beneficiaries.

36. As Ms Tipples correctly pointed out in the paradigm case the beneficial interest in the land to be acquired will pass to the purchaser on exchange of contracts (subject to the vendor's lien). In the case of a contract for the sale of freehold property the beneficial interest will be a fee simple absolute subsisting in equity; and in the case of a lease it will be a term of years absolute subsisting in equity. This was not in dispute.

37. Both PETCL and KCL emphasised that SDLT focuses on what has been acquired, and not (or not necessarily) on what has been disposed of. Thus, the argument goes, it is necessary to identify the chargeable interest from the perspective of the acquirer. In

our cases the acquirers are the three charities, and thus it is necessary to focus on what they acquired individually; namely their undivided shares in land. Moreover, these are the economically significant acquisitions, since it is entitlement to their respective undivided shares that gives each of the charities its entitlement to participate in the value of the property. There are cases in which it is possible to aggregate a series of simultaneous acquisitions, but these are specifically dealt with in the legislation: see, for example, FA 2003 s. 55 (4) (dealing with linked transactions, as defined by s. 108) and FA 2003 s. 75A (a general anti-avoidance provision). The Upper Tribunal placed much emphasis on section 103 and how it worked. This was misplaced emphasis, because section 103 is essentially an administrative provision and should not have been allowed to dictate the correct interpretation of the charging and relieving provisions.

38. Attractively as Mr Peacock QC and Mr Hitchmough QC advanced this argument, I would reject it. In its essentials I accept the analysis that Ms Tipples QC put forward on behalf of HMRC.

39. The starting point, as I see it, is that a conveyance to two or more persons must take effect as a trust of land: Law of Property Act 1925 (as amended by the Trusts of Land and Appointment of Trustees Act 1996) s. 34 (tenants in common) and s. 36 (joint tenants). For the purposes of SDLT this brings Schedule 16 para 3 into play. This applies where a person acquires a chargeable interest as bare trustee. The only person who acquired a chargeable interest as a bare trustee was PETCL (or Professor Trembath). It is that interest to which the deeming provision applies. Thus the interest acquired by the trustees is deemed to be vested in the beneficiaries; and the acts of the trustees are deemed to be the acts of the beneficiaries. The focus, therefore, is not on what the beneficiaries have in fact acquired. The focus is on what the trustees have acquired; because the interest that the trustees have acquired is deemed, for the purposes of SDLT, to be vested in the beneficiaries. The trustees act collectively. It must therefore follow, as a consequence of the deeming provision, that for the purposes of SDLT the beneficiaries also act collectively.

40. When the trustees exchange contracts (and in the system of registered land when the contract is completed) what the trustees acquire collectively is the equitable estate in the land (fee simple absolute or term of years absolute as the case may be). As a consequence of the deeming provision that estate is deemed to be vested in the beneficiaries. The equitable estate thus acquired is both a chargeable interest (as defined by section 48 (1)) and also a major interest (as defined by 117 (2)). The acquisition of the equitable estate comes about as a result of a single land transaction for the purposes of section 43 (1) (not least because there is a single bargain, a single purchase price for the whole estate, a single contract and a single transfer, all of which have a bearing on the true meaning of the defined term "land transaction"). Whether the beneficiaries are joint tenants in equity or tenants in common in equity they are for the purposes of SDLT "jointly entitled" to that equitable estate within the meaning of section 121. The important point is that collectively the beneficiaries are deemed to have acquired the interest that the trustees have acquired; and that interest is the equitable estate in the land. In my judgment submissions advanced by PETCL and KCL mistakenly read the deeming provision as deeming the trustees to have acquired what the beneficiaries, individually, have acquired. This is to read the deeming provision the wrong way round. In addition there is only one equitable estate. It is

held by a number of tenants in common in undivided shares; but the crux is that the shares are undivided. Since the shares are undivided, the equitable estate is not divided.

41. It follows that when one comes to identify the "subject-matter" of the transaction for the purposes of section 43 (6) one does so by reference to the equitable estate that has been collectively acquired. The chargeable consideration is the consideration given for that equitable estate (as the subject-matter of the transaction); and it is that consideration by reference to which SDLT is levied. There is no need to dissect the single land transaction any further.

42. A number of other points were debated in relation to this part of the case, but in my judgment they are peripheral. I shall therefore deal with them shortly. First, there is the question of section 103. I would not characterise this as a mere administrative provision. Rather, like the group of sections in which it finds itself, it is a section that deals with what one might call "special cases" (companies, unit trusts, OIECs, joint purchasers, partnerships, trustees, representatives and the Crown). If PETCL and KCL are right about the identification of the chargeable interest I found it impossible to see how section 103 could ever apply to a purchase by tenants in common in equity. Quite simply, there would never be an undivided share to which a tenant in common would be jointly entitled, because he would always be absolutely entitled to his own share. Since tenants in common in equity are far more common than joint tenants in equity, this would be a very surprising limitation on section 103. Moreover, if it did apply it would have the effect that a purchaser of an undivided share in land acquired as a result of an independent land transaction would be jointly liable for the SDLT payable by another simultaneous purchaser of an undivided share in the same land. Unless the legislative intention is to treat this for SDLT as a collective acquisition (as HMRC argue), this seems a draconian measure.

43. Second, there was some debate over whether the individual undivided shares in land counted as "appurtenant" rights or rights acquired together with the chargeable interest. I do not think that it matters what the answer is; because there is no need to characterise the undivided shares for the purposes of SDLT as the inquiry stops at the stage when the equitable estate is collectively acquired.

44. In my judgment the Upper Tribunal correctly identified the chargeable interest by reference to which SDLT is levied. Accordingly the remaining question is whether PETCL and KCL are entitled to succeed on the basis of an interpretation of Schedule 8 paragraph 1 which is broader than that which the Upper Tribunal felt able to accept.

Schedule 8 paragraph 1

45. At [44] the Upper Tribunal turned to the interpretation of Schedule 8 paragraph 1. They said:

> "Nor do we consider that, by focusing on the identity of the "purchaser" in paragraph 1(1), it is possible to extend the exemption to the acquisition by a charity of an undivided share in the property concerned. To read "the purchaser is a charity" as including "the purchasers are charities" does not assist, because the purchasers, in the cases before us, are not all

> charities. It might be suggested that it should be read as "the purchasers include a charity" although that would, in our view, go beyond any process of construction. But even it could be done, there would then need to be a textual distortion of paragraph 1(2) which refers to "the subject matter of the transaction". The "transaction" can only be read as a reference to the land transaction referred to in paragraph 1(1) which, on our analysis can only be read as a reference to the acquisition of the relevant property and not as a reference to the separate undivided share in that property. Accordingly, references in paragraph 1(2) to "the subject-matter of the transaction" would have to be read as a reference to the charity's undivided share in that subject-matter."

46. I agree with the Upper Tribunal that the mere substitution of plural for singular does not solve the problem. But I do not agree that to read the paragraph as applying where the purchasers include a charity goes "beyond any process of construction". We have seen that "the person who was the … tenant" can be read as "the joint tenants or any one or more of them"; and "a son of the landlord" can be read as "a son of the landlords or either of them." So in my judgment the process of construction could allow the court to read "the purchaser" as "one of the purchasers" if that reading is necessary to make sense of the statute as a whole.

47. However, I do not favour that reading. I do not favour it because its consequence would appear to be that the whole land transaction would then be exempt from SDLT, which cannot have been Parliament's intention. The reading of paragraph 1 (1) which I would favour is:

> "A land transaction is exempt from charge [*to the extent that*] the purchaser is a charity and the following conditions are met."

48. Thus exemption would be available to the extent that the purchaser is a charity and to the extent that the conditions are met. This reading would have the consequence that a land transaction is partially exempt, but only to the extent of a charity's interest. Ms Tipples objected that this reading did not work because the condition in paragraph 1 (2) could not be satisfied. The argument was that because the "purchaser" was not the charity alone, it could not be said that the "purchaser" would hold "the subject-matter of the transaction" for qualifying charitable purposes. But the essence of HMRC's case (which I have accepted) is that the beneficial owners of the property in question (here the equitable estate in fee simple) must be viewed collectively. Viewed collectively, I cannot see why it is impossible to determine the extent to which, collectively, they hold the equitable estate for qualifying charitable purposes. Ms Tipples then submitted that the reading I favour goes too far, because it would have the result that the whole transaction would escape SDLT. But I do not consider that that is correct. If the exemption is afforded "to the extent that" the conditions are met, this concern evaporates. The third objection is that there is no machinery for determining what part of the interest is held for qualifying charitable purposes. But under Schedule 8 para 3 a charity is entitled to relief if it holds the "greater part" of the subject-matter of the transaction for qualifying charitable purposes. There is no machinery for determining whether that condition is satisfied, so the absence of

machinery cannot be an insuperable objection. Moreover, there is no indication in paragraph 3 whether the "greater part" is greater by area or greater in value. Uncertainty at the edges cannot be decisive either.

49. Despite Ms Tipples' objections it seems to me there is a sufficient "policy imperative" to justify the reading I favour. I believe that it is also consonant with the approach of Lord Nicholls in *Inco Europe*. We are not Parliamentary draftsmen; and it is sufficient that we can be confident of the gist or substance of the alteration, rather than its precise language. In substance what this means is that the exemption would apply as regards that proportion of the beneficial interest that is attributable to the undivided share held by the charity for qualifying charitable purposes. I do not see that this gives rise to any conceptual uncertainty or to any insuperable practical administrative problems. In my judgment this reading is necessary in order to give effect to what must have been Parliament's intention as regards the taxation of charities. There has been no principled reason advanced why a charity should be exempt from SDLT in the situations to which I have referred in [19]; but not be entitled to any relief at all on its proportionate undivided share in a jointly acquired property. Not to afford a charity relief in such circumstances would, in my judgment, be capricious.

50. It appears from what Ms Tipples told us that this interpretation was not one that was argued before the Upper Tribunal. However, since it was a pure point of law, she raised no objection to its being argued before us. Since it was not argued before the Upper Tribunal they can hardly be criticised for not having adopted it.

Result

51. I would allow the appeal on the narrow ground that Schedule 8 para 1 should be interpreted in the way I have explained.

Lord Justice McFarlane:

52. I agree.

Lord Justice Laws:

53. I also agree.