Neutral Citation: [2023] UKFTT 00130 (TC)

Case Number: TC08735

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2021/01368

STAMP DUTY LAND TAX – avoidance scheme – sub-sale contract to a trust - second sub-sale contract to a company – first sub-sale contract has a 124 year longstop completion date – sub-sale relief under s45 FA 2003? – no on a purposive construction of the law applied to the facts viewed realistically – St Matthews, Fanning, Hurstwood Properties and DV3 considered – application of s75A FA 2003 to the scheme – Project Blue considered – s 75A clearly applies – does the second sub-sale contract need to be completed before there is an effective date of the notional transaction under s75A(6)? – no – gap of 8 years between opening the enquiry and closure notice - abuse of process? – no - appeal dismissed

Heard on: 24 January 2023 with written submissions received on 7 February 2023
Judgment date: 14 February 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR DUNVAN MCBRIDE

Between

MR OLU OLUFOTE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant did not appear and was not represented

For the Respondents: Elizabeth Wilson KC and Admas Habteslasie both of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

INTRODUCTION

1. This case concerns a Stamp Duty Land Tax (**"SDLT"**) avoidance scheme (**"the Scheme"**) used by the appellant for the acquisition of a residential property situate at 24 Darwin Road, Welling, DA16 2EG (**"the Property"**). Very simply, on the same date that he acquired the Property for £325,000, he purported to 'sub-sell' the Property for £10,000 to a trust with completion in 124 years. On the same date the trust contracted to sell the Property to a third party. The substantive issue is whether the Scheme is effective to avoid SDLT of £9,750, on the Property which he occupied as his home. The appellant also raises certain procedural issues.

THE ABSENCE OF THE APPELLANT

2. Shortly before the date of the hearing the appellant had written to the tribunal explaining that he had recently suffered a bereavement in the family and that he was therefore unable to attend the hearing. However, "in order not to waste the Court and HMRC's counsel precious time, the case can please carry on in my absence". He went on to explain that the tribunal had already received his grounds of appeal.

3. Under Rule 33 of the First-tier Tribunal Rules, we may hear an appeal in the absence of a party provided we are satisfied that the party has been notified of the hearing and that we consider that it is in the interests of justice to proceed with it. It was our opinion that it was in the interests of justice to proceed. The transaction in question took place in July 2011 and there has been considerable delay since, caused, in large part, by the fact that this case was stayed behind other cases.

4. The issues are of a highly technical nature and little turns on witness evidence. From what we had seen in the papers, it was our view that the appellant understood very little about the Scheme and its technical and operational moving parts. It is unlikely that he would have been able to contribute anything by way of additional fact or by way of additional technical analysis, over and above that in the documents. Accordingly, we thought that it was in the interests of justice to proceed in his absence.

5. This decision was amply borne out by the fairness with which Ms Wilson presented HMRC's case and took every point in favour of the appellant that she possibly could.

THE SCHEME

6. The Scheme is a reasonably conventional sub-sale scheme which seeks to exploit perceived drafting inadequacies in section 45 Finance Act 2003 ("**FA 2003**") ("**section 45**"). We set out, in more detail below, the interaction of section 45 with the other provisions of FA2003. But in simple terms it applies, inter alia, where following the entry into a contract for the purchase of the property ("**the original contract**"), the purchaser then contracts to sub sell the property to a sub purchaser ("**the sub-sale contract**"), and completion or substantial performance of the contracts takes place at the same time. In these circumstances the original contract is disregarded and SDLT is charged only on the consideration which passes under the sub-sale contract.

7. Here, the original contract was between the appellant and Mr and Mrs Gladdish ("**Gladdish**") and was for £325,000. The sub-sale contract was between the appellant and a trust, the consideration being £10,000.There was also a second sub-sale contact entered into on the same date between the trust and a company.

8. The theory behind the Scheme, therefore, is that by completing the original contract at the same time as substantially performing the sub-sale contract, the original contract was disregarded and SDLT was only chargeable on £10,000. This is below the SDLT threshold and thus justifies the appellant submitting an SDLT return stating that no SDLT was due.

9. HMRC challenges the Scheme on two grounds. Firstly, when section 45 is construed purposively and is then applied to the facts of this case reviewed realistically, it does not apply in the manner contended for by the appellant, with the consequence that the relief given by it ("**sub-sale relief**") is not available to the appellant who is thus liable to the duty on £325,000. Alternatively, the provisions of section 75A FA 2003 ("**section 75A**") apply which treats the original contract and its completion as a notional land transaction which is subject to SDLT on the consideration payable for all the scheme transactions, which in this case is £335,000.

10. For the reasons given later in this decision, we agree with HMRC that sub-sale relief does not apply to the Scheme, and furthermore that Section 75A applies as contended for by HMRC. Nor do we consider that the appellant's procedural grounds of appeal have merit.

11. And so we have dismissed the appeal.

THE LEGISLATION

12. The legislation which is relevant to the issues in this appeal is contained mainly in section 44 FA 2003 ("**section 44")** , section 45 and section 75A , all of which are set out in the appendix to this decision.

THE FACTS

13. We were provided with a comprehensive bundle of documents. There was no oral evidence. We set out below the facts as recorded in those documents, and then make relevant findings of fact based upon them.

Background facts

(1) The appeal is against a closure notice (the **"Closure Notice"**) and Revenue Amendment issued by HMRC on 10 March 2020 pursuant to Paragraph 23 Schedule 10 FA 2003 following an enquiry into the appellant's SDLT return pursuant to Paragraph 12 Schedule 10 FA 2003.

(2) By a contract for sale dated 12 July 2011 (**"the First Contract"**) the appellant contracted to acquire the freehold estate in the Property from Gladdish for £325,000. The First Contract incorporated the Fifth Edition of the Law Society's Standard Conditions of Sale and included special conditions 8 to 12. The First Contract provided for completion on 15 July 2011 and the transfer was effected by a TR1 dated 15 July 2011. The appellant's conveyancer was a law firm called Property Legal.

(3) The Land Registry entry for the Property shows the appellant as the registered proprietor as of 25 July 2011. The appellant acquired the Property with the assistance of a mortgage loan. The Land Registry entry records a registered charge dated 25 July 2011 in favour of Clydesdale Bank.

(4) On 20 July 2011, an SDLT return was submitted. The appellant stated that no SDLT was payable on the acquisition of the Property.

(5) HMRC opened an enquiry into that SDLT return on 9 March 2012. Correspondence took place in 2012 between HMRC and CDP Corporate Limited (**"CDP"**), the appellant's advisors and representatives, on behalf of the appellant in. In correspondence between HMRC and the appellant on 24/25 February 2014, HMRC confirmed to the appellant that the enquiry into his SDLT return was and would remain open pending decisions being made on lead cases.

(6) On 27 January 2020, HMRC wrote to the appellant setting out its view of the matter. The timeline was explained in more detail in HMRC's email to the appellant of 11 December 2020. The Closure Notice/Revenue Amendment were issued on 10 March 2020 advising that the SDLT return had been amended to show an amount of £9,750 due on the consideration paid of £325,000. HMRC concluded its review on 21 April 2021 and upheld the Closure Notice and Revenue Amendment.

(7) The appellant appealed to the First-tier Tribunal against the Closure Notice by a Notice of Appeal dated 21 April 2021.

The Scheme documents

The Trust

(8) By a deed of settlement dated 13 July 2011 (**"the Deed of Settlement"**) the appellant as settlor created the Olufote 2011 Settlement No 1 (**"the Trust"**) with CDP Property (No.1) Limited (**"CDP1"**) and Marie Mitton as trustees (**"the Trustees"**). The Deed of Settlement provides as follows:

> (a) Recital (B) records that the Settlor "has settled cash on the trusts of this Settlement" to enable the Trustees to "contract for the purchase of certain property from him".
>
> (b) The beneficiary is defined (in clause 1.3) as the appellant, his spouse, issue or parents and any other person for the time being entitled to any part in the Trust Fund on the expiry of the charitable period.
>
> (c) Clauses 1.15 and 1.16 define the Trust Fund as "any property transferred to the Trustees to hold on the terms of this Settlement from time to time; and all property from time to time representing the above" and Trust Property as any property comprised in the Trust Fund.
>
> (d) The Appointor is the person entitled to the part of the Trust Fund on the expiry of the charitable period (or their personal representative); or, where the right to any part of the Trust Fund is held on the trusts of a settlement, the trustees of that settlement.
>
> (e) The effect of the definitions and clauses 3.1 and 3.2 of the Settlement Deed is that on the expiry of the 'charitable period', the Trustees are to hold the trust property *"*for the settlor's own use and benefit absolutely". The charitable period is the period which expires 30 days after the expiry of the 'accumulation period', which in turn is either the last day of the 124-year period (commencing 13 July 2011) or "such other date as the Appointor shall specify in writing to the Trustees at any time or times". A sum of £250 is payable out of the Trust Fund if it has not already been paid to the Charitable beneficiary before then. Clause 4.2 makes it clear that the person for the time being entitled to any part of the Trust Fund at the expiry of the Accumulation Period shall be the Appointor in respect of that part.

(9) A document entitled 'Minutes of a meeting of the Trustees of the Olufote 2011 Settlement No. 1' and signed and dated on 13 July 2011 ("**the Trust Minutes**") records that the intention of the Scheme was for the appellant to avoid SDLT on the purchase of the Property by completing the purchase from Gladdish at the same time as payment by the Trustees under the sub-sale contract ("this is intended to allow the Settlor to avoid stamp duty land tax on his purchase of the Property"), and that the Trustees decided that entering into the Second Contract "was for the benefit of the beneficiaries of the Settlement and they resolved to enter into the contract with the Settlor accordingly".

The sub-sale contract

(10) By a contract dated 15 July 2011, the appellant agreed to transfer the freehold estate in the Property to CDP1 as Trustees under the Deed of Settlement for the purchase price of £10,000 (**"the Second Contract"**). The Second Contract incorporated the Fourth Edition of the Law Society's Standard Conditions of Sale. As to the Second Contract:

(a) Special Condition 4 provides that a charge granted to Clydesdale Bank by the appellant on or around 15 July 2011 is a specified incumbrance, and special Condition 5 records that the buyers agree to take the Property subject to the charge.

(b) Special Condition 6 disapplies Standard Condition 1.5 and provides that the buyers may assign their rights under the Second Contract.

(c) Special Condition 8 provides that the Property is sold with vacant possession on completion.

(d) Special Condition 11 provides that completion shall occur "124 years hence but the parties may agree to an earlier Completion Date".

(e) Special Condition 16 provides that the buyers shall have no right of possession or occupation of the Property until completion.

(11) By a contract dated 15 July 2011, CDP1 agreed to transfer the Property to CDP Property (No.2) Limited (**"CDP2"**, **"the Third Contract"**). The Third Contract incorporated the Fourth Edition of the Law Society's Standard Conditions of Sale. The Third Contract provides as follows:

(a) The purchase price shall be the greater of the market value (as defined) or £325,000 plus £1,000.

(b) That completion shall occur as follows:

(i) on the completion date, which shall be not later than 90 days after the service of a notice to complete by the appellant on the sellers; and

(ii) subject to the consent of the chargee for the time being.

Cashflow

(12) An accounts ledger dated 14 March 2012 for the appellant's account with Property Legal records (inter alia) the following entries.

(13) On 30 June 2011, a transfer with the description *"*Olufote, Deposit*"* in the sum of £10,000 to the appellant. An equivalent debit is shown on the appellant's NatWest current account on the same date. This was apparently part of the deposit under the First Contract.

(14) On 13 July 2011, mortgage monies from Clydesdale Bank in the sum of £275,211 are credited in favour of the appellant.

(15) On 14 July 2011, a £18,163 is credited from 'client deposit monies' in favour of the appellant.

(16) On 14 July 2011, a transfer with the description *"*South Manchester Sols, CDP Treat" in the sum of £10,000 is credited in favour of the appellant. This represents funds sent by the appellant to CDP via their legal advisors. Further, a HSBC print-out and NatWest payment credit advice document and the sending and receipt of a CHAPS transfer on 14 July 2011 from South Manchester Solicitors Client Account in the sum of £30,000 to 'Prop Legal CL AC' (which appears a reference to Property Legal Solicitors) with the following message to beneficiary: "CDP Olufote Stewart and Bain ten thousand each price treat on agreed terms".

(17) On 15 July 2011, the sum of £325,000 due under the First Contract was transferred with the description 'Beverley Morris completion monies'.

Scheme paperwork

(18) A guidance note published by CDP entitled "SDLT mitigation involving the use of settlements and sub- sales" (the "**CDP note**") there is the following text:

> **"The Scheme**
>
> 3. In summary the Scheme involves the following steps:
>
> (a) A agrees to sell a property ("the Property") to B and contracts are exchanged ("the Original Contract");
>
> (b) B creates a settlement ("C") of whom any corporate trustees must not be connected with B;
>
> (c) B exchanges contracts with the trustees of C for the sale of the Property ("the Sub-Sale Contract") with completion of that contract to be in 124 years but payment of the purchase price to be made in full by the trustees on the completion of the Original Contract;
>
> (d) The trustees of C transfer the purchase monies payable under the Sub-Sale Contract to the solicitors for B who hold them to the order of the trustees pending the release of the monies to B simultaneously with completion of the Original Contract;
>
> (e) The Original Contract is completed by B (with no prior substantial performance) and at the same time the purchase monies payable under the Sub-Sale Contract are released to B thus substantially performing the Sub-Sale Contract;

(f) The Property is transferred to B and he becomes the registered proprietor subject to the registration of any mortgage granted by B to help fund his purchase; and

(g) The trustees of C exchange contracts to sell the Property to a fourth party ("D") who may be the trustees of a second settlement, a company or an individual ("the Third Contract").

(h) B can be an individual or corporate purchaser or joint purchasers such as a married couple and in principle both residential and commercial property can be acquired using these arrangements.

4. The scheme relies on the completion of the Original Contract occurring simultaneously with the substantial performance (without completion) of the Sub-Sale Contract and the entry by the trustees of C into the Third Contract, which is neither substantially performed or completed. The intention is that the completion of the Original Contract is disregarded for SDLT under section 45(3) FA 2003. Only the consideration passing under the Sub-Sale Contract should fall to be taken into account. B will own the Property legally and beneficially subject to any mortgage and the Sub-Sale Contract……..

Risk

The strategy is aggressive in that it seeks to mitigate tax and avoid the consequence of statutory anti-avoidance rules. There can be no guarantee of success and prospective scheme users must be aware that because of the uncertain state of anti- avoidance case law especially in its application to SDLT, the strategy may well be enquired into and attacked by HMRC".

(19) In a letter dated 15 March 2012 sent by CDP to HMRC, CDP state that "the parties are resting on contract for so long as [the appellant] wishes to live in the property".

(20) CDP went into liquidation in 2017.

Findings of fact

14. From the foregoing facts, we make the following relevant findings:

(1) The Property was purchased from Gladdish by the appellant for him and his family to occupy and enjoy.

(2) He entered into the Scheme solely in order to avoid SDLT on the acquisition of the Property from Gladdish.

(3) The Scheme is identical to the one set out in the CDP note.

(4) The Trust was set up solely to implement the Scheme. It did nothing other than that which was necessary to give effect to the Scheme and although the Deed of Settlement set out a number of rights and obligations, there is no evidence of any of these taking place. All the Trust did was to enter into the Second and Third Contracts.

(5) Whilst the appellant lived in the Property, there was no intention that the Second Contract would be completed.

(6) If the Trustees had sought to complete the Second Contract, then the appellant could have effectively brought the Trust to an end on paying £250 as the trust assets would then have been held on bare trust for him. In those circumstances he would have been both buyer and seller under the Second Contract.

(7) The only evidence of the actions of the Trustees of the Trust are set out in the Trust Minutes and the existence of the Second and Third Contracts

(8) The only evidence of Trust Property is the benefit of the Second Contract. And the right to acquire the Property which was occupied by the appellant and his family, under it.

(9) No income has arisen in the Trust since its inception.

(10) The £10,000 which was paid by the Trust to the appellant in order to substantially perform the Second Contract was originally made by the appellant to the solicitors acting for the Trustees and was then paid to Property Legal. All of these money movements took place on 14 July 2011.

BURDEN AND STANDARD OF PROOF

15. HMRC bear the burden of establishing that the Closure Notice is valid and was duly and properly served on the appellant. We find that this is the case. The burden of proof then switches to the appellant to show that, on the balance of probabilities, the amount assessed by the Closure Notice, namely the £9,750, is not due from him. And to do this, in practice, he needs to show that the Scheme operates as is envisaged by CDP and that the only consideration under the Scheme which is potentially liable to SDLT is the £10,000 which was paid under the Second Contract.

SUBMISSIONS

Appellant's submissions

16. In an email to Judge Poole (in preparation for an interlocutory hearing) dated 22 November 2021, the appellant submitted letters written by CDP which outlined technical grounds of appeal. HMRC, and we, have treated these as part of the appellant's grounds of appeal, and they are as follows:

(1) A proper and correct land transaction return had been filed.

(2) Prior to the completion of the acquisition of the Property, a Second Contract was entered into to sell the Property to the Trustees in which the Trustees were the Settlors (sub-sale contract).

(3) Under that contract, payment of the full purchase price was made at the same time as completion of the original contract although the completion of the sub-sale contract has not yet occured and may be deferred for up to 124 years.

(4) Accordingly, because the sub-sale contract was substantially performed at the same time as the completion of the original contract then the completion of the original contract falls to be disregarded for SDLT purposes under section 45(3) Finance Act 2003 and no SDLT arises

in respect of it and no SDLT return is required as confirmed by the SDLT manual at SDLTM01080.

(5) CDP had raised a request for postponement of SDLT because the contract for the sale to which the determination relates has not been substantially performed.

17. The appellant's original Notice of Appeal sets out three grounds of appeal.

(1) "I do not have the requisite technical skills to know whether HMRC is right or wrong in their assessment and I feel disadvantaged having to deal with this matter 10 years after it happened".

(2) "It is rather harsh that this [transaction] is now re-surfacing 10 years later. This is outside the statute of limitations for a non-deliberate error".

(3) The appellant argues that HMRC should not be able to claim interest and penalties in view of their delay in dealing with the matter.

HMRC's submissions

18. HMRC's overarching submission is that, once the relevant provisions of FA 2003 are correctly interpreted, it is clear that, even if it were implemented properly, the Scheme does not effectively avoid liability for SDLT.

Interpretation of section 45

19. Ms Wilson cites *DV3 RS LP v HMRC* [2014] 1 WLR 1136, *Fanning v HMRC* [2022] UKUT 00021 (TCC) ("***Fanning***"), *Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 30 ("***Project Blue***"), *HMRC v Candy* [2022] STC 2025 and *R (St Matthews (West)) v HM Treasury* [2015] EWCA Civ 648, [2015] STC 2272 ("***St Matthews***") as authority for the following propositions:

(1) Section 45 read as a whole requires the "assignment, subsale or other transaction…" to confer an entitlement to call for a conveyance of the subject matter of the original contract on a person other than the purchaser. In other words, a classic subsale or something to like effect is required. Further, as the *Fanning* scheme shows, the entitlement to call conferred by the sub-sale or similar transaction should be one which is of the like quality as the entitlement under the original contract.

(2) As a matter of language and policy, section 45 works with section 44 to charge the 'real' purchaser. In HMRC's submission, what section 45 envisages is a situation where the new purchaser (the "transferee") stands in the shoes of the purchaser to the original contract by reason of the subsale or similar transaction. In other words, where the purchaser to the original contract acquires only a "transient" interest in the subject matter of the original contract because of a subsale or similar transaction. In that case, he should not be subject to SDLT as purchaser. The person subject to SDLT is instead the "transferee" who takes the property in his place (on the basis of a notional "secondary contract"). This is why the label "transfer of rights" is apt.

(3) If it is right that any entitlement suffices, however remote or contingent, then section 45 does not merely modify section 44, but undermines it, creating a relief from tax which runs

against the grain of section 44. It would mean that SDLT is a voluntary tax. That is not the intention of Parliament and there is no reason to construe it so that that is the result.

20. Applying *Fanning,* the Scheme is ineffective because the right to call for a conveyance that is conferred by the Second Contract on the Trustees does not fall within section 45(1)(b). It is too contingent and precarious in nature and/or it is too dissimilar in substance from the entitlement to obtain a conveyance that arises under the First Contract: see *Fanning,* in particular at [39].

21. Further, by analogy with the reasoning of the Upper Tribunal in *Fanning*, the right transferred by the Second Contract is too different from the entitlement to obtain a conveyance conferred on the appellant under the First Contract in that:

(1) Simply on the face of it, a right to call for a conveyance in 124 years is materially different from the right conferred on the appellant by the First Contract to call for a conveyance three days subsequent to the formation of the First Contract. The 'split' of beneficial ownership in the Second Contract creates a materially different right.

(2) The contingent nature of the entitlement to call for a conveyance, as described above, further distinguishes the entitlement conferred by the Second Contract from that conferred on the appellant by the First Contract.

22. It follows that section 45 does not apply to the Scheme and there is no "transfer of rights" or "secondary contract" for a land transaction. On the facts here, the subject matter of the original contract is the freehold estate in the Property and the 'real' purchaser is the appellant.

23. Secondly, even if there is a *"*transfer of rights" the Scheme fails because there is no simultaneous completion or substantial performance of the notional secondary contract with the "original contract" for the purposes of section 45(3). On the specific facts of this case, this turns on whether the circular payment of the £10,000 amounted to 'payment' for the purposes of the "substantial performance" of the deemed secondary contract. The Trustees as purchasers do not go into possession of the Property. The appellant is always in de facto possession. Nor is a substantial amount of the consideration paid or provided within the meaning of section 44 (5) (B) and section 44 (7) since the purchase price was provided by the appellant on the basis that it would be returned to him through the medium of the Second Contract.

24. Thirdly, applying *Ramsay*, (*WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300) the creation of the Trust on 13 July 2011 and the steps taken by the Trustees in respect of the Second Contract should be disregarded for the purposes of applying section 44 and section 45. The Trust and the Second Contract come into existence only for tax and contain contrived and artificial terms explained only by the tax scheme. The payments made under the Second Contract were entirely circular, involving the appellant transferring £10,000 to the Trust that he settled, and then the Trust transferring that £10,000 back to him as 'consideration' under the Second Contract. As for the Third Contract, it has no impact on the analysis. It is an artificial and tax-driven device. No real explanation has been given for its existence in the Scheme.

Section 75A

25. Even if the Scheme did fall within section 45(1)(b) and sub-sale relief applies, the SDLT thereby avoided is nevertheless due under section75A.

26. This is a sub-sale scheme, and one of the purposes of s.75A is to act as a deterrent to such schemes. As Lord Hodge observed in *Project Blue* at [44] section.75A

> "appears to be drafted in deliberately broad terms to catch a wide range of arrangements which result in tax loss. The examples of scheme transactions which are set out in sub-s (3), although merely examples, give an indication of some at least of the targets of the provision. The task is to identify where the tax loss has occurred as a result of the adoption of the scheme transactions in relation to the disposal and acquisition of the relevant interest or interests in land. This in turn involves identifying the person on whom the tax charge would have fallen if there had not been the scheme transactions to which sub-s (1)(b) refers and which exploited a loophole in the statutory provisions".

27. In this case, section 75A would apply as follows.

(1) For sub-section(1)(a), the relevant "chargeable interest" would be the freehold. "V" would be the vendors under the original contract (Gladdish) and "P" would be the appellant. In so identifying V and P, HMRC rely on *Project Blue* at [42], [44], [46], [47] and [50]. See also, *Project Blue* at [52] the "purpose of section 75A… is to prevent a tax loss which otherwise would occur because of the totality of the connected transactions which have taken place in the real world". If the appellant is "P" (and not for example the Trust), this purpose is achieved.

(2) The "scheme transactions" would include the First Contract and its completion, the creation of the Trust (with all its contrived terms), and the Second Contract to sell to the Trustees (section75A(1)(b)).

(3) Sub-section (1)(c) would be met because less tax would be payable by the appellant on the purchase of his home by reason of the scheme transactions (assuming the Scheme worked as intended).

28. The Third Contract can again be disregarded (section 75A(2)(d)). Even if its execution is a "scheme transaction", it is made after the appellant's acquisition of the freehold and it is clear that in the Scheme, it is not intended to be substantially performed or completed (and nor is it). It does not presently impact on the appellant's enjoyment of the Property (deliberately).

DISCUSSION

29. Before we plunge into the weeds of the detailed analysis, we wish to make two preliminary points.

30. Firstly, we have set out the parties respective submissions above. You will see that we have devoted more text to those submitted by HMRC than to those submitted by the appellant. We have done this for a number of reasons. Firstly, because the appellant's submissions were considerably briefer than those of HMRC. Secondly, because we think it is important, given that the appellant did not attend, that he understands what HMRC was saying. Whilst much of this was in their skeleton argument, it was fleshed out in some detail at the hearing. Finally we think it is of interest to the SDLT community that HMRC's detailed submissions are in the public domain.

31. Secondly, and we raised this with Ms Wilson at the hearing, it seems that HMRC are using section 75A as a shield and not a sword, and that they are only relying on section 75A if we were to decide that section 45 applies. Accordingly, they are not seeking to use section 75A

to charge the appellant to SDLT on £335,000. They are restricting their claim to the SDLT set out in the Closure Notice, namely £9,750.

32. We shall deal, therefore, with HMRC's primary contention, namely that section 45 does not apply, before considering the application of section 75A to the Scheme.

Section 45

33. Our task is to decide whether the relevant statutory provisions, construed purposively, are intended to apply to the transaction, viewed realistically (*Ramsay*). In this case the question is whether sections 44 and section 45, construed purposively, are intended to apply to the Scheme viewed realistically.

34. There is no doubt that the Scheme is a tax avoidance scheme. That is abundantly clear from the facts as we have found them. The Scheme's existence and purpose was solely to avoid SDLT on the purchase from Gladdish. The recent Supreme Court decision in *Hurstwood Properties (A) Ltd v Rossendale BC* [2022] A.C. 690 (SC), which dealt with business rates, is the latest word on the *Ramsay* principle.

35. From this we take the following principles of statutory construction in relation to the relevant SDLT legislation and the Scheme:

(1) Section 44 and section 45 must be read in the context of FA 2003 as a whole which in turn should be read in the historical context of the situation which led to its enactment.

(2) The purpose for which section 45 was introduced requires consideration of its political and social objective.

(3) Since the Scheme is a tax avoidance scheme which 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.

(4) It is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance. So applying a purposive approach to the interpretation of section 44 and section 45 in the context of the Scheme means that we can disregard elements of the Scheme which have no business purpose and have as their sole aim the avoidance of SDLT.

36. We now turn to a consideration of section 44 and section 45:

Purpose

(1) By April 2002, HMRC, or the Inland Revenue as it was then, was becoming concerned about the growing avoidance of stamp duty by a minority at the expense of the majority of taxpayers. They viewed this activity as posing a significant threat to the tax base and were determined to stop it.

(2) So in 2003, SDLT was introduced which was payable on land transactions rather than on particular documents which transferred title to or interests in land. The purpose behind section 44 was to tax land transactions on completion rather than on exchange of contracts, subject to those contracts being substantially performed before completion.

(3) The original proposal was that there would be two charges and there would no longer be any general relief for sub sales. But following representations, section 45 was introduced which was designed to cover a scenario where there was no substantial performance of the original contract prior to the transfer of the rights under that contract to a third party.

(4) It was designed to relieve intermediate contracting purchasers where there was such a transfer of rights. And the aim of what became section 45 was to place the taxation burden on the person who has the use and enjoyment of the property, and to afford relief to someone who has no more than a fleeting interest in the land. (Andrews J in *R (St Matthews (West)) v HM Treasury* Admin Court [2014] STC 2350 at [11], [12] and [14].

The operation of section 44 and section 45

(5) The way in which section 44 and section 45 work, which provides the statutory basis for sub-sale relief, was neatly summarised in *St Matthews* at [7] by Vos LJ:

> "SUMMARY OF ESSENTIAL FACTUAL AND LEGAL BACKGROUND
>
> [7] The Finance Act 2003 introduced SDLT in place of the old stamp duty. Section 42 provided for SDLT to be payable on 'land transactions', which were defined by s 43. Section 44 then defined when a land transaction was to be treated as having been entered into, dealing in particular with the distinction between contract and conveyance. The Finance Act 2003 aimed to place the burden of SDLT on the person who was to acquire the use and enjoyment of the property in question, and to reduce that burden on those with only a transient interest in the property. These arrangements were set up by s 45 which applied 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' and '(b) there is an assignment, subsale, or other transaction … as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him', referred to as a 'transfer of rights'. Section 45(2) provided that 'The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 … has effect in accordance with the following provisions of this section'. Section 45(3) then provided (originally) for s 44 to apply 'as if there were a contract for a land transaction (a "secondary contract") under which' the transferee was the purchaser and the consideration was, in effect, that paid for that part of the property under the original contract and that paid for the transfer of rights. The key provision of s 45(3) then said that '[t]he 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'. As it seems to me, this provision thereby took the completion of the original contract in such circumstances out of the charge to tax under s 42".

Some observations

(6) Section 44 applies to a contract for a land transaction which "is to be completed by a conveyance". (Section 44(1)).

(7) Section 45 applies where a contract for a land transaction is entered into under which "the transaction is to be completed by conveyance ……" (Section 45(1)).

(8) Section 45 builds on and supplements the provisions of section 44. (*Fanning* at [7]).

(9) Both section 44 and section 45 contain deeming provisions. (*Fanning* at [8]).

(10) The sole purpose of section 45 is to modify the operation of section 44. (*DV3* at [20]).

(11) Since section 45 builds on section 44, and section 44 is concerned with the contract which is to be completed by conveyance, this is clearly a reference to an entitlement which is definite rather than contingent. For section 45(1)(a) to apply there must similarly be a contract which is to be completed by conveyance. And so the assignment, sub-sale or other transaction referred to in section 45(1)(b) must involve a similar entitlement on behalf of the transferee to obtain a conveyance to that which arises under a contract to which section 44 applies. (*Fanning* at [30]).

Application of these principles to the facts

37. When we apply the legislation, construed purposively, to the facts construed realistically, we have no hesitation in concluding that sub-sale relief does not apply to relieve the appellant from SDLT on the purchase of the Property under the First Contract. We say this for the following reasons:

(1) The purpose of sub-sale relief, introduced in 2003 by section 45 was to relieve a purchaser who had only a fleeting or transient interest in land from a charge, where that purchaser had assigned the rights to that land prior to completing his original purchase. The intention was that the sub purchaser in these circumstances, who would have an ongoing and substantial interest in the property, would bear the duty. It was never intended to relieve a transaction from duty completely. It was intended to remove a double charge to duty in circumstances where there was, in effect, only one purchaser who acquired the real economic interest in that property.

(2) Section 45 must be read in the context of section 44, and both apply to contracts which "is to be completed by a conveyance". So when there is an assignment sub-sale other transaction within the meaning of section 45(1)(b) which confers on the sub purchaser an entitlement to call for a conveyance to him, that entitlement is under the deemed secondary contract, and that secondary contract is one which, too, "is to be completed by conveyance".

(3) The Scheme is clearly an anti-avoidance scheme, designed to exploit perceived shortcomings in the drafting of section 45, and is intended to relieve the real purchser, in this case the appellant who has the use and enjoyment of the Property, from a charge to SDLT. This is clearly outside the purpose for which section 45 was designed.

(4) It is clear from the facts, viewed realistically, that there was never any possibility, let alone a realistic possibility, that whilst the appellant was or is in occupation of the Property, the Second Contract would be completed. Its substantial performance, by dint of payment of £10,000, was always as far as it would go. It would never be followed up by completion. And if the Trustees had decided that they would complete, then the appellant would be able to defeat that decision and to effectively end the Trust with the effect that he would be both buyer and seller under the Second Contract. Section 45 was never intended to confer relief where the intermediate purchaser and sub purchaser, were the same person.

(5) Because there was no such possibility that the Second Contract would, or indeed will, be completed, it cannot be said that the Trust obtained an entitlement under the deemed secondary contract under which the contract was to be completed by conveyance. There was simply no intention that there would be such completion.

(6) Whilst theoretically there could still be completion of the Second Contract, we must look at the facts, realistically, not theoretically. And in the real world, even though there was a long

completion date under the Second Contract, it is clear that it was never going to be completed whilst the appellant was in occupation (or at all prior to the 124 year long-stop date). That date was simply a device which the promoters believed would bring the Second Contract within the ambit of section 45 and thus would relieve the appellant from SDLT on the acquisition of the Property which he had acquired for his own use and enjoyment.

(7) It is our view that the expression "is to be completed" in section 45, in the context of the purpose for which section 45 was enacted, envisages completion within the time period contemplated by the original contract to which section 44 applies. If the latter has a conventional completion date, section 45 does not contemplate a theoretical completion date extending 124 years into the future, which has been included simply to exploit perceived drafting shortcomings, and where there was never any intention to complete earlier, at the time when the appellant went into actual occupation of the Property for his own use and enjoyment.

(8) We therefore conclude that the provisions of section 45, construed purposively, do not apply in the circumstances of the Scheme, to relieve the appellant from liability to SDLT on the £325,000 which he paid under the First Contract to Gladdish. And he is liable, as contended for by HMRC, and as set out in the Closure Notice to SDLT of £9,750.

(9) For completeness, it is our view that the Second Contract was substantially performed by the payment of £10,000 by the Trust to the appellant. It was paid or provided by the Trust. The fact that it emanated from the appellant, as settlor, and then was paid to him under the Second Contract does not mean that it was not so paid or provided even though it was part of an avoidance scheme. It has real life consequences (it is potentially chargeable to SDLT under the provisions of section 75 A). The circular nature of the payment is, however, relevant in that it reinforces our conclusion that the Scheme had no purpose or function other than to avoid SDLT.

Section 75A

38. We can deal with the application of section 75A to the Scheme, reasonably quickly.

39. It is clear from the text of section 75A itself, and the circumstances in which it was introduced into FA 2003 in 2007 (having already been introduced into the SDLT regime by way of statutory instrument) that section 75A is a targeted anti-avoidance provision, designed to combat the avoidance of SDLT (see Project Blue in the FTT per Judge Brannan at [211-216]).

40. It is motiveless as per Lord Hodge in *Project Blue* at [42] "there is nothing in the body of the section which expressly or inferentially refers to motivation. The provision was enacted to counter tax avoidance which resulted from the use of a number of transactions to effect the disposal and acquisition of a chargeable interest. It is sufficient for the operation of the section that tax avoidance, in the sense of a reduced liability or no liability to SDLT, resulted from the series of transactions which the parties put in place, whatever their motive for transacting in that matter".

41. It therefore must be construed in the same manner as section 45, and the principles regarding statutory construction set out at [35] above apply.

42. Section 75A itself was designed to combat sub-sale schemes such as the Scheme. Such schemes are envisaged as being scheme transactions within the ambit of section 75A(3)(b).

43. Under section 75A, where there is a disposal of a chargeable interest from V to P, one or more scheme transactions are involved in connection with that disposal and as a result of the scheme transactions less SDLT is payable than would have been payable had there been a notional transaction from V to P, then any scheme transactions which are land transactions are disregarded, and SDLT is charged on that notional transaction.

44. One difficulty which arises is identifying V and P, and in particular P. But Lord Hodge has made it clear in [44] of *Project Blue* that P is the "person on whom the tax charge would have fallen if there had not been the scheme transactions to which subsection (1)(b) refers and which exploited a loophole in the statutory provisions".

45. In relation to the acquisition of the Property by the appellant, P is the appellant as he is the person on whom the SDLT liability would have fallen had it not been for the Scheme.

46. So applying the provisions of section 75A to the Scheme:

(1) Section 75A is engaged since Gladdish (V) disposed of the Property which was acquired by the appellant (P).

(2) The Scheme includes scheme transactions (namely the establishment of the Trust, the Second Contract and the Third Contract) which were involved in connection with that disposal and acquisition.

(3) The SDLT payable in respect of the scheme transactions (zero) is less than the amount that would have been paid on a notional transaction between Gladdish and the appellant (£9,750).

(4) In these circumstances the Second Contract, as a land transaction, is disregarded and there is a notional transaction between Gladdish and the appellant for which the chargeable consideration is the £325,000 paid by the appellant under the First Contract, and the £10,000 paid by the Trust under the Second Contract. As we have mentioned, HMRC do not contend that this should increase the appellant's liability beyond the £9,750 which is set out in the Closure Notice.

(5) Accordingly, the appellant is liable to pay the £9,750 assessed by the Closure Notice by dint of the provisions of section 75A.

47. It is our view, although this was not clear from the papers, that the Third Contract is designed to exploit the provisions of section 75A(6). This determines the effective date of the notional transaction, and thus the date from which the obligation to submit an SDLT return, and pay the SDLT, commences. It is our experience that the Third Contract is designed to push that effective date out until the completion date of the Third Contract, which in this case is not later than 90 days after service of notice to complete. The theory runs that if no such notice to complete is given, then there is no effective date for the notional transaction, and thus, even though section 75A applies (and indeed the existence of the Third Contract reflects an acceptance that it applies since it is specifically designed to exploit the provisions in subsection (6)) no liability to duty has arisen since there has been no effective date of the notional transaction.

48. On the facts of the Scheme, this theory is misconceived. The effective date of the notional transaction is the last date of completion for the scheme transactions. Since scheme transactions are very widely defined and include non-land transactions, "completion" here cannot mean

completion in the sense of completing a contract for the acquisition of land. It must have a more general meaning. To our mind it simply means that a scheme transaction has occurred. The Third Contract is not a land transaction since it is not completed. Under section 44, an uncompleted and non-substantially performed contract is not a land transaction. Since the Third Contract was therefore "completed" in the non-technical sense, i.e. was entered into, on 15 July 2011, that is the effective date for the notional transaction.

The appellant's additional grounds of appeal

49. HMRC are not assessing the appellant to a penalty. This tribunal has no jurisdiction to consider the appellant's challenge to HMRC's interest charge (which was indeed struck out by the tribunal on 30 June 2021). Nor do we have a general jurisdiction to consider abuse of process.

50. We do have jurisdiction to consider whether any delay has affected the fairness of the appellant's appeal hearing, and whether any such delay has caused him prejudice (see the recent case of *Nuttall v HMRC* [2022] UKFTT 192 (TC) and the authorities mentioned therein ("*Nuttall*")). In *Nuttall* the delay was 12 years and was described as inordinate and inexcusable. In the case of this appellant, the chronology shows that in 2012-2016, HMRC were in correspondence with CDP concerning the Scheme, even though it was not until 2020 that HMRC wrote to the appellant explaining their view of the matter and why they thought the Scheme did not work.

51. We do not think that this delay is anything like as inordinate and inexcusable as was the position in *Nuttall* (indeed in *Nuttall* this delay of itself was not sufficient to amount to an abuse of process). But the fundamental issue is whether any such delay has led the appellant to suffer prejudice in pursuing his appeal. We cannot see that he has. As mentioned at[4], resolution of this appeal requires little oral testimony from the appellant. The factual arguments are based upon the Scheme documents, and it seems to us that the only prejudice which the appellant might have suffered, had HMRC prosecuted the enquiry with greater alacrity, is the fact that he can no longer bring a claim for negligence against CDP, who went into liquidation in 2017.

52. He has not made such an allegation, indeed it would in our view be highly speculative, given the amounts involved, and the lack of evidence before us regarding the circumstances in which the appellant entered into the Scheme. We cannot see that the appellant has been prejudiced by any delay by HMRC.

53. The enquiry was opened in good time, the closure notice was valid, the appellant made no application to the tribunal for the enquiry to be closed. There is no concept of staleness for discovery assessments, and there is no justification for reading the concept of staleness into enquiries or closure notices,

54. Accordingly, we do not consider there is any merit in these procedural grounds of appeal submitted by the appellant.

DECISION

55. For the reasons given above, we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 14th FEBRUARY 2023

APPENDIX

THE LEGISLATION

1. Section 44 the FA 2003 provides as follows:

44 contract and conveyance

(1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.

(2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.

(3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction. In this case the effective date of the transaction is the date of completion.

(4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract. In this case the effective date of the transaction is when the contract is substantially performed.

(5) A contract is "substantially performed" when—

(a) the purchaser, or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or

(b) a substantial amount of the consideration is paid or provided.

(6) For the purposes of subsection (5)(a)

(a) possession includes receipt of rents and profits or the right to receive them, and

(b) it is immaterial whether possession is taken under the contract or under a licence or lease of a temporary character.

(7) For the purposes of subsection (5)(b) a substantial amount of the consideration is paid or provided—

(a) if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided;

(b) if the only consideration is rent, when the first payment of rent is made;

(c) if the consideration includes both rent and other consideration, when—

(i) the whole or substantially the whole of the consideration other than rent is paid or provided, or

(ii) the first payment of rent is made.

(8) Where subsection (4) applies and the contract is subsequently completed by a conveyance—

(a) both the contract and the transaction effected on completion are notifiable transactions, and

(b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract.

(9) Where subsection (4) applies and the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of that subsection shall (to that extent) be repaid by the Inland Revenue. Repayment must be claimed by amendment of the land transaction return made in respect of the contract.

(10) In this section—

(a) references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract; and

(b) "contract" includes any agreement and "conveyance" includes any instrument.

(11) Section 1122 of the Corporation Tax Act 2010 (connected persons) has effect for the purposes of this section.

2. Section 1122(6) of the Corporation Act 2010 provides as follows:

A person, in the capacity as trustee of a settlement, is connected with-

(a) any individual who is a settlor in relation to the settlement …

3. Section 45 of the FA 2003 provided 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 ….

(4) Where there are successive transfers of rights, subsection (3) has effect in relation to each of them. The substantial performance or completion of the secondary contract arising from an earlier transfer of rights at the same time as, and in connection with, the substantial performance or completion of the secondary contract arising from a subsequent transfer of rights shall be disregarded.

(5) Where a transfer of rights relates to part only of the subject-matter of the original contract ("the relevant part")—

(a) subsection (8)(b) of section 44 (restriction of charge to tax on subsequent conveyance) has effect as if the reference to the amount of tax chargeable on that contract were a reference to an appropriate proportion of that amount, and

(b) a reference in the second sentence of subsection (3) above to the original contract, or a reference in subsection (4) above to the secondary contract arising from an earlier transfer of rights, is to that contract so far as relating to the relevant part (and that contract so far as not relating to the relevant part shall be treated as a separate contract).

(5A) In relation to a land transaction treated as taking place by virtue of subsection (3)—

(a) …;

(b) other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the transferor.

(6) Section 1122 of the Corporation Tax Act 2010 (connected persons) applies for the purposes of subsection (3)(b)(i).

(7) In this section "contract" includes any agreement and "conveyance" includes any instrument.

4. Section 75A of the FA 2003 relevantly provides as follows:

75A Anti-avoidance

(1) This section applies where–

(a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,

(b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions") and

(c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

(2) In subsection (1) "transaction" includes, in particular–

(a) a non-land transaction,

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

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

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

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

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

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

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

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

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

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

(4) Where this section applies–

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

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

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

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

(b) received by or on behalf of V (or a person connected with V within the meaning of [section 1122 of the Corporation Tax Act 2010]2) 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.