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INDEX

CONSTRUCTIVE ABDICATION

INTRODUCTION

FA 2003 ss.75A – 75C contains widely phrased provisions under which a taxpayer may be subject to Stamp Duty Land Tax on a notional land transaction. All three sections are headed with the phrase 'anti-avoidance'. In spite of their headings, the sections themselves contain no express restriction of their scope to tax avoidance transactions, however such transactions might be defined. When they were first introduced, by way of regulation,[1] the Government announced:-

> 'The Treasury have today made regulations … that make ineffective a number of schemes designed to avoid Stamp Duty Land Tax.'[2]

It has always been a matter of uncertainty as to whether, and how far, these provisions are to be construed as confined to tax avoidance transactions and, to the extent that they are, how such transactions are to be identified. In *The Pollen Estate Trustee Company v HMRC*,[3] s.75A had been referred to by Lord Justice Lewison, in passing, as an anti-avoidance provision. The drafting of the sections is very unsatisfactory and poses many difficulties of construction. They have now been considered by the First-tier and Upper Tribunals in *Project Blue Ltd v HMRC.*[4]

THE RELEVANT LEGISLATION

Section 75A provides that any of the, 'scheme transactions' within its terms which is a land transaction is to be disregarded for the purposes of SDLT and for a, 'notional land transaction' to be treated as having occurred instead. At the time that the transactions at issue took place s.75A was as follows:-[5]

> '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,

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1 Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006 SI 2006/3237 reg. 2
2 2006 PBRN – Stamp Duty Land Tax Anti-Avoidance Measures para. 2
3 *Pollen Estate Trustee Company v HMRC* CA [2013] EWCA Civ 753 at para. 37
4 *Project Blue Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 378 (TC) (hereinafter referred to in this article as the 'FtT Decision') and *Project Blue Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKUT 0564 (TCC) (hereinafter referred to in this article as the 'Upper Tribunal Decision')
5 It has since been amended

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

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

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

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

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

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

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

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

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

(4) Where this section applies -

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

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

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

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

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

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

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

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

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

(a) sections 71A to 73, or

(b) a provision of Schedule 9.'

THE FACTS

Project Blue concerned the acquisition for development of Chelsea Barracks in London (the 'Property'), a £1bn transaction which was financed by Sharia compliant arrangements known as, 'Ijara financing'.[6]

The Parties

The parties to the transactions in the case were:-

1. the Secretary of State for Defence (the 'SSD')[7] which was the vendor of the Property;

[6] FtT Decision, para. 63

[7] Referred to in the FtT Decision as the Ministry of Defence or 'MOD'. FtT Decision, para. 3

2. the appellant company, Project Blue Limited ('PBL'), which was part of a group (the 'PBGHL Group') indirectly owned by the Qatari Ruling Family;
3. Qatari Bank Masraf al Rayan ('MAR'), a Qatari financial institution specialising in Islamic finance;[8] and
4. Project Blue Developments Ltd ('PBDL'), another member of the PBGHL Group which undertook the actual development of the site and sold the resulting residential units in the property to the Public.

The Seven Steps

It was common ground that PBL was not subject to SDLT on its acquisition of the Freehold from the SSD because of s.45(3) (sub-sale relief) unless s.75A applied.[9] In the FtT[10] it was agreed that MAR was exempt from SDLT on its acquisition under s.71A (alternative finance relief).

The FtT summarised the transactions at issue in the case (the 'Seven Steps') and their SDLT consequences subject to the application of s.71A in the following way.

5th April 2007: Step 1

PBL contracted to purchase the freehold (the 'Freehold') of the Property from the SSD for a total price of £959m payable by instalments (**'Step 1'**).

It was agreed by the Parties that this transaction was not subject to SDLT as it was not substantially performed (s.44(2) & (3)).[11]

29th January 2008: Steps 2 & 3

Step 2

PBL sub-sold the Freehold to MAR (**'Step 2'**). The consideration for this sale was:-

(a) US$1,893,353,700 payable in four tranches.
(b) The amount of any SDLT liability arising on PBL subject to a maximum of US$75,813,120.
(c) An additional amount quantified by reference to the rent payable under the lease to be granted by MAR to PBL under Steps 3 and 7. That amount was US$498,708,180.

So the total consideration was US$2,467,875,000. It was accepted by both parties that the Sterling equivalent of this amount, one presumes on the date of the grant of the lease by MAR to PBL, was £1.25bn so it appears that the US dollar on that date was worth approximately 50.7p.

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8 FtT Decision, paras. 7 & 8
9 FtT Decision, paras. 2 & 29
10 See Footnote 19
11 FtT Decision, para. 35

It was agreed by the Parties that this transaction was not subject to SDLT as it was not substantially performed (s.44(2) & (3)).[12]

Step 3

MAR agreed to grant a lease (the 'Superior Lease') of the Property back to PBL for the finance period which was 999 years and 2 days. The rent was calculated to give MAR an appropriate return on its ownership of the Freehold (**'Step 3'**).

It was agreed by the Parties that this transaction was not subject to SDLT as it was not substantially performed (s.44(2) & (3)).[13]

31st January 2008: Steps 4 – 7

On 31st January 2008, the following steps took place.

Step 4

MAR and PBL entered into put[14] and call[15] options respectively requiring and entitling PBL to repurchase the Freehold at the end of the finance period (**'Step 4'**).

The exercise price of the MAR Call Option was a sum equal to the price paid to date by MAR. The judgment does not reveal the exercise price of the MAR Put Option or the consideration given for the grant of either option.

The grant of an option by the grantor to enter into a land transaction is itself a land transaction (s.46(1)). The judgment does not record why SDLT was not payable in respect of the grant of these options, but it is clear that it was not.[16]

Step 5

The SSD conveyed the Freehold to PBL (**'Step 5'**).

It was agreed by the Parties that this transaction was not subject to SDLT because, although it completed the contract between the Parties, it was completed at the same time as, and in connection with, the completion of the contract between PBL and MAR (s.45(3)).[17]

Step 6

At the same time as, and in connection with Step 5, PBL conveyed the Freehold to MAR (**'Step 6'**).[18]

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12 FtT Decision, paras. 13 & 57
13 FtT Decision, paras. 13 & 57
14 Called in this article the 'MAR Put Option'
15 Called in this article the 'MAR Call Option'
16 FtT Decision, paras. 14 & 58
17 FtT Decision, paras. 14 & 59
18 FtT Decision, paras. 14 & 61

In the FtT it was agreed by the Parties that this transaction was exempt from charge to SDLT under s.71A(2) (that is, under the relief for alternative property finance).[19] In the Upper Tribunal, PBL argued, however, that s.45(3) had the effect that the completion of the contract between the SSD and PBL for PBL to acquire the Freehold was to be disregarded and, that being so, PBL could not have been the vendor of the Freehold to MAR for the purposes of SDLT. If that was the case, the condition of s.71A(2) that the vendor of the Freehold to MAR was PBL would not have been satisfied with the result that s71A would not have applied and so MAR would have been chargeable to SDLT on its acquisition.[20] One presumes that PBL was willing to advance this argument on the basis that an assessment on MAR would, by the time of the Upper Tribunal hearing, have been out of time.

Step 7

Immediately after Step 6, MAR granted the Superior Lease to PBL (**'Step 7'**).

In the FtT it was agreed by the Parties that this transaction was exempt from the charge to SDLT under s.71A(3) (that is, under the relief for alternative property finance).[21]

The Land Transaction Returns

On 22nd February 2008, five land transaction returns were submitted to HMRC, three in respect of Steps 5, 6 and 7, being the completion of Steps 1, 2 and 3, and two in respect of the two options granted under Step 4. All five of these returns showed no SDLT payable.[22]

Box 9 of the return ('LTR1') made by PBL in respect of Step 5, the transfer of the Property from the SSD to PBL in completion of the contract made under Step 1, included a claim for 'other relief'. The return stated that no SDLT was payable. HMRC amended this return increasing the amount of SDLT payable to £38.4m on chargeable consideration of £959m on the basis that this was the effect of s75A. Subsequently, the FtT allowed HMRC to amend its statement of case to assert that SDLT of £50m was due on chargeable consideration of £1,250bn.[23]

Further Transactions

At least three further transactions in respect of the Property took place after Step 7 but it was common ground between the parties that only Steps 1 – 7 were of relevance to the matters at issue in the case and were Scheme Transactions within s.75A(1)(b).

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[19] FtT Decision, paras. 16, 17 & 61

[20] That argument was rejected by the Upper Tribunal. Upper Tribunal Decision, para. 42

[21] We have seen that in the Upper Tribunal, PBL had argued that, because its acquisition of the Freehold under the Original Contract was to be disregarded under s.45(3), it could not have been the vendor of the Property for the purposes of s.71A. The Upper Tribunal Decision does not say that PBL went on to say that the grant of the Superior Lease under Step 7 would therefore have been chargeable to SDLT on PBL. That would appear, however, to be the logical result of PBL's argument and the Authors understand that this was acknowledged in argument by PBL's Counsel

[22] FtT Decision, para. 76

[23] On the basis that the consideration deemed by s.75A(5) to be given under the notional land transaction arising under s.75A(4) was to be determined by reference to the consideration under the contract under Step 2 that was completed by Step 6

These transactions (the 'Further Transactions') took place on the 1st February 2008. They were:-

(a) The grant to PBDL[24] by PBL of a 999-year underlease (the 'Underlease') of the Property for no premium and at a peppercorn rent. This was done, so the FtT found, in order to allow an onward sale of residential units on the site without the whole Islamic funding structure having to be disclosed;[25]
(b) PBL granted to PBDL a Call Option (the 'PBDL Call Option') giving the right to buy the Property (both the Freehold and the Superior Lease). The grant price of the Option was £1 plus a deferred premium equal to any increase in the market value of the property over £1.27bn. The strike price was £1.27bn.[26]
(c) PBDL granted to PBL a Put Option (the 'PBDL Put Option') giving PBL the right to sell the Property (again both the Freehold and the Superior Lease). The FtT's decision does not record that there was a grant price set under the option but one presumes some consideration must have been given for it. The strike price of the option was again £1.27bn.[27]

Neither of the PBDL Options could be exercised until after PBL had acquired the Freehold from MAR under the MAR Call Option.[28]

The Scheme Transactions

It has been seen that Scheme Transactions are 'transactions (including the disposal and acquisition [referred to in s.75A(1)(a)]) ... involved in connection with the disposal and acquisition ...' As Mr Justice Morgan said:-

> 'In each of these cases, questions may arise as to which are the scheme transactions. The scheme transactions are not necessarily confined to those transactions which took place between the disposal by 'V' and the acquisition by 'P'. Paragraphs (b) and (c) of section 75A(3) plainly contemplate that the scheme transactions can involve persons in addition to 'V' and P. Section 75A(2)(d) shows that a transaction which takes place after the acquisition by P can be relevant...'[29]

The FtT had said that:-

> 'The expression "involved in connection with" is an unusual one. We are not aware of this exact expression being used elsewhere in the tax or wider legislative code. The words "in connection with" are familiar enough. We were referred to a number of cases on the meaning of those words. Usually, courts have tended to construe the phrase "in connection with" widely, but noting that the meaning of this expression will depend upon the context in which the expression is used ...

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[24] Which, as we have said, was the member of the PBGHL Group, which was to develop residential units in the Property and sell them to the Public
[25] FtT Decision, para. 69
[26] FtT Decision, para. 70
[27] FtT Decision, para. 71
[28] FtT Decision, paras. 70 & 71
[29] Upper Tribunal Decision, para. 64

> As we have seen, in section 75A the phrase "in connection with" is deliberately used in conjunction with the word "involved". In our view, the word "involved" must be intended to qualify the phrase "in connection with". The word "involved" denotes some form of participation (i.e. involvement). Thus, a transaction which is part of a series of transactions will not be "involved" with other transactions simply because it is part of a series or sequence of successive conveyancing transactions. The linkage must be more than merely being a party in a chain of transactions and the test must be more than a "but for" test (or, as the classicists would put, it a sine qua non test) otherwise the word "involved" would be deprived of significant meaning.'[30]

The Upper Tribunal, as we shall see, decided the case on different grounds to those on which it was decided by the FtT and it did not refer to these comments of the FtT.

In our view, the phrase 'involved', read in its natural sense, does not materially restrict the meaning of 'in connection with'. Be that as it may, even adopting the FtT's view of the phrase, transactions which are designed to allow the Property to be marketed efficiently, as the Further Transactions were, and which are so clearly linked in time, seem to us to meet the condition of having 'some form of participation' in the scheme as a whole. It is puzzling, therefore, that the Parties, the FtT and the Upper Tribunal all seem to have proceeded on the assumption that the Further Transactions were not Scheme Transactions without any express consideration of the matter.[31]

Further Findings of Fact by the FtT

The FtT also found that:-

> ' … we do not consider that the Appellant has discharged the burden of proof in demonstrating that its transactions were not, at least in part, motivated by tax avoidance considerations.'[32]

In arriving at this conclusion it made what was surely an unwarrantable inference:-

> 'We ... attach significance to the fact that Clifford Chance submitted a notification on 1 February 2008 (i.e. immediately after the transactions involved in this appeal were undertaken) under SDLT Tax Avoidance (Prescribed Description of Arrangements) Regulations (SI 2005/1868). Clifford Chance clearly considered that the arrangements could fall within the Regulations ... section 306 (1) and the above-mentioned Regulations require transactions to be disclosed if the main benefit, or one of the main benefits, that might be expected to arise from the arrangements was obtaining an SDLT advantage.
>
> Whilst we recognise that legal advisers may well err on the side of caution, it is clear from this notification that the Appellant's advisers were well aware, and we infer that the Appellant was as well, that the manner in which the acquisition from the MoD and the Shari'a-compliant financing with MAR were being structured

[30] FtT Decision, paras. 248 - 250
[31] At least none which was recorded in the published decisions
[32] FtT Decision, para. 228

involved an SDLT advantage and which was one of the main benefits of the transaction structure.'[33]

It is mystifying why, if it is common for advisers to 'err on the side of caution' the Tribunal thought that it was:-

> ' … clear from this notification that the Appellant's advisers were well aware, and we infer that the Appellant was as well, that the manner in which the acquisition from the MoD and the Shari'a-compliant financing with MAR were being structured involved an SDLT advantage and which was one of the main benefits of the transaction structure.'

For where advisers 'err on the side of caution' in respect of the application of particular provisions they do so not on the basis that they consider that the relevant provisions apply to the facts at issue but merely that they consider it is possible that they might do so.[34] As to appellants, it will be rare for them to have an opinion one way or the other on what is a matter of legal judgement. If the Tribunal is to infer acceptance that one of the main benefits of a sequence of transactions is the obtaining of a tax advantage, from the making of a DOTAS return that will be a considerable deterrent to making such a return in cases where it is probable but not certain that a return is not required.

THE DECISIONS OF THE FIRST-TIER TRIBUNAL AND THE UPPER TRIBUNAL

The FtT's Decision

The FtT, having allowed HMRC to amend its statement of case to assert that SDLT of £50m was due, increased the assessment on PBL to that amount.[35] It did so on the basis that s.75A applied,[36] that the disposal within s.75A(1)(a) was the disposal by the SSD of the Freehold,[37] that the acquisition within that sub-section was the grant to PBL of the Superior Lease,[38] that 'V' was, therefore, the SSD[39] and 'P' was PBL[40] for the purposes of s.75A(1)(a), that the Scheme Transactions under s.75A(1)(b) were Steps 1 – 7,[41] that the notional land transaction was a sale of the Freehold by the SSD to PBL[42] and that the consideration for that notional transaction was £1.25bn.[43]

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33 FtT Decision, paras. 232 & 233
34 The Authors understand, however, that the DOTAS return was not made in the form often adopted in such cases that, in the taxpayer's opinion, such a return is not required by the relevant regulations but that the return is made in case the taxpayer's opinion should be incorrect
35 FtT Decision, paras. 309 & 310
36 FtT Decision, para. 309
37 FtT Decision, paras. 239, 240 & 246
38 FtT Decision, para. 246
39 FtT Decision, para. 246
40 FtT Decision, para. 246
41 FtT Decision, paras. 247 - 253
42 FtT Decision, para. 258
43 FtT Decision, para. 265

The Upper Tribunal's Decision

Mr Justice Morgan's partially dissenting decision

The Upper Tribunal consisted of Mr Justice Morgan and Judge Howard Nowlan. They were equally divided on the question but Mr Justice Morgan's view prevailed because, as the presiding Judge of the Tribunal, he had the casting vote[44] Judge Howard Nowlan had, in his partially dissenting decision, agreed both with the decision of the FtT[45] and, in effect, with its reasoning.

Mr Justice Morgan's decision: the decision of the Upper Tribunal

In what was the decision of the Upper Tribunal by reason of his casting vote, Mr Justice Morgan found that the SDLT assessed should be reduced from £50m to £38.36m.[46] His reasoning differed from the FtT only in considering that the consideration for the notional transactions under s.75A(1)(c) was £959m and not £1.25bn.[47]

THE APPLICATION OF SECTION 45(3) TO STEP 5

Section 45(3)

As we have seen, it was accepted by the Parties and by both the FtT and Upper Tribunal that s.45(3) applied in respect of Step 5. It may be helpful to explain this a little further. Section 45 applied because:-

(a) there was a contract for a land transaction, the contract for the SSD to sell the Freehold to PBL under Step 1 (referred to in s.45 as the Original Contract);[48]
(b) there was a sub-sale which related to the Original Contract as a result of which a person other than the original purchaser became entitled to call for a conveyance of the subject matter of the Original Contract. This was the contract under Step 2 for PBL to sell the Freehold to MAR under which MAR could call for a conveyance of the property;[49]
(c) a further exception did not apply.[50]

The Result of Section 45 Applying

The result of s.45 applying was that MAR was not treated as entering into a land transaction by reason of the sub-sale, referred to in s.45(3) as a 'transfer of rights', under Step 2. Section 44 was to apply as if there were a contract for a land transaction (called a 'Secondary Contract')[51] under which the transferee, MAR, was the purchaser

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[44] Upper Tribunal Decision, paras. 1, 103, 132 & 170
[45] Upper Tribunal Decision, para. 167
[46] Upper Tribunal Decision, paras. 106 & 130
[47] Upper Tribunal Decision, para. 106
[48] Section 45(1)(a)
[49] Section 45(1)(b)
[50] Section 45(1)(c)
[51] Section 45(3)

and the consideration for the transaction was that given for the transfer of rights which was, translated into sterling, £1.25bn. [52]

Because the Original Contract, between the SSD and PBL, was completed, by Step 5, at the same time as, and in connection with, the completion, by Step 6, of the Secondary Contract[53] the completion of the Original Contract was disregarded.[54]

Under s.44 where, as was the case in respect of the Original Contract, a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance a person is not to be regarded as entering into a land transaction by reason of entering into the contract. Where such a transaction is completed the contract and the completion are treated as parts of a single land transaction. Where the contract is substantially performed without having been completed the contract is treated as if it were itself the transaction for which it provides. Because s.45(3) had the effect that the completion of the Original Contract for the sale of the Freehold to PBL was to be disregarded, that contract was to be treated as if it was not completed and so, as it was not substantially performed,[55] no SDLT charge arose in respect of the Original Contract.

The result of that is that the only remaining land transaction was the hypothetical contract under s.45(3) under which MAR was the purchaser of the property from the SSD. If, as the Tribunals appear to have presumed, that hypothetical contract can be regarded as having been completed by the actual completion of the sub-sale from PBL to MAR under Step 6, then s.44 would apply to that hypothetical contract and an SDLT charge would arise on MAR subject to relief under s.71A.

POOR DRAFTING

The Upper Tribunal noted that ss.75A – 75C had been very poorly drafted:-

> ' … the drafting of sections 75A to 75C leaves a lot to be desired. The facts of the present case are not complicated but the application of sections 75A to 75C to these uncomplicated facts has given rise to a number of points of statutory interpretation which are high up on the scale of difficulty.'[56]

IDENTIFYING 'V' AND 'P'

Multiple Identifications

Of particular difficulty is the fact that read literally it would appear that even in quite straightforward transactions there might well be more than one person (referred to in the section as 'V') who 'disposes of a chargeable interest' and more than one person

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[52] Upper Tribunal Decision, paras. 11 – 15, 31 and 34

[53] Actually, this is rather problematical. The Secondary Contract is a purely hypothetical one. Even though its completion is referred to in s.45(3) & (4) there is nothing in the section which expressly deems it to have been so. How can it be said to have been completed at all?

[54] Upper Tribunal Decision, para. 34

[55] Section 44(5)

[56] Upper Tribunal Decision, para. 50

(referred to in the section as 'P') who 'acquires either ... [that interest] ... or a chargeable interest deriving from it'[57]. As Mr Justice Morgan commented in the Upper Tribunal:-

> 'The above discussion illustrates that the relatively uncomplicated facts of this case have given rise to the possibility that there might be a number of persons who could be 'V' and a number of persons who could be 'P'. It may be that the identity of 'V' is not determinative but the identity of 'P' is critical as it is 'P' who will be liable to pay the tax. We note that the guidance published by HMRC on 1 March 2011 contained the statement (in relation to the process of identifying 'V' and 'P'):-
>
> > "In a complex scenario this process may need to be repeated with different parties being identified as 'V' and 'P', with different results."
>
> Neither side in this case contended for an analysis where there was more than one 'V' and more than one 'P'. Both sides submitted that SSD was 'V'. HMRC submitted that PBL was 'P' and PBL submitted that MAR was 'P'. HMRC did not explain how they, or any tribunal or court, should proceed if it found that there were two or more persons who were 'P' (apart from a case where the persons had the same joint interest). Would all such persons be liable to pay tax (remembering that the taxable consideration in each case is the largest consideration given by any one person involved in the scheme of transactions)?
>
> I regard the possibility of there being more than one person who is 'V' and more than one person who is 'P' as being unsatisfactory and I would be reluctant to accept that interpretation of sections 75A to 75C.'[58]

An Objectionable Discretion

Mr Justice Morgan's reluctance was, therefore, based on the fact that if it is possible for there to be more than one 'P', it would appear that more than one person could be chargeable to SDLT in relation to a single notional transaction. The section provides no apparatus for either choosing which person is to be subject to taxation or of allocating the liability amongst the persons who are 'P' within the section's terms. Indeed, on a literal reading, although Mr Justice Morgan did not go on to make this point, multiple charges to SDLT might arise, each charged on the largest amount (or aggregate amount):-

(a) given by or on behalf of any one person by way of consideration for the scheme transactions, or
(b) received by or on behalf of 'V' (or a person connected with 'V' within the meaning of section 839 of the Taxes Act 1988) by way of consideration for the scheme transactions.[59]

In the FtT, PBL had argued that *Attorney General v Wilts United Dairies Limited*[60] was 'authority for the proposition that Parliament would usually be presumed not to have

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[57] Section 75A(1)(a)
[58] Upper Tribunal Decision, paras. 65 & 66
[59] Section 75A(5)
[60] *Attorney General v Wilts United Dairies Limited* Times Law Reports 22nd July 1921

delegated to a Minister of the Crown undefined and unlimited powers of imposing taxation.'[61]

PBL had argued that, therefore:-

> ' … it was necessary in order to give effect to the principle of legal certainty that a single 'P' should be identifiable …'[62]

Although Counsel for HMRC ' … considered that a better authority was *Vestey v IRC …*'[63] he seems to have accepted PBL's principle because he went on to say that in *Vestey v IRC* HMRC had:-

> ' … argued that they could choose which beneficiaries under a discretionary trust should be taxed. The House of Lords rejected this approach and construed the provision in question in a way which prevented HMRC having a discretion. In this case, [Counsel for HMRC] argued that HMRC did not need to choose between different parties for the role of 'P': there was only one 'P' in this case i.e. [PBL].'[64]

In the Upper Tribunal, Mr Justice Morgan seems to have accepted that more than one person could have been identified as 'V' in respect of the relevant transactions. Similarly he seems to have accepted that more than one person could have been identified as 'P':-

> 'The first step therefore is to identify 'V'. SSD disposed of a freehold in the land and so, prima facie, SSD could be 'V'. Can it be said that PBL also disposed of a freehold in the land and so PBL could also, or alternatively, be 'V'? Or, in the case of PBL, does one apply section 45(3) and the reasoning in DV3 and say that because the performance of the contract of 5 April 2007 in favour of PBL is disregarded, PBL cannot have disposed of a chargeable interest? Can it be said that MAR disposed of a leasehold interest in the land and so MAR could, also or alternatively, be 'V'?
>
> The second step is to identify 'P'. PBL could be 'P' (say, P1) on the basis that it acquired the freehold on completion of the contract of 5 April 2007, unless one applies section 45(3) and the reasoning in DV3 to say that PBL did not acquire the freehold. MAR could be 'P' (say, P2) on the basis that it acquired the freehold on completion of the contract of 29 January 2008. PBL could be 'P' (say, P3) on the basis that it acquired the lease derived out of the freehold.'[65]

Indeed the following table indicates that if one regards both the Seven Steps and the Further Transactions as Scheme Transactions, there could be multiple combinations of 'V' and 'P'.

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61 FtT Decision, para. 127
62 FtT Decision, para. 126
63 FtT Decision, para. 166
64 FtT Decision, para. 166
65 Upper Tribunal Decision, paras. 60 & 61

Alternative Identifications of 'V' and 'P'

	'V'	'P'	The Scheme Transactions[66]
1	The SSD by virtue of its disposal of the Freehold to PBL	PBL by virtue of the acquisition of the Freehold from the SSD	All seven Steps and the three Further Transactions
2	The SSD by virtue of its disposal of the Freehold to PBL	MAR by virtue of its acquisition of the Freehold from PBL	All seven Steps and the three Further Transactions
3	The SSD by virtue of its disposal of the Freehold to PBL	PBL by virtue of the grant to it of the Superior Lease by MAR	All seven Steps and the three Further Transactions
4	The SSD by virtue of its disposal of the Freehold to PBL	PBDL by virtue of the grant to it of the Underlease	All seven Steps and the three Further Transactions
5	PBL by virtue of its disposal of the Freehold to MAR	MAR by virtue of its acquisition of the Freehold from PBL	All seven Steps and the three Further Transactions
6	PBL by virtue of its disposal of the Freehold to MAR	PBL by virtue of the grant to it of the Superior Lease by MAR[67]	All seven Steps and the three Further Transactions
7	PBL by virtue of its disposal of the Freehold to MAR	PBDL by virtue of the grant to it of the Underlease	All seven Steps and the Three Further Transactions
8	MAR by virtue of its grant of the Superior Lease	PBL by virtue of the grant to it of the Superior Lease by MAR	All seven Steps and the Three Further Transactions
9	MAR by virtue of its grant of the Superior Lease	PBDL by virtue of the grant to it of the Underlease	All seven Steps and the Three Further Transactions

[66] For this purpose we take a wide view of the meaning of 'Scheme Transactions' (see the discussion above)

[67] If 'V' and 'P' were both PBL, the notional transaction under s.75A would be an acquisition of the Freehold from PBL by PBL. A Court might well balk at imposing SDLT on such a hypothetical transaction but that is the result of a literal reading of the provisions. Section 75A(4) provides that 'there shall be a notional land transaction' and a land transaction is a chargeable transaction it if is not a transaction that is exempt from charge

	'V'	'P'	The Scheme Transactions[66]
10	PBL by virtue of its grant of the Underlease	PBDL by virtue of the grant to it of the Underlease	All seven Steps and the Three Further Transactions

It might be argued in respect of Row 1, PBL's acquisition of the Freehold from the SSD, that PBL does not meet the condition of s.75A(1)(a) that it acquires a chargeable interest. We have seen that where, as in PBL's acquisition of the Freehold, a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance, s.44(2) provides that the person is not to be regarded as entering into a land transaction by reason of entering into the contract. A land transaction is any acquisition of a chargeable interest.[68] So it might be argued that if PBL is not to be regarded as entering into a land transaction in making the contract to acquire the Freehold from the SSD, the making of the contract cannot have been the acquisition of a chargeable interest by PBL within s.75A(1)(a).

Where, as was the case by virtue of PBL's sale of the Freehold to MAR, there is a subsale (referred to as a 'Transfer of Rights') as a result of which a person other than the original purchaser under the Original Contract becomes entitled to call for a conveyance to him of the subject matter of the Original Contract, under s.45(3) the completion of the Original Contract at the same time and in connection with, the completion of the Secondary Contract is to be disregarded in applying s.44. If the completion of PBL's acquisition of the Freehold is to be disregarded in applying s.44, one might argue that that completion also could not be an acquisition within s.71A(1)(a).

Therefore, one might argue, neither PBL making the contract to acquire the Freehold nor the completion of that contract could be an acquisition within s.75A(1)(a).

In reply, one might argue that s.44(2) merely treats what is in fact a land transaction by virtue of being an acquisition of a chargeable interest as not being a land transaction rather than as not being an acquisition of a chargeable interest. As always it is a question of how far one follows the logical consequences of a deeming provision.[69]

In the remainder of this article we shall assume that PBL's acquisition of the Freehold from the SSD is capable of having been an acquisition of the chargeable interest under s.75A(1)(a).

The FtT's Approach

In the FtT and in the Upper Tribunal PBL had argued that in order to so construe s.75A that it is kept within reasonable bounds and that there should not be multiple persons who are 'V' and 'P', in respect of the same transactions, it must be restricted to situations where 'P' was a person who had a motive of avoiding SDLT in respect of the

[68] Section 42(1)
[69] See *East End Dealings Ltd v Finsbury BC* [1952] 2 Ac 109 HL; *Marshall v Kerr* [1994] STC 638

Scheme's Transactions.[70] The FtT had, in effect, accepted that the scope of s.75A had to be restricted to tax avoidance transactions but had defined the necessary element of avoidance, not by reference to motive, but by reference to whether tax had objectively been avoided. That was to be determined by comparing the actual SDLT which would have been charged on the Scheme Transactions with the tax which would have been charged on an hypothetical set of comparative transactions.[71]

So, the FtT had attempted to deal[72] with the problem of multiple identifications of 'V' and 'P' by restricting the operation of s.75A to transactions which resulted in the avoidance of tax and by identifying 'V' and 'P' by reference to that avoidance.[73]

Mr Justice Morgan's Approach

As we have seen, Mr Justice Morgan in the Upper Tribunal said:-

> 'I regard the possibility of there being more than one person who is 'V' and more than one person who is 'P' as being unsatisfactory and I would be reluctant to accept that interpretation of sections 75A to 75C.'[74]

In respect of the identification of 'P', Mr Justice Morgan did not find the FtT's approach 'to be appropriate'.[75] He did not suggest any principle by which the construction of the very broad wording of the section might be constrained. Instead he began his analysis with the identifications of 'V' and 'P' made by the parties of the case:-

> 'I will therefore continue my attempt to apply these sections to the facts of this case, concentrating on the submissions which were made.'[76]

The Identification of 'V'

In respect of the identification of 'V' he said:-

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

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70 FtT Decision, para. 120. Upper Tribunal Decision, para. 49
71 FtT Decision, para. 155. Upper Tribunal Decision, para. 48
72 FtT Decision, paras. 235, 239 - 246
73 Although as Mr Justice Morgan pointed out this could still result in more than one person being 'P' where more than one person avoided tax by means of the transactions
74 Upper Tribunal Decision, para. 66
75 Upper Tribunal Decision, para. 73
76 Upper Tribunal Decision, para. 66

been able to identify in the statutory provisions themselves a convincing reason for this choice of 'V'.'[77]

Mr Justice Morgan did not say what the relevant provisions of s.75A mean. He put his conclusion in a weak negative: that he did not think that the parties' identification of 'V' was wrong. It is true, as we shall see, that he went on to consider whether PBL or MAR is 'P' but only on the basis that these are the alternative identities for which the Respondent and Appellant contended. At a stroke Mr Justice Morgan was able to ignore the difficulty that, on a literal reading, this section has the result that multiple parties could be 'V' and 'P', that it provides no express priority of one identification of 'V' over another or of one identification of 'P' over another, that, if there are multiple 'V's and 'P's, there will also be multiple notional transactions and that that will result either in multiple assessments or in some arbitrary decision to assess one notional transaction and not another or to allocate a single assessment between multiple persons identified as 'P'.

An Abdication of Responsibility

This is surely an abdication of the responsibility to construe the provisions rather than an exercise in their construction. Construing a legislative provision is deciding what it means. That will involve taking account of its context and the meaning, once determined, may apply in different ways to different facts. But if the meaning of the same words is to change from case to case according to some principle which cannot be articulated the statutory provision will, in effect, be meaningless for there will be no way of determining what is its meaning save by the exercise by the Tribunal and the Court of an arbitrary discretion in respect of each case.

The Identification of 'P'

Mr Justice Morgan rejected the approaches of the FtT and the parties as to the identity of 'P'. In respect of the approach of the FtT he said:-

> 'The FTT thought that one should identify the party who was otherwise avoiding tax. The FTT was also influenced by an approach which distinguished between the party who was acquiring the property and the funder of that party ...
>
> As regards the suggestion that one should select the party who is avoiding tax, I have already held that the section is not restricted to a case where it is the purpose of any party to avoid tax.[78] Therefore, this approach does not help where (as may be the case) no party has the purpose of avoiding tax; further, this approach does not help where two or more persons have the purpose of avoiding tax. As regards the suggestion that one can distinguish between a party acquiring the property and the funder of that party, there is no support in the statutory wording for making that distinction when identifying 'P'.'[79]

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[77] The difficulties with the FtT's approach are beyond the scope of this Article. They are set out in the chapter in *Taxline Tax Planning 2014/15* (2014 pub. Tax Faculty) entitled 'Stamp Duty Land Tax' by Sharon McKie (hereinafter called in this article the '*Taxline Tax Planning* Article')

[78] The FtT, however, had not suggested that whether a person was avoiding tax should be determined by whether he had a purpose of doing so

[79] Upper Tribunal Decision, paras. 72 - 73

As to the approaches of the Parties, he said:-

> 'As to PBL's submission that 'P' is the first person in the scheme who so qualifies and HMRC's submission that 'P' is the last person in the scheme who so qualifies, I can see no warrant in the statutory language for either approach. Nor, unfortunately, am I able to agree with HMRC's submission that the choice of PBL as 'P' is "obvious".'[80]

Proceeding on the assumption that the SSD is 'V', and assuming that the Further Transactions cannot form part of the Scheme Transactions, Mr Justice Morgan was left only with the possibilities set out in rows 1 to 3 of our table. He did not examine the possibility in row 1, where PBL is 'P' by virtue of its acquisition of the Freehold from the SSD (which he refers to as 'P1'), because:-

> '... there appears to have been common ground [between the Parties] that PBL (as a possible P1) was not 'P'. I will therefore continue my analysis on the basis that this approach is correct.'

It is a peculiarity of his analysis that he records that PBL only accepted that this possibility did not apply because it had argued that s.45(3) resulted in its not being the vendor of the Freehold for these purposes, an argument that he rejected, and yet he followed PBL in excluding the possibility from consideration.

In this way Mr Justice Morgan was able to consider only the possibilities that MAR is 'P' and that PBL is 'P' by virtue of the grant to it of the Superior Lease by MAR.

He first considered, so as to dismiss it, an argument of PBL that, if 'V' and 'P' were the SSD and PBL (by reason of the grant to it of the Superior Lease) respectively,[81] s.75A(7) disapplied s75A. As we have seen, s.75A(7) provides:-

> '... This section does not apply where subsection (1)(c) is satisfied only by reason of -
> (a) sections 71A to 73, or
> (b) a provision of Schedule 9.'

PBL argued that were it not for s.71A, SDLT would have been payable by MAR on its acquisition of the Freehold for a consideration of £1.25bn thus giving a liability equal to the liability on the notional transaction. In respect of this, Mr Justice Morgan said:-

> 'The reason why the SDLT paid by all the participants in the scheme transactions is nil is a combination of section 45(3), 71A(2) and (3). The outcome whereby the SDLT was nil was not "only" by reason of section 71A.'[82]

This seems to the Authors to be correct.

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[80] Upper Tribunal Decision, para. 74
[81] That is, in accordance with row 3 of our table
[82] Upper Tribunal Decision, para. 78

THE DEEMED CONSIDERATION

Mr Justice Morgan then turned to the deemed consideration for the notional land transaction under s.75A(4)(b).[83] We have seen that s.75A(5) provided that:-

> '(5) The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount) –
>
> (a) given by or on behalf of any one person by way of consideration for the scheme transactions, or
>
> (b) received by or on behalf of 'V' (or a person connected with 'V' within the meaning of section 839 of the Taxes Act 1988) by way of consideration for the scheme transactions.'

If the Scheme Transactions are Steps 1 - 7, that would seem to result in SDLT being charged on £1.25bn, the consideration given by MAR for the Freehold and that was indeed the amount contended for by HMRC and found by the FtT. If 'P' was PBL by virtue of the grant to it of the Superior Lease, rather than MAR by virtue of its acquisition of the Freehold, it would seem peculiar that PBL should be taxed by reference to the larger amount of consideration given by MAR rather than by reference to the consideration which it had given. Judge Nowlan agreed with the FtT that this was indeed the result of the provisions but was uncomfortable with his conclusion:-

> '...I feel compelled by the statutory wording, and notwithstanding the incoherence of the result, to treat the consideration as £1.25 billion, as HMRC contend that it should be. While these are the two matters on which we [Judge Nowlan and Mr Justice Morgan] have failed to agree, it may be worth recording that we certainly agree that these matters are far from clear and that the relevant statutory drafting leaves very much to be desired, and I for one am pleased that Morgan J's decision on the quantum of consideration (in other words £959 million rather than £1.25 billion) will prevail. I feel compelled to explain why I consider that the statutory drafting drives me to the opposite conclusion, but I readily concede that I find the result incoherent.'[84]

Mr Justice Morgan thought that the way out of this difficulty was to be found in s.75B which provided that:-

> '(1) In calculating the chargeable consideration on the notional transaction for the purposes of section 75A(5), consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest from 'V' to 'P'.
>
> (2) A transaction is not incidental to the transfer of the chargeable interest from 'V' to 'P':-
>
> (a) if or in so far as it forms part of a process, or series of transactions, by which the transfer is effected,

[83] Determined under s.75A(5)
[84] Upper Tribunal Decision, para. 132

(b) if the transfer of the chargeable interest is conditional on the completion of the transaction, or
(c) if it is of a kind specified in section 75A(3).

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

(a) the construction of a building on property to which the chargeable interest relates,
(b) the sale or supply of anything other than land, or
(c) a loan to 'P' secured by a mortgage, or any other provision of finance to enable 'P', or another person, to pay for part of a process, or series of transactions, by which the chargeable interest transfers from 'V' to 'P'.

(4) In subsection (3) –

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

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

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

Mr Justice Morgan pointed out[85] that s.75B(1) on its terms applies to transactions which are 'incidental to the transfer of the chargeable interest from 'V' to 'P'.' This is extended by s.75B(6) to transactions which are 'incidental to a disposal by 'V' of an interest acquired by 'P''. Where, as in the transactions at issue in *Project Blue* on the assumption that 'V' and 'P' are determined under row 3 of our table, 'P' does not acquire the same interest as is the subject of 'V''s disposal, the transaction is neither a transfer of the chargeable interest from 'V' to 'P' nor a disposal by 'V' of an interest acquired by 'P'.

What is the result of that? Surely it is that the transaction is not merely incidental to a transfer of the chargeable interest from 'V' to 'P' or to a disposal by 'V' of an interest acquired by 'P'; it has no relationship to it whatsoever. The use of the definite article in the reference to 'the transfer' in s.75B(1) must indicate that the transfer refers back to the 'notional transaction' referred to in the opening line of that sub-section. Mr Justice Morgan, however, adopted two approaches put forward by PBL.

The first approach was:-

> '... to seek to find in the scheme of transactions, if possible, a transaction which involved a disposal of the freehold by 'V' and the acquisition of the freehold by PBL. Such a transaction did indeed occur; it was the transfer from SSD to PBL

[85] Upper Tribunal Decision, para. 82

> for £959 million. Then one asks if the other parts of the scheme of transactions were merely incidental to that actual transaction. PBL submitted that the other parts of the scheme were incidental as they were not for the purpose of SSD transferring the freehold to PBL but were for the purpose of PBL raising funding for the purchase and for the development. I also consider that PBL could say that the arrangements between PBL and MAR come within section 75B(3)(c) and are not within section 75B(2)(c), cross referring to section 75A(3)(c), which refers to a subsale;[86] although the transfer from PBL to MAR was undoubtedly a subsale it was not a subsale by which PBL acquired the freehold but was a subsequent subsale by which it disposed of the freehold.'[87]

The search for an actual transaction to which the scheme transactions might be incidental, however, would seem to be misconceived. There is nothing in s.75B which suggests that the transfer (or, applying s.75B(6), disposal) referred to is not the notional land transaction. If the notional land transaction is neither the transfer of a chargeable interest from 'V' to 'P', nor a disposal by 'V' of an interest acquired by 'P', then it surely follows that s.75B does not apply so that the transaction concerned is not to be ignored. Even if in some way s.75B did have some application in these circumstances, it is still clear that the transaction by reference to which one determines whether a scheme transaction is incidental is the notional land transaction. Of course, there is a difficulty in determining whether an actual transaction is incidental to an hypothetical transaction which, of course, does not really exist. That is inherent in the section. What the section does not do, however, is direct one to select one of the Scheme Transactions as the key transaction simply because it has one party, but not both parties, in common with the notional land transaction.

As we shall see, however, Mr Justice Morgan accepted PBL's argument on this point.

Mr Justice Morgan went on to say that:-

> 'PBL's second approach relies on the words "in so far as" in section 75B(1). PBL submits that even if it is not possible to say that the transactions between PBL and MAR were merely incidental to the acquisition by PBL of the freehold, then the transactions between PBL and MAR can be apportioned. One can, and should, divide the transactions so that one separates the part of the transaction whereby MAR provided consideration to reimburse PBL for its acquisition of the freehold from the parts of the transaction whereby MAR provided consideration to PBL in relation to SDLT and by way of further funding. One could then hold that the part of the transaction whereby MAR paid £959 million to PBL was not incidental to PBL acquiring the freehold but that the parts of the transaction

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[86] This is very odd. Section 75A(3)(c) does not refer to a sub-sale but to the 'grant of a lease'

[87] Upper Tribunal Decision, para. 86. What Mr Justice Morgan appears to have been saying here is that MAR's acquisition is incidental to the transfer from the SSD to PBL (which he had arbitrarily chosen to identify with the notional transfer of a chargeable interest from 'V' to 'P' referred to in s.75B(1). That s.75B(3)(c) says that it may be so incidental because it is 'any other provision of finance to enable [PBL] … to pay for part of a process, or series of transactions, by which the chargeable interest transfers from' SSD to PBL. That it is not prevented from being so incidental by s.75B(2) because it does not fall within s.75B(2)(c) as being of a kind specified in s.75A(3). If that is his argument it is dependent on his decision in the first part of the passage to consider the actual transfer from SSD to PBL, in applying s.75B, rather than the notional land transaction under s.75A(1)(b) to which s.75B(1) plainly refers

> whereby MAR agreed to pay to PBL the sum which PBL was liable to pay by way of SDLT and to provide further funding were merely incidental to PBL's acquisition of the freehold. PBL submitted that one way of reaching this result was to read into section 75B(1) the words "the payment of the consideration or" after the words "if or in so far as". I do not think that reading in those words is necessary although reading them in would seem to produce the same result. Reading in words is not necessary because section 75B(1) expressly provides for the possibility that a compound transaction can be split so that the consideration for one part of it can be seen to be not incidental to the acquisition of the chargeable interest by 'P'.'[88]

The difficulty here is that the transaction under which consideration of £1.25bn was payable by MAR was the sale to it of the Freehold. There was not one part of the transaction which was a sale of the Freehold and another part which was something else. The consideration given under that transaction might have been calculated by reference to SDLT and by way of further funding, but all of it was given in consideration of the Freehold. There is nothing in the FtT's finding of facts to suggest that the FtT had found that the reality of the situation was that MAR was paying a part of its consideration for something other than the Freehold. If the transaction by which MAR acquired the Freehold was incidental to a notional acquisition by PBL of the Freehold, then it is difficult to see on what principle any of the other transactions forming the Scheme Transactions would not also be so incidental.

CONCLUSION OF THE UPPER TRIBUNAL'S DECISION ON THE SUBSTANTIVE ISSUE

In his partially dissenting judgment, Judge Nowlan considered that s.75A plainly did identify more than one person who was 'P' unless its construction was restricted by some wider principle not expressly set out in the section. He succinctly stated why Mr Justice Morgan's approach is unsatisfactory:-

> 'While Morgan J. feels unable to apply what I would call these two general principles to assist in identifying 'P', I find it significant that his careful analysis of all the possibilities still ends up with identifying two, if not more than two, possible approaches to identifying 'P'. He certainly ends up with the two possibilities of treating PBL as 'P', with the consideration then calculated as £959 million, or treating MAR as 'P' with consideration of £1.25 billion. Following all the careful analysis, there seems then to be no tie-breaker test as between the two, and while I accept the compelling good sense of choosing PBL as 'P' and treating the consideration as £959 million, I note that he does not explain why he makes this selection. Once one has identified 'P', I accept that under section 75A(5) one component in calculating the consideration is the largest amount of consideration given by any one person. This rule however assumes that 'P' has been identified. There is no rule that says that if A, B or even C might be 'P', then the party should be identified by taking the party whose facts occasion the highest, or the lowest amount of consideration, nor indeed is there any other tie-breaker.'[89]

[88] Upper Tribunal Decision, para. 88
[89] Upper Tribunal Decision, para. 146

Judge Nowlan considered that the construction of s.75A was confined by two overriding restricting principles, with the result that PBL was to be identified as 'P':-

> 'I therefore suggest that there are two glaring reasons why it is appropriate to treat PBL rather than MAR as 'P'. Properly analysed, it is far more realistic to say that the drafting error and the avoidance that we are seeking to counteract under section 75A consisted in the disregard of PBL's purchase under section 45(3), with the exemption under section 71A being entirely consistent with principle. Secondly, it is consistent with a basic principle of SDLT that the duty should be imposed on the purchaser and not the financier.
>
> ... I prefer to apply the rule that an anti-avoidance provision should most obviously seek to reverse the avoidance and once I have identified that the avoidance consists in PBL escaping SDLT on its purchase, by virtue of the drafting slip in section 45(3) the cogent answer seems to me to be, there being no other remotely credible basis of selection or allocation, that the duty should be imposed on PBL, and if possible in the amount of the duty realistically avoided. I accept that as I interpret the detailed provisions, I am going to fail to achieve the second limb of that objective, but I can achieve the object of treating PBL as 'P'.'[90]

In effect, as we have said, Judge Nowlan agreed with the FtT which had found that tax avoidance, objectively determined, was an essential element for the application of the section. We shall not analyse the difficulties with that view here. They were set out in the *Taxline Tax Planning* Article. What Judge Nowlan's comments do explain is that without some such restricting principle, the existence of which Mr Justice Morgan rejected, the provisions of s.75A are so wide that they will result, in many circumstances, in two or more persons being 'V' and two or more persons being 'P' for the purposes of the provision, with the result that the same transactions will give rise to multiple assessments. That is contrary to the general principle that taxation should be imposed by clear words[91] and that HMRC should not have discretion as to whom, or in what sums, to assess.[92]

Mr Justice Morgan confessed that he had started his consideration of the case with a preconceived idea as to what the result should be:-

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

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[90] Upper Tribunal Decision, paras. 145 - 146

[91] *WT Ramsay v IRC* [1981] STC 174, HL at para. 179

[92] *Attorney General v Wilts United Dairies Limited* Times Law Reports 22nd July 1921

conventional analysis of the detailed statutory language. I must therefore enter the labyrinth of sections 75A to 75C.'[93]

It does not seem that Mr Justice Morgan was successful in putting aside his instinctive reaction, or that he really conducted a conventional analysis of the detailed statutory language. Rather, by arbitrarily deciding to ignore the fact that the statutory language read literally, resulted in more than one person being identifiable as 'V' and more than one person being identifiable as 'P', he failed to construe its meaning at all. His choice of the SSD as 'V' and of PBL as 'P' was merely arbitrary.
It must be tempting for judges to arrive at what seems to be a just decision by making arbitrary logical jumps of this sort but, in doing so, they perpetrate an injustice on the body of taxpayers generally. SDLT is a self-assessed tax. If s.75A is not restricted by some principle such as that adopted by the FtT, or some other more rational principle, how is a taxpayer to determine the identity of 'V' and 'P' for the purposes of his self-assessment?

Section 75A is extremely unsatisfactory legislation. It surely requires repeal and replacement by a more exactly drafted provision. In the meantime, unsatisfactory though the FtT's Decision was and although it led to an arbitrary result which was grossly unfair to the taxpayer in the case, it at least provided a principle which taxpayers could apply in making their self-assessments. The Upper Tribunal has removed even that degree of probability, leaving the taxpayer with no option but to make his self-assessment as best he may and to risk being penalised for making an incorrect return.

THE ADMINISTRATIVE ISSUE: THE CORRECT SUBJECT OF THE APPEAL

The case raised a number of other interesting issues, including a fascinating administrative argument advanced by PBL.

As we have seen, the appeal was against HMRC's amendment of PBL's return, (LTR1) in respect of Step 5, the transfer of the freehold from the SSD to PBL under the contract that was entered into under Step 1. PBL argued that if a liability arose under s.75A, it arose not in relation to the actual transaction under Step 5, but in respect of a notional transaction deemed to take place under s.75A(4) which, it will be recalled, provides that:-

'(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'.'

[93] Upper Tribunal Decision, para. 68

PBL argued that:-

> 'It was clear from the details contained in … ['LTR1'] … that the return related to [a] disregarded transaction. It did not relate to the notional transaction for which HMRC argued under section 75A. HMRC could not, in [the Appellant's] submission, take one land transaction return and amend it to apply to a completely different (ie notional) transaction.'[94]

The FtT's Decision: The Administrative Issue

In respect of this argument, the FtT first referred to enquiries into land transaction returns explaining that:-

> 'Paragraph 13 of Schedule 10 defines the scope of an enquiry under Part 3. So far as material, paragraph 13 (1) provides as follows:-
>
> > "An enquiry extends to anything contained in the return, or required to be contained in the return, that relates –
> >
> > (a) to the question whether tax is chargeable in respect of the transaction, or to the amount of tax so chargeable...."'[95]

It went on to state that:-

> 'In our view, the fact that HMRC amended the return in respect of the actual transfer of the freehold by the MoD to the Appellant rather than a return in respect of a notional transfer of the same freehold between the same parties, does not invalidate the closure notice or the amendment.
>
> There is nothing in paragraph 23 of Schedule 10 that precludes an amendment to a return in respect of the actual transfer in accordance with the provisions of section 75A which applies to a notional transfer. The conclusion of HMRC was that the tax due was £38.36 million (and by the amendment to HMRC's Statement of Case the Tribunal is asked to increase the amendment to the self-assessment under paragraph 42 (3) Schedule 10 FA 2003 to show tax due of £50m).
>
> We do not consider that the terms of paragraph 13 of Schedule 10 contradict this conclusion. The enquiry can extend to anything contained in the return. The return related to a "scheme transaction" for the purposes of section 75A. We do not read the reference in paragraph 13 (1) (a) to "the transaction" as precluding an enquiry into whether the actual transfer of the freehold from the MoD to the Appellant (which by virtue of section 45 (3) was not, in fact, a land transaction) can be re-characterised as a notional transaction under section 75A.
>
> In this case, the return amended by the closure notice was a return in respect of the same parties to the notional land transaction (i.e. the MoD and the Appellant) and related to the same interest in the Property. The closure notice of 13 July 2011 made the amendments necessary to give effect to HMRC's conclusions in

[94] FtT Decision, para. 109
[95] FtT Decision, para. 300

respect of their enquiry. The only amendment made was to adjust the tax payable by the Appellant.'[96]

The FtT does not seem to have given due weight to the fact that Sch. 10, para. 13(1) restricts the enquiry to:-

> ' … anything contained in the return, or required to be contained in the return, that relates –
>
> (a) to the question whether tax is chargeable in respect of the transaction, or
> (b) to the amount of tax so chargeable... '

So the enquiry cannot extend beyond anything that is contained in the return that relates to the transaction referred to in Sch. 10, para. 13(1)(a), which must be the transaction that is the subject of the return.

HMRC can amend a taxpayer's return under Sch. 10, para. 23 but only in respect of the conclusions of its enquiry. Plainly if its enquiry can only be in relation to the transaction which is the subject of the return, and the return it amends is in respect of an actual transaction and not a notional transaction under s.75A(4), any conclusion which is not in respect of the actual transaction cannot be a conclusion of the enquiry and, therefore, HMRC cannot make any amendment in respect of a notional transaction. It is clear that a notional land transaction under s.75A(4) must be a different transaction to any of the Scheme Transactions which actually take place. Yet the FtT said that:-

> 'We do not read the reference in paragraph 13(1)(a) to "the transaction" as precluding an enquiry into whether the actual transfer of the freehold from the MoD to the Appellant … can be recharacterised as a notional transaction under section 75A.'[97]

In this, it surely asked itself the wrong question. It should have asked whether there is anything in ss.75A–75C to allow one to identify the notional transaction under s.75A(4) with any of the Scheme Transactions under s.75A(1)(b)? The answer must surely be that there is not. The Scheme Transactions are between various parties and in respect of various interests. In choosing to amend LTR1, it is true that HMRC amended the return in respect of the scheme transaction that most nearly corresponded to the notional transaction, but it was not exactly the same and the similarities were to some extent accidental. The terms of the notional transaction are determined under s.75A(1), (5) and (6). In this case, it happened that the notional transaction was between the same parties, related to the same interest in the Property and was deemed to take place on the same date as the actual transaction that was the subject of the amended return, LTR1 but the consideration for the two transactions differed. In any event, it was an accident of the facts of the case that the parties and dates of the two transactions were the same. If the lease to the Appellant had been granted by MAR on 1st February 2008 and not on 31st January, the dates of the notional and actual transactions would have differed. If other PBGHL Group companies had been involved

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[96] FtT Decision, paras. 301 - 304
[97] FtT Decision, para. 303

in the transactions, there might have been no actual transactions at all between the parties to the notional land transaction.

The FtT gave no reason why one should identify the notional land transaction with one out of several actual scheme transactions or why one should do so even where the terms of the notional and comparative transactions differ.

On an appeal, the Tribunal may only amend a self-assessment if it appears to the Tribunal that PBL is overcharged by a self-assessment or is undercharged by it (Sch. 10, para. 42). Thus, the Tribunal's decision is confined to the subject matter of the self-assessment. The self-assessment which is the subject of the appeal was the self-assessment in respect of the actual land transaction and not in respect of the notional land transaction under s.75A(4).

Because it is clear that HMRC's amendment could not have been in accordance with the conclusions of its enquiry into that return, for it is clear that no liability arose in respect of the actual land transaction that was its subject, it must be that the FtT was under a duty to restore the taxpayer's self-assessment.

The Upper Tribunal's Decision: The Administrative Issue

On this issue, Judge Nowlan agreed with Mr Justice Morgan. Mr Justice Morgan's analysis, therefore, can be taken as representing the views of both. Mr Justice Morgan said that:-

> 'The first question is how to interpret the return numbered 307388936MC [the LTR1]. Should that return be read as a return in relation to the actual transfer from SSD to PBL or as a return in relation to the notional land transaction whereby, pursuant to section 75A, SSD disposed of its freehold and PBL acquired that freehold for a consideration of £959 million? The principal, and perhaps the only, point in favour of reading it as a return of the actual transfer is that the return referred to a contract of 5 April 2007; a reference to that contract had no part to play in a return of the notional land transaction.'[98]

Mr Justice Morgan's decision that the LTR1 which the FtT had found was in respect of Step 5, (the transfer of the property from the SSD to PBL in completion of the contract under Step 1), should indeed be regarded as a return of the notional land transaction was based on the following argument:-

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

[98] Upper Tribunal Decision, para. 117

> With some hesitation, I consider that the return in question can be considered to be a necessary return, rather than an unnecessary return, and a return which performed PBL's obligation under section 76 to deliver a return. On this basis, it was a return in relation to the notional land transaction in accordance with section 75A.'[99]

With all due respect to Mr Justice Morgan, his suggestion that a taxpayer who did not consider that s.75A applied to impose a charge to tax on a notional transaction made a return of that notional transaction claiming that the SDLT liability arising on it was reduced to nil by an unspecified relief, a thing which was impossible because, if the SDLT on the notional transaction had been nil, the condition in s.75A(1)(c) could not have been satisfied, is startling. At para. 51 of the decision, Mr Justice Morgan quoted the summary of the principles to be applied to the construction of statutes which was made in *Pollen Estate Trustee Co v RCC*.[100] That summary in turn referred to the seminal House of Lords' decision in *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)*[101] which in turn quoted with approval[102] the remark of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Limited* that:-[103]

> 'The driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.'[104]

It has to be said that regarding PBL's return which the FtT found as a fact 'related to the completion on 31st January 2008 of the contract between the SSD and PBL dated 5th April 2007' actually related to a notional transaction arising under s.71A which the person completing the form did not consider arose seems to the Authors to be as unrealistic a view of the matter as is conceivable.

One would not dissent from Mr Justice Morgan's conclusions that the notional land transaction was notifiable under ss.76 and 77 (which concern notifiable transactions) in spite of the fact that s.77(1) at that time did not provide specifically that a notional land transaction under s.75A was a notifiable transaction although it was later amended to do so. The Authors also consider that, as the completion of PBL's acquisition of the Freehold from the SSD was to be disregarded under s.45(3), either Mr Justice Morgan was correct to say that the return was unnecessary or it wasn't a return at all. It is also true, as Mr Justice Morgan said, that PBL failed to perform its statutory duty to deliver a return in relation to the notional land transaction. None of that, however, would seem to lead to the conclusion that PBL must be presumed to have made a return which it did not think was required.

As PBL said HMRC's remedy, where a taxpayer fails to make a return of a land transaction, is to make a determination under FA 2003 Sch. 10, para. 25.

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99 Upper Tribunal Decision, paras. 123 & 124
100 *Pollen Estate Trustee Co v RCC* [2013] 3 All ER 742
101 *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51
102 *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51
103 *Collector of Stamp Revenue v Arrowtown Assets Limited* [2003] 6 ITLR 454
104 *Collector of Stamp Revenue v Arrowtown Assets Limited* [2003] 6 ITLR 454

Could HMRC Issue a Determination in respect of PBL's Failure to make a Return of the Notional Transaction?

If:-

> 'the Inland Revenue discover as regards a chargeable transaction that:-
>
> (a) an amount of tax that ought to have been assessed has not been assessed; or
> (b) an assessment to tax is or has become insufficient; or
> (c) relief has been given that is or has become excessive,
>
> they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.
>
> The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30.'

Paragraph 31(2A) provides that:-

> 'An assessment of a person to tax in a case involving a loss of tax –
>
> ... (b) attributable to a failure by the person to comply with an obligation under section 76(1) ... [105]
>
> ... may be made at any time not more than 20 years after the effective date of the transaction to which it relates.'

Paragraph 31(2A) was inserted by FA 2009 Sch. 51, para. 15 which received the Royal Assent on 21st July 2009. The provisions of FA 2009 Sch. 51 came into effect on the 1st April 2011.[106] If, as the Upper Tribunal found, s.75A applied, PBL was required to make a return of its notional land transaction by the 29th February 2008. Does para. 31(2A) permit HMRC to make an assessment now on that notional land transaction, even though para. 31(2A) was enacted almost a year and a half later? It does because, as of the time of writing, para. 31(2A) is in force, PBL has failed to make a return of the notional land transaction under s.76(1)[107] and less than twenty years have passed since the effective date, 31st January 2008, of the notional land transaction.

If HMRC were to make a determination in respect of a notional land transaction under para. 25(1), it appears that it could also charge a penalty equal, and in addition, to the tax charged.[108]

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105 Which imposes an obligation on the purchaser in respect of a notifiable transaction to deliver a return

106 FA 2003, FA 2009 s.99(2) and SI 2010/867 reg. 2(2)

107 Sch. 10, para. 31(2A)(b)

108 FA 2003, Sch. 10, para. 4 and Sch. 14, para. 8(3)

Even if PBL had been successful on the Administrative Issue, therefore, it is possible that it would have won only a Pyrrhic victory.

CONCLUSION ON THE UPPER TRIBUNAL DECISION ON THE ADMINISTRATIVE ISSUE

Although that may be so, it does not affect the fact that the Upper Tribunal's reasoning on this issue is deeply flawed.

The Courts seem to be particularly reluctant to allow taxpayers to escape taxation by reason of HMRC's administrative defaults although there have been some notable examples recently of taxpayers being successful on such grounds.[109] One cannot help thinking that Mr Justice Morgan's feeling that the taxpayer ought to be assessed has resulted in his ignoring the relevant statutory provisions in the most arbitrary of ways.

AN UNSATISFACTORY DECISION

Both on the substantive issue and on the administrative issue the Upper Tribunal's Decision is most unsatisfactory. We understand the case is to be heard in the Court of Appeal. One can only hope that the Court of Appeal will decide the matter on more conventional principles of construction and provide, as far as is possible, a coherent view of the operation of this incoherent legislation.

[109] *Bristol v West PLC v HMRC* [2014] UKUT 0073 TCC, *HMRC v McCarthy & Stone (Developments) Ltd and Anor* [2014] UK UT 0196 (TCC)