TC07102: HANNOVER LEASING WACHSTUMSWERTE EUROPA BETEILIGUNGSGESELLSCHAFT MBH; HANNOVER LEASING WACHSTUMSWERTE EUROPA VI GMBH & CO. KG

[2019] UKFTT 262 (TC)

CASE REFERENCE NUMBER: TC/2016/00913TC/2016/00916
FIRST-TIER TRIBUNAL (TAX CHAMBER)

DECISION NUMBER: TC07102

APPELLANT: HANNOVER LEASING WACHSTUMSWERTE EUROPA BETEILIGUNGSGESELLSCHAFT MBHHANNOVER LEASING WACHSTUMSWERTE EUROPA VI GMBH & CO. KG

RESPONDENTS: THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

TRIBUNAL CHAIRMAN: JUDGE ALEKSANDER

LOCATION: SITTING IN PUBLIC AT TAYLOR HOUSE, LONDON

DATE: 22 TO 24 JANUARY 2018, DECISION DATE 18 APRIL 2019

Stamp duty land tax – tax avoidance – application of s75A Finance Act 2003 – application of Part 3 of Schedule 15, Finance Act 2003 - identification of V and P – chargeable consideration on notional land transaction

FOR THE APPELLANTS: MICHAEL THOMAS, COUNSEL, INSTRUCTED BY BERWIN LEIGHTON PAISNER LLP

FOR THE RESPONDENT: JONATHAN BREMNER, COUNSEL, INSTRUCTED BY THE GENERAL COUNSEL AND SOLICITOR TO HM REVENUE AND CUSTOMS

Decision

1.

These appeals are against alternative determinations in respect of stamp duty land tax ("SDLT") which were made by HMRC on 31 July 2015 under s75A, Finance Act ("FA") 2003 ("s75A"). The Appellants are **Hannover Leasing Wachstumswerte** Europa Beteiligungsgesellschaft mbH ("the Hannover Company") and **Hannover Leasing Wachstumswerte** Europa VI GmbH & Co KG ("the Hannover Partnership").

2.

At the hearing, Mr Thomas represented the Appellants and Mr Bremner represented HMRC. I reserved my decision at the end of the hearing. Just as I was finalising my decision, the Supreme Court released their decision in *Project Blue v HMRC* [2018] UKSC 30. In the light of that decision, I invited the parties to make written submissions in respect of the Supreme Court's decision. This decision reflects not only the evidence given and submissions made at the hearing, but also the subsequent written submissions of the parties.

3.

At the commencement of the hearing I informed the parties that I had (more than twenty years previously) represented Greycoat PLC and some of its subsidiaries whilst it was a listed company, although not in relation to any of the properties that are the subject of this appeal, and that I am aware that some of my current clients have had dealings with Greycoat Real Estate LLP (as well as being a fee-paid judge, I am also a solicitor in private practice in London). I invited the parties to make submissions as to whether I should recuse myself. Neither the Appellants nor HMRC raised any objection to me hearing this appeal.

4.

I heard oral evidence on oath from Martin Poole, Laurentius Rucker and Heather Corben. In addition, bundles of documents were submitted in evidence.

5.

Mr Poole was the finance director of the Greycoat group from the early 1990s until his retirement in December 2015, and was, in particular, the finance director of Greycoat General Partner Limited as general partner of Greycoat Central London Office Development LP ("GCLOD").

6.

Mr Rucker is the managing director of the Hannover Company and is the managing director of **Hannover Leasing Wachstumswerte** Europa VI Verwaltungsgesellschaft mbH, the general partner of the Hannover Partnership. The Hannover Company is a subsidiary of Hannover Leasing GmbH & Co KG. In this decision, references to "Hannover" are to Hannover Leasing GmbH & Co KG and its subsidiary undertakings (including the Hannover Company and the Hannover Partnership).

7.

Mr Poole and Mr Rucker were witnesses of fact, and I found their evidence to be reliable, and it was not challenged to any significant extent. I have taken their evidence into account in reaching my findings as regards the facts in this appeal.

8.

Miss Corben is a solicitor admitted in England and Wales and is a partner working in the tax group at Forsters LLP. Prior to joining Forsters in 2016, she was a partner at King & Wood Mallesons LLP (formerly SJ Berwin LLP) where she was head of the London tax group, and co-head of tax for Europe and the Middle East. She has long standing expertise in relation to the taxation of land and buildings transactions, including property investment funds. Miss Corben gave evidence as an expert, both as to the state of the property market in London at the relevant times, and as to the manner in which property related transactions are (and were) structured. I was, somewhat reluctantly, persuaded to hear her evidence on the basis that I would then place such weight on it as I considered appropriate. Her evidence as to the state of the London property market was largely irrelevant to the issues in this appeal. Her evidence in relation to the structuring of property transactions was, for the most part, evidence in relation to English law (especially tax law), as to which this Tribunal is able to reach its own conclusions. For these reasons, I have placed no reliance on Miss Corben's evidence, and have ignored it in reaching this decision.

30 Crown Place ownership structure

9.

GCLOD was established in 2006 as a fund backed by a small group of investors and managed by a company in the Greycoat group. GCLOD was established to acquire, develop, and invest in offices in central London. 30 Crown Place (“the property”) is an office building in London that was acquired for GCLOD's investment portfolio in October 2006.

10.

On the basis of the evidence before me, I find that the structure used to effect the acquisition was as follows (and, from my own knowledge, I am aware that it was not untypical of structures used to acquire and hold investments in commercial property at the time).

11.

By a unit trust instrument dated 18 October 2006, a unit trust scheme known as the Crown Place Guernsey Feeder Trust was established in Guernsey ("the GPUT") with Marlborough Trust Company Limited ("the Trustee") as the sole trustee. 34,000,000 units in total were issued by the GPUT: 33,898,000 units were issued to GCLOD, representing 99.7% of the units in issue. The balance of 102,000 units (0.3%) were issued to a second unit holder, Greycoat Unitholder Limited ("GUL"). It is not in dispute (and I find) that the Trustee was incorporated and tax resident in Guernsey, and that the GPUT was centrally managed and controlled by the Trustee in Guernsey (and therefore tax resident in Guernsey).

12.

It was also not in dispute (and I find) that GPUT is a collective investment scheme, under which the Trustee holds assets (in this case UK property) on trust for the benefit of the unitholders in the GPUT, who are the beneficiaries under the trust. The interests of the beneficiaries are represented by transferable units, title to which is recorded in a register of unitholders. The unit trust instrument provides that the register is to be kept in Guernsey. The GPUT is not “authorised” for UK tax or regulatory purposes (and so its units cannot be readily marketed to the general public).

13.

The terms of the GPUT's unit trust instrument provide for its income to be subject to what is commonly (although probably inaccurately) known as a "Baker trust" (named after *Baker v Archer Shee* [1927] AC 844). Under the terms of the unit trust instrument, the GPUT's income does not form part of the trust fund. Instead the income is allocated to the unitholders *pro rata* to their holding of units. The income is distributed to unit holders after deducting revenue expenses and taxes arising in respect of such income. In contrast capital is retained by the Trustee and held subject to the terms of the trust created by the unit trust instrument.

14.

The Trustee (in its capacity as trustee of the GPUT), was at all material times the sole limited partner in Greycoat Crown Place Limited Partnership ("the Greycoat Partnership"), a limited partnership established under English law and registered as a limited partnership under the Limited Partnerships Act 1907 with number LP11570. The original partnership agreement was dated 15 September 2006, but it was subsequently amended and restated on 23 October 2006, when the Trustee acquired its limited partnership interest. The sole general partner of the Greycoat Partnership was Greycoat Crown Place General Partner Limited ("the General Partner") a company incorporated in England and tax resident in the UK. Profits of the Greycoat Partnership were allocated as to 99% to the GPUT and 1% to the General Partner.

15.

The Greycoat Partnership acquired 30 Crown Place using a combination of funds provided by the GCLOD investors (presumably passed down through the chain of ownership). There is limited evidence as to how this was passed down, although the Greycoat Partnership agreement refers to a loan provided by the GPUT to the Greycoat Partnership ("the LP Loan"). In addition, the Greycoat Partnership borrowed under a loan facility with the London branch of Eurohypo AG, a German bank, which was secured on the property.

UK taxation of 30 Crown Place ownership structure

16.

The Greycoat Partnership is “fiscally transparent” for UK tax purposes (perhaps not a technically accurate description, but a useful shorthand for the purposes of this decision, where the precise nature of fiscal transparency under UK tax law is not in issue). For UK tax purposes, income and gains arising to the Greycoat Partnership are allocated to, and taxed in the hands of, its partners *pro rata* to their percentage partnership interests.

17.

In consequence of the Baker trust, for UK tax purposes the income of the GPUT arises, and is taxable as it arises, in the hands of its unitholders. In other words, the GPUT is "fiscally transparent" as regards income.

18.

For the purposes of UK tax on chargeable gains, a unit trust scheme is treated as a company, and units are treated as if they were shares in a company (s99, Taxation of Chargeable Gains Act 1992 ("TCGA")). If the unit trust scheme is authorised, it is treated as if it were tax resident in the UK.

19.

The TCGA adopts the definition of "unit trust scheme" used in the Financial Services Act 2000 ("FSMA"), and it is not in dispute (and I find) that the GPUT meets the requirements of this definition. The GPUT is constituted under Guernsey law, is not authorised, and is centrally managed and controlled in Guernsey. Therefore, the GPUT is treated as if it were a company that was not resident in the UK for the purposes of UK tax on chargeable gains. As a non-resident company, the GPUT was (as the law stood at the relevant times) not liable to UK tax on its share of the Limited Partnership's gains.

20.

The end result is that net rental income arising in respect of the 30 Crown Place (after allowable deductions, such as interest) would first be allocated to the partners of the Greycoat Partnership – 1% to the General Partner and 99% to the limited partner (namely the Trustee in its capacity as trustee of the GPUT). As the General Partner is an English company, it would be liable to UK corporation tax on its share of the net rental income. As the Trustee's share of the net rental income is subject to a Baker trust, the net rental income would be further allocated to the GPUT unit holders, namely GCLOD (99.7%) and GUL (0.3%). As GUL is an English company, it would be liable to UK corporation tax on its share of the net rental income. As GCLOD is a limited partnership, its share of the net rental income would be attributed to its partners and taxed in their hands. In practice, to the extent that the net rental income is ultimately allocated to non– UK resident investors, HMRC would collect their UK income tax liability under the non-resident landlord scheme.

21.

To the extent that any chargeable gain arose in respect of a disposal by the Greycoat Partnership of 30 Crown Place, it would first be allocated to its partners – 1% to the General Partner and 99% to the Trustee in its capacity as the trustee of the GPUT. As the General Partner is an English company, it would be liable to

UK corporation tax on its share of the chargeable gain. The GPUT is treated as a non-UK resident company for the purposes of UK tax on chargeable gains, and therefore it was at the relevant time normally outside the scope of UK capital gains tax in respect of its allocated share of any chargeable gain. For the purposes of this decision, it is not necessary to analyse how the unit holders are taxed in respect of chargeable gains.

22.

For the reasons given below, no UK stamp duty or stamp duty reserve tax ("SDRT") would normally arise on a sale by any of the GPUT unitholders of their units in the GPUT to a third party. As the units are not chargeable interests in land, the sale of the units would also be outside the scope of stamp duty land tax ("SDLT"). References in this decision to "stamp taxes" are to stamp duty, SDRT, and SDLT.

23.

At the time 30 Crown Place was acquired by the Greycoat group, although no purchaser had been identified, the Greycoat group were aware that at some point in the future, the group's interest in the property would be sold. Mr Pool's evidence was clear that an important consideration in the decision as to how to structure the acquisition and ownership of 30 Crown Place was the ability of GCLOD to dispose of its interest in 30 Crown Place by a sale of the GPUT units free of all UK stamp taxes (namely stamp duty, SDRT and SDLT).

The Hannover transaction

24.

Hannover is a promotor of investment funds in Germany, including funds investing in land and buildings. Hannover manages over 200 "closed-end" public funds. In 2010 and 2011, Hannover had decided to establish a new German fund which would acquire UK land and buildings, with a view to marketing investment in this fund to German retail investors. Typically, these funds are established as German "GmbH & Co KG" which directly own the UK property. A GmbH & Co KG is broadly equivalent to an English limited partnership, and is a structure that is familiar and attractive to German retail investors. Hannover had decided to follow this model for its new fund.

25.

I find the background facts as to the transactions that are the subject of this appeal to be as follows.

26.

Following a failed attempt to purchase a London office building in 2010, Franc Warwick (a well-known firm of London commercial property agents) suggested that Hannover might make an offer to Greycoat to purchase 30 Crown Place, and Hannover engaged Franc Warwick to act as its representative in connection with the potential purchase of the property.

27.

Franc Warwick wrote to Greycoat on 11 February 2011 making an offer to buy 30 Crown Place for £132.225m ("the First Offer"), subject to contract. The property was not being marketed by Greycoat, and the offer was unsolicited. The offer was subsequently increased ("the Second Offer") to £136.250m on 8 March 2011 (again, subject to contract). The offer prices were established on the basis of Hannover's internal financial model, taking into account various factors, including current market conditions, projected rental income (and their understanding that the rental income would increase over time), costs of borrowing, and other expenses (including SDLT on the acquisition).

28.

At the time these offers were made, Hannover did not know how 30 Crown Place was owned, and so the offers were to acquire the freehold of the property directly, and assumed that SDLT would be payable. Some of the other assumptions made by Hannover (and set out in the offer letters) were wrong – in particular in relation to the rents being paid by the occupational tenant.

29.

Both the First Offer and the Second Offer were rejected by Greycoat. Mr Poole described these offers as preliminary offers, or "ranging shots", and they would have been automatically been turned down - irrespective of the amount offered - to see if a better offer would be forthcoming.

30.

At some point in February 2011, Franc Warwick became aware that 30 Crown Place was owned through a special purpose entity, although they thought (incorrectly) that it was an UK company, and sent an email to this effect to Hannover on 17 February 2011.

31.

Following the Second Offer, Greycoat engaged CBRE (a well-known firm of property agents) to act on their behalf. Hannover engaged Berwin Leighton Paisner ("BLP") to act as their solicitors in relation to the acquisition of 30 Crown Place. Greycoat (through their solicitors, Macfarlanes) made some details about 30 Crown Place available to BLP.

32.

As a result of those disclosures, by late March, Hannover became aware that 30 Crown Place was owned through a layered structure, with ability to acquire economic ownership of the property free of all stamp taxes through acquisition of the GPUT units.

33.

Hannover had previously acquired properties for their retail property funds in various ways. In general, Hannover preferred to acquire the property directly, as this was straightforward and cleaner. However, for example in Belgium, where a property was owned through a company, they had acquired the shares in the company, thereby avoiding having to pay local transfer taxes (which would have applied if the property had been acquired directly). In these corporate transactions, Hannover were concerned with the risk of the existence of historic liabilities in the company being acquired.

34.

Where a property is acquired by a retail fund that is regulated by BaFin, the German Federal Financial Supervisory Authority, the fund has to meet BaFin's regulatory requirements. Any prospectus for the fund has to be approved by BaFin before it can be published and the fund marketed. BaFin require that risks, including the risks associated with these historic liabilities, be disclosed in the fund's prospectus. In the light of these requirements, Hannover's goal was to have simple structures for the acquisition of properties so that they were readily understandable by BaFin, and if they could avoid assuming any risks, that would also be their goal. In the case where they acquired shares in property companies, they would typically seek indemnities from the seller for the risk that the company had historic liabilities.

35.

Another of Hannover's key concerns was that the structure used for the acquisition would be marketable to German retail investors. In contrast to German institutional investors, German retail investors are reluctant to invest in complicated and multi-tiered ownership arrangements, and prefer to invest in foreign (viz non-German) property through simple and familiar structures. Many German retail property funds (including funds manged by competitors of Hannover) were structured as a GmbH & Co KG which directly owned the property, and this is therefore an arrangement which was familiar and attractive to German retail investors. In Mr Rucker's opinion, such an ownership arrangement was essential if the proposed Hannover fund was to be successfully marketed to German retail investors.

36.

Once Hannover understood the structure through which 30 Crown Place was owned, they decided that they had to offer to acquire the units in the GPUT, recognising that this would avoid the imposition of stamp taxes on the acquisition. In his evidence, Mr Rucker said

> If you have to pay stamp duty, they you have to alter the stamp duty into the calculation and to be competitive in the market we have to find out if the payment of stamp duty was necessary or not.

37.

I take this to mean – and I find – that Hannover took account of the cost of stamp taxes in determining the amount that they were prepared to pay for 30 Crown Place. And in order to be able to consider whether they could increase their offer price, they had to first find out if there was a way of arranging the purchase so that they did not incur any stamp taxes.

38.

During cross-examination, Mr Rucker acknowledged that having a "tax efficient" acquisition was important so as to be able to make a competitive offer. From the context of the questions and the answers, I take this to mean (and I so find) that because the acquisition of units in the GPUT would not attract stamp taxes, the saving would allow Hannover to increase their offer price.

39.

However, Mr Rucker was also concerned about the risk of historic liabilities in the Greycoat Partnership, particularly as the Greycoat Partnership was the original developer of the property, and had owned the property for about five years. The property would be acquired by a fund to be established by Hannover which would be marketed to German retail investors. Hannover's supervisory board (whose approval was required as part of Hannover's internal processes) took a conservative approach. Their approval had been requested for the acquisition of units in the GPUT, and they would be unlikely to give approval to the transaction if it involved the acquisition of these units while the GPUT held an interest in the Greycoat Partnership.

40.

On 29 March 2011, Franc Warwick wrote to CBRE updating Hannover's offer ("the Third Offer"). This was an offer, subject to contract, to buy the freehold for £133m, or alternatively to buy the units in the GPUT for £138.225m (on the basis that the property was directly owned by the GPUT). The offer stipulated that immediately upon completion of the sale, the GPUT would itself be collapsed and the property distributed to the Hannover purchasing entity.

41.

A revised final offer was made on 15 April 2011 ("the Fourth Offer") which increased the purchase price to £133,598,825 for the property, or £138,850,000 for the units in the GPUT (again on the basis that the GPUT directly owned the property, and that immediately upon completion of the sale of the GPUT units, the GPUT itself would be collapsed and the property distributed to the Hannover purchasing entity).

42.

It is not entirely clear from the evidence when Hannover became aware of the fact that the property was owned by the Greycoat Limited Partnership, and that the GPUT trustee was a limited partner in that partnership. But certainly, this was known by the time the Fourth and final offer was made. Attached to the Fourth Offer was a draft exclusivity agreement, and a draft "steps paper" prepared by BLP and dated 15 April 2011 ("the Steps Paper"). Hannover remained concerned about the risk of historic liabilities in the Greycoat Partnership, so the offer to acquire the GPUT units was on the basis that the Greycoat Partnership's interest in 30 Crown Place was distributed to the Trustee (in its capacity as trustee of the GPUT), and the Greycoat Partnership was removed from under the GPUT – so that at the time the GPUT units were acquired by Hannover, the Trustee (in its capacity as trustee of the GPUT) would be the direct owner of the freehold of 30 Crown Place. Mr Rucker's evidence was that if Hannover acquired the Greycoat Partnership (even indirectly), they would be exposed to tax and commercial risks. Although they could seek guarantees and representations to cover these risks, those would be limited in time and amount.

43.

Hannover preferred not to have any exposure at all to the Greycoat Partnership, and it would therefore be easier if it was removed from the structure prior to Hannover acquiring any interest in the property ownership structure. This was to be achieved by the parties following the steps set out in the Steps Paper.

44.

The Steps Paper was as follows:

> **Steps paper for the acquisition of units in the GPUT (1)**
>
> Prior to Hannover Leasing acquisition:
>
> 1. Consent is obtained from Eurohypo to the transfer of the property by way of a distribution in specie by Greycoat Crown Place LP ("ELP") to Crown Place Unit Trust (Guernsey)("GPUT").
>
> 2. The ELP partnership deed and GPUT trust instrument are amended to expressly permit the property to be distributed in specie.
>
> 3. Property transferred by way of distribution in specie by ELP to GPUT and a new first legal charge is given in favour of Eurohypo.
>
> 4. Greycoat Central London Office Development Fund ("GCLOD") removes from GPUT control the ELP group below GPUT (ELP, Greycoat Crown Place GP Limited and Greycoat Crown Place 2006).
>
> Simultaneous exchange and completion
>
> 5. 1 week after initial distribution of property by ELP to GPUT HL Wachstumswerte Europa [ ] GmbH & Co KG ("Hannover Leasing") simultaneously exchanges and completes acquisition of all units in GPUT from GCLOD.
>
> 6. GCLOD (2) provides a six year indemnity to Hannover Leasing to cover the event that the SDLT regime taxes the subsequent distribution of the property by the Trustee to Hannover Leasing.
>
> 7. Hannover makes the full completion payment to GCLOD and receives units in GPUT from GCLOD and Greycoat Unit Holder Limited.
>
> 8. GPUT Trustees transfer the property to Hannover Leasing by way of a distribution in specie.
>
> 9. The bank providing Hannover Leasing with long term debt takes a first legal charge over the property owned directly by Hannover Leasing.

10. GCLOD provides GPUT Trustees with indemnity against any liabilities that have arisen during the lifetime of GPUT. (3)

Post Completion

11. GPUT Trustees wind up GPUT. (4)

Berwin Leighton Paisner LLP

GLBR/30471/1

15 April 2011

(1) This steps paper is based upon the structure chart and information supplied by Macfarlanes.

(2) A long term and substantial Vendor covenant is required.

(3) The same indemnity would be necessary were the property transferred directly to a purchaser and the GPUT then wound up.

(4) The GPUT Trustees to confirm that they will not pursue Hannover Leasing to recover the property if any liabilities subsequently arise in the GPUT (relying on the indemnity from GCLOD instead.

45.

There was some concern amongst GCLOD's investors as to whether the Hannover offer should be accepted, with some of the investors wanting to test the market by formally marketing 30 Crown Place. Eventually the GCLOD investors were persuaded by CBRE that the Hannover offer was a fair one, and that if the property was formally marketed, there was a risk that not only would Hannover withdraw their offer, but also that GCLOD would not find a better offer in the market.

46.

Hannover's offer was accepted, subject to contract, and an exclusivity agreement was signed on 5 May 2011. The exclusivity agreement set out a timetable for the intended transaction, and included provisions setting out the order in which steps would be taken (consistent with the Steps Paper).

47.

Non-binding heads of terms were also agreed.

48.

Clause 2.0 of the heads of terms included the following paragraph:

> The intention of the parties is for the buyer to own the freehold of the property without any exposure to the historic liabilities in respect of the Trust or liabilities to the trustees of the Trust. The Trust is to be wound up immediately following the transfer of the property from the Trust to the buyer.

49.

Clause 4.0 of the heads of terms included the following paragraphs:

> […] the vendor will target five weeks of signing heads of terms as the date on which the property will be transferred from the limited partnership in which it is currently held to the Trust (to be held by the Trust directly, rather than indirectly through the existing limited partnership).
>
> The general partner of the limited partnership is then removed from control of the Trust.

50.

Clause 6.0 of the heads of terms was as follows:

> **6.0 SDLT**
>
> The purchase price has been fixed on the basis that no SDLT is chargeable on the purchase of the units in the Trust, the distribution of the property by the existing partnership to the Trust or the distribution of the property by the Trust to the buyer.
>
> If following the transfer of the units in the Trust to the buyer, the Trust distributes the property in specie to the buyer and SDLT is chargeable by reference to the overall transaction (by reference to s75A FA 2003 or otherwise), this will be for the account of the vendor. Appropriate security arrangements will need to be put in place to deal with this.
>
> It is currently proposed an amount equal to the SDLT which would be chargeable in that situation (approximately £5.5m) is held in escrow and released to the vendor on the later of (i) the first anniversary of completion and (ii) when any enquiry into the transactions initiated by HMRC within the enquiry window is completed (assuming it is completed satisfactorily). If HMRC initiate an enquiry within the enquiry period and successfully assert that SDRT is chargeable on the transaction as a whole, the escrow money will be released to the buyer rather than to the vendor.
>
> The vendor is currently seeking to arrange (at the vendor's cost) an appropriate insurance policy for the period from the end of year one to the end of year six from closing, which would

> cover the risk of HMRC launching an enquiry after the end of the initial enquiry window and being able successfully to assert and SDLT liability.
>
> It is understood that if insurance cover satisfactory to the buyer cannot be obtained by the seller (at a reasonable price the seller is prepared to pay) this transaction will not proceed.

Transaction steps

51.

Following the agreement of the non-binding heads of terms, I find that the acquisition of 30 Crown Place by the Hannover Company, and the subsequent acquisition of the property by the Hannover Partnership was implemented in a number of stages as set out below.

52.

The evidence of both Mr Poole and Mr Rucker that that these steps formed a single plan, which had to be completed in full.

53.

Mr Poole's evidence was that "it was the plan" to undertake the all various steps and that "if we were to continue with the exclusivity, then the plan needed to be met" in full.

54.

Mr Rucker's evidence was consistent with Mr Poole's. He confirmed that it was "correct" that all the steps needed to happen in sequence. It was always Hannover's intention and a fundamental commercial objective that it acquired a clean property without any involvement in the Greycoat Partnership.

Step One – Sale of property by Greycoat Partnership to GPUT

55.

On 22 August 2011 the GPUT's unit trust instrument was amended and restated to allow for redemptions of units, and satisfaction of the redemption by a distribution in specie.

56.

On 23 August 2013, an agreement for the sale of 30 Crown Place was concluded between (1) the Greycoat Partnership (as seller), (2) the Trustee (as beneficial owner), and (3) the Trustee and CPlace Nominee

Limited (as buyer). This provided for 30 Crown Place to be sold by the Greycoat Partnership to the Trustee and CPlace Nominee Limited.

57.

The consideration was £138,850,000 which was satisfied by (a) the buyer agreeing to satisfy all liabilities under the Eurohypo loan, and (b) setting off the balance against the amount outstanding under the LP Loan owed by the Greycoat Partnership to the GUPT. The Trustee entered into the agreement as beneficial owner to ensure that both legal and beneficial interests in the property passed to the buyers. Although a copy of Eurohypo's consent to the transfer was not included in the bundles, reference is made to the consent in correspondence, and I find that such consent must have been given. This agreement was completed immediately after signing of the agreement by the execution of a TR1.

58.

At the conclusion of Step One, the freehold of 30 Crown Place was vested in the Trustee and CPlace Nominee Limited on the terms of the GPUT. The unit holders in the GPUT were GCLOD and GUL.

Step Two – **Acquisition of 30 Crown Place by the Hannover Company**

59.

On 26 August 2011, a facility agreement was concluded between the Hannover Company, Deutsche-Hypothekenbank AG ("Deutsche Hypo") and others, under which a secured term loan facility of £76 million would be advanced to the Hannover Company.

60.

On the same date, an agreement for the sale of the units in the GPUT was concluded between GCLOD (as the first seller), GUL (as second seller), the Hannover Company (as the first buyer) and Merope Verwaltungsgesellschaft MBH ("Merope") (as the second buyer). The agreement was expressed to be conditional (amongst other things) upon:

(1) The Trustee's interest in the Greycoat Partnership having been transferred to GCLOD; and
(2) GCLOD subscribing for additional units in the GPUT.

The parties undertook to use their reasonable endeavours to achieve satisfaction of these conditions.

61.

The agreement provided that at completion:

(1) Merope would acquire 100,000 of the GPUT units from GUL.
(2) the Hannover Company would acquire all the other units (including the additional units mentioned above).

The consideration was £138,850,000, but then adjusted to reflect the net assets or liabilities of the GPUT (other than the property itself).

62.

On 26 August 2011, the Trustee transferred its limited partnership interest in the Greycoat Partnership to GCLOD.

63.

On 31 August 2011 the following steps were taken in the following order:

(1) the Hannover Company lent GCLOD £60,856,722.16, which GCLOD applied in subscribing for additional units in the GPUT. The consequence of this subscription was to dilute GUL's percentage interest in the GPUT to 0.2%, and increase GCLOD's percentage interest to 99.8%.
(2) The GPUT used the money subscribed by GCLOD to repay the Eurohypo loan (being the loan assumed by the GPUT on 23 August when it acquired the property from the Greycoat Partnership).
(3) Eurohypo released its security over 30 Crown Place.
(4) The Hannover Company was advanced £70 million by Deutsche Hypothekenbank and Deutsche Postbank AG ("Deutsche Hypo").
(5) Instruments of transfer of the GPUT units were executed by GCLOD and GUL in favour of the Hannover Company and Merope, and the GPUT units were transferred to them pursuant to the terms of the 26 August 2011 agreement. The amount of the loan advanced at sub-paragraph (1) above was set-off against the consideration of £136,291,031 payable for the units.

64.

At the conclusion of Step Two, the Hannover Company and Merope were the only unitholders in the GPUT, and freehold of 30 Crown Place was vested in the Trustee and CPlace Nominee Limited on the terms of the GPUT.

Step Three – the Hannover Company acquires 30 Crown Place from the GPUT

65.

On 31 August 2011 the following steps were taken:

(1) the Hannover Company and Merope resolved that the GPUT be terminated in

accordance with the terms of the unit trust instrument, and that 30 Crown Place be distributed to the Hannover Company as *in specie* distribution in respect of all but one of its units, and that any remaining assets of the GPUT be distributed to the unit holders pro rata to their remaining holdings.
(2) Merope made a loan of £50,000 to the GPUT to enable the Trustee to meet expenses incurred in connection with the termination of the unit trust
(3) The Trustee (in its capacity as trustee of the GPUT) distributed its interest in 30 Crown Place *in specie* to the Hannover Company, in consideration of the redemption of the Hannover Company's units in the GPUT and the assumption by the Hannover Company of the loan made to the GPUT by Merope. The benefit of certain construction documents was also assigned to the Hannover Company.
(4) A TR1 was executed by the Trustee and CPlace Nominee Limited to give effect to the distribution of the property.

66.

On 1 September 2011, the Hannover Company granted Deutsche Hypo a debenture by which it gave security to Deutsche Hypo over 30 Crown Place in respect of the loan facility. I note that at the time the property was distributed by the GPUT to the Hannover Company, the Eurohypo security had been released, and no other security had been granted over the property. No security (or other obligation) subsisted in relation to 30 Crown Place at the time of its distribution in specie to the Hannover Company.

67.

I also note that the terms of the Deutsche Hypo facility did not include any obligation for the Hannover Company to grant security over 30 Crown Place – although under the terms of the facility agreement, the loan became repayable if such security was not given. I infer (and find) that at the time the loan facility agreement was concluded it was the common intention of both the Hannover Company and Deutsche Hypo that the Hannover Company would give security over 30 Crown Place as soon as possible after its distribution *in specie* to the Hannover Company. I make this inference for two reasons. First, there was no evidence that the Hannover Company had the resources to be able to repay the loan – and so in practice it would have to grant the security in order to avoid going into default. Secondly, it would be absurd for the Hannover Company to enter into these arrangements on the basis that it intended to repay the loan so soon after it was advanced.

68.

The effect of these arrangements was that at the end of Step Three, the Hannover Company became the owner of the freehold of 30 Crown Place. It had acquired the freehold using a combination of borrowings from Deutsche Hypo and its own resources. Deutsche Hypo had the benefit of a debenture over 30 Crown Place to secure its loan.

Step Four - Acquisition of 30 Crown Place by the Hannover Partnership

69.

Mr Rucker's evidence was (and I find) that Hannover's reason for having the Hannover Company initially acquire 30 Crown Place related to the need to obtain approval from BaFin to the proposed German retail fund. Mr Rucker's evidence was that it was not possible to market interests in the Hannover Company to retail investors, and that to do so, the property would have to be transferred to the Hannover Partnership (the proposed fund entity) Holding the property in the Hannover Company for an interim period also enabled Hannover to verify that there was sufficient investor appetite to acquire an interest in a closed-ended fund that owned the property.

70.

Hannover needed to obtain regulatory approval from BaFin to publish a prospectus to enable it to sell interests in the Hannover Partnership to German retail investors. If that approval was obtained, then the property would be transferred into the Hannover Partnership. But if BaFin approval was not obtained, then the property would continue to be owned by the Hannover Company with a view to the Hannover Company selling it. But I infer from Mr Rucker's evidence that it was always intended that the property would be transferred from the Hannover Company to the Hannover Partnership, as it was always envisaged that BaFin would give the relevant regulatory approvals, and that there would be sufficient investor appetite - otherwise Hannover would not have proceeded to purchase the property in the first place.

71.

On 10 November 2011, BaFin granted permission for the publication of a prospectus allowing the Hannover Partnership to market units to German retail investors. On 15 March 2011, the Hannover Company became a limited partner in the Hannover Partnership with a 99.9% interest (another Hannover entity was a partner with the remaining 0.1% interest). On 15 November 2011, the Hannover Company contributed its interest in 30 Crown Place to the Hannover Partnership, and the Deutsche Hypo loan facility was novated to the Hannover Partnership. The debenture granted by the Hannover Company was released, and the Hannover Partnership granted security over the property to Deutsche Hypo in the form of a debenture.

Step Five - Sale of 30 Crown Place to a third party

72.

For various reasons, the Hannover Partnership was only able to syndicate approximately £12 million of units to investors, out of a proposed total of £70 million. The fund was therefore not viable, and a decision was made by Hannover in August/September 2012 to sell 30 Crown Place. The property was sold on 19 April 2013 to the trustees of the 30 CP Unit Trust (a subsidiary of a South Korean insurance company). Hannover believes that the buyer paid SDLT in full on this acquisition (although no evidence to that effect was before me).

SDLT returns

73.

The purchase of the freehold of 30 Crown Place by the GPUT at Step One was returned on an SDLT return (form SDLT 1) dated 23 August 2011. £55,540 SDLT was paid. On 12 June 2012, HMRC opened an enquiry into this return under paragraph 12, Sch 10, FA 2003 ("Para 12").

74.

The acquisition of the freehold of 30 Crown Place by the Hannover Company at Step Three was returned on an SDLT 1 dated 31 August 2011. As the stated consideration was below the SDLT threshold, no SDLT was paid. HMRC opened an enquiry into this return under Para 12 on 12 June 2012.

75.

The acquisition of the freehold of 30 Crown Place by the Hannover Partnership at Step Four was returned on an SDLT 1 dated 16 November 2011. As the stated consideration was below the SDLT threshold, no SDLT was paid. HMRC opened an enquiry into this return under Para 12 on 28 August 2012.

76.

By letters dated 17 July 2015, HMRC issued a closure notices in respect of the SDLT returns for Step One and Step Three making no amendments to them.

77.

By a letter to the Hannover Company dated 31 July 2015, HMRC made a determination pursuant to paragraph 25, Schedule 10, FA 2003 that no land transaction return had been filed in respect of a notional land transaction under s75A, FA 2003. The amount of SDLT was determined as being £5,554,000 (being SDLT at 4% on consideration of £138,850,000).

78.

By a letter to the Hannover Partnership dated 31 July 2015, HMRC made a determination pursuant to paragraph 25, Schedule 10, FA 2003 that no land transaction return had been filed in respect of a notional land transaction under s75A, FA 2003. The amount of SDLT was determined as being £5,554,000 (being SDLT at 4% on consideration of £138,850,000).

79.

The two determinations were each made in the alternative.

80.

On 11 February 2006 both the Hannover Partnership and the Hannover Company appealed to this Tribunal against the determinations.

Stamp Tax Law

81.

Transfers of units in a unit trust scheme are not liable to stamp duty (para 1, Sch 19, FA 1999) and in consequence nor are they liable to SDRT (s 92, FA 1986). The definition of "unit trust scheme" used in FSMA has also been adopted for the purposes of stamp duty, and it is not in dispute (and I find) that the GPUT meets the requirements of this definition.

82.

SDLT is charged under s42(1) FA 2003 on "land transactions". SDLT replaced stamp duty, and in contrast to stamp duty, SDLT is chargeable irrespective of whether there is any instrument effecting the transaction (see section 42(2)(a)).

83.

Section 43(1) FA 2003 defines land transaction to mean "any acquisition of a chargeable interest", and the charge applies "however the acquisition is effected, whether by act of the parties, by order of a court or other authority, by or under any statutory provision or by operation of law" (s43(2))

84.

Section 48(1) (as in force at the relevant time) defined "chargeable interest" to mean:

> (a) an estate, interest, right or power in or over land in the United Kingdom, or
> (b) the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power,
> other than an exempt interest.

85.

Where a chargeable interest is held on behalf of a partnership, paragraph 2(1), Schedule 15, FA 2003 provides that the interest is treated as held by or on behalf of the partners, and not by or on behalf of the partnership as such.

86.

The provisions of paragraphs 10 and 18 of Schedule 15 apply to calculate the amount of SDLT payable where a chargeable interest is transferred by a partner to a partnership of which it is a partner, or *vice versa*.

87.

Paragraph 37 of Schedule 15 provides that there is a transfer of a chargeable interest from a partnership where a chargeable interest that was partnership property ceases to be partnership property, and paragraph

34 provides that a reference to partnership property is to an interest held by or on behalf of a partnership, or the members of a partnership, for the purposes of the partnership business.

88.

In broad terms, the chargeable consideration for a transfer within the scope of paragraphs 10 or 18 is determined by the formula

MV x (100 - SLP)%

Where MV is the market value of the interest transferred, and SLP is the "sum of the lower proportions" which is determined in accordance with the provisions of Schedule 15.

89.

Sections 75A to 75C FA 2003 are anti-avoidance provisions, 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) by way of consideration for the scheme transactions.

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

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

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

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

(a) sections 71A to 73, or

(b) a provision of Schedule 9.

75B Anti-avoidance: incidental transactions

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

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

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

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

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

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

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

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

(c) a loan to P secured by a mortgage, or any other provision of finance to enable P, or another person, to pay for part of a process, or series of transactions, by which the chargeable interest transfers from V to P.

(4) In subsection (3)—

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

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

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

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

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

75C Anti-avoidance: supplemental

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

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

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

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

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

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

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

(8) For the purposes of section 75A—

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

(8A) Nothing in Part 3 of Schedule 15 applies to the notional transaction under section 75A.

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

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

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

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

90.

s75A was originally enacted by paragraph 1 of the Schedule to the Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006 (SI 2006/3237). These Regulations were promulgated at the time of the 2006 Pre-Budget Report on 6 December 2006 and took effect at 2pm on that date. As originally introduced by the Regulations, s75A was a single section. The statutory instrument was superseded by s71 FA 2007, which re-enacted s75A, but also brought in s75B and s75C with retrospective effect back to 6 December 2006 (s71(2) FA 2007) (save that s75C does not have effect if, or in so far as, the disposal occurred before 19 July 2007 (the date on which FA 2007 obtained Royal Assent), and the effect of the provision would be to make a person liable to a higher amount of tax than would have otherwise been the case: s71(3) FA 2007).

Contentions of the parties

91.

The sole issue before me is whether s75A applies to the transactions that are the subject of this appeal, and if s75A does apply, what is its effect?

92.

For s75A to apply, the three conditions in s75A(1) must be satisfied. These are that

> (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.

93.

The mechanism of s75A is to compare the SDLT payable as a result of the individual "scheme transactions" identified in s75A(1)(b) with the SDLT that would be payable on a "notional land transaction". That notional transaction is in essence a deemed transfer of the property from the person(s) who owned the property at the start of the chain of scheme transactions, to the person(s) who owned the property at the end of that chain.

94.

One of the key issues that I need to consider is whether there were transactions "involved in connection with the disposal and acquisition" of 30 Crown Place for the purposes of s75A(1)(b). If there are no such transactions, then s75A is not engaged.

95.

Hannover submits that s75A must be interpreted in accordance with its purpose, which is preventing the avoidance of SDLT. Hannover's case is that, viewed collectively, the transactions that are the subject of this appeal have been taxed appropriately for SDLT purposes, and that s75A is not in point. Accordingly, there are no "scheme transactions" that are "involved in connection with" any land transfer within the meaning of s75A(1)(b). As the condition in s75A(1)(b) has not been satisfied, s75A is not engaged. Hannover therefore submit that none of the transactions give rise to any tax avoidance that would engage s75A.

96.

HMRC's case is that as the Trustee and the General Partner (as the partners in the Greycoat Partnership) have disposed of a chargeable interest (namely the freehold of 30 Crown Place), they are therefore "V" for the purposes of s75A(1) FA 2003. HMRC further submit that as the Hannover Company acquired that chargeable interest on 31 August 2011, it is therefore "P" for the purposes of s75A(1). The notional land transaction is therefore the acquisition by the Hannover Company of the freehold of 30 Crown Place from the Trustee and the General Partner (as the partners in the Greycoat Partnership). Alternatively, if the Hannover Company is not P, HMRC submit that as the Hannover Partnership acquired 30 Crown Place on 15 November 2011, the Hannover Company and the other partners in the Hannover Partnership (as the partners in the Hannover Partnership) are P. This would have the consequence that the notional land transaction would be the acquisition by the partners in the Hannover Partnership of the freehold of 30 Crown Place from the Trustee and the General Partner (as the partners in the Greycoat Partnership).

97.

HMRC submit that the following steps are the "scheme transactions" for the purposes of s75A(1)(b) as they are steps involved in connection with the notional land transaction:

(a) The unit sale agreement dated 26 August 2011 (step two)
(b) The transfer by the Trustee of its limited partnership interest in the Greycoat Partnership to GCLOD (step two)
(c) The loan made by the Hannover Company to GCLOD on 31 August 2011 (step two)
(d) The subscription for additional units in the GPUT by GCLOD on 31 August 2011 (step two)
(e) The purchase of the GPUT units by the Hannover Company and Mereope (step two)
(f) The discharge of the Eurohypo loan by the GPUT (step two)
(g) The loan by Deutsche Hypo to the Hannover Company (step two) (h) The loan by Merope to the GPUT (step three)
(i) The debenture granted to Deutsche Hypo (step two)
(j) (If P is the Hannover Partnership), the Hannover Company becoming a partner in the Hannover Partnership.

98.

HMRC submit that the effect of s75A is that SDLT is charged on a notional land transaction in the sum of £5,554,000 (being SDLT at 4% on consideration of £138,850,000), and that this is payable either by the Hannover Company or (alternatively) by the Hannover Partnership.

Hannover's Submissions

99.

It is not in dispute that a purposive approach has to be taken to the interpretation of s75A. It is common ground that s75A was enacted to combat the avoidance of SDLT. But the parties differ fundamentally on how that is applied in practice.

Purposive construction

100.

Hannover submit that the purpose of s75A is to prevent abusive tax arrangements.

101.

I was referred to the judgment of Lord Hodge (with whom a majority of the Supreme Court agreed) in the Supreme Court's decision in *Project Blue* at [69] where he says that the purpose of s75A is:

> To catch a range of tax avoidance schemes and prevent unintended tax losses by the use within a series of transactions of a combination of reliefs and exemption.

102.

And at [44] he says:

> The words of section 75A by themselves do not disclose who is V and who is P in a particular case. But the mischief which the provision addresses and the context of the provision within Part 4 of the FA 2003 provide the answer. The court adopts the purposive approach which the House of Lords sanctioned in *Barclays Mercantile Business Finance Ltd*, to which I have referred in para 34 above. The explanatory notes on clause 70 of the Finance Bill 2007 explained that the provision was introduced to counter avoidance schemes which have been developed to avoid payment of SDLT. It 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 subsection (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 subsection (1)(b) refers and which exploited a loophole in the statutory provisions.

103.

Accordingly submits Hannover, the Supreme Court has decided that for s75A to apply, it is necessary to identify a “tax avoidance scheme” or “unintended tax loss” which “exploits a loophole in the statutory provisions”. And the use of the word "scheme" in s75A(1)(b), say Hannover, gives this context. Section

75A(3) shows that the legislation is clearly aimed as scheme involving leases and sub-sales. Hannover accept that the scope of s75A is not limited just to "schemes", or even to "schemes" involving leases and sub-sales – but they submit that the primary target of s75A is "schemes". It is significant, say Hannover, that Lord Hodge did not say that s75A covers any tax savings whatsoever.

104.

I was referred by Hannover to Lord Nicholls speech in *Barclays Mercantile Business Finance v Mawson* [2004] UKHL 51 at [36] where he says

> Cases such as these gave rise to a view that, in the application of any taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro P.J. said in *Collector of Stamp Revenue v. Arrowtown Assets Ltd*. [2003] HKCFA 46, para 35:
>
> “[T]he 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.”.

105.

I note that the *Barclays Mercantile* case was cited with approval by Lord Hodge in the paragraph of his judgement in *Project Blue* extracted earlier.

106.

The Supreme Court, submit Hannover, gave an indication on how to engage in a purposive construction in its decision in *UBS v Revenue & Customs Commissioners* [2016] UKSC 13 at [73]:

> **Purposive construction**
>
> 73. As counsel for UBS and DB emphasised, ITEPA contains no explanation of the purpose of Chapter 2 upon which a purposive interpretation might be based. Nor do its provisions anywhere indicate that restrictive conditions attached to securities purely for tax avoidance purposes fall outside the scope of Chapter 2. Furthermore, Parliament dealt with certain kinds of tax avoidance in Chapters 3A to 3D, but made no provision in respect of schemes of the kind with which these appeals are concerned. In the light of these considerations, and bearing in mind that Part 7 generally, and Chapter 2 in particular, are extensive and highly detailed, counsel argued that it was impossible to attribute to Parliament an unexpressed intention to exclude schemes of the present kind from the ambit of Chapter 2. It cannot be denied that these are forceful arguments, and the Court of Appeal found them persuasive.
>
> 74. Nevertheless, the context of Chapter 2 provides some indication of what Parliament

intended. Part 7 is clearly concerned with particular taxation issues which arise when employees are remunerated in shares and other securities. As was noted in para 12 above, the purposes of Part 7 were identified in broad terms in *Grays Timber Products* as being threefold:

(1) to promote employee share ownership, particularly by encouraging share incentive schemes;

(2) since such schemes require benefits to be contingent on future performance, creating a problem if tax is charged on the acquisition of the shares in accordance with *Abbott v Philbin*, to wait and see in such cases until the contingency has fallen away; and

(3) to counteract consequent opportunities for tax avoidance.

75. The background to Chapter 2, explained more fully in paras 3-11 above, supports that view. Fiscal legislation concerning employment-related securities had its origins in anomalies which arose where shares awarded to employees as a form of remuneration, for business or commercial reasons, were subject to restrictions designed to incentivise future performance. The taxation of the shares in accordance with general principles of the law of taxation, as established in *Weight v Salmon* and more particularly in *Abbott v Philbin*, had the effect that the sum charged to tax failed to reflect the economic gain realised by the employee in the event that the shares increased in value as intended. Parliament's response was to impose a charge to tax when the restrictions were lifted (subject to the exemption of favoured arrangements), rather than when the shares were acquired. Chapter 2, as originally enacted, re-enacted provisions introduced in 1988 in order to prevent the application of *Abbott v Philbin*, and forestall consequent opportunities for tax avoidance. The amended version of Chapter 2 with which these appeals are concerned was enacted shortly afterwards to address aspects of the previous provisions which were considered to leave them vulnerable to avoidance or to create anomalies. The structure of the legislation continued to be based on the exemption of restricted securities from income tax when the shares were acquired, and the imposition of a charge to tax when the restrictive conditions were lifted, subject to a widely drawn exemption from the latter charge.

76. It is in the context explained in para 74, and against the background described in para 75, that it is necessary to consider the scope of the exemption on acquisition conferred by section 425(2), and more specifically the question whether, in section 423(1), the words “any contract, agreement, arrangement or condition which makes provision to which any of subsections (2) to (4) applies” should be construed as referring to “provision” with a genuine business or commercial purpose.

77. Approaching the matter initially at a general level, the fact that Chapter 2 was introduced partly for the purpose of forestalling tax avoidance schemes self-evidently makes it difficult to attribute to Parliament an intention that it should apply to schemes which were carefully crafted to fall within its scope, purely for the purpose of tax avoidance. Furthermore, it is difficult to accept that Parliament can have intended to encourage by exemption from taxation the award of shares to employees, where the award of the shares has no purpose whatsoever other than the obtaining of the exemption itself: a matter which is reflected in the fact that the shares are in a company which was brought into existence merely for the purposes of the tax avoidance scheme, undertakes no activity beyond its participation in the scheme, and is liquidated upon the termination of the scheme. The encouragement of such schemes, unlike the encouragement of employee share ownership generally, or share incentive schemes in particular, would have no rational purpose, and would indeed be positively contrary to

> rationality, bearing in mind the general aims of income tax statutes.
>
> 78. More specifically, it appears from the background to the legislation that the exemption conferred by section 425(2), in respect of the acquisition of securities which are “restricted securities” by virtue of section 423(2), was designed to address the practical problem which had arisen of valuing a benefit which was, for business or commercial reasons, subject to a restrictive condition involving a contingency. The context was one of real-world transactions having a business or commercial purpose. There is nothing in the background to suggest that Parliament intended that section 423(2) should also apply to transactions having no connection to the real world of business, where a restrictive condition was deliberately contrived with no business or commercial purpose but solely in order to take advantage of the exemption. On the contrary, the general considerations discussed in para 77 above, and the approach to construction explained in paras 64 and 68 above, point towards the opposite conclusion.

107.

Hannover submit that what is guiding the Supreme Court, and what should guide me when interpreting a tax statute, is to look at the background to the legislation, look at the purpose of the legislation, and then apply that knowledge into the construction of the provisions.

108.

In ascertaining the purpose of s75A, I was referred to the history of s75A, which was introduced by paragraph 1 of the Schedule to the Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006 (SI 2006/3237) at the time of the 2006 Pre-Budget Report. As originally introduced by the Regulations, s75A was a single section. The statutory instrument was superseded by s71 FA 2007, which re-enacted s75A, but also brought in s75B and s75C with retrospective effect back to 6 December 2006 (s71(2) FA 2007). Hannover submit that s75A was drafted to stand by itself, and its interpretation and effect had not been changed when it was re-enacted in the FA 2007 with sections 75B and 75C – Parliament did not change its mind between enacting the original statutory instrument and enacting the FA 2007. According to Hannover, s75A was always interpreted to ignore a share or unit sale as the first step in a series, and that interpretation was not changed by the enactment of s75C. As sections 75B and 75C were enacted retrospectively, their effect can only be to reinforce the original meaning of s75A and cannot have been intended to change it. Hannover submit moreover that the lists in ss75B and 75C of things that are outside the scope of s75A are merely examples, and cannot be exhaustive.

109.

I was referred to the Finance Bill's explanatory notes which refer to the legislation being introduced "to counter avoidance schemes which have been developed to avoid payment of SDLT" and to HMRC's "Spotlight 10" (although published on 5 August 2010, many years after the enactment of s75A) which states:

> HM Revenue and Customs (HMRC) understand that commercial and residential property sales are being carried out in ways intended to avoid Stamp Duty Land Tax (SDLT). It is done by reducing the purchase price below the SDLT rate band or threshold.
>
> In some cases an intermediate sale, often on the same day, is introduced into the arrangements with the sole intention of removing the true purchase price from tax. Such

> arrangements seek to exploit 'sub-sale relief'. This relief is intended to ensure that, where a property transaction happens in stages, SDLT is paid once on the full amount paid. This is done for the property by the person who ultimately acquires it and no double charge arises.
>
> The HMRC view is that these contrived transactions, including those involving sub-sales, produce a charge to SDLT on the full amount paid for the property.
>
> In some cases there is doubt about whether transactions actually meet the conditions for the sub-sale relief. Anti-avoidance legislation effective from December 2006 counters any arrangements seeking to depress or avoid the tax on the full amount paid for the property. This includes those seeking to exploit sub-sale relief.

110.

Hannover submit that the reference to the December 2006 legislation is clearly to s75A as originally introduced, and this Spotlight makes it clear that s75A was intended to kill sub-sale schemes for avoiding SDLT.

111.

I was also referred to two cases – *Vardy Properties and others v HMRC* [2012] UKFTT 564 (TC) and *DV3 RS Limited Partnership v HMRC* [2013] STC 2150 (CA). Both cases concerned the application of sub-sale relief in s45 FA 2003 (prior to the enactment of s75A). *Vardy* concerned arrangements involving a sub-sale of property and a distribution from an unlimited company – the arrangements "failed" because of errors in its implementation. But the Tribunal went on to comment that the arrangements would have been within the scope of the s45 FA 2003 sub-sale relief, but for the technical errors. In *DV3*, the appellant (DV3) agreed to buy a headlease from L&G. After exchange of the contract, but before completion, a partnership was established in which DV3 had a 98% interest. The other partners were connected with DV3, one of them being an individual. DV3 then entered into a contract with the partnership to sell the same headlease to the Partnership for the same price as had been agreed with L&G, completing on the same date as the L&G agreement completion date. On the completion date, L&G executed a transfer of the headlease to DV3, and the DV3 executed a transfer in favour of the partnership. In the case of *DV3* the taxpayer failed before the Court of Appeal on the application of s45 to a sub-sale involving a partnership. Both cases involved, according to Hannover, contrived arrangements whose principal purpose was to take advantage of the sub-sale relief from SDLT in s45. The reason my attention was drawn to these cases was not because of the precise reasoning adopted by the tribunal or the court, but rather because these are both examples of the kinds of arrangement that were intended to be counteracted by s75A. They are arrangements where the parties enter into contrived arrangements in order to take advantage of a tax relief.

112.

Hannover say that it is very relevant that at paragraph [37] of Lord Hodge's decision in *Project Blue*, he agrees with Lord Briggs' description (in his dissenting judgment at [109]) of the result for with the taxpayer was contending - namely that no tax was due because it had “combined a sub-sale relief and Ijara arrangements” as “an unintended tax holiday.”

113.

Mr Thomas described as a useful sense check – could the arrangements have been marketed and sold by a tax advisor as a tax "scheme"? The answer to this question would be "yes" for the arrangements in both *Vardy* and *DV3*. And whilst this test is not decisive, he considers that it is helpful in giving some colour to the legislation.

Nature of the connection

114.

Hannover submit that for arrangements to come within the scope of s75A, there must be a connection between the individual steps, otherwise than merely being part of an inter-dependent commercial arrangement. The arrangements need to be connected as part of an arrangement which gives a result that is contrary to the overall "scheme" of the tax. Relevant scheme transactions are those which exploit a loophole in the statutory provisions - and s75A applies to catch tax avoidance schemes as well as to prevent unintended tax losses by the use within a series of transactions of a combination of reliefs and exemptions.

115.

In other words, do the transactions, viewed collectively, give a result which is contrary to the scheme of the tax. If they do, then the connection is likely to be of a kind that is within the scope of s75A. If they do not, then the arrangements are not caught be s75A.

116.

Hannover submit that the decision of the Supreme Court in *Project Blue* makes it clear that the relevant task is to identify whether or not what has taken place can properly be identified as the exploitation of a loophole that, absent the application of s75A, would result in the loss of tax which is unintended - because it runs contrary to the scheme of the SDLT legislation (irrespective of the taxpayers subjective motives for the transactions).

117.

HMRC's SDLT manual at paragraph SDLTM09175 states:

> Section 75A is an anti-avoidance provision. HM Revenue & Customs (HMRC) therefore takes the view that it applies only where there is avoidance of tax. On that basis, HMRC will not seek to apply s.75A where it considers transactions have already been taxed appropriately.
>
> The General Anti Abuse Rule (GAAR) […] introduced from 17 July 2013 when the Finance Act 2013 was passed, applies to SDLT.

118.

Hannover submit that this statement correctly establishes the purpose of s75A and the way in which the provision should be interpreted and applied, and they rely on this statement as "academic" authority. Given this purpose, Hannover submit that the phrases "involved in connection with" when identifying the "scheme transactions" (for the purpose of s75(1)(b)) requires that the transactions must be connected as part of an arrangement that gives rise to tax avoidance of a kind that is outside the scheme of SDLT.

119.

Hannover submit that the statement in HMRC's manual is not concessionary – it is a correct statement of the law, and reflects the decisions of the House of Lords and the Supreme Court in *Barclays Mercantile* and *UBS*. In other words, the section should not be construed mechanistically. Rather, the correct approach is to consider the purpose of the statute, and then determine whether the transactions before you fall within its scope. Hannover go on to submit that the provisions of HMRC's manuals both at SDLTM09175 (and at SDLTM09225 cited below) is entirely consistent with the approach taken by the Supreme Court in *Project Blue*.

120.

And, Hannover submit, this is an exercise for the Tribunal to undertake – it is for the Tribunal to construe the legislation and to determine whether transactions (viewed collectively) have been taxed appropriately, and if not, to identify V and P – and therefore the person to be assessed.

121.

I was referred to the House of Lords decision in *Vestey v IRC* [1980] STC 10, and Lord Wilberforce's speech at page 19 where he says:

> The contention of the Crown is that in such cases they have a discretion which enables them to assess one or more or all of the individuals in such sums as they think fit; the only limitation on this discretion is, they say, that the total income (of the foreign trustees) may not be assessed more than once. This is a remarkable contention. Let us consider first some of the practical consequences, if it is correct.
>
> (1) It is open to the Revenue to select one or more of the beneficiaries to tax and to pass over the others […]
>
> […]
>
> Taxes are imposed on subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer, and the amount of his liability is clearly defined.
>
> A proposition that whether a subject is to be taxed or not, or that, if he is, the amount of his liability is to be decided (even though within a limit) by an administrative body, represents a radical departure from constitutional principle. It may be that the Revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it; but unless it has done so, the courts, acting on constitutional principles, not only should

> not, but cannot validate it.
>
> […]
>
> The Crown says that the income tax legislation gives the commissioners a general administrative discretion as to the execution of the Acts, and it refers to particular instances, of which one is s 115(2) of the Income and Corporation Taxes Act 1970 (power to decide period of assessment). The judge described the comparison of such limited discretions with that now contended for as 'laughable'. Less genially I agree. More generally, they say that s 412 imposes a liability on each and every beneficiary for tax in respect of the whole income of the foreign transferees; that there is no duty on the commissioners to collect the whole of this from any one beneficiary, that they are entitled, so long as they do not exceed the total, to collect from selected beneficiaries an amount decided on by themselves.
>
> My Lords, I must reject this proposition. When Parliament imposes a tax, it is the duty of the commissioners to assess and levy it on and from those who are liable by law. Of course they may, indeed should, act with administrative common sense.

122.

These paragraphs are cited with approval by Lord Hodge in his judgement in *Project Blue* at [43], where he notes that s75A does not identify who is V and who is P in relation to the transactions to which the provision apply. He states that Parliament has not conferred any discretion on HMRC to select whom they treat as V and P, and that it is necessary for the courts to identify the persons on whom Parliament has imposed this charge to tax.

123.

Although HMRC accept that only one of the two entities can be liable to SDLT, Hannover say that HMRC do not explain why this should be the case. Hannover say that the answer can be found by construing the statute purposively and determining whether there is the right kind of connection that engages s75A.

Parliament did not intend s75A should catch innocent transactions

124.

Hannover submit that in *Project Blue* the Supreme Court was focussed upon the correct application of the SDLT legislation to the particular facts of the case. Other than in relation to the paragraphs cited above, the Supreme Court did not set out any general exposition of when s75A does, or does not, apply. It therefore follows that judges in individual cases need to undertake the task of identifying where a tax loss has occurred and whether this can be said to have involved the exploitation of a loophole through the undertaking of a tax avoidance scheme or the use of a combination of reliefs and exemptions to create and unintended tax loss.

125.

No guidance is given by the Supreme Court, say Hannover, as to what is an unintended tax loss, other than it is one that exploits a loophole (see paragraph [44] cited above). Nor does the Supreme Court express any view that taxpayers are required to structure their affairs so as to maximise the amount of SDLT payable on a transaction.

126.

Although the Supreme Court did not go into any detail in *Project Blue* as to what is an "unintended tax loss", Hannover submit that what they refer to is clear. The relevant intention is that of Parliament, and Parliament's intention is ascertained by looking at the scheme of SDLT as a whole. Hannover submit that the tax saving in *Project Blue* that would have arisen (absent s75A) ran contrary to the scheme of SDLT because (by taking advantage of both sub-sale relief and relief under s71A), no SDLT liability arose on the sale and purchase of the land in question. The Supreme Court described this as an "unintended tax holiday" and the exploitation of a loophole.

127.

HMRC in their manuals give examples of transactions that are unlikely to be within the scope of s75A (SDLTM09225). Example 3 is where a property investment company is owned equally by four family members and the company is to be sold to an unconnected third party. The family members establish a partnership which is to hold properties that are to be retained. The guidance states that there is a clear commercial purpose for the properties to be transferred out of the company that is to be sold to the third party (and so s75A will not be triggered). Hannover draw a comparison with the transactions under appeal, as there is to be a share sale in order to save SDLT. Hannover note that this is an example of transactions being undertaken in advance of a share sale that are not caught by s75A (and of course units in a unit trust are treated as shares for these purposes). Further Hannover say that this is not concessionary, but is academic authority as to the interpretation of s75A, and is entirely consistent with a purposive approach to the interpretation of the provisions.

128.

Hannover draw a distinction between tax avoidance and tax mitigation and referred me to Lord Nolan's speech in *IRC v Willoughby* (1997) 70 TC 57 at 116:

> In order to understand the line thus drawn, submitted Mr. Henderson, it was essential to understand what was meant by "tax avoidance" for the purposes of s 741. Tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation), it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax.
>
> My Lords, I am content for my part to adopt these propositions as a generally helpful approach to the elusive concept of "tax avoidance", the more so since they owe much to the speeches of

> Lord Templeman and Lord Goff of Chieveley in *Ensign Tankers (Leasing) Ltd. v. Stokes* 64 TC 617, [1992] 1 AC 655 at pages 675C-676F and 681B-E. One of the traditional functions of the tax system is to promote socially desirable objectives by providing a favourable tax regime for those who pursue them. Individuals who make provision for their retirement or for greater financial security are a familiar example of those who have received such fiscal encouragement in various forms over the years. This, no doubt, is why the holders of qualifying policies, even those issued by non-resident companies, were granted exemption from tax on the benefits received. In a broad colloquial sense tax avoidance might be said to have been one of the main purposes of those who took out such policies, because plainly freedom from tax was one of the main attractions. But it would be absurd in the context of s741 to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament has deliberately made. Tax avoidance within the meaning of s741 is a course of action designed to conflict with or defeat the evident intention of Parliament. In saying this I am attempting to summarise, I hope accurately, the essence of Mr. Henderson's submissions, which I accept.

129.

Lord Hoffman in *MacNiven v Westmoreland Investments Ltd* (2012) 73 TC 1 at paragraph 62 makes a similar point:

> **Tax mitigation and tax avoidance.**
>
> 62. My Lords, it has occasionally been said that the boundary of the Ramsay principle can be defined by asking whether the taxpayer's actions constituted (acceptable) tax mitigation or (unacceptable) tax avoidance. In *Inland Revenue Commissioners v. Willoughby* [1997] 1 WLR 1071, at page 1079 Lord Nolan described the concept of tax avoidance as "elusive". In that case, the House had to grapple with what it meant, or at any rate what its "hallmark" was, because the statute expressly provided that certain provisions should not apply if the taxpayer could show that he had not acted with "the purpose of avoiding liability to taxation". The same question arises on the interpretation of the anti-avoidance provisions to which Lord Cooke of Thorndon referred in *Inland Revenue Commissioners v. McGuckian* [1997] 1 WLR 991, at page 1005; 69 TC 1. But when the statutory provisions do not contain words like "avoidance" or "mitigation", I do not think that it helps to introduce them. The fact that steps taken for the avoidance of tax are acceptable or unacceptable is the conclusion at which one arrives by applying the statutory language to the facts of the case. It is not a test for deciding whether it applies or not. […]

130.

Thus, submit Hannover, it does not necessarily matter what the taxpayer thought that he or she was doing, the transaction is "tax avoidance" if, on an objective basis, the actions are tax avoidance. This is made clear in paragraph [42] of Lord Hodge's judgment in *Project Blue*:

> PBL's first argument, that section 75A could not apply because it had not been established that the parties entered into the transactions for the purpose of tax avoidance, failed before the FTT, the UT and the Court of Appeal. In my view the tribunals and the Court of Appeal reached the correct conclusion. The heading of the section, “Anti-avoidance”, is the only indication in the section which could support PBL's contention. The heading is relevant to assist an understanding as to the mischief which the provision addresses, but it says nothing as to the motives of the parties to the scheme transactions. 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 manner. This is clear from subsection (1)(c) which compares the amount of SDLT payable in respect of the actual transactions against what would be payable under the notional land transaction in section 75A(4), by which P acquired V's chargeable interest on its disposal by V.

131.

Hannover submit that Lord Hodge's interpretation of s75A as not imposing a motive test is correct - the motives of the taxpayer are irrelevant in determining whether s75A applies to a transaction or series of transactions. Instead the relevant tax is to ask whether the tax saving is unintended because it runs against the scheme of the SDLT legislation - because an unintended loss of tax arises through a combination of exemptions and reliefs or as part of a tax avoidance scheme.

132.

Hannover therefore submit that if a taxpayer takes advantage of an opportunity deliberately offered by Parliament to save tax, that is not tax avoidance, that is tax mitigation. It is only where there is something contrived going on (such as in the cases of *Project Blue, Vardy* and *DV3*), and an economic mismatch, that there is objective tax avoidance - namely an unintended loss of tax through a combination of exemptions and reliefs.

133.

In contrast, Hannover say that the tax saving they obtained did not run contrary to the scheme of the SDLT legislation. The key point is that the economic benefit from the ownership of the property passed to Hannover when the Hannover Company acquired the units in the GPUT. Hannover note that SDLT is not payable on the transfer of shares in a company, nor on the transfer of units in a unit trust – even if those entities are UK "property rich". The transfer of such units is outside the scope of SDLT, and does not exploit exemptions or reliefs. They submit that this is a fiscally attractive option deliberately offered by Parliament, and the use of this option does not amount to tax avoidance. The tax saving in this appeal arises primarily because the sale of units in a unit trust is outside the scope of SDLT, rather than because of the application of any exemption or relief. This all fits within the scheme of the SDLT legislation and does not meet the description of when s75A applies as set out by the Supreme Court in *Project Blue*.

134.

This approach is supported, say Hannover, by HMRC's GAAR guidance (which has statutory effect under the terms of the GAAR legislation – s211(2) FA 2013), and section D2.2 in particular:

> **D2.2 Intended legislative choice**
>
> D2.2.1 This covers, for example, giving assets to children to reduce future Inheritance Tax liabilities, sacrificing salary in return for enhanced pension rights, disclaiming capital allowances

> to preserve reliefs for a later period, deciding to incorporate a business or to sell shares rather than assets (in both cases so as to pay less tax or Stamp Duty Land Tax) and choosing to borrow to invest in buy to let rather than using surplus cash or having a bigger mortgage on your main residence.
>
> D2.2.2 These are all clearly things that are recognised by the statute: Parliament has given taxpayers a choice as to the course of action to take. This category might also include reorganising a trust or corporate structure in a straightforward way to fit in with a new tax regime.

135.

Section D34.5.1 addresses the application of the GAAR to s75A:

> When s75A was introduced there was concern it could possibly attack some unintended targets. For example, a property may have been held by a company as its only asset for many years. The shares in that company may then be acquired by new parent, P Ltd, which then liquidates the company and the property is distributed to P Ltd.
>
> While the transfer of the property to P Ltd on liquidation may be for no consideration, s53 of FA 2003 may impose a market value charge. However s54(4) disapplies s53on the distribution out of the assets of a company.
>
> HMRC did not want s75A to change the policy, however, this scheme seeks to apply s75C(1) to a company that has not had a long standing interest in property thereby undermining s75A. HMRC would seek to invoke the GAAR for this scheme.

136.

Accordingly say Hannover, where a taxpayer structures its affairs in a way which has a genuine commercial purpose, and is not artificially contrived, but which takes advantage of a fiscally attractive option offered by the legislation, then the necessary element of tax avoidance required by s75A is absent. I was referred to Lord Neuberger's decision in *Secret Hotels 2* [2014] UKSC 16 at [57] where he says

> English law […] treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation.

137.

Hannover note that HMRC consider that there is nothing offensive for shares in a property investment company to be sold, followed by a distribution of a property out of the company by way of a distribution in specie in the liquidation – and that this is stated by HMRC in guidance which has statutory effect as it forms part of the GAAR provisions.

Nothing in completion and post-completion mechanics that amounts to tax avoidance

138.

Hannover submit that there is nothing in the completion mechanics that amounts to tax avoidance. In particular the loan by the Hannover Company at step two was simple an advance of the purchase price that was paid immediately prior to completion of the unit sale, which enabled the GPUT to discharge a debt. And importantly, say Hannover, the loan did not introduce any new rights of UK land into the GPUT.

139.

Hannover accept that they had a motive to save SDLT through buying units in the GPUT, but they say that this merely takes advantage of a freedom given by Parliament, and is entirely legitimate.

140.

Hannover submit that the transfer of the property into the Hannover Company following completion of the unit sale and the subsequent transfer of the property from the Hannover Company to the Hannover Partnership do not taint this analysis. I was referred to HMRC guidance published on 7 August 2013 which on the application of the targeted anti-avoidance rule (TAAR) in paragraph 2(4A) of Schedule 7, FA 2003 for SDLT group relief. The guidance states that:

> whether a sequence of steps constitutes avoidance is also informed by FA 2003 sections s7A to 75C. HMRC Stamp Taxes acknowledge that deciding to sell shares rather than land so as to pay less tax or SDLT (see paragraph D2.2.1 of HMRC's General Anti-Abuse Rule Guidance […] as approved by the Advisory Panel with effect from 15 April 2013) represents a straightforward legislative choice and is not, of itself, objectionable.
>
> A business may choose to acquire a property-owning company as opposed to acquiring the property from that company. The purchaser may, after acquiring the company, transfer the property out of the company acquired and into a different company in the purchasing group. HMRC do not regard that of itself, and subject to the list of transactions mentioned above, as resulting in the avoidance of tax such that FA 2003 paragraph 2(4a)(b) would be in point, even if the acquisition of the property-owning company and the subsequent intra-group transfer of the property formed part of the same arrangements.
>
> […]
>
> The purchaser may, after acquiring the company and transferring the property intra-group, liquidate, wind-up or strike-off the company acquired. HMRC do not regard that of itself as resulting in, or being evidence of, the avoidance of tax such that FA 2003 paragraph 2(4A)(b) would be in point, even if the liquidation, winding –up or striking-off formed part of the same arrangements that also included the acquisition and the inter-group transfer.
>
> In the events described above, the FA 2003 paragraph 2(4A)(b) analysis would be the same even if the purchaser only became a member of a group for SDLT purposes as a result of the acquisition of the property-owing company.

141.

Section D34 of the HMRC's GAAR guidance concerns a contrived scheme to transfer land into a company free of SDLT so that the shares can be sold. Section D34.5.1 considers the application of s75A in these circumstances and says:

> S75C(1) FA 2003 states: "A transfer of shares or securities shall be ignored for the purposes of s75A but if for this subsection it would be the first of a series of scheme transactions."
>
> When s75A was introduced there was a concern it could possibly attach some unintended targets. For example a property may have been held by a company as its only asset for many years. The shares in that company may then be acquired by new parent, P Ltd, which then liquidates the company and the property is distributed to P Ltd.
>
> […]
>
> HMRC did not want s75A to change that policy […]

142.

Thus, say Hannover, there is nothing abusive in a unit sale (which is, of course, treated as a share sale for SDLT purposes) followed by a hive-up or hive-down (in this case the transfer from the GPUT to the Hannover Company) and a liquidation of the company (in this case the GPUT). And in relation to D34, Hannover say that this is not just academic authority, but has statutory effect because it is part of the GAAR guidance.

143.

As regards the subsequent transfer of the property from the Hannover Company to the Hannover Partnership, Hannover say that as the Hannover Partnership is transparent, the property remains 99.9% owned by the Hannover Company following its transfer to the Hannover Partnership (as the other partner had a 0.1% interest in the partnership).

144.

The starting point of this analysis is Schedule 15, FA 2003, which sets out the how SDLT applies to partnerships. Paragraph 1 sets out a definition of what is a partnership, and it is not disputed that both the Hannover Partnership and the Greycoat Partnership are "partnerships" for SDLT purposes. Paragraph 2 provides that partnerships are to be treated as fiscally transparent for SDLT purposes:

> For the purposes of [SDLT]:
>
> (a) a chargeable interest held by or on behalf of a partnership is to be treated as held by or on behalf of the partners, and

> (b) a land transaction entered into for the purposes of a partnership is treated as entered into by or on behalf of the partners,
>
> And not by or on behalf of the partnership as such.

145.

But as regards the application of s75A, subsections (8) and (8A) of s75C apply. In other words, Part 3 of Schedule 15 (which imposes a special charging regime for land transactions between partners and a partnership) is "switched-off" in relation to s75A. But, say Hannover, the provisions of paragraphs 1 and 2 (which are in Part 1) are not switched-off and continue to apply. This is supported, submit Hannover, by the following statement by Peter Gibson J in the Court of Appeal in *Marshall v Kerr*:

> […] because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.

146.

This statement was expressly approved by Lord Brown-Wilkinson on the subsequent appeal to the House of Lords. Peter Gibson J's statement has also been cited and applied in other judgments. In particular in *DV3,* Lewinson LJ at [10] says that any separate legal personality of the partnership is to be disregarded for SDLT purposes.

147.

Hannover submit that the consequence of only Part 3 of Schedule 15 being switched-off is that, at the final step (being the transfer from the Hannover Company to the Hannover Partnership), there is only a transfer of 0.1% of the property. The 99.9% balance is treated as not having moved.

Nothing in extraction of property from Greycoat Partnership that amounts to tax avoidance

148.

Hannover further submit that there is nothing in the transfer of the property out of the Greycoat Partnership into the GPUT (or the subsequent removal of the Greycoat Partnership from under the GPUT) that taints the transactions either. Hannover apply paragraphs 1 and 2 of Schedule 15 with the effect that immediately prior to the property being transferred out of the Greycoat Partnership, it was owned as to 99% by the GPUT and as to 1% by the General Partner. When that 1% was bought out of the partnership, SDLT was paid in full. I was referred to HMRC's SDLT group relief guidance, and the white list of transaction and two examples in particular at SDLTM23040. The first example was where a property is transferred to a group company, with a view to the shares in that company might be sold within three years – thus sheltering from SDLT any increase in the value of the property in the meantime. The second example is where a property is extracted from a group company, so that the property should not pass to a purchaser of the shares of the group company. Hannover note that SDLT was paid in full when the property was originally acquired by the

Greycoat Partnership. And, whilst neither example is exactly on point, Hannover says that the guidance is academic authority that the transfer of the property from the Greycoat partnership to the GPUT, followed by the subsequent sale of the GPUT units is not abusive (in circumstances where the property has been held within the relevant vehicle for a long period of time).

149.

As a fallback position, Hannover submit that a party dealing at arm's length would only ever pay duty on the value of the general partner's 1% interest in the Greycoat Partnership – however the transaction steps were structured. The point here is that s75A does not apply if the first step in the scheme transactions is the transfer of shares (or, in this case, units in the GPUT – as they are deemed to be shares). If the extraction of the property from the Greycoat Partnership took place as a later step in the series of transactions, then the first step would become the sale of the GPUT units – bringing this step within s75C(1), and therefore ignored for the purposes of s75A. Hannover note that whoever controls the GPUT can decide whether and when to collapse the partnership – and could easily arrange for the partnership to be collapsed at a late stage in the series. Hannover say that it cannot be right that the application of s75A depends on a commercial decision as to the order of the various steps in the series of transactions.

Application of s75A

150.

Hannover also made submissions on the amount of the duty to be levied under s75A in the event that I was to find that s75A did apply to the transactions.

151.

Hannover submitted that in such a case the underlying transaction was a disposal of a 1% interest in the property, and that the duty payable would therefore be charged on only 1% of the value of the property. And as Hannover had already paid duty on an amount equivalent to 1% of the value of the property, there would be no further duty to pay.

152.

The reasoning is as follows.

153.

First, the effect of the deeming provisions in paragraphs 1 and 2 of Schedule 15 has the effect of determining that the property is initially owned for SDLT purposes as to 99% by the GPUT and as to 1% by the General Partner.

154.

As regards the 99% interest that is treated as owned by the GPUT, Hannover say that the first transaction in the series of "scheme transactions" is the sale of the GPUT units (the removal of the Greycoat Partnership being a "nothing" for SDLT purposes, as the property is deemed to already be owned by the GPUT). Under s75C(1), this unit sale is ignored for the purposes of s75A. The subsequent transactions relating to the 99% interest do not give rise to any duty say Hannover, as these are either the distribution of the property out of the GPUT to the unit holders, or the subsequent contribution of that interest to the Hannover Partnership.

155.

The only element of the transaction, say Hannover, that attracts duty under s75A can be the transfer of the 1% interest in the property held by the General Partner to the Hannover Company or the Hannover Partnership. In either case, Hannover say that the amount that is chargeable to this interest is 1% of the total consideration paid.

156.

They get to this amount by three routes. First, by applying s75B, and s75B(1) in particular. Hannover submit that the consideration attributable to the 99% interest held by the GPUT is ignored, as it is merely incidental to the transfer of the 1% interest transferred by the General Partner. Second, by applying s75C(1), which requires that the sale of the units (attributable to the 99% interest in the property) be ignored – and so therefore the consideration attributable to those units. And finally, by application of the apportionment provision in s75C(5), which requires a just and reasonable apportionment of the consideration.

157.

Credit must be given under s75C(10) for the duty Hannover has already paid – which is duty on an amount equivalent to 1% of the property's value. Therefore, say Hannover, no further duty is payable.

HMRC's submissions

158.

HMRC agree with Hannover that s75A must be interpreted purposively. But they disagree fundamentally with Hannover as to the practical effect of such an interpretation.

Purposive interpretation

159.

HMRC say that you apply s75A in accordance with its terms - Parliament has set out in s75A(1)(a) to (c) objective yardsticks for when the section is to apply. The tax avoidance that is targeted by the legislation occurs when the chargeable consideration for the scheme transactions is less than the chargeable consideration for the notional land transaction.

160.

I was referred to paragraph [42] of Lord Hodge's judgement in *Project Blue*:

> […] The heading of the section, 'Anti-avoidance', is the only indication in the section which could support PBL's contention. The heading is relevant to assist an understanding as to the mischief which the provision addresses, but it says nothing as to the motives of the parties to the scheme transactions. 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 manner. This is clear from sub-s (1)(c) which compares the amount of SDLT payable in respect of the actual transactions against what would be payable under the notional land transaction in s 75A(4), by which P acquired V's chargeable interest on its disposal by V.

161.

HMRC submit that in other words the Supreme Court had held that the only "tax avoidance" which needs to be established for s75A to apply is the existence of "a reduced liability or no liability to SDLT", which arises from a series of transactions which the parties put in place, in comparison to the SDLT which would have been payable under a notional land transaction by which P acquired V's chargeable interest on its disposal by V.

162.

If Parliament had intended, submit HMRC, that the application of s75A should be restricted to transactions which were abusive or artificial, it would have said so. There are many examples in tax legislation where Parliament has done exactly that - for example the transactions in securities regime (which can be traced back to FA 1960) has exceptions for transactions undertaken for *bone fide* commercial reasons or where the taxpayer could show that the transactions did not have as their sole or main object enabling a tax advantage to be obtained. Similarly, if Parliament had intended s75A to be restricted to transactions which had as their main purpose (or one of their main purposes) the avoidance of tax, it would have expressly done so – an example where it had done so in relation to SDLT is paragraph 2(4A), Schedule 7, FA 2003 (SDLT group relief).

163.

HMRC submit that, contrary to Hannover's submissions, there is no requirement for s75A to apply that the reduced liability to SDLT (or absence of any liability at all) must be one which runs contrary to the scheme of the SDLT legislation or that there must be objective avoidance.

164.

Instead, say HMRC, s75A self-defines the tax avoidance that comes within its scope. It does so in a number of ways, including:

(1) Disapplying s75A where s75(1)(c) is only satisfied by reason of the factors in 71A to 73, or Sch 9 (S75A(7))
(2) Deeming certain transactions to be “incidental” (s75B(3))
(3) Ignoring consideration paid on transactions attracting specific reliefs (such as s65 relief on incorporation) (s75C(4)); and
(4) Giving the Treasury power to provide for s75A not to apply in specified circumstances - including with retrospective effect (s75C(11) and (12))

165.

HMRC submit that as Parliament has set out objective tests in s75A(1)(a) to (c) as to when the provisions apply, it would be wrong in principle for the Tribunal to read in further qualifications to these objective tests in order to determine whether the transactions are “abusive” or involve “tax avoidance”. Indeed, it is irrelevant that the transactions might be “commercial”. HMRC submit that Parliament must have recognised that the provisions had broad effect, otherwise what would be the purpose of s75C(11) and (12) which give the Treasury power to narrow the provisions - retrospectively if necessary.

166.

I was referred to *Page v Lowther* (1983) 57 TC 199 which relates to the “old” transactions in land provisions in s488 Income and Corporation Taxes Act 1970. One of the issues in the case was whether a lease granted by trustees to a property developer (Trafalgar) was within the scope of the provisions. Slade LJ at page 210 says the following:

> Part XVII of the 1970 Act bears the wide heading "Tax Avoidance" and s 488 appears in Chapter IV of that Part. The section has a side note reading "Artificial transactions in land". Sub-section (1) expressly states the purpose of the section as follows: "This section is enacted to prevent the avoidance of tax by persons concerned with land or the development of land." Section 526(3) defines "tax", in effect, as meaning either income tax or corporation tax. Section 488(2), omitting the last two sentences which are immaterial for present purposes, reads as follows:
>
> "This section applies wherever - (a) land, or any property deriving its value from land, is acquired with the sole or main object of realising a gain from disposing of the land, or (b) land is held as trading stock, or (c) land is developed with the sole or main object of realising a gain from disposing of the land when developed, and any gain of a capital nature is obtained from the disposal of the land - (i) by the person acquiring, holding or developing the land, or by any connected person, or (ii) where any arrangement or scheme is effected as respects the land which enables a gain to be realised by any indirect method, or by any series of transactions, by any person who is a party to, or concerned in, the arrangement or scheme;"
>
> […]
>
> Counsel for the trustees suggested that Warner J, in regarding the lease granted by the trustees to Trafalgar as constituting an 'arrangement', failed to take into account the purpose and scope of the section as indicated by sub-s (1) and the side note. He referred us to the decision of the House of Lords in *IRC v Plummer*, [1980] AC 896, as an illustration of the principle that, if a completely literal reading of relevant words in a taxing statute would extend

its application beyond that which Parliament can reasonably be supposed to have intended, but a more restricted interpretation of those words would limit its application in a manner more likely to represent such intention, then it may be legitimate for the court to adopt the narrower interpretation if '… the words used fairly admit of such a meaning as to give effect to that purpose …' (see, for example, [1980] AC 896 at 911 per Lord Wilberforce). So long as proper weight is attached to the words which I have just quoted, I do not think that there is any doubt about the existence of the principle.

For my part, however, I cannot fault the judge's own approach to the opening sub-section. He said this (61 at 68-69):

'I do not doubt that the provisions of s 488, and those of s 489 that are supplemental to it, must be interpreted in the light of the purpose of s 488 as stated in sub-s (1). After all, any legislation must be interpreted in the light of its purpose in so far as that purpose is discernible from the legislation itself, and it would be perverse to refrain from applying that principle where the legislature has taken the trouble expressly to state its purpose at the outset. I do not, however, think that that entitles one to treat as ambiguous, with a view to bending their meaning, words in sub-s (2) that are in themselves clear. What constitutes tax avoidance is, as was pointed out by Lord Wilberforce in *Mangin v IRC* [1971] AC 735 at 739 in a passage cited by Vinelott J in *Chilcott v IRC* [1982] STC 1 at 24, very much a matter of opinion, and it would, in my judgment, be dangerous in the extreme for a judge to take it upon himself to modify the meaning of words in sub-s (2), or in any subsequent provision that was relevant to the case before him, according to his own conception of what does and does not constitute tax avoidance.'

The principle of construction exemplified by the *Plummer* decision is only applicable where the words in question fairly admit of the more restricted meaning. Like the judge, I myself feel no doubt that, even having full regard to the sidenote and s 488(1), the lease of 1971 was an 'arrangement' within the meaning of sub-s (2), entered into between the trustees and Trafalgar. The trustees' task on this appeal in this context would have been much easier if s 488 had specifically provided that a condition for the application of sub-s (2)(ii) should be that the main object, or one of the main objects, of the scheme or arrangement in question was for the avoidance or reduction of liability to tax. Significantly and in contrast, the immediately preceding section, s 487(1), does contain an express provision rendering as a condition precedent to the operation of the section the existence of an object, or a main object, of such a nature.

Counsel for the trustees, however, in my opinion clearly correctly, did not feel able to submit that s 488(1), or indeed the sidenote, goes so far as actually to impose any such condition precedent to the application of s 488, additional to those conditions set out in the second sub-section. According to the wording of sub-s (5) of that section, any number of transactions are capable of being regarded as constituting a single arrangement or scheme if a common purpose can be discerned in them. This sub-section does not state, and, in my opinion, it cannot be implied, that the common purpose must be that of avoiding tax. It is quite enough if the common purpose is that of enabling a gain to be realised by a person who is a party to the arrangement, as in the present case. The wording of sub-s (2) does not permit the presence or absence of the motive of avoiding tax to be a relevant consideration.

[…]

With all respect to the very careful argument of counsel for the trustees, I think there is no room for construing the phrases 'arrangement' and 'from the disposal of the land' in the very restricted senses which he suggests. While sub-s (1) may be regarded as being of the nature

> of a preamble, stating in general terms the nature of the mischief at which the section is aimed, its wording is not, in my opinion, nearly sufficiently clear to enable the court to give a construction to sub-s (2) which would enable the trustees to escape the net of taxation under s 488 in the present case. If it had expressly limited the operation of the section to transactions specifically designed to avoid tax, the position might have been quite different.
>
> I must accept that, on my construction of the section, the sidenote reading 'Artificial transactions in land' may, in some cases, be somewhat misleading. I would accept that the transactions involved in the present case cannot on the evidence fairly be described as artificial. Nevertheless, as Lord Upjohn pointed out in *R v Schildkamp* [1971] AC 1 at 28, 'A side-note is a very brief précis of the section and therefore forms a most unsure guide to the construction of the enacting section …'

167.

HMRC say that the decision of the Court of Appeal in *Page v Lowther* shows the correct approach to be taken in this case. Notwithstanding any sidenote or title to the provisions, or indeed the introductory paragraph setting out the objective of the provisions, where the legislation is drafted in objective terms, the legislation becomes self-defining – there is "tax avoidance" for the purposes of the legislation if the taxpayer undertakes transactions that fall within the scope of the provisions. There is no additional "tax avoidance" test that needs to be met before the provisions apply.

Series of relevantly connected transactions

168.

HMRC submit that the provisions of s75A apply if there are a series of relevantly connected transactions. In this context, HMRC note that "scheme transactions" is a defined term - there is no connotation in the legislation that there needs to be some kind of tax avoidance "scheme" - it is merely a label.

169.

HMRC submit that for transactions to be relevantly connected, they need to be commercially interdependent. This comes from the use of the phrase "involved in connection with" in s75A(1). There needs to be more than just a series of transactions, where one transaction follows after another, for the transactions to be "involved in connection with" the disposal and acquisition - they need to be commercially interdependent.

170.

HMRC submit that the following steps are the "scheme transactions" for the purposes of s75A(1)(b) as they are steps involved in connection with the notional land transaction:

(a) The unit sale agreement dated 26 August 2011 (step two)
(b) The transfer by the Trustee of its limited partnership interest in the Greycoat Partnership to GCLOD (step two)

(c) The loan made by the Hannover Company to GCLOD on 31 August 2011 (step two)
(d) The subscription for additional units in the GPUT by GCLOD on 31 August 2011 (step two)
(e) The purchase of the GPUT units by the Hannover Company and Mereope (step two)
(f) The discharge of the Eurohypo loan by the GPUT (step two)
(g) The loan by Deutsche Hypo to the Hannover Company (step two) (h) The loan by Merope to the GPUT (step three)
(i) The debenture granted to Deutsche Hypo (step two)
(j) (If P is the Hannover Partnership), the Hannover Company becoming a partner in the Hannover Partnership.

171.

HMRC submit that each of the steps taken were interdependent from a commercial point of view, and that each one was essential to the transaction. At the very least, each step was conditional (in a commercial sense) on the other steps being taken.

172.

HMRC point to the BLP steps paper, the heads of terms, and the exclusivity agreement as evidencing the common intention of the parties that all of these steps be taken in order. They further submit that the evidence of both Mr Poole and Mr Rucker is that there was a common intention and understanding of all the parties that each of these transactions be carried out in sequence from beginning to end.

173.

In particular, HMRC submit that there was a deliberate decision to distribute the property from the Greycoat Partnership to the GPUT (and for the GPUT to dispose of its residual interest in the Greycoat Partnership) prior to any sale of the GPUT units. This was a critical issue for Hannover, as it did not want to acquire any interest (however indirect or fleeting) in the Greycoat Partnership.

174.

Accordingly, say HMRC, s75C(1) is not in point. The first step in the series of transactions was not, and was never intended to be, a transfer of the GPUT units to the Hannover Company. The Hannover Company would only be prepared to accept a transfer of the units in circumstances where the property had been extracted from the Greycoat Partnership first.

Identification of V and P

175.

HMRC submit that V is the Greycoat Partnership – or more precisely the partners in the Greycoat Partnership (the General Partner and the Trustee as trustee for the GPUT) - are V.

176.

HMRC submit that it follows from paragraphs 34 and 37 of Schedule 15 that, when the property was transferred out of the Greycoat Partnership, it was the whole of the property that ceased to be "partnership property", and not just 1%. Before the transfer, all of the freehold property was partnership property, and following the transfer, none of the freehold property was partnership property.

177.

HMRC say that the provisions of Part 3 of Schedule 15 only make sense if the transfer is treated as being the whole of the partnership property. This is because the formula in paragraph 18 otherwise makes no sense. If it was only 1% that was transferred (being the percentage interest of the General Partner that was acquired for the benefit of the GPUT), the formula results in a figure that is only 1% of 1% of the property's market value, which is absurd.

178.

HMRC submit that paragraph 2 of Schedule 15 does have the effect of treating the Greycoat Partnership as "transparent" for SDLT purposes – but it does not establish the proportions in which the partners are treated as owning the underlying assets (which is not surprising, given the various sophisticated ways in which partnership profits can be allocated). The partnership ownership proportions are determined by paragraph 34(2), which specify that partnership shares are the proportions in which income profits are shared.

179.

As regards Hannover's submission that Part 3 is switched-off by s75C(8)(a), HMRC say that this is an incorrect reading of the provision. Rather s75C(8)(a) refers solely to the notional land transaction under s75A, and is only relevant if the notional land transaction involved a transfer between a partnership and its partners. It is not relevant in this case because the notional land transaction is to an unconnected third party – either the Hannover Company or the Hannover Partnership.

180.

And HMRC submit that a mirror-image analysis applies on the transfer of the property from the Hannover Company to the Hannover Partnership.

181.

HMRC submit that the effect of s75A is that SDLT is charged on a notional land transaction in the sum of £5,554,000 (being SDLT at 4% on consideration of £138,850,000), and that this is payable either by the Hannover Company or (alternatively) by the Hannover Partnership.

182.

In submissions, HMRC acknowledged that credit would need to be given for the £55,000 SDLT already paid, by virtue of s75C(10).

Discussion

183.

It is not in contention that a purposive construction needs to be adopted when considering the application of s75A. What is very much in contention is how to approach such a purposive construction.

184.

I do not agree with Hannover's argument that s75A only applies if the transactions, viewed collectively, been not taxed appropriately when you look at the scheme of SDLT.

185.

Hannover say, in essence, that you look at the SDLT payable on the basis that s75A had not been enacted, and determine whether that is an appropriate amount of SDLT. Only if it is not (and how one should determine what is an appropriate amount of SDLT they do not address in any detail), can s75A be engaged. The issue I have with this approach is the meaning of “scheme of SDLT”. Hannover's argument can only make sense if s75A is not treated as part of the “scheme of SDLT” - but treated as sitting outside it. As soon as s75A is treated as forming part of the scheme of SDLT, Hannover's argument becomes circular and paradoxical. And I can find no reason for treating s75A as somehow special, sitting outside the "scheme of SDLT".

186.

I consider that neither the *UBS* and *Willoughby* cases are relevant to this appeal. The *UBS* case is not relevant it is related to the application of the restricted securities legislation in Part 7 of Income Tax (Earnings and Pensions) Act 2003, and whether s423(1) applied to any contracts or agreements. The Supreme Court held that the legislation was to be construed as applicable only to contractual terms which have a business or commercial purpose, and commercially irrelevant terms - whose only purpose is to obtain the tax exemption - are ignored. But it does not follow from the decision that the reverse applies - in other words you cannot go on to say that a provision intended to counteract tax avoidance must be construed to apply only to cases of "tax avoidance". Nor is the *Willoughby* case relevant. *Willoughby* concerned the taxation of bonds, and a critical fact was that the taxpayers were previously not ordinarily resident in the UK, but two of the bonds under consideration were taken out later - after the taxpayers had become ordinarily resident in the UK. The issue the court had to consider was whether, for the purposes of s741, the taxpayers could show that avoiding a liability to tax was not one of the purposes of for which the transfer or associated operations were being effected. The court had to interpret the meaning of the phrase “avoiding liability to tax” in the statute, and that is the context in which the court drew a distinction between avoiding and mitigating tax. The case provides no authority in circumstances where the statutory provisions have no express requirement for there to be "tax avoidance".

187.

I did not find the references to the *Vardy Properties* or the *DV3 RS Limited Partnership* cases helpful. Although I accept that the exploitation of sub-sale relief (as illustrated by these two cases) is within the scope of s75A, these cases do not provide any useful authority as to the kind of circumstances that would fall outside the scope of s75A – and as both these cases pre-date the enactment of s75A, that is not wholly surprising.

188.

Nor am I in any way persuaded that the concept of "objective tax avoidance" is in any way relevant to an analysis of s75A, or that the decision of the Supreme Court in the *Project Blue* case requires me to identify a “tax avoidance scheme” or “unintended tax loss” which “exploits a loophole in the statutory provisions”. Although it is clear that s75A is intended to act as an anti-avoidance provision, in my view (and I find that) it self-defines the kind of tax avoidance that is within its scope (in a similar way to the former transactions in land provisions in s488 Income and Taxes Act 1970 that were considered in *Page v Lowther*). Lord Hodge in *Project Blue* says that "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 manner". I find that this is exactly what happened in this case – the series of transactions that were effected by the parties resulted in a reduced liability to SDLT when compared with the notional land transaction.

189.

Lord Hoffman's speech in *MacNiven*, although prayed in aid by Hannover, in my view provides support for HMRC's submissions. As s75A does not include words like "avoidance" or "mitigation", it is not helpful to introduce them when interpreting the provisions. It is necessary to apply the language of s75A to the facts before me.

190.

I consider that HMRC's guidance to which I was referred by Hannover is either irrelevant or wrong.

191.

The GAAR guidance is irrelevant. It applies only in the specific context of the GAAR. Applying that guidance to the interpretation of s75A is not appropriate. The tests in the GAAR (the so-called “double reasonableness” tests) consider whether the transactions under consideration can be considered to be a reasonable course of action - and the GAAR is intended to override the result that would otherwise be given by the ordinary application of the relevant provisions. Whether the steps taken by the parties in this appeal amounted to a reasonable course of action is irrelevant to the operation of s75A.

192.

The other guidance – insofar as it relates to s75A – is inconsistent with the legislation and is incorrect. It is (yet another) example of HMRC seeking to narrow by guidance legislation that they consider to operate too broadly. The solution is not to narrow the operation of the legislation by guidance, but by promoting amending legislation in Parliament. I appreciate that there may be issues of legitimate expectation if Hannover entered into the transactions which are the subject of this appeal in reliance on HMRC's guidance.

But that can only be resolved by judicial review, and is not something that can be resolved by this Tribunal.

193.

I agree with Hannover's submission (following the decision of the House of Lords in *Vestey)* that HMRC have no discretion as to who they can assess under s75A – and indeed HMRC in their submissions agreed with this point. This is also made clear in Lord Hodge's judgment in *Project Blue* at [43]. Nor is there any risk of multiple charges to tax because of overlapping notional transactions – again this is made clear in Lord Hodge's judgment in *Project Blue* at [44] onwards.

194.

Hannover also submitted that the interpretation of s75A (as originally enacted by the Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006) was unaffected by the subsequent enactment of ss75B and 75C in FA 2007. There is nothing to suggest that this is the case in any material placed before me. If s75B and s75C were not intended to affect the application of s75A, why would Parliament have enacted transitional provisions in s71(3) FA 2007 providing that s75C does not have retrospective effect if the result would be to make a person liable to a higher amount of tax than would have otherwise been the case? I find that the impact of s75A was varied as a result of the subsequent enactment of ss 75B and 75C with retrospective effect.

195.

Finally, I recognize that if the steps had been undertaken in a different order, there might well have been a different SDLT result – in particular if the Hannover Company had acquired the GPUT units as the first step, and only after that step was the property transferred out of the Greycoat Partnership. In these circumstances, s75C(1) would have applied to disregard the acquisition of the GPUT units. But the sequencing of the steps was of critical commercial importance to Hannover, and it was essential to them that the property be extracted from the Greycoat Partnership before they acquired the GPUT units. The parties made a deliberate and considered decision as to the order of the steps, and have to live with the consequences that follow.

Factual findings

196.

It therefore follows that I find that the operation of s75A is not prevented from applying to the transactions under appeal because of the absence of any "objective tax avoidance", any "tax avoidance scheme", any "unintended tax loss", aor any exploitation of a "loophole in the statutory provisions".

197.

In order to determine how s75A applies to the transactions, I make the following factual findings.

198.

I find that Steps One to Four (inclusive) were a pre-ordained series of transactions that had as one of their main purposes the saving of SDLT.

199.

I find that the transactions were structured using a sale of the GPUT units in order to benefit from the exemption from stamp taxes that applies to transfers of units in a unit trust.

200.

I find that the elements in each of Steps One to Four were commercially interdependent, and formed an essential part of the overall deal, and were intended to take place in the order in which they actually took place. I find that these steps and the elements within them are "scheme transactions" for the purposes of s75A.

201.

In particular, I find that it was always intended that (i) the property should be transferred out of the Greycoat Partnership to the trustees of the GPUT before the GPUT units were sold to the Hannover Company, and (ii) after the sale the property would be distributed to the Hannover Company and the unit trust would be dissolved.

202.

I find that the ultimate acquirer of the property was always intended to be the Hannover Partnership.

203.

I reach these findings for the following reasons:

204.

First, an outline of the steps was prepared by BLP and set out in the Steps Paper included in the Fourth Offer, and was subsequently developed in the heads of terms - in advance of contractual documents being agreed. Although the actual steps undertaken did not precisely follow the Steps Paper, there is clearly a common core to the actual steps that were taken - namely the transfer of the property from the Greycoat Partnership to the GPUT, the acquisition of the GPUT units by a Hannover entity, the distribution of the property by the GPUT to the Hannover entity, and the ultimate acquisition of the property by the Hannover Partnership.

205.

Second, Steps One and Two were embodied in contractual documentation to which Greycoat entities and

Hannover entities were parties. Whilst I had no direct evidence on the point, I infer and find that the documentation for these steps must have been pre-agreed between the parties in advance, and therefore these steps form part of a pre-ordained series. My reasons are that Steps One and Two follow in quick succession, and the voluminous documents for Step Two could not have been negotiated and agreed in the time available between the completion of the final stages of Step One and the implementation of the various elements of Step Two. Furthermore, the elements in Step One and Step Two required the consent and active co-operation of the various banks - and this could not have been obtained (and documented) in that short interval. The elements of Step One and Step Two therefore must have formed part of a pre-ordained series.

206.

Third, it was commercially important to Hannover that they never acquired any interest (direct or indirect) in the Greycoat Partnership, and therefore the property had to be transferred out of that partnership into the GPUT (and the GPUT dispose of its residual interest in the partnership) before Hannover acquired any GPUT units.

207.

Fourth, although none of the Greycoat entities were parties to Step Three, the terms of the Deutsche Hypo loan made it inconceivable that the property would not be distributed out of the GPUT to the Hannover Company. The terms of the loan were such that it became repayable if the Hannover Company did not grant security over the property to Deutsche Hypo, and the Hannover Company would have to become the owner of the property in order to grant that security. Although theoretically the Hannover Company did not have to procure the distribution of the property *in specie*, failure to do so (with the subsequent grant of security) would make the loan immediately repayable, and the Hannover Company had no resources from which it could repay the loan. Step Three therefore formed part of the pre-ordained series.

208.

Fifth, the subsequent transfer by the Hannover Company to the Hannover Partnership at Step Four was always in the contemplation of Hannover, as it was interests in the Hannover Partnership that would be offered to retail investors (indeed, the evidence before me was that shares or other interests in the Hannover Company could not be offered to retail investors). Although the property was not transferred by the Hannover Company to the Hannover Partnership until BaFin approved had been obtained, the evidence was that it was expected that this approval would be forthcoming. I note also that the Steps Paper contemplated that the Hannover Partner would be the purchaser of the GPUT units, although in practice the Hannover Company acquired the units as an intermediate step.

209.

Finally, as regards the tax avoidance motivation, Mr Rucker stated expressly in his evidence that Hannover had to find a way to increase their offer price, and the saving Hannover made in SDLT (through buying the GPUT units) enabled them to increase the offer price. Indeed, it was accepted by Hannover in its submissions that saving SDLT through buying the GPUT units was always intended by Hannover - but that this was a fiscal freedom intended and permitted by Parliament.

210.

Mr Poole in his evidence stated that the property ownership structure (namely the property being owned through a layered structure involving a partnership and unit trust) was devised in order to allow for the economic interest in the property to be sold without incurring SDLT, through selling the units in the GPUT, and I so find. I also find that there was an intention that at some point in the future that economic interest would be sold (otherwise there would have been no point in acquiring the property in this structure). However, I find that at the time the property was acquired by the Greycoat Partnership, no purchaser had been identified. In particular, I find that Hannover's approach to acquire the property was unsolicited and unexpected. I therefore find that the original acquisition of the property by the Greycoat partnership did not form part of any pre-ordained scheme.

211.

As regards the final sale by the Hannover Partnership at Step Five to the 30 CP Unit Trust, I find that this too was not part of any pre-ordained scheme. The fact that Hannover was not able to find sufficient investment interest in the Hannover Partnership to make that partnership viable was something entirely outside the contemplation of Hannover. This sale was therefore not part of any pre-ordained scheme.

The notional land transaction

212.

It follows from my factual findings, and adopting the purposive approach indicated by Lord Hodge at [44] in *Project Blue*, that I find that V is the Greycoat Partnership and that P is the Hannover Partnership.

213.

My reason for determining that the Greycoat Partnership is V is that it is the owner of the property immediately prior to the series of steps that make up the scheme transactions. I find that P is the Hannover Partnership, as it was always the intended final "destination" for the property.

214.

The subsequent disposal of the property to 30 CP Unit Trust was never part of Hannover's original plans, and the transfer by the Hannover Partnership to 30 CP Unit Trust was never "involved in connection with" the initial transfer by the Greycoat Partnership. 30 CP Unit Trust cannot therefore be P.

215.

I note that as a limited partnership constituted under English law has no legal personality independent from its partners, the reference to the Greycoat Partnership is strictly to its partners. Similarly, the reference to the Hannover Partnership is strictly to its partners (as there was no evidence before me as to the nature of a German "GmbH & Co KG", other than that it is broadly equivalent to an English limited partnership, I apply the usual English rule of conflicts of laws, that foreign law is assumed to be the same as English law, unless there is evidence to the contrary).

216.

I therefore find that the notional land transaction under s75A(4) is the transfer of the property from the Greycoat Partnership to the Hannover Partnership.

217.

I do not accept Hannover's argument that this is the transfer of merely a 1% interest in the property. I agree with HMRC that the disapplication of Part 3 of Schedule 15 by s75C(8A) is only relevant to the notional land transaction under s75A(4). As this notional transaction does not involve the transfer of a chargeable interest between a partnership and its partners, Part 3 is not disapplied.

218.

The consideration given for the notional land transaction is determined by s75A(5) as 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) by way of consideration for the scheme transactions.

219.

This is £138,850,000. The SDLT liability on the notional transaction is therefore 4% of this amount, being £5,554,000.

220.

However, credit must be given under s75C(10) for any SDLT paid in respect of the disregarded transactions. This amounts to £55,540. I therefore determine that the amount of SDLT payable by the Hannover Partnership is £5,498,460.

Conclusions

221.

I allow the Hannover Company's appeal.

222.

I dismiss the Hannover Partnership's appeal, save that I vary the amount of SDLT payable so that it is £5,498,460 in order to take account of the duty paid on disregarded transactions.

223.

This appeal was categorized as complex and the Tribunal therefore has discretion to make an order in respect of costs under Rule 10 of the Tribunal's procedure rules. I make the following directions in respect of any application for costs. Any such application must be made in writing to the Tribunal office no later than 56 days after the release of this appeal (with a copy sent to the other party or parties). As it is unlikely that any assessment of costs would be undertaken summarily, the application need not be accompanied by a schedule of costs. The Tribunal will then give such further directions as it considers appropriate. Paragraphs 3 and 4 of Rule 10 of the Tribunal's Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 are disapplied.

224.

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.

Release Date: 18 APRIL 2019

Authorities mentioned in skeleton arguments but not referred to in the decision:

Re Barnard, Martins Bank v Trustee [1932] 1 Ch 269

Jenks v Dickinson [1997] STC 853

HMRC v DCC Holdings (UK) Ltd [2010] UKSC 58

Vanquish Properties (UK) Limited Partnership v Brook Street (UK) Ltd [2016] EWHC 1508 (Ch)

Barclays Wealth Trustees (Jersey) Ltd and anr v HMRC [2017] STC 2465