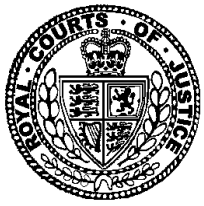

Neutral Citation Number: [2023] EWCA Civ 263

Case No: CA-2022-000609

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE MILES AND JUDGE JONATHAN RICHARDS
[2022] UKUT 21 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 March 2023

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE LEWIS
and
LADY JUSTICE FALK

- -

Between:

OISIN FANNING	**Appellant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS	**Respondents**

- -
- -

Julian Hickey and **Rebecca Sheldon** (instructed by **Levy and Levy Solicitors**) for the **Appellant**
Elizabeth Wilson KC and **Admas Habteslasie** (instructed by **the Solicitor and General Counsel to the Commissioners for HMRC**) for the **Respondents**

Hearing date: 1 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction and factual background

1. On 16 September 2011 the Appellant, Mr Fanning, completed on the purchase of a flat in Grosvenor Square (the "Property") from a company called Glendale Enterprises Four Limited ("Glendale"). The purchase price was £5,200,000, of which £200,000 was allocated to chattels. At that time the transaction would ordinarily have been charged to stamp duty land tax ("SDLT") at a rate of 5%, resulting in a tax charge of £250,000. However, Mr Fanning filed a SDLT return on the basis that he had no liability.

2. The basis for the position that Mr Fanning adopted was that tax was not due as a result of another transaction that Mr Fanning entered into on the same date. This was an agreement entered into between Mr Fanning and an Irish incorporated company, San Leon Energy plc ("San Leon"), under which Mr Fanning agreed to grant San Leon an option to purchase the Property (the "Option"). The consideration for the grant of the Option was £100. The Option was exercisable between 16 September 2016 and 16 September 2031 and the consideration payable on its exercise was the market value of the Property at that time.

3. When the transactions were entered into Mr Fanning was the executive chairman of San Leon, but he was not "connected" with it for tax purposes. The First-tier Tribunal ("FTT") found that San Leon was happy to assist Mr Fanning on the basis that the flat would be available for rent by San Leon for use by its staff. San Leon also lent Mr Fanning £300,000 towards the purchase price, the balance being funded by Barclays Wealth. Barclays took a charge over the Property. The Option was not registered with the Land Registry and, at least at the time of the hearing before the FTT, had not been exercised.

4. HMRC disagreed with Mr Fanning's SDLT analysis and issued a discovery assessment on 28 March 2014, which was upheld following a statutory review. Mr Fanning appealed unsuccessfully to the FTT and then appealed to the Upper Tribunal ("UT"). In a decision of Miles J and Judge Jonathan Richards the UT rejected Mr Fanning's appeal, in part on a different basis to the FTT (the "UT decision"). This is Mr Fanning's further appeal, made after permission was granted by Asplin LJ on three out of five of his grounds of appeal to this court.

5. I understand from HMRC that there are 41 appeals standing behind Mr Fanning's, with over £4 million of tax at stake.

The relevant legislation

6. The analysis adopted by Mr Fanning relies on a provision that has already generated more than its fair share of case law, s.45 of the Finance Act 2003 ("FA 2003"). We are concerned here with the version of s.45 in force in 2011. Section 45 was amended by both the Finance Act 2012 and the Finance Act 2013 with retrospective effect from 21 March 2012, but those changes obviously had no effect on the transactions to which Mr Fanning was a party. The Finance Act 2013 also introduced a more fundamental rewriting of s.45.

7. It is first necessary to set s.45 in context. References to statutory provisions below are, unless otherwise indicated, to provisions of FA 2003 as in force in September 2011.

8. SDLT was introduced as a new tax by Part 4 of FA 2003. It replaced stamp duty in relation to land. Unlike stamp duty it is a tax on transactions rather than documents. Section 42 provides that SDLT applies to "land transactions" and makes clear that the tax is chargeable whether or not there is any instrument effecting the transaction in question. By s.49 all land transactions are chargeable to tax unless they are exempted.

9. Section 43 defines a land transaction as any acquisition of a "chargeable interest", a concept in turn defined by s.48 to include (subject to certain exceptions) any "estate, interest, right or power in or over land in the United Kingdom". Section 43(4) provides that references to the "purchaser" and "vendor" are to the person acquiring and person disposing of the "subject-matter of the transaction". Section 43(6) makes clear that the subject-matter of the land transaction means the chargeable interest acquired (together with any right appurtenant to it).

10. SDLT is charged on the "chargeable consideration" for the transaction, which is generally any consideration in money or money's worth given for the subject-matter of the transaction, whether directly or indirectly by the purchaser or a person connected with him (paragraph 1 of Schedule 4 to FA 2003).

11. SDLT is subject to a self-assessment regime. At the relevant time returns were generally required to be submitted, and tax paid, within 30 days of the "effective date" of the transaction, which is generally the date of completion (ss.76 and 119).

12. Sections 44 and 45 are central to this appeal. As in force at the relevant time they provided as follows:

> "**44 Contract and conveyance**
> (1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
> (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction. In this case the effective date of the transaction is the date of completion.
> (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract. In this case the effective date of the transaction is when the contract is substantially performed.
> (5) A contract is "substantially performed" when—
> (a) the purchaser , or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or
> (b) a substantial amount of the consideration is paid or provided.
> (6) For the purposes of subsection (5)(a)—
> (a) possession includes receipt of rents and profits or the right to receive them, and

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

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

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

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

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

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

(ii) the first payment of rent is made.

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

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

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

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

…

(10) In this section—

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

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

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

45 Contract and conveyance: effect of transfer of rights

(1) This section applies where—

(a) a contract for a land transaction ("the original contract") is entered into under which the transaction is to be completed by a conveyance,

(b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and

(c) paragraph 12B of Schedule 17A (assignment of agreement for lease) does not apply.

References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and references to the transferor and the transferee shall be read accordingly.

> (2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.
> (3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which—
> (a) the transferee is the purchaser, and
> (b) the consideration for the transaction is—
> (i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and
> (ii) the consideration given for the transfer of rights.
> The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of any of sections 71A to 73 (which relate to alternative property finance).
> (4) Where there are successive transfers of rights, subsection (3) has effect in relation to each of them. The substantial performance or completion of the secondary contract arising from an earlier transfer of rights at the same time as, and in connection with, the substantial performance or completion of the secondary contract arising from a subsequent transfer of rights shall be disregarded.
> (5) Where a transfer of rights relates to part only of the subject-matter of the original contract ("the relevant part")—
> (a) subsection (8)(b) of section 44 (restriction of charge to tax on subsequent conveyance) has effect as if the reference to the amount of tax chargeable on that contract were a reference to an appropriate proportion of that amount, and
> (b) a reference in the second sentence of subsection (3) above to the original contract, or a reference in subsection (4) above to the secondary contract arising from an earlier transfer of rights, is to that contract so far as relating to the relevant part (and that contract so far as not relating to the relevant part shall be treated as a separate contract).
> (5A) In relation to a land transaction treated as taking place by virtue of subsection (3)—
> (a) references in Schedule 7 (group relief) to the vendor shall be read as references to the vendor under the original contract;
> (b) other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the transferor.
> (6) Section 1122 of the Corporation Tax Act 2010 (connected persons) applies for the purposes of subsection (3)(b)(i).
> (7) In this section "contract" includes any agreement and "conveyance" includes any instrument."

13. As can be seen, s.44 has the effect that SDLT is generally charged only when a land transaction is completed, rather than when a contract for a land transaction is entered into. However, there is an exception if the contract is "substantially performed",

whether by taking possession or by payment of a "substantial amount" of the consideration. (This exception addresses "resting in contract" schemes that were used with a view to avoiding stamp duty.) In that event, if the transaction subsequently completes an adjustment is made so as to ensure that no double charge arises, and if the contract falls away a refund can be obtained.

14. Section 45 addresses a "transfer of rights". Its scope is in dispute in this appeal, but an uncontroversial starting point is its application on a subsale. To take a simple example (and ignoring any deposits), assume V contracts to sell a freehold property to P for £1m. Before completion, P enters into a sale agreement with T in respect of the same property, and with the same completion date, for £1,100,000. Both transactions complete as envisaged, with legal title either passing directly from V to T or via P, and with T funding the £1m due from P to V (either directly or indirectly via P) and paying the £100,000 balance to P. The effect of s.45 is that the V-P transaction is disregarded and SDLT is charged on £1.1m by reference to a deemed "secondary contract" under which T is the purchaser and the consideration is as specified in ss.45(3)(b)(i) and (ii).

15. It can be seen that, by disregarding the V-P transaction, s.45 operates as a relieving provision. Without it P would be required to pay SDLT on the sale by V to P, and T would also be required to pay SDLT on the subsale from P to T.

16. Section 46 deals specifically with options. It relevantly provides:

> "**46 Options and rights of pre-emption**
> (1) The acquisition of—
> (a) an option binding the grantor to enter into a land transaction, or
> (b) a right of pre-emption preventing the grantor from entering into, or restricting the right of the grantor to enter into, a land transaction,
> is a land transaction distinct from any land transaction resulting from the exercise of the option or right...
> …
> (3) The effective date of the transaction in the case of the acquisition of an option or right such as is mentioned in subsection (1) is when the option or right is acquired (as opposed to when it becomes exercisable).
> (4) Nothing in this section applies to so much of an option or right of pre-emption as constitutes or forms part of a land transaction apart from this section."

17. The effect of s.46 is therefore to make explicit that the grant of an option over land is a land transaction, separate from the transaction that arises from an option being exercised. It is worth noting that this does not conflict with s.44(2). Section 44(1) applies where a contract for a land transaction "is to be completed" by a conveyance, and it is to such contracts that s.44(2) applies. An option to buy or sell land does not fall within the description in s.44(1) because, by definition, it may or may not be exercised, and only if it is exercised will it result in a conveyance. However, s.46 ensures that any premium paid for the grant of an option is subject to SDLT, irrespective of whether and on what terms the option is exercised.

18. Although HMRC's primary case rests on the interpretation of s.45, it relies in the alternative on s.75A FA 2003, an anti-avoidance provision considered by the Supreme Court in *Project Blue Ltd v HMRC* [2018] UKSC 30; [2018] STC 1355.

The analysis the scheme relies on

19. The transactions entered into in this case were intended to avoid the payment of SDLT at least in the short term and potentially altogether. The UT decision at [16] helpfully summarises the analysis on which the scheme depends, the "V-F Agreement" being the agreement between Glendale and Mr Fanning for the purchase of the Property:

> "(1) The V-F Agreement was a contract to which s.45(1)(a) applied.
> (2) The Option was an "assignment, subsale or other transaction" to which s.45(1)(b) applied. Section 45(1)(c) did not apply with the result that the treatment specified in s.45 applied.
> (3) By s.45(2) no SDLT was payable on grant of the Option.
> (4) The V-F Agreement was substantially performed and completed on 16 September 2011 when Mr Fanning took occupation of the Property and paid the balance of the consideration due and the Vendor executed the Form TR1. The Option was substantially performed on the same date when San Leon paid Mr Fanning the £100 premium due for the grant of the Option. Moreover, the V-F Agreement was completed as part of the overall arrangements that included the grant of the Option and so was "in connection with" substantial performance of the grant of the Option. Accordingly, the tailpiece to s.45(3) applied to disregard both the "substantial performance" and the "completion" of the V-F Agreement on 16 September. It followed from this that SDLT was not due on the transaction consisting of the transfer of the Property to Mr Fanning.
> (5) By s.44 of FA 2003, SDLT was not due in respect of the V-F Agreement."

It is worth expanding this slightly to explain that the reason that SDLT is said not to have been due at all by reason of s.45(3) is that the only taxable transaction was one which had a consideration of £100, and that was an amount that fell below the threshold at which SDLT was payable. Further, the reference in paragraph (5) is to the entry into of the V-F Agreement not being chargeable by virtue of s.44(2), as opposed to its completion which was said to be disregarded by virtue of s.45(3).

20. Only paragraphs (1) and (5) of the analysis just set out, and the fact that the V-F Agreement was completed, are uncontroversial. The remainder of the analysis is disputed by HMRC. It is worth clarifying, however, that HMRC do not maintain that the Option was a sham, or that the correct interpretive approach is one that simply disregards the Option under *Ramsay* principles (*WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300).

The decisions below

21. The FTT, in a decision by Judge Victoria Nicholl ([2020] UKFTT 0292 (TC)), accepted Mr Fanning's argument that the Option was an "other transaction" within s.45(1)(b), on the basis that there was no requirement for the entitlement to call for a conveyance referred to in s.45(1)(b) to be immediate or unconditional, and on the basis that the fact that the Option was not registered at the Land Registry did not preclude San Leon from relying on its contractual rights. However, Mr Fanning's argument that the "secondary contract" had been substantially performed was rejected because, applying s.44, the secondary contract had not been completed by a conveyance or substantial

performance, and it was not the case that a substantial amount of the consideration had been paid. Mr Fanning could therefore not benefit from the disregard in the final paragraph of s.45(3) (the "tailpiece"). The FTT held in the alternative that s.75A applied. On either basis the chargeable consideration was £5m.

22. In the UT HMRC sought to revive an argument that had failed before the FTT, namely that the Option was not an "other transaction" within s.45(1)(b). The UT held that HMRC were entitled to do so via a Respondent's notice and without having sought permission to appeal, relying on *HMRC v SSE Generation Ltd* [2021] EWCA Civ 105. The UT's decision on that point was the subject of one of the grounds of appeal to this court for which Asplin LJ refused permission.

23. The UT went on to decide the appeal in favour of HMRC by determining that, contrary to what the FTT had held, the Option was not an "other transaction" within s.45(1)(b). In summary, this was because:

    a) The position had to be tested as at 16 September 2011. At that point San Leon had not exercised the Option and was not entitled to do so for another five years. On a natural interpretation of s.45(1)(b) the Option conferred no "entitlement" to obtain a conveyance (UT decision at [34]).

    b) Mr Fanning's reliance on *Spiro v Glencrown Properties Ltd* [1991] Ch 537, and on the fact that an option creates an immediate interest registrable at the Land Registry, had no effect on the correct interpretation of s.45(1)(b) ([35]-[38]).

    c) The natural interpretation was reinforced by clear indications that the kind of contingent future entitlement obtained under the Option was not sufficient to engage s.45(1)(b), bearing in mind the function of s.45 to build on s.44 ([39]-[42]).

24. Although unnecessary to its decision, the UT also considered Mr Fanning's challenge to the FTT's conclusions on s.45(3)(b) (but not s.75A) on the assumption that its analysis of s.45(1)(b) was wrong. It made clear at [45] that it rejected the premise that the Option and the deemed secondary contract were one and the same. The UT indicated at [46] that, in contrast to the FTT's approach, it tended to agree with Mr Fanning that the consideration given by s.45(3)(b)(i) would be nil, but rejected the argument that the consideration under s.45(3)(b)(ii) would be just £100, concluding that on the facts it also included the market value consideration payable on exercise of the Option ([47]-[48]). Further, there had been no substantial performance or completion of the secondary contract ([49]-[51]).

The grounds of appeal

25. The grounds of appeal for which Mr Fanning has permission are that the UT was wrong to decide that:

    a) the Option was not an "other transaction" within s.45(1)(b);

    b) the consideration under s.45(3) was more than £100; and

    c) the secondary contract was not substantially performed, such that the tailpiece to s.45(3) was not engaged.

Submissions

26. Mr Hickey, for Mr Fanning, submitted that the Option did fall within s.45(1)(b). He relied on the fact that the grant of an option to sell an interest in land confers an immediate equitable interest in the land and prevents the grantor selling an unencumbered title to it: *London and South Western Railway v Gomm* (1882) 20 Ch D 562 (CA) and *Spiro v Glencrown Properties*. The grant of an option is an actual sale and not an agreement to sell: *George Wimpey & Co Ltd v IRC* [1975] STC 248. Further, on exercise of an option the grantee "becomes entitled to call for a conveyance" as required by s.45(1)(b).

27. As to s.45(3), Mr Hickey submitted that the Option was the secondary contract. The UT correctly accepted that there was nil consideration for the purposes of s.45(3)(b)(i) but wrongly failed to conclude that the grant of the Option, being the relevant "transfer of rights" and a land transaction that was distinct from any land transaction arising from its exercise, was substantially performed or completed when the £100 was paid. No additional amount or value could be ascribed under s.45(3)(b)(ii).

28. Ms Wilson, for HMRC, submitted that the starting point was s.44, since s.45 operated as an adjunct to it and modified it. Section 45 is aimed at situations where a third person stands in the shoes of a person who has agreed to buy a property and takes title or possession instead of them. An option does not result in an entitlement to call for a conveyance that has the same quality as that obtained under the contract referred to in s.45(1)(a). Under a contract of that kind the vendor could compel the purchaser to take a conveyance, whereas the grantor of an option has no such right. Further, the UT correctly held that the conditions in the tailpiece to s.45(3) were not met since there was no conveyance to San Leon or payment of a substantial amount of the consideration needed to secure title to the Property. In the alternative, s.75A negated the effect of the scheme.

Discussion

Applicable principles

29. This appeal turns principally on the interpretation of s.45, which operates in part as a deeming provision. I should therefore start with a reminder of the relevant general principles.

30. The modern approach to statutory interpretation was conveniently summarised by Lewison LJ in *Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 753; [2013] STC 1479 at [24]:

> "24. The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other: see *Inland Revenue Comrs v McGuckian* [1997] 1 WLR 991, 999; *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, para 28. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: see *WT Ramsay Ltd v Inland Revenue Comrs*

> [1982] AC 300, 323; *Barclays Mercantile Business Finance Ltd v Mawson*, para 29. The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, on its true construction, applies to the facts as found: see *Barclays Mercantile Business Finance Ltd v Mawson*, para 32."

31. It is worth adding to this the following observation by Simler LJ in *Eynsham Cricket Club v HMRC* [2021] EWCA Civ 225; [2021] STC 496:

> "45. It is also common ground that the court should seek to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Thus the court will presume that Parliament did not intend a construction that would operate in a way that is unworkable, impracticable, anomalous or illogical (see the observations of Lord Kerr of Tonaghmore JSC in *R v McCool* [2018] 1 WLR 2431, paras 24 and 25, endorsing passages from *Bennion on Statutory Interpretation*, 6th ed (2013), section 312)."

32. Since these cases were decided the Supreme Court has returned again to the topic of the modern purposive approach to statutory interpretation in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2022] AC 690. In their judgment Lords Briggs and Leggatt emphasised the central importance of identifying the purpose of legislation, as follows:

> "10. There are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. Two examples will suffice. In *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, para 8, Lord Bingham of Cornhill said:
>
> > 'Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'
>
> In *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546, para 10, Lord Mance JSC stated:
>
> > 'In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance … In this area, as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord

> Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme.'
>
> See further Lowe and Potter, *Understanding Legislation* (2018), paras 3.45–3.48 (and cases there cited)."

33. The correct approach to deeming provisions was summarised by Lord Briggs in *Fowler v HMRC* [2020] UKSC 22; [2020] STC 1476 at [27]:

> "There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory. The relevant dicta are mainly collected in a summary by Lord Walker of Gestingthorpe JSC in *DCC Holdings (UK) Ltd v Revenue and Customs Comrs* [2011] 1 WLR 44, paras 37-39, collected from *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, *Marshall v Kerr* [1995] 1 AC 148 and *Jenks v Dickinson* [1997] STC 853. They include the following guidance, which has remained consistent over many years:
>
> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
>
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, 133:
>
> > 'The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'"

Section 45(1)(b): "transfer of rights"

34. Rather than analysing ss.45(1) and (3) separately as the grounds of appeal might suggest, it is important to consider s.45 as a whole and in its statutory context in order to determine the nature of the transaction to which s.45(1)(b) is intended to apply and whether the actual transaction in this case answers to that description. In doing so, I will use the labels "V" and "P" to describe the vendor and purchaser under the "original contract" referred to in s.45(1)(a), "T" to describe the further person referred to in s.45(1)(b) and the "land" to describe the subject matter of the relevant transactions referred to in each of ss.45(1)(a) and (b) (ignoring the fact that strictly the subject-matter would be an interest in land). For simplicity I will also assume that, as in this

case, the land and the interest in it to which each transaction relates is precisely co-extensive.

35. Section 45(1) describes the situations in which s.45 can apply. Section 45(1)(a) envisages an "original contract" (between V and P) which "is to be" completed by a conveyance. Its wording replicates that of s.44(1), the provision that determines what transactions fall within the scope of s.44. Thus, any contract within s.45(1)(a) will also be within the scope of s.44.

36. Section 45(1)(b) requires there to be an "assignment, subsale or other transaction" related to the same land as the contract referred to in s.45(1)(a), as a result of which T "becomes entitled to call for a conveyance" of the land. That further transaction is defined as a "transfer of rights". It is apparent from s.45(1)(a) and the tailpiece to s.45(3) that, for s.45 to have any application, such a transaction would need to be entered into prior to, or at least no later than, substantial performance or completion of the contract between V and P.

37. It is clear from s.45(1)(b) that Parliament intended s.45 to apply to transactions under which P either assigned their rights under the original contract or entered into a further contract to sell the land (a subsale). The words "or other transaction" which follow must be construed in their context. The specific references to assignment and subsale, combined with the definitional words "transfer of rights" and the related use of "transferor" and "transferee" in the closing words of s.45(1), provide a strong flavour of the kinds of transaction to which s.45 was intended to apply. Further and importantly, the transaction must be of a kind under which T "becomes entitled" to call for a conveyance. It does not say "may" or "might" become entitled. Rather, and as discussed further below, it envisages that, at least at the time as at which s.45 falls to be applied, T <u>has in fact</u> become entitled to call for a conveyance.

38. All these elements of the language of s.45(1)(b) provide strong indications that what s.45 is intended to apply to is transactions the substance of which is an agreement that T will acquire the land instead of P.

39. Section 45(2) provides that s.44 "has effect" in accordance with the following provisions of s.45. That is an important point to bear in mind in construing s.45. Its operative provisions do not apply in isolation, but instead modify the effect of s.44. Thus s.44 must be read with the modifications made to it by s.45. As Lewison LJ said in *DV3 RS LP v HMRC* [2013] EWCA Civ 907; [2013] STC 2150 ("*DV3*") at [20]:

> "[Section 45(2)] showed that the deeming provisions in s 45 had a limited purpose. Its sole purpose was to modify the operation of s 44. … But s 44 is one of a group of sections (ss 43–47) which define what is (and what is not) a land transaction. A land transaction is the acquisition of a chargeable interest. Thus s 44 is a key provision of the SDLT code which is applied generally in order to identify a land transaction; in other words what counts as the acquisition of a chargeable interest... The real question, in my judgment, is how s 44 operates, when you have made the modifications required by s 45."

40. The key operative provision is s.45(3). The first, and important, point to note is that it provides for a deemed contract (the "secondary contract"). The suggestion that the

secondary contract is the actual contract entered between P and T (in this case the Option) is contrary to the express words of s.45(3) and is clearly wrong.

41. Section 45(3) tells us only a limited amount about the terms of the deemed contract. We are told that it is a contract for a land transaction under which T is the purchaser, and we are told what the consideration is. Nothing is expressly said about the other terms.

42. However, the tailpiece to s.45(3) refers to the "substantial performance or completion of the secondary contract". This can only refer to an actual event or transaction, rather than to a deemed event. So we need to determine what would amount to (actual) substantial performance or completion of the deemed contract.

43. Further, it is clear that whatever deeming is required to be done must be done for the purposes of the application of s.44: see s.44(2) and the reference to "[s.44] applies" in the first line of s.44(3). This, combined with the fact that the secondary contract is deemed to be a contract for a land transaction, provides a clue. The secondary contract must be of a kind to which s.44, and its concepts of substantial performance and completion "by a conveyance" (see s.44(1)), can apply. We also need to continue to bear in mind that s.45 is only engaged where T "becomes entitled" to call for a conveyance: s.45(1).

44. In *DV3* at [21], Lewison LJ accepted an argument of the taxpayer in that case that for the purposes of s.45(3) it was illegitimate to disregard the reality of the contract between V (Legal & General Assurance plc in that case) and P and the contract between P and T (the taxpayer in that case), or the transfers that amounted to the completion of each of those contracts. He referred to the definition of completion in s.44(10) and commented that it would be impossible to decide whether there had been completion between the same parties and "in substantial conformity with the contract" as that provision requires without identifying the parties to each contract and the parties to each transfer. He rejected the argument that a fictional contract between V and T could be constructed, on the basis that the real-world transactions could not be ignored. Lewison LJ's comments at [24] applied the same approach to substantial performance, explaining that it was by reference to the terms of the relevant contract that it could be ascertained whether there had been either completion or substantial performance.

45. I agree. Section 45(3) requires a determination of what amounts to substantial performance or completion of each of the (actual) contract between V and P, and the (deemed) contract between P and T. There is no difficulty with the former, and the latter must also relate to a real-world event. That event can only be the substantial performance or completion of the actual transaction with T.

46. A transaction can only fall within s.45(1)(b) if it is one under which T "becomes entitled to call for a conveyance". Completion of such a contract logically requires a conveyance, as contemplated by the contract. This is reinforced by the fact that s.45 modifies the operation of s.44, which postulates a contract that is to be completed by a conveyance. Conceptually, two transactions are envisaged to which T is a party, namely: (i) the assignment, subsale or other transaction to which s.45(1)(b) applies (the transfer of rights); and (ii) the conveyance which T become entitled to call for as a result of that transfer of rights. This is also consistent with the fact that the transfer of rights is deemed by s.45(3) to give rise to a "contract for" a land transaction.

47. Section 44 also tells us what "completion" means and what amounts to substantial performance. Section 44(1) envisages completion by a conveyance and s.44(10) requires completion to be in substantial conformity with the contract. Subsections (5)-(7) define substantial performance by reference, broadly, to entry into possession or the payment of a substantial amount of the consideration.

48. There is no difficulty applying these provisions to a subsale by P to T or an assignment by P to T of its rights under its contract with V. The contract between P and T would be completed by a conveyance and, if that occurred at the same time as and in connection with the completion of the contract between V and P, then s.45(3) would ensure that there was a single charge to SDLT on (broadly) the total amount paid by T. The same would apply if the contracts were substantially performed.

49. An option is different. Unless and until it is exercised it cannot be described as a contract which "is to be" completed by a conveyance, within s.44(1). That in turn supports an interpretation of "becomes entitled" in s.45(1)(b) that requires T to have a present entitlement to call for a conveyance, at least at the time as at which s.45, and therefore s.44, falls to be applied. In other words, by the point that the completion or substantial performance in favour of P occurs, which is the time at which P would need to satisfy the requirements of s.45 in order to qualify for relief from SDLT, T would need to have become entitled to call for a conveyance. The grantee of an option has no such entitlement unless and until the option is exercised. On the facts of this case, as the UT held at [34], the application of s.45 must be tested as at 16 September 2011, the date on which Forms TR1 were executed transferring the Property to Mr Fanning. It was at that time that any charge to SDLT arose.

50. If T did have an entitlement to call for a conveyance, and completion or substantial performance in T's favour occurred at the same time as completion or substantial performance in favour of P in accordance with s.45(3), then relief could be available. But it is clear from the reference to entitlement to call for a conveyance in s.45(1)(b) and the way in which s.45 modifies the operation of s.44 – which applies to a transaction which "is to be completed by a conveyance" – that "completion" of the deemed secondary contract would need to be by means of a conveyance rather than by anything falling short of that. Similarly, substantial performance of the deemed secondary contract would require either an entry into possession of the land within s.44(5)(a) or the payment of a substantial amount of the consideration which would become due if completion occurred.

51. This would not necessarily exclude all transactions that involved options from amounting to a "transfer of rights". A simple example would be a grant of an option over the land by P to T which is exercised before the contract between V and P completes, with completion of both the V-P and P-T transactions occurring simultaneously. In that scenario it may be the case that T could be treated as having "become entitled" to take a conveyance prior to the time at which s.45 would fall to be applied, namely the date of completion of the V-P transaction. Section 45 might then apply by reference to the transaction resulting from the exercise of the option.

52. In summary, a natural interpretation of the statutory language leads to the conclusion that the grant of an option does not, without more, answer the statutory description in s.45(1)(b). It is not an "other transaction" as referred to in that provision.

53. This conclusion is also consistent with the obvious policy objectives. SDLT is a tax on transactions. Section 44 is a key provision that imposes SDLT on transactions of the kind entered into between Glendale and Mr Fanning. Section 45 is a relieving provision that, broadly, prevents a double charge arising under s.44 where its conditions are met. As Vos LJ explained in *R (oao St Matthews (West) and others) v HM Treasury* [2015] EWCA Civ 648; [2015] STC 2272 at [7]:

> "The Finance Act 2003 aimed to place the burden of SDLT on the person who was to acquire the use and enjoyment of the property in question, and to reduce that burden on those with only a transient interest in the property."

54. There is a longer description of the policy in Andrews J's decision in that case at first instance, [2014] EWHC 1848 (Admin); [2014] STC 2350 at [7]-[14]. That discussion also refers to the Explanatory Notes that were provided at the Report Stage of the Finance Bill 2003, when the then clause 45 was amended to introduce the relief. (As originally drafted clause 45 was a taxing provision, designed to ensure that P and T both paid SDLT.) The notes refer to giving relief in certain circumstances to "intermediate contracting purchasers" where they transfer their rights without completing. As Andrews J said at [12]:

> "Thus the aim of what became s 45 of the FA 2003 was to place the taxation burden on the person who is going to have the use and enjoyment of the property."

55. Parliament cannot readily be taken to have intended that s.45 should provide a means of avoiding SDLT altogether by the simple mechanic of the grant of an option, in circumstances where it is P and not T who ends up with the enjoyment of the land. It is no response to this that SDLT would be charged in the event that the option was exercised at a later date and the land was conveyed to T. The option may never be exercised. Further, if the option was exercised then that would be a different transaction that would be subject to SDLT in the normal way in accordance with s.44.

56. In my view s.46 does not have a material impact on the analysis. It has the effect that the grant of an option is itself a chargeable transaction for SDLT purposes. This would be somewhat at odds with s.45(2) if an option could also fall within s.45, because that provision specifically provides that a transfer of rights is not to be treated as giving rise to a land transaction. That is a slight indicator that s.45 and s.46 were intended to deal with distinct rather than overlapping concepts, but the point is very far from being determinative.

57. I am also not assisted by the cases Mr Hickey relies on that establish that an option creates an equitable interest in land that fetters Mr Fanning's ability to deal with the Property. None of that is in dispute, but it does not establish that an option falls within s.45(1)(b). As Hoffmann J indicated in *Spiro v Glencrown Properties* at 544G-H, the question is not how an option should be analysed in isolation, but specifically in the context of the statutory provision in question (in that case s.2 of the Law of Property (Miscellaneous Provisions) Act 1989).

Section 45(3): consideration and substantial performance

58. My conclusion on the scope of s.45 means that I do not consider it necessary to consider the second and third grounds of appeal. However, since they were dealt with in some detail in the FTT and UT and were subject to argument before us I will address them briefly.

59. In short, I would agree with the UT that s.45(3)(b)(i) is not engaged. Mr Fanning and San Leon are not connected and HMRC do not contend that San Leon gave any part of the consideration payable by Mr Fanning to Glendale for the purposes of that paragraph.

60. Section 45(3)(b)(ii) is more difficult. Mr Fanning's position is that the consideration given for the transfer of rights, namely the option, was the £100 paid for it. That analysis therefore requires the consideration to be limited to the amount paid at the point that the option is granted, rather than taking account of the consideration payable on any later exercise of the option. However, on the hypothesis that the analysis already discussed about the scope of "transfer of rights" is wrong and that it can include an option, I see that point. The real reason Mr Fanning's case cannot succeed is that, without more, an option is not the kind of "transfer of rights" to which s.45 applies. Although the UT reached a different conclusion on this point, on analysis the reasoning was similar. The UT focused on the need for the Option to be exercised to give rise to an entitlement to a conveyance, and commented that the conceptual difficulty to which its approach gave rise reinforced the conclusion that s.45(1)(b) did not apply (see [47]-[48]).

61. Similarly, Mr Fanning's case rests on the Option being substantially performed by reason of the payment of the option premium, and/or alternatively being completed at the date of grant, such that the tailpiece to s.45(3) is engaged. Again, the reason why that is incorrect is because an option is not the sort of transaction to which s.45 applies for reasons that include the fact that the statute contemplates completion by a conveyance, and that the concept of substantial performance must be interpreted by reference to completion by that means.

Section 75A

62. In view of the conclusion reached, it is unnecessary either to determine HMRC's alternative argument that s.75A applied to the scheme, or to remit the case to the Upper Tribunal so that that question may be decided.

Conclusion

63. In conclusion, I would dismiss the appeal.

Lord Justice Lewis:

64. I agree.

Lord Justice Peter Jackson:

65. I also agree.