STAMP DUTY: AN EPILOGUE

The decision in *Parinv* in aid of the taxpayer

by Marika Lemos

In accepting a cheque in full and final settlement of the liability of a husband and his wife (Husband and Wife) to stamp duty (no payment of interest or penalties having been made), HMRC appear to have agreed that the decision in *Parinv*[1] can operate in favour of the taxpayer, at least in respect of extinguishing any potential claim to interest and penalties.

The facts were these. In late March 1999, an agreement for sale was executed between a wholly owned husband-and-wife company (the Vendor) and Husband and Wife (the Purchasers), the terms of which were that a property (the Property) would be sold to the Purchasers for a consideration of less than £500,000 payable upon signature, and that "On payment of the purchase price the Vendor shall forthwith execute and hand over to the Purchasers a declaration of trust in the form of the draft annexed hereto." Absent the execution of a declaration of trust in accordance with the terms of the agreement for sale, a liability to stamp duty would not have arisen on the sale. The intention was to implement a familiar avoidance mechanism used to get round stamp duty known as "resting on contracts": the equitable interest in the Property would pass to the purchasers by operation of law but the contract itself would not have been an instrument of transfer within ss.54 and 59 of the Stamp Act 1891. The Property could subsequently have been sold to a third party, who would then have been liable to stamp duty on the conveyance of the legal estate to it. The Purchasers would have relied on sub-sale relief under s.58(4) of the Stamp Act 1891: only the consideration from the third party would have been chargeable to *ad valorem* duty.

Husband and Wife should have rested on contracts. Meanwhile, the Vendor would have continued to occupy the Property with the benefit of a lease. Unfortunately the taxpayers were ill advised: a declaration of trust was in fact executed on the same day as the agreement for sale. The transaction was therefore not effective in avoiding stamp duty in the manner intended. If the declaration of trust were to be presented for stamping, *ad valorem* stamp duty rates applicable from 16 March to 30 September 1999 would have applied, i.e. 3.5% (in this case, because the declaration of trust had not been certified): a liability to duty, plus penalties and interest, had been incurred.

The stamp duty legislation contains no provision which enables HMRC to sue for stamp duty. This is because no legal obligation is imposed on taxpayers to pay the duty or even to submit the instruments for adjudication or stamping. The need to stamp an instrument arises from the inability to rely upon or enforce or register the instrument unless it is duly stamped: see s.14(4) of the Stamp Act 1891. The position is summarised by Donovan LJ in *Henry and Constable (Brewers) Ltd v IRC* [1961] 1 WLR 1504 at 1511: "There was ... no legal obligation on [the taxpayers] to stamp the transfers: there was simply the prospect of future disabilities if they did not." As Husband and Wife controlled the Vendor company, there was no immediate need to prove their equitable interest in the Property and therefore no pressing need or requirement to present the declaration of trust for stamping. However, they wanted to regularise their affairs, as they wanted to be able to sell the company and to be in a position to assert their ownership of the Property if necessary. They did not want to pay interest and penalties.

They were able to achieve this by procuring the conveyance to them of the bare legal title to the Property. In so doing they incurred a liability to *ad valorem* stamp duty on the conveyance of the bare legal title executed in 2009.[2] On its face, the conveyance (on Transfer Form TR1) was for nil consideration, but Husband and Wife were prepared to accept that consideration had in fact been paid for the Property under the original Agreement for Sale executed in 1999. TR1 was certified and 2.5% (instead of 3.5%) duty was paid on the initial consideration for the transfer. HMRC accepted that the liability to *ad valorem* stamp duty arose in 2009, and thereby relinquished any right to pursue interest and penalties.

The argument that was accepted by HMRC went as follows:

1. Husband and Wife do not propose to present the Declaration of Trust executed in late March 1999 by the vendor pursuant to an Agreement for Sale, for stamping;

2. In the absence of a stamped Declaration of Trust, Husband and Wife are in principle unable either to prove or otherwise to rely on the fact that equitable title to the whole of the Property passed to them in late March 1999 (section 14(4) of the Stamp Act 1891);

3. Following the Court of Appeal decision in *Parinv* and in the absence of any explanation to the contrary, which secondary evidence of the existence of the Declaration of Trust cannot provide (per Lindsay J in *Parinv* in the High Court),[3] the Stamp Office was entitled to regard the transfer effected by transfer form TR1 as a 'transfer on sale', chargeable by reference to the amount of consideration supplied for the transfer of the interest in the Property which is properly to be taken to be transferred by transfer form TR1. In other words, transfer form TR1 was to be taken to transfer so much of the equitable interest in the Property as Husband and Wife were not able to prove already vested in them. For stamp duty purposes, the consideration for the transfer effected by TR1 therefore included the consideration supplied pursuant to the 1999 agreement for sale;[4]

4. Following *Parinv*, transfer form TR1 was stampable with *ad valorem* stamp duty with reference to the consideration paid under the 1999 Agreement for Sale;

5. Transfer Form TR1 was certified as being a transaction which did not exceed the amount of consideration payable under the 1999 Agreement for Sale. The rate of duty applicable for transfers giving effect to contracts made before 22 March 2000 is 2.5% if the instrument was certified and the amount or value of the consideration was £500,000 or under (see Paragraph 4 Schedule 13 FA 1999 as effective for such transfers), which it was.

The result is perhaps not surprising, given the taxpayers' willingness to pay the tax due. It is likely that HMRC took a pragmatic view: it was better to collect some tax and to relinquish possible claims to interest and penalties, rather than to pursue these come what may. But it was also a good result for taxpayers. For those wishing to regularise their affairs, there is a strong legal argument that interest and penalties (which in this case were each at

least equal to the tax due) can be sidestepped. In this case, the taxpayers were also able to reduce their liability to tax a further 1% by ensuring that the 2009 conveyance was properly certified. Perhaps most importantly, the costs and aggravation of having to investigate and/or pursue claims against those who had failed properly to advise them that the Declaration of Trust should not have been executed were avoided.

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[1] *Parinv (Hatfield) Ltd v IRC* [1996] STC 933 (HC), [1998] STC 305 (CA) ("*Parinv*").

[2] On the basis that the conveyance was "effected in pursuance of" the agreement for sale executed in 1999 (see FA 2003, s.125 and Schedule 19).

[3] [1996] STC 933.

[4] In fact, the position was a little more complicated than set out above. The agreement for sale was for the purchase of the Property by Husband and Wife as to 50% and by a third party ("X") as to the remaining 50%. In April 2008, X had assigned her share of the Property to Husband and Wife for consideration. This assignment could not be argued to have been effected in pursuance of the March 1999 Agreement for Sale and was therefore an "SDLT transaction" subject to SDLT and not stamp duty (see Schedule 19 to FA 2003). It was argued on behalf of the taxpayers that as Husband and Wife had discharged their liability to SDLT on this transaction and HMRC had accepted the payment in satisfaction of their liability under FA 2003, HMRC must be taken to have acknowledged and to have accepted (and Husband and Wife to have proved) that an equitable interest in 50% of the Property had already been acquired by Husband and Wife. Accordingly, transfer form TR1 could not properly be taken to be giving effect to a transfer to Husband and Wife of more than the remaining 50% equitable interest the Property, and the legal title thereto. That argument was not accepted by HMRC. Unfortunately, given HMRC's stance in respect of interest and penalties, the taxpayers did not want to pursue this point.