



Neutral Citation Number: [2025] EWCA Civ 1588

Case No: CA-2025-000271

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
JUDGE JEANETTE ZAMAN AND JUDGE TRACEY BOWLER
[2024] UKUT 00373 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 December 2025

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE WARBY
and
LADY JUSTICE FALK

Between:

THE TOWER ONE ST GEORGE WHARF LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HIS MAJESTY’S **Respondents**
REVENUE AND CUSTOMS

Nicola Shaw KC and Sam Brodsky (instructed by Herbert Smith Freehills Kramer LLP)
for the **Appellant**

James Henderson and Arthur Wong (instructed by HMRC Legal Group) for the
Respondents

Hearing dates: 25 and 26 November 2025

Approved Judgment

This judgment was handed down remotely at 10.00am on 10 December 2025 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

1. This appeal concerns an assessment to stamp duty land tax (“SDLT”) based on the market value of the interest transferred, in circumstances where the actual consideration charged for the transfer was much lower. HMRC rely on s.53 of the Finance Act 2003 (“FA 2003”), which deems the chargeable consideration for the transfer of an interest in land to a connected company to be the market value of the interest, displacing the general rule that SDLT is charged on the actual consideration. The Appellant, The Tower One St George Wharf Limited, contends that SDLT should instead be charged by reference to the consideration paid, in accordance with the general rule. It seeks to rely on s.54(4) FA 2003, which provides an exception to the application of s.53 in certain cases involving a distribution of assets (the “Case 3” exception).
2. As explained below, the Appellant originally contended that group relief was available, such that the transfer in question was exempt from SDLT altogether. Following the decision of the Upper Tribunal (“UT”) in this case (Judge Jeanette Zaman and Judge Tracey Bowler, [2024] UKUT 00373 (TCC)) upholding the decision of the First-tier Tribunal (“FTT”) (Judge Christopher Staker, [2022] UKFTT 00154 (TC)) on that issue, the Appellant no longer contends that group relief applied.
3. In their Respondent’s Notice, HMRC rely in the alternative on the application of the anti-avoidance provision in s.75A FA 2003. This was an issue that was unnecessary for the UT to determine and on which it did not express a view, and which the FTT dealt with very shortly.
4. We were assisted by the submissions of Ms Nicola Shaw KC and Mr Sam Brodsky for the Appellant, and Mr James Henderson leading Mr Arthur Wong for HMRC. In line with the November 2023 guidance encouraging greater participation by junior counsel in oral advocacy, we were particularly pleased to receive well-put oral submissions from Mr Brodsky on the s.75A issue.
5. I have concluded that, contrary to the decisions below, the Case 3 exception did apply. That makes it necessary to consider s.75A. On that issue I have decided that HMRC has the better of the arguments, with the overall result that the appeal should be dismissed.

The facts

6. The dispute concerns a set of transactions undertaken within the Berkeley group of companies on the advice of PwC. For ease of reference I will refer to these transactions together as the “scheme”. The subject matter of the scheme was the group’s interest in a property in the Nine Elms area of Vauxhall known as St George Wharf, and specifically a 50-storey residential building called the Tower, which the group built as part of a phased development of the St George Wharf site.

7. The St George Wharf site had been acquired in 1997 by a Berkeley group company called St George (South London) Limited (“SGSL”). In 2000 SGSL sold the beneficial interest in the site to another group company, St George plc (“St George”), but retained the legal title as bare trustee. The development then commenced, with residential units in the Tower being offered for sale “off-plan” (FTT decision at [7]-[11]). At the time that the scheme was implemented the Tower had a book cost of around £30m (reflecting the original cost of acquisition and building work to date) and a market value of around £200m (FTT decision at [17]).
8. The scheme involved the following steps, all within the Berkeley group and all implemented on 5 July 2011 (FTT decision at [14] and [18]):
 - a) A modest capital contribution of £1,000 was made to a special purpose vehicle (“SPV”), Berkeley Sixty-Four Limited (“B64”), to ensure that it had positive distributable reserves.
 - b) SGSL granted a 999 year lease of the Tower to B64 (the “Lease”) at a premium equal to its book cost of £30,198,814 (by inference, this must be the book cost in the hands of St George, not SGSL which was a bare trustee, although the FTT decision suggests otherwise at [14(2)]), together with a rent of £1 per year.
 - c) A development management agreement was entered into between the Appellant, B64, SGSL, and St George, under which St George was appointed to carry out project management and development of the Tower.
 - d) The Appellant (which, like B64, was an SPV) acquired the entire issued share capital of B64 for £170,000,001.
 - e) The Lease was transferred by B64 to the Appellant at its carrying value, which was broadly equivalent to the premium at which the Lease had been granted (the “Transfer”). The precise amount was £30,248,814. Agreements for lease of residential units that had already been entered into were also novated to the Appellant.
9. The FTT found that there were bona fide commercial reasons for the Tower to be transferred to the Appellant, namely to ring-fence risks associated with the development in a SPV and to allow the prospect of securitised borrowing, but without the advice PwC had provided a more straightforward transaction would have been implemented (FTT decision at [41] and [42]). The PwC advice was to the effect that a substantial corporation tax advantage could be achieved if the scheme was implemented, in the form of a tax-free “step-up” from book cost to market value. In the event, following a challenge by HMRC, it was ultimately accepted that the corporation tax planning failed (FTT decision at [17] and [19]).
10. The SDLT returns filed for the grant of the Lease and the Transfer both claimed an exemption from tax, in the form of group relief under Schedule 7 to FA 2003. Although those returns were not themselves the subject of formal enquiries, HMRC’s enquiry into the corporation tax position also led to a review of the SDLT position. HMRC concluded that the group relief claim by B64 on the grant

of the Lease did not need to be considered because sub-sale relief was available in respect of that transaction under s.45 FA 2003 (as in force at the time), but denied the Appellant's group relief claim on the Transfer on the basis that the transaction formed part of arrangements of which the main purpose, or one of the main purposes, was the avoidance of liability to corporation tax, such that group relief was precluded by paragraph 2(4A) of Schedule 7. HMRC assessed the Appellant to SDLT of £8m, being 4% of £200m (FTT decision at [20]-[22]).

The FTT and UT decisions in outline

11. Before the FTT the Appellant argued that group relief applied to the Transfer so that no SDLT was payable. Its fallback argument if that was wrong was that the SDLT charge should be limited to the actual consideration paid for the Transfer rather than the market value of the Lease (a charge of around £1.2m rather than £8m). HMRC's primary argument was that s.45 FA 2003 applied to deem the relevant land transaction as taking place between SGSL and the Appellant, that group relief was precluded by paragraph 2(4A) of Schedule 7 and that the market value rule in s.53 applied. HMRC alternatively argued that paragraph 2(4A) and s.53 applied to the transaction between B64 and the Appellant, and that in any event s.75A applied with the same end result.
12. The FTT decided that s.45 FA 2003 did not apply to the grant of the Lease and the Transfer, so rejecting HMRC's primary argument. However, it accepted HMRC's arguments that paragraph 2(4A) of Schedule 7 and s.53 applied to the transaction between B64 and the Appellant (i.e. the Transfer, without reference to the earlier lease grant), such that SDLT was correctly assessed on the market value of the Lease transferred. Section 75A did not apply because that is only relevant if (broadly) its effect would be to increase the SDLT payable on the transactions comprised in the scheme. The effect was that the appeal against the assessment was dismissed.
13. The Appellant obtained permission to appeal to the UT on two grounds, namely 1) that the FTT was wrong to conclude that group relief was not available by virtue of paragraph 2(4A) of Schedule 7, and 2) if it was not available, that s.53 was not excluded by the Case 3 exception in s.54(4). Neither ground succeeded before the UT.

The grounds of appeal and Respondent's Notice

14. The Appellant no longer seeks to contend that group relief is available for the Transfer, but continues to maintain that the SDLT charge should be calculated by reference to the consideration paid rather than market value. Its two grounds of appeal both relate to s.54(4)(b) FA 2003, a provision referred to by the parties as the "proviso". The grounds are as follows:

Ground 1: The UT erred in concluding that the reference to an earlier "claim" for group relief in s.54(4)(b) encompassed an earlier invalid or ineffective claim.

Ground 2: The UT erred in concluding that, for the purposes of s.54(4)(b), "the period of three years immediately preceding the effective date of the transaction"

included the date of the transaction itself. Rather, transactions that occurred earlier on the same date were not caught by s.54(4)(b).

Grounds 1 and 2 are alternatives. Success on either would mean that the Case 3 exception applied to prevent a market value based charge.

15. By their Respondent's Notice, HMRC maintain that if the chargeable consideration was otherwise limited to the actual consideration for the Transfer because the Case 3 exception applied, then the assessment should still be upheld because s.75A would apply. They say that its effect would be to deem a notional land transaction to have taken place effecting the grant of the Lease by SGSL to the Appellant. The original version of the Respondent's Notice stated that SDLT should be charged on that transaction by reference to the market value of the Lease. Following a direction at the hearing, HMRC applied to amend the Respondent's Notice to reflect a new argument that the correct calculation under s.75A produced a higher figure than market value (see [86] below), while confirming that they were not seeking to increase the assessment in circumstances where they had not appealed the FTT's decision. This application was unopposed and I would therefore allow it.
16. I will address the grounds of appeal first before turning to s.75A.

The legislation

17. Sections 53 and 54 FA 2003 relevantly provide as follows:

“53 Deemed market value where transaction involves connected company

- (1) This section applies where the purchaser is a company and—
 - (a) the vendor is connected with the purchaser...
- (1A) The chargeable consideration for the transaction shall be taken to be not less than—
 - (a) the market value of the subject-matter of the transaction as at the effective date of the transaction, and
 - (b) if the acquisition is the grant of a lease at a rent, that rent...
- (5) This section is subject to the exceptions provided for in section 54.

54 Exceptions from deemed market value rule

- (1) Section 53 (chargeable consideration: transaction with connected company) does not apply in the following cases.
In the following provisions “the company” means the company that is the purchaser in relation to the transaction in question.
- (2) Case 1 is where immediately after the transaction the company holds the property as trustee in the course of a business carried on by it that consists of or includes the management of trusts.
- (3) Case 2 is where—
 - (a) immediately after the transaction the company holds the property as trustee, and
 - (b) the vendor is connected with the company only because of section 1122(6) of the Corporation Tax Act 2010.

- (4) Case 3 is where—
- (a) the vendor is a company and the transaction is, or is part of, a distribution of the assets of that company (whether or not in connection with its winding up), and
 - (b) it is not the case that—
 - (i) the subject-matter of the transaction, or
 - (ii) an interest from which that interest is derived,has, within the period of three years immediately preceding the effective date of the transaction, been the subject of a transaction in respect of which group relief was claimed by the vendor.”

The “effective date” of a transaction is defined in s.119 FA 2003, generally as “the date of completion”.

18. Sections 75A, 75B and 75C relevantly provide:

“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.

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...

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

(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).”

19. It will also be necessary to refer to some provisions regarding group relief. That relief is introduced by s.62 FA 2003, which provides:

“62 Group relief and reconstruction or acquisition relief

(1) Schedule 7 provides for relief from stamp duty land tax.

(2) In that Schedule—

Part 1 makes provision for group relief,

Part 2 makes provision for reconstruction and acquisition reliefs.

(3) Any relief under that Schedule must be claimed in a land transaction return or an amendment of such a return.”

As can be seen from s.62(3), group relief must be claimed.

20. Paragraph 1 of Schedule 7 provides that a transaction is “exempt from charge” if at the effective date the vendor and purchaser are members of the same group, and sets out the requirements for group membership. Paragraph 2 contains “restrictions” on the availability of group relief, including the following at paragraph 2(4A):

“(4A) Group relief is not available if the transaction—

(a) is not effected for bona fide commercial reasons, or

(b) forms part of arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to tax.

“Tax” here means stamp duty, income tax, corporation tax, capital gains tax or tax under this Part.”

(Paragraph 2(5) further provides that “arrangements” “includes any scheme, agreement or understanding, whether or not legally enforceable”.)

21. Paragraph 3 of Schedule 7 is headed “Withdrawal of group relief”. Its effect is to claw back group relief where, broadly, the transferee leaves the group within a

three year period while holding the relevant property interest or an interest derived from it. Paragraph 3(1) provides:

“3(1) Where in the case of a transaction (“the relevant transaction”) that is exempt from charge by virtue of paragraph 1 (group relief)—

- (a) the purchaser ceases to be a member of the same group as the vendor—
 - (i) before the end of the period of three years beginning with the effective date of the transaction, or
 - (ii) in pursuance of, or in connection with, arrangements made before the end of that period,
- and
- (b) at the time the purchaser ceases to be a member of the same group as the vendor (“the relevant time”), it or a relevant associated company holds a chargeable interest—
 - (i) that was acquired by the purchaser under the relevant transaction, or
 - (ii) that is derived from a chargeable interest so acquired, and that has not subsequently been acquired at market value under a chargeable transaction for which group relief was available but was not claimed,

group relief in relation to the relevant transaction, or an appropriate proportion of it, is withdrawn and tax is chargeable in accordance with this paragraph...”

22. The provisions that follow determine the tax chargeable, broadly by reference to market value.
23. Finally, because SGSL was a trustee, paragraph 3 of Schedule 16 FA 2003 is relevant. It provides:

“3(1) Subject to sub-paragraph (2), where a person acquires a chargeable interest or an interest in a partnership as bare trustee, this Part applies as if the interest were vested in, and the acts of the trustee in relation to it were the acts of, the person or persons for whom he is trustee.

- (2) Sub-paragraph (1) does not apply in relation to the grant of a lease.
- (3) Where a lease is granted to a person as bare trustee, he is treated for the purposes of this Part, as it applies in relation to the grant of the lease, as purchaser of the whole of the interest acquired.
- (4) Where a lease is granted by a person as bare trustee, he is to be treated for the purposes of this Part, as it applies in relation to the grant of the lease, as vendor of the whole of the interest disposed of.”

24. As can be seen from this, the general rule in paragraph 3(1) is that acquisitions by bare trustees are treated as acquisitions by the beneficial owner. However, special rules apply to lease grants. In particular, the effect of paragraph 3(4) is that, when the Lease was granted, SGSL was required to be treated as the vendor for SDLT purposes (the reference to “this Part” being Part 4, which contains the SDLT regime), despite the fact that at the time it was a bare trustee for St George. As discussed below, this has implications for the analysis under s.75A.

Section 54(4)(b): the parties' submissions

25. In summary, Ms Shaw for the Appellant submitted that the purpose of the proviso in s.54(4)(b) is to prevent avoidance of the rule in paragraph 3(1) of Schedule 7 that claws back group relief where the transferee leaves the group within three years of the transfer, by using the mechanism of a distribution of the property. In this case it was clear that, if HMRC had determined the issue, they would have rejected B64's claim to group relief for the same reason that they had rejected the Appellant's group relief claim. B64's claim to group relief was in effect a nullity. What s.54(4)(b) required was a valid and effective claim, reflecting the fact that it functioned as an alternative to the claw-back of group relief. The Appellant's approach gave effect to the intention of the legislation. HMRC's approach was inconsistent with their own guidance and would also give rise to double taxation.
26. On ground 2, Ms Shaw submitted that the term "effective date" is a term of art. It was common ground that the effective date was 5 July 2011, so the period of three years "immediately preceding" it expired on 4 July 2011, rather than at the time the Transfer was executed on 5 July. The UT wrongly sidestepped this by interpreting s.54(4)(b) as including 5 July 2011. That was outside the permissible bounds of interpretation. Further, the effect of the Appellant's approach was merely to reinstate the general rule that SDLT is charged on the actual consideration, rather than to allow a charge to be escaped: there was no "mischief".
27. For HMRC, Mr Henderson submitted that there was no basis to read in a requirement that group relief was successfully claimed. The test is simply whether it was claimed. The Appellant's approach also gave rise to uncertainty as to how and when the validity or effectiveness of a claim would be tested, which was inconsistent with SDLT filing requirements (at the time, within 30 days after the effective date, under s.76 FA 2003; the time limit is now 14 days). The guidance referred to was a limited concession. Further, as a matter of fact B64 had claimed group relief on the grant of the Lease and had paid no SDLT on it.
28. On ground 2, Mr Henderson submitted that the Appellant's construction would give rise to an absurd result and loophole. The clear purpose of the proviso in s.54(4)(b) was to prevent the Case 3 exception applying where group relief had been claimed on a transaction within the preceding three years. This must include transactions earlier on the same day. There were a number of interpretive routes by which this could be achieved.

Section 54(4): discussion

Preliminary points

29. As a starting point, I should clarify that it was common ground, both before us and in the tribunals below, that the Transfer involved a distribution of assets by B64, such that s.54(4)(a) is satisfied (see [17] above). Our decision should therefore not be taken to involve any determination of that issue, although it is not obviously straightforward.

30. In a little more detail, given the common ground we heard no substantive submissions over the meaning to be attributed to the phrase “distribution of assets” in s.54(4)(a), and therefore whether it should necessarily be taken to apply to any transfer of an asset at an undervalue within a group (including where, as here, it seems that the transferor had positive distributable reserves). In the Appellant’s written submissions reference was made to *Aveling Barford v Perion* [1989] BCLC 626 (“*Aveling Barford*”), but without referring to its clarification by s.845 of the Companies Act 2006 (“CA 2006”). It was, however, also pointed out in oral submissions that the definition of a distribution in the CA 2006 is stated to be for the purposes of Part 23 of that Act (see s.829). Further, the definition of a distribution for corporation tax purposes in Part 23 of the Corporation Tax Act 2010 applies only for the purposes of the Corporation Tax Acts (see s.998(1) of that Act, and contrast for example the position for income tax, where the corporation tax definition is explicitly applied by s.989 of the Income Tax Act 2007). As will become apparent, despite the common ground the meaning of the concept of “distribution” is of some relevance to one aspect of the analysis under s.75A.
31. Returning to the appeal, given that both parties agree that s.54(4)(a) applies, the dispute is over the proviso in s.54(4)(b). To recap, s.54(4)(b) provides:
- “(b) it is not the case that—
 (i) the subject-matter of the transaction, or
 (ii) an interest from which that interest is derived,
has, within the period of three years immediately preceding the effective date of the transaction, been the subject of a transaction in respect of which group relief was claimed by the vendor.”
32. The UT’s approach to the proviso was first to remind itself of the purposive approach to statutory interpretation confirmed in *Rosendale BC v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 (“*Rosendale*”), and then to consider the wording of s.54(4) (at [146]-[168] of its decision). The UT concluded that the Appellant’s approach to the interpretation of the word “claim” required an impermissible writing in of words. The UT also decided that the three year period should be interpreted as the three years prior to the transaction, rather than three years prior to the effective date. In reaching its conclusions it also noted, at [141], the apparent tension between the alternative submissions both by the Appellant and by HMRC in response.
33. I agree that there is something of a tension. In essence, Ground 1 adopts a purposive approach to the interpretation of the proviso whereas Ground 2 adopts a literal approach. HMRC’s arguments in response reflect this, adopting a literal approach in Ground 1 but objecting to that approach for Ground 2. The differing approaches appear to sit together somewhat uncomfortably. This of course does not mean that the tribunals reached the wrong conclusion, but it inevitably raises a question as to whether the correct approach has been applied.
34. In fact, however, any apparent tension is less than first appears. As discussed below, the solution to the issue raised by Ground 2 is the application of long-established principles which enable obvious drafting errors to be corrected so as to give proper effect to the intention of Parliament, with the result that Ground 2

fails for that reason rather than because of the application of the principles discussed in *Rosendale*. In contrast, I would conclude that, construing the proviso purposively, Ground 1 should succeed.

Ground 1: relevant principles

35. The basic approach to statutory interpretation was summarised by Lord Hodge in *R (O and Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, where he said this at [29] and [30]:

“29. The courts in conducting statutory interpretation are ‘seeking the meaning of the words which Parliament used’: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: ‘Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.’ (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: ‘Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.’

30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity...”

36. Lord Hodge then added, again with reference to the *Spath Holme* case:

“31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered...”

37. In the context of taxing statutes, Lord Briggs and Lord Sales said this in *R (on the application of Cobalt Data Centre 2 LLP and another) v Revenue and Customs Comrs* [2024] UKSC 40, [2024] 1 WLR 5213 at [70]-[71]:

“70. Construction of statutes, and taxing statutes in particular, requires close attention to the purpose of the provision in issue, and a realistic view of the transaction or other matter to which it is alleged to apply. The relevant authorities were recently reviewed by this court in *Rosendale Borough Council v Hurstwood Properties (A) Ltd* [2022] AC 690, paras 9-17. Two well-known dicta from those cases will suffice. The first, from *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, para 32, by Lord Nicholls of Birkenhead, giving the joint opinion of the appellate committee of the House of Lords, is that the essence of the correct 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.’

The second, from Ribiero PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6HKCFAR 517, para 35, approved in *Barclays Mercantile*, is that: ‘The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.’

71. This is not, however, to downplay the importance of the language of the provision to be construed. As Lord Hodge said in *R (O) v Secretary of State for the Home Department* [2023] AC 255, para 29, ‘they are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which their meaning is ascertained’. That said, a ‘phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections’ (ibid. para 29) and ‘sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision’ (ibid, para 30).”

38. In *Rosendale* Lord Briggs and Lord Leggatt also emphasised at [16] the need to avoid “tunnel vision”; rather:

“The particular charging or exempting provision must be construed in the context of the whole statutory scheme within which it is contained.”

39. An important point that these passages all make clear is that, while the words used are paramount (the “primary source”), they must be read in context. The context includes not only adjacent provisions but the “whole statutory scheme”. A purposive approach must be adopted to determine whether the provisions were intended to apply to the transaction in question, viewed realistically.

Ground 1: discussion

40. The starting point for the consideration of ss.53 and 54 FA 2003 is the general rule that SDLT is charged on the consideration provided for the relevant transfer: ss.50, 55 and paragraph 1(1) of Schedule 4 FA 2003. Section 53 departs from that general principle in certain circumstances where the consideration is less than the market value of the interest transferred. Section 54 then provides some exceptions from that departure, with the effect that the general principle applies.
41. We were provided with no assistance from HMRC as to the policy background to ss.53 and 54. We were shown the Explanatory Notes to the most relevant provisions of the 2003 Finance Bill, on which HMRC relied in relation to Ground 2 (see below), but they provided limited assistance. They did indicate that there had been a prior consultation about the proposed SDLT regime, but we were not taken to it.
42. Ms Shaw suggested that the aim of s.53 was to prevent SDLT avoidance by transferring land to a connected company and then selling the shares in it. It clearly achieves that objective, although it is not limited to cases where there is a subsequent sale. As to the exceptions in s.54, the first two (Case 1 and Case 2, see [17] above) both relate to cases where the company is a trustee and are no doubt explicable on that basis. The policy behind the Case 3 exception, with which we are concerned, is not immediately apparent. However, its existence indicates that it must have been considered inappropriate to impose SDLT on a market value basis on a distribution. I can see the sense of that in the context of a dividend in specie or a return of capital to shareholders (for example on a winding up), since these are transactions where there is nothing questionable about the absence of consideration.
43. What is clearer, in my view, is the purpose of the proviso in s. 54(4)(b). It applies in a specific situation, namely (and paraphrasing for now) there has been a transfer within the last three years on which group relief has been claimed. The focus is therefore on a) group relief specifically, and b) a three year period. In the context of group relief, the three year period can only relate to the clawback provision in paragraph 3 of Schedule 7 (see [21] above). Parliament has determined that group relief should be withdrawn if the transferee leaves the group within three years. Section 54(4)(b) dovetails with this. The evident intention is that paragraph 3 of Schedule 7 should not be capable of being sidestepped via a distribution of the property interest enjoying the Case 3 exception. No other explanation was suggested for the proviso, and I can see none.
44. The UT was concerned that an interpretation of “claim” that limited it to an effective one involves impermissibly reading in words. However, properly understood in the context of paragraph 3 of Schedule 7 I do not agree. Further,

the consequences that follow from HMRC's approach provide a strong indication that their interpretation is not correct.

45. Paragraph 3 of Schedule 7 applies only if group relief was not only claimed but was in fact enjoyed: see the requirement for a claim in s.62(3) ("relief ... must be claimed") and paragraph 3(1) of Schedule 7 ("in the case of a transaction ... that is exempt from charge by virtue of paragraph 1", emphasis supplied): see [19] and [21] above. Paragraph 3 could not apply if a claim for group relief had been properly denied or if the claim had been withdrawn, since in neither case would the transaction have in fact been exempt.
46. This provides important context for the interpretation of s.54(4)(b). If group relief has not in fact been obtained then the mischief at which the proviso is clearly aimed would be absent. If the company in question left the group rather than making a distribution of the land interest then no SDLT charge would arise, because paragraph 3 of Schedule 7 would not apply. Rather, SDLT would be chargeable on, and only on, the earlier transaction by which the property was acquired.
47. The effect of HMRC's approach is to impose a market value based charge on a distribution – the starting point for which is no such charge, due to the Case 3 exception – depending on whether a claim for group relief happened to have been made, however erroneously that claim was made and whatever its outcome (including, for example, if the claim was withdrawn). On the facts of this case, HMRC would have to accept that if B64 had claimed sub-sale relief rather than group relief, as HMRC maintained it was entitled to do, then that would have made all the difference.
48. At the hearing, Mr Henderson confirmed on instruction that even if B64's group relief claim had been formally denied and it had been assessed to SDLT (rather than erroneously being treated as entitled to sub-sale relief) then HMRC's position would remain that the proviso is engaged, because that is how the legislation operates. As he recognised, that is the logical consequence of HMRC's argument. However, it makes no sense in the context of the mischief at which the provision is aimed and indeed it appears to give rise to a penal result. Further, it renders HMRC's own approach to the legislation incoherent.
49. HMRC's published practice on s.53 is contained in their SDLT Manual at SDLTM30220. It says this about s.54(4):

"FA03/S54 provides that market value will not be imposed in any of the following circumstances where...the vendor is a company and the transaction is, or is part of, a distribution of assets, whether or not on the winding up of a company

'This is provided that the subject matter of the transaction, or an interest from which that interest is derived, has not within the preceding three years been the subject of a transaction in respect of which a claim to group relief was made by the vendor.'

'It is not HM Revenue & Customs intention that FA03/S54(4) should be prevented from applying where a group relief claim was made by the

vendor but recovered under FA03/SCH7/PARA3 either at the time of or before the effective date of the transaction.”

We were informed that the reason that the final two paragraphs appear in quotation marks is that they are derived from a Tax Bulletin published in April 2004, relatively shortly after the SDLT regime came into operation on 1 December 2003.

50. Mr Henderson’s instructions were that the final paragraph above is a “limited concession allowed pursuant to HMRC’s care and management powers”. However, leaving to one side that it has never been published as a concession, both of the paragraphs derived from the Tax Bulletin are telling.
51. First, the Tax Bulletin was published relatively shortly after the provisions were enacted, so what was said is capable of providing some guide to the mischief and purpose of the legislation as intended by its framers (see the comments of Lord Hodge in the *R(O)* case at [30] and the *Cobalt Data Centre* case at [71], supra). Secondly, the final paragraph clearly reinforces the link to paragraph 3 of Schedule 7 which I have already explained. Thirdly, the wording of that paragraph necessarily assumes that the claim “made” was a successful one, because that is the only situation in which paragraph 3 of Schedule 7 can apply. Fourthly, a situation where a claim is validly made but is subsequently recovered under paragraph 3 of Schedule 7, by means of a fresh charge at the time of degrouping rather than a retrospective cancellation of the earlier relief, is in fact harder to justify by reference to the wording of the proviso than the Appellant’s interpretation. Finally and relatedly, it makes HMRC’s overall position inconsistent and incoherent. It is very hard to see a legitimate basis to choose not to invoke the proviso where group relief was successfully claimed but is clawed back by a charge under paragraph 3 of Schedule 7, but to apply the proviso where the group relief claim did not succeed in the first place. That would be a highly questionable exercise of HMRC’s care and management powers. Rather, if what was said in the Tax Bulletin was indeed a concession as HMRC (now) say that it is, then that might be justified on the basis of the Appellant’s interpretation, but not HMRC’s. If it was not a concession then I certainly cannot see how it can be said to be consistent with HMRC’s approach.
52. I should emphasise that the Appellant cannot succeed because HMRC have apparently adopted an inconsistent approach, however unattractive that is. This is neither a claim for judicial review nor could it be said that the Appellant’s case falls within what was said in the Tax Bulletin. Rather, the Tax Bulletin is relevant due to its proximity to the introduction of the legislation and what it tells us about its purpose and the mischief at which it was aimed. The Tax Bulletin extract provides a strong indicator that the proviso is aimed at disapplying the Case 3 exception where group relief has actually been enjoyed. In other words, it provides a clear illustration of the mischief at which the proviso is aimed.
53. Mr Henderson submitted that the Appellant’s approach would lead to unacceptable uncertainty. An SDLT return must be filed shortly after a transaction is undertaken. The taxpayer could not know at that stage whether a group relief claim by the vendor would or would not succeed, or whether it might be withdrawn.

54. I am unpersuaded by this. Like other tax returns, SDLT returns are not made with a guarantee of their accuracy; they are made on the basis of a declaration that the return is “to the best of [the purchaser’s] knowledge, correct and complete” (paragraph 1(1) of Schedule 10 FA 2003). There is also provision for them to be amended within 12 months of the filing date (paragraph 6 of Schedule 10). Even on HMRC’s approach the company making the return must ascertain whether the vendor either has made or intends to make a group relief claim, a claim which would not necessarily be filed before the company makes its own return and indeed might be made by way of amendment to the vendor’s own return at a later date. The fact that, on the Appellant’s approach, the company needs additional information to ascertain whether the claim made by the vendor is one that will succeed, or indeed is withdrawn, is no different to many other situations where a group member’s own tax position is affected by that of other group companies. (There are numerous example of this, but an analogous one that I mentioned at the hearing is the fact that returns of chargeable gains will need accurately to take account of the tax history of assets acquired from other group members, in particular whether and what reliefs have successfully been enjoyed – including via claims that may be made at a later date – because that may fundamentally affect the tax treatment of the sale of those assets.)
55. Mr Henderson also submitted that, on the facts of this case, B64 effectively enjoyed group relief. It claimed that relief and it was not assessed to SDLT. I disagree. It is true that B64 was not assessed to SDLT, but what it “enjoyed” was HMRC’s erroneous view that sub-sale relief was available, not group relief, a view that was not corrected until it was too late to raise an assessment.
56. Given HMRC’s position and the FTT’s findings, it is in reality impossible to see how it could ever have been determined that B64 was entitled to group relief. Group relief would have been denied to B64 by HMRC for the same reason that it was denied to the Appellant, namely that the transaction by which B64 was granted the Lease formed part of a single set of arrangements which had a main purpose of avoiding corporation tax.
57. Further, and as Ms Shaw submitted, HMRC’s failure to assess B64 is a failure in HMRC’s own decision-making and assessment process, rather than one that is properly remedied by the interpretation of s.54(4)(b) that HMRC now urge on the court. HMRC are no doubt out of time to assess B64 to SDLT, but it was their choice not to do so (including by way of alternative to their original analysis), and it was their error to proceed solely on the basis that sub-sale relief was available. There are time limits for assessment with good reason, and they cannot be circumvented by a construction of the charging provisions that is not otherwise justified.
58. Turning back to the correct interpretation of s.53(4)(b), I would accept Ms Shaw’s submission that the word “claim” should be given a purposive interpretation. Just as in *Rossendale* the words “the person entitled to possession” within the meaning of s.45(1)(b) of the Local Government Finance Act 1988 could not be taken to include a company with no real or practical ability to exercise its right to possession, so too “a transaction in respect of which group relief was claimed by the vendor” cannot be taken to include a transaction which does not in fact qualify for group relief and which has not enjoyed the benefit of group relief. This

approach properly addresses the mischief at which the proviso is aimed, namely a circumvention of paragraph 3 of Schedule 7, and achieves its purpose. If the earlier transaction did not qualify for group relief, the correct approach is to levy tax on that earlier transaction.

Ground 2

59. Given the Appellant's success on Ground 1 it is not strictly necessary to consider Ground 2, but given its broader relevance I will do so relatively shortly.
60. In short, the FTT and UT were correct to conclude that the proviso does not contain a loophole that permits transactions earlier on the same day of the distribution to escape its application, a result which would be absurd.
61. The difficulty with the drafting is that the term "effective date" is defined in s.119 FA 2003 as a particular date, generally the date of completion. It is a concept used throughout the legislation – Ms Shaw told us that it was used almost 200 times – with no indication of any scope to treat it as referring to a particular time on a day. Accordingly, read literally, s.54(4)(b) appears to refer to a three year period ending on the day immediately before completion, in this case 4 July rather than 5 July 2011. But that would leave a nonsensical gap between midnight on that date and the completion of the relevant transaction on the following day.
62. However, when the mischief at which s.54(4)(b) is aimed is borne in mind, it is easy to see that there has been a simple error in the drafting. The (forward-looking) three year period in paragraph 3 of Schedule 7 is "the period of three years beginning with the effective date of the transaction". That causes no difficulty, and in particular would include an event that occurred later on the effective date. However, when the draftsman came to transpose the three year period on a backward-looking basis in s.54(4)(b) he (or she) failed to reflect the fact that slightly different wording would have been apposite to make clear that there was to be no gap.
63. As explained below, it is not necessary to decide the precise words that the draftsman should be treated as having used, but one approach (suggested by Mr Henderson) would be to treat the words "preceding the effective date" as reading "preceding and including the effective date", noting that the words "has... been" either side of the commas would still confine the proviso to transactions occurring before the transfer in question. Alternatively, the UT's simpler approach of reading the three year period as the three years prior to the transaction could be adopted. I would not however adopt the FTT's approach of equating "effective date" with "effective time", because that does not take sufficient account of the use of the defined term.
64. Mr Henderson relied on the "presumption against absurdity" discussed in section 13.1 of *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed) ("*Bennion*"), and in particular the House of Lords decision in *Luke v Inland Revenue Comrs* [1963] AC 557, 577, where Lord Reid said in the context of another legislative problem:

“To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. This is not a new problem, though our standard of drafting is such that it rarely emerges. The general principle is well settled. It is only when the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail.”

65. Mr Henderson also relied on the Court of Appeal decision in *O'Rourke (Inspector of Taxes) v Binks* [1992] STC 703. Further, he referred to the Explanatory Notes to Finance Bill 2003, which said this about what became s.54(4):

“Subsection (4) provides an exception where the vendor is a company, and the transaction relates to the distribution of assets, including a distribution made in connection with the winding up of a company. It does not apply if the vendor has claimed group relief for the land on a transaction that has taken place in the three years prior to the transaction.”

66. In my view the more obvious, and leading, authority on the correct approach is the later House of Lords decision in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592 where, having observed that in that case “the draftsman slipped up” (Homer nodded: see p.589), Lord Nicholls said this:

“It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opusculum, *Statutory Interpretation*, 3rd ed. (1995), pp. 93-105. He comments, at p. 103:

‘In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.’

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise

words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in *Jones v Wrotham Park Settled Estates* [1980] AC 74, 105-106...

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v Schindler* [1977] Ch 1, 18, Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation.”

67. In this case I am satisfied that all three of the conditions set out by Lord Nicholls are met. The intended purpose is clear: see above, has not been given effect to through inadvertence, and the court can readily ascertain the substance of the provision that would have been made, a determination of the precise words being inessential. Further, no significant variance from the language is required. It is not necessary to rely on the Explanatory Notes to the Finance Bill, but for what it is worth they are entirely consistent with this approach.
68. A pertinent illustration of the principles in operation can be seen in the Court of Appeal’s decision in *R v Lehair* [2015] EWCA Crim 1324, [2015] 1 WLR 4811. In that case the defendant robbed a bank and, on the same day, paid most of the cash into her own bank and arranged a transfer to her husband’s bank account. In confiscation proceedings, she relied on a provision that referred to gifts being tainted if made at any time “after...the date on which the offence was committed” (s.77(5)(a) of the Proceeds of Crime Act 2002).
69. The argument that the transfer to the husband was not caught because it occurred on the day the offence was committed received short shrift. Macur LJ, giving the judgment of the court, said at [19]:

“We are satisfied that a literal interpretation of section 77(5)(a) is anomalous to the explicit purpose of the Act. It could not have been intended that criminals have a day’s grace to dispose of their assets or to require either the prosecution, the enforcement agencies or the court to devise a scheme, outside the Act, to catch relevant assets. A literal interpretation of section 77(5) would require this.”
70. Similarly, in this case Parliament cannot have intended the operation of the proviso to be avoided by the simple expedient of ensuring that the transaction qualifying for group relief was entered into after, rather than before, midnight on the effective date.
71. Ms Shaw sought to rely on observations in *Project Blue Ltd v Revenue and Customs Comrs* [2018] UKSC 30, [2018] 1 WLR 3169 (“*Project Blue*”) about the likelihood of lacunae being found to exist in the early years of a new tax such as SDLT (see in particular the judgment of Lord Hodge at [31] and [34] and the

dissenting judgment of Lord Briggs at [93]), but I do not think that they assist. Those comments were directed at different provisions of the SDLT code, in respect of which the Supreme Court determined that the lacuna in question could not be addressed by a purposive interpretation (although, in the result, the problem was addressed by s.75A).

Section 75A: introduction

72. Success by the Appellant on ground 1 means that it is necessary to consider s.75A. While this is somewhat undesirable without the benefit of substantive discussion of the issues in the tribunals below, it would be disproportionate to remit the appeal for that purpose (with the consequential risk of a further appeal), and neither party suggested that we should do so.
73. By way of recap, HMRC maintain that the assessment can alternatively be justified under s.75A, which would operate to deem a notional land transaction to have taken place between SGSL and the Appellant for a consideration which is not less than its market value.
74. The Appellant's primary response to this is that the notional transaction postulated by s.75A would have qualified for group relief. Mr Brodsky submitted that the decision to transfer the Tower to an SPV was not driven by tax considerations and could not have achieved a tax benefit. Rather, it was the series of transactions that transferred the Tower in an indirect way that was infected by a tax avoidance purpose. The purpose of s.75A is to defeat avoidance arrangements, not to allow HMRC to levy tax at an artificially high rate on a non-avoidance counterfactual. Mr Brodsky placed particular reliance on certain findings by the FTT.
75. The Appellant also maintains that, if group relief was not available, then in any event the notional transaction would be a distribution by SGSL falling within the Case 3 exception, such that s.75A could not be used to justify a charge based on market value under s.75C(6) (which applies s.53 to the notional transaction).
76. HMRC say that group relief was not available. The deeming exercise under s.75A did not permit the tax avoidance purpose of the actual transactions to be disregarded. The Case 3 exception was also unavailable because SGSL was in fact a bare trustee and could not be treated as having made a distribution of its assets.
77. As previously indicated, HMRC raised an additional point which was the subject of written submissions following the hearing. This was that, due to the operation of s.75A(5), if group relief was not available then the amount on which SDLT was chargeable under s.75A was not limited to market value and was in fact higher. However, it was also confirmed that HMRC were not seeking to increase the actual assessment upheld by the FTT, which was based on a market value figure of £200m.

Section 75A: discussion

The relevant principles

78. The questions of whether group relief or the Case 3 exception apply to the “notional land transaction” under s.75A both turn fundamentally on the extent to which statutory fictions must be treated as replacing the actual facts, or put another way how far the deeming required by the relevant provision should be taken. In the case of group relief the relevant deeming is the notional transaction provided for in s.75A itself, whereas in the case of the Case 3 exception it is the combination of the deeming in s.75A and the provision in paragraph 3(4) of Schedule 16 which treats SGSL rather than St George as the vendor for SDLT purposes on the grant of the Lease.
79. The leading authority is *Fowler v Revenue and Customs Comrs* [2020] UKSC 22, [2020] 1 WLR 2227 (“*Fowler*”) at [27], where Lord Briggs summarised guidance from earlier cases as follows:
- “(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.’”
80. These principles apply to SDLT, and indeed s.75A, as they apply elsewhere: see for example *Brown v Revenue and Customs Comrs* [2024] EWCA Civ 92, [2024] 4 WLR 21 at [68], citing *DV3 RS LP v Revenue and Customs Comrs* [2013] EWCA Civ 907, [2014] 1 WLR 1136 and *Fanning v Revenue and Customs Comrs* [2023] EWCA Civ 263, [2023] 1 WLR 2853.
81. More generally in relation to s.75A, we also have guidance from *Project Blue*. There, Lord Hodge explained at [42] that although the provision is headed “Anti-avoidance”, that merely assists an understanding of the mischief at which the provision is aimed. Rather:

“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.”

How s.75A might operate in this case

82. The relevant provisions of ss.75A, 75B and 75C are set out at [18] above. Section 75A(1) includes three threshold conditions. There is no dispute that the first two are satisfied. That is, treating SGSL as “V” and the Appellant as “P”, SGSL disposed of the Lease and the Appellant acquired it, and a number of “scheme transactions” have been “involved in connection with” that disposal and acquisition (s.75A(1)(a) and (b)).
83. The third condition (at s.75A(1)(c), referred to by Lord Hodge in the passage above), has the effect that the provision is only engaged if its effect is to produce a higher charge to SDLT than the actual transactions. The Appellant maintains that this is why s.75A is not engaged.
84. “Scheme transactions” can include non-land transactions, see s.75A(2)(a). HMRC say that the “scheme transactions” in this case included not only the grant of the Lease and the Transfer but also the sale of the shares in B64 to the Appellant, and indeed the initial capital contribution to B64 (see [8] above). The Appellant disputes this.
85. Where s.75A applies, those scheme transactions that are land transactions are disregarded and there is treated as having been a notional land transaction between V and P (s.75A(4)). On the facts of this case the Lease would therefore have been treated as granted directly by SGSL to the Appellant. Under s.75A(6) the effective date of the transaction would be 5 July 2011.
86. Section 75A(5) specifies the chargeable consideration. As already indicated, this was the subject of written submissions following the hearing. HMRC’s position is that, bearing in mind that s.53 only applies if the consideration is below market value (see the “not less than” wording in s.53(1A)), s.75A(5) can produce a higher charge than through the application of s.53. HMRC say that s.75A(5)(b) requires the aggregation of the amounts paid under all the scheme transactions, including the B64 share sale and even the capital contribution, on the basis that these were all amounts received by persons connected with SGSL. As discussed further below, this results in SDLT on a total of over £230m. A credit would be allowed for the SDLT already paid on the Appellant’s acquisition of the Lease, under s.75C(10).

87. The Appellant disputes this, contending that HMRC’s position is not credible given the purpose of s.75A to calculate the SDLT properly due. The price paid for the sale of the shares in B64 would be excluded either because the share sale did not fall within the definition of a “scheme transaction” in s.75A(1)(b) at all or because it was taken out by s.75B, which requires consideration for “incidental transactions” to be disregarded. The capital contribution was not “consideration” at all. Further, s.75A(5)(b) should not be interpreted so as to “double count” the consideration received on both the grant of the Lease and the Transfer. The result, on the Appellant’s approach, was that the consideration for the notional transaction would be limited to £30m, or if the grant of the Lease was not a distribution then £200m under s.53.

Group relief on the notional transaction

88. Section 75C(2) provides that the notional transaction under s.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)”. SGSL (as V) and the Appellant (as P) were members of the same group, so in principle group relief is relevant. However, it is necessary to apply not only the “terms” of the relief but also its “restrictions”. The restrictions on group relief include paragraph 2(4A) of Schedule 7. As already indicated, this issue raises the question of how far the deeming effect of s.75A should be taken.
89. Although the written submissions for the Appellant suggested that the notional transaction must be treated as insulated or cleansed in some way from any actual tax avoidance purpose because it was “deliberately designed to be a non-avoidance counterfactual”, Mr Brodsky’s oral submissions were considerably more nuanced. He made the point that s.75A is prescriptive as to the nature, terms and date of the notional transaction, and that s.75C(2) asks whether that transaction qualifies for relief. Further, s.75C(3) provides an important clue because it makes specific provision about purpose in one instance, indicating that the purpose of individual scheme transactions is not otherwise to be attributed to the notional transaction.
90. Mr Brodsky submitted that the notional direct grant of the Lease from SGSL to the Appellant had no tax avoidance purpose. He placed particular reliance on the following paragraphs of the FTT’s decision:

“41. The Tribunal finds that at all material times the group of companies wanted to transfer the Tower to the Appellant in order to ring-fence risks and potential liabilities associated with the development, and to provide greater financial flexibility by opening up the prospect of securitized borrowing from a wider group of lenders. These were bona fide commercial reasons, that provided a commercial benefit.

42. The Tribunal is satisfied on the evidence that the group, when it first discussed with PwC the possibility of transferring the Tower to an SPV, was contemplating doing so for the reasons identified in the previous paragraph. The evidence of Mr Stearn is that he contacted PwC, the group’s principal tax advisers at the time, as the group was ‘seeking to ensure that transferring the development to an SPV would

not give rise to adverse tax consequences'. The Tribunal is satisfied that the process that led to the series of transactions on 5 July 2011 was not originally initiated out of a motive to avoid tax. The Tribunal is satisfied that if the group had never been made aware by PwC of the possible corporation tax advantage that could be obtained via the step plan, the group would likely have transferred the Tower directly from SGSL to the Appellant or another SPV in order to achieve its original purposes.”

91. Mr Brodsky’s submissions were put attractively, but I cannot accept them. True it is that the original idea of transferring the Tower to an SPV was not prompted by tax considerations, but by the time that the actual transactions were implemented on 5 July 2011 (the effective date of the notional transaction, see above) the parties had a main purpose of avoiding corporation tax, as the FTT found. Those were the actual circumstances in which SGSL granted the Lease and the Appellant acquired it.
92. While it is the case that the tax avoidance purpose could not have been achieved without intermediate steps, including the transactions which s.75A requires to be ignored, we are not told that other (actual) facts and circumstances must be ignored, and applying the principles explained in *Fowler* I do not consider that they should be. Those other facts and circumstances include the reasons and objectives for V and P’s actions, determined as at the effective date of the notional transaction, being 5 July 2011. Indeed, the Appellant seeks to rely on those (actual) facts to maintain that there were bona fide commercial reasons for the Appellant to acquire the Lease within paragraph 2(4A)(a), but in effect seeks to exclude the actual circumstances pertaining at the effective date for the purposes of paragraph 2(4A)(b).
93. We are explicitly told that reliefs are available only subject to their terms and restrictions. That is an indicator that they need to be applied in the normal way. It is well settled that whether the parties had a tax avoidance purpose has to be tested on a subjective basis. I do not consider that it “inevitably flows” from the fiction of the notional transaction (*Fowler* at [27(5)]) that V and P must be treated as having only the purpose or purposes that the evidence indicated that they would or might have had if the scheme had never been thought of. I consider that that would take the deeming too far and would not properly meet the requirement to apply the terms and restrictions of the relief. I also note that, while it so happens that in this case the Appellant can point to some apparently helpful findings by the FTT (albeit not relating to the position as at the effective date), in many cases it will not be possible to postulate with any clarity what the parties’ purposes would have been if they had implemented the notional transaction. That is itself an indicator that an (inherently uncertain) exercise of that nature is not only unnecessary but was not intended to be required to be attempted.
94. I do not consider that this produces an absurd or anomalous result. In reality, if there is an oddity (or there could be said to be a punitive effect, as Mr Brodsky put it), that lies in the fact that SDLT group relief is denied not only by SDLT avoidance purposes but by other tax avoidance purposes which have nothing to do with SDLT, and furthermore irrespective of whether or not those purposes are achieved. But Parliament clearly intended group relief to be denied in such cases.

95. I do not consider that s.75C(3) provides any material assistance to the Appellant. It refers to provisions in Schedule 7 that concern a different relief, and which we were not shown. It appears to be a provision designed to ensure that the relief in question is not prevented from applying by an argument that, shorn of the actual land transactions, there is no transfer of an undertaking as those reliefs require. It does not indicate that the actual circumstances of the transactions are ignored, in fact rather the reverse.
96. Mr Henderson also pointed to the fact that what are to be disregarded under s.75A(4)(a) are those scheme transactions that are land transactions. This would leave, in particular, the sale of the shares in B64, which was a necessary part of the corporation tax planning and itself must be treated as having a tax avoidance purpose. On the facts (and on the basis that the share sale was a scheme transaction, as to which see [113] below), this provides some further reinforcement to the conclusion that the parties' actual tax avoidance purpose cannot be disregarded, but I do not consider it essential to the analysis.

Whether s.53 applies to the notional transaction

97. The Appellant's fallback argument under s.75A is that it would not justify a market value based charge, because although s.53 is applied by s.75C(6) and the parties are connected, the Case 3 exception in s.54(4) also applies. Section 54(4)(b) is not in point in relation to the notional transaction, so the issue is whether there has been a "distribution of the assets" of SGSL. SGSL must be treated as the vendor of the "whole of the interest" pursuant to paragraph 3(4) of Schedule 16. Since the grant of the Lease was at an undervalue and to a fellow subsidiary, Mr Brodsky submitted that SGSL had to be treated as making a "sideways" distribution in accordance with *Aveling Barford* (see [30] above). In contrast, Mr Henderson submitted that the deeming required by the statute did not go so far as to deem a person who was in fact a trustee to make a distribution. Mr Brodsky's response was that if that was right then the Case 3 exception could never apply to a lease grant involving a trustee.
98. As Mr Brodsky pointed out, HMRC did not take issue with whether a "distribution" could have arisen for the purposes of the Case 3 exception, other than in relation to the status of SGSL as a trustee, so I will confine my observations to that point.
99. I agree with HMRC that SGSL cannot be treated as having made a distribution of assets. While SGSL is deemed for the purposes of Part 4 of FA 2003 to be the vendor of the entire interest, it is not an inevitable consequence that it must be treated as making a distribution of its assets by granting the Lease, whatever that concept may mean in the context of s.54. The reality is that, as a bare trustee, the grant of the Lease could not possibly be described as a distribution of SGSL's assets, since the Tower was not an asset that was on any basis available for it to distribute. Paragraph 3(4) deems SGSL to be the vendor, but it does not say that, prior to that point, SGSL must be treated as having been the beneficial owner of the Tower when it was not, or indeed that SGSL must be treated as the beneficial owner of the freehold reversion that it retained. To adapt Lord Asquith's expression, that would require more boggling than is sensibly required. It would go further than the deeming requires.

100. While I see the Appellant's argument that HMRC's approach would exclude the operation of the Case 3 exception as far as trustees are concerned, that is not a sufficient indication that the statutory fiction in paragraph 3(4) should be extended to address that point. We were shown some commentary on paragraph 3 of Schedule 16 (*Sergeant & Sims on Stamp Taxes*, 12th ed, at [AA33A]) that indicates that the specific rules for leases granted to and by trustees in paragraphs 3(2)-(4) were driven by anti-avoidance considerations, but that the precise mischief at which they are aimed is unclear. Lack of clarity about purpose of course makes it all the more difficult to determine the precise scope of the deeming under paragraph 3(4) (see *Fowler* at [27(2) and (3)]), but that does not assist the Appellant in demonstrating that the deeming should be taken as far as it says. It seems to me that, if a beneficial owner of property wishes to benefit from the Case 3 exception on a bona fide transaction, the solution is to organise its affairs so that the problems created by paragraph 3 do not arise, rather than to attempt to treat the trustee as having made a distribution that it does not in fact make.
101. Accordingly, the Case 3 exception would not apply to the notional grant of the Lease, such that the market value rule in s.53 is not prevented from applying to the notional transaction under s.75A.

HMRC's new argument and the "payable" point in s.75A(1)(c)

102. Given the conclusions I have reached and HMRC's confirmation that they do not seek to increase the SDLT assessment on the Appellant, it might seem that it is not necessary to consider HMRC's further argument based on s.75A(5), on which we received the written submissions that I have summarised above at [86] and [87].
103. In fact, however, that is not correct. During the course of advancing that argument Mr Henderson very properly raised an issue as to the meaning of the word "payable" in s.75A(1)(c). The point is this. By virtue of s.75A(1)(c), s.75A is only engaged if "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". This raises the question of what SDLT was actually payable on the scheme transactions. Is it limited to the amount actually borne by the Appellant or should it also include the SDLT that was chargeable on B64, even though it was not assessed to that tax?
104. A similar point arose in the Court of Appeal in *Project Blue* [2016] EWCA Civ 485, [2018] 1 WLR 368. In that case Patten LJ, with whom Lewison and Underhill LJ agreed, rejected an argument of Counsel for HMRC that SDLT was not "payable" by the bank in that case (MAR) because the enquiry into its return claiming relief under s.71A FA 2003 had closed without an assessment despite MAR in fact not being entitled to that relief. Patten LJ said this at [35]:

"It seems to me that 'payable' must mean payable on the completion of the transaction which gives rise to the charge. The availability of the relief cannot depend on how the claim for relief is subsequently

determined or dealt with by HMRC. The s.75A(1)(c) condition was not therefore satisfied in this case.”

105. Lewison LJ added at [52]:

“Since MAR’s liability to pay SDLT was a liability to pay on the basis of a direct sale from the MoD to it, it also follows that that amount of SDLT was no less than the SDLT that would have been payable by any one person by way of consideration for any of the scheme transactions described in section 75A. It follows, therefore, that the condition in section 75A(1)(c) is not satisfied. [Counsel for HMRC] argued that the reference to SDLT “payable” in section 75A(1)(c) meant falling due for payment, and that since HMRC had issued a closure notice to MAR accepting its claim to exemption under section 71A there was no SDLT “payable”, and therefore that condition was satisfied. There are, I think, two answers to this point. The first, given by [Counsel for the taxpayer], is that the question must be judged at the date of the notional transaction postulated by section 75A(4), whose effective date under section 75A(6) is the date of the last of the scheme transactions. That was long before HMRC issued its closure notice, with the result that the closure notice is irrelevant. The second is that ‘payable’ does not have a single meaning. It may mean ‘due for payment’, or ‘accruing due’ or ‘liable to pay’. In the context of section 75A(1)(c) I consider it means liable to pay (as that expression is used in section 85(1)). I do not consider that a mistake by HMRC in issuing a closure notice to one taxpayer can of itself impose liability on a different taxpayer if that is the reason why section 71(1)(c) is engaged.”

Section 85(1), referred to by Lewison LJ towards the end of this passage, provides that “The purchaser is liable to pay the tax in respect of a chargeable transaction”. The final reference to s.71(1)(c) must be a typographical error for s.75A(1)(c).

106. The Court of Appeal’s decision in *Project Blue* was reversed by the Supreme Court on a different ground, but these comments have not been disapproved. As Mr Henderson recognised, they remain highly persuasive, and he explicitly confirmed that HMRC do not ask this Court to depart from them, while recognising that HMRC may argue to the contrary in the Supreme Court should an appropriate case arise.

107. Although there is no equivalent in this case to the closure notice referred to by Lewison LJ, the second reason he gave, and the reason given by Patten LJ, applies equally here. In the absence of any attempt to persuade us not to follow the approach of the Court of Appeal in *Project Blue* I will therefore apply the same approach in what follows.

Does s.75A(1)(c) apply?

108. Turning first to the SDLT payable on the actual transactions, the grant of the Lease to B64 would not have qualified for group relief for the same reason that the FTT found that the Transfer did not qualify, namely that paragraph 2(4A)(b)

of Schedule 7 applied. The FTT found that the various steps taken on 5 July 2011 comprised a single set of “arrangements” which had a main purpose of avoiding corporation tax (FTT decision at [87]). It also follows from what I have said that the grant of the Lease by SGSL cannot be treated as a “distribution of assets”, so the market value rule in s.53 applies to that transaction.

109. Thus, the SDLT “payable” by B64 on the grant of the Lease was 4% of its market value, plus any SDLT on the (nominal) rent (see s.53(1A)(b)). HMRC’s post-hearing submissions refer to an open market value of £200,198,814. To this must be added the SDLT payable by the Appellant on the Transfer. Since ground 1 of the appeal has succeeded, the SDLT payable on the Transfer is 4% of the actual consideration, which was £30,248,814. Disregarding the nominal rent, the total amount on which SDLT would be payable on the actual transactions would therefore be £230,447,628.
110. This must be compared to SDLT on the consideration for the notional transaction. HMRC calculate that consideration as £230,448,629, on which SDLT would similarly be chargeable at 4%. (Again this disregards the nominal rent which needs to be taken into account on the grant of the Lease, but that is not problematic because any SDLT chargeable on it would be the same under the actual and notional transactions.) HMRC’s consideration figure comprises the sum of: £1,000 + £30,198,814 + £170,000,001 + £30,248,814, namely the capital contribution, the premium at which the Lease was granted, the consideration for the share sale and the consideration for the Transfer. It is just £1,001 higher than the aggregate chargeable consideration under the actual transactions. If HMRC are correct about that then the condition in s.75A(1)(c) is satisfied and s.75A can apply.
111. It follows that whether s.75A applies turns on whether HMRC are correct to include all these elements in the consideration for the notional transaction (other than the capital contribution, which would not by itself make all the difference on the numbers). As indicated at [87] above, the Appellant disputes HMRC’s approach in a number of respects. I will start with the consideration for the sale of the shares in B64.
112. As an initial point, it is worth noting that s.75C(1) requires certain share transfers to be ignored, but it is not applicable on the facts since the share sale was not the first transaction. However, the Appellant maintains that the share sale was not in fact a “scheme transaction” at all, on the basis that it was not “involved in connection with the disposal and acquisition” of the Lease within s.75A(1)(b) because its inclusion in the step plan was solely to facilitate the corporation tax benefit; it did not make any difference to the disposal and acquisition of the Lease. Failing that, the Appellant submitted that the share sale was an “incidental transaction” within s.75B(1), such that the consideration for the share sale fell to be excluded on that basis.
113. As to the first of these points, I consider that the share sale was a “scheme transaction”. The words “in connection with” in the definition of “scheme transactions” (“transactions...involved in connection with the disposal and acquisition”) in s.75A(1)(b) are very broad: see for example the comment of Rix J in *Campbell v Conoco (UK) Ltd* [2002] EWCA Civ 704, [2003] 1 All ER

(Comm) 35 at [19]: “the words ‘in connection with’ ... are widely regarded as being as wide a connecting link as one can commonly come across”. While it is the case that the Lease could have found its way into the Appellant’s hands without the sale of the shares in B64, that is not the test. The scheme actually implemented had the share sale as an important component of the plan which vested the Lease in the Appellant.

114. The Appellant submitted that its argument on this point was supported by the Supreme Court decision in *Project Blue*, where Lord Hodge said at [69] that the “‘scheme transactions’ ... are the actual transfer or transfers by which a chargeable interest moves from V to P or P acquires a chargeable interest deriving from it”. However, this was part of a general description of the provisions and was not an interpretation of s.75A(1)(b); indeed Lord Hodge referred to s.75A(1)(a), not s.75A(1)(b), as the authority for this comment.
115. The Appellant’s alternative submission is that the share sale was an incidental transaction within s.75B. Section 75B(1) requires consideration to be ignored “if or in so far as the transaction is merely incidental to the transfer of the chargeable interest from V to P”.
116. What Parliament had in mind by an “incidental” transaction in this context is illuminated both by the other subsections of s.75B and by the fact that it is necessarily a subset of “scheme transactions” (because only consideration for such transactions is taken into account under s.75A(5)). In particular, a transaction is not incidental if “it forms part of a process, or series of transactions, by which the transfer is effected” (the “transfer” being further elucidated by s.75B(6)), and “may” be incidental if it is “undertaken only for a purpose relating to... the sale or supply of anything other than land” (s.75B(2)(a) and (3)(b)). Specific kinds of land transaction referred to in s.75A(3) are also expressly excluded by s.75B(2)(c).
117. HMRC maintain that the share sale was an integral step in carrying out PwC’s step plan. I agree that it was a necessary part of the corporation tax planning: see [96] above, and that it should be regarded as a “scheme transaction” for the reasons already given. But it does not necessarily follow that it is not “incidental”. In principle it could be. It was a non-land transaction within s.75B(3)(b) and did not fall within s.75A(3).
118. The Appellant submitted that the share sale should be treated as “incidental” because the share sale was an “incident” of the corporation tax planning which was itself an “incident of (i.e. an opportunity presented by)” the transfer of the Tower from SGSL to the Appellant.
119. I prefer HMRC’s submissions. While the share sale was clearly not an essential step in order to vest the Lease in the Appellant from a company or property law perspective, and there is no indication that the Transfer was made legally conditional upon its having first occurred, it seems to me that s.75B(2)(a) and (b) need to be approached realistically. To recap, these provide that a transaction is not incidental:

“(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...”

120. The step plan, which the FTT found that the Berkeley group attached considerable importance to following (FTT decision at [43]), required the share sale to be effected before the Lease was transferred to the Appellant. In reality, the Transfer was conditional upon the share sale having first occurred, and it did in fact form part of the series of transactions by which the Lease found its way from SGSL to the Appellant.
121. For completeness, I should explain that the meaning of “incidental” has recently been considered by the Supreme Court in a very different context. In *Dolphin Drilling Ltd v Revenue and Customs Comrs* [2025] UKSC 24, [2025] 3 WLR 124 (“*Dolphin Drilling*”) the question was whether the use of a rig for the purposes of accommodation was likely to be “more than incidental” to another use. Lord Hodge (with whom Lord Burrows, Lady Rose, Lord Richards and Lady Simler agreed) was careful to make clear at [42] that the court’s decision was confined to the particular statutory context but at [34] he did approve Nugee LJ’s analysis in the Court of Appeal, parts of which Lord Hodge set out at [24]-[26]. That analysis included the following more general comments about the ordinary meaning of the word “incidental”:

“If I can express it in my own words, one would normally say that use A is incidental to use B if it arises out of use B, something that is done because of use B, or in connection with use B, or as a by-product of use B. Using a laptop to write a shopping list does not arise out of using it to write opinions – it is an independent end in itself, unconnected with the writing of opinions, albeit no doubt very much a subordinate or secondary or lesser one.”

And after referring to the judgment of Pennycuick V-C in *Robson v Dixon* [1972] 1 WLR 1493:

“I agree that it is difficult to regard use A as merely incidental to use B if it serves an independent purpose of its own, unconnected with use B, at any rate if that purpose is of some significance and not trivial or casual...”

122. In contrast, the FTT in that case had treated the meaning of “incidental” as meaning subordinate or secondary, and the UT had upheld that decision before being reversed by the Court of Appeal.
123. This case rather illustrates why Lord Hodge was disinclined to comment on other statutory contexts, since it is far from straightforward to apply these general comments here. By definition, a transaction must have a connection with the transfer of the land interest from V to P in order to be a scheme transaction in the first place, and therefore a candidate for being “incidental”. Further, it might be thought that the more independent of the land transfer a transaction is, the more merited might be the argument that the consideration for it ought to be excluded.

In contrast, the FTT's approach in *Dolphin Drilling* might make more sense in the present context. Overall, I have not been able to derive assistance from *Dolphin Drilling* and have reached my conclusion by reference to the specific statutory context of s.75B(1).

124. On the basis that the share sale consideration does need to be included in the consideration for the notional transaction, it is necessary to consider the Appellant's further argument that s.75A(5)(b) cannot be interpreted as HMRC say it should, to allow the aggregation of all amounts received not only by V but by persons connected with it. Rather, the consideration should be confined to the amount received for the grant of the Lease. This is on the basis that the use of the word "or" in the parenthesis "(or a person connected with V)" showed that it was an alternative, intended to capture the scenario where no consideration is received by or on behalf of V but instead is received by a connected party.
125. I cannot accept this. The word "or" can be used in an inclusive sense (see generally *Bennion* at 17.11); it all depends on the context. It is highly unlikely that Parliament intended to allow the provision to be avoided by ensuring that some consideration was received by V and the remainder by a connected party. The more natural interpretation is that, in context, Parliament intended to catch the receipt of consideration whether by V, by connected parties or by both. I note that this is also consistent with the approach that has been taken in another part of the SDLT code using similar language: see *Fox v Revenue and Customs Comrs* [2022] UKUT 310 (TCC), where the expression "consideration...given...by the transferee or a person connected with him" in s.45 FA 2003 (as then in force) was interpreted to include consideration given both by the taxpayer and by his wife.
126. Further, it is worth observing that on the facts of this case SGSL (as V) would not actually have been entitled to retain the consideration for the grant of the Lease, because it was a trustee. It seems probable that, in reality, all the consideration was "received" by connected parties, and not by SGSL at all.
127. The Appellant says that this approach would result in the book cost of the Lease being counted twice. That may be so, but the result is not that surprising given that there was more than one transaction in the Lease, and bearing in mind that the calculation of the SDLT on the actual transactions of course includes both transfers.
128. As a result, I would agree with HMRC that the consideration for the share sale, the grant of the Lease and the Transfer all need to be included in the calculation of the consideration for the notional transaction, with the effect that the sum of the SDLT payable on the actual transactions is less than the aggregate amount under s.75A(5)(b), without having to consider HMRC's argument that the capital contribution amount comprised further "consideration". Since that aggregate amount is higher than the market value of the Lease, s.53 also does not apply to the notional transaction pursuant to s.75C(6): see s.53(1A) ("not less than"). The consequence is that s.75A does apply because the condition in s.75A(1)(c) is met.

Conclusion

129. In conclusion, I would allow Ground 1 of the appeal but uphold the UT's decision to dismiss the appeal from the FTT on the basis that s.75A applies. The overall result is therefore that the appeal should be dismissed.

Lord Justice Warby:

130. I agree.

Lady Justice Asplin:

131. I also agree.