



**TC02242**

**Appeal numbers: TC/2010/06808, TC/2010/06809**

*Stamp Duty Land Tax – avoidance scheme – use of unlimited company to contract for purchase of property, followed by reduction of capital and dividend in specie of the property acquired to its parent company – claim for exemption from SDLT under section 45(3) Finance Act 2003 (sub-sale relief) – whether unlimited company had complied with section 270 Companies Act 1985 requirements for initial accounts in respect of declaration of dividend in specie – held no – whether transactions fell within section 45 – held no (though would have done so if section 270 had been complied with) – intermediate purchaser therefore liable to SDLT on the consideration paid by it – ultimate acquirer exempt from SDLT under para 1, Schedule 3 FA03 (market value substitution in section 53 FA03 being displaced by section 54(3) FA03) – appeal of intermediate purchaser therefore dismissed and appeal of ultimate acquirer allowed – position also considered if the Companies Act point had not arisen – appeal of intermediate purchaser would have been allowed and that of ultimate acquirer dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**VARDY PROPERTIES (1)  
VARDY PROPERTIES (TEESSIDE) LIMITED (2)**

**Appellants**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE KEVIN POOLE  
GILL HUNTER**

**Sitting in public at 45 Bedford Square London on 15 and 16 March and 1 and 2 May 2012**

**Michael Quinlan of Deloitte LLP for the Appellants**

**Hui Ling McCarthy of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

#### *Preliminary*

- 5 1. This appeal concerns an avoidance scheme for stamp duty land tax (“SDLT”). We are told it is one of the earliest such appeals to reach the Tribunal.
2. It concerns in part the use – HMRC would say the abuse – of the relief, commonly called “sub-sale relief”, contained in section 45 Finance Act 2003 (“FA03”).
- 10 3. In this appeal, the Appellants are forthright in saying they structured a property acquisition in a very particular way in order to avoid what would otherwise have been a 4% charge to SDLT on a purchase price of £7,250,000. The amount of SDLT at stake in this transaction is therefore £290,000. We are informed however that the SDLT at stake in all the transactions in which this scheme (or some variant of it) was used is of the order of £100 million.
- 15

#### *Basic structure of the scheme explained*

4. The basic structure of the scheme is as follows. Agreement in principle is reached for the sale of a property between its owner (which we shall call "A") and an unconnected arm's length purchaser (which we shall call "C"). C however wishes to avoid paying SDLT on its purchase of the property and to that end it arranges matters in a complex way. Instead of A and C entering into a direct contract followed by a direct transfer from A to C, C incorporates a new unlimited company (which we shall call "B") to acquire the property from A. The contract for the property purchase is entered into between A and B. As a preliminary step before that contract is entered into, C subscribes a cash sum slightly larger than the property purchase price for newly issued ordinary shares in B, its wholly owned subsidiary.
- 20
5. After B has entered into the contract to purchase the property, it reduces its share capital to a nominal amount by a special resolution. Being an unlimited company, it requires no sanction from the Court or further formalities to permit this. That resolution is of course passed by C and its nominee (which between them own all of B's issued share capital). The amount by which B's capital is reduced therefore becomes an unspecified reserve of B which, as a matter of company law, is distributable. That amount is slightly more than the purchase price of the property which B has contracted to pay to A.
- 25
6. B then declares, by ordinary resolution, a final dividend in specie of the property which it has contracted to acquire in favour of C, to be made when B itself acquires the property from A.
- 35
7. In due course, the contract between A and B is duly completed by a transfer from A to B. B uses the cash it had received from C for the share subscription to fund its payment of the purchase price. Immediately afterwards, a transfer from B to C is
- 40

completed, the consideration for that transfer being expressed to be nil, as the transfer was made gratuitously pursuant to the dividend in specie which had already been declared by B.

*The claim for relief and the points at issue*

5 8. Both Appellants ("B" and "C" in the above example) claim that section 45 FA03 applies to the combined transactions.

9. The first Appellant ("VP" - "B" in the example) therefore claims to be relieved from SDLT on its acquisition by virtue of section 45(3) FA03 and the second Appellant ("VPT" - "C" in the example), whilst accepting that in principle it was the purchaser under a land transaction by reason of the operation of section 45(3) FA03, claims that its acquisition was exempt from charge by virtue of paragraph 1 of Schedule 3 to that Act ("No chargeable consideration").

10. HMRC claim that:

15 (1) section 45 FA03 does not apply to the combined transactions (and accordingly VP, but not VPT, is liable for SDLT on its purchase of the property); but even if section 45 FA03 does apply,

(2) the effect of section 45(3) FA03 would be to exempt VP but to make VPT liable, under section 44 FA03 as applied by section 45(3), to SDLT on the full value of the consideration given for the acquisition of the Property.

20 11. HMRC therefore claim that either VP (in relation to the first property transfer) or VPT (in relation to the second), but not both, are subject to SDLT on the full amount of the purchase price.

12. The appeal therefore mainly revolves around the proper interpretation of section 45 FA03 and its application to this basic structure.

25 13. A further argument arose shortly before the hearing of the appeal (and caused its adjournment for further evidence and argument). HMRC took a late company law point about the lawfulness of the dividend in specie declared by VP, based on the failure of VP's directors to justify the declaration of the dividend by reference to initial accounts. Even if the scheme might otherwise have worked under the provisions of section 45 FA03, they said, its implementation was fundamentally flawed from a company law point of view, as a result of which it would fail anyway.

**The Facts**

35 14. The parties have helpfully agreed a statement of facts, which reads as follows. In it, references to "the Original Vendor" or "V.V.Stockton LP" are effectively to "A" in the above summary, references to "VP" are effectively to "B" and references to "VPT" are effectively to "C":

## **“Constitution and membership of the Appellants and Vardy Property Group Limited**

5 1. Vardy Property Group Limited (“VPG”) was incorporated as a limited company under the Companies Act 1985 on 8 July 2002 with registered number 4479436 and company name “R V Investments Limited”. Richard Vardy was appointed as the managing director of VPG on 8 July 2002. Sir Peter Vardy, Richard Vardy’s father, was appointed as a director of VPG on 8 July 2002.

10 2. The Second Appellant (“VPT”) was incorporated as a limited company under the Companies Act 1985 on 10 August 2006 with registered number 5901604.

15 3. On 10 August 2006, VPT’s authorised share capital was £10 million divided into 10 million ordinary shares of £1 each. Key Legal Services (Nominee) Limited (“KLS”) was the initial subscriber, holding one nil paid ordinary share of £1. On 14 August 2006, KLS transferred its subscriber share to VPG for no consideration. The transfer was registered on 25 August 2006.

20 4. The First Appellant (“VP”) was incorporated as an unlimited company under the Companies Act 1985 on 22 August 2006 with registered number 5913298. Richard Vardy was appointed as a director of VP on 22 August 2006.

25 5. On 22 August 2006, VP’s authorised share capital was £7.5 million divided into 7.5 million ordinary shares of £1 each of which two shares were issued. One ordinary share was held by VPT. The other ordinary share was held by VPG upon trust for and as nominee of VPT in pursuance of a declaration of trust executed on 24 August 2006.

30 6. On 23 August 2006, Richard Vardy appointed Sir Peter Vardy, as a director of VP and as secretary of VP. On the same date, Mr Richard Vardy and Sir Peter Vardy resolved that Zoe Hartshorn be appointed as a director of VP.

### **Funding**

35 7. On 25 August 2006, a loan agreement was entered into between Richard Vardy and VPG in the sum of £7,400,000. The loan was agreed to be unsecured and immediately repayable on written demand by Richard Vardy at any time. The loan was interest free but subject to payment of default interest (at a rate of 1% above the base rate of National Westminster Bank Plc) if VPG failed to repay the loan on demand. The loan agreement was signed twice by Richard Vardy: once on his own behalf and the second time on behalf of VPG.

40 8. On 25 August 2006, a loan agreement was entered into between VPG and VPT in the sum of £7,400,000. The loan was agreed to be unsecured and immediately repayable on written demand by VPG at any time. The loan was interest free but subject to payment of default

interest (at a rate of 1% above the base rate of National Westminster Bank Plc) if VPT failed to repay the loan on demand. Richard Vardy signed the loan agreement on behalf of both VPG and VPT.

5 9. On 25 August 2006, Richard Vardy transferred £7,500,000 [sic] to VPG. On the same day, VPG transferred £7,400,000 to VPT, which transferred the same amount to VP.

#### **Legal and other documentation giving effect to the transactions**

10 10. On 25 August 2006, VPT subscribed £7.4 million for the allotment of 7.4 million additional ordinary shares of £1 each in the capital of VP.

15 11. On 29 August 2006, Richard Vardy, acting in his capacity as managing director of VPG, requested the transfer of £725,000 on 30 August 2006 from VP's bank account with Barclays Bank plc to Dickinson Dees client account at Lloyds TSB Bank plc, client reference VAR/26/1 (Dickinson Dees having been instructed on 18 August 2006 to act for VPG in relation to the acquisition of the Property – see para 12).

20 12. On 30 August 2006, VP entered into a sale contract (the "Sale Contract") with V.V. Stockton LP, acting by its general partner V.V. Stockton GP Limited, (the "Original Vendor") in respect of the sale and purchase of land and buildings on the north side of Concorde Way, known as Preston Farm Business Park, Stockton on Tees (the "Property") for £7,250,000. Completion was agreed for 4 September 2006. On 30 August 2006, £725,000 was transferred in accordance with the instruction at paragraph 11 above.

30 13. On 31 August 2006, at a board meeting of VP, it was reported that it had been proposed by the Directors of VP that the issued share capital of VP should be reduced from £7,400,002 to £1,000. This was immediately agreed to by representatives of VPT and VPG by special resolution in an extraordinary general meeting.

35 14. On the same date, the shareholders of VP convened to approve a proposal from the board of directors of VP for the distribution in specie of the Property as a final dividend, subject to completion of the purchase of the Property by VP. The proposal was duly approved by way of an ordinary resolution.

40 15. On the same date, VPG directed VP until further notice to pay all dividends, distributions and other amounts due to VPG in respect of its holding of one ordinary share of £1 in VP to VPT for whom VPG held the one ordinary share on trust.

16. On 1 September 2006, Richard Vardy, acting in his capacity as Managing Director of VPG, requested the transfer of £6,500,934.84 on 4 September 2006 from VP's account with Barclays Bank plc to

Dickinson Dees client account at Lloyds TSB Bank plc, client reference VAR/26/1.

5 17. On 4 September 2006, £6,500,934.84 was transferred in accordance with the instruction at paragraph 16 above. The Property was conveyed, unencumbered by any debt, first by the Original Vendor to VP and then by VP to VPT.

**Stamp duty land tax notification & Tribunal process**

10 18. On 2 October 2006, Deloitte LLP acting for the Appellants submitted two SDLT land transaction returns (the “Returns”) and a covering letter (the “Letter”) to the Respondents’ Manchester Stamp Office.

19. VP completed its return on the basis that “Other Relief” was being claimed and the total amount of tax due was £0.

15 20. VPT completed its return by putting an “X” in the box marked “Yes” to the question “Are you claiming relief?”. The space next to the words “If ‘yes’ please show the reason” was left blank.

20 21. The Letter, which cross-referenced to the Returns, provided additional information relating to the transactions and the manner in which VP and VPT self-assessed their liability to SDLT. The Letter stated that, “The Original Purchaser [VP] acquired the Property from V.V. Stockton LP... for £7.5 million pursuant to a contract entered into on 30 August 2006. Since that contract was completed (on 4 September 2006) at the same time and in connection with the onward transfer of the Property to the Secondary Purchaser [VPT], the First Purchaser [sic] has claimed sub-sale relief under section 45(3) FA 2003. Box 9 of the SDLT 1 return enclosed in respect of that transaction (UTRN: 307126192MH) is therefore ticked ‘yes’ and code 28 (other relief) is indicated.” The Letter also stated that VPT had claimed the benefit of the exemption set out in paragraph 1 of Schedule 3 to the Finance Act 2003 (‘No chargeable consideration’). The Letter continued, “This claim is made in connection with the application of Case 3 of the exceptions from the deemed market value rule: section 54(4) FA 2003 refers.” The Letter requested land transaction return certificates in favour of VP and VPT to facilitate registration of the change in ownership of the Property.

22. On 23 October 2006 and 6 November 2006, the Respondents issued SDLT 5 revenue certificates to Deloitte LLP in respect of the Returns submitted by VP and VPT respectively.

40 23. On 26 October 2006, further to a telephone conversation between Deloitte LLP and the Respondents relating to VPT’s return, Deloitte LLP wrote to the Respondents on behalf of VPT making an amendment to VPT’s return. The answer to Box 9 of the form SDLT 1 (‘Are you claiming relief?’) was to be amended by substituting ‘No’ for ‘Yes’.

24. On 25 June 2007, the Respondents gave notice of their intention to enquire into the Returns under paragraph 12 of Schedule 10 to the Finance Act 2003.

5 25. On 6 August 2010, the Respondents issued a closure notice to each Appellant pursuant to paragraph 23 of Schedule 10 to the Finance Act 2003 informing the Appellants that they had concluded their enquiry into the Returns and amending the Returns to show an underpayment of SDLT of £290,000 in total, excluding interest. The amendments to the Returns were made in the alternative. It is the Respondents' case that one of the Appellants is liable to pay £290,000, not both, under alternative arguments.

10 26. On 25 August 2010, the Appellants gave notice to the relevant officer of the Respondents pursuant to paragraph 36 of Schedule 10 to the Finance Act 2003 that they were bringing an appeal against the amendments to the Returns under paragraph 35(1)(b) of Schedule 10 to the Finance Act 2003.”

15 15. By way of supplement to this statement of agreed facts, we find the following.

16. The affairs of VP, as a newly incorporated company which was created specifically for the purpose of taking part in the above transactions, were comparatively straightforward. At the times when the directors of VP recommended the declaration of the dividend in specie referred to at paragraph 14 in the above summary (“the Dividend”) (in the board meeting held at 3.30 pm on 31 August 2006) and when the members passed the resolution declaring the Dividend (at the Extraordinary General Meeting held at 3.40 pm on the same date), VP had entered into no other transactions or activities apart from those summarised above. An extract from the minutes of the relevant board meeting proposing the declaration of the Dividend is set out in Schedule 1 to this decision.

17. It was reported to the board meeting at which the Dividend was recommended that VP had distributable reserves of £7,399,002, but no consideration was given by the directors of VP to the possible need to make a provision of £290,000 to reflect the fact that VP might (if the scheme failed) have a liability to pay SDLT of that amount.

18. No consideration was given by the directors or shareholders of VP to the provisions of sections 263 and 270 Companies Act 1985 (“CA85”) up to the time of declaration of the Dividend.

19. There was no single document produced to the directors or shareholders of VP which pulled together all the details of its financial position. They satisfied themselves as to its ability to declare the Dividend by reference to the various transaction papers they had seen and the confirmation they had received to the effect that £7.4 million in cash was held by VP as a result of its share issue.

## **The legislation and its interpretation**

20. The relevant parts of sections 42, 43, 44, 45, 49, 53 and 54 of and Schedule 3 to FA03, and of sections 263, 270 and 277 CA85, as they applied at all material times, are set out in Schedule 2 to this decision.

- 5 21. The parties were both agreed that a purposive approach should be taken to the interpretation of the legislation. We take this as a reference to the principle first enunciated in *WT Ramsay Limited v IRC* [1982] AC 300, and subsequently followed and developed in various judgments. As summarised by Lord Nicholls of Birkenhead in *Barclays Mercantile Business Finance Limited v Mawson* [2005] 1 AC at [32], it  
10 can be stated as follows:

15 "The essence of the new approach was 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."

## **Appellants' submissions as to the basic legal mechanism of the scheme**

### *Introduction*

22. The Appellants submitted that the scheme operated in the following way.
- 20 23. They accepted that the acquisition by both Appellants in turn of the freehold of the Property meant that each Appellant was, in turn, a purchaser under a land transaction. The first land transaction comprised the purchase by VP of the Property from V.V. Stockton LP ("the Vendor") and the second land transaction comprised the transfer by VP to VPT of the Property pursuant to the Dividend.
- 25 24. Even though VPT gave no apparent consideration for its acquisition of the Property, it was still the "purchaser" under a land transaction – see section 43(4) FA03. Section 43(5) FA03 did not apply to exclude VPT from being a "purchaser" because VPT was a party to the transaction (i.e. the land transaction) by which it acquired the Property.
- 30 25. It is convenient to consider each land transaction in turn.

### *The first land transaction (the Vendor to VP)*

26. The first land transaction (the sale from the Vendor to VP) took the form of a contract and conveyance. In the absence of the second land transaction, section 44 FA03 would therefore have applied to it, with the result that upon completion of the  
35 purchase, a single land transaction would be deemed to take place, with VP as purchaser and with an effective date of completion of the contract.

27. But because of the existence of the second land transaction (the transfer from VP to VPT), the Appellants argued that section 45 FA03 was engaged. Their



argument was that under section 45(1)(b) FA03 there was an “other transaction” (namely the declaration of the Dividend) as a result of which VPT became “entitled to call for a conveyance” to it of the Property.

5 28. The result of this, they argued, was that under section 45(2) FA03, the overall effect of section 44 on the first transaction was modified. First, section 44(2) FA03 remained unaffected, so that the entry into of the original contract was not treated as giving rise to a land transaction. Second, by virtue of what was picturesquely referred to as the “tailpiece” of section 45(3) FA03,

10 “[t]he substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded”

29. The net result, they argued, was that no SDLT liability arose either on the creation of the contract between the Vendor and VP or on the completion of that contract by execution of the transfer from the Vendor to VP.

15 *The second land transaction (VP to VPT)*

30. Once it was engaged, section 45 FA03 also had an effect for SDLT purposes on the transaction between VP and VPT. Under section 45(2) FA03:

20 "The transferee [*i.e. VPT*] is not regarded as entering into a land transaction by reason of the transfer of rights [*i.e. the declaration of the Dividend*], but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section."

31. The way in which section 44 FA03 is to be applied to this situation is then set out in section 45(3) which, insofar as it deals with the transfer of rights between VP and VPT (as opposed to the original transaction between the Vendor and VP) reads as follows:

25 "That section [*i.e. section 44*] applies as if there were a contract for a land transaction (a "secondary contract") under which -

- (a) the transferee is the purchaser, and
- (b) the consideration for the transaction is -
  - 30 (i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and
  - (ii) the consideration given for the transfer of rights."

35 32. The effect of this, it was said, was that the declaration of the Dividend and the transfer of the property from VP to VPT were treated akin to a "contract and conveyance" under section 44 FA03 and VPT would be properly chargeable to SDLT

on the execution of the transfer (no question of "substantial performance" arose to complicate matters). However, it was argued, the amount of consideration on which SDLT was chargeable was nil. This was because the cash which was paid by VPT to VP was paid in exchange for an issue of shares in VP and could not be recharacterised as anything else - in particular, it could not be recharacterised as either:

- (1) consideration under the original sale contract between the Vendor and VP "to be given" by VPT, or
- (2) consideration given for the declaration of the Dividend.

### **Points of dispute – whether section 45 is engaged**

33. HMRC described this as their "primary contention".

34. Both parties agreed that the sale contract between the Vendor and VP fell within section 45(1)(a) FA03, and that section 45(1)(c) was not relevant in this case (dealing with assignments of agreements for lease).

35. Where the parties disagreed was on whether section 45(1)(b) was satisfied. The Appellants maintained that the declaration of the Dividend by VP was an "other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him". As a result, they maintained, section 45 was engaged. The consequence of this was that section 44 FA03 applied (with some variations) to the transactions under appeal.

36. HMRC did not agree that section 45(1)(b) was satisfied, and at the hearing they put forward three arguments in support of their case, which we address individually below.

37. In their Statement of Case, HMRC also raised a fourth argument:

"Further or alternatively, HMRC contends that when VP entered into the relevant steps... it was acting not on its own behalf but on behalf of VPT. It is clear that VP was not acting independently and that all the decisions taken by its directors and shareholders were pre-determined to happen."

38. This argument was not pursued or developed in any meaningful way at the hearing, except in support of HMRC's submission that what we are here concerned with is a single pre-planned arrangement. That submission was not seriously contested by the Appellants in any event. As a standalone argument without further explanation, we consider it has no force and we reject it.

## HMRC's arguments against section 45 being engaged and our views on them

### *HMRC's first objection – lack of consensual or multipartite element*

39. First, Miss McCarthy argued that the declaration of the Dividend was not an "other transaction in the relevant sense". Such a declaration was merely a step that a company had to take in order to put into effect its unilateral decision to make a distribution of cash or other assets to its shareholders. As such, she submitted, it lacked the consensual multipartite character that was essential to a "transaction" of the type referred to in section 45(1)(b), and this was not changed simply because the members of VP (clearly separate legal persons from VP itself) acted to pass the relevant ordinary resolution. She also argued that by reference to the *eiusdem generis* rule of construction, any "other transaction" contemplated by section 45(1)(b) could only be a transaction similar in nature to an assignment or subsale.

40. Mr Quinlan referred to the fact that section 54(4) FA03, whilst not directly in point on the central issues in this appeal, gives a clear indication that a dividend was regarded by the draftsman as being a "transaction". That subsection refers to "Case 3" as being "where... 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)....*" He also argued that the *eiusdem generis* rule was unhelpful in this case, because the "nature" of the "other transaction" contemplated in section 45(1) was made clear by the words which followed, namely "as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him".

41. No more detailed argument or authorities were submitted for our consideration on this point, and we see nothing in it. We accept Mr Quinlan's argument. As Lord Reid said in the House of Lords in *Greenberg v IRC* [1972] AC 109 at p137A when considering the meaning of the phrase "transaction in securities":

"The word 'transaction' is normally used to denote some bilateral activity but it can be used to denote an activity in which only a single person is engaged."

42. We therefore find that the declaration of the Dividend was an "other transaction" within the meaning of section 45(1)(b) FA03.

### *HMRC's second objection – VPT had no entitlement to call for a conveyance by the requisite time*

43. Second, HMRC argued that there was no moment in time before the original contract between the Vendor and VP was completed when VPT was entitled to call for a conveyance of the Property. This, they submitted, meant that section 45 FA03 could not apply.

44. The parties were agreed that, for section 45 FA03 to apply, the "original contract" referred to in section 45(1)(a) must still be extant (i.e. uncompleted) at the time when the "transaction" referred to in section 45(1)(b) occurred. We agree that this is inherent in the structure of the two provisions when read together.

45. There was much argument between the parties about the precise legal nature of the Dividend and its effects. HMRC's essential argument was that because of the way the Dividend was structured and the way it operated as a matter of law, no entitlement to call for a conveyance arose until after the original sale contract from the Vendor to VP had been completed, and this took the overall transaction outside section 45 FA03.

46. First, it is worthwhile to consider the precise wording of the Dividend resolution in question. The first interesting point to note is that the form of the resolution as set out in the notice of EGM was slightly different from the form of the resolution as recorded in the minutes of the EGM. In the notice of EGM, the resolution to be proposed was worded as follows:

"THAT the final dividend recommended by the directors of the Company, being a dividend in specie of Preston Farm Business Park Stockton on Tees ("the Property"), be and is hereby approved and declared, such distribution to be made on completion by the Company of the purchase of the Property."

47. In the minutes of EGM, the wording of the final phrase was different:

"...., such distribution to be at completion by the Company of the purchase of the Property."

48. We can only guess at the reason for or intended significance of the difference between the two, but we take it that the minutes of the EGM must be preferred, as a record of the resolution actually passed, to the wording set out in the notice of EGM.

49. Mr Quinlan sought to persuade us that VPT acquired some kind of conditional entitlement to a conveyance when the resolution was passed at the EGM at 3.40 pm on 31 August 2006 (well before the transfer from the Vendor to VP was completed on 4 September 2006), and he sought to draw parallels between the nature of its entitlement at that time and the nature of the entitlement of sub-purchasers in more conventional situations. Miss McCarthy on the other hand pointed out that the terms of the resolution declaring the Dividend made it quite clear that VPT had no legal entitlement to a conveyance until completion of VP's purchase. Thus, by definition, she argued, there was no moment of time while the original contract remained uncompleted when VPT had an entitlement to call for a conveyance to it of the Property.

50. There was much argument before us on the company law cases concerning dividends, precisely when they became legally due and payable, and so forth. We do not set out the arguments and authorities in full here because we consider that they miss the point. There is nothing in the wording or the overall scheme of the legislation which, in our view, requires the "transferee of rights" to hold an immediate and/or unconditional entitlement to call for a conveyance as a result of the "transaction" in question before section 45(1)(b) FA03 can be satisfied. That would require us to read extra words into the section which are not there. Nor can it be argued that the entitlement to call for a conveyance must arise from the "transaction"

alone, for the same reason. What the legislation requires is simply a "transaction as a result of which" the third party's entitlement to a conveyance arises.

51. It is clear that in this case the "transaction" we are concerned with is the declaration of the Dividend. That transaction took place at a time when the sale contract between the Vendor and VP was still uncompleted. The question to be asked therefore is whether VPT became entitled to call for a conveyance of the property as a result of the declaration of the Dividend. We do not consider that a close analysis of the nature of any such entitlement as it existed immediately before the completion of VPs' purchase from the Vendor is relevant or will assist us in answering this question. The fact of the matter is that, as both parties appear to agree, once VP had completed the purchase of the Property from the Vendor, VPT was entitled to call for a conveyance to it of the Property. We consider that entitlement arose as a result of the earlier declaration of the Dividend, and the fact that it was less than an unconditional and/or immediate entitlement immediately before VP completed its purchase from the Vendor is, in our view, irrelevant. We therefore reject Miss McCarthy's objection on this ground.

*HMRC's third objection – breach of Companies Act 1985*

52. Third, HMRC argued, on the basis of the company law point mentioned at [13], that VPT had never acquired any entitlement to call for a transfer of the Property due to the unlawful nature of the Dividend.

53. The only unlawful feature of the declaration of the Dividend alleged by HMRC was the failure to produce initial accounts within the meaning of section 270(4) CA85, with the result that the lawfulness of the Dividend could not be tested by reference to those accounts, as required by section 270(2) CA85. It followed that the Dividend was prohibited by section 263 CA85. This meant that VPT could not be said to have been entitled to call for a conveyance of the Property at any time. As VP and VPT had common directors, VPT should be imputed with knowledge that the Dividend had been declared in breach of section 263. Under section 277(2) CA85 and the principle originally set out in *Belmont Finance Corporation Limited v Williams Furniture Limited (No.2)* [1980] 1 All E.R. 393 (and subsequently developed by the Court of Appeal in *Rolled Steel Products (Holdings) Limited v British Steel Corporation* [1985] 3 All E.R. 52 and *Precision Dippings Limited v Precision Dippings (Marketing) Limited and others* [1986] Ch. 447), that meant the transfer of the Property to VPT gave rise to a constructive trust of it in favour of VP, reinforcing the point that it could not be said VPT had an entitlement to call for a conveyance of the Property at any time.

54. There was no argument that the Dividend was otherwise unlawful on general principles, due to non-compliance with VP's Articles of Association or on any other ground.

55. Miss McCarthy put forward the following arguments.

56. First, she argued that the concept of "accounts" connoted a single composite reference document, and the requirement for "accounts" could not be satisfied by reference to "a clutch of documents" together with extrinsic knowledge not recorded in those documents. There was in this case no single document, satisfying section 270(4) CA85, to which the directors of VP had referred to justify the Dividend. Thus the Dividend must necessarily have breached section 263 CA85. As had been acknowledged by the Court of Appeal in *It's a Wrap (UK) Limited (in liquidation) v Gula* [2006] EWCA Civ 544 at [16], section 270 CA85 "demonstrates the importance of the company's accounts as the reference point for assessing whether there are profits available for distribution". There were obvious policy reasons for requiring a single clear point of reference for this purpose, otherwise the whole purpose of section 263 CA85 would be defeated as directors of companies argued after allegedly invalid distributions that they had in fact seen sufficient records and information (when combined with their knowledge of the business and affairs of the company in question) to satisfy them as to the level of its distributable reserves. The very fact that the parties were now arguing extensively about the point (when no such argument would be needed if a single set of "accounts" had been drawn up and referred to by the directors) was ample evidence of the importance of the statutory requirement for a single clear reference document to be produced.

57. She also pointed out that the importance of a "document of record" was highlighted by the fact that after further consideration, the directors of VP had come up with a slightly different list of documents comprising "the accounts" when witness statements of the directors had been prepared for the adjourned hearing in May, compared to the initial list put forward at the hearing in March. She did not seek to criticise or cast doubt on the credibility of the directors for this, she merely pointed out that it illustrated graphically the importance of having a single contemporaneous document of record in order to avoid such uncertainties.

58. In reply to this, Mr Quinlan argued that the scope of what was meant by "accounts" must be flexible, depending on the context. There was nothing in principle that required a single document, indeed all that CA85 required was that the material be whatever was "necessary to enable a reasonable judgment to be made" as to the relevant items. A large supermarket chain would require much more detailed and formal accounts than a small retail shop. By extension, a company whose affairs were as simple as those of VP would require almost no formality and this was in line with the policy of the legislation (particularly in the case of an unlimited company which was a wholly-owned subsidiary, where the interests of the company's creditors were protected by reason of the unlimited liability of its parent).

59. Miss McCarthy's second argument, if her first failed, was that on any view the "clutch of documents" produced by VP was inadequate. This was because it was impossible, on the basis of those documents, to form a reasonable judgment on the statutory list of items set out in section 270(2) CA85; she pointed out that there was no indication in the documents that the directors had even considered the question of making a provision for the possibility of VP being liable for SDLT of £290,000. Even if (as Mr Quinlan invited) we were to regard the minutes of the board meeting as constituting "accounts" for this purpose, she submitted that they suffered from the

5 same flaw. It was a matter of policy, reinforced by the comments of the Court of Appeal in *It's a Wrap*, that the quid pro quo for creating a separate legal entity under the Companies Acts was the requirement to comply with the statutory code set out in those Acts. This was not a matter of form over substance, the substance *was* the form – and for sound policy reasons.

10 60. In reply to this, Mr Quinlan submitted that there was no requirement for accounts to record assets or liabilities (including provisions) with a nil value; it was legitimate and sufficient for the directors to reach a conclusion that this was the case without then having to record it in "accounts" (whatever form they took). Therefore it was incorrect to say the documents produced did not satisfy section 270 CA85 simply because they did not explicitly record that the directors were of the view that a "nil" value should be attributed to any particular item. He did not assert (nor did the evidence of the directors suggest) that they had specifically considered the question of provisions and reached the conclusion that nothing was required in respect of them.

15 61. He also argued that the clear purpose of the statutory provisions was the protection of members and creditors of a company. In the present case, VP was clearly solvent and was a wholly owned subsidiary of VPT. VP was unlimited and therefore VPT was liable for all its debts. In those circumstances, it was legitimate to interpret the statutory provisions without undue rigidity.

20 62. Mr Quinlan did not dispute that if the Dividend were found to be in breach of section 263 CA85 then VPT could not be said to be entitled at any time to call for a conveyance of the Property as a result of the Dividend. He simply argued that equity would not be engaged without some potential harm, mischief or malfeasance.

25 63. We agree with Miss McCarthy. We find that VP did fail to comply with section 270 CA85 and, as a result, VPT did not acquire a valid entitlement to call for a conveyance to it of the Property. We consider that section 270 CA85, properly interpreted in context, requires the production of an identifiable contemporaneous single document which records the required items under section 270(2) CA85. The degree of detail and formality of that document may vary, depending on the context, but a single document is, in our view, required in all cases. We draw a clear distinction between a company's accounting records (which will be used in preparation of accounts) and its accounts (which are compiled from those records, on the basis of judgments made by the directors). We are satisfied that in the present case, no accounts (within the meaning of section 270 CA85) were prepared and therefore the Dividend was unlawful under section 263 CA85. It follows that VPT never became entitled to call for a conveyance of the Property as a result of the declaration of the Dividend.

*Conclusion on whether section 45 FA03 is engaged*

40 64. It follows that we find section 45 FA03 is not engaged on the facts of this case by reason of non-compliance with section 270 CA85 (see [63]). Were it not for that non-compliance, however, we find that section 45 FA03 would have been engaged (see [42] and [51] above).

65. On the basis of our finding that section 45 FA03 is not engaged, VP's appeal must be dismissed and VPT's appeal must be allowed. However in case we are wrong in our view of the company law point discussed above, we now consider the further points that would arise if section 45 had been engaged.

5 66. In particular, we now turn to the question of what consideration should be attributed to the notional "secondary contract" which would have arisen as a result of the declaration of the Dividend.

67. Our discussion of that question would be unnecessarily complicated by repeated references to the fact that it only applies if we are wrong in our conclusion that section 10 45 is not engaged in this case. Without prejudice to that conclusion, therefore, we approach the question on the premise that section 45 was in fact engaged and we do not repeatedly refer to that premise throughout the following discussion.

**Points of dispute - If section 45 is engaged, arguments of the parties as to what chargeable consideration can be attributed to the "secondary contract"**

15 *Preliminary points*

68. Section 45(3) provides that:

"The... completion of the original contract at the same time as, and in connection with, the... completion of the secondary contract shall be disregarded..."

20 69. HMRC accepted that many perfectly ordinary arms' length sub-sale transactions are not completed by a single direct transfer from the original owner to the ultimate purchaser, and they do not regard a direct transfer from A to C as being an essential precondition for the availability of sub-sale relief. In common with such cases, the completion in this case of the secondary contract (i.e. the execution of the transfer 25 from VP to VPT pursuant to the Dividend) took place immediately following (rather than at precisely the same moment as) the completion of the original contract (by execution of the transfer from the Vendor to VP). HMRC accepted that "at the same time as" in section 45(3) is to be interpreted as including such immediately sequential transfers. We agree with this interpretation.

30 70. Both parties were therefore agreed that if section 45 FA03 is engaged, it has the effect of removing from charge the transaction between the Vendor and VP. We also agree.

71. There was however disagreement on the chargeable consideration which section 45 would import into the notional "secondary contract" created under section 45(3) if 35 it applied. The Appellants maintained that the figure was nil and HMRC maintained that it was £7.25 million.

*Appellant's arguments for nil consideration*

72. Mr Quinlan argued that:



(1) The legislation was carefully crafted to draw a distinction between assignments (and similar transactions) on the one hand and sub-sales (and similar transactions) on the other.

5 (2) The structure, language and context of section 45(3)(b)(i) made it clear that it was only intended to apply to situations where an assignment of the original contract (or similar transaction) had taken place. It was not intended to apply to a situation such as the present, which he maintained was more akin to a sub-sale. No consideration under section 45(3)(b)(i) could therefore be allocated to the notional secondary contract under which VPT was the  
10 purchaser.

(3) If he was wrong in this, any attempt to apply the wording of section 45(3)(b)(i) would produce the figure of "nil" as the consideration under it. This was because that section only covered consideration which "is to be given... by the transferee..." and, at the relevant time (i.e. when the secondary contract was  
15 treated as coming into existence by section 45(3) upon declaration of the Dividend), VPT had already paid its money to VP; furthermore, the money paid by VPT to VP was properly only referable to VPT's subscription for shares in VP and was not, therefore, "referable to the subject-matter of the transfer of rights" (i.e. the Property). He submitted that section 45(3)(b)(i) could not be  
20 interpreted as permitting consideration given under one transaction (a share subscription) to be re-attributed as consideration under another transaction with separate and distinct subject-matter (a property purchase), even where the two transactions were part of a composite transaction and the first was designed to facilitate the second.

25 (4) At first sight, a further apparent difficulty arose for Mr Quinlan because VP and VPT were admittedly "connected" within the meaning of section 839 Income and Corporation Taxes Act 1988 at all material times. Section 45(3)(b)(i) brings in, as consideration under the notional "secondary contract" in this case, so much of the £7.25 million consideration under the Vendor/VP  
30 contract as "is to be given (directly or indirectly) by [VPT] or a person connected with [it]". VP was clearly connected with VPT and therefore this would include any consideration which was "to be given" by VP. As VP in fact paid the whole £7.25 million under the original contract with the Vendor, this raised the possibility that the whole £7.25 million could be attributed as  
35 consideration for the "secondary contract". Mr Quinlan argued this was not correct, due to the specific words "is to be given" in section 45(3)(b)(i). The use of those words implied that the question of what consideration "is to be given" should be tested by reference to the "secondary contract" when it comes into existence; only consideration that was required to be given under that contract  
40 should be brought into account. In this case, of course, the notional "secondary contract" was the declaration of the Dividend, under which VPT was not required to give any consideration. Miss McCarthy accepted this argument, acknowledging that otherwise the "connected person" element of section 45(3)(b)(i) would accidentally catch many perfectly normal situations which the  
45 general policy of section 45(3) as a whole did not intend to cover. She sought to

include the £7.25 million of the purchase price from the Vendor that was funded by VPT, but on the basis of a different argument altogether (see below).

5 (5) As to the possibility of consideration being ascribed under section 45(3)(b)(ii) as "consideration given for the transfer of rights", Mr Quinlan argued that there could be no such consideration. The phrase "transfer of rights" was defined in section 45(1) as referring to the "other transaction" as a result of which VPT became entitled to call for a conveyance of the property - i.e. the declaration of the Dividend. VPT had, "by definition", given no consideration for that Dividend declaration. He was essentially arguing that the  
10 Dividend, like all dividends, was gratuitous.

*HMRC's arguments for £7.25 million consideration*

73. Miss McCarthy argued that there was nothing in the language, structure or context of section 45 that could be read as limiting the application of section 45(3)(b)(i) to assignments and similar transactions. In her submission, the overall  
15 purpose of section 45(3) was to include as consideration, without double counting, the aggregate of what B and C pay for the property. This was to be done without any particular regard for the form or structure of the transactions.

74. Following this analysis, her main line of argument was that £7.25 million fell to be attributed as consideration for the secondary contract under section 45(3)(b)(i).  
20 This was because the overall arrangements from the outset envisaged VPT providing VP with the necessary funds to purchase the Property from the Vendor by means of its cash subscription for VP shares. Thus, at the time of declaration of the Dividend (the transfer of rights for the purposes of section 45(3)), it was already clear that the full £7.25 million of consideration under the Vendor/VP contract was *to be given*  
25 indirectly by VPT. That was the whole purpose behind the original subscription of £7.4 million in cash by VPT for the shares in VP.

75. If that line of argument was correct, then HMRC maintained (in paragraph 77 of the Statement of Case) that nothing further fell to be charged under section 45(3)(b)(ii) FA03 "because (on HMRC's current assumption) the transfer of rights  
30 was VP's dividend declaration for which VPT gave nothing".

76. If however we agreed with Mr Quinlan that it was inherent in the structure of section 45 that section 45(3)(b)(i) was concerned exclusively with assignments and similar transactions, Miss McCarthy had an alternative line of attack. In that  
35 situation, she submitted that it was possible to characterise £7.25 million as consideration given by VPT in order to secure the declaration of the Dividend in its favour, and therefore chargeable under section 45(3)(b)(ii).

77. Her argument ran along these lines. This was a predetermined series of transactions, the end result of which was that £7.25 million of cash provided by VPT was used by VP to purchase the Property. This was achieved by an injection of cash  
40 into VP that was always intended to finance the later Dividend and which therefore should be seen, realistically, as consideration given for that Dividend. Thus the

injection of cash into VP for shares was, to the extent of £7.25 million, consideration given for the Dividend declaration for the purposes of section 45(3)(b)(ii).

78. Alternatively, she argued, if the Appellants were correct in their contention that the declaration of the Dividend resulted in VPT becoming immediately entitled to the Property, then in passing the resolution declaring the Dividend itself, VPT surrendered, *pro tanto*, its right to VP's surplus assets on a winding up and that surrender amounted to consideration for the transfer of rights comprised in the Dividend declaration. She acknowledged this might be considered to be a "strained and/or illogical" argument, but pointed out that it only applied if it was accepted that the declaration of the Dividend gave rise to an immediate entitlement to receive the Property. As such, she cited it as a further reason why that last proposition could not be correct.

**Points of dispute – discussion and findings on what consideration can be attributed if section 45 is engaged**

15 *Can section 45(3)(b)(i) apply to sub-sales and similar transactions?*

79. We consider first whether section 45(3) is to be interpreted, as Mr Quinlan submitted, so as to limit the operation of section 45(3)(b)(i) to assignments (or similar transactions). Mr Quinlan characterised the dividing line between "assignment" and "sub-sale" for these purposes as depending upon whether there was any privity of contract between A and C as a result of the "transaction" which gave rise to the secondary contract referred to in section 45(3).

80. His rationale for making this distinction was as follows:

(1) In the case of a sub-sale, the consideration payable under the original contract is not "referable to the subject matter of the transfer of rights" by B to C. This, he argued, was because no person other than B contracts to pay (or procure the payment of) that consideration.

(2) Section 45(3)(b)(i) was cast in language that was "not apt" to refer to a transaction where no consideration moves from C to A. As he put it:

"The words 'so much of the consideration under the original contract that... *is to be given* (emphasis added.....) make no sense unless some of the purchase price under the original contract remains outstanding and it falls to C, by reason of the original contract, to discharge that obligation by paying it."

(3) Restricting section 45(3)(b)(i) to assignments was:

"logical in terms of the structure of section 45: completion of the original contract is disregarded and is not therefore taken to be a land transaction, so the draftsman had to reinstate the consideration given under the original contract in the case of an assignment, where C is paying A. This reinstatement is not necessary in the case of a subsale. Where C's relationship is with B alone, section 45(3)(b)(ii) is apt of

itself to capture the consideration (if any) given for the land transaction."

(4) HMRC's published guidance, he said, also supported this approach.

5 81. As a preliminary point on Mr Quinlan's argument, we observe that it sits  
uneasily with the basic law of contract. In a classic assignment situation, B's  
assignment to C of B's rights under its contract with A does not give rise to privity of  
contract between A and C. If A does not receive the consideration due under its  
contract with B, A's rights lie against B (and not C), irrespective of any assignment by  
10 B to C of the benefit of its rights under the contract, and irrespective of any  
contractual commitment by C to B that it will pay A. Privity of contract will only  
arise between A and C if a novation of the original A/B contract takes place, such that  
it is replaced by a new contract between A and C. Followed to its natural conclusion,  
the consequence of this would be that section 45(3)(b)(i) would not attribute any  
15 consideration in such a classic assignment situation, a result which conflicts with Mr  
Quinlan's basic premise, and with the obvious intention of that section.

82. Turning to the specific points made by Mr Quinlan, we have the following observations.

20 83. In relation to [80(1)] above, we do not accept that simply because there is no  
contractual obligation in force between A and C, C cannot indirectly give  
consideration that is due under the contract between A and B. By definition, we  
consider that any such consideration is capable of being "referable to the subject-  
matter of the transfer of rights" (i.e. the property). See also our preliminary point at  
[81].

25 84. In relation to [80(2)] above, section 45(3)(b)(i) (in conjunction with section  
45(3)(a)) posits a land transaction under which C is the purchaser and the (chargeable)  
consideration specified is to be given. There is no requirement in it (explicit or  
implicit) that the giving of any consideration by C must be pursuant to the original  
contract. Thus we see no difficulty in applying the language of section 45(3)(b)(i) to  
30 a situation where there is no privity of contract between A and C. Again, see also our  
preliminary point at [81] above.

35 85. In relation to [80(3)] above, we do not follow the supposed logic. The fact that  
it may not be necessary or appropriate in a classic sub-sale situation to attribute any  
consideration under section 45(3)(b)(i) does not mean that it cannot be right to do so  
in a different situation (especially bearing in mind that the draftsman clearly wished,  
as can be seen from section 45(1)(b), to address "other transactions", not just  
assignments and sub-sales).

40 86. As to [80(4)] above, we note the examples given by HMRC but we do not  
consider that guidance which addresses only assignments and sub-sales and does not  
even purport to address any "other transactions" can be regarded as support for Mr  
Quinlan's proposition.

87. Standing back and looking at section 45 in the round, it clearly contemplates three categories of transaction taking effect as a "transfer of rights": assignments, sub-sales and "other transactions... as a result of which a person other than the original purchaser becomes entitled to call for a conveyance.." (see section 45(1)(b)). When  
5 fixing the consideration to be attributed to the secondary contract arising in any of those three categories, it does not focus at all on the type of transaction, it simply requires (in section 45(3)(b)) the aggregation of two things. In very broad terms, those two things are the consideration given by C (not necessarily to B, though that will generally be the case) for the right to acquire the property and the consideration  
10 given by C (not necessarily to A, though that will generally be the case) for the property itself.

88. It is inherent in this dichotomy that any consideration given by C can only be regarded as attributable to one or the other – i.e. there should be no "double counting" of the same consideration as attributable to both the right to acquire the property and  
15 the property itself.

89. There are of course refinements to this basic structure, particularly:

- (1) consideration given for the property itself includes consideration given "directly or indirectly" by C;
- (2) such consideration given by persons "connected" with C is also included;
- 20 (3) it is only consideration for the property itself that is "to be given" that is included (considered further at [97]).

90. Nonetheless, even with these refinements the basic structure does not seem to us to require that section 45(3)(b)(i) logically be taken out of account, as Mr Quinlan asks, in the case of a sub-sale or other transaction of a similar nature (whether that  
25 similarity comprises a lack of privity of contract between A and C or any other feature).

91. For the above reasons we reject Mr Quinlan's submission that section 45(3)(b)(i) cannot, as a matter of law, apply so as to attribute any consideration to any secondary contract arising as a result of the declaration of the Dividend in this case.

30 92. It follows that we must now consider the arguments put forward by both parties as to the amount of the consideration which is attributable to the notional "secondary contract" which arises as a result of the declaration of the Dividend.

*What consideration (if any) should be attributed to the secondary contract under section 45(3)(b)(i)?*

35 93. Mr Quinlan's argument (as summarised at [72(3)] above) was that if section 45(3)(b)(i) did apply, the consideration attributable under it was nil.

94. Miss McCarthy's counter-argument is summarised at [74] above. She submitted that the attributable consideration was £7.25 million, being the total consideration payable under the original contract between the Vendor and VP.

5 95. We analyse the situation as follows. Section 45(3) posits an entirely notional "secondary contract" and applies section 44 on the basis of that contract. It specifies the key features of the secondary contract. It provides that the transferee is the purchaser under it (which is required in order to make the transferee potentially liable to SDLT as a result of it); the other key feature it needs to specify (in order to enable the resulting SDLT to be calculated) is the consideration. The first limb of  
10 consideration it specifies (in section 45(3)(b)(i)) is:

"so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him"

15 96. The structure of this limb is deceptively complex. It requires first the identification of the consideration under the original contract. In tacit acknowledgement that the transfer of rights may relate to only part of the property comprised in the original contract, it requires the consideration attributable to that part to be identified. In the present case (where the transfer of rights related to the whole of the property comprised in the original contract), that is easy – the whole of the  
20 original consideration (£7.25 million) potentially falls within the formulation.

97. But the final step is more complex. It brings into charge so much of that consideration as "is to be given (directly or indirectly) by the transferee...". It is implicit in this form of words, and the context of section 45(3), that it is to be applied at the moment the transfer of rights (i.e. in this case the declaration of the Dividend)  
25 occurs. As at that moment, how much of the total £7.25 million purchase price for the Property could it be said was "to be given (directly or indirectly)" by VPT?

98. In relation to this question, in the light of the general scheme and purpose of section 45, we are satisfied that Miss McCarthy's answer is right. A pre-ordained scheme has been established in which C, at an early stage, provides the cash to B  
30 which will ultimately be used by B to pay A for the purchase of the property. In those circumstances, we are satisfied that when, as a result of a later step in the scheme, there is a transfer of rights which ultimately entitles C to call for a conveyance of the property, it can be said that A's purchase price, though it will be received from B, is "to be given indirectly" by C within the meaning of section 45(3)(b)(i).

35 99. We recognise that the £7.4 million in this case was subscribed by VPT for shares in VP, but we consider that does not prevent it (or the relevant part of it) from being regarded as also indirectly given as consideration for the purchase of the Property. This is not, as Mr Quinlan asserted, a "retribution" of consideration from one thing to another; it is a recognition that the direct payment of consideration for an  
40 immediate purpose may also amount to the indirect provision of consideration for another.

100. It follows therefore that we consider the entire £7.25 million purchase price paid by VP and funded by VPT is to be regarded as consideration for the secondary contract arising under section 45(3)(b)(i). Thus, were it not for our decision on the company law argument, we would allow VP's appeal in full and dismiss VPT's appeal in full.

101. In case we are wrong on the effect of section 45(3)(b)(i), we go on to consider the respective arguments about whether any consideration can be attributed to the secondary contract under section 45(3)(b)(ii) ("the consideration given for the transfer of rights").

10 *What consideration (if any) should be attributed to the secondary contract under section 45(3)(b)(ii)?*

102. As a preliminary point, it is worth repeating the point made at [88] above, to the effect that there should be no "double counting" of consideration; to the extent that any amount is brought into account under section 45(3)(b)(i), we consider the same amount cannot also be brought into account under section 45(3)(b)(ii).

103. However, if we assume for the moment that none of the purchase price paid to the Vendor for the Property should be brought into account under section 45(3)(b)(i), we are still required to consider whether any amount is chargeable under section 45(3)(b)(ii).

104. We can dispose of this point shortly. We consider Miss McCarthy's arguments (as summarised at [77] to [78] above) to be unsustainable. Section 45(3)(b)(ii) includes no reference to consideration given "indirectly" for the transfer of rights (in contrast to section 45(3)(b)(i)) and there is nothing in the language of the section which in our view displaces the general proposition that the declaration of a dividend is a gratuitous transaction, for which no consideration is given.

105. We therefore find that no consideration would properly be attributable to the notional secondary contract under section 45(3)(b)(ii), whether or not we are right in concluding that £7.25 million is properly attributable to it under section 45(3)(b)(i).

### **Conclusion and Summary**

106. We find that section 45 FA03 was not engaged in relation to the transactions the subject of this appeal, by reason of the failure to comply with section 270 CA85 in relation to VP's declaration of the Dividend – see [64].

107. The appeal of VP is therefore dismissed and the appeal of VPT is allowed.

108. But for the failure to comply with CA85 section 270, section 45 FA03 would have been engaged – see [64].

109. If section 45 had been engaged, consideration of £7.25 million would have been attributed to the notional secondary contract arising under section 45(3). That consideration would have been attributed solely under section 45(3)(b)(i) – see [100]

– and not under section 45(3)(b)(ii) – see [105]. In that situation, the appeal of VP would accordingly have been allowed and the appeal of VPT dismissed.

110. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

10

**KEVIN POOLE  
TRIBUNAL JUDGE**

15

**RELEASE DATE: 6 September2012**

**Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 12 November 2012 (correction of typographical errors in paragraphs 49 & 51)**

20



## SCHEDULE 1

### Relevant extract from minutes of VP's board meeting held on 31 August 2006

#### "5. DISTRIBUTION IN SPECIE BY WAY OF DIVIDEND IN SPECIE

- 5.1 The Chairman informed the meeting that, following the reduction in the Company's issued share capital, the Company had profits available for distribution totalling £7,399,002 and that the Company was, therefore, able to declare a final dividend of up to that amount.
- 5.2 The Chairman further informed the meeting that the Company was due to complete the purchase ("Completion") of Preston Farm Business Park Stockton on Tees (the "Property") for a total price of £7,250,000, which was less than the profits of the Company available for distribution. The Chairman stated that it had been proposed that approval be given for a final dividend, being a dividend in specie of Preston Farm Business Park Stockton on Tees (the "Property"), such distribution to be made on completion by the Company of the purchase of the Property (the "Proposal"). It was considered appropriate for the directors to obtain express authority from the members to implement the Proposal.
- 5.3 A draft notice convening a further Extraordinary General Meeting (the "Second Notice") was produced to the meeting and the Chairman noted that the proposed ordinary resolution was set out therein.
- 5.4 The directors being satisfied that the final dividend was justified by the profits of the Company available for distribution, **IT WAS RESOLVED THAT** the directors recommend that approval be given to the Proposal and **IT WAS FURTHER RESOLVED THAT** a further Extraordinary General Meeting be convened to consider the Proposal and that the Second Notice be approved, signed by any director and served on each member, the directors and the auditors of the Company (as required by the Company's articles of association)."

## SCHEDULE 2

### Relevant extracts from Finance Act 2003 and Companies Act 1985

#### Finance Act 2003

#### 30 "42 The tax

(1) A tax (to be known as "stamp duty land tax") shall be charged in accordance with this Part on land transactions.

(2) The tax is chargeable—

- (a) whether or not there is any instrument effecting the transaction,
- 35 (b) if there is such an instrument, whether or not it is executed in the United Kingdom, and
- (c) whether or not any party to the transaction is present, or resident, in the United Kingdom.

(3) The tax is under the care and management of the Commissioners of Inland Revenue (referred to in this Part as “the Board”).

### 43 Land transactions

5 (1) In this Part a “land transaction” means any acquisition of a chargeable interest. As to the meaning of “chargeable interest” see section 48.

(2) Except as otherwise provided, this Part applies however the acquisition is effected, whether by act of the parties, by order of a court or other authority, by or under any statutory provision or by operation of law.

(3) For the purposes of this Part—

10 (a) the creation of a chargeable interest is—

(i) an acquisition by the person becoming entitled to the interest created, and

(ii) a disposal by the person whose interest or right is subject to the interest created;

(b) the surrender or release of a chargeable interest is—

15 (i) an acquisition of that interest by any person whose interest or right is benefitted or enlarged by the transaction, and

(ii) a disposal by the person ceasing to be entitled to that interest;

(c) the variation of a chargeable interest (other than a lease) is—

20 (i) an acquisition of a chargeable interest by the person benefitting from the variation,

and

(ii) a disposal of a chargeable interest by the person whose interest is subject to or limited by the variation;

25 (d) the variation of a lease is an acquisition and disposal of a chargeable interest only where—

(i) it takes effect, or is treated for the purposes of this Part, as the grant of a new lease, or

(ii) paragraph 15A of Schedule 17A (reduction of rent or term) applies.

30 (4) References in this Part to the “purchaser” and “vendor”, in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction. These expressions apply even if there is no consideration given for the transaction.

(5) A person is not treated as a purchaser unless he has given consideration for, or is a party to, the transaction.

(6) References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the “main subject-matter”), together with any interest or right appurtenant or pertaining to it that is acquired with it.

#### **44 Contract and conveyance**

5 (1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.

(2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.

10 (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction. In this case the effective date of the transaction is the date of completion.

15 (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract. In this case the effective date of the transaction is when the contract is substantially performed.

(5) A contract is “substantially performed” when—

(a) the purchaser, or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or

(b) a substantial amount of the consideration is paid or provided.

20 (6) For the purposes of subsection (5)(a)—

(a) possession includes receipt of rents and profits or the right to receive them, and

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

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

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

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

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

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

(ii) the first payment of rent is made.

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

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

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

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

10 (9A) Where—

(a) paragraph 12A of Schedule 17A applies (agreement for lease), or

(b) paragraph 19(3) to (6) of Schedule 17A applies (missives of let etc in Scotland),

it applies in place of subsections (4), (8) and (9).

15 (10) In this section—

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

(b) “contract” includes any agreement and “conveyance” includes any instrument.

20 (11) Section 839 of the Taxes Act 1988 (connected persons) has effect for the purposes of this section.

.....

#### **45 Contract and conveyance: effect of transfer of rights**

(1) This section applies where—

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

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

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

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

(2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.

5 (3) That section applies as if there were a contract for a land transaction (a “secondary contract”) under which—

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is—

10 (i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and

(ii) the consideration given for the transfer of rights.

15 The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of any of sections 71A to 73 (which relate to alternative property finance).

(4) Where there are successive transfers of rights, subsection (3) has effect in relation to each of them.

20 The substantial performance or completion of the secondary contract arising from an earlier transfer of rights at the same time as, and in connection with, the substantial performance or completion of the secondary contract arising from a subsequent transfer of rights shall be disregarded.

(5) Where a transfer of rights relates to part only of the subject-matter of the original contract (“the relevant part”)—

25 (a) subsection (8)(b) of section 44 (restriction of charge to tax on subsequent conveyance) has effect as if the reference to the amount of tax chargeable on that contract were a reference to an appropriate proportion of that amount, and

30 (b) a reference in the second sentence of subsection (3) above to the original contract, or a reference in subsection (4) above to the secondary contract arising from an earlier transfer of rights, is to that contract so far as relating to the relevant part (and that contract so far as not relating to the relevant part shall be treated as a separate contract).

(5A) In relation to a land transaction treated as taking place by virtue of subsection (3)—

35 (a) references in Schedule 7 (group relief) to the vendor shall be read as references to the vendor under the original contract;

(b) other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the transferor.

(6) Section 839 of the Taxes Act 1988 (connected persons) applies for the purposes of subsection (3)(b)(i).

(7) In this section “contract” includes any agreement and “conveyance” includes any instrument.

5 ....

#### **49 Chargeable transactions**

(1) A land transaction is a chargeable transaction if it is not a transaction that is exempt from charge.

10 (2) Schedule 3 provides for certain transactions to be exempt from charge. Other transactions are exempt from charge under other provisions of this Part.

....

#### **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, or

15 (b) some or all of the consideration for the transaction consists of the issue or transfer of shares in a company with which the vendor is connected.

(1A) The chargeable consideration for the transaction shall be taken to be not less than—

20 (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.

(2) Section 839 of the Taxes Act 1988 (connected persons) has effect for the purposes of this section.

(3) In this section—

25 “company” means any body corporate;

“shares” includes stock and the reference to shares in a company includes a reference to securities issued by a company.

30 (4) Where this section applies paragraph 1 of Schedule 3 (exemption of transactions for which there is no chargeable consideration) does not apply. But this section has effect subject to any other provision affording exemption or relief from stamp duty land tax.

(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.

5 .....

(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

10 (b) it is not the case that—

(i) the subject-matter of the transaction, or

(ii) an interest from which that interest is derived,

15 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.

....

### SCHEDULE 3

#### STAMP DUTY LAND TAX: TRANSACTIONS EXEMPT FROM CHARGE

##### Section 49

20 *No chargeable consideration*

1. A land transaction is exempt from charge if there is no chargeable consideration for the transaction.”

#### **Companies Act 1985**

25 **“263 Certain distributions prohibited**

(1) A company shall not make a distribution except out of profits available for the purpose.

(2) In this Part, “distribution” means every description of distribution of a company’s assets to its members, whether in cash or otherwise.....

30 (3) For the purposes of this Part, a company’s profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made.....

....

## **270 Distribution to be justified by reference to company's accounts**

5 (1) This section and sections 271 to 276 below are for determining the question whether a distribution may be made by a company without contravening sections 263.....

(2) The amount of a distribution which may be made is determined by reference to the following items as stated in the company's accounts –

(a) profits, losses, assets and liabilities,

(b) the following provisions –

10 (i) in the case of Companies Act individual accounts, provisions of any of the kinds mentioned in paragraphs 88 and 89 of Schedule 4 (depreciation, diminution in value of assets, retentions to meet liabilities, etc), and

15 (ii) in the case of IAS individual accounts, provisions of any kind, and

(c) share capital and reserves (including undistributable reserves).

(3) Except in a case falling within the next subsection, the company's accounts which are relevant for this purpose are its last annual accounts, that is to say those prepared under Part VII which were laid in respect of the last preceding accounting reference period in respect of which accounts so prepared were laid; and for this purpose accounts are laid if section 241(1) has been complied with in relation to them.

(4) In the following two cases –

(a) where the distribution would be found to contravene the relevant section if reference were made only to the company's last annual accounts, or

25 (b) where the distribution is proposed to be declared during the company's first accounting reference period, or before any accounts are laid in respect of that period,

30 the accounts relevant under this section (called "interim accounts" in the first case, and "initial accounts" in the second) are those necessary to enable a reasonable judgment to be made as to the amounts of the items mentioned in subsection (2) above.

(5) The relevant section is treated as contravened in the case of a distribution unless the statutory requirements about the relevant accounts (that is, the requirements of this and the following three sections, as and where applicable) are complied with in relation to that distribution.

## **35 277 Consequences of unlawful distribution**

(1) Where a distribution, or part of one, made by a company to one of its members is made in contravention of this Part and, at the time of the distribution, he knows or has



reasonable grounds for believing that it is so made, he is liable to repay it (or that part of it, as the case may be) to the company or (in the case of a distribution made otherwise than in cash) to pay the company a sum equal to the value of the distribution (or part) at that time.

- 5 (2) The above is without prejudice to any obligation imposed apart from this section on a member of a company to repay a distribution unlawfully made to him....”