United Kingdom Upper Tribunal (Tax and Chancery Chamber)

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Upper Tribunal
(Tax and Chancery Chamber)

STAMP DUTY LAND TAX - group relief - arrangements of which one of the main purposes is the avoidance of liability to tax - deemed market value rule - FTT held group relief not available as one of the main purposes was the avoidance of liability to tax and that the deemed market value rule applied - appeal dismissed

Hearing venue: The Rolls Building
London EC4A 1NL
Heard on: 28 and 29 May 2024
Written submissions: 13 and 27 September, 4 October 2024
Judgment date: 20 November 2024

Before

JUDGE JEANETTE ZAMAN
JUDGE TRACEY BOWLER

Between

THE TOWER ONE ST GEORGE WHARF LIMITED
Appellant
and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Nicola Shaw KC, counsel, instructed by Herbert Smith Freehills LLP

For the Respondents: Michael Jones KC, counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. In *The Tower One St George Wharf Limited v HMRC* [2022] UKFTT 154 (TC) (the "Decision"), the First-tier Tribunal (the "FTT") dismissed the appeal of The Tower One St George Wharf Limited ("Tower One") against an assessment to stamp duty land tax ("SDLT") on its acquisition from another company in the same group of a 999-year lease in respect of a residential property development known as "the Tower" (the "Tower Lease").

2. The FTT found that there were bona fide commercial reasons for the transfer of the Tower Lease from Berkeley Sixty-Four Limited ("B64") to Tower One (the "Transaction"), but Tower One was not entitled to group relief as the Transaction formed part of

arrangements of which one of the main purposes was the avoidance of liability to tax. Further, SDLT was to be assessed on the market value of the Tower Lease and not the actual consideration.

3. Tower One was granted permission to appeal by the FTT, and following a renewed application to the Upper Tribunal it was confirmed that this permission extends to:

> (1) whether paragraph 2(4A) of Schedule 7 Finance Act 2003 ("paragraph 2(4A)") applied to Tower One's acquisition of the Tower Lease from B64 ("Ground 1"); and
>
> (2) if paragraph 2(4A) does apply, whether Tower One is only chargeable to SDLT on the consideration it gave to acquire the Tower Lease and not its market value ("Ground 2").

4. In their Respondents' Notice, HMRC confirmed that they were no longer pursuing certain arguments that had formed part of their submissions to the FTT, but maintained their alternative argument that s75A Finance Act 2003 ("FA 2003") applied to the arrangements in the event that the SDLT payable by Tower One was less than the amount of SDLT that would have been payable on a notional land transaction effecting the acquisition of the chargeable interest (ie the Tower Lease) by Tower One at market value.

5. We appreciated the clear and helpful written and oral submissions from both parties. We have not found it necessary to refer to all of those submissions, but have taken them all into account in making our decision.

6. References to numbers in square brackets are to paragraphs of the Decision unless the context indicates otherwise, and references to section numbers and schedules are to sections and schedules of FA 2003.

FTT DECISION

7. The facts as found by the FTT were as follows:

8. In 1997, St George (South London) Limited ("SGSL"), a member of the same group of companies as St George PLC ("St George"), acquired the freehold interest in a site known as St George's Wharf ([8]). In 2000, SGSL sold St George's Wharf to St George, but did not transfer the legal title; SGSL retained the legal title on bare trust for St George ([9]).

9. St George carried out a phased development of St George's Wharf, which included the Tower, a 50-storey residential building at St George's Wharf ([10]).

10. In February 2010, the Berkeley group of companies (of which St George and SGSL were members), identified various commercial advantages to moving certain developments, of which the Tower was one, into separate legal entities ([12]).

11. About a week later, the group's tax advisers, PwC, prepared a discussion document (the "step plan") showing that a corporation tax ("CT") advantage (in the form of a tax-free step-up from book cost to market value in the carrying value of the Tower) could be obtained if certain steps were implemented ([12]). PwC prepared further iterations of the step plan in November 2010 and July 2011 ([14]).

12. As at 31 December 2010 the market value of the Tower was £200m and its book value was £29,900,750, and accordingly there was a latent profit/gain of £170m ([16] and [17]). The FTT found:

> "17. ...The intended effect of the step plan was that a subsequent disposal of the Tower by [Tower One] would only give rise to taxable profits for [Tower One] to the extent that the sale proceeds exceeded the £200 million market value of the Lease as at the date of its acquisition. The

> step plan thus envisaged that the £170 million "step up" of the carrying value of the Tower to its present market value would be tax free."

13. The relevant steps, all of which were carried out on 5 July 2011 and in accordance with the step plan, included (at [18]):

(1) The grant of the Tower Lease by SGSL (as bare trustee for St George) to B64, a subsidiary of The Berkeley Group plc ("Berkeley Group"), for a premium equal to the book value of the Tower (approximately £30m).

(2) The sale of the shares in B64 by Berkeley Group to Tower One (another subsidiary of Berkeley Group) at market value (£170m).

(3) The transfer of the Tower Lease by B64 to Tower One for approximately £30m (which we have defined above as the Transaction).

14. HMRC enquired into Tower One's CT return for the year ended 30 April 2012.

15. Land transaction returns (SDLT1) were filed:

(1) by B64 in respect of the entry into the agreement for lease and the grant of the Tower Lease by SGSL to B64; and

(2) by Tower One, in respect of the transfer of the Tower Lease by B64.

16. The returns each included a claim for group relief from SDLT. HMRC concluded that the group relief claim by B64 did not need to be considered as sub-sale relief was available, and that group relief was not available to Tower One because the Transaction formed part of arrangements of which the main purpose, or one of the main purposes, was the avoidance of liability to tax. HMRC assessed Tower One to SDLT of £8m, ie 4% on consideration of £200m.

17. The FTT made the following "Findings of disputed facts":

> "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.
>
> 43. The Tribunal is satisfied that once the group received the advice about the corporation tax advantage that could be obtained, it attached considerable importance to ensuring that this advice was correctly followed, and that the expected significant tax benefit was obtained.

> 44. The PwC step plan went through several iterations. Mr Stearn could not recall exactly how much PwC was paid for their advice, but suspected that it was in the tens of thousands of pounds. Execution of the step plan required a considerable number of transactions, the documentation for which had to be carefully prepared in advance (see paragraph 83(2) below).
>
> 45. The Tribunal finds that if the transactions entered into on 5 July 2011 had been effective to produce the expected corporation tax advantages, the group would have saved somewhere in the region of £44 million in corporation tax (being the tax on the £170 million tax free "step up" from book value to market value), albeit this benefit might have taken several years to be realised. This was on any view a very significant amount.
>
> 46. Even if the Appellant had had no other reason for wanting to transfer the Tower to the Appellant, the mere possibility of realising a tax advantage of this magnitude might in and of itself have arguably provided a financial incentive for the Appellant to do so. However, the Tribunal proceeds on the basis that the group would not have transferred the Tower to the Appellant solely for the corporation tax advantage if there had been no other commercial reason for doing so. The evidence of Mr Stearn is that the group would not have done so, and there is no evidence positively indicating the contrary.
>
> 47. HMRC suggest that the group must have considered the original reasons for transferring the Tower to the Appellant to be less important than the expected tax advantages, given that the risk of a catastrophic event affecting the Tower was extremely small, that the ring-fencing would not completely insulate the rest of the group from damage caused by any such catastrophic event (for instance, through reputational damage), given that funding for the development might still be found even if it was not transferred to an SPV, given that the development could always have been moved to an SPV at a later time if this had proved genuinely necessary, and given the magnitude of the expected tax saving. However, the evidence before the Tribunal is not sufficient to allow the Tribunal to make any assessment of its own of the commercial significance of these matters, and to weigh them against the significance of the tax benefits. The Tribunal is unable to conclude that the tax benefits ever became more important to the Appellant than the original commercial considerations."

18. We have set out the reasoning and conclusions of the FTT when addressing the grounds of appeal below.

RELEVANT LEGISLATION

19. The SDLT legislation is contained in Parts 4 and 9 FA 2003. Broadly, SDLT is a tax charged on "land transactions" (s42(1)), defined as including the acquisition of a "chargeable interest" (s43(1)), which in turn is defined as including "an estate, interest, right or power in or over land" (s48(1)). It was common ground that the Tower Lease is a "chargeable interest".

20. SDLT is charged on the purchaser (s85(1)), who must notify the transaction by way of a land transaction return (SDLT1) within a specified period of the effective date of the transaction (s76(1)). The effective date of a transaction is generally the date of completion (s119(1)).

21. Paragraph 3 of Schedule 16, which deals with the treatment of bare trustees, provides that:

"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."

22. A transaction is exempt from charge if, at the effective date, the vendor and the purchaser are companies that are members of the same group. Group relief must be claimed in the SDLT1 (s62(3)). Paragraph 2(4A) provides:

"2(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."

23. Paragraph 2(5) provides that ""arrangements" includes any scheme, agreement or understanding, whether or not legally enforceable;...".

24. SDLT is ordinarily charged by reference to the actual consideration given for the acquisition (s50(1) and paragraph 1 of Schedule 4). However, where the purchaser is a company and the vendor is connected with the company, the "deemed market value rule" applies - the chargeable consideration for the transaction is taken to be not less than the market value of the subject-matter of the transaction (s53(1A)).

25. Section 53 applies subject to the exceptions provided for in s54. Section 54 sets out three exceptions from the deemed market value rule, one of which is in s54(4). Section 54(4) provides that s53 shall not apply as follows (this being the "Case 3 Exception"):

"(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."

26. Section 75A applies when: (a) a chargeable interest is disposed of and acquired by another person, (b) involving a number of transactions and (c) the SDLT payable is less than the amount that would be payable on a notional transaction effecting the acquisition of the chargeable interest directly.

27. Section 75C(2) provides that the notional transaction attracts any relief which it would have attracted if it were an actual transaction and s75C(6) provides that s53 (deemed market value rule) applies to the notional transaction.

GROUNDS OF APPEAL

28. Tower One has been granted permission to appeal on the following grounds:

(1) the FTT erred in law in concluding that Tower One was not entitled to group relief - this turns solely on the question of whether the acquisition of the Tower Lease formed part of "arrangements of which the main purpose or one of the main purposes was the avoidance of liability to tax" within paragraph 2(4A) ("Ground 1"); and

(2) if Tower One was not entitled to group relief, the FTT erred in law in concluding that Tower One was liable to SDLT on the market value of the Tower Lease (£200m) rather than the consideration paid to acquire the Tower Lease (approximately £30m) - this turns solely on the question of whether "the subject matter of the transaction...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" within s54(3)(b) ("Ground 2").

29. By its Respondents' Notice, HMRC maintained their submission (which did not need to be decided by the FTT) that in the event that the SDLT found to be payable by Tower One is less than the amount of SDLT that would have been payable on a notional land transaction effecting the acquisition of the chargeable interest by Tower One at market value, then s75A applies to the arrangements.

GROUND 1 - WHETHER THE TRANSACTION FORMS PART OF ARRANGEMENTS OF WHICH ONE OF THE MAIN PURPOSES IS THE AVOIDANCE OF LIABILITY TO TAX SUCH THAT GROUP RELIEF IS UNAVAILABLE

30. Tower One submitted that the FTT erred in law in concluding that Tower One was not entitled to group relief. It was common ground that B64 and Tower One are companies that were members of the same group for SDLT purposes at the effective date of the Transaction. The only issue before the FTT, and before us, is whether paragraph 2(4A) applied to preclude the availability of group relief. As regards that provision, it was also agreed that the transaction was effected for bona fide commercial reasons (for the purposes of paragraph 2(4A)(a)), such that the dispute between the parties was whether the alternative restriction, that the transaction "forms part of arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to tax" within paragraph 2(4A)(b) applied.

31. We have set out above the findings made by the FTT. The FTT then proceeded as follows:

(1) Transactions entered into by different parties at different points in time will in practice almost inevitably be part of the same "arrangements" if they are effected pursuant to a single plan formulated before they are effected, and if the parties to each of the transactions are aware of that plan and are acting with the intention of giving effect to it ([56]).

(2) In general, it may be said that it is not tax avoidance to accept an offer of freedom from tax which Parliament has deliberately made, but that it is tax avoidance to adopt a course of action designed to conflict with or defeat the evident intention of Parliament by taking advantage of a fiscally attractive option afforded by the tax legislation without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in tax liability

(*Inland Revenue Commissioners v Willoughby* [1997] 1 WLR 1071 ("*Willoughby*"), 1079B-G, 1081B-D) ([59]).

(3) Where there are two ways for a taxpayer to carry out a genuine commercial transaction, it is natural for the taxpayer to choose the way that will involve paying the least amount of tax, and that the taxpayer by making that choice cannot for that reason alone be said to be acting with a main purpose of avoiding tax (*Commissioners of Inland Revenue v Brebner* (1967) 43 TC 705 ("*Brebner*"), 718H-I). However, a taxpayer in this situation may well be acting with a main purpose of avoiding tax if the chosen way conflicts with or defeats the evident intention of Parliament. The mere fact that the taxpayer is carrying out a genuine commercial transaction does not mean that no means adopted for effecting that transaction can ever be tax avoidance ([60]).

(4) "Purpose" means the intended effect of the arrangements, not the motive of the taxpayer for wanting to achieve the intended effects. A determination of "purpose" therefore does not necessarily require a determination of the subjective state of mind of the taxpayer, but may be ascertainable from the terms of the arrangements themselves. Where there is a complicated series of transactions that were the result of a concerted plan, and where a consideration of the whole of the transactions shows that there was concerted action to achieve an end of the avoidance of tax, then one of the ends sought to be achieved was the avoidance of liability to tax (*Newton v Commissioner of Taxation* [1958] AC 450 ("*Newton*"), 465-467) ([61]).

(5) There is a distinction between the purpose of arrangements, and the question whether the arrangements are effective in achieving that purpose. The fact that arrangements ultimately fail to achieve their purpose (for instance, because they ultimately fail to satisfy the necessary legal criteria to produce the intended legal effect) will not retrospectively negate the fact that they had that purpose. Thus, arrangements can have the purpose of avoidance of liability to tax, even if ultimately no liability to tax is avoided ([63]).

(6) A purpose will be a "main" purpose if its achievement is one of the primary aims of the arrangements. A purpose can be a "main" purpose, even if it is not as significant a consideration as another main purpose. Thus, if arrangements are driven by two particularly significant aims, A and B, as well as other subsidiary aims, both A and B may both be "main" purposes even if the taxpayer considers A to be more important than B ([69]).

(7) Applying this analysis to the facts, at [87] the FTT concluded that the Transaction formed part of arrangements of which one of the main purposes was avoidance of liability to tax:

> "87....(1) The series of transactions that took place on 5 July 2011 were, collectively, "arrangements" within the meaning of paragraph 2(4A)(b)...
>
> (2) The transfer of the Lease from B64 to the Appellant was one of the steps envisaged in the step plan, and thus formed part of these arrangements ...
>
> (3) One of the purposes of the arrangements, viewed as a whole, was to achieve the envisaged corporation tax advantage. Even if the achievement of this tax advantage may not have been in contemplation at the time that idea of transferring the Tower into an SPV was first raised, once the group became aware of the possibility of achieving this tax advantage it became a major consideration in the arrangements. Given the magnitude of the expected corporation tax advantage, the Tribunal is satisfied that it would

have been very important to the Appellant to ensure that the arrangements were implemented correctly to ensure that the tax advantage was in fact realised.

(4) Detailed planning to this end was undertaken. The PwC step plan went through several iterations, and significant professional fees were incurred for this purpose. In advance of the transactions implementing the arrangements, the necessary legal agreements were negotiated and agreed (paragraph 83(2) above), and the transactions were executed in a carefully planned sequence, in accordance with the step plan prepared by PwC.

(5) The Tribunal is satisfied that obtaining the tax advantage became one of the main purposes of the arrangements (paragraphs 61-70 above).

(6) This purpose amounted to avoidance of liability to tax for purposes of paragraph 2(4A)(b) Schedule 7 FA 2003.

(7) This was not a case where there were two obvious or standard ways of transferring the Tower from SGSL to the Appellant, and where the Appellant simply chose the way that was least costly in terms of tax.

(8) Rather, the PwC step plan was a bespoke plan, devised by professional advisers, for an arrangement that would not only reduce or eliminate the tax costs of transferring the Tower from SGSL to the Appellant, but would in fact confer a very substantial positive financial gain on the Appellant. It involved a complicated series of transactions that were the result of a concerted plan. A consideration of the whole of the transactions shows that there was concerted action to an end of the avoidance of tax (paragraph 61 above). Moving the Tower to an SPV, the other main purpose, could have been achieved by far less complicated means. The complicated series of transactions can only have been intended to place the relevant group members outside liability to tax that would otherwise have attached to the group, whether or not the Tower had been transferred from SGSL to another group company. The step plan itself indicated that the intended effect of this series of transactions was to obtain this tax advantage.

(9) The step plan did not involve taking advantage of any offer of freedom from tax which Parliament has deliberately made (paragraph 59 above).

(10) Rather, the step plan involved a course of action designed to conflict with or defeat the evident intention of Parliament, by removing from tax liability some £170 million of latent profit that would otherwise have been taxable.

(11) The fact that ultimately no tax was avoided does not mean that the arrangements cannot have had the purpose of avoiding liability to tax (see paragraph 63 above). The Tribunal does not accept the Appellant's contention that this conclusion means that merely thinking about tax avoidance, without actually avoiding tax, will constitute tax avoidance. The Appellant in this case did not merely think about tax avoidance. The Appellant took professional advice on steps that could be taken to achieve a significant corporation tax advantage, and then entered into a series of legal transactions to implement that advice in practice. It then submitted a corporation tax return reflecting the tax advantage to which it believed that it was entitled. It might well be that the Appellant would ultimately have enjoyed that tax advantage in practice if HMRC had not enquired into the return."

32. We have summarised Ms Shaw's submissions on behalf of Tower One below. We have not recorded Mr Jones' submissions separately as we were in broad agreement with them, and have largely adopted them in our reasoning when explaining the basis for our conclusion that Ground 1 does not disclose an error of law.

Tower One's submissions

33. Ms Shaw submitted that the FTT's conclusion at [87] is predicated on four errors of law which we summarise as follows:

(1) as the arrangements entered into did not in fact achieve their aim of producing a tax-free "step-up", they should not be regarded as "arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to tax";

(2) it cannot be said that the purpose of the arrangements "is" the avoidance of liability to tax where the avoidance in question was contingent on there being a future sale of units in the Tower, ie avoidance of a liability to tax in the future does not fall within paragraph 2(4A);

(3) the FTT confused "the intended effect" of the arrangements with the "purpose" of the arrangements; and

(4) even if the avoidance of liability to tax was a purpose of the arrangements, it was not one of the "main" purposes of the arrangements.

34. Ms Shaw emphasised the FTT's findings of fact at [41] to [47], which included (having stated at [45] that the CT advantage was "on any view a very significant amount") that "the Tribunal proceeds on the basis that the group would not have transferred the Tower to the Appellant solely for the corporation tax advantage if there had been no other commercial reason for doing so" (at [46]).

No tax was actually avoided

35. Ms Shaw submitted that even if a main purpose of the arrangements was to obtain a tax-free step-up in the carrying value of the Tower, it cannot now be said that its purpose is the avoidance of tax when it is common ground that the profit/gain of £170m was and is taxable.

36. The error in the FTT's approach is that it assumes that the statutory question must be asked solely by reference to the state of affairs (in this instance, the mistaken belief that a tax-free step-up would be obtained) as at the date of the Transaction and without reference to any subsequent events (in this instance, the discovery that tax was in fact payable).

37. Once the group discovered that tax was, and always had been, payable it cannot be said that the purpose of the arrangements is the avoidance of tax. The result of the mistake is that there is only one purpose, namely the commercial purpose. To interpret the legislation as asking whether a purpose of the arrangements was the avoidance of tax and to apply it even if the arrangements did not and never will result in any tax avoidance essentially treats paragraph 2(4A) as a penal provision intended to punish mere thoughts or attempts to avoid tax. There is no basis for interpreting paragraph 2(4A) in this way. As the FTT observed at [63(2)], paragraph 2(4A) does not prohibit or seek to undo the effects of tax avoidance arrangements; it only denies the availability of group relief from SDLT. As such, the practical effect of the provision is that it only disincentivises "tax avoidance arrangements that will result in a tax saving that is less than the amount of SDLT payable" ([63(3)]).

38. Arrangements which do not have the effect of avoiding tax are not captured by the provision, regardless of their purpose at the time of entering into them.

39. This does not lead to anomalous results. The difference between a mistaken belief as to the quantum of tax avoided (the example in [63(4)]) and a mistaken belief as to the avoidance of tax (the example in [63(5)]) is that in the latter scenario no tax is avoided whereas in the former scenario the purpose of the arrangements is still the avoidance of tax (albeit of a lesser amount than anticipated).

Any avoidance was of a future or contingent liability to tax

40. Ms Shaw submitted that it cannot be said that the purpose of the arrangements is the avoidance of tax in circumstances where the FTT accepted that the intended tax avoidance was not of any immediate, or even inevitable, liability to tax but only in the future, in the (contingent) event of the disposal of units in the Tower.

41. At the point of entering into the arrangements, the disposal of the Tower at a profit "might have taken several years to be realised" ([45]), at best; at worst, there might never have been any disposal due to some catastrophic event affecting the Tower (the risk of which was acknowledged by the FTT, even if it was only small at [47]), or there may have been a disposal at a loss due to a change in market conditions. The tax effect of the arrangements was, therefore, to increase the base cost of the Tower thereby reducing the amount of profits/gains that might potentially arise on the subsequent disposal of the Tower (or units in the Tower) to a third party. Such increase in base cost was of no use or benefit for as long as the Tower was owned by the group.

42. In *IRC v Parker* [1966] AC 141 ("Parker") the issue was whether a tax advantage arose upon the issue of debentures or only upon the redemption of the debentures some eight years later. Whilst the various speeches differ, in terms of both reasoning and conclusion, each of their Lordships considered that there was no tax advantage until the advantage was achieved (as can be seen from Viscount Dilhorne at p163, Lord Hodson (with whom Lord Morton agreed) at pp166-7, Lord Guest at pp175-6 and Lord Wilberforce at pp178-180).

43. By analogy with the present case, there is no tax avoidance (or advantage) until tax is avoided (or the advantage is achieved). Accordingly, where the purpose of the arrangements is simply to put the taxpayer in a position to avoid tax in the future, it cannot be said that the purpose of the arrangements themselves is tax avoidance. The highest that it can be put is that a purpose of the arrangements was to enable future tax avoidance upon the happening of some future event that does not form part of the arrangements. This is insufficient to engage paragraph 2(4A).

Confusion of intended effect with purpose

44. Ms Shaw submitted that the FTT confused the intended effect of the arrangements with the purpose of the arrangements.

45. In *BlackRock Holdco 5 LLC v HMRC* [2024] EWCA Civ 330 ("*BlackRock*"), Falk LJ made plain that purpose (or object) must be distinguished from effect (at [114], [124(b)] and [146]).

46. In the context of paragraph 2(4A), what matters is the purpose of the arrangements and this is to be ascertained by reference to the subjective purposes of those participating in or giving effect to the arrangements. As such, the FTT was wrong to rely on *Newton* for the proposition at [61] that ""purpose" means the intended effect of the arrangements"; that something is the intended effect or consequence does not make it a purpose. In that case, the Privy Council was considering a provision of the Australian tax code which rendered void any arrangement which had or purported to have "the purpose or effect" of avoiding tax.

47. The relevant question, therefore, is "what were the participators' objectives in entering into the arrangements", not "what were the intended effects of the arrangements"? Simply because the participators were aware of and intended the anticipated tax advantages does not mean that obtaining those advantages was a purpose of the arrangements.

48. Applying the relevant question to the facts as found by the FTT, the only purposes of the arrangements were commercial purposes, namely to ring-fence risks and potential liabilities associated with the development and to provide greater financial flexibility by opening up the prospect of securitised borrowing from a wider group of lenders. Moreover, none of the factual findings demonstrate that another purpose of the arrangements was tax avoidance.

49. Ms Shaw relied on the observation of Lord Upjohn in *Brebner* at p784 that:

> "...when the question of carrying out a genuine commercial transaction, as this was, is considered, the fact that there are two ways of carrying it out, —one by paying the maximum amount of tax, the other by paying no, or much less, tax—it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except on the footing of paying the smallest amount of tax involved."

50. As the FTT held, it was the bona fide commercial reasons which caused the group to approach its tax advisers "seeking to ensure that transferring the development to an SPV would not give rise to adverse tax consequences" ([42]). Precisely these adverse consequences have flowed from the arrangements as a matter of fact. A transfer of the Tower Lease at market value, directly from SGSL to Tower One, would have resulted in the crystallisation for tax purposes of the latent profit/gain of £170m, and thus in an immediate, accelerated CT charge before it was realised economically. What the step plan sought to achieve was the step-up to market value in the carrying value of the Tower without an immediate tax charge. The fact that the group chose to implement the step plan does not mean that obtaining the tax advantage was a purpose of the arrangements.

51. Ms Shaw submitted that the FTT failed to appreciate this point. The FTT held:

> "66. Where there are two ways for a taxpayer to carry out a bona fide commercial transaction, one of which involves tax avoidance and one of which does not, and where the taxpayer chooses the way that involves tax avoidance, then tax avoidance will be at least one of the purposes of adopting that course, whether or not the taxpayer has a subjective motive of avoiding tax (*Willoughby* at 1079C-D, 1081B-D)."

52. Such a conclusion is manifestly at odds with what is said in *Brebner* and, moreover, the FTT's reliance on *Willoughby*, which concerns the meaning of "tax avoidance", is misconceived. Whilst that might inform the question of whether the step plan was intended to give rise to tax avoidance, it does not inform the question of whether such tax avoidance was a purpose of the arrangements.

53. Ms Shaw submitted that [87] does not support the proposition that a purpose (let alone a main purpose) was to achieve a tax advantage:

(1) At [87(3)] there is no mention of the findings of fact in [42] or [46]. The FTT ignored these findings because it was proceeding on the basis that it only needed to ascertain the intended effect.

(2) [87(4)], addressing the detailed planning that was undertaken, is neutral on the purpose of the arrangements.

(3) The reasoning in [87(5)] and [87(6)] is flawed by reason of its reference to the FTT's analysis of the meaning of purpose.

(4) The reasoning in [87(7)] and [87(8)] takes too narrow an approach when considering the way in which a commercial transaction is carried out. In particular, the reasoning in [87(8)] that the commercial purposes "could have been achieved by far less complicated means" and that the "complicated series of transactions can only have been intended to [avoid tax]" does not mean that the objective of the arrangements was to avoid tax. It simply explains the means by which the group chose to achieve its commercial purposes. The objective of the arrangements was to achieve the commercial objectives and the step plan was the means by which those objectives were achieved. The anticipated result was a tax-free step-up in the carrying value of the Tower Lease. The purpose of the arrangements was not such a tax-free step-up in the carrying value because it was not an end in itself. As the FTT found, "but for" the commercial objectives, the Tower would not have been transferred at all ([46]). That is so even though the FTT found that if the group had never been made aware of the possible CT advantage it would likely have transferred the Tower Lease directly from SGSL to Tower One ([42]).

(5) The factors relied upon in [87(9)] and [87(10)] are immaterial, relying on *Brebner* and the findings of fact made by the FTT as to the commercial reasons for the transfer of the Tower Lease.

Any tax avoidance purpose was not a main purpose

54. Ms Shaw submitted that even if tax avoidance was a purpose of the arrangements, it was not a main purpose. By analogy with the loan relationships code, the word "main" should be taken to mean "important" (*Travel Document Service v HMRC* [2018] STC 723 ("*TDS*") at [48]). In *TDS* at [46] Newey LJ described the hoped-for gain as large both in absolute terms and relative to the apparent value of TDS, and agreed that the inescapable inference was that securing the advantage had become a main purpose of holding the shares. At [48] Newey LJ rejected the submission that "main" means "more than trivial". It has a connotation of importance.

55. Ms Shaw submitted that the word "main" bears a sense of comparison. Where there is more than one purpose, assessing whether one purpose is a main purpose is a comparative exercise - the importance of the tax purpose must be assessed by reference to and in relation to the commercial purposes of the arrangements.

56. At [47], the FTT acknowledged that it was unable to conclude that the tax purpose was more important than the commercial purposes and whilst it did conclude that the group attached considerable importance to the tax advantage ([43]), that the anticipated tax advantage was a very significant sum ([45]) and that it was very important to the group ([87(3)]), it did so without reference to or comparison with the commercial purposes.

57. In circumstances where, absent the commercial purposes, the arrangements would not have been entered into at all (as found by the FTT at [46]), Ms Shaw submitted that it cannot be said that any tax purpose was a main purpose of the arrangements because the tax purpose cannot be said to be important if it is not a sufficient reason for entering into the arrangements.

Discussion and conclusion

58. Having heard the evidence, the FTT made clear findings of fact which addressed both the commercial reasons for the transfer of the Tower Lease and the role that tax

played in the decision-making. There was no challenge to these findings of fact. We have concluded, for the reasons set out below, that there is no error of law in the FTT's analysis of the law or its conclusions.

59. The Court of Appeal has recently considered the meaning of "purpose" in the context of the loan relationships unallowable purpose rule in s441 Corporation Tax Act 2009 in *BlackRock* and *Kwik-Fit Group Ltd and others v HMRC* [2024] EWCA Civ 434 ("*Kwik-Fit*"). (A third decision has since been released after the hearing of this appeal, *JTI Acquisition Co (2011) Ltd v HMRC* [2024] EWCA Civ 652, but we did not consider it necessary to ask the parties to provide additional written submissions in response to this decision or to address it ourselves in our reasoning.) Whilst the parties primarily referred to these authorities in the context of Tower One's submission that the FTT had confused "the intended effect" of the arrangements with their purpose, we consider it helpful to set out the guidance given in *BlackRock* at outset.

60. Falk LJ, in a judgment with which Peter Jackson LJ and Nugee LJ agreed, identified areas of common ground relevant to the loan relationships unallowable purpose rule, including that:

(1) what matters is the company's subjective purpose or purposes in being a party to the loan relationship in question ([106] and [107]); and

(2) for a corporate entity which can only act through human agents, it is necessary to consider the subjective purpose of the relevant decision makers ([108]).

61. Significantly for present purposes, Falk LJ set out as follows:

> "107....The purpose or purposes for which a company is a party to a loan relationship may or may not be the same as, for example, the purpose or purposes for which the company exists, or the purpose or purposes of a wider scheme or arrangements of which the loan relationship forms part. Those other purposes may, for example, encompass the purposes of other actors. There is a contrast here between the unallowable purpose rule and the "targeted anti-avoidance rule" introduced by Finance (No. 2) Act 2015 as ss. 455B-455D CTA 2009. That rule requires consideration of the main purpose or purposes of "arrangements"."

62. Then, having considered the decisions in *Mallalieu v Drummond* [1983] 57 TC 330, *MacKinlay v Arthur Young McClelland Moores & Co* [1990] 2 AC 239 and *Vodafone Cellular Ltd v Shaw* [1997] STC 734, Falk LJ set out the following summary:

> "124. So far as relevant to this case, and gathering the points together, I would summarise the key points as follows:
>
> a) Save in "obvious" cases, ascertaining the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor.
>
> b) Object or purpose must be distinguished from effect. Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes.
>
> c) Subjective intentions are not limited to conscious motives.
>
> d) Further, motives are not necessarily the same as objects or purposes.
>
> e) "Some" results or consequences are "so inevitably and inextricably involved" in an activity that, unless they are merely incidental, they must be a purpose for it.

> f) It is for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker."

63. Falk LJ then re-iterated some of these points when setting out the errors in the approach of the FTT and the Upper Tribunal in that appeal, drawing attention to:

(1) purpose must be distinguished from effect, and even unavoidable effects are not necessarily the same as purposes ([146]);

(2) the corporation tax relief available for interest and other expenses of raising debt is a valuable relief, and it is unrealistic to suppose that it will not form part of ordinary decision-making processes about methods of funding. It cannot have been Parliament's intention that the inevitable consequence of taking out a loan should engage the unallowable purpose rules, subject only to consideration of whether the value of the tax relief is sufficient to make it a "main" purpose. Something more is needed ([150]); and

(3) the FTT had made an error of law in proceeding on the basis that the inevitable consequence of tax relief was, without more, a main purpose ([151]).

64. Falk LJ identified at [162] that "As Nugee LJ suggested in argument, a simple starting point in ascertaining a person's purpose for doing something is to consider "why" they did it. While this will not cover all the nuances - and in particular the potential distinction between purpose and motives discussed in *MacKinlay* - it is a sensible starting point."

65. With this clear and authoritative guidance in mind, we proceed to consider Tower One's submissions as to the four errors of law below.

66. It was agreed that the arrangements did not in fact achieve a tax-free step-up in base cost for Tower One. However, we agree with Mr Jones' submissions that paragraph 2(4A) applies where the relevant purpose exists, and that the effect of the arrangements, namely whether or not any tax was in fact avoided, is irrelevant:

(1) Paragraph 2(4A) provides that group relief is not available if the transaction forms part of arrangements of which a main purpose is the avoidance of liability to tax. The statute refers to purpose; there is no reference to the outcome or effect of the arrangements. We do not accept that a natural reading of this provision is that arrangements which do not have the effect of avoiding tax are not captured. Ms Shaw referred us to certain paragraphs of the Decision to illustrate her submission that this was a natural reading of the provision. The FTT did on occasion refer to transactions within the relevant arrangement having the effect of avoiding tax, eg, at [51], [52] and [54]. This was in the context of the FTT considering the meaning of "arrangements". When considering the meaning of purpose it was clear that the FTT had not treated this as a natural reading, eg at [63] the FTT said "There is a distinction between the purpose of arrangements, and the question whether the arrangements are effective in achieving that purpose." We agree.

(2) The use of the present tense, namely that a main purpose "...is the avoidance of liability to tax" does not mean that where it is subsequently accepted that the CT benefit is not available it cannot be said that the purpose "is" (rather than "was") the avoidance of liability to tax. The question of purpose is tested at the time of the land transaction in respect of which group relief is claimed, in this case the transfer of the Tower Lease. The FTT made its findings as to the purposes at that time, and Tower One claimed the benefit of the tax-free step-up in its CT return for the year ended 30 April 2012.

67. Ms Shaw submitted that there is no obvious reason why the question of whether there was tax avoidance should be tested only at the time of the transaction, given that HMRC could subsequently challenge the tax outcome that has been claimed and the anticipated tax benefit may not be available. We disagree. The reason is simply that the legislation applies by reference to the purpose of the arrangements and not by reference to the effect or outcome thereof. This is further reinforced by Falk LJ's summary in *BlackRock*, which reiterates at [124(b)] that "object or purpose must be distinguished from effect".

68. Ms Shaw submitted at the hearing that the denial of group relief from SDLT is disproportionate, or penal, if there is no actual tax avoidance, and that it is a "radical proposition" to be punished for trying to avoid tax. Ms Shaw submitted that there is no example in reported case law of attempted tax avoidance leading to a penalty. Mr Jones did not offer an example to counter this submission. Nevertheless, we agree with Mr Jones's submission that paragraph 2(4A) is drafted, and thus operates, differently in comparison with some of the other targeted anti-avoidance rules and it is this difference which leads to the result to which Tower One objects. For example, the transactions in securities rules apply to counteract an income tax advantage which is obtained; if such an advantage is not otherwise obtained, then there is nothing to counteract. By contrast, paragraph 2(4A) can apply to deny group relief from SDLT where the tax avoidance purpose is to avoid liability to a different tax (albeit that a purpose of avoiding liability to SDLT is also within scope). The consequence of this can be that group relief from SDLT may be denied irrespective of whether the tax avoidance purpose is achieved.

69. Ms Shaw submitted that the effect of the mistaken belief as to the availability of the tax-free step-up was that there is only one purpose of the arrangements. She drew an analogy with the situation where a person travelled to A to attend a conference and visit a museum, but on arrival discovered that the museum was in fact closed. In that situation, Ms Shaw submitted that the purpose of travelling to A was to attend the conference; there can be no purpose of visiting the museum as that had not been possible. We disagree. This is the very confusion between purpose and effect which we reject - a failed, or unachieved, purpose can still be a purpose and this is the case if it was always unachievable (eg the museum had closed permanently some time previously) or if it was not possible at the time (eg a temporary closure or lack of time on the part of the visitor).

70. There were two aspects of Mr Jones' submissions that have played no part in our reasoning:

(1) Mr Jones submitted that one difficulty with Ms Shaw's submissions is the practical difficulty to which it would give rise, namely how the taxpayer, or HMRC, is to determine the availability of group relief (which is claimed shortly after the land transaction) given that the tax consequences may not become certain until several years later (as here). We agree that this would be a difficulty; but it is not the reason we reject Tower One's submission which is instead based on the statutory language and the test which is required to be applied.

(2) Mr Jones also submitted that it is material that there is no factual finding in the Decision to the effect that the purpose of the arrangements changed after the event. We do not agree that this was material, or even relevant. The application of the legislation depends on the purposes at the time of the transaction. That purpose of the arrangements was then fixed.

71. There is therefore no error of law in the FTT's conclusion at [63] that the fact that arrangements ultimately fail to achieve their purpose will not retrospectively negate the fact that they had that purpose.

72. Ms Shaw's second submission was that a purpose of avoiding a liability to tax that was expected to arise in the future, or contingently, cannot amount to a purpose of "the avoidance of liability to tax" under paragraph 2(4A). We disagree, for the two reasons advanced by Mr Jones, namely:

(1) There is no basis for reading into the legislation a qualification as regards whether the liability to tax sought to be avoided is a present or future one. A purpose of avoiding a liability to tax in the future, or which may not arise at all, can still be a "purpose" of "the avoidance of liability to tax".

(2) It is in any event inaccurate to describe the intended avoidance in this case as only arising the future, in the (contingent) even of the disposal of units.

73. We address these alternative reasons in turn.

74. Group relief is not available if the transaction forms part of arrangements of which a main purpose is "the avoidance of liability to tax", and tax means stamp duty, income tax, CT, capital gains tax or SDLT. There is nothing in this language to indicate that a purpose of avoiding liability to tax which will or may arise in the future is not caught.

75. We do not consider that *Parker* assists Tower One in this regard. That decision related to the transactions in securities rules, then in s28 Finance Act 1960 ("FA 1960"), and applied where "a person is in a position to obtain, or has obtained, a tax advantage...". By s43(4)(g) FA 1960, tax advantage was defined as "a relief...from...income tax or the avoidance of a possible assessment thereto...". Where the section applied, the Inland Revenue could issue a notice to counteract the tax advantage "so obtained or obtainable". The legislation was thus concerned with counteracting the results of the arrangement, and the speeches of their Lordships need to be read in that light. They were not addressing the purpose of the relevant transactions.

76. Furthermore, we do not agree with Ms Shaw's submission that the intended avoidance in this case only arose in the future.

77. The transactions implemented pursuant to the step plan were intended to give Tower One a base cost in the Tower Lease equal to the market value of the Tower at the time of the Transaction, ie as if Tower One had acquired the Tower Lease for its market value (of £200m) but without any company in the group having to pay tax on the profit of (£170m) that would arise on a direct sale of the Tower or the Tower Lease to Tower One for such a price. The cash benefit of this would only arise to Tower One and the group in the future, or contingently, on the disposal of units. However, the avoidance of tax, namely an increase in the base cost without any company being liable for CT on the "gain" from approximately £30m to £200m, formed part of the arrangements themselves and was not a result of future or contingent events.

78. The FTT clearly recognised this; it was set out in the memorandum from Mr Stearn in February 2010 which summarised the tax analysis and was set out at [13], the FTT described the intended tax-free step-up in base cost at [17], addressed the expected amount of the CT advantage at [45] and identified that the benefit might take several years to be realised. The FTT concluded at [87(10)] that this involved a course of action designed to conflict with or defeat the evident intention of Parliament, by removing from tax liability some £170m of latent profit that would otherwise have been taxable.

79. Therefore, to the extent that the FTT proceeded on the basis that the restriction in paragraph 2(4A)(b) may be engaged by a main purpose of the avoidance of a future or contingent liability to tax, that was not an error of law. Furthermore, on the facts as found by the FTT, the avoidance of tax was of a current liability to tax on the latent profit or gain, and not the avoidance of a future or contingent liability to tax.

80. Ms Shaw's third submission was that the FTT had confused the intended effect of the arrangements with their purpose. As identified by Mr Jones, there is an obvious tension between this argument and Tower One's first submission that no tax was actually avoided. However, we recognise that each of the four arguments relied upon by Tower One in the context of Ground 1 was put forward in the alternative.

81. Ms Shaw submitted that the FTT had been wrong to rely on *Newton*, where the legislation in issue before the Privy Council applied to arrangements having or purporting to have "the purpose or effect" of avoiding any liability to tax, which was treated as a composite phrase.

82. We consider that the FTT's reference to the decision in *Newton* in its consideration of the meaning of "purpose" was not an obvious choice of authority for this very reason; however, we recognise, as pointed out by Mr Jones, that this authority had been put to the FTT by Tower One. There was clearly potential for reliance on this decision to lead the FTT into misdirecting itself. However, we look at what the FTT actually said. We have summarised the FTT's reasoning at [31] above, including its reference to *Newton*, and consider it significant that the FTT referred to intended effects and not effects, stating at [61] that purpose "means the intended effect of the arrangements, not the motive of the taxpayer for wanting to achieve the intended effects". We agree with Mr Jones' submission that it is difficult conceptually to express the difference between a purpose (which involves ascertaining the aim or object) and an "intended effect". We are obviously aware that in *BlackRock* Falk LJ has confirmed that object or purpose must be distinguished from effect, and that "Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes" ([124(b)]). However, the FTT was not seeking to define purpose by reference to inevitable effects, but those that were intended.

83. The FTT then proceeded with its explanation of the meaning of "purpose":

> (1) At [61] the FTT stated "A determination of "purpose" therefore does not necessarily require a determination of the subjective state of mind of the taxpayer, but may be ascertainable from the terms of the arrangements themselves."
>
> (2) At [62] the FTT referred to *Seven Individuals v HMRC* [2017] UKUT 132 (TCC), a decision of Nugee J (as he then was) and said that "Where arrangements are complex and/or have been devised by specialists other than the taxpayer, regard may therefore also be had to wider considerations such as why the arrangements took the form that they did, how those who devised them hoped that they would work, and the way that those who devised them presented them to the taxpayer(s)."

84. Tower One's written submissions, whilst challenging various aspects of the FTT's reasoning and its application of the law to the facts as found, did not make any specific reference to these parts of the Decision, and Ms Shaw did not refer to them in her opening oral submissions. However, Mr Jones took us to these paragraphs, and to the Upper Tribunal's decision in *Seven Individuals*, submitting that the FTT was entitled to take this approach.

85. In *Seven Individuals* Nugee J had addressed how to approach the question of whether an individual was party to arrangements "the main purpose, or one of the main purposes, of which is the obtaining of a reduction in tax liability by means of sideways relief" and referred to the decision of the House of Lords in *Brebner*, acknowledging that such case "undoubtedly proceeds on the basis that the question was a subjective one, although the contrary does not appear to have been argued" (at [103]). Nugee J continued at [104] that he was inclined to accept that "in considering what the object of a set of arrangements are, one can look more widely than what was in the taxpayer's own mind". He said it would be surprising if the question were intended to be answered by looking at

the intentions, motives or purposes of the individual taxpayer alone, without regard to the wider context of why the arrangements took the form they did, how those who devised the arrangements hoped they would work, and the way in which they were promoted to potential participants (at [104]). This was obiter, as Nugee J did not need ultimately to come to any conclusion on the appropriate test (at [107]).

86. Ms Shaw's reply was tightly focused on the submissions which had been made by Mr Jones, and she submitted that:

(1) As per Falk LJ in *BlackRock*, ascertaining the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor. The purposes of a wider scheme of arrangements (as here, but unlike in *BlackRock* itself) may encompass the purposes of other actors.

(2) If *Seven Individuals* is suggesting that regard should be had to something other than the subjective intentions of the relevant actors, then Tower One submits that is incorrect following *BlackRock*. But Ms Shaw's submission was that in *Seven Individuals* Nugee J was looking at the means of assessing those subjective intentions, which included looking at all the wider circumstances.

87. We agree with Ms Shaw, and find it helpful to refer to Falk LJ's judgment in *Kwik-Fit*:

> "83. As in *BlackRock*, it also bears emphasising that, while ascertaining the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor, it is for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker (*BlackRock* at [124f)]). It was for the FTT to reach its own decision on whether there was an unallowable purpose based on all the evidence before it. The case did not depend on obtaining a concession in particular terms in cross-examination, or indeed on framing a question to a witness in a particular way."

88. When assessing whether the FTT had misdirected itself at [61] to [62] of the Decision we remain mindful of the clear statements in the authorities that decisions of the FTT should not be scrutinised and read as though they were words of a statute.

89. If at [61] to [62] the FTT was directing itself that the subjective intentions of persons other than those implementing the arrangements were to be assessed, then that would be a misdirection and an error of law. However, we consider that it would be subjecting [61] to too close a level of scrutiny to conclude that this was the approach being set out. The statements at [62] do arguably veer closer towards such an error of law by focusing on how those who devised the arrangements (in this case, PwC) hoped they would work. However, in the context of the Decision as a whole we conclude that any such error is not material - it is clear throughout that the assessment was being made of the purposes of the parties to the arrangements, albeit by reference to what they were told by PwC as to how the arrangements would work (as the tax analysis was set out in the step plan).

90. Furthermore, mindful of the clear statements in the authorities that decisions of the FTT should not be scrutinised and read as though they were words of a statute, we read [61] to [66] in their entirety and do not consider that the FTT had misdirected itself by its reference to either *Newton* or *Seven Individuals*. We read the FTT as recognising, consistently with BlackRock at [124(f)], that determining the purpose sought to be achieved is not a question that is answered simply by asking the decision maker, and that it may be necessary to look at what Nugee J had described as the wider circumstances to

assess the subjective intentions of the decision maker. That is the exercise that was then conducted by the FTT.

91. The FTT heard evidence from Mr Stearn, who had been a director of Tower One and had sent the memo to the then group finance director which was set out at [13]. We were briefly taken to the transcript of some of the cross-examination of Mr Stearn; Mr Jones was seeking to illustrate that there was what he submitted was an abundance of evidence before the FTT supporting its conclusions, referring, by way of example, to Mr Stearn's evidence that absent the step-up in carrying value the group would not have carried out the series of transactions but the transfer might have gone directly to the company that became Tower One - and that getting the step-up was the main purpose of what he called the interim step. As there were no challenges to the findings of fact made by the FTT, we did not find it helpful to be taken to the transcript for this purpose. Instead, we focus on the findings of fact made by the FTT, which included:

(1) a summary of PwC's step plan, with the intended tax analysis of the various steps and that it was envisaged that the £170m step-up of the carrying value would be tax-fee ([14] and [17]);

(2) no alternative arrangements were considered for transferring the Tower to Tower One ([15]);

(3) there were bona fide commercial reasons to transfer the Tower to Tower One that provided a commercial benefit ([41]);

(4) the process that led to the series of transactions was not originally initiated out of a motive to avoid tax. If the group had never been made aware of the possible CT advantage, the group would likely have transferred the Tower directly to Tower One or another SPV to achieve its original purposes ([42]);

(5) once the group received the advice about the CT advantage, it attached considerable importance to ensuring that this advice was followed and that the expected significant tax benefit was obtained ([43]);

(6) if the transactions had been effective, the group would have saved around £44m in CT, albeit this benefit might have taken several years to be realised. This was a very significant amount ([45]);

(7) having acknowledged that the mere possibility of realising a tax advantage of this magnitude might arguably have provided a financial incentive to transfer the Tower, the FTT found that the group would not have transferred the Tower to Tower One solely for the CT advantage if there had been no other commercial reason for doing so ([46]); and

(8) the FTT was unable to conclude that the tax benefits ever became more important to Tower One than the original commercial considerations ([47]).

92. The FTT had thus made its positive findings as to the transactions that were effected; and was mindful of the matters on which it had not been persuaded by HMRC. The FTT then set out its conclusions at [86] and [87]. The reasoning, which we consider further below, is concise, but needs to be read in the light of the findings of fact which had been made and the FTT's analysis of the meaning of avoidance of liability to tax and purpose.

93. The FTT had addressed the meaning of avoidance of liability to tax at [57] to [60], which we have summarised at [31] above. In particular the FTT set out:

> "59. In general, it may be said that it is not tax avoidance to accept an offer of freedom from tax which Parliament has deliberately made, but that it is tax avoidance to adopt a course of action designed to conflict

> with or defeat the evident intention of Parliament by taking advantage of a fiscally attractive option afforded by the tax legislation without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in tax liability (*Inland Revenue Commissioners v Willoughby* [1997] 1 WLR 1071 ("*Willoughby*"), 1079B-G, 1081B-D).
>
> 60. It may also be said that where there are two ways for a taxpayer to carry out a genuine commercial transaction, it is natural for the taxpayer to choose the way that will involve paying the least amount of tax, and that the taxpayer by making that choice cannot for that reason alone be said to be acting with a main purpose of avoiding tax (*Commissioners of Inland Revenue v Brebner* (1967) 43 TC 705, 718H-I). However, it follows from the previous paragraph above that a taxpayer in this situation may well be acting with a main purpose of avoiding tax if the chosen way conflicts with or defeats the evident intention of Parliament. The mere fact that the taxpayer is carrying out a genuine commercial transaction does not mean that no means adopted for effecting that transaction can ever be tax avoidance."

94. The FTT had thus considered both *Willoughby* and *Brebner*, as well as drawn conclusions as to the potential implications of these principles, with which we agree.

95. At [87] the FTT recorded its conclusion that one of the purposes of the arrangements, viewed as a whole, was to achieve the envisaged CT advantage, and that this became one of the main purposes of the arrangements. The FTT does not clearly specify what that envisaged CT advantage was when expressing its conclusion in [87] and [87(3)], but it is clear from its earlier description of the arrangements as well as [87(8)] and [87(10)] that this advantage was the tax-free step-up in base cost for Tower One. The FTT found that this purpose of obtaining the tax advantage amounted to avoidance of liability to tax at [87(6)].

96. It is well-established that the question of whether the main purpose, or one of the main purposes, of a given set of arrangements was the avoidance of liability to tax is one for the FTT to decide on a consideration of all the relevant evidence and the proper inferences to be drawn from that evidence (eg Lord Upjohn at p30G in *Brebner*). There was no error of law in the FTT's reasoning and that is sufficient for us to conclude that this aspect of Ms Shaw's challenge to the FTT's conclusions on purpose must fail.

97. We do, however, address one of Ms Shaw's specific submissions as regards *Brebner*, namely that there is a distinction between the purpose of arrangements and the reason for choosing the particular means for giving effect to that purpose.

98. Before the FTT, Tower One had given the example of a businessperson who travels from A to B to attend a business meeting, and who decides to travel by rail by a particular circuitous route in the belief that a discount will be offered on all future rail travel for 12 months if the trip is undertaken by that specific route. Tower One had submitted that the sole purpose of the journey is to attend the business meeting, and obtaining a discount on future travel is merely the reason for choosing a particular means for achieving this purpose. The FTT rejected this at [65], stating that the overall arrangement is not for a trip from A to B, but rather for a trip from A to B via the particular route chosen. The overall arrangement as a whole has two purposes, namely (1) to attend a business meeting in B, and (2) to obtain a discount on future travel. Even if, at the outset, the businessperson is unaware of the possibility of the discount, and is only proposing to travel from A to B by the quickest route, once that person becomes aware of the possibility of the discount and deliberately decides to travel specifically by the more circuitous route in order to obtain

this benefit, the specific route becomes part of the overall arrangement, and obtaining the discount becomes one of the purposes of the trip.

99. Before us Ms Shaw gave a different example, albeit staying with the theme of train journeys. Ms Shaw put forward the example of wanting to travel from A to B, but choosing to go via C because a direct train from A to B will cost £100 whereas the indirect train via C is free. Ms Shaw submitted that the purpose is to get to B, and the means she has chosen to achieve that objective is by taking the indirect train. The result is a free train journey, but the purpose was not to get a free train journey or even to get to B for free/without paying £100 because neither of those things was an end in itself.

100. We do not find these various hypothetical examples to be particularly helpful, and consider that they run the risk of distracting the relevant tribunal from the actual question in issue.

101. We would emphasise that in *Brebner* the question was whether the transactions in securities rules were precluded from applying on the basis that the transactions were carried out for bona fide commercial reasons and did not have as their main object, or one of their main objects, to enable tax advantages to be obtained. In this context, Lord Upjohn said that where there are two ways of carrying out a genuine commercial transaction it would be "quite wrong, as a *necessary* consequence, to draw the inference" that, in adopting the route which involved paying no or less tax, one of the main objects is the avoidance of tax. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence. Not only was Lord Upjohn making it clear that the question was to be decided by (here) the FTT, but also that adopting the route which involved paying less tax (or achieving some other tax advantage) did not necessarily mean that a main object was the avoidance of tax.

102. On the facts as found by the FTT, absent any possible CT advantage, the group would have transferred the Tower Lease from SGSL to Tower One (or another SPV) and this would have been for commercial reasons. Ms Shaw submitted that such a transfer at market value would have given rise to the adverse tax consequences that the group was concerned to avoid - St George would bring into account a trading profit on disposal of the Tower at market value, and there would have been no corresponding deduction for Tower One in the year. HMRC did not dispute that this would have been the result. However, Ms Shaw also recognised in her skeleton argument that a direct transfer at book value would not have resulted in a liability to tax by reference to the market value of the Tower Lease on that transfer if the position of the group was viewed together (as there would be matching transfer pricing adjustments which would have been capable of surrender). As Mr Jones submitted, the group could thus have achieved the commercial result of transferring the Tower Lease to an SPV without adverse tax consequences.

103. The FTT had set out at [14] the steps in the step plan and a summary of the tax consequences of each step. The FTT then set out its reasoning at [87(7)] to [87(10)] which included that this was not an instance where there were two obvious or standard ways of achieving a commercial aim and Tower One simply chose the way that was least costly in terms of tax; rather this was a bespoke plan that not only reduced or eliminated the tax costs of transferring the Tower but would also confer a very substantial positive financial gain on Tower One. The step plan indicated that the intended effect was to obtain this tax advantage.

104. There is no error of law in the FTT's approach to purpose, and the conclusion it reached was one that the FTT was entitled to reach on the basis of the facts as found. We come back to the principle made clear by Lord Upjohn that the question whether in fact

one of the main objects was to avoid tax is one for the FTT to decide upon a consideration of all the relevant evidence before it and the inferences to be drawn therefrom.

105. Ms Shaw's fourth submission was that even if a purpose of the arrangements is the avoidance of liability to tax it was not a "main" purpose. Ms Shaw relied on the decision of the Court of Appeal in *TDS*, which included that "main" has a connotation of importance, and that assessing whether a purpose is a main purpose is a comparative exercise.

106. We agree with Ms Shaw's submissions as to the approach to be taken to assessing whether a purpose is a main purpose. However, we consider that the FTT did adopt this approach.

107. The FTT discussed the meaning of "main" in the context of there being more than one purpose and the possibility of there being more than one main purpose:

> "68. It is clear from [the wording of para 2(4A)] that arrangements can have more than one main purpose.
>
> 69. A purpose will be a "main" purpose if its achievement is one of the primary aims of the arrangements. A purpose can be a "main" purpose, even if it is not as significant a consideration as another main purpose. Thus, if arrangements are driven by two particularly significant aims, A and B, as well as other subsidiary aims, both A and B may both be "main" purposes even if the taxpayer considers A to be more important than B.
>
> 70. Indeed, purpose B could be a main purpose of the arrangements, even if the arrangements would not have been entered into at all but for the need to achieve purpose A. Even if purpose A is the sole reason for entering into arrangements in the first place, once the decision to enter into the arrangements has been taken, an additional purpose can become an additional main purpose of the arrangements. Whether this is the case will be a question of fact, depending on the individual case. The question is whether a purpose is one of the main purposes, not whether it is the most important purpose, and not whether the arrangements would be proceeded with in the absence of any of the other purposes."

108. The language used here includes that of comparison.

109. The FTT expressly considered the position where its findings indicated that one purpose was more important than another. The FTT's findings of fact not only addressed the significance of the expected CT benefit (at [43] "it attached considerable importance", "expected significant tax benefit"), but it also made findings as to the relative importance of different outcomes. At [42], having found there were commercial reasons for transferring the Tower, the FTT found that if it had not been aware of the CT advantage it would have transferred the Tower directly (ie not only would the transfer have been direct, but a transfer would have happened). This contrasts with the finding at [46] that the group would not have transferred the Tower solely for the CT advantage. The FTT was well aware that there can be multiple purposes and that they can be of differing importance.

110. The reasoning of the FTT at [87] identified that fulfilment of the tax avoidance purpose was a "major consideration" and "very important", and held that it was "one of the main purposes of the arrangements" ([87(3)] to [87(5)]).

111. Ms Shaw submitted that where, absent the commercial purposes, the arrangement would not have been entered into at all, it cannot be said that any tax purpose was a main purpose of the arrangements. Here, we endorse the reasoning of the FTT at [70], set out above. As is clear from [70], whether this is the case will be a question of fact. There may

be instances where a group has multiple purposes, of varying degrees of importance, and in that situation it is for the FTT to make findings as to which of these, if any, are a "main purpose". That analysis may be influenced by its findings as to whether any of these purposes were on their own a sufficient reason for the arrangements to be undertaken. The FTT identified this and reached its conclusion.

112. There is therefore no error of law in the FTT's conclusion that the tax avoidance purpose was a main purpose of the arrangements.

113. The FTT did not make an error of law when applying paragraph 2(4A), and Ground 1 of Tower One's appeal is dismissed.

GROUND 2 - WHETHER THE CASE 3 EXCEPTION TO THE DEEMED MARKET VALUE RULE APPLIES

114. Tower One submitted that the FTT erred in law in concluding that Tower One was liable to SDLT on the market value of the Tower Lease (£200m) rather than the consideration paid to acquire the Tower Lease (approximately £30m).

115. It was common ground that the Transaction was within s53(1), on the basis that Tower One is a company and it is connected with B64, which is "the vendor" for this purpose. Where this section applies, the chargeable consideration for the transaction is taken to be not less than the market value of the subject-matter of the transaction as at the effective date of the transaction (s53(1A)).

116. Section 54 then sets out the situations where s53 does not apply. Tower One relied on the Case 3 Exception in s54(4). The vendor referred to in this exception is B64, and it was common ground that the transfer of the Tower Lease by B64 to Tower One at book value was, or was part of, a distribution of the assets of B64 within s54(4)(a). The only issue was whether the requirement in s54(4)(b) was met, namely:

> "(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."

117. The FTT held that the Case 3 Exception did not apply because earlier in the day on 5 July 2011, before the Transaction, the Tower Lease had been granted to B64 and B64 submitted a SDLT1 in which it made a group relief claim (although there was no finding in relation to the timing of the making of that claim). Thus, the FTT held, at the time of the transfer of the Tower Lease by B64 to Tower One, the Tower Lease had been subject to an earlier transaction in which a group relief claim had been made ([90(3)]). The FTT found it was immaterial that:

(1) the earlier transaction had taken place on the same day. That was because although the legislation referred to "the period of three years immediately preceding the effective date" that requirement is satisfied whenever the previous transaction takes place at some earlier point in time, even if the first transaction precedes the second by only minutes or seconds. The FTT said that although the legislation speaks of an "effective date of the transaction" rather than of an "effective time of the transaction", all transactions in fact take place at a specific point in time (at [71]); and

(2) HMRC had concluded that the group relief claim in the SDLT1 filed by B64 did not need to be considered because they considered sub-sale relief to be available. This was because what matters is whether a group relief claim has been made, not

whether B64 was entitled (or whether HMRC considered it to be entitled) to group relief.

118. The parties' submissions are summarised below. After the hearing, at our invitation, both parties provided further written submissions on this ground by reference to the decision of the Supreme Court in *Hurstwood Properties (A) Ltd and others v Rossendale Borough Council and another* [2021] UKSC 16 ("*Rossendale*") for which we are grateful.

Tower One's submissions

119. Ms Shaw submitted that the FTT had made an error of law in concluding that the Case 3 Exception did not apply, relying on two alternative reasons:

(1) the Tower Lease had not been the subject of a transaction within the specified three-year period as such period did not include transactions prior to but on the same day as the distribution transaction (namely the transfer of the Tower Lease from B64 to Tower One); or

(2) whilst B64 had made a claim for group relief on the SDLT1 in respect of the grant, HMRC had effectively ignored that claim and concluded that sub-sale relief was available. In this situation, B64 should not be treated as having made a claim for group relief for the purposes of the Case 3 Exception.

120. Ms Shaw submitted that the purpose of the deemed market value rule is to stop a vendor avoiding SDLT on a sale of land by transferring the land to a connected company for a nominal consideration and then selling the shares in the transferee company, paying stamp duty or stamp duty reserve tax at 0.5% - the effect of s53 in this situation being to capture and charge to SDLT the value of the land upon its transfer to a connected company. The purpose of s54(4) is then to exclude the deemed market value rule in the case of transfers between connected companies by way of distribution of the vendor's assets; this is readily understandable because SDLT is charged on the consideration given for the acquisition of land and a distribution is a transfer of value made to the member or members of a company for no consideration. The purpose of the proviso - the requirement that the subject matter has not "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" - is essentially the same as the purpose of clawback of group relief (under paragraph 3 of Schedule 7), namely to ensure that land which has enjoyed the benefit of group relief in the last three years does not leave the group without the value of the land being charged to SDLT on exit from the group.

121. Ms Shaw thus submitted that the proviso is an anti-avoidance measure to prevent an abuse of group relief where land has been transferred intragroup without charge and is then distributed out of the group within a three year period. It therefore followed that the class of facts intended to be affected by the proviso involved a transfer of land out of a group by way of distribution where the land in question has recently (in the last three years) been the subject of an intragroup transfer which enjoyed the benefit of group relief.

122. Tower One's first reason for submitting that the Case 3 Exception did not apply was that "the period of three years immediately preceding the effective date" means the period from 5 July 2008 to 4 July 2011. The grant of the Tower Lease to B64 took place on 5 July 2011, which is not within that specified period.

123. Ms Shaw submitted that it is irrelevant that all transactions in fact take place at a specific point in time (as relied on by the FTT). The FTT's interpretation ignored the words "the effective date of", and asked only whether the grant of the lease to B64 had preceded the transfer of the Tower Lease. "Effective date" is a defined term (in s119) and is used almost 200 times in FA 2003; it must be interpreted consistently. Even if it is

reasonable to assume that Parliament did not intend for transactions which had taken place earlier on the date of the distribution transaction to be treated differently from those which had taken place on, say, the previous day, there are limits to what a purposive interpretation can achieve and it was not the function of the FTT or this tribunal to override or ignore the plain meaning of the statutory language by re-writing the proviso to read "immediately preceding and including the effective date". Any anomalies or unintended consequences are for Parliament to remedy - the permissible bounds of interpretation do not extend to filling gaps or remedying anomalies.

124. Tower One's second (alternative) reason was that B64 should not be treated as having made a claim for group relief for the purposes of the Case 3 Exception.

125. Ms Shaw submitted that the requirement to demonstrate that the prior transaction is not one "in respect of which group relief was claimed by the vendor" is not determined simply by looking at the original SDLT1 without regard to whether that claim had been subsequently withdrawn or rejected/ignored by HMRC. There is no obvious reason why Parliament should have intended such a limited approach to be taken; what the legislation is trying to identify is transactions in respect of which group relief was claimed without subsequent amendment or dispute. In circumstances where the claim for group relief is disputed, then it is only in the most formalistic of senses that the transaction might be described as one "in respect of which group relief was claimed by the vendor". The interpretation adopted by the FTT leads to inequitable results in a situation where the benefit of the claimed group relief was not in fact available, eg because it was disallowed following an HMRC enquiry, yet the Case 3 Exception is nevertheless denied on a subsequent distribution transaction.

126. Ms Shaw submitted that we should apply a purposive interpretation to this language, and not take a literal approach. This is not impracticable, as the Case 3 Exception arises in the context of transactions intragroup, such that the subsequent transferee will be well aware of the full circumstances. A purposive interpretation requires that the word "claimed" should be taken to refer to a claim that has the real and practical effect of obtaining group relief.

127. In reply at the hearing, Ms Shaw submitted that HMRC's approach of looking solely at the state of affairs at the time of the distribution transaction would lead to an oddity where the prior transaction had taken place but the SDLT1 claiming group relief had not yet been filed. Ms Shaw submitted that although the time/date of filing the SDLT1 by B64 in respect of the grant of the Tower Lease was not in evidence, it was very unlikely that it would have been submitted before the rest of the transactions that day, and HMRC's acknowledgement of receipt of the SDLT1 (which was in the bundle) was dated 7 July 2011. If we can look to a subsequent submission of the SDLT1 (and Ms Shaw agreed we should), there should be no difficulty in looking at subsequent events including the outcome of the claim.

128. Furthermore, Ms Shaw's written submissions after the hearing included the submission that it is not factually correct to say that the claim for group relief had in practice succeeded. HMRC had concluded that sub-sale relief was available and that group relief was not available; the reliance on sub-sale relief meant that the claim for group relief had no real or practical effect.

129. On this basis, the facts of the present case do not fall within the class intended to be affected by the provision:

(1) The prior grant of the Tower Lease to B64 did not take place in the period of three years immediately preceding the date of the distribution; it took place on the date of the distribution.

(2) The prior grant of the Tower Lease to B64 was not entitled to and did not enjoy the benefit of group relief because HMRC treated the claim as having no effect.

(3) Nor did the distribution of the Tower Lease by B64 to Tower One result in any transfer of the land outside of the Berkeley Group.

130. The facts do not therefore "answer to the statutory description".

HMRC's submissions

131. Mr Jones submitted that the FTT had reached the right conclusion for the right reasons.

132. Section 54(4)(b) looks back over a period of three years prior to the distribution transaction and asks whether a transaction involving the same subject, and in respect of which group relief was claimed, has taken place within that time. That period starts with the transaction that is, or is part of, the distribution (here, the Transaction) and extends backwards three years. As the FTT correctly held, it thus includes transactions that took place earlier on the same day as the distribution transaction.

133. Mr Jones submitted that this accords with the purpose of the provision. In his written submissions after the hearing he noted that, subject to the parties' positions on the meaning of the word "claimed", there was not much disagreement between the parties as to the purpose of the proviso, which is to prevent the application of the Case 3 Exception in instances where group relief has been claimed on the subject-matter of the distribution, or an interest from which that subject-matter has derived, in the three years prior to the distribution in question.

134. On Tower One's construction, there is an uncovered gap that opens up from midnight the day before the distribution transaction takes place and closes once that transaction is complete. Thus, a transaction on which group relief was claimed that precedes the distribution transaction by two years and 11 months would be caught, but one that precedes it by an hour on the same day would not be. It is difficult to see any justification for such an interpretation of the legislation, the purpose of which is clear. The existence of such a gap is inconsistent with the drafting of the legislation, which uses the language "immediately preceding...", suggesting there should not be any gap.

135. Mr Jones addressed the significance of the use of the words "the effective date of", submitting that if such words had not been included then there could be no debate by Tower One as to the application of the provision. He submitted that the inclusion of these words did not make a difference to the interpretation:

(1) There can have been no intention to give a group immunity for transactions on the first part of the day on which the distribution transaction took place.

(2) "Date" is temporal and its meaning depends on the context; it is capable of referring to a year of a historic event, or being more precise as to a day of the month for a meeting. It is perfectly capable of meaning the time at which something happened and here that something is the distribution transaction. The "effective date" is concerned with when a transaction happened, a point in time.

(3) This is not a meaning that the provision cannot bear. If there are two choices in interpretation, one of which is illogical or absurd, and one of which gives effect to the purpose of the provision, we should adopt that which gives effect to the purpose of the provision.

136. As a matter of fact, the transaction between SGSL and B64 preceded the Transaction, even if only by a matter of an hour or so. It therefore falls within the

timeframe set out in the proviso in s54(4)(b).

137. As to Tower One's second argument, Mr Jones submitted that the legislation merely asks whether the prior transaction was one "in respect of which group relief was claimed". This is a simple question of fact, which is not unreasonable or anomalous. It does not invite or require an examination of the validity or outcome of the claim. Had Parliament intended otherwise then it is reasonable to suppose that this would have been stated expressly. Indeed, the use of a simple factual test is consistent with Parliament's selection of a fixed three-year look-back period - there does not appear to be any particular reason why this length of time has been selected as the cut-off point; Parliament has simply chosen to draw the line there for the sake of simplicity and ease of application. The choice of asking simply whether group relief "was claimed" is explicable on the same footing.

138. Moreover, on Tower One's construction it is not clear how the proviso is meant to be applied in practice. Suppose a distribution transaction takes place two weeks after a prior transaction in respect of which group relief has been claimed: is the prior group relief claim to be treated as successful because it has not been rejected (so that the Case 3 Exception cannot apply in respect of the distribution)? What if the claim is subsequently challenged by HMRC? What if that challenge is overturned by a tribunal on appeal? It cannot be the case that the proviso in s54(4)(b) is engaged, then dis-engaged, then re-engaged, etc depending on these events, such that whether the exception applies cannot be determined at the time that the distribution is made. This is not least because the taxpayer needs to file an SDLT1 return (and therefore decide whether SDLT applies to the distribution transaction) shortly after the effective date.

139. In any event, Mr Jones submitted that even on Tower One's construction, this aspect of the proviso was met. Tower One submits (in its written submissions) that the proviso requires "an intragroup transfer which enjoyed the benefit of group relief". Here, that was in fact the case. SGSL granted the Tower Lease to B64 and B64 made a claim for group relief under Schedule 7. HMRC had concluded that the group relief claim made by B64 did not need to be considered because sub-sale relief was available, and that group relief was not available to Tower One. However, the FTT has held that sub-sale relief did not apply to the circumstances of the grant of the Tower Lease by SGSL to B64 followed by the transfer from B64 to Tower One. The end result is that a group relief claim was made by B64 and no SDLT was paid by B64; on a "wait and see approach", the claim for group relief has in any event been allowed, ie the grant of the Tower Lease to B64 was "an intragroup transfer which enjoyed the benefit of group relief".

Discussion and conclusion

140. We have set out above the decision of the FTT and the alternative bases on which Tower One submitted that the FTT had made an error of law.

141. This ground of appeal turns on the interpretation of the Case 3 Exception and its application to the facts as found by the FTT. As we put to the parties at the hearing, there is an apparent tension or inconsistency between the alternative submissions for Tower One on this ground (and indeed in HMRC's responses thereto) - on the one hand, the submissions as to the grant of the lease to B64 not being within the specified period involve a narrow approach to the statutory language, whereas those as to whether group relief was claimed involved looking at what was said to be the overall substance of the position rather than simply looking at the relevant SDLT1. We have kept this in mind when considering the correct approach.

142. We start by reminding ourselves of the relevant general principles, in particular the purposive approach to statutory interpretation which has most recently been confirmed by the Supreme Court in *Rossendale*. That case involved schemes which (it was common

ground) had no business or other "real world" purpose, and their sole purpose was to avoid liability to pay business rates on unoccupied business premises (liability for which falls on the "owner" of the premises) by leasing the premises to an SPV controlled by the landlord, with the intended result that the SPV would be the "owner" of the premises but as the SPV had no assets it would not be able either to occupy the premises or to pay the rates on the unoccupied premises.

143. In a joint judgment, Lord Briggs and Lord Leggatt (with whom Lord Reed, Lord Hodge and Lord Kitchin agreed) set out the approach as follows:

> "10. There are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. Two examples will suffice. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, para 8, Lord Bingham of Cornhill said:
>
> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."
>
> In *Bloomsbury International Ltd v Department for the Environment, Food and Rural Affairs (Sea Fish Industry Authority intervening)* [2011] UKSC 25; [2011] 1 WLR 1546, para 10, Lord Mance stated:
>
> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance ... In this area, as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme."
>
> ...
>
> 11. The result of applying the purposive approach to fiscal legislation has often been to disregard transactions or elements of transactions which have no business purpose and have as their sole aim the avoidance of tax. This is not because of any principle that a transaction otherwise effective to achieve a tax advantage should be treated as ineffective to do so if it is undertaken for the purpose of tax avoidance. It is because it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance....
>
> 12. Another aspect of the *Ramsay* approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. Again, this is no more than an application of general principle. Although a statute must be applied to a state of affairs which exists, or to transaction which occurs, at a particular point in time, the question whether the state of affairs or the transaction was part of a preconceived plan which included further steps may well be relevant to whether the state of affairs or transaction falls within the statutory description, construed in the light of its purpose....

> 13. The decision of the House of Lords in the *Barclays Mercantile* case made it clear beyond dispute that the approach for which the Ramsay line of cases is authority is an application of general principles of statutory interpretation. Lord Nicholls of Birkenhead, delivering the joint opinion of the appellate committee (which also comprised Lord Steyn, Lord Hoffmann, Lord Hope of Craighead and Lord Walker of Gestingthorpe), identified the "essence" of the approach (at para 32) as being:
>
> "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."
>
> Lord Nicholls also quoted with approval (at para 36) the statement of Ribeiro PJ in *Arrowtown*, para 35, that:
>
> "the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.""

144. Their Lordships then described the approach to take as follows:

> "15. In the task of ascertaining whether a particular statutory provision imposes a charge, or grants an exemption from a charge, the *Ramsay* approach is generally described - as it is in the statements quoted above - as involving two components or stages. The first is to ascertain the class of facts (which may or may not be transactions) intended to be affected by the charge or exemption. This is a process of interpretation of the statutory provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they "answer to the statutory description" (*Barclays Mercantile* at para 32). This may be described as a process of application of the statutory provision to the facts. It is useful to distinguish these processes, although there is no rigid demarcation between them and an iterative approach may be required.
>
> 16. Both interpretation and application share the need to avoid tunnel vision. The particular charging or exempting provision must be construed in the context of the whole statutory scheme within which it is contained. The identification of its purpose may require an even wider review, extending to the history of the statutory provision or scheme and its political or social objective, to the extent that this can reliably be ascertained from admissible material.
>
> 17. Likewise, the facts must be also be looked at in the round..."

145. Lord Briggs and Lord Leggatt then referred to the historical background to the levying of rates, the common law rules relating to whether property was occupied, provisions for levying rates on unoccupied property, and the exceptions from liability. Their Lordships set out the facts of the schemes which were in issue, and applied the legislation to the alleged facts.

146. Following this approach, we focus on the language of s54(4) itself, in its statutory context, in order to determine the nature of the transaction, or class of facts, to which the Case 3 Exception is intended to apply and whether the actual transaction in this case answers to that description.

147. We have outlined the statutory scheme of SDLT at [19] to [27] above.

148. SDLT is charged on the "chargeable consideration" for the transaction, which is generally the actual consideration given for the subject-matter of the transaction. Where the land transaction is between connected companies, s53(1A) requires that the chargeable consideration is taken to be not less than the market value of the subject-matter of the transaction.

149. There are then three exceptions to the deemed market value rule, of which the Case 3 Exception is one. The conditions that must be satisfied for its application are in s54(4), and there are two components:

> (1) the vendor is a company and the transaction is, or is part of, a distribution of the assets of that company; and
>
> (2) it is not the case that the subject-matter of the transaction has, within the period of three years immediately preceding the effective date of the distribution transaction, been the subject of a transaction in respect of which group relief was claimed by the vendor.

150. In written submissions following the hearing (which are reflected in our summary of the parties' submissions above) both parties addressed what they submitted was the purpose of the Case 3 Exception. Mr Jones submitted that, subject to the meaning of the word "claimed", it appeared that there is actually not much disagreement between the parties as to the purpose of the proviso. We consider that to be a somewhat optimistic view of the parties' submissions. Tower One's submissions emphasised that this was an anti-avoidance provision to prevent abuse of group relief in circumstances where the subject-matter of the group transaction was then transferred out of the group by way of distribution. HMRC's submissions on purpose largely paraphrased the language of the proviso itself, but referring to the three year period for the lookback as being the three years prior to the distribution transaction in question, rather than making any reference to the effective date.

151. Mr Jones did refer us to the Explanatory Notes to this part of the Finance Bill 2003 which stated:

> "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." (underlining added)

152. We recognise that Explanatory Notes such as these can only play a secondary role in statutory interpretation. This is a principle which has been repeatedly emphasised, including recently in *R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department* [2022] UKSC 3 where Lord Hodge (with whom Lord Briggs, Lord Stephens and Lady Rose agreed) said that in the process of statutory interpretation:

> "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....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."

153. Addressing first the nature of the transactions to which the Case 3 Exception is intended to apply, this is an exception to the deemed market value rule that applies where the purchaser and vendor are connected. Whilst this exception may operate as an anti-avoidance provision, its terms do not include a main purpose or main benefit test (or any

other express reference to the avoidance of either tax generally or SDLT specifically), nor is there any carve-out or exception to the proviso that applies where the end result of a series of transactions does not involve the subject-matter leaving the group.

154. Having set out the condition that the later transaction is, or part of, a distribution of the assets of the vendor company, the proviso requires that the subject-matter of the transaction has not been the subject of a transaction in respect of which group relief was claimed by the vendor.

155. As a starting-point, we consider it is self-evident that it is essential that the relevant vendor has made a claim for group relief on the SDLT1 which it filed in respect of the prior transaction. Neither party made any submissions to the contrary. The parties differed as to whether that is sufficient.

156. We do accept that if no regard is to be had to subsequent events then, as Ms Shaw pointed out, this would mean that the Case 3 Exception is unavailable both where a vendor has claimed group relief to which it was entitled (or at least which has not been the subject of a challenge by HMRC) and has thus been exempted from SDLT on the prior transaction and where a vendor claims group relief on the SDLT1 but ultimately does not benefit from such relief (whether as a result of withdrawal of the claim or following a successful HMRC challenge or otherwise).

157. It was open to Parliament to use different language, eg "a valid claim was made for group relief" or the prior transaction "was exempt from charge by virtue of s62". This would have made it clear that the application of the Case 3 Exception needed to be determined by reference not only to the fact of a group relief claim having been made but also to the outcome of such claim. We are wary of adopting an interpretation which involves reading such additional requirements into the statutory language which has been used where such statutory language does not result in absurdity. We recognise that there may be other factual situations where the question whether "group relief was claimed" needs to be considered further (eg if group relief is stated to be claimed on an SDLT1 but that return is amended the following day to withdraw such claim for the reason that the necessary group relationship does not exist). We do not consider that the possibility of such a situation arising required the insertion of an implied condition into the statutory language such as "valid".

158. The proviso also specifies the period within which the relevant prior transaction is to have taken place, as "within the period of three years immediately preceding the effective date of the transaction". Ms Shaw submitted that such period does not include any transactions entered into earlier in the day of the later transaction. This submission is based on the reference to "preceding the effective date of the transaction", as s119 provides that the "effective date" of a land transaction is the date of completion. Mr Jones submitted that the legislation should not be read as creating any such gap.

159. We recognise that the language "within the period of three years immediately preceding the effective date of the transaction" could be construed as Ms Shaw submits and thus capture only transactions which had occurred in a period which ended on the day before the date that was the effective date of the later transaction. However, we agree with Mr Jones that there appears to be no policy reason why a transaction which had occurred earlier on the same day as the distribution transaction should not be caught, in contrast to one which had taken place a week earlier or two years beforehand.

160. As acknowledged by both parties, there can be no doubt that HMRC's position would be correct if s54(4)(b) referred only to the period of three years immediately preceding the transaction, or if it referred to the period of three years immediately preceding and including the effective date of the transaction.

161. In terms of ascertaining the nature of the transactions to which this part of the proviso was intended to apply, we have regard to the apparent absurdity in policy terms of leaving what Mr Jones described as an "uncovered gap" in the form of transactions which occurred earlier on the effective date, and we place considerable weight on the use of the phrase "immediately preceding" in the legislation. This phrase shows that transactions immediately before the distribution transaction were intended to be within the specified period, and we consider that we should be slow to adopt an interpretation which would mean that those transactions which had occurred the most immediately beforehand (ie that same day) were not within the prescribed period. Such an approach is supported by the Explanatory Notes which, as set out above, state that the exception 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". This explanation focuses on the occurrence of the transactions themselves, which is consistent with SDLT being a tax on transactions.

162. This means that we consider that the relevant period for lookback should be interpreted as the three years prior to the transaction itself.

163. For completeness, we would add that we do not accept Mr Jones' submissions that "the effective date" should be read as a reference to the particular point in time at which an event occurred. We consider that such an approach is contrary to the way in which that defined term is generally used throughout FA 2003.

164. When we look at the facts in the round, SGSL, B64 and Tower One are connected companies. SGSL granted the Tower Lease to B64, which then transferred the Tower Lease to Tower One later that same day. B64 submitted a SDLT1 claiming group relief on the grant of the Tower Lease and has not paid SDLT on that grant.

165. Whilst Ms Shaw submitted that it is factually incorrect to say that the claim for group relief was made and, in practice, succeeded, drawing attention to HMRC's conclusion that group relief was not available to Tower One on the subsequent transaction, and that HMRC had proceeded on the basis that sub-sale relief was instead available to B64, we consider that viewed realistically the facts were that B64 made a claim for group relief and has not paid SDLT on the grant of the Tower Lease and that this is within the class of facts intended to be captured by the proviso to the Case 3 Exception.

166. The question is then whether the timing of this grant was within the period specified by the proviso. The grant was on the same date as the subsequent transfer of the Tower Lease from B64 to Tower One. On the basis of our conclusions as to the nature of the transactions to which the Case 3 Exception applies, the grant was within the required period as it has occurred within three years of the transfer of the Tower Lease, and it should not be treated as having been outside the relevant class of facts simply because it occurred earlier on the day of the Transaction.

167. For these reasons, we conclude that the Transaction, ie the transfer from B64 to Tower One, was not within the Case 3 Exception to the deemed market value rule. The Tower Lease had, "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 [B64]".

168. Therefore, the FTT did not make an error of law in concluding that the Case 3 Exception did not apply to the Transaction and Ground 2 of Tower One's appeal is dismissed.

SECTION 75A

169. In view of our conclusions reached above, it is unnecessary for us to determine HMRC's alternative argument that s75A applied and we do not do so.

DISPOSITION

170. Tower One's appeal against the Decision is dismissed.

JUDGE JEANETTE ZAMAN
JUDGE TRACEY BOWLER

UPPER TRIBUNAL JUDGES

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