TC07693

STAMP DUTY LAND TAX *— application of transitional rules in section 2 of the Stamp Duty Land Tax Act 2015 – whether transaction effected in pursuance of a contract entered into before applicable date – yes – whether contract varied, or other transaction took place, on or after applicable date – no – appeal allowed*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/06115

BETWEEN

LADYWALK LLP **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANDREW SCOTT

Sitting in public at Taylor House, London EC1 on 12 and 13 December 2019 with further written representations from the parties on 10, 13 and 24 January 2020 and 6 February 2020

Mr Alastair Thomson, instructed by Bryan Cave Leighton Paisner LLP, for the appellant

Ms Barbara Belgrano, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

INTRODUCTION

1. This appeal concerns the application of the transitional rules on the introduction of the new system for calculating stamp duty land tax (SDLT) on the purchase of residential property that became operational in respect of transactions taking place on or after 4 December 2014. The transitional rules in question included provision for a purchaser of residential property to make an election for the relevant transactions to be taxed in accordance with the old rules if the transactions were effected in pursuance of a contract entered into before the operational date of the new rules (4 December 2014) and no relevant event occurred on or after that date to exclude those contracts from the transitional protection. The question that falls to be determined in this appeal is whether the purchaser was entitled to make the election.

2. The relevant transactions were the purchase of two properties known as Ladywalk and Bramble Lodge (and in what follows a reference to the Ladywalk properties includes both Ladywalk and Bramble Lodge). The contract for the sale of the Ladywalk properties was entered into on 11 June 2014. The properties were conveyed on 17 July 2015 to a limited liability partnership, Ladywalk LLP (and in what follows a reference to the LLP is a reference to Ladywalk LLP). The LLP was constituted after 4 December 2014, and, accordingly, it was common ground that it could not have been a party to the contract before that time. The membership interests in the LLP were held by Continental Administration Services Limited, St Kitss and Nevis ("CASL"). For the purposes of SDLT, the LLP was treated as transparent.

3. On 16 September 2016 HMRC issued closure notices under paragraph 23 of Schedule 10 to the Finance Act 2003 ("FA 2003") in respect of the acquisition of Ladywalk and Bramble Lodge and amended the land transaction returns in relation to Ladywalk and Bramble Lodge to show additional SDLT of £919,920.00 (plus interest of £30,114.82) for Ladywalk and additional SDLT of £150,000 (plus interest of £4,910.44) for Bramble Lodge.

4. On 27 September 2016 the LLP appealed the closure notices to HMRC and, following that appeal, HMRC accepted that CASL was not a "non-natural purchaser of a residential property" and was therefore not liable to the higher rate of 15% SDLT. That higher rate of SDLT would have been chargeable in respect of the purchase of the Ladywalk properties if (looking through the transparent LLP) CASL was a company (see paragraph 3(3)(a) of Schedule 4A to FA 2003). But "company" was defined so as not to include a company acting in its capacity as trustee of a "settlement" (paragraph 3(4) of Sch.4A), which is defined as a trust other than a bare trust (paragraph 1(1) of Sch.16).

5. HMRC accepted that, because CASL was a trustee of various settlements and was acting in its capacity as trustee of those settlements, it was not a company for the purposes of para. 3 of Sch.4A to FA 2003 and therefore the 15% SDLT rate did not apply.

6. On 31 March 2017 HMRC issued a "View of the Matter Letter" and concluded that: (1) the transactions relating to the Ladywalk properties should be treated as linked for the purposes of section 108 of FA 2003; (2) the effective date of the transactions for the calculation of SDLT was 17 July 2015 and the LLP could not rely on the transitional rule because the relevant contract had been varied; and (3) the 15% rate of SDLT did not apply. Having accepted that the 15% SDLT charge did not apply, HMRC calculated the additional SDLT to be payable as follows: £498,693 in respect of Ladywalk and £ 95,046 in respect of Bramble Lodge.

7. The LLP requested a review of HMRC's decisions on 9 April 2017. On 22 May 2017 HMRC upheld the decisions that: (1) the effective date of the transactions for the calculation of SDLT was 17 July 2015 and the LLP could not rely on the transitional rule; and (2) the

transactions relating to the Ladywalk properties should be treated as linked for the purposes of s.108 of FA 2003.

8. The LLP appealed to this tribunal by a notice of appeal dated 16 June 2017.

9. In the LLP's original grounds of appeal it contested HMRC's view that the transactions at issue in this appeal were "linked transactions" for the purposes of s.108 of FA 2003. By the time of the hearing the LLP had abandoned its appeal on that issue. It was accepted by Mr Thomson on behalf of the LLP that the consequence of the transactions for the purchase of the Ladywalk properties being "linked" was that there was an additional £30,000 of SDLT payable even if the LLP was successful in its submission that it was entitled to transitional protection so that the old rules for calculating SDLT applied to the transactions.

SUBMISSIONS OF THE PARTIES

10. This appeal turns on two principal issues:

(1) whether the transactions for the purchase of the Ladywalk properties on 17 July 2015 were for the purposes of SDLT effected in pursuance of a contract; and

(2) if so, whether anything happened on or after 4 December 2014 of such a kind that, even though the transactions were effected in pursuance of a contract, transitional protection was lost.

11. HMRC submitted that, as a result of the application of section 44 of FA 2003, the transactions were not effected in pursuance of the contract. That was because the person to whom the Ladywalk properties were conveyed (the LLP) was different from the person who was the party to the contract and, consequently, there had been no completion of the contract within the meaning of section 44 with the result that the contract was disregarded for SDLT purposes. Shortly before the hearing began, HMRC sought to arrive at the same outcome via section 44A of FA 2003 but, as explained below, permission to make submissions to that end was denied by me at the outset of the proceedings and, having been invited to make written representations after the hearing as to the true function of s.44A for the purposes of SDLT, HMRC conceded that the "better view" was that it had no application in relation to the facts of this case.

12. HMRC also submitted that, even if the transactions were effected in pursuance of a contract entered into before 4 December 2014, there had been a relevant event occurring on or after that date that resulted in the transactions being excluded from the transitional protection.

13. HMRC submitted that the contract had been varied after 4 December 2014. The principal ground on which they relied was one that was, again, raised shortly before the hearing, namely that an agreement entered into in June 2015 had varied the contract. The other ground (which was relied on in the closure notice) was that the contract had been varied because the Ladywalk properties were conveyed to a person (the LLP) who was not a party to the contract. Accordingly, the effect of the contract on completion was different from its intended effect when entered into and it followed, therefore, that there had been a variation of the contract for the purposes of the transitional rules.

14. Those submissions focused on whether events occurring after 4 December 2014 could be regarded as variations of a contract. As an alternative, HMRC submitted that, if those events had not varied the contract for the purposes of the transitional rules, the tribunal should infer that there must have been an assignment, subsale or other transaction relating to the Ladywalk properties as a result of which the LLP (who was not the purchaser under the contract) became entitled to call for a conveyance to it.

15. Mr Thomson's case on behalf of the appellant was, in essence, a simple one. He argued that, on a simple reading of the relevant statutory provisions, the transactions for the Ladywalk properties had been effected in pursuance of a contract entered into before 4 December 2014. Moreover, properly understood, what happened after 4 December 2014 was simply the performance of the original contract. The June 2015 agreement was a separate contract that had no effect at all on the terms of the original contract. And the conveyance to the LLP was plainly something that had been contemplated by the terms of the contract.

16. That was, in part, because the persons with, to use a neutral expression, the substantive economic interests in the Ladywalk properties were the beneficiaries of the trusts on which CASL held its membership interests in the LLP. Indeed, Mr Thomson went further than this and submitted that the beneficiaries under the trusts were, as a matter of law, entitled to deal with the Ladywalk properties and the combined effect of two separate deeming provisions of the SDLT code were that they (rather than the members of the LLP) should be regarded as the purchasers of the Ladywalk properties.

PRELIMINARY ISSUE

17. Shortly before the hearing began (29 November 2019), HMRC sought to make substantive revisions to their statement of case. The revisions included two new points, namely: (1) submissions that rested on the application of s.44A of FA 2003 and invited the tribunal to draw an inference that an agreement existed; and (2) a submission that an agreement in June 2015 constituted a variation of the original contract. In addition, HMRC sought to rely on two further documents, namely charge documents to which the LLP was a party.

18. Having heard submissions from the parties, I gave permission for HMRC to advance the variation argument but denied them permission to make submissions on the application of s.44A of FA 2003. I did not allow the charge documents to be added to the agreed bundle of documents.

19. In arriving at that decision, I had regard to the overriding objective contained in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT rules") to deal with the case fairly and justly, and, in particular, to rule 25(2)(a) of the FTT rules, which required HMRC to state the legislative provision under which the decision under appeal was made.

20. I also applied the principles set out in the High Court case of *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm), which although addressed to proceedings before the commercial court are, in my view, equally applicable to determining HMRC's application. Those principles required an assessment of: (1) the reason for the lateness and delay in making the new points; (2) the strength of the new case; and (3) the prejudice caused if the new points were made.

21. So far as the reasons for lateness were concerned, the following was said at [47] of *Quah* in respect of the facts of that case:

> "There is no good reason for their lateness. At most they would appear to arise out of a fresh examination of possible arguments by fresh counsel. This is precisely the sort of reason that does not find favour with the courts (see *Worldwide Corp Ltd* (supra))."

22. Counsel for HMRC acknowledged that the s.44A argument was an argument to which she had come to late in the course of preparing for the hearing.

23. On behalf of the appellant, Mr Thomson considered that there would be prejudice to the appellant in allowing the points to be raised as they affected the decision as to whether the

appellant should adduce evidence (including witness evidence) to rebut the existence of any agreement sought to be inferred for the purposes of the s.44A argument.

24. No real point was taken by Mr Thomson as to the strength of the new case.

25. I considered that this was a case where, in respect of the s.44A argument, the reason in making the point late was not a good one and that, although I had no particular view as to the merit of the s.44A argument, there was a risk of prejudice to the appellant for the reasons given by Mr Thomson. Having regard to the overriding objective of the FTT rules, I considered that, on balance, the fair and just outcome was one that permitted HMRC to make its new variation point but not the s.44A argument. As the charge documents seemed to be of relevance to the inference of a transaction contemplated by the s.44A argument, I also considered that they should not be admitted.

26. Having announced that decision at the start of the substantive hearing, the parties very properly conducted the proceedings in the light of that decision and, in particular, made no submissions in relation to the s.44A point or the significance of the charge documents. However, having regard to the way in which the case was subsequently put by both parties and to the further questions raised by me on which written submissions were submitted to the tribunal after the hearing (including as to the role of s.44A of FA 2003 for the purposes of SDLT), the practical significance of my decision has reduced markedly.

27. In their written submissions to the tribunal after the hearing, HMRC reversed the position that they had sought to take in relation to the application of s.44A to the facts of the case. They subsequently considered that the better view was that the section had in fact no application. As explained below, I agree with that conclusion.

28. It was also plain that the inference of a separate contract or other transaction was relevant to one of the arguments for which HMRC did have permission to make. As I explain below, it is clear to me that there is no warrant to infer the existence of any other transaction. Once the June 2014 contract is correctly understood, there is no need to seek out other transactions to explain why the properties were transferred to the LLP.

29. As indicated by HMRC in their case for admitting the documents into the agreed bundle, the charge documents were already referred to in the LLP's accounts and the formal admission of them would have simply confirmed the truth of that part of those accounts. As recorded below, I find as a fact that there were charges subsisting against the properties in the terms set out in the LLP's accounts.

30. In coming to my conclusions in this judgment, I also consider that, for the reasons given below, the precise terms of the charge documents have no relevance to any issues falling to be decided by me. That is because the most that those documents could do would be to confirm me in a view I would reach without regard to them, namely that the LLP was at all material times the beneficial owner of the Ladywalk properties. The charge documents are entirely consistent with that conclusion and seem to me to have no relevance to any other issues relevant to the determination of this appeal.

FINDINGS OF FACT

31. The appellant did not call any witnesses. The only sources for the following findings of fact were those contained in the hearing bundle prepared by the appellant.

32. Anthony Hamilton was the owner of an estate in Queens Hoo Lane, Tewin, Welwyn comprising a main house, Ladywalk, and a lodge, Bramble Lodge. Anthony Hamilton (who is the father of the Formula 1 racing driver, Lewis Hamilton) was known to Dr Vijay Mallya through motor racing.

33. On 11 June 2014 Dr Mallya visited the Ladywalk properties. At the time the properties were on the market and there had already been interest in them from a prospective buyer.

34. On the same day that he visited the properties Dr Mallya made an offer to buy them. Mr Hamilton accepted the offer, and, also on the same day, the offer and acceptance and the other terms of the agreement to buy the properties were set out in a written agreement signed by Dr Mallya and Mr Hamilton and dated 11 June 2014.

35. The agreement set out at the beginning the key terms of the agreement, namely "BUYER", "SELLER" and "PROPERTY".

36. "BUYER" was defined as:

> "Dr. Vijay Mallya and/or
>
> Miss Leana Vijay Mallya
>
> Miss Tanya Vijay Mallya
>
> Mr Sidhartha Vijay Mallya
>
> OR to his/their order
>
> 18/19 Cornwall Terrace, London, NW1 4QP".

37. The Cornwall Terrace address was Dr Mallya's residential address.

38. "SELLER" was defined as Mr Anthony Hamilton with his address given as that of Ladywalk.

39. "PROPERTY" was defined as "Ladywalk" and "Bramble Lodge", with the address shown for each as Queen Hoo Lane, Tewin, Welwyn, Hertfordshire, AL6 0LT.

40. There then followed five substantive clauses in the following terms:

> "1) The Buyer agrees to buy and the Seller agrees to sell the above property at a price of £12,999,999/ (GBP 12,999,999 MILLION).
>
> 2) The agreed price is inclusive of all fitted curtains, carpets and appliances excluding the simulator in the garage.
>
> 3) The property will not be listed by Savills or Knight Frank and all sales initiatives will be suspended immediately.
>
> 4) Completion will be mutually agreed when the Seller has made alternative living arrangements.
>
> 5) This Agreement is binding on both parties and will form the basis of detailed sale/purchase agreements."

41. There was no evidence that there were other terms of the agreement that had not been included in the agreement. Accordingly, among other things, it follows that the agreement did not require the payment of a deposit by the buyer.

42. The agreement ended with the signature of Dr Mallya followed by:

> "THE BUYER
>
> DR VIJAY MALLYA
>
> DATE: 11/6/2014".

43. I discuss further below who, as a matter of law, were the parties to the contract but I note here that the contract was signed *only* by Dr Mallya and that, underneath the Buyer, there was reference *only* to Dr Mallya. There was no evidence that either of his daughters or his son had accompanied him to view the property on 11 June 2014. There was also no evidence that Dr

Mallya had the actual authority of either of his daughters or his son to enter into the contract on their behalf. Accordingly, I find as a fact that none of his children had authorised Dr Mallya to make them parties to a contract to buy the property.

44. There was also no evidence before the tribunal that could be relied on to support a finding that Dr Mallya had ostensible or other implied authority to act on their behalf so as legally to bind them to perform the contract.

45. Dr Mallya's signature was witnessed by Dr Lakshmi Kanthan.

46. The agreement also ended with the signature of Mr Anthony Hamilton dated 11 June 2014. His signature was witnessed by Mr Robert Fernley.

47. Included in the hearing bundle as an annex to the appellant's amended ground of appeal was an opinion by Kenneth MacLean QC and Simon Gilson dated 13 December 2017 that was obtained on behalf of the appellant but in the knowledge that it would be disclosed to HMRC. That opinion included, as factual background, certain material derived from Counsel's instructing solicitors. In that opinion it was recorded at [7] that Dr Mallya had been looking for a new family home for his daughters. It was also recorded at [15] that although the property would be bought as a home for his two daughters, the property would, subject to advice, be likely to he held through a trust or other structure for the benefit of his daughters (Leana and Tanya) and son (Sidhartha).

48. Although the opinion of Counsel represents double hearsay evidence (so far as relating to the factual background), the tribunal is entitled to take it into account as admissible evidence (see rule 15(2)(a) of the FTT rules, which empowers the tribunal to admit evidence whether or not it would be admissible in a civil trial in the United Kingdom) recognising that the weight to be attached to it would reflect the nature of the evidence. Mindful of the limited weight that should be attached to evidence of this kind, I nonetheless consider that, with particular regard to the way in which "BUYER" was defined to include Dr Mallya's daughters and son and the specific reference in the definition to "his/their order", it is more likely than not that the factual background recorded by Counsel is an accurate account of the relevant context. I have regard, in coming to that view, to the fact that HMRC did not dispute in the course of the enquiry any of the events leading to the making of the agreement on 11 June 2014. As I discuss further below, I should, however, make it clear that, in construing the contract as a matter of law, it is, in my view, clear that the terms of the contract expressly anticipate that the transfer of the property could be made to named members of Dr Mallya's family, including by way of trust. Put another way, there is nothing in the evidence suggesting that the definition should not be read as meaning what it says.

49. On 29 January 2015 a "limited partnership agreement" was entered into by (1) CASL (Continental Administration Services Limited) as trustee of the Sileta Trust, as General Partner; (2) CASL as trustee of the Welwyn Property Trust, as Limited Partner I; and (3) CASL as trustee of the Tewin Property Trust, as Limited Partner II.

50. CASL is a corporate trustee company administered from Switzerland. Mr Andrea Rishaal Vallabh ("AV") is a director of CASL and he executed the limited partnership agreement as a deed on behalf of each of the parties. CASL was constituted under the law of St Kitts and Nevis.

51. Recital A of the limited partnership agreement provides for the partnership to be known as "Ladywalk LLP" even though it went on to provide that Ladywalk LLP "will be established as a limited partnership in England and Wales under the Limited Partnerships Act 1907" (rather than as a limited liability partnership under the Limited Liability Partnerships Act 2000). Clause 3 of the agreement provided that the purpose of the partnership was to "carry on the

business of investing in, owning and letting residential property". Clause 11 of the agreement provides that the net profits of the partnership were to be divided as follows: limited partners 99.9% (49.95% each); and the general partner 0.1%.

52. In the event, no limited partnership was in fact formed; but, as explained below, the terms of the limited partnership agreement are relevant to the manner in which the membership interests in Ladywalk LLP are held.

53. CASL executed the limited partnership agreement as trustee for three separate trusts as mentioned above: the Sileta Trust, the Welwyn Property Trust, and the Tewin Property Trust.

54. The settlor of the Sileta trust was Mrs Lalitha Mallya, the mother of Dr Mallya. The Sileta trust was established on 21 July 2007. The terms of the trust included provision for the beneficiaries to be "any person or persons, charity added and/or appointed in exercise of the powers herein conferred upon the Trustees with prior consent of the Protector". The protector was Dr Mallya (see the third Schedule to the settlement). The trust was established for the "Trust Period", a period beginning with the creation of the settlement and ending 100 years later or with an earlier date appointed by the trustees.

55. Clause 5 of the settlement set out detailed powers of appointment and advancement, including provision for transferring property comprised in the settlement to other trusts under which any or more of the beneficiaries were interested (even if other persons were also interested and even if the other trust contained discretionary powers) and provision for settling the property on any one or more of the beneficiaries. Clause 6 conferred power on the trustees to make, at the request of a beneficiary, payments to charities. Clause 8 conferred a power on the trustees to add at any time during the trust period other persons who were not, under provision conferred by clause 9, excluded persons.

56. Clauses 13 and 14 of the settlement gave detailed powers of investment to the trustees, which included, in respect of any real or immoveable property, "all the powers of an absolute beneficial owner". Among other things, it is clear that the trustees could dispose of their interests in the settled property by sale or by means of other transactions.

57. The governing law in relation to the Sileta trust was expressed to be the law under which the settlement was established or the law of such other jurisdiction as may be specified in an instrument pursuant to clause 11(a). There was no evidence of the existence of an instrument pursuant to clause 11(a).

58. Dr Mallya's two daughters (Leana and Tanya) and son (Sidhartha) were (with the consent of Dr Mallya as protector) added as beneficiaries of the Sileta trust by a resolution of the trustees dated 1 May 2016. There was no evidence as to the beneficiaries of the trust *before* that date, including at the time that the Ladywalk properties were transferred by Mr Hamilton. Accordingly, I make no finding as to the beneficiaries at that time and find instead that CASL as trustee of the Sileta trust was holding its interest in the LLP for beneficiaries that were yet to be appointed.

59. Both the Welwyn Property Trust and the Tewin Property Trust were established on 25 January 2015 (four days before the limited partnership agreement mentioned above was entered into). The terms of each trust were the same (or substantially the same). The beneficiaries were: (a) the descendants of Mrs Lalitha added or appointed under the trust; (b) any trust established under which "any beneficiary may benefit"; and (c) any person or persons or charity added or appointed under the trust. Like the Sileta tust, each trust was established for the "Trust Period", a period beginning with the creation of the settlement and ending 100 years later or with an earlier date appointed by the trustees.

60. Again in much the same way as the Sileta trust, clause 4 of the trust set out detailed powers of appointment and advancement, including provision for transferring property comprised in the settlement to other trusts under which any or more of the beneficiaries were interested (even if other persons were also interested and even if the other trust contained discretionary powers) and provision for settling the property on any one or more of the beneficiaries.

61. Clause 5 provided for default trusts of income and capital, which included provision for their taking effect at the end of the trust period. The clause provided for the trust fund to be held upon trust for one or more of the descendants of "the Primary Beneficiary". But the clause also secured that if the trustee did not make any appointments under clause 4 and did not appoint any other "Beneficiary", the trustee would hold the trust fund on trust "…for such Charities as the Trustees shall determine.".

62. Like the Sileta trust, clause 6 conferred power on the trustees to make, at the request of a beneficiary, payments to charities. And, again like the Sileta trust, clause 8 conferred a power on the trustees to add at any time during the trust period other persons who were not, under provision conferred by clause 9, excluded persons.

63. Similarly, clauses 13 and 14 of each trust gave detailed powers of investment to the trustees, which included, in respect of any real or immoveable property, "all the powers of an absolute beneficial owner". Among other things, those provisions made it clear that the trustees could dispose of their interests in the settled property by sale or by means of other transactions.

64. Both trusts were expressed to be subject to the law of the British Virgin Islands or the law of such other jurisdiction as may be specified pursuant to clause 11(a). There was no evidence of any other law being specified pursuant to that provison.

65. On 25 January 2015 Mrs Lalitha Mallya wrote to CASL setting out her wish for Tanya Mallya to be the sole beneficiary of the Tewin Property Trust. On 27 January 2015 Tanya Mallya was duly appointed as the sole beneficiary of that trust with immediate effect.

66. On 25 January 2015 Mrs Lalitha Mallya wrote to CASL setting out her wish for Leana Mallya to be the sole beneficiary of the Welwyn Property Trust. On 27 January 2015 Leana Mallya was duly appointed as the sole beneficiary of that trust with immediate effect.

67. Payments were made to Mr Hamilton in respect of the outstanding balance payable for the property totalling £1,300,000. The Counsel opinion mentioned above records those payments as having been made on 13 March 2015, 31 March 2015 and 15 April 2015. Although, as stated above, this is hearsay evidence, I consider that it is more likely than not that the payments were made on those dates. There was no evidence who made those payments and, accordingly, I make no finding as to who was the payor. There was also no evidence that Mr Hamilton did anything other than receive the payments.

68. I discuss below how, as a matter of law, to characterise those payments.

69. On 4 June 2015 an agreement was entered into relating to the Ladywalk properties. The agreement had the following heading:

> "**Sub: Sale of Bramble Lodge & Ladywalk (the properties)**
>
> **Ref: Sale Purchase Agreement dated 11 June 2014 (Exchange of Contract)**"

70. The 4 June 2014 agreement went on to provide as follows:

> "1. The Buyer has agreed to pay a further deposit advance of £4,500,000 against the agreed £12,999,999 purchase price for the Ladywalk and Bramble Lodge properties split as follows:

i. Bramble Lodge - £1,500,000

ii. Ladywalk - £11,499,999

2. A deposit advance of £1,300,000 has already been paid by the Buyer against the above Agreement.

3. The additional deposit of £4,500,000 will be actioned as follows

i. £1,500,000 upon the anticipated completion of Bramble Lodge,

ii £3,000,000 will be paid upon signature of this agreement.

4. The sale transaction for the main house as contemplated under the 11 June, 2014 agreement is scheduled to complete on or before 15 July, 2015. The balance payable will be £7,200,000. Each of the parties has the right of specific performance against the other. [underlining in original]

5. The Seller agrees to allow full access to the properties for the nominated builders to carry out the agreed refurbishment works.

6. The further deposit will be paid to the following account: [...]."

71. The agreement was signed by Dr Mallya "FOR & ON BEHALF OF BUYER(S)" and was signed by Mr Hamilton. Neither signature was witnessed.

72. Ladywalk LLP is a limited liability partnership incorporated under the Limited Liability Partnerships Act 2000 on 3 July 2015 (partnership no. OC400673). Its registered office address is Ladywalk property. Its members are AV and CASL.

73. An LLP Members' Agreement dated 3 July 2015 was entered into by AH, CASL and Ladywalk LLP. Clause 8.1 of the agreement provides that: "Any property, securities or other assets of whatsoever kind held by the LLP at the date of this Agreement or acquired after that date on behalf of the LLP shall be the property of the LLP and shall be held in the LLP Name, and if held in the names of Members shall be held by such Members in trust for the LLP."

74. On the same date (3 July 2015) AV signed a declaration to the effect that he held his interest in Ladywalk LLP as nominee of and trustee for CASL as trustee of the Sileta Trust.

75. It is now that the (unperformed) limited partnership agreement has some relevance. It was submitted by the appellant – a submission that I accept – that the limited partnership agreement established the entitlements of CASL and AV to the capital and profits and losses of Ladywalk LLP. That is, in my view, consistent with other established facts. The limited partnership agreement was entered into on 29 January 2015, four days after the establishment of the Tewin Property Trust and the Welwyn Property and two days after the appointment of Tanya Mallya as the sole beneficiary of the Tewin Property Trust and two days after Leana Mallya was appointed as the sole beneficiary of the Welwyn Property Trust. It is, in my judgment, no coincidence that the names of the two trusts were each taken from the address of Ladywalk.

76. It is also plain that CASL is a trustee company: it must be holding its interest for someone else and the question is who that someone is. There is uncontested evidence, as indicated above, as to the beneficiaries of the particular trusts. There is also a letter from CASL dated 23 August 2017 establishing that the membership interests that CASL was holding in Ladywalk LLP were held on the same trusts in the same proportions as set out in the limited partnership agreement. It is true that this letter says nothing in terms about the membership interests from the establishment of the LLP until 23 August 2017, but, having regard to the overall evidence, it seems to me more likely than not that the interests were unchanged. The presumption of continuity is, I consider, relevant here. And there is no evidence at all pointing to any other conclusion.

77. I should point out that the letter of 23 August 2017 purports to confirm the details of the beneficial owners of Ladywalk (and presumably Bramble Lodge as well) rather than the beneficial ownership of the interests in the LLP. I do not consider, however, that anything turns on this. I consider that it is more likely than not that CASL was not addressing its mind to the true legal position that the LLP was, as a separate person, the legal and beneficial owner of the property. The effect of the letter was, nonetheless, clear.

78. On 17 July 2015 Ladywalk LLP purchased Ladywalk and Bramble Lodge.

79. Ladywalk and Bramble Lodge have separate land registry titles. On 17 July 2015 Mr Anthony Hamilton signed, as a deed, forms transferring the whole of the registered titles of Ladywalk and Bramble Lodge to the LLP. The forms stated that Mr Hamilton had received the following consideration from the LLP for the property: (1) £11,499,999 in respect of Ladywalk; and (2) £1,500,000 in respect of Bramble lodge.

80. The SDLT returns for each property reflected the terms of the transfers. Each return recorded the effective date of the transaction as 17 July 2015 and provided that the date of the contract was 11 June 2014.

81. The accounts of Ladywalk LLP for the period from 3 July 2015 to 31 July 2016 stated at note 5 that:

> "Ladywalk Investments Limited, a British Virgin Islands company…as borrower has arranged a facility and lent funds to…[the Appellant] to finance the acquisition of the property. An amount of £7,200,000 has been lent to…[the Appellant] inline [sic.] with credit facility term of 10 years. The property at Ladywalk and Bramble Lodge…is pledged as security between…[the Appellant] (Chargor) and Edmond de Rothschild (Suisse) S.A. (Lender). The total amount included in other creditors is £7,200,000."

82. There is no direct evidence as to the person who paid the outstanding balance for the property. But it seems to me that, in the light of the loan to Ladywalk LLP secured on the Ladywalk properties in the same amount as the outstanding balance (£7,200,000), it is a reasonable to infer that the sum was paid by Ladywalk LLP and, accordingly, I make that inference as a finding.

83. There was reference in the accounts of Ladywalk LLP to a charge on the properties in favour of Edmond de Rothschild (Suisse) S.A. I find as a fact that there was such a charge but, as a result of my decision announced at the beginning of the hearing that the charges themselves were not to be comprised in the documents before the tribunal, no submissions on them were made by HMRC in the course of the hearing.

84. However, it seems to me clear that, in seeking to include the charges in the documents before the tribunal, HMRC were simply seeking to cite <u>further</u> evidence, in addition to the terms of the accounts of Ladywalk LP and the constituting document of the LLP itself (the LLP Members' Agreement), that the LLP beneficially owned the Ladywalk properties.

85. I consider that the evidence clearly supports only one finding, namely that the appellant was the legal and beneficial owner of the Ladywalk properties. There was, in my view, confusion in the course of the proceedings between two fundamentally different issues, namely: (1) who was the beneficial owner of the Ladywalk properties; and (2) who was the beneficial owner of the membership interests in the LLP.

86. There were times when the appellant appeared to be suggesting that the Ladywalk properties were beneficially owned by Leana and Tanya Mallya. For example, at [20] of Mr Thomson's skeleton argument of 29 November 2019 it was noted that the response by the

appellant on 19 December 2016 to HMRC enquiries confirmed that the properties were "not beneficially owned by the Appellant, but by Leana and Tanya Mallya".

87. However, there is a world of difference between the identification of a body corporate as a person who beneficially owns a property and the identification of the beneficial interests in that artificial person. There is clearly a sense – an economic sense – in which the shareholders in a company could be said to own the property that is, as a matter of law, owned (legally and beneficially) by the company. But that way of regarding matters would be to deny the existence of the body corporate as a separate legal person and would be to reverse the effect of the seminal case of *Salomon v A Salomon & Co Ltd* [1987] AC 22.

88. On the present facts, once the June 2014 contract was performed, there was only ever one person who was the beneficial owner of the Ladywalk properties and that person was the LLP. The beneficial ownership of the interests in the LLP is a wholly separate question the answer to which shines no light at all on the beneficial ownership of the Ladwyalk properties themselves.

89. I did not understand that it was any substantive part of the appellant's case that the properties were, as a matter of general law, beneficially owned by anyone other than the LLP (although the appellant did make a separate point that the operation of certain deeming provisions of Part 4 of FA 2003 produced the result that Leana and Tanya Mallya were to be regarded as the purchasers of the Ladywalk properties). If that was a part of the appellant's case, I would unhesitatingly reject it as wholly untenable.

90. Rather, the appellant's case was simply that the June 2014 contract anticipated that the properties might be conveyed to such a person as the LLP. In determining whether the LLP was indeed such a person it is important to understand the nature of the ownership interests in it but that is to address a different question. It seems to me that this was the point that Mr Thomson was trying to make when at [15] and [33] of his skeleton argument he noted that the "ultimate" beneficial purchasers of the Ladywalk properties under the respective trusts were Leana Mallya and Tanya Mallya (as to 99.9%) and the beneficiaries of the Sileta Trust at the time as to the remainder. That was, perhaps, somewhat loose language and in the remainder of this judgment I prefer to use a more neutral expression by describing the interests of Leana and Tanya Mallya as economic interests in the Ladywalk properties.

91. Accordingly, even though I have considered that the 2015 charges should not be admitted as documents before the tribunal, it seems to me that, in so far as the admission of the documents would have been intended to show that it was the LLP who was the beneficial owner of the properties, the documents would have had no evidential or other value beyond the documents that were already before the tribunal.

THE SDLT REGIME

The basic provisions

92. Stamp duty land tax was introduced by FA 2003 as a new tax to replace stamp duty. It is a tax charged on land transactions (s.42(1) of FA 2003) and, unlike the predecessor stamp duty, is chargeable whether or not there is any instrument effecting the transaction (s.42(2)(a) of FA 2003). A "land transaction" is defined as "any acquisition of a chargeable interest" (s.43(1) of FA 2003). A "chargeable interest" means any estate, interest, right or power in or over land in the United Kingdom other than an exempt interest see (s. 48(1) of FA 2003).

93. Section 43(4) to (6) of FA 2003 identify the "purchaser" in relation to a land transaction as follows:

> "(4) References in this Part to the "purchaser" and "vendor", in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction.
>
> These expressions apply even if there is no consideration given for the transaction.
>
> (5) A person is not treated as a purchaser unless he has given consideration for, or is a party to, the transaction."

94. There is no dispute that the purchase of the property by the LLP constitutes a land transaction: there has been an acquisition by the LLP (as purchaser) of an estate in land in the United Kingdom.

95. The purchaser must, in the case of a notifiable transaction (which is defined by section 77 of FA 2003 and includes the purchase of the property by the LLP), deliver a return to HMRC, which must include a self-assessment of the tax chargeable in respect of the transaction (see s.76 of FA 2003). The period for delivering the return is linked to the effective date of the transaction: at the material time, the return needed to be delivered within 30 days of the effective date of the transaction. There are a number of other provisions in FA 2003 that underline the centrality of the concept of the "effective date" in determining the amount of SDLT chargeable in respect of a land transaction: see, for example, para. 7 of Sch.4 to FA 2003, which provides for non-monetary consideration to be valued as at the effective date of the transaction.

96. The "effective date" of a land transaction is the date of completion of the transaction except as otherwise provided (s. 119 of FA 2003). There are a number of provisions elsewhere in FA 2003 that qualify that general rule, including provision contained in sections 44 and 44A of FA 2003 (which I discuss further below).

97. It is the purchaser who is liable to pay the tax (see s. 85 of FA 2003).

98. SDLT is charged as a percentage of the "chargeable consideration" (and, in the ordinary case, the chargeable consideration is the purchase price of the property). If transactions are, under s. 108 of FA 2003, "linked", the rate of tax is determined by reference to the total amount of the consideration for the transactions. Transactions are linked if they form part of a single scheme, arrangement or series of transactions between the same vendor and purchaser (or persons connected with them). Although originally disputed by the appellant in this case, it is now accepted that the purchase of Ladywalk and Bramble lodge are linked transactions.

99. The applicable SDLT rates depend on whether the property is residential property. It is common ground that the Ladywalk properties meet the definition of residential property in s.116 of FA 2003.

100. There is also, under Sch. 4A to FA 2003, a separate (higher) rate of 15% which applies in the case of certain acquisitions of dwellings by companies, partnerships including companies or collective investment schemes. Para. 3(3) of Sch.4A provides that the governing paragraph of the Schedule applies if, among other cases, the purchaser is a company or the acquisition is made by or on behalf of the members of a partnership one or more of whose members is a company. Although originally disputed by HMRC in this case, it is now accepted by them that the purchase of the Ladywalk properties in this case falls outside para. 3 of Sch.4A to FA 2003 as a result of para. 3(4). That sub-paragraph provides that references to a company do not include a company acting in the capacity as trustee of a settlement.

101. The charging of SDLT under FA 2003 on the chargeable consideration originally operated by applying a particular percentage to the entirety of the consideration. That approach

was changed by the Stamp Duty Land Tax Act 2015, which I discuss further below and the provisions of which are central to the disposal of this appeal.

The operation of SDLT in relation to partnerships

102. Where a chargeable interest is held on behalf of a partnership (including a limited liability partnership formed under the Limited Liability Partnerships Act 2000), para. 2 of Sch. 15 to FA 2003 provides that the interest is treated as held by or on behalf of the partners, and not by or on behalf of the partnership as such. A partnership is treated as transparent even if, as a matter of general law, it has a separate legal personality.

103. In the case of the Ladywalk transactions, it follows that, although the legal purchaser of the properties was the LLP, the properties are, as a result of para.2 of Sch.15 to FA 2003, regarded for the purposes of SDLT as held by the members in Ladywalk LLP, namely CASL and AV.

104. However, the members in question were holding their interests in the LLP on trust. AV was holding his membership interest as trustee and nominee for CASL as trustee of the Sileta trust. And CASL was holding its membership interest in the LLP as trustee for the trusts as described above.

105. The result so far is that the Ladywalk properties were regarded for SDLT purposes as held by CASL and AV (not by Ladywalk LLP). But the effect of para.2 of Sch.15 to FA 2003 is <u>not</u> to disregard the legal reality that both members of LLP were holding their interests in a fiduciary character. Instead, the operation of SDLT in relation to trusts is dealt with by the separate provisions contained in Sch.16 to FA 2003.

The operation of SDLT in relation to settlements

106. Schedule 16 to FA 2003 deals with the situations where trustees or nominees acquire chargeable interests. Paragraphs 1 and 3 provide as follows:

> "**Meaning of "settlement" and "bare trust"**
>
> 1(1) In this Part "settlement" means a trust that is not a bare trust.
>
> (2) In this Part a "bare trust" means a trust under which property is held by a person as trustee—
>
> (a) for a person who is absolutely entitled as against the trustee, or who would be so entitled but for being a minor or other person under a disability, or
>
> (b) for two or more persons who are or would be jointly so entitled,
>
> and includes a case in which a person holds property as nominee for another.
>
> (3) In sub-paragraph (2)(a) and (b) the references to a person being absolutely entitled to property as against the trustee are references to a case where the person has the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustee, to resort to the property for payment of duty, taxes, costs or other outgoings or to direct how the property is to be dealt with.
>
> **Bare trustee**
>
> 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) [...]

(3) [...]

(4) [...]."

107. In the case of AV's membership interest in Ladywalk LLP, the full-out words in para. 2(2) of Sch.16 make it plain that AV, as a person who holds property (his membership interest in the LLP) as a nominee, is acting as a bare trustee. As such, para. 3(1) of Sch.16 is engaged so that the interest of AV in the LLP is itself taken to be vested in the person for whom he is the trustee, namely CASL as trustee of the Sileta trust.

108. In effect, and pausing there, the combined effect of para.2 of Sch.15 and paras. 1(2) and 3(1) of Sch.16 to FA 2003 is that the Ladywalk properties are for the purposes of SDLT treated as if they were held by CASL as a trustee.

109. The next question is whether CASL is holding the interest in the LLP (including its interest as a result of the application of para.3(1) of Sch.16 in relation to AV's membership interest in the LLP) as a trustee of a settlement which is not a bare trust. HMRC submitted that the relevant settlements were not bare trusts. If they are right, it would then follow that CASL is treated as if it had acquired the Ladywalk properties. That is the effect given by para. 4 of Sch.16 to FA 2003, which provides as follows:

> "Where persons acquire a chargeable interest [or an interest in a partnership] as trustees of a settlement, they are treated for the purposes of this Part, as it applies in relation to that acquisition, as purchasers of the whole of the interest acquired (including the beneficial interest)."

110. However, if HMRC are wrong and CASL is a trustee of a bare trust, the interests in the LLP would, as a result of para. 3(1) of Sch. 16 to FA 2003, be treated as vested in the persons for whom CASL was holding those interests on trust, namely the beneficiaries under the relevant trusts. In that case, it would be the beneficiaries who would, for the purposes of SDLT, be regarded as the purchasers of the Ladywalk properties. The effect of my findings of facts mentioned above is that:

(1) the beneficiaries of the Welwyn Property Trust and the Tewin Property Trust (Leana Mallya and Tanya Mallya) were interested in 99.9% of the LLP's net profits;

(2) the beneficiaries of the Sileta trust were interested in the remaining 0.1% of its net profits; but

(3) the appointment of Leana, Tanya and Sidhartha Mallya as beneficiaries under the Sileta trust occurred after the Ladywalk properties were transferred so that the 0.1% interest in the LLP was held by CASL as trustee of the Silea trust for beneficiaries that were, at the material time, not yet appointed.

111. If the position is as contended for by the appellant, it would dramatically alter the effect of HMRC's submissions. There would no longer be any relevance in the fact that, as a matter of factual reality, the Ladywalk properties were conveyed to a person – Ladywalk LLP – who did not exist at the time of the June 2014 contract. Moreover, the properties would, so far as SDLT is concerned, be treated as if they had been conveyed to persons who were each expressly included in the definition of the Buyer in the June 2014 contract (ignoring for this purpose the 0.1% interest in the LLP).

112. It would also follow from this that the SDLT land transaction returns were wrong in stating that the LLP was purchaser of the properties and wrong in stating that the properties were not held on trust.

113. In what follows, I have taken account only of the terms of the Welwyn Property Trust and the Tewin Property Trust. As recorded above, there is no evidence as to the beneficial interests in the Sileta trust at the material time.

114. The issue is then whether or not the beneficiaries under the Welwyn Property Trust and the Tewin Property Trust (Leana Mallya and Tanya Mallya) were persons who, in accordance with para. 1(3) of Sch.16 to FA 2003, were absolutely entitled to the interests in the LLP as against CASL. That test is satisfied only if the daughters had the exclusive right to resort to those interests for payment of duty, taxes, costs or other outgoings or to direct how those interests are to be dealt with. The only qualification to the exercise of that exclusive right was that it could be subject to satisfying any outstanding charge, lien or other right of the trustee.

115. In my judgment, it is clear that the daughters did not have that exclusive right within the meaning of para. 1(3) of Sch.16 to FA 2003. Accordingly, for the purposes of the operation of the SDLT in relation to the acquisition of the Ladywalk properties, the effect is that CASL (rather than the beneficiaries) acquired the Ladywalk properties.

116. This question is, of course, an exercise of statutory interpretation of para. 1(3) of Sch.16 to FA 2003 by reference to the facts of the case. What then are the relevant facts here?

117. The governing law for the Welwyn Property Trust and the Tewin Property Trust was stated to be the law of the British Virgin Islands or such other jurisdiction as may be specified under other provisions of the trusts. There was no evidence before me that any other jurisdiction had been specified. Nor was there any evidence as to any relevant provisions of the law of the British Virgin Islands that might be said to have a bearing on the effect of the trusts or the operation of the general law of that territory on questions of beneficial entitlement. It is, in my judgment, for the appellant to make good, by reference to evidence (which includes the effect of foreign law determined by the tribunal as a matter of fact), a proposition that the general law of the British Virgin Islands has any bearing on the statutory question before me.

118. No evidence was put before the tribunal on that issue. Accordingly, it seems to me that the correct approach is simply to consider the terms of the trusts, seeking to understood their objective effect by adopting the same approach as is required to be taken in relation to the construction of a contract as I set out below. There was no evidence as to the surrounding background or wider context relevant to the construction of the trusts.

119. I consider that there are number of aspects of the terms of the trusts that are relevant to determining whether, for the purposes of para. 1(3) of Sch.16 to FA 2003, the daughters had the exclusive right to deal with the interests in the LLP: (1) the power of the trustees to add beneficiaries; (2) the existence of default trusts; and (3) the power of the trustees to dispose of the interests in the LLP without reference to the beneficiaries and the power of the trustees to transfer those interests to other trusts that could be held on discretionary terms and that could be held for beneficiaries that were not limited to the beneficiaries of the original trusts.

120. Any one of those factors is, in my view, fatal to the view that the trusts were bare trusts.

121. In his written submissions, Mr Thomson supplied the tribunal with a memorandum of wishes by Mrs Lalitha Mallya (the mother of Leana and Tanya) dated 25 January 2015 in respect of both the Tewin Property Trust and the Welwyn Property Trust. The memorandum was not subject to an application to admit it as evidence and I would not consider it right to rely on it in the absence of any such application and any objections from HMRC. In any event, it is plain that it has no bearing on the true legal meaning of the trusts: the memorandums clearly state at the beginning that "I appreciate that I have no power to require that these wishes are followed and that they are not legally binding. My wishes are not intended to fetter the

Trustees' discretionary powers in any way but I hope that the Trustees will them useful in discharging their responsibilities."

122. Although both parties referred to the rule in *Saunders v Vautier* [1841] EWHC J82, the relevance of that rule or any equivalent rule applicable under the governing law of the trust is, in my judgment, limited to determining whether the proper interpretation of the trusts is such that the daughters had the "exclusive" right to resort to the interests in the LLP for payment of taxes or to direct how they were to be dealt with, subject only to the existence of other interests taking priority as against the beneficiaries the most obvious of which is a charge. As I say above, there was no evidence before the tribunal as to any aspect of the law of the British Virgin Islands.

123. In his written submissions Mr Thomson drew attention to HMRC's guidance contained in their SDLT Manual (31710) as appearing to refer by implication to the rule in *Saunders v Vautier* as a case where the beneficiaries are entitled to require the trustee to transfer the legal estate of a property to them and terminate the trust. That may be so. And, if that is the proper legal analysis of the terms of the trust governed by the law of England and Wales, then I would agree that, as a result of that rule, there will be cases where a beneficiary could properly be regarded as enjoying an exclusive right of a kind set out in para. 1(3) of Sch.16 to FA 2003. The facts of *Saunders v Vautier* would, in my view, be such a case.

124. But it does not follow from this that Parliament has, in enacting para. 1(3) of Sch. 16 to FA 2003, intended that the availability of rights under the rule in *Saunders v Vautier* is, by itself, sufficient to mean that a trust is properly to be regarded as a bare trust. The statutory question focuses on whether the beneficiaries have an "exclusive" right. That is an ordinary English word and, applying normal principles of statutory construction, it should bear its ordinary meaning, namely a right that is exercisable by the daughters to the exclusion of all others.

125. Once that question is asked, there can be no doubt, in my judgement, that the factors mentioned above are wholly inconsistent with the view that the beneficiaries have, in effect, rights to enjoy the interests in the LLP to the entire exclusion of anyone else. There is the clear possibility that other persons may become beneficiaries. There is the clear possibility that they, as beneficiaries, might be removed from the class of beneficiaries. And for every day that the trusts are in existence there is a risk that the interests in the LLP could be sold or transferred to other trusts that may have very different terms from the ones under which the daughters are beneficiaries.

126. Accordingly, my view is that, for the above reasons, none of the trusts are bare trusts within the meaning of Sch.16 to FA 2003.

127. However, if I am wrong in interpreting that Schedule in the way just described and if the true position is that, notwithstanding the terms of para. 1(3) of Sch.16 to FA 2003, I must instead do no more than consider the application of the rule in *Saunders v Vautier* to the facts of this case, I would also consider that the trusts are not bare trusts for the purposes of that Schedule.

128. As explained above, there is no evidence before me that the rule in *Saunders v Vautier* does form part of the law of the British Virgin Islands. Nonetheless, it may be helpful in the event of an appeal if I briefly express my views on the supposition that the law of the British Virgin Islands is in material respects the same as the law of England and Wales and the statutory test is (contrary to my view) a direction to consider not the words of the statute but the evolving jurisprudence relating to the rule in *Saunders v Vautier*.

129. In my view, *Lewin on Trusts (*19th Ed. at 24-014) is correct to state:

> "The principle in *Saunders v Vautier* has no application unless all the persons who have, or may have, an interest in the trust property are of full age and capacity and all consent. A requisite consent by a beneficiary may be given either by his joining in an agreed termination of the trust with the other beneficiaries or by giving an irrevocable unilateral direction to the trustees."

130. As argued by HMRC in their written submissions, the High Court decision in *Thorpe v Revenue and Customs* [2009] STC 2107 supports that view. In that case it was held at [14] and [15] that the rule in *Saunders v Vautier* was not engaged where there are "potential beneficiaries not yet in existence". There was a possibility in that case that the only member of a pension scheme might remarry or that he might have dependents and that his widow or dependents might be entitled to an interest under the trusts of the scheme.

131. It is also the case here that there is a possibility that persons other than Leana or Tanya Mallya might become entitled to an interest under the trusts if the trustee exercises the wide powers of appointment in favour of other beneficiaries.

132. Despite the written submissions made by Mr Thomson on behalf of the appellant, I agree with HMRC that in *Orb A.R.L. v Ruhan* [2015] EWHC 262 (Comm) it was merely said to be "arguable" that the sole existing beneficiaries of a discretionary trust could, on the facts of that case, call for a transfer to them of the trust property despite the existence of a power in the trustees to add further beneficiaries (see [118]). Accordingly, it seems to me that the decision in that case has little bearing on the issue.

133. I also consider that the other case relied on by the appellant, *Rusnano Capital AG (in liquidation) v Molard International (PTC) Limited and Pullborough International Corp* is irrelevant.

134. In that case the Royal Court of Guernsey was considering the correct construction of section 53 of the Trusts (Guernsey) Law, 2007. After noting that its "primary task…[was] to interpret the relevant provisions in the 2007 Law" (see [15]), the court went on to hold that: "[h]owever interesting the development of the rule in *Saunders v Vautier* is across Commonwealth jurisdictions, I do not need to resolve any of the issues raised…[by that case]. There is nothing on the face of section 53(3) of the 2007 Law that refers to the beneficiary or all the beneficiaries having to establish an absolute, vested and indefeasible interest in the trust property". Accordingly, the most that can be said is that the court in that case made some purely obiter comments on the application of the rule.

THE NEW CHARGING REGIME

135. Autumn statement 2014 (3 December 2014) was a significant day for the operation of SDLT. On that day, the government announced its proposals to move away from a single rate on the chargeable consideration for a transaction to a series of rates that were chargeable on different portions (or bands) of the consideration. A resolution was agreed to by the House of Commons on that day under section 5 of the Provisional Collection of Taxes Act 1968 that set out the detailed terms in which FA 2003 was to be amended to give effect to the new charging regime. A resolution in the same terms was agreed to by the House of Commons on the following day (4 December 2014) under section 1 of the 1968 Act. That resolution had, under the provisions of the 1968 Act, the same effect as if contained in an Act of Parliament and authorised the introduction of the Bill that resulted in the Stamp Duty Land Tax Act 2015.

136. The effect of the new regime was that, if the purchase price did not exceed £937,500 or was between £1M and £1.125M, the purchaser would in most cases pay less tax or in a minority of cases pay the same amount of tax. In the case of purchasers of more expensive property such as the Ladywalk properties, there would be significantly more tax to pay under the new regimes.

137. As explained at [14] of the Explanatory Notes for the 2015 Act, "no prior announcement was made, and no draft issued for consultation, to prevent forestalling by purchasers and any resulting disruption of the housing market". In the summary section at [15], the Explanatory Notes explain that the Act "includes transitional provisions which allow purchasers in transactions where contracts were exchanged before the measure was announced, but completion takes afterwards, to choose whether the new or the old rates will apply" (although, as explained above, the material date for the operation of the rules was the day *after* the measure was announced at Autumn Statement). That explanation was a reference to the terms of section 2 of the 2015, which are central to this appeal.

138. Section 2 of the 2015 Act provided for the commencement of the new rules in the following terms:

> "(2) The amendments made by this Act have effect in relation to any land transaction of which the effective date is, or is after, 4 December 2014.
>
> (3) But those amendments do not have effect in relation to a transaction if the purchaser so elects and either—
>
> (a) the transaction is effected in pursuance of a contract entered into and substantially performed before 4 December 2014, or
>
> (b) the transaction is effected in pursuance of a contract entered into before that date and is not excluded by subsection (5).
>
> (4) An election under subsection (3)—
>
> (a) must be included in the land transaction return made in respect of the transaction or in an amendment of that return, and
>
> (b) must comply with any requirements specified by the Commissioners for Her Majesty's Revenue and Customs as to its form or the manner of its inclusion.
>
> (5) A transaction effected in pursuance of a contract entered into before 4 December 2014 is excluded by this subsection if—
>
> (a) there is any variation of the contract, or assignment (or assignation) of rights under the contract, on or after 4 December 2014,
>
> (b) the transaction is effected in consequence of the exercise on or after that date of any option, right of pre-emption or similar right, or
>
> (c) on or after that date there is an assignment (or assignation), subsale or other transaction relating to the whole or part of the subject-matter of the contract as a result of which a person other than the purchaser under the contract becomes entitled to call for a conveyance.
>
> (6) In subsections (3) to (5)—
>
> "land transaction return", in relation to a transaction, means the return under section 76 of the Finance Act 2003 in respect of that transaction;
>
> "purchaser" has the same meaning as in Part 4 of that Act (see section 43(4) of that Act);
>
> "substantially performed", in relation to a contract, has the same meaning as in that Part (see section 44(5) of that Act)."

139. At [26] and [27] of the Explanatory Notes for the 2015 Act, an explanation of the effect of section 2(3) and (5) was given as follows:

> "26. The section provides that the purchaser may elect that in certain circumstances the new calculation rules do not apply. The first of these is

> where contracts were exchanged before 4 December 2014 and the contract was "substantially performed" (that is, the purchaser occupied the property or paid over the whole, or substantially the whole, of the consideration) before that date. The purpose of this is to protect a subsequent transaction on completion of the contract, on which further tax may be due.
>
> 27. The election may also be made in other cases where contracts were exchanged before 4 December 2014 and the contract is completed on or after that date, provided that there is no event on or after that date, of a kind listed at subsection (5), which results in the effect of the contract on completion being different from the effect of the contract when first entered into."

140. In the House of Lords case of *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 Lord Steyn held at [5] that a court can consider Explanatory Notes as an admissible aid to construction in so far as they "cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed". Because the starting point in an exercise of statutory construction is that the language "conveys meaning according to the circumstances in which it was used", the context "must always be identified and considered before the process of construction or during it". Accordingly, it is legitimate for me to take account of the Explanatory Notes in determining the mischief at which section 2 of the 2015 Act was directed.

141. In my view it is evident that the purpose of s.2(3) to (5) of the 2015 Act was to protect persons from increased tax charges in cases where the persons were already contractually committed to acquire the land in question before the relevant announcement was made.

142. The central aim was to identify deserving cases by reference to the extent to which a transaction was bound to happen as a result of a pre-announcement contract binding on the parties. Equally, it was plain that Parliament intended not to confer transitional protection on cases where, to use a neutral expression, a materially significant event happened post-announcement. A contract entered into pre-announcement that simply ran its course post-announcement was the paradigm case for which Parliament intended to confer transitional relief. In my view, the purpose of the provisions is clearly revealed by the terms of the section itself but confirmed by the Explanatory Notes.

Was the transaction effected in pursuance of a contract as per s. 2(3)(b) of the 2015 Act?

143. HMRC submitted that for the purposes of s.2 of the 2015 Act the relevant transactions were <u>not</u> effected in pursuance of a contract entered into before 4 December 2014. The submission made was to the effect that the relevant contract did not lead to the acquisition of the properties because it was not "completed" within the meaning of s.44 of FA 2003 and the effect of that section was that the only relevant land transactions were the conveyances to the LLP. It is then said to follow that the land transactions cannot have been "effected in pursuance of" a contract because there was no preceding contract that exists for the purposes of s.2 of the 2015 Act when read in the light of the material provisions of Part 4 of FA 2003.

144. I do not accept that submission.

145. The terms of section 2 of the 2015 Act are, in my judgment, quite clear in requiring a focus on a contract that exists in the real world. On a plain reading of the section, there is nothing to suggest that a contract is to be ignored as a result of the application of s.44 of FA 2003 or any other provision of that Act. There is no definition of a "contract" in s.2 of the 2015 Act. There is no reference to a provision of Part 4 of FA 2003 that might produce the outcome that a contract that clearly was entered into was, nonetheless, to be deemed not to exist for the purposes of s.2 of the 2015 Act.

146. Section 2(3)(b) of the 2015 Act is constructed by reference to "the land transaction". That is, clearly, a reference back to subsection (2) and its reference to "any land transaction of which the effective date is, or is after, 4 December 2014". The transaction in question must be one which "is effected in pursuance of" a contract. There is no reference to whether or not a transaction is "completed" within the meaning of s.44 of FA 2003. And the very things with which s.44 is concerned, namely the identification of a land transaction and its effective date, have already been dealt with.

147. It is, in my view, unsustainable to hold that Parliament had in referring to a transaction being "effected in pursuance of" a contract intended to mean instead that the transaction was one that was "completed" pursuant to a contract within the meaning of s.44(10)(a) of FA 2003. That would be to engage not in an exercise of statutory construction but an impermissible exercise in statutory amendment. It is not as if Parliament in enacting s.2 of the 2015 Act was unaware of the existence of other terms with particular meanings in Part 4 of FA 2003 that it was seeking to attract: in addition to the reference to "land transaction" and "effective date" (which had particular meanings in that Part), Parliament also expressly provided in s.2(6) that "land transaction return", "purchaser" and "substantially performed" were to take their Part 4 meanings. In that context, it would be astonishing if Parliament had intended the reference to a contract being "effected in pursuance of" a contract as being a reference to a concept (completion) that was not only not used in the section but, unlike all the other terms used in s.2 of the 2015 Act, also had a particular meaning *only* in s.44 of FA 2003 (rather than for the purposes of Part 4 of FA 2003 as whole).

148. It is equally of note that detailed provision is made about transactions or other events occurring on or after the announcement date where it is plain that the transactions or other events referred to are transactions or events that actually happen in the real world.

149. It is also, in my judgment, clear that HMRC's submission would produce an outcome that is inconsistent with the plain purpose of the provisions as explained above. I recognise that [27] of the Explanatory Notes refers to the completion of the contract but the references there are, in my view, simply references to completion as that expression is commonly understood. It is, in my view, of far greater significance that there is no hint in the Explanatory Notes of a contract that, on any reckoning, has been entered into before the announcement date simply being ignored for the purposes of the transitional rules.

150. Rather, the plain intention of Parliament was to identify transactions and events that have actually occurred. First, an actual contract must have already been entered into before announcement. That sets out, as explained above, a class of case that could, without more, be thought to be unfairly affected by an unexpected rate change. Second, Parliament sought to remove that protection by reference to the occurrence of something after announcement in circumstances where it would be fair for that protection to cease to be available.

151. I consider it to be self-evident that, in enacting section 2 of the 2015 Act, Parliament was intending to establish fiscal outcomes that were fair, judged by reference to an actual event that happened before announcement (the entering into of a contract) and any other events that actually took place afterwards.

152. In any event, there are two other reasons why, in my judgment, HMRC's submission must be rejected.

153. First, the submission misunderstands the effect of section 44 of FA 2003 for the purposes of SDLT, wrongly assuming that the effect of the section is that, in the cases dealt with by that section, contracts are simply disregarded for all purposes of the SDLT code, including provisions such as section 2 of the 2015 Act. For the reasons given below, that is not, in my view, a tenable construction of the section.

154. Second, in the particular facts of this case, the conveyances were completed in substantial conformity with the contract (within the meaning of s.44(10)(a) of FA 2003) and did, accordingly, fall, contrary to HMRC's submission, to be dealt with by section 44(3) of FA 2003.

Section 44 of FA 2003

155. Section 44 of FA 2003 applies where an agreement for a land transaction is entered into under which the transaction is to be completed by a conveyance. That section provides as follows:

> "**44 Contract and conveyance**
>
> (1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
>
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
>
> (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.
>
> In this case the effective date of the transaction is the date of completion.
>
> (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.
>
> In this case the effective date of the transaction is when the contract is substantially performed.
>
> (5) A contract is "substantially performed" when—
>
> (a) the purchaser[, or a person connected with the purchaser,] takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or
>
> (b) a substantial amount of the consideration is paid or provided.
>
> (6) For the purposes of subsection (5)(a)—
>
> [(a) possession includes receipt of rents and profits or the right to receive them, and]
>
> (b) it is immaterial whether [possession is taken] under the contract or under a licence or lease of a temporary character.
>
> (7) For the purposes of subsection (5)(b) a substantial amount of the consideration is paid or provided—
>
> (a) if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided;
>
> (b) if the only consideration is rent, when the first payment of rent is made;
>
> (c) if the consideration includes both rent and other consideration, when—
>
> (i) the whole or substantially the whole of the consideration other than rent is paid or provided, or
>
> (ii)the first payment of rent is made.
>
> (8) Where subsection (4) applies and the contract is subsequently completed by a conveyance—

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

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

(9) Where subsection (4) applies and the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of that subsection shall (to that extent) be repaid by the Inland Revenue.

Repayment must be claimed by amendment of the land transaction return made in respect of the contract.

[(9A) Where—

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

(b) . . .

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

(10) In this section—

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

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

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

156. HMRC considered that the decision of the Court of Appeal in *The Commissioners for Her Majesty's Revenue and Customs v DV3 RS Limited Partnership* [2013] EWCA Civ 907 indicated the centrality of section 44 of FA 2003 to the operation of the SDLT regime. In my view, however, the Court of Appeal's decision in that case lends no support to the submissions made by HMRC in this case, particularly the submission that section 44 directed the result that a contract pursuant to which a land transaction was effected was to be disregarded for SDLT purposes. That is not how section 44 works, and it is not how the Court of Appeal in that case said that it worked.

157. In *DV3 RS Limited Partnership* there were two connected transactions relating to the purchase of a property for £65.1 million. First, there was a sale by the vendor to DV3 Regent Street Ltd (referred to in the Court of Appeal's judgment as "A"). There was then, by a separate contract, a sale of the same subject-matter of the first contract to a partnership, LLP DV3 RS LP (referred to in the Court of Appeal's judgment as "B"). The partnership included A as a partner as well as other companies and, crucially, an individual. It was the presence of the individual in the partnership which was key to the desired tax saving of the scheme. However, the particular details are not relevant to this appeal.

158. The Court of Appeal (in a judgment given by Lewison LJ with whom Gloster and Maurice Kay LJJ agreed) conducted a detailed analysis of the operation of both section 44 of FA 2003 and section 45 of that Act (which has since the judgment been replaced by rules set out in Sch.2A to FA 2003). The analysis was required in order to identify a land transaction by reference to which the relevant SDLT provisions operated. In the judgment of the Court of Appeal, the interest in A's hands (the intermediate buyer) was not a chargeable interest as, for the purposes of SDLT, it had not acquired the interest and, accordingly, there had been no land transaction. It had not acquired the interest under the contract as section 44(2) of FA 2003

expressly negatived this possibility. Nor had A acquired the interest on completion because section 45(3) directs the reader to disregard the transaction.

159. Section 45 of FA 2003 provided at the relevant time as follows:

> "(1) This section applies where—
>
> (a) a contract for a land transaction ('the original contract') is entered into under which the transaction is to be completed by a conveyance,
>
> (b) there is an assignment, sub-sale or other transaction (relating to the whole or part of the subject matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and
>
> (c) …
>
> References in the following provisions of this section to a transfer of rights are to any such assignment, sub-sale or other transaction, and references to the transferor and the transferee shall be read accordingly.
>
> (2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.
>
> (3) That section applies as if there were a contract for a land transaction (a 'secondary contract') under which—
>
> (a) the transferee is the purchaser, and
>
> (b) the consideration for the transaction is—
>
> (i) so much of the consideration under the original contract as is referable to the subject matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and
>
> (ii) the consideration given for the transfer of rights.
>
> The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of subsection (3) of section 73 (alternative property finance: land sold to financial institution and re-sold to individual)."

160. As Lewison LJ explained at [20]:

> "section 44 of the 2003 Act is one of a group of sections (sections 43 to 47) which define what is (and what is not) a land transaction. A land transaction is the acquisition of a chargeable interest. Thus section 44 of the 2003 Act is a key provision of the SDLT code which is applied generally in order to identify a land transaction; in other words what counts as the acquisition of a chargeable interest."

161. In the course of a discussion in which Lewison LJ accepted the submissions made on behalf of the appellant as to the illegitimacy of disregarding the reality of the underlying contracts, it was said that:

> "It was a precondition of the operation of section 45(3) of the 2003 Act that there be simultaneous completion of both contracts. Completion as defined by section 44(10) of the 2003 Act requires one to ascertain that each proposed land transaction had been completed between the same parties in substantial conformity with the contract. It would be impossible to decide whether there

> has been completion as defined without identifying the parties to each contract and the parties to each transfer…Equally it would be impossible to determine whether a contract had been completed in substantial conformity with the contract without comparing the contract in the real world and the transfer which gave effect to it."

162. Lewison LJ went on at [23] to explain that the focus of section 43(1) of the 2003 Act was on what is acquired, not what is disposed of, concluding at the end of that paragraph that he saw no inconsistency between, on the one hand, accepting that the company was entitled to an equitable interest (which is an interest in land in the real world) and, on the other, concluding that that equitable interest does not count as a chargeable interest for the purposes of SDLT while it is in the company's hand.

163. It was in that context that he then went to on to observe at [24]:

> "That is not to say that the contracts in the real world have no part to play in the world of SDLT. They serve a number of functions. First they define what is the proposed land transaction. This is clear from section 44 (1) ("a contract for a land transaction") section 44 (10) ("completion of the land transaction proposed ") and section 44 (3) ("the transaction effected on completion")…Second, it is by reference to the terms of the contract in the real world that one can tell whether the contract has been completed for the purposes of section 44 (10) ("between the same parties and in substantial conformity with the contract")."

164. In my judgment it is clear that s.44 of FA 2003 is, as the Court of Appeal explained in *DV3 RS Limited Partnership*, a key feature of the SDLT code that is focused on the identification of a land transaction. So much is, of course, apparent from the terms of s.44 itself. The core purpose of the section is revealed in subsection (2) as read with subsection (1), which together inform us that a person is not to be regarded as entering into a land transaction by reason of entering into a contract for a land transaction under which the transaction is to be completed by conveyance. Instead, s.44 provides how the contract and the conveyance are to be regarded.

165. But, although the Court of Appeal focused on this aspect of s.44 in its decision in *DV3 RS Limited Partnership*, the section also plays the critical function of identifying not only what the land transaction is but also what the effective date of the transaction (as so identified) is.

166. As the Court of Appeal recognised in *DV3 RS Limited Partnership*, the section has to operate by reference to transactions that have actually taken place in the real world. But, of course, in enacting the provisions in question Parliament is taken to have understood the general law and how a contract of a type set out in s.44(1) of FA 2003 would, by reason of its being entered into, lead to the acquisition by the purchaser of an equitable interest in the land, which would, without more, constitute a land transaction. And, equally, it would follow that the subsequent completion of the contract would, without more, constitute a further land transaction, namely the acquisition of the legal interest in the land.

167. It was precisely to deal with the fact that such a contract – a paradigm feature of the world of sales and purchases of land – would otherwise give rise to two land transactions that s.44 was required. SDLT is chargeable on a land transaction and operates by reference to the effective date of the transaction and the chargeable consideration for the transaction. Section 44 dealt with the basic scenarios but other provisions (initially, s.45) were needed to deal with other transactions that commonly occurred (eg, subsales). And, as mentioned below, there were other scenarios that were, in substance, land transactions but were, on a strict view, outside the remit of s.44. It was with those scenarios that s.44A was dealing.

168. Section 44 itself is seeking to identify what counts for the purpose of two legal constructs, namely a land transaction and its effective date. It does so by treating, for the purposes of those two legal constructs, a contract and a resulting conveyance in particular ways. But there is no need for the section to do more than that. In particular, there is no need for the section to deem the contract for the land transaction as if it never occurred for any other purpose. Nor does the section have the effect that references in Part 4 of FA 2003, or in provisions that operate by reference to that Part such as the 2015 Act, to contracts and land transactions are to be read through its prism particularly where the references are contained in provisions (such as the 2015 Act) where the land transaction and its effective date have both already been identified.

169. It is, therefore, clear to me that s.44 of FA 2003 has no role to play in the interpretation of s.2(3)(b) of the 2015 Act.

170. However, in case I am wrong about that, I now consider HMRC's submission that, on the facts of the Ladywalk transactions, s.44 of FA 2003 had the effect that a land transaction was not entered into by reason of the contract (such that subsection (2) applied) but that, because the parties to the contract and the conveyances were different or because the transactions were not in substantial conformity with the contract, s.44(3) did not apply as the definition of "completion" in s.44(10)(a) was not met.

171. Section 44(10)(a) provides that references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract.

172. In the case of the Ladywalk transfers, the LLP was the transferee. The appellant did not exist at the time that the contract was entered into. HMRC consider that this constitutes a knock-out blow in their favour. That is because their view of s.44 is that the parties to the contract and the parties to the resulting transfers have to be one and the same.

173. That is, in my view, to misunderstand the operation of s.44. Section 44(10)(a) starts by identifying the land transaction "proposed", that is to say the land transaction "proposed" by the contract. It is plain that a comparison has to take place between, on the one hand, what is proposed (or contemplated) by the contract and what subsequently happens (the resulting conveyances or transfers). But Parliament was alive to the possibility that there might be an immaterial mismatch between the transfers effected and what the contract was contemplating. Accordingly, Parliament constructed a test that operated by reference to the completion of the land transaction proposed "in substantial conformity with" the contract.

174. What then of the words in parentheses (", between the same parties,")? Were the inclusion of those words intended to alter in some way the comparative exercise that was to be undertaken so as to confine the definition of completion to a case where there had to be a complete identity between the parties to the contract and the parties to the transfers?

175. As a matter of ordinary language, it is, in my view, difficult to read s.44(10)(a) in that way. The reference to the same parties follows immediately after a reference to the proposed land transaction. There is no explicit reference to the contract in question before the reference to the parties. It would require an exercise in linguistic gymnastics to read into the provision an implicit reference to the parties to the transaction being the same as the parties to the contract. The definition would, if HMRC are right, have to be read as if it said something like this: "references to completion of a land transaction proposed by a contract are to completion of the land transaction between the same parties as the parties to the contract (whether or not the contract authorised the parties to the transaction to be different from the parties to contract) in substantial conformity with the contract".

176. There is no need to engage in such linguistic gymnastics. In my view, the reference in s.44(10)(a) to the parties is to the parties to the proposed land transaction. The contract is to be

completed for the purposes of s.44 if the transaction (the transfer) that is proposed is between the same parties that were proposed by the contract to be parties to the transaction (the transfer).

177. There is, moreover, no discernible reason why Parliament might have intended that s.44 should not be read in that way. It produces a perfectly sensible result in a case where the parties to the contract expressly contemplate that the land is to be conveyed to a person (identified in the contract) who is different from the person entering into the contract. And it seems to me that it also produces a perfectly sensible result in cases where the contracting parties expressly contemplate that the transferee could be a person nominated by the contracting purchaser.

178. It also seems to me that there is nothing said by Lewison LJ in *DV3 RS Limited Partnership* that points to an alternative construction. The comments made as to the need to identify the parties to each contract and the parties to each transfer were expressly directed at cases dealt with by s.45 of FA 2003 where more than contract was within the contemplation of the section. Such comments as there were on s.44(10)(a) of FA 20013 (which contained the definition of "completion") were doing little more than neutrally recounting its terms.

179. Perhaps of most relevance is his comment at [24] that "it is by reference to the terms of the contract in the real world that one can tell whether the contract has been completed for the purposes of section 44 (10) ("between the same parties and in substantial conformity with the contract")." It would be wrong to accord more weight to that simple sentence than it can properly bear in the circumstances. It was, in my view, simply recording the terms of s.44(10)(a). But it is, at least, directed at the relevant question as I have described it above, namely an assessment "by reference to" the terms of the contract whether the contract had been completed requiring a comparison between those terms and the resulting transactions.

180. Finally, the submissions made by HMRC are in my view close to seeking to have their cake and eat it. HMRC are not denying that, in the facts of this case, subsection (1) of s.44 is engaged. And yet that subsection is operative only if there is a contract for a land transaction under which the transaction is "to be completed" by a conveyance. The definition of completion in s.44(10)(a) is expressed to govern <u>all</u> references in the section to that term, and, as "completed" in subsection (1) is such a reference, one might think it bears the meaning given by s.44(10)(a).

181. On the construction adopted by HMRC, we then end up in a logical conundrum. If the contract is made between parties who expressly contemplate that another person (who is not a party to the contract) might be nominated as purchaser of the property (so that the parties to the contract and the parties to the resulting transaction are not the same), HMRC submit that the contract is not one that can ever be completed. And yet, by reference to the same facts and the same test of "completion", HMRC are also saying that the land transaction <u>is</u> one that "is to be completed": otherwise it could not fall within s.44 in the first place. It is true that the definition in s.44(10)(a) works best when judged after the event: the notion of something being in "substantial conformity" with the contract is hard to determine at its inception. However, there is no difficulty here if completion is construed in the way that I set out above.

182. It also seems to me highly questionable that a contract could fall to be disregarded under s.44(2) (as submitted by HMRC) in a case where, if HMRC are right, subsection (3) could never be engaged and where the other operative provisions, namely subsections (4) and (8), would seemingly collapse into nothing. Clearly, subsection (3) cannot be engaged as the contract would not be completed for the purposes of s.44 as the parties to the transactions are not the same as the parties to the contract. That would leave subsection (4), which seems to me to be anticipating the altogether different case where, for the purposes of SDLT, events are to be treated as sufficient to constitute the occurrence of a land transaction <u>before</u> the transaction is actually carried out. That is dealing with a case where parties might otherwise "rest on the

contract" by taking possession of the subject-matter of the contract or paying the consideration while deferring the formal transaction. If the transaction does then actually take place, subsection (8) is applicable (to ensure that, overall, the right amount of SDLT is ultimately payable).

183. It seems to me that the very strong implication of the words in s.44(2) ", but the following provisions have effect" is that one or other of the remaining operative provisions of that section (namely, subsections (3), (4) and (8)) are to have effect where a land transaction takes place in the very way contemplated by the parties to the contract.

184. I also consider that, for the same reasons, the proposed transactions did take place in substantial conformity with the June 2014 contract. As I explain below, the true interpretation of the contract was that a transfer to a person such as the LLP was well within the contemplation of the contracting parties. HMRC submitted that the Ladywalk properties were conveyed to someone other than the intended purchaser under the contract and, as such, the conveyances were not in substantial conformity with the contract. That is, however, to proceed on a misconception of the true position. The parties to the contract and the parties to the transfers were not one and the same but that very possibility had, plainly, been anticipated by the contract.

185. The fact that the LLP was not a party to the June 2014 contract is not disputed by the appellant and does not, in my view, take matters further forward. HMRC referred to the statement of the law contained in *Megarry & Wade: The Law of Real Property* 9th ed at [14-027] that there are "three essential elements upon which the parties must expressly agree if there is to be a valid contract for the sale of land or of an interest in land", namely the parties, the property and the consideration. In the case of the June 2014 those elements are plainly satisfied. As I explain below, my view is that Dr Mallya alone is the party to the contract and, whether or not that is the case, it would be to misunderstand the definition of the buyer in the June 2014 contract and its reference to "or to his/their order" to read that definition as having the effect, as a matter of law, that the person nominated by Dr Mallya could, simply as a result of the nomination, become a party to the contract. The nomination is, as submitted by Mr Thomson, simply a case of the contract being performed.

186. I also consider that it is unsustainable to regard the transactions as not being in substantial conformity with the contract by reference to the entering into of the June 2015 agreement. As discussed in more detail below, that agreement operated as a separate contractual agreement by reference to the June 2014 contract but, in any event, the terms of the June 2015 agreement simply cannot be regarded in a way contended for by HMRC. The advance payment of the purchase price, even if characterised as a deposit varying the terms of the June 2014 contract, was not of a kind that can plausibly be suggested as casting doubt that the resulting transactions were any different from those proposed by the contract. All that had happened was that Mr Hamilton as the seller had received the agreed contractual price earlier than he would otherwise have done with (at most) the added protection that it acted as security for the performance by Dr Mallya of the contractual obligations assumed by him under the June 2014 contract.

Section 44A of FA 2003

187. As mentioned above, HMRC's skeleton argument included new material on s.44A of FA 2003 but I ruled that HMRC ought not to be permitted to rely on their arguments based on that section. Nonetheless, in the course of the hearing, it became apparent to me that it was necessary to understand what function that section was intended to perform in Part 4 of FA 2003. The section's true meaning was not readily ascertainable in the course of the hearing but, on one view, it might be thought that the section was the applicable provision in a case where a contracting purchaser was entitled to nominate a different person as the person to whom land

was to be conveyed or transferred. If that were the case, it would be that section (rather than s.44) that would be relevant to the facts of this appeal and the above consideration of s.44 would be firing at the wrong target. Accordingly, I invited both parties to make written submissions on the application of s.44A to the present appeal.

188. In its written submission of 24 January 2020, HMRC said this:

> "4. HMRC originally submitted (in their Skeleton Argument and at the hearing of this appeal) that section 44A applies to the Agreement, with the result that this appeal falls to be dismissed.
>
> 5. Having considered Tribunal's questions in relation to section 44A, HMRC submit that the better view is that section 44A does not apply to the Agreement because the Agreement is a contract for a "land transaction" (within the meaning of section 44) that is to be completed by a conveyance, and section 44A would only have applied to it had it not been a contract for a "land transaction". The Agreement therefore falls within section 44 (that applies where a contract for a land transaction is to be completed by a conveyance) and not within section 44A."

189. The appellant described this as a concession that s.44A did not apply. The appellant supported the interpretation that HMRC described as the better view. In my judgment, HMRC and the appellant are correct that s.44A is not applicable to the circumstances of the Ladywalk transactions.

190. Section 44A of FA 2003 modifies the operation of section 44 in any case where a contract provides that an estate or interest in land is to be conveyed by one party to the contract at the direction or request of the other party to a person who is not a party to the contract. Section 44A provides as follows:

> "**44A Contract providing for conveyance to third party**
>
> (1) This section applies where a contract is entered into under which a chargeable interest is to be conveyed by one party to the contract (A) at the direction or request of the other (B)—
>
> (a) to a person (C) who is not a party to the contract, or
>
> (b) either to such a person or to B.
>
> (2) B is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
>
> (3) If the contract is substantially performed B is treated for the purposes of this Part as acquiring a chargeable interest, and accordingly as entering into a land transaction.
>
> The effective date of the transaction is when the contract is substantially performed.
>
> (4) Where the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of subsection (3) shall (to that extent) be repaid by the Inland Revenue.
>
> Repayment must be claimed by amendment of the land transaction return made in respect of the contract.
>
> (5) Subject to subsection (6), section 44 (contract and conveyance) does not apply (except so far as it defines "substantial performance") in relation to the contract.
>
> (6) Where—

(a) this section applies by virtue of subsection (1)(b), and

(b) by reason of B's direction or request, A becomes obliged to convey a chargeable interest to B,

section 44 applies to that obligation as it applies to a contract for a land transaction that is to be completed by a conveyance.

(7) Section 44 applies in relation to any contract between B and C, in respect of the chargeable interest referred to in subsection (1) above, that is to be completed by a conveyance.

References to completion in that section, as it so applies, include references to conveyance by A to C of the subject matter of the contract between B and C

(8) In this section "contract" includes any agreement and "conveyance" includes any instrument."

191. Section 44A applies where "a contract…under which a chargeable interest is to be conveyed by one party to the contract (A) at the direction or request of the other (B)" (see subsection (1)). The "chargeable interest" referred to is to be conveyed, under the contract, by A to C (C not being a party to the contract between A and B) or to B or C.

192. In my view, the contract between A and B that is envisaged is not a contract for a "land transaction". The focus of the section is aimed at a contract "under which a chargeable interest" is to be conveyed. That language is strikingly different from the opening subsection of s.44, which is focused on a contract "for a land transaction".

193. That is reinforced by a consideration of the terms of subsection (3), which provides that if the contract between A and B is substantially performed, B is treated as acquiring a chargeable interest, and accordingly as entering into a land transaction. But such a deeming is only necessary if the contract in question is not a contract to acquire a chargeable interest.

194. If Parliament had anticipated that there was an overlap between sections 44 and 44A, it might have indicated as such by making one section (rather than the other) the governing section. It did not do so, at least not in terms. In my view, there is no doubt that s.44(1) is apt to apply to the circumstances of the Ladywalk transactions. The June 2014 contract was a contract for a land transaction that was to be completed by a conveyance.

195. My interpretation is also strongly supported by the background to section 44A as revealed by the Explanatory Notes and by the promotor of the section (the Financial Secretary to the Treasury) in the relevant proceedings in the House of Commons.

196. Paragraph 8 of the Explanatory Notes for the provision of the Finance Act 2004 that inserted section 44A into FA 2003 was in the following terms:

> "Paragraph 4 [which inserted s.44A into FA 2003] makes provision for where a contract (a 'section 44A contract') is entered into whereby one party to the contract (B) has the right to direct a conveyance to himself or to a third party (C). An example is a development agreement where the developer has the right to enter on the land and build on it and then direct the conveyance of the completed plots. The new provisions put it beyond doubt that such a contract is charged to SDLT when it is substantially performed (in the same way as a contract which is to be completed by a conveyance to B, a 'section 44 contract'). They also ensure that it is the consideration that is given or is to be given by B that is charged to SDLT once substantial performance occurs."

197. During the proceedings in Committee of the Whole House on the Bill that resulted in the Finance Act 2004, the Financial Secretary to the Treasury (Ms Ruth Kelly) made the following statement on 26 April 2004 (Hansard, columns 915 and 916) in response to an

amendment leaving out "or request" from the opening words of the new section 44A(1), which was tabled by the Conservative opposition (Mr Mark Prisk):

> "This amendment [tabled by Mr Prisk] affects new section 44A, which prescribes the stamp duty land tax treatment of contracts where one party can direct or request that a conveyance of land is made to a third party. He [Mr Prisk] is correct that new section 44A is there to ensure that stamp duty land tax is not avoided, especially in commercial transactions, by disguising what is in substance the purchase of land for development as a non-land transaction, often described as a "building licence". The Government believe that the tax treatment should reflect the substance. That is our policy on a variety of issues that are to be debated today.
>
> The effect of the amendment would be to tempt taxpayers and their advisers to draft building licences that are still in substance the purchase of land but which provide that the developer will "request" rather than "direct" the landowner to convey to a third party. That would no doubt be the sort of request that it is hard to say no to.
>
> Concern has been expressed about the interaction between new section 44A and existing section 44, dealing with contracts to be completed by a conveyance. I reassure the hon. Gentleman that section 44 remains the primary charging section where contracts for land transactions are substantially preformed. In particular, the fact that a normal contract for sale includes a provision permitting the contracting purchaser to nominate someone else to take the conveyance does not take the contract out of section 44 into section 44A."

198. I do not consider that this is a case where recourse should be made to Parliamentary materials in order to ascertain the meaning of the words in the statute on the basis that they are ambiguous or obscure (see *Pepper v Hart* [1993] AC 593). But it is also possible to have regard to Parliamentary debates on a Bill to give further context or identify the nature or extent of the mischief at which the provisions were directed.

199. In particular, in *Presidential Insurance Co Ltd v Resha St Hill* [2012] UKPC 33 the Judicial Committee of the Privy Council said this at [23] and [24]

> "[23] .... The textual changes do not therefore make clear the purpose of the amendments to s.4(7). The respondent submits that assistance can, however, be obtained as to the general background and as to the mischief which the legislation was addressing by looking at the reports of the proceedings in Parliament: see e.g. *Gopaul v Iman Bakash* [2012] UKPC 1, para 3 per Lord Walker, and *R (Jackson) v. Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 97 per Lord Steyn. But Lord Steyn was careful to distinguish this principle from the more radical separate principle recognised in Pepper v Hart [1993] AC 593. He said of the former principle that "the use of Hansard material to identify the mischief at which legislation was directed and its objective setting" was permissible, but that "trying to discover the intentions of the Government from Ministerial statements in Parliament is constitutionally unacceptable". The separate principle in Pepper v Hart only allows a court to have regard… to statements in Parliament where [the Pepper v Hart conditions are met] …
>
> [24]. It is therefore permissible as a first step to look at Hansard to try to identify the mischief at which the amendment of s.4(7) was aimed and its objective setting…"

200. In addition, Lord Mance said much the same thing in the Supreme Court in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: reference by the Counsel General for Wales*

[2015] AC 1016 at [55] where he considered that ministerial statements could be referred to in order to put the legislative measure in context so long as care was taken not to question the sufficiency of debate in a way that would contravene article 9 of the Bill of Rights.

201. It seems to me that, in the exchanges in the Committee of whole House on s.44A, the Financial Secretary to the Treasury was correct to say that "the fact that a normal contract for sale includes a provision permitting the contracting purchaser to nominate someone else to take the conveyance does not take the contract out of section 44 into section 44A".

WAS THERE AN EVENT WITHIN S.2(5)(A) OR (C) OF THE 2015 ACT?

Interpretation of the June 2014 contract

202. In order to determine the true effect of the events occurring after 4 December 2014 in the case of the Ladywalk properties, it is essential to determine the true meaning of the June 2014 contract.

203. As noted by the Upper Tribunal in *Ingenious Games LLP etc v HMRC* [2019] UKUT 0226 (TCC) at [79], the basic principles to be applied to the construction of written contracts have been set out in a number of relatively recent Supreme Court judgments, namely *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Limite*d [2017] AC 1173.

204. In *Arnold v Britton* Lord Neuberger referred at [15] to Lord Hoffmann's judgment in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 (at [14]) that, in the interpretation of a written contract, the court is concerned to "identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean". And Lord Neuberger continued that the court does so by focusing on the meaning of the relevant words, in the documentary, factual and commercial context.

205. In the subsequent case of *Wood v Capita*, Lord Neuberger PSC summarised the approach to be taken as follows:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building* Society [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, *A new thing under the sun? The interpretation of contracts and the ICS decision* Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
>
> 11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the judgments confirmed the approach in

Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

14. On the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing."

206. The June 2014 contract is short and its terms are simple and tend to the informal. The factual matrix is also, as set out above, simple. There are two striking features of the factual matrix both of which are reflected in the term of the contract.

207. The first is that the contract was put together quickly on the day on which Dr Mallya visited the property: only the key provisions were included. There was no provision for a deposit. Nor was a completion date settled upon: rather it was to be "mutually agreed when the Seller has made alternative living arrangements". And the haste with which the contract was concluded militated against the inclusion of more detailed provisions, a point recognised by clause 5 of the contract, which recorded that it "will form the basis of detailed sale/purchase agreements". In the event there were no further sale/purchase agreements (ignoring for the moment whether the June 2015 agreement could be regarded as such).

208. The second is that the precise identity of the person to whom the Ladywalk properties were to be conveyed was something to be determined at a later date.

209. I have already referred above to the fact that the contract was signed *only* by Dr Mallya and that, underneath the Buyer in the contract, there was reference *only* to Dr Mallya. I have already found that:

> (1) there was no evidence that Dr Mallya had the actual authority of either of his daughters or his son to enter into the contract on their behalf; and
>
> (2) there was no evidence before the tribunal that could be relied on to support a finding that he had ostensible or other implied authority to act on their behalf so as legally to bind them to perform the contract.

210. In those circumstances, it seems to me to be an inevitable inference that, properly construed, the only party to the contract as buyer was Dr Mallya. It seems to me that this is borne out by the way in which Buyer was defined: that expression encompassed a range of possibilities including that the buyer was someone other than one of the named persons ("to his/their order").

211. The detailed provision seeking to define "the Buyer" was a material provision of the contract and is central to the determination of this appeal. It must be recognised that there is a mismatch in the contract between the party to the contract (Dr Mallya) and the person to whom the Ladywalk properties were to be conveyed. The expression "the Buyer" is used to refer to both. However, properly understood in the factual matrix, it seems to me that this is little more than a drafting infelicity.

212. It seems to me that the objective meaning of the language chosen by the parties in the contract, properly understood in the factual context, leads to the following conclusions. It is, on an ordinary reading of the contract, clear that the contract anticipated that, although Dr Mallya was the party to the contract, the person to whom the property would actually be conveyed could also be any combination of his two daughters or son. I did not understand HMRC to contest that, and, had the property been conveyed directly to any combination of his two daughters or son, it is hard to see on what basis HMRC could have proceeded with their case.

213. What then of the reference to "or to his/their order"? In the factual context of the transaction, in particular the reference to his children, it is, in my view, also clear that the contract contemplated that the children might enjoy the ownership of the property in more indirect means, the most obvious one being in the form of a trust. Whatever else those words might encompass, they must encompass that possibility. HMRC submitted that, read literally, those words cover the whole world. So much is true. But that would not, according to established case law, be the proper approach to construing the contract: it "is not a literalist exercise focused solely on a parsing of the wording of the particular clause but .. the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting

of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning".

214. The objective meaning of the definition of Buyer is, in my judgment, clear. Not only was the contract contemplating a direct transfer of the Ladywalk properties to a combination of Dr Mallya's two daughters or son but it also contemplated a transfer by more indirect means in a way that would, in a meaningful sense, benefit his children. As I say above, "or to his/their order" were, in my view, plainly included to cater for that possibility.

Did a transaction outside the contract take place?

215. Once the true meaning of the contract is understood, the events that happened in 2015 that resulted in the Ladywalk properties being transferred to the LLP require very little in way of further explanation. As submitted by Mr Thomson on behalf of the appellant, what transpired in 2015 was nothing more, and certainly nothing less, than a simple performance of the June 2014 contract in a manner that was expressly contemplated by its terms. Leaving aside the June 2015 variation argument that I consider below, the ultimate effect of the various transactions (the creation of Ladywalk LLP, the nature of its membership, the trusts on which those membership interests were held) was that, in a real sense, the economic ownership of the Ladywalk properties was enjoyed by Dr Mallya's daughters. Although, as I have described matters above, I think that it is a misunderstanding of the legal position to regard his daughters as beneficially owning the Ladwyalk properties, the analysis required to arrive at that result does clearly show that there are a range of circumstances in which it seems – to put it at its lowest – that his daughters would be likely to stand to gain or lose by an increase or decrease in the value of the properties. And nor are those circumstances unusual one. On the contrary, some change to the arrangements would have to occur to deprive the daughters of the ultimate enjoyment of (for example) the proceeds of the sale of the properties.

216. Accordingly, it seems to me that, if not the paradigm case contemplated by the June 2014 contract, the transactions that occurred in 2015 were plainly ones well within the contemplation of both parties in striking the terms of that contract.

217. I also consider that there is nothing remotely surprising in the fact that the LLP took out the borrowing from Edmond de Rothschild (Suisse) S.A. secured on the Ladywalk properties. Once it was established, as part of the arrangements under which economic ownership of the Ladywalk properties was to be conferred on Dr Mallya's daughters, that the LLP was going to hold the legal and beneficial interest in the Ladywalk properties, it naturally followed that the lending of money would be to the LLP. The charge would, plainly, be of limited (if any) significance to the lender if the borrower was not in a position to pledge the properties as security. As such, the lender would seek a charge from the LLP as the (true) legal and beneficial owner of the Ladywalk properties.

218. HMRC made submissions in their skeleton argument in relation to s.44A to the effect that the tribunal should infer the existence of a separate agreement between Dr Mallya and Mr Hamilton for the transfer of the properties to the LLP. As explained above, I held at the outset of the hearing that HMRC should not be permitted to make any such submission.

219. But HMRC were permitted to make similar submissions to the effect that, after 4 December 2014:

> (1) there had been an assignment of rights under the contract (see s.2(5)(a) of the 2015 Act); or
>
> (2) there had been an assignment, subsale or other transaction relating to the whole of the subject-matter of the June 2014 contract as a result of which the LLP (who was not

the purchaser under the contract) became entitled to call for a conveyance (see s. 2(5)(c) of the 2015 Act).

220. In both cases HMRC were, in essence, seeking to argue that some transaction must have occurred after the June 2014 contract to explain the result that the properties were transferred to a person (the LLP) who was not a party to the contract. It seems to me that this argument was proceeding on a fundamental misunderstanding of the June 2014 contract, properly construed in the manner set out above.

221. In my judgment, there is simply no need to seek out a separate transaction (whether that is an assignment of rights under the contract or a transaction of the kind mentioned in s.2(5)(c) of the 2015 Act) to explain the transfer of the properties to the LLP. As I explain above, that was a transfer that was within the clear contemplation of the parties who had contracted to buy and sell the properties. There is no evidence at all of any further transaction. Indeed, there is no evidential basis of any kind to support either of HMRC's submissions. Rather, there seems to be an attempt to retro-fit the case into the relevant terms of s.2(5)(a) or (c) of the 2015 Act. HMRC were clear in making the submissions (including the ones relating to s.44A) that they were asking the tribunal to make an inference as to the existence of a separate transaction. The inference was required to make sense of the chain of transactions including the fact that the LLP took the Ladywalk properties as legal and beneficial owner.

222. However, the true analysis leads, in my view, to the opposite conclusion. What happened in 2015 was the simple performance of the contract. The absence of any evidence at all supporting a finding as to the existence of a separate transaction is surely telling. There is no such evidence because there was no separate transaction. There is nothing at all surprising in that conclusion. Indeed, the opposite would be the case: in the light of the terms of the 2014 contract, properly construed, it would be most unexpected if there had been a separate transaction. What happened was the simple carrying out of the intention of Dr Mallya in making the contract in the terms in which he did.

223. Accordingly, I consider that the transactions are not excluded transactions as a result of the occurrence of a transaction within s.2(5)(a) or (c) of the 2015 Act (ignoring, for this purpose, whether there had been a variation of the contact).

Was the June 2014 contract varied?

224. In her skeleton argument, Ms Belgrano noted that "variation" was not defined in the 2015 Act. One of her submissions was that "variation", properly construed, was not confined to a variation for the purposes of contract law. The essence of the submission was that a change in the parties to the June 2014 contract would constitute a variation for the purposes of s.2(5)(a) of the 2015 Act whether or not it would constitute a variation as a matter of private law.

225. She then submitted that the June 2014 contract had been "varied" because the LLP, who was not a party to the contract, was a party to the eventual land transactions. In making that submission, Ms Belgrano referred in support to [27] of the Explanatory Notes to the 2015 Act, which explained that the transitional protection was available "provided that there is no event on or after [4 December 2014], of a kind listed in subsection (5), which results in the effect of the contract on completion being different from the effect of the contract when first entered into".

226. I reject that submission. If there had been a change in the parties to the contract, that would not constitute a variation of its terms but a novation, namely the extinguishing of the old contract and substitution of a new one (between new parties) in its place. That (a novation) was not a result for which HMRC contended.

227. It seems to me to be self-evident that "variation" was being used in s.2(5)(a) of the 2015 Act in its contractual sense. The question which Parliament was asking was simply this: has the contract that has been entered into been varied as a matter of law. If HMRC were right, it would seem to result in the rather absurd outcome that a contract could be regarded as "varied" for the purposes of s.2(5)(a) of the 2015 Act even if, when a comparison is made of the contract immediately before and after the "variation", the comparison results in the conclusion that the legal rights and obligations under the contract were precisely the same as they always were.

228. I also consider that the Explanatory Notes has no bearing on this issue. They say nothing at all about the meaning to be given to "variation" in s.2(5)(a) of the 2015 Act.

229. In any event, I reject HMRC's submission for the same reasons as given above in relation to the proper legal interpretation of the June 2014 contract. HMRC's case rests on a supposed mismatch between the terms of the June 2014 agreement and the resulting land transactions. There was no mismatch. The transactions were, in my view, clearly contemplated by the contract.

230. I also consider as misconceived HMRC's submission that there could be other types of events that could constitute a variation of the contract within the meaning of s.2(5)(a) of 2015 Act. In particular, HMRC submitted that:

> (1) the 2014 contract was varied by a direction by Dr Mallya that the LLP should be a purchaser or by another agreement pursuant to which the LLP became a party to the land transaction; or
>
> (2) the 2014 contract was varied by the LLP becoming entitled to call for a conveyance of the Ladywalk properties, either as a result of the assignment of Dr Mallya's rights under the contract or as a result of a sub-sale or similar transaction.

231. It was assumed that, in making those submissions, the event constituting the variation did not have to be contained in a document in writing. Indeed, it was submitted that the references to a contract in s.2 of the 2015 Act included references to an agreement of any kind (which could be in writing or made orally or by conduct). And if a contract included such an agreement there was no reason why a variation had to follow any particular form either. It could be anything which had the effect, in substance, of varying the contract, whether or not the contract was varied as a matter of law.

232. Those submissions are, in my view, without merit.

233. Section 2 of the 2015 Act uses the expression "contract" without further elucidation. Parliament could have defined that expression if it had wanted to but did not. The presence of a definition of a "contract" in s.44 of FA 2003 is far less a point in favour of HMRC than a point against them. That was a definition that had effect only for the purposes of that section. There is no definition of "contract" for the purposes of Part 4 of FA 2003, a point revealed by its absence from the list of defined expressions in s.122 of FA 2003. There is not, despite HMRC's submission to the contrary, an SDLT meaning of "contract" that would, without more, extend to the 2015 Act.

234. So far as the matters relied on by HMRC have any relevance, it is plain to me that their relevance is to the occurrence or otherwise of the other events dealt with by s.2(5)(a) or (c) of the 2015 Act. There is simply no need to resort to reading in a definition into s.2 of the 2015 Act that is not there or contending that a contract can be varied even though legally no change has been made to it. If there has been an assignment of Dr Mallya's rights under the contract, the case would happily fall within s.2(5)(a) without the tremendous struggle involved in forcing it into the concept of a variation of a contract. The same applies to all of the other matters that were said by HMRC to be capable of constituting a variation of the contract. They would either

fall into s.2(5)(c) or not. I can see no reason to adopt a strained construction of s.2(5)(a) in a situation where the other provisions of the section are plainly apt for the purpose.

235. In truth, section 2 of the 2015 Act is, in relation to these matters, nowhere near as complicated as HMRC were claiming it to be. If, as in this case, there has been a contract for the sale and purchase of the Ladywalk properties, the question whether there has been a variation of the contract is determined by simply asking whether, as a matter of law, the contract has been varied. But s.2 of the 2015 Act then goes on to complete the code by setting out the other events the occurrence of which have the effect that transitional protection is withdrawn.

236. The next question then is whether the 2015 agreement did constitute a variation, as a matter of law, of the June 2014 contract. To determine that question, it is necessary to consider first the applicable statutory provisions relevant to contracts for the disposition of legal interests in land.

237. The relevant law applicable to the Ladywalk properties is contained in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (which, as per section 6(2), extends to England and Wales only).

238. Subsections (1) to (3) of section 2 of that Act provide as follows:

> "**2 Contracts for sale etc of land to be made by signed writing**
>
> (1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
>
> (2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.
>
> (3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract."

239. The section is silent as to its application in the case of variations to a contract. The Court of Appeal in *McCausland and another v Duncan Lawrie Ltd and another* [1997] WLR 38 held that the formalities prescribed by section 2 "must be observed in order to effect a variation of a term material to the contract for the sale or other disposition of an interest in land but are not required for a variation which is immaterial in that respect" (per Morritt LJ at [49F]). In other words, a material term of the June 2014 contract could, as a matter of law, be varied only if the variation was contained in a document in writing. The only document in writing that could conceivably have that effect is the June 2015 agreement.

240. There was no dispute between the parties that, in contract law, a variation of a contract means a modification or alteration of its terms by mutual agreement, supported by consideration: see *Chitty on Contracts* (32nd edition), Ch.22, s.5. The variation may be express or implied from words or conduct.

241. HMRC submit that the June 2015 agreement constitutes, for the purposes of s.2(5)(a) of the 2015 Act, a variation of the June 2014 contract. HMRC also submitted, in the course of the hearing, that the June 2015 agreement could itself be regarded as the contract for the sale of the properties: that agreement had incorporated the terms of the June 2014 agreement.

242. In order to determine whether the June 2014 contract has been varied, we need first to be clear as to the material terms of that contract. As explained above, the contract identified, through the definition of the Buyer, the person to whom the properties were to be transferred. The contract identified the properties in question (Ladywalk and Bramble Lodge) and their

total sale price of £12,999,999. It did not seek to apportion that total amount between the two properties. The contract did not specify a completion date but provided instead that "completion will be mutually agreed when the Seller has made alternative arrangements". The contract also made provision about certain chattels and required the properties no longer to be marketed. The contract made no provision as to the payment of a deposit.

243. I have already set out above the principles for interpreting contracts, which include taking proper account of the factual matrix.

244. Of relevance to the proper construction of the June 2015 agreement are the facts (as I have found them) that payments were made to Mr Hamilton in respect of the outstanding balance totalling £1,300,000 in March and April 2015. The effect of those payments was to reduce the monies to be paid on the completion of the June 2014 contract.

245. Did those payments constitute a variation of the June 2014 contract? Could they be regarded as deposits? It seems to me quite impossible to regard those payments in March and April 2015 as altering in any way the terms of the contract (whether or not the formalities of s.2 of the 1989 Act were satisfied in respect of them). The payments were simply Dr Mallya performing (in part) his obligations that would otherwise fall to be performed on completion of the contract once a completion date had been agreed. There was no legal requirement on Dr Mallya to make those payments. There is no evidence to support a finding that Mr Hamilton provided any consideration for the movement of monies to him, and, indeed, there was no suggestion made by HMRC of such a possibility. The monies were intended to reduce the outstanding balance on the purchase of the properties and, in the light of subsequent events, it is plain that they were applied for that purpose.

246. It is convenient at this point to consider the true function of a deposit when it does properly form part of a contract. The case of *Samarenko v Dawn Hill House Ltd* [2012] 3WLR 638 concerned a contract which required the payment of a deposit not at the inception of the contractual relationship but at a later fixed date (which was still a significant amount of time before the contractual completion date). It was, nonetheless, held by the Court of Appeal in that case that the payment of the deposit constituted a condition of the contract and the failure to make timely payment of the deposit amounted to a repudiatory breach of the contract.

247. Lewison LJ at [12] to [14] reviewed the nature of a deposit and its significance in the context of conveyancing transactions as follows:

> "12 I begin by considering the nature of a deposit. The classic exposition is that of this court in *Howe v Smith* (1884) 27 Ch D 89. Cotton LJ said, at p 95, that the deposit was: "a guarantee that the contract shall be performed." Bowen LJ said, at p 98, that it was: "a security for the completion of the purchase". Fry LJ said, at p 101, that:
>
> > "It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."
>
> 13 As Lord Macnaghten put it in *Soper v Arnold* (1889) 14 App Cas 429, 435:
>
> > "Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business …"
>
> 14 So important is the payment of a deposit that in the vast majority of conveyancing transactions the seller will simply refuse to exchange contracts until the deposit monies are safely in his own hands or the hands of a stakeholder. Without actual receipt of the deposit monies the deposit cannot

> fulfil one of its essential functions viz the creation of the fear of its forfeiture thus providing a motive for the buyer to complete the purchase. That, undoubtedly, in my judgment, is the ordinary understanding of buyers and sellers of land.

248. Etherton LJ held at [51] and [52]:

> "51 In the case of a contract for the sale of land, the vendor almost always requires a deposit to be paid on exchange of contracts. If the purchaser is not willing or able to pay a deposit at that point, the vendor will not exchange contracts. That simply reflects the importance of a deposit as an indication of the commitment of the purchaser to carry through the contract and, because the deposit is forfeitable, its status as a form of security for the vendor's performance and so, in a loose commercial sense, a guarantee: see the classic statements in *Howe v Smith* (1884) 27 Ch D 89.
>
> 52 In view of the importance of a deposit for those reasons, it is difficult to imagine that a contractual obligation to pay a deposit will ever be anything other than a term of fundamental importance in the contract, that is to say a term which would be regarded at common law as a fundamental term or condition, rather than a warranty or an innominate term, and so any breach of it would entitle the innocent party to treat the contract as at an end: compare *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26."

249. I now turn to the terms of the June 2015 agreement, determining the objective meaning of its terms in accordance with the applicable case law cited above in relation to the interpretation of the June 2014 contract.

250. The first thing to note is that the 2015 agreement refers in its heading to the June 2014 agreement. It then goes on record at [1] of the agreement that the buyer has agreed to pay "a further deposit advance" of £4,500,000 against the agreed purchase price. The reference to the "deposit advance" being a "further" amount is explained by [2] of the agreement, which records as a fact that "a deposit advance of £1,300,000 has already been paid by the Buyer against the above Agreement".

251. The 2015 agreement also included detail as to the times at which the £4,500,000 was to be paid. It did so by agreeing that the original purchase price was to be apportioned between the two properties so that £1,500,000 was payable in respect of Bramble Lodge. The significance of that lies in the fact that the further payment of £1,500,000 was expressed to be payable on the anticipated completion of Bramble Lodge. The remaining £3,000,000 was payable on the signature of the agreement.

252. The 2015 agreement then required the Seller to allow full access to the properties for the nominated builder to carry out agreed refurbishment works.

253. I am unable to see how the 2015 agreement can properly be read as varying <u>any</u> of the terms of the June 2014 contract. It made no change to the person to whom the properties were to be transferred. It made no change to the properties to be sold. It made no change to the total sale price of £12,999,999. It made no change to the completion date, which remained one to be mutually agreed. I note that in HMRC's skeleton argument there was reference to the variation being supported by consideration by the parties agreeing that completion would be scheduled to take place on or before 15 July 2015 with the agreement being expressed to be specifically enforceable. However, all the June 2015 agreement does is refer to the date of completion as being "scheduled" to take place on or before 15 July 2015 (which it is to be noted did not happen – completion occurred on 17 July 2015). In my view, that is little or no advance from the terms of the original June 2014 contract that left the completion date to be mutually agreed.

The parties were clearly not committing to a particular date in the June 2015 agreement: that is not what "scheduled" means. And, even if they were, that would simply be the mutual agreement contemplated by the June 2014 contract. The mere fact that the reference was said to be specifically enforceable is, in my view, neither here nor there: the question is the meaning of the other terms of the contract that are said to be the ones varying the contract and are claimed to be specifically enforceable. In any event, it is not for the parties to agree the availability of an equitable remedy: that is in the gift of the courts not in the gift of the parties.

254. In short, the June 2014 contract was unaffected by the terms of the 2015 agreement. There is no meaningful sense in which the bargain struck between Dr Mallya and Mr Hamilton in June 2014 had been altered by it. Rather, it is plain that the 2015 agreement was making further provision that operated by reference to the (unchanged) June 2014 contract. It was, in short, a separate contractual agreement under which the seller provided consideration to the buyer (by allowing access to the properties for refurbishment work to be carried out) and the buyer provided consideration to the seller by agreeing to pay £4,500,000 when there was no legal requirement on him so to do.

255. It is true that the 2015 agreement referred to the payment of £4,500,000 as a "deposit advance". But the 2015 agreement plainly considered that this amount was of a similar kind to the previous payment of £1,300,000, which was also referred to as a "deposit advance" and which (for the reasons set out above) cannot be regarded as a deposit. The difference between the two payments was that one was made voluntarily and the other was made in return for valuable consideration consisting of access to the properties being given by the seller. In my judgment, a reasonable person, performing the exercise as set out by Lord Neuberger in *Arnold v Britton*, would be unable to regard the payment of £4,500,000 as a security for the completion of the purchase any more than the person could regard the previous payment of £1,300,000 as performing such a function. A reasonable person would, in my view, find it most unlikely if fully one year after the contract was made, and even though payments amounting to 10% of the purchase price had already been made, the purchaser nonetheless felt that he needed to guarantee that he "meant business" and to do so a mere six weeks before the actual completion of a contract entered into a year earlier.

256. The case of *Samarenko* relied on by HMRC is, in my view, of no assistance at all to HMRC's case. It was dealing with a factual scenario that bears absolutely no relationship at all to the facts of this appeal.

257. I also consider that, for similar reasons, HMRC's submission, made in oral argument, that the 2015 agreement could itself constitute the contract for the purposes of s.2 of the 1989 Act is untenable. The 2015 agreement is, plainly, not a document that provides for the sale of the properties by incorporating in it the terms of the June 2014 contract by reference. It is, as set out above, simply a further contractual arrangement that operates by reference to, and takes its meaning from, the June 2014 agreement. As Mr Thomson submitted on behalf of the appellant, it is, in truth, no different from a case where the seller had agreed to let the properties to the buyer for a period before the completion of the sale of the properties.

258. Finally, I consider that, even if I am wrong that as a matter of law the 2015 agreement did not constitute a variation of the June 2014 contract, the 2015 agreement would not, in my view, be a variation of the contract within the meaning of s.2(5)(a) of the 2015 Act. HMRC's case rested on the notion that a deposit was always a fundamental term of a contract and, consequently, the 2015 agreement must itself be regarded as effecting a material change to the contract such that it ought to lose the benefit of the transitional protection. That submission does not, however, seek to explain why Parliament would regard that outcome as the correct one.

259. In my view, the result contended for by HMRC would result in a policy outcome that cannot have been intended by Parliament. It is trite law that Acts must be construed purposively. So far as any authority is called for, it is enough to refer to the Court of Appeal's exposition of those principles in *DV3 RS Limited Partnership* at [15] endorsing the observations of the Court of Appeal in *Pollen Estate Trustee Co Ltd v HMRC* [2013] 1 ELR 3785 at [24] where Lewison LJ said this:

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other: *Inland Revenue Comrs v McGuckian* [1997] 1 WLR 991, 999 and *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, para 28. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: *WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300, 323 and *Barclays Mercantile Business Finance Ltd v Mawson* , para 29. "

260. It is also clear that, as explained above, Explanatory Notes to an Act can be used to shed light on the wider context and the mischief at which an Act was addressed.

261. It is, in my judgment, plain that the purpose of s.2(5) of the 2015 Act was, as stated in the Explanatory Notes, to remove transitional protection from a case where a post-announcement event "results in the effect of the contract on completion being different from the effect of the contract when first entered into". It would, in my view, be a most surprising outcome if the way in which one characterised a payment of money that was, on any view, performing the function of reducing the balance of the outstanding purchase price could take away valuable transitional protection. The underlying transaction, viewed from an SDLT perspective, would be entirely unchanged. There would have been no change in the identity of the buyer and the seller, no change in the property transferred, no change in the chargeable consideration, and no change in the effective date of the transaction. At most there would be an alteration in the legal rights and remedies as between the parties in ways that would, in my view, have no conceivable relevance to the fiscal outcome intended by Parliament.

262. I also note that the result contended for by HMRC in this case sits very uneasily with their published guidance. HMRC's manuals have considered the application of a similar provision to s.2(5)(a) of the 2015 Act in relation to the original change from stamp duty to the SDLT (see SDLTM49300) and in relation to the provisions for the higher SDLT rates for additional dwellings (see SDLTM09845).

263. In both cases, the manuals state that, in the view of HMRC, a "variation" does include a change to the subject-matter of the contract, or to the parties, or to the contractual consideration, or in an agreement for a lease to the term length. That is, in my judgment, undoubtedly correct. Those are all matters that are of material significance to the operation of SDLT. The manuals then go on to say that a "variation" may not include, for example, changes to prescribed colour schemes or to the contractual completion date. As to the first, that is, presumably, because it would make little or no sense for Parliament to make a fiscal outcome dependent on an event that would, for the purposes of SDLT, be of little (if any) relevance.

264. Similarly, a change in the contractual completion date would, in the cases dealt with in the HMRC manuals, be unlikely (in the ordinary case) to have any material relevance to the question whether it was fair for a pre-existing contract to retain its transitional protection. If, before a change in the law is announced affecting transactions with an effective date after the announcement, a person is already contractually committed to complete the transaction after the announcement date, it can readily be understood why (in the ordinary run of events) it

should make no difference if the date of completion is then altered to another date that (inevitably) will still be after the announcement. That is because, having regard to the nature of the charge to the SDLT, there would ordinarily be no mischief in altering the completion date such that it would be fair for the transitional protection to be lost.

265. In my judgment, the manuals are clearly addressing the correct question, namely a consideration of whether, in the particular circumstances of the case, a variation of the contract was a variation intended by Parliament to result in the loss of valuable transitional protection. Applying that test to the facts of this case, it is plain to me that, even if there is a variation of the contract, it would constitute an immaterial variation relating to carrying out of the contract and would have no more relevance to the operation of SDLT than an inconsequential change in the colour scheme of the property. As such, even if there is a variation of the contract, it is, in my judgment, plainly one that, on a purposive reading of s.2(5)(a) of the 2015 Act, is not within the terms of that paragraph.

266. Accordingly, I consider that, for the reasons set out above, the 2015 agreement does not vary the June 2014 contract. And, in the event that I am wrong as to that conclusion, I would hold that, even though the 2015 agreement would then be regarded as a variation of the June 2014 contract as a matter of the general law, the 2015 agreement would not constitute a variation of the June 2014 contract for the purposes of s.2(5)(a) of the 2015 Act.

DISPOSITION

267. For the above reasons, my decision is that the appeal is allowed.

268. As mentioned at [9] above, it was accepted by the appellant at the hearing that, if the appeal were allowed, a further £30,000 would nonetheless still be payable by the appellant in respect of the transactions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

JUDGE ANDREW SCOTT

TRIBUNAL JUDGE

RELEASE DATE: 5 MAY 2020