[2020] UKFTT 0475 (TC)

TC07949

STAMP DUTY LAND TAX – contingent consideration – section 51 Finance Act 2003 – whether part of chargeable consideration for a land transaction was contingent – entitlement to repayment of SDLT – res judicata and abuse of process – whether HMRC estopped from arguing that part of chargeable consideration was not contingent – Supreme Court decision in Project Blue Limited v Commissioners for HM Revenue & Customs [2018] UKSC 30 – held that part of the consideration was contingent – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01033

BETWEEN

PROJECT BLUE LIMITED **Appellant**

-and-

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

No 2

TRIBUNAL: JUDGE JONATHAN CANNAN

The hearing took place on 21-23 July 2020 as a video hearing using Microsoft Teams. A face to face hearing was not held because of restrictions arising from the Covid-19 pandemic.

Mr Roger Thomas QC instructed by Clifford Chance LLP appeared for the Appellant

Ms Sadiya Choudhury instructed by HM Revenue and Customs Solicitor's Office and Legal Services appeared for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns stamp duty land tax ("SDLT") payable in connection with a land transaction involving the acquisition by Project Blue Limited ("PBL") of a property known as Chelsea Barracks, Chelsea Bridge Road, London. There has of course been a previous appeal in relation to that land transaction which was determined by the Supreme Court on 13 June 2018. Put briefly, at this stage, the Supreme Court held that PBL was liable to SDLT on a chargeable consideration for the land transaction of approximately £1.25 billion. As such, the SDLT payable was £50m. In the present appeal, PBL contends that part of the chargeable consideration was contingent and in the event never became payable. In the circumstances, it claims to be entitled to a repayment of SDLT amounting to £11.64m which is the sum in dispute in the present appeal. HMRC contend that the consideration was not contingent save to part where the contingency was satisfied and have refused PBL's claim for repayment.

2. The grounds of appeal on which PBL relies in contending that it is entitled to the repayment claimed may be briefly summarised as follows:

(1) Certain sums payable under a sale agreement which fixed the chargeable consideration for SDLT purposes were subject to contingencies which were not satisfied and the sums were never paid. As a result, as a matter of fact and law PBL is entitled to a refund of part of the SDLT which it has paid.

(2) In any event, the issue in the present appeal is res judicata. HMRC are estopped from arguing that those sums were not subject to contingencies. PBL relies on both cause of action estoppel and issue estoppel.

(3) In the alternative, I am bound as a matter of precedent to follow the Supreme Court decision which found that those sums were contingent.

(4) Further, it is an abuse of process for HMRC to argue that certain sums payable under that sale agreement were not subject to contingencies.

3. I set out below some background facts which are not in dispute. I have taken much of this summary from the judgment of Lord Hodge in the Supreme Court in *Project Blue Limited v Commissioners for HM Revenue & Customs* [2018] UKSC 30 ("Project Blue") at [3] to [8].

BACKGROUND FACTS

4. PBL was a special purpose vehicle incorporated for the purpose of purchasing and holding, but not developing the barracks. PBL purchased the barracks from the Ministry of Defence ("MoD") through a sealed bid deadline tender process at a price of £959m. It exchanged contracts with the Secretary of State for Defence on 5 April 2007. A 20% deposit of £191,800,000 was paid on exchange of contracts. The balance of the price was to be paid in four equal instalments of £191,800,000 payable on 31 January 2008, 2 February 2009, 1 February 2010 and 31 January 2011.

5. Completion of the purchase was postponed by the contract until 31 January 2008 to allow the MoD to re-house troops from the barracks. The principal shareholder in PBL was Qatari Diar Real Estate Investment Company ("QD"), which was owned by the Qatari Investment Authority, a sovereign wealth fund owned by the Qatari government. QD provided the funding for the initial deposit but PBL required finance for the purchase of the barracks which it obtained from Qatari Bank Masraf al Rayan ("MAR"), a Qatari financial institution which provided a portfolio of Shari'a-compliant products, and which syndicated

the finance for the purchase. The finance was to be provided by a number of syndicate participants including MAR.

6. Financial institutions which seek to comply with the Islamic prohibition on usury have adopted structures for financing deals which do not involve lending in return for interest and the taking of security by means of a mortgage. One such form of Shari'a compliant financing, known as Ijara finance, was used to fund the purchase of the barracks by PBL.

7. Ijara arrangements are likely to occur in one of two categories of case. In the first, the counterparty wishes to acquire a property from a third party and requires funding to enable it to do so. The financial institution buys the property from the third party, leases it to the counterparty and, at the same time, grants the counterparty an option to acquire the financial institution's interest at a later stage. In the event that the counterparty has some, but insufficient, capital to acquire the property, each party can take an undivided share in the land; and the rent charged by the financial institution takes account of its reduced interest.

8. In the second case, the counterparty already owns the property but wishes to obtain funds to use for another purpose. In this case the Ijara involves the counterparty selling its own interest in the property to the financial institution and taking a lease back, together with an option to repurchase.

9. Funding for the purchase of the barracks was an adaptation of the first category, reflecting the fact that the exchange of contracts preceded the arrangement of finance. Transactions took place in the following steps which I shall refer to as "Step 1" to "Step 4(d)":

(1) 5 April 2007: PBL and the MoD entered into a contract to purchase the barracks.

(2) 29 January 2008: PBL contracted to sub-sell the freehold to MAR ("the Sale Agreement").

(3) 29 January 2008: MAR agreed to lease the barracks back to PBL.

(4) 31 January 2008: On completion, (a) MAR and PBL entered into call and put options respectively entitling or requiring PBL to repurchase the freehold in the barracks; (b) the MoD conveyed the freehold in the barracks to PBL; (c) PBL conveyed the freehold in the barracks to MAR; and (d) immediately after that, MAR leased the barracks back to PBL ("the Lease").

10. On 1 February 2008, Clifford Chance LLP on behalf of PBL submitted a "Disclosure of Tax Avoidance Scheme" notification in accordance with the Stamp Duty Land Tax Avoidance (Prescribed Descriptions of Arrangements) Regulations (SI 2005/1868). The notification stated:

> "No SDLT is payable by [PBL] on the sale from [the MoD] to [PBL] by virtue of sub-sale relief under section 45(3) Finance Act 2003. No SDLT is payable by [MAR] on the sale of the property from [PBL] to [MAR] by virtue of alternative property finance relief under section 71A(2) Finance Act 2003."

11. Such a notification is not an acknowledgement that the arrangements were entered into for the purpose of tax avoidance. Arrangements are notifiable under section 306(1) Finance Act 2004 if they enable, or might be expected to enable, any person to obtain a tax advantage and are such that one of the main benefits that might be expected to arise from the arrangements is the obtaining of that advantage. The focus of the statutory provision is on the consequences of the arrangements and not on the intention of the parties who enter into them.

12. On 22 February 2008 several land transaction returns were filed in relation to the various transactions. Three are relevant for present purposes. First, a return lodged on behalf of PBL, which related to the completion on 31 January 2008 of the contract of 5 April 2007 between the MoD and PBL (Step 4(b)). PBL claimed that there was no liability to SDLT because of the sub-sale relief in section 45(3) Finance Act 2003 ("FA 2003"). Second, a return lodged on behalf of MAR related to the completion on 31 January 2008 of the Sale Agreement between PBL and MAR dated 29 January 2008 (Step 2). The consideration was stated to be £1.25 billion, which was the approximate sterling equivalent of $2,467,875,000, and was the aggregate sum specified as payable in the Sale Agreement. In the return, MAR claimed "alternative property finance relief" under section 71A FA 2003. Third, a return was filed relating to the grant by MAR of a lease to PBL on 31 January 2008 (Step 4(d)). Again, alternative property finance relief was claimed under section 71A. The consequence, if these returns were correct, would be that no-one incurred a liability to SDLT as a result of the completion of the transactions.

13. HMRC opened enquiries into the SDLT returns which had been submitted. In relation to the first return, which was lodged on behalf of PBL, HMRC concluded the enquiry by a closure notice contained in a letter dated 13 July 2011. The closure notice amended the return by adjusting the amount of SDLT due from £0 to £38.36m. This sum is the SDLT which would be due on the completion of the sale by the MoD to PBL for the consideration of £959m if that were a chargeable transaction. PBL argued that HMRC were not empowered to amend that return as they did. HMRC did not require any amendment to the other land transaction returns as a result of their enquiries. PBL appealed the amendment of the first return.

14. PBL lodged its notice of appeal on 8 August 2011. HMRC served its Statement of Case drafted by leading and junior counsel on 28 February 2012.

15. The FTT appeal was listed for hearing on 20 and 21 March 2013. On 5 March 2013, HMRC applied to the FTT to amend its Statement of Case to increase the amount of SDLT due from £38.36m to £50m. This was on the basis that the total consideration which MAR agreed to provide to PBL was £1.25 billion, and, HMRC argued that this was the chargeable consideration for the land transaction. The application to amend was put in the following terms:

> "On further review, however, HMRC considers that the amendment, and subsequently HMRC's original Statement of Case, in fact understated the correct amount of SDLT due in relation to the transactions."

16. The FTT considered HMRC's application to amend on the first day of the hearing and granted permission for the amendment.

17. The Sale Agreement which PBL and MAR entered into on 29 January 2008 involved payments by various tranches which I shall describe in detail in due course. The fourth tranche of consideration amounting to $378,670,740 was payable on 31 January 2011. In fact, it was never paid because the finance arrangement was terminated on 1 March 2010 when PBL re-financed the purchase. There was evidence before me as to the circumstances in which the arrangement was terminated and I make relevant findings of fact below.

18. The FTT held that PBL was liable to SDLT of £50m on a chargeable consideration of £1.25 billion in respect of its purchase of the barracks. That was deemed to be the chargeable consideration on a notional land transaction pursuant to section 75A(5) FA 2003. The notional land transaction for those purposes was an acquisition by PBL of the MoD's

chargeable interest in the barracks, at the consideration given by MAR to PBL under the Sale Agreement. The FTT decision was released on 5 July 2013.

19. On 22 July 2013, PBL made a claim for repayment pursuant to section 80(4) FA 2003 ("the Claim"). The Claim was to discharge so much of the SDLT as reflected the consideration which the FTT found had been given by MAR but which had never been paid because of the occurrence of certain contingencies. The Claim was for a sum estimated to be £11.2m but both parties agreed at the hearing that the sum repayable if the appeal succeeds would be £11.64m. On 21 March 2014, HMRC opened an enquiry into the Claim under paragraph 7 Schedule 11A FA 2003.

20. Matters then proceeded by way of appeal against the FTT decision. During this period HMRC did not give any decision in relation to the Claim. The outcomes of the various appeals may be summarised as follows:

(1) The Upper Tribunal allowed PBL's appeal in part by the casting vote of Morgan J. The decision was released on 18 December 2014. It held that PBL was liable to SDLT but in the reduced sum of £38.36m on a chargeable consideration of £959m.

(2) Both parties appealed to the Court of Appeal which on 26 May 2016 decided in favour of PBL that it was not liable to SDLT at all. It said that MAR should have been assessed to SDLT based on a chargeable consideration of £1.25 billion.

(3) The Supreme Court allowed HMRC's appeal by a majority of 4-1 on 13 June 2018. It restored the decision of the FTT, that PBL was liable to SDLT of £50m on a chargeable consideration of £1.25 billion.

21. HMRC issued a closure notice dated 24 August 2018 in relation to its enquiry into the Claim. The Claim was reduced to nil, although no reasons were given. Reasons were subsequently given to the effect that HMRC did not consider the consideration payable under the sale agreement was contingent. PBL gave a notice of appeal to HMRC on 18 September 2018 and following a review HMRC's decision was confirmed on 14 January 2019. The present appeal was notified to the Tribunal on 12 February 2019.

RELEVANT STATUTORY PROVISIONS

22. The scheme of SDLT in so far as relevant for present purposes was described by Lord Hodge in Project Blue. Much of the following summary is taken from Lord Hodge's judgment in the Supreme Court.

23. Part 4 of the FA 2003 introduced SDLT as a tax on land transactions. A "land transaction" is "any acquisition of a chargeable interest"; and a "chargeable interest" is defined as including "an estate, interest, right or power in or over land in the United Kingdom" other than an exempt interest. "Security interests" are exempt interests. A security interest is "an interest or right (other than a rentcharge) held for the purpose of securing the payment of money or the performance of any other obligation". Thus, in relation to land purchases and conventional property funding arrangements in the United Kingdom, SDLT is levied on the acquisition of chargeable interests, such as freehold or leasehold interests in land, whilst security interests, including those which secure the financing of such acquisitions, are exempted.

24. When persons enter into a contract for a land transaction under which the transaction is to be completed by a conveyance, section 44(2) provides that they are not regarded as entering into a land transaction by reason of entering into the contract. Thus, the contracts entered into at Steps 1 and 2 would not of themselves give rise to any liability to SDLT.

25. If the contract is not completed but is substantially performed, for example if the purchaser takes possession of the subject matter of the contract or a substantial amount of the consideration is paid, the contract is treated as if it were the transaction provided for in the contract and its effective date is when the contract is substantially performed (section 44(4) and (5)).

26. 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, whose effective date is the date of completion (section 44(3)).

27. Section 45 creates sub-sale relief by modifying the operation of section 44 to prevent a charge to tax on the completion of the contract, such as the contract between the MoD and PBL at Step 4(b). Section 45 provides:

> "(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, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and…
>
> References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and references to the transferor and 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)."

28. The Supreme Court held that the consequence of the tailpiece of section 45(3) in the present circumstances was that the completion of the contract between the MoD and PBL for the purchase of the barracks was disregarded.

29. FA 2003 as originally enacted contained an exemption for Ijara financing in section 72. Section 71A was added in April 2005 and applies in place of section 72. Section 71A(1) sets out the scope of the section and provides:

> "(1) This section applies where arrangements are entered into between a person and a financial institution under which -
>
> (a) the institution purchases a major interest in land or an undivided share of a major interest in land ('the first transaction'),

(b) where the interest purchased is an undivided share, the major interest is held on trust for the institution and the person as beneficial tenants in common,

(c) the institution (or the person holding the land on trust as mentioned in paragraph (b)) grants to the person out of the major interest a lease (if the major interest is freehold) or a sub-lease (if the major interest is leasehold) ('the second transaction'), and

(d) the institution and the person enter into an agreement under which the person has a right to require the institution or its successor in title to transfer to the person (in one transaction or a series of transactions) the whole interest purchased by the institution under the first transaction."

30. Section 71A therefore has scope to cover the contracts between PBL and MAR at Steps (2), (3) and (4)(a). The section then spells out the exemptions which it confers on Ijara arrangements as follows. First, subsection (2) exempts the first transaction (the institution's purchase of a major interest in land) if the vendor is the counterparty to the arrangement with the financial institution (or is another financial institution which has provided Ijara finance to that person). It provides:

"(2) The first transaction is exempt from charge if the vendor is -

(a) the person, or

(b) another financial institution by whom the interest was acquired under arrangements of the kind mentioned in subsection (1) entered into between it and the person."

31. Second, subsection (3) exempts from charge the grant of the lease to the counterparty by providing:

"(3) The second transaction is exempt from charge if the provisions of this Part relating to the first transaction are complied with (including the payment of any tax chargeable)."

32. Third, subsections (4), (5) and (7) exempt from charge the re-conveyance by the financial institution of the major interest in land to the counterparty.

33. Section 71A therefore reflects the two paradigm forms of Ijara finance described above. First, if the financial institution purchases the property from a third party, that transaction is not exempted under subsection (2) and the financial institution pays SDLT on completion or the substantial performance of that contract; but the lease to the party who is being financed and the eventual transfer of the interest by the financial institution to that party on repayment of the financing are exempt under subsections (3) and (4) respectively. Second, if the financial institution purchases the property from the counterparty whom it is financing, subsection (2) applies to exempt the transfer of the major interest in land to the financial institution and subsections (3) and (4) exempt the second transaction (the lease) and the further transaction (the re-transfer of the major interest in land to the counterparty).

34. Because the arrangements for financing the purchase of the barracks involved PBL completing its purchase and its sale of the barracks to MAR on the same day in a connected transaction, PBL claimed sub-sale relief under section 45(3). Because MAR had purchased the barracks from PBL in the context of an Ijara arrangement, MAR claimed exemption under section 71A(2) for that purchase and a claim was also submitted on behalf of PBL for exemption under section 71A(3) for the lease to PBL.

35. However, the transactions engaged the operation of section 75A Finance Act 2003. This is described as an anti-avoidance provision, although the Supreme Court confirmed that it applies whether or not there is any tax avoidance purpose. It provides as follows:

"(1) This section applies where -

(a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,

(b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ('the scheme transactions'), and

(c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

(2) …

(3) The scheme transactions may include, for example -

(a) the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;

(b) a sub-sale to a third person;

(c) the grant of a lease to a third person subject to a right to terminate;

(d) the exercise of a right to terminate a lease or to take some other action;

…

(4) Where this section applies -

(a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but

(b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.

(5) The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount) –

(a) given by or on behalf of any one person by way of consideration for the scheme transactions, or

(b) received by or on behalf of V (or a person connected with V within the meaning of section 839 of the Taxes Act 1988) by way of consideration for the scheme transactions.

(6) The effective date of the notional transaction is -

(a) the last date of completion for the scheme transactions, or

(b) if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed.

36. In the FTT, it was common ground that the combined effect of section 45(3) and section 71A was to exclude liability to SDLT unless section 75A applied to the transactions. The arguments before the FTT therefore focussed on the meaning and application of section 75A. In the Upper Tribunal, PBL changed its position. It continued to argue that it was not liable to SDLT because it had the benefit of sub-sale relief. However, it also argued that MAR was not entitled to exemption on its purchase of the barracks under section 71A(2). This was because, properly construed the MoD and not PBL was the vendor of the barracks for the purposes of that sub-section. On that basis, MAR would have been liable to SDLT on the purchase price of £1.25 billion although HMRC was by then out of time to assess MAR.

37. The Supreme Court rejected PBL's argument and found that the combination of sections 45 and 71A(2) meant that there was no SDLT charge on the sales between the MoD and PBL or between PBL and MAR, but this was subject to the application of section 75A.

38. In relation to section 75A, the parties had agreed that V in sub-section (1)(a) was the MoD. As to P, PBL argued that it was MAR whilst HMRC argued that it was PBL. The Supreme Court adopted a purposive construction to the section and found that P was PBL. It held that the requirements of subsection 1(b) were satisfied - the scheme transactions were those described in Step 4 (although it seems likely that Lord Hodge at [55] intended to refer to Steps 1-3 as well) - and the SDLT payable in respect of the scheme transactions was £nil. As a result, subsection (4) deemed there to be a notional land transaction between MoD and PBL under which the chargeable consideration was 'the largest amount given by or on behalf of any one person by way of consideration for the scheme transactions'.

39. The Supreme Court went on to consider what was the chargeable consideration for this notional transaction and referred to the following provisions:

40. Paragraph 1(1) Schedule 4 FA 2003 defines the "chargeable consideration" in these terms:

> "1(1) The chargeable consideration for a transaction is, except as otherwise expressly provided, any consideration in money or money's worth given for the subject-matter of the transaction, directly or indirectly, by the purchaser or a person connected with him."

41. Section 51 addresses contingent consideration. It provides so far as relevant:

> "51(1) Where the whole or part of the chargeable consideration for a transaction is contingent, the amount or value of the consideration shall be determined for the purposes of this Part on the assumption that the outcome of the contingency will be such that the consideration is payable or, as the case may be, does not cease to be payable.
>
> (2) Where the whole or part of the chargeable consideration for a transaction is uncertain or unascertained, its amount or value shall be determined for the purposes of this Part on the basis of a reasonable estimate.
>
> (3) In this Part—
>
> "contingent", in relation to consideration, means—
>
> (*a*) that it is to be paid or provided only if some uncertain future event occurs, or
>
> (*b*) that it is to cease to be paid or provided if some uncertain future event occurs; and
>
> "uncertain", in relation to consideration, means that its amount or value depends on uncertain future events.
>
> (4) This section has effect subject to -
>
> section 80 (adjustment where contingency ceases or consideration is ascertained) …"

42. Section 80, which makes provision for the adjustment of a return and claims for repayment of tax where a contingency ceases or the consideration is ascertained, provides so far as relevant:

> "80(1) Where section 51 (contingent, uncertain or unascertained consideration) applies in relation to a transaction and -
>
> (a) in the case of contingent consideration, the contingency occurs or it becomes clear that it will not occur, or
>
> (b) in the case of uncertain or unascertained consideration, an amount relevant to the calculation of the consideration, or any instalment of consideration, becomes ascertained,
>
> the following provisions have effect to require or permit reconsideration of how this Part applies to the transaction (and to any transaction in relation to which it is a linked transaction).

…

(4) If the effect of the new information is that less tax is payable in respect of a transaction than has already been paid –

(a) the purchaser may, within the period allowed for amendment of the land transaction return, amend the return accordingly;

(b) after the end of that period he may (if the land transaction return is not so amended) make a claim to [HMRC] for repayment of the amount overpaid."

43. Having found that PBL was the purchaser for the purposes of the notional land transaction under section 75A, the Supreme Court concluded that the chargeable consideration for that notional transaction was £1.25 billion and that the SDLT due thereon was £50m. It is these provisions and the Supreme Court's reasoning in relation to its finding that the chargeable consideration was £1.25 billion which lie at the heart of the present appeal.

RELEVANT CONTRACTUAL PROVISIONS

44. The Ijara arrangement referred to above provided funding for PBL to purchase the barracks. The funding provided by MAR was intended to finance the purchase price of the barracks, payment of rent by PBL under the lease and certain other costs which might be incurred by PBL including any SDLT liability.

45. The Sale Agreement whereby PBL contracted to sub-sell the freehold to MAR provided as follows:

4. PRICE AND MEANS OF PAYMENT

4.1 Price

The Price for the Property shall be the aggregate of the sums payable under this Clause (subject to adjustment pursuant to Clause 4.2 *(Price Reduction))* and shall be paid by [MAR] to (i) the [MoD] at the request and direction of [PBL] in relation to the First Tranche to the extent of USD 378,670,740 the Second Tranche, the Third Tranche and the Fourth Tranche and (ii) [PBL] in relation to the balance of the First Tranche, the SDLT Tranche and the Additional Payment Tranche in accordance with the following payment timetable:-

4.1.1 USD 757,341.480 on the Completion Date (the "First Tranche");

4.1.2 USD 378,670,740 on 2 February 2009 (the "Second Tranche");

4,1.3 USD 378,670,740 on l February 2010 (the "Third Tranche"):

4.1.4 USD 378,670,740 on 31 January 2011 (the "Fourth Tranche");

4.1.5 USD 75,813,120 (the "SDLT Tranche") to be paid in such instalments (an "SDLT Tranche Instalment") as [PBL] shall from time to time request to discharge [PBL]'s liability (if any) for stamp duty land tax under or pursuant to the MoD Contract or any Transaction Document each instalment to be paid on the Rental Payment Date following the delivery of a Price Notice: and

4. 1.6 USD 498,708,180 (the "Additional Payment Tranche") to be paid in such amount or amounts (an "Additional Payment Tranche lnstalment") as [PBL] shall from time to time request each such amount to be paid on the Rental Payment Date or the Conversion Date (as the case may be) following the delivery of a Price Notice provided that no Additional Payment Tranche Instalment shall be greater than the aggregate of (i) the Rent due on the relevant Rental Payment Date (ii) the amount of any fees and other payments due and payable by any Finance Countcrparty to any Finance Party under any Transaction Document (iii) any professional and/or consultants costs incurred by or on behalf of [PBL] in a previous Rental Period (and not being the subject of a previous Price Notice which has been discharged) and or which

[PBL] reasonably demonstrates to [MAR] will be incurred during the next Rental Period and (iv) the initial transaction costs.

In relation to any Tranche [PBL] will deliver a Price Notice to [MAR]:

(a) in the case of the First Tranche no later than 2pm London Time on the day two (2) Working Days prior to the proposed Tranche Payment Date;

(b) in the case of all other Tranches no later than 10am London Time on the day three (3) Working Days prior to the proposed Tranche Payment Date.

46. The First to Fourth Tranches were payable on the same dates that PBL was obliged to pay the MoD the instalments due for the purchase of the barracks. PBL's obligation to the MoD was in sterling, whilst its agreement with MAR for funding was in US dollars.

47. The reference to a Price Notice was defined as a notice in the form of Annex C to the Sale Agreement which included the following terms:

"2. We require you, subject to the terms of the Sale Agreement, to pay [the First Tranche] [the Second Tranche] [the Third Tranche] [the Fourth Tranche] [an SDLT Instalment] [an Additional Payment Tranche Instalment) …

…

4. We confirm that each condition specified in clauses 7.3.2 and 7.3.3 *(Further Conditions)* of the Sale Agreement are satisfied on the date of this Price Notice."

48. Clause 7 of the Sale Agreement contained certain conditions on which completion was conditional:

7. COMPLETION

7.1 Date and time for completion

Subject to Clauses 7.2 *(Completion Conditions)* and 7.3 *(Further Conditions),* Actual Completion shall take place at such place as [PBL] may reasonably require. Completion shall take place on or before the Completion Time on the Completion Date.

7. 2 Completion Conditions

Actual Completion shall be conditional on [MAR] confirming to [PBL] that the Completion Conditions have been satisfied or confirming to [PBL] it is satisfied that on the Completion Date the Completion Conditions will be satisfied to the satisfaction of [MAR] (acting reasonably) or waived by [MAR] (with the prior written consent of [PBL]). [MAR] shall notify [PBL] promptly upon being so satisfied.

7 .3 Further Conditions

[PBL] agrees that [MAR] shall only be obliged in respect of the First Tranche to complete and in respect of all Tranches to make any payments pursuant to Clause 4.1 *(Price)* if it has received a valid Price Notice in accordance with Clause 4.1 *(Price):*

7.3.1 if no Default is continuing or would result from completion or the payment;

7.3.2 if the Repeating Representations to be made by each Finance Counterparty on the relevant Tranche Payment Date are true in all material respects;

7.3.3 if on the relevant Tranche Payment Date, neither a valid Sale Undertaking Notice nor a valid Purchase Undertaking Notice has been served; and

7.3.4 except in relation to the First Tranche, to the extent that [MAR] has received such an amount from the Participants under clause 3.1.2 *(Investment by way of Contribution)* or from the Investment Agent pursuant to clause 3.1.4 *(lnvestment by way of Contributions)* of the Investment Agency Agreement.

49. For the purposes of clause 7.3.1, 'Default' was defined by reference to a "Common Terms Agreement" and the Lease. For present purposes default included various defaults in connection with the Lease, such as non-payment of rent and, important for present purposes, certain insolvency events in connection with PBL. Hence, there would be a default if, prior to the termination of the Ijara arrangement by transfer of the freehold from MAR to PBL, PBL was unable to pay its debts as they fell due, or if:

> "The value of the assets of [PBL] is less than its liabilities (taking into account contingent and prospective liabilities)."

50. The 'Repeating Representations' referred to in clause 7.3.2 were defined by the Common Terms Agreement. Clause 2.1 of the Common Terms Agreement included certain representations made by PBL to MAR and other syndicate participants in the provision of finance. Those representations were set out in Schedule 2 of that agreement. They included representations by PBL that there was no continuing default, as defined, and that it had duly and punctually paid all taxes imposed on it within the time period allowed. There was an exception for unpaid taxes being contested in good faith. Those representations by PBL were defined as repeating representations. PBL itself was included in the definition of "Finance Counterparty".

51. The Sale Undertaking Notice and Purchase Undertaking Notice referred to in clause 7.3.3 were notices served pursuant to the call and put options at Step 4(a). The form of a Sale Undertaking Notice and the circumstances in which it could be served were described in the relevant call option. The effect of service of the notices and the transfer of the barracks to PBL was to terminate the Ijara financing arrangement with all sums due to MAR being repaid. The inclusion of such sale and purchase undertakings are standard features of Ijara arrangements for property transactions.

52. The effect of clause 7.3.4 was that MAR was only bound to make payments to PBL following the First Tranche to the extent that it received the appropriate contributions from the syndicate participants.

53. As a result of these provisions and definitions, MAR was only obliged to make payments pursuant to clause 4 if at the time payment was due there was no continuing Default by PBL, the Repeating Representations by PBL were true and no valid Sale Undertaking Notice had been served.

FINDINGS OF FACT

54. As mentioned above, MAR never paid the Fourth Tranche of the sums payable to PBL pursuant to the Sale Agreement because PBL re-financed the transaction. Further, the SDLT Tranche was never paid because prior to the transaction being re-financed PBL's position was that no SDLT was payable.

55. The Additional Payment Tranche was intended to cover the rent payable by PBL to MAR and certain professional and other fees incurred by PBL in connection with the transaction. Some instalments were advanced to PBL pursuant to the Additional Payment Tranche.

56. The facts in relation to the relevant transactions were not in dispute. I did however hear oral evidence from Mr Owen Lynch, a director of PBL from October 2009 to the present date, and he was cross-examined by Ms Choudhury.

57. Mr Lynch produced a schedule which provided a summary of the movement of funds in relation to the Ijara arrangement. The schedule showed sums drawn down by PBL from MAR in dollars. This comprised the First, Second and Third Tranches in order to make payments to the MoD, together with rental payments paid to MAR pursuant to the Lease and other sums drawn down as part of the Additional Payment Tranche which were described as "working capital". The total amount drawn down in this way was $1,673,041,900 as at 1 March 2010, against a total facility available of $2,467,875,000. This left a sum not drawn down of $794,833,100 which comprised the Fourth Tranche of £378,670,740, the SDLT Tranche of $75,813,120 and undrawn amounts from the Additional Payment Tranche totalling $340,349,240. The sterling equivalent of the sum drawn down using various exchange rates at the dates sums were drawn down was £970,302,212. The sum repaid to MAR on 1 March 2010 was £1,098,012,666 at the exchange rate then applicable. PBL therefore suffered an exchange rate loss of £127,710,452.

58. The rental payments due to MAR over the life of the Ijara arrangement were linked to LIBOR and would therefore not be known until the time for payment. Similarly, PBL's working capital requirements would not be known until closer to the time for payment.

59. Mr Lynch's evidence, which I accept, was that whilst he was not a director when the Ijara arrangement was entered into, his understanding was that it was always intended that the barracks would be transferred to Project Blue (Development) Limited once planning permission was achieved and that this would probably involve a refinancing of the project. Mr Lynch gained this understanding from discussions with directors following his appointment. The cost of the site and the redevelopment costs were expected to be some £3 billion. It was clear the Ijara arrangement was not intended to cover the construction costs. When Mr Lynch became a director in October 2009 uncertainties in financial markets and issues in relation to the planning permission led to "financial stresses" in PBL. By December 2009 and January 2010, shortly before the Third Tranche of funds was due to be drawn down and paid to the MoD, it became evident to the directors that it was unlikely PBL could meet the further conditions described in clause 7.3 of the Sale Agreement. It had agreed a high price for the barracks in 2007 and following the financial crisis in 2008 the value of the barracks had diminished substantially. PBL's Financial Statements for the year ended 31 December 2009 showed total assets of £1.269 billion and total liabilities of £1.319 billion. It therefore had a net deficit on its balance sheet of some £49m.

60. I am satisfied that by January 2010 there was a Default for the purposes of the Sale Agreement. The value of PBL's assets was less than its liabilities. This is confirmed by a note to the Financial Statements covering loans, and in particular the financing arrangement with MAR, which stated as follows:

> "As at 31 December 2009, the Company was in default of a covenant under the terms of the financing arrangements, by way of its financial position, but the lenders granted a waiver in this respect. As described in note 19 the loan was repaid in full on 1 March 2010 and ownership of the property reverted to the company."

61. Mr Lynch was not involved in funding discussions, which took place at the QD level. His understanding was that there was no chance of refinancing because development credit had become scarce. However, at the end of January 2010 QD agreed a "limitation standstill" or "temporary waiver" with MAR so that the Third Tranche could be paid. According to Mr Lynch, this referred to a waiver of the "Repeated Representations" which PBL had to make when serving a Price Notice. In other words, MAR agreed to pay the Third Tranche despite the fact that the further conditions in clause 7.3.1 and 7.3.2 were not satisfied. At the same time, QD was considering providing an inter-company loan to enable PBL to repay MAR. Shortly after the Third Tranche was paid, QD agreed to provide the funds for PBL to

refinance and repay MAR bringing the Ijara to an end. The cost of the funding from QD was broadly the same as the Ijara arrangement which it replaced, although the covenants were not as onerous.

62. As a result, on 10 February 2010, PBL served a Sale Undertaking Notice which required MAR to sell the barracks to PBL at a price set by reference to the sums advanced to PBL. PBL refinanced its acquisition of the barracks through a conventional loan with interest from QD, its indirect parent. The effect of service of a Sale Undertaking Notice and of clause 7.3.3 of the Sale Agreement was that MAR was no longer obliged to pay any further sums under the sale Agreement and it did not do so.

63. Mr Lynch's evidence which I accept is that it would have been anticipated that the Ijara arrangement would come to an end at some stage because the site could not be developed without refinancing. In order to finance the construction costs it would be necessary to refinance the purchase costs offering the unencumbered site as security.

64. I am satisfied that PBL could not have served a valid Price Notice after 10 February 2010 because as at that date:

(1) PBL was in Default and as a result the Repeating Representations could not be made. PBL could not confirm that clause 7.3.2 was satisfied which it was required to do in any Price Notice.

(2) PBL had served a Sale Undertaking Notice and it could not confirm that clause 7.3.3 was satisfied which it was required to do in any Price Notice.

SUMMARY OF THE PARTIES SUBMISSIONS

65. The submissions of Mr Thomas QC on behalf of PBL may be summarised as follows:

(1) The cause of action in the present appeal is identical to that in Project Blue, where the Supreme Court judgment established PBL's right to make a claim under section 80. Cause of action estoppel prevents HMRC from re-opening that question in the present appeal.

(2) Alternatively, there is an issue estoppel which prevents HMRC from arguing that part of the chargeable consideration included in the total sum of £1.25 billion was not contingent. A finding to that effect was an essential ingredient in the reasoning of the Supreme Court in Project Blue.

(3) Alternatively, it is an abuse of process for HMRC to resile from the position adopted by the Supreme Court in the Project Blue proceedings, that the chargeable consideration was the total sum payable of £1.25 billion, subject to a claim by PBL under section 80. In support of PBL's case on abuse of process, Mr Thomas also relied on various allegations of misconduct in relation to HMRC's conduct of the Project Blue appeals.

(4) Alternatively, I am bound by the authority of the Supreme Court as a matter of stare decisis or precedent to construe the Sale Agreement in the same way as the Supreme Court. Namely, as providing for consideration which was contingent within the meaning of section 51.

(5) In any event, as a matter of fact and law, the tranche payments MAR was required to pay to PBL under the Sale Agreement were contingent within the meaning of section 51. They would only be paid if the conditions set out in clause 7.3 of the Sale

Agreement were satisfied. Each condition in 7.3.1 to 7.3.4 described a future uncertain event and it was uncertain whether PBL would be able to serve a Price Notice.

66. Ms Choudhury on behalf of HMRC took matters in a different order. Her submissions may be summarised as follows:

(1) The consideration payable by MAR under the Sale Agreement, including the Fourth Tranche and the Additional Payment Tranche but not the SDLT Tranche was not contingent within the meaning of section 51. The requirement for PBL to serve a Price Notice was simply an "administrative step" required to activate payment of each Tranche. The fact that the Fourth Tranche was not paid because PBL had served a Sale Undertaking Notice was a common step in Shari'a financing arrangements and was simply an element of the Ijara arrangement entered into.

(2) I am not bound by the decision of the Supreme Court as a matter of precedent because the Supreme Court did not make any finding that the sums which were not paid by MAR to PBL were contingent consideration within section 51.

If the above arguments are right, then it remains necessary to consider cause of action estoppel, issue estoppel and abuse of process:

(3) There is no cause of action estoppel and the FTT is not bound as a matter of precedent by the Supreme Court decision in Project Blue. The Supreme Court was aware that PBL had made the Claim, but the validity of the Claim was left for separate determination. Hence there was no discussion as to the meaning of the term 'contingent' in section 51. The cause of action in the Supreme Court was whether PBL was liable to SDLT and if so in what amount. PBL's entitlement to repayment having made the Claim after the FTT decision is a separate cause of action.

(4) There is no issue estoppel, because the same issue was not determined by the Supreme Court. The Supreme Court did not determine the validity of the Claim, nor did it even assume that the Claim was valid. Even if issue estoppel might otherwise arise, there is a well-established principle that it does not apply in relation to taxes.

(5) HMRC's position before the Supreme Court was that PBL had made the Claim, an enquiry had been opened and HMRC would determine the validity of the Claim in due course. It has consistently maintained that the consideration unpaid under the Sale Agreement was not contingent. HMRC refutes the allegations criticising its conduct of the Project Blue appeals.

DISCUSSION

67. I shall deal with the issues in this appeal by reference to the following headings and in the following order:

(1) Were the Tranche payments payable by MAR under the Sale Agreement contingent within the meaning of section 51?

(2) Does cause of action estoppel prevent HMRC from raising the issue of contingency in the present appeal?

(3) Does issue estoppel prevent HMRC from raising the issue of contingency in the present appeal?

(4) Does the decision of the Supreme Court bind me as a matter of precedent to find that the Tranche payments were contingent?

(5) Are HMRC seeking to resile from a position adopted by the Supreme Court that the chargeable consideration was the total sum payable of £1.25 billion, subject to a claim by PBL under section 80? Does their conduct otherwise amount to an abuse of process such that the appeal should be allowed?

(1) Contingent payments

68. The starting point in relation to this issue is section 51 FA 2003 which I have set out above. In particular section 51(3) provides as follows:

> (3) In this Part—
>
> "contingent", in relation to consideration, means—
>
> (*a*) that it is to be paid or provided only if some uncertain future event occurs, or
>
> (*b*) that it is to cease to be paid or provided if some uncertain future event occurs; and
>
> "uncertain", in relation to consideration, means that its amount or value depends on uncertain future events.

69. I understand that there are no authorities which shed any further light as to the meaning of "contingent" consideration in the context of section 51. In the absence of authority, Ms Choudhury referred me to Chitty on Contracts 33rd Edition at [13-027] which defines a contingent condition in a contract as:

> "a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens."

70. It does not seem to me that this adds anything to the definition of terms given in section 51(3).

71. In the Statement of Case, HMRC put their case as follows:

> "18. …The Appellant contends that there were various circumstances which may have affected the service of a valid Price Notice. HMRC contend in response that the service of a Price Notice was an administrative step required to activate payment of a tranche. It was not reflective of a contingency, that is an uncertain future event, which may or may not have occurred. There was no doubt or uncertainty regarding the timing or amount of the funding that would be requested by PBL from MAR."

72. Section 51 is concerned with contingent consideration which may or may not be paid depending on future uncertain events. It may be the whole of the consideration which is contingent or only a part of the consideration. Section 51 also deals with uncertain consideration and unascertained consideration. It is helpful to consider all three types of consideration. Uncertain consideration is consideration which will be paid but where the precise amount depends on future uncertain events. For example, by reference to an amount of future rents or profits. There is no definition of unascertained, but it must be concerned with consideration which is to be paid and calculated by reference to existing facts, but has not been precisely calculated at the date of the transaction. For example, by reference to the profits of a previous accounting period.

73. In the case of both uncertain and unascertained consideration, a reasonable estimate of the amount payable is made and is subject to adjustment under section 80 when the actual amount payable is ascertained. Section 80 provides for reconsideration of the chargeable consideration. In the case of contingent consideration, the section is expressed to apply when the contingency occurs or it becomes clear that it will not occur.

74. Ms Choudhury submitted that just because a sum was not paid pursuant to the Sale Agreement does not mean that the sum was contingent. It was common ground that the SDLT Tranche was contingent consideration because it was uncertain that PBL would have any liability to SDLT and it was only payable if PBL had such a liability. In the end, it was payable although it was never paid because by the time liability was established the transaction had been re-financed.

75. Mr Thomas questioned why, if the SDLT Tranche was contingent, the Additional Payment Tranche was not contingent. That is a fair question and I shall consider the question of contingency in relation to each element of the consideration which is in dispute.

76. Ms Choudhury suggested a typical case where consideration was contingent would be where it depended on a future grant of planning permission. Here, the Ijara arrangement was equivalent to a conventional lending facility. She submitted that there was no doubt or uncertainty about the timing or amount of the funding. The main part of the facility was payable in four tranches which enabled PBL to meet its obligations under its purchase agreement with the MoD. The amount and date of each tranche was specified in the Sale Agreement. The requirement for service of a Price Notice was simply an administrative step or mechanism whereby PBL called for the payment. It did not reflect any contingency. The fact that PBL may have been in breach of clauses 7.3.1 to 7.3.3 was not enough to result in the consideration becoming contingent. Ms Choudhury addressed each of these clauses in her submissions.

77. As to 7.3.1, the fact that PBL's liabilities exceeded its assets did not amount to a contingency. If it did, that would mean that there would almost always be an element of uncertainty in relation to consideration payable, for example because the buyer might have a lack of funds at the time payment was due. Uncertainty would arise from the mere fact that consideration was payable over a period of time. A purchaser could deliberately breach a condition of the contract and argue that the consideration was subject to a contingency and the SDLT was repayable. Section 51 was not aimed at such circumstances. It dealt with uncertain future events outside both parties' control. In short, contingent consideration did not refer to deferred consideration.

78. As to 7.3.2, the Repeating Representations relied on by PBL are the representations which it was required to make in serving a Price Notice to the effect that it was technically solvent and that it had paid all SDLT which was due. I have already set out Ms Choudhury's submissions as to the significance of the fact that PBL might have been technically insolvent at the time a tranche payment fell due. In relation to SDLT, Ms Choudhury made the fair point that PBL was to be treated as up to date with its SDLT because at all material times it was contesting the liability in good faith.

79. As to 7.3.3, Ms Choudhury submitted that the possibility of a Sale Undertaking Notice or a Purchase Undertaking Notice being served was simply a feature of the Ijara arrangement, as opposed to an uncertain future event. She submitted that if uncertainty as to the payment of consideration arises from a feature of the arrangement then it is not contingent for the purposes of section 51. Likewise, in clause 7.3.4, to the extent that MAR did not receive funding from one of the syndicate participants then it was not obliged to make funds available to PBL. That was simply a feature of the arrangement.

80. I do not accept Ms Choudhury's submissions that the unpaid consideration under the Sale Agreement was not contingent.

81. It is not PBL's case that the consideration payable by way of tranche payments is simply deferred. PBL's case is that whether or not the tranche payments were payable at all depended on future uncertain events. The consideration is not payable under the Sale

Agreement if PBL is technically insolvent. It is the obligation to pay consideration *to* PBL which falls away if it is insolvent, rather than any consideration payable *by* PBL. The Sale Agreement reflected the fact that MAR would not lend large sums to a borrower who could not afford to repay. The position can be contrasted with the purchase agreement between PBL and MoD. The sums payable by PBL to MoD remained payable whether or not PBL was insolvent.

82. The same point applies in relation to the Price Notice. What was uncertain at the time of the transaction was whether PBL would be in a position at the time for payment of any tranche to serve a valid Price Notice. If its liabilities exceeded its assets at the time for payment of any tranche then PBL could not validly serve a Price Notice.

83. HMRC accept that the SDLT Tranche was contingent, but only as to the fact of whether SDLT was payable on the transaction. On that basis, the contingency was satisfied and the SDLT Tranche became payable. Hence, the SDLT Tranche was part of the chargeable consideration for the notional transaction. I do not accept that analysis. The SDLT Tranche was also contingent on PBL serving a valid Price Notice which, at the time it became clear that SDLT would be payable it was not able to do. The Ijara arrangement had already been terminated following service by PBL of a Sale Undertaking Notice.

84. The position is the same if PBL could not serve a Price Notice because a Sale Undertaking Notice or a Purchase Undertaking Notice had already been served. I agree with Mr Thomas' submission that the fact that something was "a feature of the arrangement" does not mean that contingencies associated with that feature are to be ignored. Section 51(3) defines contingencies by reference to the agreement, in this case the Sale Agreement. It is the Sale Agreement which defines whether something is to be paid or that it is to cease to be paid. It was uncertain whether PBL would be in a position to serve a Sale Undertaking Notice at any time in the future and even if it was, whether and when it would do so. At the time of the Sale Agreement, this would depend on PBL's financial situation in the future and the availability of financing for the development. In short, if PBL did serve a Sale Undertaking Notice then subsequent tranches would not be paid. That was an uncertain future event at the time of the Sale Agreement.

85. Mr Thomas further submitted that it was not known how much of the facility from MAR would be required. PBL might not have drawn down the whole facility, and instead might have re-financed the transaction and borrowed from a third party. Whether or not PBL served a Sale Undertaking Notice was an uncertain future event. He also pointed to the Additional Payment Tranche in clause 4.1.6 of the Sale Agreement. It was uncertain how much of this would be drawn down, for example what level of professional or consultants' costs might be incurred. Drawdown was also contingent because it depended on PBL being in a position to serve and serving a valid Price Notice.

86. Mr Thomas submitted that "contingent" was an apt description of all the Tranches described in clause 4. They were contingent on the clause 7.3 conditions being met at the time they were due for payment. If PBL was unable or failed to serve a valid Price Notice then MAR would be under no obligation to make any of the payments and would not do so unless it waived the requirement, which it did in relation to the Third Tranche. It could not be said that service of a Price Notice was simply an administrative step.

87. I agree with Mr Thomas' submissions. The Price Notice did not simply activate payment of a tranche. It required PBL to confirm compliance with conditions 7.3.2 and 7.3.3 on the date of the Price Notice.

88. Initially, Mr Thomas accepted that if no conditions were required to be satisfied before service of a Price Notice, then the service of such a document would merely be an

administrative step and the consideration would not be contingent. On further consideration he submitted that even in those circumstances the service of a Price Notice would be more than an administrative step. That is because the Price Notice is effectively the means by which a borrower such as PBL would draw down the loan. If the borrower only draws down a small amount of a much larger facility, for example because it could get a better interest rate elsewhere, why is that consideration anything other than contingent? However, it is not necessary for me to consider this submission because I am satisfied that there were conditions to be satisfied at any time PBL served a Price Notice.

89. I agree with Mr Thomas that the scheme of SDLT is to bring into account as chargeable consideration any amount which might be paid for a land transaction and then, once the outcome of a contingency is known, to reconsider the position giving credit for what was not paid. The effect of HMRC's submissions would be to unduly restrict the operation of section 51 to certain narrowly defined events which in my view is not justified by the language of section 51 or scheme of the Act.

90. In the circumstances, I am satisfied that the Fourth Tranche, the SDLT Tranche and the Additional Payment Tranche were all contingent consideration for the purposes of section 51.

(2) Cause of action estoppel

91. My finding that the consideration payable by way of the Fourth Tranche, the SDLT Tranche and the Additional Payment Tranche was contingent consideration is sufficient to determine this appeal in favour of PBL. However, I have heard full argument in relation to the other issues and in case this appeal goes further I shall set out my views on those issues.

92. There is considerable overlap between PBL's arguments based on cause of action estoppel, issue estoppel and precedent. In dealing with these arguments I must quote extensively from the decision of the majority of the Supreme Court given by Lord Hodge. Before doing so, I shall address the law in relation to cause of action estoppel and issue estoppel. I was referred to a summary in the decision of Henderson J as he then was in *Littlewoods Retail Ltd v HM Revenue & Customs* [2014] EWHC 868 (Ch):

> "152. Issue estoppel is a well-established part of the law of res judicata. It is common ground that, in order for an issue estoppel to arise, three conditions need to be satisfied:
>
> (i) the same question must previously have been decided;
>
> (ii) the judicial decision which is said to create the estoppel must have been a final decision of a court of competent jurisdiction; and
>
> (iii) the parties to the prior judicial decision (or their privies) must have been the same persons as the parties to the subsequent proceedings in which the estoppel is raised (or their privies)…
>
> 153. In *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 at 46 and 47, [1991] 2 AC 93 at 104 and 105 ('*Arnold*'), Lord Keith of Kinkel distinguished between cause of action estoppel and issue estoppel, as follows:
>
> > 'Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened.

> …
> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue …'"

93. Ms Choudhury submitted that the question of whether PBL was entitled to make a claim under section 80, and if so the amount of any such claim was not before the Supreme Court. It was the subject of a separate claim, a separate enquiry and a separate appeal procedure.

94. Mr Thomas submitted that PBL's cause of action in its appeal to the FTT involved determination of the correct amount of SDLT payable by PBL arising out of its purchase of the barracks. He submitted that is precisely the same question being addressed in the present appeal. The Supreme Court was concerned with the same issue, the same parties and the same subject matter and its decision was final. The conditions described by Lord Keith in Arnold were therefore satisfied.

95. Mr Thomas relied in particular on what Lord Hodge stated at [9] of the decision:

> "9. The sale contract which PBL and MAR entered into on 29 January 2008 involved payments by instalments which were subject to contingencies (clause 4.1 and 4.2). The fourth tranche of consideration, which was US$378,670,740 payable on 31 January 2011, was never paid because the arrangement was terminated on 1 March 2010. This is relevant to the dispute about the actual consideration and PBL's human rights challenge which I consider in paras 57-80 below."

96. Ms Choudhury did not accept that the reference to "contingencies" in this paragraph was a reference to contingent consideration for the purposes of section 51. I have to say that reading seems unlikely to me, given that Lord Hodge cross-referenced paragraphs 57-80 which include various references to section 51 and contingent consideration.

97. The parties had provided a Statement of Facts and Issues to the Supreme Court. At [27], three issues were identified for determination by the Supreme Court. These were a) whether the Court of Appeal was correct to say that PBL was not 'the vendor' for the purposes of section 71A(2), b) if the Court of Appeal were wrong, whether section 75A was engaged, and c) if so, what was the chargeable consideration. The parties also described the issues that would arise if HMRC were successful in their appeal, including if section 75A was engaged, which included "*e) … how the amount of chargeable consideration should be determined*". A footnote to that statement read as follows:

> "PBL says that the questions are whether the 'amount given' by MAR should be taken as the maximum consideration which might have become due to PBL, or the lesser amount which actually became due; and if the latter, the rate(s) at which the necessary conversion(s) from US dollars to sterling should be made. PBL further says that, in the result, the consideration given by MAR was less than the £959 million received by the MoD, with the consequence that the £959 million is the notional consideration; if correct, issues b and f [ie PBL's human rights challenges] fall away. HMRC says that the notional consideration is £1,250 million."

98. PBL argued before the Supreme Court that the largest amount given by one person by way of consideration for the scheme transactions was not £1.25 billion but a sum of £847m paid by MAR to PBL. This took into account that the Ijara arrangement with MAR was brought to an end on 1 March 2010 when the Fourth Tranche had not been paid. Lord Hodge dealt with this argument as follows under a heading of "*The actual consideration"*:

> "58. PBL … points out that the Ijara arrangement was brought to an end on 1 March 2010, at a time when the fourth tranche of the consideration under the PBL-MAR sale agreement

(US$378,670,740) had not been paid. Before the FTT, PBL argued that MAR had therefore given consideration of only £970m and not the higher figure of £1.25 billion. PBL now asserts that the sterling equivalent of the amount which it had drawn down was approximately £847m, because paragraph 9 of Schedule 4 to the FA 2003 requires the sterling equivalent to be calculated at the effective date of the transaction (ie 31 January 2008). The higher figure of £970m was, PBL asserts, based on an erroneous calculation of the sterling equivalent of each of the US$ draw downs on its own draw down date. If the consideration which MAR actually paid to PBL for the conveyance to it of the freehold in the barracks was only £847m, the largest amount given by one person for the scheme transactions was the £959m paid by PBL to the MoD.

59. In my view it is not necessary for this court to determine what is the correct sterling equivalent of the sums which MAR actually paid to PBL as I am persuaded, for the reasons set out below, that HMRC are correct that the consideration for MAR's purchase of the barracks from PBL was £1.25 billion, but that PBL may claim a refund for the part of that consideration which was never paid. Mr Gammie does not dispute that it was open to PBL to make that claim. PBL asserts that it made that claim after the FTT handed down its decision."

99. The reference in [59] to "the part of that consideration which was never paid" must have been a reference to at least the Fourth Tranche. That is what Lord Hodge recognised was not paid. I do not consider that when Lord Hodge stated at [59] that "PBL *asserts* that it made that claim after the FTT handed down it decision" that he was intending to cast any doubt on whether a claim had been made. That was common ground between the parties.

100. Lord Hodge went on to consider the provisions relating to chargeable consideration which I have set out above, namely paragraph 1(1) Schedule 4, section 51 and section 80. He stated that paragraph 1(1) might appear, by itself to support PBL's case. That is because at first sight the amount "given" by MAR to PBL was less than £1.25 billion. However, he then made reference to section 51 dealing with contingent consideration and section 80 dealing with the position where a contingency ceases. He noted in relation to section 80 at [62]:

"62 …Subsection (2) *requires* the purchaser to make a return where tax has been underpaid; but subsection (4), which applies where tax is overpaid, *permits* the taxpayer to amend the return or to claim the repayment. This statutory asymmetry has the effect that section 51 operates to tax the contingent consideration and, under section 80, the taxpayer has to take the initiative to obtain repayment if new information shows that less tax is payable than has been paid.

63. There is no scope for the application of the *Bwllfla* principle, that where facts are available they are to be preferred to prophecies (*Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426), where Parliament has laid down the process by which the correct amount of SDLT which is payable is ascertained.

64. I conclude therefore that, subject to the human rights challenge, HMRC are correct in their assertion that the chargeable consideration for the notional transaction (section 75A(4) and (5)) is £1.25 billion and the SDLT due thereon is £50m. HMRC's calculation of that sum as the SDLT due is however subject to the right to claim under section 80. PBL recorded in its written case (footnote 134) that it made such a claim shortly after the decision of the FTT and that HMRC opened an inquiry into that claim, which has been left in abeyance pending the outcome of this appeal. As HMRC has not addressed this matter, I need say no more."

101. Lord Hodge clearly described the separate statutory process for making claims under section 80 and the determination of such claims. Ms Choudhury submitted that if Lord Hodge was going further and finding that in due course the chargeable consideration would be reduced by the claim then he would have said so. I accept that submission to the extent that I am satisfied Lord Hodge was not saying that the claim made by PBL would have to be paid by HMRC. He was clearly leaving open the possibility that the claim might not be paid for one reason or another. The question is, what possibilities were being left open?

102. Mr Thomas submitted that there was no doubt that Lord Hodge considered that the consideration was contingent. He placed particular reliance on what was said at [59] and [64]. He pointed out that Lord Hodge was "persuaded" that the consideration was £1.25 billion "but that PBL may claim a refund for the part of that consideration which was never paid". He submitted that Lord Hodge could not have been saying simply that PBL could make a claim under section 80 and see if HMRC accepted it. Rather, everything said was on the basis that PBL obviously had a right to make a claim in the circumstances. Lord Hodge was not simply saying that the SDLT due was £50m, but it is still open to PBL to make a claim under section 80. It was part of his decision that PBL were entitled to reclaim SDLT on that part of the consideration which was not given by MAR, namely the Fourth Tranche, the SDLT Tranche and the Additional Payment Tranche.

103. Mr Thomas submitted that the way in which the Supreme Court arrived at a chargeable consideration of £1.25 billion was by engaging section 51. That was how the Supreme Court answered PBL's submission that the consideration was only £847m because that was what was drawn down on the facility. The Supreme Court clearly decided that section 51 and therefore section 80 were engaged, because the amount over £847m was contingent. That was why there was no scope for the application of the *Bwllfa* principle described at [63] and why at [64] Lord Hodge stated "I conclude *therefore* … that HMRC are correct in their assertion that the chargeable consideration … is £1.25 billion …" The reference in that paragraph to the conclusion being "subject to the right" of PBL to make a claim under section 80 perhaps does not take Mr Thomas' submission any further, but it is at least consistent with the submission.

104. There is considerable force in Mr Thomas' submission, even though it does not sit perfectly with the last sentence of [64]. Mr Thomas submitted that what Lord Hodge was saying no more about was the calculation of the amount of contingent consideration which had not been paid. That would be a legitimate line of enquiry for HMRC. What was said in [64] must also be looked at together with the other paragraphs of Lord Hodge's decision.

105. In my view, Lord Hodge was simply leaving open possible challenges to the amount of the claim based on exchange rate differences referred to in the preceding paragraph. He may also have been concerned about possible technical challenges to the claim, such that it was out of time or in the wrong form. The claim itself does not appear to have been explored in detail at the hearing, hence the reluctance at [64] to say anything more about the claim. However, section 51 and section 80 were explored.

106. The paragraphs from the Supreme Court decision which I have quoted above refer to PBL's human rights case. PBL had argued that the transactions fell within the ambit of Article 9 of the European Convention on Human Rights (freedom to manifest one's religion) and Article 1 of Protocol 1 (peaceful enjoyment of property). As such, it was argued that the SDLT regime, and in particular section 75B fall to be construed in a manner which is compatible with those rights and without discrimination against those of the Islamic faith. I do not need to set out section 75B in full but it is concerned with the calculation of chargeable consideration in section 75A(5) and the effect of incidental transactions.

107. Lord Hodge dealt with PBL's human rights challenge as follows:

> "75. I have come to the view that this court does not need to consider the ECHR challenge in detail because the matter can be determined on the simple bases (a) that any discriminatory effect is objectively justified and (b) that, in any event, PBL is not a victim…"

108. As to why PBL was not a victim, Lord Hodge said this:

> "79. In any event, it is not disputed that PBL has a claim under section 80 for the repayment of any amount which is overpaid. If, as appears to be the case, the sterling equivalent of the

> consideration, which MAR actually paid to PBL for the barracks before the Ijara arrangement was brought to an end, was less than the £959m which PBL paid to the MoD, it is the latter figure which is the chargeable consideration under section 75A(5)(a). In that event, PBL is paying no more than it would have paid if it had used a conventional form of loan financing. It is therefore not a victim of discriminatory treatment."

109. Mr Thomas relied on this passage to support his submission that the Supreme Court must be taken to have found that PBL was entitled to a repayment pursuant to its claim under section 80. If the position were otherwise, he submitted that PBL would be a victim of discriminatory treatment. I am satisfied that the passage does indeed lend considerable support to Mr Thomas' submission. The only qualification I read into that passage is that there may have been some doubt as to the amount of consideration which was not paid by reference to the sterling equivalent of the sums not paid. It does not appear to leave any room to argue that the claim might be refused on substantial rather than technical grounds. If the appropriate sterling conversion rate meant that MAR actually paid less than £959m then the chargeable consideration would be the latter figure.

110. Ms Choudhury submitted that reason (b) given in [75] was an additional reason as to why the human rights argument was being dismissed. The reference in [79] to PBL having a claim should be viewed in light of what had previously been said about the claim where Lord Hodge was careful not to address the merits of the claim. He was not suggesting that HMRC must give effect to the claim without further scrutiny. There was no assumption that the claim would be paid.

111. I was also referred to [86] of the decision of Lord Hodge where he referred to PBL's challenge to the FTT's decision to allow HMRC to amend their case to assert that the chargeable consideration was £1.25 billion:

> "86. The other procedural challenge is PBL's challenge to the FTT's decision to allow HMRC to amend its case to argue that the chargeable consideration was £1.25 billion and not £959m. It is hard to see how the FTT could have decided otherwise. Under paragraph 22(3) of the Stamp Duty Land Tax (Appeals) Regulations 2004 (SI 2004/1363) the FTT is bound to increase the amounts of tax due if the taxpayer has been undercharged: see (by way of analogy in relation to section 50(7) of the Taxes Management Act 1970) *Glaxo Group Ltd v Inland Revenue Comrs* [1996] STC 191. But, again, having reached the view that PBL has a claim for repayment of overpaid SDLT under section 80, there is no need to address this case management decision."

112. It is notable that Lord Hodge refers to "having reached the view" that PBL has a claim for repayment of overpaid SDLT. That clearly suggests that he had considered and was satisfied that the Fourth Tranche was contingent within the meaning of section 51 and therefore prima facie at least part of the SDLT was repayable to PBL. That was why the Supreme Court did not have to address PBL's criticism of the FTT's case management decision.

113. Lord Briggs, who dissented from the opinion of the majority and would have upheld the decision of the Court of Appeal, used similar language to Lord Hodge when identifying the issues. Hence, at [128] in the context of Shari'a compliant financing he stated:

> "128. …The Ijara structure used here was applied where the whole purchase price was being financed. In such cases the amount of tax paid by the bank will not differ substantially from the tax which would have been payable on the price paid to the third party seller. Ironically, substantially the same result may yet ensue here, because the Ijara structure was terminated early, before most of the excess finance amount had been paid. In such circumstances it is common ground that Part 4 permits a claim for repayment of the excess tax from the Revenue. This is because SDLT is paid up-front on contingent consideration on an assumption that the contingency will occur, and then reclaimed if it does not."

114. The Supreme Court does not say in terms that the Fourth Tranche or any other parts of the £1.25 billion chargeable consideration payable by MAR to PBL was contingent consideration within section 51. I am satisfied however, from the decision as a whole, that that is the basis on which the Supreme Court held that the chargeable consideration was £1.25 billion. Whilst the Supreme Court was careful not to pre-judge the result of PBL's claim under section 80, that was because there might have been issues other than whether the consideration was contingent.

115. Having said that, whilst the question of whether the Fourth Tranche was contingent consideration was an issue determined by the Supreme Court, that was not PBL's cause of action. The cause of action was the amount of the chargeable consideration on which SDLT would be levied. The finding that the Fourth Tranche was contingent consideration was simply part of the reasoning which led the Supreme Court to find that the chargeable consideration was £1.25 billion. I do not consider therefore that HMRC are subject to any cause of action estoppel in the present appeal.

(3) Issue estoppel

116. I have already referred to Lord Keith's description of issue estoppel in *Arnold*. The principle of issue estoppel was also described by Diplock LJ in *Mills v Cooper* [1967] 2 QB 459 at 468:

> '… a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect …'

117. Mr Thomas submitted that PBL were entitled to rely on issue estoppel and that the conditions set out by Diplock LJ and Lord Keith were satisfied. The Supreme Court had decided that PBL had a right to make a claim, its decision in that regard was final and involved the same parties. For the reasons given above in the context of cause of action estoppel, I am satisfied that the Supreme Court found that the consideration not paid by MAR to PBL was contingent consideration within the meaning of section 51. Prima facie, therefore the effect of issue estoppel is that HMRC cannot argue that part of the consideration was not contingent.

118. One distinction between cause of action estoppel and issue estoppel, is that the latter has a more limited application to tax cases. That limitation was recognised by the Privy Council in *Caffoor v Income Tax Commissioner, Columbo* [1961] AC 584 where it was held that issue estoppel did not apply in relation to appeals against income tax assessments because the issue was the amount of tax payable in a specific year of assessment. The limitation was considered by Henderson J in *Littlewoods Retail* where he stated at [175]:

> "175. Anomalous or not, there is in my judgment no doubt that the *Caffoor* principle remains good law in England and Wales, at least in relation to income tax, corporation tax, capital gains tax and other annually assessed (or, nowadays, self-assessed) taxes, where the basic question for determination is the correct amount of tax payable for the relevant year or period of assessment."

119. Henderson J went on to accept that the *Caffoor* principle also applies in relation to appeals against VAT assessments and that no issue estoppel arose in the circumstances of that case, subject to potential arguments based on abuse of process. He conducted an exhaustive analysis of the authorities and policy issues in relation to the *Caffoor* principle in the context

of VAT. Given my finding that the unpaid consideration was contingent I shall not lengthen this decision by describing that analysis in detail. Very briefly and considerably oversimplified, he found that the *Caffoor* principle applied to VAT such that on an appeal concerning interest on VAT, HMRC were not prevented from arguing that VAT was due even though there were previous determinations and agreements that it was not due. That was HMRC's submission in its wider form in that case. If that was wrong, Henderson J found that any estoppel would be limited to interest on VAT in the specific quarterly periods covered by the determinations and agreements. His conclusions were stated as follows:

> "(1) In the light of my review of the law, I accept HMRC's second overriding contention in its broader form. I consider that the Caffoor principle applies to the underlying determinations of VAT and section 85 agreements in the present case, and that no issue estoppel can arise in relation to the separate claims for interest now advanced by the claimants so as to prevent HMRC from arguing that the VAT was in fact due as a defence to the claims. The position is in my judgment similar in all essential respects to that considered by Jacob J in King v Walden, which I respectfully think was correctly decided.
>
> (2) If the above conclusion is wrong, I would accept HMRC's contention in its alternative, narrower, form, and hold that HMRC are not estopped from arguing that the VAT was in fact due save in relation to the specific quarterly periods and the specific companies covered by the earlier determinations and section 85 agreements.
>
> (3) For the avoidance of doubt, my conclusion in either its broader or its narrower form still leaves open the question whether it would be an abuse of process to permit HMRC to argue that the VAT was due. Although Mr Swift appeared at times to question this proposition, he rightly accepted in his closing submissions that issue estoppel and abuse of process are analytically separate issues…"

120. I was also referred to the Court of Appeal decision in *R (otao PML Accounting Ltd) v HM Revenue & Customs* [2018] EWCA Civ 2231 where a majority held that issue estoppel prevented a taxpayer from arguing before the FTT in a penalty appeal following non-compliance with an information notice, that the information notice was invalid. The issue estoppel arose because the validity of the notice had been determined in a previous "section 54 agreement" pursuant to section 54 Taxes Management Act 1970. There was no suggestion in the case that the *Caffoor* principle should apply. It is notable that Henderson LJ gave a dissenting judgment. He agreed that the appeal should be dismissed but he did not agree with all of the reasoning of the majority. In particular, he did not agree that there was an issue estoppel as to the validity of the notice. The case was decided very much on its own facts and in the context of the specific statutory scheme for information notices in Schedule 36 Finance Act 2008.

121. The parties' submissions in relation to issue estoppel were relatively brief. Ms Choudhury relied on the *Caffoor* principle as explained in Littlewoods Retail and submitted that PBL could not rely on issue estoppel.

122. Mr Thomas argued that the *Caffoor* exception to the principle of issue estoppel has no application in the present circumstances. What is in issue in the present appeal is the very amount of SDLT due in relation to the same land transaction. SDLT is charged in relation to specific transactions. It is concerned with the rare circumstance of a retrospective adjustment to the amount of tax chargeable and there is no good policy reason to have any exception from the application of issue estoppel. Further, unlike income tax and VAT, SDLT is not a periodic tax.

123. On the facts of the present appeal, I agree with Mr Thomas for the reasons he gave. I do not consider that the policy considerations which supported the *Caffoor* exception in Littlewoods Retail apply to this appeal. This appeal is concerned with the SDLT payable in

relation to a specific land transaction and a subsequent adjustment to the tax payable once uncertain future events became known. The fact that the appeal concerns a claim to repayment of SDLT rather than the amount of SDLT payable in the first place does not in my view engage those policy considerations. I consider that HMRC would be estopped from arguing that the unpaid consideration in this case was not contingent.

(4) Stare decisis

124. Mr Thomas submitted that it was an essential part of the reasoning of the Supreme Court that the tranche payments from MAR to PBL were contingent. In support of this submission, he relied on the same passages referred to above in the context of estoppel, in particular [9] of the judgment. Effectively, the submission was that as part of its reasoning the Supreme Court must have construed clauses 4 and 7 of the Sale Agreement as providing for contingent payments within the meaning of section 51. Further, the construction of a contract is a mixed question of law and fact as set out in Chitty on Contracts at 13-044:

> "The construction of written instruments is a question of mixed law and fact. The expression "construction" as applied to a document includes two things, first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. Construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts."

125. Mr Thomas submitted that where, as here there was no dispute as to the factual matrix or the meaning of words, the construction of a contract could be nothing more than a question of law. The Supreme Court's finding that the consideration was contingent was binding as a matter of precedent.

126. At first sight this adds little if anything to PBL's arguments based on issue estoppel. However, if issue estoppel was subject to the *Caffoor* principle, then PBL could still rely on a Supreme Court finding as to the construction of the contract and the meaning of section 51 as a matter of law. For the reasons already canvassed, Mr Thomas submitted that the finding at [9] was fundamental to the reasoning of the Supreme Court and thus binding on the FTT as a matter of precedent.

127. I accept that submission for the reasons given above. I am satisfied that I am bound to find that the unpaid consideration is contingent consideration within section 51, both by virtue of issue estoppel and as a matter of precedent.

(5) Abuse of process

128. In the alternative to cause of action estoppel, issue estoppel and precedent, Mr Thomas submitted that it is an abuse of process for HMRC to refuse PBL's claim for repayment of SDLT. He relied upon two broad grounds in support of that submission:

(1) HMRC are seeking to resile from the position adopted by the Supreme Court.

(2) HMRC's conduct generally in connection with the enquiries into PBL's SDLT return and its claim under section 80, and their conduct in the litigation arising out of those enquiries amounted to unjust harrassment.

129. I was referred to *Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482 where Auld LJ stated at p1490:

> "In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata… The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also, save in "special cases" or "special circumstances"; see Thoday v. Thoday [1964] P181, CA, per Diplock LJ at 197g-198g, and Arnold v. NatWest Bank Plc [1991] 2 AC 93, HL. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter…
>
> Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata, either or both because the parties or the issues are different, for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings, or where there is such an inconsistency between the two that it would be unjust to permit the later proceedings to continue…
>
> … In my judgment, mere re-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose…[T]he courts should not attempt to define or categorize fully what may amount to an abuse of process …
>
> Some additional element is required, such as a collateral attack on a previous decision … or successive actions amounting to unjust harassment."

130. Lord Bingham considered this passage in his judgment in the House of Lords in *Johnson v Gore-Wood & Co* [2000] UKHL 65 where he stated:

> " … *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party."

131. Mr Thomas relied on various matters and criticisms of HMRC's conduct in support of his submission that it was an abuse of process for HMRC to argue on this appeal that PBL is not entitled to a repayment pursuant to its claim under section 80. Those matters can be summarised as follows:

> (1) There was an unnecessarily protracted enquiry by HMRC which commenced on 14 November 2008 and was not closed until 13 July 2011. By January 2009 HMRC had all relevant documentation and by 3 June 2010 all relevant explanations that had been provided, including the fact that the Ijara arrangement had been re-financed on 1 March 2010. In a reply dated 19 October 2010, HMRC's caseworker set out why he considered that SDLT was payable by reference to the consideration received by the MoD. Further correspondence ensued and led to the closure notice dated 13 July 2011 in which the caseworker simply stated that he was amending the SDLT return to show tax due of £38.36m. That sum was based on the consideration of £959m received by the MoD.

(2) HMRC failed for whatever reason to treat the consideration as being the £1.25 billion payable by MAR to PBL. PBL say that HMRC failed to raise a discovery assessment to increase the chargeable consideration and tax due, and left it to the last minute before seeking to amend their Statement of Case. If it had put this case forward from the beginning, or at least in good time before the FTT hearing, then PBL could have made its claim under section 80 and the matter would have been dealt with in the first appeal. Much argument, cost and tribunal time would have been saved. PBL says that it has never been told when or in what circumstances HMRC realised it had a case to argue for a chargeable consideration of £1.25 billion and SDLT of £50m.

(3) In written arguments before the Supreme Court, HMRC acknowledged that the Tranches payable by MAR were conditional. The agreed Statement of Facts and Issues included a statement at [14] that "*MAR was only obliged to pay each tranche if certain prescribed conditions had been satisfied as regards that tranche.*".

(4) HMRC failed to correct the Supreme Court's clear understanding that part of the chargeable consideration payable by MAR to PBL was contingent within the meaning of section 51. They had an opportunity to make that correction when they received the Supreme Court judgment in draft and were invited to suggest any corrections prior to handing down.

(5) Following the judgment of the Supreme Court, HMRC demanded an excessive amount of interest on sums outstanding. PBL had paid the original sum demanded, £38.36m on 6 February 2013. Following the FTT decision, the FTT made a direction dated 18 September 2013 suspending the effect of its decision until final determination by the Upper Tribunal. Following the favourable Court of Appeal decision, on 5 July 2016 HMRC repaid the £38.36m with interest to PBL. Following the Supreme Court decision, and after some discussions about how interest should be calculated, HMRC demanded interest of £17,311,045 on the sum of £50m for the period 2 March 2008 to 28 August 2018. That calculation failed to give credit for the fact that for the period from February 2013 to July 2016 HMRC had the £38.36m. PBL pointed out that the interest claimed by HMRC ought to have been £16,655,772. HMRC maintained that they were strictly entitled to the £17.3m based on the application of section 87 Finance Act 2003. Both sides maintained their position and PBL referred the matter to the Tax Assurance Commissioner. PBL described HMRC's behaviour in maintaining their claim to interest on a sum which for a period HMRC actually held as "scandalous". Shortly after that letter, a director of HMRC wrote to agree PBL's calculation of interest and apologised for the confusion in what was described as "an unusual set of circumstances".

132. Ms Choudhury submitted that HMRC's position that no part of the chargeable consideration was contingent had been the same throughout all the proceedings. The Supreme Court decision accurately reflected HMRC's position, which was that the enquiry into the claim would be considered in due course. In any event, no decision as to the merits of the claim had been considered by any court or tribunal prior to the Supreme Court.

133. Following the hearing before the FTT on 20 and 21 March 2013, the FTT invited the parties to make further written submissions on human rights arguments arising from the fact that if PBL had used conventional loan financing, the chargeable consideration would have been £959m rather than £1.25 billion. At [20] of HMRC's submissions they asserted that the consideration given for the land transaction was £1.25 billion. They also acknowledged that the SDLT Tranche was contingent, but submitted as follows:

"The balance (i.e. £1.25bn less the SDLT Tranche) was not contingent, uncertain or unascertained;"

134. A footnote to that submission read as follows:

"All that was required was for PBL to deliver a "Price Notice" to MaR (see cl.4.1.6)"

135. The submission continued at [22] as follows:

"22. HMRC does not understand the basis for PBL's assertion at AWS/para.2 that s.80 FA 2003 inevitably applies to reduce the consideration:

a. Other than the SDLT Tranche, no part of the consideration identified in the PBL-MaR sale contract was said to be conditional, uncertain or unascertained. Accordingly, in relation to that proportion of the consideration, ss.51 and 80 FA 2003 are irrelevant.

b. In respect of the SDLT Tranche, unless and until PBL succeeds in this litigation, it must be assumed that PBL has a liability to SDLT (per s.51(1) FA 2003) and therefore that the SDLT Tranche formed part of the consideration "given" by MaR to PBL. But in any event, the effect of s.80 FA 2003 is to give rise to a repayment of tax on the making of a claim – see paragraph 16 above – not to reduce the amount of SDLT properly payable in the first place. Accordingly, it is not understood how s.80 FA 2003 is of any assistance to PBL bearing in mind that the contingency remains outstanding and it has made neither an amendment to its land transaction return nor a claim for repayment."

136. The submission at [22(a)] was effectively repeated in HMRC's skeleton in the Upper Tribunal. The issue was canvassed in written arguments before the Court of Appeal but in the event the Court of Appeal did not need to consider it because it found that PBL was not liable for the SDLT.

137. In its written case before the Supreme Court, PBL put what it described as "*The Actual Consideration Point*" to the Supreme Court. A footnote to that description described how it came before the Supreme Court:

"This issue was decided against PBL by the First-tier Tribunal. It fell away in the Upper Tribunal, which decided (by the Chairman's casting vote) that the chargeable consideration for section 75A purposes was no more than £959 million. It was not considered by the Court of Appeal, since the court decided that PBL had no liability to SDLT.

138. PBL then made the following submission:

"The First-tier Tribunal decided that section 51 (which as a general rule requires contingent chargeable consideration in the first instance to be brought into account without regard to the risk it might never be payable) applied to treat the whole of the amount payable under clause 4 of the Sale Contract as chargeable consideration for the purposes of section 75A; and further and erroneously decided that section 80 (to which section 51 is subject, and which requires a reconsideration of the application of the SDLT code where a contingency occurs affecting the amount payable) did not apply to vary the consideration payable *ab initio*. It observed that 'We understand that no claim has been made by the Appellant.'

…

For completeness, it should be understood that the Respondent did indeed make a section 80 claim shortly after the First-tier Tribunal released its decision. HMRC opened an enquiry into that claim, which has been left in abeyance pending the outcome of this appeal. Eventually, therefore, even if HMRC were successfully to argue that they were entitled to a decision that the chargeable consideration was £1.25 billion, that decision will be overtaken by the claim, which inevitably will reduce the SDLT payable to £38.36 million. The Commissioners'

position in arguing for the additional consideration therefore is, and always has been, utterly futile."

139. In light of the way the matter had been put to the various courts and tribunals, Ms Choudhury submitted that there could be no question of any abuse of process in now arguing that the consideration was not contingent.

140. Ms Choudhury acknowledged that [14] of the agreed Statement of Facts and Issues could be read as accepting that the consideration was contingent. Against the background of how the case had developed and how it was put to the Supreme Court, I am satisfied that HMRC were not intending to accept that each tranche was contingent in the sense of section 51. That said, for the reasons given above I am satisfied that it was contingent and the fact that it was contingent was an essential ingredient in the Supreme Court's reasoning.

141. The enquiry into PBL's SDLT return and the subsequent appeals process has involved a long and complicated journey. Four different judicial bodies have reached four different conclusions, in two cases by a majority. During the proceedings both parties have raised new arguments. In one sense it is easy to see why, with some benefit of hindsight, HMRC ought to have raised their case that the chargeable consideration was £1.25 billion much sooner than they did. However, once it was raised and once the FTT had given permission for HMRC to amend their statement of case, HMRC were entitled to argue the point, and also to argue that the chargeable consideration was not contingent.

142. I am not satisfied that HMRC had any obligation to draw to the attention of the Supreme Court when the judgment was available in draft that their case was that the consideration was not contingent. As I have said, the point was not expressly dealt with by the Supreme Court, and in my view it was not unreasonable for HMRC to consider that they remained entitled to reject the claim. For the reasons I have given that was not in fact the case, but there was no abuse of process.

143. It does not seem to me that arguments about interest add anything to PBL's case on abuse of process. I am not satisfied on the material before me that it could be said that PBL have been unjustly harassed or that it was an abuse of process for HMRC to refuse PBL's claim.

Quantum of claim

144. The original claim under section 80 which was refused was £11.2m. That was intended to be the SDLT paid on the amount of unpaid consideration. In fact, it became apparent to PBL that in calculating that amount an incorrect exchange rate had been used and in its notice of appeal PBL sought to increase the amount of the claim to £11.64m.

145. In the end HMRC agreed, subject to their other arguments, that £11.64m would be the amount due to be refunded to PBL if the unpaid consideration was contingent.

CONCLUSION

146. By way of summary, I find that the Fourth Tranche, the SDLT Tranche and the Additional Payment Tranche were contingent consideration within section 51. PBL is therefore entitled to be repaid the SDLT of £11.64m which it paid on that part of the consideration.

147. If it were necessary for me to make findings on the alternative arguments put forward by PBL, I do not consider that cause of action estoppel would have prevented HMRC from

raising the issue of contingency. I do consider that issue estoppel would have prevented HMRC from raising the issue of contingency and I would have been bound as a matter of precedent to find that part of the consideration was contingent. I am not satisfied that it was an abuse of process for HMRC to refuse payment of the claim.

148. For the reasons given above the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 24 November 2020