[2021] UKUT 0022 (TCC)

Appeal number: UT/2019/0136 UT/2019/0137

SDLT– contract and conveyance – effective date of land transaction – contract provided for purchaser to grant an annuity – annuity held on trust for purchaser pending completion of contract –was contract substantially performed before completion? – annuity redeemed between contract and completion – what was consideration for the conveyance? – application of anti-avoidance provisions - discovery assessment – was discovery assessment "stale"? – could HMRC have been reasonably expected to have been aware of insufficiency of tax? – penalty notice – was the inaccuracy in the return deliberate? – Finance Act 2003, ss 44, 52, 75A, sch 4 para 1, sch 10 para 30, Finance Act 2007, sch 24 paras 1, 3

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

(1) DAVID HANNAH **(2) CARLA HODGSON**	**Appellants**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL **MR JUSTICE MORGAN**
JUDGE SWAMI RAGHAVAN

Sitting in public by way of remote video, Skype for Business, hearing treated as taking place in London on 10 and 11 November 2020

Mr Julian Hickey, counsel, instructed by Levy & Levy, for the Appellants

Ms Elizabeth Wilson, counsel, instructed by the General Counsel and Solicitor to Her Majesty's Revenue & Customs, for the Respondents

DECISION

Introduction

1. This is an appeal, with permission granted by the Upper Tribunal, by Mr Hannah and Mrs Hodgson ("the appellants") against a decision of the First-tier Tribunal ("FTT"), the neutral citation of which is [2019] UKFTT 342 (TC) ("the FTT Decision").

2. In its Decision, the FTT dealt with various appeals brought by the appellants against the actions of Her Majesty's Revenue and Customs ("HMRC"). The principal appeal to the FTT related to a discovery assessment whereby HMRC had assessed that the appellants were liable to pay stamp duty land tax ("SDLT") in the amount of £30,600. The FTT dismissed the appeal against the discovery assessment. The appellants also appealed against penalties imposed on them by HMRC. Mr Hannah's appeal in relation to the penalty imposed on him was dismissed and Mrs Hodgson's appeal in relation to the penalty imposed on her was allowed.

3. In brief summary, the facts relating to the land transaction in this case were as follows. The appellants entered into a contract to buy a residential property. The contract stated that the price for the purchase was to be £765,000. The appellants paid to the vendors a 5% deposit of £38,250. The contract also stated that the appellants could satisfy their obligation to pay the balance of the purchase price by granting an annuity to the vendors. Between contract and completion, the appellants did grant an annuity to the vendors. Later, before completion, the vendors redeemed the annuity (as they were entitled to do) in return for the right to receive a lump sum of £726,750. On completion of the contract, the vendors were paid £726,750 which, together with the deposit of £38,250, came to the stated purchase price of £765,000. The appellants delivered an SDLT return following the grant of the annuity and before completion. The appellants contended that the consideration for the purchase was the 5% deposit plus 12 times the annual amount of the annuity, relying on s52 of the Finance Act 2003 ("FA 2003"). This contention, if correct, produced the result that no SDLT was payable by the appellants. The appellants did not deliver an SDLT return following completion.

4. Before the FTT, the appellants contended that the effective date of the land transaction for the purposes of SDLT was the date of the grant of the annuity. The FTT held that this was not the effective date of the land transaction which was, instead, the date of completion of the purchase of the property. The appellants now appeal to the Upper Tribunal on this issue (**"the effective date issue"**).

5. The appellants also argued before the FTT that, even if the effective date of the land transaction was the date of completion, the consideration for the purposes of the SDLT legislation was the 5% deposit plus 12 times the annual amount of the annuity. The FTT rejected this contention on various grounds and the appellants now appeal to the Upper Tribunal on that issue also **("the consideration issue")**.

6. The FTT also rejected the appellants' arguments that HMRC's discovery assessment was invalid because it did not meet certain pre-conditions. The FTT made

findings as to when the relevant discovery had been made by HMRC. The FTT held that the discovery had been made later in time than the time contended for by the appellants. The FTT further held that the discovery had not become "stale", as that term is used in the relevant case-law, by the time of the discovery assessment. Also, the FTT held that an HMRC officer, given the relevant information the appellants had provided, would not reasonably have been aware, by the time the enquiry window for the return had closed, of the insufficiency to tax. The appellants now appeal to the Upper Tribunal in relation to these matters **("the discovery assessment issues")**.

7. As regards the penalties imposed on the appellants, the FTT dismissed Mr Hannah's appeal against the penalty imposed on him and he now appeals that decision to the Upper Tribunal **("the penalty issue")**. Mrs Hodgson succeeded before the FTT in relation to the penalty imposed on her and so there is no appeal by her to the Upper Tribunal in relation to her earlier penalty notice.

8. The FTT made detailed findings of fact as to the transaction which was entered into in this case. Some of those findings were based on an agreed statement of facts. On the appeal to the Upper Tribunal, there did not appear to be any real challenge to the FTT's findings of the facts relating to the transaction itself. However, Mr Hannah does challenge the FTT's finding that the inaccuracy in the SDLT return was deliberate. We will, first, briefly outline the arrangements entered into (when referring to matters which are discussed in the decision of the FTT, references in square brackets are to the relevant paragraphs of the FTT Decision).

9. In this decision, all references to statutory provisions which do not contain a reference to a statute are references to FA 2003. Where we refer to other statutes, we will include a reference to the statute as well as to the particular provision of that statute.

10. Mr Hickey appeared for the appellants before the FTT and again on this appeal. Similarly, Ms Wilson appeared for HMRC before the FTT and again on this appeal. We are grateful to them for their assistance.

The relevant documents

11. In 2011, Mr and Mrs Robinson were the owners of a house, in which they lived. Title to the property was registered at the Land Registry. The house was subject to a mortgage. Mr and Mrs Robinson and Mr Hannah and Mrs Hodgson entered into a number of documents at different dates, as we will now describe.

12. **A contract of sale**. This was entered into on 26 September 2011 and provided for completion on 12 October 2011. Mr and Mrs Robinson were referred to as "the Seller" and Mr Hannah and Mrs Hodgson (who at the time was married to Mr Hannah and was known as Mrs Hannah) were referred to as "the Buyer". The purchase price was stated to be £765,000. The contract provided for the appellants to pay a deposit of £38,250, which was 5% of the purchase price. The contract stated that the deposit was to be "held to order". The contract was subject to the Standard Conditions of Sale which provided that the deposit was held by the vendors' solicitors as stakeholders.

13. The contract was also subject to additional special conditions in these terms:

> "14.1 Notwithstanding anything in this Agreement, the Buyer shall be entitled to satisfy the balance of the Purchase Price (as exceeds the Deposit) by the issuance and delivery to the Seller of an annuity contract ("Annuity Contract") issued by either or both of the persons comprising the Buyer.
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> 14.2 The Buyer shall be entitled to delivery (*sic*) such Annuity Contract before the Completion Date but shall not by virtue of such early delivery be entitled to call for any earlier completion of this Agreement than the Completion Date.
>
> 14.3 If the Buyer does make delivery of such Annuity Contract before the Completion Date, the Seller shall hold such Annuity Contract in trust for the Buyer pending completion.
>
> 14.4 The Seller shall be entitled to encash the Annuity Contract for not less than the balance of the Purchase Price (as exceeds the Deposit) in accordance with clause 3.1 of the Annuity Contract and provided that the full proceeds of encashment ("the Encashment Proceeds") shall be held by the Seller's Solicitors (as the Seller hereby authorises and directs) for the purposes of completion of the sale and purchase of the Property in terms of this Agreement. Notice of encashment shall be given by the Seller not less than seven days before completion. To the extent that the encashment proceeds fall short of the balance of the purchase price required for completion, the seller shall have recourse to the buyer for the shortfall.
>
> 14.5 If for any reason whatsoever this Agreement is rescinded such that completion of the transfer of the Property following hereon shall not occur, the Buyer shall be entitled to demand repayment of the Encashment Proceeds and the same (without any deduction) shall be paid to the Buyer's solicitors within three days of notice of such rescission having been given."

14. The contract of sale did not spell out what were to be the terms of the annuity contract. In particular, the contract of sale did not specify the amount of the annuity nor the period during which it was to be payable. Clause 14.4 referred to clause 3.1 of the annuity contract and this reference might suggest that the parties had entered into the contract of sale on the basis of a draft annuity contract which both of them had seen. However, the FTT made no finding to that effect. Indeed, there was evidence before the FTT which indicated that the amount of the annuity had not been settled by the date of the contract of sale. On 28 September 2011, Mr Hannah sent an email to his own solicitors referring to the annuity as £363.38 per annum. Using that figure, Mr Hannah calculated that 12 annual sums by way of annuity would be £4,360.50 and adding that figure to the deposit of £38,250, he arrived at the figure of £42,610.50. However, as will be seen, when the parties later entered into an annuity contract, the amount of the annuity was stated to be £383.84.

15. **The deed of annuity**: On 5 October 2011, the appellants issued and delivered a deed of annuity to Mr and Mrs Robinsons. The appellants, as grantors, covenanted to pay Mr and Mrs Robinson, as annuitants, £383.84 per annum, in perpetuity. This was stated to be in consideration for the transfer of the property. The first payment was to be made on the first anniversary of the deed. The annuitants were given a power to redeem the annuity upon 7 days' written notice, in which case the grantor was to pay to the Robinsons £726,750 on or before completion of the transfer of the property. Clause 4 of the deed stated that the grantor of the annuity, the appellants, were permitted to assign all their rights and benefits under the deed provided the assignee assumed all the grantor's liabilities and obligations, without the further consent of the annuitants. This meant that the annuitants had no control over the identity or creditworthiness of the assignee who, it seems, was to replace the appellants as the party solely responsible for paying the annuity in perpetuity, or the sum of £726,750 if the assignment took place before the annuity was redeemed.

16. **Assignment/novation of annuity**: On the same day as the annuity was granted, the appellants entered into what was described as a deed of assignment in relation to the annuity. The assignee was a BVI company, AD Alta Advisors Limited ("AD Alta"). By clause 2 of the deed of assignment, the appellants purported to assign to AD Alta, all the rights and benefits enjoyed by the appellants under the deed of annuity. However, it is not clear to us that the appellants had any rights or benefits under the deed of annuity. By clause 3 of the deed of assignment, in consideration of the assignment pursuant to clause 2 of the deed, AD Alta accepted all the continuing liabilities and obligations of the appellants under the deed of annuity. Clause 3 of the deed of assignment recorded that the appellants had paid AD Alta the sum of £734,017.50. This figure is £726,500 plus 1%. There was no evidence that this sum was ever paid to AD Alta but, if it was, it was paid to the firm of solicitors who were acting for both the appellants and AD Alta. If the deed of assignment was to be effective to bring to an end the appellants' continuing obligations to Mr and Mrs Robinson under the deed of annuity, there would have to have been a novation of those obligations, whereby they were taken on by AD Alta in place of the appellants. A novation would normally require the consent of Mr and Mrs Robinson. However, they were not parties to the deed of assignment, although clause 7 of the deed of assignment stated that they could enforce clause 3 of the deed of assignment. We will assume in favour of the appellants that the deed of assignment did amount to a novation of the appellants' obligations under the deed of annuity, from the date of the deed of assignment, whereby the appellants were thereafter released from those obligations which were thereafter owed to Mr and Mrs Robinson by AD Alta. We will make this assumption on the basis that clause 4 of the deed of annuity amounted to Mr and Mrs Robinson's consent to such a novation.

17. **The SDLT return:** On 5 October 2011, after the grant of the annuity, the appellants filed an SDLT return, in the form of an SDLT1. The return referred to a contract dated 6 September 2011 but this has been taken to be a simple mistake for the actual date of 26 September 2011. The return stated that the effective date of the land transaction was 5 October 2011 and that the total consideration was £42,610. The return stated that the form of the consideration was in accordance with codes 30 and 34. Code 30 refers to "cash" and code 34 refers to "other", which can include an annuity. This statement of the consideration must have been on the basis described by Mr Hannah in

his email of 28 September 2011, referred to above. However, the deposit of £38,250 had only been paid to the solicitors for Mr and Mrs Robinson as stakeholders. Further, clause 14.3 of the contract of sale provided that the annuity contract was held on trust between contract and completion. Further, the appellants had used the wrong annuity figure of £363.38, rather than the figure of £383.84 stated in the annuity contract.

18. **Notice of the assignment:** On 6 October 2011, the appellants gave to Mr and Mrs Robinson notice of the deed of assignment of 5 October 2011.

19. **Notice to redeem annuity**: On 7 October 2011, Mr and Mrs Robinson gave notice to redeem the annuity. This notice was not given at least 7 days prior to the completion date of 12 October 2011.

20. **Completion of the purchase**: On 12 October 2011, the appellants, AD Alta and Mr and Mrs Robinson entered into a deed of release in respect of the annuity. The release was expressed to be in consideration of the payment by AD Alta of £726,500 to Mr and Mrs Robinson.

21. On 12 October 2011, Mr and Mrs Robinson executed a TR1 transferring title to the property to the appellants. We were not shown the TR1.

22. For the purposes of completion, the appellants' solicitors prepared a completion statement which showed the purchase price as £765,000 and the payment of a deposit of £38,250 and a calculation of the sums required for completion on that basis.

23. The appellants did not deliver an SDLT return in relation to completion of the purchase on 12 October 2011.

24. **Registration of title**: It seems that the appellants' solicitors duly applied to register the transfer of the property in accordance with the TR1. It is to be inferred that the appellants' solicitors were able to provide the Land Registry with a certificate, in the form on an SDLT5, that SDLT had been duly paid. In due course, the appellants were registered at the Land Registry as the proprietors of the property. The registration took effect from 14 October 2011. The Charges Register in relation to the title shows that, on 12 October 2011, the appellants granted a mortgage over the property in favour of Barclays Bank plc. We were not shown a complete copy of the registered title so that we could not see what the register stated as to the consideration for the transfer. However, we infer from other evidence that the consideration was given as £42,610.

The Effective Date Issue

25. There was an issue before the FTT, and before us, as to the effective date of the transaction for SDLT purposes. To describe how the issue arises, it is necessary to refer to some of the provisions of FA 2003.

26. SDLT is a charge on "land transactions" (s42(1)) defined as "any acquisition of a chargeable interest" (s43(1)). The term "chargeable interest" means "any estate, interest, right or power over land in the United Kingdom other than an exempt interest"

(s48(1)). There is no dispute that the transaction or transactions in this case concerned a "land transaction".

27. S44 provides for the situation, standard in property transactions, where there is, first, a contract of sale and then a conveyance. So far as SDLT on land transactions is concerned, s44(2) provides that entering into the contract does not mean the purchaser has entered into a land transaction. By s44(3), if the transaction is completed without previously having been "substantially performed", the contract and the transaction effected on completion are treated as part of a single land transaction and the effective date of the transaction is the date of completion. Conversely, s44(4) provides that "[i]f the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract" and, in such a case, the effective date of the transaction is when the contract is substantially performed. This is supplemented by s44(8) which provides that, in a case which falls within s44(4), where the contract is subsequently completed by a conveyance, both the contract and the transaction effected on completion are notifiable transactions and s44(8) provides for the possibility of a further charge to tax if the amount of the tax chargeable on the transaction effected on completion is greater than the amount of the tax chargeable on the contract.

28. The significance of these provisions, so far as they concern the obligation to deliver an SDLT return, is as follows. The duty to deliver an SDLT return is imposed by s76 in the case of a notifiable transaction. The purchaser is required to deliver an SDLT return before the end of the period after the effective date of the transaction. At the time of the transaction in this case, the period was 30 days; it is now 14 days. Thus, in a case which falls within s44(3), the purchaser is obliged to deliver an SDLT return within a period of the contract being completed. In a case which falls within s44(4), the purchaser must deliver an SDLT return within a period of the contract being substantially performed and then a further SDLT return within a period following completion.

29. S44(5) defines what is meant by a contract being "substantially performed". So far as relevant in the present case, a contract is substantially performed when "a substantial amount of consideration is paid or provided" (s44(5)(b)). In the present case, a substantial amount of consideration is paid or provided where "the whole or substantially the whole of the consideration" is paid or provided (s44(7)(a)).

30. HMRC contend that the contract in this case was not substantially performed before completion with the result that s44(3) applied and s44(4) did not apply. On this basis, the notifiable transaction occurred on completion and the date of completion was the effective date of that transaction. Accordingly, the appellants ought to have delivered an SDLT return within 30 days of completion.

31. The appellants' case is that the contract was "substantially performed" on 5 October 2011, when the annuity was granted. On that basis, s44(3) did not apply and s44(4) did apply. Accordingly, the appellants were obliged to deliver an SDLT return within 30 days of 5 October 2011 and, in fact, they did deliver a return on 5 October 2011. Even on the appellants' case, they ought to have delivered a further SDLT return

within 30 days of completion (pursuant to s44(8)) and they did not do so. However, if no further SDLT were payable pursuant to s44(8), then it could be said that no harm would have been done by the appellants' failure to deliver a second SDLT return following completion. Conversely, if further SDLT were payable pursuant to s44(8), then the appellants failed to deliver a return as required by s44(8) and failed to pay the tax due pursuant to s44(8).

32. In the SDLT return which the appellants delivered on 5 October 2011, the appellants stated that the relevant consideration was £42,610. This figure was arrived at by adding the deposit of £38,250 to 12 times £363.38. The latter figure was the wrong figure pursuant to the annuity contract. Nonetheless, the appellants' case was that the contract was substantially performed on 5 October 2011 when the appellants entered into the annuity contract, having previously paid the deposit. If the contract had been substantially performed at that point, then the appellants contended that they were entitled to rely on s52 which provided, so far as relevant, that in the case of an annuity, such as an annuity payable in perpetuity, the relevant consideration was the amount of twelve years' annual payments.

33. The FTT held that the consideration, which was represented by the grant of the annuity, was not consideration which was "paid or provided" when the annuity was granted on 5 October 2011 because, at that date, the annuity was held on trust for the appellants pursuant to clause 14.3 of the contract.

34. The FTT viewed clause 14.3 as seeking to protect the appellants by providing that, if the annuity was delivered prior to completion, it was to be held by Mr and Mrs Robinson "in trust" for the appellants pending completion. This was reflected in clause 14.5 regarding the appellants being entitled to demand the encashment proceeds if the sale and purchase did not proceed ([3(6)] and [18]). While the nature of the trust was not specified, the FTT considered the "drafting and context of [the] provisions [was] sufficient to establish that [Mr and Mrs Robinson] held their interest in the Annuity in trust for the Appellants pending completion of the sale of the Property". Having considered its earlier findings of fact (encompassing the detailed agreed findings and its additional findings) the FTT concluded (at [19]) that Mr and Mrs Robinson held their interests in the annuity for the appellants pending completion. If completion had not taken place, the annuity would continue to be held in trust and the encashment retained by or returned to the appellants' solicitor. The annuity had not been paid or provided and s44(4) did not apply.

Was the annuity held on trust?

35. Before us, the appellants did not take issue with the FTT's interpretation of "paid or provided" under s44(4). It was accepted that if the annuity was held on trust then the requirement in relation to the contract having been substantially performed would not be satisfied. However, on behalf of the appellants, Mr Hickey argued that the FTT was wrong to conclude that the annuity was held on trust. Rather, it ought properly to have concluded that the contract to purchase was substantially performed on 5 October 2011.

36. The parties agreed that the contract was to be construed in the light of all relevant background circumstances. Mr Hickey also reminded us of the effect of parties entering into a specifically enforceable contract for the sale of land and the nature of the trust relationship between a vendor and a purchaser in the period between contract and completion. However, we do not see that the trust relationship between a vendor and a purchaser as to the land to be conveyed has any bearing on the meaning and effect of clause 14.3 of the contract in this case.

37. Mr Hickey asked us to note that the term "in trust" was not defined in the contract. He argued that the subsequent dealings were consistent with the annuity being delivered in payment for the property, and not in trust. Mr and Mrs Robinson exercised the right of redemption, either party could assign their rights and benefits and moreover, the fact the appellants "assigned" the annuity, so were no longer a party and gave notice of this to the vendors, was, he submitted, wholly inconsistent with the annuity being held "in trust" for the appellants.

38. We consider that the effect of clause 14.3 of the contract is clear. That clause stated that the annuity contract was to be held on trust for the appellants. As the FTT explained, there was a sound commercial reason for the annuity contract being held on trust in this way; the reason was to protect the appellants in case the contract of sale was not completed. Where the words of the contract are entirely clear, are consistent with other provisions in the contract (such as clause 14.5 in this case) and where their ordinary meaning is entirely in accordance with the commercial purpose of the contract, we plainly must give effect to the ordinary meaning of the contract.

39. There is no difficulty arising from the fact that the contract did not contain further definition of the nature of the relevant trust. The nature of the trust is clear. It is a bare trust. No more needed to be said. The fact that the contract did not elaborate what was involved in the relevant trust would not come anywhere near entitling us to reject the express wording of the contract and to hold, after all, that there was no trust of any kind, as Mr Hickey appeared to be suggesting.

40. The facts that Mr and Mrs Robinson were entitled to redeem, and did redeem, tell us nothing. Mr and Mrs Robinson as trustees and the appellants as beneficiaries expressly agreed that Mr and Mrs Robinson could redeem. The redemption was beneficial to the appellants and to the person to whom the appellants intended to "assign" the burden of the annuity contract. It is perfectly possible for a trustee to be given a right to redeem; the existence of a right to redeem does not mean that the annuitant is the beneficial owner of the annuity.

41. Similarly, the ability to assign, and the fact of "assignment" by the appellants, reveal nothing regarding whether the annuity was held on trust. While the trust subsisted pending completion, Mr and Mrs Robinson could assign the annuity which would remain subject to the trust. As regards the ability of the appellants to "assign", the drafting of the annuity contract was poor. It is difficult to see that the appellants had any "rights and benefits" under the annuity contract which they could assign. The annuity contract appeared to envisage something which was not an assignment of benefits but rather the replacement of the appellants by a third party. That was not an

"assignment" of the appellants' obligations, which was not legally possible. What was needed was a novation whereby the appellants' obligations were taken on by a third party and the appellants were discharged. A novation would require the consent of Mr and Mrs Robinson. As explained earlier, we are prepared to assume that such a novation did take place. We can see that in a case where the annuity contract was to be novated, the appellants and the third party ought to have given attention to whether the appellants' interest under the trust created by clause 14.3 of the contract of sale ought to be transferred to the third party. That would be a matter for the appellants and the third party. However, the fact that that matter ought to have been dealt with in the deed of assignment does not alter the clear meaning of clause 14.3 of the contract of sale. It cannot possibly be argued that if the appellants did not transfer to the third party the benefit of the trust of the annuity contract that would bring the trust to an end and Mr and Mrs Robinson would no longer hold the annuity contract on trust for the appellants.

42. We conclude that the annuity, in accordance with the contract of sale, was held on trust pending completion. The FTT was correct to find that under s44(4) the contract had not been substantially performed on 5 October 2011 when the annuity was issued. There was, therefore, no notifiable transaction on 5 October 2011.

43. For the sake of completeness, we add that the payment of the deposit was not a payment of consideration for the purposes of s44(5) as it was held by the vendors' solicitors as stakeholders. Further, by itself, a 5% deposit was not the whole or substantially the whole of the consideration under the contract of sale for the purpose of s44(7)(a).

The consideration issue

44. In view of our conclusion (in agreement with the FTT) that the relevant transaction in this case, for SDLT purposes, was the completion of the sale which occurred on 12 October 2011, the question as to the form of the consideration, and its amount, for SDLT purposes, is to be answered in relation to that transaction on that date.

45. HMRC submitted that the consideration for the sale was the payment of £765,000 by the appellants to Mr and Mrs Robinson. This payment was made by the deposit being released by the stakeholders to Mr and Mrs Robinson and by the making of the balancing payment of £726,750. The payment of £765,000 in aggregate was made by the appellants on 12 October 2011.

46. The appellants' case is that the consideration for the sale was the release of the deposit and the grant of the annuity on 5 October 2011. If the annuity had not been redeemed before completion on 12 October 2011, the trust of the annuity would have come to an end on completion and Mr and Mrs Robinson would then have been in possession of the deposit and an annuity. In the events which happened, Mr and Mrs Robinson had redeemed the annuity prior to completion so that they were entitled to be paid £726,750 by AD Alta as the encashment proceeds of the annuity. Accordingly, on completion, Mr and Mrs Robinson were in receipt of the deposit and also the encashment proceeds. The encashment proceeds were not to be treated as a part payment of the purchase price by the appellants because the contract of sale provided

that the grant of the annuity was instead of the appellants paying the balance of the purchase price and the payment of £726,750 was not made by the appellants under the contract of sale but was paid by AD Alta under the annuity contract.

47. The relevant statutory provisions are ss50 and 52 and sched 4 para 1. Sched 4 para 1 (introduced by s50) refers to the 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.

48. If HMRC's analysis of what occurred is right, then it is clear that these provisions identify the consideration as £765,000. The subject matter of the transaction is the sale of the property and the consideration of £765,000 was given for that subject matter, directly by the appellants. Although sched 4 para 1 also refers to consideration given "indirectly" by a purchaser, we did not understand HMRC to argue that, if the appellants' analysis of the transaction were the correct one, we should hold that the payment of £726,500 made by AD Alta was consideration given indirectly by the appellants.

49. If the appellants' analysis of the transaction is right, then the consideration given by the appellants was the deposit and the grant of the annuity. In the absence of s52, one would have to determine the money's worth of the annuity. However, s52 relieves one of the need so to determine. S52 provides that in relation to a consideration which consists of a relevant annuity the consideration taken into account is limited to twelve years' annual payments. On the appellants' analysis, the payment of £726,750 is irrelevant as it was not consideration for the subject matter of the transaction given directly or indirectly by the appellants.

50. Accordingly, the outcome of this issue depends on the correct analysis of the transaction.

The FTT's findings

51. The FTT set out the facts as agreed by the parties. So far as material to the present issues, the agreed facts related to the documents which were entered into and we have summarised those matters earlier in this decision. However, the FTT went on to make a number of important additional findings regarding the transaction (at [3(1) to (11)]). We can summarise the essential findings as follows.

52. The Robinsons required the full consideration of £765,000 on completion to repay a mortgage, buy their new home and repay debts ([3(2)]).

53. The annuity amount of £383.84 per annum was calculated by Mr Hannah and fixed in an amount (taking account of the £38,250 deposit) to trigger the requirement to file a SDLT1 return (£40,000 – per ss 77 and 77A) but without triggering a liability to pay any SDLT. The return would assist in obtaining a TR1 form for the registration of the title to the property. The terms of the annuity were not commercial consideration for the sale of a family home. The annuity would have to be paid for over 1,893 years to pay the principal amount, ignoring interest. It was commercially necessary and a

preordained step by those who understood the tax planning that the annuity should be redeemed ([3(3)] and [3(4)]).

54. The timing of the issue and delivery of the annuity, seven days prior to completion, reflected the 7-day notice period for redemption of the annuity ([3(5)]).

55. The vendors held their interest in the annuity in trust pending completion of the sale ([3(6)]).

56. The exercise of the right of redemption was bound to the payment of the purchase price on completion under clause 14.4 of the sale contract in three ways: i) the encashment proceeds were to be held by the vendor's solicitors for the purpose of completion of the sale and purchase of the property; ii) notice to redeem was limited to being given not less than seven days before completion; and iii) the vendors had recourse to the appellants for any shortfall between the encashment proceeds and the purchase price required for completion. These provisions made it clear it was the balance of the purchase price that was required to be paid on completion ([3(7)]).

57. It was not established that monies involved in the transaction were held for AD Alta, rather than the appellants, pending completion [3(8)]. The appellants' solicitors prepared a completion statement showing the purchase price as £765,000 and the net sum due on completion (after deducting the deposit) as £725,750 [3(8)]. The payment to Mr and Mrs Robinson on completion came at the direction of, if not from, the appellants [3(8)].

58. The notice to redeem was late but was waived. That reflected that cash was to be paid for the completion of the sale and purchase. If the grant of the annuity had satisfied the purchase consideration the late notice would mean that Mr and Mrs Robinson would have to seek redemption from the assignee the day following completion. It would not have prevented completion on 12 October 2011 ([3(9)]).

59. The recital in the deed of release referred to agreement with the appellants for redemption and release despite the fact it was the assignee who had assumed the liability ([3(10]).

60. The first payment was not due until the first anniversary of the issue of the annuity. The appellants and the assignee were released from the liability to make any annuity payment on the same day as Mr and Mrs Robinson ceased to hold it on trust for the appellants. Mr and Mrs Robinson did not receive a single annuity payment ([3(11)]).

The FTT's reasoning

61. There are three strands to the reasoning of the FTT in relation to the consideration issue. The first strand involved the FTT analysing the transaction in what it described as a realistic way [24] – [29]. The FTT did not refer to authorities for the purpose of the first strand but regarded the process as one of assessment of the facts it had found. At [25], the FTT said that the contract of sale had not been performed before completion, that the balance of the purchase price was required to be paid on completion and that

the balance came from, or at the direction of, the appellants for the purposes of completion. At [27], the FTT held that Mr and Mrs Robinson did not receive the balance of the purchase price pursuant to the annuity and that the payment of £726,750 did not consist of a payment pursuant to an annuity but was given directly or indirectly by the appellants within sched 4 para 1(1). We note, however, that in the course of these findings, the FTT referred to the understanding of Mr and Mrs Robinson as to what was happening: see at [27] – [28].

62. The second strand of the FTT's reasoning is at [30]-[41]. This strand is in the alternative to the first strand: see at [30]. The second strand involves adopting an approach in accordance with the principles in *Ramsay Ltd v IRC* [1981] STC 174 ("*Ramsay*") and the cases which followed that decision.

63. The FTT reviewed the authorities. It considered that the ultimate question per *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 (at [36]) was "whether the relevant statutory provisions construed purposively, were intended to apply to the transaction viewed realistically". As to what viewing the transaction realistically meant, the FTT referred to what Lord Reed had said in *UBS AG v HMRC* [2016] STC 934 (at [68]). The facts were to be analysed in the light of the statutory provision being applied and a contrast could be drawn between statutes interested in the overall economic outcome of a series of commercially linked transactions with statutes which required the court to focus on a specific transaction where other related transactions were unlikely to have any bearing.

64. The FTT then considered the statutory purpose of s52 (at [40]). The section was "a method of calculating the fixed amount on which SDLT should be charged". The section only concerned the consideration given and received for the property, with the focus on "so much" of the consideration "as consists of" the annuity. The FTT thought it wrong therefore to focus on the annuity in isolation as the related transactions were relevant to the determination of whether s52 applied to the transaction viewed realistically. Analysing the facts (at [41]), the documents executed on or before the completion date (assignment, redemption and release), when viewed realistically in the light of the facts found (set out at [52] to [60] above) demonstrated that the appellants acquired the property for consideration in cash. "The issuance, assignment, redemption and release of the annuity were inserted in order to bring the transaction within s52 and executed in preordained steps by those who understood the transactions, but they were gone by conclusion of the completion date on which the Property was transferred to the Appellants, and the annuity had been held "in trust" for the Appellants throughout these transactions until completion". The FTT concluded the annuity "…was not the chargeable consideration and so the *Ramsay* principle confirms that the transactions fall outside the intended scope of section 52".

65. The third strand of the reasoning of the FTT, in the alternative to the first two strands, involved the application of s75A: see at [42]-[48]. At [45], the FTT held that: (a) the appellant's acquisition was of a chargeable interest, the property; (b) there were a number of scheme transactions in connection with the disposal and acquisition of the property; (c) the amount of SDLT payable in respect of the scheme transactions (nil) was less than the amount that would be payable on a notional land transaction effecting

the acquisition of the property by the appellants on its disposal by Mr and Mrs Robinson (£30,600). At [46], the FTT disregarded the scheme transactions and created a notional land transaction which was the sale of the property by Mr and Mrs Robinson and its acquisition by the appellants for a chargeable consideration of £38,250 plus £772,267.50 (the FTT wrongly said that this was the payment made on the "assignment" of the annuity to AD Alta – the correct figure was £734,017.50). At [47] – [48], the FTT held that s75C(2) did not produce the result that s52 had to be applied to the annuity (as contended for by the appellants) because s52 did not provide for a relief within s75C(2) and, in any case, the annuity was not part of the notional transaction. Accordingly, the FTT concluded that the application of section 75A produced the result that SDLT was chargeable on the consideration of £38,250 plus £772,267.50. However, this was not the ultimate conclusion of the FTT which had already decided pursuant to the first two strands of its reasoning that the chargeable consideration was £765,000.

The appellants' arguments

66. Mr Hickey submitted that the transaction was to be analysed in the way we have summarised at [46] and [49] above. He made submissions as to how s52 applied to the facts as analysed in that way. He submitted that the FTT had gone wrong because it had failed to appreciate that s52 prevailed over sched 4 para 1.

67. In relation to the second strand of the FTT's reasoning, relying on *Ramsay*, Mr Hickey did not take any issue with the FTT's analysis of the principles established in *Ramsay* and the cases which followed it. Further, he did not dispute the findings of fact made by the FTT. He accepted that the structuring of the transaction was tax-driven but he submitted that that did not matter. His argument under this ground rested straightforwardly on s52. That provision, so Mr Hickey submits, applied to the exclusion of and in priority to other provisions on consideration such as para 1(1) Schedule 4 FA 2003. He relied on the decision in *Drummond v HMRC* (2009) 79 TC 793 and submitted that the present case did not involve an assessment of the overall economic outcome of a series of commercially linked transactions but, instead, required the tribunal to focus on a specific transaction, namely, the grant of the annuity. So considered, the SDLT payable had to be assessed in accordance with s52, applied to the annuity. Mr Hickey further submitted that the encashment of the annuity before completion was immaterial to the application of s52 to the facts of this case.

68. As to s75A, Mr Hickey submitted that the annuity formed part of the notional transaction created pursuant to s75A. The annuity could not be disregarded and s52 had to be applied to it. Accordingly for the purpose of assessing the largest amount for the purposes of s75A(5), the value of the annuity was twelve times the annual payment. This produced the result that the tax payable in relation to the notional transaction was the same as the tax payable for the actual transaction and s75A did not apply. Further, the operation of s52 was a relief within s75C(2) and the result was that s52 applied to the annuity involved in the notional transaction.

Discussion

69. The appellants' case in relation to the consideration issue depends on them establishing their analysis of the transaction. We set out the appellants' analysis at [46] and [49] above which was essentially that the consideration for the sale was the deposit and the grant of the annuity. The appellants say that the sum of £726,500 received by Mr and Mrs Robinson on completion was not the balance of the purchase price and it was not paid by the appellants. Instead, it was the proceeds of the encashment of the annuity and it was paid by, or (possibly) on behalf of, AD Alta.

70. The real issue is as to the correct analysis of the transaction in order to determine what consideration was given by the appellants for the purchase of the property. Was it the deposit plus the grant of the annuity (as the appellants contend) or was it the deposit plus the balance of the purchase price (as HMRC contend)?

71. We do not see the appeal in relation to this issue as involving any real difficulty as to the meaning and effect of s52. Nor do we think that the FTT in any way misunderstood or misapplied s52. Mr Hickey's concentration in his submissions on the operation of section 52 assumes that he is right in his analysis of the transaction. Focussing on section 52 does not address the real issue as to whether the FTT was right to analyse the transaction in the way in which it did.

72. We have described the first and second strands of the reasoning of the FTT. The first strand appeared to involve a realistic assessment of its findings of fact. The second strand expressly depended upon the *Ramsay* principles. In this case, these two strands are not completely separate but overlap to a considerable extent. However, we will examine the FTT's separate reasoning in support of the two strands.

73. In relation to the first strand of reasoning, it is important to have regard to the FTT's findings of fact. The FTT was not persuaded that it ought to make a finding that the appellants had paid AD Alta for the novation of the agreement. The FTT was not persuaded that it ought to make a finding that the funds from which the payment on completion was made were the funds of AD Alta. The FTT did make a finding that the payment on completion came at the direction of, if not from, the appellants. The FTT held that by completion, the annuity had been released and that the money paid to Mr and Mrs Robinson on completion was the balance of the purchase price and was not the proceeds of encashment of the annuity.

74. The first strand of the reasoning of the FTT is, of course, heavily reliant on, and consistent with, these findings of fact. We are not persuaded on this appeal that we can depart from the FTT's findings that the payment made on completion was the balance of the purchase price paid by the appellants and not a payment of the proceeds of encashment. We mentioned earlier that, in its reasoning, the FTT referred to the understanding of Mr and Mrs Robinson. At first sight, the understanding of Mr and Mrs Robinson ought not to be relevant to the analysis of the transaction which ought to depend on an assessment of the objective facts. The understanding of Mr and Mrs Robinson might possibly be relevant if their understanding was based on what they had been told by, or on behalf of, the appellants or their understanding was simply a reflection of an objective assessment of the facts. However, the FTT did not express

itself in those possible ways. However, we consider that reading the reasoning of the FTT as a whole, it was not affected by its comments on the understanding of Mr and Mrs Robinson but essentially depends on its assessment of its own findings as to the objective facts. In any event, the contrary was not argued by Mr Hickey.

75. It might be argued that the first strand of the FTT's reasoning could be disturbed by the Upper Tribunal on this appeal on the ground that the character of the transaction was conclusively determined by the legal documents; that the contract of sale provided that the appellants did not have to pay the balance of the purchase price if they provided an annuity and they did provide an annuity; that the movement of monies on completion was ambiguous and that it should be given a character in accordance with the legal documents. On that basis, the payment of £726,500 should be conclusively treated as being a payment of the encashment proceeds and therefore made by the person obliged to make that payment namely, AD Alta. It could be argued that the FTT ought to have held that although the funds were under the control of the appellants throughout, the legal analysis ought to have been that the payment on completion was a payment made by AD Alta acting by the appellants and was not a payment by the appellants of the balance of the purchase price.

76. In view of the possible contrary arguments identified above, we will consider the second strand of the FTT's reasoning. The appellants accepted that the FTT had correctly stated the legal principles and had asked itself the right questions which were whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction viewed realistically and whether the statutory provisions were interested in the overall economic outcome of a series of commercially linked transactions or required the tribunal to focus on a specific transaction where other related transactions were unlikely to have any bearing.

77. We consider that the answers to these questions emerge without difficulty and that the FTT was entirely right in its conclusions in these respects. The essential statutory question in this case is: what was the consideration given by the appellants for the land transaction. The FTT's findings of fact indicate that it was completely unrealistic to hold that Mr and Mrs Robinson were selling their house in return for a 5% deposit and an annuity of £383.84 per annum. The only realistic finding was that they were selling their house for £765,000. The grant of the annuity, the "assignment" of the annuity, the redemption of the annuity and the release of the annuity were artificial, uncommercial and pre-ordained steps which would be taken and then reversed prior to completion when Mr and Mrs Robinson would receive from the appellants the release of the deposit plus £726,500. The artificiality of the steps was demonstrated by the appellants' inability to show that they had paid AD Alta for the novation of the annuity or that AD Alta had paid the encashment sum to Mr and Mrs Robinson.

78. As to the nature of the statutory question in this case, we consider that the statutory provisions are to be construed purposively and applied to the transaction, viewed realistically. The statutory provisions are interested in the overall economic outcome of the series of steps involved in the transaction and are not confined to the analysis of an individual step to the exclusion of the other steps.

79. The ultimate statutory question is: what was the consideration given for the acquisition of the property? That question is raised by sched 4 para 1. The question relates to the overall economic outcome of all of the steps involved in the transaction. It is quite true that in the case of a transaction which involves the grant of an annuity, the money's worth of the annuity for the purposes of sched 4 para 1 is provided by s52. But if the transaction involves more than an annuity and the annuity is artificial, uncommercial and its cancellation is pre-ordained, then the correct answer to the statutory question posed by schedule 4 para 1 is not dictated by the answer which s52 gives to the analysis of an artificial and cancelled step involving the annuity.

80. We therefore conclude that the FTT was right to conclude that, on completion, the consideration for the purchase of the property given by the appellants to Mr and Mrs Robinson was the release of the deposit and the balance of £726,500 making a total of £765,000.

81. This conclusion on the consideration issue makes it unnecessary to consider the third strand of the reasoning of the FTT as to the application of s75A. However, for completeness, we will set out our reasoning in relation to s75A and its application in this case. We do not base our decision in this case on this reasoning as some of the matters considered below were not argued at the hearing of the appeal and/or might not be open to the appellants having regard to the fact that they were not raised before the FTT or in the grounds of appeal.

82. S 75A is headed Anti-avoidance. Subs (1) states when s75A applies 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.

83. The section thus requires a comparison between the sum of the amounts of the SDLT payable on the "scheme transactions" and a "notional land transaction". As will be seen, the "chargeable consideration" in relation to the notional land transaction is defined in s75A(5) for the purposes of s75(1)(c). The scheme transactions must be "involved in connection with" the disposal and acquisition of the chargeable interest (in this case the freehold estate in the property). Subsection (2) provides "transaction" may include amongst other thing, a non-land transaction. Subsection (3) gives examples of scheme transactions. Here, no challenge is made to the FTT's finding (at [45]) that various of the steps (the issue, assignment, notice to redeem and release of the annuity) were "scheme transactions".

84. The next key provisions are subsections (4) and (5). Subsection (4) provides:

> (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.

85. In this case the actual disposal and acquisition of the freehold estate is disregarded. A new land transaction is imagined to take place and we are told what that is: as regards this case, the transaction is that the appellants acquired the freehold estate in the property on the disposal of that estate by Mr and Mrs Robinson.

86. S75A(5) then tells us what the chargeable consideration is on the notional transaction for the purposes of both s75A(1)(c) and s75A(4)(b):

> (5) The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount)
>
> (a) given by or on behalf of any one person by way of consideration for the scheme transactions, or
>
> (b) received by or on behalf of V (or a person connected with V within the meaning of [section 1122 of the Corporation Tax Act 2010]) by way of consideration for the scheme transactions.

87. S75A(5) refers to two alternatives. Alternative (a) refers to an amount or amounts given by any one person. Alternative (b) refers to the amount or amounts received by or on behalf of the vendors ("V"). In this case, V is Mr and Mrs Robinson. We will refer to alternative (b) first although HMRC did not make submissions about alternative (b). Mr and Mrs Robinson received the deposit and (on the assumption that the appellants are right on the other points they have argued) encashment proceeds of £726,500 giving an aggregate sum of £765,000. Thus if £765,000, the amount pursuant to alternative (b), was higher than the amount pursuant to alternative (a), the chargeable consideration for the purposes of section 75A would be £765,000 and that is the figure for which the appellants were assessed for SDLT.

88. As to alternative (a) in s75A(5) (the amount or amounts given by any one person), the FTT considered the amounts given by the appellants, as given by "any one person". On the assumption that the appellants were right on the other points they argued, the appellants paid the deposit to Mr and Mrs Robinson and a sum to AD Alta. The FTT said that the sum paid to AD Alta was £772,267.50 and (adding this sum to the deposit) the aggregate amount was £810,517.50. In fact, the sum paid to AD Alta was £734,017.50 and the aggregate amount would be £772,267.50. This point was not drawn to our attention at the hearing but we mention it for completeness. On the appellants' case, they also provided an annuity to Mr and Mrs Robinson so it might have been said that one should add to these figures 12 times the annual amount of the annuity (in accordance with s52). HMRC did not argue before us that one should add in the s52 figure for the purposes of alternative (a). In the event, HMRC did not seek to recover SDLT on any figure above £765,000.

89. Mr Hickey submitted that the consideration for the notional land transaction is the deposit and the grant of the annuity. He submitted that s75A(5) did not change the form of the consideration in relation to the actual transaction. On that basis, the amount of the consideration provided by the annuity would be calculated in accordance with section 52. This would produce the same result as to the amount of SDLT as applied to the actual transaction. Therefore, he said, both the SDLT for the scheme transactions, and the SDLT for the notional transaction, were zero. That would mean that the condition in 75A(1)(c) (that the SDLT for the scheme transactions is less than that for the notional transaction) was not met.

90. We agree with HMRC that Mr Hickey's submission does not give effect to alternative (a) in s75A(5). The submission ignores the £734,017.50 given by the appellants (on their case) in connection with a scheme transaction. As indicated above, no challenge is made to the FTT's finding that the various transactions were "scheme transactions" and Mr Hickey's case does not explain why the consideration amount of £734,017.50 is not taken into account in calculating the chargeable consideration.

91. In his submissions in reply, Mr Hickey referred to s75B(1) which provides that "[i]n calculating the chargeable consideration on the notional transaction for the purposes of section 75A(5), consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental". He submitted that the payment of £734,017.50 by the appellants to AD Alta was merely incidental within s75B(1). However, that was not a point that was raised before the FTT or dealt with in the appellants' grounds, skeleton argument or oral submissions in opening the appeal. In any case, the appellants had introduced AD Alta into the scheme for the purpose of enabling the appellants to argue that the payment of the proceeds of the encashment was made by AD Alta rather than by the appellants. It can hardly be said that the novation involving AD Alta, and the payment of £734,017.50 to AD Alta, in return for the novation, was merely incidental.

92. Mr Hickey's further submission, that s75C(2) comes to his aid even if s75A is applicable, is also misconceived. S75C(2) provides that: "The notional transaction under section 75A attracts any relief under this Part which it would attract if it were an actual transaction (subject to the terms and restrictions of the relief)." On the basis that the consideration pursuant to section 75A(5)(a) is the deposit plus £734,017.50 plus possibly 12 times the annual amount of the annuity, if s52 is a "relief", then it would not operate in relation to the deposit and the £734,017.50. In any case, we doubt if s52 could be considered to be a "relief" for the purposes of s75C.

93. Mr Hickey's submission only addressed alternative (a) in s75A(5) presumably because the FTT only considered alternative (a). Our provisional view is that even if the appellants were able to reduce the amount of the consideration for the purposes of alternative (a) in s75A(5), the consideration pursuant to alternative (b) would still be £765,000.

94. Having considered all of the matters raised by the appellants in relation to the consideration issue, we dismiss the appeal on the ground that the FTT was right to hold, on a realistic assessment of the transaction, that the consideration for the appellants'

acquisition of the property was £765,000. We have expressed our provisional views as to the application of s75A but we do not base our decision on that reasoning as it is unnecessary to do so.

The discovery assessment issues

95. HMRC's power to make a discovery assessment is conferred by sched 10 para 28(1) which is in these terms:

> "(1) If [HMRC] discover as regards a chargeable transaction that—
>
> (a) an amount of tax that ought to have been assessed has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given that is or has become excessive,
>
> they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax."

96. Sched 10 para 28(2) provides that the power to make a discovery assessment "in respect of a transaction for which the purchaser has delivered a return" is subject to the restrictions in sched 10 para 30. Para 30, consistently with para 28(2), only applies where "the purchaser has delivered a land transaction return in respect of the transaction in question". Para 30 provides that a discovery assessment may only be made in the two cases specified in para 30(2) or 30(3). The case specified in para 30(2) is where the situation which gives rise to the exercise of the power to make the discovery assessment is attributable to fraudulent or negligent conduct on the part of the purchaser. The second case is specified in para 30(3), and is governed by para 30(4), which are in these terms:

> "(3) The second case is where [HMRC] at the time they—
>
> (a) ceased to be entitled to give a notice of enquiry into the return, or
>
> (b) completed their enquiries into the return,
>
> could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).
>
> (4) For this purpose information is regarded as made available to the Inland Revenue if—
>
> (a) it is contained in a land transaction return made by the purchaser,
>
> (b…. or
>
> (c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—

> (i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) or (b) above… "

97. The time limits which apply to the making of a discovery assessment are specified in sched 10 para 31. The general rule is that no assessment may be made more than 4 years after the effective date of the transaction to which it relates. The effective date in this case was 12 October 2011 and the discovery assessment was made on 5 August 2015. Therefore, HMRC complied with the general time limit as to the making of a discovery assessment. Sched 10 para 31 also provides for longer time limits (of 6 and 20 years) in certain circumstances but, as HMRC had complied with the 4 year time limit, it was not necessary for the FTT to consider the other possible time limits.

98. These provisions reflect materially similar provisions relating to discovery assessments for income tax under s29 Taxes Management Act 1970 and corporation tax under sched 18 para 41 of Finance Act 1998. A body of case-law has developed on the interpretation of these provisions which have been examined at length in other decisions of this tribunal and in the higher courts.

99. It is accepted that HMRC did, at some point in time, make a discovery within sched 10 para 28. Before the FTT, the parties disagreed as to the time when the discovery was made. The FTT held that the relevant discovery was made in December 2014. The appellants contend that the FTT ought to have found that the discovery was made in August 2013 "if not before". The reason that the date of the discovery is said to be relevant is that the appellants say that the gap in time between the date of the discovery and the date of the assessment meant that the discovery had become "stale" by the date of the assessment with the result that the discovery assessment was invalid.

100. The submission that a discovery can become "stale" with the result that HMRC loses its ability to make a discovery assessment, based on that discovery, even within the statutory time limits, is not supported in express terms by the statutory language. The submission involves the imposition of a somewhat imprecise time limit which is not expressed in the statute. It is said that the concept of a discovery becoming stale is implicit in the word "discovery" itself.

101. The appellants are able to point to a number of cases which do indeed say that a discovery can become stale with the consequence that HMRC loses its ability to make a discovery assessment, based on that discovery. The cases relied upon by the appellants include *Charlton v HMRC* [2012] UKUT 770 (TCC) at [37], *Pattullo v HMRC* [2016] UKUT 270 (TCC) at [52], *Tooth v HMRC* [2018] UKUT 38 (TCC) at [79] and [2019] EWCA Civ 826 at [60]-[61], *Beagles v HMRC* [2018] UKUT 380 (TCC) at [52]-[61] and *Hicks v HMRC* [2020] UKUT 12 (TCC) at [115].

102. In other circumstances, it might have been appropriate to analyse the decisions relied upon by the appellants and consider what exactly was decided in those cases and whether we ought to follow the relevant parts of those decisions. We understand that the decisions in *Beagles* and *Tooth* are the subject of further appeals which are still pending. In these circumstances, HMRC accepts that we should proceed on the basis that the appellants are right as to the legal position so that if a discovery becomes stale,

HMRC loses its right to make a discovery assessment based on that discovery. HMRC reserve their position on this point if the present case should be the subject of a further appeal.

103.This means that it is necessary to consider when HMRC made its discovery in this case. In order to determine that matter, it is necessary to know what is required for there to be a discovery for the purposes of para 28(1). The Court of Appeal in *Tooth v HMRC* [2019] EWCA Civ 826 endorsed the legal approach described by the Upper Tribunal in *Charlton v HMRC* [2012] UKUT 770 (TCC). All that was required was that the conclusion reached by the officer, in that case of an insufficiency in an assessment, had newly appeared to the officer. *Charlton* confirms that the question whether there has been a discovery involves the application of a subjective test as to the HMRC officer's state of mind.

104. In *Anderson v HMRC* [2018] UKUT 159 (TCC), the Upper Tribunal, after reviewing a number of authorities, put that subjective test in the following terms: the officer must believe that the information available to the officer "points in the direction of there being an insufficiency of tax". This formulation acknowledged "both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not".

105.When HMRC has made a discovery assessment and the taxpayer contends that it is stale, the tribunal needs to consider how to determine whether an earlier discovery has become stale. This raises the questions: what approach should the tribunal adopt to the length of time which has elapsed between the discovery and the assessment and what facts or matters which occur during that time could make the discovery stale? These questions were referred to in *Charlton, Pattullo, Tooth* and *Beagles*. In *Beagles* at [79]-[81], the following summary was given:

> "79. We have accepted that a discovery can lose its quality of "newness" such that a valid assessment cannot be made under s29(1) . This leads to the question of when a discovery will lose its character.
>
> 80. In *Pattullo*, Lord Glennie suggested that a discovery would become stale "on any view" after a period of 18 months (*Pattullo* [57]). In *Tooth* , the Upper Tribunal expressed the view that a discovery would be stale if the assessment was issued five years later (*Tooth* [83]). These statements are made notwithstanding the observation of Lord Glennie in *Pattullo* that a discovery will only lose its quality of "newness" in "the most exceptional of circumstances" due to inaction on the part of HMRC (*Pattullo* [53]).
>
> 81. On the other hand, as we have mentioned above, in *Charlton* , the Upper Tribunal suggested that a delay (in that case of three or four months) "merely to accommodate the final determination of another appeal which was material to the liability question" would not cause a discovery to lose its essential newness (*Charlton* [37]). In *Pattullo* , Lord Glennie accepted that a discovery could be kept fresh for the purposes of being acted upon later, for example, by HMRC

notifying the taxpayer of a discovery in "the expectation that matters could be resolved without the need for a formal assessment" (*Pattullo* [53]).”

106.In *Beagles* itself, the Upper Tribunal held, at [86], that a delay in issuing a discovery assessment for two and a half years following the discovery meant that the discovery had become stale and that HMRC had failed to take steps to preserve the quality of the newness of the discovery during that period.

107.The time at which an officer of HMRC made a relevant discovery in this case is essentially a question of fact for the FTT. In this case, the appellants challenge the FTT’s finding that the relevant discovery was made in December 2014. In their grounds of appeal, the appellants contend that the FTT’s finding as to the date of the discovery was wrong in law because the findings made by the FTT were inadequate in law to support the conclusion it reached. That ground of challenge does not seek to attack the findings of primary fact made by the FTT (save in so far as the date of the discovery is itself a primary fact) but instead accepts the other findings of primary fact and then contends that the finding as to the date of discovery is not supported by the findings of primary fact. The appellants’ grounds of appeal go on to contend that the evidence before the FTT clearly established that the discovery was made in August 2013, if not before. Given that the appeal to the Upper Tribunal is on a point of law only, we interpret this second ground of challenge as a challenge in accordance with *Edwards (HMIT) v Bairstow* (1955) 36 TC 207 to the effect that, on the evidence before the FTT, no person acting judicially and properly instructed in the relevant law could have come to the determination in question. Indeed, as the case was presented at the hearing of this appeal, the essential challenge to the FTT’s finding as to the date of discovery was an *Edwards v Bairstow* challenge.

108.We will now summarise the facts which are relevant to the issue as to the date of the discovery in this case. This summary is mainly taken from the FTT’s findings of fact, both the findings in accordance with the parties’ agreed statement of facts and the FTT’s own findings. We will also include references to the evidence which might be relevant in view of nature of the appellants’ challenge to the FTT’s finding as to the date of discovery.

The findings and the evidence as to the date of the discovery

109.The appellants’ SDLT1 return was submitted electronically on 5 October 2011 pursuant to e-mail instructions given by Mr Hannah on 28 September 2011 to the appellants’ solicitors, Craig Ferguson & Co LLP. The effective date of the transaction was stated as 5 October 2011**.** The contract date of 26 September 2011 was incorrectly entered on the form as 6 September 2011 ([2(5)] and [3(12)]). The consideration was stated as £42,610. The codes given in response to the question as to the form the consideration took were code 30 and code 34 ([2(5)]. (We set out the background to these in more detail below but for present purpose it is sufficient to note that these indicated respectively consideration that was “cash” and “other”).

110.On 27 November 2012 HMRC opened a Code of Practice 8 enquiry into Mr Hannah’s tax affairs. As part of this investigation Mr Hadley, an HMRC investigator,

checked the SDLT1 return comparing the price originally paid by Mr and Mrs Robinson and the amount borrowed by the appellants pursuant to the charge dated 12 October 2011 ([3(13)]). Mr Hadley's evidence was that he was concerned that there might have been SDLT avoidance and asked for the completion statement for the purchase and any underlying documents that explained how SDLT had been mitigated.

111.In May 2013, Mr Hadley met the appellants and was given basic details about the use of an annuity in the purchase ([3(13)]).

112.In June 2013, Mr Hadley arranged for another HMRC officer who knew more about SDLT, Peter Kane, to become involved ([3(13)]).

113.On 1 July 2013 Mr Hadley wrote to the appellants asking whether encashment of the annuity took place ([3(13)]). In the section of the letter dealing with the property purchase, HMRC asked for all correspondence between the purchasers and vendors. They noted the redemption provision with 7 days' notice, that additional special conditions allowed the buyer to deliver the annuity before completion and the provision in clause 14.3 of the contract referring to the annuity being held on trust. The letter went on to say:

> "It would appear likely that the vendor has received the full value of the property and that there will be an encashment document. Please confirm whether this took place and if so provide the documentation".

114.The letter also asked Mr Hannah to provide any further documentation between the parties and any document showing the annual payment figure as this did not appear in the annuity document. Mr Hadley also noted no mention had been made of s75A and asked why it was considered that provision did not apply.

115.In August 2013, Mr Hadley and Mr Kane arranged to meet the vendors of property, Mr and Mrs Robinson. HMRC took a witness statement from Mrs Robinson on 20 August 2013 ([3(14)]). The FTT found (at [55]), having considered that witness statement, that Mrs Robinson was unable to explain to HMRC how the transactions were effected.

116.Following the meeting, HMRC requested third party disclosure from the vendors' solicitor, Equitas Law ([55]). It appears from the chronology that was handed to the FTT by HMRC at the hearing that this request was made on 27 August 2013. HMRC's chronology explained that this was "…followed by a lengthy period of correspondence because Equitas Law were not comfortable giving disclosure, despite having a letter of authority from the Robinsons. Equitas twice claimed that information had been sent to HMRC, but it was never received."

117.HMRC had to wait until May 2014 before it received the information requested, which related to the sale and purchase of the property ([3(15)] and [55]).

118.In his letter of 9 May 2014, Mr Hadley set out an analysis of the transactions (this was referred to later by the FTT when discussing Mr Hadley's letter of 24 December 2014). In summary, the analysis referred to:

(1) the vendors' contract to sell the property with the appellants to pay a deposit held to the order of the vendors;

(2) the sale agreement with completion date of 12 October and gross consideration of £765,000;

(3) notice of encashment under special condition 14.4 to be given seven days before completion;

(4) the grant of annuity seven days before completion with the option of redemption on seven days-notice;

(5) the same day assignment and details of the consideration of £734,000;

(6) the redemption 5 days before completion;

(7) the completion statement showing full consideration.

119.The letter of 9 May 2014 asked for evidence of the payments to and from AD Alta, an explanation of the appellants' link with it, why AD Alta was used, evidence that the appellants' solicitor was also AD Alta's UK agents, and all documentation between the parties in relation to the purchase including correspondence and advice between Craig Ferguson & Co and the appellants.

120.In September 2014, the appellants provided Mr Hadley with some further information [3(15)] and [55]). The appellants' letter of 4 September 2014 queried the necessity of some of the questions and enclosed further correspondence related to the purchase. The appellants' agent requested a meeting in order to conclude the enquiry.

121.On 5 December 2014 Mr Hadley met with Mr Hannah [3(15)]. A detailed analysis of the transactions was discussed [55]. The notes of that meeting showed that Mr Hadley was still asking for the AD Alta payments to check if implementation had been carried out as stated; as to that, Mr Hannah appeared to be happy for Mr Ferguson to be approached. Regarding the correspondence between Mr Hannah and Mr Ferguson which had been disclosed, HMRC suggested that an email of 28 September 2011 showed that the various steps were pre-ordained. Mr Hadley provided a brief analysis "to set out HMRC current concerns". After describing the relevant steps, the analysis suggested that, despite the annuity and the assignment, it was clear Mr and Mrs Robinson would receive £765,000 as per the original sale agreement. The short-term advantage of the use of funds said to be available to AD Alta was also queried. The meeting notes then referred to a technical analysis covering s50 and sched 4 para 1(1), in relation to which Mr Hannah emphasised the reference in sched 4 para 1(1) to "except as otherwise provided". Mr Hannah contended that, in accordance with the legislation, completion was done when the annuity was granted and the SDLT 1 had been correctly completed in accordance with the HMRC guidance. It was agreed that "the technical analysis by HMRC" would consider this point.

122.On 24 December 2014, Mr Hadley wrote to the appellants setting out his interim analysis [3(15)]. The analysis stated that it had been preordained that Mr and Mrs

Robinson would receive £765,000 for the property. Further documentation was requested to provide evidence that AD Alta had funds in its possession and as to how £734,000 passed into its control. In addition, queries were raised as to the payment by the appellants to AD Alta of the £1 referred to in the deed of assignment of 5 October 2011 and the connection between the appellants and AD Alta. In a technical analysis section, it was suggested that the SDLT return did not reflect the consideration in accordance with sched 4 para 1(1) with particular reference to the indirect payment of the balance of the purchase price through AD Alta by virtue of the assignment of the annuity. It was said the annuity agreement and assignment were scheme transactions, and that the anti-avoidance provisions of s75A FA 2003 applied.

123.Mr Hannah responded to the letter of 24 December 2014 on 27 February 2015.

124.HMRC issued the discovery assessment on 5 August 2015.

125.Mr Hadley gave evidence before the FTT and was cross-examined. Mr Hickey asked us to admit notes made by his solicitor, Mr Levy, of that evidence. The notes were not verbatim notes of the evidence. In a covering email to the Upper Tribunal, Mr Levy described the notes as "somewhat sketchy". Ms Wilson objected to us admitting, or placing any reliance on, these notes. At the hearing of the appeal, we asked Mr Hickey to draw our attention to any parts of the notes which he said were relevant to the question as to the date of the discovery in this case. Mr Hickey then referred to a number of places in the notes which recorded that Mr Hadley had stated that he, and Mr Kane, "had concerns" at a number of occasions during the relevant period as to the appellants' treatment of the transaction for SDLT purposes. In addition, in one place, the notes recorded that Mr Hadley said that there was a "clear risk" of SDLT avoidance in this case. Although the notes do not identify the time at which Mr Hadley thought there was a clear risk of SDLT avoidance, it is possible that he was referring to the position in November 2012.

126.The notes of Mr Hadley's evidence would not be satisfactory if there was any real issue as to what Mr Hadley had said. However, it is clear from the documents which were before the FTT, and from its findings, that Mr Hadley, and Mr Kane, were indeed concerned that SDLT had not been paid in this case. The same comment applies to the note stating that there was a clear risk of SDLT avoidance. Accordingly, we will take the notes into account but they do not in the end add anything which is not already established.

127.As explained earlier, whether an officer of HMRC has made a discovery depends on the state of mind of that officer. The notes of the evidence of Mr Hadley show that, insofar as he was asked about his state of mind at various dates, the furthest he went was to say that he had concerns. The notes do not record that it was put to Mr Hadley that his state of mind went beyond his having concerns.

The decision of the FTT

128.The appellants' case before the FTT was that HMRC had discovered the insufficiency in July 2013. Having considered the chronology it had previously set out,

the FTT rejected this case. The FTT's findings deal with both the question of the date of the discovery and the question as to whether the assessment was stale in these terms at [56]:

> "These timings make two points clear. First, there was no point at which the Appellants had reason to believe that HMRC had closed their review of the transactions as they continued to take steps to understand the transactions until the issue of the assessment. Second, HMRC acted expeditiously in deciding to issue the assessment on 5 August 2015, rather than waiting until they had received all of the outstanding information that had been requested. It appears from the facts that HMRC's concerns turned into their initial conclusion in May 2014 when they put forward their analysis of the transactions and that they crossed the discovery threshold following the meeting on 5 December, as evidenced by their letter of 24 December 2014. The discovery was ongoing as a result of the continuing collection of information in an attempt to resolve how the transactions had been effected with the Appellants. HMRC were not sitting on their hands and the assessment was made whilst the 'discovery' remained "new"".

The parties' submissions as to the date of the discovery

129.Mr Hickey argued that the FTT was wrong to find the discovery was not stale. At the hearing, Mr Hickey argued that the discovery was in June 2013, at the latest, when the HMRC investigator involved another HMRC officer, an SDLT specialist, Mr Kane. In the alternative, it was argued that the discovery was made in August 2013 when HMRC took a witness statement from Mrs Robinson. The two-year delay before issuing the assessment on 5 August 2015 meant there was a protracted delay. Mr Hickey referred to what was said in *Pattullo* about a delay of 18 months or more. As regards the FTT's finding that the discovery was in December 2014, Mr Hickey pointed out that Mr Hadley's letter of 24 December 2014 referred to Mr Hadley's analysis of the transactions as contained in his earlier letter of 9 May 2014.

130.Ms Wilson reminded us that the issue is whether it was open to the FTT to make the findings which it made. She submitted that it had not been shown that the FTT was bound to find that a discovery had been made before December 2014 or that the FTT's findings were irrational or perverse.

Discussion as to the date of the discovery

131.In their skeleton argument, the appellants suggested the FTT may have erred in not appreciating that the burden of showing that the discovery assessment was valid lay on HMRC. However, Mr Hickey did not press that argument in his oral submissions. He was right not to do so. The FTT correctly directed itself as to the test to be applied for determining whether and when there had been a discovery and, having made its findings of fact, the FTT applied that test to those findings. Its decision did not turn on the burden of proof and the FTT made no error in that respect.

132.It is clear from the FTT's findings of fact that Mr Hadley had suspicions from November 2012 that the appellants had not paid the SDLT which ought to have been paid. However, the authorities to which we referred make it clear that such suspicions do not mean that an officer of HMRC has crossed the threshold of making a relevant discovery. Conversely, the authorities also make it clear that the officer need not have reached the stage of concluding that an insufficiency of tax is more probable than not.

133.The facts of this case reveal that from November 2012 onwards, Mr Hadley (and later with the assistance of Mr Kane) was continuing to investigate the underlying facts of what had happened and was developing his legal analysis in relation to those facts. There is no difficulty in this case in holding that Mr Hadley's state of mind amounted to a discovery by him at some point before the assessment was made. However, it is much more difficult to pinpoint the time when Mr Hadley crossed the threshold and made that discovery. In the course of a lengthy investigation of the kind conducted in this case, it is not easy to say that on a specific date a discovery was made. The only reason it has become necessary to consider the date of the discovery is to deal with the appellants' allegation that the assessment in August 2015 was stale.

134.Just as there is real difficulty in this case in pinpointing the date of the discovery, there is considerable vagueness about the concept of a discovery losing its newness and becoming stale. The authorities to which we have referred indicate that it is possible to keep the newness of a discovery alive in a period between discovery and assessment but the authorities do not offer much assistance as to what action will have that result.

135.Mr Hickey's submissions identified various dates as the suggested date of discovery; his dates were June 2013, August 2013 and May 2014, rather than the date of December 2014 identified by the FTT.

136.On all of the dates mentioned by Mr Hickey, Mr Hadley certainly had, at least, suspicions that the correct amount of SDLT had not been paid. Further, in accordance with Mr Hadley's evidence, he had "concerns" to that effect. In *HMRC v Hicks*, it was held an officer of HMRC "having concerns" about an insufficiency of tax did not necessarily show that the officer had made a relevant discovery.

137.The FTT's finding as to the date of the discovery in this case was either itself a finding of fact or a conclusion based on an evaluation of the primary facts. It involved the application of a test which does not involve a bright line rule. The FTT correctly directed itself as to the law and we are not persuaded that it was irrational or perverse for the FTT to reach the conclusion that it did or that it is open to the Upper Tribunal on an appeal to substitute a different finding for that of the FTT.

138.In any case, if the discovery in this case had taken place at some point prior to December 2014, we are not persuaded that it would be right to hold that the discovery had lost its quality of newness or had become stale by August 2015. From June 2013 onwards, Mr Hadley, assisted by Mr Kane, was pursuing an investigation into the facts of the transaction. By August 2013, Mr Hadley had obtained a considerable amount of information from Mrs Robinson but she was not able to explain certain matters. That led Mr Hadley to ask Equitas Law for further information and that information was not

provided to HMRC until May 2014. Further, on 1 May 2013, Mr Hadley had asked the appellants for information but there was no finding that the appellants complied with that request. When Mr Hadley obtained the further information from Equitas Law, he wrote to the appellants on 9 May 2014 and asked them for further information. The appellants took until 4 September 2014 to reply and when they did, they suggested that the matter should be dealt with at a meeting. The meeting did not take place immediately but finally occurred on 5 December 2014 and Mr Hadley then wrote to the appellants on 24 December 2014.

139.Having considered the relevant chronology, the FTT held that the discovery was not stale. The FTT correctly stated that there was no point at which the appellants had reason to believe that HMRC had closed their review of the transaction and were not sitting on their hands. The test as to staleness is imprecise and not clearly formulated in the authorities. Whatever the test precisely is, it involves an evaluation of the facts. We are not persuaded that the FTT was perverse or irrational in reaching its conclusion that the discovery was not stale in relation to a discovery which it described as "ongoing".

The awareness of a hypothetical officer

140.The appellants contended before the FTT that HMRC was not entitled to make a discovery assessment because they could not bring the case within para 30(3) of sched 10. We have set out para 30(3), and para 30(4) which supplements it, earlier in this decision. The appellants' case was that at the date which was 9 months after the filing date for an SDLT return in this case, a hypothetical officer of HMRC could reasonably have been expected, on the basis of the relevant information which had been provided, to be aware of the insufficiency of tax. The FTT rejected the appellants' case in this respect and the appellant now appeals.

141.Before discussing the awareness of a hypothetical officer of HMRC, we wish to make two preliminary observations. The first is that HMRC only need to bring the case within para 30(3) if the appellants had delivered a land transaction return "in respect of the transaction in question": see sched 10 para 30(1). In this case, the appellants delivered a return in respect of an alleged transaction on 5 October 2011. However, as we have held, there was no relevant transaction for SDLT purposes on 5 October 2011. The transaction which did occur for SDLT purposes and which is "the transaction in question" for the purposes of sched 10 para 30(2) was the transaction which occurred on completion on 12 October 2011. The appellants did not deliver a return in relation to that transaction. Therefore, it would seem to follow that the case is not within sched 4 para 30(1) and HMRC did not have to establish that para 30(3) applied. However, this point was not argued by HMRC.

142.The second preliminary observation is that, assuming that sched 10 para 30(1) applied, HMRC could make a discovery assessment if the case came within sched 10 para 30(2) which refers to the insufficiency of tax being attributable to fraudulent or negligent conduct on the part of the appellants. Given that the FTT upheld the penalty notice in relation to Mr Hannah on the ground that there was an understatement of tax due to an inaccuracy which was deliberate, it might have been said that the case came within sched 10 para 30(2). However, again, this point was not argued by HMRC.

143.Sched 10 para 30(3) refers to the time which is relevant for the purposes of that paragraph as being the time when HMRC ceased to be entitled to give notice of enquiry into a return. Sched 10 para 12 provides that the period within which HMRC may open an enquiry is 9 months from the date for filing a return. The date for filing a return was 30 days after 12 October 2011, pursuant to s76. Thus the relevant date in this case for the purposes of sched 10 para 30(3) was 11 August 2012.

144.The next question, therefore, is: what information is to be regarded as made available to HMRC by 11 August 2012? The only information provided by the appellants to HMRC was the SDLT return of 5 October 2011.

145.We have already referred to the contents of the SDLT return of 5 October 2011. Mr Hickey points to the fact that the return stated that the form of the consideration was in accordance with codes 30 and 34 in the HMRC guidance notes. Mr Hickey submits that the return therefore showed HMRC that a part of the consideration involved the grant of an annuity. We do not agree that the return went that far. Code 34 is to be used where the consideration is other than cash and the guidance notes make it clear that this code will be appropriate in a number of cases, including the case of an annuity. Therefore, the information in the return was that part of the consideration was other than cash and HMRC would know that one of the cases in which code 34 was appropriate was where there was an annuity. Therefore, HMRC would know that part of the consideration might involve the grant of an annuity but not that it did. Further, the return did not disclose any real detail of the transaction. It did not disclose that an annuity had been granted, nor that the annuity had been held on trust nor that the annuity had been encashed prior to completion nor that the sum received by Mr and Mrs Robinson was £765,000.

146.We recognise that the information which is relevant for the purposes of sched 4 para 30(3) is not confined to information which appears on the face of the return but includes information, the existence of which and the relevance of which, could reasonably be expected to be inferred by HMRC from other information provided to them: see sched 10 para 30(4). Before the FTT, the appellants relied only on the information contained in the first page of the return. At the hearing of the appeal, we were only provided with the first page of the return until we asked to be given all of the return and we were then given a return which extended to 6 pages. The first page of the return stated that the property in question was a freehold property but did not do more than that to identify it or its character.

147.In his reply, after the full return had been shown to us, Mr Hickey submitted that the second page of the return showed that the property was a house and disclosed the number of the registered title of the property. He submitted that an officer of HMRC armed with the registered title could have searched the register and would have found that Mr and Mrs Robinson had bought the property for £450,000 in 2007 and that the appellants had upon their purchase of the property charged it for a sum well in excess of the consideration stated in the return. This point was not raised before the FTT and was not in the appellants' grounds of appeal and was raised by Mr Hickey only in his reply.

148.Assuming in favour of the appellants that they would be able to put forward a submission based on the second page of the return which was not before the FTT, we would not accept that submission. The first piece of information relied on here is the fact that the property is a house. The fact that the property is a house and that the consideration was £42,610 might not be suspicious for some houses in some parts of the country but might be very surprising for other houses in other parts of the country.

149.The second piece of information relied upon is the contents of the registered title of the property. Sched 10 para 30(4)(c) refers to information the existence of which and the relevance of which could reasonably be expected to be inferred from information provided to HMRC. In this case, an officer could infer that the registered title would contain more information about the property. We accept that an officer could infer that the registered title would show the consideration given by the appellants for the property. Although we asked to be shown a full copy of the registered title (only one page of it was provided in the bundle), that was never provided to us. However, we can see from other evidence that the registered title stated that the consideration given by the appellants was £42,160, the same figure as in the SDLT return. We doubt if an officer would infer that the registered title would necessarily show the consideration paid by Mr and Mrs Robinson on their purchase of the property. We were not addressed on this point but our understanding is that the registered title does not always show the consideration paid by earlier registered proprietors. Thus, we are not persuaded that an officer could infer that the registered title would show the consideration paid by Mr and Mrs Robinson. As regards the charge granted by the appellants, the single page of the registered title which was shown to us discloses that they granted a charge to Barclays Bank plc on 14 October 2011 but does not disclose the amount of the charge.

150.Having identified the information which is relevant for the purposes of sched 10 para 30(3), the next question is whether an officer, provided with that information, could be reasonably expected to be aware of the insufficiency of tax. We were referred to the summary of the legal principles on that question in *Beagles v HMRC* [2018] UKUT 380 (TCC) (in relation to the materially similar provisions of s29 TMA 1970) at [100] which we have adapted so as to omit the commentary specific to that particular case and the case law citations:

> (1) The test is applied by reference to a hypothetical HMRC officer who has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.
>
> (2) The court or tribunal must identify the information that is treated by s29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably been expected to be aware of the insufficiency.
>
> (3) Before the level of awareness is tested, the hypothetical officer is expected to apply his or her knowledge to the law to the facts disclosed to form a view as to whether or not an insufficiency exists.

(4) It is not necessary that the actual insufficiency is identified.

(5) But the officer is not expected to resolve every question of law particularly in complex cases. It may be the law is so complex that the officer could not reasonably have been expected to be aware of the insufficiency.

(6) The officer must be aware of the actual insufficiency from the information that is treated as available by s29(6) TMA 1970 (*Paragraph 30(4) set out above is the SDLT analogue of this subsection*). The information need not be sufficient to enable HMRC to prove its case but it must be more than would prompt the hypothetical officer to raise an enquiry.

(7) The level of awareness is a question of judgment not a particular standard of proof. The information made available must "justify" raising the additional assessment or be sufficient to enable HMRC to make a decision whether to raise an additional assessment.

151.Applying these principles in this case, and even taking into account the second page of the return which was not before the FTT, a hypothetical officer of HMRC provided with the relevant information could not have been reasonably expected to be aware of the insufficiency of tax in this case. At the lowest, it was open to the FTT so to find and it is not open to the Upper Tribunal on appeal to interfere with that finding.

The penalty issue

152.This issue relates to the penalty which HMRC imposed, for a "deliberate but not concealed" inaccuracy, in the sum of £17,136 under sched 24 Finance Act 2007 ("FA 2007"), which was notified on 9 August 2016. The issue only concerns Mr Hannah as the FTT cancelled the penalty imposed on Mrs Hodgson. Mr Hannah's case is that the FTT erred in upholding the penalty imposed on him because: i) there was no inaccuracy as matter of law (for the reasons argued in the grounds above); ii) no valid discovery assessment had been made; and/or iii) there was no evidence to support the conclusion there was deliberate inaccuracy by Mr Hannah. Given our conclusions above, the appellant's arguments on i) and ii) fall away. Sched 24 para 1 of FA 2007 provides, so far as relevant:

"Error in taxpayer's document

1 (1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, [*the Table refers to a "Return under section 76 of FA 2003" in relation to SDLT*] and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of [a] liability to tax,

(b) a false or inflated statement of a loss . . ., or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part."

153.Sched 24, para 3 of FA 2007 provides, so far as relevant:

"Degrees of culpability

(1) [For the purposes of a penalty under paragraph 1, inaccuracy in] a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate [on P's part] but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate [on P's part] and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)."

154. Before dealing with the matters argued in relation to the penalty issue, we wish to make two preliminary observations.

155.The first observation flows from the analysis we earlier set out in relation to the issue as to the effective date. As explained, the relevant transaction in this case was completion of the purchase on 12 October 2011. The appellants did not, as they should have done pursuant to s 76 (i.e. of FA 2003), deliver an SDLT return in relation to that transaction. It is FA 2003, rather than FA 2007, which provides for the liability to pay a penalty for failure to deliver an SDLT return. Sched 10 para 3 (of FA 2003) provides for a flat rate penalty in such a case and sched 10 para 4 (of FA 2003) provides for a tax-related penalty. These penalties may be imposed irrespective of whether or not the taxpayer's failure to deliver a return is deliberate. Although we did not hear any argument about these provisions, they would appear to be applicable to the appellants' failure to deliver a return in relation to the transaction which took place on 12 October 2011. We do not think that it could be said that the return dated 5 October 2011 was a return in relation to the transaction which occurred on 12 October 2011.

156.The second preliminary observation also arises from our earlier analysis and concerns the wording in sched 24 para 1 FA 2007 which refers to "an inaccuracy which amounts to, or leads to … an understatement of a liability to tax". At the hearing of the appeal, we raised with counsel how that wording applied to the present case. On the basis of our earlier analysis, there was no notifiable transaction on 5 October 2011, no SDLT was payable by reference to the events up to that date, the purported SDLT return of 5 October 2011 was inappropriate and no SDLT was at that time due. Therefore, although there were inaccuracies in the return of SDLT, the fact remained that no SDLT was due at that time. It occurred to us, therefore, to ask how the case was put that the inaccuracies in the return of 5 October 2011 had led to an understatement of a liability to tax.

157.The point identified in the last paragraph does not appear to have been raised before the FTT. We will refer below to what the FTT said in relation to the question whether the inaccuracy in the return was deliberate. Before the FTT, it seems to have been taken for granted that if the return of 5 October 2011 was inaccurate and the appellants did not deliver a return in relation to the transaction which occurred on 12 October 2011 and if the result of the appellants' actions was that the appellants did not deliver a return which disclosed the correct amount of SDLT which was due, then the inaccurate return of 5 October 2011 had indeed led to that result.

158.Although we identified this point at the hearing, Mr Hickey did not seek to amend the grounds of appeal to raise this point. If he had sought permission to amend the grounds of appeal, there would have been strong reasons for not granting permission. The point concerns causation and would seem to raise issues of fact which were not explored before the FTT. Accordingly, this point has not been taken on this appeal. We refer to the point only for the sake of completeness and to avoid misunderstanding but we need say no more about it.

159. Accordingly, the only point we need to deal with in relation to the penalty issue is whether the inaccuracy in the return of 5 October 2011 was deliberate on the part of Mr Hannah.

160.As to what is meant by "deliberate", there was no disagreement before us that the FTT applied the correct test by reference to *Carter v HMRC* [2018] UKFTT 0729 (TC). That in turn referred to in *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) which also concerned sched 24 FA 2007 and, at [63], put the test as follows: "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document".

The decision of the FTT

161.The FTT dealt with the issue at [60]-[64]. At [60], the FTT referred to material which was placed before it to show that Mr Hannah was an experienced adviser in relation to SDLT and, in particular, in relation to SDLT planning.

162.At [61], the FTT stated that Mr Hannah had waived legal professional privilege in respect of an Opinion he had obtained from Patrick Way QC which dealt with an SDLT scheme referred to as Project Purity. That Opinion was shown to the FTT and to us. The FTT described the Opinion as dealing with SDLT planning which involved the provision of an annuity as the consideration for the purchase of a property. The Opinion analysed how s52 applied to such an arrangement. The FTT recorded Mr Hickey's submission that Mr Hannah had relied on the advice given in this Opinion.

163.At [62], the FTT stated that it did not intend to decide whether the SDLT planning referred to by Mr Way would have been effective. The FTT instead said that the facts of the present case did not conform to the arrangement considered by Mr Way.

164.At [63] and [64], the FTT stated:

> "63. Mr Hannah did not provide witness evidence, but he must have considered what the effect of the early issuance of the Annuity and the redemption of the Annuity for cash paid on completion had on the reporting as he sought to rely on section 44(4) to file the return as at 5 October even though the Annuity was to be held 'in trust' until the Property was transferred on completion. As Mr Hannah must have been aware given his expertise, the transaction documents took the implementation further and further away from Project Purity and to an arrangement which was in fact, or under Ramsay or section 75A, for cash to be paid to the Vendors to complete the sale and purchase of the Property. Even on Mr Hannah's analysis sections 44(8), 76 and 77 Finance Act 2003 required a further return to be delivered when the contract that was substantially completed prior to completion was subsequently completed by a conveyance. Where the second return is required, the SDLT is chargeable on the later transaction to the extent that it is greater than the tax chargeable by reference to the first notifiable event.
>
> 64. The correspondence in this case illustrates Mr Hannah's central role in the tax planning. As a principal consultant with Cornerstone he was experienced in developing and advising on SDLT planning and he had instructed Patrick Way QC on Project Purity on 12 July 2011, well before the Appellants entered into the transaction documents. He orchestrated the reporting, emailing his solicitor what codes to use in the SDLT 1 return and he chose to report the transaction only as a sale and purchase in consideration of the Annuity issued on 5 October. The failure to make complete the second return, make a disclosure or to amend the return by reference to the transactions on completion resulted in an inaccuracy in the document as filed. Applying the meaning of "deliberate" as set out in a summary of First-tier Tribunal cases referred to in *Carter v HMRC* [2018] UKFTT 0729 (TC) Mr Hannah knowingly provided HMRC with a document that contained an error with the intention that HMRC should rely upon it as an accurate document. The failure to notify the full chargeable consideration of £765,000 was an inaccuracy that led to an understatement of tax and it was deliberate on Mr Hannah's part."

The parties' submissions

165.Mr Hickey argued that the FTT's decision was plainly wrong. It was said that the only proper finding the FTT could have come to was that Mr Hannah did not deliberately provide a document containing an inaccuracy. Mr Hickey relied on Mr Hannah not being a lawyer, and that he was effectively implementing planning that been advised on favourably by tax counsel who specialised in SDLT. The annuity was not a sham. His e-mail to his solicitor as to the relevant codes to be used showed he was clearly of the view that the issue of the annuity was the consideration for the purchase

of the property. Even if Mr Hannah was careless in his analysis and the consequential return that did not mean he had filed the return, with an inaccuracy, deliberately.

166.HMRC's case was that it was open to the FTT to reach that decision. They pointed to a number of features which distinguished the transaction envisaged in the counsel's opinion as compared with the transaction which took place.

Discussion

167.The appeal in relation to the penalty issue is an appeal against a finding of fact by the FTT. The FTT reached their conclusion by considering the weight to be given to a number of matters which were primary facts which they also found. Those findings included findings as to:

(1) the facts relating to the transaction;

(2) Mr Hannah's detailed involvement in the facts of the transaction;

(3) Mr Hannah's actual knowledge of the relevant legal provisions;

(4) Mr Hannah's considerable experience of SDLT planning;

(5) the fact that the transaction in this case did not conform to the arrangement considered in Mr Way's Opinion which had been obtained by Mr Hannah shortly before the transaction in this case;

(6) the inaccuracies in the return of 5 October 2011;

(7) the failure to deliver a return following the transaction which took place on 12 October 2011.

168.We did not understand Mr Hickey to submit that it was not open to the FTT to make its findings as to the primary facts in relation to the matters listed above. If he intended so to submit, we would not accept that submission. The FTT's findings of those facts appeared to be plainly correct and, at the lowest, findings which it was open to it to make.

169.The FTT was influenced by the fact that Mr Hannah did not give evidence. We were told that Mr Hannah attended the hearing before the FTT. It was not suggested to the FTT that there was any reason why Mr Hannah could not give evidence. The position therefore was that the FTT was asked to make a finding of fact about Mr Hannah's state of mind in circumstances where the only person who could give direct evidence on that subject was Mr Hannah himself and he was not prepared to give that evidence. This circumstance must have been particularly striking to the FTT where the FTT was listening to submissions as to what Mr Hannah must have thought, where it was being alleged that the inaccuracies in the return were deliberate on his part, where he was sitting in the hearing and where he declined to give any evidence.

170.If Mr Hannah had given evidence on this issue and if he had said that, notwithstanding the inaccuracies, he had genuinely believed that he had managed to buy a property for £765,000 without incurring a liability to pay any SDLT, he would no doubt have had a lot of questions to answer. All of the deficiencies in his case which

have been discussed on this appeal could have been put to him and he could have been asked whether in the light of all of the difficulties in his way, he genuinely believed that he was not liable to pay SDLT. If he had given evidence and if he had stated that that was indeed his genuine belief, it is possible that he might have been believed. But the fact remains, he did not give evidence on those matters and he did not give any reason why he had chosen not to give any evidence.

171.It is clearly established that a court or tribunal can take into account the fact that a relevant witness has not been called to give evidence on a relevant matter and can draw an inference that, if the witness had been called, the witness's evidence would not support the case being advanced. Before a court or tribunal can draw such an inference, there must be a case to answer in relation to the finding which the court or tribunal is asked to make. There must be some admissible evidence, even comparatively weak evidence, which points in the direction of the suggested finding. If there is such evidence, then the court or tribunal is able to draw the inference, but is not obliged to do so. The court or tribunal can take into account any explanation given as to why a potential witness has not given evidence. Whether the court or tribunal does draw the inference, and the weight which it gives to the failure to give evidence, is a matter for the court or tribunal charged with the task of finding the relevant facts.

172.The legal principles stated in [171] above are well known. The FTT did not refer to the case law which established those principles. At the hearing of the appeal, we specifically referred the parties to the caselaw which we considered established the relevant principles. In particular, we referred to *R (ex p T C Coombs & Co) v Inland Revenue* [1991] 2 AC 283, *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 at 340 and *Prest v Petrodell Resources Ltd* [2013] 2 AC 415, per Lord Sumption at [44]. The parties did not dispute the relevance of those principles in this case.

173.In view of the primary facts found by the FTT (apart from its conclusion as to whether the inaccuracies were deliberate) and in view of the inference that could be drawn from Mr Hannah's failure to give evidence, we consider that it was open to the FTT to reach the conclusion that the inaccuracies in this case were indeed deliberate.

174.In accordance with the usual practice, we provided the parties with a draft of this decision and invited them to submit typing corrections and corrections of other obvious errors. The draft decision contained our discussion in relation to the penalty issue as set out at paragraphs [167] – [173] above. The solicitors for the appellants then provided us with a further submission to the effect that it was not open to the FTT or the Upper Tribunal to draw an adverse inference from the fact that Mr Hannah had not given evidence before the FTT.

175.This further submission was not an attempt to correct typing errors or other obvious errors. Indeed, at the hearing of the appeal, Mr Hickey did not submit that the principles we described in paragraph [172] above were not applicable and so the further submission is contrary to the stance taken by the appellant at the hearing of the appeal. Nonetheless, we will deal with the further submission which has been made. We did not feel it necessary to call on HMRC to deal with the further submission.

176.The further submission can be summarised as follows. The proceedings before the FTT concerned the imposition of a criminal penalty to which Article 6 of the European Convention on Human Rights and Fundamental Freedoms applied. Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. Thus, Mr Hannah had a right to remain silent at the hearing before the FTT. Further, he was entitled to assert the privilege against self-incrimination and could not be compelled to answer questions which were relevant to the imposition of the penalty. Mr Hannah's solicitors cited *John Murray v United Kingdom* (1996) 22 EHRR 29 at [45]. It was then submitted that the result of the foregoing was that no adverse inference could be drawn from the fact that Mr Hannah had not given evidence before the FTT.

177.Although we did not call on HMRC to deal with this further submission, we will proceed on the basis that the proceedings before the FTT did engage Article 6(2), that Mr Hannah had a right to remain silent and could assert the privilege against self-incrimination. It is also clear that the burden is on HMRC to prove that the inaccuracy in this case was deliberate on the part of Mr Hannah. However, it is clearly established that neither Article 6(2) nor the privilege against self-incrimination prevents a court or a tribunal from drawing an adverse inference in an appropriate case where the facts call for an explanation from a party and the party does not provide it.

178.The authority cited by Mr Hannah's solicitors does not support their further submission but supports the opposite conclusion. In *John Murray v United Kingdom*, the European Court of Human Rights referred to Article 6, the right to remain silent and the privilege against self-incrimination and then said at [47]:

> "47. On the one hand, it is self-evident that [it] is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution."

And at [52], the Court said:

> "…
> The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused "calls" for an explanation which the accused ought to be in a position to give that a failure to give an explanation "may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty". Conversely if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt. In sum, it is only common sense inferences which the judge considers proper, in the

light of the evidence against the accused, that can be drawn under the Order."

179.In this case, HMRC's case as to the deliberate inaccuracy called for an explanation which Mr Hannah ought to have been in a position to give (if one were available). The inference was that Mr Hannah had not given an explanation because his explanation and a testing of that explanation by cross-examination would not have supported his case. Accordingly, applying the principles identified in the authority cited by Mr Hannah's solicitors, we reach the same conclusion as the conclusion we arrived at in paragraph [173] above.

180.We therefore reject the appellants' ground of appeal in relation to the penalty.

Disposition

181. The appellants' appeals in relation to the effective date issue, the consideration issue and the discovery assessment issues are dismissed. Mr Hannah's appeal in relation to the penalty is also dismissed.

Signed on original

MR JUSTICE MORGAN

JUDGE SWAMI RAGHAVAN

RELEASE DATE: 2 FEBRUARY 2021