[2022] UKUT 00021 (TCC)

Appeal number: UT/2020/0102

STAMP DUTY LAND TAX– sections 44, 45 and 46 of Finance Act 2003 – whether an option falls within s45(1)(b) – no – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

OISIN FANNING **Appellant**

-and-

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

TRIBUNAL: MR JUSTICE MILES
JUDGE JONATHAN RICHARDS

Sitting in public by way of video hearing treated as taking place at Rolls Building, London on 16 December 2021

Julian Hickey, instructed by Levy & Levy for the Appellant

Elizabeth Wilson QC, instructed by The General Counsel and Solicitor for Her Majesty's Revenue and Customs for the Respondents

DECISION

1. The Appellant, Mr Fanning, appeals against a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 9 July 2020. By the Decision, the FTT dismissed Mr Fanning's appeal against a discovery assessment for £250,000 in respect of SDLT chargeable on purchase of a residential property (the "Property") holding that an SDLT avoidance scheme he had implemented was ineffective. Mr Fanning's appeal is brought following the grant of permission by the FTT.

Statutory provisions

2. Some of the statutory provisions to which we refer in this section were subsequently amended. We refer to the statutory provisions as in force at the relevant time.

3. By s42(1) of the Finance Act 2003 ("FA 2003"), SDLT is charged on "land transactions" at a sliding scale of rates. Section 43(1) of FA 2003 defines a "land transaction" as any acquisition of a "chargeable interest". By s48(1) of FA 2003 any estate or interest in land in the United Kingdom is a chargeable interest. It was common ground that Mr Fanning had acquired a chargeable interest in the Property so that, subject to the efficacy of the planning he effected, his acquisition of the Property would be liable to SDLT.

4. Typically in England and Wales parties first exchange contracts for the sale of land with completion of that contract taking place subsequently. That gives rise to the question whether SDLT is chargeable on exchange of contracts, or on completion. Section 44 of FA 2003 addresses that issue as follows:

> **44 Contract and conveyance**
>
> (1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
>
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
>
> (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.
>
> In this case the effective date of the transaction is the date of completion.
>
> (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.
>
> In this case the effective date of the transaction is when the contract is substantially performed.
>
> (5) A contract is "substantially performed" when—
>
> (a) the purchaser, or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or
>
> (b) a substantial amount of the consideration is paid or provided.

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

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

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

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

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

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

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

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

(ii) the first payment of rent is made.

5. Section 44, therefore, focuses on a typical situation arising in property transactions namely where there is a contract that "is to be completed by a conveyance" (s44(1)). Section 44 is not concerned with options which may result in a conveyance and instead options are dealt with in s46 (set out below). In a case falling within s44, the starting point is that the contract is not a "land transaction" (s44(2)) but nothing prevents the conveyance under that contract from being a land transaction.

6. Section 44 envisages two scenarios:

(1) If the contract is "substantially performed" before completion then the treatment in s44(2) is modified as the contract is treated as the same land transaction as the conveyance completing it. That land transaction is given an "effective date" by s44(4) triggering provisions requiring SDLT to be paid and reported. If the contract is subsequently completed by conveyance, a double charge is avoided by s44(8) which only requires SDLT to be paid on the conveyance to the extent that it exceeds the SDLT chargeable under s44(4).

(2) If the contract is not "substantially performed" before completion then the provisions of s44(2) are not modified. No SDLT is due in respect of the contract and instead SDLT is chargeable on completion on a land transaction consisting of a composite of the contract and the transaction completing it.

7. Section 45 of FA 2003 builds on and supplements the provisions of s44. It deals with the situation where there is a contract falling within s44 but a party to that contract effects an assignment of its rights under the contract, or something similar. Section 45 provides, so far as material, as follows:

45 Contract and conveyance: effect of transfer of rights

(1) This section applies where—

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

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

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

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

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

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

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is—

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

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

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

8. We will deal later with the competing arguments of the parties as to how this section applies to various transactions effected in connection with Mr Fanning's SDLT planning. At this stage we simply note that the purpose of s45 is to modify the operation of s44 and that both s44 and s45 contain deeming provisions that treat certain events or transactions as occurring, and specify characteristics of those deemed transactions which determine, among other matters, whether particular transactions attract SDLT, the amount of SDLT payable and the "effective date" of the deemed transactions which determines the due date for payment of SDLT.

9. Section 46 of FA 2003 sets out provisions having effect in relation to options as follows:

46 Options and rights of pre-emption

(1) The acquisition of—

(a) an option binding the grantor to enter into a land transaction, or

(b) a right of pre-emption preventing the grantor from entering into, or restricting the right of the grantor to enter into, a land transaction,

is a land transaction distinct from any land transaction resulting from the exercise of the option or right.

They may be "linked transactions" (see section 108).

(2) The reference in subsection (1)(a) to an option binding the grantor to enter into a land transaction includes an option requiring the grantor either to enter into a land transaction or to discharge his obligations under the option in some other way.

(3) The effective date of the transaction in the case of the acquisition of an option or right such as is mentioned in subsection (1) is when the option or right is acquired (as opposed to when it becomes exercisable).

(4) Nothing in this section applies to so much of an option or right of pre-emption as constitutes or forms part of a land transaction apart from this section.

The Scheme

Implementation steps

10. There is no dispute as to the nature of the steps taken to implement the scheme although the parties disagree as to how those steps should be analysed for SDLT purposes. Those steps can be summarised as follows.

11. Glendale Enterprises Four Limited (the "Vendor") as vendor and Mr Fanning as purchaser, entered into an agreement (the "V-F Agreement") for the purchase and sale of the Property. Under the V-F Agreement, Mr Fanning was to pay a consideration of £5,200,000, £200,000 of which was payable for chattels the transfer of which did not attract SDLT. The V-F Agreement was to be completed by the execution of a Land Registry Form TR1 in the usual form.

12. On 16 September 2011, the Vendor completed the V-F Agreement by executing a Form TR1 conveying title in the Property to Mr Fanning. The consideration expressed in those Forms TR1 was £5,000,000 being the amount of the purchase price allocable to land as distinct from chattels.

13. Also on 16 September 2011, Mr Fanning and San Leon Energy plc ("San Leon") executed a deed (the "Option"). The salient terms of the Option were as follows:

(1) In consideration of the payment of £100 to him, Mr Fanning granted San Leon an option to purchase the Property for its market value.

(2) San Leon was entitled to exercise the Option only within the period of 16 September 2016 to 15 September 2031.

(3) To exercise the Option, San Leon had to provide written notice to Mr Fanning.

14. San Leon is an Irish company engaged in oil and gas exploration. It was admitted to the Alternative Investment Market in 2008. At the time of the above transactions, Mr Fanning was the executive chairman of San Leon. He subsequently became its chief executive officer. However, San Leon was not "connected" with Mr Fanning for any relevant tax purpose. It could not be assumed that San Leon would, or would not, exercise the Option and its decision whether to do so would be its own and not dictated to it by Mr Fanning.

15. It was common ground that, by the time of the Decision and at the time of the hearing before us, San Leon had not delivered any notice exercising the Option. Mr Fanning was, at all material times after 16 September 2011, in occupation of the Property and the sole registered proprietor of the Property.

Mr Fanning's intended analysis of the transactions

16. It was common ground that, if the Option had not been executed, the transfer of the Property to Mr Fanning would have been a land transaction attracting SDLT at the rate of 5% of the purchase paid. Mr Fanning, however, hoped that the grant of the Option would reduce the SDLT payable because of the following line of reasoning based on s45 of FA 2003:

(1) The V-F Agreement was a contract to which s45(1)(a) applied.

(2) The Option was an "assignment, subsale or other transaction" to which s45(1)(b) applied. Section 45(1)(c) did not apply with the result that the treatment specified in s45 applied.

(3) By s45(2) no SDLT was payable on grant of the Option.

(4) The V-F Agreement was substantially performed and completed on 16 September 2011 when Mr Fanning took occupation of the Property and paid the balance of the consideration due and the Vendor executed the Form TR1. The Option was substantially performed on the same date when San Leon paid Mr Fanning the £100 premium due for the grant of the Option. Moreover, the V-F Agreement was completed as part of the overall arrangements that included the grant of the Option and so was "in connection with" substantial performance of the grant of the Option. Accordingly, the tailpiece to s45(3) applied to disregard both the "substantial performance" and the "completion" of the V-F Agreement on 16 September. It followed from this that SDLT was not due on the transaction consisting of the transfer of the Property to Mr Fanning.

(5) By s44 of FA 2003, SDLT was not due in respect of the V-F Agreement.

The Decision

17. It was common ground before the FTT, as before us, that the V-F Agreement was a contract to which s45(1)(a) of FA 2003 applied.

18. The FTT found (at [23]) that the Option was, contrary to the submissions of HMRC, an "other transaction" falling within s45(1)(b). Accordingly, the FTT accepted Mr Fanning's submission that the tailpiece to s45(3) applied. However, the FTT concluded that the tailpiece to s45(3) did not have the effects for which Mr Fanning argued.

19. First, the FTT noted that the tailpiece required that there be substantial completion or performance of the "secondary contract". The "secondary contract" was not the same as the Option. As the FTT put it:

> 38. First, the secondary contract under consideration for the application of the relief under the tailpiece of section 45(3) is not the grant of the option, but a deemed land transaction. Section 45(3)(a) provides that the secondary contract is one under which "the transferee is the purchaser". San Leon is the "transferee" because section 45(1) provides that references to the "other transaction (relating to the whole or part of the subject-matter of the original contract)" in the following provisions of section 45 are to it being a "transfer of rights". San Leon is therefore deemed to be "purchaser" under the deemed secondary contract. The subject-matter of the deemed secondary contract is the subject-matter of the "transfer of rights" and, as set out in section 45(1)(b), this relates to "the whole or part of the subject-matter of the original contract", the Property.

20. The FTT then turned to a consideration of whether the "secondary contract" was indeed substantially performed or completed. At [39] of the Decision, it concluded that question had to be decided by applying the provisions of s44. Since no Form TR1 was executed in favour of San Leon, there was no "completion" of the secondary contract falling within s44(3). Since San Leon had not taken possession of the Property, there could be no substantial performance falling within s44(5)(a). That therefore left the question of whether a substantial amount of the consideration under the secondary contract had been provided so as to constitute substantial performance falling within s44(5)(b). To answer that question, it was necessary to determine what consideration was, by s45(3)(b)(i) and s45(3)(b)(ii) to be treated as given under the secondary contract.

21. The FTT rejected Mr Fanning's argument that, since (i) San Leon was not connected with Mr Fanning and (ii) San Leon was not giving any of the consideration due under the contract between Mr Fanning and the Vendor, the consideration falling within s45(3)(b)(i) was nil. The FTT's preferred analysis was that the future payment equal to the market value of the Property on exercise of the Option was consideration of the kind specified in s45(3)(b)(i) and that the £100 San Leon paid for grant of the option was consideration of the kind specified in s45(3)(b)(ii) (see [40] of the Decision).

22. In the alternative, the FTT concluded at [41] that, if the consideration specified in s45(3)(b)(i) was nil as Mr Fanning argued, the consideration specified in s45(3)(b)(ii) should, be regarded as the substantial amount that would become payable on exercise of the Option.

23. On either analysis, the aggregate amount of consideration specified by s45(3)(b)(i) and (ii) was substantial, reflecting the fact that the Property was worth £5m in 2011.

Since San Leon had paid only £100 on grant of the Option it had not paid a "substantial amount" of the consideration due under the secondary contract. It followed that there had been no substantial performance of the secondary contract so that the tailpiece to s45(3) was not engaged. That meant that there was no basis for disregarding the completion of the V-F Agreement and SDLT of £250,000 was due in relation to the Forms TR1 completing the V-F Agreement.

24. Those conclusions were sufficient for the FTT to dismiss Mr Fanning's appeal against HMRC's discovery assessment. At [43] to [56] of the Decision, the FTT accepted the alternative basis on which HMRC defended their discovery assessment, which was based on arguments that s75A of FA 2003 applied.

Grounds of Appeal and the Respondents' Notice

25. With the permission of the FTT, Mr Fanning appeals against the Decision on three grounds:

> (1) The FTT was wrong to conclude that the aggregate consideration for the secondary transaction specified in s45(3) was anything more than the £100 paid under the Option.
>
> (2) The FTT erred in concluding that the secondary contract referred to in s45(3) was not substantially performed at the same time as the original contract so that the tailpiece to s45(3) was not engaged.
>
> (3) The FTT was wrong to accept aspects of HMRC's arguments based on s75A of FA 2003.

26. In their Respondents' Notice, HMRC sought to revive their argument, which had failed before the FTT, that the Option was not an "assignment, subsale or other transaction" that satisfied the requirements of 45(1)(b) of FA 2003. HMRC had not, however, sought permission to appeal against the Decision from the FTT and Mr Hickey argued that this meant that HMRC were not entitled to pursue this argument before the Upper Tribunal, relying on dicta in the judgment of Rose LJ (as she then was) in *HMRC v SSE Generation Ltd* [2021] EWCA Civ 105.

27. Following the Court of Appeal's judgment in *SSE Generation*, it is not infrequent for appellants to argue that a respondent who has not sought permission to appeal from the FTT should be precluded from running arguments set out in a Respondent's Notice before the Upper Tribunal. Often the point is taken for the first time in oral submissions before the Upper Tribunal. It is obviously undesirable for points having a bearing on which arguments can be pursued at a hearing to emerge for the first time at the hearing itself. Therefore, we do hope that appellants wishing to take points such as this will, in future, raise them either in a Reply to a Respondent's Notice (served pursuant to Rule 25 of the Upper Tribunal Rules) or by way of interlocutory application so that, to the extent practicable, the issue can be resolved in advance of the hearing. In saying this, we are expressing a hope as to the way in which litigants raise any such point in the future, rather than a criticism of Mr Hickey's conduct. We recognise that Mr Hickey was instructed shortly before the hearing and raised the point as soon as he reasonably could.

28. We consider that the following principles emerge from Rose LJ's judgment in *SSE Generation*:

> (1) Respondents should not assume that they are free to raise, in a Respondent's Notice, any arguments they choose to the effect that a decision of the FTT should be upheld for reasons additional to, or different from, those of the FTT. Some such arguments will require permission to appeal and, since Rule 21(2) of the Upper Tribunal Rules requires permission first to be sought from the FTT, Respondents are not presently entitled to seek any such permission in a Respondent's Notice itself (see [79] of Rose LJ's judgment)[1].
>
> (2) In order to identify whether permission to appeal is needed to pursue a point made in a Respondent's Notice it is necessary to identify the decision of the FTT to which the Respondent's arguments relate. The focus in on the FTT's decision, not on arguments it accepts or rejects on the way to making that decision (see [80] of Rose LJ's judgment).
>
> (3) If the Respondent is seeking to persuade the FTT to make a different decision, it is likely to need permission to appeal. However, if the Respondent succeeded on a particular issue before the FTT because the FTT accepted one of a number of arguments while rejecting other arguments, the Respondent can raise those unsuccessful arguments in a Respondent's Notice (see [77] of Rose LJ's judgment) because the Respondent would not, in so doing, be seeking a different decision.

29. Applying that approach, in our judgment, the FTT's "decision" was as to the correctness or otherwise of HMRC's discovery assessment. Paragraph 35(1)(c) of Schedule 10 to FA 2003 gave Mr Fanning a statutory right of appeal against that discovery assessment and, on notification of that appeal to the FTT, the FTT was obliged to "decide the matter in question" (see paragraphs 36D(5) and 36G(4) of Schedule 10). The FTT's decision was entirely in HMRC's favour since the FTT upheld HMRC's discovery assessment in its entirety.

30. Since HMRC were entirely successful before the FTT, their Respondents' Notice is not asking the Upper Tribunal to make a different decision. HMRC's complete success before the FTT came because the FTT accepted certain of their arguments even though it rejected others. HMRC are seeking to raise before us arguments on which it was unsuccessful before the FTT as part of its case that the FTT's overall decision was correct. It is entitled to do so by way of Respondents' Notice and does not need any grant of permission to appeal. We will permit HMRC to advance the argument set out in paragraph [26] above by way of a Respondents' Notice.

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[1] There is a consultation ongoing as to possible changes to the Upper Tribunal Rules in this regard. Moreover, Rule 7(2) of the Upper Tribunal Rules permits the Upper Tribunal to waive any breaches of its rules, so that conceptually the Upper Tribunal could choose to grant permission to appeal even where no prior application has been made to the FTT. However, Respondents would obviously be unwise to assume that such a discretion would necessarily be exercised in their favour.

Discussion

The Respondents' Notice

31. The central question raised by the Respondents' Notice is whether the Option satisfies the requirements of s45(1)(b) of FA 2003. In our judgment, in respectful disagreement with the FTT, it does not.

32. We note that the position has since been put beyond doubt by s45(1A) of FA 2003 which provides expressly that with effect from 21 March 2012, the grant or assignment of an option did not fall within s45(1)(b). Neither party invited us to draw any particular inference from this subsequent enactment and we will, accordingly, approach the question of construction without having regard to s45(1A).

33. In the factual context of this appeal, s45(1)(b) is asking whether the Option is "an assignment, subsale or other transaction (relating to the whole or part of the [Property]) as a result of which a person other than [Mr Fanning] becomes entitled to call for a conveyance to him". It was common ground that the Option was neither an "assignment" nor a "subsale" and so the relevant question is whether it was an "other transaction" of the kind referred to in s45(1)(b).

34. The condition in s45(1)(b) has to be tested on 16 September 2011, the date on which the Forms TR1 were executed transferring the Property to Mr Fanning since its satisfaction or otherwise has a bearing on whether SDLT is chargeable on those transfers. At that time San Leon had not exercised the Option. Nor was it even entitled to exercise the Option since the exercise period did not start until five years later. On a natural interpretation of the words, the Option conferred no "entitlement" on San Leon to obtain a conveyance of the Property.

35. Nevertheless, Mr Fanning argues that the contingent right that San Leon had to acquire the Property on future exercise of the Option constitutes the necessary "entitlement" to engage s45(1)(b). He relies heavily on the analysis of options set out in *Spiro v Glencrown Properties Ltd and another* [1991] Ch 537. In that case, A had granted an option over land to B by way of written instrument. That instrument contained all relevant terms and was executed by both A and B. B's exercise of the option, however, took the form of a unilateral notice executed by B only. The question before the court was whether the contract for sale of land was constituted by the option instrument or by the notice of exercise. That question arose because s2 of the Law of Property (Miscellaneous Provisions) Act 1989 required contracts for the sale of land to be in writing and signed by both parties. If the contract was constituted by the option instrument, that requirement would be met. However, if the contract was constituted by the document exercising the option, the requirement would not be met with the result that the contract would be void.

36. Hoffmann J (as he then was) concluded that, for the purposes of considering the formalities imposed by s2 of the Law of Property (Miscellaneous Provisions) Act 1989, the option instrument should be treated as a contract for the sale of land that is conditional on the exercise of the option. However, in the course of his judgment, he emphasised that options can be analysed in different ways for the purposes of different

statutory provisions and that in some cases, it might be appropriate to analyse an option as an irrevocable offer rather than a contract. He emphasised this point at p544 saying:

> The purchaser's argument requires me to say that "irrevocable offer" and "conditional contract" are mutually inconsistent concepts and that I must range myself under one or other banner and declare the other to be heretical. I hope that I have demonstrated this to be a misconception about the nature of legal reasoning. An option is not strictly speaking either an offer or a conditional contract. It does not have *all* the incidents of the standard form of either of these concepts. To that extent it is a relationship sui generis. But there are ways in which it resembles each of them. Each analogy is in the proper context a valid way of characterising the situation created by an option. The question in this case is not whether one analogy is true and the other false, but which is appropriate to be used in the construction of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

37. We do not, therefore, consider that *Spiro v Glencrown Properties* can bear the weight that Mr Fanning seeks to put on it. It is no authority as to the construction of s45(1)(b) of FA 2003 as it does not address the nature of an optionholder's "entitlement" or otherwise to take a conveyance of property. *Spiro v Glencrown Properties* does not determine that options are to be regarded as conditional contracts for all purposes; only that they may be regarded as conditional contracts in some contexts. It leaves open the possibility that options may be analysed as mere offers in some cases and, if that were the correct analysis for the purposes of s45(1)(b) of FA 2003, there would be still further doubt as to whether the Option so analysed conferred San Leon any "entitlement" to a conveyance of the Property.

38. Mr Fanning also emphasised that, as noted in *Barnsley's Land Options*, 6th Edition in paragraph 2-007, the Option created an immediate interest in the Property in favour of San Leon which could be registered at HM Land Registry. We do not doubt that proposition, but it does not assist in determining whether the Option conferred on San Leon the requisite "entitlement" to a conveyance of the Property necessary to engage s45(1)(b) of FA 2003.

39. In addition, we consider that there are clear indications on the face of the statutory provision that the kind of contingent future entitlement to a conveyance of the Property that San Leon obtained under the Option is not sufficient to engage s45(1)(b). As we have noted in our analysis of the statutory provisions, the function of s45 is to build on s44 by, among matters, setting out the terms of a deemed "secondary contract" to which the provisions of s44 can be applied. Section 44 in turn is concerned with a contract which "is to be completed" by a conveyance, clearly referencing an entitlement that is definite rather than contingent. For section 45(1)(a) to apply there must similarly be a contract which "is to be completed" by a conveyance. It follows that, the "assignment, subsale or other transaction" falling within s45(1)(b) must involve a similar "entitlement" to obtain a conveyance as that arising under contracts to which s44 applies. The definitions of "transferor" and "transferee" emphasise this point: the "transferee" is to obtain an entitlement to a conveyance which is similar in nature to the entitlement formerly held by the "transferor".

40. The "entitlement" to a conveyance that San Leon obtained under the Option, being contingent in nature, was qualitatively different from that it would have obtained under a contract to which s44 applied. The Option, therefore, did not confer the kind of "entitlement" to which s45(1)(b) applies. That conclusion is emphasised by the scheme of the legislation which provides for options to be dealt with under s46, rather than s44 or s45.

41. We were referred to the decision of the FTT in *Vardy Properties and another v HMRC* [2012] SFTD 1398. In that case, Judge Poole held at [42] that the declaration of a dividend was capable of falling within s45(1)(b). Mr Fanning submits that this is persuasive authority that the Option fell within s45(1)(b). We disagree. The FTT's conclusion, set out in [39] to [42] of *Vardy*, that the declaration of the dividend was a "transaction" even though it was unilateral act clearly has little relevance to the treatment of the Option in this case. At [50] and [51] of *Vardy*, the FTT considered the contingent nature of the dividend declaration. However, its actual conclusion at [51] was that, at the relevant time, there was the requisite "entitlement" to a conveyance to engage s45(1)(b) even if that entitlement arose following the fulfilment of an earlier declaration of a dividend that was conditional. We do not, therefore, consider our analysis set out above to be inconsistent with the approach of the FTT in *Vardy*.

42. In our judgment, indications to be derived from the scheme of the legislation in sections 45 to 46 of FA 2003 reinforce the natural interpretation of the words that we have set out in paragraph [34] above. The Option did not satisfy the requirements of s45(1)(b) of FA 2003.

The Grounds of Appeal

43. The conclusion that we have expressed above makes it unnecessary for us to consider Mr Fanning's grounds of appeal. Since s45(1)(b) was not engaged, the tailpiece to s45(3) does not operate to disregard the transfer of the Property to Mr Fanning. Accordingly, SDLT was correctly charged on that transfer by HMRC's discovery assessment. That in turn also makes it unnecessary to consider Mr Fanning's arguments on s75A.

44. We will, however, say something about Mr Fanning's Grounds 1 and 2 since we heard full argument on them. In doing so, we will proceed on the basis that the Option does satisfy the requirements of s45(1)(b), contrary to the conclusion set out above.

45. Mr Fanning's Ground 1 challenges the FTT's determination of the consideration given for the secondary contract under s45(3)(b). Mr Fanning based much of his argument on this issue on the proposition that the secondary contract and the Option were one and the same. We reject that assertion. By s45(3), the "secondary contract" is a deemed transaction constructed so that s44 can be applied to it. As Lewison LJ commented in paragraph 20 of his judgment in *DV3 RS Limited v HMRC* [2013] EWCA Civ 907:

> … the deeming provisions in s45 had a limited purpose. Its sole purpose was to modify the operations of s44.

Therefore, the task is to ascertain the consideration that is treated as given by s45(3)(b)(i) and s45(3)(b)(ii) for that deemed secondary contract.

46. We tend to agree with Mr Fanning that the component of consideration given by s45(3)(b)(i) would, if the Option fell within s45(1)(b), be nil. That is because s45(3)(b)(i) covers: "so much of the consideration given under the [V-F Agreement] as is referable to [the Property] and is to be given (directly or indirectly) by [San Leon]". The consideration under the V-F Agreement that is referable to the Property is clearly £5m. However, we agree with Mr Fanning that none of that consideration is to be provided directly or indirectly by San Leon. Mr Fanning has already paid the Vendor. A fundamental difficulty with the assertion that part of that purchase price was to be provided directly or indirectly by San Leon is that there is no certainty that San Leon will ever have to pay anything to Mr Fanning as it may choose not to exercise its option. Moreover, even if San Leon does exercise the Option, Mr Fanning will receive his purchase price from San Leon several years after he paid the Vendor.

47. However, we do not accept Mr Fanning's submission that the consideration under s45(3)(b)(ii) would be just £100 if the Option fell within s45(1)(b). Section 45(3)(b)(ii) is looking at the consideration given for the "transfer of rights" which, given the definition of that phrase in s45(1) is another way of looking at the consideration given for the Option. Mr Fanning submits that the consideration given for the Option is just £100 since that is all that San Leon was obliged to pay in order to obtain the Option. However, we consider that interpretation to be at odds with both the meaning and purpose of s45(3)(b)(ii). Section 45(3)(b)(ii) only falls to be considered if the Option is treated as a "transfer or rights" that entitles San Leon to call for a conveyance of the Property. Any such entitlement can only arise if San Leon exercises the option and pays a purchase price equal to the Property's market value on exercise. It would be illogical to regard the Option as providing San Leon with an "entitlement" to a conveyance of the Property but at the same time to ignore the material consideration that San Leon would need to pay to secure that entitlement.

48. The consideration under s45(3)(b)(ii) is therefore £100 plus the market value payment that San Leon would need to pay on exercise of the Option. We acknowledge that this conclusion gives rise to a conceptual difficulty: it is not possible to ascribe a precise value to the consideration given by s45(3)(b)(ii) since the market value of the Property, and so the price San Leon would need to pay on exercise of the Option is not currently known. That conceptual difficulty serves to reinforce our conclusion that the Option is not intended to be within s45(1)(b) at all. However, we do not consider that it is of any real significance. On any view, the aggregate consideration payable under s45(3)(b) is much higher than the £100 figure that Mr Fanning puts forward. Accordingly, while we have reached the conclusion by a slightly different route, there was no error of law in the FTT's conclusion to similar effect at [40] of the Decision and were it necessary to consider the issue we would dismiss Mr Fanning's appeal on Ground 1.

49. Having reached that conclusion, Ground 2 can be dealt with briefly. The tailpiece of s45(3) could only be engaged if there was "substantial performance" or completion of the V-F Agreement at the same time as, and in connection with, the substantial

performance or completion of the secondary contract constructed by operation of s45(3). The concept of "substantial performance" is defined in s44(5).

50. Completion of the V-F Agreement took place on 16 September 2011. In our view there was no substantial performance or completion of the secondary contract on that date because:

> (1) San Leon did not take any transfer of the Property on 16 September 2011 (and indeed still has not taken any transfer) so there was no "completion" on that date.
>
> (2) San Leon did not take possession of the whole or any part of the Property (and indeed still has not taken possession) so that there was no substantial performance falling within s44(5)(a).
>
> (3) San Leon paid only £100 to Mr Fanning. That was not a substantial amount of the much larger amount of consideration due under the secondary contract, so there was no substantial performance falling within s44(5)(b).

51. Mr Fanning's Ground 2 would, therefore, similarly fail if it were necessary to consider it.

52. There is no need to consider Mr Fanning's Ground 3 relating to s75A of FA 2003 and we will not do so.

Disposition

53. Mr Fanning's appeal is dismissed.

Signed on Original

MR JUSTICE MILES
JUDGE JONATHAN RICHARDS

RELEASE DATE: 21 January 2022

(Amended pursuant to Rule 42 of the Upper Tribunal Rules on 3 February 2022 to correct a single typographical error in paragraph 10).