[2017] UKFTT 135 (TC)

TC05629

Appeal numbers: TC/2016/00159
TC/2016/00160
TC/2015/05379

STAMP DUTY LAND TAX – determinations in absence of return – appeal – extent of Tribunal's jurisdiction – held, limited to matters listed in para 36(5A) Sch 10 FA 2003 – burden of proof on taxpayers – avoidance scheme – effect of s 45 FA 2003 – reduction of capital – s 270 Companies Act 1985 not applicable – held, no liability on original contracting party – whether transferee acting as bare trustee or nominee for third Appellant – no – appeal of second Appellant dismissed and appeals of first and third Appellants allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) CREST NICHOLSON (WAINSCOTT)

(2) CREST NICHOLSON (SOUTH EAST) LIMITED

(3) CREST NICHOLSON OPERATIONS LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK

Sitting in public at The Royal Courts of Justice on 6, 7 and 14 December 2016

Keith Gordon and Joseph Howard of Counsel, instructed by DACbeachcroft, for the Appellant

Hui Ling McCarthy of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. For reasons which I explain later, I refer to the respective Appellants in the order set out on the title page to this decision. The first Appellant ("Wainscott") and the Second Appellant ("South East") each appeal against Stamp Duty Land Tax ("SDLT") determinations made against them. The Third Appellant ("Operations") appeals against a SDLT discovery assessment made against it.

The background facts

2. The evidence consisted of four bundles of documents. These included a witness statement given by Peter Gerard Kane, an officer of the Respondents ("HMRC"). In addition, Mr Kane gave oral evidence. In addition, a witness statement was given by John Stuart Henry Dunlop, the solicitor for each of the Appellants with current conduct of these appeals. Mr Dunlop was not called to give oral evidence.

3. From the evidence, I find the following background facts. I deal later with other factual issues.

4. All the Appellants are, and were at the material times, subsidiaries of the Crest Nicholson Holdings PLC group.

5. Wainscott was incorporated on 26 October 2006 as an unlimited company having a share capital. On incorporation, its share capital was £32,382,122 divided into 32,382,122 Ordinary shares of £1 each. On the same date, South East and another group company, Brenville Limited each applied for and were allotted one Ordinary share of £1.

6. The relevant objects in its Memorandum of Association are:

> "(A)(i) To purchase . . . any freehold . . .
>
> (S) To distribute among the members in specie any property of the Company of the Company, or any proceeds of sale or disposal of any property of the Company, but so that no distribution amounting to a reduction of capital be made except with the sanction (if any) for the time being required by law."

7. The subject matter of the transactions in question in these appeals is the acquisition of development land ("the Land") at Hoo Road, Wainscott, Rochester, Kent from three independent vendors. In the respective submissions made for the Appellants and for HMRC, the transactions were described in differing orders. As the order does not appear to me to be of any significance, I adopt the order suggested by the Appellants, in particular because the documents in the relevant bundle follow that order.

8. On 31 October 2006, Wainscott and Operations (the latter acting as surety) entered into an agreement with CC Trading Limited (defined as "the Seller") and the Church Commissioners for the acquisition of part of the Land. The purchase price was

£13,612,112 exclusive of VAT, of which (after taking into account a deposit of 5 per cent) half was payable on completion, together with the VAT due in respect of the transaction, and the other half was payable 12 months after completion. The overall total payments were £15,994,231.60.

9. Also on 31 October 2006, Wainscott entered into an agreement with the Secretary of State for Defence (defined as "the Seller") for the acquisition of a further part of the Land. Another group company, Crest Nicholson PLC, entered into the agreement as guarantor. The purchase price as shown in the agreement was £11,470,019. The deposit was £573,500.95. The balance of the purchase price amounting to £10,816,519 was payable 18 months after completion.

10. The remaining agreement which Wainscott entered into on 31 October 2006 was with RA Whitbread Farms Limited. This was for the acquisition of the balance of the Land. Operations entered into the agreement as guarantor. The purchase price was £4,917,869. Although reference was made to a deposit of £245,839.45, a sum of £2,458,934.50, amounting in total to half the purchase price, was expressed to be payable on completion. The balance of £2,458,934.50 was payable 12 months after completion.

11. Thus the total purchase price paid or to be paid by Wainscott for the Land was the sum of the three purchase prices (including any applicable VAT). This amounted to £32,382,120.

12. Also on 31 October 2006, the first meeting of the board of directors of Wainscott was held. At that meeting it was resolved to allot and issue 32,382,120 Ordinary £1 shares to South East. It was reported that South East had paid £32,382,120 into a bank account in the name of Wainscott in full payment for the shares. It was also resolved to make a loan of £30,882,120 to Crest Nicholson PLC "for the purpose of further property purchases".

13. On 22 December 2006, Wainscott resolved to reduce its share capital by way of a distribution in specie of the Land together with assignments of the benefit of the three acquisition agreements in respect of the Land. As a consequence of the distribution the issued share capital of Wainscott was to be reduced from £32,382,122 divided into 32.382,122 ordinary shares of £1 each to £2 divided into two ordinary shares of £1 each. The reduction was to be effected by cancelling £32,382,120 ordinary shares of £1 each registered in the name of South East and returning the capital paid on such ordinary shares to South East as the shareholder by way of distribution of the Land. The resolution referred to a draft deed indemnifying Wainscott in respect of its continuing obligations in relation to the Land. There was no other evidence concerning that deed, nor was a copy of it included in the evidence.

14. On 29 December 2006, Wainscott entered into three Deeds of Assignment in substantially identical terms, assigning to South East the benefit of the respective agreements for sale to Wainscott of the relevant portions of the Land.

15. Although the submissions for the Appellants stated that Wainscott paid the price under the purchase agreements, this does not appear to be borne out by the financial records. I return to this at a later point.

16. Under three deeds of transfer of part (Land Registry forms TP1) dated 29 December 2006, South East was named as transferee and Wainscott as assignor was shown as providing consideration to the respective transferors.

17. On 19 January 2007, Davies Arnold Cooper (the firm of solicitors then acting for the relevant companies) wrote to the Land Registry applying for registration of the Land. They explained that South East had recently acquired the Land by way of three back to back sub-sale transfers which had been completed simultaneously. The original contracts for the purchase of the Land had been assigned to South East by Wainscott immediately before completion of the three transfers. The solicitors enclosed three AP1 forms, together with documentation and cheques for the relevant fees.

18. Their letter continued:

> "Please note that although there are three separate transfers there are no SDLT certificates in respect of them. These transfers are ignored for the purposes of SDLT by virtue of section 45(3) FA 2003. SDLT60 forms are enclosed for each transfer since they were effected secondary to a distribution of the assets of [Wainscott] and, accordingly, there was no consideration paid by [South East].
>
> [The solicitors referred to paragraph 2.10 of the Land Registry internal guidance.]
>
> We also confirm that there was no prior substantial performance of the original sale to [Wainscott].
>
> . . ."

19. On 9 January 2008 the Land Registry confirmed completion of registration in respect of the portion of the Land acquired from CC Trading Limited. The Land registry referred to the application as having been lodged on 9 January 2008.

20. On the same date the Land Registry confirmed completion of registration in respect of the portion of the Land acquired from RA Whitbread Farms Limited. The Land Registry referred to the application as having been lodged on 9 January 2008. (The copy of the document in evidence omits the page showing the property register and the first part of the proprietorship register.)

21. On 18 July 2008 the Land Registry confirmed completion of registration in respect of the portion of the Land acquired from the Secretary of State for Defence. Again, the application was referred to as having been lodged on 18 July 2008.

HMRC's investigations

22. In early 2011, Mr Kane was made aware by an HMRC accountant that the latter had identified a series of cases where he had noted companies making dividend payments by way of distributions in specie of properties. The accountant had identified one involving Wainscott making a distribution to South East, but had been unable to link this to any particular property.

23. Mr Kane instructed Mr Jonathan Warburton, another member of Mr Kane's team, to do some research to identify whether there were SDLT implications. Mr Warburton established that no SDLT1 returns had been made by either Wainscott or South East at around the time of the distribution. This explained why HMRC had not picked up this land transaction from the work which they had been carrying out at the time involving comparing SDLT1 returns to Land Registry entries in order to try to find out where SDLT schemes had been used.

24. Mr Warburton's research identified three charges registered at Companies House against South East in respect of land identified as being off Hoo Road and in favour of the Secretary of State for Defence, CC Trading and RA Whitbread Farms Ltd. He also established from the Land Registry that the Land had been registered in the name of South East.

25. Mr Kane instructed Mr Warburton to speak to the HMRC Inspector in their Large Business Service to seek to obtain details of the arrangements from the Crest Nicholson group's Tax Manager, and to emphasise that the time limit for raising determinations was imminent. On 11 March 2011 Mr Warburton sent an email message to Steve Radwan in HMRC's Large Business Service Construction Sector, asking him to approach Crest Nicholson to confirm whether they had purchased land at Hoo Road, Wainscott.

26. On 21 March 2011, Mr Warburton sent Mr Radwan a further message to say that he had called Mr Radwan to see whether he had received any response from Crest Nicholson. In Mr Radwan's absence, Mr Warburton had spoken to another HMRC officer, Steve Nicholls, who was not aware of the current position. Mr Warburton emphasised that the assessing time limits would expire at the end of March 2011, so that he needed to clarify the position as soon as possible.

27. On 22 March 2011 Mr Radwan emailed Mr Warburton to inform him of the response from the Crest Nicholson Tax Manager, which was:

> "Thank you for your email. I am aware of this transaction and will respond soon."

Mr Warburton replied to Mr Radwan, indicating that he would arrange for a determination to be raised on South East; this was likely to be around £1.5 million.

28. On the same day, Mr Kane, Mr Warburton and the Operational leader David James met to discuss the position. It was agreed that SDLT determinations should be issued to both Wainscott and South East, based on the probability that the amount of

the reduction in Wainscott's share capital in the sum of £32,382,120 represented the purchase price of the Land.

29. Following HMRC's decision, on 23 March 2011 a determination under para 25 Schedule 10 Finance Act 2003 ("Sch 10 FA 2003") of SDLT in the amount of £1,295,284.80, calculated at 4 per cent on the consideration of £32,382,120, was issued to South East. (Further references in this decision to "Sch 10" are to that Schedule.) On 25 March 2011 a determination under para 25 Sch 10 in the same amounts was issued to Wainscott.

30. On 21 April 2011 Davies Arnold Cooper wrote two letters to Mr James of HMRC to appeal respectively on behalf of Wainscott and of South East against the determinations.

31. Correspondence continued between the advisers to Wainscott and South East and HMRC. Subsequently Mrs Sharron Carle, the solicitor who had been involved with the transactions, moved to another firm, but continued at that stage to act on behalf of Wainscott and South East in relation to the matters arising following the determinations.

32. On 29 September 2011 Mrs Carle wrote to Mr Kane. She referred to a recent telephone conversation and enclosed a copy of an agreement between Operations and South East (under their then names) dated 24 October 1991 (entitled "Deed of Agreement"). She argued that pursuant to that agreement, South East had acted as agent or nominee for Operations in acquiring and holding the shares in Wainscott and taking a transfer of the legal title to the Land. If the argument previously put, that Wainscott and South East had given no chargeable consideration for the transfer of the Land, was incorrect, then the SDLT liability would have arisen on Operations.

33. In his response dated 11 October 2011, Mr Kane argued that HMRC had correctly raised a charge on South East. He then explained, as an alternative proposition, that on the basis of the information now disclosed to HMRC he was now aware, ie he had discovered, that an amount of tax which ought to have been assessed had not been assessed. He referred to the time limits applicable to a discovery assessment, and maintained that HMRC were able to make such an assessment on Operations. He stated that he had issued instructions that day for a discovery assessment to be made on Operations under the authority of para 28(1) Sch 10.

34. (I should add here that the correspondence between Mrs Carle and Mr Kane was marked "Without Prejudice". For the purposes of these appeals, it had been agreed between the parties that "without prejudice" correspondence could be admitted as evidence. The extent to which any other without prejudice evidence could be taken into account was a question considered at the hearing; if necessary, I will return to it later.)

35. On 12 October 2011 Jason Price, another HMRC officer, wrote to Operations enclosing a discovery assessment. The SDLT assessed was £1,295,285.80, calculated at 4 per cent on the consideration of £32,382,145.

36. Further correspondence continued between Mrs Carle and Mr Kane. As parts of that correspondence raised matters disputed at the hearing, the relevant parts of that correspondence are considered at a later point in this decision.

37. On 28 March 2012 Mr Dunlop wrote to Mr Kane to inform him that following the merger between Davies Arnold Cooper (DAC) and Beachcroft, the file had been passed back to DACbeachcroft for that firm to handle; correspondence should be addressed to Mr Dunlop.

38. After further correspondence, an application for rectification was made to the High Court. On 9 May 2014, the High Court made an Order rectifying the written resolution of the shareholders of Wainscott dated 22 December 2006. Instead of referring to a distribution in specie of the Property together with assignments of the benefit of the Property Agreements, the rectified version referred to a distribution in specie of the right under the Property Agreements to call for a transfer of the Property on legal completion, together with the benefit of such provisions of the Property Agreements as continue in effect post-completion.

39. On 7 September 2015 Operations gave Notice of Appeal to the Tribunal. The reason for the late application was that Operations had requested an internal review on 4 August 2014. On 5 August 2015, HMRC had indicated that it was still not possible for them to comply with para 36B(2) Sch 10.

40. On 22 October 2015 Sarah Dodd of HMRC's Solicitor's Office wrote to Mr Dunlop with reference to the Notice of Appeal. She referred to the determinations made in respect of Wainscott and South East, and argued that it was not in the interests of justice for the appeal against the discovery assessment to be heard independently of the appeals against the determinations. She suggested that the best course would be to stay the appeal until such time as the determinations were before the Tribunal. She attached "view of the matter" letters written by Mr Kane and addressed to Wainscott and to South East. On 27 October 2015 Mr Dunlop accepted the offers of a review in each case.

41. On 21 December 2015 Mr Spong of HMRC's Appeals and Reviews section wrote respectively to Wainscott and South East with the results of his review. His conclusion in each case was that the decision to make the determination was correct and should be upheld.

42. On 7 January 2016 South East and Wainscott gave Notice of Appeal to the Tribunal.

Submissions for HMRC

43. As Mr Gordon argued on behalf of the Appellants that, in relation to the challenges on preliminary procedural matters being made by the Appellants based on Sch 10, the burden of proof fell on HMRC, Miss McCarthy was first to make submissions in respect of those procedural points.

44. She argued that although Mr Gordon's submission was correct as far as the discovery assessment was concerned, it was not correct in relation to the determinations. She explained the way in which the procedure worked for determinations.

45. Paragraph 25(1) Sch 10 provided:

> "25 (1) If in the case of a chargeable transaction no land transaction return is delivered by the filing date, the Inland Revenue may make a determination (a Revenue determination") to the best of their information and belief of the amount of tax chargeable in respect of the transaction."

Under para 26(1) a Revenue determination had effect for enforcement purposes as if it were a self-assessment by the purchaser.

46. Under para 27(1) Sch 10, if after a Revenue determination had been made the purchaser delivered a land transaction return in respect of the transaction, the self-assessment in that return superseded the determination.

47. It was accepted as between the parties that at no time had any of the Appellants made SDLT returns in respect of the transactions under appeal.

48. Miss McCarthy briefly referred to the evidence; I deal with the factual issues later in this decision.

49. Under para 35(1)(e) Sch 10, an appeal could be brought against a Revenue determination. Paragraph 35 largely mirrored, although not exactly, the provisions of the Taxes Management Act 1970 ("TMA").

50. In relation to income tax returns, if no return was provided, HMRC could issue a determination. Such a determination could be displaced by a self-assessment. In respect of income tax, there was no right of appeal against a determination. Miss McCarthy referred to the decisions of the First-tier and Upper Tribunals in *Michael Bartram v Revenue and Customs Commissioners* ([2011] UKFTT 471 (TC), TC01321, and [2012] UKUT 184 (TCC) respectively). The relevant part of the First-tier Tribunal's decision was at [28]-[35] and the relevant passage in the Upper Tribunal's decision (which was mine) was [55]-[60], in which I had endorsed those views expressed by the First-tier Tribunal.

51. Thus for income tax, if a return had been required by HMRC but had not been given by the taxpayer, HMRC could make a determination; this could then be replaced by a self-assessment. HMRC could then enquire into that self-assessment. If the taxpayer failed to make a self-assessment, that taxpayer could seek to challenge the validity of the determination, for example by applying for judicial review, or in county court proceedings relating to enforcement.

52. For SDLT, the framework had to differ slightly. HMRC was in no position to know about land transactions, and so would not know about the requirement for a

return. HMRC did not need to know; s 76 FA 2003 imposed a requirement to submit a return in certain circumstances.

53. In the present case, no return had been submitted. Whether a return should have been submitted by Wainscott or by South East was a matter for substantive legal argument.

54. Unlike for income tax, for SDLT there was a specific right of appeal against a determination. That right was restricted by para 36(5A) Sch 10:

> "(36)(5A) The only grounds on which an appeal lies under paragraph 35(1)(e) are that—
>
> (a) the purchase to which the determination relates did not take place,
>
> (b) the interest in the land to which the determination relates has not been purchased,
>
> (c) the contract for the purchase of the interest to which the determination relates has not been substantially performed, or
>
> (d) the land transaction is not notifiable (for example, because the land transaction is exempt from charge under Schedule 3)."

55. In relation to Wainscott, its ground of appeal could be either under sub-paragraph (a) or (d).

56. Miss McCarthy submitted that there was no basis at all for Wainscott or South East raising this procedural point; it was not a ground of appeal.

57. HMRC's stance was that the Tribunal had no jurisdiction to hear the point; HMRC did not agree that there was a prior point.

58. To summarise, there were three appeals, of Wainscott, South East and Operations. It would only be necessary to consider the appeal of Operations if the Appellants had proved their case in relation to both Wainscott and South East.

59. As to Operations, HMRC's understanding was that the Appellants agreed that it should be liable to tax; its only argument was a procedural one, that the discovery assessment was not valid.

60. Miss McCarthy submitted that the Appellants needed to make submissions concerning Wainscott and South East, and that Operations should only be considered afterwards.

Mr Gordon's submissions on the procedural question

61. Mr Gordon set out the Appellants' position. It was firmly established that where the competence of an appealable decision was in issue, it was for HMRC to prove that point first. He did not have the relevant authorities with him.

62. He submitted that there was absolutely no difference for determinations. He argued that the *Bartram* decisions were irrelevant to this question. It was common ground that there was a right of appeal in respect of SDLT determinations. (The absence of a corresponding provision for income tax was why Mr Bartram had been unsuccessful.)

63. In his submission, what had to happen when an appeal was made to and heard by the Tribunal was that the necessary ingredients of a determination had to be proved by HMRC as a preliminary issue. In relation to the decisions in *Bartram*, these did not turn on the wording of s 28C TMA; they turned on the lack of an appeal right.

64. Mr Gordon sought to make good his submissions by reference to the legislation on discovery assessments. The discovery provisions in para 28(1) Sch 10 were sufficiently similar to the income tax discovery rules in s 29(1) TMA.

65. He commented that he was starting to encroach on an issue which had troubled the First-tier and Upper Tribunals over the past seven years, namely the extent to which the First-tier Tribunal could hear "collateral public law challenges". He referred to *Oxfam v Revenue and Customs Commissioners* [2009] EWHC 3078 (Ch), in which Sales J had suggested that here was a right to raise public law arguments in the Tribunal. Attempts to go down this route had been frustrated by the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Abdul Noor* [2013] UKUT 071 (TCC).

66. He submitted that where the approach in *Noor* did not "bite" was when one looked at the statutory and necessary ingredients for an appealable decision. This could be seen most clearly in the context of discovery assessments. He referred to s 29(8) TMA, which provided that an objection to the making of an assessment under that section on the ground that neither of the two conditions referred to in it was fulfilled should not be made otherwise than on an appeal against the assessment. Section 34(2) TMA was in similar terms.

67. He argued that there was nothing in s 29 TMA to indicate how a taxpayer should or might challenge the competence of a discovery assessment for non-compliance with the vital and essential ingredients of a discovery assessment set out in s 29(1).

68. Despite this, the Tribunals had seen no reason whatsoever to deny a taxpayer the right to require HMRC prove that those conditions had been satisfied. The case of *Cenlon Finance Co Ltd v Ellwood* [1962] AC 782 had been heard in the House of Lords, predicated on the assumption that it was a matter justiciable on a statutory appeal.

69. Mr Gordon argued that it was inherent in the Tribunal's jurisdiction to consider whether there was a valid decision against which an appeal had been made. He indicated that Miss McCarthy did not dispute what he was saying in the context of discovery assessments.

70. In relation to para 28 Sch 10, as with s 29 TMA, there was no express right to require HMRC to prove that a discovery had been made. A taxpayer who did not consider that the requirements of para 30 Sch 10 were met could appeal to challenge the assessment. There was no equivalent of s 29(8) TMA in para 30. The closest provision was para 31(5) concerning time limits:

> "31(5) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment."

This was equivalent to s 34(2) TMA.

71. The absence of an equivalent to s 29(8) TMA was not fatal to a taxpayer who sought to rely on para 30 through an appeal to this Tribunal. An appeal could be made to the Tribunal, and if the very validity and competence of the assessment was in issue, then the Tribunal necessarily had jurisdiction to consider those issues in relation to the decision under appeal.

72. Returning to determinations under para 25(1) Sch 10, this imposed conditions that needed to be satisfied for there to be a valid determination. There were at least three conditions, two in para 25(1) and one in para 25(3). These needed to be satisfied if there was to be a valid determination. Mr Gordon submitted that unlike the position for income tax, there was a right to appeal to the Tribunal against a determination. It therefore followed that HMRC must be prepared to prove that there was a valid determination in the first place before any substantive challenge needed to be addressed. Mr Gordon added that he was not contemplating putting HMRC to a "no case to answer" proposition. It was simply that HMRC had to show competence. The question was who had to go first. As with para 28 Sch 10 concerning discovery assessments, he submitted that it was HMRC who had to go first.

Decision on order of parties' submissions

73. Following further submissions from Miss McCarthy and from Mr Gordon, I proposed in relation to Wainscott that the submissions should be in the order substantive, then procedural for Wainscott, and that HMRC should then respond to Wainscott's submissions on both sets of issues. In relation to South East, I proposed the same order. For Operations, I indicated that the first matter to be considered was procedural, requiring HMRC to put their case first, and that the arguments on the procedural and substantive issues should be put by Operations.

74. Mr Gordon, Mr Howard and Mr Dunlop and their client withdrew to consider the matter. On their return, Mr Gordon indicated the Appellants' preference, which was to make all the Appellants' submissions in one go. Thus, on reflection, the Appellants had decided that they should go first.

Mr Gordon's outline submissions

75. Mr Gordon summarised the submissions for the respective Appellants In relation to Operations, its grounds of appeal were all procedural. For South East there

were two grounds of appeal. The first was procedural; it was that the determination was an improper decision not compliant with para 25 Sch 10. Secondly, its substantive argument was that it had acted as an undisclosed agent. For Wainscott, its first submission was procedural, as for South East. Its other submission was substantive; this was that it had carried out the transaction in a broadly similar manner to that in *Vardy Properties (1) Vardy Properties (Teesside) Limited (2) v Revenue and Customs Commissioners* [2012] UKFTT 564 (TC), TC02242, but that, unlike the position in that case, it had not wrongly implemented any element of the transaction.

76. He made more detailed submissions concerning Operations. As these related in part to issues of fact, I deal with them later, together with Miss McCarthy's submissions.

77. On the question of the determinations made in respect of Wainscott and South East, Mr Gordon referred to the time limit in para 25(3) Sch 10 for making determinations, which at the relevant time was six years after the effective date of the transaction.

78. He referred to the response in HMRC's Skeleton Argument to the Appellants' contention that the same principles applied to determinations as did to discovery assessments. HMRC did not accept that the legislation imposed a requirement on HMRC to prove that the determination reflected a view that was genuinely and reasonably held by an officer of HMRC. Mr Gordon described this as "utterly staggering". If this really represented HMRC's view, the Tribunal should make a clear ruling for the benefit of future cases.

79. The provisions dealing with determinations were relatively new and untested. As a result, he was unable to point to any case law which demonstrated that HMRC had to act honestly and reasonably when making a determination. However, this was a requirement when making an assessment. He referred to *Sanderson v Revenue and Customs Commissioners* [2013] UKUT 623 (TCC).

80. He argued that the same basic tenets of public service should apply in the context of issuing determinations. Determinations had the same effect as assessments, and could be issued with fewer additional conditions. He referred to the wording of para 25(1) Sch 10, "to the best of their information and belief", and submitted that the obligation remained to act honestly and reasonably when forming that belief.

81. In his submission, the statutory test went one stage further than for discovery assessments; it required the determination to be made to the best of HMRC's *information*. In other words, a determination could not be made simply on the basis of an officer's belief; it had also to be to the best of HMRC's information. There was clearly an objective element to the test.

Miss McCarthy's response on the procedural issues

82. In Miss McCarthy's submission, the right question to consider was this: was the validity of the determinations a ground of appeal before the Tribunal? If it was, was it in the Appellants' grounds of appeal?

83. She commented that if the Tribunal were to accept the Appellants' argument that there was this added procedural hurdle for determinations, that decision would apply across the board to more cases where HMRC had raised determinations. In the case of SDLT, the number of such cases was considerable.

84. The starting point was that a determination could be made where there was no return. If HMRC were required to overcome some initial burden of proof as to validity, then the scheme of the legislation would backfire. The scheme was for a taxpayer who had not made a return to make one, at which point HMRC, if not satisfied, could raise an enquiry. If the Appellants' argument were to be accepted, this would encourage taxpayers to do nothing other than to appeal against a determination, then sit back and wait for HMRC to show fulfilment of these alleged requirements.

85. The process would be for the taxpayer to "pick holes" in what the relevant HMRC officer had done, rather than complying with the taxpayer's obligations and making a return.

86. It was correct that there was a difference between the SDLT and the income tax rules; Sch 10 provided an express right of appeal. However, this was explicitly restricted by para 36(5A) Sch 10. All the grounds referred to in that sub-paragraph essentially came to the same thing; the person appealing would be contending that the determination was flawed because there was no obligation to make a return. Those grounds had nothing to do with the actual detail of the transactions. For example, the taxpayer could not seek to object to a determination in the sum of £2 million and argue that it should be £1 million. The only valid grounds would be that a determination had been made but the taxpayer was never required to make a return, either on the basis that there had been no purchase at all or that it had not been notifiable.

87. In the case of income tax, the circumstances in which a determination could be made were where a return had been required under s 8 TMA and none had been provided. It had been shown in *Bartram* that there was no right of appeal against a determination. The primary function of a determination was either to obtain payment or to prompt a self-assessment, in order to obtain the right amount of tax. In the context of income tax, it was in HMRC's gift to require a return by notification under s 8 TMA. Thus there was nothing to appeal against.

88. In contrast, for SDLT (unlike for income tax, where HMRC sent letters as a matter of course requiring returns) HMRC was never going to know that they should be asking for returns. It was not for HMRC to be going through records.

89. Instead, the legislation put the onus on parties to land transactions to make returns in certain situations. Given that it was not in HMRC's gift to control receipt of

a SDLT return, it was legitimate that there might be a question whether HMRC were right to issue a determination.

90. It was, critically, only that part that fell within the Tribunal's jurisdiction under para 36(5A) Sch 10. That made logical sense; the purposes of the determination route was first and foremost either a quick means to collect tax if the determination was correct (as good as the taxpayer self-assessing) or, if the determination was not correct, a prompt under para 27 Sch 10 for the taxpayer to make a self-assessment.

91. The way in which Mr Gordon had interpreted the legislation, saying that it imposed a higher hurdle than a discovery assessment, was entirely contrary to the purpose and framework of the legislation, as already explained.

92. Taking the matter one stage further, what onus would there be on the taxpayer to make returns at all? On the Appellants' interpretation, the taxpayer could wait for a determination and see what the Tribunal made of it.

93. Miss McCarthy questioned what grounds of appeal from Wainscott and South East the Tribunal had jurisdiction to hear. She referred to the Notices of Appeal. Wainscott's first ground was that the determination was inconsistent with the decision in *Vardy*. This was within the Tribunal's jurisdiction under para 36(5A) Sch 10. The second ground referred to HMRC not having come to a view. There was no challenge to the determination being made to the best of HMRC's information and belief. Miss McCarthy made submissions on factual matters; I consider these later. She submitted that the second ground was not a permitted one under para 36(5A).

94. In relation to South East, the first paragraph in the grounds in its Notice of Appeal referred to South East's understanding that the determination was protective only. This was not a ground of appeal. The second paragraph referred to South East's interest in the transaction as having been as a bare trustee. This was a ground within the Tribunal's jurisdiction. The third paragraph referred to HMRC not having come to a view; Miss McCarthy referred to her submissions made in relation to Wainscott.

95. She referred to Mr Gordon's submissions relating to the wording of para 25(1) Sch 10. He had suggested that HMRC were putting forward the proposition that a determination could be made entirely on a whim without any reason to believe in its accuracy. This was not what HMRC had said in their Skeleton Argument.

96. If she was correct in her submission on the absence of any reference on the Notices of Appeal to the determinations not having been made to the best of HMRC's information and belief, she argued that any application for permission to introduce this ground at this stage should be refused, precisely because this was not a ground for which the Tribunal had jurisdiction.

Mr Gordon's reply on the procedural issues

97. Mr Gordon replied on HMRC's submissions concerning jurisdiction, onerousness of any requirement to prove that the officer's determination was not to

the best of his information and belief, whether the matter was before the Tribunal, the meaning of the "best of information and belief" test, and whether Mr Kane had cleared the "hurdle", ie what Mr Gordon submitted was the higher requirement imposed by that test.

98. On the question of jurisdiction, Mr Gordon referred to his earlier submissions, and to *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509 and *BW Jacques v Revenue and Customs Commissioners* (2005) SpC00513. (Miss McCarthy subsequently objected to the introduction of additional authorities; I consider this question at a later point.)

99. To the extent that Mr Gordon's submissions raised issues of fact, I deal with those as appropriate when considering both parties' submissions.

Consideration and conclusions

The procedural issues

100. I deal with these first, as the conclusion on these dictates the approach to be taken in evaluating the evidence. If the Appellants are correct in their submissions concerning the determinations, the dominant issue to be considered is the approach taken by HMRC in arriving at those determinations. If the Appellants are not correct, the principal issue for Wainscott and South East is whether they can discharge the burden of proving that those determinations should not have been made.

101. Under para 35(1)(e) Sch 10, there is a right of appeal against a determination under para 25. The extent of this right of appeal is limited by para 36(5A) Sch 10 (set out at [54] above). Mr Gordon submits that the legislation should be construed as permitting an appeal to extend to the process by which the HMRC officer arrives at a decision to make a determination. Miss McCarthy submits that it is not appropriate to extend the legislation in this way.

102. In order to consider this issue, it is necessary to stand back and look at the purpose of the power under para 25 Sch 10 to make a determination that a purchaser is liable to SDLT.

103. In cases where a return has been delivered under s 76 FA 2003, information is provided to HMRC enabling HMRC to consider whether the amount of SDLT self-assessed by the purchaser is correct. HMRC are made aware both of the existence of the purchaser and of the transaction.

104. Where a purchaser (or a party considering itself not to be a purchaser) does not deliver a return, HMRC will not become aware either of the existence of that party or of the transaction. Unless HMRC learn of such matters by other means, that party and that transaction will fall outside the system. As a result, HMRC will not have the opportunity to consider whether that party has or has not been involved with a transaction in such a way as to generate a liability to SDLT.

105. In a case where HMRC become aware of a potential liability to SDLT, making a determination under para 25 Sch 10 will prompt a reaction from the party, ie the alleged purchaser, on whom it has been served. That party may simply accept the determination as correct and pay the tax determined to be due. If the party considers the determination to be incorrect, para 27 Sch 10 permits that party (within the time limits specified under para 27(2)) to submit a self-assessment of the SDLT due, and the self-assessment supersedes the determination. If necessary, HMRC can enquire into the self-assessment and a different liability can ultimately be assessed. Whichever course is taken, the result is that the correct liability to tax can be arrived at and paid.

106. However, making a self-assessment may not always be appropriate. Looking at the circumstances listed in para 36(5A) Sch 10, making a self-assessment appears to be inappropriate in any of the events listed. If the purchase did not take place, the interest in the land has not been purchased, the contract has not been substantially performed, or the land transaction is not notifiable, there should be nothing to self-assess. There should be no reason for that party to be within the SDLT system.

107. In my view, this is the reason for the limitation in para 36(5A) of the grounds on which an appeal lies under para 35(1)(e).

108. Mr Gordon argued that the respective decisions of the First-tier Tribunal and the Upper Tribunal in *Bartram* were irrelevant, as they simply decided that there was no right of appeal against a determination under the income tax self-assessment system. I do not accept that argument. It is necessary to consider the context in which determinations are made for income tax purposes, and to compare this with the position for SDLT.

109. For income tax, notice to make a return is given by HMRC under s 8 TMA. A person who is chargeable to income tax or capital gains tax for a particular tax year is required by s 7 TMA to give notice of chargeability. The intention of the legislation is that HMRC should be or should become aware of the existence of the taxpayer and the potential liability to tax.

110. Under s 28C TMA, power is given to HMRC, in circumstances where the required return has not been delivered before the filing date, to make a determination of the tax due.

111. A taxpayer on whom a notice of determination has been served may question the determination by making a self-assessment. As acknowledged by s 28C(3) TMA, the self-assessment supersedes the determination. If HMRC then wish to enquire into the self-assessment, they may do so under their normal powers pursuant to TMA 1970.

112. The underlying reason for the absence of any right to appeal against a determination made under s 28C TMA is that the taxpayer is clearly within the system. HMRC are aware of the taxpayer's existence, and have given notice to the taxpayer under s 8 (or s 8A) TMA. The taxpayer has a means of questioning the

determination by making a self-assessment, as I have indicated. There is no need for a right of appeal.

113. As I have also explained, the starting point for SDLT determinations is different, as there is no automatic means of HMRC becoming aware either of the existence of the purchaser or of the transaction. As a consequence, a determination may be made on a party which maintains that it has not been involved in a chargeable transaction. The submission of a self-assessment in such circumstances is inappropriate and perhaps illogical because of the possible implication, by making a self-assessment, that there may be some liability to tax.

114. My conclusion is that, with the exception of the matters referred to in para 36(5A) Sch 10, there is no reason for any right of appeal against a determination made under para 25 Sch 10.

115. On that basis, I agree with Miss McCarthy's submissions that it is not open to an appellant, on an appeal against a determination, to raise questions such as the quantum of the SDLT chargeable, or whether the determination was made to the best of HMRC's information and belief. The only basis on which such matters may be questioned is by providing a self-assessment of the tax considered to be due, and following the appropriate appeal route if the amount of tax (if any) cannot be agreed with HMRC.

116. Thus I do not consider that the Tribunal has jurisdiction to consider arguments to the effect that an officer's determination is not to the best of his information and belief.

117. To allow for the possibility that my conclusion as to jurisdiction might not be upheld, I consider Mr Gordon's submissions in further detail.

118. He referred to "an officer's determination". The actual language used in para 25(1) Sch 10 is:

> ". . . the Inland Revenue may make a determination (a "Revenue determination") to the best of their information and belief of the amount of tax chargeable . . ."

119. As a result of the Commissioners for Revenue and Customs Act 2005, the reference to the Inland Revenue is now to be read as being to HMRC. Unlike the corresponding income tax provisions in s 28C TMA and those relating to discovery assessments in s 29 TMA, there is no reference in para 25 Sch 10 to an officer of HMRC. Thus the power under that paragraph is given to HMRC as a body, rather than to an individual officer. In the same way, the phrase "to the best of their information and belief" applies to HMRC as a body.

120. I have already commented on the position of HMRC in relation to SDLT; they do not automatically have information concerning purchasers and potential SDLT liabilities. The reason for the use of the word "information" in the phrase "to the best of their information and belief" is that the availability of information concerning

transactions, potential SDLT liabilities and parties which may be identified as possible purchasers may well be limited. What para 25(1) requires HMRC to do is to work as well as they can on the basis of such information as is available to them to arrive at what they believe to be the amount of tax chargeable.

121. Thus I reject Mr Gordon's submission that para 25(1) Sch 10 imposes a higher standard than the corresponding requirement under s 29 TMA. Unlike the position under s 29, there is no reference to an officer or to the state of such officer's knowledge or belief; the requirement is for HMRC to make the determination to the best of their information and belief.

122. For the same reasons, I also reject Mr Gordon's submission in relation to determinations that they may not be issued unless they reflect the concluded view of an officer.

123. Unlike the regime for discovery assessments, in the context of SDLT determinations there is no need for a Tribunal to evaluate the process by which HMRC arrive at a determination. With very limited exceptions, the taxpayer's remedy is to submit a self-assessment and if HMRC do not agree with that self-assessment, for the dispute to be dealt with in the course of an enquiry, giving the taxpayer appropriate rights of appeal if necessary.

124. Further, the question of the process by which HMRC have arrived at a determination is irrelevant to any of the issues in respect of which an appeal can be made under para 35(1)(e) Sch 10; the grounds under para 36(5A) are limited to issues concerning the absence of any transaction giving rise to a liability to SDLT.

125. My conclusion on the procedural issues is that there is no basis on which the determinations can be questioned, other than on an appeal under para 35(1)(e) Sch 10 based on the limited grounds specified in para 36(5A) Sch 10. (In the light of that conclusion, I do not need to deal with the question of the additional authorities introduced by Mr Gordon.)

126. As a consequence, the matters to be considered in relation to Wainscott and South East are limited to the issues in para 36(5A). Although I have considered the possibility that my conclusion on the jurisdiction issue might not be upheld, my further view as to the proper interpretation of the requirements imposed by para 25(1) Sch 10 leads me to the position that, although a substantial part of the hearing was devoted to examination of the basis on which Mr Kane had arrived at the decision to issue determinations both to Wainscott and South East, it is not appropriate for me to arrive at any findings of fact concerning that procedural issue.

127. The result of my conclusions on these procedural matters is that instead of the burden of proof falling on HMRC, as Mr Gordon argued, it falls on Wainscott and South East to show that the determinations should not have been made. I deal below with the substantive issues arising on their respective appeals, leaving the appeal of Operations to be dealt with as a separate matter dependent on the outcome of the other appeals.

The substantive appeals

128. Before dealing with the individual appeals, it may make matters clearer if I briefly summarise the submissions being made for the Appellants. As to Wainscott, although it entered into the purchase contracts, its case is that it assigned its rights under them to South East, and that as a result the sub-sale relief provisions of s 45 FA 2003 as they then stood were engaged. As to South East, although as a result of the decision in *Vardy* it would be the party liable to SDLT in respect of the acquisitions, it submits that as a result of the Deed of Agreement dated 24 October 1991 it acts as a nominee and/or bare trustee for Operations; accordingly any liability to SDLT which would otherwise fall on it instead falls away and is to be borne by Operations. As to Operations, its case is that the discovery assessment made on it is defeated by a procedural defect, namely that it was made more than four years after the effective date of the transaction to which it related. Mr Gordon acknowledged that Operations had no substantive basis for its appeal; its grounds were purely procedural.

129. It is also necessary to explain the reason for adopting the particular order for dealing with the respective Appellants. This follows the explanation given by the Tribunal in *Vardy* at [4]-[7]. (It is necessary to repeat that there are some differences between the facts of the present case and those in *Vardy*.) The respective vendors of the Land correspond to "A" in *Vardy*. Wainscott corresponds to "B". South East corresponds to "C". Operations is an additional party, generally referred to in the course of the hearing as "D".

(a) Wainscott's appeal

130. As Wainscott's appeal is dependent on s 45 FA 2003 as it stood at the time of the transactions, I set out here the relevant parts of that section before referring to the parties' arguments:

> "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 subsection (3) of section 73 (alternative property finance: land sold to financial institution and re-sold to individual)."

131. In respect of Wainscott, Mr Howard made submissions on the substantive argument that on the basis of the sub-sale rules, Wainscott could not have been liable for the SDLT. These submissions were based both on contractual and company law.

132. Mr Howard referred to the three agreements for the acquisition of the Land, and to the board minutes of Wainscott for 31 October and 22 December 2006. He submitted that the documentation showed that the share capital had been issued by Wainscott, funded and paid out; the sum had been paid to the vendors.

133. By its written resolution dated 22 December 2006, Wainscott had resolved to reduce its share capital. Mr Howard emphasised that this transaction was different from that in *Vardy*. In Wainscott's submission, the reason why its transaction succeeded (contrary to the position in *Vardy*) was the wording of the resolution.

134. He referred to the three deeds of assignment dated 29 December 2006 by which Wainscott had assigned to South East its rights under the three acquisition agreements for the Land. Mr Howard submitted that these brought the position within s 45(3) FA 2003, so that there was a transfer of rights to South East. The three Land Registry transfer forms TP1 showed at panel 10 that Wainscott (defined at panel 13 as "the Assignor") had paid to the respective vendors the initial instalments of the respective purchase prices.

135. Mr Howard did not think that it was any part of HMRC's case that any part of the consideration had not been paid. He argued that there was sufficient documentary evidence; the correct parties were referred to. The transactions had taken place ten years before the hearing.

136. The transfer forms had been entered into after the assignment by Wainscott. They completed the purchase agreements by conveyance directly to South East. He emphasised the importance of the three forms, which were materially identical.

137. Miss McCarthy argued that s 45 FA 2003 did not apply to the transactions at issue. Wainscott was precluded from assigning the benefit of the acquisition agreements to South East either by virtue of condition 1.5.1 of the Standard Commercial Property Conditions (Second Edition) ("SCPC") or, in the case of the agreement with CC Trading Limited, by virtue of the express prohibition of assignments in the contract itself. Nothing in the Appellants' Skeleton Argument dealt with this argument.

138. In addition, the Appellants relied on *Vardy*, but had not proved that the distribution (or distributions) which Wainscott had declared were lawfully made.

139. For s 45 FA 2003 to apply, the original contract under s 45(1)(a) must be extant when the transferee's (ie South East's) relevant entitlement arises under s 45(1)(b). There had to be at least a moment in time when both these sub-sub-paragraphs were met. If there was not, on completion of the original contract s 44 FA 2003 applied to crystallise the acquisition of the chargeable interest by the purchaser under the original contract before that acquisition could be displaced by s 45. Miss McCarthy referred to *Edward Allchin v Revenue and Customs Commissioners* [2013] UKFTT 198 (TC), TC02613.

140. In response to Miss McCarthy's arguments, Mr Howard referred to *Vardy*. There were two key points in that case. On the facts, the sub-seller B (equivalent to Wainscott) did not manage to engage s 45 FA 2003.There was no effective transfer of rights. The dividend was illegal. The recipient of the dividend held it on constructive trust for [B]. There was a specific company law reason for the Tribunal's finding; this was specified at [63]. Mr Howard referred to *Vardy* at [13] and submitted that there was a key factual distinction between the present Appellants' circumstances and those in *Vardy*. He referred to the applicable version of s 270 Companies Act 1985 ("CA 1985").

141. In contrast, Wainscott fell within s 263(2)(c) CA 1985. The relevant parts of that section provided:

> "263 Certain distributions prohibited
>
> (1) A company shall not make a distribution except out of profits available for the purpose.
>
> (2) In this Part, "distribution means every description of distribution of a company's assets to its members, whether in cash or otherwise, except distribution by way of—
>
> . . .
>
> (c) the reduction of share capital by extinguishing or reducing the liability of any of the members on any of the company's shares in

> respect of share capital not paid up, or by paying off paid up share capital, and
>
> . . ."

142. As a result of that sub-section, the reduction of paid-up share capital was not a distribution and so was not subject to the requirements in s 270 CA 1985 to consider the accounts. Mr Howard referred to *Vardy* at [13]-[15]. In that case there had not been a straightforward reduction of share capital. The Tribunal's finding at [17] showed why the scheme had failed.

143. Wainscott's circumstances were different. The written resolution made on 22 December 2006 had stated that Wainscott would reduce its share capital from £32,382,122 shares of £1 each to two shares of £1 each. Section 270 CA 1985 had no relevance at all to Wainscott. It fell squarely within s 263(2)(c) CA 1985.

144. On the question of SCPC condition 1.5, HMRC were arguing that this prohibited assignment of rights under the contract. It was not correct for HMRC to jump to the conclusion that the transaction was not effective at all, like the illegal dividend in *Vardy*. HMRC's submissions were wrong on a number of grounds.

145. Condition 1.5 was as follows:

> "**1.5 Assignment and sub-sales**
>
> 1.5.1 The buyer is not entitled to transfer the benefit of the contract.
>
> 1.5.2 The seller may not be required to transfer the property in parts or to any person other than the buyer."

146. Mr Howard referred to the acquisition agreement dated 31 October 2006 between Wainscott and CC Trading Limited. This referred to the SCPC. In addition clause 15 of that agreement provided:

> "**15. No assignment or sub-sale**
>
> The Buyer is not entitled to transfer the benefit of this agreement and the Seller may not be required to transfer the Property in parts or to any person other than the Buyer or a Group Company."

147. Mr Howard submitted that the meaning of that clause was that group companies were outside the prohibition on assignments. Turning the provision on its head, it said that the buyer could require the seller to transfer the property to a group company. Clause 25.1 of the agreement provided as follows:

> "25.1 The Standard Commercial Property Conditions are incorporated in this agreement and where there is a conflict between them and any other provision of this agreement that other provision prevails."

148. In Wainscott's submission, that agreement, properly construed, contemplated the right to require the vendor to transfer the property to a group company. Thus there was no prohibition. To give clause 15 any narrower construction would be to contradict its commercial purpose.

149. Even if that submission were wrong, the terms of the SCPC had been expressly varied by agreement between the parties so as to permit assignment of the benefit of rights to South East.

150. Mr Howard referred to a fax dated 14 December 2006 from Davies Arnold Cooper to Ashursts attaching amended draft copies of the Land Registry form TP1 transfer deed and of the Legal Charge, showing assignment of the rights under the acquisition agreement between Wainscott and CC Trading Limited to South East. The amendments showed that Wainscott had been removed as transferee and replaced by South East. The amendments to clause 10 showed that Wainscott was paying, and further amendments to other clauses showed that the assignment had taken place.

151. Similar faxes had been sent to the solicitors acting for the other vendors. (Copies of the faxes had been added to the bundle, but these did not have the draft documents attached.)

152. Mr Howard submitted that it had been absolutely clear to the vendors what was going on; they were accepting that the assignments were taking place.

153. He referred to the final versions of the three form TP1 transfer deeds, and submitted that the principle applied to each of the three transactions. For example, the deed of transfer of part entered into by the Secretary of State for Defence contained a clause 13 setting out additional provisions recorded that the Assignor (ie Wainscott) had assigned the benefit of the contract. He submitted that including the term in this deed supplied all the formalities required.

154. He argued that even if the Appellants were wrong on both these grounds and Miss McCarthy were right that assignment was contractually prohibited, the effect that she had submitted without authority or support that such prohibition had was completely overstated. The prohibition did not have the effect of disengaging s 45 FA 2003. In Chitty on Contracts (32nd edition) at 19-046, it was stated that a prohibited assignment could be effective as between assignor and assignee. Reference was made to the comments of Lord Browne-Wilkinson in the *Linden Gardens* case, [1994] 1 AC 85 at 108.

155. As a consequence, even if the assignments were formally defective, they had sufficient effect between Wainscott and South East; there was a sufficient transfer of rights for the purposes of s 45 FA 2003. Mr Howard referred in detail to that section. The consequence of the deeds of assignment was that, even if they were defective, they were still valid as between the parties. The deeds would have given and did give South East the right to call on Wainscott to convey the property to it.

156. On the basis of these arguments, he submitted that s 45(3) FA 2003 clearly must have been engaged.

157. On the additional final day of the hearing, Miss McCarthy responded to Mr Howard's submissions. On the second day, she had commented that nothing in the pleadings had given any indication of the substantive arguments raised in respect of Wainscott that day; there had been a flurry of "hand-ups".

158. She referred to Mr Howard's submissions concerning what had happened as between Wainscott, South East and the vendors in each case. As to one transaction, HMRC accepted that the signed fax existed and had been sent. However, until the point of the form TP1, the evidence did not show that there was ever any actual agreement with the vendor until one could see the agreement being referred to in the TP1. Thus on its own, the fax was little evidence.

159. Two other identical fax cover sheets had been handed up and not sent in advance; there had been no reference to these documents in the Appellants' Skeleton Argument. There was no witness evidence to say, first, that the faxes had been signed and sent, secondly, if so, when, or thirdly, what the response had been.

160. HMRC's position in relation to these faxes was this. HMRC were not suggesting that the faxes did not exist; however, that got the Appellants nowhere because there was no evidence that those faxes were ever sent. There was no evidence of acceptance by Wainscott in each case. There was no consideration for variation of the terms of the original sales contracts. Thus on the documents, especially the two faxes, HMRC did not accept that they were themselves evidence of any variation by Wainscott. In their Statement of Case, HMRC had put the Appellants to proof. HMRC would have expected supporting witness evidence; there was none.

161. Thus the faxes counted for nothing. There was no alternative submission. On the basis that the variation had been executed in the form TP1 itself, the Appellants' submission was that this was in a deed so that the absence of consideration was immaterial. If it was accepted that there was a variation made by deed, the TP1 itself, which represented the vendors' consent to lift the prohibition against assignment, HMRC's position was to ask whether that fact pattern fitted s 45 FA 2003.

162. As to s 45(1)(a), each of the contracts met that condition. On s 45(1)(b), Wainscott was saying that there was an assignment as a result of which South East became entitled to call for a conveyance to it.

163. Miss McCarthy emphasised that South East's entitlement should not simply be to claim damages; it had to be entitled to call for a conveyance to it, and not to someone else.

164. HMRC's position was that, based on *Allchin*, the assignments here needed to result in entitlement for South East while the contracts between the vendors and Wainscott remained extant and uncompleted. Miss McCarthy pointed to an inconsistency in *Vardy*; at [44], the Tribunal had referred to the need for the original contract to be extant at the time when the transaction referred to in s 45(1)(b) FA 2003 occurred, but at [50]-[51] had held that this was not the case. HMRC submitted that that view of s 45 was wrong, and that the view of the Tribunal in *Allchin* should be preferred to that in *Vardy*. It was left to this Tribunal to resolve what the actual requirement under s 45(1) was. Miss McCarthy made detailed submissions on both those cases.

165. Mr Howard responded to these submissions; I take his responses into account in arriving at my conclusions on Wainscott's appeal.

166. I deal first with Miss McCarthy's submissions as to lack of evidence concerning the assignments. I accept that the evidence does not show how the effect of two of the three Deeds of Assignment dated 29 December 2006 was carried into the relevant deeds of transfer of part (forms TP1). However, each of the three forms TP1 was executed by the relevant vendor and South East on that same date; it follows that the respective vendors accepted the revisions to the relevant form TP1 which acknowledged the effect of the assignment of the benefit of the contract. The one fax in evidence attaching the amended draft transfer is shown to have been transmitted on 14 December 2006. Although the other copy faxes do not attach the corresponding amended draft transfers, I am satisfied on the balance of probabilities that the same process was undertaken in each case. I consider it improbable that the respective vendors would have executed the TP1 deeds of transfer of part if they had not consented to the assignment of the benefit of the contracts to South East.

167. Thus, whatever potential objections there might have been to the assignments, whether on the basis of the SCPC or otherwise, I find that the three assignments were effective and that the deeds of transfer of part were executed in accordance with the effect of the assignments.

168. Although it was submitted for the Appellants that Wainscott paid the purchase price under the acquisition agreements, this cannot be verified from the evidence. The copy bank statements for Wainscott show that £32,382,122 was transferred to Wainscott from South East on 31 October 2006. On the same day, a CHAPS transfer of £1,500,000 (plus the CHAPS fee of £23, covered by a transfer into Wainscott's account) was made to Davies Arnold Cooper; that amount appears to have been the total of the initial deposits for the three acquisitions. In addition, the sum of £30,882,122 was transferred from Wainscott's account, leaving a nil balance. Although the transferee is not identified, the amount of the transfer corresponds to the loan of £32,882,120 which the Board of Wainscott resolved to make to Crest Nicholson PLC, subject to the minor difference of £2, which had presumably been intended to remain in Wainscott's account to represent the reduced paid-up share capital.

169. All the subsequent bank statements for Wainscott show a nil balance. There is no trace of the £100,000 fee which the Chairman of Wainscott's Board had reported that South East would pay to Wainscott "in payment of facilitating the acquisition of the Property". There are no transfers in or out of Wainscott's account to cover the purchase prices payable to the respective vendors, whether on completion or by subsequent instalments. The balance on Wainscott's account remained nil up to 2 October 2009, the date of the last statement included in the evidence.

170. As the transactions were completed and the subsequent instalments were presumably paid, it must be inferred that the funds were provided from elsewhere within the Crest Nicholson group. The position remains unclear. Whether there is any connection between the payments of the purchase consideration to the three vendors

respectively and the reference to a draft deed indemnifying Wainscott in respect of its continuing obligations in relation to the Land must remain a matter for speculation; without sight of the executed version of such a deed or of the bank statements of whichever Crest Nicholson company actually made the payments, it is not possible to establish what happened.

171. A point which was raised in the course of Mr Gordon's cross-examination of Mr Kane was the following statement in the Directors' Report and Accounts of Wainscott for the period from 26 October 2006 to 31 October 2007:

> "The Company was incorporated on 26th October 2006. The Company did not trade during the period but acted as an undisclosed agent of Crest Nicholson Operations Limited."

172. There was nothing else in the evidence to show the basis for that statement. Further, the terms of the Board Minutes of Wainscott included in the evidence contain nothing to suggest that its business was being carried on in an agency capacity. (I accept that pursuant to object 3(U) of its Memorandum of Association, Wainscott had power to carry on its business as agent.) Without further evidence, I do not consider that the statement in the Directors' Report can be regarded as sufficient to show that Wainscott was acting as an undisclosed agent. There is nothing in the evidence corresponding to the Deed of Agreement dated 24 October 1991 between Operations and South East considered at a later point in this decision. If it were the case that there was some form of agency agreement between Wainscott and Operations, this would raise a further question; why would Wainscott have gone to the trouble of involving South East in the transactions for the acquisition of the Land if both Wainscott and South East, on the Appellants' arguments, were acting as undisclosed agents for Operations? If that had been the case, it might have had a significant effect on the analysis of the transactions and their effects for SDLT purposes. I do not think it appropriate to speculate further.

173. There is a further question; if it was possible for the agreement between South East and Operations entered into in 1991 to be traced, why was it not possible to find a rather more recent document concerning the relationship between Wainscott, incorporated in later 2006, and Operations? As no such agreement has been produced, I find on the balance of probabilities that Wainscott was not, despite the statement in the accounts, acting as the undisclosed agent of Operations in relation to the acquisition of the Land.

174. I turn to the construction of s 45 FA 2003. It may assist to summarise the transactions and their timing. The acquisition contracts were entered into on 31 October 2006. On the same day, Wainscott resolved to allot and issue the shares to South East, and South East transferred the subscription price to Wainscott. On 22 December 2006 Wainscott resolved to reduce its share capital by way of a distribution in specie of the right to call for the property transfers. On 29 December 2006, Wainscott executed three Deeds of Assignment transferring to South East the benefit of Wainscott's rights under the acquisition contracts. On the same date, the three deeds of transfer of part (TP1) were executed, completing the transfer of the Land to South East.

175. Miss McCarthy's argument as to the application of s 45(3) FA 2003 was bound up with her submission that the documentation in evidence was not sufficient to establish any variation of the terms of the original acquisition contracts so as to permit assignment of the benefit of the contracts to South East. HMRC accepted that there was a variation in each case by the TP1 deeds of transfer, and that as this was effected by deed there was no need for consideration. She submitted that in order to fulfil the requirement in s 45(1)(b), it was necessary for C (here, South East) to be entitled to call for a conveyance to it. It was not sufficient for the entitlement to be to call for damages.

176. She referred to *Allchin*, in which HMRC had argued that s 45 FA 2003 did not apply; it needed the A to B contract to be alive when C was entitled to call for a conveyance. In the present case, there had not been a point when at the same time the A to B contract was waiting to be completed and C was entitled to call for a conveyance to it. Until the TP1 deeds had been executed, there was a prohibition against assignments; South East would have had a right to damages, but no entitlement to end up with the land itself.

177. I have concluded that, as a result of the faxes sent on 14 December 2006, the respective vendors had been made aware of the intention to assign the benefit of the acquisition contracts to South East. I accept that the formal consent was not given until the TP1 deeds of transfer were executed on 29 December 2006. In one case, that of the agreement with CC Trading Limited, the terms permitted assignment to a group company; I accept that clause 15 of that agreement permitted this, and that clause 25.1 gave Clause 15 precedence over the SCPC.

178. As to the other contracts, I find that the prohibitions against assignment were not removed until the execution of the relevant deeds of transfer on 29 December 2006. Thus the argument raised by Miss McCarthy needs to be considered in relation to these contracts, whereas it does not apply to that with CC Trading Limited.

179. Mr Howard referred to the passage from Chitty at 19-046. This starts with the sentence:

> "However, it seems that a prohibited assignment can be effective as between assignor and assignee."

Although that may well deal with the position as between Wainscott and South East, it does not answer Miss McCarthy's point; until consent was given by the relevant vendors by executing the TP1 deed in each case, the terms of the original sale contract applied. These terms prohibited the transfer of the benefit of the contract, and prevented the vendor in each case from being required to transfer the property to any person other than the buyer.

180. This brings the focus back to the precise meaning of s 45 FA 2003. The argument for HMRC is that if the transfer of rights only took place at the same time as the completion of the contracts, this did not meet the conditions in s 45.

181. Mr Howard referred to s 45(1)(b), and emphasised that there was nothing in it referring to time. The timing rule in s 45 was to be found in the "tailpiece" to s 45(3). What that timing rule referred to was the timing of completion of the original contract and of the secondary contract. It did not require them to complete at the same time. There was nothing in s 45 concerning the timing of the exchange or sub-sale; it dealt only with timing in relation to completion of the contract. There was nothing in the legislation to prevent transactions from being carried out in the manner followed in the present case.

182. He submitted that the points based on *Allchin* were entirely irrelevant to these circumstances; that case had concerned a novation, not an assignment. The fundamental difference was that on a novation, the original contract ceased to exist. In contrast, the Appellants' case had not involved the original contract ceasing to exist. The Wainscott contracts had continued. They had provided for deferred consideration, and the obligations had not been transferred to South East.

183. The *Vardy* decision had been more in line with the legislation. Mr Howard submitted that the Tribunal should be more inclined to take the position adopted in *Vardy*. He commented that the source of error in *Allchin* was that at [67]-[68], the legislation had been mis-paraphrased.

184. I am persuaded by Mr Howard's submissions on the construction of s 45. I accept that there is no reference to timing in s 45(1). The Tribunal in *Vardy* at [44] referred to the need for the original contract to be extant, ie uncompleted at the time when the "transaction" referred to in s 45(1)(b) occurred. It appears to me that this conclusion was based on the language of s 45(1)(a). The phrase "is to be completed by a conveyance" indicates the need for the contract to be extant. The requirement in s 45(1)(b) for another person to become entitled to call for a conveyance to him cannot be fulfilled unless, as a matter of timing, the original contract is still extant, as confirmed in *Allchin*.

185. Miss McCarthy argued that the Tribunal in *Vardy* had been inconsistent with its statement at [44] in arriving at its subsequent conclusions at [50]-[51]. I do not accept that argument. The Tribunal stated at [50]:

> "There is nothing in the wording or the overall scheme of the legislation which, in our view, requires the "transferee of rights" to hold an immediate and/or unconditional entitlement to call for a conveyance as a result of the "transaction" in question before section 45(1)(b) FA03 can be satisfied. That would require us to read extra words into the section which are not there. Nor can it be argued that the entitlement to call for a conveyance must arise from the "transaction" alone, for the same reason. What the legislation requires is simply a "transaction as a result of which" the third party's entitlement to a conveyance arises."

186. Mr Howard's submission as to the absence of any reference in s 45(1) to timing accords with the view taken by the Tribunal in *Vardy*.

187. I am satisfied that the condition in s 45(1)(b) was met; in addition to the three Deeds of Assignment dated 29 December 2006, there was an "other transaction" in the form of the distribution in specie of the rights under the Property Agreements. I have found that in executing the TP1 deeds of transfer, two of the vendors consented to the assignment (CC Trading Limited having already given its consent to the transfer to a "Group Company").

188. In *Vardy*, the Tribunal found that, were it not for non-compliance with s 270 CA 1985, s 45 FA 2003 would have been engaged. I accept Mr Howard's submission that s 270 CA 1985 does not apply to Wainscott, as a result of s 263(2)(c) CA 1985. The transaction was clearly a reduction of share capital rather than a dividend.

189. I find that s 45 FA 2003 was engaged in Wainscott's case. Thus Wainscott's position is on all fours with what would have been the position in *Vardy* had it not been for the non-compliance with s 270 CA 1985.

190. As a result, South East is treated by s 45(3)(a) as the purchaser. Sub-section (3)(b) specifies the consideration under the secondary contract. In *Vardy* at [93]-[101] the Tribunal considered what consideration should be attributed to the secondary contract under s 45(3)(b)(i). I find the Tribunal's reasoning, although strictly obiter in that case, persuasive in analysing the facts in relation to Wainscott's appeal, as well as that of South East. The consideration to be attributed to the secondary contract is £32,382,120.

191. As the original contract was substantially performed or completed at the same time as, and in connection with, the substantial performance or completion of the secondary contract, the effect of the tailpiece to s 45(3) FA 2003 is that the substantial performance of the original contract is to be disregarded. Thus Wainscott is not liable to SDLT in respect of the purchase of the Land. It follows that the Revenue determination served on Wainscott must be set aside and Wainscott's appeal allowed.

(b) South East's appeal

192. South East's submission is that as a result of the deed of agreement dated 24 October 1991 it acts as a nominee and/or bare trustee for Operations; accordingly any liability to SDLT which would otherwise fall on it instead falls away and is to be borne by Operations.

193. South East relies on Schedule 16 FA 2003 ("Sch 16"). The relevant paragraphs of Sch 16 are:

> "**1**(2) In this Part a "bare trust" means a trust under which property is held by a person as trustee—
>
> (a) for a person who is absolutely entitled as against the trustee, or who would be so entitled but for being a minor or other person under a disability, or
>
> (b) for two or more persons who are or would be jointly so entitled,

and includes a case in which a person holds property as nominee for another.

(3) In sub-paragraph (2)(a) and (b) the references to a person being absolutely entitled to property as against the trustee are references to a case where the person has the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustee, to resort to the property for payment of duty, taxes, costs or other outgoings or to direct how the property is to be dealt with.

BARE TRUSTEE

3(1) Subject to sub-paragraph (2), where a person acquires a chargeable interest as bare trustee, this Part applies as if the interest were vested in, and the acts of the trustee in relation to it were the acts of, the person or persons for whom he is trustee.

. . ."

194. It is necessary to examine in some detail the terms of the Deed of Agreement dated 24 October 1991. As the first full page of this document is headed "Agency Agreement", I refer to it by the latter title.

195. The parties are the companies now named Operations and South East; for simplicity, I use the current names. In the recitals, Operations sets out its wish to appoint South East as an undisclosed agent to carry out the "Business" on its behalf. Relevant expressions are defined—

". . .

'Business' means the property development business carried on by the Vendor and the goodwill and all other property, rights and assets of the Vendor in connection therewith subsisting on the Commencement Date.

'Commencement Date means the close of business on 31 October, 1991."

196. There is no other reference in the Agency Agreement to the Vendor; the context implies that South East was the Vendor.

197. Clause 2.1 sets out the appointment by Operations ("the Company") of South East ("the Agent") as the undisclosed agent of Operations to manage and conduct the Business. The duties of South East as agent are set out at Clause 2.2 to 2.6.

198. It is necessary to set out Clause 2.7 in full:

"2.7 (i) The Agent shall hold as from the Commencement Date to the order and account of the Company

(a) all real and other property of whatsoever nature and any estate or interest in any rights in over or connected with such property acquired by the Agent;

(b) the benefit of all contracts entered into by the Agent;

> (c) all sums standing to the credit of any bank account maintained by the Agent in its conduct of the Business ("Agency Property") to the intent that the beneficial ownership of the Agency Property shall be vested in the Company and not in the Agent which shall have no beneficial interest in any Agency Property and so that all profits accruing from the Business shall belong to the Company and not to the Agent. The Agent shall have full power and authority to deal with and dispose of Agency Property in any manner and for any purpose connected with the Business subject to any directions which it may receive from the Company from time to time.
>
> (ii) The Agent hereby undertakes to deposit with the Company on request all deeds and documents of title to any Agency Property."

199. It is also necessary to set out much of Clause 3:

> "3 Declaration of Trust
>
> 3.1 The Agent hereby declares and acknowledges that as from the Commencement Date it holds the legal title of all the real and other property and any estate or interest in any rights over or connected with such property vested in it on or prior to the Commencement Date ("Trust Assets") on trust for the Company absolutely.
>
> 3.2 The Agent hereby undertakes to deposit with the Company on request all deeds and documents of title to the Trust Assets but subject to any mortgages charges and liens over them.
>
> 3.3 [This provides for indemnification of the Agent by the Company.]"

200. Mr Gordon submitted that Clause 3 and the definition of a bare trustee in para 3 Sch 16 could not be more closely aligned.

201. In her Skeleton Argument, Miss McCarthy contended that an undisclosed agent was not necessarily the same as a bare trustee, and so para 3 Sch 16 did not necessarily apply. It was for the Appellants to satisfy the Tribunal that South East was not the purchaser. In this regard, HMRC were adopting a neutral position, subject to hearing the Appellants' explanations in relation to such matters as South East having been identified as "purchaser" on the [SDLT] self-certificates and initially in inter partes correspondence.

202. Having examined the terms of Clause 3 of the Agency Agreement, it appears to me that they are more restrictive than South East contends. Clause 3.1 refers to all the real property etcetera vested in the Agent on or prior to the Commencement Date. Thus the "Trust Assets" are limited to those held by the Agent as at the Commencement Date, 31 October 1991. The terms of the declaration of trust in Clause 3.1 do not extend to the acquisition of any property after the Commencement Date.

203. Thus Clause 3 has no relevance to the acquisition of the Land by South East on completion of the transfers of part dated 29 December 2006. Even though what is contained in Clause 3 is a bare trust falling within the definition in para 1 Sch 16, this does not assist South East in relation to its appeal.

204. The remaining question is the effect of the other provisions of the Agency Agreement. Nothing in the language in the remainder of that Agreement corresponds to the terms used in Clause 3. There is no declaration of trust as such in relation to the assets other than the "Trust Assets". The very fact that similar language is not used in respect of the conduct of the Business after the Commencement Date suggests that it was not the intention to declare a trust in relation to property acquired in the course of the conduct of the Business after that date. Further, any attempt to declare a trust in relation to subsequently acquired property would have encountered technical difficulties; see Underhill and Hayton: Law of Trusts and Trustees Chapter 3 Article 10.6-7:

> "**Expectancies or future property**
>
> [10.6] At law, assignments of property to be acquired in the future pass nothing. Thus, a gratuitous assignment of all X's 'right title and interest in and to all the dividends' which might be declared in respect of certain shares is an ineffective transfer of a mere expectancy. However, a gratuitous assignment of all X's 'right title and interest in and to an amount equal to 90% of the income which may accrue during a period of three years from the date hereof under a' specified licence agreement, providing for royalties to be paid by the licensee to the assignor, was held an effective transfer of presently existing property, namely 90% of that portion of the assignor's existing contractual rights entitling him to royalties at a fixed rate during the period (rather than the mere expectancy of 90% of such payments as might accrue due to the assignor during the period).
>
> [10.7] Equity, however, can regard assignments of expectancies, *if for value*, as contracts to assign the property when it comes into existence . . ."

205. Nowhere in the Agency Agreement (which was executed as a deed under seal) is any consideration specified. The commitment to carry on the Business after the Commencement Date on behalf of Operations is one imposed on South East by the Agency Agreement; no form of reward is payable by Operations.

206. My conclusion is that it was not possible for South East to declare a bare trust in favour of Operations to cover any property acquired after the Commencement Date. This is the reason for the difference in language between Clause 3 of the Agency Agreement and the rest of the terms of that Agreement. Also, the commitments under all those other provisions could not have been applied retrospectively to the Business as it stood as at the Commencement Date; in order for the pre-existing business assets to be held for the account of Operations, it was necessary for South East to declare itself a bare trustee for Operations in respect of those assets (specified as the "Trust Assets"). There was a distinct reason for dealing with the Trust Assets in a different way from anything else referred to in the Agency Agreement.

207. Although the Agency Agreement refers to Operations appointing South East "as its undisclosed agent to carry on and conduct the Business on behalf of [Operations]", the effect of the agreement is to appoint South East to act as agent for an undisclosed principal.

208. The underlying nature of an agency relationship is contractual, although this must be qualified, as stated in Bowstead and Reynolds on Agency (20th Edition) Chapter 6, Section 2, in particular paragraph 6-041, which considers the remedies where an agent is holding money for a principal. The question whether the agent holds as a trustee depends on the terms of the contract between principal and agent. If there is no express term, the intention to create a trust may be inferred:

> "the matter turns on the objective interpretation, according to general principles, of the intentions of the parties."

209. I do not consider the language of Clause 2.7(i)(a) of the Agency Agreement to be such as to imply a trust. The language of Clause 2.7(i)(c) goes somewhat further, but that sub-paragraph is only concerned with "all sums standing to the credit of any bank account in its conduct of the Business". The overall obligation placed on South East by Clause 2.7(i) is to hold the listed items "to the order and account of the Company" (ie Operations). I do not construe that as amounting to a declaration of trust in favour of Operations, particularly in light of the technical objection to such a declaration where it concerns unidentified assets to be acquired at unspecified times in the future. The obligation under Clause 2.7(ii) to deposit with Operations on request all deeds and documents of title to and Agency Property, even if that expression is construed to apply more widely than the definition appears to allow, also does not amount to a declaration of trust. It simply represents part of the Agent's obligation to account to the principal, Operations, for what is covered by the agency relationship.

210. For the same reasons, I am not satisfied that South East can be regarded as holding the Land as a nominee for Operations.

211. I acknowledge that South East is under an obligation to hold the Land "to the order and account of [Operations]", but that is not sufficient to constitute South East a bare trustee or nominee for Operations. As a result, para 3(1) Sch 16 does not apply to treat Operations as the purchaser under the "secondary contract" posited by s 45(3) FA 2003.

212. As South East, rather than Operations, is the party to be treated under s 45(3) as the purchaser, the liability to SDLT resulting from its acquisition of the Land remains with South East and is not displaced by the Agency Agreement.

213. At the hearing there was some suggestion that South East had made a mistake by identifying itself rather than Operations as purchaser on the self-certificates and in subsequent correspondence. Subsequently that suggestion was played down by Mr Howard on the basis that there was some ambiguity in the legislation which made the signature by South East explicable. As a result of my conclusions as to the effect of the Agency Agreement, I do not consider that South East made any mistake in identifying itself as the purchaser. I do not need to consider whether it was correct for South East to certify under s 79(3) FA 2003 that no land transaction returns were required for the three transactions resulting in the acquisition of the Land.

214. Another matter raised at the hearing, in the context of the arguments relating to determinations, was the reference in the accounts to South East's role. Mr Gordon

submitted that the accounts confirmed the existence of the bare trust. For the sake of completeness, I consider that to be incorrect. The reference in the accounts was to South East acting as an "undisclosed agent" of Operations. There was no mention of a bare trust. I have set out my comments as to the difference between the agency relationship and a bare trust or nominee relationship.

215. As I have found that the liability to SDLT in respect of the acquisition of the Land remains with South East, I dismiss South East's appeal and uphold the determination that it is liable to SDLT calculated on the total consideration of £32,382,120, in the sum of £1,295,284.80. It necessarily follows from this that the appeal of Operations must be allowed.

216. As I have arrived at that conclusion largely without reference to the parties, I think it appropriate to deal with the appeal of Operations, to allow for the possibility that my conclusion as to South East's liability might not be upheld. I therefore set out below my conclusions in respect of Operations, based on the points raised by both parties.

(c) The appeal of Operations

217. I begin this section of this decision by emphasising that it is based on the proposition that, contrary to my decision concerning South East, the Agency Agreement between South East and Operations had the effect of making South East a bare trustee or nominee for Operations in respect of the transactions resulting in the acquisition of the Land. To adopt language similar to that used by the Tribunal in *Vardy* at [67], discussion of the discovery issue would be unduly complicated by repeated references to the fact that it only applies if I am wrong in my conclusion that the Agency Agreement did not have that effect. Without prejudice to that conclusion, I approach the discovery issue on the basis that it did not, and I do not repeatedly refer to that premise throughout the following discussion.

218. As the assessment made on Operations was a discovery assessment, it was common ground between the parties that it was for HMRC to show that the conditions for making such an assessment had been fulfilled.

219. The argument for Operations was that the assessment was defeated by a procedural defect, being that it was made more than four years after the effective date of the transaction to which it related.

220. The main provisions relevant to the appeal are paras 28(1) and 31 Sch 10 (as they applied at the time of the discovery assessment):

> "ASSESSMENT WHERE LOSS OF TAX DISCOVERED
>
> **28**—
>
> (1) If the Inland Revenue 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."

"TIME LIMIT FOR ASSESSMENT

31—

(1) 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.

(2) An assessment of a person to tax in a case involving a loss of tax brought about carelessly by the purchaser or a related person may be made at any time not more than 6 years after the effective date of the transaction to which it relates (subject to sub-paragraph (2A)).

(2A) An assessment of a person to tax in a case involving a loss of tax—

(a) brought about deliberately by the purchaser or a related person,

(b) attributable to a failure by the person to comply with an obligation under section 76(1) or paragraph 3(3)(a), 4(3)(a) or 8(3)(a) of Schedule 17A, or

(c) . . .

may be made at any time not more than 20 years after the effective date of the transaction to which it relates.

. . ."

221. Miss McCarthy referred to para 28(1) Sch 10. The Appellants had admitted that Operations should have self-assessed and paid an amount of SDLT in excess of £1 million. Operations had not done so; Mr Kane had discovered this in September 2011. If Operations owed tax, there had been a "chargeable operation".

222. She referred to *Cenlon* at 794, where Viscount Simonds set out the wider meaning of discovery, and at 799-800, where Lord Denning expressed a similar view. She also referred to *Sanderson v Revenue and Customs Commissioners* [2013] UKUT 623 (TCC), [2014] STC 915 at [20]-[24].

223. In respect of the time limits for making a discovery assessment, HMRC relied primarily on para 31(2A) Sch 10; carelessness (as referred to at para 31(2) Sch 10) was HMRC's back-up point. In HMRC's submission there had been a failure by Operations to comply with its obligation under s 76(1) FA 2003 to deliver a return. That section imposed a strict liability on the purchaser. Now it was known that Operations was liable to tax, its purchase was notifiable. It did not fall within either of the exceptions set out in s 77(3)(a) and (b) FA 2003.

224. It was known as a result of the admission by Operations in respect of its substantive case that it should have made a return and paid tax. Miss McCarthy submitted that without more, this amounted to a failure by Operations to comply with s 76(1) FA 2003. This imposed an absolute obligation, and Operations fell within its terms. Thus there had been a failure by Operations.

225. The Appellants had argued that there was a need to establish a causal link, because the loss of tax needed to be attributable to that failure. Miss McCarthy referred to the two obligations under s 76(3) FA 2003. The obligation that had not been complied with was the obligation to make a return; this required a self-assessment and the payment of SDLT of over £1 million.

226. HMRC's argument was that the return which Operations should have made would have included both the self-assessment and the payment. Had the return been made, there would have been no tax loss because HMRC would have received payment.

227. Miss McCarthy commented on the Appellants' response to that argument. In their submission, if Operations had submitted a return, this would have been a nil return; at the time, Operations had been advised that it did not owe tax. (It may be necessary to return later to the factual issues, as there was a dispute concerning the obtaining of advice by Operations.)

228. The Appellants' submission amounted to this; HMRC could not make a discovery assessment based on para 31(2A)(b) Sch 10 because Operations would have submitted an incorrect return showing nil liability and HMRC would not be able to prove a loss of tax. Miss McCarthy submitted that the Appellants had to plead that there was no loss of tax, and would have to show the evidence. HMRC should not be required to prove a negative.

229. Even if the Appellants' submission could be made good, Miss McCarthy argued that it was wrong as a matter of law. The obligation on Operations was to make a correct return, not to make a return to the best of its knowledge and belief.

230. The Appellants based their argument as to loss of tax on *Knight v Inland Revenue Commissioners* [1974] STC 156 (CA). Miss McCarthy referred to the Court of Appeal's judgment at 166, which had used the words "the duty to make proper returns". The final sentence of the first full paragraph on that page approved the Crown's argument as to the meaning of the relevant legislation. She submitted that the equivalent SDLT provision was not asking the Tribunal to speculate what the return that Operations was under an obligation to make would have been like. There was no reference to whether it was reasonable or not. What the legislation was intended to catch was losses of tax attributable (in the present case) to the failure of Operations to make a correct return.

231. In HMRC's submission, the loss of tax attributable to the failure of Operations to make a correct return was the sum of over £1 million now in dispute.

232. This had to be the requirement and the true ambit of para 31(2A)(b). Otherwise it would be necessary to ask everyone to speculate what return would have been made, in circumstances where the relevant events had occurred ten years ago and no-one actually involved with the transactions was now available to give evidence as to the circumstances at that time. That was simply not what Parliament had intended.

233. Mr Gordon had argued that HMRC's view of para 31(2A)(b) could not be right because the taxpayer would be exposed to tax for 20 years. HMRC's response was that this was the consequence of the taxpayer owing significant amounts of tax without communicating with HMRC. The provision was precisely the mechanism for encouraging compliance with filing duties.

234. I take Mr Gordon's submissions out of their actual order. Following the debate on the first day concerning the order in which the parties should present their arguments, Mr Gordon was the first to make submissions as to the time limits for discovery assessments. I return later to his initial arguments on carelessness. In relation to para 31(2A)(b) Sch 10, he submitted that there were two distinct tests, both of which had to be proven. The first requirement was a failure to comply with the obligation under s 76(1) FA 2003. The second requirement was to show a loss of tax attributable to that failure. HMRC had to show that had there not been a failure to comply with s 76(1), inevitably tax would have been assessed.

235. Putting the Appellants' argument another way, if no tax would have been self-assessed anyway, there could be no loss of tax attributable to the failure to comply with s 76(1).

236. He argued that HMRC had wrongly elided the two tests and said that the lack of a return was sufficient. If that were the case, then para 31(2A) would have said it. It could be seen that Parliament had been clear to distinguish between cases where the lack of a return was sufficient and those where it was not. In the case of discovery assessments it was not sufficient, whereas for determinations it was. If HMRC were right, there would be no meaningful distinction between a determination, subject to a four year cap, and a discovery assessment subject to a 20 year cap.

237. The Appellants were not disputing the lack of a return by Operations. However, the causal link had not been proven, and could not be. Mr Gordon referred to *Knight* at 165-66, in which the Court of Appeal had accepted the Crown's submission; this was a twin test, as he had already argued. He made submissions on the evidence; I return later to issues of fact.

238. As to the time limit for making an assessment, in Mr Gordon's submission it was now beyond doubt that HMRC had the burden of proving that the conditions for making it had been complied with.

239. Before considering the facts, it is necessary for me to arrive at a conclusion on the interpretation to be placed on para 31(2A)(b) Sch 10. On the Appellants' argument, it is not sufficient merely to show that no return has been made under s 76(1) FA 2003; in addition, it must also be shown that the loss of tax is attributable to

the failure to make a return. I did not understand Miss McCarthy to be arguing that there was only one test; Mr Gordon's reference to HMRC eliding the two tests appears to me to relate to an argument on the facts, rather than on the meaning of the legislation. My conclusion on the construction of para 31(2A) is that it requires two tests to be met, as Mr Gordon argued.

240. The Appellants did not seek to argue that there had been no loss of tax. That argument would have been difficult for them to sustain, given the acknowledgment that the arguments for Operations were based purely on procedural points.

241. Putting to one side for the moment the question of the evidence necessary to show that no return was made, the further question of law is whether the application of the attribution test under para 31(2A)(b) Sch 10 requires consideration of the return which the taxpayer *would* have made, based on its view at the date on which the return should have been delivered, or of the return which the taxpayer *should* have made, based on the legislation as subsequently interpreted in tribunal and court decisions.

242. Both parties referred to *Knight*. In looking at the judgment of the Court of Appeal in that case, it is necessary to keep in mind that the events and assessments in that case preceded the self-assessment system. As a result, the failure of the taxpayer to make a return, or the failure to make a correct return, would have resulted in the Inland Revenue being unaware of the income in question so that they would not have been in a position to make the assessments which they would otherwise have been able to make had the taxpayer complied with his obligations.

243. The obligations under s 76 FA 2003 are specific. Section 76(1) requires the purchaser to deliver a return to HMRC before the end of the 30 day period after the effective date of the transaction. Section 76(3)(a) requires the return to include a self-assessment of the tax that, on the basis of the information contained in the return, is chargeable in respect of the transaction. Section 76(3)(b) requires the return to be accompanied by payment of the amount chargeable.

244. None of the language used in s 76 FA 2003 refers to the state of mind of the purchaser, or to any requirement for the return to be correct. Such issues are left to be dealt with by enquiries under Sch 10. This is a necessary consequence of a self-assessment system.

245. Thus the consequences of an incorrect return are left to be dealt with by means of an enquiry, or, in appropriate circumstances, a discovery assessment. Where a discovery assessment is made in circumstances where a purchaser has delivered a return, the restrictions in para 30 Sch 10 apply to the making of such an assessment. That paragraph does not apply in a case where no return has been delivered.

246. Thus speculation as to what the contents of a return would have been would be inconsistent with the general nature of the self-assessment system. The simple question raised by para 31(2A) Sch 10 is: did the purchaser fail to comply with an obligation under s 76(1) FA 2003?

247. If such a failure is established, and it is also established that SDLT would have been payable in accordance with the obligation in s 76(1) FA 2003 as supplemented by s 76(3), then both of the tests imposed by para 31(2A) Sch 10 are satisfied and the extended time limit of 20 years for making a discovery assessment applies.

248. On the question of the effect of subsequent decisions of the tribunals and the courts, the generally acknowledged principle is that except for matters treated as closed, the law as interpreted in such decisions applies to events and transactions which occurred before the date on which any such decision was published, as well as to later events and transactions. Given the general nature of that principle, I do not think it necessary for me to refer to any authority on that issue.

249. My conclusion is that what the attribution test under para 31(2A)(b) Sch 10 requires is consideration of the return and payment which the purchaser should have made, based on the legislation as subsequently interpreted in tribunal and court decisions. Thus it is not necessary to look at the question of what the purchaser may or may not have thought at the time, or to review the advice, if any, which the purchaser may have taken concerning possible liability to SDLT. (The "practice generally prevailing" exemption afforded by para 30(5) Sch 10 is only available where a return has been made; see para 30(1).)

250. In the light of that conclusion, I review the questions of fact raised by this appeal.

251. The first question is whether Operations failed to make a return. I am satisfied from the evidence of Mr Kane as set out in his witness statement and as supplemented by his oral evidence that Operations did not make a return. It became apparent from Mrs Carle's letter dated 29 September 2011 that, on the basis of the Agency Agreement, it was Operations that should be considered to be the purchaser. HMRC's investigations had already shown that there had been no return in respect of the acquisition of the Land. It follows that Operations did not make a return; Mr Kane specifically referred to this in his letter dated 11 October 2011 to Mrs Carle, under the heading "Alternative Proposition":

> "It is interesting to note that Operations did not publicly identify themselves as purchaser relying instead upon their nominee South East. That opens a can of worms in that it is our view that SDLT is due on the purchase of the Property and if one accepts the proposition that the correct party to the transaction upon whom the charge falls is Operations that company has not made a return to Stamps Office."

252. The next question is the amount of the tax. In the discovery assessment dated 12 October 2011, signed by "J Price", the consideration for the acquisition for the acquisition of the Land was shown as £32,382,145, and the SDLT calculated at 4 per cent on that consideration was shown as £1,295,285.80. There is a discrepancy between these figures and those previously applied in making the determinations served on Wainscott and South East. As set out in the "background facts" above, the actual consideration was £32,382,120. The SDLT as shown in the determinations was £1,295,284.80. I find that the figures which should have been used in the discovery

assessment are those set out in the determinations, namely consideration of £32,382,120, and SDLT of £1,295,284.80.

253. I further find that the amount of SDLT which should have been set out by Operations in a self-assessment return made in accordance with s 76(1) and (3)(a) FA 2003 is £1,295,284.80, and that that was also the amount chargeable to be paid as specified in s 76(3)(b).

254. On the question whether Mr Kane had made a discovery, Mr Gordon did not seek to dispute the newness of the information provided to Mr Kane by Mrs Carle in September 2011. Mr Gordon referred to *Sanderson* at [20]-[21]; Newey J had cited *Charlton v Revenue and Customs Commissioners* [2012] UKUT 770 (TCC), [2013] STC 866 at [37] referring to the need for an officer to be acting honestly and reasonably.

255. In cross-examining Mr Kane, Mr Gordon sought to show that by keeping the determinations in force at the same time as making the discovery assessment, Mr Kane had not come to a settled view as to the liability of Operations to SDLT. In his response, Mr Kane declined to approach matters of the respective parties' liability according to mathematical probabilities. On the basis of his letter to Mrs Carle dated 11 October 2011 (immediately before the discovery assessment dated 12 October) I am satisfied that he was seeking to protect HMRC's position by making the discovery assessment. The relevant part of that letter stated:

> "On the assumption that your assertion as to the invalidity of the determination on South East is correct and taking on board the revelations regarding the identity of the purchaser I am left with the alternative to issue a discovery assessment on Operations. Such an assessment on the basis of Operations [*sic*] failure to notify HMRC of the land transaction."

256. Although Mr Kane indicated in his subsequent letter to Mrs Carle dated 3 November 2011 that he had given instructions to cancel the determination made on South East (an instruction which he subsequently decided on further reflection to cancel, so that the determination remained in force), that letter post-dated the discovery assessment.

257. I do not consider that the making of a discovery assessment in circumstances where the identity of the person or entity liable to tax remains uncertain, but where there is certainty in the view that one of the relevant parties is so liable, can be regarded as failing to meet the conditions in para 28(1) Sch 10. Nor in my view does it suggest that the officer is not acting honestly and reasonably. Transactions or schemes may work in alternative ways; see *Howard Peter Schofield v Revenue and Customs Commissioners* [2011] UKUT 306 (TCC) at [34]. It is entirely understandable for HMRC to seek to keep their respective options open; the outcome may remain uncertain until the matter is determined, as illustrated by the conclusions in this decision.

258. In relation to determinations, I have pointed out that they are to be made by "the Inland Revenue" (now HMRC). The position for discovery assessments under para 28 Sch 10 is the same; there is no reference to an individual officer. The reference to the Inland Revenue is more akin to the words "or the Board" in s 29(1) TMA. Despite this difference, it is necessary for HMRC as a body to meet the same tests in relation to discovery assessments under para 28 Sch 10 as those which have been determined to apply to discovery assessments under s 29 TMA.

259. There was a considerable amount of evidence to which I have not found it necessary to refer either specifically or generally. Although Miss McCarthy provided an extensive set of suggested findings of fact, I have referred only briefly to certain matters from that document in the context of the discovery assessment.

260. My conclusion on the facts is that the discovery assessment was properly made under para 28 Sch 10 and met the time limit under para 31(2A) Sch 10. I am satisfied that HMRC have discharged the burden of proving that the conditions were met. Thus if my decision that the liability to SDLT falls on South East cannot stand, that liability instead falls on Operations. Subject to the adjustment of the consideration to £32,382,120 and of the SDLT to £1,295,284.80, I would in such circumstances uphold the discovery assessment.

261. On the basis of that conclusion, I do not think it necessary to deal with the extensive submissions of the parties on HMRC's "back-up point" by reference to para 31(2) Sch 10 concerning loss of tax brought about carelessly. Those submissions raised difficult issues, and as my decision relating to the appeal of Operations is made purely to allow for the possibility that my decision on South East's appeal might not be upheld, I do not consider it justifiable to extend this decision by addressing those issues.

Conduct of the appeals

262. I wish to comment on the conduct of the appeals. The basis on which the parties approached the appeals, with the Appellants relying principally on procedural issues, resulted in evidence being provided at a late stage by both parties. Elements of the Appellants' case were not apparent until the actual hearing. This affected the length of the hearing, which had been listed for two days. It became clear on the second morning that an extra day would be required. The sittings on the second and third days were extended, as there was concern that the Tribunal would run out of time to deal with the appeals. I hope that such difficulties can be avoided in future appeals by clearly identifying in advance the issues and the evidence required to deal with those issues, so that the time required for hearings can be properly assessed and planned for in advance.

Outcome of the appeals

263. The appeal of Wainscott is allowed and the determination served on Wainscott is set aside. The appeal of South East is dismissed and the determination served on

South East is upheld. The appeal of Operations against the discovery assessment is allowed.

Right to apply for permission to appeal

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

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 1 FEBRUARY 2017