Neutral Citation: [2023] UKFTT 626 (TC)

Case Number: TC08863

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2019/01947

INHERITANCE TAX – the deceased entered into an agreement to sell her home to the trustees of a trust for the benefit of her children and in which she held an interest in possession – the consideration for the sale was the issue of a note by the trustees with a face value equal to the market value of her home at the time when the sale agreement was executed – the trustees resolved to allow the deceased to continue to reside in her home upon payment of outgoings - the deceased then made a gift of the note to the trustees of a trust for the benefit of her children and under which she was precluded from benefiting – the deceased died more than seven years after that gift – held that, in valuing the deceased's estate for the purposes of inheritance tax, the liability under the note should be abated to nil because Section 103 of the Finance Act 1986 (the "FA 1986") applied – accordingly, the appeal should be dismissed – other matters considered included whether the agreement to sell was void under Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, whether the agreement to sell was effective to convey beneficial ownership of the property to the trustees despite the fact that it had not been completed, the impact of the note in relation to the application of Section 49 of the Inheritance Tax Act 1984 and in the light of the decision in St Barbe Green and the application of Section 102 of the FA 1986 to the gift of the property and the gift of the note

Heard on: 22, 23, 24 and 25 May 2023
Judgment date: 14 July 2023

Before

TRIBUNAL JUDGE TONY BEARE
MR MICHAEL BELL

Between

THE EXECUTORS OF MRS LESLIE VIVIENNE ELBORNE
THE TRUSTEES OF THE ELBORNE LIFE SETTLEMENT
THE TRUSTEES OF THE ELBORNE FAMILY SETTLEMENT Appellants
and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr Charles Bradley of counsel, instructed by Buckles Solicitors LLP

For the Respondents: Mr Jonathan Davey KC and Ms Barbara Belgrano of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision relates to appeals against notices of determination which were issued by the Respondents to the executors of Mrs Leslie Vivienne Elborne on 2 February 2017 under Section 221 of the Inheritance Tax Act 1984 (the "IHTA"). The appeals concern the inheritance tax consequences of certain transactions which were implemented by Mrs Elborne in 2003. Those transactions were executed as part of an arrangement which is commonly known as a "home loan scheme".

2. We set out in greater detail below the precise form which the home loan scheme took in Mrs Elborne's case but, in short, it involved:

(1) the disposal by Mrs Elborne of the property in which she lived, Old Rectory, Main Street, Seaton, Oakham, Rutland (the "Property") to the trustees of a settlement in which Mrs Elborne had an interest in possession (the "Life Settlement") in exchange for a promissory note (the "Note") which was issued by the trustees of the Life Settlement;

(2) the subsequent assignment of the Note by Mrs Elborne by way of gift to the trustees of a settlement under which she was excluded from benefiting and her children had interests in possession (the "Family Settlement"); and

(3) Mrs Elborne's continuing to live in the Property, rent-free, until her death more than seven years after the assignment of the Note.

3. The Appellants submit that the inheritance tax consequences of the above transactions were straightforward and were as follows:

(1) Mrs Elborne's assignment of the Note to the trustees of the Family Settlement was a potentially exempt transfer (or "PET") which would have been chargeable to inheritance tax had she died within the seven years following the assignment (although, as events transpired, she did not); and

(2) on Mrs Elborne's death, the Property was deemed to form part of her estate by virtue of her interest in possession in the Life Settlement but, in determining the value of her estate for inheritance tax purposes, a deduction should be allowed for the value of the liability under the Note for the trustees of the Life Settlement.

4. The result of the above, say the Appellants, is that the transactions comprising the home loan scheme had the effect of reducing the value of Mrs Elborne's estate for inheritance tax purposes at the time of her death by an amount equal to the value of the liability under the Note at that time, which was broadly equal to the value of the Property at the time when the transactions comprising the scheme were implemented.

5. Unsurprisingly, the Respondents do not take as sanguine a view of the inheritance tax consequences of the relevant transactions as the Appellants. This is for various alternative reasons on which we will elaborate in due course. It suffices to say at this stage that the gist of the Respondents' position is that there should be no deduction for the value of the liability under the Note when it comes to valuing Mrs Elborne's interest the Property or, alternatively, that the Note should be taken to form part of Mrs Elborne's estate for inheritance tax purposes at the time of her death.

THE LEGISLATION – THE BASIC PROVISIONS

6. The provisions of the inheritance tax legislation which are relevant to this decision are set out in the IHTA, the Finance Act 1986 (the "FA 1986") and the Finance Act 2004 (the "FA 2004").

7. Section 1 of the IHTA charges inheritance tax on the value transferred by a chargeable transfer.

8. Pursuant to Section 3 of the IHTA, a transfer of value is a disposition made by a person as a result of which the value of his or her estate immediately after the disposition is less than it would be but for the disposition. Section 3(1) of the IHTA provides that, "[subject] to the following provisions of this Part of this Act, a transfer of value is a disposition made by a person (the transferor) as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer."

9. Section 4(1) of the IHTA ("Section 4") provides that, "[on] the death of any person tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death."

10. The word "estate" is defined in Section 5 of the IHTA ("Section 5"). So far as relevant, that section provides as follows:

"(1) For the purposes of this Act a person's estate is the aggregate of all the property to which he is beneficially entitled…

(3) In determining the value of a person's estate at any time his liabilities at that time shall be taken into account, except as otherwise provided by this Act.

(5) Except in the case of a liability imposed by law, a liability incurred by a transferor shall be taken into account only to the extent that it was incurred for a consideration in money or money's worth."

11. Section 49(1) of the IHTA ("Section 49") provides as follows:

"(1) A person beneficially entitled to an interest in possession in settled property shall be treated for the purposes of this Act as beneficially entitled to the property in which the interest subsists."

12. Section 268 IHTA 1984 ("Section 268") is headed "Associated operations" and provides as follows:

"(1) In this Act "associated operations" means, subject to subsection (2) below, any two or more operations of any kind, being—

(a) operations which affect the same property, or one of which affects some property and the other or others of which affect property which represents, whether directly or indirectly, that property, or income arising from that property, or any property representing accumulations of any such income, or

(b) any two operations of which one is effected with reference to the other, or with a view to enabling the other to be effected or facilitating its being effected, and any further operation having a like relation to any of those two, and so on,

whether those operations are effected by the same person or different persons, and whether or not they are simultaneous; and "operation" includes an omission….

(3) Where a transfer of value is made by associated operations carried out at different times it shall be treated as made at the time of the last of them; but where any one or more of the earlier operations also constitute a transfer of value made by the same transferor, the value transferred by the earlier operations shall be treated as reducing the value transferred by all the operations taken together, except to the extent that the transfer constituted by the earlier operations but not that made by all the operations taken together is exempt under section 18 above."

13. Section 272 of the IHTA contains certain definitions which are relevant to the above provisions. It provides, inter alia, that:

"In this Act, except where the context otherwise requires,—

"amount" includes value;…

"disposition" includes a disposition effected by associated operations;

"estate" shall be construed in accordance with sections 5, 55 and 151(4) above;

"incumbrance" includes any heritable security, or other debt or payment secured upon heritage;…

"land" does not include any estate interest or right by way of mortgage or other security;…

"property" includes rights and interests of any description but does not include a settlement power; ..."

14. For ease of reference, the remaining statutory provisions which are pertinent to the issues in this decision are set out at the start of the section of this decision to which they are relevant.

THE FACTS

15. The relevant facts in this case are not in dispute and are as follows:

(1) prior to 27 November 2003, Mrs Elborne lived at, and was the freehold owner of, the Property;

(2) by a deed dated 27 November 2003 and headed the "Elborne Life Settlement", Mrs Elborne created the Life Settlement. The trustees of the Life Settlement were Mrs Elborne and her solicitor, Mr Stephen Woolfe of the law firm Harvey Ingram Owston. The deed creating the Life Settlement included provisions to the following effect:

(a) the initial trust fund was the sum of £10 (clause 1.1(a) and the schedule);

(b) the life tenant was Mrs Elborne (clause 1.4);

(c) the "Beneficiaries" were (i) the life tenant; (ii) the children and descendants of the life tenant: (iii) the spouses and former spouses of the persons falling within paragraph (ii) above; and (iv) any person or class of persons added by the trustees in writing (clause 1.5);

(d) subject to the overriding powers of the trustees, the trustees would pay the income of the trust fund to the life tenant during her lifetime and, subject to that, the trustees would pay or apply the income of the trust fund to or for the benefit of such one or more of the Beneficiaries as the trustees thought fit (clause 3);

(e) the power to appoint new trustees was vested in the life tenant during her lifetime (clause 10.1), and the life tenant could, during her lifetime, remove any trustee (clause 10.3);

(f) the ultimate default beneficiaries were the life tenant's children (clause 5); and

(g) the trustees had the power to permit "any Beneficiary to occupy or enjoy all or part of the Trust Fund on such terms as they think fit" (clause 19);

(3) by a document dated 27 November 2003 and headed "Agreement" (the "Sale Agreement") Mrs Elborne (as seller) agreed to sell the Property to the trustees of the Life Settlement. The Sale Agreement provided that:

(a) Mrs Elborne would sell, and the trustees of the Life Settlement would buy, the Property for a purchase price of £1.8 million, the whole of which was payable as a deposit on the date of the Sale Agreement, leaving a balance due on completion of £nil;

(b) the purchase price would be fully satisfied by the trustees' issuing the Note to Mrs Elborne and the Note was to be in the form attached to the Sale Agreement;

(c) the Standard Conditions of Sale (Third Edition) (the "Standard Conditions") were incorporated in the Sale Agreement provided that, where there was a conflict between the terms of the Sale Agreement and the terms of the Standard Conditions, the former would prevail.

(The provisions of the Standard Conditions which are potentially relevant for present purposes were that:

(i) except on a sale by auction, the deposit was to take the form of a banker's draft or cheque (Standard Condition 2.2.1);

(ii) the deposit would be paid to the solicitors for the seller, acting as stakeholder on terms that it would be paid to the seller with accrued interest on completion (Standard Condition 2.2.3); and

(iii) the seller was under no obligation to the buyer to insure the property (Standard Condition 5.1.3));

(4) in a document dated 27 November 2003, the trustees of the Life Settlement passed a resolution headed "Trustees' Resolution" (the "Life Settlement Trustees' Resolution"). In the Life Settlement Trustees' Resolution, the trustees of the Life Settlement recorded that Mrs Elborne had offered to meet any stamp duty liability which might be incurred by the trustees in relation to the sale of the Property and resolved, inter alia:

(a) to retain the initial trust fund of £10 in cash and hold it with the original documents;

(b) to purchase the Property for £1.8 million, to be satisfied by the issue of the Note in the form attached to the Life Settlement Trustees' Resolution;

(c) to allow Mrs Elborne to occupy the Property rent-free during her lifetime for as long as she desired, subject to meeting the outgoings relating to the Property, including insurance, until further notice; and

(d) to appoint Harvey Ingram Owston as the nominated person for exchange of contracts;

(5) the Note was dated 27 November 2003. The terms of the Note provided that:

(a) Mrs Elborne was the holder of the Note;

(b) the Note was unsecured;

(c) the Note did not carry any interest;

(d) the Note was freely transferable by the holder of the Note from time to time;

(e) the Note was repayable on the occurrence of one of the specified events of default or on demand by the Noteholder thirty days after the later of the death of Mrs Elborne or the date falling six months after the date of issue of the Note;

(f) the amount to be repaid was to be any of the following at the discretion of the holder of the Note:

(i) the nominal amount of the Note, index-linked by reference to changes in the retail prices index over the period between the date of issue and the month preceding the date of repayment;

(ii) the nominal amount of the Note; and

(iii) the market value of the Note at the date of issue;

(6) Mrs Elborne executed a letter of wishes to the trustees of the Life Settlement dated 27 November 2003. The letter provided, inter alia, as follows:

"Following my death I intend that the trust fund be wound up and distributed to my children equally….

It is also my wish that [the Property] should not be sold until appropriate arrangements have been made for the care and comfort of my husband Robert Edward Monckton Elborne";

(7) by a deed dated 8 December 2003 and headed the "Elborne Family Settlement", Mrs Elborne created the Family Settlement. The trustees of the Family Settlement were Mrs Elborne's three children, Mr Mark Edward Monckton Elborne, Mrs Charlotte Julia Mary Beare and Mr William Henry Alexander Elborne (together, the "Children"). The deed creating the Family Settlement included provisions to the following effect:

(a) the initial trust fund was the sum of £10 (clause 1.1(a) and the schedule);

(b) the "principal beneficiaries" were the Children (clause 1.4);

(c) the "beneficiaries" were (i) the Children; (ii) the descendants of the Children; (iii) the spouses and former spouses of the Children; and (iv) any person, other than Mrs Elborne or her spouse, or class of persons added by the trustees in writing (clause 1.5);

(d) the trustees had overriding powers of appointment (clause 5);

(e) the ultimate default beneficiaries were the Children (clause 6); and

(f) during her lifetime, Mrs Elborne had the power to appoint and remove trustees (clause 11);

(8) Mrs Elborne executed a letter of wishes to the trustees of the Family Settlement dated 8 December 2003. The letter provided, inter alia, as follows:

"Following my death I intend for the trust fund to be wound up and distributed to my children Mark Edward Monckton Elborne, Charlotte Julia Mary Beare and William Henry Alexander Elborne equally…";

(9) Mrs Elborne and the trustees of the Family Settlement entered into a deed of assignment in relation to the Note dated 8 December 2003 (the "Assignment"). Under the terms of the Assignment, Mrs Elborne assigned the Note for no consideration to the trustees of the Family Settlement with the intent that the Note should be held on the trusts and with and subject to the powers contained in the Family Settlement;

(10) in an undated document executed by the trustees of the Family Settlement but not by the trustees of the Life Settlement (the "Notice of Assignment"), the former purported to give notice to the latter that the Note had been assigned to them and asked the latter to acknowledge receipt of the notice by countersigning it;

(11) in a document dated 8 December 2003, the trustees of the Life Settlement passed a resolution headed "Trustees' Resolution" (the "Family Settlement Trustees' Resolution"). In the Family Settlement Trustees' Resolution, the trustees of the Family Settlement resolved, inter alia:

(a) to retain the initial trust fund of £10 in cash and hold it with the original documents;

(b) to acknowledge receipt of the Note as an asset of the Family Settlement; and

(c) to register a restriction over the Property in order to protect the interests of the Family Settlement;

(12) notwithstanding the terms of the Family Settlement Trustees' Resolution, no restriction was registered over the Property. In fact, no such restriction could have been so registered as the Property was not registered land at the relevant time;

(13) on or around 15 November 2006, Mrs Elborne executed and sent to the Respondents an election under paragraph 21(2) of Schedule 15 to the FA 2004 dated 9 November 2006. In the election, Mrs Elborne stated that the legal owners of the Property were Mr Woolfe and herself (the trustees of the Life Settlement) and that the nature and extent of her interest in the Property was as life tenant under the Life Settlement;

(14) in her covering letter accompanying the election, dated 3 November 2006, Mrs Elborne stated that she wanted to make it clear that:

(a) the provisions of that schedule would not apply to her in respect of the Property in the then current and subsequent tax years; but

(b) the Property was to be treated for the purposes of Part 5 of the FA 1986 as property subject to a reservation and Sections 102(3) and (4) of the FA 1986 would apply but only insofar as she was not beneficially entitled to an interest in possession in the Property;

(15) on or around 27 January 2007, a Ms Sue Moore, the representative of Mrs Elborne, sent to the Respondents on behalf of Mrs Elborne a revised election under

paragraph 21(2) of Schedule 15 to the FA 2004 dated 24 January 2007 to replace the election previously submitted on the basis that it contained an error. In the revised election, the legal owner of the Property was stated to be solely Mrs Elborne herself and, in her covering letter accompanying the revised election, dated 27 January 2007, Ms Moore stated that the covering letter sent on 15 November 2006 still stood. The revised election, together with terms of the original letter, are referred to in the rest of this decision as the "Election";

(16) on 11 August 2010, Mrs Elborne executed her final will. In her will, Mrs Elborne made reference to the Property as follows:

"4 SEATON OLD RECTORY

I DECLARE to my children Charlotte Julia Mary Beare Mark Edward Monckton Elborne and William Henry Alexander Elborne that I have given significant thought and consideration to the disposition of Seaton Old Rectory and I have concluded that it should pass equally between them because it is the fairest solution".

In addition under her will, Mrs Elborne left various specific chattels legacies and pecuniary legacies and provided that the residue of her estate was to devolve to the Children in equal shares;

(17) Mrs Elborne continued to reside at the Property until her death on 6 January 2011. At the time of her death, the legal title to the Property had not yet been conveyed to the trustees of the Life Settlement by way of completing the Sale Agreement;

(18) on 21 February 2011, Mr Woolfe consulted Mr Thomas Dumont of counsel in relation to the inheritance tax position following Mrs Elborne's death. In the instructions to counsel, Mr Dumont was asked whether the Note had to be repaid or whether "it can now be forgiven in the circumstances where the beneficiaries of the two Trusts are identical?". In the note which he prepared on 21 April 2011 following the conference, Mr Dumont advised, inter alia, as follows in relation to that question:

"I do not advise re-paying the [Note] at this stage. While there are unresolved challenges to these sorts of arrangements, it makes no sense to take any irrevocable or irreversible step. It may well be, when the correct analysis is eventually laid down by a court or tribunal, that the appropriate way to deal with the [Note] will not involve any repayment or even formal release of it";

(19) notwithstanding the terms of the Sale Agreement:

(a) on 19 March 2012, legal title to the Property was registered at HM Land Registry in the name of Mrs Elborne's executors;

(b) on 11 May 2012, the executors transferred the Property to unrelated third parties, a Mr and Mrs Machin, for £1.85 million; and

(c) on 17 May 2012, Mr and Mrs Machin were registered as the proprietors of the Property at HM Land Registry;

(20) at the present time, the Note remains undischarged, in accordance with the advice of Mr Dumont;

(21) Mrs Elborne's executors submitted an inheritance tax account (with supporting schedules) to the Respondents on 1 August 2011. In the account, the executors reported that:

(a) Mrs Elborne had had an interest in possession in the Property, which had come to an end upon her death, whereupon the Property passed to the residuary beneficiaries;

(b) Mrs Elborne's estate therefore included the Property, which had a value of £1.8 million;

(c) the Property was subject to a mortgage in the amount of £1.8 million and in the form of the Note to the trustees of the Family Settlement;

(d) the Note had been issued to Mrs Elborne by the trustees of the Life Settlement on 27 November 2003 and had been assigned by Mrs Elborne to the trustees of the Family Settlement on 8 December 2003;

(e) the Note had "an original and capital value" at the date of Mrs Elborne's death of £1.8 million; and

(f) the net asset value in the Life Settlement at the date of Mrs Elborne's death was therefore nil;

(22) on 2 February 2017, the Respondents issued the notices of determination which are the subject of this decision;

(23) on 2 March 2017, the Appellants appealed against the notices of determination;

(24) on 24 December 2018, the Respondents issued their view of the matter letters to the Appellants, which upheld the notices of determination;

(25) on 6 March 2019, following a request by the Appellants for a review of the Respondents' decision, the Respondents issued their review conclusion letter upholding the notices of determination; and

(26) on 29 March 2019, the Appellants submitted their notices of appeal against the notices of determination, as upheld in the review conclusions letter.

THE WITNESS EVIDENCE

16. We were provided with an expert report from Mr Brian Watson, a fellow of the Institute and Faculty of Actuaries, who had been asked by the Respondents to calculate a value for the Note on the date of its issue. In his report, Mr Watson concluded that the Note would have had a value to a prospective purchaser on the date of its issue of no more than £583,500. The Appellants did not seek to challenge that valuation and, for the purposes of this decision, we are content to accept it. The key point for present purposes is that the value of the Note to a prospective purchaser on the date of its issue was considerably less than the nominal value of the Note or the market value of the Property on that date.

17. We were also provided with a witness statement and oral evidence from Mr Mark Elborne, one of the Children and therefore a beneficiary of both the Life Settlement and the Family Settlement, a trustee of the Family Settlement and an executor under Mrs Elborne's will.

18. Mr Elborne testified that:

(1) the sole purpose in implementing the home loan scheme had been to remove the value of the Property from his mother's estate assuming that she was able to survive for more than seven years following the implementation of the scheme;

(2) although the transactions making up the scheme were motivated solely by the desire to save inheritance tax, it was the intention of the parties at the time of implementing the scheme that the transaction documents would be adhered to;

(3) at the time when the scheme was implemented, it was intended that his mother would be able to continue residing in the Property until her death and that, following her death, the Note would be repaid out of the proceeds of sale of the Property;

(4) following his mother's death, Mr Woolfe had taken the advice of Mr Dumont in relation to the scheme and the inheritance tax position in general and Mr Dumont's advice had been that the Note should not be repaid until the current proceedings came to an end and the legal analysis became clearer;

(5) in relation to the implementation of the scheme, he and his siblings had relied throughout on the advice of Mr Woolfe, who was the family's solicitor, and on the conveyancing team in Mr Woolfe's law firm, who had been responsible for the steps taken in relation to the Property following his mother's death. Although he was a solicitor, he had no expertise in tax matters and he did not consider that he needed to understand the details of the scheme;

(6) he had executed each of the deed creating the Family Settlement, the Assignment, the Notice of Assignment and the Family Settlement Trustees' Resolution at some point at the end of January or in early February of 2004 when Mr Woolfe had sent those documents to him. Accordingly, he had executed them some time after 8 December 2003, which was the date which appeared on the three of those documents which had been dated. He had not been responsible for dating the documents and he did not know who had done so;

(7) he also could not explain why the Family Settlement Trustees' Resolution included a resolution to register a restriction over the Property when the Property was unregistered and therefore that was impossible. He accepted that the trustees of the Family Settlement had not taken any steps to preserve the value of the trust fund by ensuring that the Note could be enforced but he did not think that was necessary given that all of the parties to the arrangement apart from Mr Woolfe were members of the family and Mr Woolfe was the family's solicitor;

(8) he was also unable to explain why, following his mother's death, the Property had been registered in the names of Mrs Elborne's executors before being sold to Mr Machin. He said that, at the point when this had been done he had not thought about whether those steps were consistent with the terms of the previously-executed documents and simply relied on the conveyancing team at Mr Woolfe's firm to get things right;

(9) there had never been any formal meeting of the trustees of the Family Settlement although he and his siblings did get together from time to time; and

(10) he had no idea as to whether the initial trust fund of £10 in the Family Settlement had been paid by his mother as settlor of the Family Settlement or whether it had been retained with the transaction documents.

FINDINGS OF FACT

19. It may be seen from the description of the facts and the witness evidence set out above that the essence of the home loan scheme as it was conceived to operate was relatively straightforward. It involved Mrs Elborne's removing the value of the Property from her estate for inheritance tax purposes whilst continuing to live in the Property until she died by the simple expedient of transferring the Property to a trust (the Life Settlement) in which she had an interest in possession in return for the creation of a debt (the Note) with a nominal amount equal to the value of the Property and then disposing of the Note by way of gift to another trust (the Family Settlement) and surviving for seven years so that that gift was not

taken into account for inheritance tax purposes when she died. At the heart of the scheme was the fact that the Property at all times remained within Mrs Elborne's estate for inheritance tax purposes because of her interest in possession in the Life Settlement (as a result of the deeming in Section 49 of the IHTA) but the existence of the Note meant that the value of that interest was reduced by the value of the liability under the Note.

20. It was implicit in the scheme as so described that, when Mrs Elborne died:

(1) the Property would be sold by the Life Settlement to third parties;

(2) as legal title to the Property would be vested in Mrs Elborne's executors, completion of the transfer to the third party purchasers of the Property would necessarily involve the execution of a legal transfer of the Property from the executors to those third party purchasers;

(3) no consideration would pass to the executors or to the Children in their capacity as beneficiaries under Mrs Elborne's will because of the prior execution of the Sale Agreement and the payment in full by the trustees of the Life Settlement of the consideration for the Property by the issue of the Note;

(4) the trustees of the Life Settlement would use the proceeds of sale to discharge the Note;

(5) any excess in the value of the Property at that time over the amount at which the Note was to be discharged would be distributed by the trustees of the Life Settlement to the Children as the beneficiaries under the Life Settlement; and

(6) the amount at which the Note was discharged would be distributed by the trustees of the Family Settlement to the Children as the beneficiaries under the Family Settlement.

21. Unfortunately, however, the scheme as it was in fact executed did not follow that simple path. The many departures included the fact that:

(1) although the deed creating the Family Settlement, the Assignment and the Family Settlement Trustees' Resolution each bore the date of 8 December 2003, they were not in fact executed on that date. Instead, Mr Woolfe sent the relevant document to each of the signatories in turn by post so that they executed the relevant documents at some point after that date. Mr Elborne said that he did not know when his siblings had executed the documents but each of them had executed them at different times and in different places and he had done so in late January or early February 2004;

(2) the Notice of Assignment, which Mr Elborne said he had executed at around the same time as the deed creating the Family Settlement, the Assignment and the Family Settlement Trustees' Resolution, was undated and was not executed by the trustees of the Family Settlement despite the request for them to acknowledge the transfer;

(3) the Assignment recorded that:

(a) it was executed on 8 December 2003;

(b) that was the same day as the deed creating the Family Settlement; but

(c) it was being executed after that deed had been executed.

None of those statements was true. Mr Elborne in his evidence said that he recalled executing the Assignment before the deed creating the Family Settlement because the latter had mistakenly been omitted from the initial letter enclosing the documents which had been sent to him by Mr Woolf;

(4) Mr Elborne, despite being one of the assignees of the Note under the Assignment in his capacity as trustee of the Family Settlement, purported to execute the Assignment as "Assignor";

(5) although the trustees of the Family Settlement resolved to register a restriction over the Property, that was never effected and could not have been effected because the Property was unregistered land;

(6) notwithstanding the fact that, under the terms of the documents as already executed, Mrs Elborne no longer had the power to dispose of the Property under her will, Mrs Elborne's will contained a clause setting out the manner in which she wished the Property to be dealt with following her death; and

(7) notwithstanding the fact that, at the time of her death, Mrs Elborne had previously contracted to sell the Property to the trustees of the Life Settlement and received the consideration for that sale in full, following Mrs Elborne's death, her executors became the registered owners of the Property and purported to sell the Property to third parties and retain the proceeds of sale.

22. Those differences between the manner in which the scheme in fact unfolded and the manner in which the scheme was intended to operate have done nothing to assist the Appellants' case. Nor does the fact that the Note remains unpaid more than ten years after Mrs Elborne's death. Inevitably, although they stopped short of alleging that the documents were shams, the Respondents invited us to find that there was never any intention on the part of the parties who were involved in implementing the scheme to comply with the terms of the scheme documents. Mr Davey pointed out that:

(1) notwithstanding the terms of the Sale Agreement:

(a) the Sale Agreement had never been completed so that, at Mrs Elborne's death, she remained the legal owner of the Property;

(b) the trustees of the Life Settlement never became the registered proprietors of the Property or registered any form of land interest in the Property;

(c) Mrs Elborne purported to leave the Property to her Children under the terms of her will; and

(d) following Mrs Elborne's death, her executors sold the Property and received the sale proceeds; and

(2) the Note had never been discharged.

23. Mr Davey said that the above matters were entirely consistent with the proposition that the relevant parties had never had any intention of complying with the terms of the scheme documents.

24. Whilst we can understand the reasons for Mr Davey's submission in this regard, we do not agree. We do not think that the differences between the manner in which the scheme in fact unfolded and the manner in which the scheme was described in the scheme documents were attributable to any intention on the part of the parties to the scheme to disregard the terms of the scheme documents either when those documents were executed or at the time of Mrs Elborne's death. Instead, we believe that those anomalies were attributable to a combination of errors which were made in the implementation of the scheme, forgetfulness on the part of the protagonists and the advice of Mr Dumont to the effect that the Note should be left outstanding pending the outcome of these proceedings.

25. Our reasons for saying that are as follows:

(1) first, the fact that the Note was intended to have the effect of creating a debt between the trustees of the Life Settlement and the holder of the Note from time to time and that the parties considered that the Note gave rise to a real liability for the trustees of the Life Settlement can be seen in the question which was raised with Mr Dumont after Mrs Elborne's death. In asking Mr Dumont whether the Note might be forgiven instead of being repaid, the parties implicitly recognised that, as things then stood, the Note had given rise to a real outstanding liability which was owed by the trustees of the Life Settlement to the trustees of the Family Settlement and that that outstanding liability needed to be dealt with in some way, whether by way of forgiveness or by way of discharge. There is no other way of construing the question.

Moreover, the fact that Mr Dumont's advice – which was to defer doing anything as regards the Note while there were unresolved challenges to arrangements which were similar to the scheme – is a perfectly reasonable explanation as to why the Note remains undischarged at the present time. Having received Mr Dumont's advice to that effect, the parties were perfectly entitled to rely on it and leave the position in abeyance;

(2) secondly, we are satisfied that the fact that the executors under the will became the registered owners of the Property and then conveyed the Property to Mr and Mrs Machin and that the Sale Agreement was apparently ignored was entirely attributable to error and not to design. There was no reason why the parties would voluntarily have chosen to ignore the terms of the documents and we accept Mr Elborne's explanation that the terms of the documents were simply overlooked by the time that the Property came to be sold, which was almost ten years after the documents had been executed;

(3) thirdly, and consistent with the point we have just made, we do not consider that the reference to the Property in Mrs Elborne's will is sufficient to indicate that the Sale Agreement was not intended to have the effect which it purported to have. As Mr Bradley pointed out in his submissions at the hearing, the relevant clause starts with the words "I DECLARE", in contrast to the two clauses which follow, dealing with pecuniary legacies and the administration of the estate (which start with the words "I GIVE"). It is therefore perfectly credible that, in that part of her will, Mrs Elborne was simply expressing her wishes as to how she wished the trustees of the two settlements to deal with the Property following her death. It does not, in and of itself, indicate that Mrs Elborne was ignoring the effect of the Sale Agreement although we accept that it was somewhat odd for Mrs Elborne to deal with the Property in her will at all;

(4) fourthly, we considered Mr Elborne to be a credible and reliable witness who was frank about the reasons for the implementation of the scheme and the manner in which the scheme had been implemented. We accept his explanation that the various departures from the documents which have occurred in relation to the implementation were attributable to error and not design. Although we were surprised that Mr Elborne relied so absolutely on Mr Woolfe and Mr Woolfe's firm in relation to the implementation of the scheme and the ultimate conveyance of the Property and did not take more interest in the documentation involved, particularly given his profession, we accept his evidence that the documents implementing the scheme were intended to have the effects which they purported to have and that effect would be given to the Sale Agreement and the Note following his mother's death; and

(5) finally, we are reinforced in our conclusion by the fact that there was no reason why the parties to the scheme would have wished to disregard the terms of the scheme documents. The scheme documents as they stood produced the desired end result in

economic terms of passing the benefit of the Property in equal shares to the Children through the medium of the Life Settlement and the Family Settlement. There was therefore no need to depart from the terms of the documents in order to achieve that desired end result. The Children were intended to benefit from the Property upon Mrs Elborne's death and they could do so under the terms of the scheme documents just as easily as if the Property had devolved to them under their mother's will. The only difference was that, instead of receiving the value of the Property under the will, they would receive that value under the terms of the Life Settlement and the Family Settlement.

26. In short, we find as facts that, despite the events which have occurred:

(1) the parties involved in implementing the scheme intended to comply with the terms of the documents implementing the scheme at the time when the scheme documents were executed; and

(2) that intention remained in existence at the time of Mrs Elborne's death.

27. We also find as facts that each of:

(1) the trust deed creating the Family Settlement

(2) the Assignment; and

(3) the Family Settlement Trustees' Resolution

did not become effective until all of the signatories to the relevant document executed the relevant document and that this was in late January or early February 2004 - which is to say some time after 8 December 2003 when the relevant document was dated.

THE NOTICES OF DETERMINATION

28. Unsurprisingly, the Respondents are somewhat unenthusiastic about the proposition that the scheme has the inheritance tax effects which are claimed by the Appellants.

29. The Respondents have had five opportunities to say why they consider that not to be the case – first, in the notices of determination, secondly, in preparing their statement of case, thirdly, in applying to amend their statement of case, fourthly, in preparing their skeleton argument for the hearing and, finally, in their oral arguments at the hearing.

30. In their notices of determination, the Respondents advanced four reasons why the transactions did not have the consequences for which the Appellants contend and why the value of Mrs Elborne's estate upon her death ought to be regarded as having been augmented by an amount equal to the value of the liability under the Note. Those were that:

(1) the liability in relation to the Note consisted of an incumbrance created by the assignment of the Property by Mrs Elborne to the trustees of the Life Settlement and therefore the value of the liability should be abated to nil pursuant to Section 103 of the FA 1986 ("Section 103"). (In the rest of this decision, we will refer to this as the "Section 103 incumbrance issue");

(2) alternatively, the assignment of the Property by Mrs Elborne to the trustees of the Life Settlement was a gift for the purposes of Section 102 of the FA 1986 ("Section 102") and the Property was property subject to a reservation at the time of Mrs Elborne's death, with the result that the Property should be treated as part of Mrs Elborne's estate upon her death to the extent that was not already part of that estate. (In the rest of this decision, we will refer to this as the "Section 102 Property issue");

(3) alternatively, that the arrangements comprising the scheme amounted to a composite transaction effected by “associated operations” (as defined in Section 268) and that, having regard to the provisions of Section 102 and paragraph 6(1)(c) of Schedule 20 to the FA 1986, the Note was property subject to a reservation at the time of Mrs Elborne’s death and must therefore be treated as property to which Mrs Elborne was beneficially entitled immediately before her death. (In the rest of this decision, we will refer to this as the “Section 102 Note issue”); and

(4) alternatively, having regard to the Election, the Property should be treated as property subject to a reservation at the time of Mrs Elborne’s death, with the like consequences to those outlined in paragraph 30(2) above. (In the rest of this decision, we will refer to this as the “Election issue”).

31. Identifying the arguments upon which the Respondents based the notices of determination is relevant to the burden of proof in these proceedings. This is because these proceedings involve appeals against the determinations set out in the notices of determination - see Section 221 of the IHTA - and, if an appellant notifies an appeal to the First-tier Tribunal (the “FTT”), the FTT is to determine “the matter in question” - see Section 223G(4) of the IHTA - which means the matter to which the appeal relates – see Section 223I(1)(a) of the IHTA. The legislation provides that, in determining the appeal, the FTT must confirm the determination appealed against unless it is satisfied that the determination ought to be varied or quashed – see Section 224 of the IHTA. This means that, to the extent that the Appellants in this case wish to show that a point made by the Respondents in the notices of determination is incorrect, the burden of proof is on the Appellants. However, where the Respondents seek to make a point which is not contained in the notices of determination, the burden of proof is on them. This is of some relevance given the nature of the arguments which the Respondents sought to argue at the hearing.

32. In this case, the parties have asked that we determine the appeals in principle only, and do not set out any conclusions in relation to quantum.

THE STATEMENT OF CASE

33. The Respondents have made two attempts at drafting their statement of case. Their first statement of case was filed on 31 July 2020. The Respondents subsequently applied to amend their statement of case on 13 April 2023. The Appellants raised no objection to some of the proposed amendments and we allowed certain others by way of an order made on 12 May 2023. The final statement of case, as amended, was filed on 21 May 2023, just before the hearing.

34. In the amended statement of case, the Respondents advanced the same reasons for resisting the Appellants’ appeal as were set out in the notices of determination. In addition, they alleged that:

(1) the Sale Agreement was void under Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (“Section 2”) because the terms of the Sale Agreement did not incorporate, and were inconsistent with, the terms of the sale. The statement of case set out four reasons why that was the case and those four reasons are set out in paragraphs 46(1) to 46(4) below. It followed that the Property remained part of Mrs Elborne’s estate when she died and the issue and existence of the Note should be ignored (In the rest of this decision, we will refer to this as the “Section 2 issue”);

(2) alternatively, if the Sale Agreement was not void, the restriction which it entailed on Mrs Elborne’s ability freely to dispose of the Property fell within Section 163 of the IHTA (“Section 163”) and was therefore to be ignored in valuing Mrs Elborne’s

interest in the Property at her death. The Respondents submitted that, on that analysis, the consequences went further than simply increasing the value of Mrs Elborne's estate by the value of the Note. Instead, both the gross value of the unencumbered Property and the net value of Mrs Elborne's interest in possession under the Life Settlement were to be taken into account in quantifying Mrs Elborne's estate (In the rest of this decision, we will refer to this as the "Section 163 issue");

(3) on a realistic view of the facts, and adopting a purposive construction of Section 49, the Note was to be disregarded either because it was not a liability at all or because, even if it was a liability, it was not part of the property in which Mrs Elborne had an interest in possession. Therefore, even if the Respondents were wrong in relation to the Section 2 issue, the value of the property in which Mrs Elborne had an interest in possession under Section 49 at her death was not depleted by the value of the Note. (In the rest of this decision, we will refer to this as the "Section 49 issue");

(4) if the fact that Mrs Elborne retained some interest in the Property at the time of her death (because the Sale Agreement remained uncompleted at that time) meant that the transfer of value which occurred upon her death was only of an interest in land, as opposed to the land itself, then Section 102A of the FA 1986 ("Section 102A") applied and the above submissions should be adopted in relation to that interest in land. (In the rest of this decision, we will refer to this as the "Section 102A issue"); and

(5) in addition to the argument set out in the notices of determination in relation to the Section 103 incumbrance issue, the liability in relation to the Note should be regarded as a debt incurred by Mrs Elborne for the purposes of Section 103 and should therefore be abated to nil pursuant to that section, in accordance with the decision of the FTT in *Pride v The Commissioners for Her Majesty's Revenue and Customs* [2023] UKFTT 00316 (TC) ("*Pride*"). (In the rest of this decision, we will refer to this as the "Section 103 debt incurred issue").

35. Identifying the arguments which were set out in the statement of case is of potential relevance in determining the submissions which the Respondents are entitled to make at the hearing of the appeal. The Respondents are required by Rule 25 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (The "Tribunal Rules") to set out their position in their statement of case (or amended statement of case) in advance of the hearing. If the Respondents seek to advance at the hearing a position which was not set out in their statement of case (or amended statement of case), then they may be precluded from doing so. They will not be allowed to do so where that would be contrary to the overriding objective of the Tribunal Rules – the requirement to deal with cases fairly and justly (see Rule 2 of the Tribunal Rules).

THE SKELETON ARGUMENT AND THE SUBMISSIONS AT THE HEARING

36. In their skeleton argument dated 2 May 2023 and their submissions at the hearing, the Respondents identified further reasons why the scheme did not have the effect in law for which the Appellants are contending because the transactions which were implemented did not have the effect of divesting Mrs Elborne of beneficial ownership of the Property before she died.

37. First, the Respondents expanded on their contentions in relation to the Section 2 issue by advancing seven further reasons for their submission that the Sale Agreement did not incorporate, or was inconsistent with, the terms of the agreement for sale between Mrs Elborne and the trustees of the Life Settlement. Those seven additional reasons are set out in paragraphs 46(5) to 46(11) below.

38. Secondly, they submitted that, even if the Sale Agreement was a valid agreement, there had been a failure properly to carry out the terms of the Sale Agreement and therefore the Property remained within Mrs Elborne's estate at the time of her death. (In the rest of this decision, we will refer to this as the "Implementation issue").

39. Thirdly, they submitted that, as a matter of land law, even if the Sale Agreement was valid and there had been no failure to implement the terms of the Sale Agreement, the effect of the Sale Agreement, which remained uncompleted at the time of Mrs Elborne's death, was to leave Mrs Elborne with the beneficial ownership of the Property at the time of her death so that the value of the Property fell within her estate without regard to her interest in possession under the Life Settlement and therefore without taking into account the value of the liability under the Note. (In the rest of this decision, we will refer to this as the "Beneficial ownership issue").

THE ISSUES

40. It may be seen from the preceding three sections of this decision that the Respondents have raised a considerable number of reasons why the scheme should not have the effect for inheritance tax purposes which the Appellants are alleging.

41. For the purposes of simplifying our consideration of those issues in this decision, they may most conveniently be divided into the following groups:

(1) issues pertaining to whether or not the events which have occurred involved the alienation by Mrs Elborne of her beneficial ownership of the Property in law prior to her death, which is to say:

(a) the Section 2 issue;

(b) the Implementation issue; and

(c) the Beneficial ownership issue;

(2) issues pertaining to the nature and/or value of Mrs Elborne's interest in the Property for inheritance tax purposes at the time of her death, which is to say:

(a) the Section 163 issue;

(b) the Section 102 Property issue;

(c) the Section 102A issue; and

(d) the Election issue; and

(3) issues pertaining to whether not the value of Mrs Elborne's estate for inheritance tax purpose at the time of her death was depleted by an amount equal to the value of the Note, which is to say:

(a) the Section 49 issue;

(b) the Section 103 incumbrance issue;

(c) the Section 103 debt incurred issue; and

(d) the Section 102 Note issue.

42. It may be seen that there are a large number of issues to address and many of those issues are complicated in nature. This has inevitably led to a decision of some length and complexity. However, by way of summarising our overall conclusion, we have decided that the appeals should be dismissed because the Respondents' submissions in relation to the Section 103 debt incurred issue are correct.

43. We start our analysis by turning to the first of the issues – the Section 2 issue.

THE SECTION 2 ISSUE

Introduction

44. Section 2 specifies that a contract for the sale of land must be made in writing and must contain all of the terms which the parties have expressly agreed in relation to the sale. Specifically, it provides as follows:

"2 Contracts for sale etc. of land to be made by signed writing.

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract."

The parties' submissions

45. All in all, taking into account the notices of determination, the statement of case, the Respondents' skeleton argument and the Respondents' oral submissions at the hearing, the Respondents have identified eleven reasons for concluding that the Sale Agreement failed to comply with the requirement in Section 2 to the effect that all the terms of an agreement for sale need to be included in the Sale Agreement. Each reason relates either to an alleged inconsistency between the terms of the Sale Agreement and the terms of the agreement for sale which existed in this case or an alleged omission from the Sale Agreement of a term of that agreement for sale.

46. Those eleven inconsistencies or omissions may be summarised as follows:

(1) the fact that Mrs Elborne was entitled to deal with the deposit under the Sale Agreement – which is to say, the Note - as she pleased following the execution of the Sale Agreement and pending completion and was therefore able to transfer the Note to the trustees of the Family Settlement was inconsistent with Standard Conditions 2.2.1 and 2.2.3, which were incorporated into the Sale Agreement. Those conditions provided that the deposit payable under the Sale Agreement was to be held by Mrs Elborne's solicitor as stakeholder pending completion;

(2) the fact that Mrs Elborne was entitled to occupy the Property following the execution of the Sale Agreement and until her death was inconsistent with special condition 4 of the Sale Agreement, which provided that the Property was to be sold with vacant possession at completion;

(3) the fact that the parties never intended the Note to be repaid (and it was not repaid) was inconsistent with the terms of the Sale Agreement, which provided that the purchase price was to be satisfied by the issue of the Note;

(4) the fact that the parties never intended to give effect to the alleged sale which was described in the Sale Agreement was inconsistent with the terms of the Sale Agreement, which provided that the sale would take place at completion;

(5) the fact that the terms of Mrs Elborne's will showed that it was intended that the Property would devolve to the Children under the will was inconsistent with the terms of the Sale Agreement, which provided that Mrs Elborne had agreed to sell the Property to the trustees of the Life Settlement;

(6) the fact that the Property became registered at HM Land Registry in the name of Mrs Elborne's executors was inconsistent with the terms of the Sale Agreement, which recorded that the Property was being sold by Mrs Elborne to the trustees of the Life Settlement and which therefore meant that it was the trustees of the Life Settlement who were entitled to be registered as the proprietors of the Property;

(7) the fact that the Property was sold by Mrs Elborne's executors to Mr and Mrs Machin was inconsistent with the terms of the Sale Agreement, which recorded that the Property was being sold by Mrs Elborne to the trustees of the Life Settlement and which therefore meant that it was the trustees of the Life Settlement who were entitled to sell the Property to Mr and Mrs Machin;

(8) the fact that a term of the agreement for sale of the Property was that Mrs Elborne agreed to pay the stamp duty arising on the sale of the Property pursuant to the Sale Agreement (as recorded in a recital to the Life Settlement Trustees' Resolution) was not recorded in the Sale Agreement;

(9) the fact that Mrs Elborne was required by the terms of the Life Settlement Trustees' Resolution to keep the Property comprehensively insured during the period of her occupancy was inconsistent with Standard Condition 5.1.3 which was incorporated into the Sale Agreement and which provided that Mrs Elborne was not required to insure the Property prior to completion;

(10) the fact that a term of the agreement for sale of the Property was that Mrs Elborne was going to transfer the Note to the trustees of the Family Settlement shortly after the Note was issued to her was not recorded in the Sale Agreement; and

(11) the fact that a term of the agreement for sale of the Property was that Mr Owston was the nominated person for exchange of contracts was not recorded in the Sale Agreement.

47. None of the points which are set out in paragraph 46 above was contained in the notices of determination. The submissions set out in paragraphs 46(1) to 46(4) above were contained in the Respondents' statement of case but the submissions set out in paragraphs 46(5) to 46(11) above were not made until shortly before, or at, the hearing. The submissions set out in paragraphs 46(5) to 46(8) above were contained in the Respondents' skeleton argument and the submissions set out in paragraphs 46(9) to 46(11) above were made only in the Respondents' oral submissions at the hearing.

48. Mr Bradley objected to each of the reasons set out in paragraph 46 above. He said that the reasons should be rejected for a combination of reasons, including:

(1) the fact that many of them were made too late – the Appellants had not been given an opportunity to adduce evidence to rebut them;

(2) the fact that they failed to distinguish between a term of the agreement for sale and a term of the overall arrangement. Only the former terms were required to be included in the Sale Agreement; and

(3) the fact that they failed to distinguish between a term of the agreement for sale and actions or omissions which had occurred in breach of those terms. Where something had occurred that was inconsistent with the terms of the Sale Agreement,

that was because the parties had failed to comply with a term of the agreement for sale and not because the relevant term of the agreement for sale had not been included in, or was inconsistent with, the Sale Agreement.

Discussion

49. We agree with Mr Bradley and will address each of the Respondents' submissions in turn below.

50. As regards the submission set out in paragraph 46(1) above, we do not agree with the Respondents that Standard Conditions 2.2.1 and 2.2.3 were incorporated into the Sale Agreement. We say that because:

(1) Standard Condition 2.2.1 was inconsistent with the express terms of the Sale Agreement to the effect that the deposit would be 100% of the purchase price and would be discharged by the issue of the Note directly to Mrs Elborne, as seller. Those terms were inconsistent with the terms of Standard Condition 2.2.1, which required the deposit to be 10% of the purchase price and to be paid by way of banker's draft or cheque, given that the sale was not taking place by auction;

(2) Standard Condition 2.2.3 was inconsistent with the express terms of the Sale Agreement to the effect that the deposit would take the form of the Note and that the Note would be issued to Mrs Elborne herself. Those terms were inconsistent with the terms of Standard Condition 2.2.3, which required the deposit to be paid to the seller's solicitor as stakeholder and for interest on the deposit to be paid to the seller, together with accrued interest, at completion. We think that the references in Standard Condition 2.2.3 to the holding of the deposit by the seller's solicitor as stakeholder and to the seller's solicitor's accounting for interest accrued on the deposit at completion make it clear that the condition is intended to apply to cash deposits in the form of a cheque or banker's draft paid on exchange and not to deposits in the form of securities issued directly to the seller on exchange of contracts.

51. Since the Standard Conditions were expressly stated to be excluded from the terms of the Sale Agreement to the extent that there was a conflict between those conditions and the express terms of the Sale Agreement, we consider that those conditions did not form part of the Sale Agreement and therefore any failure to comply with the terms of those conditions could not give rise to any breach of Section 2 in the present case.

52. For completeness, we would note that the deposit in this case was the issue of the Note and it was therefore in a different form from the cash deposit to be funded by way of a loan from the seller which was required by the equivalent sale agreement in *Shelford v The Commissioners for Her Majesty's Revenue and Customs* [2020] SFTD ("*Shelford*"). That means that this case is distinguishable from Shelford when it comes to considering whether there was a conflict between Standard Condition 2.2.3 and the express terms of the Sale Agreement.

53. As regards the submission set out in paragraph 46(2) above, we do not see how Mrs Elborne's entitlement to occupy the Property until further notice was inconsistent with the obligation on the part of Mrs Elborne to provide vacant possession on completion of the Sale Agreement. Since the Sale Agreement had not been completed by the time of Mrs Elborne's death (and in fact has yet to be completed), Mrs Elborne's occupation of the Property pending completion was not inconsistent with the terms of the Sale Agreement.

54. However, this submission does naturally lead on to a related point, which is that it might be said that Mrs Elborne's right to occupy the Property pending completion was itself a term of the agreement for sale between the parties (given that beneficial ownership of the

Property passed to the trustees of the Life Settlement upon the execution of the Sale Agreement, as to which see below) and that, since that entitlement was not recorded in the Sale Agreement, that omission amounts to a breach of Section 2.

55. There are two answers to this point.

56. The first is that it is not a submission which the Respondents have made at any point in the proceedings. That is because, in the Respondents' view, Mrs Elborne retained legal and beneficial ownership of the Property following the execution of the Sale Agreement and was therefore entitled to occupy the Property in that capacity, as of right – see paragraphs 82 to 86 below. On the Respondents' analysis, therefore, there was no need for Mrs Elborne's continuing occupation pending completion to be a matter which needed to be dealt with in the terms of the agreement for the sale of the Property.

57. Having said that, we do not agree with the Respondents' view on the time when beneficial ownership passed to the trustees of the Life Settlement, for the reasons set out in the section of this decision which deals with the Beneficial ownership issue, and it is therefore necessary to set out the second answer, which is, in any event, of more general application in the context of this issue as a whole. This is that it is important to distinguish in this regard between:

(1) on the one hand, the terms on which the Property was agreed to be purchased and sold; and

(2) on the other hand, the terms of Mrs Elborne's relationship with the trustees of the Life Settlement as the settlor of that settlement and/or as the holder of an interest in possession in that settlement.

58. Only terms falling within the first of the above categories were required to be included in the Sale Agreement in order for that agreement to comply with Section 2. The terms of Mrs Elborne's relationship with the trustees of the Life Settlement in her capacity as the settlor of that settlement and/or as the holder of an interest in possession in that settlement could properly be excluded from the Sale Agreement without calling into question the validity of the Sale Agreement. In the words of Briggs J in *North Eastern Properties Limited v Coleman* [2010] 1 WLR 2715 ("*Coleman*") at paragraph [46]:

> "It is not sufficient merely to show that the land contract formed part of a larger transaction which was subject to other expressly agreed terms which are absent from the land contract. The expressly agreed term must, if it is required by section 2 to be included in the single document, be a term of the sale of the land, rather than a term of some simultaneous contract (whether for the sale of a chattel or the provision of a service) which happens to take place at the same time as the land contract, and to form part of one commercial transaction."

59. The difficulty which arises in this context is that both of the categories described in paragraph 57 above involved the same two parties – on the one hand, Mrs Elborne and, on the other hand, the trustees of the Life Settlement, one of whom was Mrs Elborne. It is therefore difficult to determine in the case of any particular matter whether the relevant matter falls within the first category or the second. In this case, Mrs Elborne's right to occupy the Property pending completion might have fallen within either category but, since the Respondents have not at any time cited this as a reason why the Sale Agreement did not comply with Section 2, we have had no evidence in relation to the question either way. In addition, it seems more likely to us that that right fell within the second category given that the right was not a matter which went to the transfer of legal or beneficial ownership of the Property or the provision of vacant possession of the Property at completion. It therefore seems to us to fall more naturally into the second category than the first. It follows that we

are unable to conclude that Mrs Elborne's entitlement to occupy the Property pending completion meant that the Sale Agreement did not comply with Section 2.

60. We can deal very briefly with the submissions set out in paragraphs 46(3) to 46(7) above, given the findings of fact which we have made in paragraphs 19 to 27 above. Since we have concluded in those paragraphs that:

(1) the parties did intend that the Note would be discharged and that the Sale Agreement would be completed in accordance with its terms; and

(2) the terms of Mrs Elborne's will do not indicate that she intended the Property to devolve to her beneficiaries under her will,

we can see nothing in the terms of the Sale Agreement as regards the issue of the Note or as regards completion of the sale of the Property which is inconsistent with the terms of the agreement between the parties for the sale of the Property. The mere fact that the parties have not acted in a manner which is consistent with the terms of the Sale Agreement does not mean that the manner in which they have acted reflects terms of the agreement for the sale which are inconsistent with the terms of the Sale Agreement. The terms of the Sale Agreement may be perfectly consistent with the terms of the agreement for the sale but the parties may simply have breached the terms in question.

61. Turning then to the submission set out in paragraph 46(8) above, Mr Davey says that Mrs Elborne's agreement to discharge any stamp duty which might arise in connection with the sale of the Property was a term of the agreement for the sale of the Property and not a term of Mrs Elborne's relationship with the trustees of the Life Settlement. Mr Bradley says the opposite. He contends that that assurance was given by Mrs Elborne to the trustees in her capacity as settlor of the Life Settlement and was not one of the terms of the agreement for the sale of the Property.

62. In this regard, it is clear that, whilst there is no need to include in the written agreement for sale terms which are merely part of the overall arrangement of which the agreement for sale forms part, a failure to include in the written agreement for sale a term on which the sale is conditional will amount to a breach of Section 2 – see *Grossman v Hooper* [2001] 2 EGLR 82 at paragraphs [19] to [22] and *Coleman* at paragraph [46]. We think that it is perfectly possible that the agreement on the part of the trustees of the Life Settlement to purchase the Property under the Sale Agreement was conditional on Mrs Elborne's assurance that she would meet any stamp duty liability to which the purchase might give rise. Indeed, given that the trustees of the Life Settlement did not have the wherewithal to meet any such stamp duty liability, it might fairly to be said to be more likely than not that they would not have agreed to enter into the obligation to purchase the Property without receiving that assurance from Mrs Elborne beforehand and therefore that, pursuant to the decisions in the above cases, the assurance was a part of the agreement for sale but was not included in the Sale Agreement.

63. However, it would be quite wrong for us to reach that conclusion without first having heard any evidence which the Appellants may have to rebut it and, because the point was raised at such a late stage in the proceedings, the Appellants have not been given a fair opportunity to produce that evidence. The Respondents filed their statement of case on 31 July 2020 and then applied to amend it shortly before the hearing, on 13 April 2023, and there is no indication in either the original version of the statement of case or the proposed amendments that the Respondents proposed to plead this point. Although it was mentioned in the Respondents' skeleton argument for the hearing, that was not filed until 2 May 2023, three weeks before the hearing. Consequently, the Appellants have not been given a meaningful opportunity to adduce evidence which might have showed that, on the balance of probabilities, the stamp duty assurance was not a term of the agreement for sale and was

merely part of the larger arrangement. For example, if the Appellants had been given sufficient notice of the point, they might have been able to call Mr Woolfe to give evidence to that effect.

64. We think that the Appellants were entitled to know the precise nature of the Respondents' case at the time when the Respondents filed their statement of case, as required by Rule 25 of the Tribunal Rules. Whilst the statement of case referred to the fact that the Respondents intended to rely on Section 2 to advance their case in the proceedings, the paragraphs dealing with the point made reference solely to the matters described in paragraphs 46(1) to 46(4) above. Moreover, those paragraphs did not even intimate that those four matters were just examples of the matters in which the Sale Agreement was deficient and that the Respondents might wish to allege that there were others. For example, the preamble said that the Sale Agreement was void under the section "because" of the four matters when it might have said that the Sale Agreement was void "because, inter alia" of the four matters. In the circumstances, we think that it would be contrary to the overriding objective in Rule 2 of the Tribunal Rules if we were to determine this question in favour of the Respondents without having heard any such evidence and we decline to do so.

65. Precisely the same point may be made in relation to the submission set out in paragraph 46(9) above. Indeed, the point is even more apparent in relation to that submission than it was in relation to the submission set out in paragraph 46(8) above because the relevant submission was not even set out in the Respondents' skeleton argument. Instead, it was not advanced until the Respondents made their oral submissions at the hearing.

66. We therefore reach the same conclusion in relation to that submission. Although it seems to us to be perfectly possible that the terms on which the Property was to be insured in the period between the execution of the Sale Agreement and completion of the Sale Agreement were part of the terms on which the Property was agreed to be sold and not simply part of the terms on which Mrs Elborne was to enjoy the right to occupy the Property under her interest in possession, the Appellants have been given no opportunity to adduce evidence to the latter effect. We are therefore unable to accept that the failure to include those terms in the Sale Agreement amounted to a breach of Section 2.

67. As regards the submission set out in paragraph 46(10) above, we do not consider that Mrs Elborne's gift of the Note to the trustees of the Family Trust was part of the terms on which the Property was agreed to be sold. That gift was obviously part of the same overall scheme but it was in no way a term of the agreement for the sale of the Property. One has only to ask whether, had Mrs Elborne failed to make that gift, she would have been in breach of contract to the trustees of the Life Settlement, to answer that question. The trustees of the Life Settlement had no interest in whether they continued to owe their obligations under the Note to Mrs Elborne or owed those obligations instead to the trustees of the Family Settlement. As such, we do not think that there was any contractual right or obligation as between Mrs Elborne and the trustees of the Life Settlement in relation to the gift of the Note by Mrs Elborne.

68. Similarly, as regards the submission set out in paragraph 46(11) above, we do not see why the identity of the person whom the trustees of the Life Settlement have appointed to effect the exchange of contracts on their behalf should be regarded as a term on which the Property was agreed to be sold. It seems to us instead to be simply a matter of housekeeping in terms of the administration of the settlement. However, even if that conclusion were to be incorrect, the same point arises in relation to this submission as it does in relation to the submissions set out in paragraphs 46(9) and 46(10) above, which is that it was not made by the Respondents until the hearing and therefore the Appellants did not have an opportunity to

produce evidence to counter the submission. For those reasons, we do not think that the fact that the appointment of Mr Owston as the nominated person to effect exchange of the Sale Agreement was not included in the Sale Agreement amounts to a breach of Section 2.

Conclusion

69. For the reasons set out in paragraphs 49 to 68 above, we have concluded that:

(1) the Sale Agreement was a valid and enforceable contract; and

(2) therefore, the Section 2 issue should be determined in favour of the Appellants.

THE IMPLEMENTATION ISSUE

Introduction

70. Even though the Sale Agreement complied with Section 2, it is still necessary to determine whether, as a matter of law, the Sale Agreement gave rise to the rights and obligations to which it purported to give rise.

The parties' submissions

71. Although he did not allege that the scheme documents were shams, Mr Davey invited us to view the documents with some suspicion. Mr Davey pointed out that, notwithstanding the terms of the documents:

(1) Mrs Elborne continued to live in the Property until her death;

(2) the Sale Agreement was never completed so that, at Mrs Elborne's death, she remained the legal owner of the Property;

(3) the trustees of the Life Settlement never became the registered proprietors of the Property or registered any form of land interest in the Property;

(4) Mrs Elborne purported to leave the Property to her Children under the terms of her will;

(5) following Mrs Elborne's death, her executors sold the Property and received the sale proceeds; and

(6) the Note had never been discharged.

72. Mr Davey said that the above matters were entirely consistent with the proposition that, on a proper analysis of the facts, the execution of the scheme documents had had no effect and the position was precisely the same as if the scheme had never been implemented. We understand this submission to be similar to the "mislabelling" argument which was made by the Respondents in *Shelford* and addressed by the FTT in paragraphs [62] to [72] of its decision. In *Shelford*, the FTT accepted that, in the absence of any pleading to that effect in that case by the Respondents, it was unable to make a finding that the documents implementing the scheme were shams. However, it concluded that, because the parties to those documents did not have any intention of honouring the rights and obligations to which those documents gave rise, those documents had been mislabelled and did not have the legal effect which they purported to have.

73. Mr Bradley said that there was no basis in law on which the terms of the documents which had been executed to effect the scheme in this case could be challenged. The evidence showed that the documents had correctly set out the intentions of the parties and any departure from the terms of the documents had arisen from inadvertence or error.

Discussion

74. Whilst we understand the Respondents' scepticism in this regard, given the events which have occurred, we do not agree that the documents give rise to rights and obligations in law which differ from their terms.

75. We have found as a fact that the parties did intend the scheme documents to have the effects which they purported to have. We say that notwithstanding the fact that there are various obligations under the scheme documents which still remain undischarged or the fact that the events which have occurred are inconsistent with those obligations. As we have already said, we do not attribute those matters to any intention on the part of the parties that the documents should not have the effects which they purported to have. Moreover, no allegation of sham has been made.

76. As such, we have concluded that the true legal effect of the scheme documents was in accordance with their form and that they gave rise to the rights and obligations set out in them.

77. For instance, we think that it is incorrect to say that the position in relation to ownership of the Property was unaffected by the execution of the Sale Agreement. Mrs Elborne's executors, when they received the sale proceeds of the Property from Mr and Mrs Machin, did not hold the sale proceeds for the Children as beneficiaries under the will. Instead, for reasons which we will rehearse in the section of this decision which follows, we believe that the sale proceeds, when they were received, were impressed with a constructive trust and held by the executors for the trustees of the Life Settlement. The Sale Agreement therefore had a meaningful and lasting legal effect.

78. So too did the Note. When it was issued, the Note gave rise to a debt on the part of the trustees of the Life Settlement. The trustees of the Life Settlement still have an outstanding obligation to discharge the Note in accordance with its terms and the trustees of the Family Settlement still have an entitlement to receive the proceeds of that discharge.

79. We would add that, had Mrs Elborne died within seven years of making the gift of the Note to the trustees of the Family Trust, we strongly suspect that the Respondents would have sought to claim that that gift had had inheritance tax consequences, thereby recognising the validity of the Note.

Conclusion

80. For the reasons set out in paragraphs 74 to 79 above, we have concluded that:

(1) the scheme documents had the effect in law which they purported to have; and

(2) therefore, the Implementation issue should be determined in favour of the Appellants.

THE BENEFICIAL OWNERSHIP ISSUE

Introduction

81. It follows from our conclusions in relation to the Section 2 issue and the Implementation issue that the Sale Agreement was a valid agreement which gave rise to the rights and obligations to which it purported to give rise. What, then, was the effect of the Sale Agreement as a matter of general law?

The parties' submissions

82. Mr Davey submitted that there was clear recent authority to the effect that an uncompleted contract for the sale of land did not involve the immediate passing of beneficial

ownership in the land from seller to purchaser. He cited Lord Walker in the House of Lords in *Jerome v Kelly* [2004] UKHL 25 ("*Jerome*"), who said the following at paragraph [32]:

> "It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full."

and words to similar effect in the judgment of Patten LJ in *Ezair v Conn* [2020] EWCA Civ 687 ("*Ezair*") at paragraphs [47] et seq.. He said that those decisions, along with the decisions in *Berkley v Poulett* [1977] 1 EGLR 86 (CA) ("*Berkley*") and *Southern Pacific Mortgages Limited v Scott* [2014] UKSC 52 ("*Southern Pacific*"), showed that the relationship between the seller and the purchaser under a contract for the sale of land could not be equated to the relationship of bare trustee and beneficiary because it was an incident of, and was therefore dependent on, the contract for sale and was no more than the consequence of the principle that equity treats as done that which ought to be done.

83. In response, Mr Bradley said that it was beyond dispute that, where the purchaser under a contract for the sale of land has discharged its obligations under the contract, beneficial entitlement to the land passes to the purchaser. In support of that proposition, he cited the following from judgment of Lord Westbury in *Rose v Watson* [1864] 10HLC 672 ("*Rose*") at 678:

> "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate"

and words to similar effect from Lord Cranworth in *Rose* at 683.

84. Mr Bradley also referred us to the judgment of Collins LJ in the more recent case of *Underwood v The Commissioners for Her Majesty's Revenue and Customs* [2008] EWCA Civ 1423 at paragraph [38]. He said that, in that paragraph, Collins LJ had explained the differences in the analyses of Lord Walker in *Jerome* and Lord Westbury and Lord Cranworth in *Rose* by reference to the fact that, when a contract for the sale of land is made, beneficial ownership of the land passes to the purchaser in increments as the purchase price is discharged. In other words, whilst the mere execution of a contract for the sale of land does not of itself give rise to a bare trust of the land in favour of the purchaser, payment of the purchase price under the contract would have the same effect in law as a bare trust. In *Underwood*, Collins LJ had concluded his summary of the position by saying:

> "Consequently the vendor may become a bare trustee for the purchaser if the purchase price is paid in full prior to completion: *Lewin on Trusts* (18th edn 2007) para 10-06, citing *Shaw v Foster* (1872) LR 5 HL 321 at 338."

85. Mr Bradley also referred us to the most recent edition of Lewin on Trusts (the 20th edition), and another leading text book in relation to trusts, Underhill and Hayton (20th

edition), each of which expressed a similar view (in paragraph 4-007 and paragraph 33.1, respectively) and cited the case of *Shaw v Foster* (1872) 5 HL 321 as support for that view.

86. Finally, Mr Bradley said that the decision in *Ezair* was explicable by reference to the specific facts in that case. In *Ezair*, there were two contracts for the sale of the land – an initial contract between A and B under which the consideration was paid up-front and then a second contract between B and C. The first contract remained uncompleted and there was no assignment by B to C of its rights under that contract. The dispute in that case turned on whether C could require A to transfer to it the legal title to the land. The Court of Appeal held that C could not do so, on the basis that the contract between A and B had not been completed and there had been no assignment by B to C of the rights under the first contract. Although the rights enjoyed by B under that first contract were equivalent to the rights which B would have had under a bare trust of the land, the trust was nevertheless an incident of the contractual relationship which arose under the contract and was no more than a consequence of the principle that equity treats as done that which ought to be done. Thus, the fact that the contract between A and B had not been completed and that there had been no assignment by B to C of B's rights under that contract meant that C was unable to compel A to transfer to it the legal title to the land. It did not mean that beneficial ownership of the land remained with A.

Discussion

87. We agree with the conclusion in relation to this issue which has been advanced by Mr Bradley. In our view, the authorities in this area make it plain that, by virtue of the fact that the purchase price for the Property was paid in full when the Sale Agreement was executed, beneficial ownership of the Property passed at that time from Mrs Elborne to the trustees of the Life Settlement and therefore that Mrs Elborne was not the beneficial owner of the Property when she died.

88. We think that the fact that the whole of the purchase price was paid up-front on execution of the Sale Agreement means that this case is readily distinguishable from the uncompleted executory contract pursuant to which none of the consideration had been paid, which was the situation being addressed by the House of Lords in *Jerome*.

89. The decision in *Ezair* raises a different question in this area, dealing as it does with the rights which the beneficial owner under a sale agreement that has not yet been completed is entitled to create prior to completion. The basis of Patten LJ's decision in that case, which relied on the decision of the Supreme Court in *Southern Pacific* and the Court of Appeal decision in *Berkley*, is that a contractual purchaser (such as B in *Ezair*) cannot create rights of a proprietary character which would take priority over other interests in land until the contractual purchaser has acquired the legal estate in the land. When applied to the facts in this case, it means that the trustees of the Life Settlement would have been unable to create proprietary rights over the Property by entering into a contract with a sub-purchaser in relation to the Property prior to acquiring the legal estate in the Property on completion.

90. However, that is not the question which we are addressing. The fact that the trustees of the Life Settlement would have had to acquire the legal estate in the Property before they were able to create proprietary interests in the Property does not mean that the trustees were not the beneficial owners of the Property from the time that the Sale Agreement was executed or, more relevantly, that Mrs Elborne remained the beneficial owner of the Property from that time. The authorities cited by Mr Bradley and referred to in paragraphs 83 to 86 above are, in our view, compelling that the beneficial ownership of the Property when Mrs Elborne died was vested in the trustees of the Life Settlement and not with Mrs Elborne notwithstanding the fact that completion had not yet occurred.

Conclusion

91. For the reasons set out in paragraphs 87 to 90 above, we have concluded that:

(1) Mrs Elborne was no longer the beneficial owner of the Property at the time of her death; and

(2) therefore, the Beneficial ownership issue should be determined in favour of the Appellants.

92. We would add that the above conclusion has certain consequences.

93. One consequence is that, since Mrs Elborne was not the beneficial owner of the Property, the Property could not fall to be treated as part of her estate on her death other than:

(1) through her interest in possession under the Life Settlement pursuant to Section 49; or

(2) by virtue of the anti-avoidance legislation relating to gifts with a reservation of benefits in Section 102.

94. Another consequence is that, as a result of the fact that Mrs Elborne was not the beneficial owner of the Property at her death, beneficial ownership of the Property could not pass under her will and therefore her executors had no entitlement to sell the Property to Mr and Mrs Machin. It follows that, in our view, as we have already intimated in paragraph 77 above, the executors received the sale proceeds of the Property from Mr and Mrs Machin as trustees under a constructive trust in favour of the trustees of the Life Settlement and are required to account to the trustees of the Life Settlement for those proceeds accordingly.

THE SECTION 163 ISSUE

Introduction

95. The previous section of this decision concludes our analysis in relation to the Respondents' submissions on issues pertaining to whether or not the events which have occurred involved the alienation by Mrs Elborne of her beneficial ownership of the Property in law prior to her death. We now turn to the Respondents' submissions on issues pertaining to issues pertaining to the nature and/or value of Mrs Elborne's interest in the Property for inheritance tax purposes at the time of her death.

96. Section 163 provides that:

"(1) Where, by a contract made at any time, the right to dispose of any property has been excluded or restricted, then, in determining the value of the property for the purpose of the first relevant event happening after that time,—

(a) the exclusion or restriction shall be taken into account only to the extent (if any) that consideration in money or money's worth was given for it, but

(b) if the contract was a chargeable transfer or was part of associated operations which together were a chargeable transfer, an allowance shall be made for the value transferred thereby (calculated as if no tax had been chargeable on it) or for so much of the value transferred as is attributable to the exclusion or restriction…

(3) In this section "relevant event", in relation to any property, means —

(a) a chargeable transfer in the case of which the whole or part of the value transferred is attributable to the value of the property; and

(b) anything which would be such a chargeable transfer but for this section."

97. A further consequence of our conclusion in relation to the Beneficial ownership issue, in addition to those which are set out in paragraphs 93 and 94 above, is that the Section 163 issue does not arise. This is because Section 163 is relevant only to the question of the value which is to be accorded to property which forms part of a deceased person's estate. It applies to preclude an exclusion or restriction on the deceased's right to dispose of the relevant property from being taken into account in valuing the property except to the extent that consideration in money or money's worth was given for that exclusion or restriction. It would therefore have been necessary to consider the Section 163 issue in the event that we had concluded that beneficial ownership of the Property remained with Mrs Elborne on her death, because, in that case, we would have needed to consider whether the restriction on disposal of the Property to which the Sale Agreement gave rise – and which therefore reduced the value of the Property to nil – was one which should be taken into account in valuing the Property. Our conclusion in relation to the Beneficial ownership issue means that that valuation question now does not arise but, since the parties made submissions on the subject, we will address it in the paragraphs which follow.

The parties' submissions

98. Ms Belgrano submitted that:

(1) the uncompleted Sale Agreement in this case gave rise to a restriction on the disposal of the Property so that Section 163 was engaged; and

(2) since no consideration in money or money's worth had been given by the trustees of the Life Settlement in return for the restriction on disposal which arose as a result of the terms of the Sale Agreement, that restriction was not to be taken into account in valuing the Property.

99. In relation to the latter point, Ms Belgrano said that there was a distinction between consideration which was given for property that had been contracted to be sold and consideration which was given for a restriction on disposal. The Note in this case fell within the former category as it was technically consideration for the Property and not for Mrs Elborne's agreement not to dispose of the Property to anyone apart from the trustees of the Life Settlement.

100. She added that a helpful way of drawing out this distinction would be to consider the situation where a call option to buy a property for £50 was granted in consideration for a payment of £10. The £10 paid in respect of the grant of the call option could be seen as being given in return for the grantor's agreement not to dispose of the property prior to the date when the right to exercise the call option expired whilst the £50 exercise price could be seen as consideration for the property and not for that restriction. By parity of reasoning, she said, the consideration payable for a property under an uncompleted contract to purchase the property was consideration for the property itself and not consideration for the restriction inherent in the seller's obligation not to dispose of the property pending completion.

101. Ms Belgrano pointed out that, in *Shelford*, at paragraphs [110] to [122], the FTT had accepted the Respondents' submissions to the effect that:

(1) the uncompleted contract for the sale of land in that case gave rise to a restriction on the disposal of that land that potentially fell within Section 163; and

(2) the consideration which was payable under the sale agreement in that case was consideration for the property which was the subject of that sale agreement and was not consideration for the restriction to which that sale agreement gave rise,

with the result that the relevant property was to be valued as if the restriction did not exist. Ms Belgrano said that the same reasoning ought to apply in this case.

102. Mr Bradley accepted that the restriction on sale arising as a result of an uncompleted agreement for sale was no different from the restriction on sale arising on the grant of a call option. However, he submitted that the consideration passing under that agreement prior to death was no different from the consideration passing under a call option agreement prior to death and therefore that the issue of the Note in this case ought to be seen as consideration given for the restriction.

Discussion

103. The Section 163 issue gives rise to two questions in the present context, as follows:

(1) first, can the Sale Agreement properly be said to have given rise to an exclusion or restriction on the disposal of the Property that potentially falls within Section 163? and

(2) secondly, if so, can the issue of the Note properly be said to amount to consideration for that exclusion or restriction or is it instead simply consideration for the Property?

104. In relation to the first of these questions, we agree with both parties - and the FTT in *Shelford* - that the effect of an uncompleted agreement for the sale of property is to exclude or restrict the right to dispose of that property and that therefore Section 163 is potentially engaged. We can see no meaningful difference in that regard between the grant of a call option over the relevant property and a binding agreement to dispose of the relevant property because, in both cases, the owner of the property is under an obligation not to dispose of the property to another person pending completion, or the exercise of the call option, as the case may be.

105. However, in relation to the second question, we agree with Mr Bradley that the issue of the Note was consideration for that exclusion or restriction in this case.

106. Before setting out the reasons for that conclusion, we would observe that the facts in this case are different from those in *Shelford* in this regard. The analysis of the FTT in *Shelford* in relation to this question proceeded on the basis of its prior conclusion that no consideration had been provided by the purchaser at the time when the sale agreement was executed. Indeed, the FTT concluded its analysis as follows:

> "If the Trustees had paid a deposit to Mr Herbert at the time the contract was exchanged, my analysis might have been different (just as if consideration was given for the grant of an option). But as this point was not argued before me, I make no finding in this regard. And in any event, I have found that no deposit was paid."

107. In the present case, a deposit equal to the entire purchase price was paid when the Sale Agreement was executed and it is therefore necessary to address the question which the FTT in *Shelford* did not.

108. In our view, there are compelling reasons for thinking that any amount which has already been paid under an uncompleted sale agreement as at the date on which the property is being valued ought to be regarded as indistinguishable from the consideration given on the grant of a call option and therefore as consideration for the restriction on disposal to which that agreement gives rise. That is because the amount so received will augment the value of the seller's estate and therefore ignoring that consideration in applying the section would be likely to involve an element of double counting. This is as true in a case where all of the consideration has been paid on execution of the uncompleted sale agreement – as in this case

– as it is in a more conventional case where, say, a deposit equal to 10% of the consideration has been paid on execution of the uncompleted sale agreement and the seller dies before the contract is completed. In both cases, it would seem wrong in principle for the amount which has already been paid under the uncompleted contract as at the date when the property is being valued to be precluded from qualifying as consideration for the restriction.

109. On the other hand, we agree with the FTT in *Shelford* that consideration which remains payable under an uncompleted sale agreement as at the date on which the property is being valued ought not to be regarded as consideration for the restriction on disposal to which that agreement gives rise. That is because taking into account that consideration in applying the section would be likely to involve an amount falling out of the value of the seller's estate inappropriately. Moreover, the amount which remains payable under the uncompleted sale agreement is the very amount which falls to be taken into account in calculating the restricted value of the property which is the subject of the uncompleted sale agreement and therefore taking that amount into account as consideration for the restriction would involve taking it into account twice in completely different contexts.

110. There is a way in which both of the undesirable outcomes which we have described in paragraphs 108 and 109 above can be avoided by reference to the terms of the relevant legislation.

111. The starting point is to note that there will be very few cases, if any, in which the consideration received by the person who is agreeing to restrict his right to dispose of property will be expressed to be in return for that person's agreeing to that restriction, as such. Instead, whether it be a call option or an uncompleted contract, the consideration will generally be expressed to be for something other than the restriction – namely, for agreeing to enter into an obligation to dispose of the property at a specified price at some future date – and the restriction will simply be a necessary incident which arises as a result of that other obligation. Thus, if the legislation were to be read strictly, it would rarely be the case that consideration could be said to be given "for" the restriction itself and that is the case whether the restriction arises as a result of the granting of a call option - which the Respondents accept falls within the ambit of the words "to the extent …that consideration in money or money's worth was given for it" in Section 163(1)(a) - or as a result of a binding agreement to sell.

112. In our view, this means that it is necessary to apply a purposive construction to the words set out above with the result that the provision should be read as encompassing not only consideration which has been given expressly for an agreement to exclude or restrict the owner's right to dispose of his property but also consideration which has been given for the owner's entering into an obligation in relation to the property whose existence necessarily gives rise to the restriction. On the basis of that construction of the provision, as is the case with consideration which has already been paid in return for the grant of a call option over property, consideration which has already been paid under an uncompleted sale agreement in relation to that property as at the date on which the property is being valued can properly be seen to be consideration for the restriction on disposal to which that agreement gives rise. In contrast, consideration which remains payable under an uncompleted sale agreement as at the date on which the property is being valued cannot be taken into account because that is simply an obligation to make a future payment under the agreement and cannot properly be seen as being referable to the restriction to which the seller's obligations under the agreement give rise.

113. We consider that the above approach can be justified by the language in the provision and produces a result in each case which is in keeping with the purpose of the legislation.

Conclusion

114. For the reasons set out in paragraphs 103 to 113 above, we have concluded that:

(1) were Mrs Elborne to have been the beneficial owner of the Property at the time of her death, the restriction on sale which was implicit in the Sale Agreement would have been a restriction which potentially fell within the ambit of Section 163;

(2) however, the consideration which was paid by the trustees of the Life Settlement in issuing the Note pursuant to the Sale Agreement would have amounted to consideration for that restriction; and

(3) therefore, the Section 163 issue should be determined in favour of the Appellants.

115. Turning then to the application of the provision in the present case on the basis of that hypothesis, it would be necessary to determine the extent to which the Note amounted to consideration for that restriction. In answering that question, it would be necessary to address how the "to the extent that" language at the end of Section 163(1)(a) should be applied in the context of an uncompleted agreement for sale.

116. The starting point in that regard is to observe that, in the case of a call option, which all parties agree falls within the section, that language does not mean that only such part of the valuation discount which arises by reason of the restriction as is equal to the amount which has been paid as consideration for the restriction should be taken into account in valuing the property. Instead, the extent to which that valuation discount should be taken into account depends on the relationship between the consideration which was given for the agreement to enter into the restriction and the market value of that agreement at the time when it was entered into. If the grantor of the call option received full market value consideration for his agreement to enter into the call option, then the entire valuation discount should be taken into account regardless of the quantum of the valuation discount relative to the quantum of the consideration. This is the approach outlined in paragraph IHTM09774 of the Respondents' Inheritance Tax Manual and we agree with it.

117. By way of an example, in return for the receipt of £10, a person grants an option to sell land with a market value of £100 at the time of grant for £120. The call option has a market value of £10 at the time when it is granted. In other words, the grantor has received full market value consideration for the grant of that call option. The grantor dies before the call option has been exercised and at a time when the land is worth £150. The impact of the restriction which is implicit in the call option at that time is therefore £30 (£150 market value minus £120 option exercise price). It would be quite wrong for only £10 of the valuation discount of £30 which arises as a result of the restriction to be taken into account in valuing the property simply because £10 was the consideration which was received by the grantor on the date of grant. Instead, the whole £30 of the valuation discount should be taken into account because the consideration which was given for the call option was the market value of the call option at the date of grant.

118. Similar principles to those described above would apply in the case of an uncompleted agreement for sale. In other words, where the consideration which is payable under an uncompleted agreement for sale is equal to the market value of the property to which the agreement relates at the time when the agreement is executed, then the entirety of the valuation discount to which the restriction gives rise should be taken into account, whereas, if that consideration is less than the market value of the property to which the agreement relates at the time when the agreement is executed, then a proportionate disallowance of the impact of the restriction should be made. That principle applies regardless of how much of the purchase price is paid before the date on which the property is being valued.

119. As such, were the Section 163 issue to be relevant in the present case, we would conclude that the Property should be valued by taking into account a proportionate part of the valuation discount which arises as a result of the restriction represented by the Sale Agreement, such proportionate part to be determined by comparing the value of the consideration which was given by the trustees of the Life Settlement - £583,500 on the basis of the value which was accorded to the Note on issue by Mr Watson - to the market value of the Property at the time when the Sale Agreement was executed – which was broadly £1.8 million. That portion of the valuation discount which arises by reason of the restriction to which the Sale Agreement gave rise would be taken into account in valuing the Property. The remaining part of the valuation discount which arises as a result of the restriction would fall to be disregarded.

ST BARBE GREEN

120. Before we turn to consider the other inheritance tax issues which are relevant in this appeal, we think that it would be helpful to make some observations about the decision of Mann J in *St Barbe Green v The Commissioners for Her Majesty's Revenue and Customs* [2005] STC 288 ("*St Barbe Green*") given the significance of that decision to the Section 102 Property issue and the Section 103 debt incurred issue addressed below.

121. In *St Barbe Green*, the deceased's free estate (as opposed to his interests as life tenant in certain settlements) had more liabilities than assets. The issue in the case was whether the excess of the liabilities over the assets in his free estate could be used to reduce the value of the assets in the settlements (that fell to be treated as part of his estate pursuant to Section 49). The trustees argued that the effect of Section 5(3), which provided that, in determining the value of a person's estate, the person's liabilities were to be taken into account, except as otherwise provided by the IHTA, meant that the trustees were entitled to set off the value of the excess liabilities in the deceased's free estate against the value of the assets in the settlements. Mann J held that they could not.

122. His main reason for reaching this conclusion turned on the use of the word "property" in Sections 5(1) and 49. He held that the reference in Section 49 to "property" must necessarily mean "net property", which is to say the value of the settlement assets minus the value of the settlement liabilities. It followed that the same interpretation of the word "property" must be applied in Section 5(1), with the result that the property of the free estate which was brought into account under that section must also be the net property – the value of the assets in the free estate minus the value of the liabilities in the free estate. It followed that Section 5(3) played no positive role in the process of deducting liabilities in calculating the value of a person's estate. Its role was in part merely confirmatory of the principle that the property to be brought into account under the sections was the net property but its main purpose was to make it clear that, in calculating the value of the net property for the purposes of each of Sections 5(1) and 49, there were certain liabilities which might be precluded from being deducted.

123. Mann J went on to say that, if he were to be wrong about the role played in the process by Section 5(3), then he accepted the Respondents' arguments in that case that the way in which that section was to be applied was to deduct liabilities only against the assets out of which they could properly be met, with the result that liabilities of the free estate could not be deducted from assets in the settled estate.

124. In the context of the issues which are relevant to this appeal, we should note that the issue which was in point in *St Barbe Green* was the meaning of the word "property" in Section 5(1) and the extent to which the deduction of liabilities in calculating the value of that

property required the application of Section 5(3). Section 49 was therefore not the point of primary focus for Mann J but he did say this in relation to the section:

> "His estate is the "aggregate of all property to which he is beneficially entitled". The word "property" is important here. It is not defined for these purposes (section 272 of the Act contains a partial definition in it that states what the expression includes but not what it means), but it is important to note that section 49(1), which brings in the settled assets, does so by deeming the deceased to be beneficially entitled to "the property" in which his life interest subsists. It does not say "net property" (i e the value of the property net of trust liabilities) but that is what it must mean, and the parties to this appeal both agree that in practice that is the effect the revenue gives to the section. Thus in section 49(1) we have the notion of property from which liabilities have been notionally deducted."

125. At the hearing, Mr Bradley submitted that there were three points of principle in relation to the application of Section 49 which could be derived from the decision in *St Barbe Green*, as follows:

(1) first, the reason why settlement liabilities are deductible in determining the value of the settled property to which the deceased was entitled under Section 49 is not Section 5(3) but simply the meaning of the word "property" in Section 49 itself;

(2) secondly, it follows from this that, where the deceased had an interest in possession in settled property so that the settled property is to be brought into his estate by Section 49, that section does not deem the deceased to have incurred the liabilities to which the settlement was subject. Instead, it is simply the case that the value of the property to which the deceased is to be treated as being entitled under that section is to be calculated after taking into account the value of the settlement liabilities; and

(3) thirdly, that process is simply a means of calculating the value of the property which should be taken into account pursuant to Section 49. It does not mean that the deceased is to be treated as having no beneficial entitlement to the portion of the assets in the settlement that does not exceed the settlement liabilities.

126. We agree with Mr Bradley's first point but we think that there is quite an uneasy relationship between the other two. That is because, if the effect of the section is to bring into the deceased's estate only the net value of the property in the settlement, then that must either mean that the deceased is to be treated as having had no beneficial entitlement to the portion of the gross settled property which did not exceed the settlement liabilities (so that the third proposition is wrong) or that the deceased is to be treated as having had a beneficial entitlement to the gross settled property but as being entitled to deduct the settlement liabilities in calculating the value of that beneficial entitlement (so that some strain is being placed on the second proposition).

127. We agree with Mr Bradley's third proposition. That is because, in the passage from the case set out above, Mann J refers to the settled property as being "property from which liabilities have been notionally deducted". It therefore seems to us to be clear that the deduction of settlement liabilities is a matter which goes to calculating the value of the property to which the deceased is to be treated as being beneficially entitled as opposed to the identification of the property to which the deceased is to be treated as being beneficially entitled. We would add that further support for that proposition is to be derived from the terms of paragraph 11 of Schedule 15 to the FA 2004 because it is clear from the language in paragraph 11(6) of that schedule that a liability which affects the value at which property is to be brought into account in calculating the value of a person's estate does not prevent the part of the property which does not exceed that liability from being part of the estate. Otherwise, paragraph 11(6) would not have been needed.

128. We can also see how Mr Bradley's second proposition might be correct but that turns on the extent of the implications to be drawn from the process of deduction which is a necessary part of the valuation process. We can see how, in theory, it might be possible to take settlement liabilities into account in valuing the property to which the deceased is to be treated as being beneficially entitled without specifically treating those liabilities as having been incurred by the deceased. But, in light of the third proposition, pursuant to which it is accepted that the deceased is to be treated pursuant to Section 49 as having a beneficial entitlement to the gross settled property (and not merely the portion of the gross settled property which exceeds the settlement liabilities), it is tempting, to say the least, to conclude that the liabilities should be deemed to have been incurred by the deceased.

129. We will return to this dichotomy when we address the relevant issues below.

THE SECTION 102 PROPERTY ISSUE

Introduction

130. Section 102 is headed "Gifts with reservations" and provides (so far as relevant) as follows:

"(1) Subject to subsections (5) and (6) below, this section applies where, on or after 18th March 1986, an individual disposes of any property by way of gift and either—

(a) possession and enjoyment of the property is not bona fide assumed by the donee at or before the beginning of the relevant period; or

(b) at any time in the relevant period the property is not enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise;

and in this section "the relevant period" means a period ending on the date of the donor's death and beginning seven years before that date or, if it is later, on the date of the gift.

(2) If and so long as—

(a) possession and enjoyment of any property is not bona fide assumed as mentioned in subsection (1)(a) above, or

(b) any property is not enjoyed as mentioned in subsection (1)(b) above,

the property is referred to (in relation to the gift and the donor) as property subject to a reservation.

(3) If, immediately before the death of the donor, there is any property which, in relation to him, is property subject to a reservation then, to the extent that the property would not, apart from this section, form part of the donor's estate immediately before his death, that property shall be treated for the purposes of the 1984 Act as property to which he was beneficially entitled immediately before his death.

(4) If, at a time before the end of the relevant period, any property ceases to be property subject to a reservation, the donor shall be treated for the purposes of the 1984 Act as having at that time made a disposition of the property by a disposition which is a potentially exempt transfer….

(8) Schedule 20 to this Act has effect for supplementing this section."

131. Paragraph 6 of Schedule 20 to the FA 1986 provides (so far as relevant) that:

"(1) In determining whether any property which is disposed of by way of gift is enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise—

(a) in the case of property which is an interest in land or a chattel, retention or assumption by the donor of actual occupation of the land or actual enjoyment of an incorporeal right over the land, or actual possession of the chattel shall be disregarded if it is for full consideration in money or money's worth;…

(c) a benefit which the donor obtained by virtue of any associated operations (as defined in section 268 of the 1984 Act) of which the disposal by way of gift is one shall be treated as a benefit to him by contract or otherwise.

(2) Any question whether any property comprised in a gift was at any time enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him shall (so far as that question depends upon the identity of the property) be determined by reference to the property which is at that time treated as property comprised in the gift..."

The parties' submissions

132. Mr Davey submitted that, even if, as a matter of law, Mrs Elborne had divested herself of beneficial ownership of the Property prior to her death, the Property should be regarded as remaining in her estate at that time pursuant to Section 102. That was because:

(1) on the assumption that beneficial ownership of the Property had passed under the Sale Agreement, Mrs Elborne had disposed of the Property by way of gift because of the undervalue in the consideration given for the Property by the trustees of the Life Settlement; and

(2) possession and enjoyment of the Property had not been bona fide assumed by the trustees of the Life Settlement at or before the "relevant period" as defined in Section 102(1) – which is to say, the beginning of the period ending on the date of Mrs Elborne's death and beginning seven years before that date; and/or

(3) at any time in the relevant period, the Property had not been enjoyed to the entire exclusion (or virtually to the entire exclusion) of Mrs Elborne and of any benefit to her by contract or otherwise.

133. Consequently, to the extent not otherwise forming part of Mrs Elborne's estate, the Property was to be treated as property to which Mrs Elborne was beneficially entitled immediately before her death. Since Mrs Elborne's beneficial entitlement to the Property under Section 49 was limited to the net value of the Property after taking into account the liability under the Note, the balance of the value of the Property fell to be taken into account pursuant to Section 102(3).

134. Mr Bradley took issue with a number of the above propositions. In particular, he said that:

(1) there had been no "disposal of the Property by way of gift" for the purposes of the section because the Property remained at all times within Mrs Elborne's estate following the execution of the Sale Agreement by virtue of Section 49 and therefore there had been no transfer of value for inheritance tax purposes;

(2) possession and enjoyment of the Property had been bona fide assumed by the trustees of the Life Settlement because they had acquired absolute beneficial ownership of the Property by virtue of the execution of the Sale Agreement and the issue of the Note; and

(3) even if the conditions in Section 102(1) were satisfied in relation to Mrs Elborne's disposal of the Property, that would have no effect because the consequence of satisfying those conditions was that Section 102(3) would apply to treat Mrs Elborne as being beneficially entitled to the Property to the extent that the Property did not already form part of her estate and, by virtue of the operation of Section 49, the whole of the Property was already in her estate even before the application of the section.

135. In relation to the first of Mr Bradley's submissions in paragraph 134 above, Mr Davey said that, on the assumption that Mrs Elborne had disposed of beneficial ownership of the Property as a matter of general law, there had clearly been a "disposal" for the purposes of Section 102 and that disposal had been by way of gift because the consideration for the disposal (the value of the Note on issue) was considerably lower than the value of the Property at the time of the disposal.

136. In response, Mr Bradley said that the Court of Appeal decision in *Inland Revenue Commissioners v Eversden and another (executors of Greenstock, deceased)* [2003] STC 822 ("*Eversden*") at paragraphs [22] and [23] had established that the words "[disposed]… by of gift" were synonymous with the concept of a "transfer of value" for inheritance tax purposes and there had been no transfer of value in this case because the Property had remained part of Mrs Elborne's estate at all times – initially directly and then, after the date of the Sale Agreement, by virtue of her interest in possession in the Life Settlement.

137. Mr Davey and Ms Belgrano said that *Eversden* was not authority for the proposition that there could be no disposal by way of gift for the purposes of the section in circumstances where there was no transfer of value. On the contrary, the decision in that case showed that there were two distinct concepts in the inheritance tax legislation – the concept of a transfer of value and the concept of a gift – and therefore, where a particular section referred to a gift, that was what it meant.

138. They added that, even if that was not correct, there had been a transfer of value in this case because, following the execution of the Sale Agreement, Mrs Elborne's estate had included only such part of the Property as exceeded the value of the liability under the Note, as that was all that Section 49 deemed to bring into account. As such, on any analysis, the part of the Property which did not exceed the value of the liability under the Note left Mrs Elborne's estate by virtue of the execution of the Sale Agreement and there was a transfer of value to that extent.

139. Mr Bradley said that that reasoning involved a confusion between, on the one hand, the concept of property and, on the other hand, the value to be accorded to that property for the purposes of inheritance tax. It was true that, in determining the value of Mrs Elborne's estate following the issue of the Note, the value accorded to the Property was depleted by the value of the liability under the Note, but that had had no effect on Mrs Elborne's deemed beneficial ownership of the Property as a whole.

140. Finally in relation to this question, Mr Bradley submitted that, even if he was wrong in saying that there had been no disposal of the Property by way of gift because the whole of the Property remained within Mrs Elborne's estate following the execution of the Sale Agreement, the gift referred to in Section 102(1) could only be of the undervalue implicit in the disposal under the Sale Agreement – which is to say the difference between the value of the Property on the date of execution of the Sale Agreement and the value of the Note on that

date. That meant that, on any analysis, only a percentage of the value of the Property could be taken into account under the section.

141. In relation to the second of Mr Bradley's submissions in paragraph 134 above, Mr Davey said that, given that no steps were taken by the trustees of the Life Settlement as donee of the Property to give effect to the Sale Agreement and that Mrs Elborne continued to have possession and enjoyment of the Property until her death, possession and enjoyment of the Property had not been bona fide assumed by the trustees of the Life Settlement.

142. In response, Mr Bradley said that Mrs Elborne's possession and enjoyment of the Property was in her capacity as the holder of an interest in possession in the Life Settlement and not as the legal and beneficial owner of the Property as she had been before the execution of the Sale Agreement. In *Ingram and another v Inland Revenue Commissioners* [2000] 1 AC 293 ("*Ingram*") at 304D, Lord Hoffman had explained that the section applied only if the donor continued to benefit from the interest which had been given away. It did not prevent the donor from deriving a benefit from the object to which that interest related. In this case, the trustees of the Life Settlement had derived absolute ownership of that beneficial interest and were therefore to be regarded for the purposes of the section as having bona fide assumed possession and enjoyment of that interest. Mrs Elborne's continuing enjoyment of the right to occupy the Property by virtue of her interest in possession in the Life Settlement did not change that fact.

143. In relation to the third of Mr Bradley's submissions in paragraph 134 above, each party maintained its position in relation to the effect of Section 49 set out in paragraphs 138 and 139 above.

144. Mr Davey said that Section 102(3) had the effect of bringing within Mrs Elborne's estate the part of the Property which did not exceed the value of the liability under the Note whereas Mr Bradley maintained that the whole of the Property had remained within Mrs Elborne's estate at all times prior to her death because the fact that the value at which the Property was taken into account for inheritance tax purposes was reduced by the value of the liability under the Note did not prevent the whole of the Property from being treated as beneficially owned by Mrs Elborne under Section 49. Since Section 102(3) was stated to apply only "to the extent that the property would not, apart from this section, form part of the donor's estate immediately before his death", the section did not apply.

145. Mr Bradley added that, even if the section did apply, the effect of the section was stated to be that the property in question was to be "treated for the purposes of the 1984 Act as property to which [the donor] was beneficially entitled immediately before his death". That said nothing about the value which was to be accorded to the relevant property for that purpose and, pursuant to Section 4(1), a deduction would be given for liabilities attributable to the property, by parity of reasoning with the one adopted in *St Barbe Green*. Thus, the value of the Property would still be reduced by the value of the liability under the Note even if Section 102 applied.

Discussion

146. The short answer to the above submissions is that, in our view, Mr Bradley is right in saying that Section 102 can have no effect in relation to the Property because, for inheritance tax purposes, even before the application of the section, Mrs Elborne fell to be treated as beneficially entitled to the whole of the Property and therefore there is nothing to which Section 102(3) can apply. That is clear from the judgment of Mann J in *St Barbe Green* and it is supported by the way in which paragraphs 11(1), 11(6) and 11(7) of Schedule 15 to the FA 2004 are worded.

147. That answer dispenses with the need for us to address the other points of dispute mentioned above. However, for completeness, we would say as follows:

(1) we do not agree with Mr Bradley's submission that *Eversden* is authority for the proposition that the words the words "[disposed]… by of gift" are synonymous with the words "transfer of value" and that therefore, if there has been no transfer of value, the language in the preamble to Section 102(1) is not satisfied.

The decision in *Eversden* concerned whether, on the facts of that case, the disposal by way of gift which had been made to the settlement amounted to a transfer of value which fell within the exemption for transfers of value in Section 18 of the IHTA ("Section 18"). The Inland Revenue sought to argue that the asset which should be regarded as being the subject matter of the disposal by way of gift was not the whole of the property which had been transferred into the settlement but was rather a package of various interests in that property, only some of which were transfers of value falling within Section 18. In rejecting that argument, the Court of Appeal held that it involved an unwarranted distortion of the language in Section 102 to try to fragment the disposal by way of gift of a single property into a disposal by way of gift of a number of different interests in that property, only some of which qualified for the exemption in Section 18. Thus, *Eversden* was a case about identifying the subject matter of a disposal by way of gift. It did not say that there could be no disposal by way of gift unless there was also a transfer of value.

We therefore conclude that, in this case, the language in the preamble to Section 102(1) is satisfied in relation to the Property because there was a disposal of the Property by way of gift when Mrs Elborne sold the Property to the trustees of the Life Settlement at an undervalue; and

(2) turning then to the question of whether possession and enjoyment of the property which was the subject of the disposal by way of gift was bona fide assumed by the donee – which is the condition in Section 102(1)(a) – this is of somewhat academic interest given that it is common ground that the condition in Section 102(1)(b) is satisfied by virtue of Mrs Elborne's continued occupation of the Property following the Sale Agreement and the two conditions are alternatives.

However, in relation to Section 102(1)(a), we do not consider that the present facts are on all fours with those in *Ingram*. In *Ingram*, the property which was the subject of the disposal was the freehold interest and Lady Ingram retained a different interest in the property, namely a leasehold interest. In this case, Mrs Elborne disposed of the beneficial interest in the Property to the trustees of the Life Settlement who received the Property on terms that Mrs Elborne was entitled to an interest in possession in the Property under the terms of the Life Settlement.

Clause 19 of the deed creating the Life Settlement provided that the trustees were entitled to permit any beneficiary to occupy or enjoy all or any part of the trust property.

Sections 12 and 13 of the Trusts of Land and Appointment of Trustees Act 1996 (the "TLAPA") provide that:

(a) a beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled to occupy the land by reason of his interest at any time if, at that time, the purposes of the trust include making the land available for his occupation or the land is held by the trustees so as to be so available;

(b) the trustees may from time to time impose reasonable conditions on the beneficiary in relation to his occupation of the land; and

(c) such conditions may include, in particular, conditions requiring him to pay any outgoings or expenses in relation to the land or to assume any other obligation in relation to the land or to any activity which is to be conducted there.

Thus, in this case, by virtue of her rights under the deed creating the Life Settlement and the TLAPA, Mrs Elborne was entitled to occupy the Property from the moment that the beneficial ownership in the Property passed to the trustees of the Life Settlement (and this was confirmed by the terms of the Life Settlement Trustees' Resolution which bore the same date as the Sale Agreement).

There are two possible ways of analysing the above events for the purposes of applying Section 102(1)(a).

One is to say that the terms of the fiction in Section 49 - to the effect that Mrs Elborne should be treated as continuing to be the beneficial owner of the interest in the Property which passed to the trustees of the Life Settlement pursuant to the execution of the Sale Agreement – should be read into Section 102(1)(a). In that case, Mrs Elborne retained the beneficial ownership of the property which was the subject of the disposal by way of gift for the purposes of applying Section 102 and therefore possession and enjoyment of the property which was the subject of the gift was not bona fide assumed by the trustees. Instead, it remained with Mrs Elborne. On that analysis, therefore, the condition in Section 102(1)(a) is satisfied.

The other is to say that the terms of the fiction in Section 49 should not be read into Section 102(1)(a). In that case, the interest which Mrs Elborne retained – her right to occupy the Property as the holder of the interest in possession in the Life Settlement – was a different interest from the interest in the property which was the subject of the disposal by way of gift and therefore the condition in Section 102(1)(a) is not satisfied, applying the reasoning in *Ingram*.

We can see no reason why the fiction in Section 49 should not be read into Section 102(1)(a). Indeed, we have done so in applying Section 102(3) – see paragraph 146 above - and will do so again when we come to consider the Section 103 debt incurred issue. It follows that, in our view, the present facts are distinguishable from those in *Ingram* and the condition in Section 102(1)(a) is satisfied.

Conclusion

148. For the reasons set out in paragraphs 146 and 147 above, we have concluded that:

(1) since, even before the application of Section 102, the whole of the Property fell to be treated as property to which Mrs Elborne was beneficially entitled immediately before her death, Section 102 can have no effect in relation to the Property; and

(2) therefore, the Section 102 Property issue should be determined in favour of the Appellants.

THE SECTION 102A ISSUE

Introduction

149. Section 102A is headed "Gifts with reservation: interest in land" and provides as follows:

"(1) This section applies where an individual disposes of an interest in land by way of gift on or after 9th March 1999.

(2) At any time in the relevant period when the donor or his spouse or civil partner enjoys a significant right or interest, or is party to a significant arrangement, in relation to the land—

(a) the interest disposed of is referred to (in relation to the gift and the donor) as property subject to a reservation; and

(b) section 102(3) and (4) above shall apply.

(3) Subject to subsections (4) and (5) below, a right, interest or arrangement in relation to land is significant for the purposes of subsection (2) above if (and only if) it entitles or enables the donor to occupy all or part of the land, or to enjoy some right in relation to all or part of the land, otherwise than for full consideration in money or money's worth.

(4) A right, interest or arrangement is not significant for the purposes of subsection (2) above if—

(a) it does not and cannot prevent the enjoyment of the land to the entire exclusion, or virtually to the entire exclusion, of the donor; or

(b) it does not entitle or enable the donor to occupy all or part of the land immediately after the disposal, but would do so were it not for the interest disposed of.

(5) A right or interest is not significant for the purposes of subsection (2) above if it was granted or acquired before the period of seven years ending with the date of the gift…."

150. It was common ground that:

(1) even if Section 102A applied, its effect would simply be to extend the application of Sections 102(3) and 102(4) to the interest in land in question; and

(2) as such, whilst success in relation to the Section 102A issue would enable the Respondents to make good any deficiencies in their arguments in relation to Section 102(1), it would be of no assistance to the Respondents in relation to the dispute over the meaning of Section 102(3).

151. It follows from the conclusions which we have reached in relation to the Section 102 Property issue and the reasons for those conclusions that our conclusions in relation to the Section 102A issue have limited relevance to the outcome of this appeal. However, for completeness, we set out below the submissions which were made in relation to it and our views on those submissions.

The parties' submissions

152. Mr Bradley said that his submission in paragraph 136 above in relation to there being no disposal by way of gift in this case because there had been no transfer of value applied equally to Section 102A(1) and therefore it was likely that, if the Respondents failed to succeed in their arguments in relation to Section 102(1), they would inevitably fail to succeed in their arguments in relation to Section 102A(1) as well.

153. Mr Davey and Ms Belgrano did not dissent from that but reiterated their view that the words "[disposed]…by way of gift" and the words "transfer of value" were not the same.

154. In addition, the parties disagreed over whether Mrs Elborne could be said to have enjoyed a "significant right or interest" or to have been a party to a "significant arrangement" in relation to the Property at any time in the "relevant period", as was required in order for Section 102A to apply.

155. Ms Belgrano said that Mrs Elborne's right to occupy the land pursuant to her interest in possession under the Life Settlement otherwise than for full consideration in money or money's worth fell within the definition of a significant right, interest or arrangement in Section 102A(3) and that neither of the exclusions in Sections 102A(4) or 102A(5) was in point.

156. Mr Bradley accepted that the exclusion in Section 102A(4) was not in point but said that Section 102A(5) applied because Mrs Elborne had occupied the Property for more than seven years prior to the date of execution of the Sale Agreement, as the beneficial owner of the Property and that, pursuant to Section 49, Mrs Elborne continued to be able to occupy the Property as the deemed beneficial owner of the Property for inheritance tax purposes following the date of the Sale Agreement. Her right of occupation had therefore been acquired before the start of the seven-year period preceding the date of the Sale Agreement.

157. Ms Belgrano said that that was not the case because:

(1) the right or interest which enabled Mrs Elborne to occupy the Property after the gift was made was her interest in possession in the Life Settlement, which arose only by virtue of the scheme. That was a different right or interest in the Property from her legal and beneficial ownership of the Property pursuant to which she had occupied the Property before the gift was made;

(2) the deeming in Section 49 did not change the analysis because that merely deemed Mrs Elborne to be the beneficial owner of the Property – that is to say, the equitable owner - whereas, prior to the making of the gift, Mrs Elborne had been the legal and beneficial owner of the Property. A person who was the legal and beneficial owner of property could not be said to have an equitable interest in the property because, in that event, the legal interest carried all the rights – see *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669 at 706D ("*Westdeutsche*"). It followed that, even taking into account the deeming in Section 49, the interest pursuant to which Mrs Elborne occupied the Property following the making of the gift was a different interest in the Property from the right or interest pursuant to which she occupied the Property before the gift was made; and

(3) in any event, the exclusion in Section 102A(5) merely qualified the terms "significant right" and "significant interest". Therefore, even if Section 102A(5) applied to prevent Mrs Elborne from being treated as occupying the Property by virtue being the holder of a "significant right" or a "significant interest", it did not stop Mrs Elborne's occupation of the Property from being pursuant to a "significant arrangement" for the purposes of the section.

158. In response, Mr Bradley submitted that the phrase "significant arrangement" was limited to an arrangement which fell short of creating rights or interests. That was why "significant arrangements" were not mentioned in Section 102A(5). In a case where the person's occupation was pursuant to a right or interest, the "significant arrangement" limb in Section 102A(3) was simply irrelevant.

Discussion

159. For the reason which we have given in paragraph 146 above, we do not think that success in relation to the Section 102A issue would avail the Respondents. In short, Section

102A merely switches on Sections 102(3) and 102(4) and therefore it can have no effect in a case such as this one where, even before the application of the section, Mrs Elborne was already treated for inheritance tax purposes as being beneficially entitled to the whole of the Property.

160. That answer dispenses with the need for us to address the other points of dispute mentioned above. However, for completeness, we would say as follows:

(1) for the reasons which we have already given in paragraph 147(1) above, we consider that there was a disposal by way of gift of Mrs Elborne's beneficial interest in the Property upon the execution of the Sale Agreement. The fact that that disposal by way of gift did not amount to a transfer of value is neither here nor there;

(2) however, applying the same reasoning as is set out in paragraph 147(2) above, we think that the right or interest enjoyed by Mrs Elborne following the execution of the Sale Agreement was the same right or interest as that which she enjoyed prior to that time for the simple reason that, pursuant to Section 49, she was deemed to remain the beneficial owner of the Property at that time. Since her beneficial ownership of the Property had been held for more than seven years before the date of execution of the Sale Agreement, Section 102A(5) applies to prevent her beneficial ownership of the Property from being a significant right or interest for the purposes of the section.

In that context, we do not think that the passage in *Westdeutsche* to which Ms Belgrano referred us in this context is to the point. That passage relates to the question of whether a person who has full beneficial ownership of money or property, both at law and in equity, can be said to enjoy an equitable interest in that property. It follows that Ms Belgrano might well have a point if we were proceeding in the context of Section 102A on the basis of ignoring the fiction in Section 49. In that event, it might fairly be said that Mrs Elborne acquired an equitable interest in the Property under the terms of the deed creating the Life Settlement and that, as the full legal and beneficial owner of the Property prior the execution of the Sale Agreement, she had not held that equitable interest in the Property prior to that time.

However, that is not the basis on which we believe Section 102A applies. Instead, believe that the section needs to be construed in accordance with the fiction in Section 49, with the result that Mrs Elborne was deemed to be the beneficial owner of the Property both before and after the execution of the Sale Agreement. It follows that her deemed interest in the Property – the beneficial interest – was one that she acquired more than seven years prior to the date of the gift and therefore that that beneficial ownership is not a significant right or interest; and

(3) we are also not persuaded by Ms Belgrano's point that, because Section 102A(5) operates only as an exclusion in defining significant rights and interests, the "significant arrangement" part of Section 102A(2) remains undisturbed. Our reason for reaching this conclusion is essentially the one advanced by Mr Bradley and it is based on the language in Section 102A(3). That section proceeds by requiring the identification of the basis on which the donor is "[entitle] or [enabled] …to occupy all or part of the land, or to enjoy some right in relation to all or part of the land, otherwise than for full consideration in money or money's worth". It follows that, if the donor's right to occupy, or enjoy some right in relation to, the land arises by virtue of a legal right or interest, then the arrangement limb of the provision is irrelevant. Putting it another way, in this case, Mrs Elborne did not occupy all or part of the Property by virtue of an arrangement. Instead, she did so by virtue of a right or interest. It follows that, by virtue of the exclusion in Section 102A(5), Section 102A is precluded from applying.

Conclusion

161. For the reasons set out in paragraphs 159 and 160 above, we have concluded that:

(1) since, even before the application of Section 102A, the whole of the Property fell to be treated as property to which Mrs Elborne was beneficially entitled immediately before her death, Section 102A can have no effect in relation to the Property;

(2) in any event, Mrs Elborne's right to occupy, or enjoy some right in relation to, the Property did not arise from a significant right, interest or arrangement for the purposes of the section; and

(3) therefore, the Section 102A issue should be determined in favour of the Appellants.

THE ELECTION ISSUE

Introduction

162. Section 84 and Schedule 15 of the FA 2004 introduced provisions which imposed a charge to income tax by reference to benefits received in certain circumstances by a former owner of property. The key provisions in the present context are:

(1) paragraph 3 of the schedule, which provides for an individual who continues to occupy land after disposing of it to be liable to income tax on any amount by which the rental value of the land exceeds the payments made by the individual to the owner of the land in respect of his or her occupation of the land;

(2) paragraph 11(1) of the schedule, which provides that paragraph 3 of the schedule does not apply to a person when his or her estate for the purposes of inheritance tax includes the relevant property;

(3) paragraph 11(6) of the schedule, which provides that, where the value of the person's estate for inheritance tax is reduced by an excluded liability affecting any property, "that property is not to be treated for the purposes of [paragraph 11(1)]… as comprised in his estate except to the extent that the value of the property exceeds the amount of the excluded liability";

(4) paragraph 11(7) of the schedule, which provides that, for the purposes of paragraph 11(6) of the schedule, a liability is an "excluded liability" if, inter alia, the creation of the liability and any transaction by virtue of which the person's estate came to include the relevant property were "associated operations", as defined in Section 268; and

(5) paragraph 21 of the schedule, which is headed "Election for application of inheritance tax provisions", and provides as follows:

"(1) This paragraph applies where—

(a) a person ("the chargeable person") would (apart from this paragraph) be chargeable under paragraph 3 (land) or paragraph 6 (chattels) for any year of assessment ("the initial year") by reference to his enjoyment of any property ("the relevant property"), and

(b) he has not been chargeable under the paragraph in question in respect of any previous year of assessment by reference to his enjoyment of the relevant property, or of any other property for which the relevant property has been substituted.

(2) The chargeable person may elect in accordance with paragraph 23 that—

(a) the preceding provisions of this Schedule shall not apply to him during the initial year and subsequent years of assessment by reference to his enjoyment of the relevant property or of any property which may be substituted for the relevant property, but

(b) so long as the chargeable person continues to enjoy the relevant property or any property which is substituted for the relevant property—

(i) the chargeable proportion of the property is to be treated for the purposes of Part 5 of the 1986 Act (in relation to the chargeable person) as property subject to a reservation, but only so far as the chargeable person is not beneficially entitled to an interest in possession in the property, ...

(ii) section 102(3) and (4) of that Act shall apply, but only so far as the chargeable person is not beneficially entitled to an interest in possession in the property, and

(iii) if the chargeable person is beneficially entitled to an interest in possession in the property, sections 53(3) and (4) and 54 of IHTA 1984 (which deal with cases of property reverting to the settlor etc) shall not apply in relation to the chargeable proportion of the property….

(4) For the purposes of this paragraph a person "enjoys" property if—

(a) in the case of an interest in land, he occupies the land, and

(b) in the case of an interest in a chattel, he is in possession of, or has the use of, the chattel."

163. Ms Belgrano's position in relation to the Election was that, by virtue of making the Election, Mrs Elborne had brought herself within the ambit of Section 102 in respect of the part of the value of the Property which did not exceed the value of the liability under the Note. (The value of the Property which exceeded the value of the Note fell outside paragraph 11(6) and therefore within paragraph 11(1), with the result that it fell outside paragraph 3 in any event and there was no need for the Election to apply to it). However, she accepted that, even if that was the effect of the Election, that would merely remedy any deficiencies in the Respondents' arguments in relation to Section 102(1) in respect of the relevant part of the value of the Property. It would be of no assistance to the Respondents in relation to:

(1) the part of the value of the Property in excess of the liability under the Note; or

(2) the dispute over the meaning of Section 102(3).

164. It follows from the conclusion which we have reached in relation to the Section 102 issue and the reason for that conclusion that our conclusions in relation to the Election issue have limited relevance to the outcome of this appeal. However, for completeness, we set out below the submissions which were made in relation to it and our views on those submissions.

The parties' submissions

165. In relation to the Election, it was common ground that:

(1) by virtue of Mrs Elborne's continuing residence at the Property following the Sale Agreement, paragraph 3 of the schedule was potentially engaged;

(2) paragraph 11(1) of the schedule conferred an exemption from the charge under that paragraph to the extent that the Property formed part of Mrs Elborne's estate;

(3) the part of the Property which exceeded the value of the liability under the Note clearly fell within paragraph 11(1); and

(4) if the part of the Property which did not exceed the value of the liability under the Note fell within paragraph 11(1) by virtue of Section 49, it was removed from paragraph 11(1) by the operation of paragraph 11(6) of the schedule because the liability under the Note was an excluded liability for the purposes of that paragraph and reduced the value of Mrs Elborne's estate.

166. However, the parties differed on the extent to which the language of disapplication which was set out in paragraph 11(6) applied in the context of paragraph 21 of the schedule.

167. Ms Belgrano maintained that, although the paragraph merely said that the relevant property was not to be treated as comprised in the relevant person's estate "for the purposes of "paragraph [11](1) and [11](2)", that deeming necessarily extended across the schedule as a whole and should therefore be regarded as operating for the purposes of paragraph 21 as well.

168. In contrast, Mr Bradley said that the words should be construed literally so that the deeming operated solely for the purposes of paragraph 11 of the schedule. They had no effect when it came to construing paragraph 21.

169. The importance of this dispute lay in the impact which it had on the impact of the Election.

170. Mr Bradley maintained that, since the deeming in paragraph 11(6) was confined expressly to paragraph 11 itself, Mrs Elborne should be treated as having an interest in possession of the Property when it came to applying paragraph 21(2)(b). That meant that the only part of the paragraph which applied to Mrs Elborne following her making of the Election was paragraph 21(2)(b)(iii) and, consequently, that paragraph 21(2)(b)(ii), which stated that Sections 102(3) and 102(4) would apply to the property which was the subject of an election under that section, did not.

171. In contrast, Ms Belgrano said that, since the deeming in paragraph 11(6) should be read as applying for the purposes of paragraph 21, paragraph 21(2)(b)(ii) applied to the Property to the extent of the value of the liability under the Note and therefore the Election had the effect of bringing the Property to that extent within the ambit of Sections 102(3) and 102(4).

172. Ms Belgrano pointed out that Mr Bradley's interpretation of the provisions had the effect that, on the present facts, the Election would have had no impact on the inheritance tax position at all. That would mean that, in effect, by making the Election, Mrs Elborne would have elected out of the income tax liability to which paragraph 3 would otherwise have given rise but without suffering any inheritance tax consequences. That was clearly contrary to the principle underlying the schedule and the heading to paragraph 21, which said "Election for application of inheritance tax provisions". Headings to enactments were drafted by Parliamentary counsel and contained in Bills presented to Parliament before enactment. As such, they provided guidance and context and should be taken into account when construing the legislation to which they related – see the judgment of Lord Hope in *R v Montila and others* [2004] 1 WLR 3141 at paragraphs [31] to [36].

173. Mr Bradley said that support for his interpretation of the provisions could be derived from the fact that, whereas paragraph 11(6) of the schedule said that, where it applied, the relevant property was "not to be treated … as comprised in [the chargeable person's] estate", paragraph 21(2)(b)(ii) was stated to apply "only so far as the chargeable person is not beneficially entitled to an interest in possession in the property". He said that, if the intention had been for paragraph 11(6) to apply for the purposes of paragraph 21 as well, then paragraph 21(2)(b)(ii) would have said "only so far as the property is not comprised in the chargeable person's estate".

174. In response, Ms Belgrano said that there was no meaningful distinction between the two phrases because a property in which a chargeable person had an interest in possession was, by definition, within that chargeable person's estate. That was why Mr Bradley had himself concluded that, but for paragraph 11(6), paragraph 11(1) would have applied to exclude the Property from the income tax charge. Paragraph 11(1) did not refer to property in which the chargeable person had an interest in possession. Instead, it referred to property which was included in the chargeable person's estate. The former was a sub-set of the latter, as the language in paragraph 11(12) made clear.

175. Moreover, unless one took into account the effect of paragraph 11(6) when applying paragraph 21, it would be impossible to identify the property in respect of which the election referred to in that paragraph could be made.

176. Ms Belgrano added that, since paragraph 11(6) was a deeming provision, it should be applied in a manner which was consistent with the principles outlined in relation to that process by Lord Briggs in *Fowler v The Commissioners for Her Majesty's Revenue and Customs* [2020] 1 WLR 22 ("*Fowler*"). At paragraph [27] in *Fowler*, Lord Briggs had said as follows:

"There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory. The relevant dicta are mainly collected in a summary by Lord Walker in *DCC Holdings (UK) Ltd v Revenue and Customs Comrs* [2010] UKSC 58, [2011] STC 326, [2011] 1 WLR 44, paras [37]–[39], collected from *IRC v Metrolands (Property Finance) Ltd* [1981] STC 193, [1981] 1 WLR 637, *Marshall (Inspector of Taxes) v Kerr* [1994] STC 638, [1995] 1 AC 148 and *Jenks v Dickinson (Inspector of Taxes)* [1997] STC 853, 69 TC 458. They include the following guidance, which has remained consistent over many years:

(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.

(2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

(3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.

(4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.

(5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably follow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, 133:

"The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

177. Ms Belgrano said that her interpretation of the paragraph was consistent with the above principles. In particular, Mr Bradley's interpretation gave rise to the absurd result that value which the paragraph was expressly bringing within the income tax regime could fall outside that regime without being taken into account for inheritance tax purposes. According to

paragraph [27(4)] of Lord Briggs's judgment, that absurd result could be justified only where the court or tribunal was compelled to do so by clear language and the language in this case did not meet that standard.

178. She added that her interpretation of the schedule was consistent with the explanatory notes to the Finance Act 2006, which introduced paragraph 21(2)(b). Paragraph 9 of the notes made it clear that the provisions in paragraph 21(2)(b) were intended to ensure that, where a chargeable person made an election to fall outside the income tax regime in relation to property, then there was an effective inheritance charge on the property. As Lord Hodge had made clear in *R (Project for the registration of children as British citizens) v Secretary of State for the Home Department; R (O) v Secretary of State for the Home Department* [2022] UKSC 3 at paragraphs [29] and [30], explanatory notes which accompanied draft legislation, whilst not displacing the clear and unambiguous language in the legislation in question, could nevertheless cast light on the meaning of that legislation.

179. Mr Bradley accepted that the result for which he was contending was absurd in the context of the facts in this case but said that that was the plain meaning of the legislation. He added that it was not correct to assume that a chargeable person could not have an interest in possession which did not form part of the chargeable person's estate. There were examples in the legislation of interests in possession which were expressly excluded from the chargeable person's estate.

Discussion

180. For the reason which we have given in paragraph 146 above, we do not think that success in relation to the Election issue would avail the Respondents. In short, even if the Election were to have the effect that the Respondents allege that it had, that would merely switch on Sections 102(3) and 102(4) in relation to the part of the value of the Property which did not exceed the value of the liability under the Note and, as we have already concluded, Section 102(3) can have no effect in a case where, even before the application of the section, Mrs Elborne was already treated for inheritance tax purposes as being beneficially entitled to the whole of the Property.

181. That answer dispenses with the need for us to address the other points of dispute mentioned above. However, for completeness, we would say as follows:

(1) we agree with Ms Belgrano that the purpose of paragraph 21 of the schedule is to ensure that the price to be paid by a person who wishes to elect to extricate himself from the income tax liability under paragraph 3 is that the relevant property falls within the estate of that person for inheritance tax purposes and that, if Mr Bradley is right, then paragraph 21 operates in the present context by giving rise to a right to elect out of the income tax liability without any inheritance tax consequences;

(2) however, the purpose underlying the enactment of a provision can take one only so far. It is also necessary to consider the plain meaning of the words used and, in this case, there are two difficulties with the language in the schedule so far as concerns the Respondents' case;

(3) the first problem is that paragraph 11(6) is clearly stated to apply solely for the purposes of paragraphs 11(1) and 11(2) and is not stated to apply for the purposes of the schedule as a whole;

(4) the second is that stipulating that property is not to be treated as being comprised in a person's estate is not the same as stipulating that the relevant person is not to be treated as having an interest in possession in the relevant property. The two concepts are different, just as the concept of a gift is different from the concept of a transfer of

value, as we have noted above. Not all property which is comprised in a person's estate will be property in which that person holds an interest in possession. Similarly, whilst property in which a person holds an interest in possession will often comprise part of that person's estate, that is not invariably the case;

(5) we would add that we do not agree with Ms Belgrano's submission that, unless one takes into account the effect of paragraph 11(6) when applying paragraph 21, it is impossible to identify the property in respect of which the election referred to in that paragraph can be made. The effect of paragraph 11(6) is simply to prevent the exclusion set out in paragraph 11(1) from applying. All that does is to leave intact the income tax charge under paragraph 3. In other words, the effect of paragraph 11(6) is to render inapplicable an exception (in paragraph 11(1)) which would otherwise apply. That then leaves paragraph 3 intact and unaffected by paragraph 11, taken as a whole, so that the property to which the election under paragraph 21 can apply is readily identifiable without regard to paragraph 11. So there is no need for paragraph 11(6) to apply for the purposes of paragraph 21. It needs merely to apply for the purposes of paragraph 11 in order to leave the property which is potentially subject to the election under paragraph 21 readily identifiable;

(6) taking all of the above into account, we think that, no matter how unjust, absurd or anomalous the result of the position advocated on behalf of the Appellants may be, that result is one based on the clear words of the legislation. This is a case falling within Lord Briggs's fourth principle of construction in the extract from *Fowler* set out above – see paragraph [27(4)]; and

(7) we therefore conclude that the Election did not bring paragraph 21(2)(b)(ii) into play.

Conclusion

182. For the reasons set out in paragraphs 180 and 181 above, we have concluded that:

(1) since, even before the application of Election, the whole of the Property fell to be treated as property to which Mrs Elborne was beneficially entitled immediately before her death, the making of the Election can have no effect in relation to the Property;

(2) in any event, the making of the Election did not bring paragraph 21(2)(b)(ii) into play because Mrs Elborne was beneficially entitled to an interest in possession in the Property; and

(3) therefore, the Election issue should be determined in favour of the Appellants.

THE SECTION 49 ISSUE

Introduction

183. The previous section of this decision concludes our analysis in relation to the Respondents' submissions on issues pertaining to the nature and/or value of Mrs Elborne's interest in the Property for inheritance tax purposes at the time of her death. We now turn to the Respondents' submissions on issues pertaining to whether not the value of Mrs Elborne's estate for inheritance tax purpose at the time of her death was depleted by an amount equal to the value of the Note.

The submissions of the parties

184. Mr Davey said that the effect of Section 49 was that a person who had an interest in possession in settled property was required to be treated for the purposes of the IHTA as beneficially entitled to the property in which the interest subsisted. In *St Barbe Green* at paragraph [12], Mann J had held that the word "property" when it was used in the section

meant "net property" – which is to say, the value of the property in the settlement in which the interest in possession existed net of the liabilities of the settlement.

185. Mr Davey said that, if the way in which Section 49 applied meant that Mrs Elborne was to be treated as being beneficially entitled to the whole of the Property for inheritance tax purposes, with the result that the value of the liability under the Note could merely deplete the value at which the Property was to be taken into account, as opposed to removing part of the Property from her deemed beneficial ownership, then, despite the decision in *St Barbe Green*, there were two reasons why the liability under the Note should not be taken into account in valuing the Property in which Mrs Elborne's interest in possession subsisted.

186. The first was that the Note should be regarded as not giving rise to a liability at all given that it was never intended to be repaid. That intention could be seen in the question put to Mr Dumont after Mrs Elborne's death and in the fact that the trustees of the Family Settlement took no steps at any time to protect the value of the Note or to ensure that it could be repaid. Moreover, since the trustees of the Life Settlement were dependent on the Property in order to be able to repay the Note and the Property had been sold by Mrs Elborne's executors, the Note could not now be repaid in any event.

187. The second was that, even if the Note could be seen as giving rise to a liability, that liability was not one which fell to be taken into account for the purposes of Section 49. Not all liabilities of the Life Settlement fell to be taken into account for the purposes of the section. As was always the case, it was necessary to apply the section, construed purposively, to the facts, viewed realistically and, in doing so in this case, the liability under the Note fell to be disregarded because it had been manufactured solely for the purpose of diminishing the value of the property in which the interest in possession subsisted and thus defeating the purpose of the section.

188. In *Rossendale Borough Council v Hurstwood Properties (A) Ltd and others; Wigan Council v Property Alliance Group Ltd* [2022] AC 690 ("*Rossendale*"), the Supreme Court had taken this approach in denying claims which had been made to avoid rates. In that case, the Supreme Court was required to identify "the person entitled to possession" of various properties for the purposes of Section 65(1) of the Local Government Finance Act 1988 and had held that, having regard to the historical background and the statutory scheme as a whole, certain special purpose vehicles set up solely for the purpose of avoiding the liability to rates did not fall within those words, despite the fact that, as a matter of real property law, those companies had the immediate legal right to actual possession of the properties. In reaching that conclusion, the Supreme Court held that Parliament could not have intended the phrase to encompass a company which had no real or practical ability to exercise its legal right to possession and on which that legal right had been conferred for no purpose other than the avoidance of liability for rates – see *Rossendale* at paragraphs [11], [12] and [47] to [51].

189. Applying the same approach in the present case, the liability represented by the Note, which had been created solely for the purpose of depleting the value of Mrs Elborne's interest in possession, should be disregarded in construing the word "property" in Section 49. It would not be appropriate to allow a deduction under the legislation for a liability which had been created solely to avoid the very charge which the legislation sought to impose.

190. Putting it another way, the arrangements as a whole gave rise to an interest in possession in the Property and a corresponding liability under the Note and the terms of the liability were such that it did not fall to be discharged until after Mrs Elborne's death. As such, the liability did not impinge on Mrs Elborne's enjoyment of the asset in which her interest in possession subsisted – which is to say, the Property – and therefore the full value

of the Property without taking into account the liability under the Note fell to be taken into account for the purposes of Section 49.

191. There was a parallel in this context with the situation pertaining in the old estate duty case of *Attorney General v Lord Montagu* [1904] AC 316 ("*Montagu*"). In that case, a life tenant had joined with the remainderman in mortgaging some real property. The loan in question was made to the remainderman only and the remainderman covenanted to indemnify the life tenant against the obligations to pay principal and interest under the loan and assigned another property to the life tenant by way of security for the indemnity. It was held that, in valuing the estate of the life tenant upon the life tenant's death, no deduction could be made for the liability under the loan. That was because, as a matter of substance, the obligations under the loan did not deplete the value of the property in which the life tenant held her interest.

192. Mr Bradley's response on the first of Mr Davey's submissions was that the evidence showed very clearly that the parties to the scheme had intended the scheme documents to have the effect which they purported to have and that any departure from the terms of the documents had been through error. In addition, the Respondents had not alleged that the scheme documents were a sham. It followed that the scheme documents had had the effect in law which they purported to have on their face and therefore that the Note gave rise to a genuine liability for the trustees of the Life Settlement.

193. As for Mr Davey's second submission, Mr Bradley said that:

(1) there was nothing in the language of Section 49 to indicate that a liability created solely for the purpose of avoiding inheritance tax was to be disregarded in applying the section;

(2) the structure of the inheritance tax legislation was to deal specifically with cases where liabilities were to be disregarded – for example, Section 5(5), Section 103 and Sections 162A, 162B and 175A of the FA 1986. It was not appropriate to read some generalised tax avoidance exclusion into a section which was silent on the point;

(3) in any event, inheritance tax by definition was concerned with uncommercial transactions such as gifts. It made no sense to seek to overlay a commerciality requirement into any provision of the legislation in the absence of express language to that effect;

(4) the fact that, absent a default, the liability under the Note would not fall due for payment until after Mrs Elborne's death was irrelevant. Section 162(2) of the IHTA demonstrated clearly that the fact that a liability would not fall due until a future date was a matter to be taken into account in valuing that liability. It did not mean that the liability could simply be ignored; and

(5) leaving aside the fact that it related to different legislation and a different tax, the facts in *Montagu* were completely different from the facts in this case. In *Montagu*, the liability in question was a liability of the remainderman and not a liability of the trustee or the life tenant.

Discussion

194. We agree with Mr Bradley's submissions in relation to this issue.

195. We can see no basis in law for simply disregarding the liability under the Note in the light of our findings of fact in paragraphs 19 to 27 above to the effect that the parties to the Note intended it to have the legal effects which it purported to have and our conclusion of

law in paragraphs 74 to 80 above to the effect that the Note gave rise to the legal effects which it purported to have.

196. As such, the Note must fall to be taken into account in valuing Mrs Elborne's interest in possession unless Mr Davey's second reason is correct.

197. In that context, we are not persuaded that the circumstances of this case are akin to those pertaining in *Rossendale*. We would observe that:

(1) in *Rossendale* at paragraph [51], Lord Briggs said expressly that the mere fact that a transaction is motivated by a tax avoidance purpose is not sufficient in and of itself to mean that the transaction can be disregarded. He said:

"We emphasise that this conclusion is not founded on the fact that the defendant's only motive in granting the lease was to avoid paying business rates, although that was undoubtedly so. If the leases entered into by the defendants had the effect that they were not liable for business rates, their motive for granting the leases is irrelevant. Nor does it illuminate the legal issues to use words such as "artificial" or "contrived" to describe the leases, when it is now accepted that they created genuine legal rights and obligations and were not shams. Our conclusion is based squarely and solely on a purposive interpretation of the relevant statutory provisions and an analysis of the facts in the light of the provisions so construed";

(2) it is therefore necessary in this context to ignore the tax avoidance motive which was underlying the scheme and focus instead on whether, on a purposive construction of Section 49, as construed by Mann J in *St Barbe Green*, the liability under the Note falls outside the language in the section;

(3) we can see no basis for reaching that conclusion;

(4) in the first place, there is nothing in the language of Section 49 itself to support the proposition that the liabilities which are to be deducted in valuing the property which is subject to the interest in possession for the purposes of that section are to be disregarded in a case where they have been created for tax avoidance reasons;

(5) moreover, the scheme of the inheritance tax legislation as a whole is to make specific provision for those circumstances in which deductions for liabilities are to be disallowed because they have been incurred for tax avoidance reasons – for example, Sections 5(4) and 5(5), Section 162(5) of the IHTA and Section 103;

(6) we therefore infer that there is no reason why Section 49 should be construed on the basis that liabilities which have been incurred for tax avoidance purposes should be disregarded in applying that section and that this is not a case where a clear statutory purpose is being thwarted solely for tax avoidance reasons;

(7) we also see no relevance in this context in the fact that the liability under the Note was created at the same time as was the interest in possession or that the liability did not fall to be discharged in accordance with its terms until the interest in possession came to an end;

(8) as regards the first of those things, we can see no reason why the fact that the liability arose simultaneously with the creation of the interest in possession means that the liability falls to be disregarded in valuing that interest in possession and, as regards the second, we do not see why the fact that the liability could not fall due until after the interest in possession came to an end should cause the liability to be ignored. Clearly, the date on which a liability is due to be repaid and the obligations of the obligor pending that repayment will be matters which need to be taken into account in valuing the liability at the relevant time (see Section 162(2) of the IHTA). But they are not

factors which go to the question of whether the liability should be taken into account at all; and

(9) we do not see any meaningful parallel between the facts in this case and the facts in *Montagu*. Leaving aside the fact that it related to estate duty and therefore different legislation, the relevant liability in *Montagu* was never a liability of the trustees or the life tenant. Instead, it was solely a liability of the remainderman. As between the life tenant and the remainderman, it was clear that the life tenant held the relevant property unencumbered. It was therefore unsurprising that, upon the death of the life tenant, the remainderman was unable to deduct the value of the liability in calculating the value of the life tenant's estate. In this case, the relevant liability – the liability under the Note – was a liability of the trustees of the Life Settlement and was therefore properly deductible in calculating the value of the property in which the interest in possession subsisted. That was the case regardless of the fact that, by its terms, the liability did not fall due until after the life tenant died.

Conclusion

198. For the reasons set out in paragraphs 194 to 197 above, we have concluded that:

(1) the value of the liability under the Note was properly taken into account in calculating the value of Mrs Elborne's interest in possession for the purposes of Section 49; and

(2) therefore, the Section 49 issue should be determined in favour of the Appellants.

THE SECTION 103 INCUMBRANCE ISSUE

Introduction

199. Section 103 is headed "Treatment of certain debts and incumbrances" and provides (so far as relevant) as follows:

"(1) Subject to subsection (2) below, if, in determining the value of a person's estate immediately before his death, account would be taken, apart from this subsection, of a liability consisting of a debt incurred by him or an incumbrance created by a disposition made by him, that liability shall be subject to abatement to an extent proportionate to the value of any of the consideration given for the debt or incumbrance which consisted of—

(a) property derived from the deceased; or

(b) consideration (not being property derived from the deceased) given by any person who was at any time entitled to, or amongst whose resources there was at any time included, any property derived from the deceased….

(3) In subsections (1) and (2) above "property derived from the deceased" means, subject to subsection (4) below, any property which was the subject matter of a disposition made by the deceased, either by himself alone or in concert or by arrangement with any other person or which represented any of the subject matter of such a disposition, whether directly or indirectly, and whether by virtue of one or more intermediate dispositions…

(6) Any reference in this section to a debt incurred is a reference to a debt incurred on or after 18th March 1986 and any reference to an incumbrance created by a disposition is a reference to an incumbrance created by a disposition made on or after that date;....."

The parties' submissions

200. Mr Davey submitted that the effect of Section 103 was to prevent the liability under the Note from being taken into account in valuing Mrs Elborne's interest in possession under the Life Settlement. He said that this was because:

(1) absent the application of the section, the liability under the Note would deplete the value of Mrs Elborne's estate;

(2) either:

(a) the liability was an incumbrance created by a disposition made by Mrs Elborne; or

(b) the liability was a debt incurred by Mrs Elborne; and

(3) in either case, the consideration given for the incumbrance or debt consisted of the Property, which derived from Mrs Elborne.

201. We will come to the questions arising in relation to paragraph 199(2)(b) in due course, in the section dealing with the Section 103 debt incurred issue.

202. At this stage, we will focus solely on the other matters referred to in paragraph 199 above.

203. In relation to those points, Mr Davey said that it was common ground that the trustees of the Life Settlement had a lien over the Property because of their liability under the Note. In *Investec Trust (Guernsey) Ltd v Glenella Properties Ltd* [2018] UKPC 7 at paragraph [59], the Privy Council confirmed the principle of English trust law that a trustee is entitled to be indemnified out of the trust fund if he pays debts properly incurred as a trustee and that the trustee has an equitable lien on the trust assets in order to secure his right to be paid under that indemnity.

204. Mr Davey went on to say that there could be no doubt that:

(1) absent the application of Section 103, account would be taken in valuing Mrs Elborne's estate of the incumbrance which reflected the liability under the Note as that liability was depleting the value of the interest in possession held by Mrs Elborne;

(2) that incumbrance was created by a disposition made by Mrs Elborne because Mrs Elborne's disposal of the Property under the Sale Agreement gave rise to the incumbrance; and

(3) the consideration given for the creation of the incumbrance was "property derived from the deceased" for the purposes of Section 103(3) as it was Mrs Elborne's agreement to sell the Property under the Sale Agreement which gave rise to the issue of the Note.

205. Mr Bradley took issue with each of the above propositions.

206. As regards the first two propositions in paragraph 204 above, Mr Bradley pointed out that:

(1) the liability under the Note did not itself amount to an incumbrance over the Property. Instead, the only incumbrance over the Property in this case was the lien held by the trustees which enabled them to have recourse to the Property in meeting their liabilities under the Note. That lien arose by operation of law and did not itself deplete the value of Mrs Elborne's estate. Instead, it was the liability under the Note which depleted the value of Mrs Elborne's estate;

(2) moreover, that lien was not created by any disposition made by Mrs Elborne. Mrs Elborne's disposal of the Property under the Sale Agreement gave rise to the issue of the Note and it was the liability under the Note which gave rise by operation of law to the trustees' lien. Taking this point together with the first point, it could not be said that the value of Mrs Elborne's estate had been depleted by an incumbrance created by a disposition made by Mrs Elborne; and

(3) in addition, even if that was not correct, no consideration had been given by Mrs Elborne in return for the creation of the trustees' lien. The consideration given by Mrs Elborne – the agreement to transfer the Property to the trustees under the Sale Agreement – was for the issue of the Note and not for the creation of the trustees' lien over the Property.

207. Mr Davey said that Mr Bradley's distinction between the event giving rise to a trustees' lien and the event giving rise to a liability which led to that trustees' lien was logically flawed. He said that, in any case where a trustees' lien arose, it was a function of two things – the transaction giving rise to the liability upon which the trustees' lien was founded and then the application of the applicable general legal principle which led to the lien's arising. It would involve an unnecessarily restrictive reading of the section to distinguish the two things. On a natural reading of the section, the incumbrance over the Property which was the trustees' lien in this case had been created by the disposition of the Property by Mrs Elborne because that disposition had led to the issue of the Note which had given rise to the lien.

208. As for Mr Bradley's consideration point, it was important to bear in mind that the section was an anti-avoidance provision and, as such, needed to be construed purposively. An overly- literal granular reading of the section which had the effect of excluding from the ambit of the provision something which was plainly intended to fall within it should be avoided.

209. As regards the third proposition in paragraph 204 above, Mr Bradley said that the paradigm situation at which Section 103 was aimed was a case where the deceased first made a transfer of value of property to a third party and then borrowed an equivalent amount from that third party. This, he said, was why Section 103(3) defined "property derived from the deceased" as "any property which <u>was</u> the subject matter of a disposition made by the deceased" (our emphasis) as opposed to "any property which <u>is</u> the subject matter of a disposition made by the deceased". In his view, there needed first to be a disposition of property by the deceased and then that property (or property representing that property) needed to be used as consideration for the disposition which created the incumbrance.

210. He added that the way in which Sections 103(1) and 103(3) were worded was such that there therefore needed to be two dispositions – one disposition of property by the deceased where the property was then used as consideration and a second disposition by the deceased which created the incumbrance. Here there was just one disposition by the deceased – the disposition pursuant to the Sale Agreement – and that disposition could not do service twice for the purposes of the section.

211. In response to Mr Bradley's first submission, Mr Davey said that the use of the past tense in Section 103(3) was entirely referable to the fact that Section 103 as a whole was addressing the position at the point when the value of the relevant person's estate immediately before his death was being calculated (see the opening words in the section) and therefore, by definition, at a point when the deceased had already died and any disposition of property by the deceased must necessarily have already occurred. He said that the use of the past tense did not connote any necessary order in, on the one hand, the disposition of property by the deceased and, on the other hand, the creation of the incumbrance.

Discussion

212. We agree with Mr Bradley in relation to this issue, taken as a whole. However, he has not convinced us that the use of the word "was" in Section 103(3) means that the disposition of the property which is, or which is represented by, the consideration for the creation of the incumbrance needs necessarily to precede the disposition which creates the incumbrance. We agree with Mr Davey that the use of the past tense is adequately explained by the fact that Section 103 is necessarily looking back in time from the point immediately before the deceased's death. In our view, in order for Section 103 to be satisfied in relation to an incumbrance, it is merely necessary to establish that, when viewed from the time immediately before the deceased's death, the consideration for the creation of the incumbrance was either property which had been the subject of a disposition by the deceased or represented that property.

213. However, that conclusion is of limited assistance to the Respondents in relation to this issue because we agree with each of Mr Bradley's other points in relation to the issue. The problem for the Respondents in relation to this issue is that the facts are incapable of being shoe-horned into the language of the section.

214. In particular, we agree with Mr Bradley that the language of the section is such that there is a clear and obvious separation between:

(1) the disposition which created the incumbrance – see Section 103(1); and

(2) the disposition of the property which was, or was represented by the property which was, the consideration for the creation of the incumbrance – see Section 103(3).

215. The way in which the Respondents are urging us to interpret the relevant statutory provisions would involve treating the same disposition – the disposition of the Property pursuant to the Sale Agreement – as doing service in both of those contexts.

216. Leaving aside that point, in order for the section to apply in this case by reference to the word "incumbrance", the following conditions would need to be satisfied:

(1) the lien would need to be a liability which would otherwise deplete Mrs Elborne's estate;

(2) the lien would need to have been created by a disposition made by Mrs Elborne; and

(3) Mrs Elborne would need to have provided the consideration for the lien.

217. None of those conditions is met because, in reality, the lien itself did not deplete the value of the Property, the lien did not arise by virtue of a disposition by Mrs Elborne (it arose by operation of law) and the consideration provided by Mrs Elborne was for the issue of the Note and not for the lien.

Conclusion

218. For the reasons set out in paragraphs 212 to 217 above, we have concluded that:

(1) the Respondents are not entitled to succeed in relation to their submissions on Section 103 so far as they turn on the creation of an incumbrance; and

(2) therefore, the Section 103 incumbrance issue should be determined in favour of the Appellants.

THE SECTION 103 DEBT INCURRED ISSUE

Introduction

219. Section 103 is set out at paragraph 199 above.

The parties' submissions

220. In relation to the Section 103 debt incurred issue, Mr Davey submitted that:

(1) absent the application of Section 103, the liability under the Note would deplete the value of Mrs Elborne's estate;

(2) the consideration for that liability consisted of property derived from the deceased – namely the sale of the Property pursuant to the Sale Agreement;

(3) the language of the section was therefore met as long as the liability under the Note could be seen as a debt incurred by Mrs Elborne;

(4) Section 49, which was the provision pursuant to which the value of Mrs Elborne's interest in possession in the Life Settlement fell to be taken into account in her estate, was a deeming provision. It provided that a person who had an interest in possession in settled property was to be treated for the purposes of the IHTA as beneficially entitled to the property in which the interest subsisted;

(5) in *St Barbe Green*, at paragraph [12], Mann J had held that the word "property" when it was used in the section meant "net property" – which is to say, the value of the property in the settlement in which the interest in possession existed net of the liabilities of the settlement. In other words, the statutory fiction imposed by Section 49, as interpreted in accordance with *St Barbe Green*, was that the settlement property, subject to the settlement liabilities, was beneficially held by the person holding the interest in possession under the settlement;

(6) Lord Briggs in *Fowler* at paragraph [27] had summarised the manner in which statutory deeming provisions ought to be interpreted and applied – see paragraph 176 above. It was plain from the principles outlined by Lord Briggs that a court should not shrink from applying the fiction created by a deeming provision to the consequences which would inevitably flow from that fiction's being real;

(7) in *Pride*, the FTT had applied the principles outlined by Lord Briggs in the case of similar facts and had concluded at paragraph [46] that, since the purpose of the statutory fiction in the section was plainly to bring the settlement assets and settlement liabilities into the estate of the person holding the interest in possession under the settlement, that fiction should be taken into account in identifying the person by whom the settlement liabilities had been incurred for the purposes of Section 103. This meant that, when construing Section 103, any liability owed by the trustees of the relevant settlement should be regarded as having been incurred by the life tenant himself; and

(8) *Pride* was correctly decided and we should follow it. That meant that the liability under the Note in this case should be deemed to have been incurred by Mrs Elborne herself and, since the consideration for the Note (the disposal of beneficial ownership of the Property pursuant to the Sale Agreement) derived from Mrs Elborne, Section 103 had the effect of requiring the liability under the Note to be abated by an amount equal to the value of the Property at the time when the Note was issued when calculating the value of Mrs Elborne's estate.

221. Mr Bradley demurred in two respects from the above analysis.

222. First, he raised the timing point on Section 103(3) to which we have referred in the previous section of this decision.

223. Secondly, he submitted that the Respondents' position:

(1) involved a misreading of the language in Section 49; and

(2) was inconsistent with the decision of Mann J in *St Barbe Green*.

224. Accordingly, he said, the decision in *Pride* in relation to this point was wrong and we should not follow it.

225. In relation to the points made by Mr Davey in paragraph 220 above, Mr Bradley said that:

(1) Section 49 did not say that a person holding an interest in possession should be deemed to have incurred the liabilities owed by the settlement. Instead, it merely said that a person holding an interest in possession should be deemed to be beneficially entitled to the property in which the interest in possession subsisted and then the decision in *St Barbe Green* had made it clear that that property was to be valued net of the settlement liabilities. There was no necessary implication in the language of the section to the effect that the debt should be treated as having been incurred by the person owning the interest in possession himself;

(2) Lord Briggs in *Fowler* was addressing the question of how far to take something which was deemed to be the case in one provision of the legislation in applying another provision of the legislation. Thus, his reasoning would be applicable in this case if Section 49 had deemed the person with the interest in possession to have incurred the debts of the settlement and then the question was whether to apply that deemed situation in applying Section 103. However, since Section 49 did not deem the person with the interest in possession have incurred the debts of the settlement, the question did not arise. The FTT in *Pride* had simply assumed, as its starting point in construing Section 103, that Section 49 deemed the debts of the settlement to be incurred by the person with the interest in possession and there was no authority for that approach; and

(3) if the true construction of Section 49 were to be that the person holding the interest in possession should be deemed to have incurred the settlement liabilities, then the taxpayers in *St Barbe Green* would have succeeded in their claim to deduct the excess liabilities in the free estate against the value of the settled property.

Discussion

226. We agree with the first part of Mr Bradley's first proposition in paragraph 225 above. Section 49 does not say expressly that the liabilities incurred by the trustees of a settlement should be treated as having been incurred by the holder of the interest in possession in the settlement.

227. However, do not agree with the rest of his propositions.

228. As regards the second part of his first proposition, we think that, contrary to his submission, there is a necessary implication in the language of Section 49 that the debts of the settlement should be treated as having been incurred by the person owning the interest in possession, for the reason which follows. The starting point in the analysis is the judgment of Mann J in *St Barbe Green*. It is clear from that judgment that Mann J saw Section 49 as bringing within the estate of the deceased the whole of the settled property in which the deceased had an interest in possession but as requiring the settlement liabilities to be deducted in valuing that settled property. In other words, Mann J was not saying that the effect of the section was that the deceased did not have an interest in possession in the portion of the gross settlement assets which did not exceed the liabilities of the settlement. (Were that to be the case, then the answer in relation to the Section 102 Property issue, the Section 102A issue and the Election issue as set out above would be very different.) Instead, Mann J was saying that the effect of the section was to confer on the holder of an interest in possession deemed beneficial ownership of the gross settlement assets but to take into

account in valuing those assets the liabilities of the settlement. Since that is the effect of Section 49, who else apart from the holder of the interest in possession – which is to say the deemed beneficial owner of the gross settled assets - should be treated as having incurred the liabilities which are to be taken into account in reducing the value of the gross settled assets? Those assets are deemed to be beneficially owned by the holder of the interest in possession but to have a reduced value to that holder by reference to the liabilities in question. We think that a necessary implication arising from that process is that the liabilities have been incurred by the holder of the interest in possession.

229. Putting this another way, Lord Briggs's principles in *Fowler* relate to both the interpretation and the application of statutory deeming provisions. On the basis of the interpretation of Section 49 in *St Barbe Green*, the section provides that the gross settlement assets are to be treated as being beneficially owned by the holder of the interest in possession but that those assets are to be valued after deducting the liabilities of the settlement. It is entirely in accordance with the fiction created by that interpretation of the provision that the liabilities of the settlement should be treated as having been incurred by the beneficial owner of the settlement assets, namely the holder of the interest in possession. That is something which "inevitably [flows] from the fiction being real" and an "inevitable [corollary] of that state of affairs" – see Lord Briggs's fifth principle in *Fowler* at paragraph [27(5)].

230. It follows from this that, in our view, Mr Bradley's second proposition starts from the wrong premise. Since there is a necessary implication in the language of Section 49 to the effect that the debts of the settlement should be treated as having been incurred by the person owning the interest in possession, it is then necessary to apply the principles set out by Lord Briggs in *Fowler* once again, this time in determining whether that deeming should be carried across when construing Section 103. It seems to us that, on the basis of the relevant principles, that is the case. Doing so is entirely in accordance with Lord Briggs's principles and, in particular, his fifth principle - in that it is a consequence which flows inevitably from assuming the fiction implicit in Section 49 to be real - and his fourth principle – in that extending that consequence to Section 103 does not produce an unjust, absurd or anomalous result. On the contrary, extending the fiction which is implicit in Section 49 in that way means that Section 103 is fulfilling its manifest purpose. To adopt any other approach to the language in the section would drive a coach and horses through that purpose.

231. We therefore agree with the conclusion reached on this point by the FTT in *Pride* at paragraph [46].

232. Turning then to Mr Bradley's third proposition, to the effect that the conclusion reached in *Pride* and which we have now reached ourselves is irreconcilable with the decision in *St Barbe Green*, we do not agree. In *St Barbe Green*, the question at issue was whether an excess of liabilities in the deceased's free estate could be used to reduce the value of the property in which the deceased had an interest in possession. Mann J held that that was not possible, for two reasons. The first (and primary) reason was that the word "property" in both Section 5(1) and Section 49 should be taken to be referring to "net property". In the alternative, Mann J held that he would have reached the same conclusion even if his construction of the word "property" in Section 5(1) were to be wrong because liabilities were to be taken into account under Section 5(3) only by setting them off against the assets out of which they could properly be met, or "the assets which are liable to bear them" as Mann J put it (see *St Barbe Green* at paragraphs [13] to [17]).

233. Both of Mann J's reasons turned on the fact that liabilities of the free estate could be deducted only from the value of the assets of the free estate and, correspondingly, liabilities of the settlement could be deducted only from the value of the settled property. Under both

analyses, nothing turned on the fact that the liabilities which were deductible from the settled property were not incurred by the deceased directly. In other words, even if the liabilities incurred by the trustees of the settlement were to be treated as having been incurred by the deceased directly, they would still remain deductible only from the settled property because:

(1) in the case of Mann J's first reason, Section 5(1) required the liabilities attributable to the free estate to be taken into account in valuing the property forming the free estate and Section 49 required the liabilities attributable to the settled property to be taken into account in valuing the settled property. The provisions therefore did not allow liabilities attributable to the property forming the free estate to be taken into account in calculating the value of the settled property, and vice versa, and that was the case regardless of whether the deceased should be treated as having incurred the liabilities referable to the settled property directly; and

(2) in the case of the second reason, Section 5(3) confined the deduction for liabilities to the assets which were liable to bear them. Again, this meant that liabilities were to be ring-fenced against the assets forming the part of the estate to which they related and the question of whether the deceased should be treated as having incurred the liabilities referable to the settled property directly was irrelevant.

It follows that, in our view, there is nothing in either of the reasons given by Mann J in *St Barbe Green* to suggest that the fact that deeming the liabilities attributable to the settled property to have been incurred by the deceased directly would have enabled those liabilities to be taken into account in valuing the property forming the free estate. We therefore see nothing in our conclusion which is irreconcilable with the reasoning in *St Barbe Green*.

234. In conclusion on this question, given that the amount by which the value of the liability under the Note is to be abated is the amount of the consideration which was provided by Mrs Elborne for the issue of the Note – which is to say the value of the Property at the time when the Sale Agreement was executed and the Note was issued so that beneficial ownership of the Property passed to the trustees of the Life Settlement – the amount of the liability under the Note should be abated to nil.

235. There are two final points which we should make in relation to the Section 103 debt incurred issue. The first is that we should say that, in our view, although there is no need for there to be two dispositions of property in a case where Section 103 is being invoked by reference to the existence of a debt incurred (as opposed to being invoked by reference to the creation of an incumbrance), so that there isn't the same difficulty in squaring the language used in Section 103(3) with the language used in Section 103(1) to which we referred in paragraphs 214 and 215 above, the same timing point in relation to Section 103(3) to which we referred in paragraph 212 above arises in this case. That is because the beneficial ownership of the Property, which amounted to the consideration for the issue of the Note, passed to the trustees of the Life Settlement simultaneously with, and not before, the issue of the Note. For the reason set out in paragraph 212 above, we consider that this is not fatal to the Respondents' case in relation to this issue. We would add that, in any event, on the present facts, it would be very peculiar if the application of the Section were to turn on the fact that the consideration given for the issue of the Note was provided simultaneously with, and not a scintilla of time before, the issue of the Note.

236. The second is that we should observe that the Section 103 debt incurred issue was not one of the issues which was raised by the Respondents in the notices of determination. As such, the burden of proof is on the Respondents to establish that Section 103 applies in the way they have alleged. For the reasons we have given above, we consider that the Respondents have satisfactorily discharged that burden.

Conclusion

237. For the reasons set out in paragraphs 226 to 236 above, we have concluded that:

(1) the Respondents are entitled to succeed in relation to their submissions on Section 103 so far as they turn on the liability under the Note being a debt incurred by Mrs Elborne; and

(2) therefore, the Section 103 debt incurred issue should be determined in favour of the Respondents.

THE SECTION 102 NOTE ISSUE

Introduction

238. The conclusion set out in paragraph 237 above is, of course, sufficient to dispose of the appeals in favour of the Respondents.

239. However, the mere fact that the Respondents have succeeded in their submissions under Section 103 – with the result that the liability under the Note should be subject to abatement to the extent that the trustees of the Life Settlement received consideration from Mrs Elborne in the form of the disposal of beneficial ownership of the Property pursuant to the Sale Agreement – does not of itself mean that the Respondents' submissions in relation to the Section 102 Note issue fall away. The Section 102 Note issue was one of the alternative bases of challenge set out in the notices of determination but, as we have just noted in paragraph 236 above, the Section 103 debt incurred issue was not. (The notices of determination included the Section 103 incumbrance issue but not the Section 103 debt incurred issue). As such, the two issues have never been framed by the Respondents as mutually exclusive alternatives. Moreover, the Respondents' submissions in relation to the Section 102 Note issue were directed at ensuring that the Note should be treated as forming part of Mrs Elborne's estate at the time of her death whereas the Respondents' submissions in relation to the Section 103 debt incurred issue were directed at ensuring that the value of the liability under the Note should be abated. The respective submissions are therefore directed at different aspects of the scheme.

240. As we have already noted in paragraph 31 above, on an appeal against a notice of determination, the FTT has the power to vary the notice of determination (pursuant to Section 224 of the IHTA) if it is satisfied that it ought to do so. We therefore believe that, notwithstanding our conclusions in relation to the Section 103 debt incurred issue, we need to address the Respondents' submissions in relation to the Section 102 Note issue.

241. It is worth noting three preliminary points in relation to this before we turn to the legal analysis.

242. The first is that, were we to determine the appeals on the basis that the Respondents have succeeded in relation to both the Section 103 debt incurred issue and the Section 102 Note issue, that would have the result on the facts of this case of increasing the value of Mrs Elborne's estate by an amount equal to twice the value of the liability under the Note – once because the liability under the Note fell to be abated to nil under Section 103 and then again because the Note fell to be treated as being property to which Mrs Elborne was beneficially entitled immediately before her death under Section 102. It is not apparent from the terms of Section 104 of the FA 1986 and the regulations made thereunder that there would be any relief from the double charge to tax which would then arise. Whilst that does not mean, in and of itself, that the Appellants should succeed in relation to the Section 102 Note issue, it would be a surprising result, and doubtless one that would be quite unwelcome to the Appellants.

243. The second is that there would be something odd in both treating the Note as an asset of the estate pursuant to Section 102 whilst at the same time abating the liability under the Note to nil pursuant to Section 103 on the ground that the liability was a debt incurred by Mrs Elborne. However, since the two provisions are dealing with different types of avoidance – in the case of Section 102, the purported alienation of an asset which then continues to be enjoyed and, in the case of Section 103, the creation of a liability – there is no reason in principle why that outcome should not arise.

244. The final preliminary point is that, whilst we accept that:

(1) the transfer of the Note by Mrs Elborne to the trustees of the Family Settlement took place in the course of a single scheme which was designed to enable Mrs Elborne to continue living in the Property while at the same time reducing the value of her estate by an amount equal to the value of the Property at the time when the Note was created; and

(2) the definition of "associated operations" is a wide one,

there would be something counter-intuitive in reaching the conclusion that the Note, which everyone agrees has been subject to an outright transfer by way of gift to the trustees of the Family Settlement, should be treated for inheritance tax purposes as remaining part of Mrs Elborne's estate.

245. Having made those preliminary points, we now turn to the legal analysis.

246. Section 102 is set out at paragraph 130 above and the definition of "associated operations" is set out in paragraph 12 above.

The parties' submissions

247. Mr Davey explained that, as the Note was property for the purposes of Section 102, the section was as capable of applying to the Note as it was to the Property. There was no dispute that Mrs Elborne had made a disposal of the Note by way of gift when she entered into the Assignment. The section would therefore apply to Mrs Elborne in respect of the Note as long as, following the assignment:

(1) the Note was not enjoyed to the exclusion, or virtually to the entire exclusion, of Mrs Elborne or of any benefit to Mrs Elborne by contract or otherwise; or

(2) possession and enjoyment of the Note was not bona fide assumed by the trustees of the Family Settlement.

248. In relation to the first of these questions, Mr Davey said that paragraph 6(1)(c) of Schedule 20 to the FA 1986, which had effect for supplementing Section 102 by virtue of Section 102(8), specified that a benefit obtained by a donor by virtue of any "associated operations" of which the gift was one was to be treated as a benefit by way of contract or otherwise. The establishment of the Life Trust, the Sale Agreement, the terms of the Note (which could not be required to be repaid, absent a default, until Mrs Elborne died) and the terms of the Life Settlement Trustees' Resolution together ensured that Mrs Elborne maintained the right to occupy the Property following her assignment of the Note and that benefit had arisen to Mrs Elborne from "associated operations" of which the gift of the Note was one.

249. In response, Mr Bradley did not dispute that the constituent elements of the scheme as a whole were "associated operations" but said that:

(1) that acceptance extended solely to the transactions which formed part of the scheme and did not extend to the terms of the Note. The terms of the Note were simply part of the subject matter of the gift; and

(2) in order for something to be a benefit for the purposes of the section, the benefit had to be something which:

(a) did not exist prior to the gift; and

(b) impacted on the donee's enjoyment of the gifted property.

Mr Bradley referred to *Buzzoni and others v Revenue and Customs Commissioners In re the Estate of Kamhi, decd* [2014] 1 WLR 3040 ("*Buzzoni*") at paragraphs [50] and [51] and *Viscount Hood (Executor of the Estate of Lady Hood) v Revenue and Customs Commissioners* [2018] STC 2355 ("*Hood*") at paragraph [65] in this regard.

250. He went on to say that neither of the conditions set out in paragraph 249(2) was satisfied in this case. Mrs Elborne's right to occupy the Property had existed before the gift was made and indeed before any of the transactions which constituted the scheme had occurred and it did not impact on the donee's enjoyment of the gifted property because it was a term of the gifted property that the monies due under it could not be demanded until Mrs Elborne died. As the FTT had observed in *Pride* at paragraph [100], "enjoyment of the loan notes, as assets, self-evidently depends on the terms of the loan notes".

251. Mr Davey said that:

(1) neither of the requirements to which Mr Bradley had referred was contained in the legislation itself. One should be wary of constructing a supposed statutory requirement out of judicial pronouncements in earlier cases;

(2) neither *Buzzoni* nor *Hood* was a case which involved "associated operations";

(3) there was no reason why the mere fact that Mrs Elborne derived a benefit from the terms on which the Note was issued (which meant that, absent a default, the Note could not be required to be paid until after her death) should be disregarded in determining whether Mrs Elborne had enjoyed a benefit. In the first place, the terms of the Note were part of the "associated operations" but, in any event, Henderson LJ in *Hood* at paragraph [61] had expressly recognised that the situation in a given case might be such that it "[obviated] the need for any separate enquiry as to whether the benefit was referrable to, or trenched upon, the gift". Where the benefit was inseparable from the gift in that the terms of the subject matter of the gift gave rise to the benefit, then the terms of the section were satisfied;

(4) the same approach had been adopted by the House of Lords in the estate duty case of *Earl Grey v The Attorney-General* [1900] AC 124, where the covenant to pay an annual rent-charge out of the property which was the subject of the gift was held to be a benefit reserved out of the gift, as opposed to limiting the scope of the gift itself; and

(5) in terms of the temporal relationship between the benefit and the gift, context was all important. The present context was a pre-planned, tightly-engineered, composite set of arrangements involving the execution of a number of documents simultaneously or in close succession. The elements of the scheme therefore had to be analysed as such in examining the relationship between the benefit and the gift.

252. Mr Davey added that, when the scheme was viewed realistically, the Note represented the value of the Property because the objective of the scheme was to extract the value of the

Property from Mrs Elborne's estate and this had been achieved by moving that value into the Note and then making a gift of the Note. It followed that, even if Mrs Elborne ceased to benefit from the Note following the making of the gift, her enjoyment of the Property after the gift was made was sufficient for this condition to be satisfied.

253. In relation to the second question in paragraph 247 above, Mr Davey said that, since:

(1) the monies under the Note could not be demanded and the Note could not be turned to account in any other way until after Mrs Elborne had died; and

(2) the trustees of the Family Settlement had taken no steps to enjoy the Note or to secure the benefit of it – such as registering a caution against first registration of the Property at HM Land Registry or ensuring that the trustees of the Life Settlement signed the Notice of Assignment,

the trustees of the Family Settlement did not assume bona fide possession or enjoyment of the gifted property.

254. In response, Mr Bradley said that the fact that the monies under the Note could not be demanded and the Note could not be turned to account in any other way until Mrs Elborne died was inherent in the terms of the Note itself and was therefore simply the nature of the gifted property. He referred to the Privy Council decision in *Commissioner for Stamp Duties of New South Wales v Perpetual Trustee Company Limited* [1948] AC 425 at 440 in this regard.

Discussion

255. We do not think that this is an entirely straightforward question to answer given that:

(1) the case law to which we have been referred is largely concerned with the question of identifying the subject matter of the gift – which is to say, whether or not the donor reserved an interest in the subject matter of the gift when the gift was made (the first limb of the test in Section 102(1)(b)) - whereas, in this case, the questions in issue are whether the donor reserved a benefit in connection with the making of the gift (the second limb of the test in Section 102(1)(b)) and whether possession and enjoyment of the subject matter of the gift were bona fide assumed by the donee (the test in Section 102(1)(a)); and

(2) for the most part, the case law to which we have been referred did not involve multiple "associated operations" in relation to the gift whereas, in this case, it is common ground that the gift was part of a single scheme comprising a number of "associated operations".

256. Having said that, the starting point must be to observe that there can be no dispute in this case about the subject matter of the gift – namely, the Note – or over whether, following the gift of the Note, the Note itself was enjoyed to the exclusion, or virtually to the entire exclusion, of Mrs Elborne. That is because, following the gift, Mrs Elborne had no further interest in the Note as she was precluded from benefiting from it under the terms of the Family Settlement. That means that the first limb of the condition in Section 102(1)(b) cannot apply in relation to the gift of the Note. Instead, only the second limb of that condition and the condition in Section 102(1)(a) need to be considered. Thus, the two questions we need to address in this case are whether, following the gift of the Note:

(1) the enjoyment of the Note by the trustees of the Family Settlement was to the exclusion, or virtually to the entire exclusion, of any benefit to Mrs Elborne, by contract or otherwise (the second limb of Section 102(1)(b)); and

(2) possession and enjoyment of the Note was bona fide assumed by the trustees of the Family Settlement (Section 102(1)(a)).

257. The authorities show that, in order to answer the first of those questions, the following conditions must be satisfied:

(1) Mrs Elborne must have enjoyed a benefit in the relevant period, which is to say, a period which, by definition, commences after the making of the gift. If no benefit was enjoyed in the "relevant period", then the second limb of the test in Section 102(1)(b) cannot be satisfied in relation to the Note because that is what the provision requires;

(2) if Mrs Elborne did enjoy a benefit in the relevant period, the benefit must have consisted of some advantage which Mrs Elborne did not enjoy before the gift was made and before any of the "associated operations" in relation to the gift occurred. If the benefit consisted of an advantage that Mrs Elborne enjoyed before the gift was made and before any of the "associated operations" in relation to the gift occurred, then the second limb of the test in Section 102(1)(b) cannot be satisfied in relation to the Note – see *Hood* at paragraphs [42] to [44], [60] and [65]; and

(3) if the benefit did consist of an advantage that Mrs Elborne did not enjoy before the gift was made or before any of the "associated operations" in relation to the gift occurred, that benefit must have impacted upon the enjoyment by the trustees of the Family Settlement of the gifted asset – namely the Note. If the benefit did not impact upon, or "trench upon", the enjoyment by the trustees of the gifted asset, then the second limb of the test in Section 102(1)(b) cannot be satisfied in relation to the Note – see *Buzzoni* at paragraphs [50] to [57] and *Hood* at paragraphs [51], [52] and [65].

258. Turning to the application of the above conditions in the present case, the first condition is clearly satisfied by virtue of the benefit to Mrs Elborne of being able to occupy the Property following the gift of the Note. That was a benefit to Mrs Elborne by contract or otherwise for the purposes of Section 102(1)(b) because, regardless of whether it arose by virtue of the terms of the Note itself (as Mr Davey submitted), it certainly arose by virtue of one or more of the transactions which were "associated operations" in relation to the gift of the Note such as the agreement to transfer the Property to a settlement under which Mrs Elborne enjoyed an interest in possession or the terms of the Life Settlement Trustees' Resolution.

259. However, that benefit was something which Mrs Elborne enjoyed before she made the gift of the Note to the trustees of the Family Settlement and indeed before the scheme commenced and the chain of "associated operations" in relation to the gift started. That benefit was not something which arose for the first time as a result of either the gift or any of the "associated operations" in relation to the gift and consequently we consider that the condition set out in paragraph 257(2) above is not met.

260. Moreover, as regards the condition set out in paragraph 257(3) above, the benefit was not one which "trenched upon" the enjoyment of the Note by the trustees. The fact that the trustees were unable to require the Note to be repaid, absent a default, until Mrs Elborne had died was not something which "trenched upon" their enjoyment of the Note because those terms were simply an integral part of the gifted property. Whilst the decisions in *Buzzoni* and *Hood* demonstrate that a benefit which arises as a result of a term in the gifted property is not precluded from being a relevant benefit for the purposes of Section 102, that is true only of a term which is created as part of the gift itself. It is not true of a contractual provision which pre-dates the gift because an advantage enjoyed both before and after the gift is made can hardly be a reservation out of the gift – see *Buzzoni* at paragraph [51] and *Hood* at paragraphs [60] and [65].

261. A similar answer to the one in paragraph 260 above may be given in relation to the second question in paragraph 256 above. The trustees of the Family Settlement may have been precluded, absent a default, from demanding repayment of the Note until Mrs Elborne died, but that was a function of the terms of the Note – which is to say the terms of the gifted property. It had no effect on the ability of the trustees to possess and enjoy the gifted property.

262. For the above reasons, which are similar to those given by the FTT in *Pride* at paragraphs [89] to [104] in reaching a similar conclusion, we have concluded that the gift of the Note by Mrs Elborne to the trustees of the Life Settlement does not fall within Section 102.

Conclusion

263. For the reasons set out in paragraphs 255 to 262 above, we have concluded that:

(1) since the benefit received by Mrs Elborne by virtue of the gift of the Note and the transactions which were "associated operations" in relation to the gift – namely, the right to occupy the Property for the rest of her life – existed before the gift of the Note was made and before any of the "associated operations" in relation to the gift occurred and did not impact upon the possession and enjoyment of the Note by the trustees, Section 102 can have no effect in relation to the Note; and

(2) therefore, the Section 102 Note issue should be determined in favour of the Appellants.

DISPOSITION

264. For the reasons set out above, we have determined that the appeal should be dismissed on the ground that the Respondents have succeeded in relation to the Section 103 debt incurred issue, with the result that, in valuing Mrs Elborne's estate immediately before her death, the liability under the Note should be abated by an amount equal to the value of the Property on the date when beneficial ownership of the Property passed to the trustees of the Life Settlement pursuant to the Sale Agreement. That means that the value of that liability should be abated to nil.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

265. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

Release Date: 14th JULY 2023