NCN: [2021] UKFTT 12 (TC)

TC07998

Appeal number: TC/2016/02707
TC/2016/02709

INCOME TAX - settlements legislation - chapter 5 Part 5 Income Tax (Trading and Other Income) Act 2005 - meaning of "settlement" - meaning of "settlor" - whether dividend or distribution taxable under s383 Income Tax (Trading and Other Income) Act 2005 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHARON CLIPPERTON **STEVEN LLOYD**	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE HARRIET MORGAN

Sitting in public at the Taylor House, Rosebery Avenue, London on 3, 4 and 5 December 2018

Mr Michael Jones, counsel, for the Appellants

Ms Aparna Nathan (now QC) and Ms Laura Poots, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents ("HMRC")

DECISION

1. The appellants appealed against HMRC's decision that sums which they received from arrangements set up by a company Winn & Co (Yorkshire) Ltd ("**Winn Yorkshire**"), of which they were the sole shareholders and directors, were subject to income tax in the tax year 2011/12. It was not disputed that the arrangements were put in place for the sole purpose of enabling Winn Yorkshire to put sums into the hands of the appellants, as its shareholders, without attracting the income tax charge which would usually apply if Winn Yorkshire had paid a dividend or made a distribution to them. These appeals have been designated as lead appeals for the purposes of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

2. As set out in more detail in Part A, in outline, under the arrangements, the following took place within a period of just under one month:

(1) Winn Yorkshire subscribed for 199 A ordinary shares of £1 each ("**the A shares**") and one B ordinary share of £1 ("**the B share**") in a newly formed subsidiary, Winn Scarborough Limited ("**Winn Scarborough**").

(2) Winn Yorkshire settled the B share on trust largely for the benefit of the appellants but on the basis that it was entitled to receive a small amount of any income arising to the trust and that the trust property was to revert to it.

(3) Winn Yorkshire subscribed for a further A share of £1 in Winn Scarborough at a premium of £200,000 ("**the additional A share**").

(4) Winn Scarborough's share capital was reduced by £200,000 by the cancellation of the share premium account created on the issue of the additional A share and that amount was credited to its distributable reserves.

(5) Winn Scarborough declared a dividend of £200,000 on the B share using the distributable reserves created by the capital reduction ("**the B share dividend**").

(6) The trustee of the trust paid the sum it received as the dividend to the beneficiaries of the trust. As the principal beneficiaries, each appellant received £98,465 ("**the income in dispute**").

I refer to these arrangements as "**the planning**" or "**the plan**".

3. In the appellants' view, the income in dispute is to be treated for income tax purposes as the income of Winn Yorkshire alone under the legislation relating to settlements in chapter 5 of part 5 of the Income Tax (Trading and Other income) Act 2005 ("**ITTOIA**"). I refer to these provisions as "**the settlements code**".

(1) This is the effect, so the appellants say, of s 624 ITTOIA which provides that income which arises under a "settlement" is treated for income tax purposes as the income of the "settlor" and of the "settlor" alone if it arises (a) during the life of the "settlor", and (b) from property in which the "settlor" has an interest (see also s 620 and s 625 ITTOIA).

(2) In the appellants' view, the income in dispute arose under a "settlement" made by Winn Yorkshire as "settlor" from the property in the "settlement", the B share, in relation to which Winn Yorkshire had an interest given that some of the income arising from the B share held in the trust was payable to Winn Yorkshire and that the trust property was to revert to it.

4. HMRC's stance is that, on the contrary, the appellants are subject to income tax on the income in dispute on the basis that, in the alternative:

(1) On a purposive construction of the relevant provisions, the income in dispute constitutes a distribution made by Winn Yorkshire to each of the appellants within the meaning of s 383 to 385 ITTOIA and s 1000 of the Corporation Taxes Act 2010 ("**CTA 2010**"). Ms Nathan referred to the well-known case of *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 ("*Ramsay*") which established that, in line with how other legislation is interpreted, the courts and tribunals must apply a purposive approach in interpreting tax legislation and the subsequent line of cases. HMRC relied, in particular, on the Court of Appeal's decision in *PA Holdings Ltd v Revenue and Customs Commissioners* [2012] STC 582 ("*PA Holdings*"). I refer to this as "**the Ramsay argument**".

(2) The settlements code applies to subject the appellants (and not Winn Yorkshire) to income tax on the income in dispute on the basis that they were the "settlors" of any relevant "settlement" given that they, as the sole directors and shareholders of Winn Yorkshire, arranged for all of the steps involved in the arrangements to be put in place. I refer to this as "**the settlement argument**".

5. For all the reasons set out below, in summary, I have decided that:

(1) the B share dividend is taxable as a distribution made by Winn Yorkshire to the appellants for the purposes of s 383 to 385 ITTOIA and s 1000 CTA 2010; and

(2) if my conclusion at (1) is wrong, under the settlements code, only Winn Yorkshire was a "settlor" of a "settlement"; neither appellant was a "settlor" of a "settlement".

Part A – Facts and law

Facts

6. The facts were not disputed and can be set out briefly.

7. At all material times, (a) Winn Yorkshire carried on a business as accountants, (b) each appellant held 50% of the shares in Winn Yorkshire, and (c) the appellants were the sole directors of Winn Yorkshire responsible for the management of its business (as provided for in its articles of association).

8. Prior to the payment of the relevant sums under the trust arrangements, Winn Yorkshire had a history of paying to the appellants, as its shareholders, substantial dividends from the profits of its accounting business. As shown in the relevant accounts:

(1) For the accounting period ended on 31 May 2012, it had reserves, as at 1 June 2011, of £698,707 profits after tax for the year of £73,898 and it declared dividends of £100,000.

(2) For the accounting period ended 31 May 2011, it had reserves as at 1 June 2010 of £595,757, profits after tax for the year of £232,949 and it declared dividends of £130,000.

(3) For the accounting period ended on 31 May 2010, it had reserves as at 1 June 2009 of £650,684, profits after tax for the year of £245,073 and declared dividends of £300,000.

(4) For the period ended 31 May 2009, it had profits after tax for the year of £231,743 and paid dividends of £332,000 in each year.

9. In 2012, however, Winn Yorkshire decided to use the plan which was marketed to it by Premier Strategies Limited. The planning was designed to enable companies to put monies, which would otherwise have been paid to its shareholders by way of dividend or distribution, into their hands in what was thought to be a tax-free way.

Winn Yorkshire signed an engagement letter with Premier Strategies Limited in relation to the plan, as described as the "dividend replacement strategy ("Aikido")", on 31 January 2012.

10. The purpose of the plan is apparent from a letter which Premier Strategies Limited sent to Winn Yorkshire on 3 February 2012. In the letter, Premier Strategies Limited stated that it understood that Winn Yorkshire was interested in implementing its "Aikido strategy" and that the purpose of the letter was to set out the issues that Winn Yorkshire must consider before proceeding and their analysis of the technical issues involved. In the note Premier Strategies Limited set out the steps as they in fact took place as set out in [12] below and their tax analysis of the effect of those steps. Their general comments included the followings:

(1) "Aikido is suitable for any UK resident company with the desire, and sufficient distributable reserves, to pay a dividend. It provides a means for the company to pay a dividend to its shareholders in a way that avoids the higher and additional rates of income tax on those dividends. In effect, the dividend should be free of tax in the hands of the recipient.

It achieves this by relying upon detailed anti-avoidance legislation to the advantage of your shareholders. How that legislation operates, and the key technical aspects of the planning, are set out in detail below."

(2) "The key steps in implementing the proposal are set out very briefly below. We will, of course, assist you at each stage and we, together with our lawyers, will prepare all of the necessary documents required to execute the planning. As with all tax planning those documents will almost certainly be scrutinised by HMRC so it is important that you devote the requisite time to ensure that they are properly executed at the appropriate time. Again, this is something that we will assist you with."

(3) "The planning achieves the anticipated tax saving by relying upon the application of the "settlements legislation contained [in the settlements code]…in a scenario in which the settlor has a lower income tax rate than the beneficiary, the legislation will still apply. It is this premise upon which the planning is based.".

11. On 7 February 2012, the appellants, as shareholders in Winn Yorkshire, gave consent, to the extent required under a shareholders agreement dated 15 November 2007 between them and that company, to the following:

(1) the incorporation of a subsidiary of Winn Yorkshire;

(2) the proposal for Winn Yorkshire to subscribe for 199 A shares in the subsidiary and for a nominee to subscribe for one B share in the subsidiary to be held for Winn Yorkshire;

(3) the declaration of a trust over Winn Yorkshire's beneficial interest in the one B share in favour of such persons as its board may determine;

(4) an application by Winn Yorkshire for the additional A share at a premium;

(5) a reduction in the share capital of the subsidiary and a declaration of a dividend by the subsidiary on the one B share; and

(6) any other steps incidental and ancillary to the steps referred to above.

12. The steps approved by the appellants on 7 February 2012 correspond to the key steps which were actually implemented in February and March 2012 as follows:

(1) On 8 February 2012 RT Corporate Trustee Limited ("**the Trustee**") was appointed to act as nominee for Winn Yorkshire in relation to the B share.

(2) On 13 February 2012, acting as directors of Winn Yorkshire, the appellants (i) resolved to incorporate a new private subsidiary company limited by shares, Winn Scarborough, and (ii) approved the terms and the execution of the memorandum of association and articles of association of Winn Scarborough.

(3) On 14 February 2012, Winn Scarborough was incorporated. Its directors were the appellants. Its share capital comprised:

(a) 199 A share**s** which on that date were allotted as fully paid up to Winn Yorkshire and carried one vote per share, a right to participate in distributions of the company and a right to a distribution of capital on a winding up; and

(b) one B share which, on that date, was allotted as fully paid up to the Trustee, as nominee for Winn Yorkshire, and carried no right to vote, a right to participate in distributions of the company but no right to any distribution of capital on a winding up.

(4) On 14 February 2012, Winn Scarborough appointed Tenon (IOM) Ltd as its attorney to consider, settle, approve, sign, execute, deliver or issue various administrative documents relating to the company.

(5) On 20 February 2012:

(a) the board of Winn Yorkshire met and resolved to approve the terms and the execution of a deed to create a trust over its beneficial interest in the B share; and

(b) the directors of Winn Yorkshire signed a written resolution of the company approving the settlement of its beneficial interest in the B share for the benefit of the appellants (and their respective spouses, civil partners and descendants).

(6) On 22 February 2012, a deed of trust was executed between Winn Yorkshire, as settlor, and the Trustee, as trustee, in respect of a trust known as the Winn & Co (Yorkshire) Limited Interest in Possession Trust ("**the Trust**"). The principal terms of the Trust (under clause 4) were that:

(a) during an Initial Period (of 18 months from the creation of the Trust), and subject to certain overriding discretionary powers (as set out in clause 3 of the deed), the trustee was to hold the fund on trust to pay or apply any income arising:

(i) as to the first £500, to Cancer Research UK, a registered charity;

(ii) subject to that, as to the next £500, to Winn Yorkshire;

(iii) subject to that, as to any further income arising (A) as to 0.5% thereof, to Cancer Research UK; (B) as to 0.5% thereof, to Winn Yorkshire; (C) as to the remaining 99% thereof (termed the "99% Income Share"), on "Protective Trusts" as regards 50% of the 99% Income Share for the benefit of each of the appellants during their lives.

The "Protective Trusts" were defined in the trust deed (under clause 1.14) as trusts giving the relevant beneficiary an immediate right to the relevant income during the Protected Period (broadly, during the appellants' lives), but which were subject to being determined in the event that the beneficiary took steps to dispose of his or her beneficial interest.

(7) Subject to those trusts and various powers, the trust fund was to be held on trust for Winn Yorkshire absolutely (under clause 5 of the trust deed).

(8) On 22 February 2012, the Trustee wrote to Winn Scarborough directing that any dividends declared on the B share should be paid direct to the beneficiaries of the Trust (other than Cancer Research UK).

(9) On 27 February 2012:

(a) The board of directors of Winn Yorkshire met and resolved that the company would apply for the allotment of the additional A share in Winn Scarborough at a premium of £200,000.

(b) Winn Yorkshire duly applied for the allotment of the additional A share on the same date.

(c) The board of Winn Scarborough met and resolved to accept Winn Yorkshire's application for allotment of the additional A share, to enter the company in the register of members and to issue a share certificate to it.

(d) The additional A share was allotted to Winn Yorkshire as fully paid up.

(10) On 29 February 2012:

(a) The board of directors of Winn Scarborough met and resolved to circulate a written resolution to Winn Yorkshire (as the only shareholder with voting rights) to approve the terms of the proposed reduction of Winn Scarborough's share capital by £200,000 and they signed a solvency statement in respect of the company.

(b) The board of directors of Winn Yorkshire met and resolved to approve the terms of a written resolution in relation to the reduction in share capital and later executed the written resolution as the sole member of Winn Scarborough. The effect of the resolution was to reduce the share capital of Winn Scarborough by £200,000 by cancelling the share premium account and crediting that amount to distributable reserves.

(11) On 2 March 2012, the board of Winn Scarborough met and resolved that the company would declare a dividend of £200,000 on the B share using the distributable reserves created as a result of the capital reduction.

(12) On 5 March 2012 the B share dividend was paid directly to the relevant beneficiaries in their respective shares as set out in the trust deed, save in respect of Cancer Research UK, whose share was remitted to it by the Trustee. Accordingly, after deduction of the bank transfer fee of £40 in each case, Cancer Research UK and Winn Yorkshire each received £1,455, and each appellant received £98,465.

13. Following the implementation of the scheme Winn Scarborough was reported to HMRC as being a dormant company (as at 23 May 2012). Its accounts for the period ended 29 February 2012 show it had no funds or assets other than those it received under the scheme.

14. The documents were largely drafted by the lawyers to Premier Strategies Limited who sent drafts to the appellants as the directors of Winn Yorkshire including the relevant board minutes

15. Both appellants disclosed details of the arrangements in their respective tax returns for the tax year 2011/12. The appellants took the view that, as a result of the application of the settlements code, for tax purposes, the income in dispute is the income of Winn Yorkshire alone (as settlor of the Trust). On that basis, neither appellant included the income in dispute in their self-assessment in their tax returns.

16. From the facts set out above and, in particular, the stated purpose of the planning in the letter sent to Winn Yorkshire by Premier Strategies Limited, I find that the sole

purpose of the relevant parties in implementing the arrangements described above was to enable Winn Yorkshire to provide its shareholders with the funds they received as a return on their investment in shares in Winn Yorkshire without attracting the income tax charge which usually applies to dividends or distributions made to shareholders. I did not understand the appellants to dispute that was the case.

Legislation

17. References in the remainder of this decision to sections and chapters of legislation are to sections and chapters of ITTOIA unless expressly stated otherwise.

Distribution provisions

18. The relevant distribution provisions operate as follows:

(1) Sections 383 and 384 impose a charge to income tax on dividends and other distributions of UK resident companies.

> **"383 Charge to tax on dividends and other distributions**
>
> (1) Income tax is charged on dividends and other distributions of a UK resident company.
>
> (2) For income tax purposes, such dividends and other distributions are to be treated as income.
>
> (3) For the purposes of subsection (2), it does not matter that those dividends and other distributions are capital apart from that subsection.
>
> **384 Income charged**
>
> (1) Tax is charged under this Chapter on the amount or value of the dividends paid and other distributions made in the tax year.
>
> (2) …"

(2) Under s 385, the person liable for any tax charged under the above provisions is "(a) the person to whom the distribution is made or is treated as made (see Part 6 of ICTA and sections 386(3) and 389(3))", or "(b) the person receiving or entitled to the distribution".

(3) In these provisions, "distribution" has the meaning given by Chapters 2 to 5 of Part 23 of the Corporation Tax Act 2010 ("**CTA 2010**") (excluding s 1027A) (see s 989 of the Income Tax Act 2007 ("**ITA**")). The relevant provisions for present purposes are in s 1000 CTA 2010 which provides as follows:

> **"1000 Meaning of "distribution"**
>
> (1) In the Corporation Tax Acts "distribution", in relation to any company, means anything falling within any of the following paragraphs.
>
> Any dividend paid by the company, including a capital dividend.
>
> *Any other distribution out of assets of the company in respect of shares in the company, except however much (if any) of the distribution—*
>
> *(a) represents repayment of capital on the shares, or*
>
> *(b) is (when it is made) equal in amount or value to any new consideration received by the company for the distribution.*
>
> *For the purposes of this paragraph it does not matter whether the distribution is in cash or not.*
>
> Any redeemable share capital issued by the company—
>
> (a) in respect of shares in, or securities of, the company, and
>
> (b) otherwise than for new consideration (see sections 1003 and 1115).
>
> Any security issued by the company—

(a) in respect of shares in, or securities of, the company, and

(b) otherwise than for new consideration (see sections 1004 and 1115).

Any interest or other distribution out of assets of the company in respect of securities of the company which are non-commercial securities (as defined in section 1005), except—

(a) however much (if any) of the distribution represents the principal secured by the securities, and

(b) however much (if any) of the distribution represents a reasonable commercial return for the use of the principal.

Any interest or other distribution out of assets of the company in respect of securities of the company which are special securities (as defined in section 1015), except—

(a) however much (if any) of the distribution represents the principal secured by the securities, and

(b) however much (if any) of the distribution falls within paragraph E.

Any amount treated as a distribution by section 1020 (transfers of assets or liabilities).

Any amount treated as a distribution by section 1022 (bonus issues following repayment of share capital).

(2) In the Corporation Tax Acts "distribution", in relation to a close company, also includes anything treated as a distribution by section 1064 (certain expenses of close companies treated as distributions).

(3) See also section 1072 (which extends the meaning of "distribution" in relation to members of a 90% group)." (Emphasis added.)

19. In ss 1024 to 1028 CTA 2010 there are extensive provisions which set out what constitutes a repayment of capital for the purposes of the above provisions. Under s 1113 CTA 2010 for the purposes of the above provisions, "a thing is regarded as done in respect of a share" if "it is done to a person - (a) as the holder of the share, or (b) as the person who held the share at a particular time" (sub-s(3)) and/or if "it is done in pursuance of a right granted, or an offer made, in respect of a share" (sub-s(4)).

Settlements code

20. Under s 624 (headed "Income where settlor retains an interest"), subject to certain exceptions which are not in point:

"(1) Income which arises under a settlement is treated for income tax purposes as the income of the settlor and of the settlor alone if it arises -

(a) during the life of the settlor, and

(b) from property in which the settlor has an interest."

21. The tax charge due under s 624 is imposed as follows:

(1) Under s 619(2) income tax is charged on "(a) income which is treated as income of a settlor as a result of section 624 (income where settlor retains an interest)".

(2) Under s 619(2), for the purposes of Chapter 2 of Part 2 of ITA 2007 (rates at which income tax is charged), such income tax "shall be charged in accordance with whichever provisions of the Income Tax Acts would have been applied in charging it if it had arisen directly to the settlor".

(3) Under s 622, the person liable for any tax charged is the settlor.

22. For the purposes of these provisions:

(1) The definition of a “settlement” and “settlor” is set out in s 620 as follows:

> “(1) In this Chapter—
>
> “settlement” includes any disposition, trust, covenant, agreement, arrangement or transfer of assets (except that it does not include a charitable loan arrangement), and
>
> “settlor”, in relation to a settlement, means any person by whom the settlement was made.
>
> (2) A person is treated for the purposes of this Chapter as having made a settlement if the person has made or entered into the settlement directly or indirectly.
>
> (3) A person is, in particular, treated as having made a settlement if the person -
>
> (a) has provided funds directly or indirectly for the purpose of the settlement,
>
> (b) has undertaken to provide funds directly or indirectly for the purpose of the settlement, or
>
> (c) has made a reciprocal arrangement with another person for the other person to make or enter into the settlement.”

(2) For the purposes of s 624:

(a) A “settlor” is treated as having an interest in property if there are any circumstances in which the property or any related property (a) is payable to the settlor, (b) is applicable for the benefit of the settlor, or (c) will, or may, become so payable or applicable (under s 625(1)).

(b) “Related property”, in relation to any property, means “income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income from it” (under s 625(5)).

23. In the case of a settlement where there is more than one settlor, the settlements code “has effect in relation to each settlor as if that settlor were the only settlor” (under s 644(1)):

(1) It is provided (under sub-s (2) that this works as follows (under sub-s (3)):

> “(3) In this Chapter, in relation to a settlor -
>
> (a) references to the property comprised in a settlement include only property originating from the settlor, and
>
> (b) references to income arising under the settlement include only income originating from the settlor.”

(2) Under s 645(1), references in s 644 to property originating from a settlor are defined as follows:

> “(a) property which the settlor has provided directly or indirectly for the purposes of the settlement,
>
> (b) property representing property so provided, and
>
> (c) so much of any property which represents both property so provided and other property as, on a just and reasonable apportionment, represents the property so provided.”

(3) Under s 645(2) references in s 644 to income originating from a settlor are defined as references to:

> “(a) income from property originating from the settlor, and
>
> (b) income provided directly or indirectly by the settlor.”

(4) Under s 645(3), for the purposes of s 645 references to property or income which a settlor has provided directly or indirectly:

> "(a) include references to property or income which has been provided directly or indirectly by another person under reciprocal arrangements with the settlor, but
>
> (b) do not include references to property or income which the settlor has provided directly or indirectly under reciprocal arrangements with another person."

(5) Finally, under s 645(4) in s 645 "references to property which represents other property include references to property which represents accumulated income from the other property".

Interaction between the distribution provisions and the settlements code

24. Under s 575(3):

> "Any income, so far as it falls within -
>
> (a) any Chapter of this Part [being Part 5 which contains the settlement code], and
>
> (b) Chapter 2 or 3 of Part 4 (interest and dividends etc. from UK resident companies etc.),
>
> is dealt with under the relevant Chapter of Part 4."

25. The parties referred to the explanatory notes published when ITTOIA was introduced. These stated the following at paragraphs 2244 to 2246 and paragraph 2248:

> "2244. Particular types of income which, in the source legislation, are charged to tax under Schedule D Case III have been given separate charges to tax in Parts 4 and 5 of this Act. As the general annual payments charge in Chapter 7 of Part 5 of this Act takes effect only if an amount is not otherwise charged to income tax there can be no overlap between this charge and the ex-Case III charges in Part 4 of this Act.
>
> 2245. Subsection (3), therefore, provides a rule where there could potentially be an overlap between Chapters within Parts 4 and 5 of this Act. It ensures that the interest charge in Chapter 2 of Part 4 takes priority over any of the charges in Part 5 that are based on Schedule D Case VI. This maintains the priority in the source legislation of Case III over Case VI which charges amounts that do not fall under any other Case of Schedule D.
>
> 2246. It also provides the priority between Chapter 3 of Part 4 of this Act (dividends etc. from UK resident companies) and Part 5 of this Act. This rewrites the effect of section 20(2) of ICTA which provides specifically for Schedule F to take priority over the other Schedules.
>
> …
>
> 2248. The non-schedular charges rewritten in Part 5 of this Act in Chapter 5 (Settlements: amounts treated as income of the settlor) and section 656 (Beneficiaries' income from estates in administration: Income charged: UK estates) do not have the potential to overlap with Chapter 2 of Part 2 of this Act (trade profits) or Chapter 3 of Part 3 of this Act (UK property business) or any of the charges in Part 4 of this Act or ITEPA. There is therefore no need to exclude these charges from the priority rules."

Part B – the Ramsay argument

Submissions

26. Following the seminal decision in *Ramsay*, it is well established that, in line with how other legislation is interpreted, the courts and tribunals must apply a purposive approach in interpreting tax legislation. The essence of the modern approach to statutory construction in a tax context is encapsulated in the Hong Kong case of

Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46 (2004) 6 ITLR 454 ("*Arrowtown*") where, at [35], Ribeiro PJ summarised the "driving principle" in the *Ramsay* line of cases as involving:

> "a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

27. Ms Nathan referred to the useful summary of the case law on this approach set out by the Upper Tribunal ("**UT**") in *Mr Andrew Berry v HMRC* [2011] STC 1057 of the cases from *Ramsay* to *Commissioners of Inland Revenue v Scottish Provident Institution* (2004) 76 TC 538 ("*Scottish Provident*") including the well-known decisions in the House of Lords in *Carreras Group Ltd v Stamp Commissioner* [2004] STC 1377 ("*Carreras*"), *MacNiven v Westmoreland Investments Ltd* [2001] STC 237 ("*MacNiven*") and *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1 ("*BMBF*"). I have set out below details of these decisions and the later decisions of the Supreme Court in and *UBS AG v Revenue and Customs Commissioners* [2016] STC 934 ("*UBS*") and *RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) (Appellant) v Advocate General for Scotland (Respondent) (Scotland)* [2017] UKSC 45) ("*Rangers*").

28. HMRC relied on the well-known comments made by Lord Wilberforce in *Ramsay* to the effect that, when interpreting a tax statute, the court may determine a composite transaction's tax effects by reference to its overall nature. In summary, Lord Wilberforce said that when construing a tax provision the court must determine the legal nature of the transaction for tax purposes but if that "emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded" and that, accordingly, the courts "are not bound to consider individually each separate step in a composite transaction intended to be carried through as a whole". By way of shorthand, I refer to this approach, as set out in further detail in the case law section as the "composite approach". In using this term, I do not suggest that Lord Wilberforce set out this approach as a distinct legal principle rather than as part of what may be required to construe a statute purposively.

29. HMRC's primary argument was that, applying a purposive approach, the transactions do not have the tax effects the appellants ascribed to them. Ms Nathan said that, on a realistic view of the facts the present case involves a series of pre-ordained transactions or a composite scheme which was designed to deliver, in effect, a distribution to the shareholders of Winn Yorkshire in respect of the shares they held in that company which was intended to be in a tax-free form.

30. Ms Nathan said that this is clear from the advice letter sent by Premier Strategies Limited to Winn Yorkshire, which summarised the scheme and set out the precise steps as they were in fact undertaken. In her view, the various steps taken under the scheme (the creation of Winn Scarborough, the injection of capital into that company and the reduction of capital) were simply the machinery adopted by Winn Yorkshire for the sole purpose of enabling it to deliver the dividend or distribution to its shareholders without them being subject to income tax. Accordingly, those steps should be disregarded for fiscal purposes. She noted that Winn Scarborough existed only for the purposes of the scheme; it had no activities and, once the scheme was completed, it was dormant. It was simply a conduit through which the relevant funds were passed in a way which was intended to deliver income into the hands of the appellants on a tax-free basis. In her view, in those circumstances, it is necessary to look beyond the form of the dividend declared by Winn Scarborough.

31. Ms Nathan drew support for HMRC's analysis from the decision of the Court of Appeal in *PA Holdings*. In that case, the Court of Appeal rejected the taxpayer's stance that steps it put in place to pay bonuses to its employees in the form of dividends resulted in them being taxable only on the sums received as dividends and not as earnings from an employment. She noted that Moses LJ considered that the essential task was to "identify the source" of the dividends and that the tribunal was entitled "within accepted limits, to look beyond the form of dividend, the mere machinery, by which the intention to pay bonuses was fulfilled". Taking a realistic view of the facts, Moses LJ held that the "insertion of the steps which created the form of dividends or distributions did not deprive the payments of their character as emoluments" and the "award of the shares and the declaration of the dividends were, in reality not separate steps but the process for delivery of the bonuses". A full description of this case is set out in the caselaw section below.

32. Mr Jones submitted that HMRC's stance goes far beyond what is permitted on a purposive approach to the construction of the relevant provisions. The dividend was in fact and law declared and paid by Winn Scarborough in respect of the B share in that company; there is no suggestion these transactions were a sham. The view that there was instead a dividend or distribution declared and paid by Winn Yorkshire, an entirely distinct legal person from Winn Scarborough, requires a re-characterisation of the facts for which there is no proper basis:

(1) The premise of HMRC's argument is that the mere fact that there were funds within Winn Yorkshire, which it could have paid to its shareholders by way of dividend or distribution, means that Winn Yorkshire can be regarded as having made a dividend or distribution of those funds to its shareholders. The logical conclusion of such a stance is that, in all cases, any sums in the reserves of an owner/manager owned company constitute dividend or distribution income of those persons whether or not they are paid out as such. That is plainly wrong.

(2) The decision in *PA Holdings* does not provide a basis for the wholesale re-characterisation of the dividend paid by Winn Scarborough as a dividend or distribution made by an entirely different party. The issue in that case was whether payments to employees were correctly to be categorised as receipts of earnings or dividends for tax purposes. It did not involve considering, as in this case, whether a payment by one party (Winn Scarborough) can be regarded as a payment by an entirely different party (Winn Yorkshire). It is certainly not authority for the proposition that it is possible to disregard the company law analysis in determining the true source of payment (namely, that the B share is plainly the source). Moreover, there is no case in the authorities on purposive construction where the court has completely redrawn the picture, as HMRC argue for here, by ignoring so comprehensively the true nature of the relevant transaction.

(3) In effect, HMRC's stance requires the separate legal personality of the entities involved to be ignored. That is simply impermissible. There are only very limited cases in which the corporate veil can be pierced as set out in *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34 ("*Prest v Petrodel*"). There are no circumstances justifying that in this case.

33. Mr Jones said that, if the dividend falls to be regarded as a dividend or distribution by Winn Yorkshire to the appellants, in any event, the effect of the settlements code is that a charge to tax can arise on Winn Yorkshire only under that code. The charge to tax on the "settlor" under the settlement code ousts the charge to tax on distributions under ss 383 to 385. The settlements code imposes an entirely freestanding, exhaustive and exclusive prescriptive charge on income which arises under a "settlement" by

treating it as that of the “settlor” alone which is taxable on the “settlor” only under the code.

34. Ms Nathan responded that, having identified the true source of the payments the logical place to start is the distribution provisions, as a principal head of charge, rather than the settlements code which is intended to operate as an anti-avoidance provision. She said that moreover the appellants’ stance ignores the priority rules in s 575(3).

35. Mr Jones said s 575(3) does not give the distribution provisions priority over the settlements code. Under the settlements code, the dividend income is the income of the “settlor” *alone* for income tax purposes (see s 624). There is simply no room for a separate charge on the appellants under s 383. In such circumstances, s 575(3) does not operate because there is no overlap between the distribution provisions and the settlements code. Mr Jones said that this is put beyond doubt by the explanatory notes to that provision (see [25]). Mr Jones added that, on HMRC’s stance, income from a trade, income arising in respect of land, interest income, dividend income and employment income would all be immune from the settlements code and it would be obsolete.

36. Ms Nathan responded that the explanatory notes are an aid to interpretation but do not replace the statute.

Caselaw – purposive approach to the interpretation of tax statutes

Ramsay

37. In *Ramsay* the House of Lords was concerned with a tax avoidance scheme under which the taxpayer sought to offset a capital gain by creating an allowable loss for capital gains purposes without incurring an economic loss. As Lord Wilberforce explained, at page 179, under the scheme “two assets appear, like particles in a gas chamber with opposite charges, one of which is used to create the loss, the other of which gives rise to an equivalent gain which prevents the taxpayer from supporting any real loss, and which gain is intended not to be taxable”. The relevant assets were loans which he said “like the particles” had a very short life:

> “Having served their purpose they cancel each other out and disappear. At the end of the series of operations, the taxpayer’s financial position was precisely as it was at the beginning, except that he paid a fee, and certain expenses, to the promoter of the scheme.”

38. He also noted that it was the clear and stated intention that once started the scheme would proceed through the various steps to the end and that “the taxpayer does not have to put his hands in his pocket” given the monies required were provided by a finance house and were automatically repaid at the end of the operation.

39. Lord Wilberforce continued that their Lordships were invited to treat the transactions as a fiscal nullity not producing either a gain or a loss and that counsel described that approach as “revolutionary”. Lord Wilberforce concluded, however, that far from being revolutionary, this approach resulted from the application of ordinary principles of statutory construction.

40. At pages 179 and 180, Lord Wilberforce set out what he considered to be well established principles:

(1) The courts are not confined to literal interpretation of statutory provisions but should consider “the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded….”.

(2) A person “is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect”.

(3) It is for the fact-finding commissioners to find whether a document, or a transaction, is genuine or a sham in the sense that "while professing to be one thing, it is in fact something different. To say that a document or transaction is genuine, means that, in law, it is what it professes to be, and it does not mean anything more than that."

(4) "Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1, 19."

41. He continued, at page 180, that whilst the principle set out in the *Duke of Westminster* is "a cardinal principle" it "must not be overstated or overextended" to require a blinkered approach:

> "While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs."

42. In the same passage, he set out what I refer to as the composite approach:

> "If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded…."

43. He concluded that whether under the principle set out in *Westminster* or under any other authority:

> "the courts are not bound to consider individually each separate step in a composite transaction intended to be carried through as a whole".

44. Lord Wilberforce went on to state that the composite approach is particularly in point where "it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps" and may be so where (as in *Ramsay* itself) "there is an expectation that it will be so carried through, and no likelihood in practice that it will not". In such cases "(which may vary in emphasis) the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions".

45. He said explicitly, at page 181, that the approach he set out did not introduce a new principle. Rather it involved applying to "new and sophisticated legal devices the undoubted power and duty of the courts to determine their nature in law and to relate them to existing legislation" in recognition that while "the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still". He said, at page 182, that:

> "To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process. In each case the facts must be established, and a legal analysis made: legislation cannot be required or even be desirable to enable the courts to arrive at a conclusion which corresponds with the parties' own intentions."

46. As Lord Reed later put it in *UBS*, it is plain that Lord Wilberforce was saying not only that the purposive approach to statutory construction, which was orthodox in other

areas, extended to tax law but also "equally significantly…that the analysis of the facts depended on that purposive construction of the statute".

47. Having noted, at page 182, that capital gains tax was "created to operate in the real world, not that of make-belief" Lord Wilberforce referred to what he said in *Aberdeen Construction Group Ltd.* v. *I.R.C.* [1978] AC 885, that:

> "it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function."

48. He summarised the relevant facts, at page 183, as follows: (a) the scheme had no commercial justification as the taxpayer was bound to make a loss, (b) "every transaction would be genuinely carried through and in fact be exactly what it purported to be", (c) it was "reasonable to assume that all steps would, in practice, be carried out, but there was no binding arrangement that they should. The nature of the scheme was such that once set in motion it would proceed through all its stages to completion", (d) the transactions "regarded together, and as intended, were from the outset designed to produce neither gain nor loss…they were self cancelling", (e) the scheme "was not designed as a whole to produce any result for Ramsay or anyone else, except the payment of certain fees for the scheme,…" and (f) the monies were advanced by a financier "on terms which ensured that it was used for the purposes of the scheme and would be returned on completion, having moved in a circle".

49. He concluded, at page 383, that:

> "it would be quite wrong, and a faulty analysis, to pick out, and stop at, the one step in the combination which produced the loss, that being entirely dependent upon, and merely a reflection of the gain. The true view, regarding the scheme as a whole, is to find that there was neither gain nor loss, and I so conclude."

Furniss and Carreras

50. Notwithstanding the plain meaning of Lord Wilberforce's judgment, as Lord Nicholls recognised in *BMBF*, for some time there was a tendency for taxpayers and HMRC to view *Ramsay* as establishing "a new jurisprudence governed by special rules of its own" (see below). That view was based, in particular, on comments made in the cases which followed in the wake of *Ramsay*, such as *Inland Revenue* v *Burmah Oil Co Ltd* 1982 SC (HL) 114 ("*Burmah Oil*"), *Carreras* and *Furniss*. Parties interpreted the decisions in these cases as meaning that, on a composite approach, *whatever the taxing statute*, elements inserted into a pre-ordained composite scheme without any commercial or business purpose should be treated as having no significance to the tax analysis. In particular, the well-known comments of Lord Brightman in *Furniss* at 527 (as based on the earlier formulation by Lord Diplock in *Burmah Oil*) suffered from this view.

51. In *Furniss* the taxpayers transferred shares which they wished to sell to a third party to a newly formed offshore company, IoM, in exchange for shares and it then immediately sold the shares on to the third party for cash. The taxpayers' purpose in inserting this step prior to the sale was to avoid any immediate charge to tax on capital gains on the sale on the basis that IoM was outside the UK tax net. It was critical to the success of the scheme, therefore, that the initial transfer of the share to IoM took place as a tax neutral reorganisation for capital gains tax purposes. The House of Lords took a composite approach in deciding that the taxpayers were to be treated as though they

had disposed of the shares direct to the third party on the basis that, with their concurrence, the sale price was paid to IoM.

52. In the relevant passage Lord Brightman said that the correct expression of the limitations of the *Ramsay* principle is as follows at [527]:

> "First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (ie business) end. The composite transaction does, in the instant case….It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax - not 'no business *effect'*. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.
>
> In the instant case the inserted step was the introduction of [IoM] as a buyer from the [taxpayers] and as a seller to [the third party]. That inserted step had no business purpose apart from the deferment of tax, although it had a business effect…."

53. However, as set out in detail below, in the later cases the House of Lords and the Supreme Court have been at pains to clarify that the view of the composite approach as a new jurisprudence governed by special rules of its own is a misconception. They have set out clearly that (a) *Ramsay* itself does not set out any such special principle and (b) in *Furniss* and the other relevant cases, the courts were not laying down any such special principle or interpreting *Ramsay* as doing so.

54. In *Carreras* the taxpayer transferred shares in one company to another company in return for an unsecured, non-transferable and non-interest bearing debenture which was redeemed only two weeks after the share transfer. It was held that, on a purposive construction of the relevant stamp tax provisions, the transaction was not an exchange of shares in one company for debentures of another company such that it did not attract stamp tax; rather it was the exchange of shares for money.

55. Lord Hoffmann, who gave judgment for the Privy Council said, at [7], that if it was permissible to take a wider view and to treat the terms of the debenture and its redemption as part of the relevant transaction then the debenture was "only a formal step, having no apparent commercial purpose or significance", in a transaction by which the shares in the company were exchanged for money.

56. He continued, at [8], that whether the statute is concerned with a single step or a broader view of the acts of the parties depends upon the construction of the language in its context. He thought that sometimes the conclusion that the statute is concerned with the character of a particular act is inescapable (as in *MacNiven*). However, since *Ramsay*:

> "the courts have tended to assume that revenue statutes, in particular, are concerned with the characterisation of the entirety of transactions which have a commercial unity rather than the individual steps into which such transactions may be divided. This approach does not deny the existence or legality of the individual steps but may deprive them of significance for the purposes of the characterisation required by the statute…"

57. He considered that there were no reasons why Parliament should have contemplated a narrower definition of the transaction which has to be considered in this context.

58. He noted, at [15], that counsel for the taxpayer submitted that a factual inquiry into what constituted the relevant transaction for the purposes of the relevant provision

would give rise to uncertainty. He seemed to accept that if the representative of Carreras had "handed the share certificates over the desk in exchange for the debenture and the representative of Caribbean had then handed it back in exchange for a cheque, it would be hard to say that the relevant transaction should not be characterised as an exchange of shares for money". But he asked "what if the debenture had been redeemed a year later? Why should a fortnight be insufficient to separate the exchange from the redemption?"

59. Lord Hoffmann said that one answer was that it was plain from the debenture's terms and the timetable that:

> "the redemption was not merely contemplated (the redemption of any debenture may be said to be contemplated) but intended by the parties as an integral part of the transaction, separated from the exchange by as short a time as was thought to be decent in the circumstances. The absence of security and interest reinforces this inference. No other explanation has been offered."

60. He continued that in any case:

> "it is inherent in the process of construction that one will have to decide as a question of fact whether a given act was or was not a part of the transaction contemplated by the statute. In practice, any uncertainty is likely to be confined to transactions into which steps have been inserted without any commercial purpose. Such uncertainty is something which the architects of such schemes have to accept."

MacNiven and BMBF

61. In *MacNiven* the House of Lords held that a debtor made a payment of interest within the meaning of the relevant statute which entitled him to a deduction or repayment of tax notwithstanding that it was funded by monies borrowed for that purpose from the creditor himself and was made solely to reduce the debtor's liability to tax. The House of Lords said that the purpose of requiring interest to be "paid" is to produce symmetry; it gives a right to a deduction in respect of any payment which gives rise to a corresponding tax liability for the recipient (or which would do so if the recipient is a taxable entity.) As the payment was accepted to have had this effect, it answered the statutory description.

62. In reviewing the *Ramsay* line of cases, Lord Nicholls emphasised that in *Ramsay* "the House did not enunciate any new legal principle" but rather highlighted that, "confronted with new and sophisticated tax avoidance devices, the courts' duty is to determine the legal nature of the transactions in question and then relate them to the fiscal legislation…." (at [1]). He noted, at [2] to [5] that *Ramsay* brought out the following three points, in particular:

(1) When seeking to attach a tax consequence to a transaction, the court may have regard to the overall effect of a series or combination of transactions intended to operate as such and:

> "..Courts are entitled to look at a pre-arranged tax avoidance scheme as a whole. It matters not whether the parties' intention to proceed with a scheme through all its stages takes the form of a contractual obligation or is expressed only as an expectation without contractual force".

(2) That does not mean that transactions or relevant steps are to be treated as "shams" nor does it require going "behind a transaction for some supposed underlying substance". Rather it enables the court "to look at a document or transaction in the context to which it properly belongs".

(3) Having identified the legal nature of the transaction, the courts must then relate this to the language of the statute:

> "For instance, if the scheme has the apparently magical result of creating a loss without the taxpayer suffering any financial detriment, is this artificial loss a loss *within the meaning of the relevant statutory provision*?"

63. Lord Nicholls, therefore, specifically endorsed the composite approach. He then referred with approval, at [6], to the comments of Lord Steyn and Lord Cooke of Thorndon in *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991 ("*McGuckian*") at 1000 and 1005 respectively that this approach (as he had described it, including the composite approach) "is an exemplification of the established purposive approach to the interpretation of statutes" and "an application to taxing Acts of the general approach to statutory interpretation whereby, in determining the natural meaning of particular expressions in their context, weight is given to the purpose and spirit of the legislation".

64. At [7], he cautioned that the observations on the *Ramsay* approach in some later decisions should be read in the context of the particular statutory provisions and sets of facts under consideration and that they:

> "cannot be understood as laying down factual pre-requisites which must exist before the court may apply the purposive, *Ramsay* approach to the interpretation of a taxing statute. That would be to misunderstand the nature of the decision in *Ramsay*."

65. Whilst he "readily accepted", at [8], that the factual situation described by Lord Brightman in *Furniss* is one where, typically, the *Ramsay* approach will be "a valuable aid" which may well often have the effect he set out, it really is just an aid and:

> "This is not an area for absolutes. The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case. Further, as I have sought to explain, *Ramsay* did not introduce a new legal principle. It would be wrong, therefore, to set bounds to the circumstances in which the *Ramsay* approach may be appropriate and helpful. *The need to consider a document or transaction in its proper context, and the need to adopt a purposive approach when construing taxation legislation, are principles of general application. Where this leads depends upon the particular set of facts and the particular statute….*" (Emphasis added.)

66. It is clear, therefore, that Lord Nicholls did not consider that *Furniss* was wrongly decided or that the description Lord Brightman gave of how the composite approach may apply was wrong, as applied in the context of the particular provision in issue and the facts of that case. He considered that the comments provide useful guidance but are not to be viewed as providing a set of universally applicable conditions which must be satisfied for a *Ramsay* approach to apply; it is always a question of interpretation of the relevant provision and its application to the specific facts.

67. Lord Hoffmann was also clear that on a *Ramsay* approach the ultimate question is one of statutory interpretation. However, he sought to provide guidance on precisely when a composite approach will be appropriate. In summary, he drew a distinction between cases where a statutory concept is intended to be given (a) a commercial meaning, in which case steps with no commercial purpose artificially inserted into a composite transaction for tax purposes will not affect the answer to the statutory question and (b) a legal meaning, in which case the juristic interpretation is to be respected.

68. At [28], Lord Hoffmann said that "everyone agreed that *Ramsay* is a principle of statutory construction". However, in his view it involved an "innovation" in that its effect "was to give the statutory concepts of "disposal" and "loss" a commercial meaning" in recognition that "the statutory language was intended to refer to

commercial concepts", so that "the court was required to take a view of the facts which transcended the juristic individuality of the various parts of a pre-planned series of transactions".

69. At [40], he considered what the court meant in *Ramsay* in referring to the "real" nature of the transaction and to what happens in "the real world". He said that: "The point to hold onto is that something may be real for one purpose but not for another". He said that accordingly:

(1) The acceptance that the transactions in *Ramsay* were not shams is an acceptance of "the juristic categorisation of the transactions as individual and discrete" and that "each of them involved no pretence. They were intended to do precisely what they purported to do. They had a legal reality".

(2) On the other hand, the view that the transactions did not give rise to a "real" disposal giving rise to a "real" loss is a rejection of "the juristic categorisation as not being necessarily determinative" for the purposes of those statutory concepts as properly interpreted. He thought that the "contrast here is with a commercial meaning of these concepts" and that reference to the income tax legislation as operating "in the real world", is a reference to "the commercial context which should influence the construction of the concepts used by Parliament".

70. He said, at [48], that in the famous passage in *Furniss* Lord Brightman provided "a careful and accurate summary of the effect which the *Ramsay* construction of a statutory concept has upon the way the courts will decide whether a transaction falls within that concept". He expanded on this as follows:

> "If the statutory language is construed as referring to a commercial concept, then it follows that steps which have no commercial purpose but which have been artificially inserted for tax purposes into a composite transaction will not affect the answer to the statutory question. When Lord Brightman said that the inserted steps are to be "disregarded for fiscal purposes", I think that he meant that they should be disregarded for the purpose of applying the relevant fiscal concept."

71. He emphasised at [49] that this formulation "is not a principle of construction" but is "rather a "statement of the consequences of giving a *commercial construction* to a fiscal concept" (emphasis added). He advised that before applying Lord Brightman's words:

> "it is first necessary to construe the statutory language and decide that it refers to a concept which Parliament intended to be given a commercial meaning capable of transcending the juristic individuality of its component parts. But there are many terms in tax legislation which cannot be construed in this way. They refer to purely legal concepts which have no broader commercial meaning. In such cases, the *Ramsay* principle can have no application. It is necessary to make this point because, in the first flush of victory after the *Ramsay*, *Burmah* and *Furniss* cases, there was a tendency on the part of the Inland Revenue to treat Lord Brightman's words as if they were a broad spectrum antibiotic which killed off all tax avoidance schemes, whatever the tax and whatever the relevant statutory provisions."

72. He noted, at [50], that the distinction between commercial and legal concepts has also been drawn in other areas of legislation and noted "by way of caution that although a word may have a "recognised legal meaning", the legislative context may show that it is in fact being used to refer to a broader commercial concept".

73. He also approved the comments in the *McGuckian* case which Lord Nicholls referred to and suggested, at [56], that particular attention should be paid to the way

Lord Cooke of Thorndon dealt with the criteria stated by Lord Brightman in *Furniss* that:

> "if the ultimate question is always the true bearing of a particular taxing provision on a particular set of facts, the limitations [in *Furniss*] cannot be universals. *Always one must go back to the discernible intent of the taxing Act*" and that he suspected that "the advisers of those bent on tax avoidance...do not always pay sufficient heed to the theme in the speeches in the *Furniss* case...to the effect that the journey's end may not yet have been found". (Emphasis added.)

74. Lord Hoffmann concluded, at [58] and [59], by again referring to the distinction between legal and commercial concepts:

> "The limitations of the *Ramsay* principle therefore arise out of the paramount necessity of giving effect to the statutory language. One cannot elide the first and fundamental step in the process of construction, namely to identify the concept to which the statute refers. I readily accept that many expressions used in tax legislation (and not only in tax legislation) can be construed as referring to commercial concepts and that the courts are today readier to give them such a construction than they were before the *Ramsay* case. But that is not always the case. Taxing statutes often refer to purely legal concepts…If a transaction falls within the legal description, it makes no difference that it has no business purpose. Having a business purpose is not part of the relevant concept…
>
> Even if a statutory expression refers to a business or economic concept, one cannot disregard a transaction which comes within the statutory language, construed in the correct commercial sense, simply on the ground that it was entered into solely for tax reasons. Business concepts have their boundaries on this topic."

75. In the later cases, such as *BMBF*, the House of Lords clarified that Lord Hoffmann's words are not to be interpreted as meaning that there is an a priori assumption that statutory concepts should be classified into legal or commercial ones before a *Ramsay* approach can be applied. In *BMBF* Lord Nicholls referred to Ribeiro PJ's comments in *Arrowtown*, at [37] and [39], that he did not think that Lord Hoffmann "actually intended to lay down a mechanistic test based on a "commercial"/"legal" dichotomy for pre-determining whether a particular provision is or is not susceptible to a *Ramsay* approach" and that:

> "the "valuable insights" that Lord Hoffmann was acknowledging [as regards Lord Brightman's comment in *Furniss*] were all centred on the proposition that the *Ramsay* doctrine has at its core the purposive interpretation of statutes applied to facts viewed realistically and untrammelled by "limitations" which might be thought to arise out of Lord Brightman's formulation. Such an approach strikes me as the antithesis of a mechanistic use of the "commercial"/"legal" dichotomy as a straitjacket limiting construction of the relevant statute…" [as Ribeiro PJ thought was reinforced by Lord Hoffmann's comments at [50] (see [83] below)].

BMBF

76. If any further clarification were needed on the effect of the decision in *Ramsay* Lord Nicholls provided this in giving the unanimous judgment of the House of Lords *BMBF* in what is now regarded as the definitive word on this topic. *BMBF* concerned whether a Barclays group company, BF, could claim capital allowances it asserted it was entitled to under a finance leasing transaction. I have not set out the facts of the case which were complex and far removed from the circumstances in these appeals.

77. Lord Nicholls first re-capped on the applicable principles of statutory construction. At [28], he noted that, as Lord Steyn explained in *McGuckian* at 999 the modern approach to statutory construction is:

> "to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose*"*.

78. He noted that until *Ramsay*, however, revenue statutes were "remarkably resistant to the new non-formalist methods of interpretation". The "particular vice" of formalism in this area was "the insistence of the courts on treating every transaction which had an individual legal identity ….as having its own separate tax consequences, whatever might be the terms of the statute". He continued that as Lord Steyn said, it was:

> "those two features - literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately - [which] allowed tax avoidance schemes to flourish."

79. He described *Ramsay*, at [29], as having "liberated the construction of revenue statutes from being both literal and blinkered". At [32], he summarised the essence of this liberated approach, noting specifically that it may include the composite approach:

> "to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction *(which might involve considering the overall effect of a number of elements intended to operate together)* answered to the statutory description…however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in [*MacNiven*], para 8:
>
> > "The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case."" (Emphasis added.)

80. He continued to emphasise, as he had done in *MacNiven*, that *Ramsay* did not introduce a new doctrine operating within the special field of revenue statutes. On the contrary, as Lord Steyn observed in *McGuckian* at 999 "it rescued law from being "some island of literal interpretation" and brought it within generally applicable principles". He said that the unfortunate tendency "to regard *Ramsay* as establishing a new jurisprudence governed by special rules of its own" was "encouraged by two features characteristic of tax law, although by no means exclusively so" (at [34]):

(1) The first is that:

> "tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, "in the real world"."

(2) The second is that:

> "a good deal of intellectual effort is devoted to structuring transactions in a form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute. It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge."

81. He continued, at [35], as he had said in *MacNiven* to caution that comments made in the cases such as *Burmah Oil*, *Furniss* and *Carreras* are not to be taken out of context, in effect, as justifying a broad-brush approach. In doing so, he did not suggest, however, that those cases were wrongly decided or that the wrong approach was taken. He said that in those cases, in looking at the overall effect of the composite transactions in question, "*on the true construction of the relevant provisions of the statute*, the court

treated the elements inserted into the transactions without any commercial purpose as having no significance" (emphasis added). However, the view based on these cases that, in the application of "*any* taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded" is "going too far" in that:

> "It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in [*Arrowtown* at [35]] [see [26] above] …."

82. He said, at [37], that the need to avoid sweeping generalisations about disregarding transactions undertaken for the purpose of tax avoidance was shown by *MacNiven* which, at [38], he said shows:

> "the need to focus carefully upon the particular statutory provision and to identify its requirements before one can decide whether circular payments or elements inserted for the purpose of tax avoidance should be disregarded or treated as irrelevant for the purposes of the statute."

83. In the same passage, he commented on Lord Hoffman's approach in *MacNiven* as not "an unreasonable generalisation" but said:

> "we do not think that it was intended to provide a substitute for a close analysis of what the statute means. It certainly does not justify the assumption that an answer can be obtained by classifying all concepts *a priori* as either "commercial" or "legal". That would be the very negation of purposive construction: see Ribeiro PJ in *Arrowtown* at paras 37 and 39…." [see [75] above]

84. In turning to applying these principles to the facts of *BMBF*, Lord Nicholls said, at [39], that *BMBF*, like *MacNiven*, illustrates the need for a close analysis of what, on a purposive construction, the statute actually requires.

Scottish Provident

85. *Scottish Provident* provides authority that, in construing the relevant provisions, the transactions should be viewed as they were intended to and did in fact take place. The decision in *Scottish Provident* was released on the same day as that in *BMBF* by the same panel as in *BMBF*. The case concerned a scheme designed to take advantage of a change in the law governing the taxation of gains and losses made by mutual life offices on the grant or disposal of options to buy or sell gilts. Under the scheme:

(1) The life office, SPI, granted Citibank the option to buy a quantity of gilts from it at a "strike price" of 70, well below their anticipated market value at the time the option was exercised, in return for a premium. Under the law then in force, the premium was exempt from tax.

(2) After the law had changed, Citibank exercised the option, requiring SPI to sell the gilts to it at a loss. Under the law then in force, the loss was allowable for tax purposes. In order to ensure that no real loss could be suffered by either party, the scheme also provided for Citibank to grant an option to SPI, entitling it to buy a matching quantity of gilts from the bank at a strike price of 90, calculated so that the overall movements of money between the parties were equivalent.

(3) It was anticipated that both options would be exercised, but there was a possibility that they might not be. In the event, both options were exercised, and neither gilts nor money changed hands.

86. Lord Nicholls set out, at [18], that whether SPI was entitled to treat the loss suffered on the exercise of the option granted to the bank as an income loss essentially depended on whether the option gave the bank an "entitlement" to gilts within the

meaning of the relevant statute. At [19], he noted that if attention was confined to that option, it "certainly gave [the bank] an entitlement, by exercise of the option, to the delivery of gilts" but "if the option formed part of a larger scheme by which [the bank's] right to the gilts was bound to be cancelled by SPI's right to the same gilts, then it could be said that in a practical sense [the bank] had no entitlement to gilts". He then endorsed the view that a purposive approach to the construction of tax legislation allows and indeed may require a composite approach:

> "*Since the decision of this House in [Ramsay] it has been accepted that the language of a taxing statute will often have to be given a wide practical meaning of this sort which allows (and indeed requires) the Court to have regard to the whole of a series of transactions which were intended to have a commercial unity*. Indeed, it is conceded by SPI that the Court is not confined to looking at the Citibank option in isolation. If the scheme amounted in practice to a single transaction, the Court should look at the scheme as a whole. [Counsel] for SPI, accepted before the Special Commissioners that if there was "no genuine commercial possibility" of the two options not being exercised together, then the scheme must fail." (Emphasis added.)

87. Lord Nicolls continued, at [20] and [21], to note that the taxpayer's counsel submitted that "even if the parties intended that both options should be exercised together…the Court could treat them as a single transaction only if there was "no practical likelihood" that this would not happen". In that context the Special Commissioners, in adopting (at [24] of their decision) the analogy of horserace betting, had accepted this. They said that:

> "If the chance of the price movement occurring was similar to an outsider winning a horse race we consider that this, while it is small, is not so small that there is no reasonable or practical likelihood of its occurring; outsiders do sometimes win horse races."

88. Lord Nicholls noted, at [21], that the test of "no practical likelihood" derived from the speech of Lord Oliver of Aylmerton in *Craven* v *White* [1989] A C 398, at p 514. However, he thought there was a distinction between that case and *Scottish Provident*. In *Craven v White* "important parts of what was claimed by the Revenue to be a single composite scheme did not exist at the relevant date" (see Lord Oliver (at p 498)); there was an uncertainty about "whether the alleged composite transaction would proceed to completion which arose, not from the terms of the alleged composite transaction itself, but from the fact that, at the relevant date, no composite transaction had yet been put together" (see [22]). On the other hand, in *Scottish Provident*:

> "…the uncertainty arises from the fact that the parties have carefully chosen to fix the strike price for the [option granted to SPI] at a level which gives rise to an outside chance that the option will not be exercised. There was no commercial reason for choosing a strike price of 90. From the point of view of the money passing (or rather, not passing), the scheme could just as well have fixed it at 80 and achieved the same tax saving by reducing the Citibank strike price to 60. It would all have come out in the wash. Thus the contingency upon which SPI rely for saying that there was no composite transaction was a part of that composite transaction; chosen not for any commercial reason but solely to enable SPI to claim that there was no composite transaction. It is true that it created a real commercial risk, but the odds were favourable enough to make it a risk which the parties were willing to accept in the interests of the scheme."

89. At [23] Lord Nicholls held that it would "destroy the value of the *Ramsay* principle of construing provisions" such as those in issue as referring to the effect of composite transactions:

> "if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. We would be back in the world of artificial tax schemes, now equipped with anti-*Ramsay* devices. The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned."

At [24] he concluded that the Special Commissioners erred in law in finding that "there was a realistic possibility of the options not being exercised simultaneously meant, without more, that the scheme could not be regarded as a single composite transaction".

UBS and Rangers

90. In the more recent cases of *UBS* and *Rangers*, the Supreme Court has endorsed fully the explanation of the modern approach to statutory construction in *BMBF* and the approach in *Scottish Provident* in the context of employment tax cases.

91. In *UBS* Lord Reed (with whom the other Lords agreed), at [61], referred to *BMBF* and noted that until *Ramsay* "the interpretation of fiscal legislation was based predominantly on a linguistic analysis" and that:

> "the courts treated every element of a composite transaction which had an individual legal identity (such as a payment of money, transfer of property, or creation of a debt) as having its own separate tax consequences, whatever might be the terms of the statute" (citing Lord Steyn in *McGuickan* at p 999)."

92. He continued, at [62], that the significance of the *Ramsay* case was "to do away with both those features". In his explanation of *Ramsay*, he very plainly accepted that it was established by that case that the composite approach is a feature of applying a purposive approach to the interpretation of tax legislation:

> "First, it extended to tax cases the purposive approach to statutory construction which was orthodox in other areas of the law. *Secondly, and equally significantly, it established that the analysis of the facts depended on that purposive construction of the statute.* Thus, in *Ramsay* itself, the terms "loss" and "gain", as used in capital gains tax legislation, were purposively construed as referring to losses and gains having a commercial reality. Since the facts concerned a composite transaction forming a commercial unity, with the consequence that the commercial significance of what had occurred could only be determined by considering the transaction as a whole, the statute was construed as referring to the effect of that composite transaction….." (Emphasis added.)

93. At [63], he referred to *BMBF* (at [32] to [34] and [64]) and said that this approach has proved to be particularly important in relation to tax avoidance schemes as a result of two factors identified in *BMBF* at [34]. In that context he also referred to the comments of Carnwath LJ in the Court of Appeal in *BMBF* [2003] STC 66, at [66] that, taxing statutes generally "draw their life-blood from real world transactions with real world economic effects". He commented that:

> "Where an enactment is of that character, and a transaction, or an element of a composite transaction, has no purpose other than tax avoidance, it can usually be said, as Carnwath LJ stated, that "to allow tax treatment to be governed by transactions which have no real world purpose of any kind is inconsistent with that fundamental characteristic". Accordingly, as Ribeiro PJ said in [*Arrowtown* at 35 (see [26] above)], where schemes involve intermediate transactions inserted for the sole purpose of tax avoidance, it is quite likely that a purposive interpretation will result in such steps being disregarded for fiscal purposes. But not always."

94. He then made a similar observation, at [65], as that made by Lord Nicholls in *BMBF* that in cases such as *Furniss*, *Carreras*, *Burmah Oil* (and he added the later cases such as *Scottish Provident)*:

> "*the court considered the overall effect of the composite transaction, and concluded that, on the true construction of the relevant statute, the elements which had been inserted without any purpose other than tax avoidance were of no significance. But it all depends on the construction of the provision in question.* Some enactments, properly construed, confer relief from taxation even where the transaction in question forms part of a wider arrangement undertaken solely for the purpose of obtaining the relief. The point is illustrated by the decisions in [*MacNiven]* and [*BMBF*] itself." (Emphasis added.)

95. He said, at [66] that the position was summarised by Ribeiro PJ in *Arrowtown* at [35] (see [26] above). He cautioned, at [67], that "references to "reality" should not, however, be misunderstood" and said, at [67] and [68]:

> "In the first place, the approach described in [*BMBF*] and the earlier cases in this line of authority has nothing to do with the concept of a sham, as explained in *Snook.* On the contrary, as Lord Steyn observed in *McGuckian* at p 1001, tax avoidance is the spur to executing genuine documents and entering into genuine arrangements.
>
> Secondly, it might be said that transactions must always be viewed realistically, if the alternative is to view them unrealistically. *The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in Ramsay, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in MacNiven and [BMBF], then other transactions, although related, are unlikely to have any bearing on its application*." (Emphasis added.)

96. At [69] and [70], he then referred at some length to the *Scottish Provident* case and proceeded to apply the approach set out in that case in concluding that a contingency which created a minor risk, but one which the parties were willing to accept in the interests of the scheme could in effect be ignored (see [88]).

97. In *Rangers,* Lord Hodge similarly described the speech which Lord Nicholls made in *BMBF* as explaining "the true principle established in *Ramsay*" and the cases which followed it. He referred, at [13], to Lord Nicholls' comments at [34] and [36] and to the same comments of Carnwarth LJ in the Court of Appeal as Lord Reed had referred to in *UBS*. At [14], he endorsed what he described as Lord Reed's helpful summary of the significance of the new approach, which *Ramsay*, as explained in *BMBF*, has brought about citing from [62] of his decision in *UBS*. At [65], he referred to *Scottish Provident* as authority that:

> "In applying a purposive interpretation of a taxing provision in the context of a tax avoidance scheme it is legitimate to look to the composite effect of the scheme as it was intended to operate" [and he cited Lord Nicholls at [23] of *Scottish Provident*].

PA Holdings

98. In *PA Holdings*, the Court of Appeal rejected the taxpayer's argument that dividends paid to its employees on shares awarded to them in effect as a discretionary bonus were taxable only as dividend income (thereby attracting a lower rate of tax than would apply on earnings of the relevant amount (and no NICs)). Moses LJ gave the

leading judgment with which the other panel members agreed. He set out the relevant facts, at [6] to [20], which, in summary, were as follows:

(1) Prior to the transactions in question, PA had a well-publicised policy to pay its staff median salaries and then to award them generous annual bonuses each year by paying profits into employee benefit trusts from which awards were made under discretionary bonus schemes. PA's accounts for 1999 included provisions for bonuses so that that the employees had a valid expectation that PA would pay bonuses for that year. The bonuses were designed to reflect an employee's efforts, the achievements of the section of PA in which the employee worked and profitability as a whole.

(2) In 1999 Ernst & Young proposed an arrangement to re-route bonuses so that they were paid as dividends from a UK resident company with the intention they would be taxed as distributions. The proposal was modified, so as to bring in an independent trustee of PA's own choosing. The overall effect of the scheme was that any employee who chose to do so received 99p in dividends and 1p in share redemption proceeds, rather than receiving a bonus of £1.

(3) Under the scheme:

(a) In December 1999, PA as settlor, and the trustee, executed a deed establishing an employee benefit trust (the "1999 ET") and PA paid £24.5 million to the trustee for payment into the 1999 ET which was described in its relevant accounts as "staff costs".

(b) In early 2000:

(i) The trustee adopted a "restricted share plan" under which it could grant eligible employees awards over shares in the capital of a Jersey company (J) established by the trustee including the right to receive all dividends or distributions accruing to those shares.

(ii) At the trustee's request, PA calculated bonus awards for all employees for 1999 using a set formula as adopted in the previous year. The trustee questioned PA about the proposals and gave separate and detailed consideration to them, changing some of them.

(iii) PA's employees were notified about "exciting proposed changes to the delivery of current bonus awards" and were invited to choose between receiving a bonus for 1999 from the employee trust in place before these arrangements were put in place or from the 1999 ET.

(c) In February 2000 (a) the trustee transferred to J almost all of the £24.5 million as a capital contribution, and (b) shortly after, the trustee was allotted 24 million 1p redeemable preference shares in J which were held by a Jersey nominee.

(d) In March 2000:

(i) The trustee granted awards over the preference shares to a list of PA employees based largely, but not entirely, on PA's information in order to "enhance and retain their goodwill as employees of PA".

(iii) The directors of J, all of whom were senior staff of PA, declared a 99p dividend for each 1p share funded from the capital contributed to J.

(e) In April 2000 the trustee gave authority to the nominee to transfer the dividend payments to the award holders subject to an agreed deduction of 25%. The gross amounts reflected the size of the awards of the beneficial interests in the shares.

(f) In November 2000, J redeemed the 1p shares and the trustee, acting as its agent for the purposes of the redemption, instructed the nominee to pay the redemption to the relevant individuals.

(4) These arrangements were repeated for 2000 and 2001 (although a glitch required retrospective correction by action in the Royal Court of Jersey).

99. At [23] Moses LJ recorded that, on the basis of those facts, the tribunal made the following main conclusions:

(1) The cash dividend received by the employees was a profit arising from the employment because it was made in reference to the services the employee rendered by virtue of his office and was in the nature of a reward for past, present or future services (the test applied by Upjohn J in *Hochstrasser v Mayes* [1959] Ch 22). On a purposive approach to the construction of the relevant provisions, it reached the same result.

(2) Under the schedular system for taxing income in place at the time (as provided for under ss 15 to 20 of the Income and Corporation Taxes Act 1988 ("**ICTA**")), the payments received by the employees were, therefore, emoluments within the meaning of schedule E. However, they were also dividends or distributions within the scope of schedule F (as provided for under s 20 ICTA).

(3) On that basis, s 20(2) ICTA required the payments to be taxed under Schedule F as dividends only as it provided that: "No distribution which is chargeable under Schedule F shall be chargeable under any other provision of the Income Tax Acts". However, absent any equivalent provision to s 20(2) for NICs, since the payments were emoluments, they were earnings for those purposes.

The UT followed the same approach.

100. Moses LJ said, at [26] and [27], that it was essential to identify "the source" of the relevant dividend income noting that different schedules, with their own rules, applied "according to the source of the income" and "generally, classify the property, profits or gains to be brought into charge for income tax purposes by reference to the source or character of the income in the hands of the recipient". He set out, at [28], that guidance as to the purpose of the schedular system was definitively expressed in *Fry v Salisbury House Estate Ltd* [1930] AC 432 from which he derived the following fundamental propositions:

> "i. income tax is only one tax, and the different Schedules do no more than to provide the method of computation charge and assessment peculiar to the Schedule to which the income is allocated;
>
> ii. the Schedules are mutually exclusive, each Schedule is dominant over its own subject matter and provides a complete code for the class of income which falls within that Schedule;
>
> iii. the same source of income cannot be taxed twice."

101. He concluded, at [31], that the principles deployed in *Fry* remained good and, if the relevant income was, as the tribunal concluded, derived from the employee's employment it might be expected, in accordance with those principles, that it should be charged under schedule E and not under any other schedule.

102. At [32] to [40], he concluded that the tribunal was correct that the relevant income was derived from the employees' employment as follows:

(1) He accepted, at [33], that there are circumstances in which employees may be awarded shares as an incentive or reward where the source of dividends or distributions they later receive in respect of their shareholding "may properly be identified as the shares and not their employment" so that the employees "receive

those payments in their capacity as shareholder or investor and not as employee" (citing *Abbot v Philbin* [1961] AC 352 as an example of such a case).

(2) He continued, at [34], that the answer to the character of the receipts in this case "lies not in the administration of some post-*Ramsay* prophylactic against tax avoidance but in the methods which the courts have long been accustomed to deploy whenever it is necessary to decide whether income is from employment..". He described those methods, at [35] to [38], noting that:

(a) the conventional approach of the courts is to look at all the circumstances of the case in order to determine whether a payment is an emolument (citing *Brumby v Milner* 1976 51 TC 583 at 607G);

(b) whilst over the years judges have indulged in judicial glosses on the statutory words there was no need for any such gloss, rather the "correct approach is to consider all the facts relevant to the receipt of the income";

(c) this requires "the court not to be restricted to the legal form of the source of the payment but to focus on the character of the receipt in the hands of the recipient" (citing *Dale v IRC* [1954] AC 11); and

(d) in other words: "The question is one of substance and not form" (referring to Viscount Simonds in *Hochstrasser v Mayes* at 706).

(3) He said, at [39], that on that approach: "The court should not be seduced by the form in which the payments (that is as dividends declared in respect of the shares in [the company]) reached the employees. It should focus on the character of the receipt in the hands of the recipients." He noted, at [40], that the tribunal had followed that approach in concluding that the payments were taxable under schedule E and, in doing so, relied in particular on the facts that (a) the purchase of the shares in J was funded in full by PA (b) the dividends and full value of the shares were transferred at no cost to the employees, (c) the intention was to motivate and encourage the employees, (d) payment was represented to them as payment of the bonus for that year and, (d) those who left, even after PA had funded funds to the trustee were not eligible and (e) the fact that the employees had no right to the payments was irrelevant. He considered that was the correct approach which:

> "owes nothing and need owe nothing to the law's development, during the past thirty years, in its attitude to artificial tax avoidance…..For at least sixty years courts have identified the character of a receipt in the hands of the recipient by looking at its substance and not its form."

(4) He concluded, at [43], that unlike in *Abbott v Philbin:*

> "The payments received by the employees owed nothing to fluctuations or increases in the value of shares in [J] and everything to the amount which PA had decided to award as bonuses to its employees…….the quantum of that which the employees received was entirely dictated by the amount PA decided to award as bonuses. The receipts were triggered by PA's decision to continue its policy of making bonus payments and to fund the 1999 Trust and arrived in the hands of employees, as they were intended to do, as bonuses."

103. At [45], Moses LJ noted that HMRC deployed the *Ramsay* principle because the tribunal and UT classified the receipts also as dividends, and construed s 20(2) as requiring them to be charged under schedule F and not schedule E. He remarked, at [53], that the tribunal and UT's conclusion that schedule F applied rested, in essence, upon the view that s 20(1) "precludes consideration of the payment of the dividend in the wider context of the decision to make bonus payments to the taxpayer's employees

through the medium of the 1999 ET". He continued to explain that he thought that this was not the correct approach:

(1) At [54], he said that the UT were "correct to base their conclusions on issues of statutory construction, in obedience to the principle that "the paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case"" (referring to *MacNiven* at [8] and *BMBF* at [38]) and that the issue was "to determine whether the statutory provision in question is concerned with the character of a particular act rather than the character of the entirety of transactions which have a commercial unity" (citing Lord Hoffmann's reference to *MacNiven*, in *Carreras* [8]).

(2) At [55] and [56], he noted that *MacNiven* and *BMBF* are examples of the case where: "on a proper construction of the statutory provisions in issue no purpose can be discerned other than to bring within their application a transaction which, on a realistic appraisal, falls within their scope. On a proper construction, it makes no difference whether the transaction was part of a series of transactions or part of a composite transaction or not."

(3) He explained, at [57] that, following those principles, the UT concluded that, as a charging provision, any transaction which came within the wide definition of a dividend or distribution within s 20(1), whether part of a series of transactions, of a composite transaction or of pre-ordained transactions, fell to be charged under Schedule F and not under Schedule E.

(4) He said, at [58], that, however, s 20(1) "must be construed within the context of the statutory scheme of which it forms part" (being s 1 and ss 15 to 20 ICTA) which, as he had already set out, "classify the nature of the income in the hands of the recipient by reference to mutually exclusive Schedules…". He said that if authority is required for so obvious a proposition then: "Whether the statute is concerned with a single step or a broader view of the acts of the parties depends upon the construction of the language *in its context*". *Carreras* [8] (my emphasis)".

(5) At [59] he said that whilst the tribunal and the UT "hit the nail on the head…they failed to drive it in":

> "They concluded that the payments were emoluments by having regard to all the circumstances of the case and by looking to the substance and purpose of the payments and not to the mere form in which they were received. In reaching their conclusion, they followed a long-accepted, traditional approach to the facts. That approach enabled them, within accepted limits, to look beyond the form of distributions, mere machinery, by which the intention to pay bonuses was fulfilled."

(6) He concluded, at [60], that once that conclusion had been reached, there was "no room whatever for any further consideration of a different Schedule". If the payments were emoluments in the hands of the taxpayer's employees, they could not be dividends or distributions in their hands. Any other conclusion "offends the basic principle expressed in *Fry* that if income falls within one Schedule it cannot be taxed under another" and, at [61]:

> "The principles of *Fry,* and for that matter all the jurisprudence relating to the issue whether payments are from employment, to which I have already referred, establish that, once they had concluded that the payments were emoluments, the [tribunal] and [UT] had exhausted the enquiry as to the character of the income which the statute obliged them to undertake. There was no room for any further enquiry, no room for asking whether the form of the payments came within the wide embrace

of the definitions of dividends or distributions for the purposes of Schedule F.”

104. Moses LJ held, at [63], that the error of the tribunal and UT, therefore, was in thinking that both schedules could be relevant whereas “income falls either under the one or the other” and the factual finding that the income fell within Schedule E precluded any finding that it also fell within Schedule F. In his view, at [64], it is the structure of Part 1 ICTA and the application of the fundamental principles of income tax law and not s 20(2) which dictates that conclusion; that section does not apply unless a distribution chargeable under Schedule F can be identified and, as its wording makes clear, it does not apply to a payment chargeable under Schedule E. He emphasised, at [65], that s 20(2) is not devoid of effect. It resolves the conflict where income from one and the same source, shares or certain securities could be charged under two different schedules:

> “Section 20(2) is concerned with income from one source, shares, which absent section 20(2) could be charged under two different Schedules. It is not concerned to charge income under Schedule F when the source of the income is charged under the different and mutually exclusive Schedule E. Schedule F does not take priority over Schedule E. It does not charge emoluments at all. No question as to the application of section 20(2) arises. The income never came within section 20 at all.”

105. On the *Ramsay* approach, he said the following at [66] to [70]:

(1) His conclusion owed little to HMRC’s deployment of familiar anti-avoidance jurisprudence but he thought that he should not overlook the application of those principles as summarised by Arden LJ in *Astall and Another v Revenue and Customs Commissioners* [2009] EWCA Civ 1010, [2010] STC 137 in which she set out the approach set out in *Arrowtown* ([66]). On that approach, the purpose of the relevant statutory provisions is to classify the income according to an appropriate and mutually exclusive Schedule. Viewed realistically, the payments were emoluments ([67]).

(2) The insertion of the steps which created the form of dividends or distributions did not deprive the payments of their character as emoluments. The insertion had no fiscal effect because s 20, construed in its statutory context, does not charge emoluments under schedule F. The argument that both the award of the shares and the distributions could be classified as income and thereby raise the spectre of double-recovery failed for the same reason. The award of the shares and the declaration of the dividend were, in reality, not separate steps but the process for delivery of the bonuses ([68]).

(3) He cited examples where a similar approach was taken (see *NMB Holdings Ltd v Secretary of State for Social Security* (2000) 73 TC 85, 125)and *DTE Financial Services Limited v Wilson* (2001) 74 TC 14). He concluded, at [70] that: “PA decided that its employees should receive a bonus, Mourant identified which of the employees, from the list provided by PA, should receive a bonus and those employees received a bonus. That, to adopt the dismissive terms of Special Commissioner de Voil in *DTE,* was the beginning and end of the matter. It is, in my view, the beginning and end of these appeals.”

Caselaw – piercing the corporate veil

106. In *Prest v Petrodel* the Supreme Court considered when a company’s separate legal personality may be disregarded in the context of proceedings regarding a financial settlement on divorce where some of the relevant assets were held in companies. The leading judgement was given by Lord Sumption.

107. At [8] Lord Sumption explained the relevant legal principles as follows:

> "Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In *Salomon v A Salomon and Co Ltd* [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. In *Macaura v Northern Assurance Co Ltd* [1925] AC 619, the House of Lords held that the sole owner and controller of a company did not even have an insurable interest in property of the company, although economically he was liable to suffer by its destruction. Lord Buckmaster, at pp 626-627 said:
>
> > "no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up."
>
> In *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 the House of Lords held that documents of a subsidiary were not in the "power" of its parent company for the purposes of disclosure in litigation, simply by virtue of the latter's ownership and control of the group."

108. In the same passage, he noted that the principles he had set out are "the starting point for the elaborate restrictions imposed by English law on a wide range of transactions which have the direct or indirect effect of distributing capital to shareholders". He noted that the "separate personality and property of a company is sometimes described as a fiction and in a sense it is". But:

> "the fiction is the whole foundation of English company and insolvency law. As Robert Goff LJ once observed, in this domain "we are concerned not with economics but with law. The distinction between the two is, in law, fundamental": *Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45, 64. He could justly have added that it is not just legally but economically fundamental, since limited companies have been the principal unit of commercial life for more than a century. Their separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them."

109. At [16] he noted that the term "piercing the corporate veil" is "an expression rather indiscriminately used to describe a number of different things" but properly speaking, "it means disregarding the separate personality of the company" in cases which are "true exceptions to the rule in *Salomon v A Salomon and Co Ltd*.." namely "where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control".

110. He took from his review of the caselaw, at [34], that as a matter of broad principle:

> "the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about. Thus in a case like *VTB Capital*, where the argument was that the corporate veil should be pierced so as to make the controllers of a company jointly and severally liable on the company's contract, the fundamental objection to the argument was that the principle was being invoked so as to create a new liability that would not otherwise exist. The objection to that argument is obvious in the case of a consensual liability under a contract, where the ostensible contracting parties never intended that anyone else should be

> party to it. But the objection would have been just as strong if the liability in question had not been consensual."

111. He concluded, at [35], that there is a limited principle of English law which applies to enable the corporate veil to be pierced. It applies:

> "when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control."

112. In those circumstances:

> "The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality."

113. However, he thought that the principle "is properly described as a limited one" for the following reasons:

> "…..in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in *Ben Hashem*, I consider that, if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in *VTB Capital* who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."

Decision on the Ramsay argument

114. I have concluded that on a purposive approach to the construction of ss 383 to 385 and 1000 CTA 2010 on a realistic view of the facts, Winn Yorkshire made a distribution to the appellants in respect of their shares in it by providing funds to Winn Scarborough (in the form of the funds used to acquire shares in it) with the sole purpose of thereby enabling Winn Scarborough to pay the B share dividend for the intended benefit of the appellants, solely in their capacity as its shareholders.

Purposive approach

115. To recap, the decision in *Ramsay* was a key turning point in bringing the approach to interpreting tax legislation into line with the purposive approach adopted in other areas. In what is widely recognised as a succinct and accurate summary, in *Arrowtown* Ribeiro PJ said that the driving principle of the *Ramsay* line of cases is to apply in tax cases "a general rule of statutory construction and an unblinkered approach to the analysis of the facts"; in other words, the "ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically".

116. Most recently in *UBS* Lord Reed emphasised (as cited with approval by Lord Hodge in *Rangers*), that *Ramsay* established not only that a purposive approach must be taken to the construction of tax statutes but also and "equally significantly" that "the analysis of the facts depended on that purposive construction". In other words, "the facts must be analysed in the light of the statutory provision" and "if a fact is of no relevance to the application of the statute", it can be disregarded for that purpose. Lord Wilberforce's composite approach, therefore, provides an illustration of the effect of taking an "unblinkered" and "realistic" view of the facts where, in light of its purpose and context, the statutory provision in question is concerned with the characterisation

of the entirety of a transaction which has a commercial unity rather than with the individual steps into which it may be divided (see *Carreras* at [8]).

117. As Lord Nicholls put it in *MacNiven* the "paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case" in the light of "the need to consider a document or transaction in its proper context, and the need to adopt a purposive approach". As he later said in *BMBF*, the court or tribunal must "determine what transactions the relevant provision is intended to apply to and whether the actual transaction (*which might involve considering the overall effect of a number of elements intended to operate together*) answers to the statutory description" (emphasis added). Lord Nicholls emphasised, therefore, the need to avoid sweeping generalisations about disregarding transactions undertaken for the purpose of tax avoidance. Rather it is essential "to focus carefully upon the particular statutory provision and to identify its requirements" before it can be decided "whether circular payments or elements inserted for the purpose of tax avoidance should be disregarded or treated as irrelevant for the purposes of the statute". There is simply no substitute for a close analysis of what the particular provision requires.

118. As Lord Reed and Lord Hodge recognised in *UBS* and *Rangers* respectively citing the decision in *Scottish Provident*, in applying this purposive approach it is legitimate to look to the effect of the composite scheme as it was intended to operate without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned. In *Scottish Provident* Lord Nicholls said that it would destroy the value of the *Ramsay* principle if "the composite effect of transactions had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned".

Application of purposive approach

119. To recap, in accordance with the plan set out by Premier Strategies Limited and the steps approved in advance by the appellants, acting as shareholders and directors of the relevant companies, within a period of just over three weeks:

(1) Winn Yorkshire set up Winn Scarborough on subscribing for A and B shares in that company.

(2) Winn Yorkshire created the Trust in respect of its beneficial interest in the B share on the basis that, after the application of small sums for the benefit of a charity and Winn Yorkshire itself, the appellants were to receive 99% of the income arising to the Trust.

(3) Winn Yorkshire subscribed for an additional A share in Winn Scarborough at a premium of £200,000 which reflects the sum Winn Yorkshire would otherwise have paid to the appellants direct as a dividend or distribution.

(4) Winn Scarborough's share capital was reduced by £200,000 by cancelling the share premium account and crediting that amount to its distributable reserves.

(5) Winn Scarborough declared a dividend of £200,000 on the B share using the distributable reserves created as a result of the capital reduction which, after deduction of bank fees, resulted in the charity and Winn Yorkshire each receiving £1,455, and each appellant receiving £98,465.

120. HMRC did not appear to dispute that each of the steps involved in the transactions if viewed as individual and discrete transactions, as Lord Hoffman put it in *MacNiven*, "involved no pretence. They were intended to do precisely what they purported to do. They had a legal reality". The question is whether, on a purposive approach to the construction of the relevant provisions:

(1) as is the effect of the appellants' argument, each of the steps should be analysed according to that legal reality or, as Lord Hoffman put it in *MacNiven*, on the basis that the juristic analysis of each step should be respected with the result that the only dividend or distribution arising for tax purposes is that paid by Winn Scarborough on the B share held in the Trust which is taxable only in the hands of Winn Yorkshire under the settlements code; or

(2) as is the effect of HMRC's argument, the transaction should be analysed adopting a composite approach, having regard to the overall effects of the steps involved as elements designed to operate together, with the result that Winn Yorkshire is to be regarded as making a "distribution out of the assets" of Winn Yorkshire "in respect of" the shares held by the appellants in Winn Yorkshire (within the meaning of s 1000 CTA 2010) of a sum equal to the sums received by the appellants on which they are taxable under ss 383 to 385.

121. In my view, having regard to the natural meaning of the terms used in s 1000 CTA 2010 (as further explained in s 1113) and viewing those provisions in the overall context of Part 23 CTA 2010, the purpose of ss 383 to 385 as regards distributions is, in broad terms, to tax a shareholder on any value which a company delivers out of its assets into a shareholder's hands by some non-prescribed means (whether directly or indirectly) as a return on his shareholding except where one of the specified exemptions apply:

(1) On its natural meaning, any "other distribution out of assets" of the company (meaning "other" than a dividend) can be taken to mean the payment, delivery, provision or giving of the assets or value from the assets of the company.

(2) Without attempting to provide an exhaustive definition, it seems to me that a distribution is "in respect of shares in the company" as that term is explained in s 1113 CTA 2010, where the relevant asset or value is put into the hands of a shareholder *in his capacity as such*, in effect, as a return on or by reference to his shareholding as an investment in the company, and not in some other capacity and for some other reason.

(3) There is nothing in the opening wording of the provision to suggest that the scope of s 1000 CTA 2010 is confined to circumstances where the relevant asset/value is provided by the company directly to the shareholder or in a manner which directly impacts on the capital structure of the company. Indeed, the lack of prescription indicates that any means of delivery, payment or provision of the asset/value to the shareholder, whether direct or indirect, is intended to be captured as long as it is made in respect of the shares, he or she holds in the sense explained above. I cannot see that the subsequent carve-out from the scope of the provision for repayments of capital or cases where new consideration is received affects the generality of the opening words.

122. In the words of Carnwath LJ in the Court of Appeal in *BMBF*, at [66], the distribution provisions "draw their life-blood from real world transactions with real world economic effects", namely, the depletion of the resources of a company in a manner which benefits its shareholders in their capacity as such. The aim is to subject shareholders to tax on the resulting value they receive. In my view, accordingly this is the sort of situation where to allow the tax treatment "to be governed by transactions which have no real-world purpose of any kind", as is the case here, would be inconsistent with the "real world" requirements of these provisions. To give effect to the true purpose of these provisions requires them to be given, as Lord Nicholls put it in *Scottish Provident*, a "wide practical meaning" which requires the tribunal "to have regard to the whole of a series of transactions which were intended to have a commercial unity".

123. It is plain from the design of the arrangements, as accords with the description of the objective set out by Premier Strategies Limited, that each step involved was implemented, as part of a carefully constructed plan, with the sole objective of ensuring that the funds which the parties wished to put into the hands of Winn Yorkshire's two shareholders as a return on the shares they held in that company were provided to them in a form which was intended to be free of income tax:

(1) The Trust was structured with the intention of ensuring that, for the purposes of the settlements code, Winn Yorkshire retained a sufficient interest in the B share to render it taxable on all of the income in dispute, which from the outset was intended to be paid to the appellants under the arrangements.

(2) Winn Scarborough plainly had no function other than to act as the vehicle through which the desired amount of monies (of £200,000) could be passed from Winn Yorkshire into the Trust (and so to the appellants/shareholders in Winn Yorkshire) in a way which did not of itself trigger any tax charges. It was specifically set up to act as a conduit for the funds; following the payment of the B share dividend it was dormant with no assets or resources.

(3) Winn Yorkshire can have had no purpose in using its available cash resources to subscribe for the additional A share at a premium of £200,000 other than to fund Winn Scarborough in paying the B share dividend so that the funds could pass into the hands of the appellants/shareholders in the desired way, namely, through the Trust.

(4) The provision in the Trust for Winn Yorkshire and the charity to receive small sums from the income arising to the Trust was evidently what the parties considered to be the necessary cost of achieving the intended tax saving for the appellants/shareholders in Winn Yorkshire in demonstrating, so the appellants say, that there was a "settlement" of which Winn Yorkshire was the "settlor" on the basis that it retained an interest in the B share which was the subject of the Trust.

124. It is clear from the caselaw that an acceptance that the steps involved in this structure had "real" legal and commercial effects does not preclude the tribunal taking the view that, on a purposive construction of the provisions, it is required to take a broad view of the overall effect of these transactions. Indeed, as recognised in the cases, tax avoidance is the spur to executing genuine documents and entering into genuine arrangements in the sense that they are not a sham and have the legal effects they purport to have (see *UBS* at [67] and [68]). As Lord Hoffmann put it in *Carreras*, a composite approach does not "deny the existence or legality of the individual steps but may deprive them of significance for the purposes of the characterisation required by the statute…"

125. Hence, in *Ramsay* there was no dispute that the transactions under which the taxpayer purported to make a gain and a loss were "real" in the sense that they had legal effects they purported to have. Viewed individually, the transactions generated a gain and a loss for the purposes of the relevant provisions. However, as Lord Reed put it in *UBS*, the relevant fact in *Ramsay* upon which it was necessary to focus was "the overall economic outcome of a series of commercially linked transactions". In *Furniss*, there was no dispute that there was a "real" sale of the relevant shares by the original owner to the offshore entity which then sold them to the third party. However, on a purposive approach to the relevant tax rules, the court felt it appropriate to ignore that transfer and applied the tax statute as though the original owner had sold the shares direct to the third party (on directing the price to be paid to the offshore company).

126. In this case, given the meaning and purpose of the distribution provisions, the facts on which it is necessary to focus are that, under this closely integrated set of transactions, Winn Yorkshire's assets were depleted to the tune of £200,000 and a corresponding sum was put into the hands of its shareholders (less the small sums paid to Winn Yorkshire and the charity) with the specific purpose of providing the shareholders with a return on their shares. Such a conclusion does not, as the appellants suggested, entail an impermissible re-characterisation of the legal effects of the transaction. Rather, in the specific context of the interpretation of the distribution provisions, as Lord Hoffman put it in *Carrera*s, notwithstanding their undoubted legal effects, those steps are deprived of significance.

127. In other words, viewed in their entirety, the purpose and effect of the arrangements was to enable the appellants to receive the bulk of the £200,000 which Winn Yorkshire used to subscribe for an additional A share in Winn Scarborough as a return on their shares in Winn Yorkshire. The fact that the appellants/shareholders did not receive the sums direct from Winn Yorkshire but through a series of steps designed solely with the intention that they would not be subject to income tax on the sums does not detract from the nature of the receipt in their hands.

128. Following the hearing, the parties referred me to the decision of the tribunal in *Mr Dunsby v Revenue & Customs* [2020] UKFTT 271 (TC) ("*Dunsby*") which involves similar arrangements to those in this case for Mr Dunsby, the sole shareholder/manager of a company, to receive the profits of the company in a tax-free form. In that case, (a) a new class of share in the company (the S share) was issued to a person who was not resident in the UK, (b) the non-resident person settled the S share into a trust on terms under which she retained a small interest but Mr Dunsby was the main beneficiary, and (c) a dividend was paid on the S share the bulk of which was received by Mr Dunsby as the main beneficiary of the trust. The tribunal held that the arrangements could not be categorised as involving the making of a dividend or other distribution by the company to Mr Dunsby:

(1) At [67] the tribunal said that there is no separate definition of the term "dividend" in the tax legislation but, "given the context, its meaning must be informed by the understanding of that term for company law purposes". The tribunal noted that the case law suggests that "corporate form is an important factor in determining whether a particular payment or transaction amounts to a "dividend"" (referring to the decision of the Court of Appeal in *First Nationwide v Revenue and Customs Commissioners*, [2012] EWCA Civ 278, [2012] STC 1261). The tribunal held that the only dividend in company law terms was that paid on the S share, that it was not a sham and there was no dividend paid on the ordinary shares in the company held by Mr Dunsby.

(2) At [70] the tribunal said that the analysis that on a purposive construction there was a distribution in respect of the relevant shares "goes too far":

> "The concept of a distribution......is not so closely tied to a particular form of corporate action as [a dividend], but it is still grounded in the corporate transactions that are undertaken and their effect on the capital structure of the company. This can be seen from the other detailed concepts within definition in Part 23, in particular, the concept of a repayment of capital and the requirement that the distribution is "in respect of shares" in the company."

(3) At [71] the tribunal noted that in *PA Holdings*, "the question was whether the amounts received by the employees, although they took the legal form of dividends, should be treated as emoluments for tax purposes" and the approach taken by tribunal and the UT "enabled them to "look beyond" the corporate form

of the payments in deciding that question". In the tribunal's view, however, the question of whether the payment received by Mr Dunsby was a "dividend" or "distribution" on the ordinary shares:

> "is not a question, which can be easily answered without reference to the corporate form. Whether or not the receipt in Mr Dunsby's hands is a distribution on or in respect of the ordinary shares is informed by the company law procedures by which the payment is made."

(4) The tribunal concluded, at [72], therefore, that:

> "when I apply the legislation construed purposively to the facts viewed realistically, the only "dividend or distribution" within s 383 ITTOIA that is made as part of the transactions is the dividend that was paid on the S share. The holder of the S share, the trustee, put in place arrangements to ensure that the dividend was paid directly to the beneficiaries, and so predominantly to Mr Dunsby, but that does not mean that it can be viewed as a distribution in respect of the ordinary shares held by Mr Dunsby."

129. I respectfully disagree with the analysis in *Dunsby* as regards the meaning of the distribution provisions so far as relating to any "distribution" which is made "in respect of shares" in a company. In my view:

(1) It is not evident that the term "distribution" is intended to be interpreted for the purposes of determining a person's tax position under ss 383 to 385 and s 1000 CTA 2010 to correlate wholly to the meaning given to that term for company law purposes given the different underlying purpose behind the company law rules to which the term is relevant (namely, the protection of a company's creditors).

(2) In any event, to the extent the company law approach is relevant, company law does not indicate that a more restricted interpretation is to be given to the concept "distribution" than that set out above or that there is any required form which a "distribution" must take to be regarded as such for company law purposes. As set out in further detail below, for company law purposes, a "distribution" to a shareholder is given a broad meaning which is not confined to transactions affecting the shares held by a particular shareholder or the capital structure of the company.

130. In summary, the relevance of a sum constituting a "distribution" for company law purposes is that it is unlawful for a company to make a "distribution" unless it complies with certain requirements. The requirements are set out in part 23 of the Companies Act 2006 which also preserves any other restrictions on the sums out of, or the cases in which, a distribution may be made arising from any rule of law, including the prohibition under common law on the making of distributions out of capital (although ss 845 and 846 of the Companies Act 2006 prevail as regards distributions in kind). The background to the current position is explained in the recent decision of the High Court in *Chalcot Training Ltd v Ralph & Anor* [2020] EWHC 1054 (Ch), at [135] and [136], as follows:

> "The common law rule as to distributions has its origin in the capital maintenance doctrine, a fundamental pillar of company law. In *Trevor v Whitworth and anor* (1887) 12 App. Cas. 409, HL, Lord Watson explained that the law prohibits:
>
> > "…every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the Court has sanctioned the transaction…….."

> A clear distinction is made between the company's capital and its profits. Dividends or distributions have always been allowed to be paid out of profits. Eligible profits are now defined in Part 23 of the Act [the Companies Act 2006] and were only first restricted by statute in Part III of the Companies Act 1980. Before the statutory restrictions were imposed, the requirement to pay dividends out of profits was normally prescribed by a company's Articles of Association…."

131. Both under statute and the case law relating to the common law rule, the term "distribution" is given a broad meaning. For the purposes of part 23, s 829 of the Companies Act 2006 states that the relevant provisions apply to "*every description* of distribution of a company's assets *to its members*, whether in cash or otherwise" (emphasis added), subject to specified exceptions. In outline, the exceptions are for (a) an issue of shares as fully or partly paid bonus shares, (b) a reduction of share capital, (c) the redemption or purchase of any of the company's own shares out of capital in certain circumstances, and (d) a distribution of assets to members of the company on its winding up.

132. In the leading authority on the common law position on unlawful distributions, *Progress Property Company Ltd v Moorgarth Group Ltd* be [2010] UKSC 55, [2011] 1 WLR 1, the Supreme Court set out details of the broad circumstances in which the courts have held there to be an unlawful "distribution". Lord Walker summarised the position as regards unlawful distributions at [1] as follows:

> "A limited company not in liquidation cannot lawfully return capital to its shareholders except by way of a reduction of capital approved by the court. Profits may be distributed to shareholders (normally by way of dividend) but only out of distributable profits computed in accordance with the complicated provisions of the Companies Act 2006 (replacing similar provisions in the Companies Act 1985). Whether a transaction amounts to an unlawful distribution of capital is not simply a matter of form. As Hoffmann J said in *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626, 631,
>
> > "Whether or not the transaction is a distribution to shareholders does not depend exclusively on what the parties choose to call it. The court looks at the substance rather than the outward appearance."
>
> Similarly, Pennycuick J observed in *Ridge Securities Ltd v Inland Revenue Commissioners* [1964] 1 WLR 479, 495,
>
> > "A company can only lawfully deal with its assets in furtherance of its objects. The corporators may take assets out of the company by way of dividend, or, with the leave of the court, by way of reduction of capital, or in a winding-up. They may of course acquire them for full consideration. They cannot take assets out of the company by way of voluntary distribution, however described, and if they attempt to do so, the distribution is ultra vires the company.""

133. Lord Walker explained, at [15], that the issue related to "the common law rule" which in the Court of Appeal (at [33]) Mummery LJ explained as follows:

> "The common law rule devised for the protection of the creditors of a company is well settled: a distribution of a company's assets to a shareholder, except in accordance with specific statutory procedures, such as a winding up of the company, is a return of capital, which is unlawful and ultra vires the company."

134. Lord Walker described this as "essentially a judge-made rule, almost as old as company law itself, derived from the fundamental principles embodied in the statutes by which Parliament has permitted companies to be incorporated with limited liability". At [16] he said that whether a transaction infringes the common law rule is "a matter of substance, not form. The label attached to the transaction by the parties is not

decisive". He noted that that is a theme running through the authorities, including *Ridge Securities Ltd v Inland Revenue Commissions* [1964] 1 WLR 479 and *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626. He set out details of these cases as follows:

(1) He explained at [17], that *Ridge Securities* was concerned with a complicated and artificial tax-avoidance scheme. Pennycuick J held (amongst other findings) that "the payments of so-called interest were in fact gratuitous (and so unlawful) dispositions of the company's money".

(2) At [18], he set out that in *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 the company owned what was essentially a husband-and-wife business running a garage. When the company went into insolvent liquidation, the liquidator challenged the propriety of director's remuneration paid to the husband and wife during the company's decline. Oliver J upheld the husband's remuneration but disallowed most of the wife's last two years' remuneration. Lord Walker commented, at [19], that the case showed that "if the label of remuneration does not square with the facts, the facts will prevail and the result may be an unlawful distribution, even if the directors in question intended no impropriety".

(3) At [20], he explained that in *Aveling Barford Ltd* a Singapore businessman, Dr Lee, who indirectly owned and controlled Aveling Barford, procured the sale by it to Perion (a Jersey company also controlled by Dr Lee) of certain property which had development potential and had been valued by valuers at £650,000 but the price on the sale to Perion was £350,000. He noted that this was the context in which Hoffmann J made the observations he had set out at [1]. He said that the need to look at substance rather than form also extended to Dr Lee's being treated as the real shareholder in *Aveling Barford* and the real purchaser of the land (Hoffmann J made a passing reference to this at page 632 but it was not an issue in the case.) At [22], he cited Hoffmann J's conclusions at (at 633) by reference to the decision in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 as follows:

> "It is clear however that Slade LJ excepted from his general principle cases which he described as involving a 'fraud on creditors' (see . . . [1986] Ch 246 at 296). As an example of such a case, he cited *Re Halt Garage*. Counsel for the defendants said that frauds on creditors meant transactions entered into when the company was insolvent. In this case Aveling Barford was not at the relevant time insolvent. But I do not think that the phrase was intended to have such a narrow meaning. The rule that capital may not be returned to shareholders is a rule for the protection of creditors and the evasion of that rule falls within what I think Slade LJ had in mind when he spoke of a fraud on creditors. There is certainly nothing in his judgment to suggest that he disapproved of the actual decisions in *Re Halt Garage* or *Ridge Securities*. As for the transaction not being a sham, I accept that it was in law a sale. The false dressing it wore was that of a sale at arms' length or at market value. It was the fact that it was known and intended to be a sale at an undervalue which made it an unlawful distribution."

135. Whilst the focus of these cases is on whether an *unlawful* distribution had been made, they amply illustrate the breadth of circumstances in which, for company law purposes, there may be a distribution to a company's shareholders.

136. Finally, I note that, in reaching my conclusion on the Ramsay argument, I have not placed any particular emphasis on the decision in *PA Holdings*. Like the other decisions cited in this context, that case provides guidance on the correct approach for the tribunal to adopt in construing tax legislation. However, given that a purposive approach to the construction of tax legislation requires a close examination of the

particular provisions in question according to a realistic view of the particular facts, that case cannot provide the answer to the matter under consideration here, concerned as that case is with different rules and circumstances.

137. As set out in full at [98] to [105], the court in *PA Holdings* was primarily concerned with the application of the regime under which income tax is imposed on "earnings" albeit that, because the sums under consideration were paid as dividends, the interaction between that regime and the rules governing the taxation of dividends and distributions was in point. HMRC place particular emphasis on the finding that, in concluding that sums paid to employees as dividends on shares were "earnings" from employment, it was correct to look beyond "the form of the distributions, mere machinery, by which the intention to pay bonuses was fulfilled". However, in making this and related statements on the application of the employment tax regime the court plainly did not, as HMRC at times seemed to suggest, lay down a "substance over form" principle that can be applied automatically to the construction of other provisions; the comments were made on the basis of the correct construction of the particular provisions in point. Whilst I have reached a similar conclusion to that in *PA Holdings* (namely, that the fact that the sums in dispute were paid under a structure designed to avoid tax does not detract from their character as distributions), that is based purely on a purposive interpretation of the distribution provisions.

Interaction between the settlements code and the distribution provisions.

138. I consider that Mr Jones is correct that, in principle, the "tie breaker" provision in s 575 is not in point for the reasons he gave. However, in my view, it is not necessary for HMRC to rely on s 575 as a means of ousting the settlements code. The corollary of the finding that, on a purposive approach to the construction of the relevant provisions, Winn Yorkshire is to be regarded as having made a distribution to the appellants of a sum equal to the income in dispute is that that income is not to be regarded as arising under a "settlement" made by Winn Yorkshire as "settlor" for the purposes of the settlements code. In other words, in order to give effect to the correct characterisation of the arrangements for tax purposes, the fact that Winn Yorkshire declared a trust over its beneficial interest in the B share is to be ignored in the same way, for example, as the transfer of shares to an offshore entity was ignored in *Furniss.*

Part C – Settlement argument

Submissions

139. I have proceeded to consider the settlement argument in case I am found to be wrong in my conclusion on the *Ramsay* argument. If the settlements code is in point, HMRC argued that the appellants were the "settlors" of a "settlement", whether a broad or narrow view is taken, of what constitutes the "settlement" for this purpose. Ms Nathan noted that:

(1) The definition of "settlement" is wide and includes an "arrangement", which is itself a very wide word (see *Jones v Garnett* [2007] 1 WLR 2030 ("*Jones*") at [47] and [75]).

(2) A "settlement" requires an element of bounty, which places some restriction on that wide definition (see *IRC v Plummer* 54 TC 1 ("*Plummer*") and *Jones* at [75]). In general, that means that, under the "arrangement", the settlor must provide a benefit which would not have been provided in a transaction at arm's length (see *Jones* at [7]).

(3) A broad and realistic view of the matter is to be taken (see *Jones* at [11], citing with approval *Crossland (Inspector of Taxes) v Hawkins* ("*Hawkins*") (1961) 39 TC 493).

(4) There is an arrangement where there is "sufficient unity about the whole matter to justify it being called an arrangement" (see *Jones* at [22] and [13]).

Further details of all of the cases HMRC referred to are set out in the caselaw section.

140. Ms Nathan submitted that:

(1) Applying those principles to the present case, the "arrangement" constituting the "settlement" comprises all of the steps undertaken to implement these transactions. Given that the relevant steps were identified and decided upon in full at the outset, there can be no doubt that there is "sufficient unity about the whole matter" to justify all of the steps being viewed as an "arrangement". Indeed, the appellants themselves describe the transactions as arrangements and admit that the steps were taken in pursuance of an arrangement. The view that the "arrangement" is restricted to the settling of the B share under the Trust, is a narrow one which is out of kilter with the need to take a "broad and realistic view of the matter".

(2) In any event, whether the "arrangement" constitutes all the steps involved in the planning or, as the appellants argue, only the settling of the B share into the Trust, the appellants were "settlors" of the relevant "arrangement":

(a) In either case, the necessary element of bounty was present. The steps involved in the transaction would not have been taken in an arm's length transaction and, in any event, the arrangements provided for a charity to receive a benefit.

(b) It is clear from the caselaw, as is consistent with the need to take a broad and realistic view, that the "settlor" is the person who provides the "bounty" (see *Jones* at [7], *Hawkins* at 506 and *Butler (Inspector of Taxes) v Wildin* [1989] STC 22 ("*Wildin*") at [36]).

(c) On a broad or narrow view of what the "arrangement" constitutes, the appellants provided funds indirectly for the purposes of that "arrangement" and, hence, the required "element of bounty":

(i) The appellants were, at the relevant time, the only shareholders and directors and, therefore, the controlling minds of Winn Yorkshire. Their participation as shareholders and directors was required for property to be provided from Winn Yorkshire's resources for the purposes of subscribing for shares in Winn Scarborough.

(iii) Prior to the transactions, the appellants effectively had the benefit of the profits and reserves within Winn Yorkshire; those cash funds were reflected in the value of their shares and could be distributed to them (by dividend or liquidation). Moreover, there was a history of the payment of substantial dividends from Winn Yorkshire which created an expectation in the shareholders' minds that they would receive the funds.

(iv) The provision of the funds for the "arrangement" required the active participation of the appellants and not just their assent. The appellants, acting as directors of Winn Yorkshire and/or Winn Scarborough, approved and implemented each step of the scheme and, as shareholders, approved the creation of the Trust and the settlement of the B Share into it.

(v) In effect, in their capacity as the ultimate beneficial owners of the assets within Winn Yorkshire, the appellants chose to shift the value

within Winn Yorkshire (in the form of its cash resources) into Winn Scarborough and the Trust and, in doing so, provided the relevant bounty.

141. Mr Jones made the following main points:

(1) The "arrangement" constituted only the Trust set up by Winn Yorkshire as "settlor" into which it settled the B share. The appellants were not "settlors" of that "settlement" as properly identified:

(2) Whilst the concept of a settlement in s 620 is broad, it has limitations. As is clear from *Plummer* and *Chamberlain v Inland Revenue Commissioners* [1943] 2 All ER 200 ("*Chamberlain*"), the purpose of the relevant provisions is to capture arrangements subject to an element of bounty where, as Lord Macmillan put it in *Chamberlain*, a person "charges certain property *of his* with rights in favour of others" (emphasis added). In other words, as Lord Macmillan continued, the arrangement must "comprise certain property which is the subject of the settlement; it must confer the income of the comprised property on others, for it is the income so given to others that is to be treated as nevertheless the income of the settlor". In identifying a "settlement", therefore, it is critical to identify the property comprised within it as property charged by the "settlor".

(3) It is also clear from *Chamberlain* that the formation and structure of a company cannot of itself be a "settlement" and, from *Chamberlain* and *Jones*, that not every step in a set plan forms part of an "arrangement". Essentially, the "arrangement" or "settlement" constitutes the product of the steps taken to set it up and not the steps themselves. As in *Chamberlain*, the acts prior to Winn Yorkshire transferring the B share into the Trust are not part of the "arrangement".

(4) The only property in the "settlement" in this case was the B share. The appellants never had an interest in the B share. It is not possible to treat the assets of Winn Yorkshire as belonging to the appellants. It was Winn Yorkshire who disposed of the B share on non-arm's length terms and retained an interest in it. Neither of the appellants made or entered into the Trust, nor did they act in any of the ways specified in s 620(3).

(5) Even if, as HMRC argue, the "arrangement" constitutes all of the steps involved in the planning, the same reasons apply as set out at (4) above as to why the appellants were not settlors of an such "arrangement". Moreover, the decision in *Chamberlain* plainly demonstrates that HMRC's approach, under which they, in effect, pierce the corporate veil, is impermissible. It is not permissible, as is the effect of HMRC's stance, to analyse whether there is an "arrangement" or what constitutes the property comprised in any "settlement", in effect, without regard to the fact that Winn Yorkshire is a separate legal entity from its shareholders/directors. It does not follow from the fact that the company can only act through its officers as its agents that its acts are their acts. Moreover, the fact that Winn Yorkshire had paid dividends in the past and had distributable reserves available from which dividends could have been paid is immaterial; no entitlement to a dividend arises until it is actually declared. No dividend was declared and paid to the shareholders in respect of the funds within Winn Yorkshire which were used to fund the relevant "arrangement".

(6) Even if the appellants were "settlors", Winn Yorkshire was also a "settlor", with the result that s 644 applies to deem each "settlor" to be the only "settlor" of a deemed separate "settlement". Given that the only property provided for the "settlement" (either directly or indirectly) was provided by Winn Yorkshire, all of the income arising under the "settlement" in the form of the dividend falls to

be treated as allocated to Winn Yorkshire; there is nothing to be apportioned to the appellants. The same points can be made as regards the impermissible piercing of the corporate veil.

142. Ms Nathan replied that:

(1) The *Chamberlain* case concerns a different scenario in that the concern was to identify what the subject matter of any "settlement" was. In this case it is not disputed that the subject matter of the "settlement" is the B share.

(2) HMRC is not seeking to pierce the corporate veil. It is simply a question of identifying what constitutes the "settlement" and who the "settlor" is, in terms of identifying who has directly or indirectly made the "settlement" which includes considering who has, directly or indirectly, provided the funds to establish it. In *Copeman (H.M. Inspector of Taxes) v Coleman* (1939) 22 TC 594 ("*Copeman v Coleman*"), *Hawkins*, *Wildin* and *Jones*, the interposition of a company in the structure did not affect the conclusion that the individual who funded the company was the "settlor" of the relevant "settlement".

(3) The appellants' argument that only Winn Yorkshire has provided property for the settlement (directly or indirectly) fails to acknowledge the need to take a broad and realistic view of the facts. For the reasons already set out both the B Share held by the Trust and the distributable reserves held within Winn Scarborough originated from the appellants, and the appellants are the "settlors" of that property.

143. Mr Jones responded that it is important to note that the facts in *Hawkins*, *Wildin* and *Jones* are very different from those in this case. In those cases, the relevant "settlor" provided funds for the "settlement" through the product of his own labours. In this case the property which was put into the "settlement" and the funds which were used to fund it never belonged to the appellants at all; the B share which Winn Yorkshire settled into the Trust was funded through its own funds which it owned as a separate legal person from the shareholders and directors.

Caselaw

144. The parties referred to a number of cases in which the courts considered different sets of earlier provisions which sought to tax "settlors" on income arising under "settlements" where the statutory definition of the terms "settlement" and "settlor" was the same or very similar to that in issue in these appeals. I refer to these provisions as "**the earlier settlements provisions**".

Chamberlain

145. As noted, the appellants place particular reliance on the earliest of these cases, namely, the decision of the House of Lords in *Chamberlain*. In outline, the facts of that case were as follows:

(1) In December 1935:

(a) The taxpayer caused Staffa Investment Trust, "Staffa", to be incorporated as an unlimited company with a share capital of £100,000 divided into (a) 50,000 preference shares of 10s. each and (b) 7,500 ordinary shares of £10 each. The taxpayer had voting control of Staffa and possessed wide powers as governing director.

(b) Shortly after, the taxpayer sold to Staffa 470 shares of £1 each in a company (C Ltd) which he owned with his brother through which they operated a successful building business. The price was £100,000, of which £17,500 was satisfied by the issue to the taxpayer of 35,000 preference

shares in Staffa and the remainder was left outstanding as an interest free loan.

(2) In March 1936, the taxpayer set up a trust and paid £3,500 to the trustees which they invested in 350 ordinary shares in Staffa which were to be held on trust for his wife and four children ("t**he March trust**").

(3) In response to changes made to the settlement provisions in the Finance Act 1936, in December 1936 the taxpayer set up four further trusts having first arranged for the reorganisation of the ordinary shares in Staffa:

(a) The ordinary shares were divided into five classes of shares comprising: 350 A shares (being those held by the trustees of the March trust); 1,750 each of B, C and D shares and 1,900 E shares. Each class was entitled only to such dividends (if any) as the company should in general meeting determine

(b) The taxpayer executed four *irrevocable* deeds of settlement, under each of which he paid £100 to the trustees to be invested as he should direct and to be held on trust for each of his four children ("**the December trusts**"). The four sums of £100 were invested by the trustees in the purchase, respectively, of ten B, C, D and E shares.

(4) In March 1937 the trustees of each of the December trusts invested the dividends received by them in respect of the ten shares they held in Staffa in the acquisition of a further 1,025 shares in Staffa of the same class, respectively, as the ten shares they already held.

(5) In the tax year 1937/38 Staffa paid to each of the trustees of the December trusts further dividends of a total of £11,730. No dividends were paid in respect of the A shares held by the March trust but Staffa also paid to the taxpayer dividends on his preference shares amounting to £875. The actual income of Staffa for that year was £12,773. HMRC treated the balance of Staffa's income of £11,898 after deduction of the preference dividends paid to the taxpayer as his income under s 38(2) of the Finance Act 1938 ("**s 38**").

146. As Lord Macmillan explained, at page 330:

(1) The issue was whether Staffa's income could be treated as the income of the taxpayer under s 38 on the basis that (a) it was income arising under a "settlement" (as defined to include an "arrangement") made by the taxpayer from property comprised in the "settlement", (b) the "settlement" or some provision thereof was revocable or otherwise determinable, and that if such revocation or determination should be effected the taxpayer or his wife would become beneficially entitled to the whole or part of the settled property or of the income of the settled property.

(2) Given the December trusts were irrevocable, viewed individually and in isolation they were not "settlements" within the meaning of these provisions. The Inland Revenue's view was that the March and December trusts, together with the incorporation and structure of Staffa, constituted an "arrangement" amounting to a "settlement" and that the taxpayer was the "settlor". This view was upheld in the lower courts. The House of Lords disagreed.

147. Lord Tankerton (with whom Lord Atkin agreed) noted, at page 329, that:

(1) The Inland Revenue maintained that, for the purposes of s 38, the income arising under the "settlement" was the income of Staffa, and "the property comprised in the settlement" was the property held by Staffa, and that they agreed that if this contention was wrong, the assessment could not stand.

(2) On that basis, the relevant question was whether the property comprised in the "settlement" (a) consisted of the whole assets of Staffa, or (b) was to be found separately comprised in each of the five deeds of settlement, the formation of Staffa being part of the arrangement conceived by the appellant, whereby a convenient and profitable investment was made available for the monies respectively settled under the five deeds of settlement.

(3) The view set out in (b) was correct as follows:

> "While the formation of Staffa provided an available investment for the sums settled under the five deeds of settlement, under which the children's provisions were actually constituted, the continuance of such investment was not essential to the continuance of the trusts under the deeds of settlement. In other words, *the sums settled under these deeds were the funds provided for the purpose of the settlement…….. Staffa, though controlled by the Appellant, did not, in my opinion, hold its assets as part of the provisions settled on the children. I am of opinion that the whole assets of Staffa did not constitute the property comprised in the settlement*, and that the assessment cannot stand." (Emphasis added.)

148. The other members of the panel reached a similar conclusion. The appellants relied, in particular, on Lord Macmillan's comments, at page 331, that he accepted that the statutory expansion of the term "settlement", as defined to include an "arrangement", justifies and indeed requires a broad application of s 38 but to come within the statute a "settlement" or "arrangement" "must still be of the type which the language of the Section contemplates" in that it "*must be one whereby the settlor charges certain property of his with rights in favour of others.*". In other words:

> "*It must comprise certain property which is the subject of the settlement; it must confer the income of the comprised property on others, for it is the income so given to others that is to be treated as nevertheless the income of the settlor.*" (Emphasis added.)

149. He noted that there was no question that the March and December trusts were "settlements" within that meaning (although the four December trusts did not fall within s 38 because of their irrevocability). He continued, however, that none of these "settlements" comprised any property of Staffa:

> "The trust funds were invested in shares of that company, which is quite a different matter. In point of fact, the whole assets of the company have never been settled at all so as to dedicate the whole of its income to any trust purposes."

150. He noted that it was argued that the formation and structure of Staffa was just a part of an "arrangement" which must be looked at as a whole and, on that view, there was a settlement of Staffa's whole assets, namely, the shares in C Ltd, which the taxpayer transferred to it. He agreed that the creation of Staffa and "its very special constitution were essential steps towards the effecting of the [taxpayer's] object" as was the sale of the 470 shares to Staffa. However, that sale was for consideration in money or money's worth, and resulted, amongst other things, in the taxpayer receiving preference shares in Staffa for himself, the income of which he had himself enjoyed. He queried how it could be said that the whole assets of Staffa were comprised in a settlement by the taxpayer "when he himself retains a substantial interest in the company which has never been the subject of a settlement at all?".

151. He said that the "most attractive way of presenting" HMRC's case was to characterise the whole transaction as a single scheme which began with the 470 shares in the hands of the taxpayer as his personal property, and "after much manoeuvring ends with the income from these shares no longer payable to himself but settled in favour of third parties. He who wishes the end wishes the means". However, he

thought that this was not an accurate legal presentation of the matter, which requires a much closer analysis. He pointed out again that the taxpayer never settled the whole of the shares in Staffa and further shares might still be issued. He continued to make the following comments on which the appellants particularly rely:

> "*It is, I think, fallacious to confuse the steps taken by the [taxpayer] with a view to effecting a settlement or arrangement with the settlement or arrangement itself. When the taxpayer created [Staffa], and sold to it his 470 shares.....he made no settlement or arrangement such as the Statute contemplates. In point of fact, he never settled any shares of [Staffa]. What he did was to settle certain sums of money, with the intention, which he was in a position to carry out, that these sums should be invested in shares of [Staffa]. It was not until he granted the trust deeds that he entered the legal stage of the settlement. All that he did previously was preparatory to making settlements. No settlement or arrangement of the nature of a settlement existed when the company was registered and the [taxpayer] sold to it his [470] shares* .....As I have said, what the [taxpayer] settled was money. That money was invested, as it was intended to be, in shares of [Staffa], but I see nothing to prevent the trustees under the trust deeds from selling their shares in the company and investing the proceeds in other securities. Could it then be said that the whole of the assets of [Staffa] were "settled"?
>
> It is essential to the Crown's case that it should make out that the whole assets of [Staffa] are comprised in a settlement or arrangement made by the [taxpayer] within the meaning of the Statute. In my opinion the Crown has failed to establish this." (Emphasis added.)

152. Lord Romer remarked, at page 333, that the Inland Revenue's additional assessment could only be justified if the whole of the assets of Staffa that produced its income for the relevant year could be regarded as constituting the settled property. He queried whether the Court of Appeal considered that the settled property constituted the 470 shares in C Ltd alone or the whole of Staffa's assets for the time being. He continued, at page 334, that, in any event, even if the various ingredients relied on could properly be regarded as forming one compound settlement the property that is the subject-matter of the settlement was neither of those:

> "If a man enters into a contract to buy 1,000 shares in a company with a view to settling 500 of them on his daughter and does so settle the 500 shares by deed, it may well be that…the settlement can be described as consisting of the contract and the deed together. But the property comprised in the settlement is the 500 shares settled by the deed and not the whole of the 1,000 shares. The mere fact that the contract to buy 1,000 shares was a part of the arrangement for settling 500 of them, is no conceivable justification for saying that the property comprised in the settlement included the other 500, even though the settlement be regarded as consisting of the whole arrangement. And yet that in substance is what has been said by the Special Commissioners and the Court of Appeal in the present case."

153. He said, at page 334, that it was quite plain that the forming of Staffa, the sale to it of the shares in C Ltd and the application of the £3,500 in subscribing for 350 ordinary shares in Staffa, were all so many steps taken or caused to be taken by the taxpayer for the purpose of making some provision for his children out of the interest that he possessed in C Ltd while retaining control over both that company and over Staffa. But:

> "the forming of Staffa and the sale to it of the Appellant's 470 shares…were capable of serving, and may well have been intended to serve, in the future other purposes as well. If, for instance, the Appellant had in his mind the possibility at a later date of issuing and settling on his brothers and sisters further shares in Staffa, whether preference or ordinary, the forming of Staffa

> and the sale to it of the 470 shares would have been steps taken to effect this purpose also, and could be treated as forming part of such subsequent settlement. Although, therefore, it may be possible to say…that on 10th March, 1936, there came into existence a compound settlement in the form of an arrangement consisting of the forming of Staffa, the agreement for the sale to it of the 470 shares…the trust deed of that date and the subscription by the trustees of 350 ordinary shares, the property comprised in that settlement consisted of nothing but the last mentioned shares. It did not and could not consist of the whole of the assets of Staffa, or even the 470 shares…that Staffa held, any more than a subsequent settlement such as I have mentioned would or could have done. The Appellant had an interest in all such assets as the holder of preference shares, and the holders of any subsequently issued preference shares and of all ordinary shares whenever they might have been issued would also be interested in such assets regardless of the date of their issue and of the date of any settlement of which they might be the subject matter."

154. At page 335 he said that once the March trust was made he could find "nothing that even remotely suggests that at that time it was in the contemplation of the Appellant to settle further Staffa shares upon his children; and had it not been for the Finance Act of 1936 I do not suppose that any such further settlement would in fact have taken place". For the same reasons as he had set out in relation to the March trust he was satisfied that the property comprised in the December trusts consisted of nothing but the relevant shares, respectively.

> "In order to bring about these settlements, the appellant no doubt utilised two of the steps he had taken to bring about the March settlement, namely, the forming of Staffa and the agreement of 23rd December, 1935. These two steps will, therefore, be ingredients that are common to the arrangements that respectively constitute the March and December settlements. The settlements are nevertheless quite distinct from one another and cannot properly be regarded as forming one comprehensive settlement. But, after all, the crucial question arising in the case is not whether there is one settlement or five settlements, but whether the property settled can be said to consist of either the total assets of Staffa or, alternatively, the 470 shares in [C Ltd]. As I am satisfied that this question must be answered in the negative, I would allow the appeal…"

Copeman v Coleman and Plummer

155. A case decided a few years later, *Copeman v Coleman*, demonstrates that a a person may be the "settlor" of a "settlement" where the relevant "arrangement" is made through a company. In that case two children of Mr and Mrs Coleman each subscribed £10 for a preference share in a company established by Mr Coleman. They received dividends which were substantially larger than the amounts they paid for the shares. Lawrence J held that the structure was a "settlement" within the meaning of s 21 of the Finance Act 1936 and that Mr Coleman was a "settlor". He said that:

> "In my opinion, it is impossible to come to any other conclusion but that this was not a *bona fide* commercial transaction, and it appears to me that there was a disposition….., or an *arrangement* in the nature of a disposition…I am also of opinion that the Respondent was a settlor…I am unable to see how the word 'indirectly' can be limited in the way which is suggested so as to exclude the settlements which are made through the interposition of a company." (Emphasis added).

156. In *Plummer*, the House of Lords held that, on a purposive interpretation, for there to be an "settlement" within the meaning of the relevant settlement provisions, the

relevant arrangements must involve an "element of bounty". In summary, the Inland Revenue sought to subject the taxpayer to tax on certain annuity payments which, as it appears was not disputed, were made as part of a tax avoidance scheme. The Inland Revenue argued that the structure fell within the terms of s 457 of the Income and Corporation Taxes Act 1970 which provided that income arising under a "settlement", which was payable to or applicable for the benefit of any person other than the "settlor", was to be treated for the purposes of surtax as the income of the "settlor" and not that of any other person (subject to a number of exceptions none of which were in point). The House of Lords held that the settlement provisions did not apply. While it was true that the payment were not made for bona fide commercial purposes (they were made for tax avoidance purposes), equally there was no element of bounty about them.

157. Lord Wilberforce noted that if "given the full unrestricted meaning, the section would clearly cover the present agreement, and would also cover a large number of ordinary commercial transactions". He considered that it was not possible to read into the definition an exception in favour of commercial transactions whether with or without the epithet "ordinary" or "bona fide". To do so would be legislation, not interpretation: if Parliament had intended such an exception it could and must have expressed it. However, it was still necessary "to enquire what is the scope of the words "settlement" and "settlor" and of the words which are included in "settlement" in the context in which they appear". He said that:

> "If it appears, on the one hand, that a completely literal reading of the relevant words would so widely extend the reach of the section that no agreement of whatever character fell outside it, but that, on the other hand, a legislative purpose can be discerned, of a more limited character, which Parliament can reasonably be supposed to have intended, and that the words used fairly admit of such a meaning as to give effect to that purpose, it would be legitimate, indeed necessary, for the courts to adopt such a meaning."

158. He noted that the 1970 Act included a number of provisions relating to "settlements" which were enacted at different times, the general effect of which was to cause income of which a person has disposed in various ways to be treated, in spite of the disposition, as the income of the disposer (as enacted in successive Acts from 1922 onwards "with increasing severity"). Having set out a short summary of the provisions he noted all of them had "a common character" in that they were:

> "*designed to bring within the net of taxation dispositions of various kinds, in favour of a settlor's spouse, or children, or of charities, cases, in popular terminology, in which a taxpayer gives away a portion of his income, or of his assets, to such persons, or for such periods, or subject to such conditions, that Parliament considers it right to continue to treat such income, or income of the assets, as still the settlor's income*. These sections, in other words, though drafted in wide, and increasingly wider language, are nevertheless dealing with a limited field - one far narrower than the field of the totality of dispositions, or arrangements, or agreements, which a man may make in the course of his life. Is there then any common description which can be applied to this?" (Emphasis added.)

159. He said that the courts which, inevitably, had to face this problem, "have selected the element of "bounty" as a necessary common characteristic of all the "settlements" which Parliament has in mind". He described the decisions as "tentative" but noted that they "all point in this direction". He said that the first clear indication of this was given by Lord Macmillan in *Chamberlain v Commissioners of Inland Revenue* [1943] 2 All ER 200 (referring to the passage set out above). He noted that it was also referred to in *Commissioners of Inland Revenue v Leiner* 41 TC 589, at page 596, and in *Bulmer v Commissioners of Inland Revenue* [1967] Ch 145 where, in dealing with an earlier set

of provisions Pennycuick J "followed the previous cases in holding that a sufficient context existed for a restriction in the scope of the definition and that he accepted the "element of bounty" test".

160. Lord Wilberforce then essentially adopted the "element of bounty" test:

> "……with the "element of bounty" test we have a definition which is in agreement with the intention of Parliament as revealed through the whole miniature code of Chapter XVI. I would compare with this the reasons of this House in *Thomas v. Marshall* [1953] AC 543. In that case the contention was that the word "settlement" did not extend to an outright gift. Their Lordships rejected this, holding that the intention was clearly to enlarge the meaning of settlement so as to include gifts. Enlargement in one direction and restriction in another are both part of a balanced process of judicial interpretation directed towards implementing but not exceeding the general legislative purpose. My Lords, there cannot be any doubt that in this case no element of bounty existed. The Special Commissioners indeed said that they regarded the transaction as a bona fide commercial transaction without any element of bounty. The taxpayer therefore succeeds on this point."

161. Lord Fraser noted that the contract in question was not "a settlement in the ordinary sense of that word", but it was an agreement and it was therefore within "the extended meaning of settlement if the extended meaning is read literally". He continued, however, that if the provision were read literally "it would include a large number of business agreements and would produce results so inconvenient and surprising as to lead to a strong presumption that they cannot have been intended" and the courts:

> "have therefore recognised that some limit must be placed on the width of the words, and the need for some limit was accepted by both parties to this appeal. The limit must be fixed by some rule capable of general application. I do not think it is enough for the Court simply to decide the case on the view that Parliament could never have intended this transaction to escape taxation; a decision on that ground would approach too closely to arbitrariness."

162. He noted that the Crown argued that the relevant definition applied to all transactions that did not have a bona fide commercial reason, and that it applied to the present transaction, the sole reason for which was to avoid tax. The taxpayer contended that the definition applied only to transactions which included an element of bounty. He said that in many cases the two contentions might lead to the same result, but not in the present case. In his view, the true rule is that:

> "*the definition applies only where there is an element of bounty*. One reason is that the commercial transaction test seems to go too far; many transactions which would be generally regarded as perfectly legitimate forms of investment are entered into solely, or at least predominantly, for tax reasons, and I think it would be wrong to suggest that they might be taxable for that reason alone. But the main reason in favour of the bounty test is that the word "settlement", even allowing for its extended definition……*seems to me to be used throughout Part XVI of the Act with a flavour of donation or bounty*.
>
> I agree with the observations of my noble and learned friend Lord Wilberforce that the various provisions in Part XVI, to which he has referred, have a common characteristic of bounty. I would add that the same characteristic seems to apply to the first three exceptions to s 457(1) itself…." (Emphasis added.)

163. He also considered that this view receives some support from the speech of Lord Macmillan in *Chamberlain* at page 204, "in a passage which, as Lord Greene M.R. pointed out in *Hood Barrs* v *Commissioners of Inland Revenue* 27 TC 385, draws attention to the importance of the statutory context". He noted that the bounty test was

accepted without argument in the *Leiner* case and that in *Bulmer*, at page 166, it was applied by Pennycuick J., but "he evidently thought that in the circumstances of that case there was no material difference between the bounty test and the commercial transaction test and did not have to decide between them".

164. Lord Keith of Kinkel agreed with Lord Wilberforce.

Hawkins and Wildin

165. *Hawkins* concerned s 397 of the Income Tax Act 1952, which applied to tax a "settlor" on income arising under a "settlement" which was paid for the benefit of a minor child of the "settlor". The definitions of "settlement" and "settlor" were substantially the same as those in the settlements code. In outline, in that case:

> (1) A well-known actor caused a company to be formed with an authorised share capital of £100, of which only two shares were initially issued to two solicitors' clerks and were later transferred to the actor's wife and accountant. A few days later he agreed with the company to make his services available as the company should direct for a salary of £50 a week and expenses. The actor was never a shareholder although he was a director of the company.
>
> (2) Around three months later the actor's father-in-law settled £100 on trust for the actor's three minor children and the trustees (the actor's wife and his accountant) used this money to subscribe for the 98 unissued shares in the company. The actor was aware of the steps being taken but was not consulted in relation to them.
>
> (3) The following year the company was paid £25,000 for Mr Hawkins' services in a film and, shortly after, it paid a dividend of £500 to the trustees, most of which they distributed to the actor's minor children.
>
> (4) HMRC argued that the actor was taxable on the dividend income under s 397 on the basis that the above steps taken together formed an arrangement and therefore a "settlement" for this purpose and the actor was a "settlor" in relation to that "settlement", as a person who had either entered into it or provided the funds.

166. In his judgement (see 546 to 550):

> (1) Donovan LJ explained that it was common for individuals to arrange for a company to provide their services on the basis that they would receive a relatively modest salary only with a view to minimising surtax on the sums received for their services. He noted that it was argued for the taxpayer that when the company was set up and the actor agreed to provide his services to it, "nothing more was intended as a surtax-saving operation. In particular, the settlement, which followed after an interval of about three months of the shares of this company, was not contemplated from the beginning…There is no express finding in the case stated on this point….". However, he said that he thought it was clear that:
>
>> "Mr Hawkins was not going to make a present of his services, less £50 a week, to two clerks…who on the face of things were, at the beginning, the only shareholders in the company. At some time he would want to have the money which had escaped surtax for himself…or to bestow it on others whom he wished to benefit, for example, his family. Otherwise the whole operation was pointless.
>>
>> I will accept for the moment the proposition that the family settlement which followed was not decided upon at the outset; *but what is important, I think, is that the eventual enjoyment by some individual or individuals of the money which had escaped Surtax must have been in*

contemplation at the outset. Otherwise, as I say, the scheme had no rational purpose." (Emphasis added.)

(2) He addressed first the argument that the formation of a company, the service agreement and the deed of settlement together formed an "arrangement" for which Mr Hawkins provided funds and was therefore a "settlor". He said that:

(a) The relevant wording does not require that "the whole of the eventual arrangement must be in contemplation from the very outset".

(b) He noted that on the facts of the case and remembering that income tax is an annual tax "one finds the whole arrangement conceived and in being in the one Income Tax year, 1954-55" given those steps all took place in one year.

(c) However, he considered that even if that were not the case:

> "*I think there is sufficient unity about the whole matter to justify it being called an arrangement for this purpose, because, as I have said, the ultimate object is to secure for somebody money free from what would otherwise be the burden or the full burden of surtax.* Merely because the final step to secure this objective is left unresolved at the outset, and decided on later, does not seem to me to rob the scheme of the necessary unity to justify it being called an 'arrangement'." (emphasis added)

(d) This was particularly so given that Mr Hawkins was a director of the company, he entered into the contract for services for a consideration which was a fraction in value of what he gave to the company in return and as a director agreed to the issue of the 98 shares to the trustees and to the interim dividend of £500.

(e) This could be viewed in a different way:

> "An alternative way of looking at the matter would be this: Here the repayment claim is made in the year 1956-57. In that year the arrangement is complete, and that is enough. It would be irrelevant that it came into being by instalments in the year 1954-55. The Revenue looks at the facts of the year being taxed or for which repayment of tax is being sought, and asks in this year 'Is it true to say that there is a settlement of the kind mentioned in the section, and in this year is it true to say that the settlor has provided funds for the purpose of the settlement?'"

(3) He also considered HMRC's argument that the actor provided funds for the "settlement" constituted by the trust deed regarded alone and was, therefore, a "settlor" in relation to it. He noted that this argument was rejected in the High Court on the basis that the actor could not be regarded as providing funds for a "settlement" of which he was not the "settlor" and to which he contributed nothing, unless somehow the formation of the company and the service agreement could be read into the "settlement":

(a) The High Court declined to do that because the deed of settlement came later in date and on the basis that there was a finding that there was no comprehensive arrangement at the outset of which the deed of settlement formed part.

(b) The relevant finding was that the actor "was aware that steps were being taken to put into effect proposals of the accountants and solicitors, but he was not consulted with regard to them. He was not present at any meeting when the matter of the settlement was discussed, or when the deed of settlement was made".

(c) The judge in the High Court said that, therefore, the actor "was not a party in any way to any scheme under which a company was to be formed, a contract to be made with the company for his services and then a settlement to be made which would involve benefits, from the first transaction, for his children. He was quite obviously, not a party in any way, and that seems to me a most material factor in this case".

(4) Donovan LJ said that he could not go that length. He noted that:

(a) It was conceded that the proposals of the accountants and solicitors included the deed of settlement so that the actor "was aware of this item in the proposals and that steps were being taken to put it into effect, albeit that he may not have been consulted when the terms of the settlement were discussed or the settlement signed."

(b) Even if the matter stopped there, he had little difficulty in holding that when the dividend was ultimately declared it came from funds indirectly provided by the actor for the purposes of the deed of settlement.

(c) However, in his view, the matter did not stop there because, when the actor agreed to give his services to the company for a fraction of the reward the company would get, the shareholders were either the clerks or his wife and accountant:

(i) If the clerks were the shareholders at that time, the irresistible inference was that they were mere nominees for the actor. On that analysis, when he later transferred or concurred in the issue of the shares to the trustees so that they became the only shareholders, he was in fact concurring that the equity in the company should pass from him to them. When eventually there was a profit and a distribution "the result of all that has gone before is that he has provided funds indirectly for the purposes of this settlement".

(ii) If, however, his wife and accountant were the shareholders at that time, then the idea of this family settlement was in mind at the outset and by this agreement, the actor was taking steps to see that the trustees would eventually get funds and, when that event happened, it was he who indirectly provided the money. He rejected the view that the word purpose indicated that the legislature had in mind only those cases where the provision of funds or the undertaking to provide them were contemporaneous with the settlement.

167. Peace LJ reached the same conclusion noting, at page 553, that the clear inference from the statement of facts is that proposals had been made by Mr Hawkins' accountants and solicitors and that he was aware that steps were being made to carry them out, but that the fact that he was not consulted about the details of the settlement and was not present when the deed was made had a bearing on the result. However, in his view, "that fact was irrelevant". He continued that:

> "The proposals were clearly proposals for achieving the result that has been achieved, namely, a family settlement financed by dividends produced by Hawkins' contract to sell his services to the company at an inadequate and uncommercial rate. Had the proposals been of any other nature the case must inevitably have so stated. The foundation of those proposals was his earning power and they needed not merely his assent but his active participation. He personally entered into the contract to serve for an inadequate remuneration, he was himself a director of the company when the shares were allotted to the trustees, when the large profit was made by the company's use of the contract,

> and when the dividend was declared. And above all he himself created the source of the company's profit by acting in the film "Fortune is a Woman".
>
> The mere fact that he did not concern himself with some of the "steps" in the legal machinery involved does not make it any the less his arrangement within the section. A man does not avoid the incidence of section 397 by merely being absent from and leaving to his solicitors and accountants certain parts of the legal machinery if he is aware of the proposals for an "arrangement" or a settlement and actively forwards them by personally carrying out and assisting in the vital parts in which his performance and co-operation are necessary. Nor can he avoid liability by merely giving his solicitors carte blanche to effect some scheme for the benefit of his family and refusing to concern himself with its precise form."

168. *Wildin* concerned the same provision as was in point in *Hawkins* (as then included in a later act). In that case:

(1) In 1980 two brothers started negotiations with British Rail to acquire a long lease of some land which they thought presented a profitable investment opportunity.

(2) They acquired a shelf company with an authorised share capital of £100 and allotted 19 shares to each of their two children which the children each paid for out of money in a savings account.

(3) The brothers then arranged for the company to acquire the lease and undertake the development as financed by a bank loan guaranteed by the brothers.

(4) Following the completion of the development in 1982, in 1985 the company made a profit and paid the children a dividend.

(5) The question was whether the dividend should be treated as income of the brothers. HMRC argued that by incorporating the company and allotting shares to the children which they could have allotted to themselves, by adopting the whole risk of the venture for the benefit of the children, by giving their personal guarantees to the bank and acting as directors without any remuneration, the brothers entered into an arrangement which had elements of bounty and provided funds directly or indirectly for the purpose of the arrangement.

169. Vinelott J decided, at pages 683 and 684, that the brothers were parties to an "arrangement" and that the dividends were paid to the children in consequence of that "arrangement":

> "The taxpayer together arranged for shares in the company to be allotted to the four older children; and they arranged for negotiations with British Rail to be opened, for the agreement with British Rail to be entered into and for the site to be developed by the company. The steps they took were throughout directed to achieving the end that was in fact achieved, namely of ensuring that the company and so indirectly the four older children (to the extent of their respective shareholdings) took the benefit of the development of the site at no cost or risk to themselves."

170. He continued to note that it has long been recognised that the definition of a "settlement" is so wide that some limitation to its scope must be implied referring to *Copeman v Coleman*. He said that the starting point must be to identify the "arrangement". The question then is whether taken as a whole it did contain the requisite "element of bounty". To that question there could be only one answer:

> "The children contributed nothing except the trifling sums which I must assume were paid on the allotment of the shares. They were exposed to no risk …. The risk that the development would not prove profitable and might result in loss was taken by the brothers."

171. He concluded that "the taxpayers were the architects of an "arrangement" within the relevant definition by virtue or in consequence of which the dividends in question were paid to the four older children".

172. As noted in the late case of *Jones*, there was no guarantee that dividends would be paid. Vinelott J said, at page 685:

> "The future of the company depended on the maintenance of a sufficient surplus over the rent payable to British Rail to meet the interest on the bank borrowing; a modest decline in the profit rental or a modest increase in the rate of interest might have had a catastrophic effect on the ability of the company to continue to service its debt….."

Jones

173. In *Jones,* the question was whether the relevant settlement provisions in s 660A of chapter 1A of Part XV of the Income and Corporation Taxes Act 1988 applied to the arrangements made by Mr and Mrs Jones to distribute the income of a company through which Mr Jones traded as a computer consultant with back office support from his wife. At [1], Lord Hoffmann described these provisions as "anti-avoidance provisions intended in principle to prevent people from reducing their tax liabilities by settlements, gifts or similar arrangements which transfer income or income-producing assets to their minor children or under which they or their spouses retained an interest". In outline:

(1) Under s 660A (1) income arising under a "settlement" during the life of the "settlor" was to be treated "for all purposes of the Income Tax Acts as the income of the settlor and not as the income of any other person unless the income arises from property in which the settlor has no interest".

(2) Under sub-s (2), a "settlor" was to be regarded as having an interest in property "if that property or any derived property is, or will or may become, payable to or applicable for the benefit of the settlor or his spouse in any circumstances whatsoever".

(3) Under sub-s (6) the reference to a settlement did not include an outright gift by one spouse to the other of property from which income arises subject to certain exceptions.

(4) The terms "settlement" and "settlor" were defined in a similar manner as applies under the settlements code.

174. The majority in the House of Lords held that in principle the requirements of s 660A(1) were met but the exception for outright gifts between spouses provided for in s 660A(6) applied. In doing so, they considered the earlier decisions in *Hawkins* and *Wildin*.

175. The facts and arguments were as follows, as set out by Lord Hoffmann at [2] to [8]:

(1) When Mr Jones was made redundant in 1992 and decided to go freelance as a computer consultant, he and his wife acquired a shelf company; the formation agents sold them the two issued £1 shares for £1 each and Mr and Mrs Jones were appointed sole director and secretary respectively. It appeared that the agencies through which computer consultants offered their services insisted upon dealing only with companies. The company entered into contracts with customers to provide the services of Mr Jones in return for income.

(2) The company's income was distributed on the advice of the taxpayers' accountant. Mr and Mrs Jones each took a modest salary which was accepted to be a reasonable figure for Mrs Jones' services but was plainly less than Mr Jones could have earned in the market. The remainder of the company's profits were

distributed to the two shareholders. The tax advantages to the taxpayers of receiving the company's earnings as dividends rather than salary were that (a) National Insurance Contributions would have been payable on salary but were not payable on dividends and (b) the dividend payable to Mrs Jones was taxable at a lower rate than it would have been if added to the income of Mr Jones. For these reasons, it was contemplated from the outset that the company would pay Mr and Mrs Jones low salaries and distribute the rest of its income as dividends.

(3) HMRC's case was that the acquisition of the company and the transfer of one of the two shares in it to Mrs Jones, thereby enabling her to receive the expected dividends, was an "arrangement" for the purposes of the relevant provisions. HMRC argued that it was not a transaction at arms' length because Mr Jones would never have agreed to the transfer of half the issued share capital, carrying with it an expectation of substantial dividends, to a stranger who merely undertook to provide the paid services which Mrs Jones provided. That provided the necessary "element of bounty". The object of the arrangement was to keep the entire income within the family but to gain the benefit of using up Mrs Jones' lower rates. The dividends paid to Mrs Jones arose under the arrangement. By working for the company, Mr Jones provided it with the funds which enabled the dividends to be paid. He was therefore a "settlor". As Mrs Jones was the spouse of Mr Jones he was to be treated as having an interest in the income derived from her share and that income was therefore to be treated as his income.

176. Lord Hoffmann had noted, at [7], that not every transfer of property is a "settlement" for the purposes of the relevant legislation; there has to be an "element of bounty" in the transaction. He thought this was an "old-fashioned phrase" noting that it apparently derived from *Commissioners of Inland Revenue* v *Leiner* at 596 and was approved by the House of Lords in the *Plummer* case at 913. He thought that whilst "conjuring up the image of Lady Bountiful in *The Beaux' Stratagem*, is perhaps not the happiest way of describing a provision for a spouse or minor children. A donation to a spouse or child is traditionally expressed in a deed to be "in consideration of natural love and affection" rather than the donor's bounty", it is:

> "nevertheless exactly the kind of thing at which the anti-avoidance provisions are aimed. In *Chinn* v *Hochstrasser* [1981] AC 533, 555 Lord Roskill cautioned against treating the word "bounty" as if it had been included in the statute. It seems to me that *the general effect of the cases is that, under the arrangement, the settlor must provide a benefit which would not have been provided in a transaction at arms' length*." (Emphasis added.)

177. Lord Hoffmann noted, at [9], that Park J accepted HMRC's argument but the Court of Appeal (see [2006] 1 WLR 1123) did not. The reasons given by Sir Andrew Morritt were, at [73] of the Court of Appeal's decision, that Mrs Jones had acquired her share "for value", namely, for £1 "in the context of a joint business venture to which both parties made substantial and valuable contributions" and that what happened thereafter, namely, that Mrs Jones was paid a salary and in addition was paid dividends derived entirely from her husband's work, "was not part of the arrangement because these events depended upon the future business of the company and decisions on dividend policy by Mr Jones, all of which were uncertain. They could not therefore supply the necessary element of bounty".

178. Lord Hoffmann considered that analysis "is divorced from reality" on the basis that, at [10]:

> "Mrs Jones could not have been issued with a share without the agreement of her husband and when he agreed to that arrangement, it was expected that he would take a low salary and that substantial dividends would be distributed.

> That was the advice which they had received from the accountant. And that was what happened. Each year the salaries were set at a level suggested by the accountant and the rest retained or distributed as dividend. The decisions were tax driven and not commercially driven. And it was necessary, in order to gain the tax benefit, that Mr Jones should, in a broad sense, transfer some of his earnings to his wife."

179. Lord Hoffmann continued, at [11], that the authority for taking a broad and realistic view of the matter may be found in several cases of which the most relevant was *Hawkins*. He cited Donovan LJ's comments in that case in relation to there being "sufficient unity about the whole matter to justify it being called an arrangement" (see [13]) and noted that Pearce LJ pointed out, at page 553, that the whole scheme followed proposals put forward by the actor's solicitors and accountants and that: "The foundation for those proposals was his earning power and they needed not merely his assent but his active participation" (see [14]).

180. Having set out details of the decision in *Wildin*, Lord Hoffmann noted, at [18] and [19], that, as in *Jones*, there was no assurance in that case that dividends would ever be paid. That depended upon whether the company made a profit (see page 685) and, even if the company made a profit, upon the decision of the brothers who were at all material times the sole directors.

181. At [20], Lord Hoffmann explained that in the Court of Appeal's decision in *Jones*, Sir Andrew Morritt distinguished *Hawkins* on the ground that the arrangement included a binding contract by the actor to serve the company for £50 a week. Lord Hoffmann did not think that it made a difference that in *Jones* there was no such contract; the taxpayers agreed their salaries retrospectively from year to year on the advice of the accountant:

> "The Wildin brothers were not obliged to fund the development by the company. They could have stopped at any time. I agree with Park J, who said in this case (at [2005] STC 1667, 1709, para 39) that it would have made no difference if there had merely been expectations that [the actor] would work for the company at a salary to be fixed from time to time and that in practice the salary would be set at a low level. As the value of a share always depends upon expectations of future yield, such expectations would give the shares a far greater value than the nominal sum for which they were transferred."

182. At [21] he noted that Sir Andrew Morritt remarked, at [78] of his decision, that in *Wildin* Vinelott J appears to have considered that the acquisition of the shares, the agreement with British Rail and the development of the land were all part of one arrangement. Lord Hoffmann did not think that remark was right because Vinelott J said (at page 678) that "the relevant date for determining whether there was an arrangement by virtue of which income was paid to the brothers and to the children is the date when the company was acquired and its shares were allotted".

183. He continued, at [22], that that is not to say that a series of steps which are contemplated in advance cannot together constitute an "arrangement". He remarked that that appears to have been the case in *Hawkins* but he would have found it difficult to say that in *Wildin* the agreement with British Rail and the development were part of the "arrangement". They depended, as Sir Andrew Morritt said of this case, upon extraneous events and decisions which had not been made. It was:

> "the *expectation* of such events and the hope of profit which, together with the absence of any risk attached to the children's ownership of the shares, gives the "element of bounty" to the arrangement constituted by the allotment. What subsequently actually happened was not part of the arrangement but the way in which (as foreseen) income arose under the arrangement. I think that this analysis (which Keene LJ said he had initially found persuasive) is correct."

184. Lord Hoffmann said, at [23], that Carnwath LJ made a rather different point when he said, at [108] of the decision in *Jones* in the Court of Appeal, that this was the first time in which the revenue had sought to apply the concept of a "settlement" in the relevant provisions to "a normal commercial transaction between two adults, to which each is making a substantial commercial contribution, albeit not of the same economic value". He did not agree that this was a normal commercial transaction, at [24]:

> "It made sense only on the basis that the two adults were married to each other. If Mrs Jones had been a stranger offering her services as a bookkeeper, it would have been a most abnormal transaction. It would not have been an arrangement into which Mr Jones would ever have entered with someone with whom he was dealing at arms' length. It was only "natural love and affection" which provided the consideration for the benefit he intended to confer upon his wife. That is sufficient to provide the necessary "element of bounty"."

185. At [25] to [30] he rejected HMRC's argument that the exception for cases in which one spouse makes an "outright gift" to the other of the property from which the income arises did not apply.

186. Lord Walker agreed with Lord Hoffmann but added his own observations. Having set out the history of the relevant provisions, he noted at [47], that the term "arrangements" plainly included situations extending beyond a classic settlement:

> "*The inclusion in the statutory definition of the very wide word "arrangement" shows that Parliament recognised, as long ago as 1922, that a wealthy taxpayer might be advised to dispose of what would otherwise be his taxable income by relatively complicated or artificial means*. These might include a classic settlement, especially when the intended beneficiaries were minor children, but even in that case a classic settlement was not essential (*Copeman* v *Coleman*…is an early example). Other components of the arrangement might be the formation or acquisition of a private company with an unusual share structure, the declaration of abnormal dividends and the granting and exercise of options (as in *Vandervell v IRC* [1967] 2 AC 291) or entering service agreements on unusual terms (as in *Crossland v Hawkins*…)." (Emphasis added.)

187. He said, at [48], that an intention to avoid tax was not absolutely essential for there to be an arrangement although "usually an intention to avoid or minimise tax can readily be inferred" (and in that case it was candidly admitted) and "that intention is part of the factual material that has to be looked at in the round". He said that Sir Wilfred Greene MR put it trenchantly in *IRC* v *Payne* at 626 as follows:

> "It appears to me that the whole of what was done must be looked at; and when that is done, the true view, in my judgment, is that Mr Walter Payne deliberately placed himself into a certain relationship to the company as part of one definite scheme, the essential heads of which could have been put down in numbered paragraphs on half a sheet of notepaper. Those were the things which it was essential that Mr Payne should do if he wished to bring about the result desired. He did it by a combination of obtaining the control of the company, entering into the covenant, and then dealing with the company in such a way as to achieve his object. Now, if a deliberate scheme, perfectly clear-cut, of that description is not an 'arrangement' within the meaning of the definition clause, I have difficulty myself in seeing what useful purpose was achieved by the Legislature in putting that word into the definition at all."

188. Lord Walker continued, at [49], that some arrangements are planned in minute detail and carried out "with timetables, in almost military precision" (referring to Lord Wilberforce in *Plummer* at 907). He noted that highly artificial arrangements of that sort led to *Ramsay* and the other well-known cases which came in its train (which he thought there was no need to consider on that occasion). However, he considered that

"a high degree of complexity, artificiality and pre-planning is not essential in order to produce an arrangement" as was "well illustrated by" *Hawkins* and *Wildin*. He said that like Lord Hoffmann, he would:

> "adopt the passage in Donovan LJ's judgment in *Crossland* v *Hawkins* at 549, where he refers to "sufficient unity." The taxpayer's intention to minimise his tax liability by a "definite scheme, the essential heads which could have been put down in numbered paragraphs on half a sheet of notepaper" explains the rationale of the sequence of events, and gives it unity."

189. At [50] he said that the Court has been reluctant to try to lay down any precise test for identifying the components of an arrangement or for assessing the "sufficient unity" to which Donovan LJ referred. In his view this caution was well-advised:

> ""Arrangement" is a wide, imprecise word. It can ("like settlement" or "partnership", or indeed "marriage") refer either to actions which establish some sort of legal structure (in this case, a corporate structure through which the taxpayer's income could be channelled) or those actions together with the whole sequence of what occurs through, or under, that legal structure, in accordance with a plan which existed when the structure was established. The planned result may be far from certain of attainment. It may be subject to all sorts of commercial contingencies over which the taxpayer has little or no control. But if the plan is successful and income flows through the structure which he has set up, it is "income arising under the settlement"."

190. He concluded, at [51], that that seems to be the approach taken in most of the authorities. He referred to Donovan LJ's comments in *Hawkins* at page 550 and said that in referring to the relevant arrangements coming about by "instalments" Donovan LJ was referring (see page 549) to the formation of the company, the service agreement, the settlement and the transfer or issue of all the shares to the trustees. He noted that Donovan LJ did not seem to have regarded the actor's performance in the relevant film or the company's payment of a dividend as part of the arrangement, but as the arrangement being put to its intended use.

191. He thought, at [52], that Donovan LJ's approach was consistent with what Vinelott J said in *Wildin* at page 678:

> "The point that Vinelott J was making was that the Special Commissioner had misunderstood the facts and misdirected himself by focusing on the date of incorporation of an off-the-shelf company whose shares the taxpayers did not acquire until over two months later. It was during that period that the taxpayers came across their business opportunity. That opportunity might have come to nothing (the judge, at 685, clearly thought it a very risky venture). But when it did prove profitable the dividend income paid out by the company was income paid "by virtue or in consequence of" the statutory settlement constituted by the arrangement……"

192. At [53] Lord Walker said he had gone into these points in some detail because he thought they had a bearing on the "outright gift" issue. He noted that it has been said that it is necessary to identify "the arrangement": Vinelott J said that in *Wildin* (at 684), and the Master of the Rolls said much the same in *IRC v Payne* (at 626) nearly fifty years before:

> "Normally (there may be exceptions) the arrangement is to be identified by the constituent parts or components of the legal structure designed for a purpose, and not by what is done (sometimes months or even years later) in using the structure for its intended purpose."

193. At [54] he said that he did not accept the revenue's argument that the arrangement entered into by Mr and Mrs Jones included, but was larger than (and so different from) the establishment of the original corporate set-up under which each had half of the

issued share capital of the company. He noted that there was no written service agreement between the company and Mr Jones comparable to the service agreement between company and the actor. The establishment of the corporate set-up, together with the common intention that Mr and Mrs Jones would use it to minimise tax in accordance with their accountants' advice, was the essential “arrangement”. What happened afterwards was that the “arrangement” was put to its intended use. He concluded, at [55], that the transfer of the share was:

> “not the sort of arrangement that would have been made between strangers dealing with each other at arm's length. Arctic was the chosen vehicle through which Mr Jones was to offer his valuable services as an IT consultant, and it was an act of bounty on his part to permit his wife to acquire half its equity for the nominal sum of £1. In my opinion that amounted to an outright gift of the share within the meaning of section 660A(6).”

194. Lord Neuberger agreed with the other Lords but wanted to express his views in his own words. He noted, at [75], that the definition of “settlement” in the relevant provisions appears, on its face, to be very wide indeed, and its ambit (or, to be more accurate, the ambit of its statutory predecessors) has been somewhat circumscribed by the courts. He thought that it was not surprising that the legislature and the courts have been content for the law to develop in this way. He noted that one of the principal purposes of the relevant provisions (save in certain circumstances) is:

> “to defeat arrangements between spouses, not conducted at arm's length, which seek to equalise their income, thereby reducing their aggregate liability to income tax and national insurance charges. The legislature has given effect to this by defining "settlement" in very wide terms, and the courts have then given the definition a limited effect, by means of the technique of purposive interpretation, through the introduction of the concept of "bounty" - see for instance per Lord Wilberforce in *Inland Revenue Commissioners* v *Plummer* [1980] AC 896 912E-F.”

195. He also was not entirely comfortable with the use of the word “bounty” but considered it sufficed to express the relevant principle. He said, at [76], that the word "bounty" “rings slightly uncomfortably, at least to my ears” as a “somewhat outdated expression which smacks of condescension”. However:

> “in the light of the judicial decisions on these provisions, it seems to me that the law is now tolerably clear and sensible, and, particularly given the need for clarity and the room for difficulties in this area, it would be inappropriate to risk introducing uncertainty or new complications by redefining the principles, even if only linguistically.”

196. At [77] he noted that the counsel for the taxpayer said that there was no arrangement when one of the two subscriber shares was transferred to Mrs Jones because this lacked the necessary element of bounty. He relied on the fact that the company had no assets other than the £2 derived from the two subscriber shares: therefore, Mrs Jones got what she paid for. The profits which subsequently accrued to the company through the skill and efforts of Mr Jones were no more than a hope or at best, an expectation, that could not, counsel said, be counted as an asset of the company because the company had no legal right to require Mr Jones to work, whether for the company's benefit or at all, let alone for a reduced level of remuneration.

197. He said, at [78] and [79], that although the Court of Appeal was convinced by that argument, it is inconsistent with both authority and principle, and should be rejected:

> “It seems to me clear that, when considering whether there was an "arrangement"……i.e. an arrangement which involved an element of bounty, one should assess the position at the time that the alleged arrangement was made, but, in carrying out that exercise, one should not disregard what

> happened thereafter. In particular, if the parties intended an element of bounty to accrue, and that element of bounty does indeed eventuate, then, absent any other good reason to the contrary, there is indeed an "arrangement" within the meaning of [the relevant provision]."

198. He continued, at [80] that, as long ago as 1940, in *Commissioners of Inland Revenue* v *Payne* (1940) 23 TC 610, Sir Wilfred Greene MR discussing a somewhat more simply drafted statutory predecessor of the sections in question here said the following, at page 626, (in relation to a scheme whose details Lord Neuberger did not consider to be significant for present purposes):

> "The word 'arrangement' is not a word of art. It is used, in my opinion, in this context in what may be described as a business sense, and the question is: can we find here an 'arrangement' as so construed? It is said that the only element in this transaction which falls within the definition of 'settlement' is the deed of covenant itself. I am unable to accept that argument. *It appears to me that the whole of what was done must be looked at*; and when that is done, the true view, in my judgement, is that Mr Walter Payne deliberately placed himself into a certain relationship to the company as part of one definite scheme......He did it by a combination of obtaining the control of the company, entering into the covenant *and then dealing with the company in such a way as to achieve his object*." (emphasis added).

199. Lord Neuberger then went on to consider *Hawkins* and cited what was said by Donovan LJ at 547:

> "I will accept for the moment the proposition that the family settlement which followed was not decided upon at the outset; but what is important I think, is that the eventual enjoyment by some individual or individuals of the money which had escaped surtax must have been in contemplation at the outset. Otherwise, as I say, the scheme had no rational purpose."

200. He said, at [82], that he was prepared to accept that in the present case the formation of the company and (more arguably) the allotment of shares had a "perfectly rational purpose", even without the benefit of seeking to equalise the income of Mr and Mrs Jones. However, in his view, Donovan LJ's essential point was that:

> "when considering the alleged "arrangement", or to put the same point in another way, in considering whether the arrangement involved an element of bounty, one looks at the whole of the purpose of the arrangement, and, in that connection, one does not shut ones eye to whether that purpose was achieved. That point is reinforced by what Donovan LJ went on to say at 550:
>
> > "Bearing in mind the ultimate object of securing money free from the burden - or the full burden - of surtax, can it matter for present purposes that the precise way of securing this result was not decided upon at the very outset? I think not"."

201. He noted, at [83], that Donovan LJ specifically disagreed with the view of the judge in the High Court that "the deed of settlement came later in date [and the commissioners had found] that there was no comprehensive arrangement at the outset of which the deed of settlement formed part". He said:

> "It is true that, at that point, Donovan LJ was dealing with a question of the identity of the settlor. However, the definitions of settlement and of a settlor….are closely connected, and it appears to me to be perfectly proper to rely upon observations as to what can be taken into account when considering who is a settlor, when deciding whether there is a settlement."

202. As regards the decision in *Wildin*, Lord Neuberger said, at [84], that the important feature was that Vinelott J concluded that there was a settlement, "notwithstanding that, at the time the shares in the company in that case were allotted, it had no right to the

benefit of the contract which was ultimately vested in it". He thought that the essential point was that the company was set up by the taxpayer, and "the shares were allotted, in the expectation, indeed with the intention, which duly eventuated, that the benefit of a potentially valuable contract being negotiated by the taxpayer would be taken in the name of, and for the benefit of, that company".

203. He noted, at [85], that counsel for the taxpayers suggested that these cases were distinguishable from *Jones* on the ground that the beneficiaries were the children or grandchildren of the taxpayer and not a spouse. However, he thought that the applicable principles as to whether a "settlement" has been created must be identical. At [86], he said that:

> "the main reason for allotting one share in the company to Mr Jones and the other share to his wife, and the only reason that Mr Jones was intending to accept, and duly accepted, an artificially low rate of remuneration for his work, was to distribute the income earned by Mr Jones roughly equally between him and his wife. That was the intention of Mr and Mrs Jones (or, perhaps more accurately, the intention of their accountants, which they were happy to adopt) at the time the company was set up, and it was what happened in each financial year (with the exception of two years when, for reasons not germane for the present purposes, owing to a misunderstanding of the law, Mr Jones was paid effectively a full salary). Accordingly, unless we are to overrule the approach adopted by the Court of Appeal in *Payne* and *Crossland*, and by Vinelott J in *Butler* v *Wildin*, it seems to me to follow that that there was here an arrangement… In my view, those cases laid down an approach which is workable and fair, which appears to give effect to the legislature's intention, and which, despite opportunities to do so, the legislature has been happy to accept by implication, in that nothing in the various re-enactments since section 38 of the 1938 Act has called the approach into question."

204. Lord Neberger continued to state, at [87], that he considered that the conclusion he had reached is consistent with principle:

> "The fact that the company had no legally enforceable right to require Mr Jones to work for it, either at all or at a reduced level of pay, does not mean that that was not something that the company and its shareholders expected to happen, and which therefore gave the shares value. As Lord Hoffmann pointed out in argument, valuation of an asset……..is very often based, at least to some extent, on profits which may be hoped or expected to be realised, but to which the owner of the asset has no present legal right."

205. In the same passage he noted that there was a curiosity in that the hope and expectation of profits accruing to the company were limited to the extent that the two shares were owned by Mr and Mrs Jones; Mrs Jones' share only had a substantial value at the date it was allotted to her as long as she was its owner and Mr Jones owned the other share. However, the notion that a particular piece of property has value (or has considerably enhanced value) only so long as it is owned by one particular person or class of person, because of some attribute which that person enjoys, or only so long as a particular state of affairs subsists, is conceptually unsurprising and not unfamiliar in practice.

206. He concluded, at [88], that "the essential point" was that, in the light of reasonable expectations as to what Mr Jones would achieve in terms of winning contracts for the company and would be prepared to accept by way of remuneration (which expectations were in due course fully realised), the value in 1992 to Mrs Jones of her share was considerably greater than the £1 which she paid. In those circumstances:

> "there was indeed an element of bounty involved in her acquisition of the share, and that bounty was provided through the expectation of what Mr Jones would

> do. The fact that the bounty primarily arose from an expectation of what he would do, rather than from what he had done, does not appear to me to be in point."

207. Finally, Lord Neuberger noted at [89], that there is an additional problem if the argument of the taxpayer is correct, namely, that "one should limit one's attention to the strictly legally enforceable rights of [the taxpayers] and the company at the time that Mrs Jones acquired her share, then":

> "that would open the door to a different approach. That approach would involve considering what transpired each year, when it was decided how much of the company's gross profit should be attributable to Mr and Mrs Jones' respective wages, and how much should be distributed by way of dividend…….when Mr Jones, as the sole director of the company, decides each year how to apportion the gross income of the company, I find it very hard to see why that should not be capable of being an arrangement within [the relevant provision], if it has been excluded from consideration as part of the arrangement when the shares were acquired by Mr and Mrs Jones. On that basis, I find it also very hard to see why Mr Jones decision each year not to take anything like a full salary, thereby increasing substantially the dividend payable to his wife, does not involve an element of bounty. Neither [counsel] was prepared to adopt this approach. Although it appears to me to be logically attractive, it would be inconvenient in practice, in that it would be difficult to administer, and it might well produce unfair, even arbitrary, results. However, the fact that it is not adopted by either party, seems to me rather to support the Revenue on the first issue."

Discussion and decision

Legislation and caselaw

208. To recap, the settlements code applies to treat income arising under a "settlement", as defined to include any "arrangement", as the income of the "settlor", as defined as the person who "made the settlement", and not of any other person if the income arises during the life of the "settlor" from property in which the "settlor" has an interest. For this purpose*:*

(1) A person is treated as having made a "settlement", if the person has "made or entered into the settlement directly or indirectly" which includes cases where the person "has provided funds or has undertaken to provide funds, directly or indirectly, for the purposes of the settlement".

(2) A "settlor" is treated as having an interest in property if there are any circumstances in which the property or any "related property" (a) is payable to the "settlor", (b) is applicable for the benefit of the "settlor", or (c) will, or may, become so payable or applicable. "Related property", in relation to any property, means "income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income from it".

209. In broad terms, the purpose underpinning the settlements code is to prevent taxpayers from reducing their tax liability by divesting themselves of what would otherwise be their taxable income by making gifts and settlements where prescribed conditions are met:

(1) In *Plummer* the relevant earlier settlement provisions were described as being "designed to bring within the net of taxation dispositions of various kinds….cases, in popular terminology, in which a taxpayer gives away a portion of his income, or of his assets, to such persons, or for such periods, or subject to

such conditions, that Parliament considers it right to continue to treat such income, or income of the assets, as still the settlor's income".

(2) In *Jones*, Lord Hoffmann described the relevant earlier settlements provisions as "anti-avoidance provisions intended in principle to prevent people from reducing their tax liabilities by settlements, gifts or similar arrangements which transfer income or income-producing assets to their minor children or under which they or their spouses retained an interest". Lord Walker said that the inclusion in the statutory definition of the very wide word "arrangement" shows that Parliament recognised that "a wealthy taxpayer might be advised to dispose of what would otherwise be his taxable income by relatively complicated or artificial means".

(3) In the earlier decision in *Chamberlain* Lord Macmillan similarly said that for an arrangement to be captured it "must be one whereby the settlor charges certain property of his with rights in favour of others…" and "must confer the income of the comprised property on others, for it is the income so given to others that is to be treated as nevertheless the income of the settlor". I note that the appellants interpret this as meaning that a person cannot be the "settlor" for the purposes of the settlements code unless, as a legal matter, he owns the property which then becomes the subject matter of the "settlement". I have addressed this below.

210. In *Jones* the House of Lords confirmed that as was held in *Plummer*, whilst there is no restriction as such on the meaning of the broad terminology used in the legislation, to constitute an "arrangement", as accords with the underlying purpose of the provisions, the relevant matters must involve "an element of bounty". Lord Hoffmann said that, in general terms, this means that "under the arrangement, *the settlor* must provide a benefit which would not have been provided in a transaction at arm's length" (emphasis added):

(1) As accords with the purpose of the provisions, Lord Hoffmann plainly envisaged that the "settlor" must provide a benefit to another party; hence his reference to a "transaction", which connotes some form of dealing between two or more parties. Moreover, this interpretation clearly accords with the natural meaning of the term "bounty", broadly, as a gift or donation or something given away by one person to another, in the sense that the recipient does not provide value or full value in return.

(2) I note that the appellants argued that a person may be a "settlor" even where he does not himself provide an "element of bounty"; the test set out in *Plummer* is simply that the "arrangement"/"settlement" must involve the provision of an element of bounty not that the "settlor" must himself provide it. However:

(a) That does not accord with Lord Hoffmann's plain statement and the descriptions given in the cases of the underlying purpose of the provisions.

(b) Moreover, in all the cases cited at the hearing in which the earlier settlements provisions were held to apply, the person who was found to be the "settlor" was also found to have provided an "element of bounty".

(c) Overall, I find it difficult to see that, on a purposive construction of the settlements code, a person can be regarded as having directly or indirectly "made", "entered into" or, "provided funds for the purposes of" an "arrangement" unless, broadly, that person is involved (albeit an indirect involvement suffices) in the provision of an "element of bounty".

211. In *Jones* the House of Lords endorsed Donovan LJ's comments in *Hawkins* that whether there is an "arrangement" depends on whether there is "sufficient unity" about

the whole matter to justify it being considered as such. It is inherent in such a formulation that there is no prescriptive set of rules for what constitutes an "arrangement". Indeed, it was suggested in *Jones* that a more precise test is not desirable; the "sufficient unity" test provides what is considered to be the necessary flexibility for the courts to take a "broad and realistic" view of the matter.

212. Whether the settlements code applies, therefore, depends on all the facts and circumstances of each particular case, but the cases give some further guidance. It is clear, for example, that the circumstances where there may be an "arrangement" include where a company is interposed as the vehicle through which the "settlor" provides an "element of bounty" to the intended recipients. Hence:

(1) in *Hawkins* and *Jones*, Mr Hawkins and Mr Jones were each held to be the "settlor" of a "settlement" as a result of them (a) facilitating and agreeing to an issue and/or transfer of shares in the relevant company to the intended recipient of an expected benefit (namely, the trustees of a trust set up for the benefit of the Mr Hawkins' children and Mr Jones' wife) for a nominal sum, and (b) agreeing that the company would provide their services to third parties in return for the company paying Mr Hawkins and Mr Jones an artificially low rate of remuneration so that any resulting profit arising in the company would be paid as dividends to the relevant shareholders; and

(2) in *Wildin*, the two brothers were held to be the "settlors" of a "settlement" as a result of them arranging for their children to subscribe for shares in a company for their "trifling" nominal value when the brothers expected to negotiate a valuable development deal for the company with the aim of ensuring that the company and so, indirectly, the children (to the extent of their shareholdings) took the benefit of the development deal at no cost or risk to themselves.

213. The majority of the House of Lords in *Jones* were of the same mind that whether there is an "arrangement" is to be judged by reference to events when the initial planning is put in place (such as, in that case, the setting up of the corporate structure) but that it is not necessarily a bar to there being an "arrangement" that, at that time, whether an "element of bounty" will be provided is subject to uncertain, contingent events. In their view, (a) the important feature in *Jones* (and in *Wildin*) was that when the corporate structure was put in place the relevant taxpayer had an *intention and expectation* that "bounty" would be provided through that structure, and (b) the arrangement may, depending on the particular facts and circumstances, constitute the initial structure and the intention to carry out the plan with such an intention and expectation or all of the steps involved in the plan:

(1) Lord Hoffmann rejected the argument that there was no "arrangement" in *Jones* because when Mrs Jones received a share in the company the payment of dividends to her depended on uncertain future events and, unlike in *Hawkins*, there was no binding contract with the company for Mr Jones to receive a low salary. He noted that in *Wildin* there was no guarantee that dividends would be paid and the brothers were not obliged to fund the development by the company. He thought that it would have made no difference to the outcome in *Hawkins* if there had merely been "expectations" that Mr Hawkins would work for the company at a low salary. He pointed out that the valuation of an asset, such as the share held by Mrs Jones, "is very often based, at least to some extent, on profits which may be hoped or expected to be realised…". He said that (a) a series of steps which are contemplated in advance may together constitute an "arrangement", as he thought was the case in *Hawkins,* but (b) he could not see that in *Wildin* the development was part of the "arrangement" given it depended

upon extraneous events and decisions which had not been made when the relevant shares were allotted. It was rather "the expectation of such events and the hope of profit which, together with the absence of any risk attached to the children's ownership of the shares", gave the "element of bounty". What subsequently actually happened was not part of the "arrangement" in that case but the way in which (as foreseen) income arose under the "arrangement".

(2) Lord Walker thought that Mr Jones' intention to minimise his tax liability by a "definite scheme, the essential heads which could have been put down in numbered paragraphs on half a sheet of notepaper" explained the rationale of the sequence of events and gave it "unity". He said that the courts were right not to lay down any precise test for identifying the components of an "arrangement". It could refer either to (a) actions which establish some sort of legal structure (such as a corporate structure through which the taxpayer's income could be channelled) or (b) those actions "together with the whole sequence of what occurs through, or under, that legal structure, in accordance with a plan which existed when the structure was established" notwithstanding that achieving the planned result may be far from certain and that it may be subject to "all sorts of commercial contingencies over which the taxpayer has little or no control". He said that if the plan is successful and income flows through the structure which he has set up, it is "income arising under the settlement".

(3) Lord Walker added that normally the "arrangement" is to be identified by the constituent parts or components of the legal structure designed for a purpose, and not by what is done later in using the structure for its intended purpose. Hence, in *Jones* the establishment of the corporate set-up, together with the common intention that Mr and Mrs Jones would use it to minimise tax in accordance with their accountants' advice, was the "arrangement." What happened afterwards was that the "arrangement" was put to its intended use.

(4) Lord Neuberger said that "one should assess the position at the time that the alleged arrangement was made" but in doing so "one should not disregard what happened thereafter". In particular, if the parties intended an "element of bounty" to accrue, and that eventuates, then, absent any other good reason to the contrary, there is an "arrangement". He thought that the important feature of *Wildin* was that there was a "settlement" even though, when the relevant shares were allotted, the company had no right to the benefit of the development contract. The essential point was that the company was set up by the taxpayer, and the shares were allotted, "in the expectation, indeed with the intention, which duly eventuated" that it would have the benefit of a potentially valuable contract which was then being negotiated by the taxpayer.

(5) Lord Neuberger held that, similarly, in *Jones* the main reason for allotting one share in the company to each of Mr Jones and his wife, and the only reason that Mr Jones intended to accept (and did accept) an artificially low rate of remuneration for his work, was to distribute the income earned from his work roughly equally between him and his wife. Like Lord Hoffmann, he considered that the fact the company and Mr Jones did not enter into a contract regarding his salary was not relevant. The company and its shareholders expected that he would work for the company for low pay and that gave the shares value (and he noted Lord Hoffmann's comments on share value). Hence, there was an "element of bounty" involved in Mrs Jones acquisition of the share provided through the expectation of what Mr Jones would do (in terms of winning contracts for the company and accepting low remuneration).

214. As noted, the appellants drew particular support from the decision in *Chamberlain* for their view that only Winn Yorkshire made a "settlement" for the purposes of the settlements code. The appellants suggested, in effect, that the House of Lords' decision in that case demonstrates that, in assessing the role of a corporate structure in deciding what constitutes an "arrangement", it is paramount that a company's separate legal personality is respected. In the appellants' view, HMRC's analysis fails to respect that fundamental principle. It involves, so they say, an impermissible piercing of the corporate veil given that (a) Winn Yorkshire and not the appellants owned the B share which became subject to the Trust, (b) its funds were used for the purposes of the planning, and (c), the appellants' involvement in the planning is confined to them acting in their role as directors of Winn Yorkshire (and Winn Scarborough); a company must necessarily act through its directors but that does not make the company's acts the acts of the directors.

215. To recap, in *Chamberlain* the majority in the House of Lords rejected the Inland Revenue's argument that:

(1) the taxpayer had made a single "arrangement"/"settlement" under which he (i) first, set up a company, Staffa, which he controlled and transferred a valuable asset into it, his shares in C Ltd, partly in return for shares in Staffa, and (ii) subsequently formed the March trust and the later December trusts primarily in favour of his children, into which he settled funds to enable the trustees to subscribe for shares in Staffa; and

(2) the taxpayer was taxable, therefore, on income which Staffa later received from C Ltd (which Staffa used to pay dividends to its shareholders (including the trustees) on the basis that the income arose under that single "settlement", from property comprised in it, namely, Staffa's assets.

216. The Inland Revenue accepted that their argument must fail if they were not correct that the whole of Staffa's assets (the shares in C Ltd) could be regarded as the property comprised in a "settlement" made by the taxpayer. The House of Lords held that, in fact, the property comprised in any "settlement" made by the taxpayer constituted only the funds which the taxpayer provided to the trustees for them to subscribe for shares in Staffa or those particular shares.

217. As the appellants emphasise, Lord Macmillan started his analysis by noting that, on a purposive approach, to come within the statute a "settlement" must be one whereby "the settlor charges certain property *of his* with rights in favour of others" (emphasis added) thereby conferring his income on others. He said that:

(1) The trusts were "settlements" within that meaning, but they did not comprise any property of Staffa. The trust funds were invested in shares of Staffa, which was "quite a different matter" and the whole assets of the company were not settled at all so as to dedicate the whole of its income to any trust purposes.

(2) Whilst he accepted that setting up the Staffa structure was an essential step towards effecting the taxpayer's object, the taxpayer himself retained a substantial interest in Staffa, namely, the shares he received in Staffa in return for the shares in C Ltd.

(3) It was not an accurate legal presentation to view the matter as a single scheme whereby the income from the shares in C Ltd ended up settled in favour of third parties given the taxpayer did not settle all of the shares in Staffa, and that further shares in Staffa might still have been issued.

(4) Moreover, it was "fallacious to confuse the steps taken by the [taxpayer] with a view to effecting a settlement or arrangement with the settlement or arrangement itself". The taxpayer did not make a "settlement" or "arrangement"

of the kind contemplated by statute when he put Staffa in place and transferred his shares in C Ltd to it. In fact, he did not settle any shares of Staffa but settled monies, with the intention, which he could carry out, that they should be invested in shares of Staffa. It was not until he granted the trust deeds that he entered the legal stage of the "settlement". All that he did previously was preparatory to making "settlements". Also, there was nothing to prevent the trustees from selling their shares in Staffa and investing the proceeds in other securities. He added that the trustees could have sold the shares in Staffa.

218. It is not clear to me that in making these comments Lord Macmillan meant, as the appellants seem to suggest, that (a) for a person to be a "settlor" of a "settlement" it is critical that he, rather than any company interposed in the structure, directly provides the property which can be identified as the subject matter of the "settlement" and/ or (b) the formation of a company can never be part of an "arrangement":

(1) In making the comments referred to at (2) and (3) above, Lord Macmillan appears to have been acting on the premise that, in principle, there could be a "settlement" as a result of the formation of the Staffa structure but the taxpayer could not be viewed, as the Inland Revenue agreed was necessary for them to succeed, as having charged his whole interest in the shares in C Ltd which he transferred to Staffa in favour of the beneficiaries of the trusts given that (a) he retained an interest in those shares himself indirectly through his ownership of shares in Staffa, and (b) in future he could have used the Staffa structure for other purposes by arranging for the issue of further shares to others.

(2) The only reason he gave for his broader view that the taxpayer did not make a "settlement" in setting Staffa up was that the taxpayer only entered the *legal stage* of the "settlement" when he later set up the trusts and all he did before that time was *preparatory* to that legal stage. That could be interpreted as meaning that the taxpayer could not be regarded, to use Lord Macmillan's own terminology, as having *charged* the shares in C Ltd with rights in favour of others when he transferred them to Staffa because, at that time, there was not a sufficiently certain arrangement in place for the Staffa structure to be used to provide his children with a benefit from the shares. In any event, Lord Macmillan was plainly not suggesting that there can be no circumstances where the routing of a taxpayer's asset/income through a company may constitute part of an "arrangement".

219. Moreover, Lord Romer evidently saw no conceptual difficulty with a person being viewed as having made a "settlement" by the indirect provision of property/a benefit through a corporate structure. Rather, Lord Romer was of the view that it was the fact that the taxpayer could not be regarded as having settled *the whole* of the assets held by Staffa meant the earlier settlements provisions did not apply. In effect, his approach foreshadows that taken in the later cases:

(1) Lord Romer considered that the formation of the Staffa structure and the making of the March trust may constitute a single "compound settlement" on the basis that all of the relevant steps were taken or caused to be taken by the taxpayer for the purpose of making provision for his children out of his interest in C Ltd while retaining control over C Ltd and Staffa. However, he considered that the taxpayer could not be regarded as having settled *the whole* of the C shares for substantially the same reasons as Lord Macmillan had given; namely, that the taxpayer retained an interest in those shares and setting up Staffa in this way "was capable of serving, and may well have been intended to serve, in the future other purposes as well".

(2) He thought that the December trusts should be viewed as separate "settlements" from this single "compound settlement" essentially on the basis that there was an insufficient link between the formation of the Staffa structure and those trusts: (a) when the March trust was made he saw nothing to suggest that it was in the contemplation of the taxpayer to settle further shares in Staffa (and he may not have done so but for later legislative changes), and (b) whilst in bringing about the December trusts, the taxpayer no doubt utilised the Staffa structure, the March and December trusts were "quite distinct from one another and could not properly be regarded as forming one comprehensive settlement". Whether this comprised a separate "settlement" or not he was satisfied that the property settled could not be said to consist of all the assets of Staffa for the same reasons as he had already set out in relation to the March trust.

220. Lord Tankerton (with whom Lord Atkin agreed) gave as reasons for his decision only that (a) while Staffa provided an available investment for the sums settled under the trusts, the continuance of that investment was not essential to the continuance of the trusts, (b) the sums settled under the trusts were the funds provided for the purpose of the "settlement", and (c) whilst Staffa was controlled by the taxpayer, it did not hold its assets as part of the provisions settled on the taxpayer's children. As in the case of Lord Macmillan, there is no real indication that Lord Tankerton considered that the fact that the relevant benefit was routed through a company was of itself necessarily fatal to the Inland Revenue's case; rather, on the facts, there was an insufficient nexus between the events for the formation of Staffa to be part of an "arrangement" together with the formation of the trusts.

221. In any event, as already set out, the later decisions plainly indicate that a "settlor" may be regarded as making a "settlement" where he routes a benefit through a company and that that may be the case even where he was not initially the owner of the property which becomes the subject of the settlement:

(1) In *Wildin*, *Hawkins* and *Jones*, the relevant individuals were held to be "settlors" notwithstanding that they had no formal legal interest in the shares which became subject to the relevant "settlement" (although there was a suggestion in *Hawkins* that Mr Hawkins may have had a beneficial interest in the relevant shares). The important factor was that each "settlor" (a) initiated the company structure and agreed to the issue and/or transfer of shares to those intended to benefit from the planning, and (b) when the structure was set up, either entered into further arrangements essentially for him to provide value, which would flow into those shares, or at least intended and expected that he would do so.

(2) In my view, in those cases the courts acknowledged, in effect, that, on a broad and realistic view of the matter, a person may achieve a similar result to that identified by Lord Macmillan as the target of the rules, namely, the conferring of a person's income on others, by adopting other methods than charging "certain property of his with rights in favour of others". The overall effect of the arrangements in *Wildin*, *Hawkins* and *Jones*, was that the "settlor" essentially conferred on others income which he generated or which he could have generated but for providing the relevant opportunity to do so to the company.

Conclusion on the application of the settlements code

222. I have concluded that, assuming at this stage of the analysis that the arrangements are not to be regarded as a distribution by Winn Yorkshire to the appellants in respect of their shares in that company, they constitute a "settlement" made by Winn Yorkshire as the "settlor":

(1) In my view the "arrangement" comprises at least the initial steps taken by Winn Yorkshire to implement the planning, namely (a) the establishment of Winn Scarborough on Winn Yorkshire subscribing for the A and B shares, (b) the subsequent almost immediate transfer by Winn Yorkshire of its beneficial interest in the B share to the trustee of the Trust on terms that the appellants were the primary beneficiaries of the Trust, and (c) the subscription by Winn Yorkshire for the additional A share for a premium of £200,000 with the expectation that Winn Scarborough would immediately cancel the share premium created on the share subscription to create distributable reserves for use in paying the B share dividend or, at any rate, the plan for that to happen.

(2) The appellants consider that the "arrangement" is confined to the settlement of the B share in the Trust. However, it seems to me that steps (a) and (c) are an integral part of Winn Yorkshire providing an "element of bounty". For all of the reasons already set out, each of these steps was essential to the provision of a benefit to the beneficiaries of the Trust, namely, the creation of income arising to the Trust in the form of the B share dividend:

(a) The only reason for setting up Winn Scarborough with the corporate structure it had was for it to act as a conduit through which funds could be channelled from Winn Yorkshire into the hands of the appellants.

(b) When the Trust was set up, given that Winn Scarborough was a shell with no intended activity, the B share would have had no value but for the intention and expectation that Winn Yorkshire would provide Winn Scarborough with £200,000 by subscribing for the additional A share so that Winn Scarborough could then create distributable reserves (by cancelling the share premium) and pay the B share dividend.

(3) I do not view the decision of the House of Lords in *Chamberlain* as supporting the view that, as Mr Jones argued, the creation of Winn Scarborough and issue of shares in it cannot be part of the "arrangement". As is plain from the analysis set out above, the House of Lords did not lay down a principle that the formation of a corporate structure can never be part of an "arrangement" whatever the surrounding circumstances.

(4) I note that it could be said that the "arrangement" in fact comprised all of the relevant steps involved in the planning given that all steps were clearly identified and planned from the outset and they were implemented within a short period of time (apart from the payment of the B share dividend which may constitute the "arrangement" being put to its intended use). In the words of Lord Walker in *Jones* the entire structure was plainly "a definite scheme, the essential heads of which could have been put down in numbered paragraphs on half a sheet of notepaper" which explained the rationale of the sequence of events, namely, to deliver the desired amount of cash from Winn Yorkshire, into the hands of the appellants/its shareholders, through the medium of Winn Scarborough and the Trust, on what was intended to be a tax-free basis.

(5) However, it makes no difference to my analysis whether the later steps are part of the "arrangements" or just the steps identified at (1). In either case, Winn Yorkshire is plainly the "settlor" of the arrangement as the party which:

(a) entered into the relevant steps and/or directly provided the funds required for the purposes of the arrangement, namely, the cash resources it used to subscribe for the initial A and B shares and for the additional A share; and

(b) thereby provided an element of "bounty" in using its cash resources for the share subscriptions with the intention and expectation that the monies subscribed for the additional A share would be used to fund the B share dividend so creating income arising under the terms of the Trust for the beneficiaries of the Trust.

223. Turning to HMRC's arguments, I cannot see that the appellants can be viewed as the "settlors" of any "arrangement" comprising the planning or any part of it. HMRC's stance is that, on the correct statutory interpretation, the provisions setting out who is a "settlor", are broad enough to capture the appellants. In their view, on a broad and realistic view, the appellants can be regarded either as:

(1) *indirectly* having made or entered into an "arrangement" comprising the whole plan on the basis that they were the force behind the plan as the "controlling minds" of Winn Yorkshire and Winn Scarborough given that, in practical terms, as their sole directors, in effect, they can be regarded as having caused the companies to carry out each of the steps involved in the planning; or

(2) *indirectly* having provided funds for the purposes of that broad "arrangement" or for any more limited "arrangement", given that the actions they approved as directors included Winn Yorkshire using its funds to subscribe for shares in Winn Scarborough which enabled that company to issue the B share and later to pay the B share dividend. As the sole owners/managers of Winn Yorkshire, the appellants no doubt fully expected to benefit from Winn Yorkshire's funds which were used for the planning and, in practical terms, it was within their control to ensure that they could do so. In approving the use of the funds for the purposes of the planning, the appellants, in effect, agreed to their shares in Winn Yorkshire being reduced in value.

224. In my view, HMRC's analysis does not, as the appellants argued gives rise to an impermissible piercing of the corporate veil. HMRC's analysis simply raises the issue of the correct statutory interpretation of the provisions setting out when a person is to be regarded as a "settlor", in particular, as a result of "indirectly" making a "settlement".

225. As set out in full above, the decisions in *Hawkins*, *Wildin* and *Jones* amply demonstrate that a person may be viewed as the "settlor" of a "settlement" where he indirectly provides a benefit involving an element of bounty to others through a corporate structure. It is plain from those cases that a person does not have to be directly involved in each step of a plan constituting an "arrangement" for him to be a "settlor" in relation to it; the precise analysis will depend on all the surrounding facts and circumstances but active involvement as a director of a company in approving steps involved in the "arrangement" can be an important feature. For the reasons already set out, the earlier decision in *Chamberlain* does not provide authority to the contrary.

226. The appellants' clear intention and expectation from the outset was that each step involved in this "definite scheme" (as Lord Walker described that term in *Jones)* would be implemented in order to deliver cash into their hands on what was intended to be a tax-free basis. Moreover, as a practical matter, the implementation of this "definite scheme" was entirely within the appellants' control. As HMRC submitted, the appellants were the "controlling minds" of Winn Yorkshire and Winn Scarborough and their active participation was required for the implementation of each step involved as the sole directors of Winn Yorkshire and Winn Scarborough and the sole shareholders of Winn Yorkshire.

227. However, this case has some features which are markedly different to the circumstances in *Hawkins*, *Wildin* and *Jones*, as reflects the different underlying purpose of the arrangements from the perspective of the individuals involved:

(1) In those cases, the individual "settlors" used a company to provide a benefit *for others* (namely their children or wife) at least in part by using their *own resources or endeavours* (their earning-capacity and the negotiation of a valuable deal) to generate income which they arranged to flow into the shares in the company held by or for the intended recipient of the benefit.

(2) In this case, by contrast, the appellants, as the parties who HMRC consider to be the "settlors", as directors of the relevant companies, arranged for funds which belonged *to another person*, Winn Yorkshire, and which were generated by it in the usual course of its trading activities, to be provided *to the appellants themselves* (barring the minor sums paid to the charity and returned to Winn Yorkshire).

228. My view is that (a) the fact that the funds belonged to Winn Yorkshire does not of itself prevent the appellants from being viewed as having indirectly made a "settlement (whether the "arrangement" constitutes the entire plan or only some of the steps involved in it) but (b) it is fatal to HMRC's analysis that, under the planning, no material benefit was provided to any other party:

(1) On a purposive approach to the construction of the provisions, it seems unlikely that the legislature intended to draw a distinction between cases where, for the purposes of an "arrangement" (a) as in *Wildin*, *Hawkins* and *Jones*, an individual sets up an new company specifically so that he can make arrangements for income, which would otherwise have arisen to him, to flow into the company for the benefit of the relevant shareholders, and (ii) an individual who is the sole owner and director of a company in which profits have accrued, in effect, gives up the potential to receive those sums by arranging for the company to give the profits away. In both cases, on the natural meaning of the terms used viewed in context, the individual may be regarded as having *provided* funds *indirectly* for the purposes of the relevant "arrangement". For the reasons already set out, I do not consider that the decision in *Chamberlain* provides definitive authority to the contrary.

(2) However, broadly framed as the settlements code is, the courts have been clear and consistent in their view that, on a purposive approach to the construction of the rules, they are intended to subject a person to income tax, as the "settlor" of a "settlement", only where, under the relevant "arrangement", that person is involved in the provision of an "element of bounty" to another person. However, following through HMRC's analysis on its own terms, the appellants did not (whether directly or indirectly) provide to any material extent such an "element of bounty" under the plan. In causing the various steps involved in the plan to occur in their capacity as directors of the relevant companies, the appellants did not intend to and, the planning did not in fact, confer any material benefit on any *other* person. The sole purpose of the plan was for the vast majority of the relevant funds which Winn Yorkshire paid to Winn Scarborough to be received by the appellants themselves, as duly happened. Under the plan, the appellants simply went from potentially having the ability to access those funds as the owners and managers of Winn Yorkshire, to receiving the bulk of those funds directly into their own hands. Whilst a small amount of the funds were paid to a charity, for the reasons set out above, in effect, that was simply the price which the appellants were prepared to pay for the receipt of the rest of the funds, so they thought, as tax free sums.

229. For all the reasons set out above, at the most, the appellants could be regarded as having made a "settlement" for the purposes of the settlements code only in respect of the planning so far as it relates to the charity receiving the small sums it received (and,

for the reasons set out at [228(2)] I consider it doubtful that the appellants are to be regarded as having provided "an element of bounty" even to that extent). Otherwise, applying the provisions as they have been interpreted by the courts on a purposive basis, it is plain that the requirements for the appellants to be taxable under them in respect of the income in dispute are not met. The fact that the appellants caused the arrangements to occur purely for the purposes of avoiding income tax by ensuring that the settlements code applied to Winn Yorkshire cannot of itself affect that conclusion. On that basis, it is not necessary to consider the appellants' arguments as regards the application of s 644 (see 141(6)).

230. I note that the tribunal reached a different conclusion on the application of the settlements code in the *Dunsby* case but, given the different facts in that case, I do not consider it useful to carry out an analysis of that decision in that respect.

Conclusion

231. For all the reasons set out above, the appeal is dismissed.

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

HARRIET MORGAN

TRIBUNAL JUDGE

RELEASE DATE: 20 JANUARY 2021