

# VOL. XXVIII—PART II

---

No. 1367—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—  
6TH AND 9TH NOVEMBER AND 14TH DECEMBER, 1942

---

COURT OF APPEAL—3RD, 8TH AND 9TH DECEMBER, 1943, AND  
1ST FEBRUARY, 1944

---

HOUSE OF LORDS—16TH, 17TH AND 18TH JANUARY AND 22ND MARCH, 1946,  
AND 28TH MARCH, 1947

---

CLARK AND THE LANGRANGE TRUST AND INVESTMENT CO., LTD. (IN  
LIQUIDATION) v. COMMISSIONERS OF INLAND REVENUE

---

*Sur-tax—Settlement—Transfer of assets to company controlled by transferor—Consideration applied in acquisition of ordinary and deferred shares in the company—Settlement by transferor of deferred shares for benefit of children—Whether series of operations an arrangement constituting a "settlement"—Undistributed income of investment company—Direction and apportionment of company's income—Whether apportionment valid—Finance Act, 1938 (1 & 2 Geo. VI, c. 46), Sections 38 and 41; Finance Act, 1939 (2 & 3 Geo. VI, c. 41), Section 15.*

*The Appellant Company, an investment company within the meaning of Section 20 (1) of the Finance Act, 1936, was incorporated in November, 1929, to acquire the individual Appellant's residence, and certain of his investments and life policies. On receipt of the purchase money, the Appellant subscribed for 98 out of 100 ordinary shares and 29,900 out of 30,000 deferred shares in the Appellant Company. He executed a deed of settlement dated 19th December, 1929, by which it was declared that the trustees—himself, his wife and his solicitor—should hold the said 29,900 deferred shares on trust for the benefit of his two children (both of age at 5th April, 1936) and their issue and spouses as he should from time to time appoint. In 1933 the trustees subscribed for and were allotted 14,202 out of a further issue of 15,000 deferred shares.*

*By a revocable deed of appointment dated 1st July, 1931, the Appellant, in exercise of his powers of appointment under the settlement of 1929, appointed the trust fund to be divided into two equal shares to be appropriated to his son and daughter respectively, the son's share of the income to be accumulated until he attained the age of 30, and the daughter's share until she became 21, on reaching which ages the children were to become entitled to life interests on protective trusts. The Appellant revoked this deed by a deed of revocation and appointment dated 4th October, 1933, and made an irrevocable appointment of the trust funds whereby their income was to be accumulated until 1950, or until the death of the settlor, whichever was the earlier. The deed reserved a restricted power of variation of the period of accumulation but for the period material to the case the whole of the income was in fact accumulated.*

*The Company was a private one and its constitution gave the Appellant the widest powers over its destiny and the application of its income and assets, both in his capacity as governing director and as the holder of 97 ordinary shares. His wife also held one ordinary share.*

*An additional assessment to Sur-tax was made on the Appellant for the year 1937-38 under Section 38 of the Finance Act, 1938, and directions were made on the Appellant Company for the years 1938-39, 1939-40 and 1940-41 under Section 21 of the Finance Act, 1922, and Section 14 of the Finance Act, 1939, the actual income of the Company being wholly apportioned for those years to the Appellant. Appeal was lodged against the additional assessment to Sur-tax and against the apportionments for the years in question (but not against the directions). The Special Commissioners held that, as regards the additional assessment on the Appellant for 1937-38, the formation of the Appellant Company, the transfer to it of assets by the Appellant, the execution of the deed of settlement of 19th December, 1929, together with the later deeds of appointment and revocation, and the allotment of the Appellant Company's shares, together constituted an arrangement and therefore a "settlement" within the meaning of Section 41 (4) (b) of the Finance Act, 1938, and that the "settlement" came within the terms of Section 38 of the Finance Act, 1938. As regards the apportionments for the years 1938-39 to 1940-41, they held that the necessary requirements of Section 15 of the Finance Act, 1939, had been satisfied and that the whole of the actual income of the Appellant Company for each of the years in question had been correctly apportioned to the Appellant.*

Held,

- (1) (Court of Appeal) that the general arrangements under which the Company was formed, the deed of settlement was entered into and the deed of appointment made did not constitute a "settlement" within the meaning of Section 41 (4) (b) of the Finance Act, 1938. *Chamberlain v. Commissioners of Inland Revenue*, 25 T.C. 317, followed;
- (2) (House of Lords) that the apportionment of income of the Appellant Company under Section 15 of the Finance Act, 1939, for the years 1938-39 to 1940-41 was correct. *Commissioners of Inland Revenue v. L.B. (Holdings), Ltd.*, 28 T.C. 1, followed.

#### CASE

Stated under the Finance Act, 1927, Section 42(7), and Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 12th September, 1941, C. F. Clark and the Langrange Trust and Investment Co., Ltd. (in liquidation) (hereinafter called respectively "the Appellant" and "the Appellant Company") appealed against:—

- (1) an additional assessment to Sur-tax made on the Appellant for the year ending 5th April, 1938, in the sum of £20,258;
- (2) apportionments of the income of the Appellant Company for the years ending 5th April, 1939, 1940 and 1941.

2. The said additional assessment to Sur-tax was made on the Appellant under the provisions of Section 38 of the Finance Act, 1938. The said apportionments apportioning the actual income of the Appellant Company wholly to

the Appellant were made under the provisions of Section 15 of the Finance Act, 1939. There was no appeal against the directions made in respect of the years ended 5th April, 1939, 1940 and 1941 on the Appellant Company. There is no appeal in respect of the apportionment of its estate or trading income for these years.

3. The Appellant Company, which is an investment company within the meaning of Section 20(1) of the Finance Act, 1936, was incorporated on 29th November, 1929. A copy of its memorandum and articles of association is annexed hereto, marked "A", and forms part of this Case<sup>(1)</sup>. It was formed to acquire from the Appellant his residence called Ripley Grange, certain investments and policies of life assurance, valued at £114,046. Our attention at the hearing was directed in particular to paragraph 5 of the memorandum, to articles 5, 13, 14 and 22 and to the deletion of article 13 and substitution of another article therefor by extraordinary resolution dated 12th September, 1939. A copy of the extraordinary resolution is annexed hereto, marked "B", and forms part of this Case<sup>(1)</sup>.

4. On 13th December, 1929, the Appellant entered into an agreement with the Appellant Company to sell to it the aforesaid property, investments and policies of life assurance for the sum of £30,000. A copy of this agreement is annexed hereto, marked "C", and forms part of this Case<sup>(1)</sup>. On receipt of the purchase money the Appellant applied and subscribed for 98 ordinary shares and 29,900 deferred shares in the Appellant Company. By his direction these 29,900 deferred shares were allotted to trustees of a settlement dated 19th December, 1929, hereinafter referred to.

5. In 1933 the authorised capital of the Appellant Company was increased to 45,000 shares by the creation of a further 15,000 deferred shares of £1 each. The trustees of the said settlement subscribed for and were allotted 14,202 of the said further deferred shares.

The issued capital of the Appellant Company, at all times material to this appeal, was £44,202 and was held as follows:—

	<i>Ordinary</i>	<i>Deferred</i>
Appellant ... ..	97	—
His wife ... ..	1	—
His son ... ..	1	—
His daughter ... ..	1	—
Trustees of the settlement dated 19th December, 1929 ... ..	—	44,102

Copies of the accounts of the Appellant Company for the years ending 31st March, 1938, 1939 and 1940 and for the period to 12th August, 1940, are contained in a bundle which is annexed hereto, marked "D", and forms part of this Case<sup>(1)</sup>.

The Appellant Company went into voluntary liquidation on 13th August, 1940.

6. By a deed of settlement dated 19th December, 1929, made between the Appellant as settlor and the Appellant, his wife and Mr. R. C. Bartlett, a solicitor, as trustees, it was declared that the trustees should stand possessed of the said 29,900 deferred shares in the Appellant Company upon trust for the benefit of the Appellant's two children, Charles Alexander Clark born in 1906 and Kathleen Clark born in 1912 and their respective issue and spouses at such ages or times and in such shares and in such manner in all respects as the settlor should from time to time by deed revocable or irrevocable or by will or codicil

(1) Not included in the present print.

appoint. Both the said children were of age at 5th April, 1936. A copy of this deed is annexed hereto, marked " E ", and forms part of this Case<sup>(1)</sup>.

7. By a revocable deed of appointment dated 1st July, 1931, made between the same parties, the Appellant in the exercise of his powers of appointment under the said deed dated 19th December, 1929, appointed that the trust fund should be divided into two equal shares to be appropriated to his said son and his said daughter respectively; that until the said son attained the age of 30, the whole of his share of the income was to be accumulated, whereupon he was to become entitled to a life interest on protective trusts; and that the share of the said daughter was to be held upon a similar trust except that the income was to accumulate until she attained the age of 21. A copy of this deed is annexed hereto, marked " F ", and forms part of this Case<sup>(1)</sup>.

8. By a deed of revocation and appointment dated 4th October, 1933, made between the same parties, the Appellant revoked and made void the said deed of appointment dated 1st July, 1931, and made an irrevocable appointment of the trust funds whereby the income was to be accumulated until 1950, or until the death of the settlor whichever were the earlier. A restricted power was reserved by this deed to vary the period of accumulation, but at all times material to this case the income was in fact accumulated by the trustees and none of it was distributed. A copy of this deed is annexed hereto, marked " G ", and forms part of this Case<sup>(1)</sup>.

9. The Appellant gave evidence at the hearing, which we accepted, as follows:—

Ripley Grange was sold to the Appellant Company in 1929, who leased it to the Appellant's wife at a rent of £300 per annum. This rent had always been paid and formed part of the Appellant Company's income. Since 1929 he had expended £20,000 to £30,000 out of his own resources in improving the property. Before the present war he spent about £2,500 per annum upon the upkeep of the gardens. The Appellant Company had purchased two farms adjoining Ripley Grange at Loughton for £11,750 and £8,000, respectively. Both produced a good revenue and were let. The Appellant Company had also purchased six other freeholds. In 1929 some shares in the Caribonum Co., Ltd. (in which he was a large shareholder) were on the market. He lent the Appellant Company £25,000 to buy these shares. Following upon the passing of the Finance Act, 1938, he released the Appellant Company from its indebtedness to him. He had in 1929 transferred the bulk of his own shareholding in the Caribonum Co., Ltd. to the Appellant Company, and as a result had very little left in the way of income-yielding assets. He formed the Appellant Company because he considered it would provide a convenient form in which the property should be held. He intended to introduce his son and daughter as directors. The avoidance of death duties might have been one of the reasons for the formation of the Company and the making of the settlement. His son in 1939 became joint managing director of the Caribonum Company and was in receipt of an income in excess of £10,000 per annum. The Appellant Company was wound up because of the provisions of recent Finance Acts.

10. It was contended on behalf of the Appellant and the Appellant Company:—

- (i) that the only " settlement " made by the Appellant within the meaning of Section 41 (4) (b) of the Finance Act, 1938, was that represented by the execution of the deed of 19th December, 1929, declaring the trusts of the 29,900 deferred shares allotted to the trustees by the Appellant's direction;

---

(1) Not included in the present print.

- (ii) that whether the settlement made by the Appellant consisted of the said deed of settlement alone (as contended by the Appellant) or comprised the formation of the Appellant Company and the transfer of assets thereto (as contended by the Respondents) neither the Appellant nor any other person or persons had power at any time to revoke or otherwise determine such settlement so that the Appellant or his wife would or might become beneficially entitled to any part of the property comprised in the settlement or to any part of the income arising from such property within the meaning of Section 38 (2) of the Finance Act, 1938;
- (iii) that the Appellant had at no time an interest in either the income arising under or the property comprised in such settlement (whatever its scope) within the meaning of Section 38 (3) and Section 38 (4) of the Finance Act, 1938;
- (iv) that the Appellant was not at any material time able or likely to be able to secure that income or assets of the Appellant Company would be applied directly or indirectly for his benefit to a greater extent than was represented by his holding of ordinary shares in the Company, and accordingly that an apportionment under Section 15 of the Finance Act, 1939, was not competent to the Commissioners, and
- (v) that in any event the Commissioners ought not in the circumstances of the case to think it appropriate to apportion the Company's income otherwise than in manner provided by Paragraph 8 of the First Schedule to the Finance Act, 1922.

11. It was contended on behalf of the Respondents:—

(a) as regards the year 1937–38,

- (i) that the formation of Langrange Trust and Investment Co., Ltd., the transfer thereto of assets by the Appellant, the execution of the deed of settlement of 19th December, 1929, and of the later deeds of appointment and revocation and the allotment of shares in the Company together form an arrangement and therefore a settlement within the meaning of Section 41 (4) (b), Finance Act, 1938;
- (ii) that the Appellant had power to determine the settlement, or a provision thereof, and in the event of the exercise of such power might become beneficially entitled to the property comprised in the settlement or to the income arising from the property so comprised—Section 38 (2), Finance Act 1938;
- (iii) that the Appellant at all material times had an interest in the income arising under and the property comprised in the settlement within the meaning of Section 38(3) and (4), Finance Act, 1938;

(b) as regards the years 1938–39, 1939–40 and 1940–41,

that the Appellant Clark was at all material times able or likely to be able to secure that income and assets of the Appellant Company would be applied directly or indirectly for his benefit and that it was appropriate that the whole of the Company's income for each of the said years should be apportioned to him.

12. We, the Commissioners, gave our decision as follows:—

In 1929 the Appellant transferred the bulk of his existing fortune to the Appellant Company and executed an irrevocable settlement of the deferred shares for the benefit of his children and their issue.



The constitution of the Appellant Company gives the Appellant the widest powers over its destiny and the application of its income and assets, both in his capacity as governing director and as the holder of 97 ordinary shares. The trustees of the settlement are the Appellant, his wife and his solicitor, and his two children, who take the immediate interest, are of full age. It is objected that any attempt by the Appellant to use his powers in his own interest and against the interest of the Appellant Company would be restrained by the Court. That presupposes active opposition to the Appellant by his children and his co-trustees or one of them. It appears to us that in the circumstances of this case there is a distinct possibility that out of respect or affection the two children would not oppose the Appellant and that if their consent or acquiescence was obtained no steps would be taken to restrain the Appellant. In our view the objection is an abstract one.

We hold, as regards the additional assessment to Sur-tax made on the Appellant for the year 1937-38:—

- (1) that the formation of the Appellant Company, the transfer to it of assets by the Appellant, the execution of the deed of settlement on 19th December, 1929, together with the later deeds of appointment and revocation, and the allotment of the Appellant Company's shares together constitute an arrangement and therefore a settlement within the meaning of the Finance Act, 1938, Section 41 (4) (b);
- (2) that the settlement comes within the terms of Section 38 of the Finance Act, 1938, and in particular Sub-sections (2), (3) and (4) of that Section.

With regard to years 1938-39, 1939-40 and 1940-41 directions were made on the Appellant Company under the provisions of the Finance Act, 1922, Section 21, and the Finance Act, 1939, Section 14, the actual income of the Appellant Company being wholly apportioned to the Appellant under the provisions of the Finance Act, 1939, Section 15. There is no appeal against these directions, the appeal being confined to the apportionments made for these years.

We hold that, as regards the said apportionments, the necessary requirements of the Finance Act, 1939, Section 15, were satisfied, and it appeared to us to be appropriate to apportion to the Appellant the whole of the actual income of the Appellant Company for each of the years in question.

We hold that the appeal fails on all grounds and leave the figures to be agreed.

13. The Appellant and the representative of the Appellant Company immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1927, Section 42 (7), and Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

R. COKE,  
H. H. C. GRAHAM, } Commissioners for the Special Purposes  
of the Income Tax Acts.

Turnstile House,  
94/99 High Holborn,  
London, W.C.1.

21st May, 1942.

The case came before Wrottesley, J., in the King's Bench Division on 6th and 9th November, 1942, when judgment was reserved. On 14th December, 1942, judgment was given in favour of the Crown, with costs.

Mr. J. Millard Tucker, K.C., and Mr. F. Heyworth Talbot appeared as Counsel for Mr. Clark and the Company, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

### JUDGMENT

**Wrottesley, J.**—In this case, the facts of which are shortly but adequately set out in the Case Stated, there are two matters upon which the Court is consulted.

The second point was the validity of the apportionment of income of the Appellant Company made under Section 15 of the Finance Act, 1939.

It appears that so far as this latter point is concerned the judgment of this Court in *Commissioners of Inland Revenue v. L.B. (Holdings), Ltd.*, 28 T.C. 1, is *in pari materia* and decisive against the Appellants. Here, therefore, the Appellants wish only to reserve their rights pending an appeal, either in that or some other case, to the effect that my decision there was wrong. Accordingly, I decide formally against the Appellants on the same grounds as in the case of *L.B. (Holdings), Ltd.*

That leaves the first point, which is as to the correctness or otherwise of the additional assessment to Sur-tax made on the Appellant for the year ended 5th April, 1938, in the sum of £20,258. This was made under the provisions of Section 38 of the Finance Act, 1938, and under Sub-sections (2) and (3) of that Section.

The Appellant Company is an investment company incorporated on 29th November, 1929. To it Mr. Clark, whom I shall refer to as the Appellant, sold his residence, Ripley Grange, and investments and life policies worth over £114,000. The purchase price was said to be £30,000, and on receipt of this sum the Appellant subscribed for 98 out of 100 ordinary shares and 29,900 deferred shares. By the Appellant's direction these 29,900 deferred shares were allotted to the trustees of a settlement, to be referred to hereafter. In 1933 a further 14,202 deferred shares out of 15,000 new £1 deferred shares were issued to the trustees of the settlement.

The settlement is dated 19th December, 1929. By it the Appellant, as settlor, settled on the trustees—himself, his wife and his solicitor—the 29,900 deferred shares on trust for the Appellant's two children, Charles Alexander, born 1906, and Kathleen, born 1912, and their issue and spouses, broadly speaking, in such shares and manner in all respects as the Appellant should from time to time appoint. At all material times, then, the Appellant held in his own right all the ordinary shares (except two) and the trustees held all the deferred shares.

On 4th October, 1933, by an irrevocable appointment, the Appellant ordered the income to be accumulated until 1950 or his death, whichever happened first. Accordingly, this income for the year ended 5th April, 1938, never was distributed.

The articles of the Company are in some respects somewhat unusual. It is a private company. The holders of the 100 £1 ordinary shares are entitled to only 10 per cent. per annum, and to be repaid capital paid up thereon, i.e., £1 per share, in full on a winding up. The Appellant was governing director of the Company and had complete control, in the most absolute sense, of the Company. He was not merely in this position as a director, but in addition, by article 13, if a meeting of the Company were held the governing director had always such a number of votes as might be necessary to be given in order to pass or reject, as he might require, any resolution upon which a decision had to be taken. The actual terms of articles 13

**(Wrottesley, J.)**

and 14 will be more eloquent than any paraphrase of mine. I will read them: article 13 has the sub-title "Votes of Members". "13. On any resolution, including a Special or Extraordinary Resolution, being proposed at any meeting of the Company, any Governing Director for the time being of the Company, if voting personally or by proxy, shall, in respect of the shares held by him, have, both on a show of hands and on a poll, such number of votes as may be necessary to be given to pass or reject as he may desire such resolution, and the provisions of this clause shall in this respect but not otherwise override the provisions of Clause 54 of Table A." Then article 14 has the sub-title "Governing Director". "14. (A) Mr. Charles Frederick Clark (hereinafter called 'Mr. Clark') shall be the Governing Director of the Company until he resigns that office or vacates the same under the provisions of these Articles, or dies, and whilst Governing Director he may exercise all or any of the following powers:—(i) He may exercise all the powers and discretions for the time being vested in the Directors, and the other Directors shall conform with and give effect to all directions given by him in relation to the Company's affairs. (ii) He may from time to time appoint Directors and define their powers and duties and remove any Director, whether appointed by him or not. (iii) He may at any time convene a General Meeting of the Company. (B) So long as Mr. Clark is Governing Director he shall be Chairman of Directors. (C) Mr. Clark may by will or any codicil thereto appoint a person to be Governing Director of the Company for life or for such period as may be specified in such will or codicil, and such appointment shall as from the date of the death of Mr. Clark be effective to confer on the person so appointed the position of Governing Director and vest in him or her during the period for which he or she is appointed all such powers, authorities and discretions as are by these Articles vested in Mr. Clark as Governing Director." Then (D) I need not read, but it enables, in the event of Mr. Clark dying intestate or without having exercised the last mentioned power, his legal personal representatives to exercise it. "(E) If Mr. Clark shall, whilst Governing Director of the Company, become incapacitated from any cause from attending to the business of the Company, whether permanently or for any period (of which incapacity the certificate of a duly qualified doctor shall be sufficient and conclusive evidence), Mr. Clark, if personally able to do so, or his wife, or any receiver of his estate or committee of his person, may by notice in writing to the Company appoint any person to be a Governing Director in the place of Mr. Clark, during the period of his incapacity, and may also by notice in writing remove any such person from the office of Governing Director without assigning any reason, and may appoint any other person in his or her stead, and all such appointments shall have the same effect as an appointment made under Sub-clause (C) or (D) of this clause: Provided that any Governing Director so appointed shall retire in favour of any Governing Director appointed under Sub-clause (C) or Sub-clause (D) of this clause, and cease to be a Governing Director as from such retirement. (F) If a resolution (whether Ordinary, Extraordinary or Special) be proposed which is directed to an alteration of this Article, or which would prejudicially affect the powers conferred on Mr. Clark or his representatives by this Article, Mr. Clark, or his representatives, if voting personally or by proxy, shall in respect of the shares held by him or them, both on a show of hands and on a poll, have a number of votes exceeding by one the number of votes given in favour of such resolution. (G) The provisions of this Article shall override the other provisions of the Articles of Association of the Company



(Wrottesley, J.)

“ for the time being, and the Articles of Association shall be construed and “ take effect accordingly.”

It is common ground between the parties that under the articles, the Appellant, Mr. Clark, could always do exactly what he liked, adding if he thought right to the shares issued; conferring if he thought right in respect of any shares issued or to be issued any rights he thought fit, and paying to himself if he thought right any sum he liked.

Section 38, Sub-section (2), of the Finance Act, 1938, is as follows: “ If and so long as the terms of any settlement are such that—(a) any person “ has or may have power, whether immediately or in the future, and whether “ with or without the consent of any other person, to revoke or otherwise “ determine the settlement or any provision thereof; and (b) in the event of “ the exercise of the power, the settlor or the wife or husband of the settlor “ will or may become beneficially entitled to the whole or any part of the “ property then comprised in the settlement or of the income arising from “ the whole or any part of the property so comprised; any income arising “ under the settlement from the property comprised in the settlement in any “ year of assessment or from a corresponding part of that property, or a “ corresponding part of any such income, as the case may be, shall be “ treated as the income of the settlor for that year and not as the income “ of any other person: Provided that, where any such power as aforesaid “ cannot be exercised within six years from the time when any particular “ property first becomes comprised in the settlement, this subsection shall not “ apply to income arising under the settlement from that property, or from “ property representing that property, so long as the power cannot be “ exercised.”

Settlement is defined in Section 41 (4) (b) as follows:—“ the expression “ ‘ settlement ’ includes any disposition, trust, covenant, agreement or “ arrangement, and the expression ‘ settlor ’ in relation to a settlement means “ any person by whom the settlement was made ”.

The Crown contended that in view of the definition of “ settlement ” to be found in Section 41 (4) (b), the formation of the Company and the general arrangement under which the Company was formed, the deed of settlement was entered into, and the deed of appointment was made, all constitute an arrangement which is therefore part of the settlement; and in view of the decisions of the Court of Appeal in *Commissioners of Inland Revenue v. Payne*, 23 T.C. 610, and the *Chamberlain* case, 25 T.C. 317, by which I am bound, it is useless to argue this matter before me; Mr. Tucker only wishes to reserve the point, since one of these cases is the subject of an appeal to the House of Lords.

That leaves for consideration other matters arising under Section 38, Sub-sections (2), (3) and (4). In order to bring the case within Sub-section (2), the Crown must establish that the terms of the settlement are such that Mr. Clark has power to revoke or otherwise determine the settlement or any provision thereof. I understood Mr. Tucker to agree that Mr. Clark could bring this about by winding up the Company; and that this flows from the decisions of the Court of Appeal in the above cases. But would the exercise of that power bring it about that Mr. Clark or his wife would or might become beneficially entitled to the whole or any part of the property or income comprised in the settlement? The Appellant said it would not; the Crown said it would. Upon this no Court has as yet pronounced, and my decision is therefore asked for.

Now the terms of the settlement, coupled with the deed of appointment, are such that neither the Appellant nor his wife would *rebus sic stantibus*

(Wrottesley, J.)

become beneficially entitled to anything beyond the £100, that is to say, the return of the capital on the ordinary shares.

On the other hand, the settlor's powers were such, under the articles of association of the Company, that he could have diverted to his own purposes the whole of the income of the Company under the guise of remuneration for his services as governing director; or he could have caused an alteration in the capital structure of the Company and the rights attached to it, so that the whole of the assets of the Company were distributed to him, either as an ordinary shareholder, or by right of other shares which he should cause to be issued.

It is needless to dilate on the various devices which might be employed by the Appellant if he were minded to get control of the income or capital of the Company, and so of the trust lands and funds. The point at issue here is whether if he acted so he could be said to be beneficially entitled, in view of the rights of the beneficiaries, to say nothing of his co-trustees, to commence a shareholders' action or proceedings in Chancery against him for breach of trust.

I start from this, that on the face of it by winding up the Company it is clear that the Appellant *rebus sic stantibus* would not become beneficially entitled to the whole or any part of the settled property, except as to £100.

Is it a fair use of language to say that the circumstances, that is to say, all the circumstances, were such that he "might become beneficially entitled"? This is an extremely wide phrase, as I think, intentionally wide. Ordinarily, of course, Courts of Law do not impute to trustees that they are likely to use powers to deprive their beneficiaries of the benefit of the trust funds for their—the trustees'—own personal advantage. But I do not think the Court is intended to be so limited in construing Sections like that under construction here.

There was a very simple method by which the Appellant could have made it clear that the powers in the articles were not to be used in any event for his own advantage, or so as to defeat the interests of the deferred shareholders, and that was by so providing in the articles. Instead of that I find provisions such as articles 13 and 14.

Not without doubt, therefore, I have come to the conclusion that the Appellant here was a person who had or might have a power, without the consent of any person, to revoke or otherwise determine the settlement or a provision thereof, and that if he used it, he or his wife might become beneficially entitled to the said property or income.

As to the suggestion that the Appellant could be made to disgorge anything which he might take in this way by appropriate proceedings, I am not satisfied as to this. Before granting any such relief any Court would of necessity have to look at the whole of the arrangement, the source from which the settled property came, the nature of it and the powers taken openly by the governing director and settlor from the inception of the whole arrangement. I do not think that any proceedings whether by shareholders, or for the administration of the trust, would have any real chance of success, having regard to the history of the transaction. There flows, therefore, the result enacted in Sub-section (2), namely, that the income is to be treated as the income of the settlor.

I turn next to Sub-section (3) coupled with Sub-section (4), an alternative upon which the Crown relies to justify the action of the Commissioners of Inland Revenue. The question here is whether the income in this case, not

(Wrottesley, J.)

having been distributed, is one in which the settlor has an interest. The relative parts of Sub-sections (3) and (4) are as follows:—“(3) If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person . . . . (4) For the purpose of the last foregoing subsection, the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever”.

Even, therefore, if the Appellant here has not got any interest properly speaking in this income, he ought nevertheless to be treated as though he had, if either income or property may become payable to or applicable for his benefit in any circumstances whatsoever. It is the grammar of the Section, so I will not try to improve on it.

It is difficult to conceive of wider language than this. It obviously has a far wider scope than the provisions of Sub-section (3). On the other hand some limitation is intended to be conveyed by the language. Read literally it might cover every settlement in which the beneficiaries were grown up, and so able to dispose of their interests. For one can readily conceive of circumstances in which children will bind themselves to pay or apply for the benefit of a father or mother every farthing of the income coming to them under a trust. So to construe the words “in any circumstances whatsoever” would be to reduce the Sub-section to an absurdity. This however is unnecessary. The Court is not, as I understand the Section, to give rein to its powers of imagination; it is to look at what I may call the realities of the case. In this connection it is not irrelevant, I hope, to remember that we have in the apparatus provided by the Chancery Courts and the law relating to trustees, a means by which any man or woman can assign property to trustees irrevocably, and so that the benefit of it shall accrue inevitably not to the settlor, but to the persons whom he or she names as beneficiaries, at least so long as those beneficiaries exist, or may come into existence. On the other hand, that same man or woman can, if so minded, devise an arrangement under which all the formalities and ritual appropriate to a trust shall be gone through, but all the time a *locus poenitentiae* shall be reserved, enabling the settlor to resume at will what he has apparently given away. Such matters appear to me to form the background against which these provisions are to be interpreted, though they are far from being the only matters relevant for the consideration of the Court, in a case of this kind.

With language so wide as this, it may well be that the edges of its content may be blurred; borderline cases may well fall some day to be considered by this Court. But in this case, looking at the articles, the general effect of which I have set out above and two of which I have read, and the Appellant's absolute powers therein, and to all the surrounding circumstances, including those referred to in paragraph 9 of the Case, I cannot say that the finding of fact on the part of the Special Commissioners was a finding for which there is no foundation.

I refer to the finding in paragraph 12 of the Case: “The constitution of the Appellant Company gives the Appellant the widest powers over its destiny and the application of its income and assets, both in his capacity as governing director and as the holder of 97 ordinary shares. The trustees

(Wrottesley, J.)

“ of the settlement are the Appellant, his wife and his solicitor, and his two children, who take the immediate interest, are of full age. It is objected that any attempt by the Appellant to use his powers in his own interest and against the interest of the Appellant Company would be restrained by the Court. That pre-supposes active opposition to the Appellant by his children and his co-trustees or one of them. It appears to us that in the circumstances of this case there is a distinct possibility that out of respect or affection the two children would not oppose the Appellant and that if their consent or acquiescence was obtained no steps would be taken to restrain the Appellant. In our view the objection is an abstract one. We hold, as regards the additional assessment to Sur-tax made on the Appellant for the year 1937–38—(1) that the formation of the Appellant Company, the transfer to it of assets by the Appellant, the execution of the deed of settlement on 19th December, 1929, together with the later deeds of appointment and revocation, and the allotment of the Appellant Company's shares together constitute an arrangement and therefore a settlement within the meaning of the Finance Act, 1938, Section 41 (4) (b); (2) that the settlement comes within the terms of Section 38 of the Finance Act, 1938, and in particular Sub-sections (2), (3) and (4) of that Section. With regard to years 1938–39, 1939–40 and 1940–41 directions were made on the Appellant Company under the provisions of the Finance Act, 1922, Section 21, and the Finance Act, 1939, Section 14, the actual income of the Appellant Company being wholly apportioned to the Appellant under the provisions of the Finance Act, 1939, Section 15.” Then they held that the appeal failed on all grounds, and left the figures to be agreed.

The same train of reasoning as that which led me to the conclusion that the terms of this settlement, looked at in the wider sense, are such that he could by winding up the Company put himself in a position where he might become beneficially entitled to the property or income, leads me with even less difficulty to say that he has an interest in the settled property within the meaning of Sub-section (3), because of the very wide definition given to interest in Sub-section (4).

If a settlor chooses to equip himself with such powers as are to be found in articles 13, 14 (A), 14 (F) and 22 of the articles of association of the Company in this case, he cannot complain if it should be said that there are circumstances in which he could, if he liked, resume the whole of the property of which he had apparently divested himself.

Now upon that what do you ask? I suppose you ask that the appeal be dismissed.

**Mr. Stamp.**—Will your Lordship simply dismiss the appeal with costs?

**Wrottesley, J.**—That the appeal be dismissed with costs. Is that the proper Order?

**Mr. Talbot.**—There is a slight correction. There are two appeals, the appeal of Mr. Clark and the appeal of the Investment Company. They are quite separate.

**Mr. Stamp.**—Yes. There are two appeals.

**Wrottesley, J.**—What about the first point? I had better reserve that. Nothing turns on that.

**Mr. Talbot.**—It will be adequate, I agree with my learned friend, if the appeal be dismissed with costs.

**Wrottesley, J.**—Of course, you want the appeal in either case dismissed with costs on the other points.

**Mr. Stamp.**—On both points.

**Mr. Talbot.**—But there are two appeals.

**Mr. Stamp.**—I think it will be enough for all purposes to dismiss the two appeals with costs.

**Wrottesley, J.**—Yes. I think that is the proper Order. Be it so.

---

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Scott, Luxmoore and du Parcq, L.J.J.) on 3rd, 8th and 9th December, 1943, when judgment was reserved. On 1st February 1944, judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Mr. J. Millard Tucker, K.C., Mr. N. C. Armitage and Mr. F. Heyworth Talbot appeared as Counsel for Mr. Clark and the Company, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

---

#### JUDGMENT

**Scott, L.J.**—I will ask Luxmoore, L.J., to read his judgment first, and then du Parcq, L.J., will read his and my judgment.

**Luxmoore, L.J.**—The Special Commissioners made an additional assessment to Sur-tax on the Appellant Clark for the year of assessment 1937–38 in the sum of £20,258, and made apportionments of the income of the Appellant Company in respect of the assessment years 1938–39, 1939–40 and 1940–41, respectively.

The additional assessment to Sur-tax was made on the Appellant Clark under the provisions of Section 38 of the Finance Act, 1938; while the apportionments under which the whole of the actual income of the Appellant Company for the respective assessment years under consideration was apportioned to the Appellant Clark were made under the provisions of Section 15 of the Finance Act, 1939; in the case of the assessment year 1938–39 pursuant to directions made under Section 21 of the Finance Act, 1922, and Section 14 (2) of the Finance Act, 1937, and in the case of the last two assessment years pursuant to the two last-named Sections and Section 14 of the Finance Act, 1939. There was no appeal against the directions, nor was there any appeal in respect of the apportionments of the Appellant Company's estate or trading income for these years.

The Appellant Clark appealed against the additional assessment to Sur-tax for the assessment year 1937–38, and the Appellant Company appealed against the apportionments in respect of the assessment years 1938–39, 1939–40 and 1940–41. The Special Commissioners dismissed both appeals. The Appellant Clark and the Appellant Company required the Special Commissioners to state a Case for the opinion of the High Court. The case was heard by Wrottesley, J., who affirmed the decision of the Special Commissioners and dismissed both appeals. The Appellant Clark and the Appellant Company have both appealed to this Court. So far as the appeal of the Appellant Clark is concerned, Wrottesley, J., held that he was bound by the decisions of this Court in *Commissioners of Inland Revenue v. Payne*, 23 T.C. 610, and *Chamberlain v. Commissioners of Inland Revenue*,



(Luxmoore, L.J.)

25 T.C. 317. After the decision by Wrottesley, J., the *Chamberlain* case was heard on appeal in the House of Lords and the decision of this Court was reversed. It is admitted on behalf of the Crown that the last-mentioned decision governs the appeal of the Appellant Clark to this Court and that such appeal must consequently be allowed.

But the appeal of the Appellant Company remains. Wrottesley, J., held that his judgment in *Commissioners of Inland Revenue v. L.B. (Holdings), Ltd.*, 28 T.C. 1, in which this Court has just delivered judgment, was *in pari materia* a decision against the Appellant Company, and he decided against the Appellant Company on the same grounds as enunciated by him in the *L.B. (Holdings)* case. I agree that so far as the question of construction is concerned the decision in the *L.B. (Holdings)* case governs this case; but it is essential to consider the facts of this case in relation to that question. It seems to me that the facts in this case are widely different from the facts in the *L.B. (Holdings)* case and that the Special Commissioners have not taken into consideration all the facts which require consideration in the present case. First and foremost, in considering whether Mr. Clark is able, or likely to be able, to secure that income or assets will be applied for his benefit, the Special Commissioners must consider whether the trustees of the settlement and the beneficiaries would be likely to act in accordance with Mr. Clark's wishes if he desired to use the trust income either in whole or in part for his own benefit. The first point of difference between the facts of this case and those of the *L.B. (Holdings)* case is that Mr. Clark is not the sole trustee of the settlement and that there is at least one independent trustee who is in no way related to Mr. Clark or his family, and is a solicitor. Secondly, the persons interested in the income to be considered include persons other than his own children, namely, the issue of such children, including issue yet unborn, because the income is not immediately distributable—it is directed by the settlement to be accumulated and capitalised—but in this connection it must be remembered that Mr. Clark has power to revoke any of the beneficial interest given to his children or their issue. The chances that the trustees would agree to the income being retained by Mr. Clark in breach of trust are obviously far more remote than if Mr. Clark had himself been the sole trustee, and so is the chance that the beneficiaries would condone any such breach of the trust if and when the appropriate time arrives, than if the only beneficiaries to be considered were his own children. Thirdly, the actual conduct of the trust business points in the same direction, for from its inception the trust has been conducted on the recognised lines applicable to trust affairs. The whole income has invariably been paid to the trustees and placed by them in a properly constituted trust account, and not a penny piece has found its way into Mr. Clark's pocket. A careful consideration of the findings of fact as set out in the Case leaves no doubt in my mind that the Special Commissioners have not directed their attention to these points. The Section requires that the Special Commissioners must be satisfied that the persons concerned are likely to act in accordance with Mr. Clark's wishes. The Special Commissioners have not so found. What they state is: "It appears to us that in the circumstances of this case there is a distinct possibility that out of respect or affection the two children would not oppose the Appellant and that if their consent or acquiescence was obtained no steps would be taken to restrain the Appellant. In our view the objection is an abstract one." The finding that a possibility exists, even when coupled with the adjective "distinct", does not satisfy the provisions of the Section

(Luxmoore, L.J.)

that the Special Commissioners must be satisfied that the persons concerned are likely to act in accordance with Mr. Clark's wishes. For these reasons I think the appeal should be allowed and the case remitted to the Special Commissioners for their further consideration.

It was argued that Mr. Clark was able to secure that the income or assets of the investment company, or a substantial part of it, should be applied for his benefit by reason of the wide powers vested in him as its governing director. It is true that he could provide a salary for himself as governing director, but he could not fix that salary at a sum out of all proportion to his services without laying himself open to legal proceedings to restrain such action, for it would obviously be a fraud on the minority of those interested in the investment company. As the trust is at present constituted Mr. Clark's children alone could not prevent such an action being brought because they are not the sole beneficiaries interested in the income. No doubt Mr. Clark is able to provide a proper salary for himself as governing director of the investment company, and the Special Commissioners would, I think, under the provisions of Section 15 of the Finance Act, 1939, be entitled to consider and should consider this in connection with the question of apportionment of the investment company's actual income. Indeed Mr. Tucker in the course of his reply admitted that this could be so.

As already stated, I would allow the appeal and remit the case to the Special Commissioners for their reconsideration in the light of the matters to which I have called attention.

I would give the Appellant Company the costs of the appeal to this Court and also in the Court below. The appeal of the Appellant Clark should also be allowed with costs here and below.

**du Parcq, L.J.**—This is an appeal by Mr. Clark and the Langrange Trust and Investment Co., Ltd. (in liquidation) against a judgment of Wrottesley, J., who affirmed a decision of the Special Commissioners. Two questions of law were involved in the Case stated by the Special Commissioners:—

(1) Whether an additional assessment for Sur-tax made on Mr. Clark for the year 1937-38 was rightly made on the ground that the formation of the Appellant Company together with the execution of a deed of settlement and other deeds, and the allotment of the Appellant Company's shares, constituted a "settlement" within the meaning of Section 41 (4) (b) of the Finance Act, 1938, and as such, came within the terms of Section 38 of that Act.

(2) With regard to the years 1938-39, 1939-40 and 1940-41, whether, on the facts found by the Special Commissioners, an apportionment of the whole of the Appellant Company's income to Mr. Clark under Section 15 of the Finance Act, 1939, had been rightly made.

The Special Commissioners and the learned Judge answered both these questions affirmatively.

With regard to the first question, the learned Judge founded his judgment on the decision of this Court in *Chamberlain v. Commissioners of Inland Revenue*, 25 T.C. 317. That decision was, however, reversed in the House of Lords, [1943] 2 All E.R. 200, after the learned Judge had given his judgment, and the Attorney-General conceded that in the light of the decision of the House of Lords the Appellant must succeed on this part of the case. To that extent, therefore, it is plain that the appeal must be allowed.

On the second question the learned Judge delivered judgment in these words: "It appears that . . . the judgment of this Court in *Commissioners of Inland Revenue v. L.B. (Holdings), Ltd.*, 28 T.C. 1, is *in pari materia* and

(du Parcq, L.J.)

“decisive against the Appellants . . . I decide formally against the Appellants  
“on the same grounds as in the case of *L.B. (Holdings), Ltd.*”(1)”

The case of *L.B. (Holdings), Ltd.* was argued before the present appeal, and before delivering judgment in that case we had the advantage of hearing both appeals fully argued. It is unnecessary that we should now repeat what we have said in our judgment in *L.B. (Holdings), Ltd.* as to the true construction of Section 15 of the Finance Act, 1939, and as to the principles by which the Special Commissioners should be guided when they are applying it. Nor do we think it necessary to recapitulate the facts of the present case, which are fully set out in the Case Stated.

In our judgment the Special Commissioners did not correctly construe or apply the Section. They held that Mr. Clark was either able, or likely to be able, to secure that income or assets of the Appellant Company would be applied for his benefit to a greater extent than was represented in the value for apportionment purposes of his relevant interest in the Company. It is clear from their findings of fact that he could only achieve this end if he acted in an unlawful manner or at least in a manner inconsistent with the terms of the settlement. Admittedly he could be restrained by the Court from so acting, or, alternatively, compelled to make restitution, if he had not procured the concurrence or acquiescence of both his co-trustees, one of them a solicitor, and also of his beneficiaries. Were the persons “likely to act in accordance with his wishes”?—see Section 15 (3)—it being understood that the “wishes” in question would be directed to the advantage of Mr. Clark and the detriment of the beneficiaries. If they were not likely so to act, Mr. Clark was neither “able” nor “likely to be able” to secure the advantage envisaged by the Section. There is no finding that the solicitor would have been prepared to acquiesce in a breach of trust, and it is surprising that the Court should be asked to assume without evidence that he would do so. It is hardly necessary to say that it cannot be assumed that a solicitor who is a trustee may be relied on to act in accordance with the wishes of a client if those wishes conflict with the terms of the trust and of the solicitor’s duty to the beneficiaries. The findings of the Special Commissioners are not very clear, but we understand them to mean that, if the beneficiaries were prepared to acquiesce in conduct which *prima facie* would amount to a breach of trust by Mr. Clark as well as an abuse of his rights and powers as shareholder and governing director, it is not likely that the co-trustees would have objected. We will assume that this inference may fairly be drawn. Even so, there is no finding that the beneficiaries were likely to act in accordance with Mr. Clark’s wishes, or that they were likely to concur or acquiesce in any breach of trust or duty by him.

In language which was no doubt carefully chosen the Special Commissioners say: “It appears to us that in the circumstances of this case there is a “distinct possibility that out of respect or affection the two children would not “oppose the Appellant”. The argument for the Crown seems to suggest that it was right, by a benevolent interpretation (that is to say, an interpretation which would tend to prevent the mischief against which the Section is directed) to read the words “distinct possibility” as equivalent to “likelihood” or “probability”, and reliance was placed on the compendious finding at the end of paragraph 12 of the Case: “We hold that, as regards “the said apportionments, the necessary requirements of the Finance Act, “1939, Section 15, were satisfied”. In our opinion it is impossible to read such a general finding, which may be based on an erroneous con-

(1) See page 61 *ante*.

(du Parcq, L.J.)

struction of the Section, as enlarging the specific finding of fact which precedes it. That finding is clear and precise, and it is hardly respectful to the Special Commissioners, who are accustomed to exercising a judicial or quasi-judicial function, to suggest that they do not distinguish between what is possible and what is likely or probable. The distinction is one which is constantly impressed upon juries, and if a Judge were to direct a jury that they should find for the plaintiff if they thought it possible that his allegations were true, a verdict for the plaintiff would normally be set aside. Where the conduct of human beings is in question many things are possible, and even (if the qualification adds anything) distinctly possible, which are very far from being probable. We do not profess to understand the comment of the Special Commissioners that "the objection" (namely, the contention that a wrongful use of Mr. Clark's powers would be restrained by the Court) was "an abstract one." If they mean that it is not at all certain that Mr. Clark would have been restrained if he had sought to act irregularly, it may equally well be said that it is by no means certain that he would ever have sought to act irregularly, so that the question of acquiescence might never arise.

In the circumstances we do not think that it is desirable, or that it would be just, to put the Appellant to the expense and hazard of a further hearing before the Special Commissioners in their judicial capacity. The Respondents have had a full opportunity of establishing a case for a full apportionment against Mr. Clark, and have failed to satisfy the Special Commissioners of the facts necessary to support it. It is in the public interest, in Revenue cases as in others, that litigation should have an end.

In our judgment the appeals should be allowed. As to the year 1937-38 the additional assessment must be discharged. With regard to the years 1938-39, 1939-40 and 1940-41 the apportionment to Mr. Clark of "the whole of the actual income of the Appellant Company for each of the 'years in question'" must be set aside.

The position now is that, although the apportionment which has been made is set aside, the directions which were given under Section 21 (1) of the Finance Act, 1922, stand. It will be open to the Special Commissioners, acting as a body in their administrative capacity, to make a new apportionment "in accordance with the respective interests of the members". In so doing they must be guided by our decision, which is that there is no sufficient ground for making an apportionment to Mr. Clark on the footing that he was either "able" or "likely to be able" to secure what he could secure only by using unlawful or irregular means with the concurrence or acquiescence of the other trustees and of the beneficiaries.

The question whether any, and if so what, apportionment should be made to any persons other than Mr. Clark is not now before us.

The Order of Wrottesley, J., as to costs must be set aside, and the Appellants will have their costs of the appeals from the Special Commissioners both in this Court and before the learned Judge.

**Mr. Hills.**—My Lords, I have to make the same application as I made on the last occasion, but a little more decisively here, because the tax has gone altogether on any view.

**Scott, L.J.**—Your merits are not identical in the two cases.

**Mr. Hills.**—No; but the question of construction of the Statute and loss of tax is important.

**Scott, L.J.**—The merits from the point of view of the appeal are not identical. Are you making any offer about costs?

**Mr. Hills.**—My Lord, I think it is habitual in the case of my clients to submit to the Order which your Lordships may think fit rather than to make an offer.

**Scott, L.J.**—Yes. I put the question only; I am not imposing any terms.

**Mr. Hills.**—My Lord, of course one always feels this—I do not know how much money is involved in this case—but it is a Sur-tax payer and if you are taking a case to the House of Lords which involves a construction of the Statute it may well be that the taxpayer ought to have some consideration; but, of course, that does not always apply. We had in the other Court of Appeal the other day a Sur-tax case where a lot of money was involved, and the Master of the Rolls refused to impose any terms, although he was asked to. If your Lordship is minded to give leave I should prefer to leave it entirely to your Lordship, and I am not opposing your Lordship imposing any terms.

**Scott, L.J.**—What have you to say, Mr. Armitage?

**Mr. Armitage.**—I would submit that it is a case in which if leave is given at all—

**Scott, L.J.**—You know, it is simply a question of law, and I suppose you would say that leave ought not to be given.

**Mr. Armitage.**—It is a matter entirely of discretion, and I should submit on the facts of this particular case that if leave were given it should be only on stringent terms as to costs.

**Luxmoore, L.J.**—Really the same question of law arises in this as in the *L.B. (Holdings)* case<sup>(1)</sup>, although the application of it may be very different.

**du Parcq, L.J.**—I suppose you would say that a good deal turns here on a construction of the findings of the Special Commissioners?

**Mr. Armitage.**—Yes, my Lord.

**du Parcq, L.J.**—If you give a wider interpretation than we have to the Section and leave out all questions about lawful means and unlawful means and assume that you have only got a likelihood of consent—

**Mr. Armitage.**—That would not have defeated us.

**du Parcq, L.J.**—That may be putting it too favourably to you.

**Scott, L.J.**—I personally feel there ought to be leave to appeal to the House of Lords. That is my own view about it.

**Luxmoore, L.J.**—I agree.

**du Parcq, L.J.**—Then there ought not to be any terms.

**Luxmoore, L.J.**—No terms.

---

<sup>(1)</sup> 28 T.C. 1.



The Crown having appealed against the decision in the Court of Appeal regarding the apportionment of the Company's income under Section 15 of the Finance Act, 1939, the case came before the House of Lords (Lord Jowitt, L.C., and Lords Thankerton, Porter, Goddard and Uthwatt) on 16th, 17th and 18th January, 1946, when judgment was reserved. On 22nd March, 1946, it was ordered that the case be remitted to the Special Commissioners for further consideration of the evidence already before them, and to make further findings of fact and state such inferences as they drew from those findings.

---

**Lord Thankerton.**—My Lords, I have had the privilege of considering the opinion about to be delivered by my noble and learned friend Lord Uthwatt, and desire to express my concurrence in it.

I have also been requested by my noble and learned friends **Lord Jowitt, L.C.**, and **Lord Goddard** to express their concurrence also in that opinion.

**Lord Porter.**—My Lords, I also have had an opportunity of seeing that opinion and concur in it.

**Lord Uthwatt.**—My Lords, the point of construction of Section 15 of the Finance Act, 1939, raised by this case is identical with that dealt with by this House in *Commissioners of Inland Revenue v. L.B. (Holdings), Ltd.* (28 T.C. 1) and upon that matter I do not desire to add anything.

The question that remains is whether in all the circumstances, and in light of the construction put by this House upon the Section, the case should be sent back to the Special Commissioners for reconsideration, or whether the apportionments of income to Mr. Clark made by the Special Commissioners should, as ordered by the Court of Appeal, be set aside, or, as Wrottesley, J., thought, should stand. The matter to be considered is the effect of the finding of the Commissioners, but to follow that finding it is necessary shortly to state the leading facts of the case.

The Respondent Company was incorporated on 29th November, 1929, as a private company limited by shares, its capital being divided into ordinary shares and deferred shares. Under the Company's articles of association (which incorporated Table A, with modifications) the ordinary shares were entitled to a 10 per cent. cumulative preferential dividend and, on a winding up, to repayment of capital and any arrears of dividend. Subject to the rights of the ordinary shareholders, the holders of deferred shares alone were interested in dividends and assets. Dividends might be declared by the Company in general meeting, but no dividend was to exceed the amount recommended by the directors or the governing director.

As regards voting rights, Mr. Clark, voting in respect of the shares for the time being held by him, could, until September, 1939, secure the passing or rejection of any resolution. In that month the article relating to this matter was replaced by an article which provided that, in the case of joint holders, all the holders must concur in the voting; but notice of any meeting was required to be given only to the joint holder named first in the register of members. Under the articles the shares were at the disposal of the directors who were to be entitled to allot or dispose of them as they thought fit. The directors of the Company were Mr. Clark and his wife, Mr. Clark being chairman of directors.

Mr. Clark was governing director of the Company with wide powers of control. He could remove any director and he could exercise all the powers of directors. Notwithstanding his position as governing director, Mr. Clark was entitled to contract with the Company and to vote in respect of any contract in which he was interested. Moreover, such voting rights were attached to his

**(Lord Uthwatt.)**

shares as precluded the Company from prejudicing his position as governing director without his consent.

At all material times the issued capital consisted of 100 ordinary shares and 44,102 deferred shares. Mr. Clark held 97 ordinary shares and his wife, son and daughter each held one. The deferred shares were held by the trustees of a settlement dated 19th December, 1929; 29,900 of these shares fully paid had been allotted by Mr. Clark's direction to these trustees on the formation of the Company, and the remaining 14,202 were in 1933 subscribed for by them and allotted accordingly.

The trusts declared by the settlement of 1929 were from time to time altered under a power contained in the deed. In the ultimate result the relevant trusts were in substance that the trust fund was divided into moieties, one of which was held, subject to a trust for accumulation, upon trust for Mr. Clark's son Charles (born in 1906) for life, and after his death for his issue and spouse, and the other upon like trusts for the benefit of his daughter Kathleen (born in 1912) for life and her issue and spouse. The period of accumulation was to end on 19th December, 1950, or the earlier death of the settlor, but Mr. Clark had a power not a fiduciary power—to shorten the period of accumulation. Under the trust deed the trustees were given power to concur in any modification of the regulations of the Company, and to exercise any of their rights as members in such manner as they in their absolute discretion might think proper. The trustees of the settlement were Mr. Clark, his wife and his solicitor.

There were several transactions between the Company and Mr. Clark. On 13th December, 1929, Mr. Clark sold some property to the Company for £30,000. Ripley Grange, part of the property sold, was then leased to his wife. Other property and assets were bought by the Company. Mr. Clark, indeed, lent the Company £25,000 to finance one purchase, and subsequently released the Company from its indebtedness to him. In the result Mr. Clark was left with very little in the way of income-producing assets.

The Company was at all material times an investment company within the meaning of Section 20 (1) of the Finance Act, 1936.

In these circumstances directions were given under the Finance Act, 1922, Section 21, and the Finance Act, 1939, Section 14, as respects the income of the Company for the years ending 5th April, 1939, 1940 and 1941, and, pursuant to Section 15 of the Finance Act, 1939, the whole of the actual income of the Respondent Company was apportioned to Mr. Clark. There was no appeal against the directions but the Respondent Company appealed to the Special Commissioners against the apportionments, and the matter comes before the Courts on a Case stated by the Special Commissioners on that appeal.

The points at issue before the Commissioners were (1) whether Mr. Clark was or was not at any material time able or likely to be able to secure that income or assets of the Company would be applied directly or indirectly for his benefit, and (2) whether or not it was appropriate to apportion the whole income of the Company for each of these years to him.

The relevant parts of the Commissioners' decision are as follows: " In 1929 the Appellant transferred the bulk of his existing fortune to the Appellant Company and executed an irrevocable settlement of the deferred shares for the benefit of his children and their issue. The constitution of the Appellant Company gives the Appellant the widest powers over its destiny and the application of its income and assets, both in his capacity as

(Lord Uthwatt.)

“governing director and as the holder of 97 ordinary shares. The trustees of the settlement are the Appellant, his wife and his solicitor, and his two children, who take the immediate interest, are of full age. It is objected that any attempt by the Appellant to use his powers in his own interest and against the interest of the Appellant Company would be restrained by the Court. That pre-supposes active opposition to the Appellant by his children and his co-trustees or one of them. It appears to us that in the circumstances of this case there is a distinct possibility that out of respect or affection the two children would not oppose the Appellant and that if their consent or acquiescence was obtained no steps would be taken to restrain the Appellant. In our view the objection is an abstract one. . . . With regard to years 1938-39, 1939-40 and 1940-41 directions were made on the Appellant Company under the provisions of the Finance Act, 1922, Section 21, and the Finance Act, 1939, Section 14, the actual income of the Appellant Company being wholly apportioned to the Appellant under the provisions of the Finance Act, 1939, Section 15. There is no appeal against these directions, the appeal being confined to the apportionments made for these years. We hold that, as regards the said apportionments, the necessary requirements of the Finance Act, 1939, Section 15, were satisfied, and it appeared to us to be appropriate to apportion to the Appellant the whole of the actual income of the Appellant Company for each of the years in question. We hold that the appeal fails on all grounds and leave the figures to be agreed.”

These findings call for comment. The Commissioners stress the wide powers of Mr. Clark. Like all powers they are capable of abuse. Abuses, it is true, may be checked or remedied by legal action, but, on the other hand, nothing may in fact be done. What are the chances that effective action would be taken in the present case? The Commissioners refer to a “distinct possibility”. The phrase “distinct possibility”, to my mind, means at least a possibility that can be rationally envisaged, and may or may not mean a possibility that ought to be rationally recognised as probable. Standing alone it would not appear to mean more. The statement by the Commissioners that the objection (i.e., the possibility that any attempt by Mr. Clark to use his powers in his own interest would be restrained by the Court) is an abstract one, however, conveys to my mind that, in their opinion, there was no substance in that objection. Such a view, I think, goes far beyond the earlier finding that the ability of Mr. Clark to secure income or assets of the Company for his benefit was a distinct possibility only. It may well be that those conversant with the Section, reading the first two paragraphs of the Commissioners’ finding, would have little doubt as to what the ultimate decision of the Commissioners would be, but that still leaves the difficulty of determining the exact conclusion at which the Commissioners have arrived.

I do not think the general finding that the requirements of the Section have been complied with carries the matter any further. It cannot, I think, be legitimately read as necessarily amounting to any fresh finding of fact. It might involve either a further inference from the findings of fact stated or an affirmation that these findings of themselves amount to the ability required by the Section.

In my view, therefore, the findings are ambiguous and, it may be, they are incomplete, but completeness is a matter for the Commissioners who alone are concerned with the findings they should make, the specific matters to be considered by them and the weight to be attached to any particular matter.

For these reasons, in my opinion, the case should be remitted to the Commissioners, not for the purpose of taking further evidence, but with a

**Lord Uthwatt.)**

view to their further consideration of the evidence already before them and resolving the ambiguity appearing in the statements referred to above, and making such relevant findings of fact as that evidence in their opinion justifies, and stating such inferences as they draw from those findings. In that connection the Commissioners should, I think, in amending the Case, have in mind the observations made by my noble and learned friend Lord Porter in *Thomas Fattorini (Lancashire), Ltd. v. Commissioners of Inland Revenue*, [1942] A.C. 643, at page 667 (24 T.C. 328, at page 358). These observations were as follows: " May I add that it would assist a tribunal, to which a case stated " is referred, if the facts found were carefully separated from the inferences " of fact and law based on them, and if those inferences themselves were " clearly distinguished. In *Bomford v. Osborne*<sup>(1)</sup> I expressed the view that " in setting out a case it was not legitimate, after stating the facts, to reach a " certain conclusion by saying that such and such a thing is found as a fact. " I am still of this opinion, and think that the final conclusion is not a fact " but an inference from facts previously set out, and that, therefore, that " conclusion is not binding on the tribunal to which the case is referred unless " it appears from the previous findings that there are facts which support it." With these observations I agree.

The only Order that I suggest should be made at the present stage is that this case be remitted to the Commissioners, and that the amended Case be reported to this House with a view to a further hearing of the appeal.

*Questions put:*

That the case be remitted to the Commissioners for the Special Purposes of the Income Tax Acts for further consideration, with a direction that they report the amended Case to this House.

*The Contents have it.*

In accordance with the Order of the House of Lords the following Supplemental Case was stated by the Special Commissioners.

## SUPPLEMENTAL CASE

Stated by the Commissioners for the Special Purposes of the Income Tax Acts pursuant to the Order of the House of Lords dated 22nd March, 1946.

We, the Commissioners who heard the appeal, state as follows:—

1. On 31st July, 1946, we heard both parties to the appeal.
2. We reconsidered the facts and evidence contained in the Stated Case dated 21st May, 1942. We heard no further evidence.
3. We preface our amended decision by a restatement of the following facts:—
  - (a) The powers granted to Mr. Clark by the memorandum and articles of association of the Company and possessed by him throughout.
  - (b) The directors of the Company were Mr. Clark, who was governing director, and his wife.
  - (c) The trustees of the settlement dated 19th December, 1929, were Mr. Clark, his wife, and Mr. R. C. Bartlett his solicitor.
  - (d) The transfer by Mr. Clark to the trustees of the settlement of practically the whole of his income yielding assets.
  - (e) The beneficiaries under the settlement were his son and daughter.

(1) [1942] A.C.14; 23 T.C.642.

4. We, the Commissioners, amend our decision as follows:—

In our opinion Mr. Clark had such powers under the memorandum and articles of association of the Company as to enable him, without in any way infringing the Company's regulations, to cause the income or assets of the Company to be applied directly or indirectly for his benefit. For instance he was able to arrange for payment to him, as remuneration, of a substantial part of the income of the Company. He was able to reconstitute the capital of the Company thereby securing for himself or for his benefit a new class of shares. He was able to arrange for loans to be made to him by the Company with or without security upon such terms as the Company might approve. He was able to finance other concerns, in which he was interested, out of the assets of the Company.

In our opinion a *prima facie* case existed that Mr. Clark was in fact able to secure that income or assets, whether present or future, of the Company would be applied directly or indirectly for his benefit. The question then to be decided is whether there was a reasonable probability that any effective action would be taken, by any person or persons interested, as would prevent Mr. Clark securing a benefit by any supposed transaction open to him if he had embarked upon it. In all the circumstances of the case we are unable to say that such a reasonable probability existed. Not every act taken by Mr. Clark would affect all the persons concerned; the son or daughter, in certain cases, would only be affected. We draw the inference from the facts as a whole and we find that Mr. Clark was in fact able to secure that income or assets, whether present or future, of the Company would be applied directly or indirectly for his benefit. We refer to this part of our decision as "the first case" under Section 15 of the Finance Act, 1939.

We now consider "the second case" under the Section as to whether Mr. Clark was likely to be able to secure that other persons having powers or rights affecting the disposal or application of the income or assets of the Company were or would be likely to act in accordance with his wishes.

In our opinion "the second case" is not appropriate to the facts. In view of the powers held by Mr. Clark under the memorandum and articles of association of the Company, the question is of probable effective opposition to any act done by *him* rather than assistance given by other persons, having the power, acting in accordance with his wishes.

If this opinion be erroneous, then, having regard to the provisions of Section 15 (3) (a) and (b) and the facts of the case, we draw the inference that Mr. Clark was likely to be able to secure that income or assets of the Company would be applied for his benefit, or would be applied to a greater extent than is represented in the value for apportionment purposes of any relevant interests which he has in the Company.

In all the circumstances of the Case it appeared to us to be appropriate to apportion to Mr. Clark the whole of the actual income of the Company.

We are requested to state that Mr. Clark has at all material times been in receipt of a considerable earned income derived from director's fees and salaries from other companies.

R. COKE,  
H. H. C. GRAHAM, } Commissioners for the Special Purposes  
of the Income Tax Acts.

Turnstile House,  
94/99 High Holborn,  
London, W.C.1.

19th August, 1946.



The case again came before the House of Lords (Viscount Jowitt, L.C., and Lords Thankerton and Uthwatt) on 28th March, 1947, when judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

The Solicitor-General (Sir Frank Soskice, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, K.C., Mr. N. C. Armitage and Mr. F. Heyworth Talbot for the Company.

---

#### JUDGMENT

**Lord Thankerton.**—My Lords, in this appeal we have now a report from the Special Commissioners which clears up the ambiguity which existed in the language of their Case stated for the Court.

It appears to me now that this case is almost completely, if not completely, covered by the decision of this House in a case which was decided just before hearing this case—the case of *Commissioners of Inland Revenue v. L.B. (Holdings), Ltd.*, 28 T.C. 1.

A question was raised by Mr. Tucker for the Respondents suggesting that there should be a further remit, I gather for the purpose of a possible fresh apportionment. My Lords, I think there is no substance in that suggestion at all. It seems to me quite clear that the Commissioners have in this report reaffirmed their finding as regards the apportionment and it requires no fresh consideration.

My Lords, for that reason I propose to your Lordships that the appeal should be allowed, that the decision of the Court of Appeal, so far as affecting the present Respondents, should be reversed, and that the decision of the King's Bench Division of Wrottesley, J., should be affirmed so far as affecting the present Respondents.

**Lord Uthwatt.**—My Lords, I concur.

**Viscount Jowitt, L.C.**—My Lords, I also concur.

#### *Questions put:*

That the Order of the Court of Appeal, so far as it affects the present Respondents, be reversed.

*The Contents have it.*

That the Order of the King's Bench Division, so far as it affects the present Respondents, be restored, and that the Respondents do pay to the Appellants their costs in this House, no costs to be paid in the Court of Appeal.

*The Contents have it.*

[Solicitors:— R. C. Bartlett & Co.; Solicitor of Inland Revenue.]

---