FTC/40/2009 and FTC/41/2009
[2010] UKUT 416 (TCC)

Income tax – Transaction in securities – Contribution by Company to QUEST – Sale by controlling shareholder of shares to QUEST – Notice under ICTAs.703 to counteract tax advantage – Served after enactment of ITA 2007 – Alternative notice under ITA 2007, s.698 – Which notice effective – Whether tax advantage – Whether tax advantage a main object – Yes - Appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

NIGEL GROGAN

Appellant

- **and –**

-

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

Respondents

TRIBUNAL: The President, the Hon Mr Justice Warren

Sitting in public in London on 21 and 22 June 2010

Andrew Thornhill QC and David Yates counsel, instructed by Haslers for the Appellant

Julian Ghosh QC and Andrew Westwood counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondent

DECISION

Introduction

1. This is an appeal from the decision released on 14 September 2009 ("**the Decision**") of the Tax Chamber of the First-tier Tribunal (Judge Wallace and Mr Menzies-Conacher) ("**the Tribunal**") concerning the application of the legislation affecting transactions in securities now contained in sections 682 to 713 of the Income Tax Act 2007 ("**ITA 2007**") prior to its amendment by the Finance Act 2010. These provisions ("the new provisions") are substantially the same as those ("the old provisions") previously found in sections 703 to 710 of the Income and Corporation Taxes Act 1988 ("**ICTA 1988**"). Mr Andrew Thornhill QC appears, together with Mr David Yates, for the Appellant ("**Mr Grogan**"). Mr Julian Ghosh QC appears, together with Mr Andrew Westwood, for the Respondents ("**HMRC**"). For ease of reference, I shall refer to these provisions, without distinction, as "the Code".

2. The factual situation to which HMRC seek to apply the statutory provisions is described by Mr Thornhill as one where a company, Nigel Grogan Ltd ("**the Company**") made a contribution of £633,150 to a qualifying employee share ownership trust ("**the QUEST**") and the trustees of the QUEST (**"the Trustees"**) used the monies contributed to acquire 15,750 ordinary £1 shares in the Company from Mr Grogan for £630,000. At the material time Mr Grogan was a director of and held all of the 70,477 issued ordinary shares in the Company. Prior to the creation of the QUEST, the other shareholder at the time was 3i Plc which held a 17.8% shareholding consisting of all 15,238 of the issued "A" Ordinary Shares.

3. Mr Grogan paid £57,929.20 of capital gains tax on this disposal. The effect of the Code, if applicable, would be to cause him to be liable for £157,500 of income tax (reduced to £99,570.80 after giving credit for the capital gains tax paid). The question which arises on this appeal is whether the transaction falls to be countered by the Code.

4. The Tribunal held that the Code did apply. Mr Grogan appeals against that decision.

5. HMRC cross-appeal in respect of one procedural issue. In order to invoke the provisions of the Code, HMRC served a notice on 31 July 2007 ("**the First Notice**") pursuant to the provisions of section 703(3) ICTA 1988. The Tribunal held that HMRC should have in fact served a notice under section 698(2) ITA 2007 and that the First Notice was invalid. HMRC later served a further notice ("**the Second Notice**") under the new provisions on 15 July 2009 during the course of the hearing before the Tribunal. The substance of the matter was sensibly dealt with by the Tribunal by reference to the Second Notice in case, as it eventually decided, the First Notice was invalid. Accordingly, the invalidity of the First Notice is not determinative of the appeal before me. However, the question is of wider importance to HMRC since, in other cases where notices have

been served under ICTA 1988 rather than ITA 2007, HMRC is now outside the 6 year time-limit for the issue of a new notice under ITA 2007.

The facts

6. In their skeleton argument on this appeal, Mr Ghosh and Mr Westwood have set out a summary of the facts taken from the Decision which is sufficient for present purposes and which I gratefully adopt with minor changes:

    a. In 2001, Mr Grogan held 82.2% of the shares in the Company. The balance of 17.8% of the shares was held by 3i Plc, which had provided third party capital to the Company.

    b. Up until 4th February 2003, the Company operated:-

        i. a Volkswagen dealership at 112 Parkway, Chelmsford ("the Parkway"), the freehold of which was owned by the Company;

        ii. a further Volkswagen dealership in Colchester (operated from leased premises);

        iii. an Audi dealership, also in Chelmsford (also operated from leased premises).

    c. On 4th February 2003, the Company sold the Volkswagen business (that is the Volkswagen dealership in Chelmsford, operated from the Parkway and the dealership operated from leased premises in Colchester) to a third party purchaser, Lindbrook Ltd. Under the agreement, Lindbrook Ltd acquired the entire business and assets of the Volkswagen dealerships, operated from the two respective sites, together with a transfer of the relevant staff, which comprised approximately two-thirds of the total employees of the Company. Lindbrook Ltd was also assigned the lease of the Volkswagen Colchester site and was granted a 12 month lease from the Company over the Parkway.

    d. In March 2003, Mr Grogan's advisers, Haslers, made a PowerPoint presentation to the Company which explained the precise tax implications of a shareholder selling shares in the Company to a QUEST and further explaining that full corporation tax relief was available for contributions by the Company to the QUEST. The presentation was clearly based on the positions of Mr Grogan and the Company.

    e. Haslers further advised the Appellant, on 6th November 2003, that the full corporation tax deduction on contributions by the Company to the QUEST would not be available after the accounting period ended 30th December 2003 when less favourable rules came into play.

f. Haslers made it clear that Haslers' fees were calculated entirely by reference to the reduced tax charge in the hands of Mr Grogan on the £630,000 received by him on the share sale to the QUEST, and corporation tax savings, compared to the tax charge had there been a dividend. Haslers' fee was entirely contingent on the tax savings. This is more fully explained in paragraph 40 of the Decision.

g. Mr Grogan implemented Haslers' advice on the basis on which it had been marketed to him. There were no material alterations made: the transactions were essentially unchanged from those in the presentation, albeit with different figures. The QUEST was established on 22nd December 2003, on which date the Company and Nigel Grogan Trustees Limited entered into a Deed of Trust establishing the QUEST. Participators in the Company were excluded from any benefit from the QUEST. Further, any new employees of the Company were excluded from any benefit from the QUEST for five years (in fact the Company had only one employee, Mr Grogan's secretary, following the sale of the Company's only business one month later: see below).

h. The Tribunal held that Mr Grogan was interested in and influenced by the personal tax implications of establishing the QUEST and selling shares to the QUEST. He had engaged Haslers on the basis that their fees were calculated entirely by reference to the tax savings; the Company had left its previous auditors because of their fees; Haslers' fees were calculated by reference to the application of the transactions in securities code in ICTA 1988 and Mr Grogan had previously raised personal tax concerns in rejecting a proposal put to him in relation to exploiting the facilities at the Parkway.

i. Mr Grogan sold 15,750 shares (being 18.4% of the total issued ordinary and "A" ordinary shares) to the QUEST for £630,000 on 23rd December 2003, which purchase price was funded by a contribution of £633,150 by the Company itself. The board had resolved on 19 December 2003 that the Company would make a contribution to the QUEST to fund that purchase including stamp duty.

j. It did not appear that Mr Grogan's objectives had changed from the time at which he had received Haslers' advice to the time of the implementation of the scheme.

k. At the time of this share sale to the QUEST, Mr Grogan had already received an offer from a third party, Hodgson Automotive Ltd ("Hodgson"), to acquire the Company's sole remaining business, the Audi dealership at Chelmsford, for £450,000. This offer originally had been made on 5th September 2003. The sale of the Audi dealership was completed on 30th January 2004 (one month following the establishment of the QUEST and the share sale by Mr Grogan).

l. Negotiations for the sale of the Audi franchise were, at the time of the establishment of the QUEST, at "an advanced stage" to use the words of the Tribunal. The sale of the Audi dealership would have resulted in the Company having only one employee, Mr Grogan's secretary, apart from Mr Grogan himself. In reaching its conclusions, the Tribunal observed that

> "Apart from the e-mails in late January 2004, [relating to a demand for a personal guarantee by the Appellant] there is nothing in the contemporary documents to suggest that the sale would not go forward; those e-mails indicate that the problem as to a personal guarantee was only raised at a late stage."

m. Mr Grogan had said that he was attracted by Haslers' proposals because such a scheme could operate as a long term incentive plan. However, he also stated that he did not aim to award shares to any employees in 2003 but wished to be seen as having made the gesture that a significant holding had been irrevocably allocated to employees and would be appropriated by the QUEST at some future period.

n. The Tribunal recorded (in spite of what Mr Grogan had said in his witness statement) that heads of terms had been agreed and signed between Hodgson and Mr Grogan by the time that the QUEST had been established and by the time that Mr Grogan had sold his shares to the QUEST.

o. At the time of the establishment of the QUEST and the sale of shares by Mr Grogan to the QUEST, the Company had already submitted a detailed planning application for the Parkway to Chelmsford Borough Council (for mixed office retail and residential uses). The Company made a series of abortive attempts to sell the Parkway between March 2005 and April 2007; on 12th April 2007 the Company sold the Parkway to a third party, the Swan Housing Association Limited, for £2.8 million.

p. The Tribunal observed that the Company's contribution of £633,150 to the QUEST and the sale of a substantial proportion of the Appellant's holding in the Company to the QUEST were "to put it at the lowest, surprising", given the impending sale of the Audi franchise to Hodgson and the fact that new employees could not benefit for 5 years.

q. Moreover, the Tribunal observed that Mr Grogan produced no satisfactory evidence of his commitment to the employee share incentives. He did not come across "as an apostle of employee share ownership". The Tribunal noted that a previous shareholder in the Company, Mr Barrington-Evans, who had sold his shares back to the Company in 2001, had paid for those shares. Further, a previous director of the Company, Mr Philips, did not receive any shares when Mr Barrington-Evans left.

r. Further, the Tribunal records the Mr Grogan's evidence that any liquidation of the Company (to obtain capital proceeds, rather than their income dividend) would have required a prior sale of the Parkway at the same time noting Mr Grogan's stated view that a sale could have been easily achieved. Mr Grogan is also recorded as having said that he did not seriously consider liquidation because the money was not available to repay his loan account and it would not have given him enough money to retire. He was only 45 and had no plans to case business.

The validity of the First Notice

8. It is convenient to deal first with HMRC's cross-appeal and to determine whether HMRC were correct to serve a notice under ICTA 1988 rather than under ITA 2007. First Notice was served under the provisions of section 703(3) ICTA 1988. This permitted HMRC to cancel a tax advantage within the Code on such basis as HMRC might "specify by notice served on [the taxpayer] as being requisite for counteracting the tax advantage".

9. The relevant transactions were the establishment of the QUEST, the contribution by the Company to the QUEST and the acquisition by the QUEST from Mr Grogan of an 18.5% holding of ordinary shares. They all took place in the year of assessment 2003-2004.

10. ICTA 1988 was effectively repealed, subject to transitional provision, for income tax purposes by ITA 2007 from 6 April 2007. This was, of course, long after all of the relevant transactions which I have just mentioned. Section 1027 and Schedule 1 (in particular paragraphs 153 to 161) made amendments to ICTA 1988 so that the Code as applicable by virtue of that Act continued to apply only for corporation tax purposes and not for income tax purposes. Section 1030 and Schedule 2 dealt with transitional provisions and savings. Subject to that, section 1034 dealt with the commencement of the Act. Subsection (1) provides relevantly as follows:

> "(1) This Act comes into force on 6 April 2007 and has effect—
> (a) for income tax purposes, for the tax year 2007–08 and subsequent tax years..."

11. The relevant transitional saving provision is found in paragraph 129 Schedule 2 ITA 2007:

> "*Transactions in securities: general*
>
> 129(1) Despite anything in this Act, Chapter 1 of Part 17 of ICTA (cancellation of tax advantages from certain transactions in securities) continues to apply so far as required for the purposes of notices under section 703(3) of that Act requiring adjustments to be made affecting tax years before

the tax year 2007-08; and a counteraction notice under Chapter 1 of Part 13 (transactions in securities) may not require such an adjustment to be made.

(2) Subject to that, Chapter 1 of Part 13 applies—

(a) whether or not the transaction or transactions, in consequence of which, or of the combined effect of which, the tax advantage has been or will be obtained, occur on or after 6 April 2007, and

(b) whether or not the tax year to which that advantage relates ("the tax advantage year") is a year before the tax year 2007-08,

but see section 698(5) (under which no assessments may be made as a result of a counteraction notice later than 6 years after the tax advantage year).

(3) This paragraph is to be interpreted as if it were part of Chapter 1 of Part 13."

12. The First Notice was served on 31 July 2007, that is to say after ITA 2007 had come into force. HMRC took the view that ICTA 1988 applied to Mr Grogan in the present case because all of the relevant transactions took place in 2003-2004 which was also the tax year in which Mr Grogan, according to HMRC, sought to obtain a tax advantage.

13. The Tribunal held that the First Notice was invalid. They noted – a statement of the obvious as they described it although, for my part, I do not see it as being as obvious as they did – that transitional savings were not needed for tax advantages obtained after 5 April 2007. They also found the wording of paragraph 129(2)(a) to be "curious" since ITA 2007 "obviously applies if the transactions occur on or after 6 April 2007". They saw it as an obtuse way of saying "notwithstanding that the transactions occur before 6 April 2007".

14. Next, focusing on paragraph 129(1), the Tribunal identified the issue as being whether the words "such an adjustment" in the tailpiece to that paragraph refer to <u>any</u> adjustment affecting tax years before 2007-08 or whether they refer to an adjustment following a notice under section 703(3) served before 6 April 2007 and thus necessarily affecting years before 2007-08

15. Put another way, are the words "served before 6 April 2007" to be read in before "under section 703(3)"? The Tribunal effectively answered the question they had asked themselves in the affirmative. Accordingly, since no notice was served under section 703(3) before 6 April 2007, paragraph 129(1) did not apply with the result that the First Notice was not valid.

16. The Tribunal recognised, however, that HMRC's interpretation avoided any argument that the new provisions had any retrospective effect. But they saw no answer to Mr Thornhill's submission that HMRC's interpretation made paragraph 129(2)(b) otiose. HMRC had argued that under section 1034(1)(a), ITA 2007 has effect for income tax purposes for the tax year 2007-08 and later years, but that paragraph 129(1) Schedule 2 ITA 2007 resulted in the provisions of ICTA 1988

continuing to apply for adjustments affecting tax years before 2007-08. But this would mean that paragraph 129(2)(b) was otiose because there could never be a case in which ITA 2007 could apply where the tax advantage year was prior to 2007-08. In contrast, on Mr Thornhill's argument, the tailpiece to paragraph 129(1) simply makes it clear that when ICTA does continue to apply, a notice under ITA 2007 cannot be issued; it avoids two notices requiring the same adjustment. This point was the foundation of the Tribunal's eventual decision on this issue. Mr Thornhill repeated the argument on this appeal, asking rhetorically why, if section 698 ITA 2007 can only ever apply where the tax advantage year is 2007-08 or later, Parliament has provided that it can apply "whether or not" the tax advantage year is a "year before the tax year 2007-08"? .

17. He also submits that the interpretation of paragraph 129 adopted by the Tribunal makes sense in terms of the regime set out in the Code. A person becomes liable to pay tax (or suffer any other detriment such as the refusal of payment or the recovery of a payment already made) only if and when a notice is served on him. A procedural step is therefore required on the part of HMRC in contrast with the normal position in relation to self-assessment. He refers to section 16(1)(c) Interpretation Act 1978 (which provides the general rule that where an Act repeals another enactment, the repeal does not, unless the contrary intention appears, affect any right, privilege, obligation or liability acquire, accrued or incurred under that enactment).

18. As to that, he comments that, as at 6 April 2007, HMRC had not taken the requisite procedural step to create a liability on Mr Grogan. It was therefore unnecessary to preserve the regime under ICTA 1988; HMRC could serve a notice under ITA 2007 instead. In contrast, in cases where notice had been served before 6 April 2007, there would be a subsisting liability on the relevant taxpayer which ought in principle to be preserved without HMRC needing to take a further procedural step by serving a further notice.

19. Mr Ghosh, for his part, submits that the appropriate notice to counteract the tax advantage obtained by Mr Grogan (if he did indeed obtain one) is one served under the provisions of section 703(3) in circumstances where all of the relevant transactions, including the relevant transaction or transactions in securities, occurred in years of assessment before 2007-08 and where the year of assessment in which Mr Grogan obtained that tax advantage (if he did) also occurred in a year before 2007-08. ITA 2007 has, he submits, no application in such circumstances; this is so even though the notice under section 703(3) - the First Notice in the present case - is served in the year of assessment 2007-08 or even later.

20. He must be right in submitting, as he does, that a taxpayer who, in 2003-04 undertook transactions and obtained or hoped to obtain a tax advantage in that year would expect, assuming he appreciated the risk at all, to be subject to the provisions of Chapter 1 Part 17 ICTA 1988. The statutory provisions might always change in the future, but in respect of past transactions and past tax

advantages, one might expect that transitional provisions would seek to maintain the position of individual taxpayers.

21. This, according to Mr Ghosh, is precisely what the transitional provisions unsurprisingly actually achieve, at least in relation to a taxpayer in the position of Mr Grogan where the transactions and the tax advantage all occurred prior to the 2007-08 year of assessment. This, he says, is the effect of the words "….so far as required for the purposes of notices under section 703(3) of [ICTA 1988] requiring adjustments to be made affecting tax years before the tax year 2007-08". Equally unsurprisingly he says, in order to prevent double assessment, no counteraction notice may be given under ITA 2007 to adjust tax years before the tax year 2007-08.

22. Accordingly, the present case is, he submits, within paragraph 129(1): an adjustment requires to be made to a tax year prior to 2007-08 (that is to say, to the year 2003-04) so that a notice has to be served under section 703(3) since, according to this argument, only a notice under that section can counteract a tax advantage by applying Chapter 1 Part 17 ICTA 1988 where all the relevant events took place and any tax advantage was obtained years ago; and this is so despite the enactment of ITA 2007.

23. It is part of Mr Ghosh's approach to the transitional provisions that they can apply <u>only</u> where all of the events and advantages were prior to the tax year 2007-08. Accordingly, the draftsman had to provide for two circumstances where otherwise there might be doubt about whether ITA 2007 applied at all. The first (catered for by paragraph 129(2)(a)) is where a relevant transaction or transactions in securities took place in a year of assessment prior to 2007-08 but where the tax advantage is or will be obtained in 2007-08 (or later). Mr Ghosh gives an example:

> Suppose in the present case that Mr Grogan had received not cash but loan notes with a face value of £630,000, from the QUEST, in 2003-2004. And suppose that he had redeemed the loan notes in 2007-2008. The tax advantage year is 2007-2008 (the year in which the loan notes were redeemed for £630,000 in capital form, rather than taking an income dividend of that amount). However one of the transactions in securities in consequence of which the tax advantage arose (the sale of the shares to the QUEST) took place in 2003-2004.

24. The second circumstance (catered for by paragraph 129(2)(b)) is where the tax advantage year (ie the tax year to which the tax advantage "relates") was prior to 2007-08 but where the advantage is or will be obtained in consequence of transactions in securities some of which took place after 6 April 2007. Mr Ghosh gives another example:

> Suppose in the present case that Mr Grogan had effected a slightly different arrangement from the scheme he actually implemented. Suppose that he had

sold his shares to the QUEST in 2006-07 but that the QUEST paid for these shares by selling the shares on to a non-UK resident person in 2007-08. These events could be close together – say on 2 April 2007 and 10 April 2007. The non-UK resident might then extract a dividend from the Company (outside the scope of the UK tax charge altogether) equal to the purchase price of the shares he acquired from the QUEST in 2007-08 and re-sell the relevant shares (for little or no value) to the QUEST or Mr Grogan in 2007-08. Mr Grogan would thereby have extracted funds indirectly from the Company. But here the tax advantage year occurs prior to 2007-08 (in 2006-07 when he obtained a capital receipt rather than an income dividend) but certain of the relevant transactions, including the relevant transactions in securities, (the sale of the shares by the QUEST Trustees, the dividend paid by the Company to the non-UK resident and the re-sale of the shares) took place in 2007-08.

25. Mr Ghosh further submits that the approach which found favour with the Tribunal could produce unfair results for a taxpayer. He was particularly concerned with the retrospective effect of ITA 2007. It is no doubt the case that the rewritten provisions were intended to produce the same results as the superseded provisions, but experience suggests that re-writes of this sort do not always succeed in preserving the previous law in its entirety. An interpretation should be adopted, if possible, which ensures there is no change in the exposure of a taxpayer in respect of transactions and tax advantages occurring wholly in the past. He emphasises the point by reference to potential amendments to ITA 2007 (noting that it has indeed been significantly amended by Finance Act 2010). He suggests that there is therefore a danger to taxpayers such as Mr Grogan who might face the prospect of increased liabilities in respect of past transactions as a result of such amendments. I accept that that could occur; but amending legislation might well contain transitional provisions of which Mr Grogan would be able to take advantage. In any case, if appropriate transitional provisions were not included in amending legislation, then it is not immediately apparent to me why persons in the following two cases should necessarily be treated differently in terms of retrospectivity:

a. Case 1: all relevant transactions take place late in the tax year 2006-07 and the tax advantage is obtained in that tax year.

b. Case 2: all relevant transactions take place early in the tax year 2007-08 and the tax advantage is obtained in that tax year.

26. Whilst accepting that there is something in the point that the transitional provisions in ITA 2007 should be interpreted so far as possible as excluding any element of retrospective effect, I do not think that there is anything in the point concerning future amendment to ITA 2007 itself.

27. It can be seen from the discussion thus far that Mr Thornhill's construction of paragraph 129(1) reads the reference to notices as being to notices given before 6 April 2007, being the commencement date of ITA 2007. The provisions which

continue to apply are then those which follow on from the service of a notice such as the implementation of the counter-measures specified in the notice. This approach gives meaning to the words "so far as required": such a provision is required since, without it, the counter-measures (at least insofar as not already implemented by 6 April 2007) might be seen to be incapable of implementation with a need, therefore, to serve a new notice under ITA 2007. On this interpretation, the focus is on the purposes of the notices, that is to say the purposes of requiring adjustments to be made affecting tax years before 2007-08.

28. Mr Ghosh's construction is that paragraph 129(1) encompasses the service of notices where the tax advantage and the relevant transactions in securities pre-date the tax year 2007-08. On this interpretation, the focus is not so much on the purposes of the notices (*ie* the counteraction measures) but on the provisions of Chapter 1 insofar as they are relevant to implementing the notice procedure and carrying out the terms of any notice to the extent that such notices are ones which require adjustments to be made affecting tax years before 2007-08. It would follow, on this interpretation, that section 703(9) ICTA 1988 (notice to intended recipient of a notice under section 703(3)), for instance, would continue to apply being a provision which can properly be described as one which applies for the purposes of notices under section 703(3). On this interpretation, the words "so far as required" do not add anything but serve to emphasis that the continued application of Chapter 1 is for the stated, and limited, purpose of notices in relation to adjustments affecting those years.

29. It is odd to my mind that the draftsman of the Act has adopted the wording which he did if the intention was to produce Mr Thornhill's construction. If he had intended that the transitional provision in paragraph 129(1) was to apply only in cases where a notice had already been served, it would have been easy for that to have been stated clearly using words such as "…continue to apply for the purposes of notices under section 703(3) served before 6 April 2007". It would be altogether unnecessary to refer to adjustments at all.

30. Instead, the qualification placed on notices which fall within paragraph 129(1) is that they are ones "requiring adjustments to be made affecting tax years before the tax year 2007-08". Mr Thornhill's construction faces this difficulty: there is nothing in the wording of that qualification which supports the conclusion that the notice itself must be served before the start of that tax year.

31. It is, of course, easy to suggest that wording could be clearer once an ambiguity has been identified; and the fact that clearer wording could have been used does not conclude the matter in favour of HMRC especially in the light of the redundancy argument. Indeed, Mr Thornhill might reasonably respond that the draftsman could, if he had intended to provide as Mr Ghosh submits he has in fact provided, have used words such as "….continue to apply where both (a) the transaction or transactions in securities took place and (b) the tax advantage was obtained before 6 April 2007".

32. It is to be remembered that paragraph 129(1) applies despite any provisions in ITA 2007. Thus it applies notwithstanding the provisions of section 1027 and Schedule 1 which would otherwise take references to income tax and individuals out of Chapter 1 Part 17 of ICTA 1988. Accordingly, paragraph 129(1) is most naturally to be read as continuing the application of Chapter 1 in all cases where a notice would require adjustments to be made affecting tax years before 2007-08. In other words, despite the removal of references to income tax and individuals in section 703 in particular, section 703 continues to apply for the purpose of notices so far as they would affect tax years prior to 2007-08. I consider it would be an unnatural and somewhat artificial construction to read the provision in the way suggested by Mr Thornhill taking paragraph 129(1) in isolation.

33. Paragraph 129(1) is not, of course, to be read in isolation. It is to be read in the context of paragraph 129 as a whole and, indeed, as part of Chapter 1 of Part 13 of ITA 2007. That enables Mr Thornhill to mount the redundancy argument and has led to an exchange in correspondence between counsel and myself since the hearing in an attempt on my part to see if an example exists to rebut the redundancy argument.

34. In that regard, Mr Ghosh's first approach, as already identified, is to say that paragraph 129(1) applies only where all the relevant events, including the relevant transactions in securities, occur prior to the tax year 2007-08 and where the tax advantage year also occurs prior to that tax year. The example in paragraph 24 above is one where the tax advantage year was 2006-07 but where relevant transactions in securities took place in 2007-08. This is an example of a case to which paragraph 129(1) does not, he says, apply but where the tax advantage year was prior to 2007-08.

35. In the alternative, examples have been constructed in which, it is said, the tax advantage year is prior to 2007-08 but the adjustments required to be made would be to, or include, the year 2007-08 or later years.

36. As to the first approach, one difficulty facing Mr Ghosh's argument is that paragraph 129(1) is expressed to apply where a notice requires adjustments to be made affecting tax years prior to 2007-08; it says nothing about when a relevant transaction in securities must take place. There is accordingly nothing in paragraph 129(1) which expressly restricts its operation only to cases where the relevant transaction in securities takes place prior to the tax year 2007-08. Unless it is restricted in that way by some other process of interpretation, it follows that Mr Ghosh's second example would fall within paragraph 129(1). The example would not, therefore, meet the redundancy argument.

37. Having said that, it is well-arguable that paragraph 129(1) applies only where all of the adjustment years (*ie* the years to which the counteraction notice requires adjustment to be made) are prior to the tax year 2007-08. It is also well arguable that a year in which a relevant transaction in securities takes place is always a year which is "affected" by a counteraction notice. If both those arguments are correct,

it would follow that paragraph 129(1) does apply, as Mr Ghosh maintains, only where the relevant transactions do occur before that tax year. The example would then effectively meet the redundancy argument.

38. As to other examples, take this one, raised by Mr Thornhill.

> Suppose that the taxpayer receives capital payments over three years as a result of a single transaction in securities. He asks whether the taxpayer has received one or three tax advantages. If he has received one, it could be suggested that a counteraction notice could take the form of three assessments over three years.

39. If that suggestion were correct, then this would an example of a case where the tax advantage in Year 1 is countered by action in Years 1, 2 and 3. All of those years would be affected. Year 1 could be prior to 2007-08 but Year 3 could be that year or a later year. The example thus provides a rebuttal of the redundancy argument, at least if it is correct that all of the affected years must be prior to the year 2007-08.

40. However, Mr Thornhill counters this by suggesting that it is arguable that there are in fact three separate tax advantages requiring three sets of adjustments; or that there is one advantage which should be countered by a single assessment for one year.

41. It seems to me that there is no clear answer to the correct way in which the tax advantage or advantages in the example are to be countered. It may well be – and I incline to the view that it would be – possible for HMRC to adopt different courses. If the case is properly to be seen as a single tax advantage and if there has to be a single assessment, it must be well arguable that the assessment could be made for Year 1 or for Year 3. If there are three advantages, it is surely well arguable that there can be a single assessment to counteract all three advantages.

42. In any case, even if Mr Thornhill is correct in suggesting that there is only one tax advantage and a need for only a single assessment raised for Year 1, it does not follow that Years 2 and 3 are not "affected". If it were not for the counteraction, the capital payments would fall to be treated as such with the result that capital gains tax would very likely be payable. In this context, it appears that, under the old provisions, HMRC were put to an election whether to tax in accordance with the Code or raising a charge under the capital gains tax legislation. Even if no tax had yet been paid, it seems to me that Years 2 and 3 would be "affected" since the election must surely affect every year in respect of which the election has an impact, that is to say every year in which the tax is different from that which it would be if the election had not been made. The position is *a fortiori* when capital gains tax has already been paid in respect of Years 2 and 3. It is impossible, in my view, to say that those years are not "affected" when repayment has to be made of the tax already paid as a result of the election (or set off against the larger income tax liability pursuant to the counteraction notice).

43. So here we have an example of a tax advantage year in Year 1 (say 2005-06) with Years 1, 2 and 3 (2005-06, 2006-07 and 2007-08) all being years affected even if there in only one counter-notice raising an assessment in Year 1. If paragraph 129(1) applies only where the counter-notice affects only years prior to 2007-08, the example still provides a rebuttal to the redundancy argument. There is then nothing in paragraph 129(2)(b) which supports Mr Thornhill's argument that a notice falling within paragraph 129(1) has to be served before the commencement of the tax year 2007-08.

44. It is not, however, clear that paragraph 129(1) does apply in that restricted way. It might apply even where the affected years include 2007-08 or later, the only requirement being that at least one year prior to 2007-08 is affected. I think, but do not decide the point, that this is an unlikely construction and the best that can be said, from Mr Grogan's point of view, is that there is a doubt.

45. I should here remark that a number of other examples were considered in the correspondence between Counsel and myself after the hearing. Those examples all go to reinforce the conclusion that it not clear (i) how the Code actually operates in certain cases or (ii) what the extent of counteraction notices which HMRC may make actually is.

46. I conclude that it is, at the very least, well arguable that action can be taken which "affects" years which are later than the year to which the tax advantage relates. It is also well arguable (and incline to the view that it is correct) that all of the years "affected" must be prior to 2007-08. This, to my mind, makes it entirely unsurprising that the draftsman has proceeded by providing that the new provisions of ITA 2007 should apply in all cases not within paragraph 129(1) by using the words in paragraph 129(2)(b) "**whether or not"** the tax advantage year is before the tax year 2007-08. Any residual doubt about whether there can be a case which does not fall without paragraph 129(1), but where the tax advantage year is prior to the year 2007-08, is removed.

47. As I have said, I do not decide that all of the affected years must be before 2007-08 for a case to fall within paragraph 129(1). It is not necessary to do so in the present case since all the relevant events took place several years ago and long before 2007-08. I leave it open, should the case ever arise, whether a notice should be served under the old provisions or the new provisions when affected years include both a year before 2007-08 and that year or a later year. Whatever the correct answer to that question, the present case is within paragraph 129(1) with the result that the First Notice was valid.

The substantive issue

48. The Tribunal held on the facts as outlined above that the Code did apply with the result that the Second Notice was effective and took effect according to its terms.

49. The Code (whether one looks at ICTA 1988 or ITA 2007) applies to a person (where that person is an individual) in respect of a transaction or transactions in securities if the person is in a position to obtain or has obtained an income tax advantage

   a. in circumstances where one or more identified provisions applies in relation to that person (previously those found in A to E of section 704 ICTA 1988 and now in sections 686 to 690 ITA 2007 (circumstances A to E referred to in the heading to those sections); see section 703(1)(a) ICTA 1988 and section 684(1)(a) ITA 2007) and

   b. in consequence of the transaction or the combined effect of the transactions (see section 703(1)(a) ICTA 1988 and section 684(1)(b) ITA 2007).

50. An income tax advantage is treated as obtained or obtainable in consequence of a transaction or transactions if it is obtained or obtainable by the person in consequence of the combined effect of the transaction or transactions and the liquidation of a company (see section 703(2) ICTA 1988 and section 684(3) ITA 2007). The circumstances referred to describe, broadly speaking, transactions the net effect of which is to reduce a taxpayer's charge to income tax.

51. Counteraction (pursuant to a notice under section 703(3) ICTA 1988 or section 698 ITA 2007) is effected by "adjustments" which are an assessment, the nullifying of a right to repayment, the requiring of a return of a payment already made or the recalculation of profits or gains or a liability to income tax (see section 703(3) ICTA 1988 and section 698(4) ITA 2007).

52. The term "transaction in securities" is widely defined in section 709(2) ICTA 1988 and section 713 ITA 2007. In the present case, the sale of shares by Mr Grogan to the QUEST was a "transaction in securities".

53. In the present case, we are concerned with the question whether the contribution of the purchase prices of the shares by the Company to the QUEST and the acquisition of Mr Grogan's shares in the Company by the QUEST are within the circumstance specified in the Code under section 704D ICTA 1988 and section 689 ITA 2007 (Circumstance D). Section 689 provides as follows:

> "(1) This section applies in relation to a person if subsections (2) to (4) apply.
>
> (2) The person receives consideration in connection with—
>
> (a) the distribution, transfer or realisation of assets of a relevant company (see section 691), or
>
> (b) the application of such assets in discharge of liabilities.
>
> (3) The consideration—

(a) is or represents the value of—

(i) assets which are available for distribution by way of dividend by the company, or

(ii) assets which would have been so available apart from anything done by the company,

(b) is received in respect of future receipts of the company, or

(c) is or represents the value of trading stock of the company.

(4) The person so receives the consideration that the person does not pay or bear income tax on it (apart from this Chapter)."

54. The relevant provisions of ICTA 1988, although worded very differently, are to the same effect.

55. There is however, what is commonly referred to as an "escape clause" found in section 703(1) ICTA 1988 and section 685 ITA 2007. The wording is, again, different but the effect is the same. The Code is inapplicable if the taxpayer can show both

a. that the transaction or transactions are effected:

   i. for *bona fide* (section 703(1)) or genuine (section 685(2)) commercial reasons or
   ii. in the ordinary course of making or managing investments and

b. that enabling tax advantage or an income tax advantage to be obtained is not the main object or one of the main objects of the transaction or any of the transactions.

56. The Tribunal considered that Mr Grogan had obtained a tax advantage. As a result of the series of transactions starting with the formation of the QUEST and the payment from it to the Company including the relevant transaction in securities (*ie* the sale of shares by Mr Grogan to the QUEST), Mr Grogan had received a capital sum when otherwise he could have obtained a substantial dividend from the Company. On that footing, the question for the Tribunal was whether the escape clause applied which raised two issues:

a. whether the sale of the share by Mr Grogan to the QUEST had a *bona fide* or genuine commercial purpose; and

b. whether the main object or one of the main objects of that sale was the avoidance of income tax.

57. The Tribunal was not satisfied on a balance of probabilities that the escape clause applied and dismissed Mr Grogan's appeal. It appears that Mr Grogan had failed to satisfy them not only that the sale had a genuine commercial purpose but also that the avoidance of income tax was not a main object.

The grounds of appeal

58. Mr Grogan now seeks to appeal the Decision in two respects, each of which raises, according to Mr Thornhill, an issue of law:

    a. There was no “tax advantage” since HMRC could not, after taking into account the existence of the QUEST, postulate an alternative transaction which would have given rise to a receipt in the hands of Mr Grogan which was liable to income tax. It was not open to HMRC to ignore the existence of the QUEST. This argument is somewhat technical.

    b. In any event, the Code cannot apply to the situation where an express statutory scheme (namely the QUEST scheme in the present case) has been utilised and complied with. This cannot constitute tax avoidance. Parliament has seen fit to make this scheme available in the interests of employees; the scheme carries certain tax advantages and consequences with it and it is not open to HMRC to remove those advantages and consequences by invoking the Code.

59. Mr Thornhill addressed these grounds of appeal in reverse order since the second is of wider scope than the first. I will consider his arguments in the same order.

Mr Grogan’s case that transactions in securities code cannot apply to an express statutory scheme

60. Mr Thornhill refers to the observations of Lord Nolan in *IRC v Willougby* [1997] 1 WLR 1071 at 1079, [1997] STC 995 at 1003. This was a case which concerned the transfer of assets abroad provisions in relation to which there was an “escape clause”, section 741 ICTA 1988, with clear parallels to that found in the legislation with which I am concerned. Mr Launcelot Henderson, appearing for the Crown, drew a distinction between “tax avoidance” and “tax mitigation”. These are recorded and discussed by Lord Nolan, starting at p 1079B:

    > “……Tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation), it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax.

My Lords, I am content for my part to adopt these propositions as a generally helpful approach to the elusive concept of "tax avoidance," the more so since they owe much to the speeches of Lord Templeman and Lord Goff of Chieveley in *Ensign Tankers (Leasing) Ltd. v. Stokes* [1992] 1 A.C. 655, 675C-676F, 681B-E. One of the traditional functions of the tax system is to promote socially desirable objectives by providing a favourable tax regime for those who pursue them. Individuals who make provision for their retirement or for greater financial security are a familiar example of those who have received such fiscal encouragement in various forms over the years. This, no doubt, is why the holders of qualifying policies, even those issued by non-resident companies, were granted exemption from tax on the benefits received. In a broad colloquial sense tax avoidance might be said to have been one of the main purposes of those who took out such policies, because plainly freedom from tax was one of the main attractions. But it would be absurd in the context of section 741 to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament has deliberately made. Tax avoidance within the meaning of section 741 is a course of action designed to conflict with or defeat the evident intention of Parliament….."

61. Just as with the transfer of assets abroad provisions (now contained within Chapter 2 of Part 13 of ITA 2007), the transactions in securities provisions are intended to counter transactions whereby the taxpayer avoids a liability to income tax due to structuring his affairs in a certain way and where tax avoidance (or the "obtaining of a tax advantage") is the main or one of the main purposes behind the relevant structure. Both regimes create a liability to income tax unless one can rely on an "escape clause". Under both regimes one must demonstrate (i) that the relevant transaction/transfer was genuinely commercial and (ii) that neither the main purpose nor any of the main purposes was the obtaining of a tax advantage or avoiding liability to taxation. Given the similarity of the two sets of provisions, Mr Thornhill submits that the comments of Lord Nolan are applicable also to the transactions in securities provisions.

62. Accordingly, he submits that the use of the QUEST was not tax avoidance or "the obtaining of a tax advantage" and that, therefore, regardless of the findings of fact by the Tribunal, Mr Grogan was entitled to rely on the escape clause. Alternatively, the transfer by the Company to the QUEST was not a circumstance to which section 704D (1) ICTA 1988 or section 689(2)(a) ITA 2007 applies.

63. He submits that the proposition that utilising the QUEST legislation in order to obtain an income tax advantage is abusive and outside the object of the QUEST legislation in section 67 of Finance Act 1989 is misplaced. He points out that the QUEST legislation is highly prescriptive and, if followed, can only result in benefit for the employees of companies who do not have material interests. Thus, in the present case, Mr Grogan and those associated with him were excluded from benefit as to which there was no dispute before the Tribunal.

64. He also says that one of the fiscal encouragements of the QUEST regime was the availability of roll-over relief for capital gains tax purposes on the sale of shares to

a QUEST. The legislation therefore assumed that capital gains tax was the target of the encouragement which would not be the case if the Code applied. The conclusion which he draws is that the establishment of the QUEST by the Company fell within the object of the QUEST legislation. I cannot attach any significance to that. The relevant provisions were repealed well before December 2003 and no relevant Parliamentary intention can be derived from the previous availability of roll-over relief.

65. As part of these prescriptive terms, under section 67 of Finance Act 1989 the trustees of the QUEST were obliged to buy shares in the Company (and only in the Company) within 9 months of the end of the Company's period of account in which the contribution to the QUEST is charged as an expense of the Company unless they distributed cash to employees within that time. In the context of individual vendors, such as Mr Grogan, this would inevitably give rise to situations where a capital receipt would arise where otherwise it could be said that monies channelled into the QUEST by a company could have been distributed in the form a dividend.

66. If HMRC's view of the law is held to be correct, Mr Thornhill submits that this would have meant that any QUEST arrangement to which an individual sold his shares would, assuming the contributing company was a company within the meaning of section 691 ITA 2007, automatically fall within the Code unless that individual could rely on the escape clause contained within section 703(2) ICTA 1988 and section 685 ITA 2007. This cannot have been intended by Parliament.

67. I agree with that last proposition. But the result described by Mr Thornhill will only be arrived at if he is correct in saying that HMRC's view of the law leads to this result. Mr Ghosh, of course, says that it does not. Usually, a QUEST might be expected to have a genuine commercial purpose (for instance, incentivising staff) and reflect no objective of tax avoidance within the Code. It is on the facts of the present case that HMRC say the position is different because the QUEST in reality had no discernible commercial purpose and its motivating feature was the avoidance by Mr Grogan of income tax.

Mr Grogan's case that no tax advantage arose in consequence of a transaction in securities

68. Mr Thornhill has a second, and more technical, point. He starts with the requirement that the relevant tax advantage must be obtained "in consequence of a transaction or transactions in securities". I have set out the material facts from which it is to be noted that the first events to take place were the establishment of the QUEST and the resolution by the board to transfer cash from the Company to the QUEST to fund the purchase. It was only later that the QUEST contracted to purchase the shares. It is probably the case that the cash was transferred before, or at the time of, the completion of the purchase. Mr Thornhill submits, on the footing that the transfer of cash occurred before the sale of the shares. That sale was the first "transaction in securities"

69. Mr Thornhill points out that for HMRC to demonstrate a “tax advantage”, they need to establish that the receipt by Mr Grogan of the purchase price of the shares could have occurred in another manner so as to be charged. This is not as the result of an express provision in the legislation; rather, that requirement is implicit and is found in the test set out by Lord Wilberforce in *IRC v Parker* [1966] 1 AC 141 at 178-9 when discussing section 43(4)(g) Finance Act 1960. That provision defined tax advantage as

> "a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains."

70. Lord Wilberforce said this:

> “The paragraph, as I understand it, presupposes a situation in which an assessment to tax, or increased tax, either is made or may possibly be made, that the taxpayer is in a position to resist the assessments by saying that the way in which he received what it is sought to tax, prevents him from being taxed on it; and that the Revenue is in a position to reply that if he had received what is sought to tax *in another way* he would have had to bear tax. In other words, there must be a contrast, as regards the “receipts”, between the actual case where these accrue in a non-taxable way with a possible accruer in a taxable way, and, unless this contrast exists the existence of the advantage is not established.”

71. The Tribunal referred to this passage at paragraph 98 of the Decision. They also referred to *Inland Revenue Commissioners v Cleary* [1968] AC 766, (1967) 44 TC 399, 422E-423C, pointing out that it was not necessary, in making the contrast, to compare like with like. As Viscount Dilhorne put it:

> “The definition does not require the contrast of like with like…..and to give it such an interpretation would narrow the scope of the section considerably.”

72. They identified the tax advantage as the receipt by Mr Grogan of the purchase price of the shares <u>as capital</u> so that he did not pay income tax on it (see paragraph 106 of the Decision), later noting that, if the QUEST had not been set up but Mr Grogan had been paid a dividend, he would have been liable to income tax (see paragraph 123 and, referring to Haslers' advice expressly making the comparison, paragraph 128). It is clear from this, I consider, that the Tribunal properly identified the test and then applied it by comparing the taxation consequences of (i) a notional dividend and (ii) the actual payment of the purchase price of the shares.

73. Mr Thornhill, however, describes this as merely “tacit acceptance” of the comparative transaction and suggests that the Tribunal failed to give sufficient

consideration to testing that comparison. He says that the key question, which received no analysis in the Decision, was whether HRMC could ignore the existence of the QUEST and the contribution made to it by the Company when seeking to maintain that the monies received by Mr Grogan could have been paid as a dividend. It cannot, he says, be ignored for these reasons:

a. The monies received by Mr Grogan could not have been paid by way of dividend since the money concerned had already been paid to the QUEST, the payment being deductible against the profits of the Company under section 67 Finance Act 1989.

b. HMRC should not be permitted to ignore transactions which create genuine third party rights since such transactions form part of the relevant background against which HMRC have to demonstrate a tax advantage. After the transfer to the QUEST, Mr Grogan and the Company could not alter or reverse the terms on which the cash was held inside the QUEST. The QUEST cannot be said to be simply a conduit or device by which Mr Grogan extracted cash from the Company. If the reference to "conduit or devise" is intended to suggest that the QUEST was a sham and not intended to have effect in the real world, I have to say that such a suggestion must be rejected. It is not, and never has been, any part of HMRC's case that the QUEST was a sham or that the transactions involved (creation of QUEST, payment of cash to it by the Company and sale or shares) were not all genuine transactions taking effect according to their terms.

c. That genuine third-party rights were created for the beneficiaries of the QUEST is evidenced by the fact that Mr Grogan was, according to Mr Thornhill, substantially worse off in financial terms as a result of the establishment of the QUEST. I would add that, as the Tribunal stated, the strongest pointer is support of Mr Grogan's evidence that he was motivated by wish to incentivise employees rather than by a tax advantage was the overall effect on his financial position, saying that on any view his overall position would have been better if he had received the purchase price as a dividend.

d. HMRC did not advance a case to show how the money, once transferred to the QUEST, could have been received by Mr Grogan in a manner chargeable to income tax. Mr Thornhill concludes that if HMRC are not permitted to ignore the transfer to the QUEST, there is no tax advantage arising to Mr Grogan.

74. Mr Thornhill presented this argument in an alternative way. He agrees that, in postulating a comparative transaction at all (as one must do in accordance with Lord Wilberforce's test), HMRC are entitled to ignore the transactions in securities which in fact occurred. I am not sure that "ignore" is really the right word: the transactions in securities cannot be ignored since the correct

identification of a comparator transaction must clearly take account the effect of the actual transactions. But the sense of what Mr Thornhill says is, I think, clear.

75. He accepts that it must follow that any other acts done following a relevant transaction in securities are also to be ignored even if those acts themselves did not constitute transactions in securities (always assuming that they would not have occurred but for any prior transactions in securities). He refers to Viscount Dilhorne's comments in *Williams v IRC* [1980] STC 535 at 542I to 543A:

> "It is not, I think, necessary to list the many transactions coming within the definition which were entered into from the inception of the scheme. They were all necessary ingredients of it, intended to secure tax free gains to the taxpayer and those gains do not cease to be in consequence of those transactions if one or more links in the chain of operations does not come within the definition."

76. I make the same observations about "ignore" in this context as I have made in relation to ignoring a transaction in securities. The point as I see it is that the identification of the comparator transaction involves taking account not only of the transaction in securities but the various links in the chain from that transaction to the end result.

77. But it does not follow – this is the core of Mr Thornhill's argument – from the passage cited that an act done <u>prior</u> to any transaction in securities can also be taken into account. Mr Thornhill submits that the chain of operations must still start with a transaction in securities otherwise the words "in consequence of" mean no more or less than that the transaction in securities must be a *sine qua non* of the tax advantage. That would not be to give the words "in consequence of" their proper meaning in the context of these anti-avoidance provisions. Accordingly, as I see the argument, it is not permissible, in identifying the comparator transactions, to take account of events prior to the first transaction in securities. If it were otherwise, one would be identifying a tax advantage obtained not in consequence of the transaction in securities but in consequence of events other than transactions in securities and which did not come about as a result of, or following on from, those transactions in securities.

HMRC's responses to both arguments and discussion of the rival contentions

78. In the course of the following paragraphs, I identify Mr Ghosh's arguments and address the rival contentions.

79. In responding to Mr Thornhill's arguments, Mr Ghosh made three preliminary points with each of which I agree and which, of course, I have in mind in addressing the arguments on each side:

    a. The question whether or not a transaction in securities was effected for *bona fide* or genuine commercial reasons and whether they were informed by a main tax avoidance objective are questions of fact: *Inland Revenue*

Commissioners v Brebner [1967] 2 AC 18, 28B-C, 30A-C , *Addy v Inland Revenue Commissioners* [1975] STC 601, 611b-d.

b. The test to establish whether a taxpayer had a genuine commercial reason for effecting a transaction and whether he had a main tax avoidance objective is subjective: *Brebner* at 30A-C.

c. The terms of the Code (under both ICTA 1988 and ITA 2007) should be construed purposively, to give effect to their self-evident objective of preventing disguised income receipts from being treated as capital (with or without the assistance of third parties).

80. Jumping ahead a little, it is also right to bear in mind what the Tribunal decided in relation to the critical issues relevant to the escape clause. According to Mr Ghosh, they decided

a. first, that Mr Grogan had no commercial purpose in making the share sale to the QUEST and

b. secondly, that Mr Grogan had a main tax avoidance objective in making the share sale.

81. I consider that that might be putting matters rather too high. What the Tribunal decided was that, on a balance of probabilities, the escape clause did not apply. On the facts of the case, they saw the two limbs of the escape clause as different sides of the same coin. As they put it, if Mr Grogan succeeded in satisfying them that none of the transactions had as their main object or one of their main objects to enable a tax advantage to be obtained (on the basis that the sole object was to provide employee incentives), he would also succeed in showing that there were genuine commercial reasons for the transactions. It was for that reason that the Tribunal addressed, primarily, the tax advantage objective. In reaching their conclusions on that, they did not expressly state that Mr Grogan had no commercial reason for effecting the sale.

82. It is, however, implicit (albeit not logically necessary) from the combination of three matters ((i) the way they connected the two limbs of the escape clause on the facts of the case as just described (ii) their actual decision on the tax advantage object and (iii) what they said in paragraph 116 of the Decision (that Mr Grogan produced no satisfactory evidence of his commitment to employee incentives and did not come across as an apostle of employee share ownership)) that they did not consider Mr Grogan to have had a genuine commercial reason for the scheme. In any case, it is perfectly clear that they were not satisfied (the onus being on Mr Grogan) that none of the transactions had as their main object or one of their main objects to enable a tax advantage to be obtained. It is also clear that they rejected employee incentivisation as the motivation for the adoption of the QUEST scheme; and it was such incentivisation which had provided the only purported

commercial reasons for the establishment of the QUEST and the sale by Mr Grogan of shares to it: there was ample evidence to justify that rejection.

83. Mr Ghosh submits that all of Mr Thornhill's submissions flow from the proposition that one must start with the transaction in securities (the sale of the shares by Mr Grogan to the QUEST) and that it is not permissible the take account of the wider scheme, starting with the establishment of the QUEST, when it comes to analysing and deciding whether there was a tax advantage at all. Mr Thornhill, he says, simply puts a gloss on the statutory words so as to exclude from the ambit of the Code a scheme where a QUEST is involved. It is certainly the case that Mr Thornhill's technical argument that once the payment had been made to the QUEST the Company was not in a position to declare a dividend starts with that proposition. But his wider argument, that where a QUEST scheme is utilized, the Code cannot apply, does not necessarily depend on the first step relied on by HMRC being the transaction in securities (although Mr Thornhill's case would be stronger than it would otherwise be if that were the correct approach). Mr Thornhill's argument must be addressed whether or not one starts with the transaction in securities.

84. Mr Ghosh says that the result for which Mr Thornhill contends is not supported by (i) the text of the legislation (ii) any principle or (iii) the authorities. I take those in turn.

85. So far as the text is concerned, section 703(1)(a) ICTA 1988 or section 684 ITA 2007 requires one of certain specified circumstances to occur. Circumstance D (section 704D ICTA 1988 and section 689 ITA 2007), he says, quite clearly existed. There was a distribution within section 704D (see section 709(3)(b) for the definition of distribution, which includes a transfer of assets) and section 689(2)(a) when the Company made a contribution to the QUEST. Mr Grogan received consideration (the purchase price of the shares) in connection with that transfer for the purposes of those provisions. The order of events does not matter when it comes to deciding whether Circumstance D existed. I agree with that. Further, "tax advantage" and "income tax advantage" are widely defined (see section 709(1) ICTA 1988 and section 683 ITA 2007); there is, within the definition, no restriction on when or how the advantage must arise. The only language which restricts the circumstances in which the Code may be applied is that which requires the advantage to be obtained "in consequence" of a transaction in securities. I therefore also agree with that there is nothing in the text, other than one possible interpretation of the words "in consequence of…" which supports the proposition that the order of events is important in ascertaining whether the Code applies.

86. So far as principle is concerned, why, Mr Ghosh asks rhetorically, should the draftsman/Parliament care about the order of events when it comes to determining whether the Code applies? The purpose of the Code is to tax the extraction of funds from a company in one way, through the utilisation of transactions in securities, when the extraction of those funds in a different way would have

resulted in a charge to income tax, subject of course to the escape clause. Suppose that, in the present case, the sale had taken place first with the purchase price being funded by a contribution from the Company made very shortly after the contract for sale. The case would remain within Circumstance D; but since the transaction in securities would have preceded the payment to the QUEST, Mr Thornhill's argument would not run. Mr Ghosh says that it is not a serious proposition that the result should be different in the two cases. I would not go so far as that. If the legislation had been clearly drafted to produce the result for which Mr Thornhill contends, I do not think that it could be described irrational and devoid of principle. However, what I do accept is that there is nothing to suggest that the result for which Mr Ghosh contends itself offends some principle to be found in the legislation or in any admissible material relied on.

87. I need next to conduct a brief review of the authorities relied on by the parties.

88. I have already mentioned *Inland Revenue Commissioners v Parker* citing the test set out by Lord Wilberforce. The context in which he applied that test was as follows. The Company capitalised distributable profits in 1953 and applied that amount in issuing debentures to the members in proportion to the amounts paid up on their shares. In January 1961, the debentures were redeemed. The relevant provision, section 28 Finance Act 1960, the precursor of the Code, did not apply where "the transaction or transactions in securities were carried out….before [5 April 1960]". One of the issues, therefore, was whether the taxpayer obtained or was in a position to obtain a tax advantage in consequence of a transaction or transactions in securities occurring after 5 April 1960 or of the combined effect of transactions one of which occurred after that date.

89. The taxpayer argued that, if any tax advantage was obtained, it was obtained solely by virtue of the transactions in 1953 and that all that happened in 1961 was the repayment of a debt. The test of the validity of that argument turned on whether the taxpayer obtained a tax advantage in 1953, the assumption being that, if he did, he did not also obtain one in 1961. Lord Wilberforce considered that the matter should be dealt with by concentrating on 1961. On that approach, the taxpayer obtained a tax-free sum in 1961: "he obtained it through combined transactions which included the capitalisation of the company's profits. Had it not been for this combination of transactions, the sum would have been taxable in his hands. The case is different from the present case in an important respect, namely that the company could have declared a dividend instead of repaying the debenture; Lord Wilberforce's analysis does not therefore provide HMRC with an answer to Mr Thornhill's more technical point that there was no tax advantage in the present case because the comparator transaction could not in fact have taken place at the time when the alleged tax advantage was obtained.

90. However, Lord Wilberforce did take the 1953 transactions into account; he expressly referred to how the taxpayer obtained the tax advantage – the "combined transactions" to which I have just referred, thereby taking account of events which pre-dated the relevant transaction in securities in 1961 in

ascertaining whether there was a tax advantage. Lord Wilberforce did not need to address, and did not address, the argument which Mr Thornhill now raises; but it does seem to me that HMRC can derive some support for their position from Lord Wilberforce's approach.

91. I have also referred already to *Inland Revenue Commissioners v Brebner*. In the context of the escape clause, this decision shows that it is inappropriate to isolate particular parts of an overall scheme. Whether there is a genuine commercial interest and whether there is a main object of obtaining a tax advantage are questions which must be addressed by reference to the scheme as a whole. Given that approach in relation to the escape clause, there is something to be said in favour of the view that the same approach should be applied in asking whether a composite scheme, which includes one or more transactions in securities, gives rise to a tax advantage in the first place; and this is so whether or not the overall scheme starts with a transaction in securities. This approach would not, the argument would run, involve reading the words "in consequence of" as if they meant no more than that a transaction in securities was a *sine qua non* of liability; there would still need to be a link between events sufficient for there to be a scheme in the first place.

92. In the present case, there was, on the facts, quite clearly a scheme linking together the formation of the QUEST, the contribution to it and the sale of the shares. There was, in my judgment, plenty of evidence on which the Tribunal could reach that conclusion. Indeed, on the primary facts as found by the Tribunal, it would be surprising, to my mind, if they had reached the contrary conclusion. In particular,

   a. Mr Grogan implemented advice give to him by Haslers following the presentation to him specifically based on the position of the Company;

   b. The reduction in tax liabilities was found to be an important matter for Mr Grogan.

   c. His objectives did not change between the date of the presentation and the implementation of the scheme.

   d. Mr Grogan had shown himself to be concerned about tax in relation to at least one previous transaction saying that "we do not remotely accept [Mr Grogan's] evidence that he was not remotely interested in the personal tax implications".

   e. Mr Grogan was willing to agree a fee structure with Haslers which was based wholly on the tax savings mentioned in paragraph 6(f) above.

93. The next case, again already referred to, is *Inland Revenue Commissioners v Cleary*. In that case, each of the taxpayers held shares in two companies, G Ltd and M Ltd. At 31 December 1960, G Ltd had accumulated distributable profits of

some £180,840. In July 1961, each of the taxpayers sold 22,000 shares in M Ltd to G Ltd for £60,500, which was their value, in cash. The Crown sought to tax the taxpayers on the basis that the payment of £60,500 should be taken into account as if it were the net amount of dividend. The taxpayers contended that they did not obtain a tax advantage by reason of the sale and that the payment was not received "in connection with the distribution of profits" (to the same effect as section 704D ICTA 1988 and section 689 ITA 2007). It was held by the House of Lords that the price of the shares was received "in connection with the distribution of profits" of G Ltd and that the taxpayers obtained a tax advantage.

94. Lord Upjohn, at least, was prepared to admit that the result might seem harsh but considered that that was a matter for Parliament. In any event, the apparent harshness was tempered by two considerations: first, the provisions did not hit a *bona fide* commercial transaction unless a main object was to obtain a tax advantage and secondly, there was a clearance procedure.

95. Mr Ghosh submits that those same considerations answer Mr Thornhill's proposition that all QUESTS would be vulnerable to attack under the Code; if there is a genuine commercial purpose in providing employee incentives, the escape clause may be available All of this is entirely fact-sensitive. In the present case, the tax motivation infects the commercial nature of the scheme and has led the Tribunal to the conclusions which it reached.

96. Mr Ghosh goes as far as to submit that the present case is indistinguishable from *Cleary*. I do not agree with that. It is distinguishable, in a material way, in that at the time of the relevant transaction in securities the taxpayers could have procured G Ltd to declare a dividend rather than purchase shares in M Ltd; but in the present case, Mr Grogan was no longer in a position to procure that the Company pay a dividend since it had insufficient distributable profits and he could not procure the trustees of the QUEST to do anything at all. It does, however, show that it would be no answer to HMRC's case for Mr Grogan to point out that the QUEST obtained full value for its own payment. There can, I think, be no doubt that the payment of the purchase price to Mr Grogan by the QUEST was the receipt by him of a consideration in connection with the payment by the Company to the QUEST, which payment was itself a transfer of assets by the Company.

97. *Cleary* was referred to by Browne-Wilkinson J in *Anysz v Inland Revenue Commissioners*. As he noted at p 318, *Cleary* shows that,

> "in making Lord Wilberforce's contrast between actual and hypothetical receipts, the hypothetical receipt does not have to accrue as a result of the same type of transaction (ie in the same way) as the actual receipt accrued. However, in my judgment, it provides no basis for saying that for the purpose of making the comparison the court is entitled to look at anything other than the actual receipt which has accrued to the taxpayer."

98. That last observation does not cause any problem for HMRC in the present case. Mr Grogan received cash from the QUEST (as the purchase price of his shares); the comparator transaction (a dividend from the Company) would have provided him with cash as well.

99. *Williams* was a case of value extraction from a company called Kithurst, a property development company. The taxpayers entered into a tax avoidance scheme. The first stage consisted of a number of property transactions the details of which I do not need to go into. The next stage involved the acquisition by the shareholders of Kithurst of one share each in a company called Gristrim. Kithurst was then acquired by Gristrim in a share for share exchange and a sum of some £423,180 was credited by Gristrim in its share premium account. Kithurst subsequently paid a gross dividend to Gristrim of £442,000. The third stage involved the following. First, another company, Dolerin, in which the taxpayers initially had no interest, agreed to lend £84,200 to each of the (five) taxpayers. Gristrim then acquired Dolerin for £421,250 using the cash received as a result of the dividend from Kithurst. The result was that the taxpayers ended up with cash in their hands but owing corresponding debts to Dolerin, a company by then owned by Gristrim.

100. It was held that the loans which were received by the taxpayers were "transactions in securities" and that they were intended to secure and did secure a tax advantage to them. Furthermore, the sums received by the shareholders by way of loans were received by them in connection with the distributions of profits of Kithurst and represented the value of assets which would have been available for distribution to them by way of dividends by Kithurst but for the steps taken by Kithurst and, accordingly, the loan transactions were within Circumstances D. The Revenue were entitled to counteract the tax advantage obtained by the taxpayers by the notices they had served.

101. It is to be noted that, once the taxpayers had effected the share for share exchange, they could not obtain a dividend from Kithurst (albeit through their ownership of Gristrim, they could control Kithurst and procure a dividend to Gristrim and then an onward dividend to themselves). Mr Ghosh says that there is an analogue with the present case where Mr Grogan was, as a result of the payment to the QUEST, unable to obtain a dividend from the Company (the very fact which Mr Thornhill relies on to demonstrate that there was no tax advantage to Mr Grogan).

102. There is some parallel, I accept, but the cases are different. In the present case, once the payment had been made to the QUEST, the relevant funds were out of the control, direct or indirect, of Mr Grogan. They were in an independent trust, the QUEST. In contrast, in *Williams*, Kithurst was at all times under the direct, and then indirect, control of the taxpayers and Gristrim was under their direct control. Whether this makes a material difference depends on how the actual transaction in the real world by reference to which the comparator transaction is to be compared is to be identified. If the actual transaction has to

begin with the transaction in securities, the parallel between the present case and *Williams* is not at all helpful. In contrast, if the actual transaction can begin with the creation of the QUEST and the payment to it of funds by the Company, there is not really any need to draw the parallel at all. The question is then the straightforward factual one of whether Mr Grogan obtained a tax advantage by reference to the entire scheme; to which the answer which the Tribunal gave is that he did.

103. Mr Thornhill is correct when he says that it does not follow from *Williams* that an act done prior to the first relevant transaction in securities can be aggregated with a transaction in securities. But equally, Mr Ghosh is correct, I think, in saying that there is nothing, either, which precludes that result. *Williams* did not, as I read the case, address the point at all. But if one reads the words of Viscount Dilhorne which I have cited above literally, they do appear to support HMRC's position rather than Mr Grogan's position.

104. Thus, Viscount Dilhorne does not consider it "necessary to list the many transactions coming within the definition which were entered into from the inception of the scheme". I find the reference to the definition of "transaction in securities" to be slightly odd since the only transactions in securities were the share for share exchange and the loans made to the taxpayers. Be that as it may, those transactions "were all necessary ingredients of" the scheme to secure tax free gains and those gains did not cease "to be in consequence of those transactions if one or more links in the chain of operations does not come within the definition". It is but a small move from there to treat preliminary steps in a scheme – not steps standing in isolation but steps taken with a view to implementing a wider scheme – in the same way. To continue the metaphor, the chain is a connected temporal whole but some of its links are temporally prior to that link which represents the transaction in securities. The linkage is essential, but once it is established there is no reason in principle why the complete chain – that is to say the entire scheme – should not be viewed as a whole. And, given that there is no reason in principle not to do so, it is not in any sense a strained use of language to describe the resulting tax advantage as arising "in consequence of" the transaction in securities.

105. Mr Ghosh has also referred to other authorities: *Inland Revenue Commissioners v Wiggins* [1979] STC; *Emery v Inland Revenue Commissioners* [1981] STC 150 and *Bird v Inland Revenue Commissioners* [1988] STC 312. I do not consider that these cases add a great deal to the debate. I would, however, mention a passage from the judgment of Nourse J in *Emery* at p 171i to 172d as it provides a neat summary, in very general terms, of the test propounded by Lord Wilberforce in *Parker* which I have cited:

> "Taking those words at their face value, I would have thought that Lord Wilberforce was saying that if the taxpayer could have received what it is sought to tax in *any* other way which would have resulted in its being subject to tax, then that was enough for him to have obtained a tax advantage".

106. *Inland Revenue Commissioners v Universities Superannuation Scheme Ltd* [1997] STC 5 concerned the participation of an approved superannuation scheme in a dividend-stripping scheme. One might view such a pension scheme as a "good thing" in the way that a QUEST can be seen as a "good thing". At least, both have been afforded beneficial tax treatment by Parliament presumably because they are seen as encouraging a desirable social end. Nonetheless, USS Ltd was not entitled to take advantage of its wide taxation exemption which, *prima facie*, it was entitled to obtain in respect of the transactions it entered into because it obtained a tax advantage as defined in the legislation as a result of the scheme which it entered into. The test propounded by Lord Wilberforce in *Parker* was held to be applicable only to the second limb of the definition of tax advantage (the parts now found in paragraphs (c) and (d) of section 683(1) ITA 2007) and were not relevant to the first limb (now paragraphs (a) and (b)).

107. That decision provides considerable support, I consider, for Mr Ghosh's submission against Mr Thornhill's own submissions to the effect that the Code is simply inapplicable where a specific statutory scheme such as the QUEST provisions apply. It demonstrates that a tax-exempt person can abuse its position by participating in a tax avoidance scheme and thereby bring itself within the same anti-avoidance provisions as apply to other taxpayers.

108. I return now to *Willoughby* which provides the foundation for Mr Thornhill's argument that the Code does not apply to an express statutory scheme such as the QUEST scheme. As with nearly all judicial statements of this level of generality, it is appropriate to remember the factual context against which Lord Nolan said what he did in the passage cited at paragraph 60 above. As he set it out at p 1078E-H:

> "In 1985 Professor Willoughby decided to take early retirement from the university and in July of that year he gave one year's notice accordingly. On retirement he was due to receive a lump sum payment from the university's provident fund. He sought advice from Personal Financial Consultants Ltd. ("P.F.C."), a company which he had earlier consulted before taking out his Save and Prosper policies. He accepted their advice to put his money into a single premium personal portfolio bond taken out with Royal Life.
>
> It is common ground that Professor Willoughby's sole concern in consulting P.F.C. was to provide for his ultimate retirement and to have an arrangement which would be flexible and also simple for his wife to deal with in the event of his death. At the time the first bond was taken out Professor Willoughby had made up his mind to return to live in the United Kingdom. The avoidance of United Kingdom tax was not in his mind, although he was well aware of the tax aspects of the policy. He could hardly fail to be, because they were naturally stressed in the Royal Life advertising material. Professor and Mrs. Willoughby were, of course, resident in the United Kingdom when the second and third bonds were taken out. It was not suggested that there is any

difference between the three bonds as regards either their inherent nature or the purposes for which they were applied."

109. The context of *Willoughby*, therefore, was that Professor Willoughby was concerned to make provision for his retirement and he did so by arrangements which attracted tax reliefs for which Parliament had provided. There was no element of tax avoidance of the sort contemplated by the relevant statutory provisions applicable in that case. The attack made by the Revenue was that the "underlying reality" of the Royal Life bonds was that Professor Willoughby would continue to manage and benefit from his own portfolio of investments but, by insertion of the bond structure, would escape tax on the income and gains from those investments. Parliament cannot, it was submitted, have intended such a result and the purpose of an investor in such bonds could not be seen as mere tax mitigation.

110. That argument was rejected for the reason that there was a basic fallacy in it, namely that Professor Willoughby did not continue to manage and benefit from his own portfolio of investments: the underlying reality was not as the Revenue had identified it. Accordingly, the case was one where Professor Willoughby's tax liability – or rather absence of it – fell to be determined in the ordinary way by a straightforward application of the provisions applicable to these offshore bonds.

111. It does not follow from *Willoughby* that the utilisation of a statutory scheme (the offshore bond provision in that case or the QUEST scheme in the present case) can never fall foul of anti-avoidance provisions. In *Willoughby* itself, Professor Willougby succeeded because, on the facts, there was no tax avoidance purpose. But the answer might well have been different if he had, contrary to Lord Nolan's analysis, had control over his own portfolio of investments with the bond simply being a convenient "wrapper" for that purpose. The general statement of principle set out by Lord Nolan is not, I consider, an indication to the contrary. It was a question of fact whether there was a tax avoidance purpose on which it was for Professor Willoughby to satisfy the Special Commissioners. I would add that, if it had been his view that the anti-avoidance provisions with which he was concerned were incapable, as a matter of law, of displacing and express statutory scheme (such as the tax code applicable in the ordinary case to offshore bonds) then it would have provided a short answer to the case.

112. Similarly, in the present case, it is a question of fact whether the adoption of the QUEST scheme was effected with the main object or one of the main objects of obtaining a tax advantage. It is not correct to say, as a matter of law, that a person who adopts the QUEST scheme is necessarily immune, in relation to it, from the effects of the Code. As Mr Ghosh says, a circular flow of funds where a company contributes cash to a QUEST, where the facts and circumstances are such that there is no desire to incentivise employees, in order to manufacture a capital (rather than an income) receipt for the company's shareholders is very firmly within the scope of the Code: that the Appellant effected abusive transactions using a QUEST which Parliament had intended to be used for

genuine employee incentivisation as part of the offending transactions in securities does not convert an abusive scheme into an innocent transaction.

113. This conclusion accords with the approach of the section 706 tribunal in *Marwood Homes Ltd v Inland Revenue* Commissioners [1999] STC (SCD) 44, an approach with which I agree. In that case, steps were taken to obtain relief under section 242 ICTA 1988 following payment of a dividend outside a group election. The tribunal accepted that taking such steps was within the spirit of the ACT code in the legislation. It stated, in my view correctly, that the fact that a transaction had been carried out to achieve a benefit conferred by a statutory provision would not of itself exclude that application of the Code. The safeguards available to the taxpayer were the clearance procedure and the escape clause. Further, so far as concerned the second limb of the escape clause (no tax advantage object) it was a matter of ascertaining the object as a subjective matter of intention to be ascertained by looking at the transaction as a whole with a broad common sense approach (reference being made to *Brebner*). It is clearly right to consider the transaction as a whole in this way: it cannot be disputed that where the transaction as a whole includes operations which are not within the scope of the particular statutory code in question (relief under section 242 in that case, the QUEST provisions in the present case), the issue of tax avoidance object or not is to be decided by reference to the transactions as whole. I see no reasons to adopt a different approach where the only operations are ones which are all directly referable to the implementation of that statutory code. Thus, in the present case, it has to be judged whether, in the context of all of the surrounding facts, the two limbs of the escape clause are satisfied.

114. The Tribunal carried out a full and thorough assessment of the facts including the financial impact of the arrangements on Mr Grogan. They directed themselves correctly in relation to the escape clause. They were not satisfied on a balance of probabilities that the escape clause applied. That conclusion was one which they were entitled to reach on the evidence before them. I accordingly reject the first of Mr Grogan's arguments for saying that the Tribunal were in error as a matter of law, namely that the Code cannot apply to the situation where an express statutory scheme (namely the QUEST scheme in the present case) has been utilised and complied with.

115. That leaves Mr Thornhill's alternative argument that there was in fact no "tax advantage" because HMRC cannot postulate an alternative transaction which would have given rise to a taxable receipt in Mr Grogan's hands.

116. From the discussion above, it can be seen that the issue reduces to the identification of the transactions which it is permissible to take into account when identifying the comparator transaction. If it is permissible to take into account all of the transactions in the overall scheme which was undertaken, starting with the establishment of the QUEST and including the payment of monies to it by the Company and the sale of shares to it by Mr Grogan, then there can be no doubt that HMRC can postulate an alternative transaction, namely a dividend by the

Company to Mr Grogan equivalent to the purchase price of the shares. In contrast, if the starting point is the sale of the shares, as the first transaction in securities, then it is not possible, on the facts of the case, to postulate an alternative transaction giving rise to an income tax liability on Mr Grogan for the reasons given by Mr Thornhill.

117. In *Williams*, Viscount Dilhorne referred to the scheme which produced the tax free gains. That scheme contained operations which did not fall within the definition of "transaction in securities"; but that did not result in the gains ceasing to be in consequence of such transactions. It is implicit in that analysis that the phrase "in consequence of" does not mean "in consequence **only** of" and, indeed, the Code would have almost no teeth at all if that were the case.

118. Further, I do not consider that such an operation has to be causally connected with the transaction in securities in the sense that it occurs as a result of that transaction. Thus, a complicated tax avoidance scheme may contain many operations which are not themselves transactions in securities but which take place after the first event which is a transaction in securities. Such operations may be a necessary ingredient of the scheme, without which the tax advantage would not be obtained. It may require active steps by a participant in the scheme to ensure that such an operation takes place. Such an operation takes place because there is a scheme not because there has been a previous transaction in securities.

119. It can be seen therefore that a tax advantage can be obtained "in consequence of" a transaction in securities notwithstanding (a) that another operation, which is not a transaction in securities, is a necessary ingredient and (b) that such other operation is not one which takes place "in consequence of" the transaction in securities. I can see no reason in principle why the other operation has to take place after the transaction in securities itself. In my judgment, it is enough if the tax advantage is obtained as the result of an overall series of transactions which are linked together to form a scheme and where the relevant transaction in securities is part of that scheme.

120. I accordingly reject Mr Thornhill's argument that there no tax advantage was obtained in consequence of a transaction in securities.

Overall conclusion

121. The result is that Mr Grogan's appeal is dismissed. HMRC's cross appeal is allowed.

Mr Justice Warren

President

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