Neutral Citation Number: [2018] EWCA Civ 2266

Case No: A3/2017/0687

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
BARLING J AND JUDGE ROGER BERNER
[2017] UKUT 4 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2018

Before :

LORD JUSTICE NEWEY
LADY ARDEN OF HESWALL
and
MR JUSTICE BIRSS

- -

Between :

The Commissioners for Her Majesty's Revenue and Customs **Appellants**

- and -

Parry and Ors **Respondents**

Elizabeth Wilson (instructed by **HM Revenue and Customs Solicitor's Office**) for the **Appellants**
David Rees QC and Hugh Cumber (instructed by **Farrer & Co LLP**) for the **Respondents**

Hearing date : 6 and 7 June 2018

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Approved Judgment

LADY ARDEN OF HESWALL:

1. OVERVIEW OF ISSUES ON THIS APPEAL

1. This appeal is principally about whether the pension scheme transfer by the late Mrs R F Staveley, and her omission to take income benefits which were then payable, constituted, or are to be treated as constituting, for the purposes of Inheritance Tax 1984 ("IHTA") a "disposition" which is a "transfer of value" in favour of her sons, who were to be the beneficiaries of the death benefit. The relevant statutory provisions are section 3(1) IHTA, read with section 10(1), and section 3(3) IHTA. At the time of the transfer, Mrs Staveley was in the late stages of a terminal illness, from which she died six weeks later. The right to receive the death benefit has been assessed as at the date of the transfer as worth a considerable proportion of Mrs Staveley's pension funds.

2. Section 10(1) IHTA, sometimes called "the purchase exemption", removes from the charge to inheritance tax ("IHT") a disposition which is not made with the intention of conferring a gratuitous benefit on any person and meets some further conditions by providing that it is not a "transfer of value". The respondents, who are Mrs Staveley's executors, concede that the transfer of funds from the original pension policy provider to the provider of PPP was a "disposition" for IHT purposes (see Judgment of the FTT, [45]) but dispute that it was a "transfer of value" and rely on section 10(1). The first issue ("Issue 1") considers whether the Upper Tribunal were correct to hold that the purchase exemption applied.

3. Under Issue 2, HMRC contend that the omission by Mrs Staveley to exercise her right to take any income benefits from the PPP after the date of the transfer and before she died (as she was entitled to do) should be treated as a further transfer of value under section 3(3) IHTA. This provision extends the statutory meaning of "disposition" to include certain omissions.

4. Issue 3 raises the question whether the transfer to the PPP was a transaction at arm's length for the purposes of section 10(1)(a) IHTA. This arises only if HMRC fail on Issues 1 and 2.

5. We are not concerned with the precise value(s) of the disposition(s) if the appeal succeeds, or the amount of IHT which may be payable if the appeal succeeds.

6. Issue 1 focuses attention on Mrs Staveley's intentions at the time of the transfer, and so I will start with the background to this matter.

2.MRS STAVELEY'S PENSION SCHEME TRANSFER

7. In her working life, Mrs Staveley had successfully built up a company, Morayford Ltd ("M"), with her husband. She was a director of it. They divorced (it is said acrimoniously) and as part of a settlement for the divorce M granted her a pension in the form known as a "section 32 buyout policy" (that is, a pension policy to which section 32 of the Finance Act 1981 applied). In October 2006, within two months of her death on 18 December 2006, aged only 56 years, she transferred this section 32

policy to a personal pension policy, which I shall call "PPP", issued by AXA. If Mrs Staveley's pension had remained in the section 32 policy then on her death a lumps sum would have been payable to her estate and chargeable to IHT. Under the PPP, Mrs Staveley nominated her two sons as her beneficiaries in relation to the death benefit, so that it might be paid direct to them on her death. At all times they were residuary beneficiaries under the terms of her Will, which was dated 31 March 2005. Mrs Staveley did not take any retirement benefit so that at the date of her death the whole of her pension fund was uncrystallised. Although she did not appreciate this, that means that, if the purchase exemption applies, the sons will receive the death benefit free of IHT.

8. The section 32 policy had a feature which led her to wish to move the policy to AXA. Prior to April 2006, a surplus in the pension fund under Mrs Staveley's section 32 policy could potentially pass back to M so that Mrs Staveley's former husband might benefit from it. Mrs Staveley wanted to avoid this result by making a transfer to a PPP.

9. The PPP policy was issued on the terms of scheme rules. These contained the following provisions about death benefit: If the policyholder had uncrystallised funds then under the rules of the scheme under which the policy had been issued, a lump sum ("death benefit") would be payable on her death. If the policyholder had nominated any beneficiaries for receipt of this sum, it would be paid to them (subject to exercise by the scheme administrator of its discretion under the rules). Otherwise there was a list of beneficiaries and the scheme administrator could choose to whom the sum would be paid. The application for transfer included a form of nomination (the "nomination" or "statement of wishes") which Mrs Staveley completed expressing her wish that each son should receive 50% of the death benefit. Read with the rules, this meant that she recognised that the administrator of the scheme would have a discretion as to the choice of person to whom to pay the death benefit.

3. APPROACH OF THE TRIBUNALS

10. The first major finding on intention was at [48] of the FTT's judgment, where the FTT found that Mrs Staveley's sole motive for the transfer was to avoid the possibility of any part of her pension funds reverting to M, and thus to her former husband:

> **48.** We find on the evidence that her sole motive in making the transfer was to sever all ties with Morayford. She had clearly been very aggrieved, not surprisingly, that, while her part of the pension fund was supposed to come to her absolutely following the divorce, the terms of the s 32 policy and the effect of the law prior to April 2006 meant that a substantial part of the fund might revert to Morayford for the benefit of her ex-husband. She was consistent in her desire to thwart this outcome during the last six years of her life following her divorce.

11. The alternative possibility was that Mrs Staveley had an intention both to avoid the possibility of her husband receiving any benefit and also to benefit her sons. The FTT rejected the possibility of dual intentions in this way, but it had already expressly

found in [16] of its judgment that it was very important to her that her sons received a benefit:

> [16]…We do, however, accept the overall tenor of the brothers' evidence that preventing Morayford receiving benefit from her pension fund was very important to her; but we accept Mr Piney's view that it was also very important to her that her sons did benefit from her estate.

12. As is clear from [49] of its judgment, the FTT also considered whether the transfer was intended to confer a gratuitous benefit in the sense of an IHT advantage on her sons by transferring her pension funds to a PPP, but rejected this because she thought that the transfer was IHT-neutral in relation to the death benefit:

> **49.** HMRC suggest she had dual motivation. We accept that as a matter of law a person could have dual motivation. But we do not find it is made out as a matter of fact in this case. HMRC suggest her second intent was to ensure the death benefits passed to her sons free of IHT. We find no evidence of that. She did not seek advice on IHT. It was clear (§28) that the only subject matter on which she sought advice in October 2006 was keeping the benefit of her pension fund away from Morayford. She did not discuss IHT with her family. She entered into no (other) form of IHT planning. While her adviser took IHT into account in the advice which he proffered, we consider it more likely than not that Mrs Staveley took what was said in the October 2006 letter at face value (§29) and was under the (mistaken) impression that the *transfer* would not affect the amount of IHT payable in the event of her death. IHT did not, therefore, form part of her motivation.

13. The FTT then had to consider the effect of the statement of wishes, which was outside the respondents' concession. It therefore considered whether that document was intended to confer any gratuitous benefit on Mrs Staveley's sons, and rejected that submission on the basis that she had already made a gift to them of the death benefit by making them residuary beneficiaries under her Will:

> **50.** HMRC say that, even ignoring the IHT, she clearly had an intent that the death benefits would pass to her sons, and this was an intent to confer a gratuitous benefit. She signed the statement of wishes. However, we do not see how this could be properly described as an intention to *confer* a gratuitous *benefit*. Her sons were her beneficiaries named in her will and therefore the persons who had stood to benefit from the death benefits of the s 32 policy (which after April 2006 would have been the whole fund). They were the persons named in her expression of wishes for the PPP. Either way they were the intended beneficiaries so that the transfer did not confer a benefit that was new to them and cannot therefore have been part of the motivation for Mrs Staveley.
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> **51.** Miss Wilson did not agree that the provision should be limited in this way. She considered that the sons were the beneficiaries under the PPP and therefore, irrespective of the fact that had been the beneficiaries under the old policy, she was of the opinion a benefit had been conferred on them by the PPP.

> **52.** We do not agree. [First reason:] The entire premise of s 10 is that benefit is conferred. It presupposes that the benefit did not exist before and is newly conferred. [Second reason:] If Miss Wilson was right, a *transfer* from one PPP to another PPP for commercial reasons (perhaps to get a better rate of return), without any change in beneficiaries, would be caught. We do not think that this was intended by Parliament.
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> **53.** The only difference to the sons in being named in the statement of wishes in respect of the PPP rather than as her residuary legatees for the death benefits from the s 32 policy was that the death benefits could be paid to them directly by the pension administrator and not come to them under their mother's estate: the effect was that the death benefits could avoid IHT whereas before the *transfer* they would have been subject to it. HMRC's view was that this was a very real benefit.
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> **54.** It certainly is a very real benefit, but we have already concluded that this IHT advantage was not a benefit which Mrs Staveley *intended* to confer, even though that was the effect of what she did.
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> **55.** In conclusion, the appellants therefore succeed on this point. The admitted disposition by the *transfer* of the funds from the s 32 pension to the PPP was not intended to confer any gratuitous benefit on any person. But that does not decide the case in the appellants' favour. In addition, they have to satisfy the Tribunal that the *transfer* was not part of a *transaction* intended to confer gratuitous benefit and that it was at arm's length. (Italics added to highlight "transfer"; other italics in the original; words in square brackets added in [52])

14. On appeal to the Upper Tribunal, HMRC argued that the FTT was wrong in law in the meaning that it gave to "confer any gratuitous benefit". The Upper Tribunal agreed with HMRC on this without expressly giving reasons ([30]).

15. The FTT went on to find, when considering Mrs Staveley's continuing decision not to access her pension at any time between June 2006 and her death (during which period the transfer from the s 32 policy to the PPP had taken place), that maximising the benefit for her sons was one of the factors in her decision not to access her pension fund (Judgment, [146]-[149]). HMRC relied on this omission as supplying any missing gratuitous intent in the transfer to the PPP for section 10 purposes. HMRC argued, but failed to establish, that an omission could be a "transaction" within the ordinary meaning of that term. The FTT rejected that argument because Parliament has specifically provided for omissions in the definition of "operations" in section 268 IHTA, which is set in the Appendix to this judgment.

16. It is well established that the term "associated operations" is confined to operations which form part of or contribute to the scheme constituted by the transfer. The principal authority on this question is the decision of the House of Lords in *Macpherson v IRC* [1989] 1 AC 159. In that case, Lord Jauncey, with whom the other members of the House agreed, considered that some limit had to be placed on "associated operations" and held that:

> …intention to confer gratuitous benefit qualifies both transactions and associated operations. If an associated operation is not intended to confer such a benefit it is not relevant for the purpose of the subsection. That is not to say that it must necessarily per se confer a benefit but it must form part of and contribute to a scheme which does confer such a benefit. (page 175-6)

17. The FTT applied that holding and concluded that Mrs Staveley had made the decision ("the no-income benefit decision") not to take income benefits from the pension in her life-time in order to preserve the death benefit for her sons. It found:

> the transfer and the omission were not linked by motive… In so far as Mrs Staveley made any positive decision not to take lifetime benefits, that decision had already been taken and taken independently of the decision to transfer the funds to the PPP. ([69] FTT)

18. The FTT then cross-referred to paragraph [28] of its judgment, in which it held:

> In any event, she chose not to access her pension fund and must have communicated this decision to Hoare & Co, presumably in about October 2006, as they wrote to her again on 31 October 2006. This letter records the writer's understanding that Mrs Staveley had agreed with his advice not to access the pension fund and that her only remaining issue was to ensure her ex-husband would not benefit from her pension fund. The writer records that the purpose of the letter was to explain how that could be achieved and the writer's understanding that it was the only area on which she required advice.

19. On appeal to it, the Upper Tribunal carefully considered the meaning of "associated operations". It held that the FTT had not misdirected itself. It further held that the FTT had found as a fact that the no-income benefit decision had been made in June 2006. By implication it was never revoked or revisited. It had not formed part of the transfer to the PPP. Therefore, it was not on the facts an "associated operation". There was in the judgment of the Upper Tribunal no error of law in making this finding and so it was upheld. In the judgment of the Upper Tribunal, the FTT had made an unassailable finding of fact as to the motivation of Mrs Staveley when transferring her pension to the PPP:

> **[35]** In our judgment none of those findings of the FTT can come close to satisfying the hurdle imposed by *Edwards v Bairstow*. A finding by the FTT that Mrs Staveley's omission to take lifetime benefits from her pension was, at least in part, intended to confer a gratuitous benefit on her sons does not mandate a similar finding with respect to the transfer to the AXA PPP itself. That fact would of course have been relevant to the FTT's multi-factorial assessment, but it cannot be supposed that the FTT ignored its own finding in that respect when it was considering Mrs Staveley's intention with respect to the transfer itself.

20. The reasons which the Upper Tribunal gave were as follows. First:

> The reference to the sons benefiting, at [16] of the FTT's decision [set out in [11] of this judgment], can in our judgment be understood simply as the other side of the coin to Mrs Staveley's actual motive in seeking to make sure that the identified risk of her ex-husband becoming entitled to any of the pension fund was avoided. Mr Piney and Mr Staveley were intended beneficiaries under Mrs Staveley's will, and any risk to her estate was a risk to their inheritance. (Judgment, [36]).

21. Second, as to HMRC's submission that there was no finding that Mrs Staveley would have transferred her section 32 policy if there was any risk that the sons would lose the death benefits, the Upper Tribunal held that the finding that avoiding the risk of assets reverting to her former husband was her sole motive could also be understood as a finding that, but for that risk, Mrs Staveley would not have made the transfer, but would have allowed the *status quo* to endure, and for her sons to benefit, as she had planned, under her Will.

22. Turning to Issue 2, the FTT held that the omission following the no-income benefit decision in the period from the transfer to the PPP up to her death (a period of six weeks) was a transfer of value by virtue of section 3(3) IHTA. It rejected the arguments of the respondents that the scheme administrator's discretion over the death benefits broke the causal link between the omission and the increase in value of the sons' estates because intention was subjective, and it was necessary to consider what, realistically, Mrs Staveley would have thought was likely to happen after she died. She had every reason to expect that the administrator would comply with her wishes so that the discretion to ignore her wishes could not be seen as breaking the chain of causation between the no-benefit decision and the benefit to her sons outside her estate.

23. The Upper Tribunal disagreed with the FTT on this point, holding in favour of the respondents:

> **[82]** Section 3(3) does not require identification of the source, which may be found irrespective of any intervening actions, but the proximate cause of the increase in a person's estate. That is the effect of the use of the word 'by' in the expression 'another person's estate … is increased by … [the] omission to exercise a right'. Where such an immediate and proximate cause exists, a more remote reason why an estate is greater than it otherwise would have been is unlikely to satisfy the statute. An effective intervening event without which the

> person's estate would not be increased will in most cases be sufficient to break the necessary causative link with the original omission. In our view in the present case the scheme administrator's exercise of its genuine discretion was clearly the immediate and proximate cause of the increase in the sons' estates, and sufficient to break the chain of causation.
>
> **[83]** We do not accept that the discretion of the scheme administrator in this case could be characterised merely as the machinery of payment or as an administrative act. The sons had no vested interest in the death benefits payable under the AXA PPP. They were merely two among a larger class of potential beneficiaries permitted by the AXA PPP scheme rules, including Mrs Staveley's grandchildren and her estate generally. Mrs Staveley's expression of wishes was no more than that; it did not deprive the scheme administrator of an effective discretion, and did not reduce the role of the scheme administrator to one of mere paymaster.

24. HMRC now appeals from the decision of the Upper Tribunal.

3. SUBMISSIONS ON ISSUE 1: GRATUITOUS INTENTION

25. Ms Elizabeth Wilson, for HMRC, submits that the defence to an IHT charge provided by section 10 (the purchase exemption) is not available because the FTT found at all material times that Mrs Staveley had an ongoing intention to benefit her sons. Moreover, there is no provision in the section 10(1) for comparing a benefit which is conferred by a transfer with the donees' position under prior gifts. This is a question of statutory interpretation and it is not relevant to ask whether Mrs Staveley would have described the gift as a benefit or not, since that is to confuse law and fact. The Upper Tribunal therefore erred in its conclusion at [35] of its judgment. If, on the other hand, that conclusion was not in error, the FTT's finding at [48] of its judgment about sole motive should be set aside as being wrong in law.

26. Ms Wilson's further submission is that the sons' position was in fact different by virtue of transfer to the PPP from what it had been before. Previously, they inherited a life interest under the Will of Mrs. Staveley, whereas under the PPP form of nomination they received a 50% interest absolutely. She accepts that the statement of wishes has to be taken into account but the point remained that any gift under the Will would be subjected to prior debts and to the expenses of the administration, whereas the gift under the form of nomination, which was part of the PPP, would not.

27. Mr David Rees QC, for the respondents, Mrs Staveley's executors, emphasises the fact that, as he puts it, there was a "pension wrapper" throughout, and that Mrs Staveley thought it was wrong that some of her money could go back to her former husband's company. The PPP was a commercial pension arrangement. It conferred a right to the death benefit but this was never a gift in any meaningful way. Mrs Staveley simply nominated the person(s) who were to get the death benefit. Essentially the question of death benefits was a right to select only. Mrs Staveley did not intend when she transferred her pension funds from her section 32 policy to a PPP to give her sons something they did not previously have or enjoy, or intend to improve the sons' positions.

28. Mr Rees also contends that the FTT was in any event entitled to reach the conclusion that it did. Mr Rees stresses the very unusual facts in the present case, that is, that there was clear evidence that Mrs Staveley was extremely anxious to extricate the section 32 policy from M.

29. Mr Rees further submits that there was no benefit in this case because to have a benefit there must be an improvement in the donee's position. The FTT were right to say there had to be a newly conferred benefit.

4.DISCUSSION ON ISSUE 1

30. Issue 1 raises three distinct questions:

(a) What findings did the FTT make on intention to confer such a benefit in relation to the death benefit?

(b) Do the words in section 10(1) "it was not intended… to confer any gratuitous benefit" mean that the purchase exemption applies if it was intended to make a gift but that gift was the same gift as the donor had previously made and, if so, how is the question whether a gift is the same gift as a prior gift determined?

(c) If HMRC fail on (a) and/or (b), and the mere transfer of funds to the PPP was taken outside section 3(1) IHTA by section 10(1), was the omission to take income benefits an "associated operation" which meant that the omission caused the transfer to be a transfer of value to which section10(1) did not apply?

(a) What findings did the FTT make on intention to confer any gratuitous benefit as regards the death benefit?

31. As Mr Rees submits, and as I have already explained, the question of what the intention of Mrs Staveley was at the time of the disposition was a question of fact. The FTT had to find the primary facts and draw the inferences, having assessed the evidence in the round (see, generally, per Lord Brightman in *Mallalieu v IRC* [1983] 2 AC 861, 875). English law treats a person's intention as as much a question of fact as the state of a person's digestion. The FTT's task was to consider whether Mrs Staveley intended to confer a gratuitous benefit on a subjective basis. Fact-finding is often a complex process, and in the process of finding whether as a matter of fact Mrs Staveley had any particular intention, the FTT could properly take into account any evidence as to what Mrs Staveley thought about whether any benefit was being conferred as that evidence might throw light on her intention. Moreover, an appellate court may not interfere with the FTT's findings of facts unless it is satisfied that no reasonable tribunal acting judicially and properly instructed as to the law could have come to that conclusion. Mr Rees took the Court in this connection to the speech of Lord Radcliffe, with whom Lord Tucker and Lord Somervell agreed, in *Edwards v Bairstow* [1956] AC 14, 36 where he preferred the formulation of the test as one whether "the true and only reasonable conclusion contradicts the determination."

32. The Upper Tribunal considered that there were no grounds for departing from the findings of fact by the FTT. For my own part, I have also concluded that there is no need to depart from them, but I do not agree with the Upper Tribunal's interpretation of the FTT's judgment. Properly interpreted, there is in my judgment a clear finding

by implication that Mrs Staveley executed the statement of wishes on transfer of the pension funds from the section 32 policy to the PPP with the intention of giving her sons a gratuitous benefit.

33. The Upper Tribunal considered that the applicable finding of fact was that in [48] FTT which I have set out in full in [10] of this judgment. Mr Rees sought to uphold the decision of the Upper Tribunal on this.

34. I do not consider that the Upper Tribunal's reading of the FTT's judgment was correct for the following reasons. It will be recalled that the respondents conceded that the transfer of funds by Mrs Staveley was a "disposition" for the purposes of section 3 IHTA. But that concession went only to that part of the transfer executed by Mrs Staveley which constituted a transfer of pension funds (FTT Judgment, [45]). The FTT, therefore, first considered whether this was a disposition made with an intention to confer a gratuitous benefit and answered that question in the negative. This point can be seen by reading [48] FTT with the paragraphs which precede it:

> ***Transfer of funds* from s 32 policy to PPP**
>
> **45.** The appellants accept that the *transfer of the deceased[*'*s]* funds from Mrs Staveley's s 32 policy to the PPP on 9 November 2006 (see §§35-36) was a 'disposition' within the meaning of s3(1) IHTA. They do not accept that it was a 'transfer of value' within the meaning of s 3(1) IHTA. This is on the grounds that they consider s 10(1) IHTA applies [. S 10 omitted]
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> We will break this provision down into its constituent parts, all of which the appellants must prove. So we will consider whether they have proved that the conceded disposition of the pension funds by transfer from the s 32 policy to the PPP was:
>
> - not intended to confer any gratuitous benefit on any person; and
> - was not made in a transaction intended to confer any gratuitous benefit on any person; and
> - was made in a transaction at arm's length between persons not connected with each other or was such as might be expected in such a transaction.
>
> **'Intended... to confer any gratuitous benefit on any person'**
>
> **46.** The appellants' contention is that Mrs Staveley's sole intention on *transferring her pension funds* from the s 32 policy to the PPP was to cut out any possibility of risk that any part of the pension fund might be returned to Morayford.
>
> **47.** HMRC's view is that the changes in law in April 2006 were such that it should have been obvious that while the fund remained well below £1.5million (it was about half that) there was no risk of any part of the pension fund being returned to Morayford; and even if Mrs Staveley did not know this, she had at least a dual motive in transferring the funds and that second motive was to ensure that the death benefits passed to her sons free of IHT.
>
> **48.** We find on the evidence that her sole motive in making the transfer was to sever all ties with Morayford. She had clearly been very aggrieved, not

> surprisingly, that, while her part of the pension fund was supposed to come to her absolutely following the divorce, the terms of the s 32 policy and the effect of the law prior to April 2006 meant that a substantial part of the fund might revert to Morayford for the benefit of her ex-husband. She was consistent in her desire to thwart this outcome during the last six years of her life following her divorce. [italics added]

35. Next, the FTT considered the question of dual motive, but rejected this. In doing so, the FTT referred to the death benefits but not to the statement of wishes (see [49] FTT set out at [12] of this judgment). In the same paragraph, the FTT considered whether there was any intention to confer a gratuitous benefit because the death benefit would be IHT-free, and the FTT rejected this possibility on the facts.

36. It is only at [50] FTT (set out in [13] of this judgment) that the FTT consider the statement of wishes. This is rejected on the basis that it is not a newly conferred benefit (see [52] FTT, set out in [13] of this judgment). In my judgment, it is implicit in this conclusion that the FTT considered that the statement that each son was to receive 50% of the death benefit was indeed otherwise an intended benefit. The FTT could not logically on the basis of what it has said in its judgment decide that statement of wishes was not within section 10(1) because it was not newly conferred but yet also consider that it was not an intended benefit at all. That would not make sense, and would fall to be set aside under *Edwards v Bairstow*. Likewise, my reading of the FTT's judgment is internally consistent with [16] of its judgment (set out in [11] above). In addition, the FTT would not have needed to consider whether previously-existing benefits were included if the statement of wishes was not an intended benefit at all.

37. The transfer of funds to AXA included the statement of wishes, even if the respondents' concession did not. Both transactions formed part of the same disposition.

38. It is correct that at [55] of its judgment the FTT (set out in [13] above) referred to the transfer of funds in the second sentence as meaning both the transfer of funds and the statement of wishes but this paragraph expresses the FTT's overall conclusion and does not therefore undermine my analysis of the FTT's reasoning following each individual stage by which the FTT explained its decision.

39. The reasons given by the Upper Tribunal likewise do not detract from my reading of the FTT's decision. The Upper Tribunal did not examine the prior question of the meaning of the FTT's step-by-step analysis of Mrs Staveley's intention. It is not necessary to explain [16] of the FTT's judgment in the complex way that the Upper Tribunal suggests. There is no friction between [16] and [48] FTT, as I read them.

40. In those circumstances, I answer question (a) as follows: the FTT found that by executing the statement of wishes on the occasion of the transfer of funds Mrs Staveley made a disposition with the intention of giving a gratuitous benefit to her sons. The sons were the "intended beneficiaries" of the death benefit. There is, for instance, no finding that, when Mrs Staveley executed the nomination, she made a mistake about the nature of the document and mistakenly thought that she was simply reconfirming the gift already made by Will. The FTT concluded that that did not prevent the purchase exemption from applying because it took the view as a matter of

law that a gift which was intended to be the same benefit as a prior gift did not prevent the disposition from qualifying under the purchase exemption. The FTT held that it did:

> not see how this could be properly described as an intention to *confer* a gratuitous *benefit*. Her sons were her beneficiaries named in her will and therefore the persons who had stood to benefit from the death benefits of the s 32 policy (which after April 2006 would have been the whole fund). They were the persons named in her expression of wishes for the PPP. Either way they were the intended beneficiaries so that the transfer did not confer a benefit that was new to them and cannot therefore have been part of the motivation for Mrs Staveley. (italics and underlining in the original)

41. In my judgment, the proper interpretation of this paragraph is that the FTT considered that, as a matter of fact, Mrs Staveley had a gratuitous intention in relation to the death benefit, but that, as a matter of law, that intention was not to "confer" a "benefit" within the meaning of section 10(1) (see for example the words "properly described" and "cannot [therefore] have been" and the italics and underlining which the FTT added). So the FTT did not, in my judgment, find that she did not intend to give them any more than was in her Will, or, as it has synonymously been put, as shorthand, by the respondents on this appeal, to "improve" their position (the word "improve" crept into their oral argument but is not used by either of the Tribunals or by the respondents in their skeleton argument, and cannot mean more than I have said. It is in that sense that I would use the word "improve" on this appeal). The onus would have been on the respondents to show that, and, as I explained, there was no evidence that she thought that by signing the nomination she was doing any more than confirm her earlier gift by Will. There is the added point, as Ms Wilson submits, that it was transparently not the same gift in law, irrespective of the IHT advantage of which she was unaware (and which therefore formed no part of her intention). One was a gift by Will and the other by nomination outside the Will. That means that the critical question that I have to address now is whether the FTT were correct to say that, as a matter of law, the words in section 10(1) "it was not intended to confer any gratuitous benefit" mean, where a gratuitous intention is shown, that "it was not intended to confer any newly-conferred benefit", and, if so, how was a newly-conferred benefit to be ascertained.

(b) Do the words in section 10(1) "it was not intended… to confer any gratuitous benefit" mean that the purchase exemption applies if it was intended to make a gift which was the same gift as the donor had previously made and , if so, how is the question whether the gift was the same gift as a prior gift determined?

42. I conclude for the reasons given in para 90 below that the FTT was wrong to hold that there was a relevant limitation in the words "it was not intended to confer any gratuitous benefit" in section 10(1) IHTA which applied in this case. The FTT considered that those words limited benefits to newly conferred benefits and that the benefit was not newly conferred in this case. I have four reasons for my conclusion.

43. First, the FTT's conclusion that the benefit was not newly conferred in this case was wrong in law. When Mrs Staveley applied to transfer her pension to the PPP, the

rights under her section 32 policy were not novated but extinguished, and new rights were created. She could not nominate her sons as beneficiaries of the death benefit until her application had been accepted and the transfer achieved, because until that time there was no benefit under the scheme rules to which she could nominate them.

44. The position may be tested in this way. It was open to Mrs Staveley to execute the application for a PPP and not to execute the nomination form. If she had taken that course, her sons would not have obtained the privileged position described in paragraphs 9 above and 45 below. So that position must have been newly created by the nomination form. The sons did not thereby acquire a proprietary interest in the uncrystallised funds attaching to the PPP, but they had a right in equity to enforce the duties imposed on the administrator of those funds on Mrs Staveley's death. No-one suggests that a person can only obtain a benefit if he acquires a proprietary interest. The "right" which the sons had under Mrs Staveley's Will was certainly not a proprietary right.

45. What the FTT has done may be described as applying a functional test of conferring a benefit. They have looked at the position in substance. But even that is wrong because the rights which the sons acquired under the PPP were very different from their position as residuary beneficiaries under Mrs Staveley's Will. They acquired a different interest in a different thing. Under the PPP, if the administrator of the scheme exercised its discretion under the PPP in the sons' favour, they had a right to receive payment directly from AXA, and it would also be free of IHT. Under Mrs Staveley's Will, the death benefit would be paid to the personal representatives of Mrs Staveley, and would (as well as being liable to IHT) be subject to expenses and other matters having priority over their residuary entitlement under the Will, and so their right to the death benefit was only indirect and might be reduced by other liabilities of the estate or other gifts under the Will. Because of this, the sons' position was, without a shadow of a doubt not the same in law as it had been under Mrs Staveley's Will as a result of the transfer to the PPP and the execution of the form of nomination: it was intended that they should receive another gift. It is not in my judgment appropriate to assess the legal position by reference to its overall effect. The analysis in law must surely be what Parliament intended. My answer, therefore, to the first reason given by the FTT in [52] of its judgment (paragraph 13 above) is that there was in this case a gift of newly created rights, and therefore the gift was newly conferred.

46. My second reason is statutory interpretation. There is no relevant statutory definition and resort must had to the ordinary meaning of their words in their context. On its ordinary meaning, a benefit involves a net gain or favourable change in a person's position, but the comparison to be made is with his position immediately before the putative benefit was conferred. This is the most natural time to determine the question of benefit and in my judgment there would need to be some mandate in IHTA to do what the FTT did, which was to look at the position in substance before the transfer took place and without reference to its legal analysis. I do not consider that there is any such mandate. The interest of the sons under the nomination was undoubtedly a favourable change from their previous position under Mrs Staveley's Will if regard is had to the legal analysis. The interpretation of "confers any gratuitous benefit" which I prefer gives weight and appropriate meaning to the statutory words.

47. In response it may be said that there was an absence of intention to confer a new benefit. Mrs Staveley was, after all, (it may be said) only giving her sons what she

had previously intended to give them under her Will. She was (it may be said) just making the same gift it in a new way. But what the FTT found was that there was a gratuitous intention in signing the nomination. So, in my judgment, on the facts of this case, the respondents had to show that, even though it was a gratuitous intention to confer what in law was a newly created right, it was not Mrs Staveley's intention to confer such a benefit: see the words "if it is shown that that it was not intended" appearing in section 10(1). An absence of evidence as to whether she intended to make a newly conferred gift is not enough. The respondents needed to show that she mistakenly thought that she was not conferring a newly created right, and the findings of the FTT do not go that far.

48. My third reason concerns Parliamentary intention. In response to the FTT's second reason in [52] of its decision, the FTT's ruling leads to results which I do not consider Parliament can be said to have intended. On the FTT's ruling in this case, (irrespective of the need to satisfy one of the further conditions in section 10(1)(a) or (b)) a general gratuitous intention to make a gift of the same property as a prior gift may provide a defence to liability to IHT in the case of the substitution of rights, even if the subject of the gift is a newly-conferred right, unless HMRC shows that the donor expressly intended to make a newly-conferred gift. The onus which is clearly prescribed in section 10(1) and unqualified would be reversed in this respect. There was no doubt a deliberate placing of the onus on the donor in these circumstances because there will be many cases where the relevant evidence about what the donor intended is not in HMRC's hands, and so difficulties in recovering IHT and the scope for possible abuse are obvious. Parliament would, moreover, surely not have intended liability to IHT to depend on whether a prior gift had been made (which may have been, as in this case, of no value when made) and revoked, and then remade (potentially, as in this case, in a much more advantageous form) at a time when it is of considerably greater value. The statutory requirement for subjective intention does not take away from that point. It is difficult to see what the reason for that would have been.

49. In that connection, the answer which Ms Wilson gave to the FTT in connection with pension scheme transfers must surely be correct and consistent with Parliament's presumed intention. They are transfers to which the purchase exemption does not apply but they may not result in the payment of IHT because there is no value involved where there is no major health issue. But, if there is value transferred, as there was in this case due, most unfortunately, to Mrs Staveley's serious medical condition, the charge to IHT is triggered. Any other conclusion would lead to the extraordinary results which I have described which, contrary to the FTT's second reason, I do not consider Parliament could have intended.

50. My fourth reason is also about statutory interpretation seen from a wider perspective. It is clear from the wording of section 10(1) IHTA that it is intended to be narrowly construed. In my judgment, that confirms the conclusion that a technical approach, and not a substantive one, to the application of the provision is the correct one. I refer to the following features of section 10(1). It is clear that section 10(1) is only to operate in limited circumstances because of the wide and general wording excluding section 10(1) where there is a gratuitous intent: the transaction must not be intended "to confer any gratuitous benefit". There is no limitation on the type of benefit and there is no requirement for the gratuitous benefit to be conferred on the recipient of

the property transferred by the disposition. It can be conferred on any person. It must be of some value, but that value need not be the same as the value of the property transferred. Moreover, the onus of showing that there was no disqualifying intention to confer a gratuitous benefit is placed on the donor. The exemption is lost if there is more than one intention, provided that there is an intention to confer any gratuitous benefit.

51. This may be a small point. I note that the wording "not intended to confer any gratuitous benefit" is used in at least four other places in IHTA (sections 33(3), 79(5), schedule 5, paragraph 6), but the respondents have not shown us that the meaning given by the FTT is supported by those provisions. Those provisions at least show that the words are a key phrase in IHTA and that their meaning is likely to have wide implications.

52. In summary I therefore answer question (b) that the conferral of a benefit is to be ascertained by a legal analysis of the transaction whereby the beneficiary acquired his rights and without comparison with a prior gift. In this case, there was a conferral of a benefit and a newly conferred right because the beneficiary acquired the new rights which were conferred on him under the PPP scheme rules. There is no extra requirement to make any comparison with the interest which he previously held. As a matter of law, the donee's position was improved by the new rights. HMRC does not have to show, in the case of substituted rights, that the donor intended by making the gift to create new rights; on the contrary, to obtain the benefit of the purchase exemption, the donor, or his personal representatives, has to show that, although the donor intended to make a gift, he did not intend to make a gift of what was in law a newly created right.

53. This conclusion means that I am respectfully unable to accept the analysis in the judgment of Newey LJ, with which Birss J agrees, and which I have had the privilege, and benefit, of reading. My reasons for not agreeing with them appear from the next paragraph of this judgment and the points that I have made above about the need to apply the legal analysis of the transaction that I have described in paragraph 43 above and the onus of proof: as I have explained, I do not consider that HMRC had to show that Mrs Staveley intended the transfer to be newly conferred or advantageous to her sons, rather that the respondents had to show that there was no intention to "confer" any gratuitous benefit at a time when she intended to give the rights, which were in fact and law newly created, to her sons. To some extent also, I may through my analysis have taken a different view of what the shorthand "improve" means on this appeal.

54. As to the point that Newey LJ and Birss J make that I have adopted the second of the three interpretations propounded by Newey LJ, which (as explained in paragraph 85 below) means that a substituted gift of a lesser amount could fall outside the purchase exemption. To say that I have adopted the second interpretation does not of course in any sense represent a summary of my process of reasoning set out in [43] to [52] above. As to the point made about gifts of a lesser amount, I respectfully do not find it a surprising conclusion that, for example, the grant of a life interest in place of an absolute interest should result in a potential liability to IHT since the donor has revoked one gift and made another. The donee is still benefitted even if the gift is a smaller gift if (as I conclude that it should) regard is had to the legal analysis of the disposal in question and not a comparison with the prior transaction. The potential

liability to IHT makes the position of the donee consistent with that of other donees who are unable to show a prior gift in their favour. (The contrasting example given by Newey LJ in paragraph 87 below of the reduction of a gift does not, with respect, undermine my analysis because, if, for example, the donor decides to revoke a testamentary gift of (say) one of a pair of candlesticks, there is no new disposal at all and so IHT does not arise for consideration). A principal issue in this case, on which my Lords' approach differs from mine, is whether section 10(1) IHTA means that regard should be had to a prior transaction, and that is not a question in this case, as I see it, of the subjective intention of Mrs Staveley but a question of law as to what section 10(1) means in its statutory context and in the light of the FTT's factual findings.

(c) Was the omission to take benefits an "associated operation?

55. On my analysis this question does not arise. However, it is necessary to decide it on the basis of the judgments of Newey LJ and Birss J. Newey LJ has kindly set out the authorities and it will shorten matters if I state that I agree with his analysis of *Macpherson* and *Rysaffe,* and adopt his summary of the submissions.

56. That is not the end of the matter as I see it. There is, in my judgment, a further issue of law and fact to be considered: was the mere continuation of a decision previously made not to take income benefits capable of being part of the scheme so that the omission was an associated operation within the meaning given to that term in *Macpherson?*

57. In my judgment, it was open to the deceased to make a decision in June 2006 that she would not take income benefits, and that she did not have to renew that decision from day to day. It would simply continue until she decided to revoke it, which it was open to her to do at any time. As a matter of law that decision could relate to her pension whichever the provider it happened to be from time to time. That means that she did not have to remake that decision when she transferred the policy to the PPP. In essence what the FTT found on the facts that Mrs Staveley made her decision in June 2006 at a point in time when there was no transfer to the PPP in sight. There is no finding that she revisited the decision when she applied to transfer her pension to AXA. In those circumstances, in my judgment Mr Rees is correct in his submission that the decision made in June 2006 did not meet the test in *Macpherson* for an associated operation. It did not form part of or contribute to the conferral of a benefit on the sons in any way. It had been made independently of it. The nomination of the beneficiaries of the death benefit could (on my approach to Issue 1(b)) result in the conferral of a benefit without the omission.

58. However, in referring to an omission, section 268 IHTA (set out in the Appendix) does not refer to decisions to omit but to omissions. A continuing omission is not a single event but a persistent process. There was clearly a continuing sequence of omissions from and after June 2006 so that HMRC can point to omissions existing each and every day that the omission continued.

59. For these reasons, I agree with the judgment of Newey LJ on associated operations.

5. ISSUE 2: REQUIREMENT FOR INCREASE IN THE SONS' ESTATES:

60. I can deal with this matter more briefly.

61. The omission to draw income benefits under the PPP potentially gives rise to a further and separate IHT charge since, if the requirements of section 3(3) IHTA are satisfied, the omission provides a basis for imposing IHT on the diminution in the value of the estate that occurred after the date of the transfer up to the time immediately before death as a result of Mrs Staveley's continuing omission. Under section 3(3), however, that does not result in a transfer of value unless there is an increase as a result in the sons' estates: see section 3(3), set out in the Appendix.

62. That led to an argument before the tribunals and in this Court as to whether the sons' estates were augmented by the omission as opposed to the exercise by the scheme administrator of its discretion to pay the death benefit to the sons. The executors argued that the omission was not sufficiently connected with the receipt of the death benefit by the sons because under the PPP, the scheme administrator had first to exercise its discretion in their favour. There was no guarantee that they would follow the letter of wishes by Mrs Staveley. HMRC disagreed.

63. The Tribunals came to different conclusions on this point.

64. The FTT ruled in favour of HMRC on this issue. It concluded:

> **114.** Our conclusion on this is that, while [*Drummond v Collins* [1915] AC 1011] is not directly in point, nevertheless the appellants have not satisfied us that the increase in the sons' estates was not caused by the omission. We are entitled to take into account that the owner of the pension policy has every reason to expect their statement of wishes to be respected. It would be wrong to regard the pension administrator's legal discretion as a break in the chain of causation when it was virtually inevitable that he would honour the deceased's wishes and pay the money directly to her sons.

65. The Upper Tribunal disagreed with the FTT and accepted the arguments of the executors:

> **[87]** In our judgment, the proximate cause of the increase in the estates of Mr Piney and Mr Staveley was the exercise of the discretion of the scheme administrator. Their estates were increased 'by' the exercise of that discretion, and not by the omission of Mrs Staveley to exercise her right to take lifetime benefits. There would have been no increase in the value of the son's estates but for the omission to take those benefits, but the test is not a 'but for' test and it was not the omission which had the effect of increasing the sons' estates; it was the exercise of the scheme administrator's discretion. It follows, therefore, that the conditions of s 3(3) are not satisfied with respect to Mrs Staveley's omission, and that omission cannot be treated as a disposition or as a transfer of value within s 3(1).

66. I agree with the analysis of Newey LJ in his judgment, subject to the following observations.

67. HMRC again relies on *Drummond*, in which the House of Lords unanimously held that income distributed by American trustees under a discretionary trust of American assets was income from a foreign possession rather than a voluntary payment dependent on the exercise by the trustees of their discretion. I agree with the FTT that this decision involved very different facts and charging provisions, and is (at best) only indirectly in point.

68. As I see it, HMRC seek to establish a rule that the administrator's discretion will always be left out of account. In agreement with the FTT, I consider that determination of whether there was an increase in the beneficiaries' estates as a result of an omission must depend on an assessment of the relevant facts. Here the decision for the administrator was relatively straightforward. The nomination had been recently made and were consistent with the demonstrated intention of Mrs Staveley as expressed in her Will. But it is possible to envisage cases where the nomination was made a long time before death or where events have occurred which would lead the administrator to consider that the wishes of the deceased should not be followed. In those situations, the court may consider that more weight has to be given to the discretion of the administrator in deciding whether section 3(3) is fulfilled. I need not express a final view on that point but would wish to leave that question open.

69. Further issues arising from section 10(1)(a) were argued by counsel but it is not necessary to deal with them.

6. **OVERALL CONCLUSIONS ON BOTH ISSUES**

70. In my judgment, HMRC succeed on Issue 1 both in relation to the question of whether a gratuitous benefit was conferred and in relation to the question whether there was an associated operation forming an integral part of the transfer in the shape of the omission to draw the income under the PPP, though I reach my conclusion on the first matter for different reasons from those of Newey LJ and Birss J.

71. On Issue 2, in agreement with Newey LJ and Birss J, I conclude that the sons' estates were increased by the omission by Mrs Staveley to take the income benefits following the transfer to the PPP and up to the last moment before her death. Therefore HMRC succeeds on this Issue as well.

72. In the circumstances, Issue 3 does not need to be answered.

73. For the reasons given above I would allow this appeal.

Lord Justice Newey:

74. I agree with Lady Arden of Heswall that the appeal should be allowed, but I have arrived at that conclusion by a somewhat different route.

The issues

75. The notices of determination relevant to this appeal proceeded on the basis that Mrs Staveley had made two transfers of value.

76. The first such transfer was said to have been effected by the transfer of funds from the section 32 policy to the PPP in November 2006. The notices of determination attributed a value of £405,694 to the transfer. This figure was rather less than the sum invested in the PPP. Since Mrs Staveley still had a right to take pension benefits before her death (in particular, a ten-year annuity), HMRC recognised that the transfer to the PPP did not reduce the value of her estate by as much as the amount invested.

77. The second transfer of value was alleged to have arisen from Mrs Staveley's omission to draw any benefits from the PPP by the time she died. This omission, HMRC say, meant that the remaining value of the investment in the PPP was lost to Mrs Staveley's estate. There had, therefore, been a *further* transfer of value, put at £302,498 in the notices of determination.

78. As Lady Arden has said, Issue 1 relates to the transfer of funds from the section 32 policy to the PPP. It is common ground that this involved a transfer of value unless section 10 of the IHTA applied. The Upper Tribunal, upholding the decision of the FTT in this respect, accepted that section 10 was applicable.

79. As Lady Arden has also indicated, Issue 2 stems from the fact that Mrs Staveley did not take benefits from the PPP before her death. The FTT sided with HMRC here, but the Upper Tribunal considered that the FTT had "made an error of law in deciding that the discretion of the scheme administrator … did not break the chain of causation between the omission by Mrs Staveley to exercise her right to take lifetime pension benefits" (see paragraph 86 of the Upper Tribunal decision). It therefore allowed an appeal.

80. It is incumbent on us to address both Issue 1 and Issue 2. There is no overlap between the two transfers of value on which HMRC rely. It is only if HMRC win on both issues that they are entitled to IHT on the full value of the funds invested in the PPP.

Issue 1

81. As Miss Wilson noted in her skeleton argument, section 10 IHTA embodies a "key inheritance tax rule", "ensur[ing] that bad bargains and wholly commercial transactions are excluded from charge, even though they result in a loss to an individual's estate". In a similar vein, Dymond's Capital Taxes states (at paragraph 7.101) that section 10(1) is "of fundamental importance" as "the primary provision sorting out gifts from purchases".

82. A disposition will not, however, fall within section 10(1), despite being made in an arm's length transaction between unconnected persons, unless it is shown that "it was not intended, and was not made in a transaction intended, to confer any gratuitous benefit on any person". As Lady Arden has explained, the FTT took this to refer to a benefit which "did not exist before and is newly conferred" (paragraph 52 of its decision). In contrast, the Upper Tribunal considered that, "as a matter of law, the mere fact of an existing putative benefit under a will of a person into whose estate certain assets will pass on death cannot prevent a disposition in lifetime from conferring a benefit, even if the benefit is to the same beneficiaries, and is substantially identical to that which would be conferred by the will" (paragraph 30 of the Upper Tribunal decision).

83. It is plain from the terms of section 10 that it can extend to a disposition that *in fact* confers a gratuitous benefit on someone. What is crucial is whether the transferor *intended* such a benefit to be conferred. If the transferor did not, subjectively, have such an intention, section 10 can be in point.

84. It is much less clear what the transferor must have intended by way of "gratuitous benefit" for section 10 to be ousted. Three possibilities seemed to me to emerge from the parties' submissions. First, section 10 could be disapplied wherever someone is intended to receive a benefit pursuant to the disposition, regardless of whether he would have benefited in exactly the same way (or better) had the disposition not been made. On this view, a disposition that was effected with a view to, say, halving a sum of money that a person was to receive would fall outside section 10. Miss Wilson espoused this interpretation, commenting that the individual in question would have benefited because he might otherwise have come away with nothing. Mr Rees, on the other hand, suggested that the construction involved an abuse of language, remarking that "[i]f a trustee exercises a power of appointment in a manner which reduces a beneficiary's interest in possession from the whole of the fund to one half of the fund it would be extremely odd to describe the appointment as 'conferring benefit' on that person".

85. A second possibility is that section 10 is inapplicable wherever the transferor intends to confer on someone a legal right that they would not otherwise have had, whether or not the person would have had equivalent (or better) rights but for the disposition. On this thesis, section 10 could apply if the transferor intended to *limit* the provision made for a person (as would be the case if a payment was halved), but not if what the recipient was to receive would, in law, constitute a *different* right rather than merely a reduced one. A disposition could still, therefore, be a transfer of value for IHT purposes where the transferor's aim was to substitute something of lesser value. Section 10 would not, for example, operate in relation to, say, a disposition as a result of which an individual was to receive a life interest in a house in place of absolute entitlement to an identical property next door.

86. The third possibility is that contended for by Mr Rees: that one must ask whether the overall effect of the disposition was intended to be favourable to, or advantageous to, the recipient of the "benefit". On this approach, section 10 could be applicable unless the transferor was intending to put a recipient in a better position than he would otherwise have been in. This construction of the section is, of course, that giving it the widest application. Mr Rees submitted that it is supported by the language of the provision. Miss Wilson criticised it as requiring the reading in of a word such as "improved".

87. The least attractive of the three possibilities is, to my mind, the second. It would mean that the application of section 10 depended on whether a disposition happened, as matter of law, to change, rather than just to limit or reduce, what a person was to receive. The section could apply if, say, the transferor wished to give the recipient a lesser amount of money, but not if the idea was to substitute a right which, while equally obviously inferior, was legally different. Parliament is, as it seems to me, unlikely to have wished liability to IHT to turn on such accidents.

88. The real choice, then, is between the first and third possibilities. On balance, it seems to me that the third interpretation is the correct one. "Confer" is defined in the

Concise Oxford Dictionary as "to grant or bestow", "benefit" as "a favourable or helpful factor or circumstance; advantage, profit …". In enacting section 10, Parliament will, I think, have been concerned to exclude from the crucial exemption for which it provides a disposition which was *itself* intended to "grant or bestow" something advantageous gratuitously. Parliament considered that an arm's length transaction should not generally give rise to an IHT charge even if it served to diminish the value of the transferor's estate, but did not want the exemption to apply if – to put matters broadly – the disposition was being used to improve someone's position on a gratuitous basis. As a matter of language, I do not think that it is appropriate to speak of a disposition having been "intended" "to confer any gratuitous benefit" if the recipient of the "benefit" was intended to receive no more than he would have had in any event. A disposition designed to give a person only what he was to receive anyway or its equivalent, let alone less, cannot fairly be described, in my view, as intended to "confer" a "benefit".

89. In the present case, on the FTT's findings, Mrs Staveley was not intending to improve her sons' position when she transferred funds from the section 32 policy to the PPP. Were the transfer to have reduced the IHT payable by the respondents, it would, as a matter of *fact*, have been advantageous to the sons, but the FTT did not consider Mrs Staveley to have had any such *intention*. In the FTT's view, IHT "did not … form part of [Mrs Staveley's] motivation" (see paragraph 49 of its decision). She did not, accordingly, see the transfer as giving her sons anything better than they would otherwise have received.

90. On this particular aspect of the case, my view differs from that of Lady Arden. As she has explained, Lady Arden considers that "the FTT was wrong to hold that there was a relevant limitation in the words 'it was not intended to confer any gratuitous benefit' in section 10(1) IHTA which applied in this case" (see paragraph 42 above). If I have understood her reasoning correctly, Lady Arden has arrived at that conclusion on the basis that the rights which the sons enjoyed following the transfer to the PPP came into being only at that stage, were "very different" from those they had previously had as residuary beneficiaries under Mrs Staveley's will and represented "undoubtedly a favourable change from their previous position under Mrs Staveley's Will if regard is had to the legal analysis". Lady Arden also attaches considerable importance to the burden of proof, taking the view that the FTT "did not … find that [Mrs Staveley] did not intend to give [her sons] any more than was in her Will" (paragraph 41 above).

91. For my part, I would accept that, with the transfer to the PPP, the sons acquired legally different rights, but I do not agree that that matters. Lady Arden's analysis appears to echo the second of the three possibilities I outlined above and, as I have said, I do not myself think it can be the correct one. Further, the impact of IHT apart, I cannot see that it is open to us to find that there was "a favourable change from [the sons'] previous position under Mrs Staveley's Will". It is not apparent to me that HMRC have ever advanced a case to that effect, let alone that the FTT made findings supporting it, and (aside, again, from IHT) I do not regard it as in the least obvious that the sons were in practice any better placed as a result of the transfer. In any event, what is crucial is not whether the sons' position was *in fact* improved, but whether Mrs Staveley intended that, and (as I read its decision) the FTT decided otherwise.

92. As for the burden of proof, I do not myself remember Miss Wilson making anything of this in her submissions to us or suggesting that HMRC's appeal should be allowed

on the footing that the FTT "did not … find that [Mrs Staveley] did not intend to give [her sons] any more than was in her Will". To the contrary, Miss Wilson said in her skeleton argument that "[o]n the facts found, Mrs Staveley wanted to … leave *intact* the provision that she was otherwise making for the benefit of her sons" and that Mrs Staveley intended "to remake the gift to her sons and beneficiaries". Miss Wilson's point was not, as I understood it, that the respondents had failed to establish that Mrs Staveley "did not intend to give [her sons] any more than was in her Will" but that she (still) intended her sons to receive death benefits. That, moreover, would seem to accord with Miss Wilson's stance before the FTT. It can be seen from the FTT's decision that Miss Wilson had argued both that one of Mrs Staveley's motives was "to ensure that the death benefits passed to her sons free of IHT" (paragraph 47) and that, "even ignoring the IHT, she clearly had an intent that the death benefits would pass to her sons" (paragraph 50). So far as I can see, there is no reference in the decision to any contention that, irrespective of the potential IHT advantage (of which, on the FTT's findings, she was unaware), the respondents had not proved that Mrs Staveley "did not intend to give [her sons] any more than was in her Will".

93. I would add the following points:

i) The construction of section 10(1) IHTA which I prefer would not involve any reversal in the burden of proof. It would still be incumbent on the taxpayer to show that the transaction in question had not been "intended … to confer any gratuitous benefit" in the relevant sense;

ii) I am not persuaded that section 10(1) should be narrowly construed. As I have mentioned, the provision is "of fundamental importance";

iii) I do not think the fact that the words "not intended to confer any gratuitous benefit" are used elsewhere in the IHTA points in favour of HMRC's construction of them. Neither the respondents nor HMRC took us to any such instances. Both, presumably, considered them to be of no help in the present context;

iv) To say, as Lady Arden does in paragraph 52 above, that "[a]s a matter of law [the beneficiary's] position was improved by the new rights" does not, with respect, seem to me to engage with the real issue, which (as I see it) is whether Mrs Staveley *intended* the disposition to be advantageous to her sons.

94. In the circumstances, I respectfully part company from Lady Arden on the issue she discusses in paragraphs 42-54 above and also, in part, with the views she expresses in paragraphs 31-41 above (though I agree with paragraph 36). I do not share her view that the appeal on Issue 1 falls to be allowed on this basis.

95. That, however, is not the end of Issue 1. Miss Wilson advanced an alternative argument based on the fact that section 10(3) IHTA provides for "transaction", as used in the section, to include "a series of transactions and any associated operations". The expression "associated operations" is itself defined in section 268(1) IHTA in these terms:

> "any two or more operations of any kind, being—

> (a) operations which affect the same property, or one of which affects some property and the other or others of which affect property which represents, whether directly or indirectly, that property, or income arising from that property, or any property representing accumulations of any such income, or
>
> (b) any two operations of which one is effected with reference to the other, or with a view to enabling the other to be effected or facilitating its being effected, and any further operation having a like relation to any of those two, and so on.
>
> whether those operations are effected by the same person or different persons, and whether or not they are simultaneous; and *'operation'* includes an omission."

96. In the present case, Miss Wilson submitted that the transfer of funds from the section 32 policy to the PPP and Mrs Staveley's "continuing decision" "not to exercise her pension benefit" (to quote from paragraph 61 of the FTT's decision) represented "associated operations". Miss Wilson pointed out that section 268 states in terms that "operation" "includes an omission".

97. The House of Lords considered the relationship between the definition of "associated operations", then to be found in section 44 of the Finance Act 1975, and section 20(4) of that Act, corresponding to what is now section 10 IHTA, in *Inland Revenue Commissioners v Macpherson* [1989] 1 AC 159. Lord Jauncey, with whom the other members of the House agreed, said this (at 175-176):

> "The definition in section 44 is extremely wide and is capable of covering a multitude of events affecting the same property which might have little or no apparent connection between them. It might be tempting to assume that any event which fell within this wide definition should be taken into account in determining what constituted a transaction for the purposes of section 20(4). However, counsel for the Crown accepted, rightly in my view, that some limitation must be imposed…. If the extended meaning of 'transaction' is read into the opening words of section 20(4) the wording becomes:
>
> > 'A disposition is not a transfer of value if it is shown that it was not intended, and was not made in a transaction including a series of transactions and any associated operations intended, to confer any gratuitous benefit ...'
>
> So read it is clear that the intention to confer gratuitous benefit qualifies both transactions and associated operations. If an associated operation is not intended to confer such a benefit it is not relevant for the purpose of the subsection. That is not to say that it must necessarily per se confer a benefit but it must form a part of and contribute to a scheme which does confer such a benefit."

98. On the facts of *Macpherson*, the agreement constituting the relevant disposition might not itself have been intended to confer a gratuitous benefit, but it was "not only effected with reference to" an appointment in favour of an individual referred to as "Timothy" but was "a contributory part of the scheme to confer a benefit on Timothy" (see 176). In the circumstances, the "associated operations" provision applied: the agreement was "made in a transaction, consisting of the agreement and the appointment, intended to confer a gratuitous benefit on Timothy".

99. Section 268 IHTA was also the subject of comment in *Rysaffe Trustee Co (CI) Ltd v Inland Revenue Commissioners*. At first instance ([2002] EWHC 1114 (Ch), [2002] STC 872; on appeal, [2003] EWCA Civ 356, [2003] STC 536), Park J observed (in paragraph 27) that "the practical operation of the associated operations provision is comparatively limited" and that "[i]t is not some sort of catch-all anti-avoidance provision which can be invoked to nullify the effectiveness of any scheme or structure which can be said to have involved more than one operation and which was intended to avoid or reduce inheritance tax".

100. The FTT concluded that section 268 did not assist HMRC in the present case. It said:

> "63. However, apart from the use of the word 'associated' in the definition, there is no requirement on the face of s 268 that there is any connection between the two operations in order to make them 'associated', other than that they must affect the same property (with its expanded definition). But we find that there must be a connection of intent because s 10(1) itself only applies if the disposition was 'made in a transaction intended, to confer any gratuitous benefit…'. Transaction here has the extended meaning and includes 'any association operations'. So if HMRC rely on 'associated operations', s 10 should be read as applying to a disposition:
>
> > 'made in [associated operations] intended, to confer any gratuitous benefit….'
>
> 64. In other words, if HMRC rely on the combination of transfer of fund and omission to take a pension, the combination of operations must have been intended to confer a gratuitous benefit. However, we find as a fact that the combination of two operations was not intended to confer a gratuitous benefit. Whatever the intent behind the omission, it was not linked with the transfer to the PPP in Mrs Staveley's mind, and her intent with respect to the transfer to the PPP was (we have found at §48) solely to break the connection with Morayford. There was no intent linking the two matters."

A little later, the FTT said (in paragraph 69 of its decision) that the transfer to the PPP "was not part of nor did it contribute to a scheme which did confer such a benefit … because the transfer and the omission were not linked by motive".

101. The Upper Tribunal agreed. It said (in paragraph 55 of its decision):

> "What was found in *Macpherson*, therefore, was that although when viewed singly the 1977 agreement did not have the necessary intention, it was part of an overall scheme, comprising both the 1977 agreement and the appointment, which viewed in combination did. The difference in this case is that the transfer, and the motivation for it, were found to be entirely separate from the omission to take lifetime pension benefits, and any intention in that respect. Even if the omission had been intended to confer a gratuitous benefit, the transfer was not part of any scheme with the omission which had that collective intention. On that basis, we can find no error of law in the FTT's approach to the question of associated operations, or in its conclusion. In our judgment, there was evidence on which the FTT could properly conclude that the transfer and the omission were unconnected, and not part of any scheme to confer benefit on Mrs Staveley's two sons. Accordingly, the FTT's conclusion with regard to associated operations was in our view correct in law."

A couple of paragraphs earlier, the Upper Tribunal had said (in paragraph 53):

> "In our judgment what Lord Jauncey was saying was that, if it does not itself confer a benefit, an operation must at least objectively form part of and contribute to a scheme that does. But there is also a subjective element which is not limited to a discrete element or elements of the scheme; the scheme, comprising all its elements, must also be intended to confer the benefit. In this case, the necessary intention must be shown for the combination of the transfer to the AXA PPP and the omission to take lifetime benefits. As the FTT had found that there was no common intention with respect to the transfer and the omission, that was sufficient for the transfer not to be an associated operation with the omission."

102. Mr Rees contended that the Upper Tribunal was right not to interfere with the FTT's decision on the "associated operations" point. He gave three reasons. In the first place, basing himself on the penultimate sentence in the passage from Lord Jauncey's speech in *Macpherson* set out in paragraph 97 above ("If an associated operation is not intended to confer such a benefit it is not relevant for the purpose of the subsection"), Mr Rees submitted that each individual operation and/or transaction in "associated operations" has to have been intended to confer a gratuitous benefit, and in the present case the transfer to the PPP was not so intended. Secondly, the FTT was, so Mr Rees said, clearly entitled to conclude that the transfer to the PPP was not part of and did not contribute to a wider scheme intended to confer a gratuitous benefit. Thirdly, Mr Rees advanced an argument to the effect that every element in a supposed "scheme" had to be either a "transaction" or an "operation"; that, here, achievement of Mrs Staveley's alleged objective could not be achieved merely by her continued omission to take benefits, but depended on her death; and that the death was neither a "transaction" nor an "operation".

103. My own view, however, is that the "associated operations" provision entitles HMRC to succeed on Issue 1 for the following reasons:

i) The FTT found as a fact that "conferring on her sons a greater benefit than otherwise was one of the factors in her decision not to access her pension fund" (paragraph 149 of the decision). That, moreover, was her intention at the time of the transfer to the PPP. The FTT said in paragraph 167 of its decision:

> "As at 30 October 2006, when [Mrs Staveley] applied to transfer the s 32 policy to the PPP, her intention in respect of the omission, we must presume, would have been the same as at June 2006 and that intention was … in part to confer gratuitous benefit";

ii) Mrs Staveley's failure to take pension benefits must thus have been both an "operation" within the meaning of section 268 IHTA (since "operation" "includes an omission") and one "intended … to confer a gratuitous benefit";

iii) The failure to take pension benefits and the transfer to the PPP will, on the face of it, have been "operations which affect the same property" within the meaning of section 268(1);

iv) The fact that the transfer to the PPP was not intended *of itself* to confer a gratuitous benefit (because Mrs Staveley was not intending to improve her sons' position by it) cannot without more prevent it from having been a relevant "associated operation". There is, I think, no question of each individual operation and/or transaction in "associated operations" having to have been intended itself to confer a gratuitous benefit. As Lord Jauncey indicated in *Macpherson*, an operation need not "necessarily per se confer a benefit" but may "form part of and contribute to a scheme which does confer such a benefit". It is good enough, therefore, that a scheme of which an operation forms part is intended to confer a gratuitous benefit. As the FTT noted, "the combination of operations must have been intended to confer a gratuitous benefit";

v) The FTT was, in my view, mistaken in considering that there was "no intent linking [the omission to take pension benefits and the transfer to the PPP]". It follows from the FTT's findings, as it seems to me, that the omission and transfer were both motivated by a desire on Mrs Staveley's part that her sons should have the death benefits that would be payable if she did not draw a pension in her lifetime. During the currency of the section 32 policy, Mrs Staveley envisaged that her sons would receive such benefits via her will. When she withdrew the funds from the section 32 policy, she put in place a different mechanism. To ensure that the benefits would go to her sons, she stated in her application for the PPP that she wished death benefits to be paid to them. While, therefore, Mrs Staveley did not see the transfer to the PPP as *improving* her sons' position and she made the transfer out of a desire to sever ties with Morayford, the only reasonable conclusion, as it seems to me, is that she also intended the PPP to be a means by which the death benefits could be passed to her sons;

vi) This conclusion is, I think, consistent with the views expressed by Lady Arden in paragraph 36 above. As she explains, it is implicit in its decision (especially at paragraphs 16 and 50) that the FTT (unsurprisingly) considered that Mrs Staveley intended her sons to benefit from the PPP;

vii) It cannot possibly matter that Mrs Staveley's death was not a "transaction" or an "operation" but rather the point at which the right to draw lifetime benefits was lost;

viii) In all the circumstances, the failure to take pension benefits and the transfer to the PPP are, to my mind, each properly to be seen as "form[ing] part of and contribut[ing] to a scheme" intended to confer gratuitous benefits.

Issue 2

104. Section 3(3) IHTA provides:

> "Where the value of a person's estate is diminished, and the value–
>
> (a) of another person's estate, or
>
> (b) of any settled property, other than settled property treated by section 49(1) below as property to which a person is beneficially entitled,
>
> is increased by the first-mentioned person's omission to exercise a right, he shall be treated for the purposes of this section as having made a disposition at the time (or latest time) when he could have exercised the right, unless it is shown that the omission was not deliberate."

105. In the present case, it is common ground both that the value of Mrs Staveley's estate was diminished by her failure to take pension benefits before her death and that in mid-2007 the scheme administrator, exercising its discretion in accordance with her statement of wishes, paid the death benefits to her sons equally. Further, the respondents no longer dispute that Mrs Staveley's omission to exercise pension rights was deliberate.

106. In the circumstances, HMRC contend that the requirements of section 3(3) are all met, and the FTT agreed. The Upper Tribunal disagreed, taking the view that there had been a break in the chain of causation. It summarised its conclusion in these terms (in paragraph 87 of its decision):

> "In our judgment, the proximate cause of the increase in the estates of Mr Piney and Mr Staveley [i.e. Mrs Staveley's sons] was the exercise of the discretion of the scheme administrator. Their estates were increased 'by' the exercise of that discretion, and not by the omission of Mrs Staveley to exercise her right to take lifetime benefits. There would have been no increase in the value of the son's estates but for the omission to take those benefits, but the test is not a 'but for' test and it was not the

> omission which had the effect of increasing the sons' estates; it was the exercise of the scheme administrator's discretion. It follows, therefore, that the conditions of s 3(3) are not satisfied with respect to Mrs Staveley's omission, and that omission cannot be treated as a disposition or as a transfer of value within s 3(1)."

In paragraph 82 of its decision, the Upper Tribunal had said:

> "In our view in the present case the scheme administrator's exercise of its discretion was clearly the immediate and proximate cause of the increase in the sons' estates, and sufficient to break the chain of causation."

107. Mr Rees supported the Upper Tribunal's view. Section 3(3), he said, requires more than merely "but for" causation. True it may be that the scheme administrator was obliged to pay the death benefits to or for the benefit of *somebody*, and that AXA was not entitled to keep the money for itself, but it was not inevitable that the administrator would choose to pay the benefits to the sons. The increase in the sons' estates was not automatic upon their mother's omission to take rights, but was effected only by a supervening independent event: the exercise by the administrator of its discretion. Moreover, the sons did not in the event receive anything until more than six months after their mother's death.

108. In contrast, Miss Wilson argued that Mrs Staveley's omission to take a pension during her lifetime was the operative cause of the increase in the value of her sons' estates. The omission, she said, yielded the very death benefits which increased the sons' estates. The scheme administrator had a limited discretion which it was under an obligation to exercise. The exercise of the discretion did not interrupt the chain of causation, which began with the omission and ended with the receipt by the sons.

109. In my view, Miss Wilson's submissions are well-founded. For section 3(3) to be applicable, a person's estate must have been increased "by" the omission in question. In the present case, the sons' estates are, I think, fairly to be regarded as having been increased "by" the omission of their mother to take benefits before she died. The sons' estates would not, of course, have been so increased *but for* the omission. Moreover, the exercise of discretion in the sons' favour by the scheme administrator did not, as it seems to me, involve any break in the chain of causation. The administrator was, after all, doing no more than it was obliged and could be expected to do in the period immediately following Mrs Staveley's death. It may be that the increase in the sons' estates could also be said to have been brought about "by" the exercise of the administrator's discretion, but that by no means makes it inappropriate to see the estates as having been increased "by" the omission. The one does not preclude the other.

110. Finally, Mr Rees argued that section 3(3) requires a temporal nexus between the diminution in the value of one person's estate and the increase in the value of someone else's. The two events, he said, must occur at the same time if section 3(3) is to apply. The provision, he said, uses the present tense ("is diminished … and … is increased") and so demands a direct reciprocation between the diminution and the increase.

111. Neither the FTT nor the Upper Tribunal accepted this contention, and nor do I. The Upper Tribunal commented (at paragraph 69 of its decision):

> "The use of the present tense in s 3(3) cannot bear the weight that Mr Rees seeks to ascribe to it. In our judgment, … there is no temporal requirement imposed by s 3(3). The use of 'is' merely describes a state of affairs, which is capable of being objectively measured. Attractive as Mr Rees' see-saw analogy was, it cannot be supported by the proper construction of s 3(3). The legislation does not support a requirement that there must be a see-saw effect of simultaneous diminution and increase in value, or as he put it 'pushing down on one side causes the other to rise'."

I agree.

112. I would, accordingly, allow HMRC's appeal on Issue 2.

Conclusion

113. Like Lady Arden, albeit for different reasons, I would allow HMRC's appeal on Issue 1. I would also, in common with both Lady Arden and Birss J, allow HMRC's appeal on Issue 2.

Mr Justice Birss:

114. Like Lady Arden of Heswall and Newey LJ, I would allow HMRC's appeal on both issue 1 and issue 2. The reasons why I would allow the appeal on issue 1 are those given by Newey LJ. Newey LJ identifies three possible interpretations of s10(1) IHTA and concludes that the third is the right one. I agree. Newey LJ then addresses associated operations. I agree with that too. That is enough to dispose of issue 1.

115. As I am also disagreeing with Lady Arden about part of issue 1, I will add the following. The FTT found that Mrs Staveley transferred the pension policy in order to make sure there was no chance any of the fund got back to her former husband's company. If that represented the totality of Mrs Staveley's relevant intention then, subject to the associated operations provisions, the transfer could not have been "intended to confer a gratuitous benefit on any person" and would escape IHT. The FTT expressly considered and rejected the idea that Mrs Staveley had a dual motivation for that transfer (paragraph 49). Lady Arden's analysis of the FTT's decision leads to the conclusion that one can find or impute the presence of a second relevant motive on the part of Mrs Staveley specifically associated with the transfer of itself. Then Lady Arden concludes that this second intention is within the ambit of an "intention to confer a gratuitous benefit". I am unable to agree with either step. Taking the second step first, as already mentioned, I agree with Newey LJ that Lady Arden's approach is based on the second interpretation of s10 but that that interpretation should be rejected. On the first step, as I read the FTT's decision, the tribunal addressed and rejected the presence of a dual motivation relating to the transfer of itself, as a matter of fact. I believe the FTT made no error in doing so which would justify the intervention of an appellate court.

116. On issue 2 the reasons given by Lady Arden and Newey LJ are the same and I agree. Lady Arden has added further observations in paragraphs 67 and 68. I agree with those further observations.

APPENDIX TO JUDGMENT OF LADY ARDEN

SECTIONS 3 AND 10 OF IHTA

3. Transfers of value

(1) Subject to the following provisions of this Part of this Act, a transfer of value is a disposition made by a person (the transferor) as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer….

(3) Where the value of a person's estate is diminished, and the value–

(a) of another person's estate, or

(b) of any settled property, other than settled property treated by section 49(1) below as property to which a person is beneficially entitled,

is increased by the first-mentioned person's omission to exercise a right, he shall be treated for the purposes of this section as having made a disposition at the time (or latest time) when he could have exercised the right, unless it is shown that the omission was not deliberate….

10. Dispositions not intended to confer gratuitous benefit.

(1) A disposition is not a transfer of value if it is shown that it was not intended, and was not made in a transaction intended, to confer any gratuitous benefit on any person and either—

(a) that it was made in a transaction at arm's length between persons not connected with each other, or

(b) that it was such as might be expected to be made in a transaction at arm's length between persons not connected with each other….

(3) In this section—

"disposition" includes anything treated as a disposition by virtue of section 3(3) above;

"transaction" includes a series of transactions and any associated operations.

268 Associated operations

(1) In this Act *"associated operations"* means, subject to subsection (2) below, any two or more operations of any kind, being—
(a) operations which affect the same property, or one of which affects some property and the other or others of which affect property which represents, whether directly or indirectly, that property, or income arising from that property, or any property representing accumulations of any such income, or
(b) any two operations of which one is effected with reference to the other, or with a view to enabling the other to be effected or facilitating its being effected, and any further operation having a like relation to any of those two, and so on.
whether those operations are effected by the same person or different persons, and whether or not they are simultaneous; and *"operation"* includes an omission.
(2) The granting of a lease for full consideration in money or money's worth shall not be taken to be associated with any operation effected more than three years after the grant, and no operation effected on or after 27th March 1974 shall be taken to be associated with an operation effected before that date.
(3) Where a transfer of value is made by associated operations carried out at different times it shall be treated as made at the time of the last of them; but where any one or more of the earlier operations also constitute a transfer of value made by the same transferor, the value transferred by the earlier operations shall be treated as reducing the value transferred by all the operations taken together, except to the extent that the transfer constituted by the earlier operations but not that made by all the operations taken together is exempt under section 18 above.