Neutral Citation Number: [2019] EWCA Civ 93

Case No: A3/2017/2886

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Arnold and Judge Roger Berner
[2017] UKUT 0300 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2019

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

- -

Between:

(1) THE TRUSTEES OF THE MORRISON 2002 MAINTENANCE TRUST **(2) THE TRUSTEES OF SIR FRASER MORRISON'S 1989 TRUST** **(3) THE TRUSTEES OF SIR FRASER MORRISON'S 1995 TRUST** **(4) SIR FRASER MORRISON**	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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Mr Kevin Prosser QC and Mr Charles Bradley (instructed by **Dentons UK and Middle East LLP**) for the **Appellants**
Mr Akash Nawbatt QC and Miss Kate Balmer (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 15 and 16 January 2019

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Approved Judgment

Lord Justice Newey:

1. This appeal concerns the effectiveness of some tax planning that was designed to avoid the capital gains tax ("CGT") that would otherwise have arisen on the disposal of certain shares. The First-tier Tribunal ("the FTT") (Judge J Gordon Reid QC and Mr Ian Malcolm) concluded that the approach first introduced by *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 applied and, hence, that CGT had not been avoided, and the Upper Tribunal ("the UT") (Arnold J and Judge Roger Berner) agreed. The appellants, however, challenge those decisions.

The facts

2. This section of this judgment is based on a statement of facts that was agreed between the parties and on findings made by the FTT.

3. The first to third appellants ("the Scottish Trustees") are the trustees of three trusts ("the Scottish Trusts") that the fourth appellant, Sir Fraser Morrison, established for the benefit of his family between 1989 and 2002. The Scottish Trustees have always been resident in the United Kingdom and have since 8 November 2004 comprised Lady Morrison (Sir Fraser Morrison's wife) and trustee companies managed by the solicitors Maclay Murray & Spens LLP ("MMS").

4. Immediately before the events giving rise to this appeal, the Scottish Trustees held some 2% of the issued capital of AWG plc ("AWG"), a listed company.

5. The Scottish Trustees wished to diversify and, to that end, to dispose of AWG shares, but they were concerned that doing so would give rise to substantial CGT liabilities. MMS were asked to advise and, following a consultation with counsel, a scheme involving the following steps was devised:

   i) The establishment of trusts with Irish-resident trustees and terms similar to those of the Scottish Trusts;

   ii) The grant by the Irish trustees to the Scottish Trustees of put options for the sale of the AWG shares at a price equal to the Scottish Trustees' CGT base cost plus indexation (if any);

   iii) The exercise of those options by the Scottish Trustees and, as a result, the acquisition of the AWG shares by the Irish trustees;

   iv) The sale of the AWG shares by the Irish trustees; and

   v) The replacement of the Irish trustees by trustees resident in the United Kingdom before the end of the tax year.

6. In pursuance of this scheme, trusts mirroring the Scottish Trusts but with Irish-resident trustees ("the Irish Trusts" and "the Irish Trustees") were established on 10 November 2004, with Lady Morrison as their settlor. The Irish Trusts were created as a vehicle to carry out the scheme to enable CGT to be avoided on the sale of the AWG shares and had no independent commercial purpose. Their trustees were a trust company managed by Matheson Ormsby Prentice (now simply "Matheson"), a Dublin law firm, and that firm's finance director. Although the Scottish Trustees had

no formal control over the Irish Trustees, it was unrealistic to assume that the latter would do anything that significantly contradicted the views of the former and the beneficiaries that the trust assets should be diversified by selling the AWG shares.

7. On Friday 19 November 2004, the Irish Trustees entered into agreements granting the Scottish Trustees put options in respect of the AWG shares at prices equivalent to their base cost for CGT purposes. The previous day, MMS had written to the Irish Trustees on the Scottish Trustees' behalf asking for the options to be granted.

8. The options were exercisable only if a "Relevant Event" (which related to the exchange rate between the US dollar and sterling) occurred. The introduction of the "Relevant Event" was an anti-*Ramsay* device. There was a 10% chance of the "Relevant Event" not occurring.

9. On Monday 22 November 2004, the Irish Trustees resolved to appoint Merrill Lynch to provide investment advice subject to a suitable letter of engagement being agreed.

10. A briefing paper presented at a meeting of the Scottish Trustees on 23 November 2004 identified the following as uncertainties:

    i) The possibility of a change in the law affecting section 144ZA of the Taxation of Chargeable Gains Act 1992 ("the TCGA");

    ii) The possibility of a change in Irish tax law;

    iii) The decision of the House of Lords in *IRC v Scottish Provident Institution*, which was due to be handed down on 25 November;

    iv) The possibility of a change in the AWG share price making immediate sale in the market more attractive than exercising the put options and transferring the shares into the Irish Trusts; and

    v) The Scottish Trustees considering that exercise of the options was not in the best interests of the beneficiaries or outwith their powers as trustees.

11. With regard to the fourth of these points, the FTT noted that "a catastrophic collapse of the AWG share price would have been required" (paragraph 104 of its decision) and that "there was no evidence that there was a real risk of such a dramatic fall in the market share price" (paragraph 62). As for point (v), the Scottish Trustees considered that transfer of the AWG shares at an undervalue could represent a breach of trust on their part, but their concerns were allayed by the provision on 23 and 24 November 2004 of indemnities from beneficiaries and a waiver from Sir Fraser Morrison.

12. The "Relevant Event" having occurred on 23 November 2004, on Thursday 25 November the Scottish Trustees exercised the put options in respect of the AWG shares. They received a little less than £4.5 million from the transactions.

13. At this stage, "there was no practical likelihood that the AWG shares would not forthwith be re-sold in the market by the Irish Trustees" (paragraph 111 of the FTT decision). While the FTT accepted that the Irish Trustees "genuinely considered matters carefully over a short period", "the possibility of the Irish Trustees acting contrary to the clear wishes of the beneficiaries and the Scottish Trustees was

remote": the reality was that "there was no practical likelihood of the Irish Trustees faltering and reaching a different view" (paragraph 109 of the FTT decision). The FTT concluded (in paragraph 111) that:

> "as at 25 November 2004, when the Scottish Trustees exercised the options, if not before, there was every practical likelihood that the AWG shares would forthwith be re-sold in the market."

14. In the event, on Wednesday 1 December 2004 the Irish Trustees sold the AWG shares to Merrill Lynch, which was acting as a principal rather than an agent, under a "risk bid" arrangement. Merrill Lynch, in turn, sold to the market. The Irish Trustees thereby achieved the certainty of a minimum price (£7.40) for the shares, Merrill Lynch underwriting the sale at a particular value with the possibility of a higher price being obtained depending on a subsequent sale by it to the market. In the end, the Irish Trustees received £7.43 a share and, hence, about £14.3 million for their holding.

15. On 11 March 2005, the Irish Trustees retired as trustees of the Irish Trusts in favour of Lady Morrison and the two trustee companies which were already trustees of the Scottish Trusts. The Scottish Trustees thus became the trustees of the Irish Trusts as well. But for the appointment of UK-resident trustees of the Irish Trusts, their settlor (Lady Morrison) and beneficiaries could have been exposed to CGT liabilities.

16. The FTT commented (at paragraph 30.31 of its decision):

> "The tax planning scheme or arrangement was carried out almost exactly as planned. The only variation was minor, namely the AWG shares were sold first to Merrill Lynch and then in the market."

17. HM Revenue and Customs ("HMRC") assessed the Scottish Trustees to CGT on the basis that they were to be treated as having disposed of the AWG shares to Merrill Lynch.

<u>The legislative framework</u>

18. Section 1(1) of the TCGA provides for CGT to be charged:

> "in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets".

By section 15, "[e]very gain shall, except as otherwise expressly provided, be a chargeable gain".

19. Under section 17 of the TCGA, disposals and acquisitions of assets are to be treated as made at market value in certain circumstances. Section 17(1) states:

> "(1) Subject to the provisions of this Act, a person's acquisition or disposal of an asset shall for the purposes of this Act be deemed to be for a consideration equal to the market value of the asset—

> (a) where he acquires or, as the case may be, disposes of the asset otherwise than by way of a bargain made at arm's length, and in particular where he acquires or disposes of it by way of gift or on a transfer into settlement by a settlor or by way of distribution from a company in respect of shares in the company, or
>
> (b) where he acquires or, as the case may be, disposes of the asset wholly or partly for a consideration that cannot be valued, or in connection with his own or another's loss of office or employment or diminution of emoluments, or otherwise in consideration for or recognition of his or another's services or past services in any office or employment or of any other service rendered or to be rendered by him or another."

20. Section 28 of the TCGA is concerned with when an asset disposed of under a contract is to be treated as having been disposed of and acquired. The section is in these terms:

> "(1) Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).
>
> (2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied."

21. In November 2004, when the relevant events took place, options were addressed in sections 144 and 144ZA of the TCGA. Section 144 provided:

> "(1) Without prejudice to section 21, the grant of an option … is the disposal of an asset (namely of the option), but subject to the following provisions of this section as to treating the grant of an option as part of a larger transaction.
>
> (2) If an option is exercised, the grant of the option and the transaction entered into by the grantor in fulfilment of his obligations under the option shall be treated as a single transaction and accordingly—
>
> …
>
> (b) if the option binds the grantor to buy, the consideration for the option shall be deducted from the cost of acquisition incurred by the grantor in buying in pursuance of his obligations under the option.
>
> (3) The exercise of an option by the person for the time being entitled to exercise it shall not constitute the disposal of an asset by that person, but, if an option is exercised then the acquisition of the option (whether directly from the grantor or

> not) and the transaction entered into by the person exercising the option in exercise of his rights under the option shall be treated as a single transaction and accordingly—
>
> …
>
> (b) if the option binds the grantor to buy, the cost of the option shall be treated as a cost incidental to the disposal of what is bought by the grantor of the option ….”

22. Section 144ZA was in these terms:

> “(1) This section applies where—
>
> (a) an option is exercised, so that by virtue of section 144(2) or (3) the grant or acquisition of the option and the transaction resulting from its exercise are treated as a single transaction, and
>
> (b) section 17(1) (‘the market value rule’) applies, or would apply but for this section, in relation to—
>
> (i) the grant of the option,
>
> (ii) the acquisition of the option (whether directly from the grantor or not) by the person exercising it, or
>
> (iii) the transaction resulting from its exercise.
>
> …
>
> (3) If the option binds the grantor to buy—
>
> (a) the market value rule does not apply for determining the cost of acquisition incurred by the grantor, but without prejudice to its application (in accordance with section 144(2)(b)) where the rule applies for determining the consideration for the option;
>
> (b) the market value rule does not apply for determining the consideration for the disposal of what is bought, but without prejudice to its application (in accordance with section 144(3)(b)) where the rule applies for determining the cost of the option.
>
> (4) To the extent that, by virtue of this section, the market value rule does not apply for determining an amount or value, the amount or value to be taken into account is (subject to section 120) the actual amount or value ….”

23. Section 144ZA was introduced to reverse the decision of the Court of Appeal in *Mansworth v Jelley* [2002] EWCA Civ 1829, [2003] STC 53, but the scheme at issue

in these proceedings sought to take advantage of it. The scheme was framed on the basis that, as a result of section 144ZA, the actual amount paid to the Scottish Trustees for the AWG shares would be substituted for their market value and, hence, that the Scottish Trustees would have made no gain and have no CGT liability.

The *Ramsay* approach

24. The "true principle established in [*Ramsay*] and the cases which followed it" was explained by Lord Nicholls in *Barclays Mercantile Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684 (see *RFC 2012 plc v Advocate General for Scotland* [2017] UKSC 45, [2017] 1 WLR 2767, at paragraph 12, per Lord Hodge). *Ramsay*, Lord Nicholls observed in the *Barclays Mercantile* case, had "liberated the construction of revenue statutes from being both literal and blinkered" (paragraph 29), but there had "[u]nfortunately" been "a tendency to regard *Ramsay* as establishing a new jurisprudence governed by special rules of its own" (paragraph 34). The "essence of the new approach", Lord Nicholls said (at paragraph 32), was:

> "to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description".

As Ribeiro PJ had said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 (at paragraph 35):

> "[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

25. In *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13, [2016] 1 WLR 1005, Lord Reed, whose judgment included extensive reference to Lord Nicholls' speech in the *Barclays Mercantile* case, said of *Ramsay* (at paragraph 62):

> "First, it extended to tax cases the purposive approach to statutory construction which was orthodox in other areas of the law. Secondly, and equally significantly, it established that the analysis of the facts depended on that purposive construction of the statute."

26. The *Ramsay* case itself involved "self-cancelling" transactions which "were designed to return and did return the taxpayer to the starting position except for the payment of expenses" (to quote from the speech of Lord Brightman in *Furniss v Dawson* [1984] AC 474, at 524). Lord Wilberforce observed in *Ramsay* (at 326) that CGT "was created to operate in the real world, not that of make-belief" and that it is "a tax on gains" and "not a tax on arithmetical differences". He explained (at 324) that it need not be necessary "to consider individually each separate step in a composite

transaction intended to be carried through as a whole", that that was "particularly the case where … there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps" and that it could also be so "where … there is an expectation that it will be so carried through, and no likelihood in practice that it will not".

27. *Furniss v Dawson* showed that the *Ramsay* approach could apply to transactions that were not self-cancelling. As Lord Jauncey noted in *Craven v White* [1989] AC 398, at 530, *Furniss v Dawson*:

> "involved extending the application of the *Ramsay* principle from circular transactions which had no purpose other than tax avoidance to linear transactions which had a legitimate commercial end purpose but into which had been inserted a step whose sole purpose was tax avoidance".

Lord Brightman said this in *Furniss v Dawson* (at 527) about where the *Ramsay* principle operates:

> "First, there must be a <u>pre-ordained series of transactions</u>; or, if one likes, <u>one single composite transaction</u>. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end …. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax - not 'no business *effect*.' If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied"

(underlining added).

<u>The decisions below</u>

28. As I have already mentioned, the FTT considered the *Ramsay* approach to be applicable in the present case. The FTT said at paragraph 120 of its decision:

> "Construing the facts as a whole, there was thus a single composite transaction, namely the disposal of the AWG shares at or about market value. The intermediate step (A to B) of selling through the medium of artificially granted options by artificially created Irish Trusts (neither serving any purpose than the obtaining of a tax advantage), should not be respected as the appellants contend. The transaction should be regarded as what in reality it was, namely a disposal in the market (A to C) to which the normal fiscal consequences of the application of the TCGA in accordance with its statutory purpose flow. These elements (A to B and B to C) were intended to operate together. The overall effect and economic result was the disposal of the AWG shares at or about market value (A to C)."

The "overall scheme, as it was developing, contained a number of doubts, uncertainties and contingencies" (paragraph 130), but "it became increasingly obvious that the scheme would be carried into effect as expected, planned and intended" (paragraph 131). "Put in the language of the authorities," the FTT said at paragraph 131:

> "there was no practical likelihood of the options being exercised without the AWG shares being sold forthwith by the Irish Trustees in the then buoyant market or its equivalent (the risk bid arrangement). There was, in our assessment of the facts as we have found them to be, every likelihood that this would occur. It was a matter of practical certainty that this would occur."

29. On appeal to the UT, the appellants argued that the FTT had made three main errors. The UT explained in paragraph 24 of its decision:

> "First and foremost, the appellants contend that the FTT failed properly to apply the decision of the House of Lords in [*Craven v White*]. Secondly, the appellants contend that the FTT was wrong to treat the involvement of Merrill Lynch as immaterial. Thirdly, the appellants contend that the FTT was wrong to analyse the question as at 25 November 2004 and that it should have analysed the question as at 19 November 2004."

30. The UT did not accept any of these contentions. It arrived at the following, among other, conclusions:

    i) The FTT was entitled to conclude that, viewed as at either 19 or 25 November 2004, there was no practical likelihood that the Irish Trustees would not sell the AWG shares to the market at market value (paragraph 50 of the UT decision);

    ii) The FTT was entitled to conclude that the involvement of Merrill Lynch made no material difference (paragraph 52); and

    iii) The FTT was correct to consider the position as at 25 November 2004 (paragraph 56).

<u>The issues</u>

31. Three issues arise on this appeal:

    i) Does the applicability of the *Ramsay* approach fall to be determined as at 19 November 2004 (when the Irish Trustees granted the put options) or 25 November (when the Scottish Trustees exercised the options)?

    ii) If 25 November is the relevant date, was the FTT entitled to hold that, as at that date, there was a "single composite transaction" pursuant to which the Scottish Trustees disposed of their AWG shares to Merrill Lynch?

iii) If 19 November is the relevant date, was there, as at that date, a "single composite transaction" pursuant to which the Scottish Trustees disposed of their AWG shares to Merrill Lynch?

32. I shall take these issues in turn.

Issue (i): The relevant date

33. Noting that HMRC could "only succeed if the exercise of the options formed part of a single composite transaction", the UT concluded that "the critical date is the date of the exercise of the options, not the date of the grant of the options" (see paragraph 56 of the UT decision).

34. Mr Kevin Prosser QC, who appeared for the appellants with Mr Charles Bradley, disputed that view. The applicability of the *Ramsay* approach should in fact, he said, be assessed as at 19 November 2004, when the options were granted. Where, he argued, the question is whether a series of transactions is to be seen as a "single composite transaction", the position must be determined at the date of the first transaction in the series. Here, that initial transaction comprised not merely the exercise of the options but their grant, and it therefore could not be right to look only at the situation at the time the options were exercised. You must, Mr Prosser submitted, treat the two parts of the single transaction (viz. the grant of the options and their exercise) alike.

35. Mr Prosser sought support for his contentions in section 144 of the TCGA, which, he stressed, provided for the grant/acquisition of an option and a transaction entered into pursuant to it to be "treated as a single transaction". Further, a person entitled to exercise an option can, Mr Prosser argued, be viewed as having the benefit of a conditional contract rather than merely the chance to accept an offer. In this respect, Mr Prosser said that section 28(2) of the TCGA characterises an option as a conditional contract. He relied, too, on *Spiro v Glencrown Properties Ltd* [1991] Ch 537, which concerned the application of the Law of Property (Miscellaneous Provisions) Act 1989 to options. Hoffmann J held that what mattered for the purposes of that Act was whether the agreement granting the option satisfied its requirements; there was no need for the document by which the option was exercised to do so. In the course of his judgment, he said (at 544):

> "An option is not strictly speaking either an offer or a conditional contract. It does not have *all* the incidents of the standard form of either of these concepts. To that extent it is a relationship sui generis. But there are ways in which it resembles each of them. Each analogy is in the proper context a valid way of characterising the situation created by an option."

36. In my view, however, the UT was right to see 25 November (when the options were exercised) as the key date. Although the grant of the options on 19 November gave them the right to sell the AWG shares to the Irish Trustees, the Scottish Trustees were still under no duty to do so. They had an entirely free hand. They became obliged to transfer the shares to the Irish Trustees only because they later chose to exercise the options. That being so, I can see no reason why the exercise of the options coupled with onward sale should not, of themselves, be capable of constituting "a pre-ordained

series of transactions" or "one single composite transaction" for *Ramsay* purposes. Putting matters slightly differently, if (as HMRC maintain, but the appellants deny) there was the requisite certainty as at 25 November that the tax-saving scheme would be pursued, it appears to me that, construing the TCGA purposively, the transfer of the shares in exercise of the options and their subsequent sale to Merrill Lynch should be considered a "disposal" regardless of whether there was more doubt about the implementation of the scheme on 19 November.

37. The point can be illustrated by reference to an admittedly unlikely example. Suppose that a person had all but concluded a sale of shares to a particular individual when it occurred to him that he could save CGT by exercising a put option that had been granted to him years earlier, for reasons having nothing to do with tax, and arranging for the transferee to make the proposed sale. It would, as it seems to me, plainly be appropriate to apply the *Ramsay* principle. Approaching the TCGA purposively and the facts realistically, the transferor would have effected a "disposal" of the shares for CGT purposes. It could not matter that no one had had tax avoidance in mind when the put option was originally granted.

38. Neither the possibility of an option being characterised as a conditional contract nor the fact that the grant/acquisition of an option and its exercise are treated as a single transaction under section 144 of the TCGA strikes me as being of any importance. As was pointed out by Mr Akash Nawbatt QC, who appeared for HMRC with Miss Kate Balmer, since section 144 deals with the position where an option is exercised, it does not come into the picture if HMRC are correct that the Scottish Trustees are properly to be considered as having effected a "disposal" to Merrill Lynch rather than selling to the Irish Trustees in exercise of the put options. In any case, the fact that an option and/or its exercise may be viewed in a particular way in another context does not, to my mind, preclude the exercise of an option and an onward sale of themselves being considered to constitute a "disposal" for the purposes of the TCGA, looking at matters realistically.

Issue (ii): The position as at 25 November

39. Mr Prosser submitted that, even if it is correct to assess the position as at 25 November 2004 (rather than 19 November), the *Ramsay* approach does not avail HMRC. A "single composite transaction" of the kind required cannot exist, he argued, in the absence of "arrangements" for the onward sale. Here, he maintained, no arrangements had been made for the sale to Merrill Lynch by 25 November. The only certainty at that date was that there would be a sale of some kind by the Irish Trustees. The sale that was actually effected (to Merrill Lynch) was not even contemplated until 1 December.

40. Mr Prosser relied in support of his contentions on *Craven v White* and the decision of Vinelott J in *News International plc v Shepherd* [1989] STC 617. In the former case, the taxpayers, who had a controlling interest in Queensferry, entered into negotiations with both Cee-N-Cee, with a view to merger, and Oriel, with a view to a sale. At a stage when the prospects of a sale to Oriel seemed poor, steps were taken to acquire an Isle of Man company, Millor, at least in part on the basis that it would provide a convenient vehicle for a merger with Cee-N-Cee. By the time the taxpayers came to exchange their shares in Queensferry for shares in Millor, negotiations with Oriel had resumed, but without any certainty that they would come to fruition. In the event,

agreement was reached three weeks later and Millor sold the Queensferry shares to a subsidiary of Oriel.

41. The House of Lords decided by a majority (Lord Templeman and Lord Goff dissenting) that the Crown could not invoke the *Ramsay* principle. Lord Keith said (at 480-481):

> "Is it enough that the original owners of the shares, being minded to dispose of them, decide to do so through an intermediary company under their control, carry through a share exchange and thereafter seek and successfully find a purchaser? In that situation there is certainly a scheme on the part of the holders of the shares to dispose of them in such a way that any capital gains tax liability is deferred. According to circumstances, there may be varying degrees of interconnection between the disposal to the intermediary company and the disposal to the ultimate purchaser. It may be many months before a possible purchaser is found and many more before a bargain is concluded. Again, the share exchange may be entered into without any immediate intention of selling but so that it may stand in good stead for tax purposes if and when a decision to sell is made. Or it may take place when negotiations with a particular purchaser are under way but the outcome is still open. In all these cases it is clear that the owner of the shares has so arranged matters that if and when a sale of the shares does take place it will not be a direct disposal of the shares by him but a disposal by an intermediary company which he controls. But I do not think that the transaction embodied in the final disposal can be said to be pre-ordained, a matter to be ascertained as at the time of the share exchange, when at that time it is wholly uncertain whether that disposal will take place, or a fortiori when neither the identity of the purchaser nor the price to be paid nor any of the other terms of the contract are known. In my opinion both the transactions in the series can properly be regarded as pre-ordained if, but only if, at the time when the first of them is entered into the taxpayer is in a position for all practical purposes to secure that the second also is entered into."

On the facts, Lord Keith thought it clear that, at the date of the share exchange, "there was no certainty that the sale to Oriel would take place" and "the taxpayers were by no means in a position for all practical purposes to secure that the sale went through" (see 483).

42. Lord Oliver, with whom Lord Keith expressed agreement, arrived at a similar conclusion. He said (at 519):

> "But at the time when the share exchange took place on 19 July there was no certainty whatever that the sale would take place …. The most that can be said is that the sale was in active contemplation at a price in excess of £2m. on some terms not

> yet finalised but that there was also in contemplation a merger with another concern, which was regarded as a second best option. In no ordinary use of language can it be said that the sale which actually took place was actually then 'pre-ordained' although no doubt it was pre-conceived, nor can it be said that there was then 'no likelihood that it would not take place.'"

Earlier in his speech (at 516-517), Lord Oliver had said:

> "Another identifying feature is that all the stages of what is claimed as the composite transaction are pre-ordained to take place in an orchestrated sequence and, in my opinion, that must mean more than simply 'planned or thought out in advance.' It involves to my mind a degree of certainty and control over the end result at the time when the intermediate steps are taken. That does not, I think, mean absolute certainty in the sense that every single term of the transaction which ultimately takes place must then be finally settled and agreed. But it does seem to me to be essential at least that the principal terms should be agreed to the point at which it can be said that there is no practical likelihood that the transaction which actually takes place will not take place. Nor is it sufficient, in my opinion, that the ultimate transaction which finally takes place, though not envisaged at the intermediate stage as a concrete reality, is simply a transaction of the kind that is then envisaged, for the underlying basis of the *Ramsay* doctrine is that it must, on the facts, be possible to analyse the sequence as one single identifiable transaction and if, at the completion of the intermediate disposition, it is not even known to whom or upon what terms any ultimate disposition will be made, I simply do not see how such an analysis is intellectually possible."

43. The third member of the majority, Lord Jauncey, said this (at 532):

> "In a linear transaction involving third parties over whom the first disponer has no absolute control mere contemplation or intention by him at the time of completion of the first transaction to complete the second transaction will not suffice to make the first part of a single composite transaction. Further steps towards the second transaction must have been taken at the time of completion of the first transaction before the latter can be said to form part of a composite transaction. The character of the first transaction falls to be determined at the time when it takes place. Was it then an independent transaction or was it an interdependent part of a composite transaction?"

Lord Jauncey went on, however, to say (at 532):

> "There might be circumstances in which at the time of the first transaction arrangements for the effecting of the second

> transaction had reached a stage at which it could properly be found as a fact that the first transaction was interdependent although a final price or specific buyer had not then been identified. Arrangements for a sale by auction might be such a situation."

44. Lord Jauncey proffered the following as a "formula defining 'composite transaction'" (at 533):

> "A step in a linear transaction which has no business purpose apart from the avoidance or deferment of tax liability will be treated as forming part of a pre-ordained series of transactions or of a composite transaction if it was taken at a time when negotiations or arrangements for the carrying through as a continuous process of a subsequent transaction which actually takes place had reached a stage when there was no real likelihood that such subsequent transaction would not take place and if thereafter such negotiations or arrangements were carried through to completion without genuine interruption."

He commented that he was "conscious that this may well constitute too rigid an approach to the problems", but also said (at 533):

> "It may be said that any formula of the type such as I have suggested would make it easy for the taxpayer to avoid tax liability merely by postponing arrangements for the second transaction until after the first had been completed. That is, however, to beg the question. The function of the court is to construe the relevant charging section and to apply it to the facts found. I do not conceive it to be the function of the court to act as the third arm of the revenue in seeking to attack tax avoidance at large. If a series of transactions involving a pure tax avoidance step can, within the principles already laid down, properly be regarded as constituting a 'disposal' or other chargeable event for the purposes of the relevant charging section then the court must so regard them. But if they cannot then Parliament alone can extend the ambit of the charging section."

45. There are passages in the speeches of Lord Keith and Lord Oliver which, taken out of their context, could suggest that the *Ramsay* approach cannot apply to linear transactions unless the identity of the ultimate purchaser and the price at which he is to buy are both known at the time of the first relevant transaction. For example, Lord Keith said that he did not think that the final sale could be said to be pre-ordained when "it is wholly uncertain whether that disposal will take place, or a fortiori when *neither the identity of the purchaser nor the price to be paid nor any of the other terms of the contract are known*" (emphasis added). Again, Lord Oliver expressed the view that a sequence could not be analysed as "one single composite transaction" if, "at the completion of the intermediate disposition, it is not even known to whom or upon what terms any ultimate disposition will be made". Were such comments taken to be of universal application, the *Ramsay* approach could, presumably, have no

application whenever the plan was to sell in the market. Where an asset is sold in the market, advance knowledge of the identity of the purchaser or the precise price will at least normally be impossible.

46. Wisely, Mr Prosser did not maintain in his submissions to us that a specific purchaser and price need necessarily be known. He focused, rather, on Lord Jauncey's speech in *Craven v White*. Lord Jauncey recognised that there might be circumstances in which a transaction could properly be found to have been interdependent "although a final price or specific buyer had not then been identified", observing that "[a]rrangements for a sale by auction might be such a situation". Mr Prosser, however, argued that it can be seen from Lord Jauncey's speech that, for the *Ramsay* approach to apply, there must have been "negotiations or arrangements for the carrying through" of the later sale at the time of the initial transaction in the alleged series. Thus, Lord Jauncey said that "steps towards the second transaction must have been taken at the time of completion of the first transaction before the latter can be said to form part of a composite transaction" and that it might be possible to treat a step as part of a composite transaction "if it was taken at a time when *negotiations or arrangements for the carrying through* as a continuous process of a subsequent transaction which actually takes place had reached a stage when there was no real likelihood that such subsequent transaction would not take place and if thereafter such negotiations or arrangements were carried through to completion without genuine interruption" (emphasis added).

47. Turning to *News International plc v Shepherd*, in that case News International held shares which had appreciated in value. It acquired two companies with pre-existing allowable losses and sold the shares to them at less than market value. The two companies, in turn, re-sold the shares in the market at a profit within a few days. It was suggested by the Crown that the two sales of the shares constituted a composite transaction, but Vinelott J did not accept that. In the course of his judgment, he commented (at 657-658) on Lord Jauncey's reference to "[a]rrangements for a sale by auction" in *Craven v White*:

> "I do not think that Lord Jauncey had in mind that transfer by A to B … with the intention that it should forthwith be put up for sale by auction by B followed by a sale by auction should be treated as a single composite transaction—a sale by A. The reference to a sale by auction in the speech of Lord Jauncey must be construed in its context. The first of Lord Jauncey's guiding factors is that 'the extent to which at the time of the tax step', the transfer from A to B, 'negotiations or arrangements have proceeded towards the carrying through as a continuous process of the remaining transaction'. The reference to 'the carrying through as a continuous process' is repeated in his suggested formula. Looked at in its context I think the situation envisaged by Lord Jauncey as possibly falling within the *Ramsay* principle is one where, at the time of the transfer by A to B, A has already made the necessary arrangements for a sale by auction and the transfer is made in the confident expectation that the asset will be sold at a satisfactory price."

This, Mr Prosser submitted, confirms the need for "arrangements" for the sale ultimately effected to have been in existence at the date of the first element of the allegedly composite transaction.

48. For his part, Mr Nawbatt argued that the passages in *News International plc v Shepherd* on which Mr Prosser relied were obiter and that the decision is not in any event binding on this Court. With regard to *Craven v White,* Mr Nawbatt said that the speeches in that case have to be seen in their context. In that respect, he relied on the decision of the House of Lords in *IRC v Scottish Provident Institution* [2004] UKHL 52, [2004] 1 WLR 3172, judgment in which was given on the same day as both judgment in *Barclays Mercantile* and the exercise by the Scottish Trustees of their put options. The scheme at issue in the *Scottish Provident* case envisaged the exercise of matching options. The Special Commissioners held that there was an outside but commercially real possibility that circumstances might occur in which the options would not be exercised so as to cancel each other out. The question therefore arose "whether, in a case in which they were in fact exercised so as to cancel each other out, the existence of this contingency prevented the commissioners from applying the statute to the scheme as it was intended to operate and as it actually did operate" (paragraph 16). The House of Lords held that it did not. Lord Nicholls said this:

> "23 We think that it would destroy the value of the *Ramsay* principle of construing provisions such as section 150A(1) of the [Finance Act 1994] as referring to the effect of composite transactions if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. We would be back in the world of artificial tax schemes, now equipped with anti-*Ramsay* devices. The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned.
>
> 24 It follows that in our opinion the special commissioners erred in law in concluding that their finding that there was a realistic possibility of the options not being exercised simultaneously meant, without more, that the scheme could not be regarded as a single composite transaction. We think that it was and that, so viewed, it created no entitlement to gilts and that there was therefore no qualifying contract."

This decision accounts for the appellants' failure to place any reliance on the provision in the present case for a "Relevant Event", that having been inserted as an anti-*Ramsay* device (see paragraph 8 above).

49. So far as *Craven v White* is concerned, Lord Nicholls noted in the *Scottish Provident* case (at paragraph 21) that in *Craven v White* "important parts of what was claimed by the Revenue to be a single composite scheme did not exist at the relevant date". There was thus, he noted (in paragraph 22), "an uncertainty about whether the alleged composite transaction would proceed to completion which arose, not from the terms of the alleged composite transaction itself, but from the fact that, at the relevant date,

no composite transaction had yet been put together". *Craven v White* was therefore distinguishable.

50. In my view, the fact that *Craven v White* concerned a situation in which there was uncertainty arising from "the fact that … no composite transaction had yet been put together" is important in the present case, too. It is also relevant that the asset in question in *Craven v White* was a controlling interest in an unquoted company. The House of Lords was thus dealing with a very different case to the present one and what was said in *Craven v White* has to be approached with that in mind.

51. In the pithy words of Ribeiro PJ, the "ultimate question" is "whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically". Where, as in the present case, the issue is whether, construing the TCGA "purposively", linear transactions should "realistically" be seen as constituting a "disposal" within the meaning of the Act, *Furniss v Dawson* shows that "a pre-ordained series of transactions" or "one single composite transaction" is required. If, as was the case in *Craven v White*, there is real doubt, for reasons unrelated to a desire to escape the *Ramsay* approach, as to whether a tax-saving scheme will be put into effect, it is easy to understand why the requisite "pre-ordained series of transactions" or "single composite transaction" should not be considered to exist. In such circumstances, inability to identify an ultimate purchaser and price is symptomatic of uncertainty as to whether the sale will happen at all.

52. It by no means follows that the *Ramsay* approach should be incapable of applying wherever the ultimate purchaser and price cannot be identified. Lord Jauncey, moreover, noted in *Craven v White* that there could be circumstances in which a transaction was considered interdependent without a final price or a specific buyer having been identified. He cited sale by auction, but it seems to me that it must also be possible for the *Ramsay* approach to apply to schemes under which assets are sold in the market. If, for instance, the plan were for an asset to be re-sold in the market immediately and arrangements for that had been made by the time of the first transaction in the series, I do not think it could matter that the buyer and price could not yet be determined. The transactions could nonetheless be "realistically" seen as constituting a "disposal" within the meaning of the TCGA. If Vinelott J thought otherwise in *News International plc v Shepherd*, then I respectfully disagree with him on this point.

53. Nor, in my view, can there be a strict requirement for "arrangements" for the final sale to have been made by the time of the first transaction. Doubtless, it will often be impossible to discern "a pre-ordained series of transactions" or "one single composite transaction" in the absence of such arrangements. I do not see, however, why that need be so if the asset in question (unlike the shareholding with which the House of Lords was concerned in *Craven v White*) can be disposed of quickly without advance preparation. Take a case such as the present one, where what is at issue is quoted shares and by the date of the first relevant transaction "there was no practical likelihood that the … shares would not forthwith be re-sold in the market" (to quote from paragraph 111 of the FTT decision). Viewing the facts realistically, it may very well be possible to say that there was "a pre-ordained series of transactions" and "one single composite transaction", and accordingly a "disposal" for the purposes of the TCGA, regardless of whether any arrangements for the intended sale had been made

when the first transaction was entered into. The *Ramsay* approach is intended to be liberating, not to spawn technical rules of its own.

54. I therefore agree with the UT that the “weight to be attached to this factor [i.e. the existence of prior arrangements] must depend on the nature of the relevant asset, and the extent to which prior arrangements are a necessary ingredient of a disposal” (see paragraph 49 of the UT decision). In the present case, where the asset comprised a shareholding in a quoted company, nothing of any significance needed to be done by 25 November for a rapid sale in the market to be achieved. The Irish Trustees were in fact in contact with Merrill Lynch before 25 November, but I do not think that was crucial to the application of the *Ramsay* approach.

55. In the event, the overall scheme “proceeded according to plan except that the shares were sold to Merrill Lynch and then to the market rather than to the market through the agency of Merrill Lynch” (paragraph 113 of the FTT decision). Mr Paraic Madigan of Matheson explained as follows in a witness statement:

> “The ‘risk bid’ being proposed by Merrill Lynch enabled us to benefit from the share price then prevailing. The shares would be placed on the market over a period of a few days but the trusts would be insulated from any market fluctuations during that period. The outcome was subject to an agreed minimum share price. We therefore obtained the benefit of a sale to the market but at a price that was, in effect, underwritten by Merrill Lynch."

56. The FTT considered that the sale to Merrill Lynch “sufficiently corresponded to the scheme as planned” and commented that it “would be extraordinary if the application of the *Ramsay* approach could be defeated by the sale being *to* brokers rather than to the market *by* brokers on behalf of the Irish Trustees” (paragraph 117 of the decision). The UT held that the FTT had been entitled to conclude that the involvement of Merrill Lynch made no material difference (paragraph 52 of the UT decision).

57. I agree. Lord Jauncey, as I have mentioned, suggested in *Craven v White* that the *Ramsay* approach could apply where arrangements had been made for a sale by auction. Suppose that in such a case the relevant item was not in fact auctioned because someone had come forward and said that he would buy it if it were taken out of the auction. I cannot imagine that that would matter. The sale would have “sufficiently corresponded to the scheme as planned” for the *Ramsay* approach to apply, to use words of the FTT.

58. The fact that the AWG shares were sold to Merrill Lynch rather than direct to the market is, in my view, similarly unimportant. As Mr Madigan said, the Irish Trustees “obtained the benefit of a sale to the market but at a price that was, in effect, underwritten by Merrill Lynch”. The price “underwritten by Merrill Lynch” (i.e. £7.40 a share) will have depended on market conditions, and, beyond that, the Irish Trustees still had a stake in how much the shares fetched in the market since that determined what, if any, uplift, they received from Merrill Lynch (in the event, 3p a share). Moreover, as had been the plan, the shares were disposed of very soon after the Scottish Trustees had exercised their put options. The “risk bid” arrangement represented no more than a minor variation on the intended theme. It did not render the *Ramsay* approach inapplicable.

59. In short, it seems to me that the FTT was right to conclude that the *Ramsay* approach was in point and that the Scottish Trustees should be regarded as having effected a "disposal" of the AWG shares to Merrill Lynch within the meaning of the TCGA.

Issue (iii): The position as at 19 November

60. The conclusions I have arrived at thus far mean that I do not need to address this issue.

Conclusion

61. I would dismiss the appeal.

Lord Justice David Richards:

62. I agree.

Lord Justice McCombe:

63. I also agree.