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UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

INCOME TAX - dividend avoidance scheme involving trust - whether taxable dividend or distribution received by taxpayers - whether settlements legislation overrode any charge under distribution code - application of settlements legislation - element of bounty requirement - whether taxpayers were settlors - application of multiple settlor provisions

Heard on: 20 and 21 July 2022
Judgment date: 20 December 2022

Before

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

Between

SHARON CLIPPERTON
STEVEN LLOYD

Appellants/
Respondents in cross-appeal

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents/
Appellants in cross-appeal

Representation:

For the Appellants: Michael Jones KC, instructed by Reynolds Porter Chamberlain LLP

For the Respondents: Aparna Nathan KC and Laura Poots, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. His Majesty's Revenue and Customs ("HMRC") assessed Ms Clipperton and Mr Lloyd (the "Appellants") to income tax on sums which they received in 2011/12 from arrangements involving a company of which they were the sole shareholders and directors. The Appellants appealed against the assessments to the First-tier Tax Tribunal ("FTT"). The FTT held that the sums in question were liable to income tax as distributions (the "distribution issue"), but, if that were wrong, would not have been liable to tax in the hands of the Appellants under the settlements legislation.

2. With the permission of the FTT, the Appellants appeal against the FTT's decision in relation to the distribution issue, and against certain aspects of the FTT's decision in relation to the settlements code. Again with the permission of the FTT, HMRC cross-appeal against the FTT's decision that the amounts would not have been taxable on the Appellants under the settlements legislation.

BACKGROUND AND SUMMARY FACTS

3. The relevant facts are not in dispute and may be summarised as follows. Unless indicated otherwise, references below to paragraphs in the form [*] are to paragraphs of the FTT's decision (the "Decision").

4. At all material times each Appellant held 50% of the shares in Winn & Co (Yorkshire) Ltd ("Winn Yorkshire"), a firm of accountants. The Appellants were also the sole directors.

5. Winn Yorkshire had historically paid the Appellants substantial dividends from the profits of its accounting business. In 2012 a plan was adopted which was marketed by Premier Strategies Limited ("Premier"), designed to enable companies to put monies into the hands of their shareholders, which would otherwise have been taxable as dividends, without any charge to income tax. The plan was described as a "dividend replacement strategy" called Aikido, and was presented to Winn Yorkshire by Premier in the following terms[1]:

> Aikido is suitable for any UK resident company with the desire, and sufficient distributable reserves, to pay a dividend. It provides a means for the company to pay a dividend to its shareholders in a way that avoids the higher and additional rates of income tax on those dividends. In effect, the dividend should be free of tax in the hands of the recipient.
>
> It achieves this by relying upon detailed anti-avoidance legislation to the advantage of your shareholders…

6. The essential steps involved in the scheme were summarised by the FTT as follows, at [2]:

> …in outline, under the arrangements, the following took place within a period of just under one month:
>
> (1) Winn Yorkshire subscribed for 199 A ordinary shares of £1 each ("**the A shares**") and one B ordinary share of £1 ("**the B share**") in a newly formed subsidiary, Winn Scarborough Limited ("**Winn Scarborough**")[2].
>
> (2) Winn Yorkshire settled the B share on trust largely for the benefit of the appellants but on the basis that it was entitled to receive a small amount

[1] [10].
[2] The directors of Winn Scarborough were the Appellants.

> of any income arising to the trust and that the trust property was to revert to it.
>
> (3) Winn Yorkshire subscribed for a further A share of £1 in Winn Scarborough at a premium of £200,000 ("**the additional A share**").
>
> (4) Winn Scarborough's share capital was reduced by £200,000 by the cancellation of the share premium account created on the issue of the additional A share and that amount was credited to its distributable reserves.
>
> (5) Winn Scarborough declared a dividend of £200,000 on the B share using the distributable reserves created by the capital reduction ("**the B share dividend**").
>
> (6) The trustee of the trust paid the sum it received as the dividend to the beneficiaries of the trust. As the principal beneficiaries, each appellant received £98,465 ("**the income in dispute**").

7. Premier stated to Winn Yorkshire that the success of the scheme depended on the settlements provisions (the "settlements legislation" or "settlements code") contained in Chapter 5 of Part 5 Income Tax (Trading and Other income) Act 2005 ("ITTOIA"). Under those provisions, income arising under a "settlement" is treated for income tax purposes as the income of, and only of, the "settlor". The intention was that (1) Winn Yorkshire would be the (only) settlor of the trust, (2) income arising under the trust would be treated by the settlements code as income only of Winn Yorkshire, (3) the dividend declared by Winn Scarborough would be income of Winn Yorkshire alone, and (4) no tax would be payable by Winn Yorkshire in respect of the dividend.

8. Thus, claimed Premier, the Appellants would together receive around 98% of the declared dividend completely free of income tax.

9. Prior to the steps described above, the Appellants as shareholders and directors in Winn Yorkshire gave consent to actions necessary to implement the steps.

10. The A shares in Winn Scarborough carried full rights to vote, participate in distributions and to a distribution of capital on a winding up. The B shares carried a right to participate in distributions but no voting rights or rights to distribution of capital on a winding up. A deed of trust was executed between Winn Yorkshire as settlor and RT Corporate Trustee Limited (the "Trustee") as trustee in respect of the Winn & Co (Yorkshire) Limited Interest in Possession Trust (the "Trust"). The principal terms of the Trust were summarised by the FTT as follows, at [12(6) and (7)]:

> (a) during an Initial Period (of 18 months from the creation of the Trust), and subject to certain overriding discretionary powers (as set out in clause 3 of the deed), the trustee was to hold the fund on trust to pay or apply any income arising:
>
> (i) as to the first £500, to Cancer Research UK, a registered charity;
>
> (ii) subject to that, as to the next £500, to Winn Yorkshire;
>
> (iii) subject to that, as to any further income arising (A) as to 0.5% thereof, to Cancer Research UK; (B) as to 0.5% thereof, to Winn Yorkshire; (C) as to the remaining 99% thereof (termed the "99% Income Share"), on "Protective Trusts" as regards 50% of the 99% Income Share for the benefit of each of the appellants during their lives.
>
> The "Protective Trusts" were defined in the trust deed (under clause 1.14) as trusts giving the relevant beneficiary an immediate right to the relevant

> income during the Protected Period (broadly, during the appellants' lives), but which were subject to being determined in the event that the beneficiary took steps to dispose of his or her beneficial interest.
>
> (7) Subject to those trusts and various powers, the trust fund was to be held on trust for Winn Yorkshire absolutely (under clause 5 of the trust deed).

11. The Trustee wrote to Winn Scarborough directing that any dividends declared on the B share should be paid direct to the beneficiaries of the Trust, other than Cancer Research UK.

12. The board of Winn Yorkshire resolved that the company would apply for the allotment of the additional A share in Winn Scarborough at a premium of £200,000 and that share was then allotted as fully paid up.

13. The board of Winn Scarborough approved the terms of a proposed reduction of Winn Scarborough's share capital by £200,000, and the board of Winn Yorkshire in turn approved that reduction, resulting in the cancellation of that amount in Winn Scarborough's share premium account and the crediting of that amount to its distributable reserves.

14. The board of Winn Scarborough resolved that the company would declare a dividend on the B share of £200,000, using the distributable reserves so created. That dividend was paid directly to the beneficiaries of the Trust in their respective shares, save in respect of Cancer Research UK, whose share was remitted to it by the Trustee. After the deduction of bank transfer fees, Cancer Research UK and Winn Yorkshire each received £1,455. Each Appellant received £98,465, together comprising approximately 98.5% of the total dividend.

15. The Appellants disclosed details of the arrangements in their respective tax returns for the tax year 2011/12. They took the position that as a result of the settlements code the relevant receipts were taxable only on Winn Yorkshire as settlor of the Trust.

16. Having summarised the facts, the FTT stated as follows at [16]:

> From the facts set out above and, in particular, the stated purpose of the planning in the letter sent to Winn Yorkshire by Premier Strategies Limited, I find that the sole purpose of the relevant parties in implementing the arrangements described above was to enable Winn Yorkshire to provide its shareholders with the funds they received as a return on their investment in shares in Winn Yorkshire without attracting the income tax charge which usually applies to dividends or distributions made to shareholders. I did not understand the appellants to dispute that was the case.

ISSUES BEFORE THE FTT

17. The FTT helpfully summarised the positions of the parties as follows, at [3] and [4]:

> 3. In the appellants' view, the income in dispute is to be treated for income tax purposes as the income of Winn Yorkshire alone under the legislation relating to settlements in chapter 5 of part 5 of [ITTOIA]. I refer to these provisions as "**the settlements code**".
>
> (1) This is the effect, so the appellants say, of s 624 ITTOIA which provides that income which arises under a "settlement" is treated for income tax purposes as the income of the "settlor" and of the "settlor" alone if it arises (a) during the life of the "settlor", and (b) from property in which the "settlor" has an interest (see also s 620 and s 625 ITTOIA).
>
> (2) In the appellants' view, the income in dispute arose under a "settlement" made by Winn Yorkshire as "settlor" from the property in the "settlement", the B share, in relation to which Winn Yorkshire had an interest given that some of the income arising from the B share held in the

trust was payable to Winn Yorkshire and that the trust property was to revert to it.

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

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

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

THE FTT'S DECISIONS

18. The FTT's decisions can be briefly summarised as follows:

(1) The FTT found in favour of HMRC in relation to the *Ramsay* argument, deciding that the B share dividend was taxable as a distribution made by Winn Yorkshire to the Appellants for the purposes of sections 383 to 385 ITTOIA and section 1000 CTA.

(2) In relation to the interaction between the distribution provisions and the settlements code, the FTT found that the corollary of its finding that there was a distribution was that the relevant income was not to be regarded as arising under a settlement made by Winn Yorkshire as settlor.

(3) If the arrangements were not to be regarded as giving rise to a distribution, the arrangements constituted a settlement, but, agreeing with the Appellants, Winn Yorkshire was the sole settlor of that settlement, so the income could not be apportioned to the Appellants.

19. The Appellants appeal against decisions (1) and (2), and aspects of the FTT's reasoning in relation to (3). HMRC appeal against decision (3).

DUNSBY

20. At the time when the FTT delivered its decision, there had been another decision of a differently constituted FTT relating to a similar but not identical arrangement, namely *Mark Dunsby v HMRC* [2020] UKFTT 271 TC ("*Dunsby FTT*"). The FTT in this appeal referred at various points in the Decision to conclusions reached in *Dunsby FTT*, disagreeing with them or distinguishing them in several respects.

21. Subsequently, this Tribunal (Mrs Justice Bacon and Judge Herrington) heard the appeal against *Dunsby FTT*, and their decision is reported at [2021] UKUT 0289 (TCC) ("*Dunsby UT*"). Since that decision is relevant to many of the issues in this appeal, it is convenient before we discuss those issues to summarise the relevant aspects of *Dunsby UT*.

22. The arrangement in *Dunsby UT* was also a marketed dividend replacement scheme, but with differences to the scheme in this appeal. Mr Dunsby was the sole shareholder and director in a private company which implemented a scheme involving the following steps:

(1) the creation of a new class of shares and the issue of a share (the S share) in that new class to a non-resident individual, Mrs Gower;

(2) the transfer by the non-resident individual of that share to a trust ("the Trust") in which Mrs Gower retained an interest, but from which Mr Dunsby could benefit;

(3) the declaration of a dividend on the new class of shares, in circumstances where, under the terms of the Trust, Mr Dunsby received almost all of the benefit of the dividend.

23. Again, the scheme was intended to operate so that the settlements code would apply and the sums paid to Mr Dunsby would as a result be treated as the income of Mrs Gower (a non-resident) and not Mr Dunsby. HMRC assessed Mr Dunsby to income tax on the alternative bases that he had received a dividend or distribution or that he was a settlor of the settlement[3]. The FTT concluded that (1) the payment received by Mr Dunsby was not a dividend or distribution, however (2) he was a settlor of the settlement and therefore taxable on the income he received under the settlements code. Even if both Mr Dunsby and Mrs Gower were to be regarded as settlors, under the rules applying to multiple settlors it was just and reasonable to apportion to Mr Dunsby all the dividend income on the S share. In broad terms, that decision was the direct opposite of the FTT's decisions in this appeal.

24. HMRC challenged the FTT's finding on the distribution issue[4], and Mr Dunsby appealed against the FTT's finding on the settlement issue. The Upper Tribunal decided in summary as follows:

(1) Although the concept of a distribution under section 1000(1) CTA requires reference to the effect of the corporate transactions, the company law concept of a distribution is a wide one and does not turn on formalities. There was no dispute that there was a distribution within section 1000, and that it was in respect of shares. The disputed question was whether Mr Dunsby was the person "receiving or entitled to" that distribution within section 385 ITTOIA. Applying a purposive construction, he was.

(2) In relation to the law on distributions, the Tribunal rejected the taxpayer's argument that "form is substance" on the basis of the authorities. Those authorities included another important decision given since the FTT's decision in this appeal which we consider below, namely that of the Court of Appeal in *Khan v HMRC* [2021] EWCA Civ 624 ("*Khan*").

(3) The FTT was therefore wrong to have decided that the income was not taxable as a distribution.

(4) In relation to the settlements issue, Mr Dunsby's first ground of appeal was that the scope of the "settlement" was limited to the establishment of the Trust and the settlement of the S share on the trust. This ground relied on statements in the decision of the House of Lords in *Chamberlain v IRC* [1943] 2 AER 200 ("*Chamberlain*"). The Tribunal rejected that argument, holding that those two steps had "no independent economic logic"[5], but were inextricably bound to the earlier steps by which the S share was created and acquired by Mrs Gower.

[3] HMRC also assessed Mr Dunsby under the transfer of assets abroad regime. That issue is not relevant to this appeal and is not discussed in this decision.
[4] The Upper Tribunal decided that to the extent that permission to appeal was needed, they would grant it.
[5] Paragraph [98] of the decision.

(5) Mr Dunsby also appealed against the FTT's decision that Mr Dunsby was a settlor of the settlement. The Tribunal considered that given its conclusion as to the scope of the settlement, there was no real doubt that the settlor was Mr Dunsby, but it would have reached that conclusion even if the settlement was confined in its scope as Mr Dunsby had argued.

(6) If the Tribunal was wrong that the only settlor was Mr Dunsby and both Mr Dunsby and Mrs Gower were to be regarded as being settlors, the Tribunal was inclined to agree with Mr Jones (who also represented the taxpayer in *Dunsby UT*) that, contrary to the FTT's analysis, the provision relied on by the FTT did not address the situation of multiple settlors. However, under other provisions, since Mr Dunsby indirectly provided all of the property in the settlement, the income would be treated as being Mr Dunsby's.

25. It will be necessary to discuss in greater detail below the reasoning and conclusions in *Dunsby UT* in relation to the grounds of appeal in this case. As a decision of the Upper Tribunal, we are not bound by *Dunsby UT* as a matter of precedent: *HMRC v Raftopoulou* [2018] EWCA Civ 818 at paragraph 24. However, as a matter of judicial comity, we would normally follow an earlier decision of this Tribunal as a court of co-ordinate jurisdiction unless we were satisfied that it was wrong. As Judge Bishopp stated in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) at paragraph 12:

> Although a decision of another judge of this Chamber is not binding on me, the convention is that a judge should follow the decision of another judge at the same level unless he is satisfied that the decision, or the reasoning which led to it, is wrong.

APPELLANTS' APPEAL GROUND 1:THE DISTRIBUTION ISSUE

Relevant legislation

26. At the relevant time (the tax year 2011/12) and insofar as material the legislation was as set out below.

27. The relevant provisions of ITTOIA are as follows:

> **383 Charge to tax on dividends and other distributions**
>
> (1)Income tax is charged on dividends and other distributions of a UK resident company.
>
> (2) For income tax purposes such dividends and other distributions are to be treated as income.
>
> (3) For the purposes of subsection (2), it does not matter that those dividends and other distributions are capital apart from that subsection.
>
> **384 Income charged**
>
> (1) Tax is charged under this Chapter on the amount or value of the dividends paid and other distributions made in the tax year.
>
> …
>
> **385 Person liable**
>
> (1)The person liable for any tax charged under this Chapter is—
>
> (a) the person to whom the distribution is made or is treated as made (see Part 6 of ICTA and sections 386(3) and 389(3)), or
>
> (b) the person receiving or entitled to the distribution.

28. By virtue of section 989 Income Tax Act 2007, "distribution" in these provisions has the meaning given by Chapters 2 to 5 of Part 23 of CTA 2010 (excluding section 1027A). The relevant provision in this appeal is Section 1000(1) CTA 2010, which provides as follows:

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

29. Section 1113 CTA 2010 provides as follows:

> **1113 "In respect of shares"**
>
> …
>
> (3)For the purposes of this Part a thing is regarded as done in respect of a share if it is done to a person—
>
> (a)as the holder of the share, or
>
> (b)as the person who held the share at a particular time.
>
> (4)For the purposes of this Part a thing is also regarded as done in respect of a share if it is done in pursuance of a right granted, or an offer made, in respect of a share.
>
> …

30. Section 1117(3) CTA 2010 states that:

> (3)For the purposes of this Part a distribution is treated as made out of assets of a company if the cost falls on the company.

The FTT's decision

31. The FTT began its consideration of this issue by describing the need to apply a purposive construction to tax legislation, referring to the well-known formulation of Ribeiro PJ in the Hong Kong case of *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.

32. The FTT then analysed the relevant authorities, at [26]-[105]. HMRC placed particular reliance on the decision in *PA Holdings Ltd v HMRC* [2012] STC 582 ("*PA Holdings*").

33. The position of the Appellants, also represented below by Mr Jones, was set out at [32]:

> Mr Jones submitted that HMRC's stance goes far beyond what is permitted on a purposive approach to the construction of the relevant provisions. The

dividend was in fact and law declared and paid by Winn Scarborough in respect of the B share in that company; there is no suggestion these transactions were a sham. The view that there was instead a dividend or distribution declared and paid by Winn Yorkshire, an entirely distinct legal person from Winn Scarborough, requires a re-characterisation of the facts for which there is no proper basis:

> (1) The premise of HMRC's argument is that the mere fact that there were funds within Winn Yorkshire, which it could have paid to its shareholders by way of dividend or distribution, means that Winn Yorkshire can be regarded as having made a dividend or distribution of those funds to its shareholders. The logical conclusion of such a stance is that, in all cases, any sums in the reserves of an owner/manager owned company constitute dividend or distribution income of those persons whether or not they are paid out as such. That is plainly wrong.
>
> (2) The decision in *PA Holdings* does not provide a basis for the wholesale re-characterisation of the dividend paid by Winn Scarborough as a dividend or distribution made by an entirely different party. The issue in that case was whether payments to employees were correctly to be categorised as receipts of earnings or dividends for tax purposes. It did not involve considering, as in this case, whether a payment by one party (Winn Scarborough) can be regarded as a payment by an entirely different party (Winn Yorkshire). It is certainly not authority for the proposition that it is possible to disregard the company law analysis in determining the true source of payment (namely, that the B share is plainly the source). Moreover, there is no case in the authorities on purposive construction where the court has completely redrawn the picture, as HMRC argue for here, by ignoring so comprehensively the true nature of the relevant transaction.
>
> (3) In effect, HMRC's stance requires the separate legal personality of the entities involved to be ignored. That is simply impermissible. There are only very limited cases in which the corporate veil can be pierced as set out in *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34 ("*Prest v Petrodel*"). There are no circumstances justifying that in this case[6].

34. The FTT analysed the relevant authorities in considerable detail, at [26]-[105]. These included the decisions in *Ramsay*; *Furniss v Dawson* [1983] UKHL 4 ("*Furniss*"); *Carreras Group Ltd v Stamp Commissioner* [2004] STC 1377 ("*Carreras*"); *MacNiven v Westmoreland Investments Ltd* [2001] STC 237 ("*MacNiven*"); *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1 ("*BMBF*"); *HMRC v Scottish Provident Institution* [2004] UKHL 52 ("*Scottish Provident*"); *UBS AG v HMRC* [2016] STC 934 ("*UBS*"); *RFC 2012 plc (in liquidation) v Advocate General for Scotland* [2017] UKSC 45 ("*Rangers*"), and *PA Holdings*.

35. The FTT summarised its conclusion at [114] as follows:

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

[6] This argument is not maintained in this appeal.

36. The FTT then explained its reasons for this conclusion at [115]-[137]. Having reviewed the *Ramsay* purposive approach as explained and developed in *UBS*, *Rangers*, *Carreras*, *BMBF* and *Scottish Provident*, the FTT considered that approach to the facts of the case. It noted that each of the steps in the transactions, if viewed as individual and discrete transactions, "involved no pretence" and "had a legal reality", in the words of Lord Hoffmann in *MacNiven*. The question was whether, on a purposive approach to the relevant provisions, the juristic analysis of each separate step should be respected or whether the transaction should be analysed adopting a composite approach, having regard to the overall effects of the elements designed to operate together.

37. The FTT explained the purpose of the distribution code to be as follows, at [121]-[122]:

> 121.In my view, having regard to the natural meaning of the terms used in s 1000 CTA 2010 (as further explained in s 1113) and viewing those provisions in the overall context of Part 23 CTA 2010, the purpose of ss 383 to 385 as regards distributions is, in broad terms, to tax a shareholder on any value which a company delivers out of its assets into a shareholder's hands by some non-prescribed means (whether directly or indirectly) as a return on his shareholding except where one of the specified exemptions apply:
>
> (1) On its natural meaning, any "other distribution out of assets" of the company (meaning "other" than a dividend) can be taken to mean the payment, delivery, provision or giving of the assets or value from the assets of the company.
>
> (2) Without attempting to provide an exhaustive definition, it seems to me that a distribution is "in respect of shares in the company" as that term is explained in s 1113 CTA 2010, where the relevant asset or value is put into the hands of a shareholder *in his capacity as such*, in effect, as a return on or by reference to his shareholding as an investment in the company, and not in some other capacity and for some other reason.
>
> (3) There is nothing in the opening wording of the provision to suggest that the scope of s 1000 CTA 2010 is confined to circumstances where the relevant asset/value is provided by the company directly to the shareholder or in a manner which directly impacts on the capital structure of the company. Indeed, the lack of prescription indicates that any means of delivery, payment or provision of the asset/value to the shareholder, whether direct or indirect, is intended to be captured as long as it is made in respect of the shares, he or she holds in the sense explained above. I cannot see that the subsequent carve-out from the scope of the provision for repayments of capital or cases where new consideration is received affects the generality of the opening words.
>
> 122. In the words of Carnwath LJ in the Court of Appeal in *BMBF*, at [66], the distribution provisions "draw their life-blood from real world transactions with real world economic effects", namely, the depletion of the resources of a company in a manner which benefits its shareholders in their capacity as such. The aim is to subject shareholders to tax on the resulting value they receive. In my view, accordingly this is the sort of situation where to allow the tax treatment "to be governed by transactions which have no real-world purpose of any kind", as is the case here, would be inconsistent with the "real world" requirements of these provisions. To give effect to the true purpose of these provisions requires them to be given, as Lord Nicholls put it in *Scottish Provident*, a "wide practical meaning" which requires the tribunal "to have regard to the whole of a series of transactions which were intended to have a commercial unity".

38. The FTT found that it was clear that each step in the arrangements was implemented as part of a carefully constructed plan with the sole objective of providing the funds to the Appellants free of income tax: [123]. It referred to Lord Hoffmann's statement in *Carreras* that a composite approach does not "deny the existence or legality of the individual steps but may deprive them of significance for the purposes of the characterisation required by the statute": [124]. The FTT concluded as follows, at [127]:

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

39. The FTT stated that following the hearing the parties had referred the tribunal to *Dunsby FTT*, which had determined in relation to similar arrangements that no distribution arose, relying in particular on the company law meaning of that term. The FTT respectfully disagreed with that view, stating that in its view (1) the term "distribution" was not to be interpreted so as to correlate wholly to the company law meaning of that term given the different purposes of the tax and company law codes, and (2) in any event the term is given a broad meaning for company law purposes: [129]. As to the latter point, the FTT reviewed various company law authorities and concluded that, while those cases focussed on the lawfulness of a distribution, they amply illustrated the breadth of circumstances in which a company law distribution might arise: [135].

40. The FTT explained that in reaching its conclusion on the *Ramsay* argument, it had not placed any particular emphasis on the decision in *PA Holdings*, broadly because it concerned a purposive construction of different provisions: [136]-[137].

The Appellants' submissions: distribution not "in respect of shares"

41. Mr Jones emphasised that section 1000 CTA 2010 applies to a distribution out of assets of a company "*in respect of shares*" in the company. He submitted that the FTT erred in finding that there was a distribution "in respect of shares" in Winn Yorkshire. In summary, that was an error for the following reasons:

(1) Section 1113(3) CTA 2010 provides that a thing is to be regarded as done in respect of a share if it is done to a person as the holder or former holder of the share. Here, Mr Jones said, the only such transaction was the dividend paid by Winn Scarborough in respect of the B share. The transaction in which Winn Yorkshire was involved was the subscription for shares; that was a transaction between parent and subsidiary, and not something done by Winn Yorkshire "to a person" as the current or former shareholder in Winn Yorkshire.

(2) In *Dunsby UT*, the Upper Tribunal held that the concept of a distribution under section 1000 requires reference to the effect of the corporate transactions undertaken on the capital structure of the relevant company. Here, as regards Winn Yorkshire that was only the subscription for shares in Winn Scarborough.

(3) The FTT's conclusion results in two distributions, one by Winn Yorkshire and one by Winn Scarborough, which cannot have been intended by Parliament.

(4) In *Khan*, the Court of Appeal held that the statutory provisions in the distribution code require a focus on the particular transaction under which the distribution arose, and

not on connected transactions viewed as a composite whole. The FTT's approach runs contrary to that direction.

Discussion

42. It is important to state at the outset that the taxpayers' appeal on the distribution issue relates only to whether Winn Yorkshire made a distribution "in respect of shares". It is accepted that (1) Winn Yorkshire made a distribution "out of assets" within the terms of section 1000(1)B CTA 2010[7], and (2) unlike the position taken by the taxpayers in *Dunsby UT*, the Appellants were persons "receiving or entitled" to a distribution so as to be liable to income tax under section 385 ITTOIA. However, says Mr Jones, there was no distribution because Winn Yorkshire made no distribution in respect of its shares.

43. Since *Khan* was decided subsequent to the FTT's decision, it is convenient to begin with a consideration of whether that decision has the result for the purposes of this appeal maintained by Mr Jones.

44. Mr Khan acquired the share capital of a failing company by a structure involving a loan from the company to make the purchase and a buyback of the shares by the company. Mr Khan borrowed £1.95m from the company and used it to buy the share capital of 99 shares for £1.95m plus its nominal net book value. At the same time, he entered into a buyback agreement under which the company repurchased 98 of the shares held by him for £1.95m utilising its distributable reserves. This was paid by way of set-off against Mr Khan's loan obligation. The buyback payment was accepted to be a distribution for tax purposes, and the issue was whether Mr Khan was a "person receiving or entitled to" that distribution within the meaning of section 385 ITTOIA. Mr Khan argued that the purchase, loan and buyback should be regarded as a single composite transaction, and the court should consider its overall effect, which was to leave him as the owner of one share in the company, which had no distributable reserves, at a cost equal to the nominal net book value. He contended that, viewed realistically, the persons who received and were entitled to the buyback payment were the vendor shareholders, and not him. The Court of Appeal dismissed Mr Khan's appeal, holding that he was a person receiving or entitled to the distribution within section 385 ITTOIA.

45. It will be evident that Mr Khan was, in effect, relying on a *Ramsay* construction to argue that he was not liable to tax. The Court of Appeal stated as follows, in a passage from the judgment of Andrews LJ (with whom the other judges agreed) on which Mr Jones placed particular reliance, at [49]-[52] of the decision:

> 49.In the *UBS* case, the *Ramsay* approach was explained by Lord Reed at [61]-[68]. As he said, prior to *Ramsay*, fiscal legislation had been interpreted predominantly on a linguistic analysis. Moreover, the courts had treated each element of a composite transaction which had an individual legal identity as having its own separate tax consequences. *Ramsay* did away with both those features, and required the same purposive approach to be applied to fiscal legislation as to any other legislation. It established that the factual analysis depended on the purposive construction of the statute. The ultimate question was:
>
> > "whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

[7] As regards point (1), the Appellants did argue before the FTT that there was no distribution "out of assets" by Winn Yorkshire. That argument is no longer pursued in this appeal. In light of the terms of section 1117(3) (set out at paragraph 30 above), a provision which was not referred to by the parties, we consider that Mr Jones was right not to pursue this point.

> 50.Lord Reed added the following clarification of how that question should be approached:
>
> > "the requirement to view the transactions realistically means no more than that *the facts must be analysed in the light of the statutory provision being applied.* If the legislation is concerned with the overall economic outcome of a series of commercially linked transactions, then that is where the focus should be; *but if the legislation requires the court to focus on a specific transaction, then other transactions, although related, are unlikely to have any bearing on its application*." (Emphasis added.)
>
> That passage is particularly pertinent when considering the approach to be taken in the present case. It serves as a salutary reminder of the dangers of trying to import interpretations of similar words or phrases used in the context of other statutes which may have entirely different purposes. It also stresses that not all fiscal legislation is concerned with the overall effect of a series of related transactions viewed as if they were one composite transaction.
>
> 51.It is unusual for a taxpayer to rely upon the *Ramsay* approach, which is generally invoked by HMRC when seeking to challenge artificial tax-avoidance schemes (which this undoubtedly was not). However, the principles in *Ramsay* are of general application, and our focus must be upon whether the UT erred in refusing to look at the sale and buyback transactions as a single composite whole and if so, whether that led to their reaching the wrong conclusion as to who "received or was entitled to" the distribution.
>
> 52.In my judgment, this is a case in which the legal nature of the transaction to which a tax consequence is attached does not emerge from looking at the connected transactions taken as a whole. On the contrary, the statutory provisions require the focus to be on the transaction under which the taxable distribution arose. However, even if one were to look at the transactions taken as a whole, they do not produce the end result contended for by Mr Sykes [counsel for Mr Khan], namely, a distribution by the Company in respect of its shares to the vendor shareholders.

46. Mr Jones relied on this passage as authority that in applying a purposive construction to the distribution legislation, it is necessary to focus on the particular transaction said to be a taxable distribution, rather than to adopt a composite approach by looking at related transactions. It must follow from this, he said, that the FTT's approach in this appeal was fundamentally flawed.

47. We do not agree. The Court of Appeal's description of the manner in which the *Ramsay* approach to construction should apply as set out in *UBS* is entirely uncontroversial. Moreover, it accords with the FTT's analysis of the relevant case law. At [94], for example, in discussing *UBS*, the FTT specifically mentioned the following quotation from the decision of Lord Reed in that case:

> He then made a similar observation, at [65], as that made by Lord Nicholls in *BMBF* that in cases such as *Furniss, Carreras, Burmah Oil* (and he added the later cases such as *Scottish Provident)*:
>
> > "*the court considered the overall effect of the composite transaction, and concluded that, on the true construction of the relevant statute, the elements which had been inserted without any purpose other than tax avoidance were of no significance. But it all depends on the construction of the provision in question.* Some enactments, properly construed, confer relief from taxation even where the transaction in question forms part of a wider arrangement undertaken solely for the purpose of obtaining the

> relief. The point is illustrated by the decisions in [*MacNiven]* and [*BMBF*] itself." (Emphasis added.)

48. In *Khan*, the Court of Appeal was simply re-emphasising that, in Lord Reed's words, "it all depends on the construction of the provision in question".

49. Mr Jones sought to draw from *Khan* the conclusion that the approach of the Court of Appeal to a purposive construction of the issue in that case, namely whether or not Mr Khan was a person receiving or entitled to the distribution within section 385 ITTOIA, is the approach which the Court of Appeal was directing must be applied to the distribution code in its entirety, and therefore to whether the distribution in this case was "in respect of shares". We reject that argument. In the first place, Andrews LJ expresses the conclusion that a composite approach is not appropriate by stating "***this is a case*** in which the legal nature of the transaction to which a tax consequence is attached does not emerge from looking at the connected transactions taken as a whole" (emphasis added). Mr Jones invited us to read this as a reference to the distribution legislation as a whole, but in our view there is nothing to support that interpretation and it is clear that "this…case" was the case before the Court of Appeal, which in this respect concerned the construction of the phrase "receiving or entitled to" in section 385 ITTOIA. Moreover, the context makes that clear, because the primary point being made in the passage above is that the appropriate approach to construction depends entirely on the particular provision being construed. The appropriate approach may differ depending on the precise provision in question. Put another way, the approach to construing the chargeability provisions contained in section 385(1)(a) ITTOIA does not determine the approach to construing elements of the definition of "distribution out of assets" in section 1000 CTA 2010, or vice versa. It all depends on the construction of the provision in question.

50. We therefore reject the proposition that *Khan* must mean that the FTT erred in its approach to the distribution issue.

51. The other submissions made by Mr Jones in relation to this ground of appeal are summarised at paragraph 41 above. The essential argument is that the only transaction to which Winn Yorkshire was a party was the subscription for shares in its subsidiary, and, in finding that that subscription was a distribution in respect of shares the FTT impermissibly treated that transaction as done to a person (the Appellants) in respect of shares. Mr Jones asserts that there is now support for respecting the company law analysis of each transaction in *Dunsby UT*.

52. The first question to which this argument gives rise is the basis of the FTT's decision. More precisely, since section 1113(3) CTA 2010 provides that "a thing is to be regarded as done in respect of a share if it is done to a person" as the holder or past holder of the share, what did the FTT consider was the "thing" done to the Appellants in respect of their shares in Winn Yorkshire?

53. We do not accept Mr Jones' submission that the "thing" found by the FTT to give rise to a distribution was the share subscription. We remind ourselves of the terms of the conclusion set out at [114]:

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

54. Mr Jones' characterisation ignores the words from "with the sole purpose" onwards. The "thing" which the FTT found to give rise to a distribution in respect of shares was the entire

composite arrangement sold by Premier to Winn Yorkshire. The purpose and culmination of that arrangement was, found the FTT, a payment made to the Appellants, solely in their capacity as shareholders in Winn Yorkshire. The entire thrust of the FTT's analysis was that it did not accept an approach to statutory construction in this case which confined itself to an analysis of the individual steps in the composite arrangement, let alone to an analysis of the single step comprising the subscription for shares. That is clear from the FTT's analysis read as a whole, and in particular from passages such as [119]-[120] and [126]-[127].

55. So, did the FTT err in law in construing the relevant provisions as giving rise to a distribution by Winn Yorkshire, when applied to the arrangements viewed as a composite whole? In answering this question we have considered the FTT's reasoning, the effect of *Dunsby UT*, and the decision of the Supreme Court in *Hurstwood Properties (A) Ltd and Ors v Rossendale Borough Council & Anor* [2021] UKSC 16 ("*Hurstwood*"). Although *Hurstwood* was not referred to by either party in written submissions, we gave permission to the parties to refer to it, it since it is now a leading Supreme Court authority on purposive construction.

56. We have concluded that the FTT did not err in law in reaching its decision on the distribution issue. It was justified in applying the approach to construction which it did, and, indeed, that approach is supported by and consistent with the subsequent decisions in *Dunsby UT* and *Hurstwood*.

57. The starting point is that there is no challenge to the FTT's findings of fact that the arrangements were intended to operate as a composite, and with the aim of replacing Winn Yorkshire taxable dividends with (broadly) equivalent tax-free receipts for its shareholders. However, each of the steps involved "had a legal reality". We consider that against this factual background, the FTT correctly identified the central issue, at [120]:

> The question is whether, on a purposive approach to the construction of the relevant provisions:
>
> > (1) as is the effect of the appellants' argument, each of the steps should be analysed according to that legal reality or, as Lord Hoffmann put it in *MacNiven*, on the basis that the juristic analysis of each step should be respected with the result that the only dividend or distribution arising for tax purposes is that paid by Winn Scarborough on the B share held in the Trust which is taxable only in the hands of Winn Yorkshire under the settlements code; or
> >
> > (2) as is the effect of HMRC's argument, the transaction should be analysed adopting a composite approach, having regard to the overall effects of the steps involved as elements designed to operate together, with the result that Winn Yorkshire is to be regarded as making a "distribution out of the assets" of Winn Yorkshire "in respect of" the shares held by the appellants in Winn Yorkshire (within the meaning of s 1000 CTA 2010) of a sum equal to the sums received by the appellants on which they are taxable under ss 383 to 385.

58. We consider that the FTT correctly identified and described the purpose of the distribution provisions in the tax code, as set out at paragraph 37 above, being to tax shareholders on value which a company delivers to them out of its assets, directly or indirectly, by some non-prescribed means. We also agree that as defined the requirement for a distribution out of assets to be "in respect of shares" refers to a situation where the relevant asset or value is put into the hands of a shareholder *in his capacity as such*, in effect, as a return on or by reference to his shareholding as an investment in the company, and not in some other capacity and for some other reason.

59. We need not repeat here the analysis of the authorities referred to above which led to the FTT's conclusion set out at [126]-[127]:

> 126. In this case, given the meaning and purpose of the distribution provisions, the facts on which it is necessary to focus are that, under this closely integrated set of transactions, Winn Yorkshire's assets were depleted to the tune of £200,000 and a corresponding sum was put into the hands of its shareholders (less the small sums paid to Winn Yorkshire and the charity) with the specific purpose of providing the shareholders with a return on their shares. Such a conclusion does not, as the appellants suggested, entail an impermissible re-characterisation of the legal effects of the transaction. Rather, in the specific context of the interpretation of the distribution provisions, as Lord Hoffmann put it in *Carrera*s, notwithstanding their undoubted legal effects, those steps are deprived of significance.
>
> 127. In other words, viewed in their entirety, the purpose and effect of the arrangements was to enable the appellants to receive the bulk of the £200,000 which Winn Yorkshire used to subscribe for an additional A share in Winn Scarborough as a return on their shares in Winn Yorkshire. The fact that the appellants/shareholders did not receive the sums direct from Winn Yorkshire but through a series of steps designed solely with the intention that they would not be subject to income tax on the sums does not detract from the nature of the receipt in their hands.

60. In *Carreras*, Lord Hoffmann, who gave judgment for the Privy Council, stated as follows, at [8] of the decision:

> Whether the statute is concerned with a single step or a broader view of the acts of the parties depends upon the construction of the language in its context. Sometimes the conclusion that the statute is concerned with the character of a particular act is inescapable: see *MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd* [2003] 1 AC 311. But ever since *Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 the courts have tended to assume that revenue statutes in particular are concerned with the characterisation of the entirety of transactions which have a commercial unity rather than the individual steps into which such transactions may be divided. This approach does not deny the existence or legality of the individual steps but may deprive them of significance for the purposes of the characterisation required by the statute. This has been said so often that citation of authority since *Ramsay's* case is unnecessary.

61. In short, we consider that the FTT carried out a thorough and careful analysis of the relevant authorities, and reached the right result in terms of a purposive construction of the relevant distribution provisions.

62. To a significant extent, the arguments maintained by Mr Jones in this appeal re-asserted the arguments considered and rejected by the FTT as to the need to respect and focus on the individual steps in the arrangement and to regard the only transaction relevant to Winn Yorkshire as the share subscription. Insofar as those arguments rest on the inapplicability of a "commercial unity" approach to the legislation as applied to the arrangements, we have concluded that the FTT was justified in rejecting them for the reasons it gave. However, we have also considered whether the FTT's reasoning remains sound in light of the subsequent decisions in *Dunsby UT*, *Khan* and *Hurstwood*.

63. In *Dunsby UT*, as we have described the dividend avoidance scheme was somewhat simpler, involving no subsidiary as in this case. However, although the facts were different, and the central issue in dispute was different (whether Mr Dunsby was a person receiving or

entitled to a dividend) the Upper Tribunal did consider the meaning of "distribution" for tax purposes. In particular, it considered the extent to which that definition turned on the company law approach to the term. Mr Jones stated that it was held in *Dunsby UT* that the concept of a distribution under section 1000(1) CTA 2010 requires reference to the effect of the corporate transactions on the capital structure of the relevant company. Here, adopting that approach there was a share subscription by Winn Yorkshire and the payment of a dividend by Winn Scarborough to the Trustee, and only the latter transaction was a distribution.

64. Mr Jones' reliance on *Dunsby UT* is misplaced. The relevant passage recording the Tribunal's conclusion on the taxpayer's argument that the only taxable distribution was the dividend "formally" paid on the S share was as follows:

> 69. In the present case, the purpose of ss 383–385 ITTOIA is to impose income tax on dividends and other distributions of a UK resident company, in the hands of the person receiving or entitled to the distribution. As we have set out above, the term "distribution" is defined very broadly in s. 1000(1) CTA so as to encompass any dividend paid by the company, and any other distribution out of assets of the company in respect of shares in the company.
>
> 70. The FTT placed emphasis on the fact that the dividend was not formally paid on Mr Dunsby's ordinary shares, but was formally paid on the S share and flowed to Mr Dunsby by way of the trust of that share. The question, for the purposes of the approach set out in UBS, is whether that fact is relevant to the application of the statutory provisions.
>
> 71. We do not disagree with the FTT's observation that the concept of a distribution under s 1000(1) CTA requires reference to the effect of the corporate transactions undertaken on the capital structure of the relevant company. But as Ms Poots submitted the company law concept of a distribution is a wide one and does not turn on formalities. In *Progress Property Company v Moorgrath Group* [2010] UKSC 55 Lord Walker approved at [1] the following quotation from Hoffmann J's judgment in *Aveling Barford Ltd v Perion* [1989] BCLC 626, 631:
>
> > "Whether or not the transaction is a distribution to shareholders does not depend exclusively on what the parties choose to call it. The court looks at the substance rather than the outward appearance."
>
> 72. In the present case there is no doubt (and indeed no dispute) that a distribution within the meaning of s. 1000(1) CTA was made by the Company, and that this was a distribution in respect of shares as defined in s 1113(3). The disputed question is whether Mr Dunsby was the person receiving or entitled to that distribution for the purposes of s 385 ITTOIA.
>
> 73. In that regard, s 385 does not require the taxable person to be the holder of the shares on which the distribution is made. All that is required is that they are the person to whom the distribution is made or treated as made (subsection (a)), or the person receiving or entitled to the distribution (subsection (b)). The overarching purpose is to ensure that a shareholder who either does receive, or is entitled to receive, a distribution from a UK resident company is subject to income tax on that distribution.
>
> 74. The effect of the Scheme was that Mr Dunsby directly received the payment of a dividend declared by the Company of which he was, prior to the Scheme, the sole shareholder. He was also entitled to the distribution, as the principal beneficiary under that Trust. Indeed the stated purpose of the Scheme, as recorded by the FTT, was "to allow the payment of dividends from UK resident companies free of income tax". On that basis, it seems to us that

> the transaction fell squarely within both the scope and the purpose of ss 383–385 ITTOIA.

65. Having reached this initial conclusion, the Tribunal went on to consider and reject the argument of Mr Jones (who also represented the taxpayer in that case) that the authorities, including *Khan*, established that "in this branch of the law, "form is substance"". Its final conclusion was as follows, at [86] of the decision:

> We therefore respectfully disagree with the FTT on the Distribution Issue. Our conclusion is that Mr Dunsby received a distribution within the meaning of ss 383–385 ITTOIA, and is chargeable to tax on that basis. We note that this is essentially the same conclusion as that reached by the FTT in *Clipperton & Lloyd v HMRC* [2021] UKFTT 0012 (TC), especially at [129(2)], albeit that that case was decided before and therefore did not take account of the reasoning in the Court of Appeal's judgment in *Khan*.

66. Although the facts of *Dunsby UT* were different, and we are in any event not bound by the decision, we respectfully agree with its reasoning and conclusion on this issue. That reasoning and conclusion support the FTT's approach and offer Mr Jones no support in his re-assertion of the primacy of a corporate law analysis to the construction of the tax legislation.

67. In relation to *Khan*, we have already discussed why we do not accept the argument that the approach to construction adopted in that case mandates a blanket approach to be applied to any provision falling within the distribution code. It remains to deal with a separate passage in *Khan* referred to by Mr Jones at [76] of that decision, as follows:.

> …even in a case in which there are a series of pre-ordained steps designed for no reason other than to save tax, and the application of the principle in *Ramsay* requires consideration of the transaction taken as a whole, the characterisation of the composite transaction must be consistent with the result of the component transactions. In support of that proposition, he relied on Knox J's judgment in *Pigott (Inspector of Taxes) v Staines Investments Co Ltd* [1995] STC 114, (1995) 68 TC 342, and in particular the passage at [1995] STC 114 at 141–142, (1995) 68 TC 342 at 375, which signifies that the end result must be one that can be achieved lawfully and consistently with the individual steps taken towards it.

68. The context in which this statement was made by the Court of Appeal was the discussion which follows it regarding the suggestion that a recharacterisation of a composite transaction for tax purposes should not result in a transaction which would be unlawful. In this case, there has been no suggestion that it would have been unlawful for Winn Yorkshire to pay a dividend or make a distribution. We do not consider that the statement supports the view that in this case the FTT reached an impermissible conclusion.

69. Mr Jones at one stage suggested that the Appellants were in the same position as Mr Khan as regards their liability to tax on any distribution. Since the facts of *Khan* were far removed from this case, and *Khan* in any event concerned a different statutory provision, we have no hesitation in rejecting that suggestion.

70. In relation to the purposive approach and the *Ramsay* principle, it is now necessary to take into account the leading decision of the Supreme Court in *Hurstwood*. In the decision of Lord Briggs and Lord Leggatt (with whom the other judges agreed) the law was summarised as follows:

> 9. The first way in which the local authorities advance their claim that the defendants are liable for the unpaid rates relies on the approach to statutory interpretation associated in the field of tax legislation with the case of *WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300. What has often been

referred to as the *Ramsay* principle or doctrine may be said now to have reached a state of well-settled maturity, not least because of its restatement at the highest level in two 21st century authorities: *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 AC 684 and *UBS AG v Revenue and Customs Comrs* [2016] UKSC 13; [2016] 1 WLR 1005. Although usually deployed in relation to tax avoidance schemes, it is not in its essentials particular to tax, being based upon the modern purposive approach to the interpretation of all legislation, one which penetrated the field of tax legislation only at a relatively late stage: see *Barclays Mercantile* at paras 28-29; and *UBS* at paras 61-63.

10. There are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. Two examples will suffice. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, para 8, Lord Bingham of Cornhill said:

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

In *Bloomsbury International Ltd v Department for the Environment, Food and Rural Affairs (Sea Fish Industry Authority intervening)* [2011] UKSC 25; [2011] 1 WLR 1546, para 10, Lord Mance stated:

> " In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance … In this area, as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme . "

See further Lowe and Potter, *Understanding Legislation* (2018), paras 3.45 - 3.48 (and cases there cited).

11. The result of applying the purposive approach to fiscal legislation has often been to disregard transactions or elements of transactions which have no business purpose and have as their sole aim the avoidance of tax. This is not because of any principle that a transaction otherwise effective to achieve a tax advantage should be treated as ineffective to do so if it is undertaken for the purpose of tax avoidance. It is because it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance. As Judge Learned Hand said in *Gilbert v Commissioner of Internal Revenue* (1957) 248 F 2d 399, 411, in a celebrated passage cited (in part) by Lord Wilberforce in *Ramsay* [1982] AC 300, 326:

> "If … the taxpayer enters into a transaction that does not appreciably affect his beneficial interest except to reduce his tax, the law will disregard it; for we cannot suppose that it was part of the purpose of the Act to provide an escape from the liabilities that it sought to impose."

See also *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, paras 112-113 (Lord Millett NPJ).

> 12. Another aspect of the *Ramsay* approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. Again, this is no more than an application of general principle. Although a statute must be applied to a state of affairs which exists, or to a transaction which occurs, at a particular point in time, the question whether the state of affairs or the transaction was part of a preconceived plan which included further steps may well be relevant to whether the state of affairs or transaction falls within the statutory description, construed in the light of its purpose. In some of the cases following *Ramsay*, reference was made to a series of transactions which are "pre-ordained": see eg *Inland Revenue Comrs v Burmah Oil Co Ltd* [1982] STC 30, 33 (Lord Diplock); *Furniss v Dawson* [1984] AC 474, 527 (Lord Brightman). As a matter of principle, however, it is not necessary in order to justify taking account of later events to show that they were bound to happen - only that they were planned to happen at the time when the first transaction in the sequence took place and that they did in fact happen: see *Inland Revenue Comrs v Scottish Provident Institution* [2004] UKHL 52; [2004] 1 WLR 3172, para 23, where the House of Lords held that a risk that a scheme might not work as planned did not prevent it from being viewed as a whole, as it was intended to operate.
>
> 13. The decision of the House of Lords in the *Barclays Mercantile* case made it clear beyond dispute that the approach for which the *Ramsay* line of cases is authority is an application of general principles of statutory interpretation…

71. We agree with Ms Nathan that these statements of the law are consistent with the approach taken by the FTT in this case.

72. Mr Jones sought to draw from *Hurstwood* that the FTT had erred in law because they had interpreted the relevant statutory provisions in a way which was influenced by the facts, and that was impermissible; the purposive construction of a statutory provision did not change because the provision was being construed in the context of a tax avoidance scheme. He pointed out that in concluding in *Hurstwood* that the lease under consideration did not achieve the result sought for business rate purposes, the Supreme Court emphasised this point:

> 51. We emphasise that this conclusion is not founded on the fact that the defendant's only motive in granting the lease was to avoid paying business rates, although that was undoubtedly so. If the leases entered into by the defendants had the effect that they were not liable for business rates, their motive for granting the leases is irrelevant. Nor does it illuminate the legal issues to use words such as "artificial" or "contrived" to describe the leases, when it is now accepted that they created genuine legal rights and obligations and were not shams. Our conclusion is based squarely and solely on a purposive interpretation of the relevant statutory provisions and an analysis of the facts in the light of the provisions so construed.

73. We agree with the proposition that a *Ramsay* approach to purposive construction is not restricted to cases of tax avoidance. *Ramsay* is, as was confirmed in *Hurstwood*, shorthand for a generally applicable principle of statutory construction. However, in the vast majority of cases there will be no need to wrestle with a purposive construction of a statutory provision because it will be plain that the facts answer to the statutory description, and, as we have discussed, there will in any event be statutory provisions which, purposively construed, do not lend themselves to a composite approach; it all depends on the construction of the provision in question. In rejecting the criticism that their approach to the relevant test introduced

unacceptable uncertainty into the construction of the statutory provisions, the Supreme Court made this observation in *Hurstwood*:

> 61.It may be that other factual situations may demonstrate that this test needs some further adjustment. For example the letting of unoccupied business property by a parent company to a wholly owned and controlled subsidiary would not of itself cause the subsidiary to fail to satisfy the ownership test merely because the management of the affairs of the subsidiary (including whether to bring the premises back into occupation) rested with the parent's board. We would, however, reject the criticism that the test is insufficiently certain. In any ordinary case the test will easily be satisfied by identifying the person who is entitled to possession as matter of the law of real property. The fact that the law of real property may not prove a reliable guide in an unusual case of the present kind is not in our view an objection to our preferred interpretation. The value of legal certainty does not extend to construing legislation in a way which will guarantee the effectiveness of transactions undertaken solely to avoid the liability which the legislation seeks to impose.

74. In this case, the FTT took an approach to the construction of the relevant provisions which we have decided was both appropriate and justified, and correctly applied that construction to the facts as found. We therefore reject Mr Jones' submission.

75. The final point raised by Mr Jones was that Parliament cannot have intended the provisions to operate in the way found by the FTT because that would result in two dividends—one by Winn Yorkshire and one by Winn Scarborough on the B share. He referred to examples of dividends paid by a holding company and funded by dividends from subsidiaries where this "loose approach" as he called it could produce absurd or uncertain results. We do not accept that this argument means that the FTT was precluded from reaching the decision which it did, for the reasons which it gave. First, this is in substance just another way of presenting the argument that the scheme worked because the only dividend was paid by Winn Scarborough and it was treated under the settlement code as (non-taxable) income of Winn Yorkshire. Second, the FTT did not in fact determine that there were two distributions, because the only question before it in relation to the distribution issue was the correctness of the assessment on the Appellants. Third, the effect of the FTT's purposive construction in any particular case would depend on the facts. Fourth, it is relevant that if the scheme had the effect under the settlements provisions contended by the Appellants, the dividend paid by Winn Scarborough would not be liable to income tax.

Conclusion

76. The FTT did not err in law in concluding that Winn Yorkshire made a distribution out of assets in respect of shares to the Appellants. Its construction of the relevant statutory provisions was correct, and remains correct in light of *Khan*, *Dunsby UT* and *Hurstwood*. The appeal on this ground is dismissed.

APPELLANTS' APPEAL GROUND 2 AND HMRC'S CROSS-APPEAL: THE SETTLEMENTS ISSUES

77. The remaining issues in the appeal concern the application to the arrangements of the settlements provisions.

Legislation

78. References below are to provisions contained in Chapter 5 of Part 5 ITTOIA, and to the provisions as in force at the relevant time and so far as material. The legislation is anti-avoidance legislation, intended to prevent a settlor from gaining a tax advantage by diverting income via a settlement to another person who is not liable to tax on the income, or liable to tax at a lower rate.

79. Section 619 treats the relevant income as that of the settlor and provides as follows:

> **619 Charge to tax under Chapter 5**
>
> (1)Income tax is charged on—
>
> (a)income which is treated as income of a settlor as a result of section 624 (income where settlor retains an interest),
>
> …
>
> (2)For the purposes of Chapter 2 of Part 2 of ITA 2007 (rates at which income tax is charged), where income of another person is treated as income of the settlor and is charged to tax under subsection (1)(a) or (b) above, it shall be charged in accordance with whichever provisions of the Income Tax Acts would have been applied in charging it if it had arisen directly to the settlor.

80. The definitions of "settlement" and "settlor" are found in section 620:

> **620 Meaning of "settlement" and "settlor"**
>
> (1)In this Chapter—
>
> "settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets (except that it does not include a charitable loan arrangement), and
>
> "settlor", in relation to a settlement, means any person by whom the settlement was made.
>
> (2)A person is treated for the purposes of this Chapter as having made a settlement if the person has made or entered into the settlement directly or indirectly.
>
> (3)A person is, in particular, treated as having made a settlement if the person—
>
> (a)has provided funds directly or indirectly for the purpose of the settlement,
>
> (b)has undertaken to provide funds directly or indirectly for the purpose of the settlement, or
>
> (c)has made a reciprocal arrangement with another person for the other person to make or enter into the settlement.
>
> (4)This Chapter applies to settlements wherever made.

81. Under section 624, income arising under a settlement is treated as income of the settlor if it arises during the settlor's life from property in which the settlor has an interest:

> **624 Income where settlor retains an interest**
>
> (1)Income which arises under a settlement is treated for income tax purposes as the income of the settlor and of the settlor alone if it arises—
>
> (a)during the life of the settlor, and
>
> (b)from property in which the settlor has an interest.
>
> (1A)If the settlement is a trust, expenses of the trustees are not to be used to reduce the income of the settlor.
>
> (2)For more on a settlor having an interest in property, see section 625.

82. Section 625 sets out the circumstances in which a settlor is to be regarded as having an interest in property, as follows:

> **625 Settlor's retained interest**
>
> (1)A settlor is treated for the purposes of section 624 as having an interest in property if there are any circumstances in which the property or any related property—
>
> (a)is payable to the settlor or the settlor's spouse or civil partner,
>
> (b)is applicable for the benefit of the settlor or the settlor's spouse or civil partner, or
>
> (c)will, or may, become so payable or applicable.
>
> …
>
> (3)Subsection (1) does not apply if—
>
> (a)there are no circumstances in which the property or any related property can become payable or applicable as mentioned in that subsection during the life of a person other than—
>
> (i)the bankruptcy of the person, or
>
> (ii)the assignment or charging of the person's interest in the property or any related property, and
>
> (b)the person is alive and under 25 years old.
>
> …
>
> (5)In this section "related property", in relation to any property, means income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income from it.

83. We set out below the legislation relating to multiple settlors when we come to consider that issue.

84. Section 575 deals with priority as between the provisions in Part 5 ITTOIA and other provisions. Dividend income is dealt with under Chapters 2 and 3 of Part 4 ITTOIA, and section 575(3) provides as follows:

> **575 Provisions which must be given priority over Part 5**
>
> **…**
>
> (3)Any income, so far as it falls within—
>
> (a)any Chapter of this Part, and
>
> (b)Chapter 2 or 3 of Part 4 (interest and dividends etc from UK resident companies etc),
>
> is dealt with under the relevant Chapter of Part 4.

Issues to be determined

85. Under the appeal and cross-appeal various issues arise in relation to different aspects of the FTT's decision regarding the settlements legislation, as follows:

> (1) The Appellants appeal against the conclusion of the FTT that the corollary of its conclusion that Winn Yorkshire made a distribution to the Appellants was that the settlements legislation could not apply.

(2) HMRC appeal against the FTT's conclusion that, if the settlements legislation could in principle apply, the Appellants were not settlors of the settlement, so that the income could not be treated as their income under the settlements code. A central aspect of HMRC's appeal is that the FTT erred in law in various respects as to the "element of bounty" test in relation to the settlement.

(3) The Appellants argue that there are further or alternative reasons which would support the conclusion reached by the FTT that the settlements legislation would not apply in this case to impose a charge to income tax on the Appellants. The first is the extent of the settlement, which the Appellants argue was limited to the creation of the Trust. The second is that the effect of the provisions regarding multiple settlors is that even if the Appellants were settlors, all the income falls to be allocated to Winn Yorkshire.

86. We will consider these issues in turn.

(1) Interaction between the settlements code and the distribution provisions

87. The Appellants' second ground of appeal is that even if the FTT was correct that the distribution provisions did, or more strictly could, apply, they were ousted by the settlements legislation. It was common ground, said Mr Jones, that the settlements legislation applied on its terms to the facts of the case, and that prescriptive code overrode any possible distribution treatment. The FTT therefore erred in law in deciding that it did not need to consider the settlement provisions.

88. It is worth noting at the outset that if this ground were to succeed, HMRC's cross-appeal would become critical, since on the Appellants' case the settlements legislation would not only need to override any distribution charge, but also to take effect in the way contended for by the Appellants under the arrangements to avoid any income tax charge on the Appellants.

89. One might be forgiven for thinking that this was a short point, because section 575(3) ITTOIA provides that any income falling within both the settlements code and the distribution provisions is to be dealt with under the distribution provisions. However, Mr Jones argued before the FTT that section 575(3) did not so operate, because the settlements code treated the income as that of the settlor *alone*, meaning that the same income could never be charged on the Appellants under the distribution rules, and there was therefore no overlap on which section 575(3) could bite: [35]. Mr Jones placed particular reliance on the Explanatory Notes published when ITTOIA was introduced to support this interpretation. The FTT accepted Mr Jones' argument, at [138].

90. We note that in *Dunsby UT*, the Tribunal referred to section 575(3), but did not deal with it specifically. However, having concluded that there was a distribution to Mr Dunsby, the Tribunal stated, at [87] of the decision:

> If we are right on the Distribution Issue we do not need to go further and consider the Settlements Issue. We do so, however, in case we are wrong on the Distribution Issue and because the point was fully argued before us.

91. It would appear from this passage that the Tribunal in *Dunsby UT* saw the determination of the distribution question as meaning that the Settlements Issue need not be determined. However, we cannot infer that it reached that view on the basis of the effect of section 575(3). That is because HMRC withdrew their argument in the *Dunsby* appeal that section 575(3) had this effect. That is evident from [46(6)] of *Dunsby FTT*. It is also clear from *Dunsby FTT* that

the FTT accepted Mr Jones' argument, as did the FTT in this case, as regards the interpretation of section 575(3)[8].

92. Most importantly, in this appeal HMRC did not support the proposition that section 575(3) applied to oust the settlements code, so we must determine the issue on the basis that the answer lies elsewhere.

93. We begin with the FTT's decision on the issue. This is confined to the following paragraph, at [138]:

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

94. Mr Jones submits that this was an error of law. He says that the question of whether particular elements of a transaction can be "ignored" turns on the construction of the provisions in issue (see *UBS* at [63]-[68]) and whether those provisions require a focus on the composite transaction. That does not apply here, he says, because the settlements legislation is prescriptive in its effect, namely that the income which arises under the settlement is treated as that of the settlor alone and charged under section 619 ITTOIA. That treatment and charge therefore oust the charge to tax on distributions. It was therefore necessary, he says, for the FTT to go on to consider the settlements legislation "because the charge under that legislation will apply in place of the charge imposed under other heads". Mr Jones submits that if regard is had to the settlement, then the position is as follows:

(1) The income arising under the settlement arose from the B share: [222(5)(b)].

(2) Moreover, some of that income was payable to Winn Yorkshire and the trust property was to revert to it: [12(6)].

(3) Winn Yorkshire therefore had an interest in the B share from which the income arose.

(4) That being so, the distribution was, pursuant to section 624 ITTOIA, to be treated for income tax purposes as the income of Winn Yorkshire alone.

95. We do not accept Mr Jones' argument.

96. This ground of appeal falls to be considered on the basis that the FTT was, as we have found, correct in concluding that, construing the distribution legislation purposively and applying it to the facts viewed realistically, the arrangement gave rise to a distribution by Winn Yorkshire to the Appellants. On that basis, the result of the FTT's approach was that the dividend avoidance scheme, based on the insertion of a trust, did not achieve its intended result of preventing such a distribution. As the FTT put it, the income in dispute did not arise under

[8] *Dunsby FTT* [52]-[55].

a "settlement" of which Winn Yorkshire was the "settlor". Its true source was not the settlement but the shareholding in Winn Yorkshire. We consider that in that situation, although the FTT's reasoning was somewhat condensed, it was justified in concluding that it was unnecessary to consider the settlements legislation.

97. Mr Jones asserted that the settlement code was "prescriptive" and "took priority" over any other legislation. However, that assertion was not made good. Mr Jones referred to the Explanatory Notes to ITTOIA, but they do not take the place of legislative or case law authority, even were they to offer any support the assertion. Nor does the anti-avoidance nature of the settlements code of itself dictate this result.

98. We consider that in any event this ground fails for a more basic reason. That is because the dividend on the B share is not the same as the distribution in respect of shares by Winn Yorkshire. Once the FTT had correctly found that under the distribution code there was a distribution in respect of shares by Winn Yorkshire, *that* distribution could not be conjured away by the applicability of the settlements code to a *different* distribution.

99. This point is in fact consistent with Mr Jones' argument in relation to section 575(3) that under the arrangements there is no "overlap" of tax on the same income for that subsection to address. This was the submission made by HMRC in *Dunsby FTT* (by Ms Poots, who also represented HMRC in that case), as recorded at [54]-[55] of that decision:

> 54. Mr Jones says that the Explanatory Notes confirm that there is no need for a separate provision to determine the priority between the settlements code and Chapter 3 Part 4 ITTOIA because there is no overlap between them. The dividend income on the S share is "income which arises under a settlement". If the settlement code applies to the dividend on the S share, then, pursuant to s624 ITTOIA, the dividend income is the settlor's income and the settlor's income alone for income tax purposes. There is no room for a separate charge under s383 ITTOIA on Mr Dunsby.
>
> 55. Ms Poots does not seriously challenge Mr Jones's submission. And I accept it. Instead, Ms Poots submits that, on the current facts, a distribution was made on or in respect of the ordinary shares - either to the exclusion of a distribution taking the form of a dividend on the S share or in addition to it - and that distribution is not "income which arises under a settlement" and so does not fall within the ambit of s624 ITTOIA.

100. The FTT in *Dunsby FTT* did not have to decide whether it accepted Ms Poots' submission, because it found that there was no distribution to the taxpayers. However, the point made by Ms Poots was in our opinion a good one.

101. We consider that the FTT did not err in law in reaching the conclusion which it reached at [138]. We therefore dismiss Ground 2 of the Appellant's appeal.

102. It is therefore not strictly necessary to consider the issues arising from HMRC's cross-appeal in relation to the FTT's decision that the Appellants were not "settlors" under the settlements legislation. However, since we heard full argument on those issues and in case we are wrong, we will do so.

(2) Were the Appellants "settlors"?

The FTT's decision

103. At [139], the FTT proceeded to consider the Settlement Issue in case it was wrong in relation to the "*Ramsay*" distribution analysis.

104. Having set out the arguments of the parties, the FTT reviewed in detail (at [144]-[207]) the authorities on which the parties relied. These included *Chamberlain v Inland Revenue*

Commissioners [1943] 2 All ER 200 ("*Chamberlain*"); *Copeman (HM Inspector of Taxes) v Coleman* (1939) 22 TC 594 ("*Copeman v Coleman*"); *IRC v Plummer* [1979] STC 793 ("*Plummer*"); *Crossland (Inspector of Taxes) v Hawkins* (1961) 39 TC 493 ("*Hawkins*"); *Butler (Inspector of Taxes) v Wildin* [1989] STC 22 ("*Wildin*"); *Jones v Garnett* [2007] 1 WLR 2030 ("*Jones*"), and *Commissioners of Inland Revenue v Payne* (1940) 23 TC 610 ("*Payne*").

105. We deal in greater detail below with the FTT's findings as to the extent of the "settlement" in this case, but it is necessary to refer to certain of those findings since they informed the FTT's decision that the Appellants were not "settlors".

106. The FTT stated that "the purpose underpinning the settlements code is to prevent taxpayers from reducing their tax liability by divesting themselves of what would otherwise be taxable income by making gifts and settlements where prescribed conditions are met". It noted that in *Jones* the House of Lords confirmed that while a settlement is broadly defined in the legislation to include any "arrangement", a settlement must involve "an element of bounty". The FTT emphasised that in *Jones* Lord Hoffmann said that under the arrangement "***the settlor*** must provide a benefit which would not have been provided in a transaction at arm's length". The FTT rejected the Appellants' argument that a person may be a "settlor" even where he does not himself provide an element of bounty: [210(2)].

107. The FTT did not accept the Appellants' argument that the arrangement comprising the "settlement" was confined to certain preliminary steps taken by Winn Yorkshire, for reasons which we discuss below. It decided, at [222(5)], that, regardless of the scope of the relevant "arrangements" in this context:

> In either case, Winn Yorkshire is plainly the "settlor" of the arrangement as the party which:
>
> (a) entered into the relevant steps and/or directly provided the funds required for the purposes of the arrangement, namely, the cash resources it used to subscribe for the initial A and B shares and for the additional A share; and
>
> (b) thereby provided an element of "bounty" in using its cash resources for the share subscriptions with the intention and expectation that the monies subscribed for the additional A share would be used to fund the B share dividend so creating income arising under the terms of the Trust for the beneficiaries of the Trust.

108. The FTT then considered HMRC's arguments that the provisions defining who is a "settlor" were broad enough to capture the Appellants as well as Winn Yorkshire, as having *indirectly* entered into the "arrangement" or having provided funds for it. As the sole owners and managers of Winn Yorkshire, argued HMRC, the Appellants fully expected to benefit from Winn Yorkshire's funds which were used for the planning and it was within their control to ensure that they could do so.

109. The FTT did not accept the Appellants' argument that treating the Appellants as settlors would "pierce the corporate veil". It also accepted HMRC's submissions as to the expectations and practical control of the Appellants, and that they were the "controlling minds" of both Winn Yorkshire and Winn Scarborough. However, it rejected the argument that they were "settlors". Its reasoning and conclusions were set out at [227]-[230] as follows:

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

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

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

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

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

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

> 229.For all the reasons set out above, at the most, the appellants could be regarded as having made a "settlement" for the purposes of the settlements code only in respect of the planning so far as it relates to the charity receiving the small sums it received (and, for the reasons set out at [228(2)] I consider it doubtful that the appellants are to be regarded as having provided "an element of bounty" even to that extent). Otherwise, applying the provisions as they have been interpreted by the courts on a purposive basis, it is plain that the requirements for the appellants to be taxable under them in respect of the income in dispute are not met. The fact that the appellants caused the arrangements to occur purely for the purposes of avoiding income tax by ensuring that the settlements code applied to Winn Yorkshire cannot of itself affect that conclusion. On that basis, it is not necessary to consider the appellants' arguments as regards the application of s 644 (see 141(6)).
>
> 230.I note that the [FTT] reached a different conclusion on the application of the settlements code in the *Dunsby* case but, given the different facts in that case, I do not consider it useful to carry out an analysis of that decision in that respect.

HMRC's cross-appeal

110. HMRC appeal against the FTT's decision that the Appellants were not settlors.

111. HMRC point out that the FTT concluded, at [228(1)], that the Appellants indirectly provided property for the purposes of the settlement. HMRC support that conclusion, and say that a similar conclusion was reached in *Dunsby UT*.

112. Ms Nathan says that the FTT's conclusion that, regardless of this provision of property, the Appellants were not "settlors" was based on its decision that they did not provide to any material extent the necessary "element of bounty" to another person. She submits that this conclusion involved several errors of law, and "unless corrected, this aspect of the Decision risks undermining the effectiveness of the settlements code which is an important tool in tackling tax avoidance". HMRC say that the FTT made four errors of law:

(1) First, the FTT misapplied judicial statements to the effect that an element of bounty is required in order for there to be a "settlement".

(2) It ignored the fact that a benefit was conferred by the Trust on the charity and on Winn Yorkshire.

(3) It unlawfully imported a *de minimis* threshold into the "element of bounty" test.

(4) It wrongly viewed the "settlement" as confined to the element of bounty.

113. Mr Jones says that the FTT reached the right decision, and that its conclusion can be supported on the additional grounds discussed at (3) below. He rejects the errors of law identified by HMRC, and argues that in any event several of these were findings of fact, open to the FTT on the evidence, which cannot be challenged before this Tribunal.

Discussion

114. The meanings of "settlement" and "settlor" are set out in section 620 ITTOIA. The definition of "settlement" is extraordinarily wide, and it includes any trust or arrangement. A person is treated as a "settlor" if that person has made or entered into the settlement directly or indirectly, which includes providing funds directly or indirectly for the purposes of the settlement.

115. The FTT found (not surprisingly) that the arrangements did involve a settlement, and (at [228(1)]) that the Appellants had provided funds indirectly for the purposes of the arrangements. Based on the statutory wording, it would seem to follow inexorably that the

Appellants were settlors. However, the position is more complicated because case-law has established that in order for a settlement to arise, there must be an "element of bounty". In applying that concept to the facts of this case, the FTT concluded that the Appellants were not settlors, because it was "fatal to HMRC's analysis that, under the planning, no material benefit was provided to any other party".

116. The FTT's decision that the Appellants were not settlors effectively rested on its conclusions that (1) where there is a settlement, the element of bounty test must be applied to the circumstances of an individual to determine whether they are a "settlor" of that settlement, (2) such an element of bounty exists only where the individual intends to and does confer a material benefit on a third party, and (3) on the facts, the Appellants did not meet this requirement.

117. One question is whether the element of bounty principle applies not only in establishing the existence of a settlement but also in establishing the identity of the settlors. Mr Jones sought during the hearing to object to HMRC raising this point, on the basis that they had not identified it in their grounds of appeal or skeleton argument. We have no hesitation in rejecting that submission. HMRC's skeleton makes it sufficiently clear that in their submission the cases, properly understood, have sought to identify the type of "arrangements" intended to be within the settlements code, and have not focussed on whether a person is a settlor because they have conferred an element of bounty on a third party. The point is in any event explicit in the FTT's essential reasoning (see, in particular, [210(2)]), in respect of the issue on which HMRC have appealed.

118. The FTT described the emergence and development of the "element of bounty" test in the decided cases, particularly in *Jones* and *Plummer*. We need not repeat that description in full here, but we do need to consider whether the FTT made any of the errors of law asserted by HMRC in applying the test.

119. In *Plummer*, the Inland Revenue argued that a settlement arose in respect of certain annuity payments made as part of a tax avoidance scheme. Lord Wilberforce, delivering the majority decision, described the problem arising from the bare wording of the definition of settlement as follows, at p800 d-e:

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

120. Lord Wilberforce determined that "the courts have selected…the element of 'bounty' as a necessary common characteristic of all the 'settlements' which Parliament has in mind". He continued, at p801:

> …with the 'element of bounty' test we have a definition which is in agreement with the intention of Parliament as revealed through the whole miniature code of Part XVI.

121. The position was more fully explained by Vinelott J in *Wildin* as follows, at page 36:

> It has always been recognised that the definition of a 'settlement' is so wide that some limitation to its scope must be implied. The definition includes any 'transfer of assets'; but it cannot have been intended to include a sale of property at full value. It was held very shortly after the enactment of the predecessor of s 437—that is, s 21 of the Finance Act 1936—that a bona fide

> commercial transaction, though an arrangement, is outside the intended scope of the section (see *Copeman (Inspector of Taxes) v Coleman* [1939] 2 KB 484, 22 TC 594). In more recent cases the test that has been applied has been to ask whether the transaction in question contained any element of 'bounty'. However, as Lord Roskill pointed out in *Chinn v Collins (Inspector of Taxes)* [1981] STC 1 at 12, [1981] AC 533 at 555—
>
> > '... the word "bounty" appears nowhere in the statute. It is not a word of definition. It is a judicial gloss on the statute descriptive of those classes of cases which are caught by the section in contrast to those which are not. The courts must, I think, be extremely careful not to interpret this descriptive word too rigidly. I would recall some sapient observations of Frankfurter J in *Tiller v Atlantic Coast Line Railroad Co* (1943) 318 US 54 at 68: " A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas."…
>
> In deciding whether an arrangement is within or without the classes of cases caught by s 437, the starting point must be to identify the arrangement. The question then is whether taken as a whole it did contain the requisite element of bounty.

122. So, what is an "element of bounty"? In *Jones*, Lord Hoffmann described it as an "old-fashioned phrase". Reiterating the caution expressed by Vinelott J in *Wildin*, he described it as follows, at p2033 (emphasis added):

> In *Chinn v Hochstrasser* [1981] AC 533, 555 Lord Roskill cautioned against treating the word "bounty" as if it had been included in the statute. It seems to me that the general effect of the cases is that, **under the arrangement, the settlor must provide a benefit which would not have been provided in a transaction at arm's length.**

123. Before looking at what is meant by the requirement for an element of bounty, and whether it was present in this case, we first consider whether the FTT was correct to conclude that in order to be a settlor a person must provide an element of bounty.

124. It is certainly true that the main case law authorities have mostly concerned situations in which individuals found to be settlors have provided an element of bounty. It is also the case that, as the FTT emphasised (at [210]), Lord Hoffmann in *Jones* states that under the arrangement the settlor must provide a benefit.

125. However, we do not consider that any of the authorities directly addresses the question of whether it is possible for a person to be a settlor without themselves providing an element of bounty. The various judicial pronouncements as to the meaning of the element of bounty restriction are made in the context of evaluating whether a particular arrangement constitutes a settlement, not of describing the characteristics needed to identify a settlor.

126. We note that in *Dunsby FTT*, Mr Jones on behalf of Mr Dunsby argued that there was no requirement for an element of bounty in order for a person to be a settlor. The FTT recorded his submission in response to HMRC's argument that Mr Dunsby was a settlor because he was the only person providing an element of bounty at [112(3)] of *Dunsby FTT*:

> HMRC's argument confuses the making of the settlement and the definition of the settlor. The settlor does not have to be the person who provides the bounty. The requirement for an element of bounty is a gloss on the definition of settlement. It is not a gloss on the definition of settlor. It is not a requirement that every transfer has to have an element of bounty in order for

> the transferor to be treated as a settlor. The settlor may provide bounty but does not have to do so.

127. The FTT concluded, at [129] of *Dunsby FTT*:

> The definitions of settlement and settlor are, of course, inextricably linked. While I accept the proposition that in the majority of cases, the person who provides the element of bounty will be a settlor, in the absence of clear authority, I am reluctant to conclude that a person who does not provide an element of bounty cannot also be a settlor. In this case, for the reasons that I give below, I do not need to decide that point and I do not do so.

128. This issue was not pursued in *Dunsby UT*, and the Upper Tribunal did not comment on this aspect of the FTT's reasoning.

129. We share the caution of the FTT in *Dunsby*. Where an arrangement has been found to be a settlement, which means that it involves the necessary element of bounty, we are not persuaded that a person can only be a settlor if they provide an element of bounty to that settlement. As the authorities make clear, the question is whether a person falls within the statutory definition of that term. In this case the FTT concluded that the Appellants did, but that they were prevented from being settlors because they did not satisfy the "judicial gloss" on the statute, in a situation where that judicial gloss has focussed on narrowing the extremely wide definition of "settlement". However, we do not need to determine this issue, and it is appropriate to leave it to a case where it is dispositive. We do not need to determine it because we consider that in any event the FTT erred in law in concluding that the Appellants did not provide the necessary element of bounty to the settlement in this case. What follows assumes that it is necessary for an individual to provide an element of bounty in order to be a settlor.

130. As set out above, The FTT's essential reasoning was as follows:

> …the appellants did not (whether directly or indirectly) provide to any material extent such an "element of bounty" under the plan. In causing the various steps involved in the plan to occur in their capacity as directors of the relevant companies, the appellants did not intend to and, the planning did not in fact, confer any material benefit on any *other* person. The sole purpose of the plan was for the vast majority of the relevant funds which Winn Yorkshire paid to Winn Scarborough to be received by the appellants themselves, as duly happened. Under the plan, the appellants simply went from potentially having the ability to access those funds as the owners and managers of Winn Yorkshire, to receiving the bulk of those funds directly into their own hands.

131. On the FTT's findings, the arrangements gave rise to a settlement, the Appellants provided funds indirectly for the purposes of the settlement, the Appellants were the controlling minds of the arrangements, and the Trustee was to hold the fund on trust to pay income in stated percentages initially to Cancer Research, thereafter to Winn Yorkshire, and thereafter to the Appellants. However, because the Appellants were the principal beneficiaries under the trust and there was a plan for most of the income to be paid to them, the FTT determined they had not provided any element of bounty and so were not settlors. With respect to the FTT, we consider this to be an error of law.

132. We do not consider that the element of bounty test means that a person who makes a settlement (and falls within the statutory definition of settlor) is prevented from being a settlor because they are a principal beneficiary under the settlement. That is the case even if there is a "plan" to distribute income from the trust property. We agree with HMRC that the settlements code is clearly intended to encompass settlor-interested arrangements, and the leading authorities make that clear. It would deprive the code of a significant part of its purpose if the element of bounty test were to have the wide-ranging effect found by the FTT.

133. As explained by Lord Hoffmann in *Jones*, the general effect of the cases is that the element of bounty test means that the settlor must provide a benefit which would not have been provided in a transaction at arm's length. We respectfully agree with that formulation. That test is not on all fours with a test which turns on whether a settlor who indirectly provides property for the purposes of the settlement has a hope and expectation of receiving back as income from the settlement an amount equivalent to a large percentage of the trust property (the B share), with another beneficiary being entitled to the trust property itself. The FTT did not find that the Appellants would have entered into the relevant transactions on an arm's length basis, and Mr Jones did not seek to argue that they would.

134. Even if we are wrong as to the meaning of the element of bounty test, we consider that in any event under the arrangements the Appellants clearly provided an element of bounty (however defined) to Winn Yorkshire and to Cancer Research. The FTT appears not to have considered the entitlement of Winn Yorkshire under the Trust in reaching it conclusion. As regards the entitlement of Cancer Research, the FTT dismissed this, stating "[w]hilst a small amount of the funds were paid to a charity…in effect, that was simply the price which the appellants were prepared to pay for the receipt of the rest of the funds, so they thought, as tax free sums". However, the fact that the bounty was small, or that it was a tax-driven payment, did not mean that there was not *an element* of bounty on the part of the Appellants when making the settlement in relation to both Winn Yorkshire and Cancer Research. There is no authority in the case law to suggest that some sort of judicially-defined *de minimis* threshold applies. If, for instance, the Aikido scheme had been utilised for a company with £100 million of funds, would the payment to Winn Yorkshire and the charity of £1.5 million have been "small" or "immaterial"?

135. Mr Jones argued that the FTT's finding that there was no element of bounty was a finding of fact, which the FTT entitled to reach and which could not be disturbed on appeal. We do not agree. We have found that the FTT misdirected itself in several respects in relation to the legal test imposed in case law by the element of bounty requirement, and in that event its finding of fact was vitiated by those errors of law.

136. In concluding that the Appellants were not settlors because they provided no element of bounty, even if it is assumed that the element of bounty test applies in determining status as a settlor, the FTT erred in law. We therefore allow HMRC's appeal.

(3) Additional or alternative reasons: extent of the settlement and multiple settlor provisions

137. In opposing HMRC's cross-appeal, the Appellants submit that the FTT's conclusion that the Appellants were not liable to income tax as settlors under the settlements code can be supported for two additional or alternative reasons. The first is that the settlement was limited to certain steps involving Winn Yorkshire, which was therefore the only settlor. The second is that under the provisions dealing with multiple settlors, the Appellants are to be treated as having provided no property to the settlement and so cannot be attributed any of its income.

138. We deal with these issues in turn.

Extent of the settlement

139. Mr Jones argues that the "settlement" was limited to the Trust, which was created by Winn Yorkshire alone. That is because there is a legal distinction, he says, between the steps taken with a view to creating a settlement and the settlement thus created. He relies in this respect on the decision in *Chamberlain*. He also argues that in section 620(1) ITTOIA the term "arrangement" is confined to something akin to a structure, such as a trust.

140. Why does this matter? Mr Jones submits that because the narrowly defined "settlement" was made by Winn Yorkshire alone as creator of the Trust and provider of the funds for it, it was therefore the sole "settlor" to whom the income under the Trust was treated as arising, as the FTT held for other reasons.

141. In considering the extent of the arrangement comprising a settlement, the FTT reviewed the case law and reached the following conclusions at [222]:

> (1) In my view the "arrangement" comprises at least the initial steps taken by Winn Yorkshire to implement the planning, namely (a) the establishment of Winn Scarborough on Winn Yorkshire subscribing for the A and B shares, (b) the subsequent almost immediate transfer by Winn Yorkshire of its beneficial interest in the B share to the trustee of the Trust on terms that the appellants were the primary beneficiaries of the Trust, and (c) the subscription by Winn Yorkshire for the additional A share for a premium of £200,000 with the expectation that Winn Scarborough would immediately cancel the share premium created on the share subscription to create distributable reserves for use in paying the B share dividend or, at any rate, the plan for that to happen.
>
> (2) The appellants consider that the "arrangement" is confined to the settlement of the B share in the Trust. However, it seems to me that steps (a) and (c) are an integral part of Winn Yorkshire providing an "element of bounty". For all of the reasons already set out, each of these steps was essential to the provision of a benefit to the beneficiaries of the Trust, namely, the creation of income arising to the Trust in the form of the B share dividend:
>
> > (a) The only reason for setting up Winn Scarborough with the corporate structure it had was for it to act as a conduit through which funds could be channelled from Winn Yorkshire into the hands of the appellants.
> >
> > (b) When the Trust was set up, given that Winn Scarborough was a shell with no intended activity, the B share would have had no value but for the intention and expectation that Winn Yorkshire would provide Winn Scarborough with £200,000 by subscribing for the additional A share so that Winn Scarborough could then create distributable reserves (by cancelling the share premium) and pay the B share dividend.
>
> (3) I do not view the decision of the House of Lords in *Chamberlain* as supporting the view that, as Mr Jones argued, the creation of Winn Scarborough and issue of shares in it cannot be part of the "arrangement". As is plain from the analysis set out above, the House of Lords did not lay down a principle that the formation of a corporate structure can never be part of an "arrangement" whatever the surrounding circumstances.
>
> (4) I note that it could be said that the "arrangement" in fact comprised all of the relevant steps involved in the planning given that all steps were clearly identified and planned from the outset and they were implemented within a short period of time (apart from the payment of the B share dividend which may constitute the "arrangement" being put to its intended use). In the words of Lord Walker in *Jones* the entire structure was plainly "a definite scheme, the essential heads of which could have been put down in numbered paragraphs on half a sheet of notepaper" which explained the rationale of the sequence of events, namely, to deliver the desired amount of cash from Winn Yorkshire, into the hands of the appellants/its shareholders, through the medium of Winn Scarborough and the Trust, on what was intended to be a tax-free basis.

142. The FTT considered that it did not need to decide whether the arrangement comprised *all* of the relevant steps, because, whatever the extent of the settlement, the settlor was plainly Winn Yorkshire: [222(5)].

143. This issue was recently considered by the Upper Tribunal in *Dunsby UT*. Having summarised the facts in *Chamberlain*, the Tribunal noted that the issue in that case was the identification of the property comprised in the settlement. It continued, at [93]-[95]:

> 93. Mr Jones placed considerable reliance on the observation by Lord Macmillan at page 205D–E that it is "fallacious to confuse the steps taken by the appellant with a view to effecting a settlement or arrangement with the settlement or arrangement itself". On that basis, he said, the settlement in this case was confined to the settlement by Mrs Gower of the S share on the Trust, and did not extend to consideration of the entire Scheme (and thus the prior steps by which Mrs Gower acquired the S share).
>
> 94. We do not accept that submission. It is clear from *Chamberlain* that the creation of a settlement as part of a series of steps that pursue an overall plan does not in itself mean that the earlier steps are to be regarded as part of the settlement itself. But *Chamberlain* does not set out a general proposition that the steps leading to the creation of a settlement are always to be ignored when determining the scope of the settlement. Indeed Mr Jones did not himself take issue, as a matter of principle, with the FTT's conclusion at [104(3)] that steps which form an integral part of the arrangements to create a structure under which the income of property becomes payable to others may be regarded as part of the settlement.
>
> 95. The courts have hitherto been rather cautious of laying down any precise test for identifying the components that are to be regarded as part of a settlement, as defined in s 620 ITTOIA. In *Crossland v Hawkins* [1961] Ch 537, where Mr Hawkins, an actor, provided his services through a company whose shares were acquired by a trust established by Mr Hawkins' father-in-law for the benefit of Mr Hawkins' children, the court considered that there was "sufficient unity" about the series of transactions to make them an "arrangement" within the meaning of the settlements legislation. That does, however, rather beg the question as to what is "sufficient" for these purposes. But the difficulty with any more specific definition is, as Lord Walker commented in *Jones v Garnett (Inspector of Taxes)* [2007] 1 WLR 2030 at [50], that the word "arrangement" in the context of what was the predecessor to s 620:
>
> > "is a wide, imprecise word. It can (like 'settlement' or 'partnership', or indeed 'marriage') refer either to actions which establish some sort of legal structure (in this case a corporate structure though which the taxpayer's income could be channelled) or those actions together with the whole sequence of what occurs through, or under, that legal structure, in accordance with a plan which existed when the structure was established."

144. The Tribunal then stated that "a relevant question to ask is whether the act of settlement, narrowly defined, has an economic logic that is freestanding and severable from the preparatory steps leading to that settlement". If it does, that is a strong indication that the preparatory steps are not integral to that settlement. On the facts, the Tribunal decided that the various steps were "inextricably bound" and so the settlement comprised the entire sequence of transactions constituting the scheme. It considered that describing the settlement solely by reference to the creation of the trust was "wholly artificial and unrealistic".

145. We are not bound by *Dunsby UT*, but we agree with and endorse its analysis at [93]-[95] above. We therefore reject Mr Jones's argument in reliance on *Chamberlain*. Nor do we accept

Mr Jones's submission that the term "arrangement" is limited in this context to the establishment of a legal structure. The full passage from *Jones v Garnett*, set out above, states that the term *can* refer to this, but can also refer to "those actions together with the whole sequence of what occurs through, or under, that legal structure, in accordance with a plan which existed when the structure was established".

146. In *Dunsby UT* the Tribunal suggested that it was relevant to ask whether particular steps had a freestanding and severable economic logic. While we accept that it is difficult to propose a more precise test than "sufficient unity" in identifying the component elements of an "arrangement" in this context, we find some assistance in the formulation suggested by Lord Walker in *Jones* of asking whether the relevant steps form part of "a plan which existed when the structure was established". In the passage referred to above in *Dunsby UT*, Lord Walker continued:

> The planned result may be far from certain of attainment. It may be subject to all sorts of commercial contingencies over which the taxpayer has little or no control. But if the plan is successful and income flows through the structure which he has set up, it is "income arising under the settlement".

147. In relation to this case, we reach the same conclusion as that in *Dunsby UT*, namely that to describe the settlement, as Mr Jones proposes, solely by reference to the creation of the Trust would be wholly artificial and unrealistic. Whether one approaches the determination of the extent of the settlement by asking whether the various steps comprised in the Aikido scheme were integral to the settlement; or were, in the words of Viscount Dilhorne in *IRC v Mills* ("*Mills*") "an integrated scheme"; or were part of a plan which existed when the structure was established, or were, in the words of the Master of the Rolls in *Commissioners of Inland Revenue* v *Payne* 23 TC 610 "part of one definite scheme, the essential heads of which could have been put down in numbered paragraphs on half a sheet of notepaper"[9], the answer is the same. As the FTT found, at [222(4)], "all steps were clearly identified and planned from the outset and they were implemented within a short period of time". We consider that the "arrangement" comprising the settlement consisted of all the steps in the scheme.

148. Since we have rejected Mr Jones' submission as to the extent of the settlement, we do not need to determine whether the Appellants would necessarily have fallen outside the definition of "settlors" if we had accepted that submission. We express no view on that issue.

149. We do not agree that the FTT's conclusion that the Appellants were not settlors could also or alternatively be supported by reference to the extent of the settlement.

Multiple settlors

150. The FTT found that Winn Yorkshire was a settlor of the settlement. If, contrary to the FTT's decision, the Appellants were also settlors, Mr Jones argues that the effect of the provisions applying where there are multiple settlors is that the income which can be apportioned to the Appellants under the settlements code is nil.

151. Since we have found that (if we are wrong in relation to the distribution issue) the Appellants were settlors, it is necessary to determine whether this argument is correct.

152. The FTT stated that, having decided that the Appellants were not settlors, it was not necessary for it to consider this point: [229].

153. Section 644 ITTOIA deals with situations where there is more than one settlor:

> **644 Application to settlements by two or more settlors**

[9] Page 626 of the decision.

(1)In the case of a settlement where there is more than one settlor, this Chapter has effect in relation to each settlor as if that settlor were the only settlor.

(2)This works as follows.

(3)In this Chapter, in relation to a settlor—

(a)references to the property comprised in a settlement include only property originating from the settlor, and

(b)references to income arising under the settlement include only income originating from the settlor.

…

(6)See section 645 for the meaning of references in this section to property or income originating from a settlor.

154. Section 645 sets out the meaning of property or income "originating from" a settlor, as follows:

645 Property or income originating from settlor

(1)References in section 644 to property originating from a settlor are references to—

(a)property which the settlor has provided directly or indirectly for the purposes of the settlement,

(b)property representing property so provided, and

(c)so much of any property which represents both property so provided and other property as, on a just and reasonable apportionment, represents the property so provided.

(2)References in section 644 to income originating from a settlor are references to—

(a)income from property originating from the settlor, and

(b)income provided directly or indirectly by the settlor.

(3)In this section references to property or income which a settlor has provided directly or indirectly—

(a)include references to property or income which has been provided directly or indirectly by another person under reciprocal arrangements with the settlor, but

(b)do not include references to property or income which the settlor has provided directly or indirectly under reciprocal arrangements with another person.

(4)In this section references to property which represents other property include references to property which represents accumulated income from the other property.

155. Mr Jones points out that section 644 provides that where there is more than one settlor, the settlements legislation has effect in relation to each settlor as if that settlor were the only settlor of a deemed separate settlement. References to the property comprised in a settlement and to income arising under the settlement are then treated as references only to property and income "originating from the settlor" in question. Section 645 defines property and income originating from a settlor. Applying those provisions to the facts, says Mr Jones, the only property provided for the settlement was provided by Winn Yorkshire, as the FTT found at [222(5)]. Therefore, all of the income arising under the settlement in the form of the dividend

falls to be treated as allocated to Winn Yorkshire, with nothing capable of being allocated to the Appellants.

156. Ms Nathan says that in interpreting sections 644 and 645 in accordance with the purpose of the settlements code, the focus is on the person who provided value. Prior to the transactions of which the Appellants were the controlling minds, they had the benefit of profits and reserves in Winn Yorkshire, reflected in their shares, which could be distributed to them. On a realistic view of the facts, both the B share and the distributable reserves within Winn Yorkshire originated from the Appellants, and all of the settlement property was settled by them. Ms Nathan says that this is consistent with the result in *Hawkins*, and with the approach in *Dunsby UT*.

157. In his oral submissions, Mr Jones put forward an additional argument which had not been referred to in his skeleton argument or in the Appellants' Response to HMRC's cross-appeal. This was that there is a lacuna or failure in sections 644 and 645 in that they do not contemplate or deal with the position where more than one person can be said to provide the same property. They deal only with the situation where different property is provided by different settlors. In those circumstances, he said, there are simply no statutory provisions which deal with multiple settlors which are applicable in this case, unless the provisions can apply to charge the same amount twice. Ms Nathan did not seek to object to this argument being raised, and we begin by considering it.

158. We consider that on a straightforward construction of sections 644 and 645, those provisions are sufficiently wide to encompass a situation where the same property can be said to have been provided by more than one settlor. The definition of "settlor" in section 620 is, as we have seen, very wide and deals with a number of situations in which a person is "treated as having made a settlement". Where there is more than one person falling within the definition, Section 644(1) then operates to treat each of them as the only settlor, and to treat references in the settlements code to property comprised in the settlement or income arising under the settlement as including only property or income originating from the person treated as the only settlor. We see no warrant in the terms of sections 644 and 645 to restrict them in the manner suggested by Mr Jones. We accept that the provisions contain no method of apportioning income capable of allocation to more than one settlor.

159. Mr Jones relied on statements made by Lord Wilberforce in *Vestey v Inland Revenue Commissioners [1980] STC 10*, at pages 1171c to 1174b, for the proposition that where provisions potentially impose a charge to tax on multiple taxpayers for the same amount, with no guidance as to allocation, that is a case where, as Lord Wilberforce put it, "the tax must fail". However, those comments were made in relation to different provisions of the settlements code, namely those defining the beneficiaries under a trust, which contained no equivalent of sections 644 and 645 (which we note are not charging provisions). In relation to a predecessor to section 644, in *IRC v Mills* [1975] AC 38 Viscount Dilhorne observed as follows (at page 54):

> It may be that a case will arise in which it can be said that income has been provided directly by one settlor and indirectly by another, in which case there may be a liability in respect of undistributed income falling on both settlors. What would be the position then has not to be determined in this case…

160. This statement seems to us to recognise that in principle sections 644 and 645 could lead to "double taxation", and the same conclusion was reached by Vinelott J in *Wildin* at page 37j-page 38a. We therefore reject Mr Jones' oral submission that sections 644 and 645 are defective and so "the tax must fail".

161. We do not agree that the effect of sections 644 and 645 is that the Trust income can only be apportioned to Winn Yorkshire. Mr Jones' argument rests on two assertions which we do not accept. The first is that there was no property originating from the Appellants within the terms of the provisions. The second is that the FTT found this as a fact.

162. We have determined above that the FTT erred in law in concluding that the Appellants were not settlors. The question of whether they provided property to the settlement therefore falls to be determined on the basis that they were settlors (and indeed the alternative argument proceeds on that basis). We consider that they did, because they provided property indirectly for the purpose of the settlement within the terms of section 645. As the FTT recorded (at [223(2)]), HMRC argued that "on a broad and realistic view" the Appellants could be regarded as:

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

163. At [224]-[226] and [228(1)] the FTT effectively accepted HMRC's analysis on this issue. It went on to conclude that the Appellants were nevertheless not settlors, *not* because they had not provided property indirectly to the settlement, but because they failed the element of bounty test. We consider that the FTT reached the correct conclusion, for the correct reasons, in relation to the indirect provision of property issue.

164. Mr Jones says that the FTT found at [222(5)] that the only property provided for the settlement was provided by Winn Yorkshire. That would be entirely inconsistent with its conclusions at [224]-[226] and [228(1)]. It is also not what [222(5)] says. At that sub-paragraph, the FTT is expressing its conclusion that, however narrowly the "arrangement" is defined in determining the extent of the settlement, Winn Yorkshire was a settlor of that arrangement. It then turned at [223] to the issue of whether the Appellants were also settlors.

165. We therefore reject this additional argument. While the application of sections 644 and 645 might in principle lead to the possibility of double taxation, in this case, of course, the only settlors actually liable to tax would presumably be the Appellants, it being part of the tax planning of the scheme that Winn Yorkshire would not be taxable on the dividend apportioned under the settlement code.

DISPOSITION

166. We decide as follows :

(1) The Appellants' appeal against the FTT's decision that the B share dividend was taxable as a distribution made by Winn Yorkshire to the Appellants is dismissed.

(2) The Appellants' appeal against the FTT's decision that the corollary of its finding on the distribution issue was that the relevant income did not fall to be taxed under the settlements code is dismissed.

(3) HMRC's appeal against the FTT's decision that the Appellants were not "settlors" is allowed. We set aside the FTT's decision on this issue and remake it, determining that

(if the sums were not taxable as distributions) the Appellants were settlors of the settlement.

(4) The Appellants' additional or alternative reasons for concluding that the Appellants would not be liable to income tax under the settlements code regarding the extent of the settlement and the multiple settlor provisions are not accepted.

167. The Appellants' appeal against the FTT's decision is dismissed.

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

Release date: 20 December 2022