Neutral Citation Number: [2024] EWCA Civ 720

Case No: CA-2022-001869

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mrs Justice Falk and Upper Tribunal Judge Jonathan Richards
[2022] UKUT 00185 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 June 2024

Before :

LORD JUSTICE NUGEE
LADY JUSTICE WHIPPLE
and
SIR LAUNCELOT HENDERSON

- -

Between :

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- AND -	
(1) ALTRAD SERVICES LIMITED	**Respondents**
(2) ROBERT WISEMAN AND SONS LIMITED	

- -
- -

David Milne KC, Jonathan Davey KC and Barbara Belgrano (instructed by **The General Counsel and Solicitor for HMRC**) for the **Appellants**
Jonathan Peacock KC and Edward Hellier (instructed by **KPMG LLP**) for the **Respondents**

Hearing dates : 14 & 15 May 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 28 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Launcelot Henderson:

Introduction

1. These appeals concern a marketed tax avoidance scheme under which the two taxpayer companies sought to exploit the United Kingdom legislation relating to capital allowances, as it stood in 2010 and 2011, in a way which was designed to bring about a substantial increase in their pools of expenditure on plant and machinery qualifying for allowances without incurring any of the practical or economic consequences which would normally justify such an increase.

2. The magic of the scheme, if it worked, was that it enabled a trader, which had an existing and established entitlement to capital allowances for plant and machinery used for the purposes of its trade, to increase, or "step up", the amount of the expenditure qualifying for those allowances by entering into a planned series of transactions over a period of some three to four weeks, at no cost to the trader apart from the fees payable to the promoters of the scheme and implementation costs. Moreover, the relevant items of plant and machinery would remain in the uninterrupted use of the trader for the purposes of its trade while the scheme ran its short course; and in principle there was no obvious reason why the scheme could not then be repeated many times over, always using the same existing items of plant and machinery to generate a fresh increase in qualifying expenditure.

3. It is now common ground that there were no material differences between the transactions undertaken by the two taxpayer companies, which are the respondents in this court but were the appellants in both Tribunals below. The arrangements were duly disclosed by the promoters to HMRC under the "DOTAS" regime introduced by Part 7 of the Finance Act 2004, and they were allocated a "scheme reference number". In due course, HMRC issued closure notices denying the taxpayers the additional capital allowances claimed in reliance on the scheme, and the taxpayers appealed to the First-tier Tribunal (Tax Chamber) ("the FTT") which heard their appeals over three days in June 2019. By its decision released on 23 March 2020, the FTT (Tribunal Judge Harriet Morgan) dismissed the appeals ("the FTT Decision"). At that time, the first appellant was a company in the Cape group called Cape Industrial Services Limited, and in the FTT Decision it was referred to as "CIS". It has subsequently changed its name to Altrad Services Limited ("Altrad"), which is the name by which I will refer to it in this judgment. The second appellant was, and remains, Robert Wiseman and Sons Limited ("Wiseman").

4. HMRC's primary argument before the FTT, which the FTT accepted, was that on a purposive construction of the relevant legislation, as applied to the facts viewed realistically, the scheme failed at its first stage because when the taxpayers sold the relevant assets to the participating bank ("the Bank") they did not "cease to own" the assets within the meaning of section 61(1)(a) of the Capital Allowances Act 2001 ("CAA 2001"), so there was no disposal event for the purposes of that section. It followed that the subsequent stages in the scheme did not have the intended tax consequences, because the assets never left the ownership of the taxpayers in the first place. A number of other arguments were advanced by HMRC in the alternative, which the FTT considered on their merits and rejected; but none of this mattered if, as the FTT held, the primary argument was sound.

5. As will be apparent from the brief summary I have given of HMRC's primary argument, it was based on the long line of authority at the highest level stemming from the seminal decision of the House of Lords in the *Ramsay* case in 1981 (*W. T. Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300), and the much-cited encapsulation of the "driving principle" of the *Ramsay* line of cases given by Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, (2004) 6 ITLR 454, at [35], where he described it as involving:

> "35. …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."

6. Ribeiro PJ went on to say, immediately after the words just quoted:

> "Where schemes involve intermediate transactions having no commercial purpose inserted for the sole purpose of tax avoidance, it is quite likely that a purposive interpretation of the statute will result in such steps being disregarded for fiscal purposes. But not always."

7. As to the facts, the FTT made trenchant findings, which the taxpayers have not attempted to challenge, to the general effect that the scheme was purely tax-driven and devoid of any commercial purpose. Thus, for example, having analysed the steps in the scheme Judge Morgan concluded as follows at [258] of the FTT Decision:

> "258. Viewing the transaction as it was intended to operate as a composite whole, at the end of the three or four week period during which the Leases were in place, the appellants ended up in exactly the same position as they had started in, as the legal and beneficial owners of the assets having had the use of the assets in their trades throughout. The appellants gave up ownership of the assets (subject to the leaseback) with the attendant legal and commercial effects that entailed but they only did so to generate the desired allowances and, it appears, for the bare minimum of time considered necessary to achieve that result. In economic terms they had incurred no material costs other than the fees due to [*the Bank*] and other expenses associated with implementing the transactions."

8. The taxpayers then appealed to the Upper Tribunal (Tax and Chancery Chamber) ("the UT"), with permission granted by the UT. By their formal Responses to the appeals, HMRC also sought to rely on some of the arguments of law which they had unsuccessfully advanced on the subsidiary issues which the FTT had decided against them. The appeals were heard over two days in June 2022 by a formidably well-qualified panel composed of Mrs Justice Falk (now Falk LJ) and Upper Tribunal Judge Jonathan Richards (now Richards J). By their decision ("the UT Decision"), released on 12 July 2022, the UT allowed the appeals of the taxpayers on the primary *Ramsay* issue, and they also upheld the FTT Decision on the subsidiary issues. The overall

result was therefore that the decision of the FTT was set aside, and the UT remade the decision so as to allow the taxpayers' appeals against the original closure notices.

9. In so concluding, the UT expressly recognised, at [96] of the UT Decision, that some readers might "find it surprising that an artificial series of transactions which, on the unchallenged findings of the FTT, were devoid of business purpose and effected only to achieve a "magical" increase in qualifying expenditure should survive a challenge based on the *Ramsay* line of cases." The UT stressed, however, that their conclusion was "based on the *Ramsay* argument that HMRC chose to put forward", and said it was not for them to comment on other ways in which the *Ramsay* argument could have been advanced, or the conclusions which they might otherwise have reached: *ibid*.

10. The UT refused HMRC permission to appeal, but by an order made on 12 December 2022 Whipple LJ granted HMRC permission on the papers to appeal on their primary case which had succeeded before the FTT (ground 1). By the same order, she adjourned to an oral hearing the question whether HMRC should also be permitted to appeal on an alternative *Ramsay* basis (ground 2), which had arguably not been advanced below, to the effect that at the final stage of the scheme the taxpayers did not incur "qualifying expenditure" entitling them to claim further capital allowances when they reacquired the assets from the Bank, because the expenditure was not on the provision of plant or machinery wholly or partly for the purposes of the trade as required by section 11(4)(a) of CAA 2001. HMRC did not seek permission to appeal on any of the subsidiary issues, so those issues have now been conclusively determined in the taxpayers' favour.

11. The oral permission hearing took place on 4 April 2023 before Newey LJ and Whipple LJ. For the reasons given in the written judgment of Whipple LJ handed down on 3 May 2023, with which Newey LJ agreed, the court concluded that ground 2 was indeed a new one not pursued below, but that there would be no prejudice to the taxpayers to the extent that it raised issues of law, and that any prejudice to the extent that it raised new issues of fact could be met by (a) assuming in the taxpayers' favour that their subjective intention in paying the option price to reacquire the assets was to do so "for use in their businesses", and (b) giving the taxpayers liberty to make an application for permission to admit any documents relevant to ground 2 which were not in evidence before the FTT: see the court's order of 3 May 2023, and the judgment of Whipple LJ at [2023] EWCA Civ 474.

12. In the event, no application for permission to admit further evidence was made by the taxpayers. At the hearing of the appeals, we heard cogently presented oral arguments on behalf of HMRC from Mr Milne KC on ground 1 and from Mr Davey KC (who had not appeared before either Tribunal) on ground 2, while Mr Peacock KC argued the case for the taxpayers on both grounds with conspicuous skill and clarity.

13. Despite the best efforts of counsel for the taxpayers, I have come to the firm conclusion that the FTT was correct in law to accept HMRC's primary case. Since the other members of the court agree with this conclusion, it follows that HMRC's appeal will be allowed on ground 1. As I shall explain, it is not necessary or appropriate to consider ground 2.

The legislative background

14. CAA 2001 was an early product of the Tax Law Rewrite Project. It was described in its long title as "An act to restate, with minor changes, certain enactments relating to capital allowances". The previous consolidating Act was the Capital Allowances Act 1990. Part 2 of CAA 2001 dealt with plant and machinery allowances.

15. For the purposes of HMRC's *Ramsay* arguments, the key provisions in Part 2 of CAA 2001 are sections 11 and 61, which provide so far as material as follows (here, as elsewhere, references are to the legislation as it stood at the material times in 2010 and 2011, unless the contrary is stated):

> "**11 General conditions as to availability of plant and machinery allowances**
>
> (1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.
>
> (2) "Qualifying activity" has the meaning given by Chapter 2.
>
> (3) Allowances under this Part must be calculated separately for each qualifying activity which a person carries on.
>
> (4) The general rule is that expenditure is qualifying expenditure if –
>
> (a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and
>
> (b) the person incurring the expenditure owns the plant or machinery as a result of incurring it.
>
> …
>
> **61 Disposal events and disposal values**
>
> (1) A person who has incurred qualifying expenditure is required to bring the disposal value of the plant or machinery into account for the chargeable period in which –
>
> (a) the person ceases to own the plant or machinery;
>
> (b) the person loses possession of the plant or machinery in circumstances where it is reasonable to assume that the loss is permanent;
>
> (c) the plant or machinery has been in use for mineral exploration and access and the person abandons it at the site where it was in use for that purpose;

> (d) the plant or machinery ceases to exist as such (as a result of destruction, dismantling or otherwise);
>
> (e) the plant or machinery begins to be used wholly or partly for purposes other than those of the qualifying activity;
>
> (ee) the plant or machinery begins to be leased under a long funding lease;
>
> (f) the qualifying activity is permanently discontinued.
>
> (2) The disposal value to be brought into account depends on the disposal event, as shown in the Table - …"

16. The wider context of these key provisions was helpfully explained by the UT in an overview of the relevant parts of the capital allowances regime which they placed near the start of the UT Decision:

> "5. The depreciation in value of plant and machinery and other capital items does not give rise to a deductible expense for tax purposes. CAA 2001 seeks to reduce the impact of this rule by providing for capital allowances to be given, by way of a deduction against taxable profits, in respect of expenditure on, among other things, plant and machinery used for the purposes of a "qualifying activity", which includes a trade. Allowances are generally given on a "pooled" basis, so a taxpayer incurring expenditure to acquire plant and machinery increases the pool of expenditure qualifying for allowances. Allowances are made as a percentage of the balance available in the pool, the pool being reduced by the amount of the allowances given (known as the reducing balance basis). A taxpayer selling plant and machinery that has qualified for allowances in any accounting period is required to bring the sale proceeds into account as a "disposal value". Amounts brought into account as disposal value reduce the expenditure in the pool eligible for allowances in subsequent accounting periods or, if the disposal value exceeds the balance in the pool, create a balancing charge.
>
> 6. The general rule, set out in s11 of CAA 2001, is that expenditure on plant and machinery qualifies for capital allowances if: (i) the expenditure is "capital expenditure on the provision of plant and machinery", (ii) it is incurred for the purposes of a qualifying activity, and (iii) the person incurring the expenditure owns the plant and machinery as a result of incurring it. Section 61 deals with "disposal events", with the paradigm example of such an event occurring when a person "ceases to own" plant and machinery (s61(1)(a)). As Mr Peacock QC put it in his oral submissions, s11 and s61 are "book-ends" with s11 providing for capital allowances to begin to accrue

> when plant and machinery is purchased and s61 providing for future allowances to cease to accrue when that plant and machinery is disposed of (to the extent that disposal value is brought into account), as well as recapturing excessive allowances that have been given."

17. As the UT went on to explain, the concept of "ownership" was in general central to the entitlement to capital allowances. Thus, a taxpayer who incurred expenditure on plant and machinery for the purposes of his trade would not normally be entitled to allowances unless he owned the assets in question (see section 11(4)(b)), and conversely, upon the cessation of ownership, a disposal value calculated in accordance with section 61(2) would be brought into account in the pool, thereby reducing the taxpayer's future entitlement to allowances. As an exception to these general principles, however, section 67 of CAA 2001 and predecessor legislation treated a person who entered into a contract of hire-purchase (or similar transactions) as if he had owned the relevant asset from the inception of the contract, and also provided for a deemed cessation of ownership if he ceased to be entitled to the benefit of the contract during the initial hire period, so that a disposal value could be brought in under section 61.

18. In 2006, further significant changes were introduced to deal with finance leases of plant and machinery. Although such transactions took the legal form of a lease, they were, as the UT put it, "in substance loans in which the lessee had the risks and rewards of ownership of the machinery and raised finance from the lessor, with the machinery serving as the collateral or security for that loan": see the UT Decision at [9]. Consistently with that economic reality, it was the lessee under a finance lease, not the lessor, which would recognise the machinery as an asset on its balance sheet.

19. In broad terms, one effect of the 2006 amendments, so far as relevant to the present case, was to enable a lessee of plant and machinery under a "long funding finance lease" to obtain capital allowances, even though the lessee was not the legal owner of the asset. It is common ground that the leases under which the Bank leased the relevant items back to the taxpayers in the present case were, at least if viewed in isolation, "long funding finance leases" under the relevant definitions, even though the leases had a fixed duration of no more than a few weeks. The reason for this strange-looking result is that, put simply, where the parties entered into a sale and leaseback transaction, and the leaseback took the form of a finance lease, the lease was automatically deemed to be "long". Mr Peacock helped us to navigate the complex web of definitions which lead to this agreed conclusion.

20. On the footing that the leasebacks under the scheme were long funding finance leases, the legislation had to determine the amounts on which allowances could be obtained, and the disposal value which would have to be brought into account on termination of the lease. The UT briefly described how this was done, at [10] to [13]:

> "10. … Very broadly, at times material to these appeals and before further legislative changes were made in Finance Act 2011, the legislation determined that, for leases such as those relevant in these appeals, allowances would be available by reference to the present value of the "minimum lease payments", defined in s70YE(1) of CAA 2001 as:

> "the minimum payments under the lease over the term of the lease (including any initial payment) together with –
>
> (a) in the case of the lessee, so much of any residual amount as is guaranteed by him or a person connected with him…"
>
> In broad terms, "residual amount" was that part of the fair value of the plant or machinery that was not expected to be recovered through rental payments.
>
> 11. Therefore, a lessee was entitled to allowances by reference to the present value of (i) ordinary payments under the lease and (ii) any residual value of the plant and machinery that was guaranteed by the lessee or a connected person.
>
> 12. It was also necessary for the regime to specify the events that would require a lessee to bring into account a disposal value, and the amount of the disposal value to be brought into account. Section 70E of CAA 2001 provided, among other matters, that a termination of a long funding lease was a disposal event and the associated disposal value was:
>
> (QE-QA) + R
>
> 13. In the context of this appeal, QE can be understood as "qualifying expenditure", broadly the amount on which the lessee was entitled to claim allowances. R was, broadly, any amount representing any rebate of rent due on termination of the lease and is not relevant in the circumstances of this appeal. In the context of a long funding finance lease, s70E(2C) defined "QA" as:
>
> (a) the payments made to the lessor by the person under the lease (including any initial payment), and
>
> (b) the payments made to the lessor by the person under a guarantee of any residual amount (as defined in section 70YE)."

The planning and implementation of the scheme

21. The relevant facts were set out by the FTT in Part C of the FTT Decision at [37] to [75], and they are also summarised by the UT in the UT Decision at [15] to [18].

22. The starting point, as I have already emphasised, is that the scheme was designed to operate in relation to items of plant or machinery ("assets") which were already owned and used by the taxpayer for the purposes of its trade, and which were already subject to the basic capital allowances regime. None of the assets had been acquired on hire-purchase or similar terms, and none of them were subject to finance leases. Nor was there anything special or unusual about the taxpayers' trades or the nature of the assets. Altrad was a subsidiary of the Cape group which provided industrial services to the

energy and natural resources sectors, and the assets in question consisted of items such as scaffolding, pumps, cleaning equipment, heaters, tractors, trailers and testing and analytical equipment. Wiseman was a subsidiary of Robert Wiseman Dairies PLC, which was a major supplier and distributor of milk. The assets in question were used in the collection, processing, packing and distribution of milk and milk products. In what follows I will refer to Altrad alone, since it is no longer suggested that there are any material differences between the transactions entered into by the two taxpayers.

23. On 21 June 2010, some months before the transactions took place, KPMG sent the Cape group a paper entitled "Short-term financing" which set out the steps involved in the scheme, together with a short tax analysis and a summary of the intended tax benefit, risks and costs. The FTT found that the description of the planning in this paper accorded with the transactions as actually carried out: [38].

24. At [39], the FTT recorded that the KPMG paper included the following main points:

> "39. …
>
> (1) The suggestion was that (a) assets would be sold to a bank at market value (b) the bank would lease them back to the asset user for four weeks at weekly rentals, (c) "to eliminate asset risk" for the bank, the user would provide a guarantee as to the minimum value of the assets at the end of the lease term in the form of a Put Option, (d) the bank would provide a Call Option to a group company, and (e) it was expected that the bank would exercise its Put Option.
>
> (2) It was stated that (a) the sale and finance leaseback should be tax neutral for the asset user being both an allowances disposal event and a re-acquisition for the same amount, (b) although the termination of the leaseback would be a disposal event, the terms of the Put Option should result in a nil value, and (c) the payment to acquire the assets under the Put Option should constitute new capital expenditure for the user and result in incremental capital allowances equivalent to the expected market value of the assets at the end of the lease term.
>
> (3) It was stated that the user and the bank would account for the transaction as a finance lease or loan in their respective accounts and the assets would remain on the user's balance sheet throughout.
>
> (4) It was stated that for a transaction size of £23 million the tax savings should be around £6.4 million part of which would be a reduction in current tax and part a credit through deferred tax which would be realised as tax relief in future periods."

25. On 14 July 2010, KPMG produced an accounting opinion which advised, inter alia, that the leaseback was likely to be classified as a finance lease under International

Accounting Standard 17, and that Altrad should not recognise a sale of the assets but should continue to keep them on its balance sheet and account for them as before: [40].

26. By early December 2010, the Cape group had obtained the necessary consent for the transaction from its existing lenders, and it had been agreed that the role of the Bank would be fulfilled by a member of the Société Générale group, SG Leasing (June) Limited ("SGLJ").

27. On 8 December 2010, the directors of Altrad resolved to enter into the proposed transactions, and the parent company of the group, Cape PLC ("Cape"), agreed to act as a guarantor for Altrad in respect of its obligations to the Bank under the scheme.

28. On 9 December 2010, a suite of documents was executed putting in place the framework of the scheme:

    (1) By a sale and purchase agreement ("SPA"), Altrad sold the assets to the Bank for a specified sum, with completion to take place on the same day;

    (2) By a lease of even date, the Bank leased the assets back to Altrad for a period of 21 days from the Start Date, defined as the date of delivery of the assets to the Bank under the SPA, in return for three specified weekly rental payments, the first of which was due and was paid immediately;

    (3) Altrad granted the Bank a put option, giving the Bank the right to require Altrad to repurchase the assets, broadly upon expiry of the lease period and for a price representing the expected residual value of the assets at that time;

    (4) The Bank also granted Cape a call option, giving Cape the right to purchase the assets for a similar price; and

    (5) Cape entered into a deed of guarantee with the Bank under which Cape guaranteed all of the obligations which Altrad had undertaken to the Bank.

29. On the same date, the parties also signed a fee letter whereby Cape agreed to pay the Bank an initial fee of £200,000 on execution of the above documents, and a second fee of £50,000 which, if (as happened) the lease period expired by effluxion of time, would become payable only if the Bank validly exercised the put option: [45] and [46]. Finally, a netting letter, again of the same date, made provision for the discharge of the various payments required to be made on 9 December.

30. On 16 and 23 December 2010, Altrad made the second and third of the weekly rental payments due under the lease. On 22 December, the Bank resolved to exercise the put option and served the requisite notice on Altrad. On 30 December, the lease terminated by effluxion of time and Altrad reacquired the assets pursuant to the put option. On the same day, the parties executed delivery and acceptance certificates in respect of the re-delivery of the assets to the Bank on termination of the lease, and their subsequent immediate delivery to Altrad under the put option: [52].

31. The way in which the scheme was designed to operate for tax purposes was explained by the FTT at [7] to [14] of the FTT Decision, with the benefit of a simplified worked example provided by the taxpayers which was included in our bundles. Mr Peacock took us through the worked example, which was based on an assumed market price of

100 paid by the Bank to acquire the assets at the inception of the scheme in 2010. The example further assumed that the taxpayer had originally acquired the assets for 200 in 2006, and that it had already obtained annual writing down allowances for them of 120 between 2006 and 2010, with the result that the assets had a written down value of 80 when they were sold to the Bank and immediately leased back to the taxpayer. The sale and leaseback were designed to be tax neutral, because the disposal value of 100 realised by the taxpayer on the sale to the Bank would be matched by the corresponding deemed acquisition cost of the assets under the leaseback, which (as I have explained) was a "long funding finance lease".

32. In a little more detail, section 70C deemed the amount of the taxpayer's capital expenditure to be the "commencement PVMLP" (short for present value of the minimum lease payments) as defined in section 70YE, composed of (a) the minimum payments under the lease during its term, and (b) "so much of any residual amount as is guaranteed by [the lessee] or a person connected with him". In the worked example, the present value of the weekly payments under the leaseback was taken to be 5, and the residual amount of the assets guaranteed by the taxpayer by virtue of the put option was 95, giving a commencement PVMLP of 100.

33. On the termination of the leaseback, the disposal value was again designed to be tax neutral for the taxpayer, because in the formula (QE – QA) + R, both QE and QA would again be 100, and R is inapplicable, so the product of the formula would be zero. By virtue of section 70E(2A), QE "is the person's qualifying expenditure on the provision of the plant or machinery", which is here 100, and QA, in the case of a long funding finance lease, is defined in subsection (2C) as the aggregate of the minimum payments under the lease (which is 5) and "the payments made to the lessor by the person under a guarantee of any residual amount (as defined in section 70YE)" (which is 95, again by virtue of the put option), giving a total of 100.

34. The final step in the scheme is then the reacquisition by the taxpayer of the assets from the Bank, for their now reduced market value of 95. If the scheme worked, this was intended to be a fresh incurring of qualifying expenditure on the provision of plant or machinery within section 11, and it would generate capital allowances accordingly, even though the purchase price of 95 had been funded by the Bank out of the 100 which it provided at the inception of the scheme, and which had passed through a preordained loop.

35. The FTT summarised the intended effect of the scheme thus:

> "15. On the appellants' view, therefore, looking at each step up to and including the expiry of the Leases, the appellants' allowances position in respect of the assets remained, in effect, precisely as it had been before the transactions were implemented. However, these steps put the appellants in the position whereby they could claim that, when they re-acquired the assets on SGLJ exercising the Put Options, for the purposes of s 11 they incurred new qualifying expenditure on the assets in the form of the Option Price. On their analysis, they incurred that sum on the assets for the purposes of their respective trades and owned the assets as a result of incurring it (having "ceased to own" the assets on the initial disposal of the assets to SGLJ).

> 16. The overall result, therefore, so the appellants assert, is that they added qualifying expenditure of £95 to the existing AQE [*available qualifying expenditure*] relating to the assets (of £80). In their view, that was the case notwithstanding that (a) they had suffered no real cost of £95, given that the Option Price was funded by the sales proceeds received from SGLJ on the initial sale of the assets to it, and (b) they parted with ownership of the assets under a pre-set plan on a temporary basis only for the sole purpose of generating further allowances in this way."

It will be noted that [16] incorporates clear findings of fact by the FTT that the scheme was a "pre-set plan" which the taxpayers entered into "for the sole purpose of generating further allowances", and that they had suffered "no real cost" of 95, because the option price was funded by the sale proceeds of 100 received from the Bank on the initial sale of the assets to it.

The Ramsay principle

36. This is not the occasion for a lengthy review of the case law on the *Ramsay* principle. There are two main reasons for this. The first reason is that, in the most recent case on this subject to reach the Supreme Court, *Rossendale Borough Council v Hurstwood Properties (A) Ltd, Wigan Council v Property Alliance Group Ltd* [2021] UKSC 16, [2022] AC 690 ("*Rossendale"*), Lord Briggs and Lord Leggatt JJSC (with whom Lord Reed PSC, Lord Hodge DPSC and Lord Kitchin JSC agreed) said at [9] that "the *Ramsay* principle or doctrine may be said now to have reached a state of well-settled maturity". They added (*ibid*) that "[a]lthough 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 …". The second reason is that the parties appear to be in general agreement about the present state of the law on the topic, and (as is so often the case) their disagreement lies not so much in the formulation of the relevant principles as in the application of those principles to the construction of the relevant legislation and to the facts.

37. The facts in *Rossendale* are important. They are conveniently summarised in the headnote at [2022] AC 690:

> "The defendants in two separate cases were the registered owners of a number of unoccupied commercial properties on which non-domestic rates were payable by the "owner of the hereditament" within section 45(1)(b) of the Local Government Finance Act 1988, defined in section 65(1) of the Act as "the person entitled to possession" of the hereditament. The defendants sought to avoid liability for such rates by leasing the hereditaments to special purpose vehicle companies ("SPVs") without any assets or business, which were then voluntarily wound up, so as to trigger the winding-up exemption to non-domestic rates, or allowed to be struck off the register of companies as dormant companies and thus dissolved, so that the leases and liability for rates passed as bona vacantia to the Crown. The leases were not shams, so that as a matter of real

> property law they conferred an entitlement to possession upon the SPVs. The claimant local authorities brought claims seeking recovery of non-domestic rates from the defendants, contending that: (i) the 1988 Act should be given a purposive interpretation so that "owner" in section 45(1)(b) meant someone with a "real" entitlement to possession, which in the present cases would be the defendants; and (ii), alternatively, the court could pierce the corporate veil of the SPVs so that the defendants would be treated as the true owners of the hereditaments for the purposes of section 45(1)(b). The defendants applied to strike out the particulars of claim on the basis that they disclosed no reasonable grounds for bringing the claims. The judge allowed the applications in part, striking out those parts of the particulars of claim which related to a purposive interpretation of the Act, but not those parts which related to piercing the corporate veil. The Court of Appeal dismissed the claimants' appeals, allowed the defendants' cross-appeals and struck out the claims, holding that the SPVs were the "owners" of the hereditaments for the purposes of section 45(1)(b) and that it was not open to the court to pierce the corporate veil of the SPVs."

38. We are not concerned with the issue of piercing the corporate veil, but it is both relevant and instructive to see how the Supreme Court dealt with the argument of the local authorities that the defendants remained the "owners" of the unoccupied commercial properties within the meaning of section 45(1)(b) of the Local Government Finance Act 1988, despite the grant by them of leases to SPV companies which (a) were not shams, and (b) as a matter of real property law conferred on the SPVs a legal entitlement to possession of the properties. Given the apparently exhaustive statement in section 65(1) of the 1988 Act that "The owner of a hereditament or land is the person entitled to possession of it", there was obvious force in the argument for the defendants that, once the leases had been granted, the only person entitled to possession of each property was the relevant SPV. That was the view taken by the Court of Appeal, where I delivered the leading judgment on this part of the case with which David Richards LJ (as he then was) and Baker LJ agreed: see [2019] EWCA Civ 364, [2019] 1 WLR 4567, at [65] to [73]. The Supreme Court, however, disagreed, and held that on the unusual facts of the case, and on a purposive construction of the legislation, it would "defeat the purpose of the legislation" to identify "the person entitled to possession" in section 65(1) "as the person with the immediate legal right to possession of the property": see [48].

39. In reaching this conclusion, Lord Briggs and Lord Leggatt began their analysis of the *Ramsay* principle by emphasising "the central importance in interpreting any legislation of identifying its purpose": see [10] and the cases there cited. They continued, in a key passage:

> "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 Comr 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 liabilities that it sought to impose."

See also *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454, 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 e g *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] 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 [2005] 1 AC 684 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. Lord Nicholls of Birkenhead, delivering the joint opinion of the Appellate Committee (which also comprised Lord Steyn, Lord Hoffmann, Lord Hope of Craighead and Lord Walker of

> Gestingthorpe), identified the "essence" of the approach (at para 32) as being:
>
> > "to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall e›ect of a number of elements intended to operate together) answered to the statutory description."
>
> Lord Nicholls also quoted with approval (at para 36) the statement of Ribeiro PJ in *Arrowtown*, para 35, that:
>
> > "the 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.""

40. I would emphasise in particular (a) the express recognition by the Supreme Court in [11] that "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", and (b) the explanation given for this, namely that "it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance". Furthermore, the quotation in [11] of part of the "celebrated passage" from the judgment of Judge Learned Hand in the *Gilbert* case suggests to me that the court wished to endorse that eminent American judge's reasoning that "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" as well as the preceding proposition that "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" (which was cited by Lord Wilberforce in *Ramsay* itself [1982] AC 300, 326). It seems to me that the Supreme Court here comes close to enunciating a general principle which should be applied to the interpretation of all United Kingdom tax legislation, although it is also necessary to heed the warning of Lord Wilberforce in *Ramsay* at 327 that "It is probable that the United States courts do not draw the line precisely where we, with our different system, allowing less legislative power to the courts than they claim to exercise, would draw it …".

41. Of no less importance are the principles which the Supreme Court stated in [12] about the need to consider tax avoidance schemes as a whole and as they were intended to operate. The court returned to this theme in [15] to [17], which again merit quotation in full:

> "15. In the task of ascertaining whether a particular statutory provision imposes a charge, or grants an exemption from a charge, the *Ramsay* approach is generally described - as it is in the statements quoted above - as involving two components or stages. The first is to ascertain the class of facts (which may or may not be transactions) intended to be affected by the charge or

> exemption. This is a process of interpretation of the statutory provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they "answer to the statutory description" (*Barclays Mercantile* at para 32). This may be described as a process of application of the statutory provision to the facts. It is useful to distinguish these processes, although there is no rigid demarcation between them and an iterative approach may be required.
>
> 16. Both interpretation and application share the need to avoid tunnel vision. The particular charging or exempting provision must be construed in the context of the whole statutory scheme within which it is contained. The identification of its purpose may require an even wider review, extending to the history of the statutory provision or scheme and its political or social objective, to the extent that this can reliably be ascertained from admissible material.
>
> 17. Likewise, the facts must be also be looked at in the round. In *Inland Revenue Comrs v McGuckian* [1997] 1WLR 991, 999, Lord Steyn explained that it was the formalistic insistence on examining steps in a composite scheme separately that allowed tax avoidance schemes to flourish. Sometimes looking at a composite scheme as a whole allows particular steps which have no commercial purpose to be ignored. But the requirement to look at the facts in the round is not limited to such cases. Thus, in *Scottish Provident* [2004] 1WLR 3172 where the taxing statute granted an allowance which depended upon the taxpayer having an entitlement to a specified type of property (gilts), a view of the facts in the round enabled the House of Lords to conclude that a legal entitlement to gilts generated by one element in a larger scheme failed to qualify because the entitlement was intended and expected to be cancelled out by an equal and opposite transaction."

42. Having established the ground rules, the Supreme Court then analysed the rating legislation in detail, with particular reference to its historical background, the statutory exceptions from liability and the legal concept of entitlement to possession, before examining the avoidance schemes and how they were intended to operate, leading to a summary of the relevant facts set out at [46] in six numbered sub-paragraphs. The court then applied the legislation to the alleged facts, in another key passage running from [47] to [51]. I have already referred to the court's conclusion in [48] that it would defeat the purpose of the legislation to identify "the person entitled to possession", in the unusual circumstances of the case, as the person with the immediate right to possession of the property. The court continued:

> "48. … As we have explained, the schemes were designed in such a way as to ensure that the SPV to whom a lease was granted had no real or practical control over whether the property was occupied or not and that such control remained at all times with the landlord.

> 49. In our view, Parliament cannot sensibly be taken to have intended that "the person entitled to possession" of an unoccupied property on whom the liability for rates is imposed should encompass a company which has no real or practical ability to exercise its legal right to possession and on which that legal right has been conferred for no purpose other than the avoidance of liability for rates. Still less can Parliament rationally be taken to have intended that an entitlement created with the aim of acting unlawfully and abusing procedures provided by company and insolvency law should fall within the statutory description.
>
> 50. In these circumstances we have no difficulty in concluding that, on the agreed and assumed facts, the SPVs to which leases were granted as part of either of the schemes we have described did not thereby become "entitled to possession" of the demised property for the purposes of the 1988 Act. Rather, throughout the term of the lease that person remained the defendant landlord. This does not involve ignoring the leases, in the way that an intermediate element in a circular transaction might be ignored under the *Ramsay* doctrine. Rather it involves their close examination in their context, and a conclusion that they did not transfer to the SPVs the entitlement to possession required by the Act as the badge of ownership. If the defendants did not thereby transfer their entitlement to possession it necessarily remained, for the purposes of the Act, with them. The Act requires someone to be identified as the owner. That will be the person who, in any tenurial chain, starting with the freeholder and working downwards, has not disposed of the entitlement to possession of the property in question.
>
> 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."

43. The Supreme Court went on to subject the reasoning in the courts below to a critical examination, while recognising at [52] that they had "received little assistance from counsel for the local authorities as regards the purpose of the rating legislation". An important theme which emerges from this discussion is that the "legal" nature of a statutory concept should not necessarily deter the court from "giving it a practical meaning": see [58] and the decision of the House of Lords in the *Scottish Provident*

case, *IRC v Scottish Provident Institution* [2004] UKHL 52, [2004] 1 WLR 3172. In a similar way, said the court at [59], the words "entitled to possession" in section 65(1) of the 1988 Act "are properly construed as being concerned with a real and practical entitlement which carries with it in particular the ability either to occupy the property in question, or to confer a right to its occupation on someone else, and thereby to decide whether or not to bring it back into occupation." The court added, at [60], that a purposive construction of this nature "achieves some coherence between the language of the statute and its purpose in identifying the "owner" of an unoccupied non-domestic property as the person who is liable for business rates."

44. Finally, it is worth noting how the court dealt with an argument advanced by counsel for the defendant companies that this approach would make the test uncertain. The court said, at [61]:

> "61. … 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 a 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."

The decision of the FTT on the Ramsay issue

45. Having set out the facts, and rejected any suggestion that the taxpayers might have had a genuine commercial purpose in obtaining short-term finance from the Bank for use in their business, the FTT at [75] reiterated its view that "it is plain from the design and economics of the scheme that the appellants' sole purpose in entering into the various transactions was to obtain allowances on the Option Price without suffering the economic burden of paying that amount." The FTT then considered HMRC's primary *Ramsay* argument that, on a purposive construction of the relevant provisions in CAA 2001, when the taxpayers sold the assets to the Bank, they did not "cease to own" them for the purposes of section 61(1)(a). The FTT dealt with this question at very considerable length, in Part D of the FTT Decision which runs for over 200 paragraphs from [76] to [278]. The discussion was divided into sections headed "Submissions" ([76] to [99]), "Caselaw" ([100] to [229]) and "Decision" ([230] to [278]).

46. In relation to the case law, the FTT did not have the benefit of *Rossendale*, which was not decided in the Supreme Court until May 2021 nearly two years after the FTT hearing in June 2019. Understandably, therefore, the FTT reviewed many of the previous landmark cases in the evolution of the *Ramsay* principle in detail, starting with *Ramsay* itself and then devoting particular attention to *MacNiven v Westmoreland Investments Ltd* [2001] UKHL 6, [2003] 1 AC 311, *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 41, [2005] 1 AC 684 ("*BMBF"*), *Scottish Provident* and *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13, [2016] 1 WLR 1005 ("*UBS"*), as well as to two other cases at the highest level which (like *BMBF*) had been concerned with aspects of the law on capital allowances: *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655 ("*Ensign*") and *Tower MCashback*

LLP 1 v Revenue and Customs Commissioners [2011] UKSC 19, [2011] 2 AC 457 ("*Tower*"). The FTT also reviewed the decision of this court in *Mayes v Revenue and Customs Commissioners* [2011] EWCA Civ 407, [2011] STC 1269, upon which the taxpayers at that stage placed reliance as a striking example of a case where an artificially contrived tax avoidance scheme with no commercial purpose proved resistant to a *Ramsay* analysis.

47. In the "Decision" section, the FTT directed itself on the modern approach to statutory interpretation, with particular reference to the *Ramsay* line of authority, at [236] to [244]. I do not understand the taxpayers to have any quarrel with this passage, which seems to me to be firmly based on the established case law and not to require any substantial modification in the light of *Rossendale*. The FTT then turned to the purposive approach to the capital allowances legislation, and began, appropriately in my view, at [245] with the high-level formulation of the purpose of the capital allowances regime given by Lord Nicholls of Birkenhead in *BMBF* at [3], [4] and [39], where the court described the object of granting writing-down allowances as being "to provide a tax equivalent to the normal accounting deduction from profits for the depreciation of machinery and plant used for the purposes of a trade." The FTT then emphasised the need, as shown in the cases, for the expenditure incurred by the taxpayer to be "real", and for the taxpayer to "own" the asset as a result of incurring the expenditure, although in certain circumstances a person may be deemed to own an asset. The FTT accepted Mr Peacock's submission that the taxpayer "owns" an asset "where he has the bundle of rights and liabilities which in legal terms are associated with that concept".

48. The FTT next considered the overall purpose of section 61 of CAA 2001:

> "246. The overall purpose of s 61 is to trigger an adjustment to the taxpayer's allowances position where any one of a number of specified disposal events occurs in relation to an asset in respect of which the taxpayer has claimed allowances. Given the entitlement to allowances is based on whether the taxpayer owns the relevant asset, not surprisingly one of the specified events is where a taxpayer "ceases to own" the asset under sub-s (1)(a). The other specified events fall into two broad categories (see [26] above):
>
> > (1) Events where the asset ceases to be available to the taxpayer on a permanent basis or, at any rate, under a state of affairs which is expected to be on-going, such as (a) the loss of possession of the asset where it is reasonable to assume the loss is permanent, (b) where a person abandons an asset in certain circumstances or (c) where the asset ceases to exist.
> >
> > (2) Events where the asset may remain available to the taxpayer but a capital allowances adjustment is considered necessary under the general scheme of the allowances rules such as where (a) the asset begins to be used wholly or partly for purposes other than those of the qualifying activity or (b) the asset begins to be leased under a long funding lease, or (c) the qualifying activity is permanently discontinued."

49. The FTT then gave an example of how the rules operate when a disposal event is triggered by cessation of ownership on the sale of an asset, observing at [247] that the disposal value normally corresponds to the net sale proceeds received, and depending on its amount it may give rise either to a balancing charge or to an additional balancing allowance. The FTT then said:

> "248. It can readily be seen, therefore, that, viewed in the context of the overall scheme of the allowances code, s 61(1)(a) is intended to operate, by reference to the key concept of ownership, as a coherent whole with s 11. Ownership of the asset is an essential feature of a taxpayer's entitlement to allowances on capital expenditure incurred in respect of the asset (under s 11) and, correspondingly, the "*cessation*" of that ownership results in that entitlement ending and, in effect, a final reckoning of the allowances due during the period of ownership (under s 61(1)(a)).
>
> 249. The intended effect of s 61(1)(a) is that the taxpayer's entitlement to allowances, as established under s 11 by reference to "real world" events, gives rise to allowances (a) only for the period during which the taxpayer owns the relevant asset, and (b) in a total sum corresponding to the asset's actual depreciation during that period, as measured by the specified disposal value which, on the sale of assets, is a sum equal to the net sales proceeds received. Given the interrelationship between s 11 and s 61, it is a reasonable assumption that the disposal value, by reference to which an adjustment is to be made on a disposal occurring, must be no less "real" than the qualifying expenditure to which, in effect, the adjustment is made."

50. The FTT went on to observe, at [250], that the regime for long funding leases operated to some extent "as its own mini-code" within the overall capital allowances regime, but it did so by reference to the same concepts and broadly within the same framework, although entitlement to such allowances depended on deemed, rather than actual, ownership. Accordingly, said the FTT, "it is reasonable to suppose that the requirements of those provisions are also intended to operate by reference to "real" expenditure and "real" events with real economic consequences." In the words of Carnwath LJ in the Court of Appeal in *BMBF*, the relevant provisions "draw their life-blood from real world transactions with real-world economic effects": see [2002] EWCA Civ 1853, [2003] STC 66, at [66].

51. The FTT continued, in a passage which seems to me to contain the core of its impressive analysis:

> "252. In my view, accordingly this is precisely 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 plainly the case here, would be wholly inconsistent with the "real world" requirements of these provisions and their intended "real world" economic effects. To give effect to their true purpose 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”.

253. It is apparent from the very design of the arrangements that the parties intended that each step involved would be carried through in accordance with a pre-set plan with the single goal of generating (a) additional “qualifying expenditure” for the appellants in respect of the assets without the appellants suffering any actual material cost and (b) a fee for SGLJ for its role in facilitating this. There was no real suggestion that the transactions were undertaken for any other purpose.

…

255. From the outset, there was no real doubt that the appellants’ respective groups would reacquire the assets at the end of the Lease periods given the Put and Call Option mechanism and the on-going need for the assets for use for the relevant group’s trading purposes. For the reasons set out below, barring wholly unexpected events, the expectation was that the re-acquisition would take place on SGLJ exercising the Put Options on expiry of the Lease period. In CIS’ case, under terms imposed by its existing lender, the funds released to CIS on the sale could only be utilised for the purpose of funding the Option Price under the Put Option or the Call Option. Both CIS and Wiseman were required to deposit a substantial part of the funds with Société Générale (London branch) and to assign the deposit in favour of SGLJ as security for their obligations to it under the transactions. The terms of the Netting Letter indicate that the parties fully intended and expected the transactions to take place as planned.

256. Each step involved in the transactions was carefully constructed to achieve the desired result from an allowances and funding perspective as follows:

(1) It was intended that on the sale of the assets to SGLJ:

(a) For allowances purposes, the appellants would thereby cease to own the assets under s 61(1)(a) so that when, as planned, they reacquired the assets only three or four weeks later, they could claim that, for the purposes of s 11, in paying the Option Price they incurred fresh “qualifying expenditure” on the provision of the assets for the purposes of their trades. That was on the basis that, having previously ceased to own the assets, they then owned them again as a result of incurring that sum.

(b) For funding purposes, the appellants would receive sales proceeds which would be sufficient to fund the Option Price due when, as planned, the Put Options were

exercised. It was integral to the operation of the plan, therefore, that the appellants would not have to put their hands in their pockets to fund the supposed "qualifying expenditure".

(2) As regards the grant of the Leases and the Put Options:

(a) From a commercial perspective, the need for the appellants to have the right to use the assets under the Leases was simply a function of the overall plan for the appellants to generate the desired allowances by temporarily giving up legal ownership of the assets. In practice, the appellants had to have a legal right to use the assets given they needed to continue to use them in their trades.

(b) From an allowances perspective, the Leases and Put Options were structured specifically with the intention that the funding lease regime would apply with the effect that:

(i) the appellants would be regarded as incurring qualifying capital expenditure of £100 on entering into the Leases (by reference to the rents and the Option Price), which would entirely negate the consequence of the appellants having to bring a disposal value of £100 into account for allowances purposes on the sale of the assets to SGLJ; and

(ii) whilst there would be a disposal event on the expiry of the Leases, there would be no disposal value for the appellants to bring into account on the basis that under the disposal formula the value was nil as QE matched QA. For this purpose, it was critical that the Option Price fell within both QE and QA as set out above.

It was essential to the success of the plan to ensure that the benefit of the "qualifying expenditure" which the appellants intended to generate was not, in effect, wiped out by a corresponding disposal value.

(c) The Put Option was also the mechanism put in place to enable the appellants to re-acquire the assets thereby generating the intended "qualifying expenditure" in the form of the Option Price. It was essential that the acquisition took place under this mechanism; it was only on that basis that the Option Price would be taken into account in QA in the disposal formula (so that there was no disposal value to be brought into account on the expiry of the Leases).

> (3) All the steps set out above were put in place, therefore, so that when the appellants re-acquired the assets pursuant to the Put Options they could (a) fund the Option Price with the sales proceeds received on the initial sale to SGLJ, (b) claim that the Option Price constituted "qualifying expenditure" within the meaning of s 11, and (c) claim that there were no adverse allowances consequences which, in effect, would negate the benefit of that additional expenditure.
>
> …
>
> 258. Viewing the transaction as it was intended to operate as a composite whole, at the end of the three or four week period during which the Leases were in place, the appellants ended up in exactly the same position as they had started in, as the legal and beneficial owners of the assets having had the use of the assets in their trades throughout. The appellants gave up ownership of the assets (subject to the leaseback) with the attendant legal and commercial effects that entailed but they only did so to generate the desired allowances and, it appears, for the bare minimum of time considered necessary to achieve that result. In economic terms they had incurred no material costs other than the fees due to SGLJ and other expenses associated with implementing the transactions."

52. I also draw attention to the way Judge Morgan put the matter in [260], when explaining why "on a realistic and unblinkered view of the facts" the taxpayers did not dispose of the assets for a disposal value within the meaning of section 61:

> "260. …
>
> (1) On the sale of the assets to SGLJ, the appellants did not dispose of the assets for a disposal value for the purposes of s 61:
>
> (a) Viewed in the light of the overall context in which that provision operates and in light of the other disposal events, it seems to me that the reference to a "cessation" of ownership in sub-s (1)(a) implies that, for that provision to operate, it is not sufficient for the taxpayer to give up or lose the bundle of rights and liabilities characteristic of ownership in legal terms if, as is the case here:
>
> (i) it does so in the certain knowledge that, barring a wholly unforeseen event, it will re-acquire ownership within a matter of weeks, and
>
> (ii) the temporary loss of ownership was effected as the first step in a composite scheme each element of which was carefully crafted to ensure that the scheme would operate to deliver additional "magical" qualifying expenditure for

> the taxpayer of £95 without it suffering an actual cost of that amount.
>
> In other words, there is no such cessation of ownership on a sale of assets which was effected to generate a loss of ownership, which it was known from the outset would be for a very short period only, as an essential ingredient in an artificial construct to manufacture "qualifying expenditure".
>
> (b) Accordingly, the sales proceeds received by the appellants on the sale cannot be viewed as comprising a "real" disposal value which is required to be brought into account in a capital allowances adjustment. These sums were merely monies put into a loop for the appellants to use to generate supposed "qualifying expenditure" by paying the Option Price when the Put Options were exercised."

53. Judge Morgan then went on to explain why she was not deflected from these conclusions by the decisions in *Ensign, Tower, BMBF* and *Mayes*: see [261] to [267] and [274].

The decision of the UT on the Ramsay issue

54. The UT identified as the first issue it had to decide ("Issue 1") the question "[w]hether the FTT erred in law in concluding that the appellants did not cease to own the Assets for the purposes of s61 of CAA 2001 when they sold the Assets to [*the Bank*]": see the UT Decision at [39]. The need to identify an error of law arose from the fact that an appeal from the FTT to the UT, like an appeal from the UT to this court, lies only on points of law: see sections 11(1) and 13(1) of the Tribunals, Courts and Enforcement Act 2007. The UT then decided to approach this issue in the light of its consideration of one of the subsidiary issues, Issue 4, which was whether the FTT had "erred in law in concluding that the Option Price fell within the definition of "QA" in s70E of CAA 2001". The UT's reason for proceeding in this way was that "Issue 4 brings sharply into focus how the planning was intended to work", and it would therefore "serve as a useful basis" for the subsequent discussion of Issue 1: [42].

55. As I have already explained, the UT upheld the decision of the FTT on the subsidiary issues which were still contested before it, including Issue 4 which it proceeded to deal with at [43] to [61]. In the course of its discussion of Issue 4, the UT pointed out at [46] that, when Parliament introduced remedial legislation in 2011 to "correct the potential for anomalies" disclosed by schemes of the present type, it did so, in section 33 of the Finance Act 2011, by excluding from the calculation of both QE and QA any amount that could reasonably be assumed to constitute qualifying expenditure at the time when it was paid. Thus, if the taxpayers had implemented the same arrangements when section 33 was in force, on their analysis the arrangements would have produced no net benefit. There would instead have been a disposal value of 100 when the Assets were sold to the Bank, allowances of just 5 under the leaseback, no disposal value on termination of the lease, and qualifying expenditure of 95 under section 11 when the option price was paid. The UT also recorded the agreement of both parties that these later changes in the law cannot affect the true construction of the legislation as it stood when the taxpayers implemented their transactions: see again [46]. No doubt the

parties were also in agreement that the enactment of such remedial legislation does not imply any recognition by the legislature that the scheme as implemented would have achieved its objective under the legislation then in force: that is the question for determination in the present proceedings.

56. HMRC's argument on Issue 4, which the Tribunals rejected and is no longer alive, was summarised by the UT at [47]. The argument had two limbs, either or both of which would have sufficed. The first limb was that the payment of the option price by each taxpayer was not made "under a guarantee of any residual amount" within the meaning of section 70E(2C)(b). The second limb was that the payment of the option price could not do double duty as both qualifying expenditure falling within section 11 and as a payment falling within QA.

57. Having cleared aside Issue 4, the UT began its consideration of Issue 1 with a comparatively brief review of the authorities and principles relating to *Ramsay*. The passage in question runs from [62] to [75], and it was adopted in its entirety by Mr Peacock in his oral submissions to us. Apart from *Rossendale*, which had been decided in the Supreme Court more than a year before the UT hearing, the main cases referred to were *BMBF, Arrowtown, UBS, Scottish Provident* and *Carreras Group Ltd v Stamp Commissioner* [2004] UKPC 16, [2004] STC 1377 ("*Carreras*"). The UT rightly emphasised the importance of a close, purposive interpretation of the relevant statute, and the need to examine the facts of a tax avoidance scheme as a whole. They recorded the reliance placed by HMRC on *Carreras*, but they noted at [72] that the case gave no guidance on what it means to "cease to own" assets for the purposes of section 61(1)(a) or on the meaning of "ownership" more generally. At [75], the UT recorded HMRC's submission

> "75. …that all that happened was that the appellants sold the Assets on terms that they would reacquire them a few weeks later following a temporary and entirely tax-motivated transition in the appellants' status from owner of the Assets, to lessee and back again."

58. The next section of the UT Decision, running from [76] to [80], is headed "*The error of the FTT*". The nub of the alleged error diagnosed by the UT was that the FTT's findings of fact were nowhere properly linked to a purposive construction of section 61. The UT considered that, although the FTT had rightly "recognised the centrality of the exercise in statutory construction" at [236] to [244] of the FTT Decision, it had "lost sight" of the fact that the "particular provision" it needed to construe was section 61(1)(a), given the way HMRC had put their *Ramsay* argument. While the FTT "did consider issues relevant to a purposive construction of s61 at [246] to [248] and in doing so made some pertinent observations, its overall conclusion at [249] that s61 was concerned with "real" disposal values did not answer the question": see [79]. Nor had the FTT addressed the taxpayers' core submission, supported by the decision of the House of Lords in *Melluish v BMI (No. 3) Ltd and related appeals* [1996] AC 454 ("*Melluish*"), that "any cessation of legal and beneficial ownership, whether temporary or not, was sufficient to cause the Assets to cease to be owned in the requisite sense": *ibid*.

59. The UT then criticised the FTT for having misunderstood the taxpayers' arguments and for having attributed to the taxpayers a formalistic approach to the analysis of the

facts for which they were not contending: [80]. Rather, the taxpayers' point was that, properly *construed*, section 61(1)(a) provided for them to "cease to own" the Assets "once legal and beneficial ownership was lost". While there could be no objection to the findings of fact made by the FTT, in the absence of an appropriate grounding in the true construction of section 61 those findings could not support the *Ramsay* argument: *ibid*.

60. Having identified this alleged error of law, the UT then said, at [81], that it was necessary for them to reach their own conclusions on the proper interpretation of section 61(1)(a).

61. I would comment at the outset that this way of approaching the problem may, in my respectful view, risk giving a slightly misleading impression that it was necessary for the UT to identify a discrete error of law before they could interfere with the FTT's conclusions on HMRC's primary *Ramsay* argument. The true position, as I see it, is that the *Ramsay* doctrine is in essence a principle of statutory interpretation, and on an appeal confined to points of law the question for the UT was simply whether the FTT's construction of section 61, and its application to the facts, was or was not correct in law. There was no threshold requirement for the UT to satisfy itself that the FTT had misdirected itself in law before the UT could embark upon a consideration of the unitary question of law which it had to decide, and which (in turn) we must now decide. Or, in other words, the error of law, as in any case turning on an issue of statutory interpretation, will normally be a reflection of the court's ultimate conclusion on the issue, rather than a necessary step in the analysis which leads to that conclusion.

62. The UT began their analysis of the "correct interpretation of s61(1)(a) read purposively", at [81], by noting what they described as "something of an oddity" in HMRC's argument. In general, where a taxpayer is obliged to bring a "disposal value" into account for capital allowance purposes, that will operate to his immediate detriment, and (depending on the facts) it may produce an overall benefit to the Exchequer, because it will reduce his pool of allowable expenditure and may even give rise to a balancing charge. One might therefore expect HMRC to argue for an interpretation which broadens, rather than narrows, the scope of what amounts to ceasing to own plant or machinery for the purposes of section 61(1)(a). However, the UT observed that this was not a point to which Mr Peacock had attached significance in oral argument, no doubt because all statutes must be construed purposively, whether they benefit taxpayers or HMRC. Nevertheless, the UT clearly considered the point to have some potential significance, because they then said, at the end of [81], that "the oddity to which we refer does perhaps suggest that HMRC's *Ramsay* challenge is not most naturally brought by reference to s61(1)(a)."

63. The UT next listed three features of section 61 and the statutory code which were in their judgment relevant to the construction of the phrase "ceases to own": [82]. They described the three features in these terms:

> "(1) Section 61(1)(a) is to be applied by reference to a snapshot in time, not over a period of time. If a person "ceases to own" an asset at any particular point in time, that is a trigger for a disposal event and a disposal value. If another person "owns" the asset as a consequence of incurring capital expenditure on it, the

> purchaser is entitled to allowances by virtue of s11. Therefore, s61(1)(a) refers to events that can mark the end of one person's "ownership" of an asset and the beginning of another person's ownership.
>
> (2) Section 61(1)(a) does not expressly invite any analysis of why a person ceases to own an asset.
>
> (3) Section 61(1)(a) does not invite any analysis of whether it is possible, likely or preordained that a person will become an owner of the asset again in the future. This is by contrast with ss61(1)(b), (c) and (d) which defines different disposal events by reference to concepts of permanence. Thus, to count as a disposal event under s61(1)(b), it must be reasonable to assume that any loss of plant and machinery is "permanent". The concept of abandonment of plant and machinery that appears in s61(1)(c) is similarly redolent of permanence, as is the concept of plant and machinery ceasing to exist for the purposes of s61(1)(d)."

64. The first of these features (that section 61(1)(a) is to be applied by reference to a snapshot in time) was then discussed by the UT at some length, from [83] to [88], with particular reference to the decision of the House of Lords in *Melluish*. As the UT explained in [83], *Melluish* concerned predecessor legislation contained in section 44(1) of the Finance Act 1971 (and later consolidated in CAA 1990) which conferred the right to allowances where plant or machinery "belongs" to a person, and did not use the language of "ownership" first found in CAA 2001. The UT, rightly in my view, considered that the reason for this change in terminology was to make the legislation clearer and easier to use, in accordance with the principles of the Tax Law Rewrite Project, and it was not intended to make any substantive change in the law. The UT then said, and again I would agree, that although the present case is concerned with the cessation of ownership, "a consideration of what it means for assets to be owned by a person, or to belong to a person, will shed some light on the circumstances in which assets can be said to have ceased to be owned": [84].

65. The issue in *Melluish*, in short, was whether the taxpayer, BMI, which had acquired plant and machinery and leased it to local authorities, could satisfy the condition that the assets "belonged" to it for capital allowances purposes even though, under the general law, the assets were from the beginning affixed to, and thus became part of, the land owned by the local authorities. BMI argued that it had paid for the assets, and it received rent from the local authorities for their use. Moreover, the master leases of the equipment provided for the return of the assets to BMI upon expiry of the leases, and they also gave BMI an equitable right to repossess the equipment in specified circumstances of default. These submissions were rejected by the House of Lords, which held that BMI's only property right was a contingent right to become the owner of the assets at a future date, and in the meantime the assets were owned and enjoyed exclusively by the local authority: see the speech of Lord Browne-Wilkinson (with whom the other members of the court agreed) at [1996] AC 454, 475F-476A.

66. Lord Browne-Wilkinson went on to say, in a passage quoted by the UT at [86]:

> "It is important to bear in mind that the question whether the equipment "belongs" to the taxpayer company does not fall to be answered once and for all at one particular date. The question has to be answered in relation to each chargeable period; moreover, in calculating the disposal value which has to be brought into account for the purpose of the balancing charge, it is necessary to determine whether and when the equipment has ceased "to belong to" the taxpayer: section 44(5)(c). Therefore, in construing the word "belongs" as used in section 44 one would expect, first, that the question whether equipment belongs or has ceased to belong to the taxpayer would be capable of a ready answer and, second, that the taxpayer could control, or at least be aware of, circumstances which caused the property to cease to belong to him. Yet if the taxpayer companies' submission is correct, equipment which belongs to them could at any time "cease to belong" thereby giving rise to a balancing charge, without the taxpayer companies knowing anything about it."

67. Lord Browne-Wilkinson then concluded, at 476F-G:

> "I therefore reach the conclusion that for the purposes of section 44 property belongs to a person if he is, in law or in equity, the absolute owner of it. Such a construction reflects the obvious, prima facie, meaning of the word: what belongs to me is what I own. It produces a coherent and easily applicable formula and, save in relation to fixtures, avoids anomalous results."

68. Lord Browne-Wilkinson also said (*ibid*) that he was fortified in reaching this conclusion by the decision of the Court of Appeal in *Stokes v Costain Property Investments Ltd* [1984] 1 WLR 763, from which he quoted the words of Fox LJ at 769:

> "I agree that "belong" and "belonging" are not terms of art. They are ordinary English words. It seems to me that, in ordinary usage, they would not be satisfied by limited interests. For example, I do not think one would say that a chattel "belongs" to X if he merely had the right to use it for five years."

69. Returning to the present case, the UT then observed at [88], with reference to *Melluish*:

> "88. Those statements were not made in the context of the kind of transaction with which we are concerned. However, in our judgment, they provide a clear indication that, when determining whether the appellants ceased to own the Assets when they sold them to SGLJ, s61(1)(a) focuses on whether the appellants lost legal and beneficial ownership at that point. Moreover, the statement that the "belonging" condition should be "capable of a ready answer" points against HMRC's argument that the existence or otherwise of a future "pre-ordained" plan for the appellants to re-acquire ownership of the Assets prevented them from ceasing to own them. On that interpretation, a taxpayer facing a disposal event under s61(1)(a) could assert to HMRC

that, in fact, no such disposal value should be brought into account because, even though legal and beneficial ownership had been lost, there was a pre-ordained plan for the taxpayer to reacquire ownership. If that were right, the focus of the enquiry would become whether the arrangement truly was pre-ordained, with further difficult and uncertain questions arising if the intention of one party or another to participate in the pre-ordained plan changed."

70. After referring at [89] to two further cases upon which HMRC had placed some reliance by way of analogy, and saying that they derived little assistance from them, the UT next turned to the second of the "relevant features" which they had identified at [82], namely that section 61(1)(a) "does not expressly invite any analysis of *why* a person ceases to own an asset." In relation to this, the UT said at [90]:

> "90. HMRC argue that the point made in paragraph 82(2) is of no significance. They argue that, whether express reference is made to a person's purpose or not, s61(1)(a) is concerned only with "real world" transactions and that in *Melluish* itself, the House of Lords based its reasoning on a need to avoid "anomalous results" (see 974d).While we accept that the point in paragraph 82(2) provides a more slender indication of the correct purposive construction, we do not accept HMRC's submission that it is devoid of weight. We are prepared to accept HMRC's argument that s61(1)(a) can, at a high degree of generality, be said to be concerned with "real world" transactions. However, HMRC have not explained why precisely Parliament provided in s61(1)(a) for the sale of the Assets not to be "real world" in the requisite sense. We quite understand that HMRC object to the tax analysis that is said to arise as a consequence of the Lease, the Put Option and its subsequent exercise. However, that does not, in itself, explain why, as a matter of construction, s61(1)(a) invites a consideration of the consequences of those transactions when deciding whether the appellants ceased to own the Assets when they sold them to SGLJ, in circumstances where those other transactions did not in fact prevent a cessation of legal and beneficial ownership."

71. To this, the UT added a further point at [91], arising from the fact that the "anomalies" relied on by HMRC are a consequence of the 2006 amendments which conferred eligibility for capital allowances on lessees under long funding finance leases: see [19] above. The UT considered that these anomalies were not a permissible aid to the construction of section 61(1)(a), by reference to the principle stated by Lord Neuberger in *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5, [2008] 1 WLR 289, at [23]:

> "23. In my opinion, the legislature cannot have intended the meaning of a subsection to change as a result of amendments to other provisions of the same statute, when no amendments were made to that subsection, unless, of course, the effect of one of

> the amendments was, for instance, to change the definition of an expression used in the subsection."

72. The third of the UT's "relevant features" identified in [82] was that "Section 61(1)(a) does not invite any analysis of whether it is possible, likely or pre-ordained that a person will become an owner of the asset again in the future." The UT described this feature at [92] as being "perhaps of the least weight", but consistent with the other indications they had drawn of the purpose of section 61(1)(a). Taken together, the indications led the UT to conclude (*ibid*) that, construed purposively, the section "provides for plant and machinery to cease to belong to a person where that person loses legal and beneficial ownership" of it.

73. In the remaining paragraphs of the UT's discussion of Issue 1, the UT applied the section, purposively construed, to the facts. Given the way the *Ramsay* argument was advanced by HMRC, the relevant question for the FTT was whether the taxpayers lost legal and beneficial ownership of the Assets when they sold them to the Bank. The FTT had answered that question in the taxpayers' favour at [258] of the FTT Decision, quoted in [7] and [51] above, where it said that the taxpayers "gave up ownership of the assets (subject to the leaseback) with the attendant legal and commercial effects that entailed." In the light of that finding, said the UT at [93], the FTT should have concluded that the requirement of section 61(1)(a) was satisfied. The FTT had wrongly considered that its findings about the composite nature of the subsequent transactions, and the purpose of the taxpayers in effecting them, led to a different result. As the UT put it:

> "The problem with the FTT's conclusion was not that its factual findings in this regard were wrong. Rather, they were not relevant to the enquiry that s61(1)(a), construed purposively, required."

74. The UT then explained why they were not deterred from reaching this conclusion by the judgments in *Carreras* and *Scottish Provident*, although they accepted that there were "some analogies" between the facts of those cases and the facts of the present case: [94]. The UT said, at [95]:

> "95. However, we do not consider that these cases justify the outcome for which HMRC argue. First, they were concerned with different statutory provisions. In *Carreras*, the Privy Council reached its conclusion by reference to the purpose of the relevant Jamaican statute imposing transfer tax. That gave rise to very different purposive considerations from those arising under s61(1)(a). In *Scottish Provident*, the House of Lords was considering the interpretation of the word "entitlement" whereas in this case we are concerned with the question of whether a person "ceases to own" plant and machinery in circumstances where other parties may be affected by the answer to that question, with a corresponding need for it to be "capable of a ready answer" as Lord Browne-Wilkinson put it in *Melluish*. In any event, the nature of the analysis in *Scottish Provident* was very different. In that case, the two cross options were both exercisable at the same points of time. Any gilts that Citibank

> sought to acquire on exercise of its option could immediately be taken away from it by the exercise of Scottish Provident's option. The House of Lords held that, once commercially irrelevant contingencies were ignored, there was no point in time at which Citibank had an "entitlement" to the gilts. Our case is different. For a period of three or four weeks, the appellants did not have legal or beneficial ownership of the Assets, but SGLJ did. HMRC's argument is that the sale of the Assets should not be treated as falling within s61(1)(a) because a later sale back of those Assets on exercise of the Put Option was pre-ordained. We see no reason why the very different analysis in *Scottish Provident* should apply in our case given the different statutory provisions with which we are concerned."

75. I have already drawn attention, in the introductory section of this judgment, to the final comments made by the UT in [96]: see [9] above.

Discussion of HMRC's ground 1

76. A helpful starting point is the articulation of the "essence of the new approach" by Lord Nicholls in *BMBF* at [32]:

> "32. The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8: "The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.""

77. What, then, is the correct purposive construction of section 61(1)(a) of CAA 2001, read in its context as an integral part of the statutory code relating to plant and machinery allowances in Part 2 of the Act? For the general nature and purpose of the capital allowances code, Lord Nicholls again gave an authoritative introduction in *BMBF* at [3]:

> "3. A trader computing his profits or losses will ordinarily make some deduction for depreciation in the value of the machinery or plant which he uses. Otherwise the computation will take no account of the need for the eventual replacement of wasting

> assets and the true profits will be overstated. But the computation required by Schedule D (whether for the purpose of income or corporation tax) has always excluded such a deduction. Parliament therefore makes separate provision for depreciation by means of capital allowances against what would otherwise be taxable income. In addition, generous initial or first-year allowances, exceeding actual depreciation, are sometimes provided as a positive incentive to investment in new plant."

The above passage was cited by Lord Walker of Gestingthorpe in *Tower* at [19], where he added the comment that:

> "19. … In practice, generous first-year allowances have also provided a positive incentive to artificial tax avoidance schemes."

78. We are not concerned in the present case with a scheme designed to exploit generous first-year allowances, but rather with a scheme designed to subvert the basic scheme of the legislation by enabling a trader with existing capital allowances for plant and machinery used in his trade to sell those assets to a bank and then reacquire them from the bank in a way that would generate fresh allowances at no additional cost to the trader apart from the fees charged by the promoter of the scheme and implementation costs. No rational legislature could have intended traders with existing allowances to be permitted to increase the amount of their capital allowances in such a way, not least because (if it worked) the scheme could then be repeated indefinitely at intervals of a few weeks (or even less). Nor, by any stretch of the imagination, could an artificial scheme of this nature, financed by circular movements of money from and back to the Bank, be described as a legitimate means of providing the trader with the equivalent of a deduction in computing his profits for the depreciation of assets in respect of which he already enjoyed capital allowances, and which he could continue to use in his trade without interruption while the scheme ran its course.

79. The underlying commercial purpose of the relevant legislation was clearly, and in my judgment correctly, identified by the FTT in the passages from the FTT Decision at [245] to [251] which I have already quoted or summarised at [47] to [50] above. In particular, the FTT appreciated that the two "book end" provisions, sections 11 and 61 of CAA 2001, need to be construed together, and that the key concept of ownership is central to each of them. The FTT also rightly recognised that the requirements of the sections, in the vivid words of Carnwath LJ in the Court of Appeal in *BMBF,* "draw their life-blood from real world transactions with real world economic effects": see [251].

80. As I have explained, if the scheme was to work, the initial sale of the assets to the Bank had to give rise to a cessation of ownership of the assets by the taxpayer within the meaning of section 61(1)(a), thereby triggering a disposal value to be brought into account under subsection (2). It seems to me, as (I think) it did to the FTT, that some assistance on what is meant by the words "ceases to own" in this context may be gained from the other events specified in subsection (1), several of which involve the concept of permanence or the termination of an existing state of affairs with long-term consequences. Thus, subsection (1)(b) refers to loss of possession of the asset "in circumstances where it is reasonable to assume that the loss is *permanent*", and (1)(f)

applies where the qualifying activity "is *permanently* discontinued", while (1)(c) refers to an asset used for mineral exploration or access which the taxpayer "*abandons*" on site, and (1)(d) applies where the asset "*ceases to exist as such (as a result of destruction, dismantling or otherwise)*". It is also worth observing that the last of these instances uses the phrase "ceases to", as in (1)(a). Mr Milne submitted, and I would agree, that nobody would normally say an asset had "ceased to exist as such" if it were dismantled and then reassembled on the next day. Of course, these indications are in no way conclusive, but they do in my view support an inference that the section is in general concerned with events that have enduring consequences in the real world, and so affect the practical use of the asset made by the taxpayer in his trade. Moreover, this is no more than common sense would suggest in a context designed for operation by traders in the real world.

81. A further indication which can be gleaned from the immediate context of section 61 is that the section applies only where a person who carries on a qualifying activity as defined in section 15 (which includes "a trade") has already incurred qualifying expenditure on the acquisition of plant or machinery, and that person has made a successful claim for capital allowances in a tax return for the purposes of income or corporation tax: see section 3 of the CAA 2001. It follows that section 61 can come into play only where the taxpayer already has the benefit of existing allowances based on satisfaction of the "real world" conditions set out in section 11, including the requirement of ownership of the relevant assets as a result of incurring the expenditure. Against that background, it is obvious to my mind that the requirements of section 61 should be construed in a similar practical fashion anchored to the real world.

82. It is also material to observe that the phrase "ceases to own" is expressed in simple, non-technical language which should require no elaboration to unpack its meaning. Neither "ceases" nor "own" is defined, so each word should be given its ordinary and natural meaning; and, as we have seen, "own" is intended to be synonymous with "belongs to" in the predecessor legislation, which was a similarly non-technical and everyday expression.

83. The question which must therefore be answered is whether, as a matter of ordinary language, and in a real and practical sense, the taxpayers ceased to own the assets which they sold to the Bank as step 1 in the scheme. In answering that question, it is elementary that the scheme must be regarded as a whole, and as it was intended to operate. As Lord Wilberforce said more than 40 years ago, in *Ramsay* itself, at 323-324, in a key passage cited by Lord Nicholls in *BMBF* at [30]:

> "It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."

84. In an equally famous passage, Lord Wilberforce said at 326:

> "To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process. In each case the facts

> must be established, and a legal analysis made: legislation cannot be required or even be desirable to enable the courts to arrive at a conclusion which corresponds with the parties' own intentions."

85. Adopting this holistic approach, and on the basis of the unchallenged facts found by the FTT, I have little hesitation in concluding that the taxpayers did not cease to own the relevant assets within the meaning of section 61(1)(a) when they were sold to the Bank. On the contrary, the whole purpose of the scheme was that the same assets would be returned to the sole beneficial ownership of the taxpayers upon exercise of the put option by the Bank three weeks later, and that for all practical purposes the taxpayers would continue to have the uninterrupted beneficial use of the assets for the purposes of their trade in the meantime. On the FTT's findings, the scheme was entirely tax-motivated and none of the steps in it had any real commercial purpose. Nor was there any real likelihood that any of the steps would not take place in accordance with the plan. In the language of the earlier *Ramsay* cases, the steps in the scheme were "pre-ordained", although it has been clear since the decision of the House of Lords in *Scottish Provident* that it may anyway be sufficient to support an application of the *Ramsay* principle that the scheme in question was in fact implemented as planned, even if there was a real, but remote, possibility that one or more of the steps or contingencies in it might not happen.

86. Another way of expressing my conclusion would be to say that, on its true construction, section 61(1)(a) was intended by Parliament to operate in the real world of commerce, with the consequence that a brief interruption of the taxpayer's legal ownership of the assets, brought about solely by the scheme and devoid of any commercial purpose apart from tax avoidance, falls outside the scope of the statutory language, and the intermediate steps may therefore be disregarded. So viewed, the case is a good example of the type recognised by Ribeiro PJ in *Arrowtown* at [35]: see [6] above. It also falls comfortably within the principles stated by the Supreme Court in *Rossendale* at [11] and [12], quoted in [39] above. If the steps in the scheme are to be disregarded, the end result is that for the purposes of capital allowances the ownership of the assets remained throughout vested in the taxpayers. Mr Peacock helpfully confirmed in his oral submissions to us that, on this hypothesis, there was nothing upon which the scheme could operate, and it therefore had to fail.

87. I must now examine the reasoning which led the highly experienced and expert members of the UT to the opposite conclusion.

88. In my respectful opinion, the key error made by the UT lay in its conclusion that section 61(1)(a) must be applied "by reference to a snapshot in time, not over a period of time": see [82(1)] of the UT Decision, quoted in [63] above. As I have explained, the UT based this conclusion on its analysis of the decision of the House of Lords in *Melluish*: see [64] to [69] above. But *Melluish* was a case about the meaning of "belonging" in predecessor legislation, and it turned on the technicalities of English land law about the annexation of chattels to land, and whether the parties could contract out of the consequences of such annexation for capital allowance purposes. The case was not authority on the meaning of the phrase "ceases to own" in section 61(1)(a), and the factual context in which the question arose could hardly have been more different. Nor did *Melluish* involve any consideration at all of the *Ramsay* principle. It seems to me, therefore, that the UT's concentration on *Melluish* had the unfortunate effect of

diverting their attention from the simple untechnical language of section 61(1)(a) itself, and from the cardinal principle, where a *Ramsay* analysis is in issue, of regarding a composite scheme as a whole. Indeed, confining attention to a "snapshot in time" is normally the very antithesis of what the *Ramsay* approach requires, as Lord Wilberforce so clearly explained in the passages I have cited at [83] and [84] above.

89. The significance which the UT attached to *Melluish* and the "snapshot in time" approach is underlined by the fact that they considered the other two features of section 61 and the statutory code which they identified in [82] to carry much less weight than the first feature: see [90], where the second feature was described as providing "a more slender indication of the correct purposive construction", and [92], where the third feature was said to be "perhaps of the least weight". I agree, and would in fact go further and say that in my judgment neither of the other features advances the taxpayers' case. The second feature was that section 61(1)(a) "does not invite any analysis of *why* a person ceases to own an asset", but I can see no reason in principle why an investigation of the taxpayer's motives should not be relevant to the question whether he has, in any real and practical sense, ceased to own an asset for the purposes of the statutory code. The third feature was that section 61(1)(a) "does not invite any analysis of whether it is possible, likely or pre-ordained that a person will become an owner of the asset again in the future", to which I would answer that a realistic consideration of that issue may be very relevant to the question whether there has been a cessation of ownership in the sense contemplated by the statute.

90. The UT concluded at [92] that, on a purposive construction of section 61(1)(a), plant and machinery ceases to belong to a person where that person "loses legal and beneficial ownership" of it. The UT went on to say, at [93], that the FTT had in fact answered that question in the taxpayers' favour at [258]: see [73] above. There is some force in this point, but I cannot accept that the FTT inadvertently decided the case in favour of the taxpayers when it said that they "gave up ownership of the assets (subject to the leaseback) with the attendant legal and commercial effects that entailed". That was no doubt correct, so far as it went, if the sale and leaseback are viewed in isolation. The transactions were not sham, and they had the legal effects which they purported to have. But one of the key lessons of *Rossendale* is that a *Ramsay* analysis is not necessarily precluded even if a composite transaction does have its purported legal effect when the steps are viewed in isolation. The leases granted to the SPV companies by the taxpayer defendants in that case were not sham, and as a matter of land law they did indeed confer possession of the demised premises on the SPV tenants. But, according to the Supreme Court, the concept of "possession" in the relevant statute, when purposively construed in the unusual context of the rating avoidance scheme, had a broader meaning than the mere legal right to possession conferred by a valid lease, and the SPVs did not obtain possession of the properties in that broader sense.

91. By parity of reasoning, it may be said that, in the present case, the taxpayers did cease for a short period to be the legal and beneficial owners of the assets which they sold to the Bank at the start of the scheme, but that this does not preclude an analysis which looks at the scheme as a whole and concludes that the taxpayers did not, in any real or practical sense, cease to own the assets within the meaning of section 61(1)(a) during the three weeks while the scheme ran its course. There is nothing about the concept of cessation of ownership which positively requires the normal and narrower meaning of the concept to prevail from the moment when the initial sale was completed, even

though the sale formed an integral part of a composite transaction designed to return the assets to the full legal and beneficial ownership of the taxpayers three weeks later.

92. Similar considerations also provide the answer, in my view, to an argument ably developed by Mr Peacock in his oral submissions. The argument builds on the 2006 amendments to the capital allowances code which (among other things) introduced a new regime for finance leases, under which the lessee is deemed to be the owner of the leased asset. Mr Peacock pointed out that transactions of sale and leaseback may be entered into for good commercial reasons with a bank or other financial institution, and that a trader with existing capital allowances for assets which he owns may decide to restructure the financing of those assets by entering into such arrangements. If he does so, the taxation of the arrangements will follow the pattern which the taxpayers sought to exploit in the present case, and it will clearly be right to treat the trader as having ceased to own the assets within the meaning of section 61(1)(a) when the assets are sold to the finance house, even though the trader will immediately become the deemed owner of the assets under the leaseback. As Mr Peacock put it, in the post-2006 world the legislation has to find a way of dealing with people who move from the world of real ownership to deemed ownership, and section 61(1)(a) is the method Parliament has chosen to make the transition.

93. I am willing to accept that Mr Peacock may well be right about this, in normal cases where the transactions are undertaken for good commercial reasons. But it does not follow that section 61(1)(a), purposively construed, will inevitably apply where transactions of a similar legal form are undertaken for exclusively tax avoidance purposes in a composite transaction which is designed to restore the status quo after a short interval, leaving the trader with the same full legal and beneficial ownership of the assets as he had before the scheme was implemented. To construe the section as saying that there is no cessation of ownership in such circumstances seems to me, for all the reasons I have given, to fall well within the legitimate scope of the *Ramsay* principle.

94. I should also comment briefly on the UT's point that there is something rather odd about HMRC arguing for an interpretation of section 61(1)(a) which makes the provision less, rather than more, likely to apply: see [62] above. I think there are two answers to this. The first is that the misplaced ingenuity of the designers of tax avoidance schemes often seeks to exploit legislative provisions in a way that might at first seem counter-intuitive. The second is that the construction for which HMRC contend will not apply in normal cases which are not exclusively driven by tax avoidance motives, and there cannot in my judgment be any objection in principle to a construction which merely reflects the underlying practical reality of a circular scheme which leaves the taxpayer in all essentials where he started.

95. Standing back from the detail, the fundamental issue under HMRC's ground 1 is whether the sale by the taxpayers to the Bank of the assets at step 1 of the scheme answered to the statutory description in section 61(1)(a) of a disposal event where the person in question "ceases to own" the plant or machinery. With the greatest respect to the UT, I consider that the FTT clearly reached the correct conclusion on this issue, and I would therefore allow HMRC's appeal to this court on ground 1.

Ground 2

96. If the other members of the court agree with my conclusion on ground 1, it is unnecessary to consider ground 2 which arises only if the appeal on ground 1 is dismissed. Although we heard full argument on ground 2, I would prefer to express no view on it. There are a number of reasons for this. The first is that anything we said about ground 2 would, of necessity, be *obiter,* so detailed consideration of it is better left to a case where a decision on ground 2 is necessary to the outcome. Secondly, we do not have the benefit of the reasoning and views of either Tribunal on ground 2, since it was first raised when HMRC sought permission to appeal to this court. Thirdly, this is not a test case, and the relevant events happened so long ago that there are unlikely to be many other cases awaiting the outcome of this one. Fourthly, the legislative gap which arguably enabled the scheme to work was closed by Parliament in 2011. Fifthly, in 2013 Parliament also enacted the general anti-abuse rule ("GAAR") which, on any view, would almost certainly cover schemes of the type we have had to consider: see Part 5 of the Finance Act 2013 (sections 206 and following).

97. Finally, without expressing any concluded views, it soon became apparent to me that some of the arguments on ground 2 are far from straightforward, particularly given the terms on which HMRC were granted permission to advance it: see [10] to [12] above. Since ground 2 is predicated on the dismissal of ground 1, consideration of it would have to proceed on the footing that, at the beginning of the scheme, the taxpayers *did* cease to own the relevant assets within the meaning of section 61(1)(a) when they sold them to the Bank. That starting point would make it harder to apply a *Ramsay* analysis to any of the later stages in the scheme, especially as it was evidently a commercial necessity for the taxpayers to reacquire the assets for continued use in their businesses.

Disposal

98. I would accordingly allow the appeal. I also agree with the judgment of Whipple LJ.

Lady Justice Whipple:

99. I agree with Sir Launcelot Henderson. This appeal must be allowed on ground 1 and it is not necessary or appropriate to express any view on ground 2. I would however wish to address one point which was left open following the grant of permission on ground 2. In my earlier permission judgment ([2023] EWCA Civ 474) I said at [38]:

> "38. The Taxpayers' third point involves a dispute about whether it is open to this Court to apply a Ramsay analysis to a part of the arrangements which was not directly challenged before the FTT, in circumstances where the FTT made findings about the purpose and nature of the arrangements considered compositely but did not make findings specific to the part of the arrangements now under challenge. That is, in my view, a dispute of law, not fact, and it is one which the full Court should determine. This Court would only go on to consider the merits of Ground 2 if satisfied of HMRC's case that it was open, as a matter of law, to this Court to do so."

100. In the event, the taxpayers did not press their third point at the substantive hearing. They accepted that it was open to this court to entertain a *Ramsay* argument which had not been advanced at first instance. That, in my judgment, is the correct position.

It is at one with the conclusion reached by Sir Launcelot Henderson, expressed in terms at paragraph [61] and implicit throughout his judgment, that a *Ramsay* argument is one of law. Whether a party should be permitted to raise a *Ramsay* argument late in the day, and if so on what terms, is a different question. I referred in my earlier judgment to *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 which provides helpful guidance on that question.

Lord Justice Nugee:

101. I agree with both judgments.