Neutral Citation Number: [2026] EWCA Civ 894

Case No: CA 2025 001355

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(Tax and Chancery Chamber)
Judge Jeanette Zaman and Judge Vimal Tilakapala
[2025] UKUT 00059 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2026

Before:

LADY JUSTICE ASPLIN
LADY JUSTICE ANDREWS
and
SIR LAUNCELOT HENDERSON

Between:

(1) MARK ELBORNE, CHARLOTTE BEARE, WILLIAM ELBORNE AND STEPHEN WOOLFE (EXECUTORS OF LESLIE VIVIENNE ELBORNE DECEASED) **(2) STEPHEN WOOLFE (TRUSTEE OF THE ELBORNE LIFE SETTLEMENT)** **(3) MARK ELBORNE, CHARLOTTE BEARE AND WILLIAM ELBORNE (TRUSTEES OF THE ELBORNE FAMILY SETTLEMENT)** **(together "the Elborne Parties")**	**Respondents**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS ("HMRC")	**Appellants**

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Jonathan Davey KC and Barbara Belgrano (instructed by **The General Counsel and Solicitor for HMRC**) for the **Appellants (HMRC)**
Charles Bradley (instructed by **Buckles Solicitors LLP**) for the **Elborne Parties**

Hearing dates: 28, 29 and 30 April 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13th July 2026 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. The issue on this appeal is whether a scheme to avoid inheritance tax ("IHT") entered into by the late Mrs Leslie Vivienne Elborne ("Mrs Elborne") in 2003 achieved its desired objective of removing the value of her residence (the Old Rectory, Seaton, Rutland, "the Property") from her taxable estate while enabling her to continue living there rent-free until her death on 6 January 2011. The scheme was a version of the so-called home loan scheme which, in its essentials, involved (a) the sale of the Property by its freehold owner, in the present case Mrs Elborne, for its market value to the trustees of a settlement created by her in which she had a beneficial life interest in possession ("the Life Settlement") in exchange for a promissory note of equivalent value ("the Note") which was issued by the trustees of the Life Settlement; (b) the subsequent assignment by Mrs Elborne of the Note by way of gift to the trustees of a second new settlement created by her under which she was excluded from all benefit but her three children had beneficial interests in possession ("the Family Settlement"); and (c) her continued residence in the Property rent-free until her death, which it was hoped would, and did in fact, occur more than seven years after the assignment of the Note.

2. By these relatively simple means, it was intended that, on Mrs Elborne's death, the Property would be deemed to form part of her estate because of her interest in possession in the Life Settlement, but its value would be matched by a corresponding deduction for the outstanding liability due under the Note, while the potentially exempt transfer ("PET") under section 3A of the Inheritance Tax Act 1984 ("IHTA 1984") which she had admittedly made when the Note was assigned to the Family Settlement trustees would be exempt from charge because she had survived the making of the PET by seven years.

3. This favourable treatment was comprehensively challenged by HMRC after Mrs Elborne's death on numerous grounds which were eventually reflected in notices of determination issued to her executors and to the trustees of the two new settlements (together "the Elborne Parties") on 2 February 2017 under section 221 of IHTA 1984. The Elborne Parties appealed to the Tax Chamber of the First-tier Tribunal ("FTT") (Tribunal Judge Tony Beare and Mr Michael Bell) which in its decision released on 14 July 2023 ("the FTT Decision", [2023] UKFTT 626 (TC), [2024] SFTD 21) rejected all but one of HMRC's grounds of opposition, but upheld their contention that, in valuing Mrs Elborne's estate immediately before her death, a deduction for the liability under the Note was prohibited by section 103 of the Finance Act 1986 ("FA 1986") with the consequence that the value of that liability should be abated to nil: see the FTT Decision at [264]. The appeal of the Elborne Parties was accordingly dismissed, but on this one ground alone.

4. Both sides then appealed to the Tax and Chancery Chamber of the Upper Tribunal ("UT"), (Upper Tribunal Judges Jeannette Zaman and Vimal Tilakapala), which by its decision released on 17 February 2025 ("UTD", [2025] UKUT 59 (TCC), [2025] STC 394) allowed the appeal of the Elborne Parties on the section 103 FA 1986 issue, and dismissed HMRC's cross-appeal on all the other issues which were still live, with

the overall consequence that the appeal of the Elborne Parties against the notices of determination succeeded.

5. HMRC now appeal to this court, with permission granted in part by the UT and in part (on the remaining grounds for which the UT had refused permission) by Lewison LJ.

Facts

6. I will now describe some of the factual background in a little more detail. None of the relevant facts were in dispute before the FTT, which set them out in the FTT Decision at [15] to [27]. The only witness of fact who gave oral evidence was Mark Elborne, one of Mrs Elborne's three children. He was cross-examined by Jonathan Davey KC, who has appeared throughout for HMRC leading Barbara Belgrano.

7. Before 27 November 2003, Mrs Elborne lived at, and was the freehold owner of, the Property. The Property was originally acquired in the joint names of Mrs Elborne and her husband Robert in 1982, but in 1990 it was transferred into her sole name. She and her husband continued to live there until his death in 2010. Mrs Elborne then died not long after, in January 2011.

8. In late 2003, Mrs Elborne was concerned to take steps to mitigate the IHT prospectively payable on her death. She consulted the family solicitor, Stephen Woolfe, who was not himself a tax specialist, but in one way or another (there is no evidence of the details) he must have introduced her to the home loan scheme. According to the written evidence of Mark Elborne, his mother instructed Mr Woolfe to set up the scheme, and he explained its general nature to Mark Elborne and his two siblings, Charlotte Beare and William Elborne. Neither Mark nor his siblings sought independent legal advice.

9. The first step in the implementation of the scheme was the execution of the Elborne Life Settlement on 27 November 2003. The settlor was Mrs Elborne, and the trustees ("the Life Trustees") were herself and Mr Woolfe. The initial trust fund was a nominal sum of £10, but it was envisaged that additions would be made to this (clause 2). Subject to various overriding powers exercisable in favour of a class of Beneficiaries comprising Mrs Elborne, her children and descendants and their spouses, clause 3.1 provided that the income of the trust fund should be paid to Mrs Elborne "during her lifetime". There was an ultimate default trust for her children equally. The administrative provisions included a power to permit any Beneficiary to occupy or enjoy trust property on such terms as the trustees thought fit. It is common ground that these provisions conferred on Mrs Elborne an interest in possession for IHT purposes in the entirety of the trust fund.

10. On the same day, Mrs Elborne signed a letter of wishes to the trustees expressing her intention that after her death the trust fund should be wound up and distributed to her three children equally.

11. Also on 27 November 2003, the following further steps were taken:

a) Mrs Elborne signed a written contract ("the Sale Agreement") for the sale of the Property to the Life Trustees for £1.8 million, subject to a special condition that the purchase price would be fully satisfied by "the Buyer issuing to the Seller a promissory note in the form attached" i.e. the Note);

b) The terms of the Note provided (inter alia) that its nominal amount was £1.8 million and it was issued "for full value provided to the Trustees", that Mrs Elborne was its holder, that it was unsecured and carried no interest, that it was freely transferable, and that it was repayable on the occurrence of specified events of default or on demand by the noteholder 30 days after Mrs Elborne's death, the amount to be repaid being at the discretion of the holder either the nominal amount index-linked to the Retail Prices Index, or the nominal amount, or the market value of the Note at the date of issue; and

c) The Life Trustees signed a written resolution recording their decisions (i) to purchase the Property for £1.8 million, with the purchase price to be left outstanding and satisfied by the issue of the Note; and (ii) to permit Mrs Elborne to occupy the Property until further notice free of rent during her lifetime, but on terms that she would be responsible for the payment of outgoings, non-structural repairs and keeping the Property fully insured.

12. There matters rested for under two weeks, until the remaining steps in the scheme were put in place by a further tranche of documents dated 8 December 2003 (although, as the FTT found, they were not in fact signed by all parties on that date):

a) Mrs Elborne created the Elborne Family Settlement, made between herself as settlor and her three children as the trustees ("the Family Trustees"). The initial trust fund was again a nominal sum of £10, but with additions to it expressly contemplated. The children were designated as the "Principal Beneficiaries", with a wider class of "the Beneficiaries" comprising them, their children and descendants, and their respective spouses. Clause 3 then provided that the trust fund would be held upon trust for the children in equal shares, and conferred life interest trusts in respect of each share. The trusts in remainder were of a standard nature, including an ultimate trust for the children absolutely. It is, however, important to note that Mrs Elborne and her husband were excluded from all possibility of benefit under the settlement by clause 14;

b) Mrs Elborne executed a letter of wishes to the Family Trustees in similar terms to her letter to the Life Trustees;

c) Mrs Elborne and the Family Trustees also entered into a deed of assignment of the Note ("the Assignment") whereby she assigned the Note to them to hold as an asset of the Family Settlement, upon the trusts and with and subject to the powers and provisions therein contained (including, of course, the exclusion from benefit of herself and her husband);

d) Written notice of the assignment was given by the Family Trustees to the Life Trustees; and *e)* The Family Trustees signed a written trustees' resolution to acknowledge receipt of the Note as an asset of the Family Settlement, and to register a restriction over the Property.

13. The FTT observed, in the FTT Decision at [21], that the scheme as it was in fact executed did not in all respects follow the "simple path" that was intended. In particular, three of the documents apparently dated 8 December 2003 were not in fact executed on that date, but instead they were executed by the three siblings sequentially, at different times and in different places, after Mr Woolfe had sent the relevant documents to them by post. Thus, for example, the evidence of Mark Elborne was that he had signed them in late January or early February 2004. Various other infelicities were also pointed out by the FTT, but for present purposes they do not matter because the FTT went on to find as facts, at [26], that "the parties involved in implementing the scheme intended to comply with the terms of the documents … at the time when the scheme documents were executed" and "that intention remained in existence at the time of Mrs Elborne's death". The FTT also found, at [27], that the three documents not signed on 8 December 2003 did not become effective until all the requisite signatures were in place in late January or early February 2004.

14. In so concluding, the FTT relied on the favourable view they had formed of Mark Elborne as a "credible and reliable witness who was frank about the reasons for the implementation of the scheme and the manner in which [*it*] had been implemented": [25(4)]. Although expressing their surprise about the absolute reliance which Mark Elborne had placed on Mr Woolfe and his firm, the FTT accepted his evidence that "the documents implementing the scheme were intended to have the effects which they purported to have and that effect would be given to the Sale Agreement and the Note following his mother's death" (*ibid*). The FTT was also reinforced in its conclusion by the fact that "there was no reason why the parties to the scheme would have wished to disregard the terms of the scheme documents": [25(5)]. Accordingly, the FTT rejected the submission of HMRC, who had anyway stopped short of alleging that the documents were sham, that there was never any intention by the relevant parties to comply with the terms of the scheme documents: [22] and [24].

IHT: basic provisions

15. IHT is charged on "the value transferred by a chargeable transfer": section 1 of IHTA 1984. A "chargeable transfer" is "a transfer of value which is made by an individual but is not … an exempt transfer": section 2(1). By virtue of section 3(1), a "transfer of value" is "a disposition made by a person (the transferor) as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer".

16. Section 4 of IHTA 1984 deals with transfers on death. Section 4(1) provides that:

> "On the death of any person tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death."

17. Section 5(1) defines a person's estate for the purposes of the Act as "the aggregate of all the property to which he is beneficially entitled", subject to immaterial exceptions. Section 5(3) states that:

> "In determining the value of a person's estate at any time his liabilities at that time shall be taken into account, except as otherwise provided by this Act."

18. Part III of IHTA 1984 deals with settled property, and section 49(1) contains the important deeming provision which equates beneficial entitlement to an interest in possession in settled property with beneficial entitlement to the property in which the interest subsists:

> "A person beneficially entitled to an interest in possession in settled property shall be treated for the purposes of this Act as beneficially entitled to the property in which the interest subsists."

It was established in the early days of capital transfer tax that in this context the expression "interest in possession" denotes a present right to present enjoyment of property: see *Pearson v Inland Revenue Commissioners* [1981] AC 753.

19. It should be noted here that the scope of the deeming provision in section 49(1) was very significantly narrowed by the Finance Act 2006 ("FA 2006") which confined its operation to interests in possession to which (as in the present case) a person became beneficially entitled before 22 March 2006, and to limited other categories defined as "qualifying interests in possession". The general effect of these changes was to bring most future interest in possession settlements made after March 2006 within the "relevant property" regime applicable to discretionary trusts under Part III of IHTA 1984, including, in particular, the ten-year periodic charge levied under section 64 and the exit charge under section 65 when settled property ceased to be relevant property. We are not directly concerned with any of those changes, but they serve to emphasise the historic nature of the treatment of life interest family trusts of which the home loan scheme sought to take advantage.

How are trust liabilities brought into account under the IHT legislation?

20. Both sides agree that it is of critical importance to understand how the liability incurred by the Life Trustees under the Note is to be taken into account for IHT purposes. The natural starting point in considering this question is in my judgment section 162 of IHTA 1984, which is headed "Liabilities" and is contained in Chapter I of Part VI of the Act which deals with "Valuation" (sections 160-198). Section 162(4) provides (subject to an immaterial exception) that:

> "A liability which is an incumbrance on any property shall, so far as possible …, be taken to reduce the value of that property."

As a matter of general law, trustees have a right of indemnity for any liabilities properly incurred by them in the execution of the trust. This right confers on the trustees a charge or lien over the trust property which is enforceable in equity and gives them a proprietary interest in that property: see *Equity Trust (Jersey) Ltd v*

Halabi, Investec Trust (Guernsey) Ltd and others v Fort Trustees Ltd and another [2022] UKPC 36, [2023] AC 877, ("*Halabi"*) at [94] and [105] of the judgment of Lord Richards JSC and Sir Nicholas Patten. The other five members of the Board all agreed with the reasoning which led to this conclusion: see the judgment of Lord Reed PSC at [3].

21. In the light of the authoritative exposition of the law in *Halabi*, it cannot in my view be reasonably doubted that the proprietary interest of trustees in the trust property in respect of liabilities properly incurred by them constitutes an "incumbrance" on that property within the meaning of section 162(4). Accordingly, it must follow that the value of the trust property for IHT purposes is to be reduced by the amount of such liabilities. It must further follow, in the light of the FTT's findings of fact about the implementation of the scheme, that the liabilities under the Note incurred by the Life Trustees in principle reduced the value of the Property in the Life Settlement, and thus the amount of the deemed transfer of value of her estate made by Mrs Elborne on her death.

22. In the Tribunals below, and in the written arguments of HMRC on this appeal, a considerable amount of time was devoted to analysis and criticism of the decision of Mann J in *St Barbe Green and another v Inland Revenue Commissioners* [2005] EWHC 14 (Ch), [2005] STC 288 ("*St Barbe Green"*). The question in issue in that case, however, was not one of valuation as such, but rather whether on the death of an insolvent life tenant under three settlements the excess of his liabilities over the assets in his free or personal estate could be used to reduce the value of the assets comprised in the settlements for the purposes of computing the amount of IHT chargeable. The trustees relied on section 5(3) of IHTA 1984 (quoted at [17] above) to argue that this could be done, but HMRC disagreed and contended that the effect of section 5(3) was that liabilities were to be taken into account by deducting them from assets out of which they could properly be met, but no further. Thus, the deceased's personal debts were deductible only from his personal estate, and the resulting deficiency could not be carried over and set against the settled property in which he had a life interest.

23. Mann J agreed with HMRC in the result, and with much (but not all) of their submissions, but I will not subject the judge's reasoning to a detailed examination because the issues in *St Barbe Green* were very different from the present case, and he did not have the benefit of the judgment of the Privy Council in *Halabi.* In my view, the relevance of *St Barbe Green* to the present case is only peripheral, although I will need to return to it briefly in the context of some of HMRC's grounds of appeal which make reference to it.

HMRC's grounds of appeal:

24. HMRC's grounds of appeal may be summarised as follows:

   a) **Grounds 1-3:** The UT erred in law in overturning the correct decision of the FTT that in valuing Mrs Elborne's estate on her death the liability under the Note was subject to abatement pursuant to section 103 of FA 1986 ("the section 103 abatement issue"). In so concluding, the UT should have held (i) that the deeming in section 49(1) IHTA 1984 had the effect of treating the liabilities under the Note as incurred by Mrs Elborne herself rather than by the Life Trustees, and (ii) that the

Property was "property derived from the deceased" for the purposes of section 103. Under these grounds, HMRC also contend that in various respects the UT misunderstood and/or misapplied the decision of Mann J in *St Barbe Green.*

b) **Grounds 4-6**: the UT further erred in law in not holding that the Note itself was comprised in Mrs Elborne's estate as "property subject to a reservation" under section 102 of FA 1986 ("the section 102 reservation of benefit in the Note issue"). The UT should have held that on a realistic view of the facts and a purposive construction of section 102, the present case falls within both section 102(1)(a) and within the first and second limbs of section 102(1)(b).

c) **Ground 7:** alternatively, the UT should have applied the analysis and approach of the Supreme Court in the *Rossendale* case (*Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 ("*Rossendale*")) to hold that the liability under the Note did not reduce the value of Mrs Elborne's estate under sections 5(3) or 49(1) IHTA 1984.

d) **Grounds 8-10:** these grounds allege in various ways that the Property was "property subject to a reservation" under section 102 of FA 1986 and certain related provisions ("the reservation of benefit in the Property issues").

25. I will now deal with the grounds of appeal in the above order.

(1) The section 103 abatement issue

26. So far as material, section 103 of FA 1986 provides as follows under the heading "*Treatment of certain debts and incumbrances".*

> "(1) Subject to subsection (2) below, if, in determining the value of a person's estate immediately before his death, account would be taken, apart from this subsection, of a liability consisting of a debt incurred by him or an incumbrance created by a disposition made by him, that liability shall be subject to abatement to an extent proportionate to the value of any of the consideration given for the debt or incumbrance which consisted of –
>
> (a) property derived from the deceased; or
>
> (b) consideration (not being property derived from the deceased) given by any person who was at any time entitled to, or amongst whose resources there was at any time included, any property derived from the deceased.
>
> …
>
> (3) In subsections (1) and (2) above "property derived from the deceased" means, subject to subsection (4) below, any property

> which was the subject matter of a disposition made by the deceased, either by himself alone or in concert or by arrangement with any other person or which represented any of the subject matter of such a disposition, whether directly or indirectly, and whether by virtue of one or more intermediate dispositions".

27. The mischief which section 103 was designed to counter was clearly explained by Lord Patrick in the Court of Session in *McDougal's Trustees v Lord Advocate* [1952] SC 260 at 275-6, by reference to the materially similar predecessor provisions contained in section 31(1) of the Finance Act 1939. After observing that the section "is intricate and involved in expression", Lord Patrick said that:

> "It looks back from the date of death to the events of the past. If any of the consideration given for a debt consisted of property derived from the deceased, an abatement is to be made from the allowance [*made for debts due by the deceased in valuing his estate for the purposes of estate duty*] proportionate to the value of the property derived from the deceased. This is designed to meet, for example, a case where A gives money to B, and B lends the money back to A. If, in such a case, A's executors were allowed to deduct the amount of the loan from A's estate for estate duty purposes, a device would have been found for avoiding the provision that gifts must bear estate duty if the donor dies within five years of the date of the gift, since the debt would rank for deduction from the deceased's estate if the debtor died at any time after the gift was made and the debt incurred. The above is case (a) of section 31(1) [*now section 103(1)(a)*]".

28. Lord Patrick went on to consider case (b) of section 31(1), which corresponded to section 103(1)(b), but for present purposes this may be ignored because in the present case (as Mr Davey KC helpfully confirmed) HMRC have never sought to rely on section 103(1)(b). It is enough to say that limb (b) of the section broadens the scope of limb (a) by focussing not on the property given as consideration for the liability (in Lord Patrick's example, the money lent by B back to A), but on the person who gave the consideration (Lord Patrick's B). In such a case, the liability is potentially subject to abatement, and A's taxable estate would thus be correspondingly increased, if B had *at any time* (my emphasis) been entitled to, or owned, property derived from A.

29. It follows from the structure of limb (a) that, if it is to apply, (i) the deceased must have incurred a debt or created an incumbrance over property, and (ii) the consideration for that debt or incumbrance must consist, in whole or in part, of "property derived from the deceased" as defined in section 103(3). If both those conditions are satisfied, the liability which would otherwise be taken into account in valuing the deceased's taxable estate is proportionately reduced. Accordingly, two questions arise: first, was the liability of the Life Trustees under the Note a debt incurred by Mrs Elborne or an incumbrance created by a disposition made by her? And if it was, secondly, was the consideration for that debt or incumbrance "property derived from the deceased" within the meaning of section 103(3)? If HMRC are to succeed on this issue, both questions must be answered in their favour.

a) Was the debt under the Note incurred by Mrs Elborne?

30. The submission of the Elborne Parties on this question is short and simple. The debt under the Note was not incurred by Mrs Elborne, nor was it an incumbrance over property created by her. The debt under the Note was incurred by the Life Trustees, acting in their capacity as such. The fact that Mrs Elborne was herself one of the Life Trustees cannot transform a liability of the Life Trustees into a liability incurred by her personally. The only answer which HMRC have to this submission is to submit that, by virtue of the deeming in section 49(1) of IHTA 1984, Mrs Elborne is to be treated as if she had incurred the liability personally. In my judgment, however, that contention cannot be right, although it was accepted by the FTT. The effect of the deeming provision in section 49(1) is to treat Mrs Elborne as if she were herself the beneficial owner of the settled property in which her interest in possession under the Life Settlement subsisted. This means that the full market value of the assets comprised in the trust fund was in principle included in her taxable estate. But there is nothing in the wording or context of section 49 to require or justify the further step of treating Mrs Elborne as if she were the sole beneficial owner of the trust property for all purposes, and as if the acts of the Life Trustees in relation to the trust property were her acts in her personal capacity. Such an extension of the meaning and effect of the deeming in section 49(1) would in my judgment have required clear and express statutory language, but no such language is to be found. Furthermore, an approach of this nature would run counter to the now well-established principles which the court should apply when interpreting a statutory deeming provision: see *Fowler v Revenue and Customs Commissioners* [2020] UKSC 22, [2020] 1 WLR 2227, ("*Fowler*") at [27] (Lord Briggs JSC, with whom the other members of the court agreed) and the recent decision of this court in *Muller UK and Ireland Group LLP v HMRC* [2026] EWCA Civ 248 (not yet reported) at [28].

31. Lord Briggs said in *Fowler* at [27]:

> "There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory. The relevant dicta are mainly collected in a summary by Lord Walker of Gestingthorpe JSC in *DCC Holdings (UK) Ltd v Revenue and Customs Comr*s [2011] 1 WLR 44, paras 37-39, collected from *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, *Marshall v Kerr* [1995] 1 AC 148 and *Jenks v Dickinson* [1997] STC 853. They include the following guidance, which has remained consistent over many years: (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears. (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes. (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made. (4) A deeming provision

> should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language. (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC109,133:
>
> > 'The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'"

32. With this guidance in mind, I consider that on the true construction of section 49(1) read in its statutory context the purposes for which the statutory fiction is to be resorted to relate to the treatment for IHT purposes of settled property in which a person is beneficially entitled to an interest in possession, including importantly the key principle that the beneficiary in question is to be treated, and his estate is to be valued, as if he were the beneficial owner of the underlying trust property in which his interest subsists. It is this key principle which distinguishes the IHT regime applicable to life interest and other interest in possession settlements on the one hand from the settled property regime applicable to "relevant property" held on discretionary, or other non-interest in possession, trusts on the other hand. But it is no part of those purposes, in my view, to treat a beneficiary with an interest in possession under section 49(1) as if he were the sole legal and beneficial owner of the trust property for all purposes and as if the actions of the trustees acting as such, including in relation to the incurring of trust liabilities, were to be attributed to him. It is notable that section 49(1) has nothing to say expressly about liabilities, or indeed about valuation. It is, rather, a central governing feature of the architecture of IHT as it applies to settled property.

33. It is also pertinent to note in this context, as Mr Bradley pointed out, that where the drafter wishes to achieve the result for which HMRC contend, there is no difficulty in doing so: see section 60 of the Taxation of Chargeable Gains Act 1992 where (albeit in the context of capital gains tax, not IHT) it was provided, in relation to property held by a person as nominee for another person, or as trustee for another person absolutely entitled as against the trustee, that:

> "this Act shall apply as if the property were vested in, and the acts of the nominee or trustee in relation to the property were the acts of, the person or persons for whom he is the nominee or trustee (acquisitions from or disposals to him by that person being disregarded accordingly)."

In the absence of any comparable language in section 49(1), it cannot in my view be said that it is an "inevitable corollary" or a necessary implication of the statutory deeming, radical and far-reaching though it undoubtedly is in some respects, that Mrs Elborne should be treated for the purposes of section 103 of FA 1986 as having herself incurred the liability under the Note.

34. In so concluding, I have well in mind that, by virtue of section 114(5) of FA 1986, section 103, in common with the remainder of Part V of the 1986 Act including section 102, is to be construed as one with IHTA 1984. The fundamental difficulty for HMRC, as I see it, is that even when section 103 is placed and construed in the context of the entire IHT code principally contained in IHTA 1984, the deeming in section 49(1) still falls well short of requiring Mrs Elborne to be treated as if she in her personal capacity, rather than the Life Trustees acting as such, had incurred the liability under the Note.

35. The core reasoning of the UT on this issue is contained in UTD [58]. After observing that it is section 49 which brings the settled property into the estate of the holder of the interest in possession, the UT continued:

> "(3) Having applied the deeming in s49(1) for this purpose of bringing the settled property into the estate of the holder of the interest in possession, there is no obvious need for s49(1) to be given a construction which goes beyond this. Parliament could have said expressly that liabilities incurred by the trustee were to be treated as liabilities of the holder of the interest in possession, but it did not do so. It was in any event not necessary for them to have done so to ensure that settled property was brought within the holder's estate.

…

> (7) However, the difficulty faced by HMRC is that whilst we are satisfied that the guidance in *Fowler* would support an approach which means that the "logical world" provided for by s49(1) should be read across and applied to other statutory provisions where this reflects the inevitable consequences or corollaries of such a state of affairs, particularly where this assists with giving effect to the purpose of anti-avoidance provisions, and the result would not lead to absurdity, we do not agree with HMRC as regards the interpretation of s49(1) itself. We are not persuaded that the deeming in s49(1) requires that the holder of the interest in possession be treated as personally liable for the debts of the settlement … Section 49(1) should not be construed in a way which forces it to answer a different question, which is one that there is no evidence that Parliament had intended it should answer."

I respectfully agree. In reaching this conclusion, the UT rightly regarded as erroneous the view of the FTT in the FTT Decision at [228] that "there is a necessary implication in the language of Section 49 that the debts of the settlement should be treated as having been incurred by the person owning the interest in possession."

36. For these reasons, I consider that the debt under the Note was not a debt incurred by Mrs Elborne within the meaning of section 103 of FA 1986, with the consequence that for this reason alone the section cannot apply in the present case. If the other members of the court agree with this conclusion, it is unnecessary for us to rule on the second question identified in [29] above, namely whether the consideration for the

debt was "property derived from the deceased". The UT, again differing from the FTT, held that this condition too was not satisfied, basically because the UT accepted the submission of the Elborne Parties that section 103 "envisages, and requires, two transactions - that which involved the creation of the liability consisting of a debt incurred by the deceased, and one in which any property was the subject matter of a disposition made by the deceased" (UTD at [63]). On that approach, the Property, which was agreed to be transferred under the Sale Contract to the Life Settlement in consideration for the issue of the Note by the Life Trustees, could not also be "property derived from the deceased" for the purposes of section 103(1)(a): *ibid*. Mr Bradley accepted, however, in his oral submissions that the question is one of some difficulty, not least because there is, in my view, an intuitive attraction to the simple point that since the whole purpose of the scheme was for Mrs Elborne to transfer ownership of the Property to the Life Settlement without her losing the right to live in it for the rest of her life, it may seem paradoxical to deny that the Property was, in one way or another, property derived from her. Since anything we said on the subject would inevitably be obiter, I consider that the better course is to leave the question open and for its resolution to await a case where the outcome is necessary to the court's decision, while making it clear that we should not thereby be taken either to endorse, or to disapprove, the reasoning of either Tribunal on the issue.

b) Was the consideration for the debt under the Note property derived from the deceased within section 103(1)(a) of FA 1986?

37. As I have just explained, it is unnecessary for us to decide this question, and I think it is preferable to leave its resolution to a case where the outcome is necessary to the court's decision.

38. Before leaving grounds 1 to 3, I should add that I have considered whether it would be helpful to say any more about the decision of Mann J in *St Barbe Green* in relation to these grounds. With no disrespect to the judge's careful and comprehensive judgment in that case, I remain of the view that the actual issue for determination (on which everybody agrees he reached the right conclusion) is remote from the issues with which we are now concerned, and that any dicta which might throw light on the correct treatment of trust liabilities under the IHT legislation must now be read subject to the guidance given by the Privy Council in *Halabi*. With the benefit of hindsight, and without any criticism of either Tribunal or of counsel on either side, I think it is now apparent that a disproportionate amount of time and argument has been devoted to analysis and criticism of the judge's reasoning in that case.

Grounds 4 to 6: the section 102 reservation of benefit in the Note issue

39. Under the heading "*Gifts with reservation*", section 102 FA 1986 relevantly provides that:

> "(1) Subject to subsections (5) and (6) below, this section applies where, on or after 18th March 1986, an individual disposes of any property by way of gift and either –
>
> (a) possession and enjoyment of the property is not bona fide assumed by the donee at or before the beginning of the relevant period; or

> (b) at any time in the relevant period the property is not enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise;
>
> and in this section "the relevant period" means a period ending on the date of the donor's death and beginning seven years before that date or, if it is later, on the date of the gift.
>
> (2) If and so long as –
>
> (a) possession and enjoyment of any property is not bona fide assumed as mentioned in subsection (1)(a) above, or
>
> (b) any property is not enjoyed as mentioned in subsection (1)(b) above,
>
> the property is referred to (in relation to the gift and the donor) as property subject to a reservation.
>
> (3) If, immediately before the death of the donor, there is any property which, in relation to him, is property subject to a reservation then, to the extent that the property would not, apart from this section, form part of the donor's estate immediately before his death, that property shall be treated for the purposes of the 1984 Act as property to which he was beneficially entitled immediately before his death."

40. By virtue of paragraph 6(1)(c) of schedule 20 to FA 1986, in determining whether any property which is disposed of by way of gift is enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise,

> "a benefit which the donor obtained by virtue of any associated operations (as defined in section 268 of the 1984 Act) of which the disposal by way of gift is one shall be treated as a benefit to him by contract or otherwise."

It is common ground that Mrs Elborne's sale of the Property to the Life Trustees, and her assignment by way of gift of the Note to the Family Trustees, were "associated operations" within the meaning of the very broad definition in section 268 of IHTA 1984, but, as Mr Bradley rightly emphasised, the effect of para 6(1)(c) is simply to extend the meaning of the expression "by contract or otherwise" in the second limb of section 102(1)(b). Accordingly, I accept his submission that the extensive case law on the second limb of section 102(1)(b) is in principle equally applicable whether the impugned benefit arises "by contract or otherwise" or from "associated operations".

41. The policy of section 102 was explained by Lord Hoffmann on behalf of the Appellate Committee of the House of Lords in *Ingram v Inland Revenue Commissioners* [2000] 1 AC 293 ("*Ingram*"). The basic facts of the case were simple. On successive days in late March 1987: (a) Lady Ingram, who was then 72, conveyed her country house

and 61 acres of land in Berkshire to her solicitor as her nominee; (b) at her direction, the nominee then granted her a 20-year lease of the property on day 2; and on day 3 the nominee, again at her direction, conveyed the freehold reversion in the property, subject to the lease, to trustees for her children and grandchildren to hold on trusts declared in a separate document. The gift into the settlement was a PET, which (as in the present case) it was hoped Lady Ingram would survive by seven years. In fact, she did not even survive for the three years which would have entitled her estate to pay IHT at a reduced rate; but the question whether section 102 of FA 1986 applied was still important, because the value of the property was much higher at the date of her death than it had been at the time of the gift.

42. Lord Hoffmann dealt with the policy of section 102 at 304-305. After observing that its policy "has puzzled people for a long time", he said at 304D:

> "For one thing, it is in one sense a penal section. Not only may you not have your cake and eat it, but if you eat more than a few de minimis crumbs of what was given, you are deemed for tax purposes to have eaten the lot. Secondly, a superficial reading of phrases like "beneficial enjoyment of the property" and enjoyment of property "to the entire exclusion . . . of the donor" has led to numerous occasions in the past century in which the revenue has put forward the proposition that, as a matter of practical common sense, it simply must be contrary to the policy of the statute for a donor to be able to give away property such as a house and go on enjoying the benefit of the property by continuing to live there. This is the premise upon which the revenue claim the high ground of substance and reality. Mr. Nugee said that for Lady Ingram to have made a potentially exempt transfer and retained the right to stay in the house was simply too good to be true and in the Court of Appeal, Evans L.J. accepted this proposition. But this approach ignores the fact that "property" in section 102 is not something which has physical existence like a house but a specific interest in that property, a legal construct, which can coexist with other interests in the same physical object. Section 102 does not therefore prevent people from deriving benefit from the object in which they have given away an interest."

43. Lord Hoffmann then stated, at 305A:

> "What, then, is the policy of section 102? It requires people to define precisely the interests which they are giving away and the interests, if any, which they are retaining. Once they have given away an interest they may not receive back any benefits from that interest. In *Lang v. Webb*, 13 C.L.R. 503, 513 Isaacs J. suggested that the policy was to avoid the "delay, expense and uncertainty" of requiring the revenue to investigate whether a gift was genuine or pretended. It laid down a rule that if the donor continued to derive any benefit from the property in which an interest had been given, it would be treated as a pretended gift unless the benefit could be shown to be referable to a specific

> proprietary interest which he had retained. This is probably the most plausible explanation and accepting this as the policy, I think there can be no doubt that the interest retained by Lady Ingram was a proprietary interest defined with the necessary precision."

44. It is a striking feature of section 103 of FA 1986, which is the subject of grounds 1 to 3, that it generated virtually no judicial consideration either of its terms or of its precursor legislation in the law of estate duty before the present case, apart from the Scottish case of *McDougal's Trustees v Lord Advocate, loc. cit.*: see [27] above. By contrast, section 102 and its estate duty precursors have been the subject of an extensive jurisprudence in the higher courts both before and after its enactment in 1986. For a fairly recent review of this material, which both sides were content to accept as accurate, reference may be made to my judgment (with which Patten LJ and Sir Colin Rimer agreed) in *Viscount Hood (Executor of the Estate of Lady Diana Hood) v HMRC* [2018] EWCA Civ 2405, [2018] STC 2355, ("*Viscount Hood"*) at [16] to [52].

45. With this introduction, I can now turn to grounds 4 to 6 which it is convenient to consider in reverse order. Ground 6 is concerned with section 102(1)(a), whereas grounds 5 and 4 respectively concern the first and second limbs of section 102(1)(b).

Ground 6: section 102(1)(a) of FA 1986

46. Ground 6 is that the UT erred in law in deciding that possession and enjoyment of the Note was bona fide assumed by the Family Trustees and that section 102(1)(a) did not apply in respect of the gift of the Note. The UT should have held that on a realistic view of the facts, and construing the legislation purposively, the requirement of bona fide possession and enjoyment was not met.

47. This ground was in my view rightly rejected by both Tribunals: see the FTT Decision at [261] and UTD at [205] to [207]. It is true that, absent an event of default, the debt under the Note was not payable until after Mrs Elborne's death, but that restriction simply reflected the terms of the Note, and thus the terms upon which Mrs Elborne's gift of the benefit of the Note to the Family Trustees had been made. It had no effect on the ability of the Family Trustees to possess and enjoy the Note once it had been assigned to them. I can see no reason to doubt that they immediately had "such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted": *Commissioner for Stamp Duties of New South Wales v Perpetual Trustee Co Ltd* [1943] AC 425 at 440, per Lord Russell of Killowen giving the judgment of the Privy Council. Moreover, Mrs Elborne was of course excluded from all benefit in the Note after its assignment by the express terms of the Family Settlement.

Ground 5: section 102(1)(b) of FA 1986, first limb

48. This ground may be disposed of equally shortly, and, as with ground 6, it was barely touched on by Mr Davey KC for HMRC in oral argument. The question here is whether the Note was "not enjoyed to the entire exclusion, or virtually to the entire exclusion, of Mrs Elborne". In my judgment, there is no answer to the simple submission of the Elborne Parties that the Note was clearly enjoyed to her entire

exclusion because it was held on the trusts of the Family Settlement under which she was entirely excluded from benefit. Unsurprisingly, neither Tribunal had any difficulty in so concluding: see the FTT Decision at [256] and UTD at [200], the UT rightly regarding the answer to this question as "obvious". No more needs to be said about it.

Ground 4: section 102(1)(b) of FA 1986, second limb

49. Mr Davey put this ground at the forefront of his argument for HMRC on this part of the case, seeking to persuade us that, in one way or another, there was a benefit to Mrs Elborne "by contract or otherwise" which flowed from her gift of the Note to the Family Trustees. The benefit was identified as her continuing right to occupy the Property as her home, obtained by associated operations of which the gift of the Note to the Family Trustees was one. In my judgment, however, there are two insuperable objections to any such analysis which Mr Bradley for the Elborne Parties rightly identified.

50. The first objection is that, in order for a benefit to the donor to fall within section 102(1)(b), it must be one that is derived from the property that has been given away, or as it is sometimes put, the benefit must be "referable" to the gift. As Lord Hoffmann explained in *Ingram*, in the passages which I have cited above, if "the benefits which the donor continues to enjoy are by virtue of property which was never comprised in the gift, he has not reserved any benefit out of the property of which he disposed". In the present case, Mrs Elborne's right to continue living in the Property derived from her life interest under the Life Settlement and the decision of the Life Trustees to permit her to do so. It did not derive in any shape or form from her gift of the Note to the Family Trustees, and this cannot in my judgment be altered by the fact that all the steps in the scheme were associated operations within the very broad definition in section 268 of IHTA 1984. The existence of associated operations will often help to identify a composite transaction to which the second limb of section 102(1)(b) could potentially apply, but it cannot displace the need to find a substantial causal connection between the property which has been given away (here the Note) and the benefit which the donor continues to enjoy (here the right to live in the Property for the remainder of Mrs Elborne's life).

51. The second objection is that the impugned benefit must be one which impacts on the enjoyment by *the donee* of the property given away. This was the ratio of the decision of this court in *Buzzoni v HMRC* [2013] EWCA Civ 1684, [2014] 1 WLR 3040 ("*Buzzoni*"). As Moses LJ, with whom Black and Gloster LJJ agreed, said at [50]:

> "The second limb of section 102(1)(b) of the 1986 Act requires consideration of whether the *donee's* enjoyment of the property gifted is to the exclusion of any benefit to the donor. The focus is not primarily on the question whether the donor has obtained a benefit from the gifted property but whether the donee's enjoyment of that property remains exclusive. The statutory question is whether the donee enjoyed the property to the entire exclusion or virtually to the entire exclusion of any benefit to the donor. If the benefit to the donor does not have any impact on the donee's enjoyment, in my view, then the donee's enjoyment is to the entire exclusion of any benefit to the donor."

See too [51] and [55], to similar effect.

52. For an explanation of the factual background in *Buzzoni*, and the reasons which led to success for the taxpayers in that case but not in the superficially similar case of *Viscount Hood* decided by this court a few years later, reference may be made to my judgment in *Viscount Hood* at [45] to [52] and [59] to [67]. Both cases concerned an attempt by the head lessee of a residential property in London to reduce its value as part of her taxable estate by the grant of a reversionary underlease which would be held for the benefit of the intended main beneficiaries of the donor's estate. In each case, it was necessary to obtain the consent of the superior landlord to the proposed sub-letting. In a nutshell, the critical distinction on the facts was that the positive covenants entered into by the proposed underlessee in the licence to underlet in the *Buzzoni* case were already in existence (in the sense that they mirrored obligations already undertaken by the donor in the headlease) when the impugned gift was made and they did not affect the beneficial enjoyment of the underlease thereafter, whereas in *Viscount Hood* the relevant covenants were for the first time contained in the underlease itself and they conferred on Lady Hood and her successors in title benefits which had no prior existence and which thus constituted the reservation by her of a benefit by way of contract. It was in this context that I held at [61] and [62]:

> "[61] In my view, it is no answer to this question to say that the positive covenants which give rise to the benefit formed an integral part of the original gift. So they did, but that is a separate question from whether the enjoyment of the gift by the sons (and their successors entitled to the sub-lease) was free of any benefit to the donor. On the facts of a case such as this or *Buzzoni*, the benefit to the donor was inseparable from the gift, but that only goes to show the closeness of the connection between the gift and the benefit. Incidentally, it also obviates the need for any separate enquiry as to whether the benefit was referable to, or trenched upon, the gift, because (as I have said) one could not have existed without the other. Indeed, the connection could hardly have been closer.
>
> [62] The fact that the sons' covenants had no prior existence is in my judgment of critical importance for at least two reasons. First, it leaves little, if any, room for an argument that the benefit was something retained by the donor, or otherwise separate from the gift which she made. Rather, the benefit was an inherent part of the gift itself. Secondly, it distinguishes cases of the present type from ones such as *Ingram* or *St Aubyn*, where the donor takes advantage of the sophisticated nature of English land or trust law so as to define the property given away in such a manner that any benefits retained by the donor never formed part of the gift at all."

53. In the present case, the simple point in my judgment is that the occupation of the Property by Mrs Elborne had no impact on the future enjoyment of the gift of the Note by the Family Trustees, so there is no scope for the second limb of section 102(1)(b) to operate.

54. Accordingly, grounds 4 to 6 must in my view be dismissed.

Ground 7: Rossendale and the Ramsay principle

55. Under this ground, the focus of HMRC's submissions is on the proposition that the liability under the Note did not reduce the value of Mrs Elborne's estate under either or both of section 49(1) and section 5(3) of IHTA 1984. The proposition must be, and is, advanced as one of construction of those two statutory provisions, realistically applied to the facts.

56. This is not, in my judgment, an appropriate occasion for a detailed review of the current state of the jurisprudence on the so-called *Ramsay* principle (derived from the seminal decision of the House of Lords in *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300) or of its restatement by the Supreme Court in 2021 in *Rossendale*. That is a task which I have already essayed in *Altrad Services Ltd v HMRC* [2024] EWCA Civ 720, [2024] STC 1201, ("*Altrad*"), in a judgment with which Nugee and Whipple LJJ both agreed, at [36] to [44]. It is enough for present purposes to say that the *Ramsay* principle remains one of statutory interpretation and application of the law to the facts, in a way that has probably never been better encapsulated than by Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454 at para 35, quoted in *Altrad* at [39]:

> "the driving principle of the *Ramsay* line of cases continues to involve a general rule of statutory interpretation 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."

57. A striking feature of *Rossendale* was that the Supreme Court attributed to the relevant statutory provision, which required identification of "the person entitled to possession" for non-domestic rating purposes of unoccupied business property under scheme leases which were found to be valid and not sham by the tribunal of fact, a meaning which that expression would not ordinarily bear, because only in this way could proper effect be given to the intention of Parliament as ascertained from a close examination of the scheme as a whole: see in particular the judgment of Lord Briggs and Lord Leggatt, with which the other members of the court agreed, at [48] to [51], quoted in *Altrad* at [42]. The Court of Appeal, where I delivered the leading judgment on this part of the case, had taken a narrower view, which I of course must now accept was wrong: see *Altrad* [43] and [44].

58. I emphasise, however, that if a statutory provision is to be given a wider meaning and application than normal in reliance on the *Rossendale* approach, it must be possible for the purpose of the statutory provision in question to be safely identified, and for the wider meaning, when realistically applied to the facts, to be needed in order to prevent frustration of Parliament's evident intention in enacting it: compare the very recent decision of the Supreme Court, in which judgment was given on 17 June 2026, after the conclusion of the hearing before us, in *HMRC v HFFX LLP* [2026] UKSC 17 at [85] and [86] in the judgment of Lord Sales JSC, with whom the other members of the court agreed.

59. In their written submissions, counsel for HMRC argued that, in the circumstances of the present case, Parliament cannot rationally have intended that section 49(1) of IHTA 1984 together with related provisions is to be construed as enabling an avoidance scheme aimed at escaping the very charge to IHT which the legislation seeks to impose. Even if, in a normal case, and assuming HMRC's arguments so far to have been rejected, section 49(1) does enable the value of trust liabilities in certain cases to be deducted in calculating the value of the life tenant's deemed estate, in the unusual circumstances of an avoidance scheme such as the present case that principle would not include a liability in the form of the debtor's liability under the Note. That liability, so the argument runs, is nothing more than an element in a composite scheme designed with the sole purpose of removing the value of the Property from Mrs Elborne's taxable estate while in substance leaving her enjoyment of the Property entirely intact.

60. By an extension to this argument, deployed for the first time in this court, HMRC argue that a similar approach should be adopted to the construction of section 5(3) of the 1984 Act which, it will be recalled, states that "In determining the value of a person's estate at any time his liabilities at that time shall be taken into account, except as otherwise provided by this Act": see [17] above. This submission is linked to HMRC's primary contention before us that the value of trust liabilities normally falls to be taken into account under section 5(3) rather than section 49(1). On that basis, it is now argued that "a liability such as that arising under the Note, which is only incurred for the purpose of offsetting a charge to tax resulting from property being deemed to fall within a life tenant's estate, does not fall to be deducted under section 5(3) IHTA 1984" (HMRC's skeleton argument, para 40).

61. The argument is pitched at such a high level of generality, and it is so far divorced from the actual statutory language of sections 49(1) and 5(3), that I confess to having some difficulty in understanding it. In so far as reliance is placed on section 49(1), I have already explained that its key purpose is to deem a beneficiary with an interest in possession in settled property (whether for life or for any shorter period) to be beneficially entitled to the underlying property in which the interest subsists. As such, the section has a very important role to play in articulating the regime applicable to settled property under the 1984 Act, and in ascertaining the taxable estate of a person whose estate includes a beneficial interest in possession. Both of those functions are reflected in the mechanics of the scheme in the present case, and they explain why, on Mrs Elborne's death, her taxable estate prima facie included the full market value of the Property at that date, because the Property was settled by the Life Settlement under which Mrs Elborne had a beneficial life interest. What section 49(1) does not do, however, on any conventional principles of construction, is to deem Mrs Elborne to have herself incurred the liability under the Note which was in fact incurred by the Life Trustees acting as such. If section 49(1) had indeed had that result, it would have produced the absurd result that she was deemed to owe the debt under the Note to herself, which would alone in my view be a cogent reason for not pressing the deeming that far.

62. Nor, on the face of it, does section 49(1) have anything to say about valuation or the deduction of debts and incumbrances incurred by the trustees. As I have already explained, I accept the submission of the Elborne Parties that the deductibility of the liability under the Note is primarily governed by section 162(4) read with the

principles expounded by the Privy Council in *Halabi*: see [20] and [21] above. Section 5(3) of the 1984 Act is also not in point, because the liability under the Note was incurred by the Life Trustees. It was not a debt incurred by Mrs Elborne personally, and it therefore fell outside the wording of the subsection which only requires the liabilities of the person whose estate is being valued ("*his*" liabilities) to be taken into account. Accordingly, I fail to see how a *Rossendale* analysis of either of the sections upon which HMRC rely could get off the ground. As Lord Sales aptly observed, when rejecting a similarly adventurous submission advanced on behalf of HMRC in the *HFFX* case at [87]:

> "Mr Baldry's appeal to the general purpose and object of section 850 [*of ITTOIA 2005*] is pitched at a level which is too general and abstract, and is untethered from the language used by Parliament to impose the tax charge. The meaning of a provision is to be derived from the words used, according to their natural and ordinary meaning as read in context."

63. A further point made by HMRC in their written submissions, by reference to a well-known passage in the judgment of Judge Learned Hand in *Gilbert v Commissioner of Internal Revenue (1957) 248 F 2nd 399,* cited both by the House of Lords in *Ramsay* and by the Supreme Court in *Rossendale*, asserted that the scheme in the present case is accurately described as one which did not appreciably affect Mrs Elborne's beneficial interest except to reduce her tax. In agreement with Mr Bradley, however, this contention seems to me wide of the mark. Mrs Elborne's beneficial interest as absolute owner of the Property was obviously and significantly affected in the real world, first by her transfer of the Property into a trust under which she had only a life interest, and secondly, by her gift of the Note which would undoubtedly have been chargeable to tax as a failed PET had she died within seven years of the gift. HMRC would surely not have been slow to claim the tax chargeable on that basis if, like Lady Ingram, Mrs Elborne had died within three years of the gift and tax had thus become chargeable at the full rate on the value transferred by the gift.

64. The FTT discussed this ground as part of their consideration of section 49(1), saying at [197] that they were not persuaded that the circumstances of the present case "are akin to those pertaining in *Rossendale*". I agree with the reasons which the FTT then gave for reaching this conclusion in nine numbered sub-paragraphs. The UT in turn considered the issue at UTD [118] to [137], concluding that the decision of the FTT involved no error of law. Again, I respectfully agree. Indeed, I would go further and say that I consider HMRC's whole approach to this issue to be clearly untenable.

65. I would therefore dismiss ground 7 of HMRC's appeal.

Grounds 8 to 10: the reservation of benefit in the Property issues

66. Under these grounds, HMRC argue that the Property was "property subject to a reservation" in Mrs Elborne's estate on her death within the meaning of section 102 of FA 1986, either (i) directly, by application of section 102(2) (ground 8), or alternatively (ii) by virtue of section 102A (ground 9) or in the further alternative (iii) by virtue of an election made by Mrs Elborne in her lifetime under provisions relating to the so-called previously-owned assets charge to income tax ("POAT") in schedule

15 to the Finance Act 2004, paragraph 21(2)(b) (ground 10). These grounds were ably argued on behalf of HMRC by junior counsel, Ms Belgrano.

67. I have already set out the relevant provisions of section 102 of FA 1986 in [39] above, in connection with the issue whether there was a reservation of benefit in the Note. For convenience, I will repeat the critical wording of subsection (3) which states that (with my emphasis):

> "If, immediately before the death of the donor, there is any property which, in relation to him, is property subject to a reservation then, *to the extent that the property would not, apart from this section, form part of the donor's estate immediately before his death,* that property shall be treated for the purposes of the 1984 Act as property to which he was beneficially entitled immediately before his death."

The obvious reason for the words which I have emphasised is that if and to the extent that the relevant property subject to a reservation would already form part of the donor's taxable estate on death, for example because it is property in which he has a beneficial interest in possession to which section 49(1) of IHTA 1984 applies, there is no need for an additional provision to bring it within his taxable estate. The property in question is already within the charge to tax under section 4 of the 1984 Act, and to that extent nothing would be gained for HMRC by duplication of the charge even if (as the wording of the subsection expressly contemplates) the conditions for treating the property as being subject to a reservation were all satisfied.

68. This point applies in its simplest form to ground 8, where HMRC argue that the Property was subject to a reservation in Mrs Elborne's estate because she had disposed of the Property by way of gift when it was sold to the Life Trustees at an undervalue, and by reason of her continued residence there rent-free it was plainly not enjoyed to the exclusion of her and of any benefit to her by contract or otherwise. The Elborne Parties do not accept that Mrs Elborne's disposal of the Property was "by way of gift" within the meaning of the section, but even if that is right (on which I prefer to express no view) the effect of subsection (3) is that the Property must anyway be treated as forming part of her gross taxable estate by virtue of section 49(1), and the real issue is whether the liability under the Note is deductible in valuing the Property for IHT purposes.

69. The position is similar under section 102A, which is headed "Gifts with reservation: interest in land" and was inserted into the legislation in 1999 with effect for disposals made after 8 March 1999: see section 104 of the Finance Act 1999. So far as material, the section provides:

> "(1) This section applies where an individual disposes of an interest in land by way of gift on or after 9th March 1999.
>
> (2) At any time in the relevant period when the donor or his spouse or civil partner enjoys a significant right or interest, or is party to a significant arrangement, in relation to the land –

> (a) the interest disposed of is referred to (in relation to the gift and the donor) as property subject to a reservation; and
>
> (b) section 102(3) and (4) above shall apply.
>
> (3) Subject to subsections (4) and (5) below, a right, interest or arrangement in relation to land is significant for the purposes of subsection (2) above if (and only if) it entitles or enables the donor to occupy the whole or part of the land, or to enjoy some right in relation to all or part of the land, otherwise than for full consideration in money or money's worth.
>
> …
>
> (5) A right or interest is not significant for the purposes of subsection (2) above if it was granted or acquired before the period of seven years ending with the date of the gift."

70. It is common ground that section 102A is an alternative to section 102, and that where it applies it operates in a similar way by treating the relevant interest in land as property subject to a reservation, and by importing the provisions of section 102(3): see subsection (2)(a) and (b). Accordingly, here too the words which I have emphasised in section 102(3) at [67] above will disapply this treatment to the extent that the interest in land would otherwise form part of the donor's estate immediately before his death, for example by force of section 49(1). That is the position here and, as Ms Belgrano rightly recognised, the effect is to render academic the issues which might otherwise arise under the section (including, again, the issue whether the disposal of the interest in land was made "by way of gift").

71. As to ground 10, it is enough to say by way of background that the POAT charge to income tax in relation to previously-owned land and other assets was introduced by section 84 of, and schedule 15 to, the Finance Act 2004. In the case of land, the amount of the charge was linked to the annual rental value of the property, but under paragraph 21 of schedule 15 it was open to the chargeable person to elect that the IHT regime applicable to property subject to a reservation should apply instead, although "only so far as the chargeable person is not beneficially entitled to an interest in possession in the property": paragraph 21(2)(b)(i). Sub-paragraph (2)(b)(ii) then provided that:

> "section 102(3) and (4) of that Act [i.e. FA 1986] shall apply, but only so far as the chargeable person is not beneficially entitled to an interest in possession in the property."

72. Mrs Elborne was advised, no doubt correctly, that the transactions which she had undertaken for the purposes of the home loan scheme rendered her potentially liable to the POAT income tax charge in relation to the Property, and on or around 15 November 2006 she executed and sent to HMRC an election under para 21(2) of schedule 15. This document stated that the legal owners of the Property were Mr Woolfe and herself (i.e. the Life Trustees) and that the nature and extent of her interest in the Property was as life tenant under the Life Settlement. In the covering letter, Mrs Elborne made it clear that the Property was to be treated as property subject to a

reservation, and sections 102(3) and (4) of FA 1986 would apply "but only insofar as she was not beneficially entitled to an interest in possession in the Property": see UTD [6(5)]. The original election was not strictly accurate, in that the Sale Contract had never been completed and Mrs Elborne therefore remained the sole legal owner of the Property, as indeed she did until her death in 2011. This error was then corrected in a further revised election sent to HMRC in late January 2007: *ibid* [6(6)].

73. For present purposes, the important point is that the effect of the election was to ensure that the relevant IHT provisions of FA 1986 would apply in relation to the Property on her death, including again section 102(3) which gave priority to her deemed beneficial ownership of the Property by virtue of section 49(1) of the 1984 Act.

74. In these circumstances, I agree with Mr Bradley that section 102(3) provides a short and conclusive answer to grounds 8, 9 and 10, and makes it unnecessary for us to deal with any other points which arise under those grounds. This was also the view of the UT on what it called "the section 102(3) issue": see UTD [116]. I would therefore dismiss each of these grounds.

Overall conclusion

75. For all the reasons which I have given, I would dismiss HMRC's appeal. In simple language, I consider that the scheme worked. If that may seem to some an unexpected conclusion, I would answer that the case law on property subject to a reservation illustrates that success for the taxpayer is by no means uncommon in this arcane and difficult area of tax law: see for example *Ingram* and *Buzzoni*. In the present case, it seems to me that Mrs Elborne and her advisers succeeded in implementing an ingenious scheme which worked because it took advantage of the now historic treatment for IHT purposes of interests in possession in family settlements, and of the opportunity to separate the value of her continued residence in the Property as tenant for life from the matching liability under the Note, without falling foul of either the anti-avoidance provisions enacted in FA 1986 or the approach to construction of fiscal legislation in a tax-avoidance context as explained by the highest courts from *Ramsay* to *Rossendale* and beyond.

76. It is also relevant to note that the transactions in the present case took place before the enactment of legislation about the disclosure to HMRC of tax-avoidance schemes under the *DOTAS* provisions which date back to the Finance Act 2004, and before the introduction of a general anti-abuse rule, or *GAAR*, in the Finance Act 2013 which, had it been in place at the relevant time, could in principle have been deployed to counteract schemes of the present type.

Lady Justice Andrews:

77. I agree.

Lady Justice Asplin:

78. I agree.