A HIGH COURT OF JUSTICE (CHANCERY DIVISION)—CRAVEN *v.* WHITE—14, 15, 16, 17 AND 24 MAY 1985 COMMISSIONERS OF INLAND REVENUE *v.* BOWATER PROPERTY DEVELOPMENTS LTD.—11, 12, 15, 16 AND 18 JULY 1985 AND 18 OCTOBER 1985 BAYLIS *v.* GREGORY—20, 21 AND 26 NOVEMBER 1985

B

COURT OF APPEAL—CRAVEN *v.* WHITE, COMMISSIONERS OF INLAND REVENUE *v.* BOWATER PROPERTY DEVELOPMENTS LTD. AND BAYLIS *v.* GREGORY—20, 21, 22, 23 AND 26 JANUARY 1987 AND 24 MARCH 1987

C

HOUSE OF LORDS—CRAVEN *v.* WHITE, COMMISSIONERS OF INLAND REVENUE *v.* BOWATER PROPERTY DEVELOPMENTS LTD. AND BAYLIS *v.* GREGORY—16, 17, 18, 23, 24 AND 25 MAY 1988 AND 21 JULY 1988

D

1 Craven (H.M. Inspector of Taxes) *v.* White[1]
2 Commissioners of Inland Revenue *v.* Bowater Property Developments Ltd.[2]
3 Baylis (H.M. Inspector of Taxes) *v.* Gregory[3]
Baylis (H.M. Inspector of Taxes) *v.* Gregory and Weare

E

Capital gains tax—Disposal—Tax avoidance Scheme—Composite transaction—Preordained series of transactions—Shares in United Kingdom company exchanged for shares in Isle of Man company followed later by sale to purchaser company—Second transaction not certain when first transaction carried out—Whether series of transactions to be treated as single composite transaction—Finance Act 1965, *s* 19(1), *Sch* 7 *paras* 4 *and* 6.

F

Development land tax—Tax avoidance scheme—Composite transaction—Fragmentation of land prior to sale for multiple exemptions—Purchaser ending negotiations before sale agreed—Sale completed later on terms different from those originally proposed—Whether series of transactions to be treated as single composite transaction—Development Land Tax Act 1976, *ss* 1, 12.

G

H

Assessment—Mistake—Vacation—Year wrongly stated on assessment—Taxpayer not misled—Assessment unilaterally vacated by H.M. Inspector—Whether mistake on assessment could be disregarded—Whether unilateral vacating of assessment by Inspector possible—Taxes Management Act 1970, *ss* 29(6), 114.

I

(1) Reported (ChD) [1985] 1 WLR 1024; [1985] 3 All ER 125; [1985] STC 531; 129 SJ 417; (CA) [1987] 3 WLR 660; [1987] 3 All ER 27; [1987] STC 297; (HL) [1989] AC 398; [1988] 3 WLR 423; [1988] 3 All ER 495; [1988] STC 476.

(2) (ChD) [1985] STC 783; (CA) [1987] 3 WLR 660; [1987] 3 All ER 27; [1987] STC 297; (HL) [1989] AC 398; [1988] 3 WLR 423; [1988] 3 All ER 495; [1988] STC 476.

(3) (ChD) [1986] 1 WLR 624; [1986] 1 All ER 289; [1986] STC 22; 130 SJ 16; (CA) [1987] 3 WLR 660; [1987] 3 All ER 27; [1987] STC 297; (HL) [1989] AC 398; [1988] 3 WLR 423; [1988] 3 All ER 495; [1988] STC 476.

(1) White A

The three Respondents ("W") owned all the issued shares in a United Kingdom trading company ("Q"). From 1973 W conducted negotiations with various other companies with a view either to merger with a similar business or to sale of Q. Early in 1976 a holding Company ("M") was set up in the Isle of Man. At about the same time negotiations started with a company ("O") for sale of the shares in Q. The negotiations with O faltered in June 1976, and negotiations for merger with another company were then resumed; the negotiations with O resumed in late June 1976, but the merger negotiations also continued. On 9 July 1976 Q's share capital was reorganised. On 13 July 1976 a board meeting of M approved acquisition of the shares in Q. On 19 July 1976, pursuant to an illegibly dated offer reported on 14 July, W agreed with M to exchange their shares in Q for shares in M. On 9 August 1976 M sold the shares in Q to a subsidiary of O. B C

Over the next five years M made loans to W totalling £520,000, of which £50,000 was repaid. In October 1981 M resolved to advance the balance of its unexpended funds to W to enable them to acquire insurance policies, and deferred annuity contracts were then taken out with a Gibraltar insurance company, from whom W later obtained loans against the security of the policies. D

On appeal by W against assessments to capital gains tax for 1976–77, the Special Commissioners (who gave their decision in principle prior to the House of Lords decision in *Furniss* v. *Dawson*) held there was a composite transaction consisting of the share exchange agreement in July and the sale agreement in August coupled with an arrangement for M to make loans to W (though not the later arrangement concerning the policies), but rejected the Crown's contention that the transfers to M should be treated as fiscal nullities and held W were assessable on the amounts of the loans from M in the fiscal years when the loans were made. The Crown appealed against all three decisions but one appeal was deferred because the Respondent had died and representation to his estate had not been taken out. E F

The Chancery Division, dismissing the Crown's appeals, held the disposal of the shares in Q to O's subsidiary was not, for capital gains tax purposes, made by W because: G

1. The share exchange agreement in July and the sale agreement in August were not a composite transaction because, on the facts found by the Commissioners, it was impossible to conclude that at the date of the share exchange there was no likelihood in practice that the sale to O's subsidiary would not be completed and there was no arrangement made before the August agreement between W and O that there would be a sale of the shares in Q to O's subsidiary; H

2. the share exchange agreement in July could not he held to have had no commercial purpose, because the purpose of any step must be ascertained as at the time the step was taken, and the commercial purpose of acquiring M to be the holding company for the purposes of a merger was not to be disregarded because it was only a secondary and alternative purpose and not one which coexisted with the primary tax avoidance purpose in the sense of being achievable at the same time as, and not alternatively to, the primary purpose; I

A 3. the *Ramsay*[1] principle should not be extended to apply simply because a tax avoidance step can be seen to have been taken in circumstances where W's primary objective was a sale, there was a desire to avoid tax, and there was a common understanding between W and O at the time of the share exchange agreement in July that if a sale was to be effected it would be by M selling to O's subsidiary.

B

(2) Bowater

C The Respondent (B.P.D.) was at the material time a member of the Bowater group of companies (the group). At the beginning of 1980 B.P.D. owned 23 acres of land (the land) negotiations for the sale of which to an outside company (M.P.L.) were in progress and a price of £202,500 had been agreed subject to contract.

D On 25 March 1980 B.P.D. sold the land for £180,000 to five other companies in the Bowater group each of which was entitled to £50,000 exemption from development land tax. The five Bowater companies took the land as beneficial tenants in common in equal shares.

E On 7 July 1980 M.P.L. decided not to go ahead with the purchase of the land due to economic factors.

In February 1981 M.P.L. again showed interest in the land and negotiations were reopened resulting in the sale of the land to M.P.L. by the five
F Bowater Companies for £259,750.

On appeal by B.P.D. against an assessment to development land tax in respect of the sale of the land the Special Commissioners held that M.P.L.'s withdrawal from negotiations in July 1980 had caused a break in the continuity of the group's active intention to sell the land to M.P.L. and this pre-
G vented the March 1980 transfer to the five companies and the October 1981 disposal to M.P.L. from constituting a single composite transaction. The Crown appealed.

The Chancery Division, dismissing the appeal, held the disposal of the
H land to M.P.L. by the five Bowater companies was not a disposal for development land tax purposes by B.P.D. because the March 1980 transfer and the October 1981 disposal did not form a composite transaction within the *Ramsay* principle. The transfer of the land to the five Bowater Companies in March 1980 was designed to avoid B.P.D. being chargeable to development land tax if the sale to M.P.L. went through and had no business purpose.
I But it could not be said at the time of that transfer that there was no likelihood in practice that the sale to M.P.L. would not follow.

---

(1) 54 TC 101.

(3) Gregory

A

The first Respondent (G) through personal and trustee shareholdings controlled a company, (PGI), in which the second Respondent (W) was a shareholder in a personal and trustee capacity.

B

Negotiations for sale of PGI shares to an unconnected company (Cannon) terminated unsuccessfully in 1974. Pursuant to a scheme intended to defer capital gains tax liability which would have arisen, the sale to Cannon was to he effected through a Manx Company (Holdings) newly incorporated for the purpose. Though no other purchaser was then in prospect the Respondents and other shareholders of PGI proceeded with the incorporation of Holdings and exchanged shares in PGI for shares in Holdings.

C

Holdings sold the PGI shares to another unconnected company, (Hawtin), and the proceeds of sale were later loaned by Holdings to the Respondents and the other shareholders interest free.

D

Alternative capital gains tax assessments were raised on the shareholders in respect of 1973-74, the year of the share exchange, and (except in one case) 1975-76, the year of the sale to Hawtin. G, who was assessed in his personal capacity and G & W, in their capacity as trustees of the estate of J. Gregory deceased, appealed to the Special Commissioners. One assessment referred in error to 1974-75 instead of to 1975-76 and the Inspector purported to "vacate" that assessment unilaterally.

E

The Special Commissioners decided that the disposals of the PGI shares to Holdings in 1974 were not chargeable disposals and that the disposal by Holdings of the PGI shares to Hawtin in 1976 was not a disposal by the individual shareholders. They also held that the purported "vacation" of the erroneous assessment was an alteration within s 29(6) Taxes Management Act 1970 and was of no effect; the assessment remained in existence; the error in the year was not capable of being disregarded under s 114 Taxes Management Act 1970 and it was an assessment for 1974-75 not 1975-76. The Special Commissioners discharged all the assessments on all the shareholders. The Crown appealed.

F

G

The Chancery Division, dismissing the Crown's appeals held:

1. (a) there being no provision in the Income Tax Acts for an assessment, to be withdrawn by the unilateral act of the Inspector, the act of the Inspector in this case in purporting to "vacate" the assessment was ineffective, and

H

(b) a genuine mistake in the year of assessment may be corrected by virtue of s 114 Taxes Management Act 1970 where, as here, there was on the evidence no likelihood that the taxpayer had been misled; and

I

2. the two transactions consisting of the exchange of PGI shares by Holdings could not be treated as steps in a pre-ordained series of transactions or as a single composite transaction within the principle stated in *Ramsay*, as developed and applied by the House of Lords in *Furniss* v. *Dawson*, because the sale had not been arranged at the time of the exchange.

A *Per Curiam:* treating the transactions as a single tripartite agreement would lead to the anomalous conclusion that the consideration for the shares in Holdings had never been fully paid and could in other circumstances lead to potential, double taxation.

B

(4) White, Bowater and Gregory

The Crown appealed in all three cases and the trustees in **Gregory** appealed against the preliminary finding (3)1(b) above.

C

The Court of Appeal, dismissing the Crown's appeals, held that successive transactions, each of which has legal effects, are not properly to be regarded as a pre-ordained series or as a single composite transaction within the *Ramsay*[1] principle unless, at the time when the first transaction was effected, all the essential features, not merely the general nature, of the sec-
D ond transaction had been determined by a person (or persons) who had the firm intention and the ability in practice to procure the implementation of the second transaction; accordingly—

in **White**, the July and August agreements could not be regarded as a com-
E posite transaction, nor was there a pre-ordained series of transactions since, at the time when the shares ceased to be the property of the taxpayers, there was then no formulated plan fixing the identity of the ultimate recipients or the terms of the transfer;

in **Bowater** it could not be said at the time of the March 1980 transfer that all
F the essentials of the October 1981 disposal had already been determined by a person who had the firm intention, and ability to procure the said disposal;

it was not open to the Special Commissioners to find that the two transactions comprised one composite transaction in **Gregory**; the share exchange and the sale of the PGI shares to Hawtin were not a pre-ordained series of
G transactions or a composite transaction since, at the date of the share exchange no one had the intention, still less the practical ability, to implement a sale to Hawtin;

W. T. Ramsay Ltd. v. *Commissioners of Inland Revenue* 54 TC 101; [1982] AC 300, *Commissioners of Inland Revenue* v. *Burmah Oil Co Ltd.*
H 54 TC 200; [1982] STC 30 and *Furniss* v. *Dawson* 55 TC 324; [1984] AC 474 distinguished.

On the preliminary issue in **Gregory** the Court of Appeal, allowing the trustees' appeal, held that:

I

(1) the Taxes Management Act 1970 conferred no general powers on an Inspector to vacate an assessment. The purported vacation of the assessment for 1974–75 was accordingly not properly made and had no legal effect,

---

(1) 54 TC 101.

(2) the relevant fiscal year of assessment is an integral, fundamental part of the assessment itself, and s 114 of the Taxes Management Act 1970 does not allow an assessment for one fiscal year to be treated as an assessment made for another fiscal year; accordingly the assessment made on the trustees would not be treated as an assessment for the year 1975-76. A

Save as regards the preliminary issue in **Gregory** the Crown appealed in all three cases. B

Held, in the House of Lords dismissing by a majority the Crown's appeal in **White**, and dismissing unanimously the Crown's appeals in the cases of **Bowater** and **Gregory** that:

C

1. (Lord Templeman and Lord Goff of Chieveley dissenting) for the *Ramsay* principle, as explained in *Furniss* v. *Dawson*, to apply to a series of transactions, it had to be shown (i) that the series of transactions was, at the time when the intermediate transaction was entered into, pre-ordained in order to produce a given result; (ii) that that transaction had no other purpose than tax mitigation; (iii) that there was at that time no practical likelihood that the pre-planned events would not take place in the order ordained, so that the intermediate transaction was not even contemplated practically as having an independent life, and (iv) that the pre-ordained events did in fact take place. In these circumstances the court can be justified in linking the beginning with the end so as to make a single composite whole to which the fiscal results of the single composite whole are to be applied. D E

W. T. Ramsay Ltd. v. *Commissioners of Inland Revenue* 54 TC 101; [1982] AC 300, *Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.* 54 TC 200 STC 30 and *Furniss* v. *Dawson* 55 TC 324; [1984] AC 474 distinguished.

F

2. On application of that principle:

(a) (Lord Templeman and Lord Goff of Chieveley dissenting) In **White**, at the time it was agreed that M would acquire the share capital of Q from W in exchange for shares in M it was uncertain that the sale to O's subsidiary would take place, and the share exchange could not therefore be said to be part of a pre-ordained series of transactions. G

(b) In **Bowater** and **Gregory** (Lord Templeman and Lord Goff of Chieveley concurring in the result) there was no such connection between the intermediate transactions entered into by BPD and by the shareholders in PGI respectively and the eventual sales to third parties as to permit of any possible finding that those intermediate transactions were part of a pre-ordained series. H

Per Lord Jauncey of Tullichettle (Lord Keith of Kinkel and Lord Oliver of Aylmerton agreeing): by way of a tentative guide, rather than as a definitive exercise, a formula defining "composite transaction" is as follows: I

> "A step in a linear transaction which has no business purpose apart from the avoidance or deferment of tax liability will be treated as forming part of a pre-ordained series of transactions or of a composite transaction if it was taken at a time when negotiations or arrangements for the carrying through as a continuous process of a subsequent transac-

A tion which actually takes place had reached a stage when there was no real likelihood that such subsequent transaction would not take place and if thereafter such negotiations or arrangements were carried through to completion without genuine interruption."

B

(1a) STEPHEN WHITE

CASE

C Stated under the Taxes Management Act 1970 s 56 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 1 to 4 August 1983 Stephen White (hereinafter D called "the Respondent") appealed against the following assessments to capital gains tax:

1976–77	£400,000	(Main)
	£1,075,000	(Further)
E 1977–78	£80,000	(Main)

At the same time we heard appeals by Archibald Henry White and Brian White against capital gains tax assessments made upon each of them for the said years, and in which the same question fell to be decided.

F 2. Shortly stated the question for our decision was whether or not an agreement made on 19 July 1976 between (1) the Respondent, Archibald Henry White and Brian White and (2) Millor Investments Ltd. was a transaction falling within para 6 Sch 7 Finance Act 1965 and accordingly, by virtue of para 4 of the said Schedule, not to be treated as involving a disposal on which a chargeable gain accrued to, *inter alia*, the Respondent.

G

3. The following witnesses gave evidence before us:

Mr. William Clarke FCA, sole principal of William Clarke & Co.
The Respondent
Mr. Brian White

H

4. The following documents were proved or admitted before us:

1. Agreement dated 19 July 1976 between the Respondent, Archibald Henry White and Brian White (1) and Millor Investments Ltd. (2).

I 2. Agreement dated 9 August 1976 between Morris & David Jones Ltd. (1) and Millor Investments Ltd. (2).

3. Affidavit dated 7 June 1983 by Michael Andrew Kennish and copy Minutes annexed thereto.

4. Bundle containing copies of Minutes of meetings of directors and shareholders of S. White & Sons (Queensferry) Ltd. A

5. Bundle of correspondence relating to abortive negotiations for the purchase of shares of S. White & Sons (Queensferry) Ltd.

6. Balance Sheet of S. White & Sons (Queensferry) Ltd. at 7 August 1976. B

7. Memorandum and Articles of Association of Millor Investments Ltd.

8. Bundle of press cuttings relating to Oriel Foods.

C

9. Balance Sheets of Millor Investments Ltd. at 19 July and 9 August 1976.

10. Note of acquisition of shareholdings in S. White & Sons (Queensferry) Ltd.

D

11. Statement of financial position of Millor Investments Ltd. (undated).

12. Return of Allotments made by Millor Investments Ltd. on 19 July 1976 filed at the Isle of Man Companies Registry.

13. Bundle containing form of letter of offer by Millor Investments Ltd. to acquire shares of S. White & Sons (Queensferry) Ltd., form of acceptance, and acceptances signed by the Respondent, Archibald White and Brian White. E

14. Copy of letter dated 3 August 1976 from Millor Investments Ltd. to Morris & David Jones Ltd. F

15. Bundle containing drafts of letters (1) from Morris & David Jones Ltd. to Millor Investments Ltd. (2) from Morris & David Jones Ltd. and Millor Investments Ltd. to Midland Bank Ltd. contemporaneous with agreement mentioned at 2. above.

G

16. Bundle of correspondence passing between J. Bryan Smith & Philip Davis, Solicitors, and the office of the Solicitor of Inland Revenue.

17. Bundle of correspondence relating to the sale of shares in S. White & Sons (Queensferry) Ltd. by Millor Investments Ltd. to Morris & David Jones Ltd. (principally William Clarke & Co; Ashurst, Morris, Crisp & Co; Kneale & Co; Oriel Foods Ltd; Midland Bank Ltd). H

18. Summary of Insurance Policies and Analysis of loans made to the Respondent, Archibald Henry White and Brian White.

19. Specimens of Unit-Linked Endowment Assurance Policies with Edinburgh Life Assurance Ltd. of Gibraltar. I

20. Bundle containing minutes of meetings of shareholders and directors of Millor Investments Ltd.

21. Extract from The Companies Consolidation Act 1931 of the Isle of Man.

A None of the above is annexed hereto as an exhibit. They are available for inspection by the Court if required.

5. We the Commissioners who heard the appeal took time to consider our decision and gave it in writing on 18 January 1984. A copy of that decision, which sets out the facts which we found as a result of the oral and documentary evidence adduced before us, a summary of the submissions made on behalf of the parties, and the grounds on which we reached our conclusions, is annexed hereto and forms part of this Case. B

At the time when our decision was issued the opinions of the House of Lords in *Furniss* v. *Dawson*(1) had not yet been delivered ([1984] 1 All ER 530). C

Our decision in principle was that on each of the occasions when the Respondent received a loan (from Millor Investments Ltd.) he must be deemed to have made a part disposal of the shares which he had formerly owned in S. White & Sons (Queensferry) Ltd.

D

6. Figures were agreed between the parties on the basis of our decision in principle on 8 March 1984 and on 2 April 1984 we adjusted the assessments appealed against by the Respondent by discharging the further assessment for 1976–77, reducing the main assessment for that year to £31,907 and reducing the assessment for 1977–78 to £55,113.

E

7. The Inspector immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and on 4 April 1984 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970 s 56 which Case we have stated and do sign accordingly. F

8. The question of law for the opinion of the Court is whether we were correct in holding that on each of the occasions when the Respondent received a loan from Millor Investments Ltd. he must be deemed to have made a part disposal of the shares which he had formerly owned in S. White G & Sons (Queensferry) Ltd., or whether, as the Inspector contended, there was, on the sale of those shares by Millor Investments Ltd. to Morris & David Jones Ltd., a disposal by the Respondent on which a chargeable gain accrued to him, the consideration for such disposal being the cash received by Millor Investments Ltd. in payment for the said shares.

H

E. Wix
B. James } Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
98 High Holborn
London WC1V 6LQ
I
21 August 1984

---

(1) 55 TC 324.

Decision

A

1. Two transactions consitute the subject matter of these appeals: (1) the exchange by the Appellants on 19 July 1976 of their shares in S. White and Sons (Queensferry) Ltd. ("the Company") for share in Millor Investments Ltd. ("Millor"), an Isle of Man company and (2) the sale by Millor on 9 August 1976 to Morris & David Jones Ltd. ("Jones") of the shares of the Company which it had acquired on 19 July 1976.

B

2. The question for determination is whether or not the agreement (hereafter "the July agreement") made on 19 July 1976 between (1) Stephen White, Archibald Henry White (hereafter "Archibald White") and Brian White and (2) Millor, whereby the Appellants agreed to transfer a total of 3,502 £1 ordinary shares in the Company in consideration for the issue of a total of 3,502 fully paid £1 ordinary shares in Millor, was a transaction falling within para 6 Sch 7 Finance Act 1965 and accordingly, by virtue of para 4 of the said Schedule, not to be treated as involving a disposal of the shares on which a chargeable gain accrued to each of the Appellants.

C

D

3. The assessments under appeal, which are to capital gains tax, are:

		£	
Archibald White	1976–77	130,000	Main
		360,000	Further
	1977–78	27,000	Main
Stephen White	1976–77	400,000	Main
		1,075,000	Further
	1977–78	80,000	Main
Brian White	1976–77	130,000	Main
		360,000	Further
	1977–78	27,000	Main

E

F

G

4. The Appellants were represented by Mr. A. L. Price Q.C. and Mr. G. Crawford. The Inspector of Taxes was represented by Mr. J. F. W. Hinson of the Office of the Solicitor of Inland Revenue.

5. There was no statement of agreed facts. The primary facts which we find are set out below.

H

5.1 The Company was incorporated on 25 June 1946. Immediately before the events hereafter described its authorised share capital was £5,000 divided into £1 ordinary shares, of which 3,502 were issued and were held as follows:

I

Stephen White	2,101
Archibald White	701
Brian White	700

The Company carried on in the north west a family grocery business, taken over shortly after the Company was formed, and subsequently

A expanded. Stephen White acquired 100 shares when the original business was bought in 1946; he bought 775 shares from his father (also called Stephen White) on 30 April 1947; he inherited 876 shares from his father on 16 March 1957; and he received a further 350 shares as a gift from Archibald White (his uncle) on 19 February 1968. Archibald White acquired 1 share as a subscriber to the Memorandum of the Company, 100 when the original B business was bought, 775 by purchase from his brother Stephen, and 875 as a legacy from his brother; in 1968 he disposed of 1,050 shares by way of gift (350, as already mentioned, to his nephew Stephen White, and 700 to his son Brian, the third Appellant).

5.2 The Company was started by Archibald White and his brother C Stephen, and they and Stephen White the Appellant were directors. Stephen White Senior remained a director until his death in 1950. Upon his death Stephen White his son became, without any formal appointment, managing director of the Company, with Archibald White as Chairman. In 1968, Brian White became a director. From early 1973 the active directors were Stephen D White and Brian White; the latter looked after the supermarkets which the Company then owned. Archibald White took no active part in the business, but devoted his time to his other interests. He attended (Bundle 4) board meetings and annual general meetings at least until 14 December 1973 (the last minutes provided until those dealing with the reorganisation of the Company's share capital on 9 July 1976 (see para 5.4 below).)

E

5.3 The business expanded over the years and at 29 May 1973 the Company owned twelve supermarkets with a total selling area of 45,000 square feet: one unit of 2,000 square feet, six units of 2,500 square feet, one unit of 3,500 square feet, one unit of 4,500 square feet, two units of 5,000 square feet, and one unit of 10,000 square feet. One store had been destroyed F by fire in 1972 and was to be replaced by a new unit of 4,500 square feet, and a new unit of 5,000 square feet was about to be opened for business.

5.4 On 9 July 1976 meetings of the directors and of the shareholders of the Company were held at short notice as a result of which the authorised capital of the Company was increased from £5,000 to £7,500 by the creation G of additional £1 ordinary shares, £3,502 of the Company's reserve was capitalised and distributed to the members in the form of fully paid renounceable letters of allotment, and the existing issued ordinary shares were converted into deferred ordinary shares with greatly diminished rights. The purpose of the reorganisation of share capital was (on advice from Kneale & Co., lawyers in the Isle of Man to whom reference will be made hereafter) to H effect stamp duty savings should the agreement mentioned in para 5.10.1 be entered into. After the reorganisation, each of the three shareholders held the same number of ordinary shares as before, but in the form of renounceable letters of allotment, and in addition a like number of deferred ordinary shares.

I 5.5 At a board meeting of the Company held on 14 July 1976 Stephen White reported that Millor had offered to acquire the whole of the issued share capital of the Company at a price of 50 pence for each deferred ordinary share and one share of £1 in the capital of Millor for each ordinary share of the Company.

The offer was contained in a document headed "Millor Investments Limited" addressed to "Shareholder". The copy put before us is unsigned and the date is illegible. The body of the document reads: A

> "We are writing to confirm that we are prepared to acquire and hereby offer to acquire upon the terms and subject to the conditions set out in the enclosed Agreement, the whole of the issued share capital as increased and reorganised of S. White & Sons (Queensferry) Limited. B
>
> If you wish to accept this offer, please sign and return to us the form of acknowledgement at the foot of the copy of this letter which we enclose for that purpose, when this letter and your acknowledgement will constitute a binding agreement between us.
>
> C This offer is subject to acceptance by the holders of over 90% of the issued capital, etc and will remain open until the 9th day of August, 1976."

Each of the three shareholders signed an acceptance, dated 19 July 1976, in the following terms: D

> "I acknowledge receipt of your letter of offer dated 1976 and write to confirm my acceptance of the offer upon the terms and subject to the conditions set out in the said agreement."

All three shareholders were present at the meetings on 9 and 14 July. E

5.6 Millor was incorporated on 2 May 1973, in the Isle of Man, under the Companies Acts 1931 to 1968 with a capital of £2,000, which on 23 June 1976 was increased to £4,000 divided into 4,000 £1 ordinary shares of which two shares had been issued. The proposed acquisition of the Company was approved at a board meeting of Millor held on 13 July 1976. F

5.7 On July 1976, Stephen White, Archibald White and Brian White entered into an agreement with Millor (namely, the July agreement) whereby they exchanged their respective holdings of ordinary shares in the Company for ordinary shares in Millor and their deferred shares for cash. The agreement was expressed to be governed by the law of England. The exchange and sale were completed at the offices of Kneale & Co., Advocates and Notaries, in Douglas, Isle of Man where Millor had its registered office, and at a board meeting of Millor held on 19 July the allotment of shares in Millor was approved. The return of allotments filed at the Isle of Man Companies Registry records the shares held in Millor as: G

H

Stephen White	2,101
Archibald White	701
Brian White	700

The two original shares issued issued to Michael Andrew Kennish and Kenneth Leslie Terry, both described in the subscription to the memorandum as "Advocates Clerk", were on 19 July 1976 held by Peter James Kneale, Mr. Terry having transferred his share to Mr. Kneale when Mr. Kneale was appointed a director, and chairman, of Millor and Mr. Terry resigned as director and chairman. Mr. Kennish continued as director and secretary. I

5.8 At a board meeting of the Company held at Queensferry, in Clwyd, on 20 July 1976 the transfers of the deferred shares to Millor were approved

A and registered, and it was agreed that when the renounced letters of allotment for the ordinary shares (not yet received by the Company) were received registration of those be completed "in accordance with the forms of renunciation".

5.9 On 6 August a board meeting of the Company records the redemption of two mortgages, one with Summers Permanent Building Society, one with Peter Croft.

B

5.10.1 On 9 August 1976 an agreement was entered into between (1) Jones and (2) Millor (hereafter "the August agreement") whereby Millor sold and Jones purchased the whole of the issued share capital of the Company, for an aggregate consideration of £2,200,000 apportioned as to 50p for each deferred ordinary share and the balance to the ordinary shares. Payment of the consideration was to be by instalments:

C

(i) on completion: £1,800,000

D

(ii) seven days after completion and certification of the Completion Accounts (to be prepared as at the close of business on 7 August 1976, a Saturday) such sum as should be payable in accordance with clause 3(C) (which provided for adjustments to the purchase consideration (in relation to the value of net assets) which it is not necessary to describe in detail)

E

(iii) seven days after preparation and certification of the December accounts (ie for the period from 8 February to 31 December 1976): £400,000 or such lesser sum as should be shown to be payable in accordance with clause 3(E) (which provided for adjustments should the net profits for the period fall short of £560,000).

F

5.10.2 The agreement recited (*inter alia*) that Millor "is or will at completion be the beneficial owner" of the shares to be sold. Millor entered (clause 5) into the fifteen pages of warranties contained in the third schedule, and delivered at completion a deed of indemnity in favour of Jones and the Company in relation to estate duty and sundry taxes. The fifth schedule listed freehold and leasehold properties owned by the Company (nineteen in all). Millor was to procure that at or before completion each of Stephen White and Brian White should enter into a service agreement with the Company in the form agreed between the parties with covenants similar to those to be given by Millor, namely not (for one year after ceasing to be engaged concerned or interested in the business of the Company) to be engaged in Lancashire or Cheshire or Clwyd in the business of retail sale of groceries nor to solicit customers of the Company. The receipt of Kneale & Co., advocates, was to be a good discharge for all monies payable and documents deliverable by Jones pursuant to the agreement.

G

H

5.10.3 The agreement provided, in clause 3(D), for the parties to try to ensure that the business management policies adopted by the directors (that is, the three Appellants) prior to completion would be maintained from the date of completion to 31 December 1976 and that all trading and capital arrangements policies and controls should until that date be under the sole direction and control of Stephen White and Brian White and should not be altered without their prior written consent. If any alterations were made

I

without such written consent Millor was to give written notice to Jones and if the alteration was not cancelled the whole of the £400,000 [5.9.1 (iii) above] was to become payable forthwith. A

At completion the written resignations of all the directors and the secretary of the Company (save for such persons as Jones might nominate) were to be delivered (clause 4(C)). In the event Brian White resigned as Secretary but not as director; Archibald White resigned as director. B

5.10.4 Completion of the August agreement was conditional upon the obtaining within 28 days of Exchange Control consent (ultimately received on or before 14 September 1976—the 28 day period was extended by consent of the parties). Pending receipt of the Exchange Control consent £1.8 million was deposited, in the names of Kneale & Co. and Ashurst, Morris, Crisp & Co., solicitors for the purchasers, with the Midland Bank, for seven days fixed (subsequently renewed until release on 15 September 1976). The £18,789 interest earned on the deposit went to the purchasers. That completed, as Kneale & Co., confirmed in a letter to Ashurst, Morris, Crisp & Co. on 16 September, "stage one of this matter". There remained certain ancillary matters to be dealt with: the passing of Board Minutes in the form required by the purchaser, an alteration to the Company's Articles of Association, finalisation of the completion accounts, and property matters. C D

On 9 November the second instalment of the consideration, £259,493 (related to the value of net assets) was paid, £130,000 of which was deposited jointly in the names of the two firms of lawyers against any shortfall or surtax liability of the Company in respect of periods prior to the sale. E

At 6 December 1976 property matters had not been wholly dealt with by the Chester solicitors who had been instructed by the Company. We infer that these had been completed by 8 February 1977 when Kneale & Co. sent its account "in connection with services rendered to Millor" to Mr. William Clarke, who was auditor to the Company. F

5.10.5 The completion accounts, prepared by Arthur Young McClelland Moores & Co., are dated 30 September 1976. A statement, undated, of the financial position of Millor put before us at the hearing (document 11) records that following completion of the sale of the Company on 16 September 1976 the funds of Millor amounted to £2,457,744. "At the present time" ie presumably at the date of the hearing Millor's "net assets amount to £2,457,744 and with the exception of £1,500 consists of loans". A balance sheet (undated) of Millor as at 19 July 1976 shows the following: G H

ASSETS		
Shares of S. White & Sons (Queensferry) Ltd.		
3502 Deferred Ordinary at cost	£1,751	
3502 Ordinary at valuation	£2,457,742	£2,459,493
CREDITORS		1,749
		£2,457,744

I

A balance sheet of Millor as at 9 August 1976 shows:

ASSETS	
Debtor— Morris & David Jones Ltd.	£2,459,493
CREDITORS	1,749
	£2,457,744

We infer that these documents were prepared after the event, and reflect the total sums ultimately received by Millor. Document 11 already referred to states that Millor has not been required by the Manx authorities to produce accounts and "as the company has never traded" accounts have not been prepared for any period since incorporation.

6. Following completion of the sale by Millor to Jones of the shares of the Company, Stephen White, Brian White and Archibald White received loans from Millor. Details of these are set out in Table I below.

Table I

		Stephen White £		*Brian White* £		*Archibald White* £
Period to 31 March 1977	25.3.77	40,000	2.3.77	8,000		
		15,000	24.3.77	4,000		
Year to 31 March 1978	21.8.77	60,000	30.8.77	60,000	13.9.77	20,000
			28.2.78	6,000		
			24.3.78	4,000		
Year to 31 March 1979	4.4.78	35,000	17.5.78	15,000	31.7.78	10,000
			24.3.79	4,000		
Year to 31 March 1980			12.3.80	4,000	29.5.79	20,000
Year to 31 March 1981	3.4.80	60,000	9.4.80	11,000	7.10.80	20,000
	5.8.80	10,000				
	8.10.80	55,000	24.3.81	4,000	20.10.80	10,000
1 April to October 1981	30.9.81	(50,000)	3.8.81	10,000	30.9.81	20,000
			6.10.81	15,000		
		£225,000		£145,000		£100,000

After repayment by Stephen White of £50,000 on 30 September 1981 the loans totalled in aggregate £470,000.

7.1 In October 1981 the directors of Millor, by then Mr. Alvin Arthur Harding and Mr. Kennish (Mr. Kneale having resigned on 28 December 1979) resolved to advance the balance of Millor's funds with the exception of £1,500 (in fact already expended on options) to Stephen White, Brian White and Archibald White to enable them to purchase insurance policies. A summary of these insurance policies, which were taken out with Edinburgh Life

Assurance Ltd. ("Edinburgh"), a company having its head office and its registered office in Gibraltar, is set out in Table II below: A

Table II

	Stephen White	*Brian White*	*Archibald White*
Annual premium Policies			
Number of policies	60	20	20
Annual Premium on each policy	£2,000	£2,000	£2,000
Total premiums payable annually	£120,000	£40,000	£40,000
Total sum assured	£804,000	£300,000	£180,000
Date of commencement	5 September 1980	5 September 1980	5 September 1980
Deferred Annuity Contracts			
Number of contracts	8	8	8
Single premium	£120,000	£40,000	£40,000
Total premiums	£960,000	£320,000	£320,000
Annuity	£50,800	£10,040	£30,820
Date of commencement	7 October 1981	7 October 1981	7 October 1981
Day of attainment	7 October 1993	7 October 1993	7 October 1993

B C D E

7.2 The annual premium policies were, we were told, all in the same form. For Stephen White, born on 5 February 1921, the sum assured under each policy is £13,400 payable on 5 September 1990 or on his prior death. For Brian White, born on 4 December 1940, the sum assured under each policy is £15,000, also payable on 5 September 1990 or on his earlier death. For Archibald White, born on 17 October 1909, the sum assured in each case is £9,000, payable on 5 September 1990 or on death before that date. F

Copies of deferred annuity contracts were not put in evidence; we were told that no copies were available. The originals of both types were deposited with Edinburgh. G

8.1 The facts recorded in preceding paragraphs are based, except where otherwise indicated, upon documentary evidence, some of which was produced at our instigation as the hearing progressed: namely, details of the loans in Table I, the summary of the insurance policies in Table II, copies of specimen annual premium policies (one for each of the three Appellants), and photocopies of pages 1 to 23 of Millor's Minute book the last page of which records a directors' meeting on 17 May 1983 (the bundle originally put in contained typed copies of minutes of meetings up to and including 19 July 1976). H

8.2 Annual General Meetings of Millor were held on 13 September 1976, 7 November 1977, 19 September 1978, 30 October 1979, 26 November 1980, 16 December 1981 and 6 December 1982. Meetings of directors were held on 28 December 1979 (when Mr. Kneale resigned and the registered office was changed) and on 17 May 1983 when the registered office of Millor was again changed. No mention of the loans detailed in para 6 is made in any of the minutes. I

A 9. We heard oral evidence from Mr. William Clarke, FCA, of William Clarke & Co., auditors to the Company, of which firm Mr. Clarke is the sole principal; from Stephen White and from Brian White. In the following paragraphs we summarise their evidence, supplemented by information culled from the documentary evidence which was before us.

B 10.1 Mr. Clarke has been professionally qualified as a Chartered Accountant for some twenty years and continues to practise as such. He has had his own firm, which operates from his home, since 1967. He was auditor for the Company between 1973 and 1976. The Company did not have a full-time accountant and Mr. Clarke gave advice to the Company and acted as accountant and management accountant as well as acting as auditor.

C

10.2 In 1973 the Company, which traded under the name "Discount Foods", had about thirteen supermarkets and its annual profits were about £300,000. Until 1973 the Company had been expanding but expansion was becoming more difficult. Mr.Clarke discussed the future of the Company with Stephen White and Brian White. He saw two possible courses: to merge D with a similar supermarket business operating in the same area, or to sell the Company to a public company so that the business of the Company could be merged with that of the public company or a subsidiary.

Until 1973 the expansion of the Company had enabled it to avoid shortfall assessments on profits, because money was being laid out on stock, and E on fixtures and equipment which attracted capital allowances. Without expansion the Company would have lost perhaps three-fourths of its profits in taxation. In addition, the Company expected difficulties from competition with supermarkets operating from larger units in its own areas, which within a few years would send the Company's profits down.

F 10.3 Mr. Clarke's task was to explore both of the possible courses, and he sought advice, first from the Regional Head Office of Midland Bank Ltd. in Liverpool. The Bank's Financial Services Adviser, Mr. Gareth Hughes, introduced Mr. Clarke to Midland Bank Finance Corporation Ltd. in London, where Mr. Clarke saw Mr. Vernon Gordon. The result of that meeting was an introduction to Cornwall Property (Holdings) Ltd. G ("Cornwall") in April 1973. After preliminary information about the Company had been given by Mr. Gordon to Cornwall a meeting took place in Liverpool on 25 June between Mr.A.H.Main of Cornwall and Mr. Clarke. Cornwall was sufficiently interested in the idea of acquiring the Company to obtain further information about the Company's affairs but later Cornwall became itself the subject of a takeover bid and the matter came to nothing. H The Appellants took no part in the discussions, which were conducted on their behalf by Mr. Clarke, who reported to them on progress. That attempt came to an end in July or August 1973.

An introduction by Midland Bank Finance Corporation to Albert Heijn NV in 1973 also proved unfruitful.

I

10.4 Mr. Clarke then sought advice from Singer and Friedlander.Ltd., a merchant bank. In a letter dated 24 September 1973, addressed to Stephen White, with copy to Mr. Clarke, Mr. R. Panton Corbett, head of the corporate finance department of Singer and Friedlander "set out the pros and cons

of selling the business as opposed to obtaining a Stock Market Quotation for the shares". In relation to the possibility of sale he indicated, *inter alia*, that "if certain steps are taken prior to 5 April 1974, it should be possible to avoid most of the capital gains tax arising on the disposal of the business." The Whites decided to pursue the possibility of selling rather than obtaining a stock market quotation, and Singer and Friedlander introduced Key Markets Ltd., a subsidiary of Fitch Lovell Ltd.

Discussion with Key Markets and Fitch Lovell and the supply of information about the Company continued during October, November and December, and Mr. Clarke and the Whites were optimistic that the sale, the consideration for which was to be partly in cash and partly in Fitch Lovell shares, would be achieved.

On 18 December the Chairman of Fitch Lovell wrote to Stephen White in confirmation of a telephone call a few days earlier to say that the purchase of the Company at a price between £2.25m and £2.5m had been recommended to the Fitch Lovell board but the board had not accepted the recommendation. On the same day Mr. Clarke wrote to Mr. Corbett to tell him that Fitch Lovell were not proceeding and that the Whites had decided "not to make any further moves in view of the present financial climate". Mr. Clarke wrote in similar terms to the Chairman of Fitch Lovell, but leaving the way open for a further approach during 1974.

10.5 Meanwhile Midland Bank Finance Corproration had reported to Mr. Clarke, on 3 October 1973, "an enquiry from a customer interested in acquiring a company similar to" the Company; that came to nothing in December 1973. Another introduction, to Rosgill Holdings Ltd., ("Rosgill"), came from Industrial and Commercial Finance Corporation Ltd., who had been approached by Mr. Clarke in September. Rosgill, which had a stock market quotation, had a subsidiary called Moneysave which was faring badly and it was thought that a purchase of the Company would be advantageous to Rosgill. Mr. Clarke attended all the meetings with Rosgill, which were going on contemporaneously with the negotiations with Fitch Lovell. Proposals were put to Rosgill by ICFC on 20 December 1973 for the acquisition of the Company which would have resulted, assuming the necessary level of profits was achieved, in a consideration (mainly in cash, partly in Rosgill shares, and with some consideration deferred) of £2m.

In January 1974 the Rosgill board rejected the proposals.

10.6 In March 1974 Mr. Clarke approached International Stores Ltd., the supermarket subsidiary of British American Tobacco. In August or early September 1974 that approach came to nothing. In March or April a director of Fitch Lovell put Stephen White in touch with the managing director of John Holt Wines Ltd., ("Holt") in Liverpool who wanted to expand into supermarkets. Discussions with Holt continued until July and a price of £2 million was agreed in principle. Holt was a subsidiary of Lonrho and the proposed acquisition was rejected by the Lonrho board as an immediate proposition, but put on the shelf and was not finally rejected by Lonrho until 1975.

An approach by Saatchi & Saatchi and Company Ltd. in February 1974 was thought unsuitable by Mr. Clarke and the Whites.

A In October 1974 Mr. Clarke approached Oriel Foods Ltd. ("Oriel") which had recently acquired Jones, but Oriel was not interested at that time.

10.7 In May 1975 Mr. Clarke wrote to Combined English Stores Ltd.; that produced no result. Stephen White received an approach from G.and W. Collins Ltd. ("Collins") a food wholesaler operating on Merseyside which B wanted to expand into retailing; a price of £2m was agreed in principle, but the board of Collins' parent company rejected the recommendation to purchase the Company.

10.8 In March approaches were made to Stephen White by Stephen Parkyn Ltd., Industrial and Financial Consultants, with an address at 9 C North Audley Street, London, who described themselves as "professional intermediaries of repute", on behalf of "a client with whom we are working"; and Chesham Amalgamations and Investments Ltd. of Manchester who stated it was "the leading European company involved in planned mergers, corporation acquisitions and hive-offs" and believed that it "could put forward some interesting suggestions". Nothing came of those approaches.

D

10.9 In the summer of 1973, as well as talking to ICFC and Singer and Friedlander, Mr. Clarke went to see Mr. J.A.M. Humphreys of Cee-N-Cee Supermarkets, and Paddy's super stores ("Paddy's"), with a view to the three businesses amalgamating into a single group. When Singer and Friedlander pointed the Company towards a sale the talks with Cee-N-Cee and Paddy's E stopped.

By the end of 1975, Mr. Clarke and the Whites felt that they had approached almost every potential purchaser. Early in 1976 Stephen White again approached Mr. Humphreys who still showed interest. In February or March 1976 Mr. Clarke initiated talks with Kneale & Co. about establishing F a holding company in the Isle of Man, a holding company, wherever situated, being regarded as the simplest way of achieving a merger of the Company with Cee-N-Cee, since neither business had enough cash to take the other over. Mr. Clarke also asked Kneale & Co. about tax legislation in the Isle of Man.

G 10.10 At about the same time as discussions were resumed with Mr. Humphreys, Mr. D.G.C. Webster, a director of Oriel, asked Mr. Clarke if the Company was still up for sale. Mr. Clarke said it was, and negotiations for a sale of the Company to Oriel began. On the Company's side those negotiations were conducted by Mr. Clarke, Stephen White and Brian White. Archibald White took no part in these, or in the earlier, negotiations. The H negotiations with Cee-N-Cee, and Kneale & Co.'s advice, were meanwhile set aside.

The negotiations with Oriel, which had been acquired in 1974 by RCA Corporation of America, involved much work. Figures were discussed as early as May, and it was known that if a sale went through the consideration I would probably be in excess of £2m; and in cash. In the first half of June 1976, there were reports in the national and trade press that RCA, which had had a change of management, was regretting its venture into food, additional to its traditional electronics business. Upon enquiry from Mr. Clarke, on 14 June, Mr. Webster confirmed that the meeting arranged for 17 June, at

Jones' office in Liverpool, should take place. Mr. James Gulliver, Chairman of Oriel, and Mr. Alistair Grant, a director of Oriel, Mr. Webster, Stephen White, Brian White and Mr. Clarke attended. The Whites wanted to know how the proposed deal with Oriel stood. The Oriel directors had had no instructions from RCA, and said that the price which RCA was asking for Oriel (£25m) was too high for them to buy it, and might make it necessary to split up Oriel's separate activities and sell them off separately. The Whites and Mr. Clarke left the meeting feeling despondent. They met the next morning at the Company's offices to take stock. They had exhausted other potential purchasers, trading prospects for the Company as it stood were not good; it was decided to go back to Cee-N-Cee. Stephen White telephoned Mr. Humphreys, who was willing to resume talks, and Mr. Clarke went on 21 June to Douglas to discuss with Kneale & Co. the formation of a holding company.

10.11 Mr. Kneale had a company, Millor, available and Mr. Clarke gave firm instructions to arrange matters, notwithstanding that there was no firm agreement with Cee-N-Cee, so that Millor would acquire White as a subsidiary. That involved an increase in Millor's capital (see para 5.6 above).

10.12 On his return from Douglas Mr. Clarke received a telephone call from Mr. Webster asking if Mr. Clarke and the Whites could meet him on 25 June to continue discussions. The meeting took place at the offices of Ashurst Morris Crisp & Co. in London. Mr. Webster had still received no directions from RCA but wanted to continue the negotiations, and he handed the Whites and Mr. Clarke the bundle of press cuttings which constitutes bundle 8 of the exhibits. Mr. Clarke thought the chances of a sale had not improved one whit since the previous week, but thought that Mr. Webster's wish to continue the discussions offered a glimmer of hope. It was the first time that Ashurst Morris Crisp & Co. had appeared on the scene, and Mr. Webster asked if a draft contract, ninety per cent of which would be in standard form, could be sent to the Whites' solicitors, even though the main part of the deal had not been agreed; he was told that the draft should be sent to Kneale & Co. as lawyers for Millor, and Mr. B.M. Walker, the partner of Ashurst Morris Crisp & Co. entrusted with the matter, despatched the draft contract the same day.

10.13 On 24 June, Mr. Clarke had sent a draft of the July agreement, prepared by himself, to Kneale & Co (see para 5.7 above). Having received the draft of the August agreement from Mr. Walker, with the possibility of a sale by Millor to Oriel in mind, Kneale & Co. suggested a stamp duty saving scheme, which they explained to Mr. Clarke when he made another visit to Douglas at the beginning of July. After reporting to the Whites on his return Mr. Clarke gave instructions for the stamp duty scheme to be adopted. The steps relating to this, and to the completion of the share exchange agreement between the White shareholders and Millor, are set out in paras 5.4 to 5.8 above. Mr. Clarke was the channel of communication between Kneale & Co., who prepared the documentation for the Company, and the White shareholders. He filed the requisite returns with the Companies Registry.

10.14 Between 25 June, when Mr. Walker sent the draft share sale agreement to Kneale & Co., and 3 August 1976, correspondence between the two firms continued, concerned principally with obtaining and providing information about the Company (for which Kneale & Co. had to rely upon the Company's English solicitors in Chester) and revision of the draft agreement

A in accordance with negotiations on price, and other non-standard terms, carried out between the principals on either side, and with agreements ancillary to the main agreement. Mr. Clarke was aware that the correspondence was taking place and was consulted about amendments to the agreement. Meanwhile in July Mr. Webster was looking at the Company's accounts, and there were meetings in Liverpool, where Oriel's main business was, on several B occasions. Oriel's main concern was that there had been a fall in the Company's profits, and it wanted part of the consideration to be deferred and to depend upon the profit record for a period after acquisition. That was resisted by the Whites because once they no longer controlled the Company they could not control the profits either.

C No direct information had come from RCA that the deal would proceed, although the Oriel directors gave the Whites to understand that it would, if they would agree to the deferment point. Although the contract had not been finally settled it was agreed that a meeting would be held on 9 August, and if a deal could be done the contracts would be altered by hand, if necessary, and executed. Meanwhile during July, Stephen White continued D to talk to Mr. Humphreys of Cee-N-Cee, and they were looking at each others businesses. On 9 August, at Ashurst Morris Crisp & Co.'s offices, the negotiations with Oriel were concluded and the August agreement altered and signed. Stephen White, Brian White and Mr. Clarke attended the meeting in order to conduct the negotiations; Mr. Kneale and Mr. Kennish attended, that they might sign the agreement on behalf of Millor, and also E ancillary documents.

10.15 In due course Millor received the proceeds of sale of the shares. The way in which the proceeds of sale, other than £1500, were dealt with is set out in paras 6 and 7.1 above. There are no written agreements about these loans, but they are debited to Stephen White, Brian White and F Archibald White in Millor's books. The £1500 was used by Millor to acquire options not as yet exercised, in three other Isle of Man investment companies, the owners of which were unknown to Mr. Clarke.

In addition to borrowing from Millor, the Messrs. White have also borrowed from Edinburgh against the security of the deferred annuity policies G which have been deposited with Edinburgh in Gibraltar.

Mr. Clarke advises Millor. He was also the channel of communication between each of the three shareholders of Millor (namely the three Whites) and Millor's directors.

H 11.1 Stephen White's evidence about the course of events up to the time of the August agreement was to the same effect as Mr. Clarke's in so far as it dealt with the same events. In addition he told us that the success of the Company was due to stringent controls, and computerisation, which enabled it to work on low profit margins, yet obtaining a good net profit and a high gross profit. In his view this was what potential purchasers of the Company I were really interested in and once they had discovered how the Company achieved its results they lost interest in purchasing.

11.2 The attraction of a merger with Cee-N-Cee was that their retail units were larger than the Company's, and their turnover greater. Their net

profit, however, was only one third of that of the Company, and the two managing directors thought that the combination of Cee-N-Cee's larger units and the Company's expertise with control and computerisation would make for success. There had been early discussions with Mr. Humphreys of Cee-N-Cee, but on this occasion a Mr. McLoughlin, a director of Paddy's also joined the discussions. The main discussions, however, were with Mr. Humphreys. Talks continued with Mr. Humphreys (but not it would seem with Mr. McLoughlin) while the negotiations with Oriel were taking place, but–to adopt Stephen White's phrase–"the talks were going hot and cold." Meanwhile the negotiations with Oriel went on for some time and went quite well up to the first week in June or thereabouts when the news about RCA's disenchantment with its diversification into food suggested to Stephen White that there was not going to be a deal with Oriel. At the meeting on the following day he announced his intention to concentrate on the negotiations with Mr. Humphreys, whom he met on 22 June while Mr. Clarke was obtaining a holding company in the Isle of Man, ostensibly to receive shares of the Company, Cee-N-Cee and Paddy's stores (or of the companies respectively owning those businesses). It was a long meeting, because there were "an awful lot of things to discuss, an awful lot of details and things to do before we could come to a final agreement on which the thing would be set up". As yet no value had been settled between them for either business, nor had the best method of operation been decided upon—the Company used concessionaires for cooked meats and off-licence, but Cee-N-Cee did not. That meeting was three days before the meeting with Oriel on 25 June, following which the draft contract was sent to Kneale & Co.

11.3 The prospects, as Stephen White told us he saw them, of a deal with Oriel were further depressed by a report form Oriel's auditors, who were investigating the Company's figures, that the Company's profits were not being maintained. That gave rise to discussions about deferment of part of the consideration. Talks with Oriel continued during July. Towards the end of July they became more active. Stephen White inferred that Oriel had come to an agreement with RCA and was ready to talk about the outstanding points. A meeting was arranged for 9 August, on the footing that if a contract was to be entered into it must be at that meeting or not at all. The sticking-point, so far as Stephen White was concerned, was the deferred consideration. After Stephen White and his party had walked out of the meeting a compromise was reached and the agreement was signed, though still conditional upon certain administrative matters such as Exchange Control consent. It remained to tell Mr. Humphreys that a merger with his company was no longer possible. Stephen White said that he was happy for there to be a sale to Jones but would have been "quite happy to do it the other way", i.e. to merge with Cee-N-Cee.

11.4 Stephen White was vague about the dates on which he received from Millor the loans totalling £275,000, later reduced to £225,000, the amount of each individual loan, or the purpose for which he required them, mentioning only that in the beginning he was short of money which he needed to keep up his standard of living, and, in cross-examination, that he put some money into a property company called Gainland. He kept no separate record of the loans that were made to him. The monies were paid into his bank account. Eventually, before 1981, Mr. Clarke—to whom Stephen White had delegated the task of looking after the money which Millor had received—said that loans could not continue to be taken out of Millor: something else had to be arranged. Mr. Clarke proposed a larger loan to be

A invested in insurance policies designed to produce sufficient to repay in due course all the monies borrowed from Millor. Stephen White recalled the total required for premiums (£1.2m) but not the details of individual premiums and policies. In cross-examination he said that he would not have asked Mr. Clarke to arrange a loan for him from Millor if he had thought there was no chance of getting one but said that he did not put his chances higher than B 50/50. He said he did not know the precise state of Millor's assets because he left that to Mr. Clarke and Millor's directors. He had met Mr. Kennish, but not Mr. Harding who replaced Mr. Kneale as a director in December 1979, though he had been consulted about the change by Mr. Clarke. He told us that he gave no suggestions or directions to Mr. Clarke as to what approach he should adopt in relation to Millor's investments; he had dealt with Mr. C Clarke for so long that he was happy with whatever Mr. Clarke, as financial adviser, suggested, relying upon Mr. Clarke's knowledge and his loyalty to him, Stephen White. He would not, however, have sat back if Millor had used the money it had received in a way he objected to.

11.5 When the summary of loans (see para 6 above) was produced, on D the fourth day of the hearing, Stephen White was recalled for further examination. The £40,000 borrowed in March 1977 was invested in Gainland, the £15,000 was lent to his son to buy a house. The £60,000 borrowed in August 1977 was borrowed partly for general living expenses, and in order to invest (in what manner was not specified) in another firm; that investment did not proceed and the loan was later repaid (we infer that that was the repayment E of £50,000 in 1981). About the reason for borrowing £35,000 in April 1978 Stephen White could recall nothing. £60,000 borrowed in April 1980 was in order to lend money to his daughter to buy a house. £10,000 borrowed in August 1980 was lent, in tranches over three years, at about 10 per cent interest, to a company called Clwyd Business Machines, in which Stephen White is not a shareholder; the loan is repayable in 1984. Stephen White had F no recollection of the reason for borrowing £55,000 in October 1980. He has also borrowed, sums of approximately £20,000 from Edinburgh, on each of four occasions, for general expenses. There is a limit to the total amount that he can borrow from Edinburgh; it is not his present intention to go beyond the £80,000. He does not know whether the loans from Edinburgh carry interest but assumes they do. He is not aware of having paid any interest on G them.

12.1 Brian White, formerly a shareholder in the company, and since July 1976 a shareholder in Millor, is now a director of Gainland (which is a property development company) and has acquired an interest in a video company in which he is the sole shareholder and of which he and his wife are directors. H He told us that he was less involved than Stephen White in the discussions about the future of the Company which began in 1973, being concerned with the running of the supermarkets, but attended meetings from time to time, and knew of the intention to sell the Company, and attended the meetings which took place with the various prospective purchasers, each of which attempts fell by the wayside. He knew, too, of the discussions with Mr. I Humphreys, and the proposal to form a holding company in the Isle of Man; it was pointed out to him that there could be possible advantages in that for the future. He attended the formal meetings with Oriel, and shared the view of his co-directors that the press reports about Oriel's parent company wishing to sell its food interests made a sale to Oriel unlikely, but otherwise

remembered little in detail. He recalled the meeting at which it was decided to concentrate on the negotiations with Cee-N-Cee, and Mr.Clarke's sortie to the Isle of Man to arrange for the holding company. He also recalled, though not in detail, the meetings on 9 July to reorganise the capital of the Company, and the subsequent board meetings of the Company on 14 and 20 July, and the exchange of shares in the Company for shares of Millor on 19 July. At that date he saw no chance of success with the Oriel negotiations, and his expectations did not change until 9 August when the agreement with Oriel was in fact reached. He himself did not take part in the negotiations on 9 August, but when Stephen White walked out of the meeting he Brian White "followed along".

12.2 Questioned about the loans totalling £145,000 which he had received from Millor, Brian White was unable to remember when he first sought a loan, but said that the loans were partly to maintain his living standards, and partly to start Gainland. The Gainland loan would have been about the time when his three-year contract with the Company, entered into in connexion with the sale to Jones, was about to end. He approached Mr. Clarke for the loans, and received cheques from Millor which he paid into his bank account. He could not remember discussing with his father or with Stephen White the possibility of obtaining loans from Millor, and had no idea, until he spoke to Mr. Clarke, how he was going to borrow the money. In further examination, after the summary of the loans (see para 6 above) had been produced, Brian White was able to expand his recollection. The five loans, each of £4000, were used to pay annual premiums on insurance for the benefit of his children. The £60,000 borrowed in August 1977 was used for or towards the purchase of his present house. There was no loan specifically related to the investment in Gainland but he put £40,000 from the loans into that company in one tranche. The remaining £25,000 was used to supplement his living standards. There was also something left over from the proceeds of sale of his former house, but he could not remember how much. The new house cost between £50,000 and £60,000.

The shareholders of Gainland are Brian White as to one-third, Stephen White and his wife Mrs. R. White as to one-third, and Mr. Roberts as to one-third. We were not told where Gainland was incorporated.

12.3 Brian White was clear about the sum of £400,000 borrowed from Millor, and used to buy insurance policies, although he knew no details of the policies and had no copy of them. Mr. Clarke had suggested the further loan, so that policies might be bought which would insure the repayment of the loans at a future date. He, too, had borrowed sums from Edinburgh, about £10,000 on each of two occasions. Mr. Clarke arranged the borrowing.

12.4 Brian White said in cross-examination that he had not calculated what his share of the proceeds of sale would have been had he sold his 700 shares in the Company direct to Jones on the same terms as the agreement of 9 August 1976, though later agreeing that he had some idea of the amount of money involved, and the value of his shares. He, too, looked to Mr. Clarke to take care of Millor's affairs, and to advise him personally. He did not concern himself with the way in which Millor looked after the monies which it had received.

A *Submissions of the Parties*

13. Mr. Price's submissions on behalf of the Appellants may be summarised as follows:

13.1 The only disposals by the Appellants were (1) the disposals by way B of exchange of the ordinary shares in the Company for an equal number of ordinary shares in Millor (2) the disposals of deferred ordinary shares of the Company for cash (of 50 pence per share).

13.2 The only capital gains tax payable in respect of the transactions under consideration is that which relates to the disposal of the deferred ordi- C nary shares for cash.

13.3 The disposal of the ordinary shares is not to be treated as a chargeable disposal for capital gains tax purposes because of the combined effect of paras 4(2) and 6 Sch 7 Finance Act 1965.

D 13.4 The July agreement was not part of a prearranged scheme leading inexorably to the August agreement, it was not entered into as part of a larger transaction (*Floor* v. *Davis* 52 TC 609, per Eveleigh L.J., at p. 633G).It was part of an arrangement which was wholly alternative to that, and set in hand at a time when the Appellants regarded the prospect of any sale to Jones as being no more than a forlorn hope.
E

13.5 If that were not accepted *Furniss* v. *Dawson*(1) (1983) STC 549 provides clear authority for the proposition that no tax is payable. In *Furniss* v. *Dawson* there was clearly a prearranged scheme, but it fell out of the mischief of *W. T. Ramsay Ltd.* v. *Commissioners of Inland Revenue*(2) 54 TC 101 because there was no self-cancelling effect in respect of the Isle of Man com- F pany, which was a permanently established investment company intended to operate as such. Similarly here, Millor's commercial function was conceived and planned quite separately from the sale to Jones; it was not intended as a mere temporary device for the purpose of that sale.

G 13.6 If Millor, as owner of the shares in the Company, is to be ignored and the transactions are to be treated as a sale by the Appellants direct to Jones there could be, as in *Furniss* v. *Dawson*, the possibility of double taxation on the same gain: the tax presently claimed in the disposal of shares of the Company, and taxation on a future disposal of the shares of Millor, the acquisition cost of which would be the acquisition costs of the shares of the H Company, because the Appellants would be treated as having acquired their shares in the Company. That is an inescapable consequence of ignoring the disposal by the Appellants of their shares in the Company to Millor. The present case is stronger than *Furniss* v. *Dawson* in that here there was no prearranged scheme for the avoidance or reduction of capital gains tax; and while Greenjacket (in *Furniss* v. *Dawson*) had the beneficial ownership of the I shares transferred to it for a few hours at most, Millor was legal and beneficial owner of the shares of the Company from 19 July until 9 August. The longer interval of time in the present case is explained by the fact that no sale, to Jones or to anyone else, had been organised; it was only after Millor

(1) 55 TC 324 (2) [1982] AC 300.

had become the beneficial owner that a sale to Jones became a real possibility and, on 9 August, a reality. A

13.7 The loans by Millor to the Appellants are not to be equated with a winding-up of Millor. Millor exists. Its assets have not been dissipated. A loan is not a disposal for capital gains tax purposes. The Appellants remain potentially liable to Millor as borrowers. B

14. Mr. Hinson's submissions on behalf of the Revenue may be summarised as follows:

14.1 It is not necessary that all the transactions under consideration should have been pre-ordained in the sense that they were deliberately fitted together as happened in *Floor* v. *Davis* and in *Furniss* v. *Dawson*. The principle stated by Eveleigh L.J. in *Floor* v. *Davis* should be extended to cover the transactions of 19 July and 9 August. Those transactions constitute stage one of the arrangements. C

14.2 In *Floor* v. *Davis* it was an integral part of the scheme that six-sevenths of the proceeds would be siphoned off via the Cayman Islands company Donmarco. The lending of the proceeds of sale by Millor to the Appellants on the terms and conditions on which the monies were lent should be regarded as the equivalent of stage two in *Floor* v. *Davis:* save for £1,500, all the money received by Millor has been disbursed as interest free unsecured loans to the Appellants, in respect of which there are no written agreements. In *Furniss* v. *Dawson* a second stage was not found, and *Furniss* v. *Dawson* can be distinguished on that ground. D E

14.3 Millor has not behaved as an investment company should. Its assets stand at the same figure now as in September 1976. It is unlikely that the loans could be recalled by Millor without the consent of the White shareholders; if they were recalled, it is unlikely, since the loans have been invested in insurance policies over which Millor has no control, that the monies borrowed could be repaid. F

14.4 It is significant that a non-resident company, such as Millor is, cannot be a close company, and therefore the question of liability to tax under s 286 Income and Corporation Taxes Act 1970 (loans to participators) cannot arise. In *Furniss* v. *Dawson* the proceeds of sale of the Wood Bastow shares were left in Greenjacket; here the money has come out of Millor (the equivalent of Greenjacket) in the form of loans. The prospect that the shares of Millor will be sold, or the company liquidated, is a faint one. G H

14.5 There was an element of circularity here, as there was in *Floor's* case. The shares, which started in the Whites' ownership, were transferred to Millor, and sold by Millor to Jones, and the circle was completed when the proceeds of the sale were received by Millor which is controlled by the Whites. In assessing the position, it is permissible to look at what ultimately happened. I

14.6 A possible alternative is to regard the exchange of shares on 19 July as stage one, the sale by Millor on 9 August as stage two, and the loans by Millor to the Appellants as stage three of the scheme which the Revenue alleges. It does not matter whether or not it was initially part of the scheme that the monies would be got out in the way that they were.

A 14.7 The transfers of shares to Millor should be treated as fiscal nullities for capital gains tax purposes. On that footing the whole of the gains would be assessable on the Appellants in 1976–77.

14.8 If on the other hand the Appellants fall to be assessed on the amounts which they received from Millor by way of loans, and at the times B when the loans were made, it is relevant that in 1976–77 loans were made only to Stephen White and to Brian White, but in 1977–78 to all three Appellants.

15. In reply, Mr. Price submitted:

15.1 There is not even a stage one in the present case. The phrase "com- C posite transactions forming part of one tax avoidance scheme" [*Furniss* v. *Dawson* [1983] STC 549, at p.572j] is a useful guide to what consitiutes a relevant series of transactions. The first stage must be at the time when the series was embarked upon. At 19 July there was no composite series of transactions such as the Revenue relies upon in mind. What had looked like promising negotiations with Jones' United Kingdom parent company ceased D to be so in June when the press reported the American parent company's wish to dispose of its food interests. The hope of concluding a sale to Jones was too remote to be the cause of the reconstruction of the Company or of the transfer of shares on 19 July. These arrangements were part of the alternative project of merging with Cee-N-Cee.

E 15.2 The evidence was that Millor was acquired with the sole object of forming a group for holding the shares of the operating companies. Any long term benefit that there might be was for investigation later. The necessary element of pre-ordainment is lacking in these transactions.

15.3 If, however, there were a first stage on 19 July, there was perhaps a F second stage on 9 August; but the agreement reached on 9 August was achieved in circumstances in which forward planning about how the money coming to Millor might be used could not have taken place.

15.4 There is no evidence to show that what Millor has done with its money is not in accordance with its constitution. It cannot be said that the G loans are not repayable on demand, nor that they will never be repaid. They were not made in proportion to the respective interests of the Appellants in Millor, nor were the Appellants certain of obtaining loans from Millor. Millor is a continuing company with continuing rights including rights in relation to the loans. The separate legal entity of Millor is not to be ignored. The insurance policies would produce more than sufficient to repay the loans.

H

15.5 It cannot be that the liability to tax in respect of a transaction in 1976 is to be determined by reference to what was done in 1981, not foreshadowed by anything that had gone before. Nor can what happened before 1981 in respect of loans found any inference as to the intention of the Appellants on 19 July or 9 August 1976.

I

Conclusions

16. In the first instance, all depends—as Mr. Price said in opening—upon the facts. We had twenty bundles of documentary evidence to consider,

and we had the oral evidence of Mr. Clarke, Stephen White and Brian White. A

16.1 Seventeen of the bundles had been prepared, and agreed, before the hearing. Some of them had certain lacunae. The Balance Sheets of Millor as at 19 July and 9 August 1976 are undated and give only sketchy information. The statement of the financial position of Millor (bundle 11) is undated, B although it is clear that it was prepared after October 1981. The loans made to the Appellants are recorded as totals without reference to the dates on which they were made. It was only at our urging that fuller details (bundle 18) were provided (recorded in para 6) although the Revenue, on learning from a letter dated 22 July 1983 received a week before the hearing, of the loans made by Millor to the Appellants, indicated that one of the questions C in issue would be the precise details, including the terms, dates and amounts, of such loans (bundle 16). It was also at our urging that information about the insurance policies was assembled and put in evidence (bundle 18: the details are recorded in para 7), and copies of specimens of the annual premium policies (bundle 19) were produced. It was only during the course of the hearing that copies of all the entries in Millor's minute book were pro- D vided, to fill out the selected extracts in the agreed bundle 3. Included in the agreed documents was bundle 13 (part of which is reproduced in para 5.5 above) which was referred to by neither party during the hearing.

16.2 Mr. Clarke's recollection of certain matters had to be corrected during the course of the hearing. In examination-in-chief he stated that there E was a written agreement covering the repayment of the loans made in 1981 to purchase insurance policies, and that it was with Millor in the Isle of Man. After telephoning Mr. Kennish in the Isle of Man he said, in cross-examination, that he was mistaken. Mr. Kennish had told him that a loan agreement had been drafted but none had been executed. In cross-examination Mr. Clarke stated that the insurance policies were with the brokers in the Isle of F Man who had lodged them with the insurance company. In further examination, after Mr. Clarke had visited the Isle of Man to obtain more information about the loans and insurance policies, and to obtain copies of specimen policies, it emerged that the policies had been taken out with Edinburgh, a Gibraltar company, and that there had been further borrowings against the policies themselves. In initial cross-examination Mr. Clarke said that he did G not know on what the Appellants had spent the £470,000 they had received between them. Later, after he had extracted the details of the loans and these had been put in evidence, his memory was refreshed and he was able to recall the more substantial of the particular items for which the borrowed monies had been sought.

H

16.3 Stephen White was unable to recall, in examination-in-chief, particulars of the loans made to him and had kept no record; nor could he remember when the first loan was obtained. It was only when he was referred to the details extracted by Mr. Clarke that he recalled some of the major purposes for which he had required loans. He was unable even then to recall the reason for borrowing £35,000 in April 1978, and £55,000 in October 1980. Of I the £80,000 or thereabouts borrowed from Edinburgh since 1981 he could only say that it had been used for general expenses. He did not know whether interest was payable on the Edinburgh loans.

16.4 Brian White could not remember when he first sought a loan. He "thought" his service agreement with the Company was a three-year contract. He could remember no details of the insurance policies. He had not

A calculated precisely what the proceeds of sale of his shares would be. Of the loans from Millor he could remember, at first, only the sum he had borrowed to invest in Gainland. He "thought" he owned one-third of the shares in Gainland. His recollection, too, was refreshed by the information extracted from Mr. Clarke.

B 16.5 There was a lack of precision in much of the evidence of these witnesses, especially in relation to events after 9 August 1976. We heard no evidence from Archibald White. Mr. Price said that he was not well enough to come to London, and that it was considered that the facts relating to the appeals would emerge from the documents. He invited Mr. Hinson to apply for Archibald White to be made available for cross-examination, but no such C application was made.

17. As yet we have only summarised (in paras 10, 11 and 12) the evidence of the three witnesses. There are two aspects of that evidence which require consideration: the view to be taken of the negotiations which immediately preceded the August agreement; and whether there is any evidence of a pre-D arranged scheme, as contended by the Revenue, and denied by the Appellants.

18. Mr. Clarke, and Stephen White, were insistent that the sole purpose of acquiring Millor was to act as a holding company for the shares of the çompany and Mr. Humphreys' company, and any other company which might join the group. Early in 1976 Stephen White approached Mr. Humphreys with a view to resuming talks about a merger between the E Company's business and that of Cee-N-Cee. In February or March Mr. Clarke initiated talks with Kneale & Co. about establishing a holding company in the Isle of Man. At about the same time as discussions were resumed with Mr. Humphreys, Mr. Webster of Oriel asked Mr. Clarke if the Company was still up for sale. Serious negotiations began with Oriel and the negotiations with Cee-N-Cee were set aside. On 25 March Millor appointed F bankers, the first occasion since its incorporation nearly three years earlier. The talks with Oriel continued. The press reports about RCA's disenchantment with its food operation which appeared on 12 June suggested a set back, but the meeting arranged for 17 June in Liverpool (see para 10.11) took place as planned. The witnesses came away from that meeting feeling despondent. On 18 June Stephen White telephoned Mr. Humphreys with a G view to resuming talks about Cee-N-Cee and shortly afterwards, on 21 June, Mr. Clarke went to the Isle of Man and arranged to acquire Millor as a holding company. He returned from Douglas the same day, and on his return received a telephone call from Mr. Webster of Oriel asking for a further meeting on 25 June. On 23 June Millor's capital was increased sufficiently to enable it to acquire the Company on the basis of a one-for-one H share exchange. The meeting on 25 June took place at the offices of Oriel's solicitors in London, and the same day a draft contract for the acquisition of the Company was despatched to Kneale & Co. (It is significant that it was to Kneale & Co that the draft contract was sent although it was not until 14 July, nearly three weeks later, that Millor's offer to acquire the Company's shares was reported to the directors of the Company.) Thereafter discussions I and correspondence continued until the stormy meeting on 9 August when the agreement was executed between Millor (since 19 July the beneficial owner of the Company's shares) and Jones, Oriel's subsidiary. We do not accept the witnesses' reservations that throughout this period they had only minimal expectations that the agreement would be concluded.

Nor do we accept that the sole purpose of acquiring Millor was to act as a holding company for the purposes of a merger between the Company and Cee-N-Cee. The view we have formed is that Stephen White's approach to Mr. Humphreys early in 1976 was made as a final resort after repeated unsuccessful attempts since 1973 to dispose of the Company. We infer, from the fact that so soon as Oriel reappeared as a possible purchaser the talks with Mr. Humphreys were set aside, that Stephen White and Brian White regarded a deal with Oriel as a more desirable target than a merger with Cee-N-Cee. In our view that was the end which they and Mr. Clarke strove for. Progress towards that end faltered between 17 June, or perhaps 14 June, and 21 June, but from the meeting on 25 June resumed more strongly and continued, albeit not always smoothly, towards the execution of the agreement on 9 August. That talks with Mr. Humphreys, resumed after the disappointing meeting on 17 June, continued notwithstanding the increased purposefulness from 25 June onwards of the discussions with Oriel occasions no surprise. We have seen (para 10.5) that negotiations with Rosgill were going on contemporaneously with negotiations with Fitch Lovell. We infer that, with the setback in the first half of June in mind, Stephen White was again keeping his options open. The evidence does not, in our view, support the contention that the sole purpose of a merger between the Company and Cee-N-Cee, and we so find. (We note without drawing any conclusions about it, that the offer by Millor to acquire the Appellants' shares was to remain open until 9 August 1976, the day the agreement with Jones was concluded).

19. We turn now to the question of whether there was a pre-arranged scheme of the kind which was the subject of consideration in *Floor*, or of the nature considered in *Dawson*. The witnesses insisted that there was no pre-arranged scheme; that the events which occurred after the agreement with Jones was entered into happened as they came, each event, or series of events, newly generated as it arose.

19.1 The effect of the July agreement was merely to exchange shares in an Isle of Man company for shares of the Company. No cash changed hands. That agreement was entered into at a time when the Appellants and their adviser Mr. Clarke were working towards an agreement for the sale of the Company's shares to Jones, an agreement which would produce between £2.25m and £2.5m in cash. It must have been apparent to the Appellants that the proceeds of such a sale would be paid not to them but to Millor. The evidence of Stephen White and Brian White was that some time after the August agreement they approached Mr. Clarke about the possibility of obtaining loans; Stephen White said that he did not put his chances of getting a loan from Millor above 50/50. Brian White said that until he spoke to Mr. Clarke he did not know from whom he could obtain the loans. We find these accounts disingenuous. It is difficult to believe that Stephen White would not have asked Mr. Clarke, before the July agreement with Millor was entered into, what possibility there was of his getting the use of any proceeds of sale, or part of them. If Mr. Clarke had said that that was not going to be possible it is difficult to believe that the July agreement with Millor would have been entered into. We infer that Mr. Clarke was able to reassure Stephen White on this score. We also infer that Brian White would have known of such reassurance, even if he had not himself received assurance direct from Mr. Clarke. We infer that Archibald White, would also have known of it, even if he did not seek assurance direct from Mr. Clarke.

A 19.2 We see that the first loans were made in March 1977: to Brian White on 2 March 1977, within a month of the completion of the August agreement (see para 5.9.4); and to Brian White and Stephen White on 24 and 25 March 1977 respectively. (Archibald White's first loan was in September 1977). Any assurances that Mr. Clarke offered to the Appellants may well have been in general terms, but we have no doubt that such assurances were B given; and that Stephen White and Brian White and Archibald White entered into the August agreement with the understanding that arrangements could be made for them to have the use of the proceeds of sale directly or indirectly, for their own purposes and as required, and we so find. We have derived support for that finding from the evidence of Mr. Clarke who said that the "wealth of Millor Investments is obviously for the benefit of the C Whites, and if they require some funds from Millor Investments then it is only sensible that Millor Investments would advance those funds to them".

19.3 Mr. Clarke also said that "the Whites had to decide what their future policy was going to be in regard to Millor. They decided that Millor should invest those funds, not to receive income because income tax was so D high, and that they should make arrangements to invest those funds for future capital gain". That is on the face of it, hearsay evidence, but neither Stephen White nor Brian White, who were present when Mr. Clarke gave his evidence, contradicted that statement when they later gave evidence themselves. (We think there may have been some confusion on Mr. Clarke's part; Millor is an Isle of Man company and it is our understanding that income E tax in the Isle of Man is materially lower than in the United Kingdom). What we were able to piece together from the oral evidence is that when the first payment of £1.8m was received in September 1976 it was paid into Millor's bank account. Fifteen hundred pounds was spent on acquiring options in three Manx companies, the owners of which were unknown to Mr. Clarke (see paragraph 10.15), and the remainder was "invested" by way of F interest free loans to those same companies, who invested the funds received for capital gains "and were instructed" Mr. Clarke, said "that the basis of the loans to them was that they would only invest for capital gains and would not have income themselves". (It is not clear why such instructions were given to the companies which received the loans, since Millor could expect to be repaid no more than the amounts it had lent. Perhaps Mr. Clarke had his G eye on the Charybdis of s 478 as well as the Scylla of capital gains tax).

19.4 In 1981, when Millor needed £2 million to lend to the Appellants to enable them to buy insurance policies the companies to whom Millor had lent monies had to call in from those with whom they had been deposited the monies which they had borrowed from Millor. We find it difficult to under- H stand how Mr. Clarke, as the Appellants' financial adviser, in whom as they told us they told us they trusted implicitly, could justify the lending of very large sums of money to companies whose owners were unknown to him. No particulars were provided of the names of the borrowers, the amounts lent, the dates on which the money was lent and later repaid, or what form of monitoring was used to ensure that Millor's instructions to the three compa- I nies were carried out. The loans totalling £470,000 to individuals must also have occasioned movement in the loan accounts between Millor and the three investment companies, since—we were told—the monies received from Jones did not stay in the current account in Millor's name very long. The reluctance to provide more than minimal information about the loans made

prior to 1981 to the Appellants, or about the insurance policies, coupled with the reticence about dealings with the other monies of Millor between 1976 and the purchase of the insurance policies have suggested to us a lack of frankness on the part of the witnesses, or at best an insufficient preparation for the hearing.

19.5 That there was a desire to avoid the payment of capital gains tax and knowledge that this was possible is apparent from the correspondence (see para 10.4). That the exchange of the Company's shares for shares of a United Kingdom company would have brought loans to the Appellants, as participators in that company, within the dangers of s 286 is a fact.

20.1 The understanding which we find to have been reached between the Appellants and Mr. Clarke before the exchange of shares with Millor took place is of a different nature from the carefully thought out, and dovetailed, arrangements reflected in the transactions considered in *Floor* and in *Dawson*. For the Appellants it was submitted that we should focus solely on the disposals to Millor of the ordinary and deferred ordinary shares of the Company. We have already rejected the submission that the sole purpose of acquiring Millor was to act as a holding company for the purpose of a merger between the Company and the Cee-N-Cee, a merger which did not take place. We consider that we are constrained by authority to look at the transactions as a whole (*Ramsay*). We have found that the primary objective of the Appellants was to conclude a sale of the Company's shares to Jones. That objective was achieved, and the agreements of July and August are to be looked upon as parts of a composite transaction comprising those two agreements, if no more; it is irrelevant that the terms of the August agreement were not finally settled until the day it was executed. The directors of Millor would have recognised that the Appellants had to power to prevent Millor from dealing with its assets otherwise than in accordance with their wishes. That may account for the absence of any reference in the minutes of Millor to any one of the 25 loans of which we have details, to the loans to the three Manx companies, to the loans to the Appellants for the insurance policies, or to the grant of the options.

20.2 We turn now to events which took place after these two agreements. We have found that the Appellants proceeded with the July agreement on the understanding that when Millor had received the proceeds of sale of the August agreement they would have access in one way or another to the monies received. That was achieved, at least to the extent of £470,000 (at one time £520,000) between 2 March 1977 and 6 October 1981. There is no evidence to show who received a benefit, in the form of interest free loans totalling some £2 million, between September 1976 when the greater part (£1.8m) of the sale proceeds were paid to Millor, and October 1981 when £2 million had to be recalled to purchase the insurance policies. We find it difficult to believe that the transactions constituted by the loans to the three Manx companies were not contemplated until after the August agreement was concluded even though precise details of the amounts to be lent were not settled. All was done through the agency of Mr. Clarke, acting for the Appellants, instructing the complaisant directors of Millor. We were told by Stephen White and Brian White that they left all the details of Millor's affairs to Mr. Clarke. We infer that Mr. Clarke would have considered the disposition of the proceeds of sale in principle as soon as broad agreement on price had been struck with Oriel which was as early as May (para 10.10). If, on the other hand, and as we believe to be the case, the Appellants themselves expressed their wishes about the disposition of

A the monies received by Millor we infer that they, too, would have considered that matter during the period between the resumption of negotiations with Oriel early in 1976 and the conclusion of the July agreement. On either footing we take the view that consideration of the method of disposing of the proceeds of sale and the implementation of the decision or decisions reached in principle is properly to be regarded as part of the composite transaction; notwithstand-
B ing that precise details of the last stage may not have been formulated until after 9 August.

20.3 We turn now to the loans, called in from the three Manx companies, for the purpose of making further loans to the Appellants to enable them to purchase their respective insurance policies. It was submitted for the
C Appellants that the arrangements made in 1981 were not foreshadowed by anything that had gone before. We are inclined to accept that view of events. The evidence suggests that towards the end of 1981 Mr. Clarke had become alarmed at the condition in which Millor found itself, an investment company earning no income on its considerable assets and stripped of use of those assets for its own purposes, and with some at least of the loans to
D Stephen White and Brian White disbursed on general living expenses. It was necessary to review matters. The arrangements about the insurance policies (and any rearrangement that may have been necessary in relation to the loans to the three Manx companies) constituted, we find, a *novus actus interveniens*, and a departure from the original plan. Those arrangements we find not to be a part of the composite transaction consisting of the July and
E August agreements and the loans to the Appellants and to the three Manx companies.

21. Having identified the composite transaction, we turn to consider its nature. Mr. Price suggested that comparison should be made with *Dawson*(1), from which the transaction in which the Appellants were concerned is to be
F distinguished. Mr. Hinson directed our attention to *Floor*(2) to which he claims the present case is similar.

21.1 In our view *Dawson* offers no guidance in the present case because in *Dawson* Greenjacket retained the proceeds of sale of the Wood Bastow shares on deposit account with a finance company at least until 30
G November 1972, some 11 months after the sale, and there was no evidence before the Commissioners that the original shareholders of Wood Bastow had received any part of the proceeds of sale in any form. There was, as Mr. Hinson said, a stage one in *Dawson*, but not a stage two.

H 21.2 The better comparison, in our view, is with *Floor*. The July agreement is to be equated with the sale of IDM shares by Major Floor and his sons-in-law to FNW in exchange for shares of that company. The sale of IDM shares by FNW to KDI is to be equated with the sale of Millor of shares of the Company to Jones. The disposal by FNW of the proceeds of sale of the IDM shares was effected by (1) the issue by FNW to a Cayman
I Islands company (Donmarco) of shares carrying the right to six-sevenths of FNW's assets in a liquidation and (2) the liquidation of FNW. That two-stage procedure was represented in the present case by the loans of £470,000 (rising at one point to £520,000) known to have been made to the Appellants

(1) 55 TC 324. (2) 53 TC 609.

by Millor. That points to three stages in the composite transaction we have identified rather than two. A

22. We follow the decision of the Court of Appeal in *Floor* in holding: (1) that the transactions consisting of the July and August agreements were real transactions (the Revenue did not suggest that they were a sham); that Millor acquired the Company's shares as a principal and not as a mere nominee or agent for the Appellants and, accordingly, the Appellants cannot be regarded as having disposed of their shares in the Company direct to Jones. (2) That Millor acquired control within the meaning of para 3 Sch 18 Finance Act 1965 by the share exchange transaction and accordingly when the July agreement was entered into there was at that stage no disposal of the respective shares of any of the Appellants in the Company for capital gains tax purposes within Sch 7, para 6. B C

23. The decision that we have reached in the preceding paragraph based on a consideration of the relevant transactions in *Floor* is consistent with the decision reached by the Court of Appeal in *Dawson* when a first stage (itself consisting however of two stages equivalent to the first two stages which we have pointed to here) alone was in point, and no subsequent stage was found. D

23.1 Mr. Hinson urged us to follow the additional ground for allowing the Revenue appeal suggested by Eveleigh L.J. in *Floor,* and to hold that the ultimate sale to Jones by Millor being predestined and procurable throughout by the Appellants that sale was effected by the Appellants and is the only relevant disposal for capital gains tax purposes. It is true that here, as in *Floor,* the Company's shares "were in reality at the disposal of the original shareholders until the moment they reached the hand of [Jones] although the legal ownership was in [Millor]" (per Eveleigh L.J. 52 TC 609, at p 633 I). Indeed, in the present case Stephen White alone, without the concurrence of his fellow shareholders, has control of Millor within the meaning of para 3 Sch 18 Finance Act 1965, holding as he does 60 per cent of the issued share capital, and can procure the passing of an ordinary resolution in general meeting. With the help of either Archibald White or Brian White he can procure the passing of a special resolution. (We were told, by Mr. Price, and Mr. Hinson accepted, that the Isle of Man Companies Act 1931 follows our Companies Act 1929.) The approach of Eveleigh L.J. in *Floor* was approved by the House of Lords in *Ramsay.* In *Dawson* Oliver L.J. examined carefully Eveleigh L.J.'s judgment and the references to it by the House of Lords in *Ramsay* and found himself unable to accept that he himself was required to regard the two transactions in Dawson as constituting a sale by the original shareholders to Wood Bastow. One of the consequences of that would have been the possibility of a double liability to capital gains tax: (1) upon the sale of the shares in the family company to Wood Bastow (2) again upon a sale of Greenjacket or on its liquidation. Oliver L.J. found that repugnant. E F G H

23.2 In *Dawson* Greenjacket had retained the proceeds of sale. The case here is otherwise. Mr. Price submitted that the loans made by Millor to the Appellants are not to be equated with a winding up of Millor, which continues to exist, and whose assets have not been dissipated, since the Appellants remain liable to Millor as borrowers. Let us assume that the Appellants, despite the absence of any formal acknowledgements of the loans, recognise their indebtedness to Millor and their obligation to repay. Part of the £470,000 of loans has been dissipated in living expenses or has been otherwise employed. Although, as Brian White agreed, when he was re-examined I

A by Mr. Price, that he could raise money on his house and perhaps on other assets in order to repay Millor, it is difficult to see what incentive he, or either of the other shareholders would have, to exchange interest free loans for loans at market rates of interest, even on the smaller aggregate of the earlier loans. We were told that the purpose, or a purpose, of taking out the insurance policies with Edinburgh was to be able to repay Millor in due B course. We were told that the annual premium policies, which are to produce the sums to achieve this, will at maturity be worth a great deal more than the minimum total sum assured; in Stephen White's case that minimum total is £804,000, while his borrowings from Millor total £1,445,000. (The total annual premiums of £120,000 are funded by surrendering each year one deferred annuity contract—single premium £120,000). The annual premium C policies do not mature, however, for any of the Appellants, until 5 September 1990 (or earlier death). Stephen White will then be 69, Archibald White will be 80, and Brian White 50. Until 1990 Millor can be expected to remain in its present denuded state. While Millor remains without the use of the proceeds of sale it will find no purchaser, so that the risk of a capital gains tax liability on that account is not a likely one. It is difficult to see what incentive D there will be, when repayment becomes feasible, for the Appellants to repay the loans rather than retaining for themselves the free use of the policy monies, but assuming, against probability, as we believe, that that should happen, it still lies with the Appellants to refrain from selling the shares of Millor, or putting it into liquidation. The most effective was of avoiding a second liability would be to refrain from repaying the loans.

E

23.3 It is within the power of the Appellants to avoid the hardship of a double jeopardy which Oliver L.J. found repugnant in *Dawson.* The nature of the third stage which we have found in the present case is such that it lies within the Appellant's hands to refrain from action which would give rise to a liability for capital gains tax at some future date.

F

23.4 Despite the distinction between *Dawson* and the present case, we are reluctant to adopt the approach of Eveleigh L.J. in *Floor* because it seems to us that it involves ignoring the interposition of Millor, and treating it as though it were not a separate legal entity but merely the *alter ego* of the Appellants. That is a path which has not yet been ventured upon and we G shall not make the attempt. *Floor* went against the taxpayers in the House of Lords because it was the transfer of value occasioned by the issues of the shares with special rights to Donmarco which was deemed to be the disposal, and it was unnecessary to look through the first disposal to the second disposal.

H

24. The question of value passing out of the shares of the Company, which arose in *Floor* as a result of the issue to Donmarco of the shares with special rights, does not arise in that form in the present appeals. The third stage of the composite transaction here is the taking out of loans totalling at one time £520,000. That was the route by which part of the consideration reached the Appellants. Had Mr. Clarke not introduced new arrangements, I more might have reached the Appellants by the same method. Those loans have not been recorded in the minutes of Millor, no written agreements exist in respect of them. There were, at the date of the appeal hearings, no accounts of Millor. There was nothing, save acknowledgement by the borrowers, on which an action to recover the sums borrowed could be founded.

The loans made prior to 31 March 1977, totalling £67,000, had by the date of the hearing already, on the face of it, become statute barred. Millor was not a party in these appeals and cannot therefore claim the benefit even of such acknowledgement as might be deduced from the evidence of Stephen White and Brian White of their intention to repay. Since the hearing a further £140,000 of loans have *prima facie* become statute barred. In our view, each time that money was lent to Millor by one of its shareholders, value passed out of the Company, and we so find

What each borrower received was the use of the monies lent to him. In the absence of any means for Millor to enforce repayment, and bearing in mind that control of Millor lay with the Appellants themselves (and for some purposes in Stephen White alone) the appropriate measure of the value that passed out of the Company would seem to be the face value of the loan which the recipient obtained, and we so find.

That is not, as we understand it, a passing of value with the meaning of para 15 Sch 7 Finance Act 1965, which was the relevant provision in *Floor*, and the majority decision of the House of Lords in *Floor* does not assist us here.

Each loan was, however, an extent by which part of the cash consideration relating to the shares in the Company which he had formerly owned reached the Appellant to whom the loan was made, a composite transaction by which this was brought about being concluded each time a loan was made to one of the Appellants. We so find.

The lack of direct relationship between the loans to the Appellants and their proportionate interests in the assets of Millor is not significant. Any disproportion is capable of adjustment between the parties at any time.

Although the possibility of our reaching such a conclusion, albeit by a different route, was adumbrated by Mr Hinson (see para14.8) it was not argued before us and no authority for treating the loans as receipts of consideration in the years in which they were respectively received was cited to us.

25. On the basis of our findings of fact, our decision in principle is that on each of the occasions when an Appellant received a loan he must be deemed to have made a part disposal of the shares which he formerly owned in the Company.

On that footing Stephen White will be assessable on £55,000 received in 1976–77, and on £60,000 received in 1977–78. There are no assessments before us for subsequent years. The same approach will apply in the case of the other two Appellants.

It is unnecessary to decide for present purposes the status of the £50,000 repaid by Stephen White on 30 September 1981. When the main assessments for 1976–77 and 1977–78 were made, on 16 July 1979, that sum had not yet been repaid.

26. If agreement on the figures can be reached between the parties we shall make a final determination as soon as they are notified to us. We adjourn the proceedings for one month in order that figures may be considered on the basis of our decision in principle.

A

E. Wix
B. James } Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
98 High Holborn
London WC1V 6LQ

B

18 January 1984

C (1b) BRIAN WHITE

(1c) ARCHIBALD HENRY WHITE

In each of these cases the assessments under appeal were, for 1976–77, £130,000 (Main) and £360,000 (Further), and, for 1977–78, £27,000 (Main), but D in all other material respects the Cases Stated were identical to the above Case.

---

(2) BOWATER PROPERTY DEVELOPMENTS LTD.

E

CASE

Stated under the Taxes Management Act 1970 s 56 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

F

1. On 19, 20 and 21 March and 9 and 10 August 1984 the Special Commissioners heard the appeal of Bowater Property Developments Ltd (hereinafter, "BPD") against an assessment to Development Land Tax in the sum of £207,220 made in connection with a disposal of an interest in certain land effected by a contract dated 23 October 1981.

G

2. BPD is one of a number a companies in the Bowater group of companies. At the beginning of 1980 BPD was the owner of certain land in Kent, a sale of which to Milton Pipes Ltd. (a company outside the Bowater group) was under negotiation. On 25 March 1980 BPD transferred its beneficial interest in the said land to five other companies in the Bowater group; and H on 23 October 1981 the said five companies contracted to sell their interests in the said land to Milton Pipes Ltd. The sole question for our determination was whether, on all the facts of the case, the latter disposal is (by virtue of the decisions in *W.T. Ramsay Ltd.* v. *Commissioners of Inland Revenue*[1] [1982] AC 300 and subsequent cases) to be treated as a disposal for I Development Land Tax purposes made by BPD (rather than as disposals made by each of the aforementioned five companies).

3. The following witnesses gave evidence before us:

---

(1) 54 TC 101.

Mr. A. F. Barrett	(Assistant Taxation Manager, Bowater Corporation PLC—the parent company in the Bowater group; and a Director of BPD);
Mr. D. A. G. Troup FRICS	(of Messrs. Porter & Cobb, of Maidstone, Kent);
Mr. R. H. Miller	(Head of the Legal department, Bowater Corporation PLC); and
Mr. C. W. S. Goodger	(at the material dates a legal adviser in the said Legal department).

A

B

C

4. We had before us an agreed Statement of Facts, five bundles of agreed documents and sundry maps or plans. The bundles contained material as follows:

No 1: Diagrams showing the relationships of companies within the Bowater group.

D

No 2: Copies of Agreements and other documents having legal effect, namely, the documents connected with (a) the acquisition of the land in question by BPD; (b) the transfer of the beneficial interest therein by BPD to the five Bowater companies referred to in para 2 above: and (c) the disposal of the said five companies' interests to Milton Pipes Ltd.

E

No. 3: Copies of certain cheques, bank statements and financial records.

No 4: Extracts from correspondence files (mostly those of Messrs. Porter & Cobb) covering a period from November 1977 to November 1981.

F

No. 5: Sundry accounts, tax computations and associated correspondence.

G

The contents of the above documents gave rise to no dispute between the parties and none of them is annexed hereto as an exhibit. Copies of all or any of them are, however, available for inspection by the Court if required.

5. The facts of the case (so far as material to the issue before us) and the contentions of the parties are set out in our reserved Decision issued on 2 October 1984. A copy of the said Decision is attached to and forms part of this Case. For the reason expressed on pages 17, 18 thereof we held that there was insufficient continuity to constitute BPD's disposal to the five Bowater companies and the latters' disposal to Milton Pipes Ltd. "one transaction"; and therefore that BPD could not be treated as the disponor in relation to the disposal to Milton Pipes Ltd. We accordingly discharged the assessment under appeal.

H

I

6. The Appellant Commissioners immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and on 29 October 1984 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970 s 56, which Case we have stated and do sign accordingly.

A 7. The question of law for the opinion of the Court is whether, in the light of all the facts, we erred in deciding that BPD should not be treated for the purposes of Development Land Tax as the disponor in relation to the disposal which occurred on 23 October 1981.

B B. O'Brien } Commissioners for the Special Purposes
A. K. Tavaré } of the Income Tax Acts

Turnstile House
98 High Holborn
London WC1V 6LQ

C 28 January 1985

Decision

D This is an appeal by Bowater Property Developments Ltd. ("BPD") against an assessment to Development Land Tax dated 13 February 1984 in the sum of £207,220. The assessment arises out of the disposal on 23 October 1981 of some 23 acres of land at Cooks Lane, Milton Regis, Sittingbourne, Kent by five other companies in the Bowater group of companies to Milton Pipes Ltd. ("Milton Pipes"). Immediately before 25 March 1980 that land E had belonged to BPD and negotiations for its acquisition by Milton Pipes had reached the "subject to contract" stage. The Inland Revenue's case for assessing BPD (rather than the five companies) is, shortly, that the 1981 disposal to Milton Pipes was in reality that of BPD, an intermediate disposal by BPD to the five Bowater Companies on 25 March 1980 being an artificial transaction the only purpose of which was to obtain five separate exemptions F of £50,000 under s 12 of the Development Land Tax Act 1976. The "*Ramsay* principle"(1) [1981] STC 174 and *Furniss* v. *Dawson*(2) [1984] STC 153 were prayed in aid.

Primary Facts

G The primary facts are not in dispute and are as follows.

The Bowater group of companies comprises (so far as relevant) The Bowater Corporation Ltd. ("Bowater") and a number of subsidiaries which are wholly owned by it either directly or at one remove.

H Bowater's offices are at Knightsbridge, in London; and the legal and taxation departments serving the group as a whole are there. From the legal department we had as witnesses Mr. R. H. Miller, who had been its head since 1978, and Mr. C. W. S. Goodger, who was responsible for conveyancing matters. A third, and more important witness from Knightsbridge was Mr. A. F. Barrett FCA. Having worked in the taxation department since I 1966, Mr. Barrett became Bowater's Assistant Taxation Adviser in 1973, a post which he still holds. He has, furthermore, been intimately concerned with the affairs of BPD since 1973 and has been a director of that company since 1979.

(1) 54 TC 101; [1982] AC 300. (2) 55 TC 324.

BPD is one of the directly-owned subsidiaries in the Bowater group. We were not told much of its history apart from the fact that when the Bowater group and Ralli International Ltd. merged in 1972 and the latter was put into liquidation, BPD was left with allowable capital losses of not far short of £50m. It has traded as a land dealer and developer since 1973 and, not surprisingly, the policy of the Bowater group has been to channel sales of property through BPD—at any rate if substantial capital gains were likely to be realised. BPD operates from Knightsbridge. Another of the directly owned subsidiaries in the Bowater group is Bowaters United Kingdom Paper Co. Ltd. ("BUKP"). That company operates from Kemsley, near Sittingbourne, and on its staff there is, or was at the material time, a Mr. H. T. J. Austen. Despite a rather grand title ("Group Property Co-ordinator") Mr. Austen was not a director of BUKP (he referred elsewhere for decisions), and he was concerned only with BUKP property; but he had an intimate knowledge of that property and had, over the years, developed useful personal contacts with officials of the Swale Borough Council and Kent County Council.

In 1973 one of the then directors of BPD and Mr. Austen reviewed BUKP's extensive holdings of land in the Sittingbourne area. They identified some 2,000 acres, held as fixed assets, which were surplus to BUKP's requirements and which could accordingly be sold. On 26 July 1973 BUKP granted to BPD an option, exercisable on one or more occasions before 1 July 1980, to purchase the whole or any one or more parts of those lands at a price equal to 97½ per cent of the open market value of the land in respect of which the option was being exercised, as at the date of such exercise. The lands covered by the option included the 23 acres which was the subject matter of the disposal with which this case is concerned, and which we will call "Crafts Marsh".

Crafts Marsh lies just outside Milton Regis, and is on Milton Creek, an arm of the River Swale. A minor road runs along part of one side and along the top and most useful part of the land is that which has the road frontage. The back land, towards the water, is subject to some risk of flooding.

In the mid-1970's there were some negotiations for the sale of Crafts Marsh to Milton Pipes, a local company not in any way connected with the Bowater group. They came to nothing. However, in October or November 1977 Mr. D. H. Briscall, the managing director of Milton Pipes, made it clear to Mr. Austen of BUKP that his company was still interested in acquiring Crafts Marsh for the expansion of its business. Milton Pipes occupied land on both sides of Crafts Marsh; and that company had become particularly anxious to obtain more land because it faced the prospect of having a new road driven through the middle of the more important of its existing sites. Before the end of the year Mr. D. A. G. Troup FRICS, of Messrs. Porter & Cobb, was instructed by BUKP to negotiate a sale of Crafts March to Milton Pipes. Mr. Troup gave evidence before us and it is clear that he regarded himself as acting in the matter on behalf of the Bowater group generally. He had undertaken other work for the group and we note that in the present instance, at the end of the day, he directed his fee note to Bowater.

Milton Pipes' actual requirements extended to about 8 acres only: two acres along the road at the top of the site, to be occupied by industrial buildings, and six acres behind, for use as open storage. Planning permission would be required from Swale Borough Council, but it was understood that the Council appreciated the difficulties that Milton Pipes was in, and, in

A principle, favoured the development of Crafts Marsh as indicated. There was, however, another matter which would have to be settled before any planning consent would be granted. In the course of 1977 it became apparent that Kent County Council had its eye on Crafts Marsh with a view to establishing a permanent gipsy encampment there, and Swale BC would not take any planning decisions which might be inconsistent with the County Council's B requirements if (contrary to the wishes of everyone in the neighbourhood) the gipsy threat materialised.

Mr. Troup's file indicates that his negotiations with Mr. Briscall did not make fruitful progress in the period up to September 1978. During that period it seems that Mr. Briscall was thinking in terms of an unconditional C contract at a price in the region of £100,000; but BUKP then made it clear that would not be acceptable. Negotiations then proceeded on the basis of a contract conditional on the grant of the required planning permission at approximately double the aforementioned price. In November 1978 agreement (subject to contract) was reached on that basis, at a price of £202,500.

D During the same month it became known that Kent CC had decided (subject to the formal views of Swale BC) that an official gipsy site should be established on Crafts Marsh; and a sketch plan indicated that an area at the top of the land in the corner with the double road frontage had been chosen. This did not appear to Mr. Troup to be inconsistent with his understanding of Milton Pipes' ideas for development; nevertheless, in January 1979 E Mr. Briscall indicated that his company should be recompensed in some way for the fact that the presence of gipsies had become a more certain threat.

On 2 February 1979 Milton Pipes notified BUKP that it was putting in an application for outline planning permission on Crafts Marsh; and on the same day Mr. Briscall wrote to Mr. Troup and asked for a report on the situation as regards a draft contract. His answer did not come, effectively, until F 9 March. During January and February, Mr. Barrett at Knightsbridge had been busy making internal arrangements within the Bowater group. Mr. Troup was involved in them because valuations were required; and it was at this stage that Mr. Troup started dealing in the main with Mr. Barrett (and Mr. Goodger) rather than with BUKP at Kemsley, though he continued G to consult Mr. Austen from time to time.

The internal arrangements involved two steps. First, on 7 March 1979 BPD exercised its option to acquire Crafts Marsh from BUKP for £102,375 (97½ per cent of £105,000, Mr. Troup's open market valuation at that date). Secondly, Mr. Barrett lined up a number of Bowater subsidiaries willing to take undivided shares in Crafts Marsh—a fragmentation exercise designed to H make maximum use of the s 12 exemption from DLT. At that date the exemption level stood at £10,000 only and no fewer than eighteen subsidiaries were involved. No actual disposal of BPD's newly-acquired interest in Crafts Marsh had taken place, but the form of the draft Deeds which Mr. Goodger sent to Milton Pipes on 9 March 1979 (with an explanation for the delay) clearly indicates that a disposal in favour of the eighteen subsidiaries I would take place before the deal with Milton Pipes was finalised.

Mr. Goodger's drafts were in the form of Options, and he asked that they be considered as soon as possible with a view to completing the arrangement before the beginning of the new tax year. There was, however, no such

progress on the legal front. It appears that Mr. Briscall told Milton Pipes' solicitors not to hurry. A

During the summer of 1979 Kent CC produced a more detailed drawing of the proposed gipsy encampment. This deviated considerably from the sketch sent to Mr. Troup the previous November and there was a meeting in October at which Mr. Troup suggested that the gipsies be placed much nearer the water. Not surprisingly, that idea was not acceptable to the County Council. However, on 11 March 1980 the County Council wrote to Mr. Briscall indicating that an area had been decided upon which did not conflict with Milton Pipes' planning application, and a revised drawing was promised. The Council sent a copy of that letter to Mr. Troup. That encouraged Mr. Troup to write to Mr. Barrett on 17 March: "It seems, therefore, that things are moving to a reasonably clear conclusion and it may be wise for you to do the inter Company operation before the end of the present financial year." B C

The reference to an "inter Company operation" was to the previously envisaged transfer by BPD of its beneficial interest in Crafts Marsh to the eighteen subsidiaries. In fact, by March 1980, the exemption level had been raised to £50,000 and a transfer to five companies only was required for the purpose. D

On 25 March 1980 that operation was carried out, and the beneficial interest in Crafts Marsh was transferred to the five companies to which we referred in opening, as tenants in common in equal shares. Each of them paid BPD £36,000 (£180,000 in total—Mr. Troup's open market valuation at that date). It is not necessary to burden this Decision with their names, but none of them was a subsidiary of BPD (or of BUKP). Their sole qualification for selection, in Mr. Barrett's eyes, was that none of them had used any part of its £50,000 DLT exemption. Mr. Barrett had satisfied the directors of each of them that their investment should prove profitable. The wisdom of having taken this step without delay was demonstrated the following day when, in his Budget speech, the Chancellor of the Exchequer announced that he proposed to stop abuse of the s 12 exemption in this way, with immediate effect. E F G

On 29 April 1980 Kent CC notified Mr. Troup that the relevant Committee had resolved to apply for planning consent for its gipsy site. It was immediately apparent from the plan enclosed with the letter that the chosen area conflicted quite seriously with Milton Pipes' application. It soon transpired, however, that a mistake had been made (the County Estates Officer had not been properly consulted) and a revised drawing was produced early in June. This indicated an overlap with Milton Pipes' application of a few feet only, and Mr. Troup wrote to Mr. Briscall on 16 June hoping to persuade him to accept the position. H

I

In the meanwhile, Mr. Goodger had been carrying on a somewhat desultory correspondence with the solicitors acting for Milton Pipes; and on 22 May 1980 he sent them a revised draft contract, conditional on Milton Pipes obtaining planning permission, to replace the draft Option deeds of the previous year. In this draft the named Vendors were, of course, the five Bowater companies.

A On 8 July 1980 Mr. Goodger received a wholly unlooked-for letter from Milton Pipes' solicitors. Dated the previous day, it read (in part):

> "We are sorry to tell you that the present economic situation with its direct effect on the concrete making industry has compelled our Clients to give up the proposal to purchase your Company's land."

B

To Mr. Barrett and Mr. Troup it appeared that the Milton Pipes sale was gone for good. Mr. Troup was totally depressed by the deal having collapsed in this way, just at the moment when it seemed that a particularly frustrating piece of business was about to be brought to a successful conclusion. The general policy of selling Crafts Marsh was not reversed, but C Mr. Troup had no other potential purchaser in mind, and did not seek one out during the succeeding months. He and Mr. Barrett were not applying their minds to the long-term future—Mr. Barrett was more anxious to find some immediate means of mitigating what he described as "a tax and accounting disaster". The prices paid by the five companies had been based on the probability that Crafts Marsh would soon be sold for £202,500. With D no sale in prospect the value of the land was very much lower and Mr. Barrett wanted, if possible, to avoid losses arising to the five companies. It accordingly appeared to him and Mr. Troup that the first priority was to get planning permission for Crafts Marsh, for that would improve its value at once. It might also enhance claims for compensation in respect of the gipsy site if the County Council's proposals (against which objections had E been lodged) were implemented.

Mr. Troup did his best to get Mr. Briscall to keep Milton Pipes' planning application on foot. It had always been his view that while permission might readily be given to Milton Pipes, an application by a Bowater company would (correctly) be regarded as a speculative value-enhancing exercise, F and the chances of success would not be good. However, on 18 July, Milton Pipes' application was formally withdrawn. A little later, Mr. Troup attempted, unsuccessfully, to get Swale BC to accept an application which he hoped might be regarded by the Council as a reinstatement of Milton Pipes' withdrawn application. Thereafter Mr. Troup prepared, and eventually submitted, an application on behalf of Bowaters.

G

On 5 January 1981 Kent CC wrote to Mr. Troup to give him the news that the proposal to acquire part of Crafts Marsh for a gipsy site had been abandoned. No reason was given but it had become plain that a difficult public enquiry was in prospect.

H A few weeks later, at the very beginning of February 1981, the solicitors who had been acting for Milton Pipes telephoned Mr. Goodger—the call was actually taken by his chief, Mr. Miller—to indicate that that company was interested in Crafts Marsh again. Mr. Troup lost no time in getting in touch with Mr. Briscall and in renegotiating the price. More than two years had elapsed since the £202,500 price had been agreed; and the threat of having I gipsies as neighbours had been lifted. Within a fortnight, the new price had been settled, at £260,000; and draft contracts were sent to Milton Pipes' solicitors a week later. Milton Pipes put in a fresh application for planning permission. Again, Kent CC was the cause of delay: this time there were some highway problems. However, on 23 October 1981 contracts were exchanged

between the five Bowater companies (and, in respect of a small additional sliver of land, BUKP) and Milton Pipes; and the sales were completed on 23 November 1981. Each of the five Bowater companies received for its own benefit its due share of the net proceeds of sale.

Contentions

Mr. Andrew Park Q.C., who appeared on behalf of BPD, conceded that the transfer of the beneficial interest in Crafts Marsh by BPD to the five Bowater companies had no business purpose save to avoid the liability to DLT which would otherwise fall on BPD if the sale to Milton Pipes went through as planned. The tax avoidance plan in the present case was of the same general character as that in *Furniss* v. *Dawson*(1) and the sole question, in considering the application of the *Ramsay*(2) principle (as applied in *Furniss* v. *Dawson*) was whether, on the facts of this case, the transfer to the five Bowater companies and the sale to Milton Pipes constituted a single "composite transaction" (to use Lord Wilberforce's phrase from Ramsey itself); or, put another way, whether there was here a "pre-ordained series of transactions" including both the transfer and the sale, to use Lord Diplock's language in *Commissioners of Inland Revenue* v. *Burmah Oil Co Ltd.*(3) [1982] STC 30, adopted by Lord Brightman in *Furniss* v. *Dawson.*

Mr. Park submitted that there was not in this case a "composite transaction"or "series of transactions" because:

(1) On 25 March 1980, when the transfer to the five Bowater companies took place, there was no near-certainty that the hoped-for onward sale to Milton Pipes would take place. At that date the commercial decision by Milton Pipes to commit itself to the deal had yet to be taken. In fact, when the relevant decision was taken, it was against proceeding. But even if matters had progressed normally after Mr. Goodger had sent the revised draft contract in May it could not have been said that Milton Pipes' signature to that contract was "pre-ordained", or that the transfer to the five Bowater companies and their exchange of contracts with Milton Pipes formed a "pre-ordained series of transactions".

There was here no "single integrated scheme in the sense that the parties entered into it on the understanding that the scheme would be carried through as a whole or not at all" (a feature of the *Ramsay* line of cases judged significant by Vinelott J in *Ewart* v. *Taylor*(4) [1983] STC 721 at p.772j); and there was nothing in the way of a pre-arranged timetable. The fact that Milton Pipes' commercial decision had not yet been taken on 25 March 1980 meant, of course, that there was no possibility of a multi-party agreement on that day, involving BPD, the five Bowater companies and Milton Pipes, of the sort suggested by Lord Brightman in *Furniss* v. *Dawson* [1984] STC at p.166 d–f.

Mr. Park accepted that the absence of particular facts regarded in the precedent cases as indicia of "preordination" did not conclude the matter in his favour. Nevertheless, he submitted that where, as in the present case, none is present the applicability of the *Ramsay* principle must be in the gravest doubt.

(1) 55 TC 324 (2) 54 TC 101 (3) 54 TC 200 (4) 57 TC 401

A (2) Even if the transfer to the five Bowater companies and a subsequent sale by them to Milton Pipes in the ordinary course of events could properly have been found (contrary to (1) above) to have been a composite transaction, the sale in the present case did not follow in the ordinary course. There was a complete break in July 1980. The purchaser who emerged in February 1981 happened to be Milton Pipes, but B that was fortuitous. The sale which occurred in October 1981 was a wholly different sale from that envisaged on 25 March 1980. The circumstances had changed, and the price with them; and Milton Pipes should be regarded as an entirely new purchaser, the previous negotiations having been abortive. It was as if Crafts Marsh had been sold to any other party: and if it had been, clearly the required nexus between C the transfer to the five Bowater companies (conceived in connexion with the former planned sale) and the actual sale giving rise to the charge to DLT, would not be established.

Finally, Mr. Park submitted that the *Ramsay* principle should not apply in this case because it could involve double taxation. As we understood him, D he contended that the true reason for the absence of a double taxation risk in *Furniss* v. *Dawson* was that Greenjacket Investments Ltd. would not itself have made a capital gain on an immediate sale because of the price which it had paid for the subject shares. Here, the five Bowater Companies undoubtedly realised development value and there would be an overlap if BPD also were held to have realised the full value. E

Mr. K. Brown, of the Office of the Solicitor of Inland Revenue, accepted that the assessments on BPD were supportable only if the *Ramsay* principle applied to make that company the disponor of Crafts Marsh for tax purposes. His contention that it did was based on what he submitted was the true principle lying at the root of the decision in *Ramsay*, following the judg- F ment of Eveleigh L.J. in *Floor* v. *Davis*(1) [1978] STC 436.

According to Lord Fraser, who was party to the decision in *Ramsay*, the ratio of the decision in that case was to be found in the now celebrated paragraph in Lord Wilberforce's speech at [1981] STC 174 at page 182, which G begins "The capital gains tax was created to operate in the real world..." (*Burmah*, [1982] STC at p.37 h). The same paragraph included the proposition that in certain circumstances an apparent loss should be treated as not such a loss as the legislation was dealing with.

The first step, therefore, (as we understand Mr. Brown's argument) was H to determine whether a situation which had arisen (or which appeared at first sight to have arisen) reflected reality. Disposals by the five Bowater companies in the present case did not reflect reality because the companies' capacity to make the disposals derived from the 25 March 1980 transfers, which were admitted to be transactions devoid of any business purpose save for tax-saving. The disposals by those companies were not such disposals as the legisla- I tion was dealing with. Having thus determined that the disposals were not (for tax purposes) made by the five Bowater companies, the next step was to isolate the legal transactions which led to their capacity (under the general law) to make them. In the present case it was not necessary to go further

(1) 52 TC 609 at page 632.

back than the transfer by BPD. BPD was thus identified as the true disponor. A

Mr. Brown contended that the characteristics of the schemes which had so far been adjudicated upon by the Courts formed an insufficient guide to the ambit of the *Ramsay* principle. Each of the cases had shown the principle to be applicable to a new set of circumstances, and it was clear from Lord Scarman's speech in *Furniss* v. *Dawson* that the ambit of the principle was not finally defined by that decision. The use of the word "pre-ordained" in *Burmah* and *Furniss* v. *Dawson* was natural in the light of the facts of those cases but too much weight should not be placed on it. A "pre-ordained series of transactions" could legitimately be paraphrased as "a number of pieces of business carried out in an arranged sequence". It was not necessary that the pieces of business should be effectively contemporaneous, the details of the ones falling later in the series being fixed before the earlier steps were carried out. It was enough that a final step (a disposal) was in contemplation when the earlier steps were taken. B C

In the present case, BPD made the transfer to the five Bowater companies with a view to saving DLT on any sale to any purchaser at any time; and Milton Pipes' unreadiness on 25 March 1980, that company's withdrawal in July, and the identity of the ultimate purchaser in October 1981 were not material. Those facts did not affect the unreality of treating the five Bowater companies as disponors, and so the correctness of seeing BPD as the true disponor. D E

On the subsidiary point (Mr. Park's 'double taxation' argument), Mr. Brown submitted that Mr. Park had done less than justice to Lord Brightman's answer, given in *Furniss* v. *Dawson* (at p. 165 d–f). In this case, as in that, the position was that if the Revenue succeeded in establishing that BPD was the disponor, it will be precluded from alleging otherwise as against the five Bowater companies; and thus no double taxation can occur. F

Conclusions

The question in *Ramsay* was whether, notwithstanding the existence of a series of closely integrated transactions with an overall outcome which owed nothing to the tax-avoiding steps included in it, effect had to be strictly given to the consequences of each of the transactions, including those steps. Against that background, Lord Wilberforce's "real world" passage is rightly seen as the ratio of the decision. The question in this case is different: it is the prior question, is there here a series of transactions of the sort which calls for the application of the approach held in *Ramsay* to be justified in law? G H

In our judgment, the starting-point on the consideration of this question is the two-paragraph passage in Lord Wilberforce's speech at [1981] STC 180 in which he set out and discussed his "familiar principle". He accepted the proposition, established in *Commissioners of Inland Revenue* v. *Duke of Westminster*(1) [1936] AC 1, that the duty of the Court is to give judgment in accordance with the legal effect of the transaction in question; but pointed out that that proposition does not itself answer the question, what is "the transaction" to which effect is to be given? Lord Wilberforce disclaimed any novelty for the answer which he provided, namely, that where a transaction I

(1) 19 TC 490.

A is "intended to take effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole", the relevant transaction (to which the *Westminster* principle applies) is the whole of the wider transaction. Whether, in any particular case, the several transactions are to be regarded as separate transactions (albeit in a series) or as one composite transaction is a question of fact (reviewable of course, in accordance with B normal principles).

It is only when the relevant transaction has been identified that its effect can be determined: and it is the real effect of that transaction which is sought.

C We think we have probably said enough already to indicate that we do not accept the main thrust of Mr. Brown's argument. Put somewhat crudely (but not, we hope, unfairly) he first identifies the mischief, then finds the individual transactions which have led to it, and then says that those transactions are (by definition) merely steps in a composite transaction. It seems to us that that stands Lord Wilberforce's process of reasoning on its head. It D leaves the fact finding tribunal with no real function save to find the primary facts: whereas it is plain from Lord Wilberforce's speech that the question whether the transactions are independent, or are to be regarded as a composite, is a question of degree and is to be decided by Commissioners as a matter of secondary fact. A composite transaction cannot be constructed on a purely cause-and-effect basis, and working backwards from the effect.

E

In our view, Lord Wilberforce's "real world" paragraph cannot be taken out of its context to found a wide-ranging "*Ramsay* principle" going beyond cases in which genuine composite transactions exist. When, in *Furniss* v. *Dawson*, Lord Brightman said (at p.166g) that the formulation by Lord Diplock in *Burmah* "expresses the limitations of the *Ramsay* principle", he F was, we believe, using the word "limitations" in a sense (familiar to Chancery practitioners) indicating that the two requirements define the boundaries of the *Ramsay* principle—not that they cut down some wider principle which could be extracted from the speeches in *Ramsay* itself.

We are thus satisfied that the approach adopted by the Revenue in argu- G ment in this case does not represent the *Ramsay* principle, and that it is indeed, at odds with the authorities to such an extent that we cannot accept it. We will only add this, that if it is legitimate to look at the "reality of the situation" generally, it is not at all clear why BDP should be chosen as the target. That company's short lived interest in Crafts Marsh itself derived from transactions—the 1973 option and its exercise—which were commer- H cially dubious from BUKP's point of view and which may, on the facts, be assumed to have been tax-saving operations, and nothing else. On the Revenue's approach, it might seem to be more real to treat BUKP as the disponor. Furthermore, the only company (apart from the five) which really benefited from the disposal was Bowater, as the parent of all concerned. The realised development value has not ended up in the hands either of BDP or I of any creature of that company, and the second observation made by Lord Scarman in *Burmah* is, *prima facie*, in point.

We turn therefore to Mr. Park's argument, and first to his proposition that because of the "ifs and buts" which, on 25 March 1980, surrounded the

question of a contract with Milton Pipes, the transfer to the five Bowater companies and a subsequent sale by them to Milton Pipes could not properly be regarded as a "pre-ordained series of transactions", even if the uncertainties had been resolved and the sale had proceeded in the normal course. A

That proposition requires us to consider the word "pre-ordained" as used by Lord Brightman (following Lord Diplock in *Burmah)* and the connected question of the "tripartite contract' which Lord Brightman used to illustrate his argument. B

There cannot be any doubt that (as Mr. Park argued) Lord Brightman regarded his expression "pre-ordained series of transactions" as synonymous with Lord Wilberforce's "composite transaction". Indeed, at the foot of page 166 of the report of *Furniss* v. *Dawson*, he says so. Now the word "preordained" carries, to our minds, a distinct flavour of "all arranged in advance", and this is fully consistent with the notion of treating a pre-ordained series of transactions as equivalent (for tax purposes) to a tripartite contract. Not surprisingly, Mr. Park points to the equivalence of "composite transaction" and "pre-ordained series of transactions" to introduce the same flavour into the former. C D

The facts in *Burmah* and *Furniss* v. *Dawson* admitted the full force of "pre-ordained". So, of course, did those in *Ramsay*. But there is, in our opinion, nothing in *Ramsay* itself to indicate that a finding of a composite transaction cannot be justified unless everything has been to all intents and purposes fixed in advance. If it has been, the finding of a composite transaction is naturally easier to reach. But, as Lord Wilberforce said, cases where there is an expectation that the whole plan will be carried through "may vary in emphasis". We do not believe that in *Furniss* v. *Dawson* their Lordships intended, by accepting the word "pre-ordained", to cut down the scope for the application of the approach endorsed in *Ramsay*: it is certainly impossible to read Lord Scarman's speech in such a light. E F

It follows that we do not accept that the alternative possibility of the parties having entered into a tri- (or multi-) partite contract is a conclusive test. Indeed, during the argument we had some discussion of the sort of case where such a contract would by definition be impossible at the date when the tax-avoidance transaction was effected—the case, for example, where the ultimate sale was to be made by way of public auction. In our judgment, what is critical is the firmness (or otherwise) of the expectations of the party introducing the tax-avoidance transaction that the ultimate transaction will occur. G

In the light of those views of the law, we review the facts as assumed by Mr. Park's first reason for saying that there was no composite transaction in this case. In November 1978 the Bowater interests (then represented by BUKP) and Milton Pipes reached an agreement in principle, and as between them there was nothing further of substance to be discussed. That agreement was not implemented immediately because the gipsy problem had not been quantified and the grant of planning permission (which was not otherwise in doubt) was in suspense. In the early months of 1979 the DLT saving transfers were prepared, but were not then implemented: we infer that the intention was, and remained, to execute them at an appropriate time before the deal with Milton Pipes became contractual. That appropriate time arrived on 25 March 1980. The actual choice of date was governed by other considerations, but BPD (that is to say, Mr. Barrett) understood from Mr. Troup that H I

A the gipsy problem was resolving itself, in the sense that the siting of the proposed encampment could be expected soon to become certain, and that it would not prove inconsistent with Milton Pipes' development requirements. There was never any suggestion that Milton Pipes' interest in Crafts Marsh was conditional on there being no gipsy site at all.

B We find that on 25 March 1980 there was a firm expectation on the Bowater side that the sale to Milton Pipes then in contemplation would go through; and it was in that expectation that Mr. Goodger issued a revised draft contract in May. We do not know what Mr. Briscall's expectations were at that date, but in our view anything known to him but not to the Bowater side would be irrelevant. Mr. Troup did say in evidence that the C chances of Milton Pipes being willing to sign a contract on or about 25 March 1980 were nil—evidence which would have come better from Mr. Briscall, had he been called. We believe nevertheless that the statement was true. However, if the reason for the unwillingness was that the gipsy site had not been formally fixed it says nothing about Mr. Briscall's expectations in relation to the contemplated purchase. If, on the other hand, Mr. Briscall D could already see the financial problems which were to bring the chapter to a close in July, and he was unwilling to commit Milton Pipes on their account, that had no bearing on Mr. Barrett's expectations because he had no inkling of them.

On the facts, we find that such "ifs and buts" as remained in relation to E the contemplated contract on 25 March 1980 were insufficient to prevent the transfers on that date from being treated as one with the implementation of what was then contemplated. If Milton Pipes had, in say July 1980, entered into the contract envisaged by Mr. Goodger's May draft we would certainly have found that the transfer to the five Bowater companies and their disposals to Milton Pipes were all one transaction, and we would have applied the F *Ramsay* principle accordingly.

That leads us to Mr. Park's second reason for not applying the *Ramsay* principle here. Put shortly he contended that as a result of the total break brought about by Milton Pipes' withdrawal in July 1980, the disposal which actually took place in October 1981 was a totally different disposal from that G in contemplation in 1980, in connexion with which Crafts Marsh was transferred to the five Bowater companies. Those transfers and the actual disposal could not therefore be found to be all one transaction, with appropriate consequences.

The relevant facts on this aspect of the case appear to us to be these. H From 1973 there had been a general intention on the Bowater side to dispose of (*inter alia*) Crafts Marsh—and it was in connexion with that intention that the first tax avoidance transaction (the option) was entered into. The intention may have become more active a little later when the first discussions with Milton Pipes took place, but if it did it then reverted to the general. By November 1978, at the latest, when agreement (subject to contract) with I Milton Pipes was reached, the intention clearly became active (indeed, specific) and it was while it was so that the transfers to the five Bowater companies took place. In July 1980 there was an absolutely genuine withdrawal by Milton Pipes, and no other purchaser was in the offing or was sought. We find that the intention to dispose reverted to the general. Finally, in February

1981, following Milton Pipes' initiative, the intention became specific again, and remained so until implemented.

If a prior tax-saving transaction and a later commercial disposal are to be regarded as a single composite transaction, the former must, in Lord Wilberforce's words be "intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole". In our view, no such intention can be found in relation to a tax-saving step taken as a matter of pure strategic planning at a time when there exists, at most, a general intention to effect a commercial disposal. Indeed, we very much doubt whether the Revenue would challenge that, because it entirely explains the exclusion of BUKP's 1973 option from the "wider transaction" which is alleged.

The transfer to the five companies was, however, not conceived and entered into by way of mere strategic planning. As we have already found, that was, by contrast, a "scheme transaction" intended to operate as one with the Milton Pipes contract then in prospect. But could its quality as a "scheme transaction" survive the change in the nature of the Bowater side's intentions as to disposal—from the active and back to the general—which occurred in July 1980 on Milton Pipes' withdrawal?

We have come to the conclusion that the answer to that question is, no. In saying that, we do not rely on the point made by Mr. Park that, in the circumstances, Milton Pipes, as the October 1981 purchaser, should be treated as if it were an entirely new purchaser, not connected with the expected purchaser in 1980. The critical point in our view is the interruption of the active intention in relation to disposal. It seems to us that if effect is to be given to two or more transactions as a single composite transaction there must exist throughout, at the very least, an unbroken intention of an active (rather than merely general) nature. It is the foundation of the essential unity of the transactions. The required continuity is lacking in this case and we therefore do not find that the March 1980 transfer to the five Bowater companies and the October 1981 disposal to Milton Pipes constituted a single composite transaction.

On Mr. Park's "double taxation" point we will say only that we agree with Mr. Brown that the answer given by Lord Brightman in *Furniss* v. *Dawson* is a sufficient answer here too.

However, for the reason which we have given, we find that the five Bowater companies were the true (as well as ostensible) disponors of Crafts Marsh. We accordingly discharge the assessment on BPD under appeal.

B. O'Brien } Commissioners for the Special Purposes
A. K. Tavaré } of the Income Tax Acts

Turnstile House
98 High Holborn
London WC1V 6LQ

2 October 1984

A (3a) ROBERT FELIX GREGORY

CASE

Stated under the Taxes Management Act 1970 s 56 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High B Court of Justice.

1. On 23, 24 and 25 March 1983 the Commissioners for the Special Purposes of the Income Tax Acts heard (together with a number of connected appeals by other persons) the appeals of Robert Felix Gregory against assessments to capital gains tax made upon him for the years 1973–74 and C 1975–76, both in the sum of £785,000. Those assessments were alternatives.

2. In March 1974 the Respondent, together with all the other shareholders in Planet Gloves (Industrial) Ltd. ("PGI"), disposed of all his shares in that company to a newly-formed company, PG Holdings, in consideration D for an issue of shares in the latter company. In January 1976 PG Holdings sold all the shares in PGI to a third company, Hawtin Ltd. Put shortly, the issue in relation to the assessment for the year 1973–74 was whether the Respondent's disposal of PGI shares to PG Holdings was a chargeable disposal notwithstanding the provisions of para 6 (in conjunction with para 4(2)) of Sch 7 to the Finance Act 1965 ("roll-over relief"); if not, the issue in E relation to the assessment for the year 1975-76 was whether the sale to Hawtin Ltd. should be regarded for capital gains tax purposes as a disposal of PGI shares by (*inter alios*) the Respondent.

3. The Respondent (who was at all material times the managing director of and, until the disposal first referred to above, the principal shareholder in F PGI) and Bernard John Weare FCA (who was the financial adviser to both PGI and PG Holdings) gave evidence before us.

4. The documentary evidence proved or admitted before us (all in copy form) was contained in a folder comprising:

G Bundle 1:

(a) Correspondence relating to a proposed acquisition of PGI shares by Cannon Street Investments Ltd.;

(b) Documents relating to the incorporation etc of PG Holdings;

H

(c) Documents relating to an alteration in the share capital of PGI;

(d) Agreement dated 11 March 1974 for the exchange of the whole of the issued share capital of PGI for shares of PG Holdings;

I (e) A schedule showing the allocation of shares of PG Holdings to former shareholders of PGI;

(f) Correspondence leading up to and relating to the sale of PGI shares by PG Holdings to Hawtin Ltd.;

(g) Agreement dated 30 January 1976 for the said sale; A

(h) Deed of Indemnity dated 30 January 1976, connected with the Agreement of even date;

(i) Four Convertible Unsecured Loan Notes of Hawtin Ltd. dated 30 January 1976. B

Bundle 2: Correspondence and other documents relating to events after 30 January 1976 : in particular, to acquisitions and disposals of investments by PG Holdings and to loans made by PG Holdings to its shareholders. The latter include a statement showing how the amounts of the loans made on 21 March 1977 were arrived at and a Schedule showing all loans made by PG Holdings to its shareholders between 5 April 1976 and 14 July 1981. C

Bundle 3: Correspondence etc leading to the hearing of the Respondent's (and the other connected) appeals.

D

Bundle 4: Balance Sheet of PG Holdings as at 31 January 1976 and that company's accounts from that date to 31 January 1981.

Bundle 5: Minutes of meetings of the Directors of PG Holdings held on various dates between 19 February 1974 and 24 February 1983; and of the Annual General Meetings of that company held on 31 July 1975 and 3 August 1976. E

None of the documentary evidence is exhibited to this Case but all or any of it is available for inspection by the Court if required.

5. No authorities other than those referred to in our Decision were cited to us. F

6. The facts found by us and the contentions of the parties are set out in so much of our decision as is concerned with what is therein described as the main issue.

G

7. We the Commissioners who heard the appeals took time to consider our decision. One of the connected appeals heard together with those of the Respondent raised additional questions and that appeal was adjourned. At the conclusion of the adjourned hearing of that other appeal on 17 May 1983 a decision covering the Respondent's and all the connected appeals was delivered orally. A transcript of the said decision is attached hereto and forms part of this Case. (The portion of the decision from the heading on page 16 to the end is not relevant to the Respondent's appeals.) As appears from the decision for the reasons there set out, we answered both the questions set out in para 2 of this Case in the negative and accordingly discharged both the assessments made on the Respondent. H I

8. The Appellant immediately after the determination of the Respondent's appeals declared to us his dissatisfaction therewith as being erroneous in point of law and on 19 May 1983 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act s 56, which Case we have stated and do sign accordingly.

A 9. The question of law for the opinion of the Court is whether, on the facts found by us, we have erred, in applying the law as indicated by the House of Lords in *Ramsay* v. *Inland Revenue Commissioners*(1) and *Inland Revenue Commissioners* v. *Burmah Oil Co Ltd.*,(2) and by Vinelott J. in *Furniss* v. *Dawson*.(3)

B B. O'Brien } Commissioners for the Special Purposes
B. James } of the Income Tax Acts

Turnstile House
98 High Holborn
London WC1V 6LQ

C

1 August 1983

D (3b) GREGORY and WEARE

CASE

Stated under the Taxes Management Act 1970 s 56 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

E

1. On 23, 24 and 25 March and 17 July 1983 the Commissioners for the special purposes of the Income Tax Acts heard (together, on the first three days, with a number of connected appeals by other persons) the appeals of Robert Felix Gregory and Bernard John Weare against assessment to capital F gains tax made upon them, as the trustees of the estate of Joseph Gregory deceased, for the years 1973–74 and 1974–75 (or 1975–76). Both of the assessments were in the sum of £155,000, and they were alternatives. (The year for which the second assessment was made was, as appears below, one of the issues in dispute.)

G 2. In March 1974 the Respondents, as trustees as aforesaid, together with all the other shareholders in Planet Gloves (Industrial) Ltd. ("PGI"), disposed of all their shares in that company to a newly-formed company, PG Holdings, in consideration for an issue of shares in the latter company. In January 1976 PG Holdings sold all the shares in PGI to a third party, Hawtin Ltd. Put shortly, the issues for determination were:

H

(1) As to the first assessment, whether the Respondents' disposal of PGI shares to PG Holdings was a chargeable disposal notwithstanding the provisions of para 6 (in conjunction with para 4(2)) of Sch 7 to the Finance Act 1965 ("roll-over relief"); if not

(2) As to the second assessment:

I

(i) whether, in the light of certain action taken by H.M. Inspector of Taxes, any such assessment was now extant; if there was such an assessment in existence

---

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324.

(ii) whether such an assessment was for the year 1974–75 (in which event it was common ground that no capital gains tax was payable thereon) or whether it was for the year 1975–76, the mistake on its face being capable of being disregarded by virtue of the Taxes Management Act, s 114; and in the latter event A

(iii) whether the sale to Hawtin Ltd. should be regarded for capital gains tax purposes as a disposal of PGI shares by (*inter alios*) the Respondents. B

3. The issues numbered (1) and (2) (iii) in the preceding paragraph were heard by both of the Commissioners who have signed this Case; and those numbered (2) (i) and (ii) were, by agreement of the parties, heard by the first named Commissioner alone. C

4. Oral evidence was given by:

Mr. R. F. Gregory (the first Respondent), who was at all material times the managing director of, and until March 1974 the principal shareholder in PGI; D

Mr. B. J. Weare FCA (the second Respondent), who was the financial adviser to both PGI and PG Holdings; and

Mr. Gordon James Rothwell, one of H.M. Inspector of Taxes, who was at the material times in charge of Pontypridd I tax district where the assessments under appeal were made. E

5. The documentary evidence proved or admitted before us (all in copy form) was contained in a folder comprising[1]:

F

Bundle 1:

(a) Correspondence relating to a proposed acquisition of PGI shares by Cannon Street Investments Ltd.;

(b) Documents relating to the incorporation etc of PG Holdings; G

(c) Documents relating to an alteration in the share capital of PGI;

(d) Agreement dated 11 March 1974 for the exchange of the whole of the issued share capital of PGI for shares in PG Holdings;

H

(e) A schedule showing the allocation of shares in PG Holdings to former shareholders of PGI;

(f) Correspondence leading up to and relating to the sale of PGI shares by PG Holdings to Hawtin Ltd.;

I

(g) Agreement dated 30 January 1976 for the said sale;

(h) Deed of Indemnity dated 30 January 1976, connected with the Agreement of even date;

---

[1] Not included in the present print.

A (i) Four Convertible Unsecured Loan Notes of Hawtin Ltd., dated 30 January 1976.

Bundle 2: Correspondence and other documents relating to events after 30 January 1976: in particular, to acquisitions and disposals of investments by PG Holdings and to loans made by PG Holdings to its shareholders. The B latter include a statement showing how the amounts of the loans made on 21 March 1977 were arrived at and a schedule showing all loans made by PG Holdings to its shareholders between 5 April 1976 and 14 July 1981.

Bundle 3: Notice of the second assessment (purporting to be for the year C ending 5 April 1975); copy thereof indicating amendment by H.M. Inspector of Taxes; correspondence leading to the making of the assessments; and correspondence etc leading to the hearing of the Respondents' (and the other connected) appeals.

Bundle 4: Balance sheet of PG Holdings as at 31 January 1976, and that D company' s accounts from that date to 31 January 1981.

Bundle 5: Minutes of meetings of the Directors of PGI Holdings held on various dates between 19 February 1974 and 24 February 1983; and of the Annual General Meetings of that company held on 31 July 1975 and 3 August 1976.

E

None of the documentary evidence is exhibited to this Case but all or any of it is available for inspection by the Court if required.

6. No authorities other than those referred to in our decision were cited to us.

F

7. The facts found by us (or, in relation to the issues numbered (2)(i) and (ii) in para 2 above, by the first named of us), and the contentions of the parties are set out in our Decision, a transcript of which is attached hereto and forms part of this Case.

G 8. At the conclusion of the hearing on 25 March 1983 we reserved our decisions on the issues numbered (1) and (2) (iii) in para 2 above (referred to together in our Decision as "the main issue") and adjourned the hearing of the appeal against the second assessment for argument on the issues numbered (2) (i) and (ii), before a single Commissioner. At the conclusion of the adjourned hearing on 17 May 1983 the single Commissioner read our joint H decision on the reserved issues and delivered his own decision on the remainder. As appears from the Decision, for the reasons there set out the issues numbered (1), (2) (ii) and (iii) in para 2 above were resolved in the Respondents' favour and both the assessments under appeal were discharged accordingly.

I 9. The Appellant immediately after the determination of the Respondents' appeals declared his dissatisfaction therewith as being erroneous in point of law and on 19 May 1983 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970 s 56, which Case we have stated and do sign accordingly.

10. The questions of law for the opinion of the Court are: A

(i) whether, on the issue numbered (2) (i) in para 2 above the single Commissioner erred in his construction and application of s 29(6) of the Taxes Management Act 1970;

(ii) whether, on the issue numbered (2) (ii) in para 2 above, the single Commissioner erred in his construction and application of s 114 of the Taxes Management Act 1970; and B

(iii) whether, on the issues numbered (1) and (2) (iii) in para 2 above, and on the facts found by us, we erred in applying the law as indicated by the House of Lords in *Ramsay* v. *Inland Revenue Commissioners* and *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.* and by Vinelott J. in *Furniss* v. *Dawson.* C

B. O'Brien
B. James
} Commissioners for the Special Purposes of the Income Tax Acts D

Turnstile House
98 High Holborn
London WC1V 6LQ

1 August 1983 E

Decision

In this case we heard together 24 capital gains tax appeals on behalf of former members of a company named Planet Gloves (Industrial) Ltd. ("PGI"). The Appellants, and the amounts of the assessments made upon them, were as follows: F

		£
1.	Mr. R. F. Gregory	785,000
2.	Trustees of the estate of J. Gregory, decd	155,000
3.	Mrs. S. Gregory	155,000
4.	Mr. B. J. Weare (in his personal capacity)	8,000
5.	Mr. B. J. Weare as trustee of J. Gregory's Settlement	425,000
6.	Mr. B. J. Weare as trustee of S. Gregory's Settlement	425,000
7.	Executor of R. F. Atkinson, decd	55,000
8.	Mrs. F. E. Davies	13,000
9.	Mr. J. E. Goddard	43,000
10.	Mr. W. James	15,000
11.	Mr. P. R. Mann	47,000
12.	Mr. J. Price	39,000

G H I

A In each case two assessments were made, as alternatives. The first of the pair was (in each case) for the year 1973–74; and the second, in the same figure, was (in every case except one) for the year 1975–76. The exceptional second assessment was that in the case of the estate of J. Gregory, deceased: the notice of assessment referred to the year 1974–75.

B The main issue, common to all the appeals, was whether, in disposing of their shares in PGI to another company, PG Holdings ("Holdings", a private unlimited company incorporated in the Isle of Man), the Appellants were entitled to the benefit of the provisions of para 6 (in conjunction with para 4(2)) of Sch 7 to the Finance Act 1965: so-called "roll-over" relief. At the conclusion of the argument on that issue we reserved our decisions in the C first and third to twelfth pairs of appeals and the 1973–74 appeal in the late Mr. J. Gregory's case; and adjourned the hearing of the second appeal in the latter case for argument on the separate issues arising in that case—principally, the effect (if any) of the apparent mistake concerning the year of assessment. In order to avoid delay, the parties consented to the latter issue being heard by a single Commissioner (Mr. O'Brien). At the conclusion of D the adjourned hearing our joint decision on the main issue was read and Mr. O'Brien delivered an immediate decision on the separate issues relating to the second assessment in the late Mr. J. Gregory's case.

Main issue

E The facts, which were not substantially in dispute, are as follows.

PGI is a manufacturer, reconditioner and importer of industrial gloves and other protective clothing. Throughout the period with which we are concerned its managing director was Mr. Robert Felix Gregory ("Mr. Gregory"). Before 11 March 1974, Mr. Gregory was also the principal share- F holder in PGI. The other shareholders were certain members of Mr. Gregory's family, trustees of settlements made by members of the family, a few employees of PGI and Bernard John Weare FCA ("Mr. Weare"), a member of the firm which acted as the company's accountants. Together with family trusts, Mr. Gregory controlled PGI.

G In the autumn of 1973, Mr. Gregory followed up an advertisement in the Financial Times and on behalf of all the shareholders in PGI entered into negotiations with Cannon Street Investments Ltd. ("Cannon") for the acquisition by Cannon of all the PGI shares. In the course of those negotiations Mr. Gregory's solicitors (Messrs. Nabarro, Nathanson & Co.) raised the possibility of deferring the immediate liability to capital gains tax which would H arise on such a sale. In pursuance of that suggestion Mr. Gregory decided that if the negotiations were successfully concluded the PGI shares should be transferred to Cannon in an indirect manner: they would first be transferred to a company resident in the Isle of Man in exchange for shares in that company, and they would then be sold by the Isle of Man company to Cannon for cash. The minority shareholders in PGI accepted the adoption of such a I procedure, it being explained to them by Mr. Gregory or Mr. Weare that they would be able to obtain interest free loans from the Isle of Man company equivalent to the cash which they would otherwise have received on a direct sale of their PGI shares to Cannon. Cannon was also content with that procedure.

On 13 February 1974 Mr. W. T. Hislop (who had been conducting the negotiations on Cannon's side) wrote to Mr. Gregory to say that economic conditions in the financial sector were then such as to make it difficult for Cannon to see its way to completing the acquisition of PGI (and its associated companies) in the foreseeable future. That letter effectively brought the discussions with Cannon to an end.

By that date, however, arrangements for the formation of the envisaged Isle of Man company were far advanced and most of the expenditure connected therewith had already been incurred. Mr. Gregory saw no disadvantage (rather, the possibility of future advantage) in proceeding with the share-exchange step in the original plan. Holdings was incorporated on 19 February 1974. Its first directors were Mr. J. E. Crellin and Mr. P. G. Crellin, advocates practising in Douglas, Isle of Man. They were introduced to Mr. Gregory by his solicitors, who had put the tax-saving scheme into Mr. Gregory's mind. We note in passing that the Messrs. Crellin played a similar role in the reported case of *Furniss* v. *Dawson*(1) [1982] STC 267, a case to which we will have to return. In March 1976, Mr. R. J. Atkey, managing partner in Messrs. Nabarro, Nathanson & Co.'s associated firm in Guernsey became an additional director of Holdings. The day-to-day business of Holdings was conducted by Messrs. Crellin's clerk, a Mr. Savage.

By an Agreement dated 11 March 1974 between Mr. Gregory and all the other shareholders in PGI of the one part and Holdings of the other, the PGI shareholders agreed to transfer all their PGI shares to Holdings in exchange for the issue to them (pro rata) of 100,000 £1 shares in Holdings (the entirety of Holdings' authorised share capital). The two subscribers, Mr. J. E. Crellin and Mr. Savage, waived their rights to the two subscribers' shares. The Agreement was completed on the same day by making the appropriate entries in PGI's and Holdings' Registers of Members. Thus Holdings became the legal and beneficial owner of PGI and controlled that company. By the same token, Mr. Gregory, through his personal and trustee shareholdings, controlled Holdings.

There were no further material developments for more than a year. Although Mr. Gregory had been disappointed by the collapse of the Cannon negotiations neither he nor the directors of Holdings sought a cash purchaser for the PGI shares to replace Cannon. Mr. Gregory concentrated his attention on the management of PGI and its associated companies. The directors of Holdings were kept informed, but as PGI paid no dividends during that period and the PGI shares were Holdings' only asset at that time, those directors were not called upon to perform any substantial functions.

Some time during the late spring of 1975 Mr. Gregory was returning from a holiday and on his way chanced to meet a Mr. Dovey, a businessman with whom he was faintly acquainted. They both lived in the Cardiff area and Mr. Gregory gave Mr. Dovey a lift home. During the course of that journey Mr. Dovey indicated to Mr. Gregory that a company of which he was a non-executive director, Hawtin Ltd. ("Hawtin"), might be interested in acquiring PGI. He offered to introduce Mr. Gregory to his colleagues on the board of Hawtin; and not long afterwards Mr. Gregory went up to Blackpool to meet them. Certain discussions took place in May and June 1975, in which Mr. Gregory acted for PGI on behalf of the directors of

(1) 55 TC 324.

A Holdings, who were kept informed. Those discussions came to nothing: it appears that Mr. Gregory was interested only in a sale for immediate cash whereas Hawtin (which had other investment transactions concurrently in mind) required payment of part of the asking price to be deferred in some manner.

B However, in November 1975, on Hawtin's initiative, negotiations were re-opened. These led to an Agreement between Holdings and Hawtin dated 30 January 1976 for the sale by Holdings to Hawtin of all the issued share capital of PGI for a total consideration of £1.75m. This was to be satisfied by an immediate payment of £1m; payment of a further sum of £550,000 on 31 December 1979; and the issue to Holdings of Convertible Unsecured Loan C Notes having a total face value of £200,000. Holdings and Mr. Gregory gave Hawtin certain warranties, liability on which would expire at the end of 1979; and arrangements were made to secure the payment of the sum due from Hawtin at that time. Completion of the Agreement took place on the same day (30 January 1976) at the offices of Holdings' directors in Douglas, Isle of Man.

D

The negotiations leading to the sale of the PGI shares to Hawtin were conducted (on Holdings' side) by Mr. Gregory and Mr. Weare: the directors of Holdings being kept informed by telephone. During the course of the negotiations Counsel was consulted, primarily in connexion with a matter not relevant to the present case, but he advised caution on the part of E Mr. Gregory and his fellow shareholders in Holdings in withdrawing money from that company after the sale had taken place, and recommended a delay of at least a year before making such withdrawals.

In relating the subsequent events a number of sums of money will fall to be mentioned. Nothing turns in principle on the details and in order to make F the undoubted pattern emerge more clearly we will resort to the use of round figures. Apparent differences between the sums payable to Holdings by Hawtin under the Sale Agreement of 30 January 1976 and the sums subsequently dealt with by Holdings are to be explained in part by the fact that Holdings received interest and made capital gains on money while in its hands, and in part by the fact that Holdings ultimately realised more in G respect of the Hawtin Loan Notes than their face value.

The £1m received by Holdings in January 1976 was disposed of as follows. Some £750,000 was invested in fixed-interest securities which would be redeemed (or could readily be realised) in March 1977; £200,000 was loaned to a company named Dovey Holdings Ltd., repayable in March 1977; and H £50,000 was loaned, free of interest, to Mr. Gregory. The latter was the only substantial breach of Counsel's recommendation of a year's delay. Mr. Gregory's wish to have the balance of £1m available in March 1977 is evident from the correspondence before us from as early as May 1976, and we find that a more general withdrawal of funds, to take place in March 1977, was in contemplation at the date of the Sale Agreement.

I

On 10 March 1977 a meeting of the Directors of Holdings took place, attended only by Mr. J. E. Crellin and Mr. Savage (proxy for Mr. Atkey). Mr. Crellin reported that he had received from Mr. Weare's firm a request for certain loans to be made to the shareholders and it was resolved that such

loans (totalling some £945,000) be made, interest free but repayable on demand. After signature by Mr. Atkey (in Guernsey) the cheques were posted to the shareholders on 18 March 1977. Each cheque was accompanied by a statement showing how the sum in question was arrived at. In each case it constituted the shareholder's proportionate share of the net proceeds (to date) of the sale of the PGI shares, *plus* his share of the capital gains and income arising therefore (net of UK capital gains tax and Isle of man income tax and expenses) *less* the amount (if any) already advanced and a relatively small sum which was retained to enable the shareholder to meet his personal income tax liability on the income element. The statement also indicated that a further loan on the same basis would be made when the deferred cash consideration was paid; and that the shareholder would continue to have (through Holdings) an interest in the Hawtin shares into which the Loan Notes had been converted in September 1976. The shareholders' receipts acknowledge that the payments were interest free loans.

No withdrawals took place in 1978 or (apart from a small loan to Mr. Gregory) in 1979. During that period Holdings' cash resources were limited to the amounts retained for tax as mentioned above (apparently, some £25,000 in total) together with the interest earned on it.

In December 1979 Hawtin successfully negotiated a further deferment, for six months, of £400,000 out of the £550,000 due to be paid by it to Holdings at the end of that month. The fact that Mr. Gregory had become a joint managing director of Hawtin doubtless facilitated matters.

On 15 April 1980 sums totalling some £103,000 were paid by Holdings to Mrs. S. Gregory and the minor shareholders (except Mr. Atkinson's executors) by way of interest free loans. On 29 August 1980 sums totalling £435,000 were similarly loaned to Mr. Gregory and the other major shareholders. These amounts substantially exhausted the deferred cash consideration due from Hawtin for the PGI shares.

On 15 April, 16 June and 14 July 1981 further sums totalling some £224,000 were paid to Holdings' shareholders by way of interest free loans. These payments were funded wholly or largely by sales on the Stock Exchange of Hawtin shares held by Holdings following the conversion of the Loan Notes which were part of the consideration for the PGI shares. We do not know exactly how many of the 4 million Hawtin shares were sold for this purpose, and how many were retained. In February 1981 400,000 shares were sold for some £27,000; and in April 1981 300,000 were sold for some £29,000, a further 300,000 for a similar sum and a further 500,000 for some £62,000. It is clear from the correspondence in evidence that Holdings retained a considerable number of Hawtin shares after the making of the loans in mid-1981 and we infer that the number was of the order of 2 million (with a market value of 10p each or thereabouts). This is perhaps confirmed by the fact that (according to the minutes of a Directors' meeting) Holdings had more than £200,000 on all its accounts in August 1982.

During the autumn of 1981 substantial sums were repaid to Holdings by Mr. Gregory, in both his personal and trustee capacity. That was done on legal advice: the assessments under appeal for the year 1973–74 had by then been issued. Nevertheless, further loans were made to Mr. Gregory (and to his mother, Mrs. S. Gregory) during 1982.

A The minority shareholders in Holdings—those not members of the Gregory family—have never been asked to repay any part of the loans made to them: but no arrangements have been made which might lead to those loans not being repayable as a matter of law.

All the loans were initiated by requests directed to Mr. J. E. Crellin or B (more often) Mr. Savage, either by Mr. Gregory or Mr. Weare. The requests were generally couched in terms somewhat peremptory in tone and (in writing to Mr. Weare) Mr. Savage more than once referred to them as "instructions". The loans, were, however, formally approved at Directors' meetings. Similarly, the investment transactions were initiated by Mr. Gregory on Mr. Weare rather than by the directors of Holdings; the instructions to the stock- C brokers were however (except in one instance) given by the directors in the Isle of Man. (Mr. Atkey, the Guernsey director, appears never to have attended a meeting in person—his function seems to have been limited to the signing of cheques.) The directors were however concerned to ensure that the proprieties were observed. They delivered a firm reprimand when they found that one set of instructions to the stockbrokers to sell Hawtin shares had D been given by Mr. Gregory direct. And in 1982 they refused a request by Mr. Gregory that Holdings buy a Jaguar XJS car for his private purposes—a transaction which would have amounted to a distribution of some £20,000 to Mr. Gregory otherwise than by way of loan.

The arguments

E Mr. Michael Flesch (now, but not then Q.C.) put the case for the Appellants in two ways:

(1) The share-exchange (Holdings for PGI) carried out on 11 March 1974 clearly satisfied the conditions in para 6 of Sch 7 to the Finance Act 1965 and it accordingly did not constitute a disposal of assets by the F Appellants—The sale of the PGI shares to Hawtin on 30 January 1976 was a disposal by Holdings, and not by the Appellants. The latter proposition can only be challenged if the facts establish that the 1974 share-exchange and the 1976 sale were elements in a "composite transaction" or "pre-ordained scheme", thereby justifying an approach to the facts as a whole along the G lines indicated by the House of Lords in *Ramsay* v. *Inland Revenue Commissioners*[1] [1981] STC 174 (in general) and in Eveleigh L.J.'s judgment in *Floor* v. *Davis* 52 TC 609 (in particular). On the facts of the present case, the share-exchange and the sale were independent transactions, and were not parts of a single composite transaction and paras 6 and 4(2) of Sch 7 have their independent effect.

H

(2) Alternatively, even if the two transactions were parts of a single composite transaction, that did not suffice to make good a charge to capital gains tax. As *Furniss* v. *Dawson* [1982] STC 267 demonstrated, it was still necessary to show that in consequence of the composite transaction a chargeable gain has accrued to the person assessed (s 19(1), Finance Act 1965)—on the par- I ticular facts in *Floor* v. *Davis,* Eveleigh L.J. (and the House of Lords in approving his judgment in *Ramsay)* could properly assume that a gain did accrue to the taxpayers because of the prompt planned dissolution of the intermediate company in that case, FNW. In the present case Mr. Gregory

---

[1] 54 TC 101.

and the other former shareholders in PGI were, after the sale of the PGI shares to Hawtin in 1976, in the same position as the members of the Dawson family when the composite transaction in *Furniss* v. *Dawson* was complete: the gain on the sale-on had accrued not to them but to the intermediate company, which was and remained the beneficial owner of the proceeds of sale. The evidence of enduring legal consequences attaching to the share exchange was more extensive in the present case, in relation to Holdings, than it was in relation to the intermediate company (Greenjacket) in *Furniss* v. *Dawson*. The decision in the latter case determined the issue in favour of the present Appellants.

Mr. Flesch added that even if the loans in the present case—there appears to have been no evidence of a corresponding nature in *Furniss* v. *Dawson*—could be regarded as gains accruing to the Appellants, such gains could plainly not be attributed to either of the years for which assessments had been made.

Mr. Baron, an Assistant Solicitor of Inland Revenue, argued:

(1) As to *disposals* by the Appellants. It was a feature of all the cases discussed by Lord Wilberforce in *Ramsay* as illustrations of the present position in the law (to which *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.* [1982] STC 30 and *Furniss* v. *Dawson* could now be added) that the transactions in question were all pre-ordained and were carried out in accordance with an arranged timetable. That feature was admittedly not present in the instant case. But "disposal" was not defined in the legislation and the existence of a pre-arranged timetable was not, in every type of case, a necessary feature of a composite transaction. It might be so in cases (such as *Ramsay* and *Burmah Oil*) where the aim of the scheme was to create artificial gains or losses by juggling with figures; but it was not so in "through-disposal" cases (such as the present, *Floor* v. *Davis* and *Furniss* v. *Dawson*). Capital gains tax operated in the real world; and where, in a "through-disposal" case, the original owners of the shares which were the subject matter of the disposal were in control of the intermediate company, the reality of the matter was that the disposal to the ultimate purchaser was made by them. Only in form was it made by the intermediate company. In the present case Mr. Gregory and the other original shareholders in PGI were in control of Holdings as they had been of PGI. In reality, Holdings was merely their agent; and in *Floor* v. *Davis* Eveleigh L.J. applied the maxim *qui facit per alium facit per se*, even to a case where there was no legal obligation on the intermediary to carry out the transaction. The fourth of the principles enunciated by Lord Wilberforce in *Ramsay* required transactions to be seen in their context: and two transactions might have been entered into in the same context notwithstanding a lapse of time between them. In the present case, the sale of PGI shares to Hawtin was in the context of the previous share-exchange which had set the scene. The continuous thread was provided by the Appellants' control of the destiny of the PGI shares throughout. The sale to Hawtin accordingly constituted disposals by the Appellants.

(2) As to *gains accruing* to the Appellants. The loans in the present case clearly distinguished it from *Furniss* v. *Dawson* in which there was no evidence that the ultimate proceeds of sale had been dealt with in such a way that the gain could be said to have accrued to the Dawson family. If the gains which passed to Donmarco in *Floor* v. *Davis* could be treated as having accrued to the Appellants in that case, so should the gains in the present case

A be held to have accrued to the present Appellants. It was unrealistic to treat the interest free loans differently from distributions to the shareholders: that was particularly clear in relation to the shareholders outside the Gregory family. In reality, Holdings had been, to a substantial extent, stripped of the proceeds of sale.

B *Conclusions on the main issue*

We will deal first with the assessments on the Appellants for the year 1973–74. Although these were made in March 1980 when the majority of the events set out earlier in this Decision had already occurred, their soundness cannot, in our view, have been improved by the occurrence of those events. C Looking at the matter as at 6 April 1974 the share-exchange was the only transaction which had been entered into; and (although it was a disposal in the ordinary sense of the word) it was not a chargeable disposal because of the provisions of paras 6 and 4(2) of Sch 7 to the 1965 Act. It seems to us that the only ground on which those assessments could be sustained is that since the Appellants (through their ownership of Holdings) would continue D to have de facto control of the shares, Holdings' control of PGI would not be "real" control and the condition in para 6(2) would not be satisfied. An argument along those lines cannot succeed before us, in the light of its clear rejection by Vinelott J. in *Furniss* v. *Dawson* (at page 289 e,f). We accordingly allow the appeals against those assessments and discharge them; and turn to those for the year 1975–76.

E

As a matter of form, it is not in doubt that the gains accruing on the sale of the PGI shares to Hawtin were gains which accrued to Holdings on a disposal made by Holdings and it is common ground that all the appeals must succeed if that is the true position in law on the facts of the case. As we see it, the two questions (by whom the disposal was made, and to whom the F gains accrued) are not really separate questions: the answers to them are connected, and flow from the answer to the basic question, namely, was the share-exchange in 1974 mere machinery having no real, lasting effect on the legal position of the parties? If it was, it was an irrelevance and the tax consequences follow from the real change in the position, without reference to the share-exchange.

G

If a transaction is to be regarded as 'mere machinery', it must be part of a wider context involving at least one other transaction, wherein the substance lies. The existence of such a context presupposes a connexion between the 'machinery' transaction and the other or others, such that all can fairly be regarded as a composite transaction. But if there is no such connexion the H transactions are all independent, and have their independent effects (and tax consequences).

What then is the nature of the context-creating connexion between transactions for which we are to look? In all the recent cases in which the "composite transaction" approach has been applied, the transactions have I formed parts of obviously pre-arranged schemes, in which the steps to be taken, and the participants to take them, have been known in advance. It may be that Mr. Baron was right in suggesting that the existence of a scheme, fully worked out in all its details, is not essential; but it seems to us that the common feature of all those cases may be generalised by stating it as

a continuous, pursued, intention to carry out a series of transactions of the envisaged character. A detailed pre-arranged scheme would simply provide the clearest evidence of the existence of such an intention.

Unfortunately for Mr. Baron, even such a generalisation of the sought-for connecting link between the transactions is of no assistance to him in the present case, because the facts are against him. The arrangements which had been made with Cannon would doubtless have presented a different picture if they had been carried out as planned. But that scheme went off. The incorporation of Holdings and the share-exchange which followed notwithstanding the collapse of the negotiations with Cannon were (as Mr. Gregory fairly admitted) not made without an appreciation of the possible value of having taken those steps if, at some future date, the Appellants decided to sell the PGI shares to an outside purchaser. But at that time an intention of selling (or of procuring a sale) was absent: it came into being not earlier than the summer of 1975. The share-exchange and the sale on were not, in the present case, linked by any continuous, pursued, intention.

In those circumstances, Mr. Baron suggested, as an alternative, a quite different sort of connecting link appropriate to "through-disposal" cases: continuous control of the subject matter (albeit direct at one stage and indirect at another). We have found this a tempting argument, but have formed the view that the fact of continuous control cannot by itself constitute a link between the transactions in question such as to make them the elements of a composite transaction. To hold otherwise would seem to make it necessary to treat as "composite", transactions carried out for wholly different, and wholly commercial, purposes: and that (on the face of it, at least) would be nonsense.

Even if we are wrong about that, we have not reached the end of the question. *Furniss* v. *Dawson*, by which we are bound, is relevant to the present case in more than one respect. In the first place, it shows that 'composite transaction' is not an 'open sesame' giving the Revenue automatic access to what they may regard as the robbers' cave. Even if the share-exchange and the sale to Hawtin are to be regarded as a composite transaction, it is still necessary to have regard to all the effects of the transaction, so regarded. The share-exchange element cannot be dismissed as an irrelevance if, comparing the positions obtaining before and after the composite transaction, there are undoubted real effects attributable to the share-exchange.

Vinelott J. set out in his judgment in *Furniss* v. *Dawson* ([1982] STC at p288) the enduring consequences of the share-exchange in that case which he considered could not be ignored. Consequences of the same kinds are features of the present case. It is perfectly true that the present case contains an additional feature (the loans) not present—or, at least, not evidenced—in *Furniss* v. *Dawson:* but that does not detract from the point now being made. If anything, the making of the loans provides further evidence of the "real" existence of Holdings: it was not suggested that the loans were actually sham. Furthermore, despite the loans, it is clear that a substantial portion of the consideration provided by Hawtin for the PGI shares—the balance of the Hawtin shares remaining unsold after the 1981 loans—remained in Holdings' hands for years after the transactions with which we are concerned: indeed for all we know those shares, or their proceeds, are still held by Holdings. It seems to us that *Furniss* v. *Dawson* cannot be distinguished in these regards unless the evidence establishes that Holdings was throughout merely the

A agent of the Appellants, and was, in consequence, not the beneficial owner of the PGI shares. We did not understand Mr. Baron to put his contention quite as high as that; but he did suggest it by laying emphasis on several clear indications in the evidence of Mr. Gregory's plenipotentiary powers in negotiations with Hawtin, and of Hawtin's directors treating Mr. Gregory as a B principal. In our view those facts do show that Mr. Gregory was the effective manager of Holdings (a conclusion which, in all the circumstances, should occasion no surprise), but they go no further. We would require much more to be satisfied that Holdings issued its own shares for no consideration.

For those reasons, whether there was a 'composite transaction' or not, C the share-exchange cannot be eliminated from the scene: with the result that the gains on the sale to Hawtin accrued on a disposal made not by the Appellants but by Holdings. It seems to us that it also follows that those gains accrued to Holdings (rather than to the Appellants). But there are two additional points which we wish to make in relation to the alleged accrual of gains to the Appellants.

D

A second aspect of the decision in *Furniss* v. *Dawson* which is significant for present purposes is Vinelott J.'s explanation of Eveleigh L.J.'s judgment in *Floor* v. *Davis.* The absence from the latter (and from the speeches in the House of Lords in *Ramsay,* approving it) of any explicit reference to the E accrual of gains to the charged taxpayers does not mean that such an accrual is not essential. In the present case Mr. Baron relies in this regard on the loans. We do not question the proposition that the loans, interest free and of indefinite duration as they were, were beneficial to the Appellants but we entertain doubt as to whether the receipt of loaned money can be equated with the accrual of gains. The loans have not in principle affected the value F of Holdings' assets or, accordingly, the value of Holdings' shares; and we do not find it at all easy to see how, if the Revenue were to succeed in relation to the present assessments, a substantial element of double taxation could be avoided on a sale by all or any of the Appellants of shares in Holdings. The loans could not be treated as bad debts in the face of evidence to the contrary.

G

Secondly, we are troubled about the chosen year of assessment, 1975–76. Because Holdings sold the PGI shares in that year, that year would be correct if the Revenue were relying not on the actual making of loans but on the Power of the Appellants to procure loans (or other distributions) by H Holdings. But if the actual loans are not significant it seems to us that the only point of distinction between this case and *Furniss* v. *Dawson* disappears. If, on the other hand, the actual receipts of loaned money are significant in the context of "gains accruing to" the Appellants, 1975–76 is plainly the wrong year.

I For those reasons we allow the appeals against assessments made for the year 1975–76 and discharge them—including that of the trustees of the estate of the late Mr. J. Gregory, if the second alternative assessment that case should be treated as having been made for that year. That leads directly to the separate issues in that case.

J. Gregory deceased—separate issues A

For some years, from early in 1978 at least, the transactions giving rise to the main issue dealt with above were the subject of correspondence between Mr. Rothwell, who was at the time the District Inspector of Taxes at Pontypridd 1 Tax District, and Mr. Weare, on behalf of the taxpayers. Eventually, in March 1980 Mr. Rothwell made, or arranged to have made, the twelve assessments for the year 1973–74. In March 1982, Mr. Rothwell decided that alternative assessments should be made for 1975–76, the year in which the sale to Hawtin occurred. On 15 March 1982, Mr. Rothwell wrote to Mr. Weare's firm as follows: B

> "You will recall that Capital Gains assessments were made for 1973–74 only and I would advise you that alternative assessments are being made for 1975–76 to ensure that the Revenue's position is protected. I would be grateful if you would advise those interested parties for whom you act and no doubt you will arrange to submit appeals in due course." C

Not all the twelve Appellants' tax affairs were dealt with in Mr. Rothwell's district and Mr. Rothwell asked the other appropriate District Inspectors to raise assessments for 1975–76. Two of the cases, however, were dealt with in his own office, and the estate of Joseph Gregory was one of them. Mr. Rothwell personally instructed one of his officers to make and issue a 1975–76 assessment to the trustees of that estate but, as it turned out, the assessment which was actually made and issued on 15 March 1982 was one stated to be for the year ending 5 April 1975 (ie 1974–75). In due course Mr. Weare's firm appealed against all the second assessments and in the case of J. Gregory deceased their letter dated 8 April 1982 reads as follows: D E

> "We refer to Capital Gains Tax assessment dated 15 March 1982 marked 1974–75. Please take this letter as formal appeal. Our appeal is based on Paragraph 6 of the 7th Schedule of the 1965 Finance Act. We are requesting full postponement of tax." F

I pause there only to note, at this stage, that the assessment year was not expressly made a ground of appeal though, by the date on which the assessment was made, the year 1974–75 had fallen out of time for assessment. Unfortunately for the Inspector, he also noticed, immediately after he received the notice of appeal, that the year 1975–76 had also gone out of time for assessment. G

At a later stage, Messrs. Berwin Leighton, when preparing the cases for hearing, wrote a letter to the present Inspector of Taxes at Pontypridd 1, enclosing a schedule of all the appeals which were to be heard together; and in that schedule they referred to the second assessment on the trustees of J. Gregory deceased, as being an assessment for the year 1975–76. H

There is one other fact which I have to mention. Having received the notice of appeal in the case of J. Gregory deceased, Mr. Rothwell's immediate reaction was to recognise that the second assessment was, on its face, bad as being out of time. He took steps on 26 April 1982 to have recorded on file the fact that the assessment had been "vacated" as having been raised in error. He notified the Collector of Taxes, but, he did not tell Mr. Weare that he had taken that action. I

A On those facts two distinct issues emerge. First, has there been any extant second assessment at all since 26 April 1982, when the assessment was "vacated"? Second, can the second assessment be treated as a good assessment for the year 1975–76, on the footing that the mistake as to the year falls to be disregarded by virtue of the provisions of s 114 of the Taxes Management Act 1970?

B

By agreement, Mr. Flesch opened, although it seemed to me that the principal burden in relation to s 114 fell on Mr. Baron. On the first issue, Mr. Flesch submitted that the Inspector's action should be given what appears to be its natural effect, notwithstanding the fact that knowledge of it was restricted to the Revenue. He commented adversely on the failure to C notify Mr. Weare. The assessment having been eliminated, it could not be revived. Mr. Baron countered with s 29(6) of the Taxes Management Act 1970 and submitted that an Inspector cannot effectively dispose of an assessment unilaterally, once it has been served. On this issue I am with Mr. Baron. In my judgment (and contrary to Mr. Flesch's submission in reply) the word "altered" in s 29(6) must cover not only partial variation but also D total discharge, if the subsection is to make sense. I sympathise with Mr. Flesch's comments on the failure to notify Mr. Weare because, if Mr. Weare had known, ensuing correspondence might well have resulted in the settlement of the appeal by agreement under s 54 Taxes Management Act 1970. Mr. Rothwell freely admitted in evidence that at that time he regarded the E position as hopeless. But in the circumstances that quite different position was never reached.

On the second issue, relating to s 114, Mr. Flesch submitted that a mistake as to the year is so fundamental that it could not be cured by the application of that section. Such a mistake was necessarily a mistake of the type F referred to by Megarry J. in *Fleming* v. *London Produce Co. Ltd* [1] 44 TC 582 (at p. 597) as a "gross error" which could not be covered by anything in s 114. The income and capital gains tax system was based on annual assessments, and errors of year were incurable. Looking at the matter from a different angle (which may have been suggested by me during the argument) Mr. Flesch submitted that the section invited one to ask the question "What G exactly is 'the assessment' which is not to be quashed if the section applies?" The assessment in question here was one for 1974–75 and Mr. Flesch was perfectly content to say that he was not asking for any such assessment to be quashed, or deemed to be void or voidable. He was perfectly happy with the assessment as it stood: it just so happened that on that footing his clients had no liability to tax.

H

Mr. Baron was obliged to struggle with what seems to me to be an extremely difficult section. A number of different sorts of mistakes are referred to in the section but a mistake as to the year is not among them. Because we are concerned here with a mistake as to year, Mr. Baron is unable to rely on subs (2) which relates in terms to mistakes of specified I natures. He says, however, that subs (2) is significant because it covers the majority of the mistakes which may be made in assessments; and as it is not to be supposed that the reference to assessment errors in subs (1) is otiose,

(1) [1968] 1 WLR 1013.

that reference in subs (1) must be to assessment errors of other kinds, of which mistakes as to year are the most obvious. Having got so far, Mr. Baron submitted that subs (1) must be capable (notwithstanding its form) of operating positively to rectify mistakes. A

He accepted that mistakes could not be rectified unless, in the terms of subs (1), the assessment was "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts". (The remaining words concluding the subsection gave rise to no difficulty where the error did not relate to the description of persons or property). Mr. Baron divided the phrase just cited into two limbs, viz "in substance and effect in conformity with the Taxes Acts" and "according to the intent and meaning of the Taxes Acts". He treated these as alternative conditions, the first relating to form and the second to intent. He submitted that, on the evidence, it was plain from the context of the making of the assessment what the assessment was intended to be, and how it should be construed: and that that satisfied the second limb of the condition which had to be met. B C

In the course of the argument, there emerged an example which gave me a good deal of trouble. What would the position be if the assessment in the present case, instead of saying "1975–76" (as it ought to have) had said "1875–76"? It would be obvious to all that that could not be right, especially as it was an assessment to Capital Gains Tax. If one takes the strict view that the year appearing on the assessment itself is sacrosanct and incurable, then one is obliged to say that that assessment is bad and cannot be cured, however little everybody has treated the mistake as a mistake of no significance. On the other hand, if such a mistake could be disregarded, is there any difference in principle between "1875–76" and "1974–75"—the mistake which has actually been made? D E

In the light of the evidence (and particularly the letter of 15 March 1982 from the Inspector to Mr. Weare) I have no difficulty in finding as a fact that everybody appreciated at all times that the intended year was 1975–76. At no stage in the course of correspondence was the point taken against the Revenue. It has been argued because Mr. Baron thought, when setting the main issue down for hearing, that the point ought not to be passed over. (I may add that the "vacation" point must also have emerged as a result of very proper disclosure by the Revenue.) F G

On the meaning of subs (1) of s 114 I have not been assisted, I am afraid, by the authorities. In *Fleming*, Megarry J. declined to provide any exegesis of that subsection and dealt with the point before him in terms of subs (2). The second case cited to me, *Bath and West Counties Property Trust Limited* v. *Thomas*(1), 52 TC 20, was one in which the assessment did not contain a mistake at all. Walton J. gave guidance on the meaning of the words "common intent and understanding" at the end of s 114(1) but that part of the subsection is not in issue in the present case because the mistake here does not relate to a misdescription of persons or property. H I

The most recent case, *Hart* v. *Briscoe*(2) 52 TC 53, is more to the point in that Brightman J. expressed the view that the likelihood of the recipient of the assessment being deceived or misled would be an important fact in con-

(1) [1977] 1 WLR 1423. (2) [1979] Ch 1.

A struing s 114(1). It is not easy to see how far that factor (or its absence) assists in the construction of the subsection generally; but the view does at least invite the argument that where, as here, there is no risk of anyone being misled or deceived at any stage, a very broad approach may be taken to the section, enabling me to say that the assessment in the present case should be treated as an assessment for the intended year.

B

At the end of the day, without real assistance from the authorities (though Mr. Flesch and Mr. Baron have both done their best to help) I go back to the section.

> "An assessment ... shall not be quashed, or deemed to be void or
C voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts....."

Although I have the greatest difficulty in seeing precisely what the words "according to the intent and meaning of the Taxes Acts" mean, I am satisfied D that they do not mean "according to the intention of the Inspector making the assessment", or even "according to the mutual understanding of the Inspector and the taxpayer".

In my view, the year of an assessment is an essential element in the definition of that assessment and a mistake as to year is not a mistake in the E assessment. I have before me an assessment on its face for the year 1974–75 and the trustee taxpayers are not attacking that assessment as such, by raising quibbles about its form or content. The negative form of that section indicates to me, as Mr. Flesch suggested, that the section is designed to be a defence against such quibbles: it is not available to the Revenue for the purpose of turning an assessment for one year into an assessment for another. F That is how I view the section, although I cannot pretend to be happy with the result, which is a non-sensible result on the facts of the case. Furthermore, that approach deals even less satisfactorily with the "1875–76" case. It may be that if the year appearing on an assessment is obviously impossible, whatever the surrounding circumstances, the patent error can be corrected. The error in the present case is, however, not in that category.

G

On the footing that the second assessment in the case of J. Gregory deceased was one for 1974–75 (and not 1975–76) it is entirely accepted by both parties that that assessment cannot stand. Whether our decision on the main issue is correct or not, the appeal against this particular appeal succeeds.

H

B. O'Brien } Commissioners for the Special Purposes
B. James } of the Income Tax Acts

Turnstile House
98 High Holborn
I London WC1V 6LQ

25 May 1983

1) CRAVEN *v.* WHITE A

The case was heard in the Chancery Division before Peter Gibson J. on 14, 15, 16 and 17 May 1985 when judgment was reserved. On 24 May 1985 judgment was given against the Crown, with costs.

Jules Sher Q.C. and *Robert J. Carnwath Q.C.* for the Crown. B

A. Leolin Price Q.C. and *Grant Crawford* for the taxpayers.

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.* 54 TC 200; [1982] STC 30. *Chinn* v. *Collins* 54 TC 311; [1981] AC 533; *Young* v. *Phillips* 58 TC 232; [1984] STC 520; *Magnavox Electronics Ltd.* v. *Hall* 59 TC 610; [1985] STC 260; *Regina* v. *General Commissioners of Income Tax for Freshwell* (ex parte *Clarke*) 47 TC 691; [1972] 1 All ER 545; *Muir* v. *Commissioners of Inland Revenue* 43 TC 367; [1966] 1 WLR 1269. C

D

CRAVEN *v.* WHITE

Peter Gibson J.:—The recent decisions of the House of Lords, starting with *W.T. Ramsay* v. *Commissioners of Inland Revenue* [1982] AC 300, and culminating in *Furniss* v. *Dawson* [1984] AC 474, have firmly established a new principle, commonly called the *Ramsay* principle, to be applied by the Courts in determining the effect in law of a transaction to which tax consequences are sought to be attached when that transaction is but one of a series of pre-ordained transactions into which one or more steps have been inserted for no commercial purpose other than to obtain a tax advantage. Lord Scarman, in *Furniss* v. *Dawson* at page 513, described the law in this area as being in an early stage of development and referred to the map-making process in which the Courts are engaged. The present case explores the boundaries of the *Ramsay*(1) principle. I am grateful that I have had the assistance of such skilful cartographers as Mr. Sher for the Crown and Mr. Price for the taxpayers. E F G

I have heard together two appeals by the Crown from a decision given by the Special Commissioners. They heard together appeals by three taxpayers, Archibald White, his son Brian and his nephew Stephen White, against assessments to capital gains tax. The date of that decision was 18 January 1984, some three weeks before the decision of the House of Lords in *Furniss* v. *Dawson*(2). The Crown appealed against the decision in respect of each of the Whites, but since then Archibald White has died and as yet there is no personal representative of his estate. Accordingly these appeals relate only to Brian and Stephen White. H

The Special Commissioners gave a careful and detailed decision in a document running to 45 pages(3). I can summarise the basic facts as follows. I

(1) Archibald, Brian and Stephen White until 19 July 1976, owned all the issued share capital of S. White & Sons (Queensferry) Ltd. ("Queensferry"), which owned and operated about a dozen supermarkets.

(1) 54 TC 101. (2) 55 TC 324. (3) pages 10–36 *ante*.

A Archibald White held 701, Brian White held 700 and Stephen White held 2,101 £1 ordinary shares.

(2) In 1973 the Whites, on the advice of Queensferry's accountant, Mr. Clarke, decided that they would either merge Queensferry with a similar business or they would sell Queensferry. Between 1973 and the summer of B 1976 they sought without success to achieve the one or the other result.

(3) One company a merger with which was investigated was Cee-N-Cee Supermarkets ("Cee-N-Cee"), and in February or March 1976 Mr. Clarke initiated talks with Manx lawyers, Kneale & Co. ("Kneales") about establishing a holding company in the Isle of Man as the vehicle for such merger.

C

(4) A company which was approached in 1974 but said it was not interested was Oriel Foods Ltd. ("Oriel"), but in early 1976 Oriel inquired if Queensferry was still up for sale. Oriel itself had been acquired by RCA Corporation of America ("RCA") in 1974. A subsidiary of Oriel was Morris & David Jones Ltd. ("Jones"). Once Oriel's inquiry was received, negotia- D tions with Cee-N-Cee were set aside and negotiations with Oriel were pursued. In May 1976 broad agreement on price had been reached, that is to say that if a sale went through the consideration would probably be in excess of £2 million and in cash.

(5) In June 1976 the Whites were alarmed by trade press reports that E RCA was disenchanted with its food operations. A meeting with Oriel on 17 June to find out how the proposed sale to Oriel stood left Brian and Stephen White and Mr. Clarke feeling despondent. They had exhausted other potential purchasers and trading prospects for Queensferry were not good. They went back to Cee-N-Cee, which was willing to resume talks.

F

(6) Mr. Clarke on 21 June arranged with Kneales to acquire an off-the-shelf company, Millor Investments Ltd. ("Millor"), as a holding company for the projected merger with Cee-N-Cee. Millor then had a £2 issued share capital, its two £1 shares being held by two advocates' clerks from Kneales. On 23 June Millor increased its authorised share capital with a view to issuing 3,502 Millor shares in exchange for the Whites' Queensferry shares. On 24 G June Mr. Clarke sent to Kneales a draft which he had prepared of a contract between the Whites and Millor.

(7) Meanwhile on 21 June Oriel asked Mr. Clarke for a further meeting on 25 June. That was held at the offices of Oriel's solicitors. Oriel asked if a draft contract for the acquisition of Queensferry could be sent to the Whites' H solicitors and were told that the draft should be sent to Kneales as lawyers for Millor. Oriel's solicitors sent the draft to Kneales. However, the parties had not yet reached agreement on the sale, and negotiations between Oriel on the one side and Stephen and Brian White and Mr. Clarke on the other thereafter continued.

I

(8) Notwithstanding the increased purposefulness from 25 June onwards of the talks with Oriel, the talks with Cee-N-Cee continued.

(9) On 9 July, on the advice of Kneales, who had received the draft contract from Oriel's solicitors, the share capital of Queensferry was reorganised

with the purpose of effecting stamp duty savings should the contract for the sale to Jones by Millor be entered into. Queensferry's authorised share capital was increased and 3,502 new ordinary shares were issued to the Whites on renounceable letters of allotment while the existing ordinary shares were converted into deferred ordinary shares with diminished rights. A

(10) On or before 14 July Millor offered to acquire the issued share capital in Queensferry. It offered to buy the deferred ordinary shares for 50p each and to exchange one Millor share for each Queensferry ordinary share, the offer to remain open until 9 August. On 19 July the Whites entered into an agreement with Millor ("the July agreement") accepting Millor's offer, and the Whites held shares in Millor in the same proportions as they had held shares in Queensferry. B C

(11) On 20 July the Queensferry board approved and registered the transfers of the deferred ordinary shares to Millor and agreed that when the renounced letters of allotment for the ordinary shares were received registration would be completed in accordance with the forms of renunciation. D

(12) On 9 August there was a meeting between representatives of Oriel and Jones on the one hand and Stephen and Brian White and Mr. Clarke and the two directors (both from Kneales) of Millor on the other. That meeting was stormy: at one stage Stephen White and his party walked out. But agreement was in the end reached and Millor and Jones entered into a written agreement ("the August agreement") whereby Jones agreed to purchase the whole of the issued share capital of Queensferry for a consideration of £2.2 million subject to adjustment. That consideration was apportioned as to 50p for each deferred ordinary share and the balance to the ordinary shares. Payment of the consideration was to be by instalments, £1.8 million on completion and then two other payments of adjustable amounts. In the event £2,459,493 was paid by Jones. E F

(13) Following completion and between 25 March 1977, and 6 October 1981, Millor made several interest-free loans to the Whites. In all £275,000 was lent to Stephen White but of that £50,000 was repaid on 30 September 1981; £145,000 was lent to Brian White and £100,000 to Archibald White; £1,500 was expended on acquiring options on three Manx companies, and the balance lent interest-free to those companies. G

(14) In October 1981 the loans to the Manx companies were called in and those monies lent to the Whites to enable each of them to purchase insurance policies; some were annual premium policies assuring payment of sums in 1990 or on earlier death, and some were deferred annuity contracts. H

Those were the basic facts. The Special Commissioners also made other findings, to which I shall refer a little later.

The Inspector of Taxes raised assessments to capital gains tax against each of Archibald and Brian White in the sum of £490,000 for 1976–77 and in the sum of £27,000 for 1977–78, and against Stephen White in the sum of £1,475,000 for 1976–77 and in the sum of £80,000 for 1977–78. At the hearing of the appeals by the Whites before the Special Commissioners Mr. Price submitted for the Whites that the only disposals by the Whites were the disposals of their Queensferry shares to Millor, and of those disposals only the sale of the deferred ordinary shares to Millor was a disposal for capital gains I

A tax purposes, the exchange of the Queensferry ordinary shares for the Millor shares being by the combined effect of para 4(2) and para 6 of Sch 7 to the Finance Act 1965, no disposal for capital gains tax purposes. In summary those paragraphs provide (so far as material) that the issue by company A of its shares in exchange for shares in, and so as to acquire control of, company B is treated as a reorganisation under which the shareholders of company B B make no disposal for capital gains tax purposes of their company B shares and no acquisition of the company A shares, the company A shares and the company B shares being treated as the same asset acquired as the company B shares were acquired. The Crown submitted to the Special Commissioners that the Whites had for capital gains tax purposes disposed of all their shares in Queensferry to Jones because the transfer by the Whites of their shares to C Millor should be treated as a fiscal nullity. Alternatively the Crown submitted that the Whites fell to be assessed on the amounts which they received from Millor by way of loans and at the times when the loans were made.

The Special Commissioners found that there was a composite transaction consisting of the July and August agreements and the loans up to 6 D October 1981, by Millor to the Whites. But following the decision of the majority of the Court of Appeal in *Floor* v. *Davis*[1] [1978] Ch 295, on what was described as the first stage of the transaction in that case the Special Commissioners held that the July and August agreements were real transactions, that Millor acquired the Queensferry shares as a principal and that E accordingly the Whites could not be regarded as having disposed of their shares direct to Jones. They therefore held that there was no disposal for capital gains tax purposes of the Queensferry ordinary shares effected by the July agreement. However they went on to hold that each of the loans up to 6 October 1981, was an event by which part of the cash consideration relating to the Queensferry shares which the borrower had formerly owned reached F the borrower, that this concluded a composite transaction and that on each occasion when the borrower received a loan he must be deemed to have made a part disposal of the shares which he formerly owned in Queensferry.

The Crown now appeals against the rejection by the Special Commissioners of the argument that the Whites made a disposal for capital gains tax G purposes of their Queensferry shares to Jones. The views followed by the Special Commissioners of the majority of the Court of Appeal in *Floor* v. *Davis* have now been held by the House of Lords in *Furniss* v. *Dawson*[2] to have been wrong, and the dissenting judgment of Eveleigh L.J. reaffirmed as correct. Mr. Sher submitted that the scheme employed by the Whites was exactly the same as that in *Furniss* v. *Dawson* and that given the finding of a H composite transaction by the Special Commissioners the Court should hold that the only true and reasonable conclusion on the facts found by the Special Commissioners is that the transfer of the Queensferry shares to Millor had no commercial purpose other than the avoidance of tax. Accordingly he submitted that on the application of the *Ramsay*[3] principle the real transaction was the sale by the Whites of their Queensferry shares to I Jones for the monies which they caused to be paid to Millor. Mr. Price submitted that the Ramsay principle had no application to the present case without a major and unwarranted extension of that principle.

(1) 52 TC 609. (2) 55 TC 324. (3) 54 TC 101.

The *Ramsay* principle, its rationale and its limitations have been authoritatively stated by the House of Lords in *Furniss* v. *Dawson.* The speeches, even of their Lordships' House, do not fall to be construed as though they were enacted by Parliament. Nevertheless it is clear that the House of Lords attempted to give general guidance on the application of the *Ramsay* principle and to dispose of what they held to be the misunderstandings of the lower Courts as to the scope of the principle. Lord Fraser ([1984] AC 474) at page 512 said this of the principle:

> "The true principle of the decision in *Ramsay* was that the fiscal consequences of a preordained series of transactions, intended to operate as such, are generally to be ascertalned by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately."

Lord Brightman, with whom all the other members of the House of Lords agreed, expounded the rationale of the *Ramsay* principle at page 526:

> "My Lords, in my opinion the rationale of the new approach is this. In a pre-planned tax-saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) a like series of steps which are followed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results. For example, equitable interests may pass when the contract for sale is signed. In many cases equity will regard that as done which is contracted to be done. *Ramsay* says that the fiscal result is to be no different if the several steps are pre-ordained rather than pre-contracted."

He then demonstrated how the principle applied to the facts of *Furniss* v. *Dawson.* In that case the Dawsons held shares in two operating companies and agreed in principle that a purchaser, Wood Bastow, should buy all the shares in the operating companies. They then arranged for their shares to be exchanged for shares in a company, Greenjacket, which was to be incorporated in the Isle of Man so that the sale to Wood Bastow would be made by Greenjacket. Wood Bastow agreed to that arrangement. Greenjacket was incorporated and its board resolved to execute two agreements, one to acquire the Dawsons' shares and the other to sell those shares to Wood Bastow. Both agreements were completed at the same time. Lord Brightman said this at pages 526 and 527:

> "For example, in the instant case tax will, on the *Ramsay*[1] principle, fall to be assessed on the basis that there was a tripartite contract between the Dawsons, Greenjacket and Wood Bastow under which the Dawsons contracted to transfer their shares in the operating companies to Greenjacket in return for an allotment of shares in Greenjacket, and under which Greenjacket simultaneously contracted to transfer the same shares to Wood Bastow for a sum in cash. Under such a tripartite contract the Dawsons would clearly have disposed of the shares in the operating companies in favour of Wood Bastow in consideration of a sum of money paid by Wood Bastow with the concurrence of the Dawsons to Greenjacket. Tax would be assessed, and the base value of the

(1) 54 TC 101.

A Greenjacket shares calculated, accordingly. *Ramsay* says that this fiscal result cannot be avoided because the pre-ordained series of steps are to be found in an informal arrangement instead of in a binding contract. The day is not saved for the taxpayer because the arrangement is unsigned or contains the magic words 'this is not a binding contract'."

B Lord Brightman then stated the limitations of the *Ramsay* principle at page 527:

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

D

There has been much debate before me as to the requirements of a composite transaction for the application thereto of the *Ramsay* principle. Mr. Sher submitted that the important characteristic of each step forming part of a composite transaction was that it should be intended by the taxpayer to be one step in a series of steps. For this he relied on the words of
E Lord Wilberforce in the *Ramsay* case at page 323:

"If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine [cf. *Commissioners of Inland Revenue* v. *Duke of Westminster*(1)
F [1936] AC 1] to prevent it being so regarded."

However in the next paragraph at page 324 Lord Wilberforce referred to the "intentions of the parties", which suggests that he may not have regarded the intention of the taxpayer alone as sufficient for determining what the relevant transaction was. Further he went on to say that the Commissioners

G "are not, under the *Westminster* doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. This is particularly the case where (as in [*Eilbeck* v. *Rawling*(2) [1982]AC 300]) it is proved that there was an accepted obligation once a scheme is set in motion, to carry it
H through its successive steps. It may be so where (as in *Ramsay*(2) or in *Black Nominees Ltd.* v. *Nicol*(3)(1975) 50 TC 229) there is an expectation that it will be so carried through, and no likelihood in practice that it will not. In such cases (which may vary in emphasis) the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of inde-
I pendent transactions."

The latter part of the last sentence has been disapproved, I think, by the House of Lords in *Furniss* v. *Dawson*(4) Lord Brightman holding (at pages

(1) 19 TC 490. (2) 54 TC 101. (3) [1975] STC 372. (4) 55 TC 324.

527–8) that a finding that a transaction is a composite one is a finding of fact reviewable only on the principles of *Edwards* v. Bairstow(1)[1956] AC 14.

Lord Wilberforce in the passage cited refers to two classes of case to which the *Ramsay* principle has or may have application and which correspond to the contractual and non-contractual arrangements to which Lord Brightman referred in giving the rationale of the *Ramsay* principle. It is to be noted that to the non-contractual class of case Lord Wilberforce applies the description that it is where there is an expectation that the series of steps will be carried through once a scheme is set in motion and there is no likelihood that it will not. The practical certainty, to adopt Mr. Price's phrase, that the series of steps will be completed once started is a feature of the rationale of the *Ramsay* principle as expounded by Lord Brightman and is well exemplified in all the cases in which the principle has been held to apply. The justification for equating the non-contractual arrangement with the contractual is that looking at the realities of a pre-planned tax-saving scheme where every step has been arranged, there is no distinction between the two: both will in practice be carried through to their intended conclusion. Contrast the case where in reality there is a distinct possibility that a planned series of steps may not be completed as planned; in those circumstances the real position is not the equivalent of a contractual arrangement capable of being enforced.

Mr. Sher accepted that there must be not only an intention on the part of the taxpayer that the planned series of steps will, once the first step is taken, be completed but an expectation that this would happen and no likelihood in practice that it would not. He submitted, however, that the Special Commissioners, in finding that there was a composite transaction, must be taken to have applied the right test, having had the relevant authorities, including the *Ramsay* case, cited to them, that their finding was one of fact and as such could not be disturbed unless there was no evidence to support that conclusion. He submitted that there was evidence to support that conclusion, including evidence that on 19 July 1976, there was no likelihood in practice that the sale to Jones would not eventuate.

The Special Commissioners do not spell out their understanding of the requisites of a composite transaction. They did however state that one aspect of the oral evidence of Mr. Clarke, Stephen White and Brian White that required consideration was whether there was evidence of a prearranged scheme. They found that the Whites strove for a sale to Jones as a more desirable target than a merger with Cee-N-Cee, that the evidence did not support the Whites' contention that the sole purpose of acquiring Millor was to act as a holding company for the merger between Queensferry and Cee-N-Cee, that at the time when the July agreement was entered into the Whites and Mr. Clarke were working towards an agreement for the sale to Jones, that before the July agreement Mr. Clarke reassured Stephen White as to the possibility of getting the use of any proceeds of sale, or part of them, that there was a desire to avoid capital gains tax and knowledge that this was possible and that the primary objective of the Whites was to conclude a sale of the Queensferry shares to Jones. The Special Commissioners stated that it was irrelevant that the terms of the August agreement were not finally settled until the day it was executed. They found that the understanding reached between the Whites and Mr. Clarke (but not, be it noted, with Oriel or Jones) before the July agreement as to any proceeds of sale being available to

(1) 36 TC 207.

A the Whites was of a different nature from the carefully thought out and dovetailed arrangements in *Floor* v. *Davis*(1) and *Furniss* v. *Dawson*(2).

It would appear from these findings that what the Special Commissioners regarded as the essential quality of a composite transaction was that the taxpayer (with his advisers) should at the time the first step in B the composite transaction was taken have planned the steps in the series that made up the composite transaction, regardless of whether the means of achieving all the steps lay within the control of the taxpayer or of whether there was otherwise any practical certainty that all the planned steps would be completed. Thus, although I do not doubt that the Special Commissioners were attempting to make a finding of a composite transaction for the pur- C pose of the application of the *Ramsay*(3) principle, to my mind they have not directed themselves correctly in law. The case would have to be remitted to the Special Commissioners, as Mr. Sher submitted it should, unless there was only one true and reasonable conclusion on the facts as found or there was some other point decisive of the appeals.

D Looking at the facts found by the Special Commissioners I think that it is impossible to conclude that there was no likelihood in practice on 19 July that the sale to Jones would not be completed. There was no contractual or non-contractual arrangement in advance of the August agreement between the Whites and Oriel or Jones that there would be a sale of the Queensferry shares to Jones. True it is that the sale is what the Whites strove for, that E even as early as the share reorganisation of Queensferry their purpose was to save stamp duty if a sale to Jones took place, and that desire was their primary objective when entering into the July agreement. But progress towards the execution of that agreement continued "not always smoothly", the meeting on 9 August was "stormy" (no doubt a reference to the evidence that Stephen White and his party walked out) and the terms of the August agree- F ment were not concluded until 9 August 1976. I add that although there is no express finding by the Special Commissioners as to the reason for the meeting being stormy, there was evidence, recorded by them, from two witnesses that the difficulty in the negotiations between the Whites and Oriel lay in the fact that Oriel wanted part of the consideration to be deferred and made dependent upon the profits for a period after the acquisition, whilst the G Whites, who in such period would not have control of the business, were not surprisingly unhappy with that.

There are other references in the Special Commissioners' decision which support the conclusion that the possibility that the sale to Jones would not be concluded was a live one at the time of the July agreement. The Special H Commissioners, whilst rejecting the Whites' evidence that the *sole* purpose of acquiring Millor was to act as a holding company for the purpose of a merger with Cee-N-Cee, significantly do not say that it was not *a* purpose of that acquisition. Mr. Clarke had on 21 June arranged for Millor to be acquired as a holding company for the merger, and although that purpose had ceased to be the primary purpose of that acquisition by the time of the I July agreement, the obvious inference is that the Special Commissioners accepted that it was a secondary purpose at that date. That is consistent with

(1) 52 TC 609. (2) 55 TC 324. (3) 54 TC 101.

the finding that the continued talks with Cee-N-Cee were because Stephen White wanted to keep his options open. When the Special Commissioners infer that Stephen White asked Mr. Clarke before the July agreement what possibility there was of his getting the use of "any proceeds of sale, or part of them", they used language consistent with the recognition that there might be no sale. I therefore accept Mr. Price's submission that it cannot be said that at the time of the July agreement there was no likelihood in practice that the sale to Jones would not take place. It follows that it is not possible to say that the July agreement and the August agreement were parts of a composite transaction for the application of the *Ramsay*[1] principle, and Lord Brightman's first limitation is not satisfied.

Nor in my judgment is the second limitation. Mr. Sher submitted that the July agreement had no commercial purpose other than to avoid tax because when one looks at what in the event happened on 9 August it can be seen that the sole purpose that the July agreement served was the avoidance of tax. He relied on the finding that there was a desire to avoid capital gains tax and the knowledge that this was possible. He submitted that the commercial purpose of acquiring Millor to be the holding company for the merger with Cee-N-Cee should be disregarded because it was only the secondary and alternative purpose and not one which coexisted with the primary tax avoidance purpose in the sense of being achievable at the same time as, and not alternatively to, the primary purpose. It seems to me that Mr. Sher is in effect seeking to qualify Lord Brightman's formulation of the second limitation. I do not think that is justified. The purpose of the insertion of a step must be ascertained as at the time the step was taken. It seems to me wrong in principle to apply hindsight so as to fix the Whites with the single tax avoidance purpose which in the event the acquisition of Millor served when in reality they had a dual purpose at 19 July 1976, one being a proper commercial purpose which at that time it was quite possible the acquisition of Millor would serve.

It follows therefore that in my judgment the *Ramsay* principle as it has been formulated has no application to the present case. However Mr. Sher submitted that the principle should be extended to apply to a case such as this where a tax avoidance step can be seen to have been taken in circumstances where the taxpayers' primary objective was a sale, where there was a desire to avoid tax and where there was a common understanding between the Whites and Oriel at the time of the July agreement that if a sale was to be effected it would be by Millor selling to Jones. But so to extend the *Ramsay* principle requires not only a new formulation of that principle but also a rationale quite different from that given by Lord Brightman. It is one thing for the Court to treat as a fiscal nullity a purely artificial step which will inexorably be followed by one or more others so as to achieve the desired end result. It is quite another for the Court to treat as a fiscal nullity a step which had a commercial purpose in addition to tax avoidance and which in reality at the time it was taken might not have been followed by the other steps. Mr. Sher submitted that not to extend the *Ramsay* principle in the way he suggested would leave it capable of easy circumvention. But the *Ramsay* principle is judge-made law, not a statute. The limitations of that principle and hence the possibilities of escaping its application are evident from the formulation by the House of Lords. In any event I do not doubt that Commissioners, in finding the facts, will look to the realities and will be

(1) 54 TC 101.

A vigilant against the risk that those desiring to avoid tax may try to import artificial uncertainties in respect of what is in truth a composite transaction.

It seems to me that what I am being invited to hold by the Crown would amount to judicial legislation. Parliament in other fiscal contexts, such as estate duty and capital transfer tax, has enacted provisions relating to associated operations so that a disposal by two or more such operations is made subject to tax. I am not prepared to do what Parliament has not thought fit to enact.

In the result I must hold that the *Ramsay*(1) principle has no application to the facts of the present case. It is common ground that if the July agreement does not fall to be disregarded, the provisions of paras 4 and 6 of Sch 7 are applicable so that the transfers of the ordinary shares in Queensferry by the Whites to Millor are to be treated as not being disposals for capital gains tax purposes. Accordingly I must dismiss the Crown's appeals.

To limit the order I make to such dismissal would leave standing the Special Commissioners' determination in principle that there were part disposals by the Whites of their Queensferry shares when long after they and, indeed, Millor ceased to own the shares they received loans from Millor. Surprisingly the Whites did not indicate dissatisfaction with the Special Commissioners' determination either immediately or within 30 days or at all until the hearing before me, when Mr. Price has argued that that determination is plainly erroneous in law. The Crown does not seek to uphold that determination and there are obvious difficulties in the way of supporting it. However there is a possible procedural obstacle to my acceding to Mr. Price's submission on that determination in view of the absence of any timely indication to the Special Commissioners of dissatisfaction by the Whites. Mr. Price says that it does not affect the Court's ability to deal with the correctness of the determination. Mr. Sher submits that it does, though he offers a possible escape route on the wording of the question stated for the opinion of the Court in the Case Stated. Neither side is anxious that I should rule on this procedural point unless it proves necessary to do so, and a practical solution to the problem is being sought. I propose therefore to make no order other than to dismiss the appeals, subject however to the direction that the order be not drawn up for a period, the length of which I shall discuss with Counsel, with liberty to either side in that period to restore the matter for further argument should a ruling on the procedural point and hence on the Special Commissioners' determination be required.

Appeals dismissed, with costs.

2) COMMISSIONERS OF INLAND REVENUE v. BOWATER PROPERTY DEVELOPMENTS LTD.

The case was heard in the Chancery Division before Warner J. on 11, 12, 15, 16 and 18 July 1985 when judgment was reserved. On 18 October 1985 judgment was given against the Crown, with costs.

Jules Sher Q.C. and *Alan Moses* for the Crown.

(1) 54 TC 101.

Andrew Park Q.C. and *David Goy* for the Company. A

The following case was cited in argument in addition to the cases referred to in the judgment:—*Ewart* v. *Taylor* 57 TC 401; [1983] STC 721.

B

COMMISSIONERS OF INLAND REVENUE *v.*
BOWATER PROPERTY DEVELOPMENTS LIMITED

Warner J.:—.This is an appeal by the Commissioners of Inland Revenue against a decision of the Special Commissioners in a development land tax case. It raises a question as to the application of what has come to be called "the R*amsay*(1) principle", after the case of *W.T. Ramsay Ltd.* v. *Commissioners of Inland Revenue* [1982] AC 300. The Respondent to the appeal is Bowater Property Developments Ltd. ("B.P.D."), a company in the well known group of which the Bowater Corporation PLC is the parent. C

D

The facts are in outline these. At the beginning of 1980 B.P.D. was the owner of 23 acres of land near Milton Regis in Kent, known as "Crafts Marsh". A sale of Crafts Marsh to Milton Pipes Ltd. ("M.P.L."), a company outside the Bowater group, was under negotiation. In the negotiations between the Bowater group and M.P.L. a price of £202,500 had been agreed subject to contract, it being also agreed that the contract would be conditional on planning permission being obtained for the uses to which M.P.L. wished to put the land. E

On 25 March 1980, B.P.D. contracted to sell Crafts Marsh for £180,000 to five other companies in the Bowater group as beneficial tenants in common in equal shares. It is not in dispute that that transaction (which I will call "the first transaction") had no business purpose. The five companies were selected because none of them had used any part of its £50,000 exemption from development land tax under s 12 of the Development Land Tax Act 1976, as amended. The sole object of the first transaction was to avoid the liability to development land tax which would otherwise fall on B.P.D. if the sale to M.P.L. went through. At the time of the first transaction there was, as the Special Commissioners found, a firm expectation on the Bowater side that that sale would go through but the chances of M.P.L. being willing to sign a contract on or about 25 March 1980, were nil. F G

On 22 May 1980, Mr. Goodger, a group legal adviser in the Bowater Corporation's legal department, during the course of what the Special Commissioners describe as "a somewhat desultory correspondence" between himself and the solicitors acting for M.P.L., sent to them, to replace an earlier draft, a revised draft contract, conditional on M.P.L. obtaining planning permission. In this draft the five companies were of course named as vendors. On 7 July 1980, M.P.L.'s solicitors wrote to Mr. Goodger in these terms: H I

> "Dear Sir, *Land at Crafts Marsh*. We thank you for your letter of the 22nd May. We are sorry to tell you that the present economic situation with its direct effect on the concrete making industry has compelled

(1) 54 TC 101.

A our Clients to give up the proposal to purchase your Company's land. We enclose the various documents which you have sent us."

It appeared to those concerned on the Bowater side that the sale had fallen through for good. During the ensuing months it remained their general policy to sell Crafts Marsh, but they had no other potential purchaser in B mind and they did not actively seek one. Early in February 1981, circumstances having changed, particularly from the planning point of view, the solicitors who had been acting for M.P.L. telephoned the Bowater Corporation's legal department to say that M.P.L. was interested in Crafts Marsh again. Negotiations were thereupon re-opened. They resulted in the exchange on 23 October 1981, of unconditional contracts for the sale of C Crafts Marsh by the five companies to M.P.L. for £259,750. (I will call that sale "the second transaction"). On the same day—though it is common ground that nothing turns on this—another company in the Bowater group sold a small adjoining piece of land to M.P.L. for £250. The sales were completed on 23 November 1981.

D On 13 February 1984, the Commissioners of Inland Revenue, in reliance on the *Ramsay*(1) principle, assessed B.P.D. to development land tax on the footing that the second transaction should be treated for tax purposes as a disposal by B.P.D. The Special Commissioners held that, on the facts of this case, that principle did not apply and they discharged the assessment.

E The relevant primary facts are set out in detail by the Special Commissioners in their written decision, which is attached to the Case Stated. There would, I think, be no advantage in my taking up time reading their findings, or paraphrasing them, or summarising them further than I have already done. The view taken by the Special Commissioners of the law was that it was not essential for "the *Ramsay* principle" to apply that (and I F quote) "everything has been to all intents and purposes fixed in advance". "In our judgment", they said, "what is critical is the firmness (or otherwise) of the expectations of the party introducing the tax-avoidance transaction that the ultimate transaction will occur".

G Consistently with that view they held that the state of mind of those acting for M.P.L. at the time of the first transaction was irrelevant unless known to those acting for the Bowater group. They continued(2):

> "On the facts, we find that such 'ifs and buts' as remained in relation to the contemplated contract on 25 March 1980 were insufficient to prevent the transfers on that date from being treated as one with the H implementation of what was then contemplated. If Milton Pipes had, in say July 1980, entered into the contract envisaged by Mr. Goodger's May draft we would certainly have found that the transfer to the five Bowater companies and their disposals to Milton Pipes were all one transaction, and we would have applied the *Ramsay* principle accordingly."

I

What led the Special Commissioners to decide the case in favour of B.P.D. was the break, resulting from M.P.L.'s withdrawal in July 1980, in

(1) 54 TC 101. (2) page 49D/E *ante*.

the continuity of the intention of those concerned on the Bowater side to sell Crafts Marsh to M.P.L. The Special Commissioners said(1): A

"The critical point in our view is the interruption of the active intention in relation to disposal. It seems to us that if effect is to be given to two or more transactions as a single composite transaction there must exist throughout, at the very least, an unbroken intention of an active (rather than merely general) nature. It is the foundation of the essential unity of the transactions. The required continuity is lacking in this case and we therefore do not find that the March 1980 transfer to the five Bowater companies and the October 1981 disposal to Milton Pipes constituted a single composite transaction." B

C

Mr. Sher, on behalf of the Commissioners of Inland Revenue, accepts that this is a case where *Edwards* v. *Bairstow*(2) [1956] AC 14 applies and that, accordingly, I can allow the appeal only if either (i) the Case Stated contains something *ex facie* which is bad law and which bears upon the decision or (ii) the facts found in the Case Stated are such that no one acting judicially and properly instructed as to the relevant law could have come to that decision. D

Mr. Sher submits that, in applying the *Ramsay*(3) principle, one must distinguish between two types of case. One type is that where there is a "circular" or "self-cancelling" scheme, as in the *Ramsay* case itself, in its companion case *Eilbeck* v. *Rawling*(3) [1982] AC 300, and in *Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.*(4) 54 TC 200. In that type of case, the relevant intention or expectation is that of the taxpayer concerned, for that taxpayer alone is, as Mr. Sher expressed it, "in the driving seat". E

The other type of case is that exemplified by *Floor* v. *Davis*(5) [1978] Ch 78 and *Furniss* v. *Dawson*(6) [1984] AC 474 where there is a "linear" or bilateral transaction into which there has been inserted a step having no purpose other than the avoidance of a liability to tax. In this type of case there are two real parties to the transaction and they are at arm's length. Both must concur before the transaction can go through. But, says Mr. Sher, for the purposes of the application of the *Ramsay* principle only the intention or expectation of the party introducing the tax avoiding step matters. F G

So far Mr. Sher's submissions accord with the views of the Special Commissioners. He goes on to submit, however, that the *Ramsay* principle applies whenever it is found that a step has been taken with a view to avoiding tax in a certain event and that event actually occurs. Thus, he says, in the present case, what matters is the expectation or intention of those concerned on behalf of the Bowater group at the time of the first transaction. They at that time expected the sale of Crafts Marsh to go through and their purpose in causing the first transaction to take place was to avoid development land tax on that sale. Therefore, the *Ramsay* principle applies, and the break in the negotiations between the Bowater group and M.P.L. that occurred from July 1980 to February 1981 was irrelevant. Indeed, Mr. Sher says, the *Ramsay* principle would have applied just the same if those concerned on the Bowater side had had no specific purchaser in mind at the time of the first transaction or even had intended then to sell the land at auction. H I

(1) page 50D/E *ante*. (2) 36 TC 207. (3) 54 TC 101. (4) [1982] STC 30. (5) 52 TC 609. (6) 55 TC 324.

A In support of those submissions Mr. Sher relies mainly on the following passage in the speech of Lord Wilberforce in the *Ramsay* case (at pages 323–324)(1):

> "Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of *Inland Revenue Commissioners* v. *Duke of Westminster*(2)... This is a cardinal principle but it must not be overstated or overextended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. 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. For this there is authority in the law relating to income tax and capital gains tax: see *Chinn* v. *Hochstrasser*(3)... and *Inland Revenue Commissioners* v. *Plummer*(4)... For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams', from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is. They are not, under the *Westminster* doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. This is particularly the case where (as in *Rawling*(5)) it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps. It may be so where (as in *Ramsay*(5) or in *Black Nominees Ltd.* v. *Nicol*(6) ...) there is an expectation that it will be so carried through, and no likelihood in practice that it will not. In such cases (which may vary in emphasis) the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions."

Mr. Sher emphasises the reference by Lord Wilberforce in that passage to "a document or transaction... intended to have effect as part of a nexus or series of transactions", his reference to the legal nature of a transaction emerging "from a series or combination of transactions, intended to operate as such", and his reference to appellate commissioners not being "bound to consider individually each step in a composite transaction intended to be carried through as a whole".

I My own understanding of Lord Wilberforce's speech is, however, that he had no intention of laying down any such wide proposition as Mr. Sher contends for. It is indeed plain, from the last sentence in the passage that I

(1) [1982] AC 300. (2) 19 TC 490. (3) 54 TC 311. (4) 54 TC 1. (5) 54 TC 101. (6) 50 TC 229.

have read, that Lord Wilberforce envisaged that there would be cases where the Commissioners would properly find that a series of transactions constituted not "a composite transaction" (to which the *Ramsay* principle would apply) but "a number of independent transactions"(to which it would not).

The matter does not however rest there, because we now have the guidance of Lord Brightman's speech in *Furniss* v. *Dawson*[1], a speech with which all the other members of the Appellate Committee in that case agreed. At page 527 he said[2]:

> "The formulation by Lord Diplock in *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*[3]... expresses the limitations of the *Ramsay*[4] principle. First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax—not 'no business *effect*'. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied...The formulation, therefore, involves two findings of fact, first, whether there was a preordained series of transactions, i.e. a single composite transaction, secondly, whether that transaction contained steps which were inserted without any commercial or business purpose apart from a tax advantage."

Lord Brightman's use of the word "limitations" led to a semantic argument before me and seems to have done so also before the Special Commissioners. In order to get rid of that argument, I will substitute the word "requirements".

It seems to me that Mr. Sher's submissions amount to saying that one may ignore the first of Lord Brightman's requirements. Mr. Sher is saying, in effect, that, if one finds that a series of transactions includes a transaction that had no purpose other than the avoidance of a liability to tax arising from a later transaction in the series, one may *ipso facto* conclude that the series constituted a "single composite transaction". That, it seems to me, cannot be right, because, as Lord Brightman's words show, and indeed as the whole tenor of the authorities shows, a single composite transaction, in this context, means one all the steps in which have been pre-arranged or pre-ordained.

One thing is certain: in no sense was the second transaction in the present case pre-arranged or pre-ordained at the time when the first transaction was carried out.

Mr. Sher argued that, unless his submissions were accepted, the application of the *Ramsay* principle in the "linear" or bilateral type of case would be haphazard. A well-advised taxpayer need never be affected by it, because he could always ensure that the tax-avoiding transaction was carried out before any deal with the other party was clinched. That argument would be very convincing if it were legitimate to regard the *Ramsay* principle as a judge-made anti-tax-

(1) 55 TC 324. (2) [1984] AC 474. (3) 54 TC 200. (4) 54 TC 101.

A avoidance rule, which it was open to the courts to mould and develop in the light of their experience of tax avoidance devices. Indeed Mr. Sher went so far as to suggest that I should so regard it. In my opinion, however, that would be nothing short of unconstitutional. Under our constitution the imposition of taxation is a matter for Parliament. Indeed within Parliament itself it is a matter in which the House of Commons has a predominant role. The only function of the B courts in this sphere is to interpret and apply the legislation enacted by Parliament in accordance with relevant legal principles. Among the relevant legal principles is the principle that the courts are bound to seek to ascertain the true nature of a transaction and to give effect to it. That, to my mind, is the real basis of the *Ramsay*(1) principle. (I choose the phrase "true nature", but other expressions such as "reality" or "substance"—in the sense in which I under- C stand the latter term to have been used by Lord Bridge in *Furniss* v. *Dawson*(2)—will do just as well).

I recognise that there are dicta, particularly dicta of Lord Scarman in *Furniss* v. *Dawson*, that might suggest that that was wrong. But even Lord Scarman was careful to say that "the best chart that we have for the way for- D ward" appeared to him to be the words of Lord Diplock in the *Burmah Oil*(3) case quoted by Lord Brightman in his speech. Those words referred to a(4)

> "significant change in the approach adopted by this House in its judicial role to a pre- ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are E inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable".

That hardly points, if I may say so, to a general power for the courts to counteract transactions designed to yield tax advantages. Indeed Lord Brightman, in F a passage preceding the one that I read a moment ago, said this(5):

> "My Lords, in my opinion the rationale of the new approach is this. In a pre-planned tax-saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a G binding contract, and (ii) a like series of steps which are followed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results. For example, equitable interests may pass when the contract for sale is signed. In many cases equity will regard that as done which is contracted to be done. *Ramsay* H says that the fiscal result is to be no different if the several steps are preordained rather than pre-contracted."

That echoes what Lord Wilberforce said in the passage that I read earlier, where he referred to "the case where (as in *Rawling*) it is proved that there was an accepted obligation, once a scheme is set in motion, to carry through its suc- I cessive steps" and to the case "where (as in *Ramsay* or in *Black Nominees Ltd.* v. *Nicol*(6)...) there is an expectation that it will be so carried through, and no likelihood in practice that it will not".

(1) 54 TC 101. (2) 55 TC 324. (3) [1982] STC 30.
(4) [1984] AC 474, at page 524. (5) *ibid*, at page 526. (6) 50 TC 229.

Mr. Sher very properly referred me to the recent decision of Peter Gibson J. in *Craven* v. *White* (24 May 1985, unreported), and invited me not to follow it. That case differs from the present in that there, as the learned Judge held, neither of Lord Brightman's requirements was satisfied, whereas here it is undisputed that the second was satisfied. I find myself, however, in entire agreement with the reasoning that led Peter Gibson J. to hold that, in that case, the first requirement was not satisfied and that he should decline to extend the *Ramsay*(1) principle to cover the case. I would particularly adopt this paragraph in his judgment(2):

> "It seems to me that what I am being invited to hold by the Crown would amount to judicial legislation. Parliament in other fiscal contexts, such as estate duty and capital transfer tax, has enacted provisions relating to associated operations so that a disposal by two or more such operations is made subject to tax. I am not prepared to do what Parliament has not thought fit to enact."

I would add this. Before the Special Commissioners Mr. Park took, on behalf of B.P.D., what was described as a "double taxation" point. Before me he conceded that, as the Special Commissioners held, the answer given by Lord Brightman to that point in *Furniss* v. *Dawson*(3) was sufficient here too; but he took what seemed to me a more telling point. B.P.D. is taxed as a trader in land. Accordingly it became liable to corporation tax on the profit that it made when it sold Crafts Marsh to the five companies. It did not actually pay that tax because the liability was covered by group relief. It is common ground between Mr. Park and Mr. Sher that, in a situation where the *Ramsay* principle did not apply, there are specific statutory provisions which would ensure that, if a transaction such as the second transaction took place within 12 years of the first transaction, credit would be given against any development land tax payable as a result of the later transaction for the corporation tax payable as a result of the first transaction. In practice that credit would be given whether the liability for the latter tax had been discharged by payment or by the absorption of group relief. It is also common ground, however, that those statutory provisions would not fit a case where the *Ramsay* principle applied. That would not of course matter if the second transaction took place so soon after the first that there would not be time for assessments to be made or to become final during the interval between them, which would be the case in the normal sort of *Ramsay* situation even if all was not "over in time for lunch". But Mr. Sher conceded that, in a case like the present, the credit could only be given as a matter of extra statutory concession. To my mind it is bad enough when extra statutory concessions have to be introduced to remedy injustices caused by Parliamentary inadvertence. It is unacceptable that such a concession should have to be introduced to remedy an injustice caused by what would be, to use Peter Gibson J.'s description, judicial legislation.

Accordingly, I dismiss this appeal. It will be seen however that my reason for holding that the *Ramsay* principle does not apply here differs from the Special Commissioners'. I do not share their view that, if M.P.L. had, following the receipt by its solicitors of the draft that Mr. Goodger sent to them in May 1980, entered into the contract envisaged by that draft, the *Ramsay* principle would certainly have applied. Nor do I think that the critical point was the effect on the minds and conduct of those acting for the

(1) 54 TC 101. (2) [1985] 3 All ER 125, at page 155C. (3) 55 TC 324.

A Bowater group of M.P.L.'s solicitors' letter of 7 July 1980. The crucial fact, to my mind—a fact of which the events of May and July 1980 are but evidence—is that it had not been pre-ordained or pre-arranged, at the time of the first transaction, that the second transaction would follow. Applying the test suggested by Lord Wilberforce's words, it could not be said at that time that there was "no likelihood in practice" that the second transaction would not follow.
B When it followed—19 months later—it followed as an independent transaction.

Appeal dismissed, with costs.

C (3) BAYLIS *v.* GREGORY
BAYLIS *v.* GREGORY AND WEARE

The cases were heard in the Chancery Division before Vinelott J. on 20 and 21 November 1985 when judgment was reserved. On 26 November 1985 judgment was given against the Crown, with costs.

D

Alan Moses for the Crown.

Michael Flesch Q.C. for the taxpayers.

The following cases were cited in argument in addition to the cases
E referred to in the judgment—*Colchester Estates (Cardiff)* v. *Carlton Industries plc* [1984] 2 All ER 601; *Reed* v. *Nova Securities* 59 TC 516; [1985] STC 124; *Hart* v. *Briscoe* 52 TC 53; [1979] Ch 1.

F

BAYLIS *v.* GREGORY
BAYLIS *v.* GREGORY AND WEARE

Vinelott J.:—These are appeals by the Revenue by Case Stated against two related decisions of the Special Commissioners discharging assessments to capital gains tax on Robert Felix Gregory ("Mr. Gregory") and on Mr.
G Gregory and Bernard John Weare ("Mr. Weare") as trustees of the estate of Joseph Gregory deceased. The assessments were made in relation to the same transaction or series of transactions which concerned the shares of a company called Planet Gloves (Industrial) Ltd. ("PGI") in which Mr. Gregory and the trustees held shares. There were a number of other shareholders (ten in all) all members of Mr. Gregory's family, trustees of family settlements or employees
H of PGI except Mr. Weare, who was the company's accountant and who held a few shares in his own right. Appeals by the Revenue against the discharge of assessments on the other shareholders have been held over pending a decision on these appeals.

I The factual background to the issues raised in these appeals is fully and carefully set out in the decisions of the Special Commissioners. A brief summary will suffice for the purposes of this judgment.

PGI carries on business as manufacturers, reconditioners and importers of industrial gloves and other protective clothing. At all material times Mr. Gregory was its managing director. He also, through his personal and trustee

holdings, had voting control of PGI. In 1973 he followed up an advertisement in the *Financial Times* and as a result negotiated on behalf of all the shareholders a sale of the entire issued share capital of PGI to an investment company, Cannon Street Investments Ltd. ("Cannon"). Although not so stated in the decisions it appears from the documentary evidence that the price provisionally agreed for the sale of the entire share capital of PGI was £2 million. In the course of the negotiations it was suggested to Mr. Gregory that liability to capital gains tax could be indefinitely deferred if the shares of PGI were exchanged for shares of a holding company incorporated in the Isle of Man which would sell them on to Cannon, thus, it was hoped, obtaining the benefit of "roll-over" relief in para 6 read together with para 4 of Sch 7 to the Finance Act 1965. It was also suggested to him that there would be no fiscal penalty if the proceeds of sale were later lent by the holding company to the shareholders rateably in proportion to their shareholdings. Mr. Gregory arranged for a private unlimited company to be incorporated in the Isle of Man called PG Holdings ("Holdings"). Before shares of PGI were exchanged for shares of Holdings, Cannon wrote to say that because of changed market conditions (this was early in 1974) Cannon could not proceed with the purchase. Mr. Gregory and the other shareholders decided that they would nonetheless proceed with the share exchange. There was no disadvantage in doing so. The exchange would be carried out by means of the issue and renunciation to Holdings of bonus shares of PGI on which no stamp duty would be payable. And the machinery would be there ready for use if a sale of the shares of PGI were subsequently negotiated.

There matters rested for some time. Mr. Gregory busied himself with the affairs of PGI. He took no steps to find a purchaser. Such business as Holdings was required to transact was transacted by its directors, two partners of the firm of advocates who formed Holdings and a Jersey resident. Then in the late spring of 1975 in the course of a chance meeting with an acquaintance Mr. Gregory learned that another company, Hawtin Ltd. ("Hawtin"), might be interested in acquiring the shares. There were discussions in May and June 1975, but they came to nothing. In November 1975 Hawtin approached him again. The renewed negotiations bore fruit, and on 30 January 1976 an agreement was concluded between Holdings and Hawtin for the sale of all the shares of PGI for an aggregate consideration of £1.75 million to be satisfied by a down payment of £1 million, a further payment of £550,000 on 31 December 1979 and an issue of convertible loan notes with a face value of £200,000. The agreement was completed on the same day in the Isle of Man.

As a result of advice given by Counsel the proposal that the proceeds of the sale should be lent to the shareholders of Holdings was deferred for a year save that £50,000 was lent to Mr. Gregory. The Commissioners found that "a more general withdrawal of funds, to take place in March 1977, was in contemplation at the date of the Sale Agreement". In the meantime the balance of the £1 million was invested. In March loans totalling £945,000 were made. Further loans were made after the deferred consideration of £550,000 had been paid (the payment of this sum having been by agreement deferred for a further six months). It is unnecessary to set out in detail the amounts of the loans or the dates on which they were made. Although the Crown at one time contended that the loans were gains accruing to the shareholders, that claim was not pursued before the Commissioners. The convertible loan stock was converted into shares. Some have been sold. Some

A remained unsold at the time when these appeals were heard by the Commissioners.

The question whether these transactions gave rise to a liability to capital gains tax was the subject of correspondence between a Mr. Rothwell, District Inspector of Taxes for the Pontypridd District, and Mr. Weare starting in B 1978. In March 1980 Mr. Rothwell arranged for assessments to be made on all the shareholders for the year 1973–74. In March 1982 Mr. Rothwell decided that alternative assessments should be made for the year 1975–76. On 15 March 1982 he wrote to Mr. Weare's firm to say that alternative assessments would be made for the year 1975–76. He added: "I would be C grateful if you would advise those interested parties for whom you act and no doubt you will arrange to submit appeals in due course." His office was only concerned with the tax affairs of the trustees and one of the taxpayers. He asked the District Inspector for the district in which the other ten taxpayers' affairs were dealt with to raise the necessary assessments. That was done. Mr. Rothwell asked a subordinate to issue an assessment for 1975–76 to the D trustees. Unfortunately the subordinate issued an assessment (also dated 15 March 1982) for the year to 5 April 1975. Mr. Weare's firm appealed against all the assessments. In the case of the trustees, their letter (dated 8 April 1982) reads: "We refer to Capital Gains Tax assessment dated 15th March 1982 marked 1974–75. Please take this letter as formal appeal. Our appeal is based on Paragraph 6 of the 7th Schedule of the 1965 Finance Act. We are E requesting full postponement of Tax."

At this stage Mr. Rothwell noticed the error. He also noticed that as 5 April 1982 had passed it was too late to make an assessment for the year 1975–76. So on 26 April 1982 he marked in his records on a standard form opposite the calculation of "Total Chargeable Gains—(Estimated) £155,000" F in the column headed "Amendment" the words "Vacated" and "Raised in Error". Then, opposite the calculation of the tax payable at 30 per cent. (£46,500) appear the words "Tax discharged—£46,500", and at the foot the tax payable as amended is stated to be "Nil". Mr. Rothwell notified the Collector of Taxes of this change but not Mr. Weare.

G There is only one other fact I need mention. When preparing the appeals to the Commissioners the taxpayers' solicitors wrote to the Inspector of Taxes Pontypridd and enclosed a schedule of appeals (24 in all: two for each taxpayer). In that schedule two assessments are shown as made on the trustees, one for 1973–74 and one for 1975–76.

H The first question is whether there is now an assessment on the trustees for the year 1975–76 against which they could (or needed to) appeal. Although for reasons I will later explain I have formed the clear view that the assessment for the year 1975–76 (if there was one) is wholly misconceived, I must I think deal with this preliminary question because if there was no valid assessment for the year 1975–76 the Commissioners had no jurisdic- I tion to hear the trustees' appeal in relation to that year and I have no jurisdiction to hear an appeal from the Commissioners.

Mr. Flesch, who appeared for Mr. Gregory and the trustees, submitted first that the assessment issued on 15 March 1982 (whether for 1974–75 or

1975–76) has been vacated and cannot now be restored, and secondly that if still extant it cannot be treated as an assessment for the year 1975–76. A

On the first question he submitted that when the Inspector marked the Revenue's internal document "Vacated" the assessment simply ceased to exist. It is now too late for the Revenue to issue a further assessment; indeed, it was admittedly already too late when the error was noticed. Mr. Flesch relied by analogy on the decision of Peter Gibson J. in *Honig* v. *Sarsfield*[1] [1985] STC 31, where it was held that an assessment is made when a certificate of entry of the assessment into the assessment book is signed and not when it is sent or delivered to the taxpayer (that later date being in that case after the expiry of the period prescribed by s 40(1) of the Taxes Management Act 1970). If I may say so without disrespect to Mr. Flesch's able advocacy in the course of the argument this point evaporated. An assessment is made when a notice of assessment is completed and entered into the assessment book and a certificate of entry into the assessment book is signed. It can be amended (and a further certificate signed) at any time before it has been served. Thereafter it cannot be altered except in accordance with the express provisions of the Act (see s 29(6) of the Taxes Management Act 1970). It can be varied, discharged or cancelled in accordance with the procedure set out in s 54 of that Act. But there is no provision in the Income Tax Acts for an assessment to be withdrawn by the unilateral act of the Inspector. The contention vigorously pressed by Mr. Flesch that an assessment is not "altered" if it is reduced to nil and marked "Vacated" is simply beside the point. B C D E

The second question is one of greater difficulty. The only provision in the Act under which a mistake in an assessment can be corrected or disregarded is that contained in s 114, which I should I think read in full:

> "(1) An assessment, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding. (2) An assessment shall not be impeached or affected—(a) by reason of a mistake therein as to—(i) the name or surname of a person liable, or (ii) the description of any profits or property, or (iii) the amount of the tax charged, or (b) by reason of any variance between the notice and the assessment." F G

H

In *Fleming* v. *London Produce Co. Ltd.*[2] 44 TC 582, where income was assessed on the taxpayers "as agents for" another and the question was whether the mistake could be disregarded under the predecessor of s 114, Megarry J. said at page 597:

I

"However apt these provisions might be for minor deviations such as mis-spellings of names, slight inaccuracies in the description of sources of income and the like, they could not, it is said, rescue assessments based on categorical departures in which names or sources of income were wholly misdescribed: and 'Agents' could by no feat of forensic dexterity be made to

(1) 59 TC 337. (2) [1968] 1 WLR 1013.

A appear as merely a minor variation of 'Meat Salesmen'. That is the contention.

I shall not attempt an exegesis of the sub-sections. I would be slow to accept that they provide an impervious cover for gross errors. One may observe the form of para (a) of subs (3):"—that corresponds to subs (2) of s B 114—"what this saves from impeachment is a mistake in an assessment 'as to' the name or surname of a person liable, and so on. This suggests that, for example, something recognisable as the true name of the person liable must appear in the assessment, and only if it does is any mistake as to that name cured by the subsection. Faulty spelling is an obvious example. I think the subsection would apply if 'McGarry' appeared in place of 'Megarry', as in C other contexts it often has: but it would be otherwise if the substitute were 'Allen' or 'Goff'. The likelihood of the recipient being deceived or misled would also be an important factor. In the present case, however, Mr. Goff points out that it would be wrong to divorce the word 'Agents', as the description of the income assessable, from L.P. 'as agents for' Kaiapoi, as the description of the person assessed; and, I would add, the reference to D '£80,000' as the amount of the assessment should also be included. One may ask whether an assessment of £80,000 on L.P. as agents for Kaiapoi is so gross and misleading an error as to be incapable of cure under s 514 merely because the income assessable is described as 'Agents'. In my judgment, one has only to ask the question for it to answer itself. The Commissioners rightly gave short shrift to L.P.'s contention on this point: mine, though E longer in words, is shorter in spirit."

It is unnecessary to say that I attach the greatest weight to any observation by Megarry J. I am not, however, persuaded that two tests must be satisfied before the dispensing power in s 114 can be exercised; that is, that the error must fall short of gross error and that it must be such that there is no F likelihood that the recipient will be deceived or misled. The difficulty can be illustrated by an example. Suppose that the Revenue regularly corresponded with and assessed a taxpayer addressing him by his second Christian name in the belief that it was his surname. The taxpayer may have caused or contributed to the error because in replying he signed his letters using his two Christian names alone. Suppose that many years later when it was far too G late for further assessments to be made the taxpayer raised the objection that the assessment was made in the wrong name. That, it seems to me, would fall within the specific instances given in s 114(2)(i) provided, of course, that the Court was satisfied that the name was misstated as a result of a genuine mistake on the part of the Inspector and that there was no real likelihood that the taxpayer had been misled.

H

Mr. Flesch submitted that nonetheless a mistake as to the year of assessment cannot be corrected because s 114 cannot be relied upon to convert an assessment for one year into an assessment for another year. But that submission again seems to me to go too far. The printed form of notice of assessment starts on the top left-hand corner with the words "Year ending 5 I April 19 ". The last two figures are left to be written or typed in. Mr. Flesch's argument, if well founded, would lead to the conclusion that if the Inspector or his subordinate carelessly failed to type in the last two figures the assessment would be irremediably bad even though the notice of assessment was accompanied by a letter stating that the assessment was made for a

given year or that it was otherwise plain to the taxpayer from the amount assessed coupled with earlier correspondence and other information known to him to what year the assessment related. I can see no reason why the Court should not supplement the notice and treat it as an assessment for a specific year of assessment if it is clear from other documentary evidence or from the surrounding circumstances that it could only have been understood as an assessment for that year. If that is right, I do not see why the mistake should not similarly be corrected if it is clear that the Inspector or his subordinate carelessly typed in a reference to a future year (which could not form the basis of an assessment) the typist perhaps in 1977 typing "76" as "79" or reading a "5" as an "8". The question is whether the same principle should apply if the year stated is (as here) a possible year of assessment. Again, I can see no reason why it should not, provided, of course, that the Crown can show that there was a genuine mistake and that in all the circumstances there was no real possibility that the taxpayer was in any way misled. If I may borrow the words from another context the Commissioners and the Court should have regard to matters of substance and not to matters of form. The burden of proving that there is no real possibility that the taxpayer was misled by a mistake of this kind will in practice be a difficult one to discharge given our system of annual assessments, more particularly in the field of income tax. But in the instant case there is no question of the taxpayer being misled. The assessment issued on 15 March 1982 for the year 1974–75 was foreshadowed by a letter of the same date saying that an assessment would be issued for the year 1975–76. It was one of a bundle of twelve assessments all directed to the same transaction and sent to Mr. Weare as the agent for all the taxpayers. Everyone knew that the assessment related to the exchange of shares of PGI for shares of Holdings and the subsequent sale of the shares of PGI by Holdings to Hawtin. The amount assessed was the estimated gain to the trustees resulting from that composite transaction. Two possible years of assessment were in issue, 1973–74 when the exchange was made or 1975–76 when the shares were sold to Hawtin. Nothing happened in 1974–75 on which an assessment could be founded and assessments had already been made for 1973–74. As I have said, Mr. Weare, while he noted that the assessment was *marked* "1974/5", gave para 6 of Sch 7 as the ground of the appeal; he did not appeal on the ground that it was out of time though it must have been plain to him that in March 1982 the time within which an assessment could be made (in the absence of special circumstances) for the year to 5 April 1975 had expired.

I turn therefore to the substantive appeals. The question is whether the two transactions (the exchange of the shares of PGI for shares of Holdings and the sale of the shares of PGI by Holdings) can be treated as steps in a pre-ordained series of transactions or as a single composite transaction within the principle stated in *W.T. Ramsay Ltd.* v. *Commissioners of Inland Revenue*(1) [1982] AC 300, as developed and applied by the House of Lords in *Furniss* v. *Dawson*(2) [1984] 1 AC 474. The case for the Crown shortly stated is that it is sufficient for the purposes of the application of that principle that the exchange was made solely in order to obtain the benefit of the exemption in para 6 of Sch 7 to the Finance Act 1965 (read in conjunction with para 4(2) of that Schedule) and to ensure that if a favourable opportunity for the sale of the PGI shares were to recur the capital gains tax that would have been payable apart from the interposition of Holdings would be indefinitely postponed notwithstanding that all the shareholders would

(1) 54 TC 101. (2) 55 TC 324.

A obtain the benefit of the purchase price by means of interest-free loans. It is said that the transactions were pre-ordained in the sense that the first step created a machinery designed and intended to be used if a purchaser was found or presented himself. So, it is said, the exchange was in the words of Lord Wilberforce in *Ramsay*(1) at page 323 "intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction B intended as a whole", and accordingly should be so regarded. It is said that the two conditions explained by Lord Brightman in *Dawson*(2) (at page 527, first main paragraph) must be understood with that observation by Lord Wilberforce in mind. The conditions should not be read restrictively as requiring in the case of the first condition that each step in a pre-ordained C series must be one which the parties contemplated would for all practical purposes follow inevitably once the first step was taken.

That contention was advanced by the Crown and was rejected by Peter Gibson J. in *Craven* v. *White* [1985] STC 531. In that case the taxpayers owned all the shares in Q Ltd. In 1976 they commenced negotiations with C D Ltd. for a merger. A company M Ltd. was incorporated in the Isle of Man which would act as a holding company following the merger, and on 19 July 1976 the shares of Q Ltd. were exchanged for shares of M Ltd. In the meantime before the exchange the shareholders entered into negotiations with another company J Ltd. for the outright sale of the shares of Q Ltd. The negotiations with C Ltd. were not however abandoned until after the E exchange. On 9 August 1976 terms were agreed for the sale of the shares of Q Ltd. by M Ltd. to J Ltd. On those facts Peter Gibson J. held that neither of the two conditions stated by Lord Brightman in the passage to which I have referred (that there must be a pre-ordained series of transactions and steps inserted which had "no commercial (business) purpose apart from the avoidance of a liability to tax") was satisfied. He summarised his reasons in a F passage which I should I think read in full. He said (at page 561)(3):

> "It would appear from these findings that what the Special Commissioners regarded as the essential quality of a composite transaction was that the taxpayer (with his advisers) should at the time the first step in the composite transaction was taken have planned the steps in G the series that made up the composite transaction, regardless of whether the means of achieving all the steps lay within the control of the taxpayer or of whether there was otherwise any practical certainty that all the planned steps would be completed. Thus, although I do not doubt that the Special Commissioners were attempting to make a finding of a H composite transaction for the purpose of the application of the *Ramsay* principle, to my mind they have not directed themselves correctly in law. The case would have to be remitted to the Special Commissioners, as counsel for the Crown submitted it should, unless there was only one true and reasonable conclusion on the facts as found or there was some other point decisive of the appeals.
>
> I Looking at the facts found by the Special Commissioners I think that it is impossible to conclude that there was no likelihood in practice on 19 July that the sale to Jones would not be completed."

(1) 54 TC 101. (2) 55 TC 324. (3) page 77A/D *ante*.

Then, having referred to the second test and having found that at the date of the exchange there was a possibility that there would be a merger with C Ltd., he continued[1]:

"It follows therefore that in my judgment the *Ramsay*[2] principle as it has been formulated has no application to the present case. However, counsel for the Crown submitted that the principle should be extended to apply to case such as this where a tax avoidance step can be seen to have been taken in circumstances where the taxpayers' primary objective was a sale, where there was a desire to avoid tax and where there was a common understanding between the taxpayers and Oriel [the parent of J Ltd.] at the time of the July agreement that if a sale was to be effected it would be by [M Ltd.] selling to [J Ltd.]. But so to extend the *Ramsay* principle requires not only a new formulation of that principle but also a rationale quite different from that given by Lord Brightman. It is one thing for the Court to treat as a fiscal nullity a purely artificial step which will inexorably be followed by one or more others so as to achieve the desired end result. It is quite another for the Court to treat as a fiscal nullity a step which had a commercial purpose in addition to tax avoidance and which in reality at the time it was taken might not have been followed by the other steps. Counsel for the Crown submitted that not to extend the *Ramsay* principle in the way he suggested would leave it capable of easy circumvention. But the *Ramsay* principle is judge-made law, not a statute. The limitations of that principle and hence the possibilities of escaping its application are evident from the formulation by the House of Lords. In any event I do not doubt that commissioners, in finding the facts, will look to the realities and will be vigilant against the risk that those desiring to avoid tax may try to import artificial uncertainties in respect of what is in truth a composite transaction.

It seems to me that what I am being invited to hold by the Crown would amount to judicial legislation. Parliament in other fiscal contexts, such as estate duty and capital transfer tax, has enacted provisions relating to associated operations so that a disposal by two or more such operations is made subject to tax. I am not prepared to do what Parliament has not thought fit to enact."

That decision was followed by Warner J. in *Inland Revenue Commissioners* v. *Bowater Property Developments Ltd.* [1985] STC 783. That case concerned the Development Land Tax Act 1976. The taxpayer company was a member of the Bowater Group of companies. In 1980 it entered into negotiations with M Ltd. for the sale of an area of land referred to in the report as Crafts Marsh. In March 1980 in order to take advantage of the exemption in s 12 of the 1976 Act of sales for less than (as amended) £50,000 the taxpayer company contracted to sell undivided shares of Crafts Marsh to five other companies which though within the Bowater Group were not subsidiaries of the taxpayer company. In May 1980 negotiations broke down. However, they were resumed in February 1981 and in November 1981 the five companies concurred in selling Crafts Marsh to M Ltd. The question was whether the taxpayer company could be taxed on the footing that the proceeds of all the sales accrued on a disposal by it. Warner J. summarised the Crown's argument in a brief passage which I should read in full. He said at page 796[3]:

---

[1] page 78F–79B *ante*. [2] 54 TC 101. [3] Page 82D/I *ante*.

A "Counsel for the Crown submits that, in applying the *Ramsay* principle, one must distinguish between two types of case. One type is that where there is a 'circular' or 'self-cancelling' scheme, as in the *Ramsay* case itself, in its companion case *Eilbeck* ... and in *Inland Revenue Commissioners* v. *Burmah*(1) ... In that type of case, the relevant intention or expectation is that of the taxpayer concerned, for that taxpayer alone is, as counsel for B the Crown expressed it, 'in the driving seat'. The other type of case is that exemplified by *Floor* v. *Davis*(2) ... and *Furniss* v. *Dawson*(3) ... where there is a 'linear' or bilateral transaction into which there has been inserted a step having no purpose other than the avoidance of a liability to tax. In this type of case there are two real parties to the transaction and they are at arm's length. Both must concur before the transaction can go through. C But, says counsel for the Crown, for the purposes of the application of the *Ramsay*(4) principle only the intention or expectation of the party introducing the tax avoiding step matters.

So far the submissions of counsel for the Crown accord with the views of the Special Commissioners. He goes on to submit, however, that the D *Ramsay* principle applies whenever it is found that a step has been taken with a view to avoiding tax in a certain event and that event actually occurs. Thus, he says, in the present case, what matters is the expectation or intention of those concerned on behalf of the Bowater group at the time of the first transaction. They at that time expected the sale of Crafts Marsh to go through and their purpose in causing the first transaction to take E place was to avoid development land tax on that sale. Therefore, the *Ramsay* principle applies, and the break in the negotiations between the Bowater group and Milton Pipes that occurred from July 1980 to February 1981 was irrelevant. Indeed, says counsel for the Crown, the *Ramsay* principle would have applied just the same if those concerned on the Bowater side had had no specific purchaser in mind at the time of the first transac- F tion or even had intended then to sell the land at auction."

It may well be that in making that last observation Counsel for the Crown had the instant case in mind.

Counsel for the Crown in the *Bowater* case, like Mr. Moses in the G instant case, placed considerable reliance upon the observations in the speech of Lord Wilberforce in *Ramsay* which I have already cited. Dealing with that point Warner J. said (at page 797)(5):

"My own understanding of Lord Wilberforce's speech is, however, that he had no intention of laying down any such wide proposition as H counsel for the Crown contends for. It is indeed plain, from the last sentence in the passage that I have read, that Lord Wilberforce envisaged that there would be cases where the commissioners would properly find that a series of transactions constituted not 'a composite transaction' (to which the *Ramsay* principle would apply) but 'a number of independent transactions' (to which it would not)."

I Then, having cited the passage in the speech of Lord Brightman in *Dawson* to which I have referred he said (at page 797)(6):

(1) 54 TC 200. (2) 52 TC 609. (3) 55 TC 324. (4) 54 TC 101.
(5) page 83I–84A *ante*. (6) page 84F/H *ante*.

"It seems to me that the submissions of counsel for the Crown amount to saying that one may ignore the first of Lord Brightman's requirements. Counsel for the Crown is saying, in effect, that, if one finds that a series of transactions includes a transaction that had no purpose other than the avoidance of a liability to tax arising from a later transaction in the series, one may ipso facto conclude that the series constituted a 'single composite transaction'. That, it seems to me, cannot be right, because, as Lord Brightman's words show, and indeed as the whole tenor of the authorities shows, a single composite transaction, in this context, means one all the steps in which have been prearranged or preordained. One thing is certain: in no sense was the second transaction in the present case prearranged or preordained at the time when the first transaction was carried out."

The arguments adduced by the Crown in support of its contentions in the instant case have thus been fully considered and rejected by two experienced judges. No authority has been cited to me which was not cited to them. In these circumstances, it would be sufficient for me to say that no argument has been adduced to me that would justify me in taking a different view.

However I think I should say that the facts of this case to my mind demonstrate even more clearly than the facts in *Craven* v. *White* and *Inland Revenue Commissioners* v. *Bowater* the fallacy in the Crown's case. It is accepted by Mr. Moses that the exchange was effective to pass the full legal and beneficial interest in the shares of PGI to Holdings. It follows that after the exchange Holdings had control of PGI within the meaning of para 6(2) and that accordingly the exchange fell within the exemption in paras 4 and 6. That conclusion is implicit in the further admission by the Crown that the assessments for the year 1973–74 were rightly discharged. It is immaterial for this purpose that Mr. Gregory, the majority shareholder in Holdings, had *de facto* control of Holdings and that the exchange was made with a view to the avoidance or the indefinite postponement of a liability to capital gains tax and for no other purpose. The doctrine of abuse of right by a taxpayer which obtains in some continental countries has no place in our jurisprudence. The case for the Crown must therefore be that although the exchange fell within the exemption the sale by Holdings must nonetheless be treated as a sale by the shareholders of PGI acting through Mr. Gregory as the person having *de facto* control of Holdings.

As I pointed out in *Ingram* v. *Inland Revenue Commissioners*(1) the decision of the House of Lords in *Dawson*(2) involved reconstructing the composite transaction in that case and treating it as a single tripartite transaction under which the taxpayer sold the shares in the operating company to Wood Bastow on terms that the purchase price would be paid to Greenjacket and treated as paid in satisfaction of the sum payable on the allotment and issue of shares in Greenjacket. If it is also assumed that under that tripartite contract Greenjacket agreed to give the necessary warranties to Wood Bastow in place of the taxpayers the enduring effects of the substituted Tripartite arrangement coincided with the enduring effects of the transactions in fact entered into. But where, as here, the sale on by the holding company has not been arranged at the time of the exchange the two transactions cannot be amalgamated and reconstructed in this way. In the instant case the share-

(1) [1985] STC 835. (2) 55 TC 324.

A holders in PGI cannot be treated as if they had entered into a tripartite arrangement for the sale of the shares of PGI to Hawtin and the application of the proceeds in discharge of the sums payable on the allotment and issue of shares of Holdings. Those proceeds were received long after the exchange had been completed and might have been more or less than the sum credited in Holdings' books as the consideration for the issue of B its shares. Moreover, the sum ultimately received was in fact less, and treating that sum as paid in discharge of the sums payable on the allotment and issue of shares in Holdings would result in the conclusion that the consideration for those shares had never been fully paid.

C Moreover, the Crown's case leads inevitably to potential double taxation. That can be illustrated in the following way. At the time of the exchange a value had to be placed on the shares of PGI and, as I have said, that value must have been credited in Holdings' books as the consideration for the issue of its shares. That was the base cost of the acquisition of the shares by Holdings. Assume that value to be £2 million (the D price offered by Cannon shortly before the exchange). If at the time of the sale by Holdings the value had increased to £2.5 million each shareholder, on the Crown's case, would be liable to capital gains tax on a gain equal to the difference between the cost of acquisition of his shares of PGI and the part of £2.5 million attributable to his shares. But Holdings would also have made a gain on £500,000 on which the share- E holders in PGI would ultimately be liable either by virtue of an apportionment (Holdings being a non-resident company) or on a disposal or deemed disposal of the shares of Holdings. In *Dawson*[1] this potential claim to double taxation did not arise because if the two transactions were treated as a single composite transaction the price paid by Wood Bastow would form both the basis of the assessment on the taxpayer and F the base cost of the acquisition of the shares by Greenjacket. Where as here the sale on by the holding company has not been agreed at the time of the exchange the risk of double taxation in the event of an increase in the value of the shares exchanged for shares of a holding company is manifest.

G For these reasons I think the appeals fail and must be dismissed.

Appeals dismissed, with costs.

H

CRAVEN v. WHITE
COMMISSIONERS OF INLAND REVENUE v. BOWATER
PROPERTY DEVELOPMENTS LTD.
BAYLIS v. GREGORY

I The Crown's appeals in all three cases, together with the Trustees' appeal in *Baylis* v. *Gregory & Weare*, were heard in the Court of Appeal (Slade, Parker and Mustill L.JJ.) on 20, 21, 22, 23 and 26 January 1987. On 24 March 1987 judgment was given against the Crown with costs.

(1) 55 TC 324.

Jules Sher Q. C. and Alan Moses for the Crown A

Leolin Price Q. C. and Grant Crawford for the taxpayers in the First Appeal.

Andrew Park Q. C. and David Goy for the taxpayers in the Second Appeal. B

Michael Flesch Q. C. for the taxpayers in the Third Appeal.

The following cases were cited in argument in addition to the cases referred to in the judgment:–

Helvering v. *Gregory* (1934) 69 F.2d 809; *Young* v. *Phillips* 58 TC 232 [1984] STC 520; *Ewart* v. *Taylor* 57 TC 401; [1983] STC 721; *Bath & West Counties Property Trust Ltd.* v. *Thomas* 52 TC 20; [1978] 1 All ER 305; *Barnes* v. *Hely-Hutchinson* 22 TC 655; [1940] AC 81; *Commissioners of Inland Revenue* v. *Cleary* 44 TC 399; [1968] AC 766; *Morley-Clarke* v. *Jones* 59 TC 567; [1985] STC 660; *Coren* v. *Bye* 60 TC 116; [1985] STC 113; *Bird & Others* v. *Commissioners of Inland Revenue* 61 TC 238; [1985] STC 584; *New Windsor Corporation* v. *Mellor* [1975] Ch 380; *Commissioners of Inland Revenue* v. *Challenge Corporation* [1987] AC 155; *Magnavox Electronics Co. Ltd.* v. *Hall* 59 TC 610; [1985] STC 260.

C D

E

Slade L.J.:—There are before the Court appeals by the Crown from three judgments. The first is from a judgment of Peter Gibson J. delivered on 24 May 1985 in the cases of *Craven* v. *Stephen White* and *Craven* v. *Brian White* reported at [1985] STC 531. The second is from a judgment of Warner J. delivered on 18 October 1985 in the case of *Commissioners of Inland Revenue* v. *Bowater Property Developments Ltd.* reported at [1985] STC 783. The third is from a judgment of Vinelott J. delivered on 26 November 1985 in the cases of *Baylis* v. *Gregory* and *Baylis* v. *Gregory & Weare* reported at [1986] STC 22. The first and third of these judgments concern assessments to capital gains tax. The second of them concerns an assessment to development land tax. The three cases are quite separate from one another on their facts. However, they raise similar problems concerning the extent and limitations of the principle relating to tax avoidance schemes which has come to be known as "the *Ramsay*[1] principle". This was first stated by the House of Lords in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners* and *Eilbeck* v. *Rawling* [1982] AC 300 (to which two cases I will refer together as "Ramsay"). It has subsequently been developed by their Lordships in *Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.*[2] 54 TC 200 ("*Burmah*") and *Furniss* v. *Dawson*[3] [1984] AC 474 ("*Dawson*") in which they reaffirmed the correctness of the dissenting judgment of Eveleigh L.J. in *Floor* v. *Davis*[4] [1978] Ch 295 ("*Floor*").

F G H

The facts of all the cases now before this court have certain common features. In each of them there has been a disposition by the taxpayers of assets to one or more companies, followed by a disposition of those assets by the company or companies to an ultimate purchaser. Save possibly in the case of *Craven* v. *White,* where this element is in dispute, the first disposition has had no commercial purpose other than that of tax avoidance. In none of

I

(1) 54 TC 101. (2) [1982] STC 30. (3) 55 TC 324. (4) 52 TC 609.

A the cases now before the court did there exist a contractual obligation to effect the second disposition at the time when the first was made. In each case the Crown, in reliance on the *Ramsay* principle, asserts that, for the purpose of ascertaining their fiscal consequences, the two steps or transactions involved should be treated as a single, composite transaction under which there was a "disposal" by the taxpayers in favour of the ultimate purchaser.

B

Section 19(1) of the Finance Act 1965 ("the 1965 Act"), which introduced capital gains tax, provided: "Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets."

C

Since a "disposal of assets" is the event which gives rise to the charge, the first inquiry must always be whether or not such a "disposal" in the relevant sense has occurred. The 1965 Act contained provisions stating in effect that certain specifically defined events should or should not (as the case might be) be treated as involving a disposal of assets. However, it contained D no comprehensive definition of the word "disposal". Accordingly, where an assessment of capital gains tax is under challenge and the transactions in question are not specifically covered by a particular statutory provision, the task of the court, in the final analysis, must always involve the identification of the relevant disposal or disposals of assets (if any). In deciding whether a disposal has occurred within the meaning of the statute, it may have to con- E sider in particular (i) who were the parties to that disposal; (ii) what was its date; and (iii) what were the assets disposed of.

The identification of the relevant disposal or disposals was the essential issue before the court in *Dawson*[1] and is the essential issue in each of these three appeals, though the second of them happens to concern disposals with F reference to the Development Land Tax Act 1976 ("the 1976 Act") rather than the 1965 Act.

There are many similarities (though the taxpayers would say essential differences) between the facts of the first and third appeals and the facts of *Dawson*. A brief reference to the facts of that well known case will suffice for G present purposes. The Dawsons held shares in two operating companies. They reached an agreement in principle with another company ("Wood Bastow") that Wood Bastow would purchase all those shares. Before the sale took place, they entered into a scheme designed to defer the liability to pay capital gains tax to which the transfer of the shares to Wood Bastow would otherwise have given rise. To that end, with the concurrence of Wood H Bastow, they arranged for their shares to be exchanged for shares in a company ("Greenjacket") specially incorporated for the purpose in the Isle of Man. The final part of the scheme, which was implemented on 20 December 1971, involved two distinct steps, namely (a) a transfer by the Dawsons to Greenjacket of the shares in the operating companies; (b) a subsequent transfer of the same shares (on the same day) by Greenjacket to Wood Bastow. I The thinking behind the scheme was that para 6 of Sch 7 to the 1965 Act ("Schedule 7") would apply, so as to prevent the transfers by the Dawsons to Greenjacket from being chargeable disposals of the shares in the family companies.

[1] 55 TC 324.

The facts of *Dawson* had at least four features in common with the facts of each of the three present appeals. They involved a transfer of assets by A to B, followed by a transfer of those same assets by B to C. The Commissioners in each case accepted that the transfer by A to B was a genuine transaction; there was nothing sham about it in the sense that it purported to be something that it was not in fact. The Commissioners in each case further accepted that the transfer by A to B had passed to B the full legal and beneficial ownership of the assets in question. In each of the four cases the Revenue has further sought to exact tax on the basis that for fiscal purposes there has been a disposal by A not in favour of B but in favour of C.

There are, however, certain significant differences between the facts of *Dawson* and the present case. In particular, in *Dawson* (unlike the present cases) at the time when the transfer of assets by A to B took place, there existed, by virtue of the pre-arranged scheme, the practical certainty (albeit covered by no pre-existing legally binding contractual arrangements) that the transfer of the same assets by B to C would almost immediately follow. Whether or not this renders *Dawson* distinguishable on its facts is one of the important issues on each of the present appeals.

On appeal by the Crown to this court from the decision of Vinelott J. in *Dawson*, this court([1]) rejected the Crown's claim that there had been a disposal of the shares in the operating companies by the Dawsons in favour of Wood Bastow. All its members (of whom I was one) found difficulty in accepting the re-analysis of the relevant transactions for which the Crown contended, in such a way (in Oliver L.J.'s words at page 483) "as to attribute to them, for fiscal purposes, a legal result which they did not have and which indeed they were specifically designed to avoid having". Oliver L.J. was also particularly concerned with the prospect of double taxation. He considered (at page 482) that, if the Crown's argument were right, when the taxpayers sold their shares in Greenjacket, their value on the sale would, under Sch 7, fall to be measured by the asset content of Greenjacket, which would include the assets representing the proceeds of sale of the original shares in the operating companies; the gain on that transaction would then be computed under that Schedule on the difference between that value and the acquisition cost of the original shares, which (on, this hypothesis) would already have been taxed. In my own judgment (at pages 505–506) I referred to what seemed to me the conceptual difficulties involved in regarding a composite transaction embodying a transfer by A to B of the full legal and beneficial title to property and a subsequent transfer of the same property by B to C as giving rise to *three* disposals for capital gains tax purposes, namely a disposal by A in favour of B, a disposal by B in favour of C and a disposal by A in favour of C in each case of the same assets.

The House of Lords, however, in reversing the decision of this court in *Dawson* concluded (see at page 528 *per* Lord Brightman):

> "The result of correctly applying the *Ramsay*([2]) principle to the facts of this case is that there was a disposal by the Dawsons in favour of Wood Bastow in consideration of a sum of money paid with the concurrence of the Dawsons to Greenjacket. Capital gains tax is payable accordingly."

([1]) [1984] AC 474. ([2]) 54 TC 101.

A Their Lordships' decision made it clear that the "three disposals" point which had concerned me was, at least on the facts of that case, without substance. If in any given case the *Ramsay* principle applies, there will merely have been one disposal for fiscal purposes, namely a disposal by A to C; the introduction of B into the scheme will fall to be wholly disregarded for fiscal purposes: (see at page 527D *per* Lord Brightman). By parity of reasoning, the B decision indicated that Oliver L.J.'s fears of oppressive, double taxation were not well founded on the facts of that case. As Lord Brightman put it (at page 525):

> "If the Crown's case were correct, there would be a disposal by the Dawsons to Wood Bastow on which capital gains tax would be payable. C There could be no *additional* capital gains tax on the steps by which that disposal was achieved, namely the sale first to Greenjacket and then by Greenjacket to Wood Bastow, because it is the Crown's case that the fiscal consequences of the introduction of Greenjacket are to be disregarded. The Revenue cannot, and does not claim to, have it both ways."

D This decision of the House of Lords has thus clearly established that, in the light of the *Ramsay* principle, and contrary to the views which I had expressed in this court, a composite transaction which embodies a transfer by A to B of the full legal and beneficial title to property, and a subsequent transfer by B to C of the full legal and beneficial title to the same property, is capable in certain circumstances of giving rise to a disposal by A to C for E capital gains tax purposes. The task of this court on the first and third of the present appeals is to consider whether or not the facts are such as to produce this result.

The House of Lords in *Dawson*[1], while giving guidance in general terms, did not think it necessary or appropriate to attempt a comprehensive F definition of the circumstances in which two such successive transfers of the same property may give rise to a disposal by A to C for fiscal purposes. As Lord Scarman observed (at pages 513–514) the law in the area of the *Ramsay*[2] principle is in an early stage of development. Nevertheless, a number of significant guidelines are to be found in their Lordships' speeches.

G First, they contain expositions of the general nature of the *Ramsay* principle, which was being applied. Lord Fraser, who had himself been a party to the *Ramsay* decision, explained it thus (at page 512):

> "The true principle of the decision in *Ramsay* was that the fiscal consequences of a pre-ordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of H the series as a whole, and not by dissecting the scheme and considering each individual transaction separately. The principle was stated in the speech of Lord Wilberforce in *Ramsay* at p. 324A–C, especially where his Lordship said: 'For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as I precluded by their own finding that documents or transactions are not 'shams', from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, *the relevant transaction* is. They are not, under the *Westminster* doctrine [*Inland Revenue*

(1) [1984] AC 474. (2) 54 TC 101.

Commissioners v. *Duke of Westminster*[1] [1936] AC 1] or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole'." A

Lord Brightman (at page 523) similarly explained the *Ramsay* principle by reference to Lord Wilberforce's speech in that case: B

"The fact that the court accepted that each step in a transaction was a genuine step producing its intended legal result did not confine the court to considering each step in isolation for the purpose of assessing the fiscal results. '...viewed as a whole, a composite transaction may produce an effect which brings it within a fiscal provision.' (p. 325). Lord Wilberforce added later, at p. 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'." C D

Secondly, *Dawson* establishes that the *Ramsay* principle is capable of applying to what has been described in argument on the present appeal as "linear transactions", as well as to "self-cancelling transactions" such as those under consideration in *Ramsay* itself. In the latter case the respective taxpayers had adopted elaborate and artificial schemes which were designed to create a loss for tax purposes, capable of being set off against existing realised gains, but would nevertheless not leave the taxpayers out of pocket after the schemes had been carried through to completion. The actual decisions in *Ramsay* were that the schemes gave rise to no allowable loss (save a sum not exceeding £370 in one case). In *Dawson*[2] (as Lord Fraser pointed out at page 512) the scheme was much simpler and had enduring legal consequences. However, this was not a sufficient ground for failing to apply the *Ramsay*[3] principle. E F

Thirdly, however, the mere fact that a scheme which involves a series of stages is designed to avoid or mitigate tax does not by itself entitle the Revenue to charge tax by reference to the result of the series as a whole, without considering each individual stage separately. Lord Brightman, with whose speech the rest of their Lordships concurred, expressed, in the following crucially important passage (at page 527), the conditions which have to be satisfied if the *Ramsay* principle is to be applied in any given case: G

"The formulation by Lord Diplock in *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*[4] [1982] STC 30, 33 expresses the limitations of the *Ramsay* principle. First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax—not 'no business *effect*.' If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end H I

[1] 19 TC 490. [2] [1984] AC 474. [3] 54 TC 101. [4] 54 TC 200.

A result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied."

Fourthly (and this is allied to the third point), as Lord Brightman stated (at page 527F–G) in any case where the Revenue is seeking to invoke the *Ramsay* principle, the Commissioners will be required to make two findings B of fact, namely:

" ... first, whether there was a pre-ordained series of transactions, i.e. a single composite transaction, secondly, whether that transaction contained steps which were inserted without any commercial or business purpose apart C from a tax advantage. Those are facts to be found by the commissioners. They may be primary facts or, more probably, inferences to be drawn from the primary facts. If they are inferences, they are nevertheless facts to be found by the commissioners. Such inferences of fact cannot be disturbed by the court save on *Edwards* v. *Bairstow*(1) (1956) A.C. 14 principles."

D [Lord Wilberforce in *Ramsay* [1982] AC 300 (at page 324) had referred to the duty of the Commissioners as being to "find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions". To the limited extent that he referred to this matter as being "one of law", I think that, as Peter Gibson J. pointed out in his judgment in *Craven* v. *White*, Lord Wilberforce' opinion E must be regarded as having been overruled by Lord Brightman's speech in *Dawson*(2) with which all their Lordships concurred.]

For present purposes, the third of these four guidelines is of paramount importance. In two of the three appeals before us the schemes in question F admittedly included steps which had no business purpose apart from the avoidance of a liability to tax. The principal argument in all three appeals has centred round the condition for the application of the *Ramsay*(3) principle that "there must be a pre-ordained series of transactions; or if one likes, one single composite transaction". I will refer to this as "the first *Ramsay* condition". The first appeal, however, also concerns the application of the G condition that "there must be steps inserted which have no commercial (business) purpose, apart from the avoidance of a liability to tax ... " I will refer to this as "the second *Ramsay* condition".

Mr. Jules Sher Q.C., in opening the appeals on behalf of the Crown, rightly indicated that perhaps the most important point of principle which H this court has to consider is the essential nature of the link between two or more transactions which will suffice to satisfy the first *Ramsay* condition and thus entitle the Revenue or the court to treat all the transactions as one single transaction for fiscal purposes. In the course of his forceful and able argument, he naturally put the point in different phraseology and with differing shades of emphasis. However, while it is expressed in slightly more quali- I fied terms in its notices of appeal in the other cases, I think that the basic proposition which the Crown is concerned to establish is well and clearly reflected in its notices of appeal in the *Baylis* cases, as follows:

(1) 36 TC 207. (2) 55 TC 324. (3) 54 TC 101.

"(4) It is submitted that in order to prove a pre-ordained series of transactions which culminates in an ultimate disposal it is only necessary to prove that at the time of the first transaction it was intended by the taxpayer that the first transaction should be used as conveyancing machinery in order to achieve a final disposal of the asset if a disposal was ultimately made. It is submitted that provided the machinery by which the commercial end is to be achieved is pre-ordained, it is irrelevant that there remains a possibility that its execution may be frustrated by a failure to achieve the commercial end itself or that at the time of the first transaction there was no immediate prospect or intention of finally disposing of the asset."

It will be convenient to consider in general terms this proposition, which I will call "the Crown's basic contention", before turning to the particular facts of each appeal.

While in *Dawson* the proposed price and other terms of the ultimate purchase by C had been negotiated, although not to the stage of commitment, in advance of the transfer of assets by A to B, this was not so in any of the cases now before the court. Mr. Sher accepted that, if the evidence shows that, in advance of the first transaction, the purchase price and terms were all known, that may be the best evidence of the existence of one single composite transaction. Nevertheless, he submitted, the *Ramsay* principle is not applicable only in a case where there existed at the time of the first transaction a known purchaser who was prepared to purchase at a known price and on known terms. Since, he submitted, the purpose of the *Ramsay*(1) principle is to identify the real transaction in any given case, by ignoring artificially inserted steps, the actual identification of the purchaser and the price does not signify anything of critical importance. If A Ltd. wishes to sell its land free of development land tax and fragments the land into five subsidiary companies which have not used their £50,000 free band, can it make any difference, he asked, whether at the time of the fragmentation A Ltd. has found the purchaser and negotiated the terms of the purchase or whether it has listed the sale in an immediately impending auction at a modest reserve which will for all practical purposes ensure its sale?

In the Crown's submission, the essential link required to enable the Revenue to treat two or more transactions as a single composite transaction within the first *Ramsay* condition, does not depend on the identification at the first stage of the ultimate purchaser or the proposed terms of his purchase, or indeed upon the likelihood or otherwise of the second transaction following the first. The essential link is the intention of the taxpayer at the time of the first transaction. If, it is said, he embarks upon the first stage with a view to facilitating an ultimate sale of the asset by means of a second stage, and that ultimate sale eventuates, that is enough to satisfy the first *Ramsay* condition. In Mr. Sher's submission, it suffices for this purpose even if at the time of the transfer of assets by the taxpayer A to B, A has no present intention to sell but his intention is merely that the transfer shall serve as a convenient springboard in case at some future date it may be desired to sell. (In the course of his argument he referred to the initial transfer in such a case as an instance of "strategic tax planning", and I will use the same convenient phrase hereafter in this judgment.) In the alternative, he submitted, it must in any event suffice if, at the time of the transfer of assets by A to B,

(1) 54 TC 101.

A A has the present general intention to sell and intends that such transfer shall serve as a springboard for a sale when it eventuates.

It would be quite wrong to dissect and apply every word of Lord Brightman's formulation of either the first or the second *Ramsay* condition as if it had statutory force. In due course, the House of Lords are B themselves likely to give further guidance as to the circumstances in which the *Ramsay* principle is capable of applying to a linear transaction. In the meantime, however, I think that we in this court are both bound and entitled to apply Lord Brightman's careful and considered formulation of the limits of the *Ramsay* principle (which followed a similar formulation by C Lord Diplock in *Burmah*(1) and has the approval of all their Lordships) according to what we understand to be its true meaning and intent. Proceeding on this footing, I find myself unable to accept the Crown's basic contention. In my judgment, for the reasons which I will now attempt to state, it would involve an unwarrantable extension of the *Ramsay* principle.

D First, as Lord Brightman's speech makes clear, their Lordships in *Dawson*(2), regarded the phrases "a pre-ordained series of transactions" and "one single composite transaction" as synonymous. I would not regard either phrase as apt to describe two transactions, each of which, independently, undeniably had legal effect, unless (as in *Dawson, Ramsay* E and *Burmah*) at the time when the first transaction was effected, all the essential features (not merely the general nature) of the second transaction had already been determined by a person or persons who had the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction. Special considerations might apply to a case where the second transaction consisted of a sale by auction which had F been arranged before the first transaction was effected. Normally, however, it seems to me that a transfer by A to B followed by a sale by B to C could not, on the ordinary meaning of words, be together described either as "one single composite transaction" or as "a pre-ordained series of transactions" unless at the time of the first transfer C had been identified as a prospective purchaser, and all the main terms of the sale to him had G at least in principle been agreed; if this is not so, they have to be regarded as independent transactions. I am fortified in the belief that the House of Lords, in their precise formulation of the first *Ramsay*(3) condition, would not have accepted the Crown's basic contention, by the second, third and fourth considerations to which I am about to refer.

H Secondly, in the particular circumstances of all of *Ramsay, Burmah* and *Dawson*, at the time when the first stage in the relevant scheme was carried through, all the essential features of the second stage had in fact been determined by persons who had the firm intention and for practical purposes the ability to procure the implementation of the second stage. I Furthermore, this point emerges more or less explicitly from many of the speeches in those decisions.

As to the *Ramsay* scheme itself:

---

(1) 54 TC 200. (2) 55 TC 324. (3) 54 TC 101.

"It was reasonable to assume that all steps would, in practice, be carried out, but there was no binding arrangement that they should. The nature of the scheme was such that once set in motion it would proceed through all its stages to completion."

(see [1982] AC 300 at page 328B *per* Lord Wilberforce). In the case of the *Rawling*(1) scheme, one of the six Jersey companies concerned had actually contracted to procure the implementation of all the steps comprised in the scheme and was in a position to obtain the requisite co-operation of two of its associated companies: (see *ibid* at page 332A–B). Lord Wilberforce described the common features of the *Ramsay* and *Rawling* schemes thus (at page 322F–G):

"First, it is the clear and stated intention that once started each scheme shall proceed through the various steps to the end—they are not intended to be arrested half-way: ... This intention may be expressed either as a firm contractual obligation (it was so in *Rawling*) or as in *Ramsay* as an expectation without contractual force."

Burmah raised the question whether certain transactions resulted in an allowable capital loss for the purposes of corporation tax on capital gains. Lord Fraser in his speech, with which all the rest of their Lordships agreed, referred (54 TC 200 at pages 219–220) to certain differences between the two stage scheme there under consideration and the schemes in *Ramsay* and *Rawling*. One difference was that in those cases the taxpayers had been provided with a "preconceived and ready made plan", whereas in *Burmah* the plan, though preconceived, was specially tailor-made for *Burmah*. Again, in those earlier cases, it was the clear and stated intention that, once started, each scheme would proceed to completion and would not be arrested half way. In *Burmah*(2) the first series of events, those occurring on 12 December 1982, could have stood on their own and need not have been followed by the second series on 18 December. However, as Lord Fraser pointed out (at page 219):

"It is clear that the events initiated on 18 December formed part of a single scheme and I have already quoted the finding by the Special Commissioners that they took place in the order and according to a timetable prepared in advance ... No doubt the directors could have chosen, even at that stage to abandon the scheme but the reality was that the decision had already been taken to carry it through to completion ... "

In *Dawson*,(3) though there was no pre-existing contract when the scheme began to be implemented, there was an equivalent practical certainty that all its steps would be carried through to the end. Lord Brightman (at page 520 of the report) described the manner in which the two sale agreements had been exchanged on the very same day and referred to minutes of the board meetings of the companies concerned. He commented:(4)

"These show that the whole process was planned and executed with faultless precision. The meetings began at 12.45 p.m. on 20 December, at which time the shareholdings of the operating companies were still owned by the Dawsons unaffected by any contract for sale. They ended with the shareholdings in the ownership of Wood Bastow.

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324. (4) [1984] AC 474.

A The minutes do not disclose when the meetings ended, but perhaps it was all over in time for lunch."

There are many other similar references in the speeches, in which the inevitability for practical purposes of the scheme proceeding from the first stage to the completion of the second stage is stressed. I do not think that the B House of Lords would have been at such pains to emphasise this feature of the respective schemes if they had not regarded it as being of cardinal importance in deciding whether or not the various transactions could properly be treated as one composite transaction for fiscal purposes and whether or not the intermediate steps, inserted purely for the purposes of tax avoidance, could be disregarded for tax purposes, even though otherwise fully legally C effective according to their terms.

Thirdly, the Crown's basic proposition is, in my opinion, inconsistent with the whole rationale of the *Ramsay*(1) principle as explained by Lord Wilberforce in *Ramsay,* particularly at pages 323G–324D and by Lord Brightman in *Dawson,* who explained it thus (at pages 526F–527C): D

"In a pre-planned tax-saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) a like series of steps which are followed through because the participants are contractually bound to E take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results. For example, equitable interests may pass when the contract for sale is signed. In many cases equity will regard that as done which is contracted to be done. *Ramsay* says that the fiscal result is to be no different if the several steps are pre-ordained rather than pre-contracted. F For example, in the instant case tax will, on the Ramsay principle, fall to be assessed on the basis that there was a tripartite contract between the Dawsons, Greenjacket and Wood Bastow under which the Dawsons contracted to transfer their shares in the operating companies to Greenjacket in return for an allotment of shares in Greenjacket, and under which Greenjacket simultaneously contracted to transfer the same G shares to Wood Bastow for a sum in cash. Under such a tripartite contract the Dawsons would clearly have disposed of the shares in the operating companies in favour of Wood Bastow in consideration of a sum of money paid by Wood Bastow with the concurrence of the Dawsons to Greenjacket. Tax would be assessed and the base value of the Greenjacket shares, calculated, accordingly. *Ramsay* says that this fiscal H result cannot be avoided because the pre-ordained series of steps are to be found in an informal arrangement instead of in a binding contract. The day is not saved for the taxpayer because the arrangement is unsigned or contains the words 'this is not a binding contract'."

I Thus, the whole rationale of the *Ramsay* principle is that no distinction falls to be drawn between case (i) and case (ii) referred to in this passage "*because none exists in reality*". The whole of this reasoning presupposes that, in a case where there was no pre-existing contract but the *Ramsay* prin-

(1) 54 TC 101; [1982] AC 300.

ciple applies, all the steps in the pre-ordained series of transactions would have been capable of being embodied in a binding contract before the first transaction was effected, though the persons having control of the scheme chose or omitted so to embody them. This in turn presupposes that, before the first transaction was effected, all the essential features of the second transaction were planned, intended and ascertained.

Fourthly, I think that, if the *Ramsay* principle were to be held to apply to transactions of which the connecting link is so tenous as that suggested in the Crown's basic contention, formidable uncertainty and practical difficulties would arise in the administration of our tax law, which the House of Lords, in formulating and developing the *Ramsay* principle, did not contemplate and would not have intended. The whole essence of this principle when it applies is that the step inserted in the series of transactions which has no commercial purpose apart from the liability to tax falls to be wholly disregarded for fiscal purposes: (see *Dawson*[1] [1984] AC 474 at page 527D *per* Lord Brightman). But the step so inserted may well, by itself, have immediately and permanently altered the legal rights of the parties, for example by transferring the legal and beneficial title to assets from A to B. In the circumstances envisaged in the Crown's basic contention, a substantial interval of time may elapse before any transfer of those assets by B to C ensues and, indeed in the event, no such transfer may ever take place. In the meantime, the Revenue may well assess the interested parties to tax (prima facie quite properly) on the basis that there has been a disposal of assets by A to B, effective according to the tenor of the documents. (It can by no means be assumed that in the case of other tax-saving schemes the first disposal will be wholly covered by a specific statutory exemption, such as was available in *Dawson*). What are then to be the fiscal consequences if and when a sale of assets by B to C at last ensues? If the original scheme was designed to avoid or mitigate tax, it is to be assumed that, if it could properly do so in reliance on the *Ramsay* principle, the Revenue would subsequently wish to claim tax on the basis of a disposal by A to C, when the sale to C eventuates. However, of one thing I am certain. The 1965 Act, on its true construction, does not permit one single transfer of assets by A to be treated for capital gains tax purposes both as a disposal of all those assets in favour of B and as a disposal of all those same assets in favour of C. Neither the House of Lords in *Dawson*, nor Mr. Sher in this court, suggested to the contrary. What then is to be the status of the earlier assessment in such circumstances? Was it wrong when made or has it merely become wrong? If it cannot be said that it was wrong when made, how can the taxpayer escape oppressive double taxation in the absence of any relieving statutory provision? (No such provision has been drawn to our attention.) If the Revenue is to be entitled to claim tax on the basis of a disposal by A to C, what is to be regarded as the date of that disposal? What is to be regarded as the base value of the assets disposed of and at what date is it to be ascertained? The list of difficult practical and conceptual problems that could arise, if the Crown's basic contention were well founded, could be multiplied.

Though several of these problems were canvassed in some depth in argument before us, I cannot attempt to provide satisfactory answers to them and I do not think that Mr. Sher, with due respect to his submissions, was able to do so. In drawing attention to them, I observe that, in cases where the scheme involves a pre-ordained series of transactions, in the sense which I

(1) 55 TC 324.

A attribute to that phrase (as in *Dawson, Ramsay*[1] *Burmah*[2]), there may be little practical likelihood of the problems arising, because there is no practical likelihood of a substantial "limbo" period elapsing between the first and second stages of the series. In other cases, the problems might be real and serious.

B Finally, before turning to the facts of the individual cases before us, I should mention that each of the notices of appeal before us includes (*inter alia*) the following ground:

> "The effect of the learned judge's decision is that the *Ramsay* principle can be easily side-stepped by the simple expedient of the taxpayer C taking the first step in the composite transaction (namely, the share exchange) prior to going into the market to find his purchaser ... "

While I appreciate the concern of the Revenue in this context, this ground, with due respect to the submission, seems to me to beg the very question which has to be decided namely, whether or not there has indeed D been a composite transaction. They assume that two transactions are together capable of constituting one composite transaction within the meaning of the first *Ramsay* condition, even though at the time of the first transaction the persons having control of the matter had not yet gone into the market to find a purchaser and there was at that time no certainty whatever that an ultimate sale would eventuate. For the reasons which I have E attempted to indicate, this assumption is, in my judgment, incorrect. This was not the sort of case which the House of Lords, in referring to "one composite transaction" can have had in mind. Various fiscal statutes expressly state that the term "disposition" includes a "disposition effected by associated operations". Simply, for example, s 51(1) of the Finance Act 1975 (in the context of capital transfer tax) so provides; and s 44(1)(b) of that Act F provides that "associated operations" means "any two operations of which one is effected with reference to the other, or with a view to enabling the other to be effected or facilitating its being effected .. "If the capital gains tax legislation had included similar provisions, the Crown's basic contention might have been easily sustainable. In my judgment, however, the gap cannot be filled by judicial legislation.

G

As things are, as a matter of general principle, I conclude that two successive transactions, each of which has legal effects, are not properly to be regarded as a pre-ordained series or as a single composite transaction within the meaning of the first *Ramsay* condition as stated by the House of Lords unless, at the time when the first transaction was effected, all the essential H features (not merely the general nature) of the second transaction had already been determined by a person or persons who had the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction.

I After these general observations, I turn to a separate consideration of the three appeals now before us.

Craven v. *Stephen White* and *Craven* v. *Brian White*

---

[1] 54 TC 101. [2] 54 TC 200.

In this case the Special Commissioners heard together appeals by three taxpayers, Messrs. Archibald, Brian and Stephen White, against assessments to capital gains tax. They gave their decision allowing those appeals, on 18 January 1984, after the decision of the Court of Appeal in *Dawson*,(1) but before the decision of the House of Lords. The Crown appealed against the decision in each case, but the appeals which came before Peter Gibson J. related only to Brian and Stephen White; by that time Archibald White had died.

I gratefully adopt, more or less verbatim, the learned Judge's summary of the basic facts of the case, merely adding a few references to certain additional points which Mr. Sher drew to our attention. Archibald, Brian and Stephen White, until 19 July 1976, owned all the issued share capital of S. White & Sons ("Queensferry") Ltd. ("Queensferry"), which owned and operated about a dozen supermarkets. They respectively held 701, 700 and 2,101 £1 ordinary shares.

In 1973, on the advice of Queensferry's accountant, Mr. Clarke, they decided that they would either merge Queensferry with a similar business or they would sell it. Between 1973 and the summer of 1976 they sought without success to achieve the one or the other result.

Early in 1976 Stephen White approached Mr. Humphreys of Cee-N-Cee Supermarkets ("Cee-N-Cee") with a view to resuming talks about a possible merger between Queensferry's business and that of Cee-N-Cee. In February or March 1976 Mr. Clarke initiated talks with Manx lawyers, Kneale & Co. ("Kneales") about establishing a holding company in the Isle of Man as a vehicle for such a merger.

At about the same time as discussions were resumed with Mr. Humphreys, a company called Oriel Foods Ltd. ("Oriel") asked Mr. Clarke if Queensferry was still up for sale. Oriel itself had been acquired by RCA Corporation of America ("RCA") in 1974. A subsidiary of Oriel was Morris & David Jones Ltd. ("Jones"). Once Oriel's inquiry was received, negotiations with Cee-N-Cee were set aside and negotiations with Oriel were pursued. In May 1976 broad agreement on price had been reached, that is to say that, if a sale went through, the consideration would probably exceed £2 million and be paid in cash.

In June 1976 the Whites were alarmed by trade press reports that RCA was disenchanted with its food operations. A meeting with Oriel on 17 June to find out how the proposed sale to Oriel stood left Brian and Stephen White and Mr. Clarke feeling despondent. They had exhausted other potential purchasers and trading prospects for Queensferry were not good. They went back to Cee-N-Cee, which was willing to resume talks.

On 21 June 1976 Mr. Clarke arranged with Kneales to acquire an off-the-shelf company, Millor Investments Ltd. ("Millor") as a holding company for the projected merger with Cee-N-Cee. Millor then had a £2 issued share capital, its two £1 shares being held by two advocates' clerks from Kneales. In evidence before the Commissioners Mr. Clarke and Stephen White insisted that the sole purpose of acquiring Millor was to act as a holding company for the shares of Queensferry and Cee-N-Cee and any other com-

(1) 55 TC 324.

A pany which might join the Group. The Commissioners (see para 18 of their decision) did not accept that this was the sole purpose of the acquisition. They put the matter thus(1):

> "The view we have formed is that Stephen White's approach to Mr. Humphreys early in 1976 was made as a final resort after repeated B unsuccessful attempts since 1973 to dispose of [Queensferry]. We infer, from the fact that so soon as Oriel reappeared as a possible purchaser the talks with Mr. Humphreys were set aside, that Stephen White and Brian White regarded a deal with Oriel as a more desirable target than a merger with Cee-N-Cee."

C Nevertheless, I think it clear that the Commissioners accepted as a fact that a subsidiary purpose of acquiring Millor was that it should act as a holding company if the sale to Jones did not happen but a merger between Queensferry and Cee-N-Cee should eventuate.

On 23 June 1976 Millor increased its authorised share capital with a D view to issuing 3,502 Millor shares in exchange for the Whites' Queensferry shares on a one for one basis. On 24 June Mr. Clarke sent to Kneales a draft which he had prepared of a contract between the Whites and Millor.

Meanwhile, on 21 June 1976 Oriel had asked Mr. Clarke for a further meeting on 25 June. That meeting was held at the offices of Oriel's solicitors. E Oriel asked if a draft contract for the acquisition of Queensferry could be sent to the Whites' solicitors and were told that the draft should be sent to Kneales as lawyers for Millor. Oriel's solicitors sent the draft to Kneales. The Commissioners found that following the meeting of 25 June negotiations for the acquisition of Queensferry by Oriel "resumed more strongly and continued, albeit not always smoothly, towards the execution of the agreement on F 9th August". Nevertheless, notwithstanding the increased purposefulness of these negotiations, the talks with Cee-N-Cee also continued.

On 9 July 1976 Queensferry's authorised share capital was increased and 3,502 new ordinary shares were issued to the Whites on renounceable letters of allotment while the existing ordinary shares were converted into deferred G ordinary shares with diminished rights. The Commissioners found that the purpose of this re-organisation of share capital was on the advice of Kneales to effect stamp duty savings should the contract for the sale to Jones by Millor be entered into.

H On or before 14 July Millor offered to acquire the issued share capital of Queensferry. It offered to buy the deferred ordinary shares for 50*p* each and to exchange one Millor share for each Queensferry ordinary share, the offer to remain open until 9 August. On 19 July the Whites entered into an agreement with Millor ("the July Agreement") accepting Millor's offer, and the Whites held shares in Millor in the same proportions as they had held shares I in Queensferry.

On 20 July the Queensferry board approved and registered the transfers of the deferred ordinary shares to Millor and agreed that, when the

(1) page 30A/B *ante*.

renounced letters of allotment for the ordinary shares were received, registration would be completed in accordance with the forms of renunciation. A

On 9 August there was a meeting between representatives of Oriel and Jones on the one hand and Stephen and Brian White and Mr. Clarke and the two directors (both from Kneales) of Millor on the other. That meeting was stormy: at one stage Stephen White and his party walked out. But agreement was in the end reached and Millor and Jones entered into a written agreement ("the August Agreement") whereby Jones agreed to purchase the whole of the issued share capital of Queensferry for a consideration of £2.2 million subject to adjustment. That consideration was apportioned as to 50*p* for each deferred ordinary share and the balance to the ordinary shares. Payment of the consideration was to be by instalments, £1.8 million on completion and then two other payments of adjustable amounts. In the event, £2,459,493 was paid by Jones. B C

Following completion and between 25 March 1977 and 6 October 1981 Millor made several interest-free loans to the Whites. In all £275,000 was lent to Stephen White, but of that £50,000 was repaid on 30 September 1981; £145,000 was lent to Brian White and £100,000 to Archibald White: £1,500 was expended on acquiring options on three Manx companies, and the balance lent interest-free to those companies. D

Assessments to capital gains tax were raised against each of Archibald and Brian White in the sum of £490,000 for 1976–1977 and in the sum of £27,000 for 1977–1978, and against Stephen White in the sum of £1,475,000 for 1976–1977, and in the sum of £80,000 for 1977–1978. At the hearing of their appeals before the Special Commissioners it was submitted on their behalf that the only disposals by them were the disposals of their Queensferry shares to Millor and that of those disposals only the sale of the deferred ordinary shares to Millor was a disposal for capital gains tax purposes, the exchange of the Queensferry ordinary shares for the Millor shares being, by the combined effect of paras 4(2) and 6 of Sch 7 to the 1965 Act, no disposal for such purposes. On the other hand, in reliance on the *Ramsay*[1] principle, the Crown submitted that the Whites had for such purposes disposed of all their shares in Queensferry to Jones, on the grounds that the transfer of their shares to Millor should be treated as a fiscal nullity. Alternatively, it was submitted, the Whites fell to be assessed on the amounts which they received from Millor by way of loans and at the time when the loans were made. E F G

The Commissioners found (at paras 19.1 and 19.2 of their decision) that, before the July Agreement with Millor was entered into, the Whites and Mr. Clarke had reached an understanding that, if a sale to Jones transpired, arrangements could be made for the Whites to have the use of the proceeds of sale, either directly or indirectly, for their own purposes. Nevertheless, they pointed out (at para 20.1) that this understanding was "of a different nature from the carefully thought out and dovetailed arrangements reflected in the transactions considered in *Floor*[2] and in *Dawson*[3]. Without spelling out their understanding of the nature of a "composite transaction", they said[4]: H I

---

(1) 54 TC 101. (2) 52 TC 609. (3) 55 TC 324.
(4) page 32D/E ante.

A "We consider that we are constrained by authority to look at the transactions as a whole (*W. T. Ramsay Ltd.* v. *Commissioners of Inland Revenue*)[1]. We have found that the primary objective of the Appellants was to conclude a sale of [Queensferry's] shares to Jones. That objective was achieved, and the agreements of July and August are to be looked upon as parts of a composite transaction comprising those two agree-
B ments, if no more; it is irrelevant that the terms of the August agreement were not finally settled until the day it was executed."

Nevertheless, following the decision of the majority of this court in *Floor*, on what was described as the first stage of the transaction in that case, the Commissioners held that the July and August Agreements were real
C transactions, that Millor acquired the Queensferry shares as a principal and that accordingly the Whites could not be regarded as having disposed of their shares direct to Jones. They therefore held that there was no disposal for capital gains tax purposes of the Queensferry ordinary shares effected by the July Agreement. However, they also held that on each of the occasions when one of the Whites received a loan he must be deemed to have made a
D part-disposal of the shares which he formerly owned in Queensferry.

By the time that Peter Gibson J. heard the Crown's appeal against the rejection of the Special Commissioners' argument that the Whites had made a disposal for capital gains tax purposes of their Queensferry shares to Jones,
E the views of the majority of this court in *Floor* had been held by the House of Lords in *Dawson* to have been wrong and the dissenting judgment of Eveleigh L.J. in *Floor* had been reaffirmed as correct. It was submitted to the learned Judge that the scheme employed by the Whites was exactly the same as that in *Dawson* and that, given the finding of the composite transaction by the Special Commissioners, the court should hold that the only true reason-
F able conclusion, on the facts found by them, was that the transfer of the Queensferry shares to Millor had no commercial purpose other than the avoidance of tax. It was therefore submitted that, by virtue of the *Ramsay* principle, the real transaction was the sale by the Whites of their Queensferry shares to Jones for the moneys which they caused to be paid to Millor and that the taxpayers were liable to capital gains tax.

G

Counsel for the Crown submitted to the learned Judge, as he did before us, that the important characteristic of each step forming part of a "composite transaction" is that it should be intended by the taxpayer to be one step in a series of steps. For this he particularly relied on Lord Wilberforce's words in *Ramsay*[2] ([1982] AC 300 at page 323):

H

"If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: ... "

I However, in the next paragraph, Lord Wilberforce referred to the "intentions of the parties" which, in Peter Gibson J.'s view ([1985] STC 531 at page 559G), suggested that he may not have regarded the intentions of the taxpayer alone as sufficient for determining what the relevant transaction

(1) 54 TC 101. (2) *Ibid* at page 185B.

was. Furthermore, Lord Wilberforce went on to say ([1982] AC 300 at page 324) that the Commissioners A

> "are not, under the *Westminster*(1) doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. This is particularly the case where (as in *Rawling*(2)) [(1981) STC 174, (1982) AC 300)] it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps. It may be so where (as in *Ramsay* or in *Black Nominees Ltd.* v. *Nicol*(3) (1975) 50 T.C. 229) there is an expectation that it will be so carried through, and no likelihood in practice that it will not." B

Peter Gibson J. observed ([1985] STC 531 at page 560B–E)(4): C

> "Lord Wilberforce in the passage cited refers to two classes of case to which the Ramsay principle has or may have application and which correspond to the contractual and non-contractual arrangements to which Lord Brightman referred in giving the rationale of the *Ramsay* principle. It is to be noted that to the non-contractual class of case Lord Wilberforce applies the description that it is where there is an expectation that the series of steps will be carried through once a scheme is set in motion and there is no likelihood that it will not. The practical certainty, to adopt the phrase of counsel for the taxpayers, that the series of steps will be completed once started is a feature of the rationale of the *Ramsay* principle as expounded by Lord Brightman and is well exemplified in all the cases in which the principle has been held to apply. The justification for equating the non-contractual arrangement with the contractual is that looking at the realities of a pre-planned tax-saving scheme where every step has been arranged, there is no distinction between the two; both will in practice be carried through to their intended conclusion. Contrast the case where in reality there is a distinct possibility that a planned series of steps may not be completed as planned; in those circumstances the real position is not the equivalent of a contractual arrangement capable of being enforced." D E F

The learned Judge (at page 560) recognised that the Special Commissioners had attempted to make a finding of a composite transaction for the purpose of the application of the *Ramsay* principle and that, having regard to what had been said in *Dawson*, this was a finding of fact which was reviewable on the principles of *Edwards* v. *Bairstow*(5) (*supra*). Having referred to this and other findings of fact by the Commissioners, he commented (at page 561A–B)(6): G

> "It would appear from these findings that what the Special Commissioners regarded as the essential quality of a composite transaction was that the taxpayer (with his advisers) should at the time the first step in the composite transaction was taken have planned the steps in the series that made up the composite transaction, regardless of whether the means of achieving all the steps lay within the control of the taxpayer or of whether there was otherwise any practical certainty that all the planned steps would be completed. Thus, although I do not doubt that the Special Commissioners were attempting to make a finding of a composite transaction for the purpose of the application of the H I

(1) 19 TC 490. (2) 54 TC 101. (3) [1975] STC 372.
(4) page 76A/D *ante*. (5) 36 TC 207. (6) page 77A/C *ante*.

A *Ramsay*[1] principle, to my mind they have not directed themselves correctly in law. The case would have to be remitted to the Special Commissioners, as counsel for the Crown submitted it should, unless there was only one true and reasonable conclusion on the facts as found or there was some other point decisive of the appeals."

B However, looking at the primary facts found by the Commissioners, he concluded that, at the time when the July Agreement was made, there was no "practical certainty" that the sale to Jones would be completed; on the contrary there was a live possibility that it would not. In those circumstances, he concluded that it was impossible to say that the July Agreement and the August Agreement were parts of a composite transaction, so as to satisfy the C first *Ramsay* condition. He considered (see [1985] STC 531 at page 561A) that the Commissioners had misdirected themselves in law because they

> "regarded as the essential quality of a composite transaction ... that the taxpayer (with his advisers) should at the time the first step in the composite transaction was taken have planned the steps in the series D that made up the composite transaction, regardless of whether the means of achieving all the steps lay within the control of the taxpayer or of whether there was otherwise any practical certainty that all the planned steps would be completed."

As a second, further ground of his decision the learned Judge (at pages E 561J–562B) held that, in any event, the second *Ramsay* condition was not satisfied, because it could not properly be said that the July Agreement had no commercial purpose other than the avoidance of a liability to tax. He therefore held that the *Ramsay* principle, as formulated by the House of Lords, had no application to the case. It was common ground that, if the July Agreement did not fall to be disregarded, the provisions of paras 4 and F 6 of Sch 7 were applicable, so that the transfers of the ordinary shares in Queensferry by the taxpayers to Millor were to be treated as not being disposals for capital gains tax purposes. He therefore dismissed the Crown's appeals.

In relation to the first of the two main grounds of Peter Gibson J.'s deci- G sion, Mr. Sher submitted to us that the learned Judge erred in holding that the Commissioner's finding of a composite transaction was insupportable on *Edwards* v. *Bairstow*[2] principles. On the contrary, he contended, the Judge himself, in applying the "practical certainty" test referred to above, applied the wrong test; he confused certainty as to the series of steps by which a particular commercial end is to be achieved with certainty as to the achievement H of the end itself. It was irrelevant, in Mr. Sher's submission, that, at the time of the July Agreement, there remained a possibility that the sale to Whites would not ultimately be achieved; the crucial point was that, at that time, the taxpayers had a firm intention that, *if* a sale to White should be achieved, it would be routed through the interposed company, Millor.

I In any event, even if contrary to his submission, the "practical certainty" test were the correct one, Mr. Sher suggested that it was satisfied on the facts. At the time of the first transfers of the shares in Queensferry on 19 July

---

(1) 54 TC 101. (2) 36 TC 207.

1976, the negotiations for the ultimate sale had advanced a long way. The proposed purchaser, Jones, was identified. The approximate likely consideration (in excess of £2 million) had been known since May 1976. From that time onwards, the taxpayers had been striving towards the object of an ultimate sale to Jones. These negotiations faltered between 17 and 21 June. However, from that time on they continued, according to the Commissioners' findings, with increased purposefulness until the contract with Jones was finally concluded on 9 August; this contract had been in draft form since 25 June 1976. In Mr. Sher's submission, the fact that Jones may not have had any settled intention to purchase as at 19 July 1976 was irrelevant; the learned Judge erred in considering that the intentions of the contemplated purchaser are relevant in deciding whether or not there is one composite transaction in any given case; the intentions of the taxpayer are the only relevant intentions.

As a matter of legal analysis, I would for my part prefer to express the first *Ramsay*[1] condition by reference to the test suggested at the end of the first section of this judgment, rather than by reference to the "practical certainty" test adumbrated and applied by the learned Judge. It seems to me, with respect, that the former test perhaps reflects more accurately both the wording of the phrase "a pre-ordained series of transactions, i.e. a single composite transaction" and the essential rationale which enables such a composite transaction to be regarded as involving a disposal by A to C, rather than a disposal by A to B for tax purposes. Nevertheless, both tests come to much the same thing. Unless, at the time when the first transaction in the series is effected, all the essential features of the second transaction have already been determined by persons who have the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction, there will be no practical certainty that the second transaction will be effected.

I agree with the learned Judge that, on the basis of the facts found by the Commissioners, they could not in law properly have found that the July and August Agreements constituted a single composite transaction so as to satisfy the first *Ramsay* condition. As at the date of the July agreement, the Whites, though hoping and intending that the sale to Jones would go through if they could achieve it, did not have the practical ability to ensure this result. Their ability to do so depended on what Jones might finally be willing to contract with Millor on terms which the Whites regarded as acceptable. (This, I think, is the relevance of Jones' intentions.) The final decision of Jones was still unpredictable. As is indicated by the "stormy" meeting which took place on 9 August 1976, only at the last moment was there any practical certainty that the August Agreement would be concluded. As the respondents' counsel cogently submitted in their skeleton argument:

> "Acceptance of the appellants' submission [that the first *Ramsay*[1] condition was satisfied] would mean that the status of the share exchange with Millor could not be known on 19th July 1976, being contingently disregardable depending on whether a sale to Jones eventuated. Since the sale to Jones did take place on 9th August 1976, that period of uncertainty was only 21 days. But suppose the sale had not been concluded as quickly or possibly at all? The intention to create such uncer-

(1) 54 TC 101.

A tainty, especially in the context of taxation, should not be imputed to their Lordships."

In my judgment, this appeal should fail because the first *Ramsay* condition is not satisfied. In these circumstances, it is unnecessary to reach any conclusion in regard to the learned Judge's view that the second *Ramsay* condition is not satisfied. I will only make these brief comments in this context. Though it is clear that the steps involving the interposition of Millor in the series of transactions had business effect, the relevant question is whether or not, on the Commissioner's findings of fact, it could properly be said that the interposition of Millor had "no commercial (business) purpose apart from the avoidance of a liability to tax" Having studied these findings, I think that a proper reading of them indicates that the Commissioners (a) regarded the primary purpose of both the acquisition of Millor and the subsequent transfer of the Queensferry shares to Millor as being to avoid the tax which would otherwise have been immediately payable on the ultimate sale to Jones, if that sale were eventually to take place; (b) accepted that a subsidiary purpose of both that acquisition and that transfer was that Millor should act as a holding company of the Queensferry shares if a sale to Jones did not happen but a merger between Queensferry and Cee-N-Cee eventuated; (c) nevertheless, regarded the primary objective of the taxpayers at all material times as being to conclude a sale to Jones.

In these circumstances, I see the force of the submission made on behalf of the taxpayers that it cannot properly be said that the interposition of Millor had *no* commercial purpose apart from the avoidance of a liability to tax. Nevertheless, I would find some difficulty in accepting that the mere existence of what may be described colloquially as a "long-stop" purpose, such as mentioned in (b) above, can prevent the second *Ramsay* condition from being satisfied in a case where the *Ramsay* principle would otherwise apply on the facts. Such a conclusion would at present appear to me contrary to the true intent of the *Ramsay* and *Dawson*[1] decisions.

However, I find it unnecessary to express any concluded view on this point. For the reasons stated, relating to the first *Ramsay* condition, I would dismiss this appeal.

Commissioners of Inland Revenue v. *Bowater Property Developments Ltd.*

This appeal concerns the Development Land Tax Act 1976 (the "1976 Act"), which imposed new tax on the realisation of the development value of land. Section 1, so far as material, provided as follows:

> "1(1) A tax, to be called development land tax, shall be charged in accordance with the provisions of this Act in respect of the realisation of the development value of land in the United Kingdom. (2) Subject to the provisions of this Act, a person shall be chargeable to development land tax on the realised development value, determined in accordance with this Act, which accrues to him on the disposal by him on or after the appointed day of an interest in land in the United Kingdom ... "

(1) 55 TC 324.

Section 4(1) provided:

> "Subject to the following provisions of this Act, the realised development value accruing to a person, on the disposal by him of an interest in land shall be the amount (if any) by which the net proceeds of the disposal exceed the relevant base value of that interest."

Section 4(3) defined "the net proceeds of the disposal of an interest in land", and s 5 defined "relevant base value". Section 12, as amended, gave an exemption for the first £50,000 of development value. It provided, *inter alia*:

> "(1) Subject to the provisions of this section, if the total amount of realised development value which accrues to any person in a financial year and on which, apart from this section, that person would be chargeable to development land tax does not exceed £50,000, development land tax shall not be chargeable on any of that realised development value. (2) If subsection (1) above does not apply to any person in respect of a financial year, then, subject to following provisions of this section, the sum of £50,000 shall be deducted from the amount of realised development value on which, apart from this subsection, that person would be chargeable to development land tax in that financial year."

Section 20(1) provided that a disposal of an interest in land by a member of a group of companies to another member of the group should be treated for the purposes of the 1976 Act as a disposal and acquisition for which no consideration was given.

The respondent to this appeal by the Commissioners of Inland Revenue is Bowater Property Developments Ltd. ("BPD"), a company in the Group of which the Bowater Corporation PLC is the parent. Another of the subsidiaries in the Bowater Group is Bowaters United Kingdom Paper Co. Ltd ("BUKP"). By November 1978 agreement had been reached between BUKP and a company outside the Bowater Group, Milton Pipes Ltd ("MPL"), subject to contract, for the sale to MPL of 23 acres of land near Milton Regis in Kent, known as "Crafts Marsh", for a sum of £202,500. In these negotiations, it had also been agreed that the contract would be conditional on planning permission being obtained for the uses to which MPL wished to put the land. On 7 March 1979 BPD exercised an option to purchase Crafts Marsh from BUKP and thus became its owner. At about that time, one of Bowater's taxation advisers lined up a number of Bowater subsidiaries willing to take undivided shares in Crafts Marsh, a fragmentation exercise designed to make maximum use of the exemption under s 12. At that date the exemption level stood at only £10,000 and no fewer than 18 subsidiaries were involved. Draft deeds were sent to MPL on 9 March 1979 which indicated that a disposal in favour of the 18 subsidiaries was contemplated as a prelude to the sale to MPL. However, by 25 March 1980, no contract had yet been concluded with MPL because of uncertainties relating to planning and other matters.

I now take up the story, more or less verbatim, from the judgment of Warner J. On 25 March 1980 BPD contracted to sell Crafts Marsh for £180,000 to five other companies ("the five companies") in the Bowater Group as beneficial tenants in common in equal shares. It is not in dispute that that transaction ("the first transaction") had no business purpose. The five companies were selected because none of them had used any part of its

A £50,000 exemption from development land tax under s 12 of the 1976 Act as amended. The sole object of the first transaction was to avoid the liability to development land tax which would otherwise fall on BPD if the sale to MPL went through. At the time of the first transaction there was, as the Special Commissioners found, a firm expectation on the Bowater side that that sale would go through, but the chances of MPL being willing to sign a contract B on or about 25 March 1980 were nil.

On 22 May 1980 Mr. Goodger, a Group legal adviser in the Bowater Corporation's legal department, during the course of what the Special Commissioners describe as "a somewhat desultory correspondence" between himself and the solicitors acting for MPL, sent to them, to replace an earlier C draft, a revised draft contract, conditional on MPL obtaining planning permission. In this draft the five companies were of course named as vendors. On 7 July 1980 MPL's solicitors wrote to Mr. Goodger in these terms:

> "Dear Sirs, *Land at Crafts Marsh*. We thank you for your letter of the 22nd May. We are sorry to tell you that the present economic situa-D tion with its direct effect on the concrete making industry has compelled our Clients to give up the proposal to purchase your Company's land. We enclose the various documents which you have sent us."

It appeared to those concerned on the Bowater side that the sale had fallen through for good. During the ensuing months it remained their general E policy to sell Crafts Marsh, but they had no other potential purchaser in mind and they did not actively seek one. Early in February 1981, circumstances having changed, particularly from the planning point of view, the solicitors who had been acting for MPL telephoned the Bowater Corporation's legal department to say that MPL was interested in Crafts Marsh again. Negotiations were thereupon re-opened. They resulted in the F exchange on 23 October 1981 of unconditional contracts for the sale of Crafts Marsh by the five companies to MPL for £259,750 ("the second transaction"). The sales were completed on 23 November 1981.

On 13 February 1984 the Commissioners of Inland Revenue, in reliance on the *Ramsay*(1) principle, assessed BPD to development land tax on the G footing that the second transaction should be treated for tax purposes as a disposal by BPD. The Special Commissioners held that, on the facts of this case, that principle did not apply and they discharged the assessment.

In this case it was undisputed that the second *Ramsay* condition was satisfied. The submissions made before the learned Judge concerned the first H *Ramsay* condition and are to be found summarised in his judgment [1985] STC 783 at pages 796–798. It will be seen that, following the lines of what I have called the Crown's basic contention, they involved a submission by its counsel that the *Ramsay* principle applies whenever it is found that a step has been taken with a view to avoiding tax in a certain event and that event actually occurs.

I

> "Thus, he says,"—(see *ibid* at p.796E–F)—"in the present case, what matters is the expectation or intention of those concerned on behalf of the Bowater group at the time of the first transaction. They at

(1) 54 TC 101.

that time expected the sale of Crafts Marsh to go through and their purpose in causing the first transaction to take place was to avoid development land tax on that sale. Therefore, the *Ramsay*(1) principle applies, and the break in the negotiations between the Bowater group and Milton Pipes that occurred from July 1980 to February 1981 was irrelevant." A

B

Warner J. rejected these submissions of the Crown. He expresses himself in entire agreement with the reasoning that led Peter Gibson J. to hold in *Craven* that the first *Ramsay* condition was not satisfied. He expressed the ratio of his final conclusion as follows (at page 800A and B)(2):

"The crucial fact, to my mind—a fact of which the events of May and July 1980 are but evidence—is that it had not been pre-ordained or pre-arranged, at the time of the first transaction, that the second transaction would follow. Applying the test suggested by Lord Wilberforce's words, it could not be said at that time that there was 'no likelihood in practice' that the second transaction would not follow. When it followed, 19 months later, it followed as an independent transaction." C D

The Revenue's case on this appeal, as I see it, stands or falls on the Crown's basic contention. For the reasons which I have given in the first section of this judgment, I think that that contention is not well founded and that the relevant test for the purpose of the first *Ramsay* condition is that which I have indicated in that section. On the facts of this case, that test is not satisfied. It cannot conceivably be said that, at the date of the first transaction (25 March 1980), all the essential features of the second transaction (which ultimately took place on 23 October 1981) had already been determined by a person who had the firm intention, and for practical purposes the ability to procure the implementation of that second transaction. If the "practical certainty" test is to be preferred, that test likewise is not satisfied. E F

Further detailed reference to the facts is unnecessary, but I mention a few points drawn to our attention by Mr. Andrew Park Q.C., on behalf of BPD, as illustrating the difficulties (to my mind insuperable) of holding that on 23 October 1981, either in substance or in reality, or within the meaning of the 1976 Act, there was a disposal of the land by BPD in favour of MPL: G

(1) At the time of the second transaction the five companies *not* BPD, had been the legal and beneficial owners of the land for some 19 months.

(2) BPD was not a party to the contract of sale of 23 October 1981. H

(3) BPD was not a party to the negotiations which led to that contract and did not receive any of the proceeds of sale.

(4) BPD had no control over the land through the five companies. The Bowater Group holding company controlled both BPD and the five companies, but BPD had no control, directly or indirectly, of the five companies. I

It is common ground that the first transaction was effected without any commercial or business purpose, apart from a tax advantage. Nevertheless, on the facts found by them, I do not think it would have been open to the

(1) 54 TC 101. (2) page 87A/B *ante*.

A Commissioners properly to find that the first and second transactions were one single composite transaction. The learned Judge, in my view, was plainly right in deciding that, when the second transaction followed, it did so as an "independent" transaction in the sense of that phrase as used by Lord Wilberforce in *Ramsay*(1) ([1982] AC 300 at page 324).

B Various other matters were canvassed in the course of argument, in particular suggested possibilities of double taxation. I do not find it necessary to deal with these matters. More generally, I would, with respect, associate myself with the following observations of Warner J. at page 798B–E (*ibid*)(2):

> "Counsel for the Crown argued that, unless his submissions were C accepted, the application of the *Ramsay* principle in the 'linear' or bilateral type of case would be haphazard. A well-advised taxpayer need never be affected by it, because he could always ensure that the tax avoiding transaction was carried out before any deal with the other party was clinched. That argument would be very convincing if it were legitimate to regard the *Ramsay* principle as a judge-made anti-tax-D avoidance rule, which it was open to the courts to mould and develop in the light of their experience of tax avoidance devices. Indeed counsel for the Crown went so far as to suggest that I should so regard it. In my opinion, however, that would be nothing short of unconstitutional. Under our constitution the imposition of taxation is a matter for Parliament. Indeed within Parliament itself it is a matter in which the E House of Commons has a predominant role. The only function of the courts in this sphere is to interpret and apply the legislation enacted by Parliament in accordance with relevant legal principles. Among the relevant legal principles is the principle that the courts are bound to seek to ascertain the true nature of a transaction and to give effect to it. That, to my mind, is the real basis of the *Ramsay* principle. (I choose the F phrase 'true nature', but other expressions such as 'reality' or 'substance'—in the sense in which I understand the latter term to have been used by Lord Bridge in *Furniss* v. *Dawson*(3)— will do just as well.)"

To call the true nature of the series of transactions in the present case a disposal made on 23 October 1981 in favour of MPL by BPD would appear G to me to involve a travesty of the facts.

I would dismiss this appeal.

Baylis v. Gregory & Weare

H The decision of Vinelott J., which is under appeal by the Revenue in this case, was given on appeals by the Revenue against two related decisions of the Special Commissioners. These decisions had discharged assessments to capital gains tax respectively on Mr. R. F. Gregory and on Mr. Gregory and Mr. J. B. Weare ("the-trustees") jointly as trustees of the estate of Joseph I Gregory deceased. They arose out of a transaction, or series of transactions, concerning the shares of a company called Planet Gloves (Industrial) Ltd. ("PGI") in which Mr. Gregory and the trustees held shares. There were ten other shareholders of PGI. All were members of Mr. Gregory's family,

(1) 54 TC 101. (2) [1985] STC 783; page 84H–85C *ante*. (3) 55 TC 324.

trustees of family settlements or employees of PGI, except Mr. Weare. He was the Company's accountant and held a few shares in his own right. Appeals by the Revenue against the discharge of assessments on the other shareholders had been held over pending the learned Judge's decision on the appeals before him.

Once again, I will gratefully adopt, more or less verbatim, the greater part of the learned Judge's summary of the facts found by the Special Commissioners.

PGI carries on a clothing business. At all material times Mr. Gregory was its managing director. He also, through his personal and trustee holdings, had voting control of PGI. In 1973 he negotiated, on behalf of all the shareholders, a sale of the entire issued share capital of PGI to an investment company, Cannon Street Investments Limited ("Cannon"). In the course of the negotiations it was suggested to Mr. Gregory that liability to capital gains tax could be indefinitely deferred if the shares of PGI were exchanged for shares of a holding company incorporated in the Isle of Man, which would sell them on to Cannon—thus, it was hoped, obtaining the benefit of the relief afforded by paras 6 and 4 of Sch 7 to the 1965 Act. It was also suggested that there would be no fiscal penalty if the proceeds of sale were later lent by the holding company to the shareholders rateably in proportion to their shareholdings. Mr. Gregory arranged for a private unlimited company called P.G. Holdings ("Holdings") to be incorporated in the Isle of Man. Early in 1974, before shares of PGI were exchanged for shares of Holdings, Cannon wrote to say that it could not proceed with the purchase. Mr. Gregory and the other shareholders decided that they would nonetheless proceed with the share exchange. There was no disadvantage in doing so. The exchange would be carried out by means of the issue and renunciation of the holdings of bonus shares of PGI on which no stamp duty would be payable. The machinery would be there for use if a sale of the shares of PGI were subsequently negotiated. The exchange was duly completed on 11 March 1974 pursuant to an agreement made that same day.

There matters rested for some time. Mr. Gregory took no steps to find a purchaser. Then, in the late spring of 1975, he learned by chance that another company, Hawtin Ltd. ("Hawtin"), might be interested in acquiring the shares. Discussions in May and June 1975 came to nothing. However, in November 1975, Hawtin approached him again. The renewed negotiations bore fruit, and on 30 January 1976 an agreement was concluded between Holdings and Hawtin for the sale of all the shares of PGI for £1.75 million to be satisfied by a down payment of £1 million, a further payment of £550,000 on 31 December 1979, and an issue of convertible loan notes for the face value of £200,000. The agreement was completed on the same day in the Isle of Man.

As a result of advice given by counsel the proposal that the proceeds of the sale should be lent to the shareholders of Holdings was deferred for a year save that £50,000 was lent to Mr. Gregory. The Commissioners found that "a more general withdrawal of funds, to take place in March 1977, was in contemplation at the date of the Sale Agreement". In the meantime, the balance of the £1 million was invested. In March loans totalling £945,000 were made. Further loans were made after the deferred consideration of £550,000 had been paid (the payment of this sum having been by agreement deferred for a further six months). Although the Crown at one time con-

A tended that the loans were gains accruing to the shareholders, that claim was not pursued before the Commissioners.

The question whether these transactions gave rise to a liability to capital gains tax was the subject of correspondence between a Mr. Rothwell, District Inspector of Taxes for the Pontypridd District, and Mr. Weare starting in B 1978. In March 1980 Mr. Rothwell arranged for assessments to be made on all the shareholders for the year 1973–1974. In March 1982 Mr. Rothwell decided that alternative assessments should be made for the year 1975–1976. On 15 March 1982 he wrote to Mr. Weare's firm to say that alternative assessments would be made for the year 1975–1976.

C Mr. Weare's firm was only concerned with the tax affairs of the trustees and one of the taxpayers. Alternative assessments for the year 1975–1976 were against all the shareholders, including Mr. Gregory personally, for that year, though Mr. Rothwell had asked a subordinate to issue an assessment for 1975–1976 to the trustees, the subordinate regrettably made an assessment (dated 15 March 1982) expressed to be for the fiscal year to 6 April D 1974—5 April 1975. At the same time he issued a notice of assessment bearing the same date, also expressed to be for that fiscal year.

Mr. Weare's firm appealed against all the assessments. In the case of the trustees, their letter (dated 8 April 1982) read:

E "We refer to Capital Gains Tax assessment dated 15th April 1982 marked 1974–1975. Please take this letter as formal appeal. Our appeal is based on Paragraph 6 of the 7th Schedule of the 1965 Finance Act. We are requesting full postponement of Tax."

At this stage Mr. Rothwell noticed the error. He also noticed that, as 5 F April 1982 had passed, it was too late to make an assessment for the year 1975–76. So on 26 April 1982 he marked in his records on a standard form opposite the calculation of "Total Chargeable Gains—(Estimated) £155,000", in the column headed "Amendment" the words "Vacated" and "Raised in Error". Then, opposite the calculation of the tax payable at 30 per cent. (£6,500) appear the words "Tax discharged—£46,500", and at the foot the G tax payable as amended is stated to be "Nil". Mr. Rothwell notified the Collector of Taxes of this change but not Mr. Weare.

When preparing the appeals to the Commissioners the taxpayers' solicitors wrote to the Inspector of Taxes, Pontypridd, and enclosed a schedule of appeals (24 in all: two for each taxpayer). In that schedule two assessments H are shown as made on the trustees, one for 1973–74 and one for 1975–76.

In substance, three issues have been argued on these appeals, namely:

(A) Since 26 April 1982, when the assessment made against the trustees expressed as an assessment for 1974–75 was "vacated", has that assessment I been capable of having any legal effect at all?

(B) If the answer to question (A) is yes, can the last-mentioned assessment be treated as a good assessment for the fiscal year 1975–76, either by virtue of s 114 of the Taxes Management Act 1970 or otherwise?

(C) Does the *Ramsay*[1] principle entitle the Revenue to claim that there have been disposals by the trustees and by Mr. Gregory personally in favour of Holdings? A

I will deal in turn with these issues, of which the first and second do not concern Mr. Gregory in his personal capacity.

B

Issue (A)

The recent decision of this court in *Honig* v. *Sarsfield*[2] [1986] STC 246 has established that, for the purpose of applying the time limit imposed by s 40(1) of the Taxes Management Act 1970, as amended, ("the 1970 Act"), an assessment is made at the time when the inspector, authorised to make such an assessment, signs the certificate in the assessment book, not when notice of the assessment is served on the taxpayer. C

By what he has suggested is parity of reasoning, Mr. Flesch Q.C., on behalf of the trustees, has submitted that an inspector can effectively vacate or nullify an assessment merely by making an appropriate entry in his records, unilaterally and without any notice to the taxpayers. When Mr. Rothwell marked in his records the words "vacated" and "raised in error", this, it was submitted, ipso facto nullified the assessment made against the trustees. D

Though for the purpose of the relevant time limits an assessment can be made in the privacy of the inspector's office, it will have little, if any, other effect until notice of it is served on the person assessed. Until such service, such person is under no liability to pay; nor does the right of appeal conferred by s 31 arise. However, once notice of the assessment has been served, the position entirely alters. The taxpayer can get rid of the assessment by means of a successful appeal under s 31. Section 50 provides for the reduction or increase of an assessment in the case of an appeal. Section 54 provides for the settling of appeals by agreement. Section 32(1) contains express provisions for the vacation of an assessment in specified circumstances. It reads: E F

> "If on a claim made to the Board it appears to their satisfaction that a person has been assessed to tax more than once for the same cause and for the same chargeable period they shall direct the whole, or such part of any assessment as appears to be an overcharge, to be vacated, and thereupon the same shall be vacated accordingly." G

However—and this, in my judgment, is the crucial point—the 1970 Act confers no general powers on an inspector to vacate an assessment. Significantly, s 29(6) specifically provides: "After the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts." H

In the present case, therefore, s 29(6) would, in my opinion, have clearly precluded Mr. Rothwell from altering the relevant assessment so as to reduce the sum assessed to a nominal sum. It is perhaps more debatable whether s 29(6) on its true construction would itself have prohibited him from withdrawing or vacating an assessment. Nevertheless, Mr. Sher was, in my judgment, right in submitting that (a) the vacation of an assessment has to be I

(1) 54 TC 101. (2) 59 TC 337.

A effected properly if it is to be valid, and (b) in the absence of any statutory authority for the purported "vacation" by Mr. Rothwell, his entry in the assessment book which purported to record a vacation was not properly made and had no legal effect.

In agreement with the learned Judge, I would therefore reject the B trustees' contentions on issue (A).

Issue (B)

As did the learned Judge, I regard the next issue as more difficult. In this context I should begin by dealing with what seems to have been a new line of argument raised by Mr. Sher in this court and not canvassed in the C court below. He pointed out that the assessment against the trustees related to capital gains tax, not income tax, and that, while income tax is payable in respect of income actually or notionally received over a period of time, capital gains tax is payable in respect of actual or notional disposals. In the latter case, as he put it, a particular time does not ordinarily have to be identified by the Revenue beyond identifying the year in which the event took place. In D the present case there were only two possible relevant events, namely, the share exchange which took place in the fiscal year 1973–1974 (11 March 1974) and the sale to Hawtin which took place in the fiscal year 1975–1976 (30 January 1976). Accordingly, there were only two fiscal years in which the relevant disposal could have taken place, that is to say 1973–1974 or 1975–1976. On 15 March 1982 Mr. Rothwell had written to Mr. Weare's E firm to say that (following the assessments already made for the year 1973–1974) alternative assessments would be made for the year 1975–1976. On that same day the Revenue made an assessment against the trustees, which it marked with the year 1974–1975, and sent out a notice of assessment marked with the same year. The notice was one of a bundle of twelve assessments all directed to the same transaction. The other assessments and F notices of the assessments were duly marked with the year 1975–1976. In these circumstances, Mr. Sher submitted, no-one concerned believed that the assessment issued against the trustees and marked with the year 1974–1975 was intended as anything other than assessment for the year 1975–1976. It was plainly intended to relate to the disposals which had taken place on 30 January 1976. In all the circumstances, it was submitted, the assessment was G an assessment for the year 1975–1976 and the Crown does not have to rely on s 114 of the Act.

I have some sympathy with this argument because it would seem to me that Mr. Weare's firm (or their clients), on receipt of the notice of assessment marked 1974–1975, could not in all the circumstances, after proper thought, H have reasonably believed that either the notice of assessment, or the assessment to which it referred, was intended by the Revenue to relate to any year other than 1975–1976. Nevertheless, apart from s 114, to which I will revert, I find it impossible to hold that the assessment either was or took effect as an assessment for 1975–1976. Contrary to Mr. Sher's submissions, as I understood them, the year of assessment is of critical importance in relation to I capital gains tax. This is illustrated by s 19(3) of the 1965 Act, which provided that: "... a tax, to be called capital gains tax, shall be assessed and charged for the year 1965–66 and for subsequent years of assessment in respect of chargeable gains accruing in those years ... " Section 113(3) provided that: "Every assessment ... notice of assessment ... required to be

used in assessing, charging, collecting and levying tax shall be in accordance with the forms prescribed from time to time in that behalf by the Board ..." The printed prescribed form of notice of assessment, which was employed by the Revenue in the present case, predictably has a heading in the top left-hand corner: "Capital gains tax. Year ending 5 April 19." The body of the notice begins with the words "This notice gives particulars of an assessment made on you *for the year shown above*". (The emphasis is mine). All these matters illustrate that the year of assessment is an essential element of the assessment itself. *The assessment is what is written in the assessment book.* Section 114 apart, I find it is impossible to say that an assessment for one specified fiscal year can ever be or take effect as an assessment for another fiscal year. Section 114 apart, the fact that the taxpayer may have appreciated that a mistake has been made on receiving the notice of assessment is, to my mind, irrelevant in this context.

I now turn to s 114 which provides:

> "(1) An assessment, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding. (2) An assessment shall not be impeached or affected—(a) by reason of a mistake therein as to—(i) the name or surname of a person liable, or (ii) the description of any profits or property, or (iii) the amount of the tax charged, or (b) by reason of any variance between the notice and the assessment."

The learned Judge took the view that s 114 will enable an assessment expressed to be for one year to be treated and take effect as an assessment for another year provided that the Crown can show that there was a genuine mistake and that in all the circumstances there was no real possibility that the taxpayer was in any way misled. While I again have some sympathy with this view (which was supported by Mr. Sher in this court by way of alternative submission), I do not find myself able to concur in it, since I do not think it is warranted by the wording of the section.

Subsection (2) has no application to the facts of this case. The only words of subs (1) which can possibly be relied on by the Revenue are the following:

> "An assessment ... which purports to be made in pursuance of any provision of the Taxes Acts shall not ... be affected by reason of a mistake ... if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts ... "

The assessment in the present case, which the Crown asserts "is not to be affected ... ", is an assessment for 1974–1975. Mr. Flesch accepted and contended that, as an assessment *for that fiscal year*, it would not be affected by reason of a mistake if the other conditions specified in s 114(1) were satisfied. However, as he pointed out, the subsection does not provide for rectification of an assessment; it is not the equivalent of the "slip rule". The relevant fiscal year of assessment is an integral, fundamental part of the assessment itself. I, for my part, find it impossible to read the wording of s

A 114(1), wide though it is, as justifying in any circumstances the treatment of an assessment made for one fiscal year as an assessment made for another fiscal year. If the Revenue make an assessment for the wrong year, their proper course is to issue a new assessment for the correct year. It is pertinent to observe that s 29(6) of the 1970 Act would preclude them from themselves amending an assessment by substituting a reference to one fiscal year for B another.

In the course of argument, three authorities relating to the effect of s 114 were cited: *British Estate Investment Society, Ltd.* v. *Jackson* 37 TC 79; *Fleming* v. *London Produce Co. Ltd.*[1] 44 TC 582; and *Hart* v. *Briscoe*[2] 52 C TC 53. However, I did not derive any great assistance from these authorities, since the judgments in those cases were directed to facts very different from those of the present case. However, in a passage in his judgment in *Fleming*[3] (which judgment primarily concerned the statutory predecessor of s 114(2)) Megarry J. made the general observation (at page 597) that he would be slow to accept that the subsections "provide an impervious cover D for gross errors". Vinelott J. in the present case was not persuaded that gross error must be absent before what he described as the "dispensing power in section 114" can be exercised. I would merely make this comment. As I am sure the learned Judge appreciated, s 114, where it applies, does not strictly confer a "dispensing power". In a case where it applies, it gives the Revenue or the taxpayer, as the case may be, the statutory right to claim that the E assessment, warrant or other proceeding in question shall not be affected by reason of a mistake etc. etc. If, contrary to my view, this statutory right has any relevance in relation to an assessment which has been made for the wrong year, I think it unlikely that the legislature would have intended that it would be exercisable where the error was a gross one—as in the present case I think it must have been. To sum up, however, in my judgment, neither s F 114 nor any other statutory provision provides an escape route for the Revenue if they issue an assessment for the wrong fiscal year. This is something they must get right.

For all these reasons, I think that the assessment made against the trustees cannot be treated as an assessment for the year 1975–1976. It is com- G mon ground that, if it is to be regarded as an assessment for 1974–1975, it can give rise to no legal liability on the part of the trustees.

Issue (C)

Even if my conclusion on issue (B) is correct, this does not dispose of the disputes relating to the assessment made against Mr. Gregory personally. H I must therefore proceed to consider issue (C).

The Crown's contention is that the exchange of the shares of PGI for the shares of Holdings and the subsequent sale of the PGI shares to Cannon constituted one single composite transaction which, on an application of the I *Ramsay*[4] principle, is to be treated for fiscal purposes as involving a disposal by the taxpayers of the PGI shares to the ultimate purchaser, Hawtin. I propose to deal with this contention very shortly, because I think that the

---

[1] [1968] 1 WLR 1013. [2] [1979] Ch 1. [3] 44 TC 582.
[4] 54 TC 101.

reasons for which I would reject the Crown's similar claims in the two earlier appeals apply a fortiori on the facts of the present cases. A

Attention, however, should be drawn to a few particularly significant facts. In these cases, as the Commissioners found, by the time when the shares of PGI were exchanged for shares of Holdings on 11 March 1974, the previously contemplated sale to Cannon had fallen through. The Commissioners found as facts that:(1) B

"The incorporation of Holdings and the share exchange which followed ... were ... not made without an appreciation of the possible value of having taken those steps if, at some future date, the appellants decided to sell the PGI shares to an outside purchaser. But at that time an intention of selling (or of procuring a sale) was absent: it came into being not earlier than the summer of 1975." C

On these findings, the transfer of the PGI shares to Holdings (though, as the Commissioners found, it passed the full legal beneficial interest to Holdings) was made solely by way of what has been referred to in the opening section of this judgment as "strategic tax planning". At that time no sale at all was in contemplation. The highest it could be put on behalf of the Crown is that the parties intended that the interposition of Holdings should serve as a convenient springboard (convenient for tax purposes) in case at some future date it might be desired to sell the shares in PGI. D

E

There is no dispute that the second *Ramsay*(2) condition is satisfied. In the circumstances, however, I agree with Vinelott J. that it is impossible to say the same of the first *Ramsay* condition. The Revenue's case is again founded on the Crown's basic contention referred to in the opening section of this judgment. In the court below particular reliance appears to have been placed on Lord Wilberforce's reference in *Ramsay* ([1982] AC 300 at page 323H) to "a transaction intended to have effect as part of a nexus or series of transactions or as an ingredient of a wider transaction intended as a whole". The exchange of the PGI shares, it was postulated, could properly be regarded as a transaction so intended, within Lord Wilberforce's words. Therefore, it was submitted, the first *Ramsay* condition was satisfied. I much doubt the correctness of the premise of this submission. Even accepting the premise, however, I do not think the conclusion would follow. Lord Wilberforce's words now fall to be read in the light of what Lord Diplock subsequently said in *Burmah*(3) and what Lord Brightman said in Dawson(4) in the authoritative formulation of the first *Ramsay* condition. In my judgment, that condition does not come near to being satisfied on the facts of the present case. It cannot properly be said that the share exchange and the subsequent sale of the shares to Cannon were a pre-ordained series of transactions or a single composite transaction because, at the date of the share exchange, so far from the essential features of a sale to Cannon or any other purchaser having already been determined no one had the intention, still less the practical ability, to implement a sale to Cannon, or indeed to any other purchaser. F G H I

The learned Judge referred to the greater conceptual difficulties involved in treating the shareholders in PGI as if they had entered into a tripartite

(1) page 64B/C *ante*. (2) 54 TC 101. (3) 54 TC 200. (4) 55 TC 324.

A arrangement for the sale of the shares in PGI to Hawtin, in a case such as this, where the sale on by the interposed company, Holdings, had not been arranged at the time of the share exchange. He also made some cogent comments in relation to double taxation. I do not, however, find it necessary further to explore these points.

B For the reasons which I have already stated, I would dismiss these appeals.

Parker L.J.:—For the purposes of this judgment I shall first state the essential facts of the three appeals in the shortest possible form and indicate C how the issues for determination arise.

Craven v. *Stephen White* and *Craven* v. *Brian White*

On 19 July 1976 Stephen, Brian and Archibald White, who at that time owned 100 per cent of the shares in S. White & Sons (Queensferry) Ltd. D ("Queensferry"), exchanged such shares for shares in Millor Investments Ltd ("Millor"). Millor thereby acquired control of Queensferry.

But for the provisions of paras 4 to 6 of the 7th Schedule to the Finance Act 1965, this would undoubtedly have been a disposal by the Whites of their shares in Queensferry, not least because s 22(3) of the Act, Part II of E which creates capital gains tax, provides:

"Subject to subsection (6) of this section, and to the exceptions in this Part of this Act, there is for the purposes of this Part of this Act a disposal of assets by their owner where any capital sum is derived from assets ... "

F

and subs (9) of s 22 provides that in that section "capital" sum means any money or money's worth.

As a result the Whites would, by virtue of ss 19(1) and (3) and s 20 of the Act have been chargeable to capital gains tax in respect of any chargeable G gains accruing to them on such disposal.

By virtue of the provisions of paras 4 and 6 of the 7th Schedule to the Act, however, such an exchange is not to be treated as a disposal of the Queensferry shares or an acquisition of the Millor shares.

H This being so the Whites were not chargeable to capital gains tax in respect of that transaction viewed alone. They would, however, of course, be chargeable in respect of a subsequent disposal of the Millor shares.

Three weeks later, Millor, the owner of the Queensferry shares, sold them to Morris and David Jones Ltd. ("Jones") for £2.2 million subject to I adjustment. Viewed alone, this was plainly a disposal of the Queensferry shares by their owner Millor, from which Millor derived a capital sum.

The Crown, however, contend that, for fiscal purposes, the share exchange should be ignored and that the two transactions together constitute

a disposal by the Whites of their shares in Queensferry to Jones from which the purchase price accrues to the Whites. A

On the face of it, this contention is somewhat remarkable. By s 19(1) capital gains tax is to be charged in respect of chargeable gains accruing to a person on the disposal of assets and it is clear from s 22(3) that the person chargeable is their owner. In law the only disposal of assets by the Whites was when they exchanged shares but this is not to be treated as a disposal. Thereafter, Millor disposed of the shares of which it was the legal and beneficial owner and derived a capital sum from the disposal, but the Whites did not. B

The contention is, however, advanced on the basis (1) that the sole purpose of the share exchange, which for present purposes I shall assume is correct, was to avoid, or more strictly to defer, the payment of capital gains tax which, but for the Schedule, would have resulted had the Whites sold the Queensferry shares to Jones, and (2) that, this being so, the combined result of *Ramsay*,[1] *Burmah*[2] and *Dawson*[3] is that the Whites are chargeable on the basis that the capital sum derived by Millor from the sale to Jones accrued to them. C D

Baylis v. Gregory & Weare

The basic facts are very similar save as to the dates. In this case the share exchange was effected on 11 March 1974, i.e. in the 1973–1974 year of assessment, and the sale on to a purchaser twenty-two months later in the 1975–1976 year of assessment. The Crown's contention is the same. In this case it is even more remarkable. Messrs. Gregory and Weare are thus said to have disposed in 1976 of shares in which they had had no legal or beneficial interest since March 1974. E F

Before turning to the remaining appeal, I pause to observe that, in each of the foregoing cases, the question is whether, on the true construction of the relevant provisions of the Finance Act 1965, there was, on the facts, a disposal resulting in a chargeable gain accruing to the taxpayer. This observation may appear to be entirely superfluous but I make it because it seemed to me, during the course of the arguments presented to us on the scope and effect of the *Ramsay* principle, that it has been to some extent overlooked. It is of importance to bear it in mind. This is because taxing acts must be construed according to well known principles by which this court is bound no less than it is bound by the decisions of the House of Lords in *Ramsay, Burmah* and *Dawson*. G H

Commissioners of Inland Revenue v. Bowater Property Developments Ltd. ("BPD")

In this case the asset concerned was land and not shares and the relevant statute is the Development Land Tax Act 1976. I

On 25 March 1980 BPD, which was a subsidiary of the Bowater Corporation PLC, sold to each of five other subsidiaries of the Corporation a one-fifth undivided share in 23 acres of land known as Crafts Marsh, for £180,000. By virtue of s 20(1) of the 1976 Act each of these five sales is to be

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324.

A treated as a disposal and acquisition for which no consideration was given. There was thus on any one of these transactions no question of any charge to development land tax arising. The transfers would, however, have the result that, if, as was contemplated, the land were thereafter sold by the five companies to a purchaser outside the Group, each would have available the free allowance provided for by s 12.

B

None of the five purchaser companies was controlled by BPD. The sales to them occurred in the 1979–1980 year of assessment. Nineteen months later in the next year of assessment the five companies joined together in selling the land to a company outside the Group for a total purchase price of £259,000. Viewed alone, this was clearly a disposal by them of their interests C in Crafts Marsh.

At that date the land was neither legally nor beneficially owned by BPD, the five companies were not controlled by BPD and no part of the proceeds of sale accrued legally, beneficially or "really" to BPD.

D

The Crown, however, again contend that the two transactions should be treated as one and regarded as a disposal by BPD resulting in realised development value accruing to BPD.

This contention is even more remarkable than the contention in the other two appeals. Again, the question is one of construction of a taxing act.

E

I turn therefore to the basic statutory provisions

The Finance Act 1965

> "19—(1) Tax shall be charged in accordance with this Act in respect
> F of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets. ... (3) Subject to the said provisions, a tax, to be called capital gains tax, shall be assessed and charged for the year 1965–66 and for subsequent years of assessment in respect of chargeable gains accruing in those years, and shall be so charged in accordance with the following provisions of this
> G Part of this Act. 20—(1) Subject to any exceptions provided by this Act, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom. 22—(3) subject to subsection (6) of this section, and to the exceptions in this Part of this Act, there is for the
> H purposes of this Part of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum, and this subsection applies in particular to — (a) capital sums received by way of compensation for any kind of damage or injury to assets or for the loss, destruction or dissipation of assets or for any depreciation or risk of
> I depreciation of an asset, (b) capital sums received under a policy of insurance of the risk of any kind of damage or injury to, or the loss or depreciation of, assets, (c) capital sums received in return for forfeiture or surrender of rights, or for refraining from exercising rights, and (d) capital sums received as consideration for use or exploitation of assets

> ... 22—(9) The amount of the gains accruing on the disposal of assets shall be computed in accordance with Part I of Schedule 6 to this Act, and subject to the further provisions in Schedules 7 and 8 to this Act, and in this section 'capital sum' means any money or money's worth which is not excluded from the consideration taken into account in the computation under the said Part I of Schedule 6 to this Act. (10) Every gain accruing after 6th April 1965 shall, except so far as otherwise expressly provided by this Part of this Act, be a chargeable gain, but subject to the provisions of Part II of Schedule 6 to this Act which restricts the amount of chargeable gains accruing on the disposal of assets owned on 6th April 1965)."

A B

There is no definition of "disposal" in the definition section but this is not surprising. Subsection (3) of s 22 which I have set out, the other subsections of that section, in particular subs (5), and the provisions of the 6th, 7th and 8th Schedules contain detailed provisions as to what is and what is not to be regarded as a disposal and as to what persons are or are not to be treated as making a disposal. It would have been quite impossible to embody these detailed provisions in any paragraph which began "for the purposes of this Part of this Act 'disposal' means ... " What, as it seems to me, Parliament has plainly done is to create a very detailed and elaborate set of provisions to make it clear what transactions were or were not to be disposals and who was to be chargeable. Section 22(5) is a good example of making chargeable a person beneficially entitled albeit the disposal was made by the legal owner, and s 22(6) and paras 4 and 6 of the 7th Schedule provide examples of cases which are not to be regarded as disposals.

C D E

The Development and Land Tax Act 1976

> "1—(1) A tax, to be called development land tax, shall be charged in accordance with the provisions of this Act in respect of the realisation of the development value of land in the United Kingdom. (2) Subject to the provisions of this Act, a person shall be chargeable to development land tax on the realised development value, determined in accordance with this Act, which accrues to him on the disposal by him on or after the appointed day of an interest in land in the United Kingdom, and shall be so chargeable whether or not he is resident (for purposes of income tax or otherwise) in the United Kingdom ... 4—(1) Subject to the following provisions of this Act, the realised development value accruing to a person on the disposal by him of an interest in land shall be the amount (if any) by which the net proceeds of the disposal exceed the relevant base value of that interest. (2) In this Act, in relation to a disposal of an interest in land, 'the chargeable person' means the person making the disposal. (3) References in this Act to the net proceeds of the disposal of an interest in land are references to the consideration for the disposal, less the incidental costs to the chargeable person of making the disposal."

F G H

Again, disposal is not defined but, again, there are elaborate and detailed provisions as to what is and is not to be treated as a disposal and as to the persons to be chargeable. I give as examples ss 2, 20 and 28 and Part I of Sch 1.

I

In one sense, the question to be determined here is, in two cases, whether the taxpayer disposed of shares to the ultimate purchaser and

A whether, thereby, a chargeable gain accrued to him within ss 19 and 20 of the Finance Act 1965. In the other case, it is whether the taxpayer disposed of Crafts Marsh to the ultimate purchaser and whether, thereby, realised development value accrued to it within ss 1 and 2 of the Development Land Tax Act 1976. This, however, is, in my view, a gross over-simplification. The true question is, in each case, whether, on the true construction of any of the B other provisions of the respective Acts, the taxpayer is, on the facts, brought within the charging sections.

In searching for the answer to this question I shall deal first with well settled principles before I examine in any detail the three decisions which together form the *Ramsay*(1) principle. Lest it be thought that in so doing I C am reluctant to escape from the ghosts or shackles of the past, I should perhaps make it clear that I do so because they were reiterated by Lord Wilberforce in *Ramsay* and because Lord Diplock stated in *Burmah*(2) that the new approach in *Ramsay* did not involve over-ruling previous decisions of their Lordships' House. Since in *Ramsay* Lord Russell of Killowen, Lord Roskill and Lord Bridge of Harwich agreed with Lord Wilberforce, and since D in *Burmah* Lord Scarman, Lord Roskill and Lord Brandon of Oakbrook agreed with Lord Diplock, I regard myself as bound to do so.

I take those principles from the speech of Lord Wilberforce in *Ramsay* [1982] AC 300, at page 323.

E Principle No.1

"A subject is only to be taxed upon clear words, not upon 'intendment' or upon the 'equity' of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle."

F Lord Wilberforce then continued:

"What are 'clear words' is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may indeed should, be considered the context and scheme of the relevant Act G as a whole, and its purpose may, indeed should, be regarded; see *Inland Revenue Commissioners* v. *Wesleyan and General Assurance Society* (1946) 30 TC 11, 16, per Lord Greene M. R. and *Mangin* v. *Inland Revenue Commissioner* (1971) AC 739, 746, per Lord Donovan. The relevant Act in these cases is the Finance Act 1965, the purpose of which is to impose a tax on gains less allowabie losses, arising from disposals."

H

It is not entirely clear at first sight how, if intendment is to be excluded, "purpose" is to be included. I can myself derive no assistance on the point from Lord Greene's judgment for his observations on construction related to the construction of a document. He did, however, on the same page make some general observations of relevance to the present appeals. He said:(3)

I

"In dealing with Income Tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other

(1) 54 TC 101. (2) 54 TC 200. (3) 30 TC 11, at page 16.

method is adopted, tax will not be payable. It is sufficient to refer to the quite common case where property is sold for a lump sum payable by instalments. If a piece of property is sold for £1,000 and the purchase price is to be paid in ten instalments of £100 each, no tax is payable. If, on the other hand, the property is sold in consideration of an annuity of £100 a year for ten years, tax is payable. The net result from the financial point of view is precisely the same in each case, but one method of achieving it attracts tax and the other method does not.

There have been cases in the past where what has been called the substance of the transaction has been thought to enable the Court to construe a document in such a way as to attract tax. That particular doctrine of substance as distinct from form was, I hope, finally exploded by the decision of the House of Lords in the case of *Duke of Westminster* v. *Commissioners of Inland Revenue*,(1) 19 TC 490."

On the particular point Lord Donovan's judgment in *Mangin*(2) does not assist either, but again it is of value on the general ambit of Principle No. 1. Lord Donovan said:(3)

"' ... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. *Nothing is to be read in, nothing is to be implied.* One can only look fairly at the language used': per Rowlatt J. in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1921) 1 KB 64, 71, approved by Viscount Simon L.C. in *Canadian Eagle Oil Co. Ltd.* v. *The King* (1946) AC 119, 140.

Thirdly, the object of the construction of a statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. *If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.*

Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction."

(Emphasis added.)

In connection with the first principle I cite two further passages from speeches in their Lordships' House:–

" ... as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

(1) [1936] AC 1. (2) [1971] AC 739. (3) *Ibid*, at page 746.

A (*Partington* v. *Attorney General* (1869) LR 4 HLC 100 at p. 122 *per* Lord Cairns). And:

> "In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that B there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, *you must see whether a tax is expressly* imposed."

(*Tennant* v. *Smith* [1892] AC 150 at page 154 *per* Lord Halsbury L.C.) C (Emphasis added.)

When Lord Wilberforce referred to the purpose of the Finance Act 1965 being to impose a tax on gains less allowable losses, arising from disposals, he was, as it seems to me, stating the "purpose" within those limits mentioned by Lord Halsbury.

D

In this limited sense the purpose does not appear to be of any assistance in the present appeal for the detailed and elaborate provisions of the Act make it clear that the purpose was to tax some people and not others in respect of certain transactions and not others, and one can only determine which people and which transactions by looking at the words of the E sections.

Principle No. 2

A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be con- F sidered according to its legal effect.

This principle is stated by Lord Wilberforce without qualification. The first sentence is a paraphrase of what Lord Tomlin said in the *Duke of Westminster's*(1) case [1936] AC 1 at page 19. The remainder appears to me to summarise the effect of the rest of Lord Tomlin's speech but, in view of G later developments, it is desirable that Lord Tomlin's statements should be seen in context. He said:

> "*It is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called 'the substance of the matter'* ... This supposed doctrine (upon which the Commissioners H apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting 'the incertain and crooked cord of discretion' for 'the golden and streight metwand of the law.' Every man is entitled if he I can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of

(1) 19 TC 490.

his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of 'the substance' seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable. The matter was put accurately by my noble and learned friend Lord Warrington of Clyffe when as Warrington L.J. in In *In re Hinckes, Dashwood* v. *Hinckes*(1) he used these words: 'It is said we must go behind the form and look at the substance but, in order to ascertain the substance, I must look at the legal effect of the bargain which the parties have entered into.'"

A

B

Principle No. 3

C

"3. It is for the fact-finding commissioners to find whether a document, or a transaction, is genuine or a sham. In this context to say that a document or transaction is a 'sham' means that while professing to be one thing, it is in fact something different. To say that a document or transaction is genuine, means that, in law, *it is what it professes to be*, and it does not mean anything more than that."

D

Principle No. 4

Given that a document or transaction is genuine the court cannot go behind it to some supposed underlying substance. As to this principle Lord Wilberforce said(2):—

E

"This is a cardinal principle but it must not be overstated or overextended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as *part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole*, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. 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. For this there is authority in the law relating to income tax and capital gains tax: see *Chinn* v. *Hochstrasser*(3) (1981) AC 533 and *Inland Revenue Commissioners* v. *Plummer*(4) (1980) AC 896.

F

G

H

For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams', from considering what, *as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is.* They are not, under the *Westminster*(5) doctrine or any other authority, bound to consider individually each separate step in *a composite transaction intended to be carried through as a whole*. This is particularly the case where (as in *Rawling*)(6) it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps. It may

I

(1) [1921] 1 Ch 475. (2) [1982] AC 300 at pages 323/324. (3) 54 TC 311. (4) 54 TC 1. (5) 19 TC 490. (6) 54 TC 101.

A be so where (as in *Ramsay*[1]) or in *Black Nominees Ltd.* v. *Nicol*[2]) (1975) 50 TC 229) there is an expectation that it will be so carried through, and no likelihood in practice that it will not. In such cases (which may vary in emphasis) the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions."

B

I confess to finding some difficulty in appreciating how one can arrive at the conclusion that the *legal* nature of a series of transactions is something which in law it is not. It appears to me that this is preferring substance to form and this certainly appears to have been the view of both Lord Roskill and Lord Bridge of Harwich in their speeches in *Dawson*.[3] I shall return to C this question later. First I shall consider whether, on any construction of any provision of either of the two Acts here in question, it can be said, within the four principles, that the taxpayers disposed of their shares or their land to the ultimate purchaser and thereby made a chargeable gain or realised development value. In my view, the answer must plainly be no. It would only be possible to arrive at such a result by implying some elaborate proviso in para 6 D of the 7th Schedule to the Finance Act 1965 and s 20 of the Development Land Tax Act 1976.

In the one case such a proviso would have to be on the following lines:

E "Provided that, if the sole purpose of the exchange is to avoid the tax which would have resulted had the original holding been sold to a third party and the shares are thereafter sold to a third party, then the sale to the third party shall be treated as if it were a disposal by the original owner to the third party and the proceeds of sale shall be treated as a capital sum derived from the disposal by the original owner."

F The implication could not, however, stop there, or so it seems to me. The original owner would still be possessed of the new holding and provision would need to be made as to what was to happen if and when he disposed of the new holding for, in the absence of such a provision, the position of the new holding is unascertainable. If one is to ignore the exchange, does one also ignore the acquisition and the subsequent disposal of the new holding?

G

In the third case also there would have to be some provision, equally elaborate, to achieve the result contended for by the Crown. The contention is only made because the fragmentation resulted in the five companies having greater free allowances than the original owner. What then must be read in? There are clearly many possibilities, none of them being expressed. Whatever H solution were adopted it would seem to involve elaborate implication. If Lord Donovan was right, nothing is to be implied. If intendment and equity are excluded, there is, in any event, no warrant for reading in anything. If motive does not invalidate, the share exchanges and the fragmentation stand. If the legal results of genuine documents are looked at there is no question of the taxpayers being chargeable. If the parliamentary purpose is looked at it I appears to be clear. In the two share cases it was that there should be no tax on the disposal constituted by the change but tax on a subsequent disposal of the new holding by the original owner. In the development land case it was similar.

(1) 54 TC 1. (2) [1975] STC 372. (3) 55 TC 324.

Unless, therefore, the *Ramsay*(1) principle is wide enough to over-ride, but without over-ruling, the four principles, the Crown's case must fail. A

I turn, therefore, to this aspect of the case. In *Ramsay* and in *Burmah*(2) the question was whether the taxpayers had succeeded in creating an allowable loss and it was held that they had not.

B

I find it unnecessary to examine further the speeches in that case, for in *Burmah* the House of Lords defined the ratio of the case and it is with that that this court is concerned.

Lord Fraser of Tullybelton, with whose speech all other members of the Judicial Committee agreed, said 54 TC 200 at page at page 220: C

"The ratio of the decision in *Ramsay* is to be found in the speech of Lord Wilberforce at page 459E where he said this:

'The capital gains tax was created to operate in the real world, not that of make-belief. As I said in *Aberdeen Construction Group Ltd.* v. *Inland Revenue Commissioners*(3) (1978) AC 885, it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an *indivisible process,* and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a *single continuous operation,* is *not such a loss (or gain) as the legislation is dealing with,* is in my opinion well and indeed essentially within the judicial function.' D E

At page 469H of the same case I said this with reference to the cases of *Commissioners of Inland Revenue* v. *Plummer*(4) [1980] AC 896 and *Chinn* v. *Hochstrasser*(5) [1981] 2 WLR 14:

'The essential feature of both schemes was that, when they were completely carried out, they did not result in any actual loss to the taxpayer. The apparently magic result of creating a tax loss that would not be a real loss was to be brought about by arranging that the scheme included a loss which was allowable for tax purposes and a matching gain which was not chargeable.' F

G

The question in this part of the appeal is whether the present scheme, when completely carried out, did or did not result in a *loss such as the legislation is dealing with*, which I may call for short, a real loss. In my opinion it did not."

Apart from defining the ratio of *Ramsay, Burmah* is, in my view, principally of importance for a passage in the speech of Lord Diplock with whose speech Lord Scarman, Lord Roskill and Lord Brandon of Oakbrook agreed. Lord Diplock said(6):– H

"It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that *Ramsay's* case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no com- I

(1) 54 TC 101. (2) 54 TC 200. (3) 52 TC 281. (4) 54 TC 1. (5) 54 TC 311. (6) 54 TC 200 at page 214D.

A mercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable. The difference is in approach. *It does not necessitate the over-ruling of any earlier decisions of this House;* but it does involve recognising that Lord Tomlin's oft-quoted *dictum* in *Commissioners of Inland Revenue* v. *Duke of Westminster*(1) (1936) AC 1 at page 19, 'Every man is entitled if he B can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be', tells us little or nothing as to what methods of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would attach to them if business transactions were conducted in a straight-forward way."

C (Emphasis added).

This passage is of importance for two reasons: (i) it defines the subject matter to which the significant new approach in *Ramsay* is to be applied; (ii) it states that the difference in approach does not involve over-ruling any earlier decisions of the House of Lords; (iii) it accepts specifically Lord Tomlin's D dictum in the *Duke of Westminster* case but states that the new approach does involve recognising that the dictum is silent or at least nearly silent as to its scope or ambit.

As to the first of these matters, the definition goes further than *Ramsay* because it includes cases where the series of transactions includes the achieve- E ment of a legitimate commercial end. It is, however, much more specific than *Ramsay* for it appears to limit the cases to which the new approach is to be applied to those in which there are: (i) a series of transactions, which (ii) are pro-ordained, and into which (iii) there are inserted steps which have no commercial purpose apart from the avoidance of a liability to tax which, in the absence of those particular steps, would have been payable.

F It is important to realise that Lord Diplock is not saying that, given these elements, the tax which the inserted steps are designed to avoid is payable. He is saying only that, given those elements, it is a proper case for the new approach. That approach is one in which one must look for the real loss or gain.

G In my view, he could not have been going further than I have indicated, for ultimately the question is one of construction of a taxing Act and, previous decisions not being over-ruled, they as well as the *Ramsay* principle must be applied. He cannot, therefore, have been saying that, given the elements mentioned, the result follows *whatever the language.*

H I now come to *Dawson*,(2) which clearly extended the *Ramsay* principle. The facts were very different. The transactions were only two in number, were not self-cancelling or circular, and included the achievement of a legitimate commercial end. In essence, those transactions consisted in the transfer from to A to B Ltd. of shares in X Ltd. in exchange for shares in B Ltd. and I the sale by B Ltd. of the shares in X Ltd. to C.

The transactions, as transactions, were, therefore, in essence the same as the transactions here under consideration, although the fiscal advantages

(1) 19 TC 490. (2) 55 TC 324.

sought were different. Here in the two share exchanges the advantage was, as in *Dawson*,[1] sought by the taxpayers themselves by way of tax deferment. In the case of the Crafts Marsh transactions, however, the advantage was a Group advantage in the availability of the five companies' free allowances. Although the *Dawson* transactions were the same, the nature of the operation was markedly different in that case to the operations in the present cases.

Lord Brightman described the *Dawson* operation thus:[2]

> "There are very full minutes of the board meeting of one of the operating companies and similar minutes exist in the case of the other company. These show that the whole process was *planned and executed with faultless precision.* The meetings began at 12.45 p.m. on 20 December, at which time the shareholdings of the operating companies were still owned by the Dawsons unaffected by any contract for sale. They ended with the shareholdings in the ownership of Wood Bastow. The minutes do not disclose when the meetings ended, but perhaps it was all over in time for lunch."

and Lord Bridge said that the purpose of the scheme was to ensure that for a "scintilla temporis" the beneficial interest in the shares was held by Greenjacket (B Ltd.).

The two transactions were thus carried out within a very short space of time, they were plainly pre-ordained and the purpose of the first was solely to defer payment of tax which would have been payable on a direct sale.

I have ventured to say a little about the facts in *Dawson* before investigating the legal effect of the decision, for it is, in the present appeals, important to bear them in mind. To ascertain the legal effect requires, I fear, an examination in some detail of the speeches delivered by their Lordships. I take them in the order in which they were delivered.

Lord Fraser, who had in *Burmah*[3] identified the ratio of *Ramsay*,[4] now identified its principle. He said:[5]

> "The true principle of the decision in *Ramsay* was that the fiscal consequences *of a preordained series of transactions, intended to operate as such*, are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately. The principle was stated in the speech of Lord Wilberforce in *Ramsay* at p. 324A–C, especially where his Lordship said: 'For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams', from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the *relevant transaction* is. They are not, under the *Westminster*[6] doctrine (*Inland Revenue Commissioners* v. *Duke of Westminster* (1936) A.C. 1) or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole.' (Emphasis added'.)" He concluded: "The series of two transactions in the present case *was planned as* a single scheme, and I am clearly of opinion that it

(1) 55 TC 324. (2) [1984] AC 474, at page 520. (3) 54 TC 200.
(4) 54 TC 101. (5) [1984] AC 474, at page 512. (6) 19 TC 490.

A should be viewed as a *whole*. The relevant transaction, if I may borrow the expression used by Lord Wilberforce (1982) AC 300, 324, consists of the two transactions or stages taken together. It was a disposal by the respondents of the shares in the operating company for cash to Wood Bastow. I would allow the appeals."

B The acceptance of the *Westminster* doctrine is to be noted, as also Lord Fraser's reference to "the fiscal consequences of a pre-ordained series of transactions intended to operate as such".

Lord Scarman made some observations which deal with the general approach but also accepted the *Westminster* principle. He said:(1)

C "*What has been established* with certainty by the House in *Ramsay's*(2) case is that the determination of what does, and what does not, constitute unacceptable tax evasion is a subject suited to development by judicial process. The best chart that we have for the way forward appears to me, with great respect to all engaged on the D map-making process, to be the words of my noble and learned friend, Lord Diplock, in *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*(3) (1982) STC 30, 32 which my noble and learned friend, Lord Brightman, quotes in his speech (post. p.521B–C). These words leave space in the law for the principle enunciated by Lord Tomlin in *Inland Revenue Commissioners* v. *Duke of Westminster* (1936) AC 1, 19 that E every man is entitled if he can to order his affairs so as to diminish the burden of tax. The limits within which this principle is to operate remain to be probed and determined judicially. Difficult though the task may be for judges, it is one which is beyond the power of the blunt instrument of legislation. Whatever a statute may provide, it has to be interpreted and applied by the courts: and ultimately it will prove to be in this area F of judge-made law that our elusive journey's end will be found."

I pause to observe that I find some difficulty in reconciling this approach with the well established principle that the subject is only to be taxed by clear words.

G By contrast with those who had gone before him Lord Roskill, referring to the *Duke of Westminster* case said:(4)

"1936 a bare half-century ago, cannot be described as part of the Middle Ages but the ghost of the *Duke of Westminster* and of his transaction, be it noted a single and not a composite transaction, with his H gardener and with other members of his staff has haunted the administration of this branch of the law for too long. I confess that I had hoped that that ghost might have found quietude with the decisions in *Ramsay* and in *Burmah*. Unhappily it has not. Perhaps the decision of this House in these appeals will now suffice as exorcism."

I Lord Bridge appears to have taken the view that the *Westminster*(5) doctrine is only applicable in the case of a single transaction. He said:(6)

(1) [1984] AC 474, at page 513. (2) 54 TC 101. (3) 54 TC 200.
(4) [1984] AC 474, at page 515. (5) 19 TC 490.
(6) [1984] AC 474, at pages 516–7.

"Of course, the judiciary must never lose sight of the basic premise expressed in the celebrated dictum of Lord Tomlin in *Inland Revenue Commissioners* v. *Duke of Westminster* [1936] AC 1, 19 that: 'Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be.' ... The strong dislike expressed by the majority in the *Westminster* case for what Lord Tomlin described, at p. 19, as 'a doctrine that the court may ignore the legal position and regard what is called 'the substance of the matter,' is not in the least surprising when one remembers that the only transaction in question was the duke's covenant in favour of his gardener and the bona fides of that transaction was never for a moment impugned.

When one moves, however, from a single transaction to a series of interdependent transactions designed to produce a given result, it is, in my opinion, perfectly legitimate to draw a distinction between the substance and the form of the composite transaction without in any way suggesting that any of the single transactions which make up the whole are other than genuine. This has been the approach of the United States federal courts enabling them to develop a doctrine whereby the tax consequences of the composite transaction are dependent on its substance, not its form. I shall not attempt to review the American authorities, nor do I propose a wholesale importation of the American doctrine in all its ramifications into English law. But I do suggest that the distinction between form and substance is one which can usefully be drawn in determining the tax consequences of composite transactions and one which will help to free the courts from the shackles which have for so long been thought to be imposed upon them by the *Westminster* case.

I shall attempt no exhaustive exposition of all the criteria by which, for the purpose I suggest, form and substance are to be distinguished. Once a basic doctrine of form and substance is accepted, the drawing of precise boundaries will need to be worked out on a case by case basis."

I come finally to the speech of Lord Brightman with which all other members of the Judicial Committee agreed. Having examined in some detail the judgments in *Floor* v. *Davis*(1) [1978] Ch 295 and the judgments both at first instance and in this court in *Dawson*(2) itself, gently chiding those who delivered them for what appeared to him to be a determination to resist any inroads into the principles of the *Duke of Westminster* case, he said:(3)

"The formulation by Lord Diplock in *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.* [1982] STC 30, 33 expresses the limitations of the *Ramsay* principle. First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*(4). Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax—not 'no business *effect*'. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied."

(1) 52 TC 609. (2) [1984] AC 474. (3) Ibid, at page 527. (4) 54 TC 101.

A This last quotation, in my view, embodies the limits of the *Ramsay* principle. The limitations of the principle therein stated are such that, in my view, the Crown must fail in the present cases for in none of them can the ultimate transaction be considered as part of a pre-ordained series, but in my view *Dawson*(1) leaves many questions unanswered. Taking the last two sentences of the quotation, the question arises as to the consequences B of disregarding the share exchanges and land fragmentation for fiscal purposes when the effect of the transactions has already been stated by Parliament to have no immediate fiscal results. What happens when the new holdings are ultimately sold? What would have happened on the land fragmentation if it had resulted in realised development value not off-set by BPD's free allowance? How can one look at the end result and *then* see C how the end result is to be taxed when the terms of the taxing statute do not apply to the real legal result unless the *Duke of Westminster*(2) case and indeed the four principles are over-ruled? How does one reconcile the fact that what finally attracted tax, according to the Crown, was the sale to the ultimate purchaser which neither legally, beneficially or in reality was made by the taxpayer? I would find it easier to follow if the result D were said to be that the taxpayer lost the advantage of the share exchange or the fragmentation as the case may be, but this would be to give it fiscal consequences not to deny it such consequences. The merit would, however, be that one would not be left in a situation when, in the share cases, the taxpayer has in his hands the new holdings which would attract tax if there were a gain on disposal.

E

More generally, if it is to remain the case that the subject is chargeable only by statute and only by clear and express words, how can it be right to say that taxing the subject is not suitable to be dealt with by the blunt instrument of statute but must be probed and developed by judicial F decision?

All these questions will no doubt be answered by their Lordships when they deal, as it seems inevitable that they will, with appeals from this court. For myself, I am unable to answer them and am thankful that it is unnecessary for me to do so. One way or another it appears to me that the ghost G of the pre-*Westminster* doctrine which that case sought to lay to rest would, if the present appeals are to succeed, have to be resurrected. At present, I am of the clear view (1) that the Crown's contention in these cases is to borrow Lord Tomlin's words "nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable"; (2) that to extend the H *Ramsay* principle to the present cases would involve substituting "the incertain and crooked cord of discretion for the golden and streight metwand of the law"; and (3) that for the commissioners to determine the fiscal end result of a series of transactions and then apply the statute is a process which involves determining that a taxable transaction has occurred before I looking at the language of the statute instead of seeing whether any and which words of the statute can fairly be read as applying to what has taken place. Where every step is artificial as in *Ramsay*(3) and *Burmah*(4) I find no difficulty in understanding that the statute cannot be read as covering the

(1) 55 TC 324. (2) 19 TC 490. (3) 54 TC 101. (4) 54 TC 200.

so-called loss thereby created. Where, as in *Dawson*,(1) the transactions are conducted so that the first survives only for a 'scintilla temporis' I find it less easy to understand but do not need to for I am bound by the decision in *Dawson*. It may be that *Dawson* can be further extended but I do not think that this court can extend it to cover these cases. The House of Lords can, of course, do so but, as presently advised, I cannot see how it can be done without over-ruling, at least to some extent, many of their previous decisions.

On the detailed analysis of the facts and all other points I agree with and have nothing to add to the judgments of Slade L.J. and Mustill L.J. which I have had the opportunity to read in draft.

I too would dismiss the appeals.

Mustill L.J.:—I also agree that these appeals should be dismissed. A study of the speeches delivered in *W. T. Ramsay* v. *Inland Revenue Commissioners* and *Eilbeck* v. *Rawling* [1982] AC 300, *Commissioners of Inland Revenue* v. *Burmah Oil Co.* 54 TC 200 and *Furniss* v. *Dawson* [1984] AC 474 would appear to warrant the following propositions:

1. The fiscal consequences of a transaction or group of transactions are to be determined by applying the words of the taxing statute to the facts of the individual case. If the out-come of the transaction, properly understood, falls within the words of the statute, also properly understood, the appropriate fiscal consequence will follow. Otherwise it will not.

2. When considering the application of the statute to the facts of the individual case the court must view both the language of the statute and the components of the transaction in a broad fiscal perspective, and must not confine itself to the narrower focus which would be appropriate if the purpose was to elucidate and enforce the private rights created by the documents in which the transaction is embodied.

3. Nevertheless, the determining factor will always be the language of the statute. The subject is not to be taxed upon the intendment or the equity of the Act.

4. Unless the enactment specifically so provides, a transaction which falls properly into one fiscal category is not to be transferred to another simply because the motive or one of the motives for embarking upon it is to obtain a fiscal advantage.

5. A document is not to be treated as a sham unless it is intended to convey to third parties or the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations which the parties intend to create.

6. If the transaction under scrutiny consists of a single element the court will look behind the language of the relevant document only for the purpose of considering whether or not it is a sham. If it is not, its fiscal consequences will be ascertained solely by reference to its legal effect.

(1) 55 TC 324.

A 7. If, however, it is contended that the relationship between the taxpayer and the other relevant parties is of a composite nature consisting of a number of linked transactions, the inquiry does not end at the point when the fact-finding tribunal has concluded that none of the documents which embody the relevant elements can be discarded as a sham. The court must, it is true, recognise that these documents may have lasting legal consequences—B in the sense (for example) that they create enforceable contractual rights, or effect a transfer of title, or alter the capital structure of a company. But the process of matching the facts to the words of the statute is not necessarily confined to an examination of these consequences. The fact-finding body must also look to see whether there stands behind the legal relationships a unitary business relationship by reference to which the application of the fis-C cal statute ought to be determined.

8. A business relationship may be regarded as unitary notwithstanding that the performance of all its stages was not assured by contractual obligations already in existence when the first of the steps was put in train.

D 9. If it is found that the individual elements did together create a unitary business relationship, and if it is necessary to decide what account should be taken of this relationship when applying the taxing statute, it is material to consider whether any of the individual elements which are said to make it up was taken with a view to the avoidance of tax, and without any other business purpose.

E

10. The question to be considered when applying the last stated proposition is whether the step in question had a business *purpose*. The inquiry is not limited to whether it had any enduring business or legal *consequence*.

F The problem raised by the present group of appeals is to determine the breadth of the concept which, in the propositions just stated, has for the moment been indicated by the word "unitary" (I have made use of this word to avoid begging any of the questions which may be raised by concentrating on a single one of the expressions which are found in the reported cases.) Do the principles of *Ramsay*(1) and *Furniss*(2) extend to a case where the multiple transactions take the same general shape as was intended when the first step G was embarked upon, but where there is an unforeseen interruption in the execution of the series, or where the later stages are carried through in different terms, or with different parties, from what had originally been planned? If the tests for the application of the principle are satisfied, is the outcome in a fiscal sense limited to the disregarding of the steps which have no business H purpose, or are there other consequences? What is the status of the steps which are ultimately disregarded, at a time when the plan is in suspense or is being reformulated?

Understandably, much of the argument before this court concentrated on the expression "a pre-ordained series of transactions" and "a single com-I posite transaction", for these and other closely related formulations are stamped with authority by the speeches in the three leading cases. I believe, however, that this direct approach must be adopted with some caution. On one side, there may be an inclination to read the various formulae as if they

(1) 54 TC 101. (2) 55 TC 324.

formed part of the taxing statute itself. Too minute a scrutiny of the bare words may cause their context to be overlooked. Thus, at one stage of the argument, it was proposed that there should be recourse to a dictionary, to ascertain the precise meaning of "pre-ordained". This cannot be the right method. On the other hand, if too much regard is paid to the context, the reader may be led to believe that the new principles apply only to situations on a par with those discussed in *Ramsay*(1) and *Furniss*.(2) The speeches delivered in *Furniss* make it plain how misguided this would be. In these circumstances I believe that it is useful to begin by looking at the way in which the law has arrived at its present state, and then going on to consider the practicability of applying one reading rather than another to transactions, different from those under examination in *Ramsay* and *Furniss*, which may commonly arise in practice.

Accordingly, I think it appropriate to begin by identifying the steps by which the doctrine has evolved. In *Ramsay* itself the chain of relevant dealings began at a time when a transaction had already been concluded in "the real world" with consequences which were fiscal as well as contractual: namely, the taxpayers had made a chargeable gain. Nothing in what followed was designed to modify this transaction in any way. Instead, the intention was to conjure up a new situation in which the taxpayers would, without in reality making a gain or suffering a loss, have attributed to them a loss which could for fiscal purposes be set against the existing chargeable gain. Since the two aspects were entirely separate, it was possible for the House of Lords to concentrate on the later dealings (which alone were carried out with tax avoidance in mind), to view them in the round, and to recognise that, because their elements nullified each other, they were entirely sterile in the result, even if possessing transient legal effects when viewed in isolation. This feature made it possible for the House to disregard the second group of transactions in their entirety, so far as their fiscal consequences were concerned.

The position in *Commissioners of Inland Revenue* v. *Burmah Oil Co.*(3) 54 TC 200 was in one important respect the same: namely, that before the tax avoidance manoeuvres were set in train there had been anterior transactions with real fiscal as well as contractual consequences. In fact, there had been two such transactions. In one, the taxpayers had realised gains which were assessable for corporation tax. In the other they had suffered a loss in the shape of a bad debt owed by Holdings, which was not allowable against the liability for corporation tax. The difference between this case and *Ramsay* was that, whereas in the latter the self-cancelling tax avoidance transactions were entirely distinct from the dealing which had brought about the gain, the scheme in *Burmah* was intended to convert the fiscal outcome of the second anterior transaction from a bad debt owed by Holdings into an allowable loss on the realisation of the taxpayer's shares in Holdings. Notwithstanding this difference, it was possible to focus on the later group of transactions, and to recognise that, when viewed in the round, they did not lead to any disposal of the real asset (the B.P. shares) or any real loss in the sense contemplated by the statute. The essence of the decision was that the tax avoidance dealing could be disregarded for fiscal purposes: and it is, in my view, significant that Lord Diplock (at page 215F) referred to the intermediate circular book entries as being "ignored".

(1) 54 TC 101. (2) 55 TC 324. (3) [1982] STC 30.

A When the House came to consider *Furniss* v. *Dawson*(1) [1984] AC 474 it was faced with a very different situation. No longer was there a free-standing anterior transaction which could remain intact once the tax-avoidance dealings had been stripped away. Instead, the integrated plan had a genuine commercial object: namely, the disposition of the asset by the taxpayer ("A") and its acquisition by a third party buyer ("C"). The tax avoidance element was B introduced, not after the genuine transaction was complete, but by the interpolation into the planned future transaction of a commercially superfluous party, in the shape of Greenjacket Investments Ltd. ("B"). These two elements were knitted together in the scheme, so that the nullification of the artificial tax avoidance aspects, with the consequent exposure of its true fiscal C implications, could not be achieved simply by treating the redundant dealings as if they had never occurred: for, if the transfers from A to B, and thence from B to C were ignored, there would be nothing left to bridge the gap between A and C. The process of reasoning in *Furniss* was therefore different from that of the two earlier cases. Instead of merely *subtracting* the commercially meaningless steps by ignoring them, the court had to give effect to an D *additional* underlying fiscal reality which was not reflected in the documents actually executed: viz. a direct transfer from A to C, for which the consideration was furnished by C to B, at the request of A. *Furniss* demonstrates that, in what has been called a "linear" as distinct from a "circular" transaction, the court must carry out the following exercise: (i) consider whether all the dealings under scrutiny form part of a single transaction; (ii) consider E whether any of the steps have no commercial purpose; (iii) discard those that have no such purpose; (iv) identify what Lord Brightman called the end result of the single transaction. Precisely how the end result is to be taxed will then depend on the terms of the taxing statute which it is sought to apply.

F It is against this background of a developing doctrine that the tests formulated in *Ramsay*(2) and *Burmah*,(3) and reiterated in *Furniss*, must properly be understood. In *Furniss*, as in the other two cases, the documents creating the inserted steps were not a sham. It follows that they did have real legal effects. They created obligations which were enforceable in law; they effected G transfers of legal or equitable interests which were valid as against third parties; they brought about real changes in the capital structure of the various companies. Moreover, their nature was such that, at least when considered in isolation, they were capable of having fiscal consequences of their own. Yet they had to coexist with another underlying transaction which gave rise to different fiscal consequences. This caused no practical problems in *Furniss*. H The scheme went through in a short space of time exactly as planned. A precisely specified outcome had been contemplated at the outset, and precisely this outcome had been achieved by the end. No lasting rights were created by the intermediate dealings. Moreover, any fiscal consequences which may have theoretically flowed from these dealings were so transient that they I could have caused no problems in practice. Their replacement by the fiscal consequences of taxing A as on a direct transfer to C took place so quickly that the problem of the way in which the dispositions from A to B and B to C should be taxed could never directly arise.

(1) 55 TC 324. (2) 54 TC 101. (3) 54 TC 200.

The same ready solution is not, however, available when in timing or execution there is a discontinuity between the stages by which the end result is reached. Here, the earlier steps may possess in the real world fiscal as well as legal consequences of their own, which are not so easily disregarded when the later stages come to be performed. It seems to me that an understanding of the language used in *Ramsay*,(1) *Burmah*(2) and *Furniss*(3) must take account of the apparent tension between the two or more sets of legal and fiscal consequences; and that the words of the speeches should not be read as extending the principle to situations where these consequences cannot genuinely co-exist.

By way of illustration, one may take a hypothetical case much pressed in argument. Imagine that the taxpayer ("A") envisages that on some future occasion he may wish to dispose of an asset, or engage in some other commercial transaction, with an independent third party, of whose identity he has at present no idea. He recognises that, if the transaction ever does take place, there will be a fiscal advantage if it is channelled through an intermediary ("B"). Against this contingency he decides to carry out the transaction with B straight away, and does so, with consequences which are reflected by entries in registers of title or shares, and by appropriate debits and credits in the accounts of the two companies. Assume also that the dealing with B has a fiscal consequence so far as A is concerned—whether by way of chargeable gain, or allowable loss, or in some other manner. At this stage, there can be no ground upon which the Revenue could abstain from assessing, or the taxpayer from paying, the relevant kind of tax by reference to the transaction as actually carried out. *Ex hypothesi* the transaction is not a sham. Nor, consistently with the principles set out by Lord Wilberforce, could the argument for the appellants be carried to the length of suggesting that (in the absence of express statutory warrant) the existence of an ulterior motive could be a ground for taking the transaction fiscally otherwise than at its face value. Unless it falls into an exempted category, the outcome of the transaction will fall to be brought into account as loss or gain, or in some other way, when A's overall tax position is computed. Indeed, if the interval of time is long enough, his liability may be actually assessed and paid. Let it now be assumed that, after a substantial interval, A decides to implement the original scheme by causing B to carry out with C a transaction of the type which A had contemplated from the outset. In their argument on the present appeal, the appellants asserted that the *Ramsay/Furniss* principle requires A to be re-taxed on the basis of a direct disposition from himself to C. But, if this is so, what is to be the fiscal status of the concluded transaction between A and B, and of the crystallised version of A's overall tax position founded upon it? Mr. Sher Q.C. for the appellants suggested that the fiscal position might be reconstituted by means of an appeal by one party or the other against the original assessment. But an appeal could succeed only if the original tax return by A and the assessment based upon it could properly be treated as erroneous, and apt for correction. Yet there seems no sense in which it is possible to say that the return and assessment were wrong when made, and Mr. Sher was unable to cite any authority in support of the notion that they could be retrospectively invalidated when the transaction with C went through. As an alternative, Mr. Sher suggested that the whole matter could be disentangled by reworking A's accounts for the current and earlier years on the basis that the transaction with B had never taken place, and then by extra-statutory concession giving credit for any tax actually paid

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324.

A in respect of the transaction in earlier years against the assessment which brings into account a notional transfer direct from A to C. With due respect to the resourceful arguments of Mr. Sher, this expedient seems to me only to paper over the intellectual difficulties which arise from trying to force this situation into the mould of a doctrine conceived by the House of Lords in quite different circumstances. The only link between the two dealings is the com- B mon fiscal purpose. It is, however, quite plain from the authorities that this alone is not enough. It must also be possible to treat the dealings as part of a single transaction. In the example stated there are, to my mind, two transactions, not one.

Another example may be given. Imagine that the plan made by A con- C templates that the sale by B to C will be made on terms which may be labelled "X". After the transaction between A and B has been completed, a difficulty is encountered, as a result of which it is possible to complete the second stage only if its terms are changed to "Y". If it is held that, in the real world, there is a triangular transaction between A, C and B, what are its terms? The transfer away from A was never on terms "Y"; the transfer to C D was never on terms "X". So also if the example is varied to make the breakdown in the plan relate to the identity of the purchaser, rather than the terms on which he buys; the essence of the problem is the same.

I must emphasise that the purpose of these examples—and they are only examples—is not to repeat the argument over double taxation which was dis- E posed of by Lord Brightman in *Furniss.*(1) The problems arising from the appellants' argument on the present appeal are of a different nature. Still less is there any intention to hint that the clock should be set back to where it was before *Ramsay.*(2) The principle is firmly established and, if its application within its necessary limits gives rise to problems, these must be solved. It is, however, legitimate to recognise that such limits do exist. The House has F entrusted to the courts the task of elaborating this doctrine, which is still in a state of evolution. When considering its thrust and effect, and working out how to apply it in new situations, an examination of the circumstances in which the House has held that it can successfully be applied, and of the practical difficulties of applying it in other circumstances, must surely help to arrive at an understanding of what the speeches were intended to convey. G

Approaching the matter in this way, I would conclude that the doctrine cannot have been intended to have the wide compass for which the appellants contend. This is indeed the opinion which I would have formed simply by reading the language used by their Lordships in what would seem to be its H natural sense. Given the importance of the issue, it may be permissible to set out at a little length the expressions actually used. Taking the speeches in the order in which they were delivered, we find:—"a nexus or series of transactions"; "a series or combination of transactions, intended to operate as such"; "a composite transaction intended to be carried through as a whole"; "a composite transaction"; "an indivisible process"; "a [scheme] planned as a I single continuous operation"; "each step ... so closely associated with other steps with which it formed part of a single scheme"; "a complete prearranged scheme"; "a complete scheme"; "inter-connected transactions"; "a ... transaction planned as a single scheme"; "a series of interdependent

(1) 55 TC 324. (2) 54 TC 101.

transactions"; "interlocking, interdependent and pre-determined transaction"; "one single composite transaction". In view of the weight of argument directed to the precise meaning of "pre-ordained" in the authoritative formulation by Lord Brightman in *Furniss* at page 527, it is important to register that his Lordship treats the expression "a pre-ordained series of transactions" as interchangeable with "a single composite transaction".

It is, of course, essential to avoid the mistake of confusing a description of the case before the court with a definition of the principle to be applied in future cases, but I confess that, quite apart from the practical considerations already mentioned, I can see nothing in any of the speeches to sustain the appellant's proposition that the *Ramsay*(1) principle extends to all cases where an initial step is taken with an ultimate tax advantage in mind, and there is subsequently after whatever interval and in whatever precise form, another step of the kind originally envisaged.

Against this background I turn to the individual appeals. These have already been discussed in detail by Slade L.J., and I may therefore deal with them very shortly. In each case the start and finish must be the words of the statute. I believe that a valuable touchstone was furnished by Lords Diplock and Fraser in *Burmah*(2) when they spoke of "the real" loss and by Lord Scarman when he spoke of the need to determine "where the profit, gain and loss is really to be found". Of the three appeals, *Craven* v. *Stephen White* offers the most scope for debate, since at the time when the first stage of the transaction was carried out a sale by Millor to Jones was on the cards, and such a sale did take place, within a relatively short time-span on terms which were, at least as to price, not dissimilar to those originally contemplated. Nevertheless, I cannot find in the events leading up to the sale any ground for holding that "the real disposal" by the taxpayers was to Jones rather than Millor. At the time when the shares ceased to be the property of the taxpayers they were destined for Millor and nowhere else; there was then no formulated plan fixing the identity of the ultimate recipient, or the terms on which the shares would be transferred; nor any settled intention on the part of Oriel or Jones that the latter should participate in a triangular dealing such as was revealed by the House in *Furniss*.(3) Whatever the precise boundaries of the word "pre-ordained", it cannot, in my view, be stretched to cover a series of dealings so intermittent in execution and so unformed at the outset. In my judgment, there was not here a single composite transaction or operation, but two distinct transactions, and the fiscal implications of the two stages ought to be ascertained by reference to the legal effect of the contracts from which they sprang.

I have reached the same conclusion in relation to *Commissioners of Inland Revenue* v. *Bowater Property Developments Ltd.* As subsequent events demonstrated, there was a hope and an expectation, at the time when the land was transferred to the five companies, but there was in no sense a practical certainty, that an onward sale would be made to Milton Pipes on the terms negotiated a few months previously by BUKP. In the event, the sale did ultimately go through, but on different terms, and after a lapse of twenty months. This discontinuity must, in my view, rule out any treatment of the dealings as an indivisible whole, or the treatment of the sale by the taxpayers to their affiliates as if (in a fiscal sense) it had never happened. So far from being pre-ordained, the transaction might well have never happened at all—

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324.

A or, if it had happened, might have been concluded between different parties, if another buyer had come forward before the change of mind by Milton Pipes. For my part, I would regard *Baylis* v. *Gregory & Weare* as the plainest of the three appeals, so far as concerns the issue which is common to all. On 11 March 1974, when the exchange with P.G. Holdings took place, not only was Hawtin Limited not visible on the horizon as a potential purchaser, but B there was no sale to anyone presently in contemplation. For the reasons already stated, I cannot follow how, on any understanding of what was said in the three leading cases, events which occurred nearly two years later could retrospectively convert the share exchange into one element in a composite transaction of which the timing, terms, parties and even existence were at that stage quite unpredictable. *Ramsay*(1) and its successors demand that C dealings which have none but a fiscal purpose should not be allowed to camouflage an underlying transaction which exists in the real world, but this is no warrant for compressing into a supposed unity two transactions which are in truth distinct. In my judgment, the disposal was to Holdings, and to Holdings alone. It is true, as was emphasised in argument, that this opinion carries with it the consequence that an operation performed for reasons of D what has been called "strategic tax planning", by which the first stage of a linear series of transactions is carried out in isolation in the expectation that it may prove useful in the future, will escape the taxation net if it is followed at some later stage by a dealing of the type envisaged. Certainly, the *Ramsay* principle is open to elaboration; its frontiers are not yet determined. But I would regard the argument advanced by the Revenue as involving not simply E as an expansion of the principle, but as a striking-out into a whole new field of judicial legislation in a manner inconsistent with the constraints announced at the time when the doctrine itself was being propounded.

As to the other two issues arising on the appeal from the decision of Vinelott J. I have nothing to add to what has been said by Slade L.J., with F whose conclusions I respectfully agree.

For these reasons, therefore, I also would dismiss all these appeals.

Appeals dismissed with costs. Leave to appeal to the House of Lords in Craven v. Stephen White and Craven v. Brian White *granted on terms as to* G *costs. Leave to appeal to the House of Lords in* Commissioners of Inland Revenue v. Bowater Property Developments *and in* Baylis v. Gregory and Baylis v. Gregory and Weare *refused.*

The Appeal Committee of the House of Lords gave leave to appeal in H Commissioners of Inland Revenue v. Bowater Property Developments Ltd. *and* Baylis v. Gregory *on terms as to costs.*

CRAVEN v. WHITE
COMMISSIONERS OF INLAND REVENUE v. BOWATER PROPERTY DEVELOPMENTS LTD.
BAYLIS v. GREGORY

I

The Crown's appeals in all three cases came before the House of Lords (Lords Keith of Kinkel, Templeman, Oliver of Aylmerton, Goff of

(1) 54 TC 101.

Chieveley, and Jauncey of Tullichettle) on 16, 17, 18, 19, 23, 24 and 25 May 1988. On 21 July 1988 judgment was given against the Crown with costs (Lord Templeman and Lord Goff of Chieveley dissenting in *Craven* v. *White*). A

[1]*E.G. Nugee, Q.C., Jules Sher, Q.C.* and *Alan Moses* for the Crown. These appeals raise the central question as to the scope and ambit of the principle enunciated in this House in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300, which was further developed by this House in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* (1981) 54 T.C. 200 and *Furniss v. Dawson* [1984] A.C. 474. B

The *Ramsay* principle is concerned with identifying for fiscal purposes what may be regarded as the "real" transaction where that which faces the court is a number of transactions or steps. The principle, when applied, looks beyond those transactions (or steps) and identifies for fiscal purposes the composite transaction which is effected by the number of transactions. Artificially inserted transactions or steps, that is those which have no commercial purpose, are, accordingly, but for fiscal purposes only, ignored. C D

The Court of Appeal has confined the principle developed in the aforementioned cases on the narrowest conceivable basis and placed it in a strait-jacket and thus diminished its obvious potential for good in confining tax planning to its appropriate area of operation, namely, choosing between two or more possible courses of conduct designed to achieve a commercial end that course of conduct which is likely to mitigate, so far as possible, the impact of taxation. The House has recognised that the principle is in an early stage of development and that it will grow on a case by case basis (see *Furniss v. Dawson* [1984] A.C. 474, 513F–G *per* Lord Scarman). Indeed the Court of Appeal in these very appeals recognised that this House is likely to give further guidance as to the scope of the principle and, indeed, that this House can, of course, extend the principle and that the principle is "open to elaboration"; its frontiers are not yet determined: The Crown invites the House to examine those frontiers in these conjoined appeals which raise a wide range of circumstances in which, it is submitted, the developing doctrine has application, contrary to the unanimous decisions of the courts below. To the question: how does one determine the boundaries of the principle?, the answer is well illustrated by Lord Nottingham's observation in the *Duke of Norfolk's* case (1682) 3 Cha.Cas. 1, 49, "Where will I stop? I will stop where any visible inconvenience shall appear." E F G

The principle developed by this House in *Ramsay, Burmah* and *Dawson* ("the *Ramsay* principle") marks a change in the court's approach to identifying the transaction to which it is sought to attach a tax or tax consequence, particularly in relation to tax-avoidance schemes. H

In each of these three appeals the court is faced with two transactions which the Crown seeks to persuade the House should be seen and identified for fiscal purposes as a single composite transaction. The first transaction is the disposition of the asset to the interposed company: the second transaction is the disposition of the asset by the interposed company to the ultimate (outside) purchaser. The composite transaction is the disposition of the asset by the tax payer to the outside purchaser. The phraseology in which the I

---

[1] Argument reported by J.A. Griffiths Esq., Barrister-at-Law.

A *Ramsay* principle has been couched so far has led to the identification of what appear to be two separate requirements to be satisfied: see *Furniss v. Dawson* [1984] A.C. 474, 527D, and *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.*, 54 T.C. 200, 214D–E. The requirements are stated thus: (i) there must be a single composite transaction; (ii) the first step (i.e. the disposition of the asset to the interposed company) must have had no commercial pur-
B pose other than tax-avoidance. (The latter element is unquestionably satisfied in *Bowater and Gregory*. In *Craven v. White*, this element is in dispute).

Before considering these *apparently separate* requirements, the Crown wish to emphasise that it is part of the Crown's case that the two requirements are not separate and independent of each other. The crucial require-
C ment is the second, namely, that the part of the transaction sought to be fiscally ignored was embarked upon for no commercial (i.e. non-tax) purpose. It is difficult to see why, given the obvious willingness of this House to curb the extreme forms of tax-avoidance that we have witnessed in the last decade, any transactions, (whether it is part of a series of integrated transactions or not) should have any fiscal effect if it is inspired *solely* by a tax-
D avoidance purpose and would be *pointless* without that purpose in view. The tax legislation is designed to impose and to relieve tax on "real" i.e. commercial (and, of course, family) transactions. If a particular transaction has no commercial (or family) purpose in mind and is done solely to achieve a tax advantage, there seems to be no injustice in denying it the recognition intended by the parties, by holding that it was not the sort of transaction at
E which the legislation was aimed. This is, in effect, the thinking which underlies the approach of this House in the three cases of *Ramsay*, *Burmah* and *Dawson*, where, contrary to the expectation of the taxpayer, it has been held that the scheme for avoidance or deferral of tax has not achieved its purpose. Because of the rapidity with which each transaction in the series followed the others in those cases, all of which involved multiple transactions, it was suffi-
F cient for the courts to state the new principle as requiring the identification of a composite transaction or a pre-ordained series of transactions. However, to deduce from that an ultimate restriction on the scope of the new doctrine to cases where the various transactions in the series follow one another with equal rapidity, or with the same degree of predictability as was present in those cases, would be to stultify the development of the doctrine and to lose
G sight of the idea which has inspired and underlies it. That idea is the "no business purpose" idea. The moment one finds that any particular transaction in a series has no business purpose, it becomes clear that it was embarked upon to operate in combination with some other transaction wherein the true business purpose resides. Complete absence of a business purpose in the first transaction is the surest indication of its dependency
H upon another transaction to achieve some looked for advantage. The absence of a business purpose in relation to one transaction itself indicates that that transaction is an ingredient in a wider whole; and it is that which makes it merely a part of what has been called a composite transaction. The original thought process is not that there must be a composite transaction into which there has been inserted a transaction that has no business purpose but rather,
I that because a particular transaction has no business purpose it can be seen only as part of a scheme of two or more transactions (which are then described as "composite" or "pre-ordained"). The danger of definition of the doctrine by breaking it down into two elements, and in particular by stating the composite transaction element first, is that the word "composite", which

imports the notion of singularity, may be seen as a limiting factor when it is really only one example of how the no business purpose test can work in practice to distinguish between legitimate and illegitimate tax avoidance, or in the words of Lord Templeman in *Commissioner* of *Inland Revenue v. Challenge Corporation Ltd.* [1987] A.C. 155, 167H, between "tax mitigation" and "tax-avoidance."

Bearing in mind the dangers of treating lord Brightman's formulation in *Furniss v. Dawson* [1984] A.C. 474 as if it were a section of a statute, the Crown now addresses the question in Lord Brightman's terms: was there a composite transaction? In *Furniss v. Dawson* the proposed price and other terms of the ultimate purchase were fully negotiated (although not to the stage of commitment) in advance of the first step. This was not so in the three cases under consideration in these appeals. Of course, if the evidence shows that in advance of the first step the purchaser and terms were known, that is the best evidence of a composite transaction. However, bearing in mind that the purpose of the *Ramsay* principle is to identify the real transaction by ignoring artificially inserted steps, the actual identification of the purchaser and the price does not signify anything of critical importance. Suppose the first step is taken before an auction sale. The purchaser and price are unknown but this should not be determinative of the application of the *Ramsay* principle.

The essential link required by the *Ramsay* principle to identify two or more transactions as a single composite one is not dependent upon the identification at the first stage of a purchaser or the pre-determination at that stage of the exact proposed terms or, indeed, upon the likelihood of the second transaction following the first. The essential link is the intention of the tax payer at the time of the first transaction. If he embarks upon it in contemplation of a sale of the asset *and that sale eventuates*, why should it be a matter of critical importance whether he knew the purchase or purchase price in advance or whether it was certain or near certain that a sale would actually happen?

The essential link is to be found in *Ramsay* [1982] A.C. 300, 323H, where Lord Wilberforce said that if a transaction "was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole," there is nothing in *Inland Revenue Commissioners v. Duke of Westminister* [1936] A.C. 1 to prevent it being so regarded by the court. If "the legal nature of any transaction. . . emerges from a series or combination of transactions, intended to operate as such," it is that series or combination which will identity "the relevant transaction."

It is now clear, after the decision in *Furniss v. Dawson* in this House, and contrary to the judgments in the Court of Appeal in that case, that Lord Wilberforce's and Lord Fraser of Tullybelton's approval (in *Ramsay*) of the minority judgment of Eveleigh L.J. in *Floor v. Davies* [1978] Ch. 295, signified an intention that the "emerging" *Ramsay* principle applies to "linear" transactions as it does to self cancelling (or "circular") transactions. The intended demise of the interposed company in *Floor v. Davies* ("FNW") and the siphoning off of its assets into the Cayman Islands company, Donmarco, was quite irrelevant to the House of Lords approval of that minority judgment. The *Ramsay* principle applies even if there are, and remain, "enduring legal consequences" which would not have flowed from the composite transaction if done in a single step.

A When Lord Wilberforce said in *Ramsay* [1982] A.C. 300, 324c, that the courts are not bound to consider individually each step in a composite transaction, he went on to say that this was *particularly* so where every step was pre-contracted and may be so where there is no likelihood in practice that the successive steps will not happen. He did not say that such approach was limited to those circumstances. His Lordship's statement has been elevated B by the courts below in the three cases under appeal into a limiting test for the operation of the *Ramsay* principle. But that was not so intended. It is submitted that the phraseology "no likelihood in practice that it will not" was used by Lord Wilberforce in relation to the self cancelling category of tax avoidance schemes where *all* steps are in the hands of the scheme organisers. In the "linear" category there is a real party at the other end of the scheme C who has nothing whatever to do with the scheme and who cares not whether it will be, or has been, embarked upon or not. His state of mind is surely quite irrelevant.

Given that the first step was done for no other purpose than tax avoidance, the real nature of the transaction from a fiscal point of view should not D depend upon the likelihood of the ultimate purchaser actually purchasing. The critical "link" in the linear transaction which justifies a finding that there has been a composite transaction is the likelihood of the transaction (assuming it does happen) happening in this tortuous, indirect, manner, not the likelihood of it happening at all. It cannot be the law that merely because the tax payer anticipates making a gain rather than is certain of making it that he E can avoid tax when he does actually make it.

In each of the present cases the tax payer desired and intended to sell the asset concerned. In each case he (or it) disposed of the asset (by way of share exchange or fragmentation) to an entity within his own control or within the control of the same holding company. In *Bowater* and *Gregory* F (and in *White's* case as well although here it is disputed) there was no business or commercial purpose in such disposal: it was quite pointless without the tax avoidance consideration in mind. In each case, that disposal was envisaged as the preparatory step, i.e. the foundation or spring board for the "real" sale on. In each case, it was intended, envisaged, pre-ordained, prearranged—it does not matter what word is used—that if the tax payer was G successful enough in the negotiating field, the commercial end achieved, i.e. a sale of the asset, would be achieved by means of the tortuous route or machinery envisaged, namely, by means of fragmentation and sale by the fragmentee companies or share exchange and sale by the interposed Isle of Man company. The series of transactions (in each of these cases *two* only) was pre-ordained: the temporal succession was prepared in advance; and H there was a practical certainty of those transactions happening in the sequence and order pre-appointed for them to happen if, of course, the sale happened at all. The word "pre-ordained" used in the formulation of the *Ramsay* principle by Lord Brightman in *Furniss v. Dawson* [1984] A.C. 474 (following Lord Fraser of Tullybelton in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.*, 54 T.C. 200) was natural enough in the context of the I facts of those cases. It was not, however, intended as a term of art and must not be construed as if it appeared in a section in a statute. In any event the Crown submit that the series of transactions involving the share exchange (or fragmentation) on the one hand and sale on the other is nonetheless preordained because the sale terms and purchaser have not yet been identified.

It is the series, i.e. the sequence of these elements, that requires to be pre- ordained. A

Nothing has done more to confuse the law in this area than the supposed effect of Lord Tomlin's speech in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1. The true, and unexceptional ratio of that decision, was that the taxpayer is to be taxed by reference to what he has B actually done and not by reference to what he might have done to achieve the same object, but chose not to do. A careful study of the speeches in that case (including the dissenting speech of Lord Atkin) reveals that the outcome depended upon the factual issue as to whether the gardener was or was not legally bound (contrary to the terms of a letter sent to all save one of the servants) by an "arrangement" dehors the deed of covenant not to claim his C ordinary wages to the extent to which they were duplicated by the payment under the deed of covenant. The majority outcome of that case was dependent upon the acceptance of what today would no doubt be regarded as a benevolent finding of fact that, legally, the gardener was free to claim his wages in full as well as the payments under the deed of covenant. Once that was accepted as a fact, the outcome of the case was assured. That outcome is D of no assistance to the House in resolving the issues in the present appeals. Moreover, the dictum of Lord Tomlin concerning the doctrine of "the substance" as opposed to the form of the transaction has been misunderstood as authority for the proposition that in English tax law, form is to be preferred to substance. All that Lord Tomlin was concerned to do was to analyse the true legal effect of the transactions which had actually taken place rather E than what might have been done. If Lord Tomlin's reference to "substance" was a reference to the latter rather than the former (which the Crown contend it was), then the dictum is unexceptionable. A tax payer is only to be taxed by reference to what he has done, not might have done. However, if by "substance", Lord Tomlin meant that the only course open to the court is to analyse the legal effect of each step in a multi-step transaction, without F regard to the legal effect of the whole transaction, the House is invited to take a contrary view.

As to Slade L.J.'s adumbration of the *Ramsay/Furniss v. Dawson* principle in the Court of Appeal, his view of when two successive transactions, each of which has legal effects, are to be regarded as a pre-ordained series or G as a single composite transaction within the principle, is much too narrow. It is the Crown's contention that there are four possible places where the line can be drawn, that is, four possible situations which might fall within the ambit of the principle: (1) Where at the time when the first disposal takes place (the relevant time) all the terms for the second disposal had been agreed subject to contract: the position in *Furniss v. Dawson.* (2) Where at H the relevant time the first disponer (the vendor) has a particular intention such as a particular sale in mind, not necessarily confined to known ultimate disponees, for example a sale by auction or the conclusion of current negotiations with a number of different persons. (3) Where at the relevant time the first disponer has a genuine intention to effect a disposal but has neither decided upon the method of disposal nor identified a possible disponee. (4) I Where the first disposal is merely a step in a strategic tax planning exercise which may not be completed for a period of years. The first three of the foregoing situations are covered by the principle and it may be also the fourth.

It is now necessary to consider the individual facts of each of the cases under appeal. Was there a composite transaction in *Craven v. White?* In fact,

A in *Craven v. White,* the negotiations for the ultimate sale had gone very far towards fruition. The purchaser (Jones) was identified. The likely consideration was known, and had been since May 1976. From that time negotiations for the sale of Queens Ferry proceeded until contractual commitment on 9 August 1976. That was the end which the tax payers strove for and although progress faltered somewhat between 14 or 17 June and 21 June, it continued B with "increased purposefulness" until contract on 9 August. The contract was in draft form as early as 25 June 1976.

The question whether there is a composite transaction is a question of fact, i.e. secondary inference from primary facts and is the province of the Commissioners: see *Furniss v. Dawson* [1984] A.C. 474, 528. The appellate C court ought not to interfere with that inference of fact except where it is insupportable on the basis of the primary facts found. The Commissioners asked themselves whether on the evidence there was a pre-arranged scheme and concluded that "the agreements of July and August are to be looked upon as part of a composite transaction comprising those two agreements, if no more; it is irrelevant that the terms of the August agreement were not D finally settled until the day it was executed." The court should not disturb that conclusion unless satisfied that it is contrary to the only true and reasonable conclusion. Peter Gibson J. was wrong in rejecting it.

Was there a composite transaction in the *Bowater* case? Agreement between Bowater United Kingdom Paper Co. Ltd. ("BUKP") and Milton E Pipes Ltd. had actually been reached "subject to contract" by November 1978 for the sale of Crafts Marsh for £202,500 (subject to the grant of planning permission). (Bowater Property Developments Ltd. ("Bowater") had an option exercisable against BUKP to purchase Crafts Marsh which it exercised on 7 March 1979). Draft documents were sent to Milton Pipes Ltd. on 9 March 1979 indicating fragmentation into 18 companies as a prelude to F sale to Milton Pipes Ltd. At 25 March 1980, Bowater felt that things were moving to a reasonably clear conclusion and they did the fragmentation exercise. In the Budget Speech next day the Chancellor of the Exchequer indicated that the loop hole in the legislation on which Bowater relied would be closed as from that day, 26 March 1980. In May, Bowater sent a revised draft contract to Milton Pipes Ltd. On 8 July 1980, out of the blue, Milton G Pipes Ltd. pulled out of the transaction. Bowater's policy of selling Crafts Marsh continued but it did not actively seek a new purchaser. In February 1981 Milton Pipes Ltd. showed an interest again. Negotiations resumed and the price was agreed within a fortnight.

The Commissioners held that if Milton Pipes had in, say, July 1980 H entered into the contract a draft of which had been sent in May 1980, they, the Commissioners would have applied the *Ramsay* principle and found for a composite transaction. It was only because of the break in negotiations in July 1980 that they refrained from making that finding. They held that the fragmentation exercise in March 1980 had the quality of a "scheme transaction" but its quality as such could not survive the change in the nature of the I Bowater side's intentions as to disposal "from the active and back to the general."

The Commissioners' finding as to the quality of the first step and that it would have formed part of a composite transaction had the particular con-

tract then in contemplation gone ahead ought not to have been disturbed by Warner J. Once that finding is restored, there is no significant difference between that situation and the one that actually obtained, namely, severance of negotiations in July 1980, resumption of negotiations in 1981 and sale at an increased price. The fragmentation was done to facilitate a sale (free, as it was thought, from development land tax) and, indeed, a sale to Milton Pipes Ltd.: such sale was indeed achieved, though after an interruption in negotiations. The requirement of the Commissioners that there must exist throughout an "unbroken intention of active (rather than merely general) nature" is untenable.

Was there a composite transaction in *Baylis v. Gregory?* Here the position was similar to that in *Bowater*. There had been a clear and firm intention on the part of the shareholders of P.G.I. to sell and, with that intention in mind, they embarked upon the share exchange scheme. It so happened that the prospective transaction in mind when the share exchange procedures were initiated (namely, the sale to Canon Street Investments for £2,000,000) went off *before* the actual share exchange was finalized. (In *Bowater*, it went off *afterwards*). However, by the time the prospective sale went off, *most of the expenditure* in connection with the share exchange had been incurred and Mr. Gregory quite naturally let the procedures in this respect be completed (appreciating the tax avoidance value of having taken those steps if, at some future date, he and his fellow shareholders decided to sell P.G.I. to an outside purchaser). The fact that the prospective sale went off *before* rather than *after* the actual date of the share exchange should not make any difference to the taxability of the transactions. Similarly, it should make no difference whether the identity of the purchaser remains the same from beginning to end or not.

As to the second element in the *Ramsay* principle, namely, that the inserted step must have had no commercial purpose other than tax avoidance, in *Bowater* and *Gregory* there is no question but that the fragmentation exercise and share exchange respectively were embarked upon for no other purpose than tax avoidance.

In *Craven* v. *White* the Commissioners did not have before them the decision of this House in *Furniss v. Dawson* [1984] A.C. 474 and, consequently, they did not address themselves to the formulation of the *Ramsay* principle by Lord Brightman in terms of the two requirements. They accordingly made no specific finding whether, at the date of the share exchange on 19 July 1976, there was no other business purpose (other than tax avoidance). The tax payers were at pains to say that the *sole* purpose of the acquisition of Millor was in connection with a possible merger with Cee-n-Cee. This evidence was disbelieved by the Commissioners who found that the *primary* purpose of such acquisition was to conclude a sale of Queens Ferry to Jones. However, the Commissioners went on to find that the sale was the target the taxpayers and Mr. Clarke strove for and, at the point in time when the actual share exchange with Millor was effected (on 19 July 1976), the tax payers and Mr. Clarke "were working towards an agreement for the sale of the company shares to Jones, an agreement which would produce between £2,000,000 and £2,500,000 in cash." Moreover, they stated that it was difficult to believe that the share exchange of 19 July would have gone ahead unless Mr. Clarke had assured Mr. Stephen White and (through him) the other Whites, that he (or they) would be able to obtain the use of part of the proceeds of sale. In these circumstances, there was no business purpose in the

A share exchange other than tax avoidance or, if there was any purpose associated with the possible merger, it was simply an alternative, long stop, purpose of a kind which should not inhibit the application of the *Ramsay* principle.

Reliance is placed on the formulation of Nicholls J. in *Young v. Phillips* B [1984] S.T.C. 520, 539: "The *Ramsay* principle is concerned with identifying the relevant transaction by looking at the end result of a composite transaction, disregarding for fiscal purposes the artificially inserted step." The interposition of Millor was no less artificial because there might have been an intended use for it in the event that the sale to Jones did not happen. In the context of that prospective sale, there was no suggestion that the interposi- C tion of Millor could, or would, serve any commercial purpose whatsoever. It would be absurd if what was to be a purely fiscal device, in the events which were expected to happen and which did happen, is not to be recognized as a purely fiscal device simply because it might have served a commercial purpose if different events had taken place and if the parties were far sighted enough to put down on paper what was to happen if the sale fell through.

D

The commercial purpose relevant to Lord Brightman's formulation is a commercial purpose which is consistent and co-exists with the tax avoidance purpose in the context of the fulfilled composite transaction and is not a wholly alternative possible use for the interposed company in the event that the sale to the outside purchaser fails to take place. As to the possibility of E the tax payers being subject to double taxation, in the Court of Appeal Slade L.J. considered that if the Crown were right formidable uncertainty and practical difficulties would arise in the administration of our tax law. Both Slade and Mustill L.JJ. instanced a hypothetical case where a disposal was made by A through B to C where the A to B disposal was not wholly covered by a specific statutory exemption and the B to C transaction took place F a sufficiently long time after the A to B transaction to enable the tax in respect of the A to B transaction to be assessed and paid. The Court of Appeal were unnecessarily troubled by difficulties in this connection which were apprehended rather than real. An appeal would plainly lie out of time under s 49 of the Taxes Management Act 1970 and even though the assessment in respect of the A to B transaction would have been a correct assess- G ment on the facts known at the time of the assessment, it would plainly be apparent at the hearing of the appeal that it ought to be discharged: events known at that time must obviously be taken into account: see *Leach v. Pogson* (1962) 40 T.C. 585 and *Jeffrey v. Rolls Royce Ltd.* [1962] 40 T.C. 443.

In conclusion, the appeal In *Craven v. White* should be allowed since it H falls within the second situation of the four situations put forward by the Crown as coming within the *Ramsay /Furniss v. Dawson* principle. On the other hand, it is conceded that if the principle is confined to the first and second situations then the appeals in *Bowater and Baylis v. Gregory* fail. [Reference was also made to *Ayrshire Pullman Motor Services v. Inland Revenue Commissioners* [1929] 14 T.C. 754].

I

Sher Q. C. following. In this field the court is engaged in an interpretative process In which the greatest appeal is to common sense. The courts are not prepared to be bewitched by a multiplicity of transactions. They ask the question: what really has taken place? The starting point is to ascertain what

end the taxpayer had in mind and then to see what he has done towards achieving that end. All this is done in aid of a common sense, man-in-the-street, interpretation of characterisation of what the taxpayer has done. The intelligent layman would ask: if the Dawsons were taxable in the circumstances of that case why should not the White family be taxed? A

Of the four situations postulated by the Crown as coming within the principle, the principle cannot be limited to the first situation. That position is intellectually unsustainable since the first situation merges into the second situation and that into the third. The break from the traditional approach having been taken in *Ramsay* and *Furniss v. Dawson,* there is no logical stopping place short perhaps of the fourth situation which might be said not to come within the principle. B C

Leolin Price, Q. C. and *Grant Crawford* for the tax payers in the first appeal. Section 19(1) of the Finance Act 1965 provides, "tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets." This provision is therefore concerned with *the disposal* of assets. "Disposal" is broadly the transfer of property or the beneficial interest in property. D

It is difficult to see why the straightforward construction of s 19 should not govern the transaction. In the case of a contract of sale the "disposal" occurs at the date of sale. A contract involves contractual certainty. If it is then asked as between the first and second situation of the four situations postulated by the Crown which of the two comes as close as sensibly possible to the ordinary meaning of "disposal", it is plain that it is the first situation rather than the second. The questions which arise in these appeals are: (1) Did the July agreement and the August agreement together constitute a composite transaction (in the sense of a pre-ordained series of transactions) for the purpose of the *Ramsay* principle? (2) Did the July agreement have a commercial (business) purpose apart from the avoidance of tax so as to exclude the application of the *Ramsay* principle? E F

The inevitable inference from the Commissioners' findings (in the light of the arguments which were addressed to them) is that they did *not* find that, at the time of the July agreement, it was pre-ordained that the August agreement would be concluded. It follows that the Commissioners' findings of a (so-called) "composite transaction" does not conclude the question of whether the July agreement and the August agreement together constituted a composite transaction for the purposes of applying the *Ramsay* principle. In making the apparent finding of a composite transaction the Commissioners were using that term in a different sense from its meaning for the purposes of the *Ramsay* principle, and were adopting not the prospective test of pre-ordainment but a retrospective test of continuity. G H

For the Crown to succeed on question (1) it must show that it is permissible to apply such a retrospective test for the purpose of the *Ramsay* principle. In other words, it must show that a composite transaction for the purpose of that principle is present, even though, at the time of the first transaction in a series of two transactions which ultimately take place, there is no practical certainty that the second transaction will ever occur (notwithstanding that the tax payer may wish it, or something like it, to occur). That would involve a complete rejection of the formulation of what is meant by a I

A composite transaction (or a pre-ordained series of transactions) given by Slade LJ. in the Court of Appeal, Such a rejection would ignore the rationale of the *Ramsay* principle stated by Lord Brightman In *Furniss v. Dawson* [1984] A.C. 474, 526F-G. That statement of the rationale derives from a dictum of Lord Wilberforce in *Ramsay* itself [1982] A.C. 300, 324B–D.

B In all the cases in which the *Ramsay* principle has evolved there has been present the element of certainty (for all practical purposes) that once a tax-saving scheme has begun, it will inexorably grind on to its conclusion. That element, which has been graphically described in the cases, is necessary for the *Ramsay* principle to apply. Often the transactions are (as in *Furniss v.* C *Dawson*) "all over in time for lunch"; sometimes (as in *Burmah Oil*) they extend over several days. The length of the period between the various transactions is not, of itself, important; although the longer the period the more difficult it may be to establish that the transactions were in fact pre-ordained. The important feature is that ". . . it is the clear and stated intention that once started each scheme shall proceed through the various steps to the end- D they are not intended to be arrested half way": *Ramsay* [1982] A.C. 300, 322F–G, *per* Lord Wilberforce. See also *Chinn v. Hochstrasser* [1981] A.C. 533, 550C, *per* Lord Russell of Killowen.

The Crown is, accordingly, inviting the House to extend the range of situations to which the *Ramsay* principle can apply. It is seeking to modify E Lord Brightman's formulation of the first limitation on the principle in *Furniss v. Dawson* [1984] A.C. 464, 527C–D, namely, that there must be a pre-ordained series of transactions, or one single composite transaction; by subsituting the following limitation. It is sufficient on the Crown's case, for there to be (i) a series of transactions which actually happens, provided that (ii) the tax payer wished it to happen. On the Crown's reformulation of Lord F Brightman's first limitation of the *Ramsay* principle it is not relevant (a) that, on the occasion of the first transaction taking place the second (or a subsequent) transaction may not take place; and (b) that there is a lapse of time (perhaps a very lengthy lapse of time; perhaps several years or even decades) between the first transaction and the second (or a subsequent transaction).

G The purpose of the *Ramsay* principle is to identify the relevant transaction. Once that has been done the taxing statute can be applied. The effect of applying the *Ramsay*, principle to the facts in *Furniss v. Dawson* was to decide that there had been one disposal, for fiscal purposes, of the Dawson shares in the operating companies from the Dawsons to Wood Bastow, and H that there had been no exchange (again for fiscal purposes) of those shares for shares in Greenjacket so as to attract the relief from capital gains tax then contained in the Finance Act 1965, Schedule 7, paras. 4(2) and 6. In other words, the House was stating that the exchange of shares with Greenjacket was not such an exchange as was contemplated by those provisions. The first question on these appeals therefore becomes; was the I exchange which occured on 19 July 1976 between the tax payers and Millor an exchange of the kind which was contemplated by the Finance Act 1965, Schedule 7, paras. 4(2) and 6; or was it an exchange which did not fall within those provisions even though, until 9 August 1976, it was uncertain whether there would be a sale on to Jones, or indeed at all?

If it is to be said that a share exchange is not such an exchange as was contemplated by those provisions it must be possible to say so at the time that the share exchange takes place. Unless it is then known that it is practically certaln that that exchange will be followed by a subsequent transaction involving the disposal of the shares to an outside purchaser (in the sense that there is no likelihood in practice that that will not happen) that condition is not satisfied. The necessity for that condition is well illustrated by the misgivings of Oliver L.J. in regard to double taxation in *Furniss v. Dawson* in the Court of Appeal [1984] A.C. 474, 481-482, and the difficulties envisaged by the members of the Court of Appeal in the present case.

At the relevant time Parliament had expressly declared in the Finance Act 1965, Schedule 7, paragraphs 4(2) and 6(1), that a share exchange was *not* to be treated as involving any disposal of the exchanged shares (provided that the conditions set out in paragraph 6(2) of Schedule 7 were satisfied). It is one thing for the courts to state that those statutory provisions are not to have effect where a share exchange will inevitably be followed by another transaction, and when it is undertaken as a tax saving element in that transaction. But it is quite another thing for the courts to state (as the Crown in the present appeal invites them to state) that, where there is no element of inevitability, the share exchange is *not* to have the effect provided for by the statute, if, as matters eventually turn out, it is in fact followed by another transaction. In the former case it is possible to dismiss any worries about double taxation as being without foundation, for the statutory provision never applies to a share exchange which is not a share exchange for fiscal purposes. but in the latter case that is not possible. The share exchange exists; and the further transaction may never take place. In the meantime, there is no reason for the statute not to apply and no excuse for not applying it. Once it has been applied, and the share exchange clothed with fiscal effect, there is no justification for *subsequently* rescinding that application.

The Crown's invitation should therefore be rejected and Lord Brightman's formulation of the first limitation on the *Ramsay* principle in *Furniss v. Dawson* [1984] A.C. 474, 527C–D, affirmed. That formulation not only provides the degree of certainty which is essential in the law (and particularly in this area of the law); it also reflects the reasoning on which the *Ramsay* principle is founded.

As to the second question, in the light of the matters which emerged either from the express findings by the commissioners, or from their reactions to submissions, or from unchallenged and unrejected testimony, the inevitable inference is that the Commissioners either found or ought to have found, that a purpose of the July agreement, albeit a secondary or alternative purpose (but nevertheless a substantial one), was to have Millor available as a holding company for a merger between Queensferry and Cee-n-Cee if the sale to Jones were to fall through. That is a commercial (business) purpose apart from the avoidance of tax, and so, of itself prevents the application of the *Ramsay* principle so as to disregard the July agreement for fiscal purposes.

For the *Ramsay* principle to apply there must be *no* commercial purpose apart from tax avoidance present (subject, no doubt, to the de minimis principle). If there is a substantial, although less important, alternative commercial purpose (as in these appeals) the principle must be excluded. It cannot be the law that the courts are to be engaged on a precise evaluation of the com-

A merciality of a transaction so as to decide whether it falls on one side of an arbitrary line or on the other.

That accords with the basis of the *Ramsay* principle. If it is to be said that a statutory provision (in this case the Finance Act 1965 (Schedule 7, paragraphs 4(2) and (6)) is *not* to have effect even though the circumstances B which are present appear to fall plainly within the words of the statute, that can only be because the courts are of the opinion that Parliament, in enacting the statute, can have intended it to apply to a transaction which was carried out *purely* for the purpose of tax avoidance *and for no other purpose.* As soon as there is another purpose present that construction of the statute is no longer possible if the supremacy of Parliament is to be acknowledged and C effect given to Parliament's will as expressed in the statute.

Although Parliament may provide (as it has done in s 87(1) of the Capital Gains Tax Act 1979) that the presence of a tax avoidance purpose together with other purposes will be sufficient to exclude a particular relief, it is not open for the courts, by what is a process of legislation, to embark D upon such an exercise. The *Ramsay* principle is, in effect, a principle of statutory *construction* and well within the judicial function. As a principle of construction it can, however, only enable the court to decide whether or not a transaction is such as was contemplated by the statute. It cannot enable the court to amend the statute so as to allow the relief to transactions which involve some degrees of a tax avoidance purpose but to disallow it to those E which involve other degrees.

Andrew Park, Q. C. and *David Goy* for the tax payer company in the second appeal. This appeal concerns an assessment to development land tax: see Development Land Tax Act 1976, ss 1(1)(2), 4(1). The heart of the Crown's case is that the sale of Crafts Marsh was a "disposal" by Bowater F Property Developments Ltd. and therefore subject to tax under that Act. At the outset it is emphasised that on the facts of the present case the Crown cannot hope to win: it is no exaggeration to say that the taxpayer company had nothing to do with the sale of the land to Milton Pipes Ltd., which happened nineteen months after the tax-payer company's sale to the five Bowater group companies.

G

The *Ramsay /Furniss v. Dawson* principle is not one of statutory construction: see *Furniss v. Dawson* [1984] A.C. 474, 527E. Further, it was not so regarded by Lord Wilberforce in *Ramsay* [1982] A.C. 300, 323, where his Lordship said, "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 H that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded." Lord Brightman's authoritative exposition in *Furniss v. Dawson* [1974] A.C. 474, 527 presents the principle, not as one of statutory construction, but as one of analysis of a transaction.

I

A taxing statute will contain taxing provisions and relieving provisions and in determining their applicability three processes are involved: (i) from the language of the statutory provision identity what transaction or continuing state of affairs must exist for the provision to take effect. (ii) a consideration of the facts of the instant case to determine on the facts whether the

requisite transaction has happened or the requisite state of affairs exists. (iii) if the requisite transaction has taken place or if the requisite state of affairs exists, then the statutory provision (charging or relieving) applies in accordance with its own terms. In carrying out that exercise the part which *Ramsay and Furniss v. Dawson* play in (ii) is in determining whether the requisite transaction has taken place—those cases are not concerned with a state of affairs. It is here that the principle has a fundamental role to play. The doctrine consists of an analysis of the facts prior to an analysis of the statutory provisions.

A

B

The *Ramsay/Furniss v. Dawson* principle is not that any transaction entered into for the purposes of avoiding tax is ipso facto ineffective to achieve the avoidance of tax. The principle arises in the context of schemes involving two or more stages. In that context it breaks new grounds in that it enables two or more steps, which analytically are distinct legal transactions, to be viewed for tax purposes, not on a step by step basis, but by reference to their combined end result. It is by any standards a major advance in the Crown's powers to counteract planned tax-avoidance and, indeed, to kill stone dead the commercially organized tax-avoidance industry which flourished in the 1970s. But in these three appeals the Crown is seeking to take the principle to lengths which it cannot reach, either as a matter of authority or as a matter of principle.

C

D

The question in the present case is what degree of connection must exist between two legally distinct transactions for the principle to apply to them? The answer is that the two transactions must be connected in both of two ways: (i) they must be a "pre-ordained series of transactions" or (a phrase of identical meaning) a "single composite transaction": (ii) a step must have been inserted solely for purposes of tax avoidance. In the *Bowater* case connection (ii) is present, but connection (i) is not.

E

F

The assumption is that a transaction (1) is followed by a transaction (2) and that the transaction (1) was taken with a view to saving tax at the stage of transaction (2). The two transactions can be treated for tax purposes in terms of their combined effect in the circumstances just predicated.

It is not enough for the principle to apply that transaction (2) does, in the events that happened, occur after transaction (1) and that transaction (1) has been taken with the view to saving tax if transaction (2) happened: see *Ramsay* [1982] A.C. 300, 324D *per* Lord Wilberforce.

G

Some further degree of nexus, beyond the mere fact of sequence, is required between transactions (1) and (2). It is likely that cases will, on their facts, fall into one of three broad categories, which may be described as nexus 1, nexus 2 and nexus 3. In each case transaction (2) has happened, and given the hindsight knowledge of transaction (2) the position at the time of transaction (1) has to be analyzed.

H

Nexus 1. At the time of transaction (1) the transaction which in the event became transaction (2) was contemplated and was in practice certain to happen.

I

Nexus 2. At the time of transaction (1) the transaction which in the event became transaction (2) was contemplated but was not in practice certain to happen.

A Nexus 3. At the time of transaction (1) the transaction which in the event became transaction (2) was not contemplated, and therefore, exhypothesi, was not in practice certain to happen.

Every case to which the *Ramsay/Furniss* principle has been applied is a nexus 1 case. *Bowater's* case is a nexus 3 case. *Craven v. White* is a nexus 2 or B 3 case. *Baylis v. Gregory* is a nexus 3 case. This House in *Furniss v. Dawson* [1984] A.C. 474, has clearly stated that the nexus required for the *Ramsay /Furniss v. Dawson* principle to apply is nexus 1. In Lord Brightman's words (p. 527D), "First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction." See Warner J. [1985] S.T.C. C 797–798, the Crown's submission in the present case amounts to saying that one may ignore the first of Lord Brightman's requirements.

There are many passages in the relevant authorities where the judges have identified the characteristics of the kinds of tax avoidance schemes to which they are addressing themselves. Consistently they emphasise a degree D of connection between the sequence of transactions which correspond to only nexus 1. See, for example, *Ewart v. Taylor* [1983] S.T.C. 721, 772. Sir Peter Millett in an article in [1986] British Tax Review p. 336, considers that the *Ramsay/Furniss v. Dawson* principle is limited to nexus 1 cases.

Viewing the matter as one of principle, it is entirely rational to apply the E *Ramsay /Furniss v. Dawson* doctrine to a nexus 1 case, but not to a nexus 2 or a nexus 3 case. It is one thing—and desirable in a fiscal context—for the law to decline to attach independent fiscal consequences to a fiscally motivated transaction which the parties knew was never going to stand independently. It is another thing—and undesirable and unworkable—for the law to decline to attach independent fiscal consequences to a transaction, whether F fiscally motivated or not, which might have stood independently and where the parties did not know at the time of it whether it would stand independently or not. In such a case the Crown's argument has to be that transaction (1) has its own independent fiscal consequences if, in the events that happen, no transaction (2) follows, but does not have its own independent G fiscal consequences if, in the events that happen, some transaction (2) does follow. This is a hopeless approach. Transaction (1) would have to go into some sort of tax limbo, of indefinite duration, while everyone waits to see whether there is a transaction (2) or not. The unacceptable results are well illustrated by the present case. The Revenue wish to ignore the taxpayer company's sale to the five companies for purposes of development land tax, but H have nevertheless taken account of it for corporation tax and are unable, except by concession, to prevent the same profit being brought into computation for development land tax and for corporation tax.

On the Crown's argument, what is to happen to the tax already paid on the basis that there was a disposal from A to B at the time of transaction (1)? I There is no satisfactory answer to the question. Also, what happens if transaction (1) leads to other results which have tax implications? Suppose that in the present case the land was let to an agricultural tenant. The five companies would have received 19 months' rent, but who is to be taxed on that rent if the five companies' acquisition of the land is to be disregarded?

A different, and more general, point of principle is this. Speeches in your Lordships' House have frequently affirmed the principles that taxation should be levied according to law and that the taxpayer is entitled to take legitimate steps to reduce his tax liability. These principles are unaffected by denying the benefit of a relieving position for a taxpayer whose transaction, viewed realistically, does not fulfil the statutory requirements for relief: In *Furniss v. Dawson,* the Dawsons did not in a real sense make a disposal to Green Jacket. In the present case, however, it is impossible to deny that In every sense, real and formal, the taxpayer company did dispose of the land to the five companies. To treat it as if it did not would be to abandon the fundamental principles just referred to.

It is sometimes said that the *Ramsay/Furniss v. Dawson* principle involves approaching a sequence of transactions on the basis of substance and reality (see in particular the speech of Lord Bridge of Harwich in *Furniss v. Dawson*). It accords neither with substance nor with reality to say that the disposal to Milton Pipes Ltd. in October/November 1981 was a disposal by the tax-payer company, since (a) The company had no beneficial interest in the land for 19 months. (b) The company was not a party to the negotiations leading to the contract of 23 October 1981. (c) The company was not a party to the contract. (d) The company did not receive the proceeds of sale. (e) The company had no control over the land through the five companies. The Bowater Corporation (the group holding company) controlled both the tax-payer company and the five companies, but the tax-payer company had no control, direct or indirect, over the five companies.

It follows, that the sale by the tax-payer company to the five companies and the sale by the five companies to Milton Pipes were, to use Lord Wilberforce's expression, "independent transactions." The independent transactions of sale to Milton Pipes Ltd. was a disposal by the five companies, not a disposal by the taxpayer company. The assessment for development land tax on the taxpayer company therefore cannot stand. [Reference was also made to *Young v. Phillips* [1984] S.T.C. 520].

Michael Flesch, Q. C. for the tax payer in the third appeal. Whatever be the limits of the *Ramsay/Furniss v. Dawson* principle the transactions entered into by Mr. Gregory do not fall within it. The present is a case of pure strategic planning.

The first transaction (in March 1974) and the second transaction (in January 1976) did not constitute a "pre-ordained series of transactions" or a "single composite transaction." Accordingly, the first requirement of the *Ramsay* principle is not satisfied. The first transaction and the second transaction were rather in the words of Lord Wilberforce in *Ramsay* [1982] A.C. 300, 324D–E, "independent transactions." They should be regarded as such for fiscal purposes. Accordingly, the first transaction came within paragraphs 4(2) and 6 of Schedule 7 to the Finance Act 1965 and the second transaction was a disposal by Holdings.

As to what is meant by a "pre-ordained series of transactions" the law is correctly stated by Vinelott J. [1986] 1 W.L.R. 624, and by all three judges in the Court of Appeal. It is accepted that it would be wrong to treat Lord Brightman's formulation of the two requirements of the *Ramsay* principle as if it were enshrined in a taxing statute. Nevertheless Lord Brightman's formulation is entirely consistent both with the earlier case law (see in particu-

A lar *Ramsay and Burmah Oil*) and with principle. The submissions made by Mr. Andrew Park Q.C. in the *Bowater* case on this matter are adopted.

Mr. Gregory's case is, on the facts, far stronger than those of the tax payers In *Craven v. White* and even of *Bowater:* see the judgment of Slade L.J., and that of Mustill L.J. The first transaction was undertaken solely as B an exercise in "strategic tax planning." At the relevant time the second transaction was not even on the distant horizon. Indeed, to describe the first transaction and the second transaction as a "pre-ordained series" is really an abuse of the English language.

C The Crown's argument effectively requires one to ignore the first of Lord Brightman's requirements. The Crown do not really seek an application of the *Ramsay* principle. In order to succeed in Mr. Gregory's case, the Crown require the invention and application of a new and quite different principle: see the judgment of Mustill L.J.

D The Crown's approach is unworkable in practice. In particular, how are the parties to be taxed in the "limbo period" between the first transaction and the second transaction? (In the present case this period was two years: it could have been 10). Suppose, for example, some of the shareholders in Holdings had disposed of their shares prior to the sale of PGI to Hawtin. What would their "base cost" have been for capital gains tax purposes? E Would it be different from the "base cost" of those who only disposed of their Holdings shares after the sale to Hawtin? These and other similar problems, would inevitably arise if the Crown's arguments were accepted. Whereas these problems would be very unlikely to arise in practice if the *Ramsay/Furniss v. Dawson* principle remains subject to Lord Brightman's first requirement.

F

Nugee Q. C. In reply. The argument has shown that where the line is to be drawn between legitimate tax mitigation and unacceptable tax avoidance is a matter of very great importance. In *Ramsay* [1982] A.C. 300, *Burmah Oil*, 54 T.C. 200, and *Furniss v. Dawson* [1984] A.C. 474, all the Lords of Appeal G who were concerned in those cases were unanimous and there is no suggestion that they differed in their reason. In particular, in *Furniss v. Dawson* all their Lordships gave their unqualified agreement to Lord Brightman's opinion. In *Furniss v. Dawson* [1984] A.C. 474, 513, Lord Fraser of Tullybelton said that there the series of transactions was planned as a single scheme and should therefore be viewed as a whole. "Planned as a single scheme" is as H good a test as any to distinguish between a scheme concerned with tax mitigation and a scheme for tax avoidance. If it is desired to elaborate the test it may be put as follows: for fiscal purposes two transactions will be treated as one composite transaction if at the time of the first transaction the taxpayer has embarked upon a course of conduct planned to achieve a transaction of a kind which actually takes place, and which leads without significant inter- I ruption to the transaction that actually took place.

As to *Craven v. White* and *Inland Revenue Commissioners v. Bowater Property Developments Ltd.*, these come within the emerging principle which it was stated in *Furniss v. Dawson* to be in course of development. [Reference

was also made to *Ingram v. The Inland Revenue Commissioners* [1986] Ch. 585, and *Magnavox Electronics Co. Ltd. v. Hall* [1985] S.T.C. 260]. A

B

The following cases were cited in argument in addition to the cases referred to in the speeches:

Duke of [Lord] Norfolk's case (1682) 2 Cha. Cas. 1; *Young* v. *Phillips* 58 TC 232; [1984] STC 520; *Morley-Clarke* v. *Jones* 59 TC 567; *Gilford Motor Co. Ltd.* v. *Horne* [1933] Ch 935; *Jones* v. *Lipman* [1962] 1 WLR 832; C *Magnavox Electronics Co. Ltd.* v. *Hall* 59 TC 610; [1985] STC 260; *Ingram* v. *Commissioners of Inland Revenue* [1986] Ch 585 *Leach* v. *Pogson* 40 TC 585; *Jeffrey* v. *Rolls Royce Ltd.* 40 TC 443; *Barnes* v. *Hely-Hutchinson* 22 TC 655; *Bye* v. *Coren* [1985] STC 113; 60 TC 116; *Canadian Eagle Oil Co. Ltd.* v. *The King* [1946] AC 119; *Cenlon Finance Co. Ltd.* v. *Ellwood* 40 TC 176; D *Commissioners of Inland Revenue* v. *F. S. Securities Ltd.* 41 TC 666; *Commissioners of Inland Revenue* v. *Challenge Corporation Ltd.* [1987] AC 155; *Helvering* v. *Gregory* (1934) 69 F. 2d 809; affirmed (1935), 293US465; 59 S. Ct. 266; *Commissioner of Internal Revenue* v. *Newman,* 159 F. 2d 848 (1947); *Commissioner of Internal Revenue* v. *National Carbide Corporation,* 167 F. 2d 304 (1948); *Commissioner of Internal Revenue* v. *Ickelheimer* 132 F. 2d E 660 (1943); *Commissioner of Internal Revenue* v. *Transport Trading & Terminal Corporation,* 176 F. 2d 570 (1949); *Gilbert* v. *Commissioner of Internal Revenue,* 248 F 2d 399 at 411 (1957); *Knetsch* v. *S.*, (1960), 654 U.S. 361 (U.S. Supreme Court).

F

Lord Keith of Kinkel—My Lords, these conjoined appeals raise questions as to the nature and scope of the principle which emerged from *Furniss* v. *Dawson*(1) [1984] AC 474. That case was founded on but represented an G advance from what was laid down in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*(2) [1982] AC 300 and *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*(3) 54 TC 200.

The latter two decisions were concerned with a situation where the tax- H payer had sought to create an allowable loss with a view to setting it off, for purposes of capital gains tax or corporation tax on a capital gains basis, against chargeable gains. The transactions into which the taxpayer had entered for that end were entirely artificial. They were of a circular self-cancelling character so that the taxpayer ended up no worse off from a financial point of view than before the transactions were entered into. Each successive I transaction in the series must inevitably, in order to achieve the desired result, follow upon its predecessor and none of them had any other purpose than tax avoidance. It was held that each set of transactions had to be regarded as a whole and that when it was completed there was no real finan-

(1) 55 TC 324. (2) 54 TC 101. (3) [1982] STC 30.

A cial loss such as the relevant legislation allowed to be set off against chargeable gains.

Neither in *Ramsay* nor *Burmah* was there any commercial purpose whatever in the transactions entered into. However, Lord Diplock in *Burmah* 54 TC 200, 214 indicated that the new approach adopted by the House in B *Ramsay* to a pre-ordained series of transactions which included steps that had no commercial purpose apart from tax avoidance might apply whether or not there were also included the achievement of a legitimate commercial end. In *Furniss* v. *Dawson* [1984] AC 474 the taxpayer's purpose was directed to the achievement of a legitimate commercial end, namely the sale to an independent party of their shareholdings in two family companies. In order, C however, to defer capital gains tax on the sale they arranged that an Isle of Man company controlled by them (Greenjacket) should acquire the shareholdings in exchange for an issue to the taxpayers (the Dawsons) of its own shares, and should immediately sell the shareholdings on to the outside purchaser (Wood Bastow) for a price payable to itself. The taxpayers thus hoped to take advantage of the provisions of paras 4(2) and 6(1) of Sch 7 of the D Finance Act 1965. This House held, however, that the insertion into the sale transaction of the share exchange arrangement with the Isle of Man company fell to be disregarded for fiscal purposes, with the result that for those purposes the taxpayers must be treated as having made a direct disposal to the purchaser. Lord Brightman, with whose speech the rest of their E Lordships agreed, said, at p.526:

> "My Lords, in my opinion the rationale of the new approach is this. In a pre-planned tax-saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) a like series of steps which are fol- F lowed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results. For example, equitable interests may pass when the contract for sale is signed. In many cases equity will regard that as done which is contracted to be done. *Ramsay*[1] says that the fiscal result is to be no different if G the several steps are pre-ordained rather than pre-contracted. For example, in the instant case tax will, on the *Ramsay* principle, fall to be assessed on the basis that there was a tripartite contract between the Dawsons, Greenjacket and Wood Bastow under which the Dawsons contracted to transfer their shares in the operating companies to H Greenjacket in return for an allotment of shares in Greenjacket, and under which Greenjacket simultaneously contracted to transfer the same shares to Wood Bastow for a sum in cash. Under such a tripartite contract the Dawsons would clearly have disposed of the shares in the operating companies in favour of Wood Bastow in consideration of a sum of money paid by Wood Bastow with the concurrence of the Dawsons to I Greenjacket. Tax would be assessed, and the base value of the Greenjacket shares calculated, accordingly. *Ramsay* says that this fiscal result cannot be avoided because the pre-ordained series of steps are to be found in an informal arrangement instead of in a binding contract.

[1] 54 TC 101.

The day is not saved for the taxpayer because the arrangement is unsigned or contains the words 'this is not a binding contract.' A

The formulation by Lord Diplock in *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*(1) [1982] S.T.C. 30, 33 expresses the limitations of the *Ramsay* principle. First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax—not 'no business *effect*.' If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied. B C

In the instant case the inserted step was the introduction of Greenjacket as a buyer from the Dawsons and as a seller to Wood Bastow. That inserted step had no business purpose apart from the deferment of tax, although it had a business effect. If the sale had taken place in 1964 before capital gains tax was introduced, there would have been no Greenjacket. D E

The formulation, therefore, involves two findings of fact, first, whether there was a pre-ordained series of transactions, i.e. a single composite transaction, secondly, whether that transaction contained steps which were inserted without any commercial or business purpose apart from a tax advantage. Those are facts to be found by the commissioners. They may be primary facts or, more probably, inferences to be drawn from the primary facts. If they are inferences, they are nevertheless facts to be found by the commissioners. Such inferences of fact cannot be disturbed by the court save on *Edwards* v. *Bairstow*(2) [1956] A.C. 14 principles." F

This passage appears to embody the *ratio decidendi* of the case. G

My Lords, in my opinion the nature of the principle to be derived from the three cases is this: the court must first construe the relevant enactment in order to ascertain its meaning; it must then analyse the series of transactions in question, regarded as a whole, so as to ascertain its true effect in law; and finally it must apply the enactment as construed to the true effect of the series of transactions and so decide whether or not the enactment was intended to cover it. The most important feature of the principle is that the series of transactions is to be regarded as a whole. In ascertaining the true legal effect of the series it is relevant to take into account, if it be the case, that all the steps in it were contractually agreed in advance or had been determined on in advance by a guiding will which was in a position, for all practical purposes, to secure that all of them were carried through to completion. It is also relevant to take into account, if it be the case, that one or more of the steps was introduced into the series with no business purpose other than the avoidance of tax. H I

(1) 54 TC 200. (2) 36 TC 207.

A The principle does not involve, in my opinion, that it is part of the judicial function to treat as nugatory any step whatever which a taxpayer may take with a view to the avoidance or mitigation of tax. It remains true in general that the taxpayer, where he is in a position to carry through a transaction in two alternative ways, one of which will result in liability to tax and the other of which will not, is at liberty to choose the latter and to do so B effectively in the absence of any specific tax avoidance provision such as s 460 of the Income and Corporation Taxes Act 1970.

In *Ramsay*(1) and in *Burmah*(2) the result of application of the principle was to demonstrate that the true legal effect of the series of transactions entered into, regarded as a whole, was precisely nil from the point of view of C creating an allowable loss such as the relevant legislation intended to make deductible in computing chargeable gains. In *Furniss* v. *Dawson*(3) the result was that the two interconnected transactions under consideration were held to be equivalent in legal effect to a tripartite contract between the Dawsons, Greenjacket and Wood Bastow under which the Dawsons transferred the shares in the family companies to Wood Bastow in consideration of a price D paid by the latter to Greenjacket. The result of that was that Greenjacket never acquired control of the family companies within the meaning of para 6(2) of Sch 7 to the Finance Act 1965. Accordingly, para 4(2) of the Schedule did not apply to the Greenjacket shares acquired by the Dawsons. There was no question but that the Dawsons had disposed of their shares in the family companies so as to be liable for capital gains tax if they were not saved by E paras 4(2) and 6(2) of Sch 7. In the event they were not so saved.

As regards the scope of the principle, for present purposes attention should be confined to cases broadly similar in character to *Furniss* v. *Dawson*. Cases of different character will have to be considered when they arise. The main problem concerns the circumstances under which all the F transactions involved in a series may properly fall to be regarded as "preordained." In *Furniss* v. *Dawson* the Dawsons had arrived at a complete informal agreement with Wood Bastow, and the transactions designed to give effect to that informal agreement were all settled in a very short space of time in the course of one morning. It was in that context that Lord G Brightman found that what had happened was equivalent to a tripartite contract. Is it enough that the original owners of the shares, being minded to dispose of them, decide to do so through an intermediary company under their control, carry through a share exchange and thereafter seek and successfully find a purchaser? In that situation there is certainly a scheme on the part of the holders of the shares to dispose of them in such a way that any capital H gains tax liability is deferred. According to circumstances, there may be varying degrees of interconnection between the disposal to the intermediary company and the disposal to the ultimate purchaser. It may be many months before a possible purchaser is found and many more before a bargain is concluded. Again, the share exchange may be entered into without any immediate intention of selling but so that it may stand in good stead for tax I purposes if and when a decision to sell is made. Or it may take place when negotiations with a particular purchaser are under way but the outcome is still open. In all these cases it is clear that the owner of the shares has so arranged matters that if and when a sale of the shares does take place it will

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324.

not be a direct disposal of the shares by him but a disposal by an intermediary company which he controls. But I do not think that the transaction embodied in the final disposal can be said to be pre-ordained, a matter to be ascertained as at the time of the share exchange, when at that time it is wholly uncertain whether that disposal will take place, or a fortiori when neither the identity of the purchaser nor the price to be paid nor any of the other terms of the contract are known. In my opinion both the transactions in the series can properly be regarded as pre-ordained if, but only if, at the time when the first of them is entered into the taxpayer is in a position for all practical purposes to secure that the second also is entered into.

It follows that on the facts of the three appeals I do not consider that any of them is caught by the *Ramsay*(1) principle as extended by *Furniss* v. *Dawson*. In *Inland Revenue Commissioners* v. *Bowater Property Developments Ltd.*, a case under the Development Land Tax Act 1976, a sister company of the respondent company in November 1978 negotiated, subject to contract the sale of certain land to Milton Pipes Ltd. No contract was ever concluded and on 7 July 1980 Milton Pipes withdrew. In the meantime the sister company had sold the land to the respondent company, on 7 March 1979, for 97½ per cent of its market value. On 25 March 1979 the respondent company sold the land in equal shares to five other associated companies for its then market value. The purpose was to take advantage of the Development Land Tax exemption of £50,000 available at the time to each of the five companies. In February 1981 Milton Pipes reopened negotiations and on 23 October 1981 contracts of sale at a price of £259,750 were exchanged between them and the five companies. The Revenue sought to assess the respondent company to Development Land Tax on the basis of a sale by it direct to Milton Pipes, but failed before the Commissioners, Warner J. in the High Court and the Court of Appeal. It is clear that there was no such connection between the sale to the five companies and the sale by the latter to Milton Pipes as to permit of any possible finding that the two transactions were part of a pre-ordained series.

In *Baylis* v. *Gregory* the taxpayers prior to 13 February 1974 were negotiating the sale of shares in a family company to a company called Cannon Street Investments Ltd. It was envisaged that the sale would be carried out through an Isle of Man company as in *Furniss* v. *Dawson*.(2) However, on that date negotiations were broken off. On 19 February 1974 an Isle of Man company ("Holdings") was incorporated and on 11 March 1974 the taxpayers exchanged their shares in the family company for shares in Holdings. No other purchaser was on the horizon at the time. Another potential purchaser ("Hawtin") did appear by chance in May 1975 and sporadic negotiations ensued. Eventually on 30 January 1976 binding agreement was reached for the sale by Holdings to Hawtin of the family company shares. Assessments to capital gains tax were raised on the taxpayers on the basis that they had sold directly to Hawtin, but these were discharged by the Commissioners and their decision was upheld by Vinelott J. and by the Court of Appeal. Here again, there was clearly no such connection between the two transactions as could properly lead to the conclusion that they were pre-ordained.

In *Craven* v. *White* the facts were considerably closer to the line. The taxpayers owned all the shares in the family company "Queensferry" and in 1973 were advised by their accountant that they should either merge the

(1) 54 TC 101. (2) 55 TC 324.

A company with a similar business or sell it. Up until 1976 they sought without success to achieve one or the other. The prospects of a merger with a company called Cee-N-Cee were inconclusively investigated, but in early 1976 a company called Oriel showed an interest in purchasing Queensferry. Negotiations were pursued and by May 1976 broad agreement on price had been reached. A meeting with Oriel on 17 June 1976, however, had the result B that the prospects of a sale did not look good. So negotiations with Cee-N-Cee for a merger were again taken up. On 21 June 1976 arrangements were made to acquire an off-the-shelf Isle of Man company ("Millor") with a view to its being a holding company for a merger with Cee-N-Cee. On the same date Oriel asked for a further meeting on 25 June and further proposed sending a draft contract for the acquisition of Queensferry. They were requested C to send the draft to the Isle of Man solicitors acting for Millor, and did so. Negotiations with Oriel proceeded purposefully from 25 June, but talks with Cee-N-Cee still continued. On 9 July Queensferry's share capital was reorganised with a view to saving stamp duty. About 14 July Millor offered to acquire the shares in Queensferry in exchange for its own shares, and the offer was accepted by the taxpayers on 19 July. On 9 August there was a D meeting with Oriel, described as stormy, which resulted in an agreement for the acquisition by a subsidiary of Oriel ("Jones") of all the shares in Queensferry for £2.2m. subject to adjustment and payable by instalments. Millor, having received the proceeds of sale, later lent most of them to the taxpayers. Since Millor was an Isle of Man company the loans were not caught by s 286 of the Income and Corporation Taxes Act 1970. The E Commissioners' decision was given after the Court of Appeal decision in *Furniss* v. *Dawson* but before that of this House. They held that Millor had acquired control of Queensferry and that the taxpayers had not disposed of their shares in Queensferry direct to Jones. However, they held that the share exchange with Millor, the disposal by the latter to Jones and the loans by Millor to the taxpayers together constituted a composite transaction which F had the effect that on each occasion when one of the taxpayers received a loan from Millor he made for capital gains tax purposes a part disposal of the shares which he formerly owned in Queensferry. The Crown appealed to the High Court, where Peter Gibson J. held that the *Ramsay*(1) principle did not apply to the facts of this case, principally on the ground that at the time G of the share exchange there was no practical certainty that the subsequent sale by Millor to Jones would be taking place. His decision was affirmed by the Court Appeal.

The taxpayers had stated in evidence before the Commissioners that their sole purpose in acquiring Millor was to use it as a vehicle for merger H with Cee-N-Cee. The Commissioners did not accept that such was their sole purpose, and found that a sale to Oriel was their primary objective. They also found that the taxpayers were keeping their options open, and this warrants the inference that a possible merger with Cee-N-Cee was a subsidiary purpose of the acquisition of Millor, in addition to indicating that on 19 July the sale to Oriel was by no means a certainty. Indeed, at the meeting on 9 I August Oriel's proposal for deferred payment of part of the consideration seriously threatened the negotiations and caused a temporary walk-out by the White team. It is clear, in my opinion, that Peter Gibson J. was right in his view that on 19 July there was no certainty that the sale to Oriel would

(1) 54 TC 101.

take place. On that date the taxpayers were by no means in a position for all practical purposes to secure that the sale went through. The Commissioners' finding of a composite transaction including the share exchange, the sale to Oriel and the loans was made before the decision of this House in *Furniss* v. *Dawson*(1) and so without regard to Lord Brightman's formulation in that case of the applicable principle. Accordingly it cannot, in my view, be regarded as conclusive against the taxpayers.

My Lords, for these reasons, and for those expressed in the speech of my noble and learned friend Lord Oliver of Aylmerton, which I have had the advantage of reading in draft, I would dismiss all three appeals.

Lord Templeman—My Lords, an artificial tax avoidance scheme is carried out by an individual taxpayer to avoid (or reduce or postpone) payment of the tax exigible in respect of a taxable transaction by means of one or more tax avoidance transactions which serve no business purpose apart from the avoidance of the tax on the taxable transaction. This House has on four occasions decided that an artificial tax avoidance scheme does not alter the incidence of the tax sought to be avoided.

In *Black Nominees Ltd.* v. *Nicol*(2) 50 TC 229, the taxpayer actress failed to avoid income tax on her future earnings, the taxable transaction, by tax avoidance transactions which had no business purpose apart from avoiding income tax on the earnings of the actress.

In *Floor* v. *Davis*(3) [1978] Ch 295, the dissenting judgment of Eveleigh L.J. held that the taxpayer failed to avoid a tax on capital gains in respect of a taxable transaction by a tax avoidance transaction which had no business purpose apart from avoiding that tax by means of an exchange of shares with a company in the Isle of Man.

In *Chinn* v. *Hochstrasser*(4) [1981] AC 533, this House held that a taxpayer failed to avoid a tax on capital gains in respect of a taxable transaction by tax avoidance transactions which had no business purpose apart from the avoidance of that tax by means of the sale of a reversion to and purchase of shares from a company in the Channel Islands.

In *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*(5) [1982] AC 300 ("*Ramsay*") this House held that a taxpayer failed to avoid a tax on capital gains in respect of a taxable transaction by a tax avoidance transaction which had no business purpose apart from avoiding that tax by the creation of an allowable loss matched by a non-taxable gain. In *Ramsay* this House approved the decision in *Black Nominees Ltd.* v. *Nicol* 50 TC 229 and the dissenting judgment of Eveleigh L.J. in *Floor* v. *Davis* [1978] Ch 295.

In *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*(6) 54 TC 200, ("*Burmah*") this House held that a taxpayer failed by means of an artificial tax avoidance scheme to convert a bad debt into a deductible loan for the purpose of tax on capital gains.

In *Furniss* v. *Dawson*(7) [1984] AC 474 ("*Furniss*") this House rejected the argument that the taxpayer had avoided tax on a taxable transaction

(1) 55 TC 324. (2) [1975] STC 372. (3) 52 TC 609. (4) 54 TC 311. (5) 54 TC 101. (6) [1982] STC 30. (7) 55 TC 324.

A which was not contractually binding and not within the power of the taxpayer to command at the time of the preceding tax avoidance transaction which was part of an artificial tax avoidance scheme.

A principle emerges from the authorities and in particular from *Ramsay, Burmah* and *Furniss.* The principle is that an artificial tax avoidance scheme B does not alter the incidence of tax.

Ramsay, Burmah and *Furniss* concerned the Finance Act 1965 or its successors whereby capital gains tax, or in the case of companies corporation tax, was: "19(1) … charged … in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a C person on the disposal of assets." By s 20(4): "Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting any allowable losses accruing to that person … "

In *Ramsay* the taxpayer sought by the scheme to reduce his liability to D tax without suffering the loss which entitled him to a reduction. The taxpayer began by a *taxable transaction* when he made a real chargeable gain on the sale and "disposal" of a farm.

To reduce the liability to an assessment of tax engendered by that disposal the taxpayer entered into a *tax avoidance transaction.* The tax avoid- E ance transaction was planned to produce and did produce a gain which was not a "chargeable gain," matched by an equal "allowable loss." By this tax avoidance transaction the taxpayer made neither a loss nor a gain. The taxpayer claimed to deduct the allowable loss from the chargeable gain on the farm. This would have enabled the taxpayer to enjoy the chargeable gain F made on the disposal of the farm without paying any tax. This House held that the taxpayer was not entitled to deduct the allowable loss. The artificial tax avoidance scheme did not alter the incidence of tax.

In *Burmah* 54 TC 200 also an "allowable loss" was held not to be "deductible" where the taxpayer, in the words of Lord Fraser of Tullybelton, G at p.220, achieved: "'The apparently magic result of creating a tax loss that would not be a real loss … by arranging that the scheme included a loss which was allowable for tax purposes and a matching gain which was not chargeable.'" The artificial tax avoidance scheme did not alter the incidence of tax.

H The *Ramsay*[1] principles were set forth in the speech of Lord Wilberforce in *Ramsay* and in particular in passages at pp.323–324:

> "If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing … to I prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. 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 trans-

(1) [1982] AC 300.

actions, intended to operate as such, it is that series or combination which may be regarded ... For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that documents or transactions are not "shams", from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is. They are not ... bound to consider individually each separate step in a composite transaction intended to be carried through as a whole ... the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions."

In *Burmah* Lord Diplock warned, at p.214(1):

"It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume that Ramsay's case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable."

Both in *Ramsay* and in *Burmah* there was a scheme but no contractual obligation to carry out any of the transactions which made up the scheme. The scheme was capable of being wholly or partly abandoned at any time but in fact was carried through. The scheme was treated as a whole. The scheme was "pre-ordained" in the sense that it was planned as a whole and carried through as a whole. The scheme failed to alter the incidence of tax.

The *Ramsay* principles were applied in *Furniss* v. *Dawson*(2) [1984] AC 474. The taxpayers, Dawsons, negotiated for the sale of their shares in an operating company to Wood Bastow. Such a sale would have involved the Dawsons in a liability to capital gains tax resulting from the "disposal" of the shares and was therefore a taxable transaction. A scheme was evolved for the taxpayers. The Dawsons transferred the shares in the operating company to Greenjacket, an Isle of Man company, in exchange for shares in Greenjacket. The exchange was a tax-avoidance transaction. The exchange did not involve a liability for capital gains tax and had no business purpose apart from the avoidance of a liability to tax which in the absence of the exchange would become payable on a disposal of the shares in the operating company to Wood Bastow. There was at the time of the exchange no binding contract with Wood Bastow for the disposal of the shares in the operating company but Dawsons controlled Greenjacket and therefore could after that exchange and in agreement with Wood Bastow procure a sale of the shares in the operating company to Wood Bastow. Immediately after the exchange Dawsons procured and Wood Bastow accepted a sale of the shares in the operating company to Wood Bastow for cash paid to Greenjacket. This sale considered in isolation did not involve a claim to capital gains tax. The sale completed the scheme. There was a scheme consisting of two transactions, a tax-avoidance transaction whereby Dawsons exchanged their shares in the operating company for shares in Greenjacket and a taxable transaction whereby Dawsons procured a sale of the Dawson shares in the operating

(1) 54 TC 200. (2) 55 TC 324.

A company to Wood Bastow in consideration for cash paid to Greenjacket. This House held that upon the true construction of the taxing statute the scheme effected a "disposal" by Dawsons. Similarly, upon the true construction of the statute the scheme resulted in an "acquisition" by Dawsons of their shares in Greenjacket in consideration for and at the value of the purchase price procured by Dawsons to be paid by Wood Bastow to B Greenjacket for the shares in the operating company. The scheme resulted in a taxable transaction, namely, a disposal by Dawsons of the shares in the operating company to Wood Bastow in consideration of cash paid to Greenjacket.

Lord Fraser of Tullybelton said, at p.513(1):

C

> "The series of two transactions in the present case was planned as a single scheme, and I am clearly of opinion that it should be viewed as a whole."

Lord Roskill said, at p.515:

D

> "there was a disposal by the Dawsons to Wood Bastow in consideration of the payment to be made by Wood Bastow to Greenjacket at the behest of the Dawsons. This disposal is not exempt. Capital gains tax is payable."

Lord Bridge of Harwich said, at p.517:

E

> "When one moves, however, from a single transaction to a series of interdependent transactions designed to produce a given result it is, in my opinion, perfectly legitimate to draw a distinction between the substance and the form of the composite transaction without in any way suggesting that any of the single transactions which make up the whole F are other than genuine."

Lord Brightman said, at pp.526–527:

> "In a pre-planned tax-saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of G steps which are followed through by virtue of an arrangement which falls short of a binding contract and (ii) a like series of steps which are followed through because the participants are contractually bound to take each step seriatim ... In the instant case tax will, on the *Ramsay*(2) principle, fall to be assessed on the basis that there was a tripartite contract between the Dawsons, Greenjacket and Wood Bastow under which H the Dawsons contracted to transfer their shares in the operating companies to Greenjacket in return for an allotment of shares in Greenjacket, and under which Greenjacket simultaneously contracted to transfer the same shares to Wood Bastow for a sum in cash. Under such a tripartite contract the Dawsons would clearly have disposed of the shares in the operating companies in favour of Wood Bastow in consideration of a I sum of money paid by Wood Bastow with the concurrence of the Dawsons to Greenjacket. Tax would be assessed, and the base value of the Greenjacket shares calculated, accordingly. *Ramsay* says that this fiscal result cannot be avoided because the pre-ordained series of steps are

(1) [1984] AC 474. (2) 54 TC 101.

to be found in an informal arrangement instead of in a binding contract. The day is not saved for the taxpayer because the arrangement is unsigned or contains the words 'this is not a binding contract.' ... First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax—not '*no business effect*.' If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied."

Furniss(1) reaffirmed the *Ramsay* principle that the courts will construe and apply a taxing statute so that a taxpayer who seeks to carry out a taxable transaction which will involve him in an assessment of tax cannot escape that assessment by combining the taxable transaction with a tax avoidance transaction which has no business purpose apart from the saving of the tax involved. The two transactions together constitute a scheme which produces a taxable transaction.

The circumstances in which the court will either in the *Ramsay* or *Furniss* type of case construe and apply the taxing statute to a scheme as a whole and not to the constituent parts have been variously described. Lord Wilberforce referred to "a nexus or series of transactions, or an ingredient of a wider transaction intended as a whole ... a series or combination of transactions, intended to operate as a whole ... a composite transaction intended to be carried through as a whole." Lord Diplock referred to "elaborate tax-avoidance schemes" and to "a pre-ordained series of transactions." Lord Fraser of Tullybelton referred to "a series of two transactions ... planned as a single scheme ... [which] should be viewed as a whole." Lord Bridge of Harwich referred to "a series of interdependent transactions" and to a "composite transaction." Lord Brightman referred to a "pre-planned tax-saving scheme" and a "pre-ordained series of transactions; or if one likes, one single composite transaction." All these requirements can be summed up by saying that the *Ramsay* and *Furniss* principles apply where the taxpayer plans and carries out an artificial tax avoidance scheme to avoid (or reduce or postpone) an assessment to tax by combining a taxable transaction with a tax avoidance transaction whose purpose is the avoidance of the assessment.

Ramsay(2) decided that where a taxpayer adopts and carries into effect a scheme to avoid an assessment to tax on a taxable transaction by a subsequent transaction which serves no business purpose apart from the avoidance of tax which would otherwise be payable in respect of the taxable transaction, the court will construe and apply the taxing statute to the scheme as a whole and not to the separate transactions which make up the scheme. In *Ramsay* the taxable transaction (the sale of the farm) was followed by the tax avoidance transaction (the matching loans). *Furniss* decided that where a taxpayer adopts and carries into effect a scheme to avoid an assessment to tax

(1) 55 TC 324. (2) 54 TC 101.

A on an *intended* transaction by a *prior* tax avoidance transaction which serves no business purpose apart from the avoidance of tax which would otherwise become payable if the taxable transaction were carried out, the court will construe and apply the taxing statute to the scheme as a whole and not to the separate transactions which make up the scheme. In *Furniss* the taxpayers Dawsons adopted a scheme whereby a tax avoidance transaction (the
B exchange of shares with Greenjacket) was carried out to avoid an assessment to tax on an intended taxable transaction (the sale to Wood Bastow). The tax avoidance transaction had no business purpose apart from the avoidance of tax on the intended transaction. This House construed and applied the taxing statute to the scheme as a whole and not to the separate transactions, which
C made up the scheme and concluded that by the scheme Dawsons "disposed" of the shares in the operating company to Wood Bastow in consideration for cash paid to Greenjacket and that Dawsons "acquired" the shares in Greenjacket at a value equal to the price paid by Wood Bastow for the shares in the operating company.

D The Revenue only levy tax on a taxable transaction but a taxpayer cannot escape tax on a taxable transaction. Where a taxpayer plans and achieves two transactions, the question is whether the transactions are independent of one another or whether the two transactions are part of a scheme which produces a taxable transaction. In *Furniss* the exchange with Greenjacket and the sale to Wood Bastow were parts of a scheme which produced a taxable
E transaction, namely, a disposal of the shares in the operating company by Dawsons to Wood Bastow in consideration of cash paid to Greenjacket. The two transactions formed part of a scheme although they did not involve the same parties; the exchange of shares involved Dawsons and Greenjacket, the disposal of the shares to Wood Bastow involved Wood Bastow and Greenjacket. The two transactions formed part of a scheme although
F Dawsons had no control, direct or indirect, over Wood Bastow and could at no stage oblige Wood Bastow to buy the shares in the operating company. But both transactions were part of a scheme which was planned by Dawsons, which in the event was successful and which produced a taxable transaction. Two transactions can form part of a scheme even though it is wholly uncer-
G tain when the first transaction is carried out whether the taxpayer who is responsible for the scheme will succeed in procuring the second transaction to be carried out at all. If the exchange with Greenjacket had taken place after the negotiations with Wood Bastow had been begun but while it was still uncertain whether the negotiations with Wood Bastow would succeed, there would still have been a scheme planned by Dawsons to produce a tax-
H able transaction. If the negotiations with Wood Bastow succeeded then the scheme would succeed and would result in a taxable transaction. If the negotiations with Wood Bastow failed the scheme would fail, there would be no taxable transaction and any subsequent independent and genuine sale to Wood Bastow or to anybody else would not be taxable transaction. If Dawsons had carried out an exchange of shares with Greenjacket at a time
I when Dawsons were not planning a sale to Wood Bastow there would have been no scheme and a sale to Wood Bastow would not be a taxable transaction. The principle is that a taxable transaction which results from an artificial tax avoidance scheme is liable to tax. Put another way, an artificial tax avoidance scheme does not alter the incidence of tax.

In these appeals the Revenue argued that *Furniss*([1]) decided that whenever a taxpayer carries out a tax avoidance transaction, that transaction must be ignored for the purpose of computing the liability of the taxpayer to tax. This argument would prevent a taxpayer from availing himself of the fiscal immunities, privileges allowances and other mitigating factors provided or permitted by Parliament. If a taxpayer mindful of the immunity from taxation enjoyed by a Manx company transfers assets to a company in the Isle of Man, the immunity of that company will continue and may be enjoyed indirectly by the taxpayer subject to an express provision by Parliament to the contrary. Parliament intends that a taxpayer shall be free to place an asset out of reach of the taxing provisions. The courts have neither the power nor the desire to interfere. *Ramsay*([2]), *Burmah*([3]) and *Furniss*, however, decided that there is a distinction between an independent transaction carried out to avoid the ambit of a taxing statute in a manner authorised by Parliament and a transaction which is not an independent transaction but forms part of an artificial tax avoidance scheme designed to enable the taxpayer to carry out a taxable transaction and to avoid an assessment to tax. Parliament cannot have intended that an individual taxpayer should be able to elect to carry out a taxable transaction without paying the tax which Parliament has imposed proportionately on all taxpayers. The court is entitled and bound to construe the taxing statute and to apply the taxing statute in relation to the scheme as a whole.

The taxpayers involved in the present appeal put forward a submission which is as extreme in their favour as the argument for the Revenue is extreme in favour of the Revenue. The taxpayers submitted that *Furniss* is confined to its own facts. A scheme indistinguishable from Furniss in every respect will suffer the same fate as *Furniss*. But a scheme which is modelled on *Furniss* and is indistinguishable from *Furniss* in every respect save the time factor will, it is said, enable the taxpayer to avoid tax. Where there is a scheme which involves two transactions, the first of which serves no business purpose apart from the avoidance of an assessment to tax on the second transaction, the court cannot, it is submitted, view the scheme as a whole unless both transactions are carried out simultaneously or contemporaneously, where, for example, as in *Furniss*, both transactions are carried out on the same day. If there is an interval of time, deliberate or accidental, between the two transactions the court, it is said, must ignore the scheme and apply the taxing statute to each transaction separately unless perhaps, at the date of the first transaction it is "practically certain" that the second transaction will take place or there is no "practical likelihood" that the second transaction will not take place or unless the interval between the first and second transactions is so short that "the first transaction is not even contemplated practically as having an independent life." It is to be observed, however, that in an artificial tax avoidance scheme the first transaction is never contemplated as having an independent life because *Furniss* never applies unless the first transaction has no business purpose apart from the avoidance of a tax assessment on an intended second transaction.

If the shadowy, undefined and indefinable expressions "practically certain", "practical likelihood" and "practical contemplation" possess any meanings, those expressions and those meanings are not to be derived from *Furniss*. The speeches in *Furniss* consciously applied and extended the

([1]) 55 TC 324. ([2]) 54 TC 101. ([3]) 54 TC 200.

A principles enunciated by Lord Wilberforce and others in *Ramsay*(1) and by Lord Diplock and others in *Burmah*.(2) In *Furniss* this House did not labour to bring forth a mouse. The taxpayers rely on the references in the speech of Lord Brightman in *Furniss* to a "tripartite contract," to a "pre-ordained series of steps" and to "a single composite transaction." But Lord Brightman was vehement in asserting that the scheme in *Furniss* could be viewed as a B whole although Dawsons never controlled Wood Bastow by contract or otherwise. Lord Brightman and his colleagues were not concerned with the time factor of a scheme but with the identification and result of a scheme which Lord Brightman described as "a pre-planned tax saving scheme". Lord Brightman was saying that if two transactions are part of a scheme to avoid an assessment to a tax on the second transaction then the scheme must be C viewed as though there had been one tripartite contract instead of two transactions. It is inconceivable that Dawsons would have succeeded before this House in *Furniss* if the exchange with Greenjacket had taken place after negotiations with Wood Bastow had commenced and about a week or a month before the negotiations with Wood Bastow were concluded. When the exchange with Greenjacket took place, Dawsons and Wood Bastow might D still have been haggling about the purchase price for the operating company shares; or if the purchase price had been agreed in principle, Wood Bastow might have been waiting for a valuation and survey report on properties owned by the operating company; or Dawsons' solicitors and Wood Bastow's solicitors might have been discussing proposed amendments, essential, important or trivial to a draft contract. Even if the whole arrangement E with Wood Bastow had been agreed "subject to contract", either Dawsons or Wood Bastow would remain free to resile from the arrangement until Greenjacket, under the control of Dawsons and Wood Bastow, an independent third party, exchanged binding contracts. But the result in *Furniss* would have been the same whatever the state of negotiations between Dawsons and Wood Bastow at the date when the exchange with Greenjacket F was effected. The result would have been the same because *Furniss* decides that a taxing statute must be applied to an artificial tax avoidance scheme which seeks to avoid an assessment to tax on a taxable transaction by combining it with a prior tax avoidance transaction. An interval of time between two transactions is irrelevant save as evidence to be taken into account by the Commissioners when they are asked to decide whether the two transac- G tions were independent of one another or whether the two transactions form part of a pre-planned tax avoidance scheme. The taxpayers' submission in the present appeal that *Furniss* only applies to the scheme where negotiations for the second transaction have reached an advance stage at the date of the first transaction are devoid of logic and contrary to the principles established H by all our predecessors in *Ramsay*, *Burmah* and *Furniss*. Accordingly I reject the taxpayers' submissions just as I have rejected the Revenue's argument.

I have read the drafts of the speeches to be delivered in these present appeals. Three of those speeches accept the extreme argument of the taxpayers that *Furniss*(3) is limited to is own facts or is limited to a transaction I which has reached an advanced stage of negotiation (whatever that expression means) before the preceding tax avoidance transaction is carried out. These limitations would distort the effect of *Furniss*, are not based on principle, are not to be derived from the speeches in *Furniss*, and if followed would

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324.

only revive a surprised tax avoidance industry and cost the general body of taxpayers hundreds of millions of pounds by enabling artificial tax avoidance schemes to alter the incidence of taxation. In *Furniss* Lord Brightman was not alone in delivering a magisterial rebuke to those Judges who sought to place limitations on *Ramsay*(1) because they disliked the principle that an artificial tax avoidance scheme does not alter the incidence of tax. In my opinion a knife-edged majority has no power to limit this principle which has been responsible for four decisions of this House approved by a large number of our predecessors. Adapting the words of Lord Diplock in *Burmah*(2), it remains disingenuous to suggest, and dangerous on the part of those who advise taxpayers to assume, that *Ramsay* and *Furniss* did not mark a significant change in the approach adopted by this House in its judicial role to artificial tax avoidance schemes (whether or not they include the achievement of a legitimate commercial end) which include steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable.

Of course if there are two transactions separated in time, the Commissioners may conclude that the two transactions did not form part of an artificial tax avoidance scheme planned at the time of the first transaction and completed by the second transaction. If at the date of the first transaction no arrangements or negotiations are in train for the second transaction the Commissioners may conclude that both transactions were independent and were not part of a scheme. Each case will depend on the totality of the evidence accepted by the Commissioners who must ask themselves whether the two transactions were part of a scheme or were independently conceived and carried out. In most cases where there is a scheme, there will be evidence that arrangements or negotiations for the second transaction were Commenced before the first transaction was carried out, and in most cases where there is a scheme the interval between the first and second transactions will be short. Sometimes the Commissioners on the evidence will conclude that there was no scheme. Sometimes the Commissioners will conclude on the evidence that although there was an initial scheme at the time of the first transaction, that scheme foundered and that the second transaction was not part of the scheme. Dawsons would have come to no harm, if after the exchange with Greenjacket, the negotiations with Wood Bastow had broken down. The scheme would have foundered and a subsequent sale of the shares in the operating company by Greenjacket would not be part of the scheme. Two of the present appeals are illustrations of a scheme which foundered. The Commissioners will consider, wherever appropriate, whether the alleged breakdown of a scheme was contrived or was only a temporary interruption. This complication is not present in the appeals now before the House and this complication will be of infrequent occurrence. The Commissioners should have no difficulty in deciding whether there was a scheme at the time of the first transaction and, if so, whether it was that scheme which was completed by the second transaction.

The trilogy of tax avoidance cases, *Ramsay, Burmah* and *Furniss* decided that a scheme to avoid an assessment of tax on a taxable transaction by a tax avoidance transaction which serves no business purpose apart from the avoidance of the tax which would otherwise be payable in respect of the taxable transaction must be viewed as a whole; the taxing statute must be applied to the scheme and not to the constituent transactions comprised in

(1) 54 TC 101. (2) 54 TC 200.

A the scheme. In the case of a *Furniss*(1) scheme where the tax avoidance transaction precedes the taxable transaction four essential conditions must be satisfied.

First, the taxpayer must decide to carry out, if he can, a scheme to avoid an assessment of tax on an intended taxable transaction by combining with a B prior tax avoidance transaction. Secondly, the tax avoidance transaction must have no business purpose apart from the avoidance of tax on the intended taxable transaction. Thirdly, after the tax avoidance transaction has taken place, the taxpayer must retain power to carry out his part of the intended taxable transaction. Fourthly, the intended taxable transaction must in fact take place. In *Furniss* the taxpayers, Dawsons, adopted a scheme with C the object of avoiding an assessment to tax on a sale to Wood Bastow then under negotiation. The exchange of shares with Greenjacket had no business purpose apart from the avoidance of tax on the intended sale to Wood Bastow. After the exchange with Greenjacket the Dawsons retained power to carry out their part of the intended sale to Wood Bastow because they had power through their shareholding in Greenjacket to ensure that Greenjacket D sold to Wood Bastow if Dawsons and Wood Bastow agreed. Finally, the sale to Wood Bastow took place thus completing the scheme. The scheme as a whole effected a disposal of the shares in the operating company by Dawsons to Wood Bastow in consideration of cash paid to Greenjacket. The scheme as a whole effected an acquisition by Dawsons of the shares in Greenjacket at the value paid by Wood Bastow for the shares in the operating company.

E

In *Ramsay*(2) the scheme left a taxable transaction remaining liable to tax. In *Furniss* the scheme resulted in a taxable transaction. *Furniss* does not require a taxpayer to pay the maximum amount of tax and does not prevent a taxpayer from taking steps to mitigate tax. A "bed and breakfast" scheme which consists of a sale and reacquisition of shares is not affected by *Furniss* F because the scheme does not create a taxable transaction apart from the sale which the taxpayer brings into his tax computation by exercising his right to sell when he pleases. If a taxpayer strips a company of dividend before selling the company's business or its shares then, without more, and subject to any statutory provisions to the contrary, the two transactions only involve one disposal, namely, the sale of the business or the shares for the price paid by G the purchaser. *Furniss* only requires that a scheme which satisfies the four essential conditions present in *Furniss* shall be viewed as a whole and that any taxable transaction which results from that scheme shall be taxed. The taxable transaction which resulted from the scheme in *Furniss,* viewed as a whole, was a disposal by Dawsons of the shares in the operating company to H Wood Bastow in consideration of cash paid to Greenjacket.

It has been suggested that the *Furniss* principle interferes with the freedom of a taxpayer. This suggestion is based on a misunderstanding. A taxpayer is free to enter into any transaction he chooses. In *Furniss* the shares in the operating company were first acquired by Greenjacket and then acquired I by Wood Bastow. The shares in the operating company were exchanged by Dawsons for shares in Greenjacket. The purchase price paid by Wood Bastow for shares in the operating company was received by Greenjacket. All these transactions were genuine and the court did not interfere with them or

(1) 55 TC 324. (2) 54 TC 101.

their effect. But the two transactions constituted a scheme for avoiding an assessment to capital gains tax by combining a tax avoidance transaction and a taxable transaction. Viewing the scheme as a whole and construing and applying the taxing statute this House held that there was a capital gains tax "disposal" by Dawsons of the shares in the operating company in consideration for the price paid by Wood Bastow to Greenjacket and there was an "acquisition" by the taxpayers of the shares in Greenjacket for the price paid by Wood Bastow.

In *Ramsay*(1) [1982] AC 300, 325 Lord Wilberforce dealt with the submission that the courts should not concern themselves with tax avoidance and he concluded, at p. 326, that it was permissible and necessary:

> "To apply to new and sophisticated legal devices the undoubted power and duty of the courts to determine their nature in law and to relate them to existing legislation. While the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still. Such immobility must result either in loss of tax, to the prejudice of other taxpayers, or to Parliamentary congestion or (most likely) to both. 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."

It was also argued that *Furniss*(2) involves double taxation. This argument is based on a misunderstanding. Furniss only construed and applied the capital tax legislation. By the scheme Dawsons "disposed" of the shares in the operating company for the price paid by Wood Bastow to Greenjacket. Dawsons made a capital gain of the difference between the price originally paid by Dawsons when they acquired the operating company shares and the price paid by Wood Bastow to Greenjacket at the behest of the Dawsons. The scheme also effected an "acquisition" by Dawsons of the shares of Greenjacket in consideration for the price paid by Wood Bastow to Greenjacket. If and when the Dawsons dispose of their shares in Greenjacket they will make a capital gain or loss of the difference between the price received by Greenjacket from Wood Bastow for the shares in the operating companies and the price obtained by the Dawsons on their disposal of the Greenjacket shares. There is no double taxation.

It was also argued that in certain circumstances *Furniss* might introduce fiscal complications. A substantial interval of time might elapse between the transfer of the operating company shares from Dawsons to Greenjacket and the transfer of the operating company shares from Greenjacket to Wood Bastow. The transfer to Wood Bastow might never take place. But if the transfer to Wood Bastow never took place there would be no completed scheme. If there was an interval of time between the two transactions it was suggested that the Revenue might assess the parties to tax on the basis that there had been a disposal from Dawsons to Greenjacket of the operating company shares and that it would be difficult or impossible to revise those estimates when the transfer to Wood Bastow took place. But the whole point of the transfer from Dawsons to Greenjacket was that there would appear to be no disposal. No tax can be assessed unless and until the scheme is com-

(1) 54 TC 101. (2) 55 TC 324.

A pleted when Greenjacket transfers to Wood Bastow. If there is a substantial interval of time between two transactions there is probably no scheme.

The courts below, dealing with the three cases now under appeal, were faced with the choice between the wide construction of *Furniss*[1] advanced by the Revenue and the narrow construction favoured by the taxpayers. The B courts understandably chose the latter construction. In the result all the courts below decided in favour of the taxpayers. The Revenue now appeal and the question in each case is whether there was a scheme and, if so, whether the essential conditions were satisfied so that the taxing statute must be construed and applied to the scheme as a whole.

C In *Craven* v. *White* the taxpayers held the issued shares in Queensferry which carried on a family grocery business on the mainland. In 1976 the taxpayers were negotiating for a merger of the business of Queensferry with the business of a company called Cee-N-Cee. The taxpayers were, at the same time, negotiating for a sale of the Queensferry shares to a subsidiary of a company called Oriel. It was quite uncertain whether the negotiations with D Cee-N-Cee would succeed or whether the negotiations with Oriel would succeed or whether both negotiations would fail. The taxpayers acquired Millor, an Isle of Man company, which was planned to be employed with the merger with Cee-N-Cee or in the sale to Oriel should either set of negotiations succeed. In July 1976, as the Commissioners found, the taxpayers were advised that if the Queensferry shares were transferred to Millor, and if Millor then E sold the Queensferry shares to Oriel, capital gains tax would be avoided and the purchase price could then be loaned by Millor to the taxpayers who would control Millor. On 19 July 1976 the taxpayers exchanged their shares in Queensferry for shares in Millor. This was a classic *Furniss* scheme. The object was to avoid an assessment of tax on the intended taxable sale to Oriel by means of the prior exchange. In the context of that sale, the exchange F with Millor had no business purpose apart from the avoidance of tax on the intended taxable sale to Oriel. The taxpayers retained power to procure a sale to Oriel. On 9 August 1976, the taxpayers procured Millor to sell the Queensferry shares to Oriel for cash on terms arrived at between the taxpayers and Oriel. The scheme was thus completed. This indeed is admitted but the taxpayers argue that on 19 July 1976 it was possible that the taxpayers G might have achieved a merger with Cee-N-Cee instead of sale to Oriel. If there had been a merger with Cee-N-Cee, it is said, whether accurately or inaccurately I know not, that the transaction of 19 July 1976 would have served a business purpose and the scheme would not have succeeded. In my opinion the fact, if it be a fact, that the exchange with Millor on 19 July 1976 H might have served a business purpose if the negotiations with Cee-n-Cee had succeeded is immaterial. In the event, the only negotiations which succeeded were the negotiations with Oriel and the transfer of the Queensferry shares to Millor served no business purpose apart from the avoidance of tax on the sale of the Queensferry shares to Oriel. There is no relevant distinction between the facts in *Furniss* and the facts in *Craven* v. *White* and accordingly I the sale of the Queensferry shares to Oriel was a disposal by the taxpayers.

In *Baylis* v. *Gregory* taxpayers held a majority of the shares in a company P.G.I. which dealt in industrial gloves and other protective clothing. In

---

[1] 55 TC 324.

the autumn of 1973 the taxpayers negotiated with a company Cannon for the sale of the P.G.I. shares. The sale was planned to be carried out through an Isle of Man company on the *Furniss* model. Cannon broke off negotiations for the purchase of the P.G.I. shares on 13 February 1974. On 19 February 1974 an Isle of Man company, Holdings, was incorporated and on 11 March 1974 the shareholders in P.G.I. exchanged their shares for shares in Holdings. The plan to sell to Cannon was at an end but, as the Commissioners found, the taxpayers "saw no disadvantage (rather the possibility of a future advantage)" in the share exchange. Following a later initiative from a company Hawtin, the taxpayers procured a sale of the P.G.I. shares by Holdings to Hawtin for cash on 30 January 1976. The Commissioners held that there was no such connection between the first transaction of 19 February 1974 and the second transaction of 30 January 1976 as sufficed to make them part of a composite transaction. The two transactions were not part of a single scheme. At the date of the first transaction the taxpayers had abandoned the plan to sell the P.G.I. shares. The taxpayers placed themselves in a position to escape tax in the future but there was no scheme. The sale by Holdings was a transaction independent from the exchange of shares.

In *Inland Revenue Commissioners* v. *Bowater Property Developments Ltd.* the Bowater Group negotiated for the taxpayer company which was part of the Bowater Group, to sell land at Crafts Marsh to a company Milton Pipes for £202,500. On 25 March 1980 the taxpayer company sold Crafts Marsh for £180,000 to five companies which were also part of the Bowater Group in equal shares. If the five companies sold Crafts Marsh each would be entitled to claim £50,000 exemption from development land tax afforded by s 12 of the Development Land Tax Act 1976. Under that Act the tax is payable on a "disposal". The Bowater Group continued to negotiate with Milton Pipes until July 1980 when Milton Pipes broke off negotiations saying that they no longer wished to purchase the land. In February 1981 Milton Pipes reopened negotiations and purchased Crafts Marsh on 23 October 1981 for £260,000. The Commissioners concluded that the sale of 25 March 1980 and the sale of October 1981 were not parts of a single composite transaction. When the first transaction was undertaken the scheme was to sell to Milton Pipes but that scheme was frustrated when Milton Pipes abandoned the negotiations. The eventual sale was an independent transaction and the *Furniss*(1) principle does not apply.

On behalf of the taxpayers, Mr. Park took the additional point that the taxpayer company sold Crafts Marsh to five companies at a fair price and that the purchasing companies were not subsidiaries of the taxpayer company although they were all members of the Bowater Group and subject to ultimate group management and control. I do not consider that this would have made any difference if the five companies had sold to Milton Pipes in July 1980 in accordance with the original scheme. There would have been a scheme by the taxpayer company to sell to Milton Pipes for £202,500 of which £180,000 would be payable to the taxpayers and £22,500 to the five companies. The taxpayer company would have "disposed" of Crafts Marsh for £202,500 just as in *Furniss* the taxpayers disposed of the shares in the operating company to Greenjacket for the price paid by Wood Bastow.

(1) 55 TC 324.

A The Court of Appeal found in favour of all three respondents. I would allow the appeal of the Revenue in *Craven* v. *White* and dismiss the appeals in *Baylis* v. *Gregory* and in the *Bowater* case.

Lord Oliver of Aylmerton—My Lords, in each of these three appeals property originally acquired by the respondent taxpayer has been sold at a B price considerably in excess of the original acquisition cost. In none of them has the purchase price been directly received by the taxpayer from the purchaser because in each case, before the sale was completed or even agreed, the property had been vested in a company or companies controlled by or associated with the taxpayer which entered into the contract with the purchaser, completed the sale and received the proceeds. In each case the appel- C lant, the Inland Revenue, claimed tax from the taxpayer in reliance upon the decision of your Lordships' House in *Furniss* v. *Dawson*(1) [1984] AC 474 and in each case that claim has been rejected both in High Court and in the Court of Appeal.

D It will be remembered that in that case the transactions which had to be considered by your Lordships' House substantially reproduced the first (and, at that time, successful) stage in *Floor* v. *Davis*(2) [1978] Ch. 295. The controlling shareholders in a family company had negotiated a sale of their shares to the point at which nothing further required to be agreed, although there was no binding contractual commitment of either side. That, in fact, E was the only element that was lacking. At that stage, having taken advice with regard to the tax implications of the proposed sale, they resolved to channel the sale through a company to be formed in the Isle of Man and thus, by taking advantage of the provisions of Sch 7 to the Finance Act 1965, to postpone the payment of capital gains tax on the sale until such time as they came to sell their shares in the Manx company, if that ever occurred. F They obtained the consent of the purchaser to this change of plan and the arrangements for the incorporation of the Manx company, an agreement to issue shares in that company in exchange for shares in the operating company, the approval and signature of an agreement for the sale of those shares on to the ultimate purchaser and the transfers of the shares were all carried through in a single afternoon, the transaction being actually completed four G days later by the appropriate issues and the approval of the transfers or allotment of the shares and the payment of the price. The whole operation was, to use Lord Brightman's words, "planned and executed with faultless precision." This House concluded unanimously that the transactions into which the taxpayers and the intermediate company had entered constituted in fact one single transaction which involved a disposal of shares in the operating H companies from the taxpayers to the ultimate purchaser upon which capital gains tax was payable by the taxpayers. The rationale of the decision is contained in the following passage from the leading speech of Lord Brightman, at p.526:(3)

> "My Lords, in my opinion the rationale of the new approach is this.
> I In a pre-planned tax-saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) a like series of steps which are fol-

(1) 55 TC 324. (2) 52 TC 609. (3) [1984] AC 474.

lowed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results. For example, equitable interests may pass when the contract for sale is signed. In many cases equity will regard that as done which is contracted to be done. *Ramsay*(1) says that the fiscal result is to be no different if the several steps are pre-ordained rather than pre-contracted. For example, in the instant case tax will, on the *Ramsay* principle, fall to be assessed on the basis that there was a tripartite contract between the Dawsons, Greenjacket and Wood Bastow under which the Dawsons contracted to transfer their shares in the operating companies to Greenjacket in return for an allotment of shares in Greenjacket, and under which Greenjacket simultaneously contracted to transfer the same shares to Wood Bastow for a sum in cash. Under such a tripartite contract the Dawsons would clearly have disposed of the shares in the operating companies in favour of Wood Bastow in consideration of a sum of money paid by Wood Bastow with the concurrence of the Dawsons to Greenjacket. Tax would be assessed and the base value of the Greenjacket shares calculated accordingly. *Ramsay*(1) says that this fiscal result cannot be avoided because the pre-ordained series of steps are to be found in an informal arrangement instead of in a binding contract. The day is not saved for the taxpayer because the arrangement is unsigned or contains the words 'this is not a binding contract.'

The formulation by Lord Diplock in *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*(2) [1982] STC 30, 33 expresses the limitations of the *Ramsay* principle. First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax—not 'no business *effect*.' If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied."

The transactions which are before your Lordships in these three appeals all display the same basic pattern as the *Furniss* v. *Dawson*(3) [1984] AC 474 transactions in the sense that there has been an ultimate purchase of property originally in the beneficial ownership of the taxpayer which, before the completion of the purchase, has been vested in an intermediate company or companies controlled by the taxpayer or, in the case of the Bowater appeal, by the parent company of the taxpayer. In each case, however, one or more of the salient features present in the *Furniss* v. *Dawson* transactions is missing. In particular the transactions which, in each appeal, the Inland Revenue seeks now to reconstruct into a single direct disposal from the taxpayer to an ultimate purchaser were not contemporaneous. Nor were they pre-ordained or composite in the sense that it could be predicated with any certainty at the date of the intermediate transfer what the ultimate destination of the property would be, what would be the terms of any ultimate transfer or even

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324.

A whether an ultimate transfer would take place at all. In none of the three appeals therefore do the facts match with the criteria set out in Lord Brightman's speech. The findings of the Special Commissioners are fully set out in the report of the three cases below ([1985] 3 All ER 125, [1985] STC 783, and [1986] 1 All ER 289) and it is unnecessary for present purposes to do more than summarise them very briefly, although it will be necessary at a B later stage to look rather more closely at the circumstances in the case of *Craven* v. *White* which bears a much closer resemblance to *Furniss* v. *Dawson* than do the other two appeals.

In *Craven* v. *White* the sequence was that the taxpayers, who owned a controlling interest in a family food-retailing company, Queensferry, were, in C 1976, engaged in negotiations with two interested parties. One such negotiation was a possible merger with another similar group, Cee-N-Cee, which did not have the resources available for an out-and-out purchase. The other was with a company called Oriel and was for a sale of the Queensferry shares at a price which, it was expected, would be in excess of £2m. The instructions for the acquisition of the intermediate company were given at a time when the D latter negotiation (which was the preferred option) had gone cold and the evidence was that at least one purpose of those instructions was to provide a convenient vehicle for the suggested merger with Cee-N-Cee, if it took place, although there is no doubt that the taxpayers had very much in mind the advantages from the point of view of capital gains tax if they achieve the preferred option of a sale. The negotiations to that end resumed after the E instructions had been given but before the Queensferry shares were exchanged for shares in the intermediate company, an event which took place on 19 July. At that date the negotiations were being actively pursued but without any certainty that they would prove successful and the Special Commissioners, whilst rejecting the taxpayers' evidence that the sole purpose of the formation of the intermediate company was to act as a holding com- F pany for the merger with Cee-N-Cee, nevertheless found as a fact that the taxpayers were then keeping their options open. There were at that time considerable difficulties and uncertainties and contemporaneous negotiations with Cee-N-Cee continued. The operation, at that stage therefore, served two alternative purposes. The negotiations with Oriel finally resulted in an agreement for sale on 9 August 1976 between the intermediate company and a G subsidiary of Oriel which agreement the Inland Revenue claim is to be treated as a disposal by the taxpayer directly to Oriel.

In the case of Bowater Development Co., the sequence was very different. Here the taxpayer company had been in negotiation for the sale of a parcel of land to a purchaser, Milton Pipes Ltd., at a price which had been agreed H subject to contract — a sale which, had it then taken place, would have caused the taxpayer to incur a liability for development land tax. It had also been agreed that the sale would be conditional upon a suitable planning permission having been obtained. Those negotiations ran into difficulties and the purchaser pulled out. Prior to this, however, in March 1980, solely with a view to avoiding development land tax on any ultimate sale and in the firm I expectation that the sale would go through ultimately, the taxpayer sold its interest in the land to five different companies within the same group at a proper commercial price, each company taking a one fifth undivided share. Each company was entitled to an exemption under s 12 of the Development Land Tax Act 1976, as amended, the amount of which, when added to the

exemptions of the other four, was sufficient to absorb the whole probable gain, thus insuring that no development land tax would become payable on the proposed sale. Fresh draft contracts were submitted to the proposed purchaser which were subsequently returned when the negotiations fell through. Some 11 months later the same purchaser again evinced interest in the land and ultimately purchased it from the five intermediate companies in October 1981.

In the third appeal, that of Gregory, the taxpayers, with a view to selling their shares in the family company to a prospective purchaser, arranged for those shares to be exchanged for shares in an intermediate company. Before that took place the purchaser withdrew but the intermediate company was formed and the share exchange completed in March 1974. Some 18 months later and without any relation whatever to the prior negotiations, a different purchaser approached the taxpayers with a view to acquiring the shares in the operating company. These were eventually sold by the intermediate company to that purchaser on 30 January 1976.

Thus in each case one or more of the criteria enunciated by Lord Brightman is missing and the appeals raise essentially three questions for your Lordships' decision. First, are those criteria definitive as they appear to have been intended by Lord Brightman to be or are they capable of expansion so as to embrace all or any of the transactions here in question either because they merely exemplify some wider principle or because it may be thought politic that they should be so expanded? Secondly, *ought* they to be expanded by your Lordships as a matter of judicial intervention into an area in which Parliament is demonstrably capable of legislating effectively but has not sought to do so? Thirdly, and if the answer to the second question is affirmative, what formula or principle are your Lordships to evolve which will be at once certain, effective and easy to apply and upon what legal foundation is such a principle to be based?

As to the first question, the features of the transactions the subject matter of these appeals which are said to produce the result for which the Inland Revenue contended are, on analysis, first an initial contemplation by the taxpayer of a transaction of the kind which has in fact taken place and secondly that what I will call for convenience the intermediate transfer was effected with the dominant, if not the sole, motive of saving or minimising the tax which would become payable if that contemplated transaction took place without it. It is said that the result for which the appellants contend in these circumstances is merely the logical application of the principle enunciated by your Lordships' House in *Furniss* v. *Dawson*(1) [1984] AC 474 and no more than invocation of the recently emerging role of the courts as an agency for preventing taxpayers from taking advantage of the statutory consequences which the legislature has seen fit to attach to certain actions for the purpose of avoiding, minimising or postponing the tax which would attach to a transaction if it were carried out in some other manner.

What has clearly emerged from the arguments and the discussion in your Lordship's House is that there are two different and, to some extent, conflicting views about what *Furniss* v. *Dawson* decided. On one view it decided that any transaction having as its purpose, or as one of its purposes, the avoidance, minimisation or postponement of a liability to tax on another

(1) 55 TC 324.

A transaction of a kind which was then in contemplation and which subsequently takes place is to be ignored for fiscal purposes because it has been planned to take place and therefore forms part of a "scheme for the avoidance of tax"—a proposition said to derive from *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*(1) [1982] AC 300. On this view of the matter, the state of negotiation achieved in *Furniss* v. *Dawson* [1984] AC 474 at the date B of the share exchange and the likelihood or otherwise of that negotiation resulting in a final agreement were entirely immaterial. It was sufficient that the share exchange was effected with that contemplation or anticipation for it then became part of a "scheme". On the other view, *Furniss* v. *Dawson* decided no more than that the approach to the construction of interdependent transactions sanctioned by the *Ramsay* case is properly to be applied to C what has been described as a "linear" transaction as well as to a circular self-cancelling transaction if the necessary conditions exist enabling the court realistically to regard the two transactions together as constituting one single composite and indivisible whole involving only a single disposal for tax purposes.

D Now it has, I think, to be accepted that *Furniss* v. *Dawson*(2), whilst it purported to do no more than apply the *Ramsay* principle to a different set of facts, involved in fact an extension of the principle and it did so not simply because it applied the principle to a "linear" transaction as opposed to a circular transaction. The *Ramsay* principle is simply that you look at the result which the parties actually intended to and did produce and apply to it E the ordinary fiscal consequences which flow from that result. *Furniss* involved going a considerable step further than this and, by reconstituting the actual constituent transactions into something that they were not in fact, attributed to the parties an intended result which they did not in fact intend. To that unintended result there are then attached the fiscal consequences which would have flowed if the transaction had actually taken the form into F which it is deemed to be reconstituted. It has to be borne in mind that the particular transaction with which *Furniss* concerned, and with which each of the three appeals before your Lordships is concerned, was one in which an actual exchange of shares had taken place, a transaction which had permanent legal and fiscal results and to which certain fiscal provisions applied G from the moment at which the transaction was effected. The critical question is that of identifying the circumstances in which such a transaction can be simply ignored and in which so radical a reconstruction of the actual events as that undertaken in *Furniss* v. *Dawson* is permissible and is to be undertaken by the court and whether, apart from the concept of tripartite contract upon which reliance was placed in reaching the decision in *Furniss*, such a H reconstitution is rationally and logically possible within the accepted principles of construction provided by *Ramsay* or, indeed, any other principle.

It has been urged, in the course of the argument, that in *Furniss* v. *Dawson* this House crossed the Rubicon and that your Lordships should not be astute to confine the bridgehead thus created. That event, of course, con- I stituted a declaration of war upon the republic of Italy and I confess that I do not find the analogy drawn from so partisan an exercise an altogether happy one. I do not, however, quarrel with the general proposition, but before embarking even upon a reconnaissance into republican territory it is

(1) 54 TC 101. (2) 55 TC 324.

at least desirable to test what the bridge will support by an analysis of the means by which the crossing was effected. The first essential, therefore, appears to me to be to analyse the true basis and the legal justification for the decision in *Furniss* v. *Dawson* in order to see whether it does in fact rest upon or establish some wider principle of law which justifies the appellant's claim to recover tax from the respondents upon gains from which, no doubt, they benefited but which did not in fact directly accrue to them. The second is to construe the relevant statute and to apply it to such facts as have been found or as may properly be inferred.

My Lords, I confess to having been a less than enthusiastic convert to *Furniss* v. *Dawson* because I found, initially at any rate, some difficulty in following the intellectual process by which, in contradistinction to the cases which preceded it, it reconstructed the transaction which had taken place in that case in a way which disapplied the specific statutory consequences which, on the face of them, attached to the intermediate transfer which had in fact taken place and which the Special Commissioners had found as a fact was a genuine transaction. It has been said in the course of argument on the present appeals that *Furniss* v. *Dawson*(1) is "judge-made law." So it is, but judges are not legislators and if the result of a judicial decision is to contradict the express statutory consequences which have been declared by Parliament to attach to a particular transaction which has been found as a fact to have taken place, that can be justified only because, as a matter of construction of the statute, the court has ascertained that that which has taken place is not, within the meaning of the statute, the transaction to which those consequences attach. It seems to me, therefore, that the first and critical point to be borne in mind in considering the true ratio of *Furniss* v. *Dawson* is that it rests not upon some fancied principle that anything done with a mind to minimising tax is to be struck down but upon the premise that the intermediate transfer, whose statutory consequences would otherwise have resulted in payment of tax being postponed, did not, upon the true construction of the Finance Act 1965, constitute a disposal attracting the consequences set out in paras 4 and 6 of Sch 7 to the Act. That is the first point. The second is that, in reaching that conclusion as a matter of construction, this House did not purport to be doing anything more than applying and explaining the principle which had been laid down two years previously in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*(2) [1982] AC 300. It was that decision which explains why and how the question of construction raised in *Furniss* v. *Dawson* came to be answered in the way that it did and it is, as it seems to me, only if these two considerations are borne in mind that *Furniss* v. *Dawson* itself can be properly understood or rationally justified as a proper exercise of the judicial function.

The genesis of and, indeed, the legal basis for *Furniss* v. *Dawson* [1984] AC 474 is the case of *Ramsay* [1982] AC 300 and in the course of the argument there has been a good deal of discussion about what has been termed the "*Ramsay* principle." Since this really lies at the root of the matter it is essential initially to identify what the principle is. It is easy to select words from the speeches and by attributing to them a significance which divorces them from their context to construct a principle of law which bears no necessary relation to the actual ratio of the decision. First, it can be said that in *Ramsay* the taxpayer's object of saving tax was frustrated by the court and that *Ramsay* was concerned with a "scheme". But a scheme in its ordinary

(1) 55 TC 324. (2) 54 TC 101.

A signification means no more than a conscious plan to take a particular action for the purpose of producing an intended result. Secondly, *Ramsay* was concerned specifically with "a tax-saving scheme" which means no more than that there was an intended action for the purpose of saving tax. Thirdly, it was a scheme involving a "series" of events. But a series means no more than a succession of related matters — a description that applies to virtually every B human activity embarked upon with a view to producing any rational result. And so one ends up with the broad proposition of law that the court will frustrate any transaction deliberately undertaken with a view to saving tax and involving successive steps or events which are the result of conscious volition. But this, in my view, is to ignore what is the true underlying ratio of the case. *Ramsay* was concerned with a scheme of a particular but familiar C type, that is to say, an artificially contrived concatenation of individual transactions linked together with the purpose of producing an end result entirely different from that which, on the face of it, would have been achieved by each successive link in the preconceived chain if such a link fell to be considered in isolation from its partners. That the enterprise was undertaken with an intention of saving tax and was thus categorised as "a tax-sav- D ing scheme" was of course important and relevant in three senses. In the first place this sort of artificial loss creation is not normally undertaken in any other context. Secondly, the lack of any discernible object other than the saving of tax underlines the total artificiality of the design. And thirdly, of course, the court was concerned specifically with the construction of a taxing statute and its application to the structure artificially brought into being. But E the essence of the decision lay not in the fact that the object of the exercise was to save tax but in the approach of the court as a matter of construction to a devised combination of events designed to produce an actual result quite different from that which, for fiscal purposes, it was intended to display. It is, therefore, of critical importance to appreciate what was the "emerging principle" which was enunciated in that case in the speeches of Lord F Wilberforce and Lord Fraser of Tullybelton.

It is equally important to bear in mind what the case did not decide. It did not decide that a transaction entered into with the motive of minimising the subject's burden of tax is, for that reason, to be ignored or struck down. Lord Wilberforce at p. 323 was at pains to stress that the fact that the motive G for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. Nor did it decide that the court is entitled, because of the subject's motive in entering into a genuine transaction, to attribute to it a legal effect which it did not have. Both Lord Wilberforce and Lord Fraser of Tullybelton emphasize the continued validity and application H of the principle of *Inland Revenue Commissioners* v. *Duke of Westminster*(1) [1936] AC 1, a principle which Lord Wilberforce described as a "cardinal principle." What it did decide was that that cardinal principle does not, where it is plain that a particular transaction is but one step in a connected series of interdependent steps designed to produce a single composite overall result, compel the court to regard it as otherwise than what it is, that is to I say, merely a part of the composite whole. In the ultimate analysis, most, if not all, revenue cases depend upon a point of statutory construction, the question in each case being whether a particular transaction or a particular combination of circumstances does or does not fall within a particular for-

(1) 19 TC 490.

mula prescribed by the taxing statute as one which attracts fiscal liability. As part of that process it is, of course, necessary for the courts to identify that which is the relevant transaction or combination before construing and applying to it the statutory formula. Reduced to its simplest terms that is all that *Ramsay*(1) did. Referring to the Crown's contention Lord Wilberforce observed [1982] AC 300, 326:

> "That does not introduce a new principle: it would be to apply to new and sophisticated legal devices the undoubted power and duty of the courts to determine their nature in law and to relate them to existing legislation."

The question in issue in *Ramsay* was in fact a very simple one, and it was whether the appellants had suffered an allowable loss within the meaning of s 23 of the Finance Act 1965 which they were entitled to set against the capital gains which they had admittedly made. In each of the two schemes with which the appeals were concerned, there was no purpose in view other than the artificial manufacture of what was intended to be an allowable loss in such a way that the taxpayer suffered no loss at all in fact because, by another integrated and pre-planned transaction, the artificially contrived loss was balanced precisely by a non-chargeable gain. To find in these circumstances that the "loss" is found not to be a loss within the meaning of the statute when properly construed, is neither very surprising nor very revolutionary. In Lord Wilberforce's words, at p. 326(2):

> "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 ... To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function."

The taxpayers in *Ramsay* assumed the burden of establishing that they had sustained allowable losses within the meaning of the statute and they did so by isolating two artificially contrived transactions which would, if taken on their own and isolated from every other feature of the schemes which had been purchased, demonstrate that they were arithmetically worse off at a particular point of time if the continuous series of operations were treated as then interrupted. But the fact was, as was plain to see, that those transactions not only were not intended to be interrupted or to stand in isolation but could not in fact have done so in the real world. They were totally dependent upon and integrated with other transactions whose purpose, and whose only purpose, was to nullify their effects and to leave the taxpayer in exactly the same position as they were before. In the one case there was actually a contractual obligation to carry the steps through to the end; in the other there was the confident expectation that they would be carried through to the end and no likelihood whatever that they would not. In the words of Lord Fraser of Tullybelton, at pp. 337–338:

(1) 54 TC 101. (2) *Ibid* at page 187.

A "It is perfectly clear that neither of these disposals would have taken place except as part of the scheme, and, when they did take place, the taxpayer and all others concerned in the scheme knew and intended that they would be followed by other prearranged steps which cancelled out their effect. In *Rawling* the intention was made explicit as the supplier of the scheme, a company called Thun Holdings Ltd., bound itself B contractually, if the scheme was once embarked upon, to carry through all the steps. There is, therefore, no reasons why the court should stop short at one particular step. In *Ramsay* the supplying company, Dovercliff Ltd., did not undertake any contractual obligation to carry the scheme through, but there was a clear understanding between the C taxpayer and Dovercliff that the whole scheme would be carried through; that was why the taxpayer had purchased the scheme. The absence of contractual obligation does not in my opinion make any material difference."

In these circumstances it is easy to understand why and how the conclu- D sion was reached that the Appellants had failed to discharge the burden which they had undertaken. Indeed the contrary conclusion would have been surprising. What the case does demonstrate, as it seems to me, is that the underlying problem is simply one of the construction of the relevant statute and an analysis of the transaction or transactions which are claimed to give rise to the liability or the tax exemption. But it does not follow that because E the court, when confronted with a number of factually separate but sequential steps, is not compelled, in the face of the facts, to treat them as if each of them had been effected in isolation, that all sequential steps must invariably be treated as integrated, interdependent and without individual legal effect. Indeed, *Inland Revenue Commissioners* v. *Plummer*(1) [1980] AC 896 was a F case in which, although the transactions effected were integrated as part of a preconceived scheme which was commercially marketed and had no other conceivable purpose than that of saving tax, the construction of the statute compelled the acceptance of a fiscal result which accorded very ill with the true "substance" of the transactions taken as a whole. Every case has to be determined on its own facts and every series of transactions has to be exam- G ined and analysed to determine whether in truth, it constitutes a single composite and integrated whole entitling the court, in construing the statute, to ignore the legal effect of individual steps because they are not and never were contemplated as other than part of a single whole. No doubt the fact that neither the transactions as a whole nor any ingredient in it, taken on its own, serves or is intended to serve any purpose other than that of avoiding a lia- H bility to or attracting an exemption from a charge to tax facilitates an analysis of the transaction as an integrated whole, both in fact and in intention, but the appellants in *Ramsay*(2) failed not because they had engaged in an exercise designed to eliminate their tax liability, but because the planned and integrated steps which they took and the intended and actual outcome of I those steps did not, on analysis, achieve the fiscal purpose which it was hoped to achieve. And the reason why it did not achieve it was that, on its true construction, the word "loss" in the statute meant an actual loss and not merely a manipulated arithmetical difference.

(1) 54 TC 1. (2) 54 TC 101.

The judicial approach as exemplified by *Ramsay* was carried one stage further in *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*[1] 54 TC 200, but the salient features of that case were not essentially different. There again the taxpayer assumed the burden of demonstrating an allowable loss and it did so by a pre-planned and interrelated series of book entries, backed by a completely circular series of payments, the result of which was to transmute a bad debt into share capital. Once again this House analysed the transactions as a single composite whole and had regard to the actual end result. Once again there was a single pre-arranged scheme and a finding by the Special Commissioners that the progressive steps took place in order and according to a timetable prepared in advance. Theoretically, of course, there was no compulsion to proceed with the scheme to the end but, to use the words of Lord Fraser of Tullybelton, at p. 220:

> "the reality was that the decision had already been taken to carry it through to completion, and that was unquestionably the intention of the directors in this case, just as it was the intention of all parties concerned in *Ramsay* and in *Chinn* v. *Hochstrasser*[2] [1981] AC 533."

What was significant about the case, however, was the comment of Lord Diplock in relation to the *Ramsay*[3] approach, which he related specifically to tax-avoidance schemes. He said, at p. 214[4]:

> "It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume that *Ramsay's* case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable. The difference is in approach."

It is this reference to the motive of the taxpayer in engaging in a particular transaction which represents the significant alteration in approach and which raises immediately the question why the taxpayer's motive for an action, otherwise lawful and effective, should lead to its being disregarded. It does not, I think, arise from a moral judgment which the court is called upon to make, for Lord Fraser of Tullybelton in his speech at p. 220 stressed that the fact that the purpose of a scheme is tax avoidance does not carry any implication that it is in any way reprehensible or other than perfectly honest and respectable. The reason must, therefore be something else and it is, I think, simply this that the absence of any commercial motive underlines the artificiality of the interrelated transactions and entitles the court to disregard them because they are not intended to produce anything other than an artificial fiscal result.

It is this aspect of motive which assumes great importance in *Furniss* v. *Dawson*[5] [1984] AC 474. That case disclosed a number of important distinctions from its predecessors. In the first place, the series of transactions there under consideration was evolved with a commercial object in view. Secondly, quite apart from the fiscal consequences attaching to the end result if analysed as a single disposal by the taxpayer, there were permanent legal, practi-

(1) [1982] STC 30. (2) 54 TC 311. (3) 54 TC 101. (4) 54 TC 200.
(5) 55 TC 324.

A cal and fiscal consequences attaching to the intermediate step, however analysed, which could not be simply ignored but had to be rationalised in a permissible way within the framework of the statutory provisions. This is, I think, a very important factor to be borne in mind, because it both compels and limits the analysis upon which the decision of your Lordship's House was based and provides a statutory framework within which the limits of the B scope for further permissible extension can be observed. Thirdly—and this assumes a particular importance in the light of the Crown's submissions in the instant appeals—there appears to be introduced in the speech of Lord Scarman at least, a moral dimension by which the court is to identify what he described as "unacceptable tax evasion." On the face of it this might be C taken to suggest that the long accepted distinction between tax avoidance and tax evasion is to be elided and that the fiscal effect of a transaction is no longer to be judged, as in *Ramsay* and *Burmah*, by the criterion of what the taxpayer has actually done, but by whether what he has done is "acceptable". It may be doubted whether this was indeed what Lord Scarman intended to suggest, but if it was, he was, I think, alone in expressing this view. Indeed D Lord Brightman, who delivered the leading speech from which the ratio of the decision is to be deduced, expressly affirmed, at p. 518:

> "The scheme before your Lordships is a simple and honest scheme which merely seeks to defer payment of tax until the taxpayer has received into his hands the gain which he has made."

E The suggestion that there should be introduced a moral dimension into the equation is important, however, since it forms the basis of the suggestion implicit in the Crown's submission on the instant appeals that the limits expressed by Lord Brightman in his speech are too narrowly drawn because, when so drawn, "it would be easy for the taxpayer to circumvent them." F Your Lordships are thus invited not simply to analyse the transaction, to construe the statute and then to apply it to the analysis of what the taxpayer has really done, but to construct a general catch-all formula for rendering ineffective any step undertaken with a view to the avoidance or minimisation of tax on an anticipated transaction or disposition. That is an invitation to legislate and it goes a very long way beyond what, at any rate, was expressed G to be the ratio of *Ramsay*(1) and *Furniss* v. *Dawson*(2) itself, where the emphasis throughout was upon the pre-ordained sequence of the transactions which took place, their dependence upon one another and the necessity of being capable of being construed as one single composite whole. This is graphically underlined in the speech of Lord Russell of Killowen in *Chinn* v. *Hochstrasser*(3) [1981] AC 533, 550 where he described as a matter "of crucial H importance" that "the record on the turntable which was switched on contained the whole story from beginning to end, and there was no provision for switching if off half-way." It is an aspect of the matter also which emerges clearly from the speeches of Lord Fraser of Tullybelton, Lord Bridge of Harwich and Lord Brightman in *Furniss* v. *Dawson* [1984] AC 474 itself. Lord Fraser of Tullybelton said, at p.512:

I

> "The true principle of the decision in *Ramsay* was that the fiscal consequences of a pre-ordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of

(1) 54 TC 101. (2) 55 TC 324. (3) 54 TC 311.

the series as a whole, and not by dissecting the scheme and considering each individual transaction separately." A

Lord Bridge of Harwich (at p. 517) referred to "a series of interdependent transactions". And Lord Brightman (at p. 527) in the passage to which I have already referred stated in unequivocal terms the limits of the doctrine which he was expounding and upon which his decision was based. In other B parts of his speech Lord Brightman explained that in essence the problem is one of construction of the statute and he emphasised the importance of the essential links between the pre-ordained steps which enabled them to be brought within the concept of the tripartite contract, an aspect of the matter which is also stressed in the speeches of Lord Fraser of Tullybelton, Lord Roskill and Lord Bridge of Harwich. The critical question was whether the C intermediate company, Greenjacket, did genuinely acquire control of the operating companies within the meaning of the statute. Lord Brightman said, at p. 520:

> "Section 19 of the Finance Act 1965 charges tax in respect of capital gains accruing to a person on the disposal of assets. There is no definition of disposal but it scarcely needs definition. Paragraph 6 of D Schedule 7 provides certain exceptions in the case of company amalgamations. One exception applies to shares in a company transferred to another company which thereby acquires control, in exchange for shares in the transferee company ...
>
> In the instant case Mr. George Dawson and his sons were assessed E to capital gains tax in respect of the year 1971–1972 ... The then argument on the part of the revenue was that Greenjacket did not acquire control of the operating companies within the meaning of paragraph 6 of Schedule 7, because Greenjacket was a nominee or bare trustee for the Dawsons. If on the other hand, as the taxpayers contended, F Greenjacket did acquire control of the operating companies, any charge to capital gains tax would, it was contended, be deferred until such time as the taxpayers disposed of their shareholdings in Greenjacket and thereby realised a chargeable gain. At this point the one and only question at issue was whether Greenjacket acquired control of the operating companies within the meaning of the Act. Indeed that is in a sense the G only question at issue now, but it falls to be answered in a very different legal context from that in which it originally fell to be considered."

It was this question which highlights the importance of the concept of the tripartite contract and this very clearly emerges from the passage from Lord Brightman's speech at pp. 526–527 to which I have already referred. H The suggestion implicit in the Crown's submissions is that the limitations expressed by Lord Brightman were simply those that were, as it were, thrown up by the facts of the particular case then under consideration and that there is in fact a much broader principle at work which rests not upon the possibility of analysing a series of transactions as a single composite whole from which can be ascertained the reality of *the* transaction which is claimed as I giving rise to tax liability, but simply upon the carrying out of a transaction which has no other purpose than that of conferring a tax advantage. Thus the shift of the submission is away from the *Ramsay*[1] principle towards the element introduced in the speech of Lord Diplock in the *Burmah*[2] case. By concentrating upon this as the key element, there is sought to be substituted

(1) 54 TC 101. (2) 54 TC 200.

A for the concept of the single composite transaction (the *Ramsay* principle) the statutory concept, applicable in certain other specified situations, of "associated operations" having the effect of avoiding or minimising tax.

My Lords, for my part I find myself unable to accept that *Furniss*[1] either established or can properly be used to support a general proposition B that any transaction which is effected for the purpose of avoiding tax on a contemplated subsequent transaction and is therefore "planned" is, for that reason, necessarily to be treated as one with that subsequent transaction and as having no independent effect even where that is realistically and logically impossible. The particular question which fell to be determined in *Furniss* was, as it is in the present appeals, whether an intermediate transfer was, at C the time when it was effected, so closely interconnected with the ultimate disposition that it was properly to be described as not, in itself, a real transaction at all but merely an element in some different and larger whole without independent effect. That is, I think, necessarily a question of fact but it has to be approached within the bounds of what is logically defensible. *Ramsay*, as developed in *Furniss*, merely established that the fiscal consequences of a D pre-ordained series of transactions carried to their pre-ordained conclusion are generally to be determined by looking at the pre-ordained end result of the series. The emphasis was, throughout, on the unbroken and pre-destined chain from start to finish and, in the ultimate analysis, the divergence of view to which I have referred comes down, I think, to the meaning to be attributed in this context to the expressions "pre-ordained" and a "composite E transaction." The wider view interprets "pre-ordained" simply as "preconceived" or "planned to take place in the future" so that all events which occur sequentially, which contain a tax-saving element and which result from the same initial conscious volition or contemplation on the part of the taxpayer form part of "a scheme," are therefore "pre-ordained" and accordingly fall to be construed as part of, and indivisible from, the ultimate disposition F whether or not, at the time of the transaction in question, the ultimate disposition was certain, uncertain, anticipated or merely hoped for, provided that there was some particular type of disposition in view. On this footing the concept of the "single composite transaction" is a Procrustean bed into which events or transactions are to be forced even at the expense of a total distortion of their actual nature.

G

I have not felt able to accept this wider view of the effect of *Furniss* for four reasons. In the first place, no such novel general proposition was expressed in terms. *Furniss* did not purport to do anything more than to apply the *Ramsay*[2] principle of construction to a different chain of events H and *Ramsay* itself, as I have endeavoured to show, is no authority for any proposition wider than this, that where it can be shown that successive transactions are so indissolubly linked together, both in fact and in intention, as to be properly and realistically viewed as a composite whole, the court is both bound and entitled so to regard them. Secondly, if it had been intended to formulate the wider proposition which the Appellants urge, the very close I and meticulous analysis by Lord Brightman in *Furniss* of the successive steps which were taken, the way in which they were carried out and the close relationship between them was entirely unnecessary. It would have been sufficient to say simply that the share exchange with Greenjacket was affected in

(1) 55 TC 324. (2) 54 TC 101.

anticipation of the sale to Wood Bastow taking place and in order to defer the tax which would have been exigible if that had been effected directly by the Dawsons as individual shareholders. Simply to assert, as has been suggested, that it is inconceivable that the result would have been any different if the Greenjacket transaction had taken place at some earlier stage of the contemplated sale to Wood Bastow is, if I may say so respectfully, to beg the very question which has to be answered. Thirdly, on the footing which I believe to be correct and which I understand to be accepted by all your Lordships, that the question dealt with in all three of the cases of *Ramsay*, *Burmah*[1], and *Furniss* is essentially one of statutory construction, I cannot for may part follow from what principle of statutory construction the proposition for which *Furniss* is now said to be authority derives. Essentially, *Furniss* was concerned with a question which is common to all successive transactions where an actual transfer of property has taken place to a corporate entity which subsequently carries out a further disposition to an ultimate disponee. The question is, "when is a disposal not a disposal within the terms of the statute?" To give to that question the answer, "when, on an analysis of the facts, it is seen in reality to be a different transaction altogether" is well within the accepted canons of construction. To answer it, "when it is effected with a view to avoiding tax on another contemplated transaction" is to do more than simply to place a gloss on the words of the statute. It is to add a limitation or qualification which the legislature itself has not sought to express and for which there is no context in the statute. That, however, desirable it may seem, is to legislate, not to construe, and that is something which is not within judicial competence. I can find nothing in *Furniss* or in the cases which preceded it which causes me to suppose that that was what this House was seeking to do. Fourthly, I find myself quite unable to discern any rational basis for the proposition which, if the Appellants are to succeed in any of the appeals now before your Lordships, has to be derived from *Furniss*[2] or has to be formulated by your Lordships. The proposition has to be capable of being stated with a degree of certainty before it can be applied. I do not think that it was ever formulated in terms in the Appellant's argument except in so far as it could be deduced from what was submitted to be the result in a number of different hypothetical situations, but, as originally advanced in its widest form, the underlying proposition may be paraphrased thus:

> "In applying a taxing statute to a transaction which is effected with the sole intention of avoiding tax on some other transaction then in view the former is to be treated as having no independent fiscal effect but as a single indivisible transaction with the latter, if and when the latter takes place."

It was, perhaps a little reluctantly, acknowledged that that produces the manifestly absurd result of negating even what has been called "strategic tax planning" undertaken months or possibly years before the event in anticipation of which it was effected and the Appellant's most extreme formulation was then abandoned. I have sought to state the proposition, not for the purpose of reviving it simply in order to demolish it, but in order to test whether it can rationally be modified in any intelligible way and whether the argument upon which reliance continues to be placed is not simply repeating the same proposition in a different form which depends for its effect simply upon the temporal proximity of the end result. It is said that there is no logical distinction to be drawn between a tax-saving transaction effected when a nego-

(1) 54 TC 200. (2) 55 TC 324.

A tiation is complete and one effected when it is incomplete. But equally what is the logical distinction between a tax-saving transaction effected immediately before and one effected immediately after the inception of a negotiation? Or between a tax-saving transaction effected when a further transaction is contemplated but not formulated and one effected when the shape of the ultimate transaction is envisaged with a reasonable degree of clarity? The B truth is that once one seeks to substitute for the test of pre-ordination in the sense embraced in Lord Wilberforce's reference to a "single continuous operation" and in the concept of the tripartite contract relied upon in *Furniss* a test simply of whether there is a plan to produce a foreseen result of saving tax there is no logical stopping-place short of the wider formulation. Every formulation ultimately comes back to the same underlying proposition, that C any transaction effected for the sole purpose of saving tax payable on another transaction is to be treated fiscally as indivisible from that other transaction. No such tax-saving transaction is ever entered into without some preconception of its ultimate purpose, so that it is, by definition, a "planned" transaction and one ultimately ends with the proposition that a tax-saving transaction is "pre-ordained" and therefore indivisible because it is a tax-sav- D ing transaction.

This result follows from standing the decision in *Ramsay*(1) on its head and concentrating on the tax-saving purpose as the key element rather than, as *Ramsay* teaches, upon looking at the transactions as a whole and asking whether realistically they constitute a single and indivisible whole and E whether it is intellectually possible so to treat them. It does not appear to me to be either a rational or a permissible approach because it involves substituting a determination to prevent the avoidance of tax for which there is no statutory, moral or logical basis for a rational, factual and intellectually possible appraisal of what is the reality of the position at the time when the relevant transaction is undertaken. I cannot, for my part, derive this from F *Furniss*(2) and I am quite sure that this House was not seeking to construct so irrational a doctrine.

I do not, of course, suggest that the *Ramsay* principle is applicable only to transactions displaying the precise sequence which occurred in *Furniss*. There are, no doubt, many circumstances in which transactions are so closely G linked as realistically to be regarded as a single indivisible composite whole—a concept which may be summed up in homely terms by asking the question whether at the material time the whole is already "cut and dried." Where, however, the question arises in relation to the type of transaction here in question, I cannot, for my part, easily envisage such circumstances outwith H the limitations expressed in the speech of Lord Brightman which seems to me, for the reasons which I will endeavour to express, to be essential to any rational analysis of the decision.

Those limitations echoed in fact what had been clearly stated by Lord Wilberforce in *Ramsay* in his references to "an indivisible process" and "a I single continuous operation" (p. 326) and cannot, I think, be properly regarded simply as references to the facts of the particular case. They were fundamental to the decision if it is to be rationally explained, just as it was basic to the analysis which produced the result in *Furniss* v. *Dawson* not sim-

(1) 54 TC 101. (2) 55 TC 324.

ply that the intermediate step was effected with the sole purpose of procuring a tax advantage but that it could legitimately be treated, on the facts, as part of a tripartite contract, for it was only by such analysis that the single composite transaction would be constructed and the suggested consequence of the double taxation on the same gain overcome. A

In *Furniss* v. *Dawson* this House was confronted with a transaction which the Revenue claimed was a sale by the Dawsons directly to Wood Bastow on which the Dawsons had realised the gain but where, as a matter of *fact* and as a matter of *law*, both the legal and the beneficial interest in the property had passed through Greenjacket. The only possible way in which the Revenue could succeed therefore was by eliminating the legal consequences of the transfer to Greenjacket and the payment to Greenjacket of the consideration for the sale of the shares to Wood Bastow. But the difficulty was that the Finance Act 1965 had, in the Seventh Schedule, clearly and compulsively attached to that transfer statutory and fiscal consequences which, so long as the transaction stood as a genuine transaction, could not be reversed or ignored. So there were two problems. First, how do you turn genuine *contractual* arrangements for the sale by A to B and the subsequent sale by B to C, with the consideration being paid by C to B, into a disposition by A to C resulting in a gain realised by A? Secondly, how do you reconcile that result with the fiscal and legal consequences which have already attached, and permanently attached, to the genuine transfer which *has* actually taken place from A to B? The rationale of the answer to the first of these questions is simply this, that if the transactions A to B and B to C, which were in fact contemporaneous, had been linked not merely by contemporaneity but also by a simultaneous contractual obligation binding all three participants, there would be no difficulty in regarding them as no more than a tripartite agreement under which A accepted *ab initio* an obligation to C to transfer the property to B and to procure B to transfer to C; B accepted an obligation *ab initio* to transfer the property to C; and C accepted *ab initio* an obligation to A to pay the agreed price for the property to B. In other words, a sale by A to C through the instrumentality of B, the purchase price (and hence the gain) being paid to B at A's behest. The equitable interests would pass eo instante with the contract and the motive for the intermediate transfer would be entirely immaterial. But there were not in fact contractual obligations and it is at this point that the *Ramsay*(1) approach comes into the picture. How, in the absence of contractual obligation, is the Revenue's sought for result to be obtained? The answer is to be arrived at in two stages. First of all through *Ramsay*, because that establishes that where there is (i) a scheme involving a series of transactions *plus* (ii) an expectation that it will be carried through from beginning to end *and* (iii) no likelihood that it will not, the court is not bound, in assessing the fiscal consequences to consider each step individually and accord to it its individual legal result but is entitled to look at the composite transaction as a single transaction having a single legal result. This dispenses with the need for a contractual obligation but to achieve that result all three of the enumerated elements must be present. They were present in *Furniss* v. *Dawson*(2) and, there being in the exercise no necessity for contractual obligation linking the beginning with the end but merely a confident expectation, the court was able to look at the overall transaction and to assess its legal result as a composite whole. But it was able to do this because it was *in fact* not only conceived but carried out as one indivisible transaction. However, that in itself was not enough, because if you

B C D E F G H I

(1) 54 TC 101. (2) 55 TC 324.

A merely did that you still ended up with the statutory fiscal results of an actual disposition by the Dawsons via Greenjacket to Wood Bastow and the price firmly locked in Greenjacket. You have to go one stage further and nullify the intermediate transfer to Greenjacket which has its own permanent fiscal consequences unless it can be totally disregarded, for *Ramsay* merely "enables the courts to arrive at a conclusion which corresponds with the par- B ties' intentions." In *Furniss* v. *Dawson* the parties' intention was to produce a sale by Greenjacket instead of a sale by the Dawsons. So a further ingredient has to be supplied, and that is found in *Burmah*.[1] This establishes the further proposition that if you find in what, ex hypothesi, is an integrated and interdependent series of transactions a step inserted which has no other pur- C pose than that of avoiding or minimising a liability to tax which, without that step, would be attracted by the transactions, you are entitled for fiscal purposes to ignore that step in assessing what is the true legal result of the series taken as a whole. So, in reliance upon these two authorities, the House set about considering the true legal effect of the transactions undertaken and they were able to arrive at the conclusion that, although there was in fact no D contractual connection between the steps making the tripartite contract, the circumstances were such that the steps could be treated together in exactly the same way as if they were. The tripartite contract concept is an essential feature of the decision because it was *only* in this way that the House was able to deal with the statutory consequences which otherwise, willy nilly, would have attached to the share exchange and would have resulted in a E double taxation on the same gain. To avoid that it *had* to be shown that the transfer of the shares to Greenjacket was not a "disposal" by Dawsons which attracted the provisions of the sixth and seventh Schedules. If those shares fell to be treated, when transferred to Greenjacket, as Greenjacket's shares with no subsisting arrangement (to use a neutral phrase) for their onward transmission to Wood Bastow, then it is impossible not to conclude that they F had been "disposed of" to Greenjacket with the consequence that paras 4 and 6 of the seventh Schedule would apply. Thus the concept of the tripartite contract and the limitations so clearly stated by Lord Brightman in his speech were not merely exemplary of the wider doctrine of *Ramsay* but were essential to the decision of the case.

G As the law currently stands, the essentials emerging from *Furniss* v. *Dawson*[2] [1984] AC 474 appear to me to be four in number:

(1) that the series of transactions was, at the time when the intermediate transaction was entered into it, pre-ordained in order to produce a given H result;

(2) that that transaction had no other purpose than tax mitigation;

(3) that there was at that time no practical likelihood that the preplanned events would not take place in the order ordained, so that the I intermediate transaction was not even contemplated practically as having an independent life, and

(4) that the pre-ordained events did in fact take place.

---

(1) 54 TC 200. (2) 55 TC 324.

In these circumstances the court can be justified in linking the beginning with the end so as to make a single composite whole to which the fiscal results of the single composite whole are to be applied. A

I do not, for my part, think that *Furniss* v. *Dawson* goes further than that. The intellectual basis for the decision was *Ramsay*(1) and the criteria for the application of the *Ramsay* doctrine were those enunciated by Lord Brightman. On those criteria, I see no escape from the conclusion reached in all the three appeals in the High Court and in the Court of Appeal that the Appellants must fail. Nor do I readily see that the criteria are logically capable of expansion so as to apply to any similar case except one in which, when the intermediate transaction or transactions take place, the end result which in fact occurs is so certain of fulfilment that it is intellectually and practically possible to conclude that there has indeed taken place one single and indivisible process. To permit this it seems to me essential that the intermediate transaction bears the stamp of interdependence at the time when it takes place. A transaction does not change its nature because of an event, then uncertain, which subsequently occurs and *Ramsay* is concerned not with reforming transactions but with ascertaining their reality. There is a real and not merely a metaphysical distinction between something that is done as a preparatory step towards a possible but uncertain contemplated future action and something which is done as an integral and interdependent part of a transaction already agreed and, effectively, predestined to take place. In the latter case, to link the end to the beginning involves no more than recognising the reality of what is effectively a single operation *ab initio*. In the former it involves quite a different process, viz. that of imputing to the parties, ex post facto, an obligation (either contractual or quasi contractual) which did not exist at the material time but which is to be attributed from the occurrence or juxtaposition of events which subsequently took place. That cannot be extracted from *Furniss* v. *Dawson* as it stands nor can it be justified by any rational extension of the *Ramsay* approach. It involves the invocation of a different principle altogether, that is to say, the reconstruction of events into something that they were not, either in fact or in intention, not because they in fact constituted a single composite whole but because, and only because, one or more of them was motivated by a desire to avoid or minimise tax. That may be a very beneficial objective but it has to be recognised that the rational basis of *Ramsay* and *Furniss* v. *Dawson* then becomes irrelevant and is replaced by a principle of nullifying a tax advantage derived from any "associated operation." The legislature has not gone this far and the question is should or can your Lordships? B C D E F G

My Lords, I do not think so. I am at one with those of your Lordships who find the complicated and stylised antics of the tax avoidance industry both unedifying and unattractive but I entirely dissent from the proposition that because there is present in each of the three appeals before this House the element of a desire to mitigate or postpone the respondents' tax burdens, this fact alone demands from your Lordships a predisposition to expand the scope of the doctrine of *Ramsay*(1) and of *Furniss* v. *Dawson*(2) beyond its rational basis in order to strike down a transaction which would not otherwise realistically fall within it. H I

Nor do I consider that the *Ramsay* approach, which is no doubt applicable to a much wider variety of transactions than those embraced in the

(1) 54 TC 101. (2) 55 TC 324.

A instant appeals, requires further exposition or clarification. Its basis is manifest and has been clearly explained by Lord Wilberforce. What the Appellants urge upon your Lordships is a restatement of the approach in a formula based, as it seems to me, not upon seeking to identify the reality of sequential transactions, but upon a much wider, but at the moment undefined, general principle of judicial disapprobation of the lawful rearrange-
B ment of the subject's affairs designed to produce a result which is fiscally advantageous to him in relation to a transaction into which he anticipates entering. That is essentially a legislative exercise and one upon which, in my opinion, your Lordships should hesitate long before embarking.

In the course of argument various suggestions were made for the evolu-
C tion of some wider suggested formula which would operate as a touchstone for the determination of whether successive transactions, one of which is undertaken for the sole or dominant purpose of alleviating the burden of tax, fall to be treated as one single composite whole within the *Ramsay* principle. It was suggested, for instance, that any such step taken at a time when some further or ultimate transaction is "in contemplation" or "under negotiation"
D falls, without more, to be treated as merely a step in a single composite transaction. I confess, however, that I cannot, for my part, see how there can be any logical difference between intelligent tax planning before commencing negotiations for an ultimate disposition and intelligent tax planning after a particular disposition is contemplated or after negotiations which may lead to it have commenced, so long as the outcome of such negotiations remains
E wholly uncertain. I doubt, therefore, whether any such universal formula either can be satisfactory or is desirable. Essentially the question in every case is going to be "what has the taxpayer actually done and does it amount to a single composite transaction which is different from the constituent parts?" I do not think that that can be answered by any formula more clearly expressed than it has already been expressed in *Furniss* v. *Dawson.*
F

Nor do I believe that the Special Commissioners will, in practice, encounter difficulty in reaching a conclusion. Certain points of reference have been and are clearly identified. One critical feature is that what I have referred to as the intermediate step serves no purpose other than that of sav-
G ing tax. Thus, for instance, Mr. Nugee accepted in the course of argument that if, in *Furniss* v. *Dawson,* the Dawsons had formed Greenjacket for the purpose of carrying on a building business in the Isle of Man to be financed out of the proceeds of the shares in the operating company, it would not have been permissible to disregard the share exchange as an effective disposition for tax purposes even though the identical events occurred in the identi-
H cal sequence. But whilst this feature opens the door to what may be called the *Ramsay*[1] approach and may, indeed, even be a *sine qua non* for it, its presence does not of itself, affect the nature of the transaction. A disposal is no less a disposal within the statute because the motive for it is to minimise tax; but the motive for it may and often will indicate that what appears on its face as a disposal is no more than an interdependent part of some other or larger transaction.
I

Another identifying feature is that all the stages of what is claimed as the composite transaction are pre-ordained to take place in an orchestrated

(1) 54 TC 101.

sequence and, in my opinion, that must mean more than simply "planned or thought out in advance." It involves to my mind a degree of certainty and control over the end result at the time when the intermediate steps are taken. That does not, I think, mean absolute certainty in the sense that every single term of the transaction which ultimately takes place must then be finally settled and agreed. But it does seem to me to be essential at least that the principal terms should be agreed to the point at which it can be said that there is no practical likelihood that the transaction which actually takes place will not take place. Nor is it sufficient, in my opinion, that the ultimate transaction which finally takes place, though not envisaged at the intermediate stage as concrete reality, is simply a transaction of the kind that is then envisaged, for the underlying basis of the *Ramsay* doctrine is that it must, on the facts, be possible to analyse the sequence as one single identifiable transaction and if, at the completion of the intermediate disposition, it is not even known to whom or upon what terms any ultimate disposition will be made, I simply do not see how such an analysis is intellectually possible. It is an essential part of the analysis that there is but one disposal and not two and that the transfer to the intermediate company is not a "disposal" within the meaning of the statute. Whatever the ultimate transaction the fact is that the transfer to the intermediate company has taken place and shares have been acquired by the taxpayer. That transaction not, clearly, being an arms length transaction, the consideration is statutorily deemed to be the value of the shares transferred as of that date. Unless at that point of time it is possible to account for the transaction as a subscription in cash for the shares issued at a price equal to the ultimate purchase price of the shares transferred—an impossible exercise if that sum is not even known—it seems to me to be quite impossible to say that there has been no disposal to the intermediate company attracting the statutory consequences set out in Sch 7.

A third identifying feature, at any rate in the *Furniss* v. *Dawson*(1) type of transaction, is in my opinion that there should be no sensible and genuine interruption between the intermediate transaction and the disposal to an ultimate purchaser. If such an interruption occurs I cannot for my part see on what possible basis of statutory construction the intermediate transaction can, as it were, be held in limbo once it has been completed. The shares have been transferred. The shares in the intermediate company have been issued and s 22(4) of the Act compulsively attributes to that issue a price equal to the value of the transferred shares at that time. Any significant temporal interruption between the conclusion of the intermediate share exchange and the completion of the negotiation for an ultimate disposition must, if the whole is to be treated as one single transaction, inevitably open the door to the possibility of double taxation referred to in the argument before your Lordships, for instance in the event of the ultimate disposition taking place at a price in excess of the value of the shares at the date of the exchange, for it would not then be possible without flatly contradicting the provisions of s 22(4) of the Act, to treat the ultimate price as the base value of the shares in the intermediate company. It is possible to do this only by the tripartite contract analysis which, in turn, would only be possible if in some way the intermediate transfer could be treated as suspended in its operation until completion of the final disposition. That, I suppose, might be possible if it could be demonstrated that the interval in the negotiation could be shown to have been fabricated for the very purpose of preventing such an analysis, for that would itself be cogent evidence of the tripartite nature of the overall

(1) 55 TC 324.

A transaction. Short of this, however, I do not see how the doctrine can be applied where a sensible and genuine interruption in the negotiations takes place after completion of the intermediate step, for it is, as I understand the *Ramsay*[1] doctrine, inherent in it that the steps which are welded together form part of a pre-planned continuum. If a formula is to be devised which will serve as a touchstone for the guidance of the Special Commissioners, I B do not, for my part, think that it can or should go beyond that suggested by my noble and learned friend Lord Jauncey of Tullichettle, whose speech I have had the advantage of reading in draft.

It follows that in my view it is quite impossible to apply a *Ramsay* analysis on any intellectually acceptable basis to the transactions with which the C *Bowater* and *Gregory* appeals are concerned and I would therefore dismiss both those appeals. The case of *Craven* v. *White* displays features more akin to those present in *Furniss* v. *Dawson*[2] than do the other two cases, but it clearly does not satisfy either Lord Brightman's test or the formula referred to above. The Whites had been attempting for years to find a purchaser for their business and the project of vesting the shares in a Manx company was D conceived and put into operation at a time when two mutually exclusive sets of negotiation were in progress. On no analysis could it be said that at that stage there was a "pre-ordained" series of transactions, for it was not even known what the ultimate transaction would be, if indeed it eventuated at all. The Special Commissioners rejected the evidence of the taxpayers that the sole purpose of its formation was a vehicle for an amalgamation with Cee-N-E Cee, but their evidence was that it was at least one of the purposes, and there was the express and important finding of the Commissioners that Mr. Stephen White was keeping his options open, though the sale of the shares to Oriel which ultimately took place was the preferred choice and the one to which the taxpayers' efforts were principally directed. It was not, however, suggested that the possibility of a merger with Cee-N-Cee was not seriously F under consideration even if it was *faute de mieux* nor that the formation of a holding company was not regarded as a convenient vehicle for such a purpose, quite apart from the tax advantages flowing from the proposed company's Manx residence. Undoubtedly the taxpayers had it in mind that if the hoped for sale took place part at least of the proceeds would be made available to them free of tax by way of loans. Undoubtedly too they had it in G mind when the original instructions for the acquisition of the Millor, the Manx company, were given that it would be the vendor of the operating company's shares if a sale eventually took place. Millor made an offer for the taxpayers' shares on 14 July 1976 and it is beyond doubt that at that time there was at least a hopeful anticipation that an ultimate sale to Oriel would be agreed, for the offer was expressed to remain open until 9 August 1976— H a date which appears to have been agreed for a meeting with Oriel's representatives which, it seems, was regarded as the "make or break" point at which, if there was to be an agreement at all, it would be concluded. But at the time when the share exchange took place on 19 July there was no certainty whatever that the sale would take place. A draft sale contract had been I brought into being and submitted to the Manx solicitors, but it does not appear that the price had been agreed and the purchaser was expressing concern at a down turn in the profits of the business and suggesting that payment of part of the consideration ought to be deferred. The most that can be

---

(1) 54 TC 101. (2) 55 TC 324.

said is that the sale was in active contemplation at a price in excess of £2m. on some terms not yet finalised but that there was also in contemplation a merger with another concern, which was regarded as a second best option. In no ordinary use of language can it be said that the sale which actually took place was actually then "pre-ordained" although no doubt it was pre-conceived, nor can it be said that there was then "no likelihood that it would not take place." It was not then even "arranged" in any accepted sense of the word. Quite apart from the fact that the intermediate transfer was in part for a commercial purpose I can see no ground upon which it could legitimately be said that the transfer of the Queensferry shares to Millor was not a disposal of them within s 22 of the Act to which the provisions of Sch 7 accordingly applied. I would accordingly dismiss this appeal also.

Lord Goff of Chieveley—My Lords, these appeals raise in an acute form the question of the true scope of what has come to be known as the *Ramsay*(1) principle (from *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners* [1982] AC 300).

It would be naive in the extreme to imagine that that principle is not concerned with the outlawing of unacceptable tax avoidance. It plainly is. But it would be equally mistaken to regard the principle as in any sense a moral principle, or having any foundation in morality. It plainly is not. We can see this clearly from Lord Brightman's description of the scheme in *Furniss* v. *Dawson*(2) [1984] AC 474 as an honest scheme; and I would likewise so describe the schemes in the present three appeals. What the courts have established, however, is that certain tax avoidance schemes, although not shams in the sense of not being what they purport to be, are nevertheless unacceptable because they embrace transactions which are not "real" disposals or do not generate "real" losses (or gains) and so are held not to attract certain fiscal consequences which would normally be attached to disposals or losses (or gains) under the relevant statute. It is these unacceptable tax avoidance schemes which Lord Scarman described (in *Furniss* v. *Dawson* [1984] AC 474, 513) as "tax evasion"—a label which is perhaps better kept for those transactions which are traditionally so described because they are illegal.

Nevertheless it would not, I believe, be right to represent the submissions of the Crown in the present appeals as being that the mere existence of a motive to avoid tax is sufficient to bring the relevant transaction within the *Ramsay* principle, or that the principle should be construed as a catch-all formula whose purpose is to render ineffective any step which is taken to avoid tax. To some extent, I recognise, the Crown courted trouble of this kind. Before the Court of Appeal, the Crown appears to have submitted that at least some kinds of "strategic tax planning" might be caught by the principle—a submission which was, in my opinion, rightly rejected by that court (see [1987] 3 WLR 660, 678–679 *per* Slade L.J., and pp.712–713, per Mustill L.J.). Before your Lordships' House, a similar submission was at first advanced, but was abandoned by the Crown before the end of the argument. In these circumstances, it does not, in my opinion, assist the solution of the problem in the present case now to resurrect any such suggestion and then to demolish it.

Any idea that the principle in *Ramsay* is a moral principle, or that it is designed to catch any step taken to avoid tax, is, in my opinion, destroyed by

(1) 54 TC 101. (2) 55 TC 324.

A the recognition of the *Ramsay* principle as a principle of statutory construction. Indeed the principle cannot be independent of the statute, for the obvious reason that your Lordships have no power to amend the statute. That it is essentially a principle arising from the construction of the statute appears from a number of passages in the speeches in the cases. For example, in *Ramsay* itself [1982] AC 300, 326, Lord Wilberforce stated that it was within B the judicial function to conclude that there was not such a loss (or gain) as the legislature was dealing with; see also an earlier passage in his speech in that case, at p. 323. In the same case, Lord Fraser of Tullybelton stated (at p. 339) that he was prepared to dismiss the appeals on the ground that the relevant asset was not disposed of in the sense required by the statute; and in *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*(1) 54 TC 200, 220, he C used language reminiscent of Lord Wilberforce's statement of the law in *Ramsay* (referred to above) to identify the relevant question, which he epitomised as being whether the scheme, when completely carried out, did or did not result in a real loss. But that being so, it follows that tax avoidance schemes are only unacceptable for present purposes if, on a true construction of the statute, they are held to be so.

D

As Lord Diplock recognised in the *Burmah Oil* case at p. 214, the *Ramsay* principle involves a new judicial approach. Furthermore, we have seen the ambit of the principle, once recognised in *Ramsay*, being gradually extended in *Burmah Oil* and more significantly extended in *Furniss* v. *Dawson*(2), as your Lordships' House has proceeded, in the ordinary way, to E develop the principle from case to case. It follows, however, that no case should be read as completely encapsulating the law. Every case is, as always, a decision on its own facts: and every statement of legal principle tends to be coloured by the facts of the particular case and in any event is, in the ultimate analysis, no more than a working hypothesis. But it must not be thought that, as a consequence, the courts have gone beyond their proper F function in these cases and have indulged, illegitimately, in legislation. That some lawyers have believed this to be so is evident not only from the relevant literature but even from certain judgments in the cases. These lawyers have found it difficult first to swallow *Ramsay* itself, and then even more difficult to swallow *Furniss* v. *Dawson;* and then, having reluctantly swallowed both, they conscientiously conceive their function thereafter to be essentially one of G damage limitation. We have seen evidence of this attitude in the present appeals, both in Parker L.J.'s vigorous criticism of *Furniss* v. *Dawson* (see [1987] 3 WLR 660, 704–708), and in the statement by counsel for one of the respondents in the course of argument that it was now accepted that *Ramsay* was rightly decided—a belated concession which failed to accord any recognition to the significant later development of the law in *Furniss* v. *Dawson*. H This I believe, with all respect, to be a mistaken approach; though I fear that it exercises a potent influence upon the minds of those who adopt it.

In each case, your Lordships' House has been seeking to ascertain the true intention of Parliament when it has applied the words of the statute to I the facts of the case before it; and in so far as your Lordships have been attempting, in any particular case, a statement of principle, that statement of principle has been an attempt to formulate the Parliamentary intention with an eye to the facts of that particular case. We have therefore to exercise great

(1) [1982] STC 30. (2) 55 TC 324.

care before we assume that every feature referred to in any particular statement of the law is necessarily applicable in later cases. Of course, as the cases have been decided, one by one, we have been enabled to perceive more clearly how the principle should be stated; but the process of formulation can never be absolutely complete, and that it is in fact still in a state of active development was expressly recognised in *Furniss* v. *Dawson*(1) [1984] AC 474 both by Lord Scarman (pp. 513–514) and by Lord Bridge of Harwich (p. 516). It follows that it would be quite wrong to regard *Furniss* v. *Dawson* as containing any definitive statement of the law, or as marking the final limit of the development of the *Ramsay*(2) principle; so to hold would, in my opinion, not only fly in the face of the express statements in that case to which I have just referred, but in truth constitute a rejection of the spirit of the decided cases.

Even so, we can now see, from the statements of the law in the decided cases, what broadly constitutes the *Ramsay* principle. It is that there is no real disposal, or no real loss (or gain) within the meaning of the statute, if the relevant step has been inserted into a pre-ordained series of transactions or a composite transaction for no commercial purpose other than the avoidance of a liability to tax: see *Burmah Oil*(3) 54 TC 200, 214 *per* Lord Diplock, and *Furniss* v. *Dawson* [1984] AC 474, 527, per Lord Brightman. We can see from this broad principle that a distinction has to be drawn between a composite transaction of that kind, and a series of independent transactions of which the first constitutes a step taken to prepare for the avoidance of tax, such avoidance being achieved by later, independent, steps. It is that latter type of scheme which is usually known as strategic tax planning, which must be distinguished from unacceptable tax avoidance caught by the *Ramsay* principle. So understood, the *Ramsay* principle can be identified as not merely consistent with the statute, but as achieving a result which is sensible in terms of policy.

It is easy now to see how the "circular" schemes in *Ramsay* and *Burmah Oil* fell foul of the principle. *Furniss* v. *Dawson* marks a significant extension, in that it recognises that the principle is applicable not only in the "circular" cases, where the relevant asset ends up with the taxpayer exactly as before, but also in so-called "linear cases" where it ends up at a different destination. As appears from the speech of Lord Brightman in *Furniss* v. *Dawson* [1984] AC 474, 527, linear cases may be caught by the principle, just as circular cases may be. In both types of case, the application of the principle may involve the "disregarding" for certain fiscal purpose of one or more steps in the composite transaction, even though such steps otherwise have legal effect. The difference between the two types of case is that, in the linear cases, the composite transaction does have the commercial object of achieving a transfer of the relevant asset to another party; so that, in those cases, the court has not merely to "disregard" for certain fiscal purposes the intermediate step or steps, but it has also to recognise, for fiscal purposes, a real disposal direct from the taxpayer to the ultimate transferee. This is a most substantial distinction. Simply to "disregard" certain intermediate transactions, as in *Ramsay*, is a far less drastic step than the short-circuiting across an intermediate step or steps to recognise a new transaction as the real disposal, as in *Furniss* v. *Dawson*. It is this recognition which has generated most opposition to the development of the law by your Lordships' House. Indeed it has been thought to create problems of its own: but in both types of case the nature of

(1) 55 TC 324. (2) 54 TC 101. (3) [1982] STC 30.

A the exercise is essentially the same—the asset ends up at the ultimate destination intended by the taxpayer, and the intermediate step or steps are "disregarded" for the relevant fiscal purposes, whilst otherwise having legal effect.

I do not, for my part, consider that the *Ramsay*(1) principle can sensibly be restricted, in any of the manners suggested in the course of argument. In B particular it cannot, in my opinion, be restricted to one type of composite transaction, comprising a tripartite arrangement very close to being an arrangement binding in contract—for example, an arrangement which is only not binding in law because it is expressed to be subject to contract. This would be a true exercise in damage limitation, really restricting the application of the *Ramsay* principle in linear cases to the facts of *Furniss* v. *Dawson* C itself. Certainly no trace of so narrow a construction as that suggested is to be found in any of the written cases of the three Respondents in the appeals before your Lordships' House. Indeed, so to restrict *Furniss* v. *Dawson* would, in my opinion, be wholly artificial; and such a restriction cannot, in my opinion, be justified by reference to the underlying principle. Nor do I, with all respect, consider that it is necessary to impose the requirement that D negotiations for the last stage of the scheme should have reached an advanced stage, or even have been embarked upon, before the principle applies. Likewise, I do not consider it necessary that the intermediate transfers which, in law, effect the real disposal to the ultimate transferee should be more or less instantaneous. That was doubtless a feature of the highly artificial schemes in the earlier cases, which understandably attracted the attention E of those considering them; but I can see no logical reason why it should constitute a prerequisite of the application of the *Ramsay* principle. Matters of this kind constitute, in my opinion, no more than useful evidence that the relevant transactions have been planned as a whole and so, if successfully performed, amount to a composite transaction. But they are not, in my opinion, prerequisites. Indeed the very number of alternative restrictions canvassed in F the course of argument reveals, to me, their lack of foundation in principle. In truth, in *Furniss* v. *Dawson* the House of Lords crossed the Rubicon from the circular cases to the linear cases; once the Rubicon was crossed, the function of your Lordships' House is not to restrict the crossing to the narrowest possible bridgehead, but rather to recognise it as having occurred and then to interpret the principle sensibly so as to accommodate both groups of cases. G In *Furniss* v. *Dawson*, the intermediate disposal was held not to be a real disposal within the meaning of the statute; once that had been held to be so, it was necessary to face up to the consequences and to hold that, for the relevant fiscal purposes, there must be deemed to be a disposal direct from the taxpayer to the ultimate transferee. In the same way, answers must be found H to other problems which might conceivably arise (some pretty unlikely examples of which were canvassed in the course of argument) in the case of linear transactions. Lord Brightman himself indicated in *Furniss* v. *Dawson* [1984] AC 474, 525 how the supposed problem of double taxation could be dealt with. I cannot for my part see that matters of this kind should be allowed artificially to inhibit the identification of the applicable principle.

I

There remains, however, the question: what is meant by a pre-ordained series of transactions or a composite transaction? To me, the two expressions mean the same thing, though in each the word "transaction" is being used in

(1) 54 TC 101.

a different sense. In the expression "series of transactions," the word transaction refers to each step in an overall transaction, including any intermediate step inserted only for the purpose of avoiding tax; whereas in the expression "composite transaction," the word "transaction" refers to the overall transaction embracing all the steps within it. The word "pre-ordained" in the expression "pre-ordained series of transactions" means simply "decided in advance" or, to adopt the words of Lord Fraser of Tullybelton in *Furniss* v. *Dawson*(1) at p.513, "planned as a single scheme." Of course, in a composite transaction each step must, by definition, be planned in advance; but where one refers not to the composite transaction but to the series of transactions which constitute it, the word "pre-ordained" is added to show that that series of transactions does indeed constitute a composite transaction.

But how does one identify any particular transaction (in the overall sense) as being for present purposes a composite transaction? That the overall transaction should have been pre-ordained, in the sense of planned in advance, is (as I have indicated) by definition essential; but it is, I consider, no more than a pre-requisite, for there may (for example) be cases in which the whole transaction is planned in advance, and yet there may be such delay or such significant interruption before the last step is taken that it would not be right to describe the transaction, as performed, as a composite transaction. If I take the simple example of a case in which there are two steps in the alleged composite transaction, the first step being that which is alleged to be the step inserted solely for the purpose of avoiding tax, it is to me essential, before the whole transaction can amount to a composite transaction for present purposes, not only that the whole transaction should have been planned in advance, but also that the last step in the transaction as performed should both be put into effect as part of that plan and sufficiently correspond to the transaction as planned, both in its terms and in the time within which it takes place, that it is appropriate to describe the whole transaction as a composite transaction. I wish however to add this, that, for the whole transaction to be planned in advance, it is not necessary that the details of the second step should be settled at the time when the first step was taken, nor that they should exactly correspond with those planned in advance. Furthermore, I can see no reason why, when the second step involves a transfer to a third party C, the mere fact that the taxpayer has in mind an alternative purchaser D should of itself prevent there being a composite transaction involving the transfer to C; nor do I see why, when the second step involves an auction sale, the mere fact that the ultimate purchaser and the price are not therefore identified at the date of the first step should prevent that step together with the auction sale constituting a composite transaction. Indeed I would find it a most remarkable conclusion that a transfer of an asset to an Isle of Man company controlled by the taxpayer for the express purpose that such company should forthwith dispose of the relevant asset by auction, which it then does, should not constitute a composite transaction within the *Ramsay*(2) principle. It follows that I find myself in respectful disagreement with the formulation of principle by Slade L.J. in the Court of Appeal (see [1987] 3 WLR 660, 679–680). In the end, the question whether or not the overall transaction constitutes for present purposes a composite transaction is very much one of common sense, which the Commissioners are well equipped to decide. I do not for myself regard this as giving rise to any unacceptable uncertainty in practice. I have no doubt that, in practice, the animal is easily recognisable.

(1) 55 TC 324. (2) 54 TC 101.

A What is indeed unacceptable is that the principle should be artificially restricted in its meaning and effect.

A prominent feature of the submissions of the respondents before your Lordships, and indeed one which found favour with Peter Gibson J. in *Craven* v. *White* at first instance, is that there can be no composite transac-
B tion within the principle unless there is, at the time of taking the first step, a practical certainty that the whole transaction will proceed right through to the end. This was indeed a feature of the schemes in cases such as *Ramsay*(1) itself, and attracted much attention in the earlier cases. But, like Slade L.J. in the Court of Appeal ([1987] 3 WLR 660, 685–686), I do not regard the "practical certainty" test as apposite. This is because "pre-ordained" does not
C mean "pre-destined;" it means decided or planned in advance, but not fore-doomed—unless the expression is used in connection with a decision by some supernatural agency, such as fate. The mere fact that a series of transactions planned as part of a single scheme may not in fact be carried out to the end, does not prevent those transactions, if performed, constituting a composite transaction for the purposes of the principle. If a taxpayer transfers an asset
D to an Isle of Man company for auction, the mere fact that the asset may not, at the auction, reach its reserve, does not, in my opinion, prevent the transfer and the auction sale, if successful, from together constituting a composite transaction.

With these principles in mind, I turn to the three appeals now before
E your Lordships. In the first, *Craven* v. *White,* the Commissioners found that the agreements in question were "to be looked at as part of a composite transaction comprising those two agreements, if no more; it is irrelevant that the terms of the August agreement were not finally settled until the day it was executed." The decision of the Commissioners in the case was however coloured by the fact that, at the date of the decision, the speeches of the
F House of Lords in *Furniss* v. *Dawson*(2) [1984] AC 474, had not been delivered. Peter Gibson J. held that the Commissioners, in concluding that there was a composite transaction, had misdirected themselves in law; he considered this to be so in particular because they failed to have regard to the question whether there was any practical certainty that all the planned steps
G would be completed. For the reasons I have already given, I do not, with all respect, consider that the "practical certainty" test adopted by the learned judge is appropriate. Slade L.J. considered the criterion of a composite transaction to be that, at the time when the first step is taken, all the essential features, not merely the general nature, of the second transaction, had already been determined by a person or persons who had the firm intention, and for
H practical purposes the ability, to pursue the implementation of the second step; and he further considered that the facts of *Craven* v. *White* did not satisfy that test (see [1987] 3 WLR 660, 679–680, 685–686). I for myself feel, with all respect, that, the approach adopted by Slade L.J. is at the same time too narrow and too wide. On the one hand, I can envisage a composite transaction which does not comply with his test, as for example where the
I plan embraces a transfer followed by an auction sale, the first transfer being solely for the purposes of avoiding tax. On the other hand the test does not, I think, allow for the possibility that a significant interruption between the first step and the achievement of the planned second step may be regarded as

(1) 54 TC 101. (2) 55 TC 324.

preventing the whole from constituting a composite transaction. Mustill L.J. (at pp. 714–715), after commenting on certain features of the case, concluded that "Whatever the precise boundaries of the word "pre-ordained," it cannot, in my view, be stretched to cover a series of dealings so intermittent in execution and so unformed at the outset." Although I find myself to be in respectful agreement with substantially all the reasoning in the judgment of Mustill L.J., I am unable to agree with his conclusion on this appeal. As it seems to me, the primary facts of the case are such that it would not be right to interfere with the finding of the Commissioners that there was here a composite transaction. It is true that the Whites had, at all material times, two strings to their bow—a merger with Cee-N-Cee, and a sale to Oriel; it is also true that when, on 21 June 1976, arrangements were made for the purchase of Millor Investments Ltd., this was with a view to Millor acting as a holding company for the projected merger with Cee-N-Cee, because, following a meeting with Oriel on 17 June, the Whites were "despondent" about the prospects of acquisition by Oriel. But, by the time when, on 19 July, the transfer of the shares in Queensferry to Millor was agreed, it was plain that Oriel was once again the front runner, a draft contract having been submitted by Oriel, and negotiations with Oriel thereafter having proceeded with increased purposefulness, although talks with Cee-N-Cee also continued. Final agreement for the sale by Millor to Oriel was reached at a "stormy meeting" on 9 August. In these circumstances it was in my opinion open to the commissioners to hold that, at the time of the transfer to Millor, it was planned by the Whites that the whole transaction (the transfer to Millor followed by a transfer to Oriel) should be put into effect, and that the last step (the transfer to Oriel) was put into effect as part of that plan and sufficiently corresponded to the transaction as planned that it was appropriate to describe the whole transaction as a composite transaction. The facts that the final negotiation between the Whites and Oriel was stormy, and that, at the time of the transfer to Millor, the Whites had in mind the alternative possibility of a merger with Cee-N-Cee do not, in my opinion, invalidate that conclusion. For these reasons, I would allow the appeal of the Crown in this case.

So far as the other two appeals are concerned I would, in agreement with the remainder of your Lordships, dismiss both appeals.

Lord Jauncey of Tullichettle—My Lords, these three appeals raise the question of whether transactions in which the three respondent taxpayers were involved constituted disposals by them which were chargeable to capital gains tax or development land tax. To answer this question it is necessary in the first place to look at three decisions in your Lordships' House, namely *W. T. Ramsay* v. *Inland Revenue Commissioners*(1) [1982] AC 300, *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*(2) 54 TC 200 and *Furniss* v. *Dawson*(3) [1984] AC 474.

In *Ramsay* a taxpayer who had made a chargeable gain in an accounting period sought to avoid payment of tax thereon by establishing an allowable loss. To this end a ready made scheme was bought whose sole purpose was to avoid tax. Without going into details suffice it to say that the scheme involved certain self-cancelling operations carried out to a timetable. To quote the words of Lord Wilberforce at p.322F:

(1) 54 TC 101. (2) [1982] STC 30. (3) 55 TC 324.

A

> "At the end of the series of operations, the taxpayer's financial position is precisely as it was at the beginning, except that he has paid a fee, and certain expenses, to the promoter of the scheme ... "

Lord Fraser of Tullybelton used similar words at p. 337F:

B

> "The essential feature of both schemes was that, when they were completely carried out, they did not result in any actual loss to the taxpayer. The apparently magic result of creating a tax loss that would not be a real loss was to be brought about by arranging that the scheme included a loss which was allowable for tax purposes and a matching gain which was not chargeable."

C

This House dismissed the taxpayer's appeal thereby effectively concluding that the loss thrown up by the scheme was not such a loss as the legislation was dealing with. Lord Wilberforce said, at p. 323G([1]):

D

> "Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of *Inland Revenue Commissioners* v. *Duke of Westminster*([2]) [1936] AC 1. This is a cardinal principle but it must not be overstated or overextended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. 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."

E

F

G

Lord Wilberforce went on to say, at p. 324B:

> "For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams,' from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is. They are not, under the *Westminster* doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. This is particularly the case where (as in *Rawling*) it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps. It may be so where (as in *Ramsay* or in *Black Nominees Ltd.* v. *Nicol*([3]) ((1975) 50 TC 229) there is an expectation that it will be so carried through, and no likelihood in practice that it will not. In such cases (which may vary in emphasis) the commissioners should find the facts

H

I

---

(1) 54 TC 101 at page 185. (2) 19 TC 490. (3) [1975] STC 372.

and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions." A

The first two sentences of this passage were described by Lord Fraser in the *Dawson*(1) case [1984] AC 474, 512F as Lord Wilberforce's statement of the principle in *Ramsay* [1982] AC 300.

B

Lord Wilberforce said, at p. 326D:

"The capital gains tax was created to operate in the real world, not that of make-belief. As I said in *Aberdeen Construction Group Ltd.* v. *Inland Revenue Commissioners*(2) [1978] AC 885, it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain), as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function." C

D

This passage was described by Lord Fraser in the *Burmah*(3) case 54 TC 220, as the ratio of the decision in *Ramsay*(4).

Pausing there it is apparent that Lord Wilberforce was considering a scheme, of which the totality had no purpose other than tax avoidance, where steps fell to be taken in accordance with a closely regulated timetable and as a result of which the taxpayer's position at the end of the day was for all practical purposes identical to that of his position at the beginning. Furthermore, Lord Wilberforce in enunciating the proposition that the commissioners were not bound to consider individually each separate step in a composite transaction had in mind particularly cases where there was a contractual obligation to carry through a scheme once started to its completion and cases where there was an expectation that it would be carried through "and no likelihood in practice that it would (sic) not." E F

Ramsay [1982] AC 300 was followed in *Burmah* 54 TC 200 wherein the taxpayer company sought by means of a pre-arranged scheme to convert a capital loss which was not deductible for corporation tax purposes into one which was. The scheme involved a sum of money going round in a circle and returning to its starting point on one day and the same sum going round the same circle in the opposite direction some six days later. The taxpayer company ended up precisely as it had started and this House decided that it had sustained no real loss and no loss in the sense contemplated by the legislation. Lord Diplock said, at p. 214: G H

"It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that *Ramsay's* case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable. The difference is in approach. It does not necessitate the over-ruling of any ear- I

(1) 55 TC 324. (2) 52 TC 281. (3) [1982] STC 30. (4) 54 TC 101.

A lier decisions of this House; but it does involve recognising that Lord Tomlin's oft-quoted dictum in *Inland Revenue Commissioners* v. *Duke of Westminster*(1) [1936] AC 1 at p. 19, 'Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be,' tells us little or nothing as to what methods of ordering one's affairs will be recognised by the courts as B effective to lessen the tax that would attach to them if business transactions were conducted in a straightforward way."

Lord Diplock said, at p. 215E(2):

"I agree with Lord Fraser of Tullybelton that the approach to tax C avoidance schemes of this character sanctioned by *Ramsay*(3) entitles your Lordships to ignore the intermediate circular book entries and to look at the end result ... "

I understand Lord Diplock in this passage to be referring particularly to circular schemes which had no purpose other than tax avoidance. Lord Fraser D of Tullybelton after referring to the ratio of the decision in *Ramsay*, said, at p. 220H:

"The question in this part of the appeal is whether the present scheme, when completely carried out, did or did not result in a loss such as the legislation is dealing with, which I may call for short, a real loss. E In my opinion it did not."

Both Lord Fraser and Lord Wilberforce in the passage which he cites and to which I have already made reference used words such as "a loss such as the legislation is dealing with." In so doing they were implicitly recognising that what has become generally known as the *Ramsay* principle is a principle of F construction to be applied in determining what is meant by such words as "loss" or "disposal" in a taxing statute. I mention this because counsel for the respondents advanced the proposition that the *Ramsay* principle was not one of statutory construction but of some other sort. In the light of the foregoing dicta I consider this proposition to be unsound.

G In *Dawson*(4) [1984] AC 474 the facts were somewhat different and there was involved not a circular scheme as in *Ramsay* and *Burmah* but a linear scheme whereby assets passed from the taxpayer into the permanent beneficial ownership of a third party. The facts may be summarised as follows. In September 1971 the taxpayers who, for practical purposes, owned all the shares in two companies (the operating companies) agreed in principle to sell H those shares to another company W.B. The taxpayers were advised not to sell directly to W.B. but first to exchange their shares for shares in an investment company to be incorporated in the Isle of Man, which company, it was contemplated, would then sell the shares to W.B. The solicitors acting for W.B. agreed to this proposal and on 16 December 1971 a company G. was incorporated in the Isle of Man and all the necessary arrangements were I immediately made (i) for the exchange with the taxpayers of the shares in the operating companies, and (ii) for the subsequent sale of those shares by G. to W.B. On 20 December there took place within a short time both the exchange between the taxpayer and G. and the sale by G. to W.B. The

(1) 19 TC 490. (2) 54 TC 200. (3) 54 TC 101. (4) 55 TC 324.

exchange of shares necessarily involved a disposal by the taxpayers but if it were an independent transaction it would not, by virtue of paras 4(2) and 6(1) of Sch 7 of the Finance Act 1965, be treated as a disposal for the purposes of the Act. The Crown contended that the share exchange had no purpose other than tax avoidance, that it fell to be ignored and that for the purposes of capital gains tax there was a disposal by the taxpayers direct to W.B. This House upheld the Crown's contention. The leading speech was that of Lord Brightman, who commented on the *Ramsay* principle as follows, at p. 526:

> "My Lords, in my opinion the rationale of the new approach is this. In a pre-planned tax-saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) a like series of steps which are followed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results. For example, equitable interests may pass when the contract for sale is signed. In many cases equity will regard that as done which is contracted to be done. *Ramsay*[1] says that the fiscal result is to be no different if the several steps are pre-ordained rather than pre-contracted. For example, in the instant case tax will, on the *Ramsay* principle, fall to be assessed on the basis that there was a tripartite contract between the taxpayers, G. and W.B."

Lord Brightman later observed, at p. 527C:

> "The formulation by Lord Diplock in *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*[2] [1982] STC 30, 33 expresses the limitations of the *Ramsay* principle. First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax—not 'no business *effect*.' If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied."

The decision in *Dawson*[3] thus involved extending the application of the *Ramsay* principle from circular transactions which had no purpose other than tax avoidance to linear transactions which had a legitimate commercial end purpose but into which had been inserted a step whose sole purpose was tax avoidance. The question involved in these three appeals is where the line should be drawn between linear transactions which do and those which do not fall within the ambit of the *Ramsay* principle and in particular what constitutes a pre-ordained series of transactions or a composite transaction which amounts to a single disposal for the purposes of the relevant charging section. It is not disputed that in each of the appeals the transactions under

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324.

A scrutiny included a step which had no commercial purpose other than the avoidance of tax.

It may be convenient to consider the foregoing question in the light of a transaction such as that in *Dawson* where there was a disposal by A to B followed by a disposal by B to C, B having been introduced into the scheme B solely for tax avoidance or deferment purposes. In the Court of Appeal [1987] 3 WLR 660, 679H Slade L.J. drew the line in the following manner:

> "As things are, as a matter of general principle, I conclude that two successive transactions, each of which has legal effects, are not properly to be regarded as a pre-ordained series or as a single composite transac- C tion within the meaning of the first *Ramsay* condition as stated in the House of Lords unless, at the time when the first transaction was effected, all the essential features not merely the general nature, of the second transaction had already been determined by a person or persons who had the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction."

D

The Crown contended that this was far too narrow a construction of the principle laid down in *Ramsay*(1) and applied in *Dawson*(2). Mr. Nugee for the Crown suggested four possible situations which might fall within the ambit of the principle:

E (1) Where at the time when the first disposal takes place (the relevant time) all the terms for the second disposal had been agreed subject to contract, i.e. the position precisely as in *Furniss* v. *Dawson.*

(2) Where at the relevant time the first disponer has a particular intention such as a particular sale in mind, not necessarily confined to known ultimate disponees, for example a sale by auction or the conclu- F sion of current negotiations with a number of different people.

(3) Where at the relevant time the first disponer has a genuine intention to effect a disposal but has neither decided upon the method of disposal nor identified a possible disponee.

G (4) Where the first disposal is merely a step in a strategic tax planning exercise which may not be completed for a period of years.

Mr. Nugee submitted that situations (1) to (3) should be covered by the principle but did not press for the inclusion of (4). On the other hand, counsel for the Respondents argued broadly that only situation (1) should be covered.

H

My Lords, when Lord Wilberforce in *Ramsay* referred to the task of the court being to ascertain the legal nature of any transaction to which it is sought to attach a tax he no doubt had in mind the relevant provisions of the taxing statute since it is the provisions thereof which ultimately determine whether a transaction or series of transactions is chargeable to tax. In the I context of his observation that the commissioners were not bound to consider individually each step in a composite transaction Lord Wilberforce referred to two types of scheme, namely, one where there was an accepted obligation to carry out all steps in the scheme once it started and the other

(1) 54 TC 101. (2) 55 TC 324.

where there was an expectation that it would be so carried through and no likelihood in practice that it would not. In that part of his speech which Lord Fraser in *Burmah*(1) described as the ratio of the decision Lord Wilberforce used the words "indivisible process" and "what was bought as, and planned as, a single continuous operation." These words were echoed by Lord Fraser in *Dawson* [1984] AC 474, where he said, at p. 512F:

> "The true principle of the decision in *Ramsay* was that the fiscal consequences of a preordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately."

It is against the background of these observations that there falls to be considered what is meant by a pre-ordained series of transactions or one single composite transaction, of which the existence was considered by Lord Brightman in *Dawson*(2) to be a pre-requisite of the application of the *Ramsay*(3) principle.

In a linear transaction involving third parties over whom the first disponer has no absolute control mere contemplation or intention by him at the time of completion of the first transaction to complete the second transaction will not suffice to make the first part of a single composite transaction. Further steps towards the second transaction must have been taken at the time of completion of the first transaction before the latter can be said to form part of a composite transaction. The character of the first transaction falls to be determined at the time when it takes place. Was it then an independent transaction or was it an interdependent part of a composite transaction? I do not consider that a transaction which was initially independent in fact could properly be rendered interdependent *ex post facto* by subsequent events although it is possible that a transaction which judged at the time had the character of an interdependent transaction could lose that character by the subsequent and unexpected failure to materialise of the second transaction. It must be remembered that in *Dawson* when the first transaction took place all the arrangements for the second transaction had already been made and indeed that transaction was completed within a very short time, possibly within only minutes, after the first. There was accordingly, to quote the words of Lord Wilberforce in *Ramsay*, at the time of completion of the first transaction "no likelihood in practice" that the second would not be completed. I therefore have no difficulty in concluding that situation (3) suggested by Mr. Nugee does not fall within the ambit of the principle.

On the other hand, I consider that Slade L.J. in the Court of Appeal [1987] 3 WLR 660, 679H confined the ambit of the *Ramsay* principle too closely by his reference to all the essential features of the second transaction having been determined at the time when the first was effected. There might be circumstances in which at the time of the first transaction arrangements for the effecting of the second transaction had reached a stage at which it could properly be found as a fact that the first transaction was interdependent although a final price or specific buyer had not then been identified. Arrangements for a sale by auction might be such a situation. I read his reference to ability to procure the implementation of the second transaction as covering both the case where there was a binding contract to effect the sec-

(1) 54 TC 200. (2) 55 TC 324. (3) 54 TC 101.

A ond transaction as well as the case where there was no such contract but where there was an expectation that it would be effected and no likelihood in practice that it would not.

My Lords, in determining whether a number of transactions of which at least one has no purpose other than tax avoidance (the tax step) should be B treated for fiscal purposes not as independent but as forming part of one composite linear transaction from which tax consequences flow certain factors must be taken into account. These include:

(1) The extent to which at the time of the tax step negotiations or arrangements have proceeded towards the carrying through as a continuous C process of the remaining transactions;

(2) The nature of such negotiations or arrangements;

(3) The likelihood, at the time of the tax step, of such remaining transactions being carried through; and D

(4) The extent to which after the tax step negotiations or arrangements have proceeded to completion without genuine interruptions.

I do not suggest that this list is exhaustive and there may well be other factors of equal or greater importance in particular cases. E

If it were appropriate to prepare a formula defining "composite transaction" in the light of the passages in the speeches in *Ramsay*,(1) *Burmah*(2) and *Dawson*(3) to which I have referred I should be tempted to suggest the following:

F

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

However, I am conscious that this may well constitute too rigid an approach to the problems and I therefore put it forward as a tentative guide rather H than as a definitive exercise.

It may be said that any formula of the type such as I have suggested would make it easy for the taxpayer to avoid tax liability merely by postponing arrangements for the second transaction until after the first had been I completed. That is, however, to beg the question. The function of the court is to construe the relevant charging section and to apply it to the facts found. I do not conceive it to be the function of the court to act as the third arm of the Revenue in seeking to attack tax avoidance at large. If a series of trans-

(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324.

actions involving a pure tax avoidance step can, within the principles already laid down, properly be regarded as constituting a "disposal" or other chargeable event for the purposes of the relevant charging section then the court must so regard them. But if they cannot then Parliament alone can extend the ambit of the charging section.

There is one further matter which I consider to be of importance. That is the question of possible double taxation. This was raised in *Dawson* [1984] AC 474 but Lord Brightman considered at p. 525 that it could not arise because there would be no capital gains tax payable in respect of disposals from the taxpayers to G. and from G. to W.B. in addition to that paid in respect of the disposal from the taxpayers to W.B. Lord Brightman accepted that there would be a charge to capital gains tax when the taxpayers sold their shares in G. for which purpose the base cost of these shares "would be the price which they paid for them, namely the value of the shares in the operating companies at the date of the transactions." Counsel for the respondents submitted that if in a *Dawson* type of transaction there was a gap in time between the first and second transactions during which the shares originally held by A, the taxpayer, appreciated in value double taxation would arise in as much as A would pay capital gains tax:

(i) on the disposal to C on the whole gain which had accrued on those shares between his acquisition thereof and the date of such disposal, and

(ii) on a subsequent disposal of his shares in B on so much of the gain in B's shares between the date of his acquisition of them and subsequent disposal which was directly attributable to the increase in value of the original shares while held by B.

A would thus be paying tax twice over on the increase in value of the original shares while in B's hands. This is a rather different situation to that which Lord Brightman was considering in *Furniss* v. *Dawson*(1) where the first and second transactions took place upon the same day.

At first Mr. Nugee was inclined to maintain that for the purposes of a sale by A of his shares in B the base value must be taken as the value of the original shares at the date of the actual exchange. However, later on he was persuaded that the base value would be the value of the original shares at the date of their disposal by B to C. If the latter base value were correct then the fears of the respondents would probably be groundless. However, I have considerable doubt whether Mr. Nugee's latter approach was correct. The exchange of shares of the *Dawson* type between A and B is disregarded as an inserted step or telescoped into the next step for the purposes of determining the relevant taxable transaction of which it forms a part. However, it cannot be totally disregarded since it has produced lasting consequences in the form of A's shareholding in B. If the inserted step formed part of a composite transaction and was not therefore such an independent transaction as fell within the scope of paras 4(2) and 6(1) of Sch 7 of the Finance Act 1975 how is A to be deemed to have acquired his shares in B for the purpose of calculating the base value thereof? The Respondents say that the matter is quite simple. A acquired his shares in B on the date of the exchange and for a consideration equal to their then market value which was the value of the original shares transferred by him to B on that date. The Crown argue that he

(1) 55 TC 324.

A must be treated as acquiring the shares on the date of the disposal of the original shares by B to C and for a consideration equal to the market value on that date of the original shares. Thus the Crown's argument involves the assumption that A acquired shares in B on a date upon which he did not acquire them and for a market value which did not obtain on the true date of their acquisition. Thus not only does the *Ramsay*[1] principle involve disre- B garding or telescoping interposed steps for the purposes of taxing one transaction but it also involves hypothesising as to events which did not occur for the purposes of taxing other transactions. I have considerable doubts as to whether the application of the *Ramsay* principle should involve consequences. But it is not necessary for me to reach a conclusion on the matter as C it is not directly in issue in these appeals. Possible double taxation is, however, relevant in considering the time taken to complete the stages of a composite transaction. If the Respondents' assessment of the position is correct it follows that the risk of double taxation increases as the time taken to complete the stages lengthens. This is a further reason for concluding that the *Ramsay* principle should not be extended to a series of transactions which are D not planned from the outset to take place as a continuous uninterrupted process.

I conclude my analysis of the three cases by emphasising that the *Ramsay* principle is a principle of construction, that it does not entitle the courts to legislate at large against specific acts of tax avoidance where E Parliament has not done so and that in the end of the day the question will always be whether the event or combination of events relied upon amount to a chargeable transaction or give rise to allowable relief within the meaning of the relevant statutory provisions.

I turn briefly to consider the three individual appeals.

F

Craven v. *White*

The scheme here was in outline very similar to that in *Dawson*.[2] The taxpayers who owned all the share capital of Queensferry, exchanged their shares in Queensferry for shares in an Isle of Man company Millor, which G had been acquired for the purpose, and Millor thereafter sold the Queensferry shares to Jones. However implementation of the scheme did not proceed along a path so smooth or so short as that in *Dawson*. The facts are set out in detail by the Special Commissioners in [1985] 3 All ER 125 and are summarised by Peter Gibson J., at p. 149. I do not propose to rehearse them. What is in my view important is:

H

(1) That in May 1976 broad agreement on a price for the sale of the Queensferry shares to Jones' parent company Oriel had been agreed in principle,

(2) After a meeting on 17 June 1976 with Oriel the taxpayers were despondent as to the prospects of a sale and reopened negotiations for I the merger with another company,

(3) That Oriel then asked for a further meeting with the taxpayers to be held on 25 June,

---

(1) 54 TC 101. (2) 55 TC 324.

(4) That negotiations between the taxpayers and Oriel were continuing, as were negotiations with the other company for merger, when the agreement to exchange shares in Queensferry for shares in Millor was concluded on 19 July. A

Against this factual background if, at the date of the share exchange agreement, the question had been asked whether to use Lord Wilberforce's words there was any likelihood in practice that the sale to Jones would not be completed I think that it would have been very difficult to say that there was no such likelihood. In these circumstances, although the issue is very narrow, I think that the share exchange between the taxpayers and Millor was an independent transaction and that there was accordingly no disposal by the taxpayers to Jones for the purposes of s 19(1) of the Finance Act 1965. I would dismiss the appeal. B C

Inland Revenue Commissioners v. *Bowater Property Developments Ltd.*

This appeal concerns the charge to development land tax on realised development value accruing to the taxpayer company on the disposal by them of an interest in land. The relevant transactions concerned a number of companies in the Bowater group and an outside company M.P.L. and the facts are set out in the judgment of Slade L.J. [1987] 3 WLR 660, 687–689. In summary the following events occurred: D

(1) by November 1978 agreement had been reached subject to contract for the sale by Bowaters United Kingdom Paper Company Limited (B.U.K.P.) of land to the outside company of M.P.L. E

(2) On 7 March 1979 the taxpayer company exercised an option to purchase the land from B.U.K.P.

F

(3) On 25 March 1980 the taxpayer company sold the land to five other companies in the Bowater group in equal shares. None of these five companies had used any part of its annual exemption of £50,000 and the sole purpose of the sale was to avoid development land tax on any sale of land to M.P.L. On that date there was a firm expectation that the sale to M.P.L. would take place but no possibility that M.P.L. would then have signed the contract. G

(4) On 7 July 1980 M.P.L. intimated that they were giving up the proposal to purchase the land.

(5) In February 1981 M.P.L.'s circumstances altered and they reopened negotiations. H

(6) On 25 November 1981 sales of the land by the five companies to M.P.L. were completed.

In this case not only could it not have been said on 25 March 1980 that there was no reasonable likelihood that the sale to M.P.L. would not take place but thereafter there was a complete and genuine interruption of all dealings for a period of seven months followed by further negotiations for nine months before the sale took place. I do not consider that it could possibly be said that in these circumstances the sales of March 1980 and November 1981 were part of a composite transaction which constituted a dis- I

A posal for the purposes of s 1 of the Development Land Tax Act 1976. I would dismiss this appeal.

Baylis v. *Gregory*

This is another scheme of the *Dawson*(1) type but the path to fruition was even longer and rougher than in *Craven* v. *White*. The facts are set out in B the judgment of Slade L.J. [1987] 3 WLR 660, 691. The critical fact is that at the time when the taxpayers exchanged the relevant shares for shares in the Isle of Man company prior negotiations with a particular purchaser had broken down and no other purchaser was then in view. Not until more than a year later did a potential purchaser emerge and a further six months elapsed before a sale was finally concluded. The first transaction accordingly took C place as an exercise in strategic planning rather than with any particular subsequent transaction in mind and I did not understand that the Crown really disputed this. There can in these circumstances be no question of there being any nexus between the two transactions whereby they could together form any composite transaction for capital gains tax purposes. I would dismiss the appeal.

D

My Lords, I will only add that since giving the foregoing reasons I have had the advantage of reading in draft the speech of my noble and learned friend Lord Oliver of Aylmerton with whose reasons for dismissing the appeals I am in agreement.

E

Appeals dismissed, with costs.

[Solicitors:—Solicitor of Inland Revenue; Berwin Leighton (for the taxpayers in the first and third appeals);
Gray Marshall & Campbell, Croydon, agents for C.W.S. Goodger, (for the taxpayers in the second appeal).]

F

G

H

I

Printed in the United Kingdom for HMSO.
Dd. 0293458, 10/91, C43, 0477, 5673, 161940.

(1) 55 TC 324.