TC01870

Appeal number TC/2009/16852

CAPITAL GAINS TAX - ss 60 and 71 TCGA- Was beneficiary to whom appointment made absolutely entitled? Yes as a matter of general law - Did artificiality mean it did not signify for tax purposes? No – Appeal allowed

FIRST-TIER TRIBUNAL
TAX

JAMES ALBERT MCLAUGHLIN **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: ADRIAN SHIPWRIGHT (TRIBUNAL JUDGE)
TOBY SIMON (TRIBUNAL MEMBER)

Sitting in public at 45 Bedford Square, London WC1 on 12, 13 and 14 October 2011

Kevin Prosser QC and Jonathan Bremner, counsel, instructed by KPMG for the Appellant

Adam Tolley, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by James Albert McLaughlin ("the Taxpayer") against the conclusion of the Respondents ("HMRC") stated in a closure notice dated 28 October 2008, closing an enquiry into the Taxpayer's return for the tax year 2002-03.

2. HMRC concluded that, in the circumstances described below, there was a disposal by the trustees of a settlement rather than by a non-UK domiciled individual with a consequent UK capital gains tax charge on the Taxpayer as explained below. The effect of the amendment to reflect this conclusion was that an extra £2,863.25 was to be paid by the Taxpayer after Taper Relief had been applied.

The Issue

3. The essential issue in this case is whether section 71(1) of the Taxation of Chargeable Gains Act 1992 ("TCGA") applied to an appointment ("the Appointment") made on 6 March 2003 by the trustees of the James Albert McLaughlin 2003 Settlement ("the Settlement") in favour of a person who had been added as a beneficiary of the Settlement, Mr Adrian Gower ("AG").

4. The Appointment related to part of the trust fund containing certain loan notes ("the Loan Notes"). The Loan Notes are considered in more detail below.

Common Ground

5. It was common ground between the Parties that if:

(a) as the Taxpayer contended, section 71(1) applied to the Appointment the Loan Notes became vested in AG, so that the disposal of the Loan Notes on 7 March 2003, was a disposal by AG and as he was non-UK domiciled, and the Loan Notes were situated outside the UK, no capital gains tax was payable on the disposal (assuming no remittance etc.); or

(b) as HMRC contend, section 71(1) did not apply to the Appointment, then the Loan Notes continued to be vested in the trustees, and so the disposal on 7 March 2003 was by the trustees on which capital gains tax was in principle payable with consequent changes to the sale consideration of a sale of the Loan Notes to the trustees and so to the Taxpayer's tax liability.

6. It was not disputed that there was a disposal of the Loan Notes on 7 March 2003. It was also common ground that the Loan Notes, being "non qualifying corporate bonds" were assets for the purposes of capital gains tax so that gains arising on the disposal of the Loan Notes could be chargeable gains. The dispute was as to who was the disponor, AG or the trustees.

7. It was also common ground that "… the various steps taken by the trustee were taken as Part of a plan to avoid tax and thereby benefit [the Taxpayer], a beneficiary of the trust".

8. There was no suggestion that the documents were shams nor that the trustees acted improperly. Counsel for HMRC very properly disclaimed any suggestion of sham or impropriety.

9. The Taxpayer accepted that no-one contemplated AG would give the trustees any direction at all in relation to the Loan Notes.

10. It seemed accepted, at least not challenged, that AG was domiciled outside the UK and the situs of the Loan Notes was outside the UK and to the extent necessary we so find.

Abbreviations and Dramatis Personae

11. The following abbreviations and references to persons are used in this decision but as ever are subject to the requirements of the context.

"AG"	Mr Adrian Gower, a non UK domiciled individual
"the Appointment"	an appointment made on 6 March 2003 by the trustees of the Settlement
"the Bank"	SG Hambros Bank & Trust (Jersey) Limited
"Deed of Addition"	the deed adding AG to the class of beneficiaries referred to at 62 below
"the Deed of Appointment"	the deed making the Appointment referred to at [63] below
"Deed of Appointment Allocation and Declaration"	the deed inter alia creating the Part B fund referred to at 57 below
"HMRC"	the Respondents
"IFA"	IFA Holding Company Limited, formerly Lynx Group PLC, a subsidiary of Skandia and a member of the Skandia Group
"IFASH"	IFA Services Holding Company PLC, a subsidiary of Skandia and a member of the Skandia Group
"the Loan Notes"	the loan notes which are the assets in question in this appeal which are described in more detail at [27 ff] below
"Part A"	one of the two Parts of the trust fund of the Settlement created by the Deed of Appointment Allocation and Declaration
"Part B"	one of the two Parts of the trust fund of the Settlement created by the Deed of Appointment Allocation and Declaration
"the Settlement"	The James Albert McLaughlin 2003 Settlement and references to the trustees are generally to the trustees of the Settlement unless the context otherwise requires
"Skandia"	Skandia and where appropriate its group
"the Taxpayer"	the Appellant, James Albert McLaughlin
"TCGA"	Taxation of Chargeable Gains Act 1992

The Law

Legislation

12. The important legislation, in so far as is relevant here, is found in sections 71, 68 and 60 TCGA. So far as is relevant these provide as follows.

13. Section 71(1) TCGA provides:

"(1) On the occasion when a person becomes absolutely entitled to any settled property as against the trustee all the assets forming part of the settled property to which he becomes so entitled shall be deemed to have been disposed of by the

trustee, and immediately reacquired by him in his capacity as a trustee within section 60(1), for a consideration equal to their market value."

14. Section 68 TCGA defines "settled property" as "any property held in trust other than property to which section 60 applies". It was not argued that there was no settled property here before the Appointment. The issue as noted above was the effect of the Appointment in the context of section 71 TCGA.

15. Section 60 TCGA provides:

"(1) In relation to assets held by a person as nominee for another person, or as trustee for another person absolutely entitled as against the trustee… this Act shall apply as if the property were vested in, and the acts of the nominee or trustee in relation to the assets were the acts of, the person or persons for whom he is the nominee or trustee (acquisitions from or disposals to him by that person or persons being disregarded accordingly).

(2) It is hereby declared that references in this Act to any asset held by a person as trustee for another person absolutely entitled as against the trustee are references to a case where that other person has the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustees to resort to the asset for payment of duty, taxes, costs or other outgoings, to direct how that asset shall be dealt with."

Case Law etc.

16. We were also referred to, and provided with copies of the following cases which we have carefully considered:

Saunders vs. Vautier (1841) Beav 115
Holmes vs. Godson (1856) 8 De G.M. & G 152
Christie vs. Ovington (1875) 1 Ch 279
In Re Stringer's Estate [1877] 6 Ch D1
Kirby vs. Wilkins [1929] 2 Ch 444
JR Bibby & Sons vs. IRC (1945) 29 TC 167
Re Brockbank [1948] 1 Ch 206
IRC vs. Silverts [1951] 1 Ch 521
Re Grimthorpe [1958] Ch 615
Napier vs. Light (1974) 236 EG 273
Stephenson vs. Barclays Bank Trust Company Ltd. [1975] STC 151
Holding & Management Limited vs. Property Holding &Investment Trust PLC [1990] 1 All ER 938
X vs. A [2000] 1 All ER 490
MacNiven vs. Westmoreland Investments Ltd. [2001] STC 237
Barclays Mercantile Business Finance Limited vs. *Mawson* [2005] STC 1
Scottish Provident Institution vs. *IRC* [2005] STC 15
Eyretel Unapproved Pension Scheme Trustees vs HMRC [2009] STC (SCD) 17
Astall vs. HMRC [2010] STC 137
Berry vs. HMRC [2011] STC 1057
First Nationwide vs. HMRC [2011] STC 1540
Tower MCashback LLP 1 vs. HMRC [2011] STC 1143

17. We were also provided with extracts from the 17th and 18th additions of Underhill & Hayton, Snell's Equity (thirteenth edition) and the 18th edition of Lewin on Trusts and the 1st edition of Thomas on Powers.

The Evidence

18. We were provided with agreed bundles of documentation. The documents were all admitted in evidence, no objection having been taken to any of the documents.

19. We heard oral evidence from Mr Michael Walker, a partner in KPMG. A Witness Statement was provided in respect of his evidence which was treated as his evidence in chief, and he was cross examined.

The Facts

20. From the evidence we make the following findings of fact.

The Taxpayer

21. At the relevant times the Taxpayer was resident, ordinarily resident and domiciled in the UK. He had sold a business with a significant capital gain.

22. The Taxpayer heard about the tax planning described below from other persons who had made similar paper for paper exchanges and had consulted the accountants who provided this planning. He consulted the accountants on his own behalf.

Mr Gower - AG

23. AG was a UK resident and ordinarily resident individual who was domiciled outside the UK and was understood to have been accepted as such by HMRC. AG's domicile was not in dispute before the Tribunal and AG was treated as domiciled outside the UK for the purposes of this decision.

24. AG was added to the beneficiaries of the Settlement shortly before the Appointment.

25. AG was the beneficiary of the Appointment which appointed Part B of the trust fund of the Settlement to be held for AG absolutely.

26. AG was found after a difficult search for a suitable non-domiciliary. He was a relative of one of the individuals who was employed by one of the entities involved in the structure. This of itself caused a degree of delay whilst the potential for conflict was considered.

The Loan Notes

(i) Acquisition

27. The Taxpayer acquired the Loan Notes in 2002.

28. The Loan Notes were acquired by the Taxpayer in exchange for certain shares held by the taxpayer.

29. It was not disputed that by virtue of section 135 TCGA this paper for paper exchange did not constitute a disposal of the shares or an acquisition of the Loan Notes. The Loan Notes were effectively treated as the same asset as the shares for capital gains tax purposes.

(ii) Issuers and Registers

30. The Loan Notes were issued by two subsidiaries of Skandia UK Limited ("Skandia").

31. These subsidiaries were:

(a) IFA Holding Company Limited, formerly called Lynx Group plc ("IFA"); and

(b) IFA Services Holdings Company plc ("IFASH").

32. The Loan Notes at the relevant times were registered in overseas registers. It seemed to be common ground that the situs of the Loan Notes was consequently outside and not in the UK. We so find. We note in doing so that the situs of the registers had been changed in late October 2002.

33. The total face value of the Loan Notes was £1,179,376

(iii) IFA Loan Notes

34. The Taxpayer, before he transferred them to the Settlement, held Loan Notes in IFA with a face value of £189,504.

35. The IFA Notes were due to be repaid at par on 13 February 2006 (see clause 4.1 of the instrument constituting those Loan Notes).

36. Each Noteholder was entitled by giving at least 90 days' notice to require IFA to redeem his Notes at par on 31 October or 31 March of any relevant year (see clause 4.3).

37. IFA was entitled to purchase any Notes by private treaty at any price agreed between the parties at any time (see clause 4.2).

38. The Notes were freely transferable to certain defined persons, and otherwise with the prior written consent of IFA (not to be unreasonably withheld or delayed), by instrument in writing (see Clause 11).

(iv) IFASH Loan Notes

39. The Taxpayer, before he transferred them to the Settlement, held Loan Notes in IFASH with a face value of £989,872.

40. The IFASH Notes were due to be repaid at par on 31 January 2006 (see Clause 2.1 Schedule 2 of the instrument constituting those Loan Notes).

41. However, each Noteholder was entitled to require early repayment of his Notes on any 31 January or 31 July of any relevant year (see Clause 2.1 Schedule 2).

42. IFASH was entitled at any time to purchase any Notes by private treaty at any price agreed between the parties at any time (see Clause 2.6 Schedule 2).

43. The Notes were transferable to any person by instrument in writing (clause 4 Schedule 3).

The Planning – The Steps

44. The Taxpayer decided to carry out some tax planning in order to avoid Capital Gains Tax on a disposal of the Loan Notes.

45. As noted above it was common ground that "… the various steps taken by the trustee[s of the Settlement] were taken as part of a plan to avoid tax…" It was not disputed that the planning was "a marketed scheme and was implemented by approximately 16 individuals" as HMRC asserted in their Skeleton Argument. We have no reason to doubt this but there was no corroborative evidence of this before us. We have assumed it to be the case for the purposes of this decision.

46. The broad aim of the planning was to avoid capital gains tax by the taxpayer transferring the Loan Notes to a trust and making a section 165 TCGA hold over claim on the transfer into trust and for the trustees to appoint the Loan Notes which were to be non UK situs assets to a non-domiciled individual with the benefit of the remittance basis having created two funds and borrowed using effectively one of the funds only as security for the borrowing. The other fund was then available to the trustees without encumbrance.

47. The planning involved (inter alia) the following steps.

(a) The Taxpayer would transfer the Loan Notes to the trustees of the Settlement;

(b) The trustees would borrow a sum slightly less than £1.179m from a bank, and would divide the trust fund into two Parts, Part A consisting of the money borrowed from the bank, and Part B consisting of the Loan Notes subject to the liability to the bank. Thus, the net value of Part B would be low; it would in effect constitute payment to the non-domiciliary for his participation.

(c) The trustees would appoint Part B to a non-UK domiciled beneficiary, but without prejudice to the trustees' lien and right to reimbursement in respect of their liability to the bank;

(d) It was intended that the Appointment would be a disposal of the Loan Notes by the trustees to the beneficiary under section 71(1), but there would be no Capital Gains Tax charge, because hold-over relief would again be claimed, by the trustees and the beneficiary.

(e) The Loan Notes would be redeemed or sold and the trustees would repay the bank; this would be a disposal of the Loan Notes by the non-UK domiciled beneficiary, but there would be no Capital Gains Tax charge on this disposal as either:

(i) the Loan Notes were situated outside the UK and the disposal was by a non UK domiciliary; or

(ii) Taper relief would apply and no chargeable gain would accrue on the later redemption or sale (see below).

(f) Where necessary the Loan Note instruments would be varied beforehand so that the Loan Note register was outside the UK and the Loan Notes would be non UK situs property.

(g) This, as noted above, was done in this case towards the end of October 2002. It is not clear whether this is part of the "composite" HMRC argue for but we have assumed for the purposes of this Decision that it was part of the arrangements for the planning. It is hard to see why else it would be done. HMRC did not include it in the steps which constituted the "composite" when replying to the Tribunal's question as to what the steps they said were included in the "composite". This is discussed below.

Taper Relief

48. The position was complicated by the potential application of Taper Relief. The complication was:

(a) if the Taxpayer redeemed or sold the Loan Notes a chargeable gain would accrue to him, but the capital gains tax payable would be reduced by taper relief; but

(b) if the Taxpayer carried out the planning, and it failed, because section 71(1) did not apply to the Appointment, then a chargeable gain would accrue to the trustees on the redemption or sale, and the capital gains tax payable on that disposal would not be reduced by taper relief.

49. In order to ensure that, if the planning failed, taper relief would be available, the planning involved the Taxpayer transferring the Loan Notes to the trustees by way of sale, for an initial price of £900 to be revised upwards to £1.161m if, in effect, the planning failed. This meant that if the planning succeeded, hold-over

relief would be available in respect of Mr McLaughlin's transfer of the Loan Notes to the trustees but if the planning failed, then hold-over relief would not be available in respect of the transfer to the trustees, and so a chargeable gain would accrue to Mr McLaughlin, but with the benefit of taper relief, and no chargeable gain would accrue on the later redemption or sale.

50. We note that it is because of this complication that HMRC, who considered that the planning failed, concluded in the closure notice that a chargeable gain accrued to the Taxpayer in respect of his transfer of the Loan Notes to the trustees.

Implementation

51. On 22 January 2003, SG Hambros Bank & Trust (Jersey) Limited ("the Bank") wrote to Skandia seeking confirmation that Skandia or one of its UK subsidiaries would purchase the Loan Notes by private treaty at face value from whoever held them, if a request was made to Skandia to do so giving at least 3 weeks' notice and the purchase was completed by 28 February 2003.

52. The Taxpayer established the Settlement with an initial trust fund of £1,000 by a trust deed dated 5th February 2003 made between the Taxpayer and SG Hambros Trust Company Ltd. as the trustees. The deed included power to divide the trust fund into two or more separate parts (see Clause 2.2) and to allocate liabilities to one part alone (clause 3.2). It was broadly an interest in possession trust for the Taxpayer subject to overriding powers of appointment. There was also power for the trustees to add beneficiaries (see Clause 5).

53. On 5 February 2003 the Taxpayer agreed by a written sale agreement to sell the Loan Notes to the trustees for an initial price of £900. This price was to be revised to £1.161m if, in effect, the planning failed.

54. The Taxpayer transferred the Loan Notes to the trustees by two loan note transfer forms both dated 5 February, 2003.

55. On 7 February 2003 the trustees wrote to Skandia, referring to Skandia's letter to the Bank and to clause 4.2 of the IFA Loan Notes and Schedule 2 clause 2.6 of the IFASH Loan Notes, requesting that the Loan Notes be redeemed by Skandia or one of its UK subsidiaries by private treaty at face value on 28th February 2003. There was no enforceable agreement entered into in consequence of the request.

56. On 19 February 2003 the trustees borrowed £1,161,972 from the Bank.

57. On 21 February 2003 by a Deed of Appointment Allocation and Declaration, the trustees divided the trust fund into two parts, namely:

(a) Part A consisting of the £1,161,972, and

(b) Part B consisting of the Loan Notes subject to all liabilities to the Bank and certain other obligations.

58. It did not prove possible to enter into private treaty agreements for the sale of the Loan Notes by 28 February 2003. This was because of a dispute as to whether interest should be paid gross or net.

59. It was also the case that a suitable non-UK domiciled individual had not then been found. However, even if such a person had been available it is clear that until the withholding tax dispute had been settled there would be no sale or redemption of the Loan Notes nor any enforceable agreement to do so and we so find.

60. On 27 February 2003, Skandia wrote to the Bank, referring to their letter of 22 January 2003, and confirming that Skandia or one of its UK subsidiaries would acquire the Loan Notes by private treaty at face value from whoever held them providing that the transfer was completed by 7 March 2003.

61. On 4 March 2003 IFA gave its written consent to the addition of a non UK domiciled individual as a beneficiary of the Settlement as did IFASH. This would remove any restriction on transfer of the Loan Notes to AG if an appointment were to be made to him.

62. On 5 March 2003 by a deed ("the Deed of Addition") the trustees added AG, who was UK resident and ordinarily resident but non-UK domiciled, as a beneficiary of the Settlement.

63. On 6th March 2003 the trustees executed the deed making the Appointment ("the Deed of Appointment"). By clause 2 of that deed the trustees irrevocably appointed, subject to clause 3, "that they shall hold the capital and income of Part B trust fund upon trust for Mr Gower [i.e. AG] absolutely".

64. Clause 3 provided that the Appointment was without prejudice to the trustees' "lien and right to reimbursement in relation to the costs, expenses and liabilities" incurred or to be incurred broadly in connection with the Bank borrowing.

65. By two private treaty agreements dated 7 March 2003 the trustees transferred:

(a) the IFA Notes to IFA for cancellation on completion. and

(b) the trustees transferred the IFASH Notes to IFASH for cancellation on completion.

66. In accordance with the terms of the agreements:

(a) IFA paid the trustees £189,504; and

(b) IFASH paid the trustees £989,872.

67. This was a total £1,179,376.

68. We find as a fact that there were no side agreements and, in particular, nothing amounting to some sort of agreement by AG not to exercise a prima facie right conferred by the Appointment.

The Submissions of the Parties

The Appellant's Submissions in outline

69. The Taxpayer argued, in essence, that:

(a) The Appointment to AG had the result that, in accordance with its terms, AG became absolutely entitled as against the trustees to what was appointed and so became entitled to the Loan Notes.

(b) Accordingly, AG made the disposal on 7 March 2003 as the Loan Notes had become vested as a matter of general law and for capital gains tax purposes in AG, so that the disposal of the Loan Notes was a disposal by AG and not by the trustees.

(c)The gain was not a gain on a disposal by the trustees but on a disposal of a non UK situs asset, the Loan Notes, by an individual domiciled outside the UK who was entitled to the remittance basis but who made no remittance. Consequently, no charge to UK Capital Gains Tax arose on the Taxpayer on the disposal of the Loan Notes as there was no adjustment to the consideration on the transfer into settlement.

70. In more detail the Taxpayer argued as follows.

(a) The Loan Notes were appointed absolutely to the Taxpayer.

(1) The documents, in terms, show clearly that AG became absolutely entitled as against the trustees to Part B of the trust fund.
(2) Clause 2 of the Deed of Appointment of 6 March, 2003 provided that the trustees "… irrevocably appoint that the trustee shall hold the capital and income of Part B upon trust for Mr Gower absolutely".
(3)There was an agreement to join in making a claim for holdover relief on the deemed disposal on becoming absolutely entitled which was done.
(b) The Appointment was subject to the trustees' right of reimbursement and lien.
(1) Clause 3 of the Deed of Appointment provided that the appointment was without prejudice to the trustees' lien and right to reimbursement in relation to the costs, expenses and liabilities specified which included "… All amounts due by the trustees to SG Hambros Bank and Trust Limited under the loan agreement dated 19 February, 2003".
(2) This Appointment falls within the wording of section 60(2) TCGA. The absolute entitlement (i.e. the irrevocable appointment) to the Loan Notes was "… subject only to satisfying any outstanding charge, lien or other right of the trustees to resort to the asset for payment of duty, taxes, costs or other outgoings, to direct how that asset shall be dealt with."
(c) The Taper Relief feature does not affect this analysis.
(1) The trustees would not be entitled to Taper Relief.
(2) However, if the disposal of the Loan Notes to the issuer was not treated as a disposal by AG the sale price payable to the trustees on the original transfer into settlement was to be adjusted but this did not affect who was entitled to the Loan Notes and made the disposal on 7 March, 2003. It only came into effect if there was no absolute entitlement to the Loan Notes.
(d) Redemption of the Loan Notes was deemed to be an act of AG (see section 60(1) TCGA) as he could call for their conveyance.
(e) AG could have called for the conveyance of the contents of Part B of the trust fund of the Settlement to him and so AG was absolutely entitled to the Loan Notes.
(f) AG's rights depend on the legal position. The provisions have to be interpreted with the law in mind (see *Stephenson* and Lord Millett in *Ingram*). AG could control how the Loan Notes or their proceeds were dealt with by having them conveyed to him. This was subject to the trustees' lien but by section 60(2) TCGA that does not prevent AG being absolutely entitled.
(g) The language of section 60(2) TCGA is not congruent with the wording of the Deed of Appointment. That Deed refers to "Liabilities" whilst the subsection refers to "any outstanding charge, lien or other right of the trustees to resort to the asset for payment of duty, taxes, costs or other outgoings". Repayment of the loan from the Bank is a cost or other expense for which the trustees have the right to resort to the Part B Fund to make the repayment and so clearly falls within the subsection.
(h) *Stephenson* shows there is no rationale for a distinction between one and more beneficiaries. This is supported by *Saunders v Vautier* itself which only concerned one beneficiary.
(i) Walton J in *Stephenson* talks of a right to direct how the trust fund may be dealt with. He says the beneficiaries cannot override the trust and keep it in

existence but they can direct the trustees to transfer the trust fund to them or others.

(j) The Taxpayer relied on *X v A* for the effect of lien and noted that it can arise by operation of law but here it was specified in the document. The lien did not prevent the Loan Notes being something that AG was absolutely entitled to as against the trustees. The lien allowed the trustees to resort to that fund. AG could, if he wished, have paid out of his other assets if he wished and stopped the Loan Notes being resorted to.

(k) Even if it were considered the lien affected the right to the Loan Notes in some way section 60 TCGA provided that the lien was to be ignored.

(l) The question of absolute entitlement therefore had to be decided in the Taxpayer's favour.

(m) Accordingly, AG became absolutely entitled to the Loan Notes and the appeal should be allowed.

HMRC's Submissions in outline

71. In essence, HMRC submitted that:

(a) this was a series of transactions designed to be a "composite" intended to achieve the outcome that the taxpayer paid less tax;

(b) under this "composite" AG had no right to call for and/or deal with the Loan Notes which continued to be vested in the trustees who made the disposal for tax purposes;

(c) a tax charge therefore arose on the Taxpayer on the adjusted price on the transfer into settlement;

(d) accordingly, the appeal should be dismissed.

72. In more detail it was argued by HMRC that:

a. section 71(1) did not apply to the Appointment which was too artificial to signify:

   i. so the Loan Notes continued to be vested in the trustees for tax purposes;

   ii. the disposal on 7 March 2003 was made by the trustees not AG;

   iii. this led to an adjustment of the price on the transfer into settlement with a consequent charge on the taxpayer.

b. For the planning to succeed it required AG to become absolutely entitled to the Loan Notes on the Appointment. HMRC say in the circumstances of this case that he did not come within the definition of a "person absolutely entitled as against the trustees" set out in section 60 TCGA properly interpreted.

c. The line of cases on what is sometimes described as "the *Ramsay* principle" requires the legislation to be applied purposively in the context of all the circumstances.

d. Applying the legislation here AG cannot be said to fall within what Parliament considered to be the meaning of "absolutely entitled". Accordingly:

   i. AG did not become absolutely entitled as against the trustees and did not make the disposal on 7 March, 2003.

   ii. The disposal was made by the trustees with a consequent tax charge on the Taxpayer because of the adjustment to the sale price on the transfer into settlement.

e. There was no commercial reason for what was done. It was done solely to extract the value by the prior appointment and not pay the tax properly due.

f. There was a "composite" which consisted of :
   i. The trustee borrowing;
   ii. The creation of the Part A and Part B funds;
   iii. The allocation of liability in particular in respect of the bank loan;
   iv. The appointment of AG as the beneficiary of the Part B (and presumably the Appointment);
   v. The redemption of the Loan Notes.

g. The meaning of absolutely entitled is given by the statutory definition in section 60 (2) TCGA.
   i. This provides, so far as relevant, "… references in this to any assets held by a person as trustee for another person absolutely entitled as against the trustees are references to a case where that other person has exclusive rights, subject only to satisfying any outstanding charge, lien or other rights of the trustees to resort to the asset for payment of duty, taxes, cost or other outgoings, to direct how that asset shall be dealt with".
   ii. HMRC emphasise that it needs to be an exclusive right to direct how the asset shall be dealt with for this provision to apply.
   iii. It is to be noted that this definition is to apply throughout the TCGA.

h. In the light of the *Ramsay* principle of construction this means that a person who is absolutely entitled must have a right to direct how the asset in question is dealt with. This requires that:
   (1) The right must vest *solely* in the person absolutely entitled as against the trustees and not in any other person so as to give effect to the statutory words "exclusive rights";
   (2) The right must be over all dealings with the assets itself and not merely in the remainder interest in the asset so as to give effect to the words "to direct how that asset shall be dealt with";
   (3) Such a right is subject to the trustees' lien over the asset to meet costs and expenses.

   i. This reflects the ordinary and natural meaning of absolute ownership.
      i. An absolute owner of an asset would be expected to be able to do anything with the asset without reference to, or seeking permission from, or another person.
      ii. The phrase "absolute owner" connotes "… the ability to exercise complete dominion over the asset".
      iii. It is intended to reflect the ordinary and natural meaning of absolute ownership. An absolute owner of an asset would be expected to be able to do anything with the asset without reference to or seeking permission from another person. Hence the subsection contains within it the complete dominion requirement.

j. This accords with Article 69.1 in Underhill and Hayton which explains that an absolute owner is not prevented from directing the trustees how to act in relation to the asset but he cannot compel them so to act. Such an owner does, however, have the ability as absolute owner to terminate the bare trust and hold the asset directly.

k. It also fits in with *Stephenson vs. Barclays Bank*. Walton J said that the beneficial interest holders where they are all sui juris and acting together are entitled to direct the trustees how the trust fund may be dealt with.

l. This is recognised in section 60 (2).

i. This section is based on the premise that the trustees give effect to the directions of the absolute owner of an asset when they deal with it.

ii. The purpose of this subsection is to reflect the fact that an absolute owner has the present rights both as to how and when the asset is dealt with and to direct the trustees accordingly.

iii. This is subject to the exception for the trustee's lien which is to ensure that the trustees do not personally suffer from the financial burden of acting as trustees (see Danckwerts J in *Re Grimthorpe*).

m. When taking an "unblinkered approach" to the facts to determine whether they come within the meaning of that subsection it is clear that AG did not become entitled absolutely to the Loan Notes on the Appointment. His rights fell very far short of the rights of an absolute owner of the Loan Notes. This was because (inter alia):

(1)The trustees had already requested the loan notes be redeemed at a time before AG had been identified as a beneficiary yet alone had the trustees appointed the Loan Notes to AG;

(2)The documentation shows that the Parties proceeded on the basis that the trustee would request redemption and that redemption was bound to occur;

(3)The documents also show that AG was clearly informed that the appointment of the Loan Notes to him did not prevent the trustees from redeeming the Loan Notes pursuant to the request already made by them to Skandia.

n. When viewed realistically AG in reality had no right, let alone an exclusive right, to direct how the Loan Notes would be dealt with. He was powerless to prevent the trustees from redeeming the Loan Notes. His entitlement was to what remained in Part B of the trust fund once the Loan Notes were redeemed and the borrowing discharged. This is not absolute entitlement bearing in mind:

(1) Redemption of the Loan Notes was bound to occur;

(2) AG's rights to Part B of the trust fund were expressly made subject to the rights of the trustees to redeem the loan notes; and

(3) There was no practical likelihood that the Loan Notes would not be redeemed as envisaged by the Parties.

o. This hollow right does not satisfy the purpose behind section 60 (2) TCGA.

p. The ingenious anti *Ramsay* feature of dressing up the limitation placed on AG's rights to deal with the Loan Notes as an outgoing and therefore subject to the trustees' lien was just that and should be treated as such. Only Part B of the trust fund was made liable to the loan which effectively denuded Part B of virtually all of its value and tied AG's hand so that he was unable to deal with the assets or direct the trustees how to deal with them. Given that AG was tied hand and foot as to how to deal with the Loan Notes it cannot be said that he had any rights that approximated even remotely to the rights of an absolute owner of the assets in Part B appointed to him.

q. Moreover this was a scheme designed so that the Appellant's gain would accrue to AG in circumstances in which AG would have no or very limited exposure to UK tax in respect of it whilst retaining the economic value in Part A of the trust fund in which the Appellant had an interest in possession.

r. The arrangements are too artificial to fall within or signify for the section. What AG got did not meet the words of the legislation and so AG was not absolutely entitled as against the trustees. The disposal of the Loan Notes on 7 March 2003 was accordingly by the trustees and not AG. There was for instance a pre-planned self-imposed obligation to repay the loan leaving only a small recompense for his participation.

s. On viewing the facts realistically the unavoidable conclusion is that the anti *Ramsay* device of not looking for a purchaser until a late stage in the planning can be ignored. Further HMRC contend that there was no practical likely that the each step would not follow the preceding one. Whatever is said about the difficulty of finding a non-domiciled individual it is overwhelmingly likely that the Appellant's advisers would have found such a person because such a person is essential to the success of the scheme.

t. Further, even if the Appointment does signify, in the circumstances here, as AG was a sole beneficiary he did not satisfy the requirements of absolute entitlement, as a sole beneficiary does not have the same rights as beneficiaries do when there is more than one beneficiary.

u. The right of a sole beneficiary to call for property derives from absolute ownership (see Thomas on Powers and Underhill and Hayton Article 62 and *Re Stringer's Estate*).

v. The rights of a sole beneficiary and joint beneficiaries are to be distinguished as the rights of a sole beneficiary are different from those of joint beneficiaries as is clear from what Romer J said at page 454 in *Kirby vs Wilkins.*

w. There is ample authority that in the case of shares beneficiaries' rights are not confined to calling for the assets but include the right to direct how to vote. A bare trustee is to comply with all directions. Reference should be made to *Bibby* (particularly Lord Greene MR at 173) and *Silverts* (particularly at 530-531).

x. Further there is ample further authority that in the case of personalty a sole absolute owner has rights in respect of shares not confined to calling for shares.

y. It is incorrect to say that the only meaning of the statutory phrase "absolutely entitled" is a right to call for a transfer of the asset in the case of a sole beneficiary (see Lewin at 24-02).

z. In summary on this point:

i. The reason why a person beneficially absolutely entitled as against the trustees is entitled to call for the transfer of the asset derives from the idea of absolute ownership;

ii. A beneficiary absolutely entitled to personalty such as shares has the right to direct how the asset shall be dealt with;

iii. Textbook authorities recognise a distinction between the rights of a sole owner and those where there is a multiplicity of owners;

iv. As between trustees and a sole beneficiary the sole beneficiary is effectively the owner and therefore entitled to deal with the asset as though the owner. AG had no rights that signified.

aa. Under the scheme only the trustees have rights

bb. Accordingly the appeal should be dismissed.

73. Further by section 48 TCGA the Appellant is required to include any future consideration including contingent consideration such as that stipulated in the sale agreement to the trustees on the transfer to the trustees. The consequence is that, in effect, the contingency is disregarded. This has not been done.

Discussion

Introduction

74. The issue for determination here is whether AG became absolutely entitled as against the trustees to the Part B fund. This raises a number of questions including the following.

(a) What was the effect as a matter of general law of the Deed of Appointment?

(b) What rights (if any) did that give AG?

(c) What does "absolutely entitled as against the trustees" mean?

(d) Was AG absolutely entitled as against the trustees as a matter of general law?

(e) Is this the case for Tax Law as well or does it not "signify" for tax purposes?

(f) What conclusion does this lead to?

75. These will now be considered in turn.

What was the effect as a matter of general law of the Deed of Appointment?

76. Clause 2 of the Deed of Appointment of 6 March, 2003 provided:

"Subject to clause 3 below in exercise of the powers conferred by Clause 2 of the Settlement and all other part them enabling them with the consent hereby given of the Settlor the Trustees **HEREBY IRREVOCABLY** appoint that the Trustees shall hold the capital and income of Part B upon trust for Mr. Gower absolutely".

77. Clause 3 of the Deed of Appointment provided:

"(a) The above Appointment is without prejudice to the Trustees' lien and right to reimbursement in relation to the costs expenses and liabilities mentioned in clause 2 (b) of the Deed of Appointment [Allocation and Declaration dated 21 February, 2003] and the Schedule hereto (together "the Liabilities"). The trustees shall only exercise such a lien and right of reimbursement in respect to the Liabilities against the Loan Notes (and the parties so agree) to the intent that Mr. Gower shall receive the beneficial interest therein subject to such a lien and right of reimbursement.

"(b) For the avoidance of any doubt Mr. Gower shall have no obligation whatsoever to the trustees or otherwise to discharge the Liabilities or any of them or to reimburse the Trustees or any other person (s) who may discharge the Liabilities or any of them (to the intent that the Trustees' lien and right of reimbursement shall be exercisable against and out of Part B but not against Mr. Gower)".

78. The Schedule to the Deed provided that "The Liabilities shall include all amounts due by the Trustees to SG Hambros Bank & Trust Limited under a loan agreement dated 19 February, 2003". This is the loan from the bank referred to at [56].

79. The natural reading of this, in our view, is that:

(a) The trustees hold the capital of Part B of the trust fund for Mr. Gower absolutely;

(b) The income produced by the capital of Part B is to be held for Mr. Gower absolutely;

(c) The trustees have a lien and the right to reimbursement for costs, expenses and liabilities, which include the Liabilities which are defined so as to cover the loan from the Bank;

(d) There was no obligation on AG to make repayments but only rights as against the assets in the Part B i.e. the Loan Notes.

80. We consider that as a matter of general law the Deed of Appointment gave AG a present vested right to the capital and income of Part B of the trust fund which at that time consisted of the Loan Notes and we so find. This is subject to the Lien but section 60 TCGA tells us this is to be disregarded.

81. Even if the Loan Notes were to be repaid they had not been repaid at the time of the Appointment or of their redemption.

82. At the time of the Appointment AG became entitled absolutely to the capital of Part B which at that time consisted of the Loan Notes and we so find.

83. The value of the Loan Notes was obtained by two private treaty agreements dated 7 March 2003, the day after the Appointment and completed on that day.

84. The fact that there was a right of reimbursement and/or a lien in respect of the bank alone against the Loan Notes does not prevent absolute entitlement; it merely shows that there was in effect a charge against the assets. We do not consider that the lien or right of reimbursement prevents AG becoming absolutely entitled to the property within Part B for the purposes of the TCGA either as a general matter of law or in the specific circumstances of the case.

85. We do not accept that the trustees had already contracted for the Loan Notes to be redeemed at a time before AG had been identified as a beneficiary (or the trustees had appointed the Loan Notes to AG), as HMRC asserted. We of course accept that the trustees had been in contact to ascertain if redemption could take place early. We accept the Taxpayer's contention in reply that "The fact that the trustee wrote the letter of request to Skandia in contemplation of, and so before the borrowing from the bank, cannot affect this analysis" i.e. that the trustee had incurred a personal liability albeit with a right of reimbursement. However, if the fund was not sufficient to meet that liability, for example if the issuers could not pay, then the trustees still had a liability they had to meet out of their own assets with no effective right of reimbursement. We find as a primary fact that there was no enforceable agreement to redeem the Loan Notes until the private treaty agreements were entered into on 7 March, 2003.

86. We also accept the Taxpayer's contention that AG "… had no right to a fixed sum in return for his participation: a figure was mentioned to him but only as an estimate" and we so find and to the extent we can we so find as a matter of fact. Again AG's receipt depended on values and timings as the Taxpayer contended. We find as a fact AG received a sum of money because of the Appointment and not as a fee payable for a service.

What rights (if any) did that give AG?

87. HMRC sought to argue that the Appointment, even if it signified for tax purposes, did not give AG sufficient rights to make AG absolutely entitled as against the trustees. They argued this required the equivalent of "absolute ownership" and "complete dominium" in relation to the assets in question. They relied on a number of cases to make good this argument which we consider next in deciding what rights AG had.

88. We have carefully considered these cases but have not found them of great impact on the issue before us.

89. *Christie vs Ovington* (1875) 1 Ch.D. 279 was relied on by HMRC. It concerned a for a declaration of the rights of persons interested in the fee simple of real estate, and for partition or a sale. The headnote read:

"Where a surviving trustee of real estate had died intestate after the passing of the Vendor and Purchaser Act, 1874, and prior to the commencement of the Land Transfer Act, 1875, the legal estate vested in his heir-at-law notwithstanding the provision of the 5th section of the Vendor and Purchaser Act, 1874.

Semble, a person to whose fiduciary office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his cestuis que trust, be compellable in equity to convey the estate to them, or by their direction, is a bare trustee within the meaning of the 48th section of the Land Transfer Act, 1875".

90. It is a decision on an act which was to be repealed and before important changes were made to the law of property in England (e.g. 1888, 1925, 1996 etc.).

91. It also appears to straddle the coming into force of the Supreme Court of Judicature legislation and the running of common law and equity in the same channel.

92. *Hotung and another v Ho Yuen Ki* 5 ITELR 556 was not relied on by HMRC but it considered the *Christie* case. It concluded it was authority of for the proposition "A bare trustee may originally have had duties in respect of the property which had since ceased and on the requisition of the beneficiaries, he is compellable to convey the estate to them or by their direction: *Christie v Ovington* (1875) 1 Ch D 279, 24 WR 204". We respectfully agree but consider it does not advance the position here.

93. *In re Stringer's Estate. Shaw vs Jones-Ford.* [1876 S. 268] 1877] 6 Ch D1 was also relied on by HMRC. This case broadly concerned the construction of a limitation in a will and estoppel .We did not find it of real assistance here.

94. HMRC next relied on *Inland Revenue Commissioners vs Silverts Ltd.* [1951] Ch. 521.The Court of Appeal considered that the case should not be "… one of great difficulty; nor would it have been so, had it not been for the introduction under the settlement of the bank as custodian trustee". By the settlement, National Provincial Bank Ltd. was appointed custodian trustee within the meaning of the Public Trustee Act, 1906. The managing trustees were the two directors.

"The rights and obligations of a custodian trustee were set out in section 4(2) of the Public Trustee Act, 1906. By para. (*b*) of sub-section 4(2), all "powers and discretions" are stated to "remain vested in the" managing trustees; but, by para. (*d*), the custodian trustee is not (like a bare trustee) bound to give effect, for example by voting, in all cases (not involving criminal liability) to the wishes or directions of the managing trustees. Thus he is not so bound if what he is directed to do involves a breach of trust. The distinction (between a custodian and bare trustee) is, for practical purposes, perhaps a fine one; but it is a real one. Indeed, it has not been seriously contended before us on the part of the Crown that the bank in the present case can be properly regarded as a bare trustee in the sense intended by the House of Lords in the *Bibby* case. But one argument for the Crown did, in effect, invite us to hold that, in the relevant

matter of voting power, the position of a custodian trustee vis-à-vis the managing trustees is so closely analogous to that of a bare trustee vis-à-vis his principal as to bring the case within the spirit, albeit not within the letter, of the exception made by Lord Greene, M.R., and the reservation made by the House of Lords in the *Bibby* case."

"Lord Greene, M.R., who had read the judgment of the Court of Appeal, indicated that the result would have been different had the trustees been bare trustees only; that in such case the "controlling interest" would be in the beneficial owner. But the noble Lords in the House of Lords took so strongly the view that the question of control was to be determined by reference to the situation of the voting power under the company's regulations that they preferred rather to reserve than to affirm even the exception of a bare trustee".

95. We did not find this case of real assistance here. The line of cases on control whilst interesting are on a different statute and in a different context.

96. We found more assistance in the *Ingram* case where Millett LJ (as he then was said at [1997] STC 1234 at 1259:

"It is important not to understate Mr. Macfadyen's position. He was not independent of Lady Ingram, but neither was he a mere cypher. His duty was 'to deal with the land as Lady Ingram might direct'. He was bound to convey the land to her or to whom she might direct. But he was not bound to comply with other directions which she might give (see *Re Brockbank* [1948] Ch 206 and *Re George Whichelow Ltd* [1954] 1 WLR 5 at 8). He could not have been compelled to grant the lease, though if he had refused to do so Lady Ingram could simply have found someone willing to do her bidding and require Mr. Macfadyen to convey the land to him. It is not, in my opinion, correct to identify Mr. Macfadyen's mind with Lady Ingram's for the purposes of the two-party rule. ….

"The reasons for this conclusion are variously stated in the cases. They are: (i) that a general power of sale given to a trustee does not authorise a sale in contravention of the self-dealing rule; (ii) that the very word sale connotes a transaction between independent parties dealing with each other at arm's length, so that whatever else a transaction between a principal and his nominee may be it is not a sale; and (iii) that the beneficial interests under a trust are not affected by any transaction by the trustees which is not entered into between independent parties dealing with each other at arm's length. None of these reasons are of any relevance in the present case: the first and third because Lady Ingram was an absolute owner; and the second because the word lease is not like the word sale and does not import any connotation of bargain. It is analogous to words like 'conveyance', 'transfer' or payment which denote merely the passing of property from one person to another whether preceded by a bargain between them or not".

97. We consider AG was in the position of Lady Ingram as he was an 'absolute owner'. AG could have compelled conveyance of the property and found someone to do his bidding.

98. We also found it helpful to remind ourselves of *Saunders v Vautier* (and the equivalent case of *Miller v Miller* in Scotland).

99. In *Saunders v Vautier* the testator had bequeathed East India Company stock on trust for Vautier. There was to be an accumulation until Vautier attained the

age of 25. When Vautier reached his majority (21 then) he sought access to the capital and dividends immediately.

100.The case was ruled in favour of the defendant. The rights of the beneficiary were held to supersede the wishes of the settlor as expressed in the trust instrument. As he was absolutely entitled to the full equity he could compel the conveyance of the assets to him.

101.Lord Langdale MR held as follows:

"I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge".

102.The case only concerned one beneficiary but it is frequently for said to apply where there are multiple beneficiaries provided they are all sui juris and of full competence.

103.Although an individual beneficiary may not have any specific interest at law or in equity in any specific item of the trust property the beneficiary or beneficiaries are treated in equity as having the right to the whole of the trust fund i.e. as a class of beneficiaries (whether one or more) as holding the entire equity. Accordingly, they may require the trustees to end the trusts and distribute the funds as the beneficiary or beneficiaries direct. The distribution terminates the trust which cannot continue as they have ceased. The trustee no longer holds the asset can save us his conscience cannot be affected in respect of that asset.

104.A trust allows the management and economic enjoyment of the assets within the trust to be separated. The beneficiary's rights are against the legal construct of the trust fund whose contents may change but the right remains.

105.The appointment gave AG an absolute vested interest in part B of the trust fund i.e. the Loan Notes. He was of the "absolute owner" in the sense used by Millett LJ (as he then was) in the Lady Ingram case.

106. Accordingly AG could compel the conveyance of the asset to him and do what he wanted with the assets within the limitation of the asset itself. If the asset was to be repaid the next day because of the terms of the assets (for example, that was the date of redemption fixed when the loan was issued) that did not stop the person being absolutely entitled.

107.Further as any dealings by the nominee or bare trustee are treated as dealings by the beneficiary and according to the words in brackets in section 60 (1) acquisition by the person absolutely entitled is to be disregarded if the conveyance allows the person to do with the assets as if a person absolutely entitled them the right to call for a conveyance means the person with that right is absolutely entitled.

What does "absolutely entitled as against the trustees" mean?

108. We turn now to consider what is meant by "becoming absolutely entitled as against the trustees" as used in the TCGA. For convenience we set out section 60(2) TCGA again which provides:

"It is hereby declared that references in this Act to any asset held by a person as trustee for another person absolutely entitled as against the trustee are references to a case where that other person has the exclusive right, subject

only to satisfying any outstanding charge, lien or other right of the trustees to resort to the asset for payment of duty, taxes, costs or other outgoings, to direct how that asset shall be dealt with."

109. This is not always easy language to interpret although it makes it clear that the trustees' lien and certain administrative powers do not prevent a person being absolutely entitled as against the trustee.

110. The wording also has certain technical difficulties. For example, in our view, a person who has an absolute vested interest in possession can terminate a trust but cannot generally direct the trustees how to exercise their discretion by the obvious reason that if the trusts of being terminated the trusts no longer exist (see, e.g., *Re Brockbank (deceased), Ward v Bates* above and cf *Stephenson v Barclays Bank Trust Co* above). We will consider the argument concerning sole beneficiaries later.

111. Although the phrase "absolutely entitled as against the trustees" sounds simple, it is difficult to give it a precise meaning. We consider that the following propositions can be derived from the case law in this area which can be used as a working hypothesis in discussing this issue:

(1) A right to call for a conveyance and to give a good receipt will make a person absolutely entitled (*Hoare's Trustees v Gardner* [1978] STC 89, *Bond v Pickford* 1983] STC 517, and *Tomlinson v Glyn's Executor & Trustee Co* [1969] 45 TC 600). This will be so even if the right is subject to paying the trustees' costs, other outgoings etc. A lien etc. in the context of deciding if a person absolutely entitled is to be disregarded under section 60 (1) if the recipient can deal with the assets as if an absolute owner that person can "direct how that asset shall be dealt with". It does not matter that the person has to call for the conveyance of the asset first as this is to be disregarded under section 60 TCGA.

(2) Joint ownership (whether as joint tenants or tenants in common) will not normally give rise to settled property where there are concurrent but no successive interests (*Kidson v Macdonald* [1974] STC 54, *Stephenson v Barclays Bank Trust Co Ltd* above and *Harthan v Mason* [1980] STC 94). A single person can be absolutely entitled if that person has the full equity.

(3) A number of persons may together be absolutely entitled as may a single person. The determinant is whether they are between them, if more than one, entitled to the entire equity when (if sui juris and of full competence) they can put an end to the trust.

(4) Difficulties can arise where a beneficiary's interest becomes absolute under a trust of land where there are continuing interests. The owner of the absolute interest as a matter of English land law cannot call for his share of the land nor direct the trustees how to deal with the land or how to exercise the power of sale. Such a beneficiary is not necessarily absolutely entitled as against the trustee (*Crowe v Appleby* [1975] STC 502*)* though it may be that subsequent changes in law could have affected this.

(5) An annuity charged upon property can make it settled property (*Stephenson v Barclays Bank Trust Co Ltd* above).

(6) Beneficiaries under a will are not entitled to residue as against the personal representatives unless and until the residue is ascertained (*Cochrane v IRC* [1974] STC 335 and cf *Marshall v Kerr* [1004] STC 638)

(7) Absolute entitlement includes beneficial entitlement but is not restricted to it (*Bond v Pickford* above).

112. Walton J turned to a consideration of the statutory phrase 'absolutely entitled as against the trustee' in *Stephenson vs Barclays* [1975] STC at page 163. He noted that it has meaning that the person concerned

"has the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustees to resort to the asset for payment of duty, taxes, costs or other outgoings, to direct how that asset shall be dealt with."

113. He thought it desirable to state what he conceived to be certain elementary principles. These were as follows.

" (1) In a case where the persons who between them hold the entirety of the beneficial interests in any particular trust fund are all sui juris and acting together ('the beneficial interest holders'), they are entitled to direct the trustees how the trust fund may be dealt with.

(2) This does not mean, however, that they can at one and the same time override the pre-existing trusts and keep them in existence. Thus, in *Re Brockbank* itself the beneficial interest holders were entitled to override the pre-existing trusts by, for example, directing the trustees to transfer the trust fund to X and Y, whether X and Y were the trustees of some other trust or not, but they were not entitled to direct the existing trustees to appoint their own nominee as a new trustee of the existing trust. By so doing they would be pursuing inconsistent rights.

(3) Nor, I think, are the beneficial interest holders entitled to direct the trustees as to the particular investment they should make of the trust fund. I think this follows for the same reasons as the above. Moreover, it appears to me that once the beneficial interest holders have determined to end the trust they are not entitled, unless by agreement, to the further services of the trustees. Those trustees can of course be compelled to hand over the entire trust assets to any person or persons selected by the beneficiaries against a proper discharge, but they cannot be compelled, unless they are in fact willing to comply with the directions, to do anything else with the trust fund which they are not in fact willing to do.

(4) Of course, the rights of the beneficial interest holders are always subject to the right of the trustees to be fully protected against such matters as duty, taxes, costs or other outgoings; for example, the rent under a lease which the trustees have properly accepted as Part of the trust property".

114.His lordship continued:

"It is, I think, in the light of these elementary propositions that one can understand the forces which have shaped the definitions in the present instance. The scheme of the capital gains tax legislation is to treat all assets alike, and it would be extremely curious if, by reason of the different natures of the assets when a person became entitled to an aliquot share of a trust fund, some were treated one way and some another way for the purposes of that tax".

We respectfully adopt his Lordship's proposition.

115. We consider it would also be curious if a person entitled to the whole equity under the trust would treated differently from several persons together entitled to the whole equity where there are no difficulties as to division etc..

116.His Lordship considered that the definition has been framed with the following points in view.

"(i) The elimination of the trustees' rights of indemnity, because otherwise it would be possible to postpone the payment of capital gains tax indefinitely by keeping alive what might be a very small right indeed.

(ii) The elimination of any question as to what were the assets to which a person has become absolutely entitled in the commonest of all cases, namely, where the trust fund ultimately vests in possession in various persons in various shares. Of course, if, in the event, vesting takes place at different times, it appears to me inescapable that the question may still arise.

(iii) The definition says 'jointly'; it does not say 'together'. I think this is because it is intended to comprise persons who are, as it were, in the same interest. This is a point which was alluded to by Foster J in *Kidson v Macdonald* [1974] 1 All ER at 858, [1974] 2 WLR at 574, [1974] STC at 63. If property is settled upon A for life with remainder to B, A and B are 'together' entitled absolutely as against the trustees, but they are not so entitled 'jointly', 'concurrently', or 'as tenants in common'.

(iv) Finally, of course, the definition is so framed as to require the person who becomes absolutely entitled to be able to give the trustees a good discharge. In a sense, this is the reverse of the penny of absolute entitlement".

117. On the basis of the analysis set out above His Lordship concluded that on the execution of the deed of family arrangement the two grandchildren became absolutely entitled as against the trustees to the whole of the remaining assets of the residuary estate.

118. We note the comment by Walton J that "When the situation is that a single person who is sui juris has an absolutely vested beneficial interest in a *share of the trust fund*, [emphasis supplied] his rights are not, I think, quite as extensive as those of the beneficial interest holders as a body. In general, he is entitled to have transferred to him (subject, of course, always to the same rights of the trustees as I have already mentioned above) an aliquot share of each and every asset of the trust fund which presents no difficulty so far as division is concerned. This will apply to such items as cash, money at the bank or an unsecured loan, stock exchange securities and the like".

119.This not the situation here; AG was entitled to the whole of Part B absolutely not a share of it. He was entitled to the entire equity, i.e. all the beneficial interest, in that part of the trust fund as we have found.

120.We consider that AG he had the right to call for the conveyance of the assets in Part B and to give a good receipt for it. We have also found that Part B was held on trust for AG absolutely.

Was AG absolutely entitled as against the trustees as a matter of general law?

121. On the basis set out above we have concluded that AG was in the position of Lady Ingram. Like her he could require the assets to be conveyed to him and find someone to do his bidding like Lady Ingram whom Millett LJ (as he then was) described as an "absolute owner". We respectfully adopt his Lordship's

reasoning and find that AG was an absolute owner and so absolutely entitled as against the trustees.

122.English law is on the whole concerned with who has the better right to something. Here AG has the better rights as against the trustees. The concept of "dominium" which was referred to by HMRC is a civilian concept which is more absolutist in its connotation. However, AG and Lady Ingram come as close to that as is possible in English law given the particular circumstances.

123.AG was entitled to the entire equity in the Part B fund and so could call for its contents to which he could give a good receipt.

124.Accordingly, we find AG was absolutely entitled as against the trustees as a matter of general law.

Is this the case for Tax Law as well or does it not "signify" for tax purposes?

125.Under the current law a person is entitled to organise his or her affairs so that the minimum amount of tax is paid. Whether they achieve their aim is a question to be determined by applying the statute interpreted purposively to the facts found realistically (see *BMBF* and *Arrowtown*).

126.Whether or not persons ought to do this is not an issue that is before us. We express no view on this. We are only concerned with the legal position.

127.The question for us to decide is whether on the facts viewed realistically the transactions fall to be treated as making AG absolutely entitled as against the trustees for the purposes of the TCGA.

128.We consider the correct approach following the *BMBF* line of cases and that case in particular, is as set out at [2005] STC 1 at [36],:

'first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35], (2004) 6 ITLR 454 at [35]:

"[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."'

129.Prima facie the Appointment, as we have found, gave an absolute interest in the assets in Part B of the trust fund i.e. the Loan Notes to AG. This, to use old fashioned language, was something which had "enduring legal consequences". HMRC accepted that there is no sham here and no suggestion of impropriety.

130.The TCGA imposes a charge on a person who disposes or is deemed to dispose of assets that give rise to a chargeable gain. Special provision is made for the circumstances where a person becomes absolutely entitled as against the trustees of a settlement. The trustees are deemed to dispose of the asset to which the beneficiary becomes entitled. The beneficiary gets a beneficial interest in the asset which he or she did not have before. This is regarded as the beneficiary gaining something. Usually a gift by an individual would result in that individual losing the beneficial interest in the asset which gives rise to a disposal for capital gains tax purposes (see *Turner vs Follett* [1973] STC 148). The trustee does not lose something in that way but it is analogous. Hence the deemed disposal and so an occasion of charge is imposed. What happened here falls within the transactions that answer to the statutory description.

131. Accordingly, we find that a transaction whereby a person gains a beneficial interest in effect at the expense of the trustee is one that answers to the statutory language and purpose. Here there was such a transaction and the section seems to be fulfilled.

132. The statute provides that the trustees are deemed to make a disposal of the assets to which the beneficiary becomes absolutely entitled. This is what Parliament enacted and its purpose was to impose a charge in such circumstances. Parliament also provided that gains could be "held-over" in circumstances which included the circumstances under consideration here.

133. The fact that a person's motivation for doing something may be to save tax does not of itself mean that the statute cannot apply.

134. We need to test this further and to do so we gratefully adopt Lewison J's review of the position in *Berry v Revenue and Customs Commissioners* [2011] UKUT 81 (TCC) [2011] STC 105 at [30]ff:

"The ***Ramsay*** **principle**

"[30**]** I was expertly guided… through the origins and development of the *Ramsay* principle in the House of Lords from its birth in *WT Ramsay Ltd v IRC* [1981] STC 174, [1982] AC 300 to its maturity in *IRC v Scottish Provident Institution* [2004] UKHL 52, [2005] STC 15, [2004] 1 WLR 3172. I will state my own conclusions on this array of learning as shortly as I can.

[31**]** In my judgment:

(i) The *Ramsay* principle is a general principle of statutory construction (*Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35], 6 ITLR 454 at [35]; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [36], [2005] 1 AC 684 at [36]).

(ii) The principle is two-fold; and it applies to the interpretation of *any* statutory provision:

(a) To decide on a purposive construction exactly what transaction will answer to the statutory description; and

(b) To decide whether the transaction in question does so (*Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [36], [2005] 1 AC 684 at [36]).

(iii) It does not matter in which order these two steps are taken; and it may be that the whole process is an iterative process (*Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [32], [2005] 1 AC 684 at [32]; *Astall v Revenue and Customs Comrs* [2010] STC 137 at [44], 80 TC 22 at [44]).

(iv) Although the interpreter should assume that a statutory provision has some purpose, the purpose must be found in the words of the statute itself. The court must not infer a purpose without a proper foundation for doing so (*Astall v Revenue and Customs Comrs* [2010] STC 137 at [44], 80 TC 22 at [44]).

(v) In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole (*WT Ramsay Ltd v IRC* [1981] STC 174 at 179, [1982] AC 300 at 323; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [29], [2005] 1 AC 684 at [29]).

(vi) However, the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words. (This, I think, is what Arden LJ meant in *Astall v Revenue and Customs Comrs* [2010] STC 137 at [34], 80 TC 22 at [34]. As Lord Hoffmann put it in an article on 'Tax Avoidance' ([2005] BTR 197): 'It is one thing to give the statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there': see *Mayes v Revenue and Customs Comrs* [2009] EWHC 2443 (Ch) at [30], [2010] STC 1 at [30].)

(vii) In looking at particular words that Parliament uses what the interpreter is looking for is the relevant fiscal concept: *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6 at [48], [49], [2001] STC 237 at [48], [49], [2003] 1 AC 311.

(viii) Although one cannot classify all concepts a priori as 'commercial' or 'legal', it is not an unreasonable generalisation to say that if Parliament refers to some commercial concept such as a gain or loss it is likely to mean a real gain or a real loss rather than one that is illusory in the sense of not changing the overall economic position of the parties to a transaction: *WT Ramsay Ltd v IRC* [1981] STC 174 at 182, [1982] AC 300 at 326; *IRC v Burmah Oil Co Ltd* [1982] STC 30 at 38, 54 TC 200 at 221; *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] STC 226 at 238, 240–241, 246, [1992] 1 AC 655 at 673, 676, 683; *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] STC 237 at [5], [32], [2003] 1 AC 311 at [5], [32]; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [38], [2005] 1 AC 684 at [38].

(ix) A provision granting relief from tax is generally (though not universally) to be taken to refer to transactions undertaken for a commercial purpose and not solely for the purpose of complying with the statutory requirements of tax relief: see *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454 at [149]. However, even if a transaction is carried out in order to avoid tax it may still be one that answers the statutory description: *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [37], [2005] 1 AC 684. In other words, tax avoidance schemes sometimes work.

(x) In approaching the factual question whether the transaction in question answers the statutory description the facts must be viewed realistically: *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [36], [2005] 1 AC 684.

(xi) A realistic view of the facts includes looking at the overall effect of a composite transaction, rather than considering each step individually: (*WT Ramsay Ltd v IRC* [1981] STC 174 at 180, [1982] AC 300 at 324; *Stamp Comr v Carreras Group Ltd* [2004] UKPC 16 at [8], [2004] STC 1377 at [8]; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] STC 1 at [35], [2005] 1 AC 684.

(xii) A series of transactions may be viewed as a composite transaction where the series of transactions is expected to be carried through as a whole, either because there is an obligation to do so, or because there is an expectation that

they will be carried through as a whole and no likelihood in practice that they will not: *WT Ramsay Ltd v IRC* [1981] STC 174 at 180, [1982] AC 300 at 324.
(xiii) In considering the facts the fact-finding tribunal should not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way in which the scheme was intended to operate: (*Astall v Revenue and Customs Comrs* [2009] EWCA Civ 1010 at [34], [2010] STC 137 at [34], 80 TC 22).
(xiv) In considering whether there is no practical likelihood that the whole series of transactions will be carried out, it is legitimate to ignore commercially irrelevant contingencies and to consider it without regard to the possibility that, contrary to the intention and expectation of the parties it might not work as planned: *IRC v Scottish Provident Institution* [2005] STC 15 at [23], [2004] 1 WLR 3172 at [23]. Even if the contingency is a real commercial possibility it may be disregarded if the parties proceeded on the basis that it should be disregarded: *Astall v Revenue and Customs Comrs* [2010] STC 137 at [34], 80 TC 22 at [34]".

135. We consider that looking to the purpose of the TCGA, where a person acquires the absolute right to an interest in settled property in such a way as to be able to call for that property to be conveyed to them (and can give a good discharge and receipt) then having regard to the context and the purpose of the TCGA, that is to be a deemed disposal.

136. On the facts viewed actually and realistically AG became absolutely entitled as against the trustees to the settled property. This is even true if one looks at HMRC's "composite" which is essentially that AG becomes beneficial owner of the Part B fund subject to the lien but this is of no real value. It is the ability to resort to the fund that is said to devalue what AG got. However, section 60 says that such a lien is to be disregarded. This is a concept that has a legal context which has to be borne in mind in construing it in its statutory context. Walton J's propositions in *Stephenson* reinforce this and show how these and allied provisions have been approached in the context of the capital gains tax legislation. What was done we find answers the statutory description notwithstanding that there was an admitted tax avoidance motive. We so find viewing the facts realistically and make the findings of fact necessary for this effect.

137. We consider that the lien here does exist and has enduring legal consequences. It is not something that is a peripheral step inserted by the actors which is irrelevant to the way in which the scheme was intended to operate. It meets the statutory description. There is no obvious reason why it should be disregarded other than it may enable less tax to be paid. As Lewison J said "… Even if the transaction is carried out in order to avoid tax it may still be one that answers to the statutory description…"

138. We find that what was done answers to the statute's description of the transactions to which section 71 applies. To the extent that we can do so we find this as a matter of fact.

What conclusion does this lead to?

139.This leads us to the conclusion that both as a matter of general law, and as a matter of tax law, and particularly for the purposes of TCGA, AG became absolutely entitled to the Loan Notes as against the trustees

140.The issue for determination here is whether section 71(1) TCGA applied to the Appointment. We find it did.

Conclusion

141. We have found that:

a. The effect of the Deed of Appointment was that Part B of the trust fund was held for AG absolutely;

b. AG had the right to call for a conveyance of the assets and to give a good receipt for them;

c. "Absolutely entitled as against the trustees" broadly meant that AG had to be capable of dealing with the assets as if entitled to them absolutely which he could do by requiring the assets to be transferred to him first which was to be disregarded under section 60 TCGA which so provided;

d. This was the case for general law and tax law. The Appointment did signify for tax purposes. It answered to the statutory description of transactions fitting the statutory wording interpreted purposively and viewing the facts realistically;

e. Consequently, we find that AG did become absolutely entitled to the Loan Notes as against the trustees within the meaning of section 71 TCGA.

142. Accordingly, the Appeal is allowed.

143. This document contains full findings of fact and reasons for the decision. Any Party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that Party. The Parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms Part of this decision notice.

ADRIAN SHIPWRIGHT
TRIBUNAL JUDGE
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