TAX AVOIDANCE: REFLECTIONS ON LORD HOFFMANN'S LECTURE IN HONOUR OF PROFESSOR SIR ROY GOODE

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1 The Talk

On December 1st 2004, Lord Hoffmann gave a talk on *Tax Avoidance* at Queen Mary University of London as part of a series of lectures in honour of Professor Sir Roy Goode. It was highly instructive on many levels. The *Ramsay* doctrine has now been with us for almost a quarter of a century. Its precise scope has always been to some extent uncertain and the outcome of, not only marginal, cases unpredictable. While that feature may be not unattractive to those charged with the collection of public revenue, it makes the life of taxpayers and their advisers much more complicated. And taxpayers include not only those whom perhaps most members of society would judge as out-and-out tax avoiders but the many businesses, pension and other collective investment funds and charities which most would judge are beneficial to society yet whose managers are generally expected so to conduct their affairs so as not to pay too much tax.

In the previous twelve months there had been decided a bumper crop of important cases on the *Ramsay* doctrine, in particular:

> *Collector of Stamp Revenue v Arrowtown Assets Limited* (a Chinese case decided by the Final Court of Appeal of the Hong Kong Special Administrative Region, with Lord Millett NPJ, the "midwife" of the *Ramsay* doctrine, giving the lead judgment)

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Carreras Group Limited Appellant v Stamp Commissioner (a Privy Council Case, on appeal from Jamaica, the Appellate Committee including Lord Hoffmann but not Lord Millett)

Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2004] UKHL 51 [2005] STC 1(an English case decided by the House of Lords, with the Appellate Committee again including Lord Hoffmann but not Lord Millett)

Inland Revenue Commissioners v Scottish Provident Institution [2004] UKHL 52 [2005] STC 15 (a Scottish case decided by the House of Lords at the same time as *Barclays Mercantile* and by the same Appellate Committee)

In addition, there had been considerable uncertainty about the scope of the House of Lords decision in *MacNiven v Westmoreland Investments* [2001] UKHL 6, [2001] STC 237, which, it was generally thought, in some ways clarified and other ways muddied the position.

Lord Hoffmann's talk, while in many ways a seamless whole, can be divided into two main segments. First was the analysis of the true scope of the *Ramsay* doctrine after these recent authorities. Second was a discussion of whether there is a need for a judicial general anti-avoidance doctrine.

In this article, I shall ask "Where are we now?" in the light of these cases and Lord Hoffmann's talk.

2 A Brief History of the *Ramsay* Doctrine

2.1 Introduction

Before analysing Lord Hoffmann's speech in detail, it will be helpful to give a brief history of the *Ramsay* doctrine. The aim is to remind the reader of the major developments and not to engender further obscurity by noting every twist and turn.

2.2 The Position in the First Decade

By the end of the 1980s it was generally thought to have been established that there must, as a *sine qua non*, be either:

(a) a circular, self-cancelling series of transactions, entered into for no purposes other than tax avoidance, as in *W T Ramsay Ltd v Inland Revenue*

Commissioners; *Eilbeck (Inspector of Taxes) v Rawling* [1982] AC 300; or

(b) a linear series of transactions into which steps had been inserted for tax avoidance purposes, as in *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474

In the former case, the series of transactions was ignored altogether. In the latter case, the series of transactions was "collapsed" and re-analysed as the simpler transaction which would have been undertaken had the inserted steps been omitted.[2] It was crucial that "there must be steps inserted which have no commercial (business) purpose". Whether or not that was still the case was highly debatable after *MacNiven*. After *Barclays Mercantile* and *Scottish Provident* and Lord Hoffmann's talk, while it seems unlikely that this is a *necessary* condition for the application of Ramsay, the existence of these factors may arguably still be of some relevance, in an appropriate statutory context. It may be that we may have to distinguish between (a) a narrow *Ramsay* rule (where inserted steps are needed) and (b) the wider *Ramsay* approach to construction (where inserted steps are not needed). I discuss this point below.

It was also established in *Craven v White* [1989] AC 398 that, at the time of the intermediate transaction there must have been no practical likelihood that the planned transactions would not take place in the order ordained so that the intermediate transaction was not even contemplated practically as having an independent life. While inroads have now been made on that rule by *Scottish Provident*, that authority has by implication endorsed the basic rule.

2.3 Developments in the 1990s

It is not enough to bring the rule into play that all the steps taken were pre-ordained. *IRC v Fitzwilliam* [1993] 1 WLR 1189. That has not since been called into doubt and has been re-affirmed in *MacNiven*.

It was also established in *Countess Fitzwilliam v IRC* [1993] STC 502 that for the doctrine to apply, one must be able to say that the steps in the tax saving plan realistically constituted a single and indivisible whole in which one or more of them was simply an element without independent effect and it must be intellectually possible so to treat them. This test has given rise to enormous difficulties of interpretation. There is no subsequent case which has been decided using this test. My own view is that the case will continue to be ignored by the

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2 See the decisions of the House of Lords in *Furniss v Dawson* and *Craven v White* [1989] AC 398.

Courts, albeit that it may still be useful for counsel for taxpayers to cite it.

McGuckian v Commissioners of Inland Revenue [1997] 69 TC 1 gave a strong indication that *Ramsay* is not a judge-made general anti-avoidance doctrine. It is simply a canon of statutory construction and an example of purposive construction.

2.4 *MacNiven*

In *MacNiven*, an investment company owned by an exempt pension fund had made huge genuine commercial losses. It had borrowed from its parent and owed substantial amounts of interest which would be tax-deductible only when paid. It borrowed more money from its parent, which it used to pay the interest. The Revenue claimed there had been no payment as the money went round in a circle: the subsidiary started off indebted to its parent and finished up indebted to its parent and nothing had changed except that it was claimed that a tax advantage had been obtained. The House of Lords rejected the application of *Ramsay*. In my view, which is also the explanation given in *Arrowtown* and *Barclays Mercantile*, the reason was that there was a genuine liability, potentially deductible; that the condition of payment of interest merely reflected the fact that (under the then law) the creditor would not normally be liable to tax unless and until the interest was paid; the payee would have been so liable in the present case, but for an exemption, which depended entirely on a decision to that effect by Parliament. Hence, there was no scope to interpret the legislation any differently applying *Ramsay*.

In *MacNiven*, Lord Hoffmann, with whose reasoning a majority of the House agreed, rejected the following submission of Counsel for the Crown:

"When a Court is asked

(i) to apply a statutory provision on which a taxpayer relies for the sake of establishing some tax advantage

(ii) in circumstances where the transaction which is said to give rise to the tax advantage is, or forms part of, some pre-ordained, circular, self-cancelling transaction

(iii) which transaction though accepted as perfectly genuine (i.e. not impeached as a sham) was undertaken for no commercial purpose other than the obtaining of the tax advantage in question

then (unless there is something in the statutory provisions concerned to indicate that this rule should not be applied) there is a rule of construction that the condition laid down in the statute for the obtaining of the tax advantage has not been satisfied."

Lord Hoffmann also appeared to introduce a further limitation to the operation of *Ramsay*, namely to those cases concerning the construction of a statutory term or concept which had a *commercial* or *business*, rather than a *legal* or *juristic*, meaning. It was this aspect of *MacNiven* which gave rise to the greatest problems and has since been clarified in *Barclays Mercantile* and Lord Hoffmann's speech.

MacNiven was an attempt to rationalise *Ramsay* and give it constitutional respectability. There was heavy emphasis on *Ramsay* as a principle of statutory construction. Lord Hoffmann had also made some very helpful observations on "reality", a concept to which the Revenue often appeals without undue analysis of the statutory provision in question.

Some found the decision difficult to reconcile with *Burmah Oil*. In my view, Lord Hoffmann has convincingly done so.

As the House of Lords found that *Ramsay* did not apply even though everything was pre-planned and went according to plan, it said nothing about *Craven v White* and the degree of preordination required, in those cases where preordination was relevant.

In common with other authorities, it said nothing of the *Countess Fitzwilliam* requirement that it must be intellectually possible realistically to treat steps as constituting a single and indivisible whole in which one or more of them was simply an element without independent effect. *Countess Fitzwilliam* continues to be ignored by the higher courts.

It had been argued after the decision of the House of Lords in *Inland Revenue Commissioners v Willoughby*[3] that *Ramsay* could come into play only where there was a tax avoidance, as opposed to a tax mitigation, motive. Lord Hoffmann *arguendo* in *Lady Ingram's Executors v IRC* [1999] STC 37 did not seem at all keen on such a notion, which (as Leading Counsel for the executors) I was keen to promote. The distinction did not figure in *MacNiven*, or any later case. With the continuing emphasis on *Ramsay* as a rule of statutory interpretation, its potential *technical* importance must be regarded as low. Yet it is only realistic to expect that those factors which would encourage a court to consider that the taxpayer had engaged in tax avoidance would also make it more likely that they would find, that on the true construction of the statutory provision in question, the tax planning had been ineffective.

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3 [1997] STC 995 and [1997] 1 WLR 1071.

2.5 *Collector of Stamp Revenue v Arrowtown Assets Limited*[4]

This case concerned an exemption from stamp duty on a transfer of land between two "associated" companies, which would have been clawed back if the companies had later ceased to be "associated", that is "one is beneficial owner of not less than 90 per cent of the issued share capital of the other, or a third such body is beneficial owner of not less than 90 per cent of the issued share capital of each." That is exactly what would have happened but for the tax planning. A scheme was therefore hatched whereby, after the transfer of the land, there was to be a reorganisation of the share capital of a company so that it had a nominal capital of HK$1,010 consisting of 1,000 ordinary shares of HK$0.01 each and 100,000 "B" non-voting shares of HK$0.01 each. Following the sale of 980 of the 1,000 ordinary shares to third parties, there was retained only 2% of the ordinary shares but more than 99% of the total issued share capital after the "B" non-voting shares were taken into account. The sole purpose of the issue of the "B" non-voting shares which were retained was to satisfy the statutory test for relief from stamp duty. The Collector claimed that the "B" Shares should be ignored, applying *Ramsay*.

Lord Millett, NPJ, relied on the arguments he had put forward, as Counsel for the Inland Revenue, in *Ramsay* itself, which in turn depend on US authority. I had myself always understood this argument as involving *Ramsay* being no more than a principle of statutory construction. It involves a "no business purpose" test under which a transaction which is apparently covered by a statutory provision is not in fact covered by it if it had no business purpose. As will be seen, Lord Hoffmann, in his speech, took the view that Lord Millett may have been suggesting that the "no business purpose" test was something other than a rule of statutory construction. I respectfully query whether that is the case and suggest that there is probably very little, if indeed any, difference of substance between the approach of Lord Millett and that of Lord Hoffmann and that Lord Millett would probably agree that whether the "no business purpose" test was to be applied in a particular statutory context was to be ascertained by construing the statute in question and that it was not permissible first to construe the statute and then to apply the "no business purpose" test so as to result in its having a effect contrary to that construction.

Lord Millett had no difficulty in deciding that the issue of the "B" Shares served no business purpose and could therefore be disregarded. That was because the construction of the section depended on the purpose for which it was enacted; the words "issued share capital" in the section, properly construed, mean share capital issued for a commercial purpose and not merely to enable the taxpayer to claim

4 [2003] HKCFA 46, (2004) 6 ITLR 454, decided 4th December 2003.

that the requirements of the section have been complied with; it therefore followed that the "B" non-voting shares were not "share capital" within the meaning of the relevant statutory provision and should be disregarded.

From one point of view, that is an unexceptionable decision. It can easily be regarded as a classic exposition of *Ramsay* / *Furniss v Dawson*, as those cases were understood by 1988, in that steps which had been inserted purely for a tax avoidance purpose were simply ignored. What I do find most odd is that it had been established in the context of the corresponding United Kingdom provision that the reference to issued share capital is a reference to the *nominal* value of the issued share capital which is constant and not its market value which may fluctuate from day to day: see *Canada Safeway Ltd v IRC* [1973] 1 Ch 374. Lord Millett cited the authority at the very beginning of the discussion of the vital issue without any suggestion that it was wrongly decided. While such an interpretation can obviously produce bizarre results, it can in principle work against the taxpayer as much as in his favour. In my respectful view, Lord Millett should either have said that the case was wrongly decided, which he could easily have done, on the basis that it was a product of its unenlightened age of literal statutory interpretation, or he should have said it was conclusive in favour of the taxpayer in *Arrowtown*. We have finished up with the odd result that if two companies satisfy the commercial test of being associated but do not satisfy the literal legal one, relief is denied; whereas if they satisfy the legal test of being associated but not the commercial one, relief is also denied, at least where the reason they satisfy the legal test is that steps which had no other purpose were taken with the object of ensuring that they did. Surely, what is sauce for the taxpayer is sauce for the public revenue?

It might be argued that a further apparent difficulty with this whole approach is that it involves the Court embarking on the purpose of Parliament in enacting legislation – not merely the intention of Parliament, which, it is well established, is in general to be determined only by having regard to what Parliament has said in the statute. For a modern very clear and helpful restatement of this fundamental principle in a non-tax context, see the House of Lords decision in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349. One answer to this difficulty would be for the courts to accept that the purpose of Parliament in enacting legislation was to be determined by reference to the same limited materials as its intention. After all, the courts routinely adopt a purposive construction of a statute without offending the *Spath Holme* principles.

Lord Millett accepted that *MacNiven* was a special case in that the payment on one view had no business purpose. However, that was a question of the construction of the particular statute. That appears to me to be correct, as the statutory provision was very special and the requirement for there to be a "payment" served a very limited purpose.

Lord Millet doubted the commercial concept / business concept distinction advanced by Lord Hoffmann in *MacNiven*. While he was not the first, or the last, to express such doubts, he did so in categoric language. Those doubts are now in my view reflected and adequately dealt with, in the re-statement of Lord Hoffmann's distinction in *Barclays Mercantile*. See below.

2.6 *Carreras Group Limited Appellant v Stamp Commissioner*

On 27th April 1999 Carreras Group Ltd ("Carreras") entered into a written agreement to transfer all the issued ordinary share capital and most of the preference shares in Jamaica Biscuit Company Ltd ("Jamaica Biscuit") to Caribbean Brands Ltd ("Caribbean"). The consideration was expressed to be a debenture to be issued by Caribbean in the sum of US$37.7 million. The terms of the debenture were that it would not be either secured or transferable. The principal debt would carry no interest and be repayable by banker's cheque on 7th May 1999. In the event, the debenture was not redeemed until 11th May 1999.

The question in this appeal was whether the transfer of shares was chargeable to transfer tax, which it was unless expressly exempted. Part I of the First Schedule to the Transfer Tax Act contains "special provisions with reference to shares and to debentures". Paragraph 4 deals with "reorganization of share capital":

> "4.-(1) This paragraph shall apply in relation to any reorganization of a company's share capital; and for the purposes of this paragraph …
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> (a) reference to reorganization of a company's share capital include … (i) any case where persons are … allotted … debentures of the company in respect of and in proportion to (or as nearly as may be in proportion to) … their holdings of shares in the company …
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> (b) 'original shares' means shares held before and concerned in the reorganization … of capital, and 'new holding' means, in relation to any original shares, the … debentures of the company which, as a result of the reorganization … represent the original shares …
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> (2) … a reorganization … of a company's share capital shall not be treated as involving any disposal of the original shares."

While paragraph 4 thus dealt with an exchange of shares for debentures in the same company, paragraph 6(1) extended this to an exchange of shares in one company for debentures in another.

These provisions had been copied from the United Kingdom capital gains tax legislation.[5] Unwisely. For the purpose of the corresponding capital gains tax provisions is simply to defer a charge to tax until the debenture is realised. Yet under the Jamaican statute, there was a complete exemption from tax.

The Privy Council agreed that the question was whether the relevant transaction could be characterised as a reorganisation of share capital as defined in the Act, that is to say, as an issue of a debenture in exchange for shares. They also accept that if the relevant transaction was confined to what happened on 27 April by virtue of the agreement executed on that date, there could be no doubt that it fell within that description. They in fact decided that one was entitled to take a wider view and to treat the terms of the debenture and its redemption two weeks later as part of the relevant transaction and from that perspective the debenture was only a formal step, having no apparent commercial purpose or significance, in a transaction by which the shares in Jamaica Biscuit were exchanged for money. They observed:

> "But ever since Ramsay Ltd v Inland Revenue Commissioners [1982] AC 300 the courts have tended to assume that revenue statutes in particular are concerned with the characterisation of the entirety of transactions which have a commercial unity rather than the individual steps into which such transactions may be divided."

Although no reference was made to inserted steps as such, this was exactly a *Furniss v Dawson* type case. The issue of the debenture had been inserted to avoid tax. By ignoring its issue and the repayment and characterising the repayment as a payment of cash consideration for the shares, the transaction was taken out of the exempting provision. To some extent, therefore, the concept of steps inserted purely for tax avoidance purposes is still alive. What, of course, the case came nowhere near deciding was that they were an *essential* ingredient for the application of *Ramsay*.

The Privy Council did note that while, in the instant case, the exchange and

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5 They were last considered by the Court of Appeal in *Unilever (UK) Holdings Ltd v Smith (Inspector of Taxes)* [2002] EWCA Civ 1787 [2003] STC 15. In my, perhaps biased, view, that decision has left the law in an unsatisfactory state. The House of Lords gave leave to the taxpayer to appeal. The hearing of the appeal was postponed as their Lordships decided to hear a more urgent case. The taxpayer then decided to withdraw its appeal. That decision to withdraw was one for which neither James Kessler QC nor myself, who together represented the taxpayer, bear any responsibility.

redemption of the debenture were plainly a single transaction and fell to be taxed as such, yet there might well be cases in which the facts did not justify such a conclusion and transfer tax would be avoided without there being any ultimate charge on the redemption of the debenture: "compare *Craven v White* [1989] AC 398". That suggests that, at least in the particular context and, quite possibly, generally where there have been steps inserted for tax planning reasons, there is still a requirement of pre-ordination.

Of course, if *Ramsay* is simply a rule of statutory construction, the courts have almost *carte blanche* to conclude that, in any particular case where there is less than the *Craven v White* degree of pre-ordainment then, say, an exemption or relief is or is not, on the true construction of the statutory provision in question, to be available.

The Privy Council also dealt with the objection "But what if the debenture had been redeemed a year later? Why should a fortnight be insufficient to separate the exchange from the redemption?" They said:

> "One answer is that it is plain from the terms of the debenture and the timetable that the redemption was not merely contemplated (the redemption of any debenture may be said to be contemplated) but intended by the parties as an integral part of the transaction, separated from the exchange by as short a time as was thought to be decent in the circumstances. The absence of security and interest reinforces this inference. No other explanation has been offered. In any case, their Lordships think that it is inherent in the process of construction that one will have to decide as a question of fact whether a given act was or was not a part of the transaction contemplated by the statute. In practice, any uncertainty is likely to be confined to transactions into which steps have been inserted without any commercial purpose. Such uncertainty is something which the architects of such schemes have to accept."

In summary, the Court came to the aid of an inept legislator, yet strongly suggested that if the parties had not been in so much of a hurry and/or had taken more care, they could have avoided the charge to tax.

Tax planners might well draw the moral that they should build in as much delay and uncertainty as the client is prepared to stomach. Yet, in that regard, they should also consider the decision in *Scottish Provident*, discussed below, as to uncertainties which are introduced with the sole aim of excluding the application of the *Ramsay* doctrine. I am also reminded of one of the very many pieces of advice given to me as a young barrister by that highly experienced litigator, Charles Potter QC. While all the advice seemed good at the time, it has proved itself time and time again and now that I have had a quarter of a century of practice in which to test it out for myself, it seems better than ever! Charles joked after *Ramsay* was decided that in future instructions to tax counsel on artificial tax avoidance schemes would conclude "Counsel is asked to invent commercial reasons for implementing the proposed scheme".

2.7 *Barclays Mercantile Business Finance Ltd v Mawson*

This case concerned a sale and leaseback to a financial institution of a pipe-line, with complicated provisions for security involving what to the untrained eye were apparently circular and self-cancelling payments. The Court of Appeal and the House of Lords refused to apply *Ramsay*. Rightly. What was all the fuss about? The Revenue accepted that a sale and lease-back by an operating company which in effect transferred the benefit of the capital allowances to the financial institution did not in general fall foul of *Ramsay*. Nor is it in any way objectionable as constituting tax avoidance. The allowances are introduced, at least in part, as an incentive for capital investment in the assets in question. If, for whatever reason, the operating company cannot use the allowances, a sale and leaseback allows them to be transferred to the financial lessor. In economic terms it is still the operating company which gets the advantage of the allowances, in the form of a lower cost of finance. Hence, it the provision of allowances gives it the requisite incentive to invest, albeit indirectly, in the acquisition of the assets in question. The Revenue has to give the benefit of the allowances to the financial lessor, but then it is in no worse a position than having to give the benefit of them to an operating company which is in a position to use them. Indeed, the irony is that financing leasing in such circumstances actually allows the policy of providing an inventive to investment which has motivated the statutory provision to be more effective than would otherwise be the case! This is a far, far cry from engaging in transactions which are intended to defeat the intention of Parliament.

It would seem that in *Barclays Mercantile,* the Revenue lost sight of the wood for the trees and were beguiled by the complexity of the particular arrangements and the circularity of the cash flows into thinking that there was somehow something objectionable about them. I respectfully agree with the Court of Appeal and the House of Lords that there was not.

The House of Lords reiterated that *Ramsay* is about statutory construction:

> "[28] As Lord Steyn explained in *IRC v McGuckian* [1997] STC 908 at 915, [1997] 1 WLR 991 at 999, the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. Until the *Ramsay* case, however, revenue statutes were

> 'remarkably resistant to the new non-formalist methods of interpretation'. The particular vice of formalism in this area of the law was the insistence of the courts on treating every transaction which had an individual legal identity (such as a payment of money, transfer of property, creation of a debt, etc) as having its own separate tax consequences, whatever might be the terms of the statute. As Lord Steyn said, it was-
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> > '... those two features-literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately-[which] allowed tax avoidance schemes to flourish ...'
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> [29] The *Ramsay* case ([1981] STC 174, [1982] AC 300) liberated the construction of revenue statutes from being both literal and blinkered. It is worth quoting two passages from the influential speech of Lord Wilberforce. First ([1981] STC 174 at 179, [1982] AC 300 at 323), on the general approach to construction:
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> > 'What are "clear words" is to be ascertained on 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 as a whole, and its purpose may, indeed should, be regarded: ...'
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> [30] Secondly ([1981] STC 174 at 180, [1982] AC 300 at 323-324), on the application of a statutory provision so construed to a composite transaction:
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> > '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.'"

So far, the House of Lords in *Barclays Mercantile* was saying nothing new, but providing a welcome re-affirmation of established principles.

Interestingly, while *Carreras* was approved, Lord Millett's judgment in *Arrowtown* was ignored.

Lord Hoffmann's dicta in *MacNiven* were "explained":

> "In the speech of Lord Hoffmann in MacNiven it was said that if a statute laid down requirements by reference to some commercial concept such as

> gain or loss, it would usually follow that elements inserted into a composite transaction without any commercial purpose could be disregarded, whereas if the requirements of the statute were purely by reference to its legal nature (in MacNiven, the discharge of a debt) then an act having that legal effect would suffice, whatever its commercial purpose may have been. This is not an unreasonable generalisation, indeed perhaps something of a truism, but we do not think that it was intended to provide a substitute for a close analysis of what the statute means. It certainly does not justify the assumption that an answer can be obtained by classifying all concepts a priori as either 'commercial' or 'legal'."

That was a welcome 'clarification' of Lord Hoffmann's views. In effect, Lord Hoffmann had been basically right but had expressed himself in language which was liable to be misunderstood if read too literally. In fairness to him, he himself had come to accept that well before the decision in *Barclays Mercantile*, to which, of course, he was party.

As to the present case, their Lordships said:

> "[39] The present case, like *MacNiven*, illustrates the need for a close analysis of what, on a purposive construction, the statute actually requires. The object of granting the allowance is, as we have said, to provide a tax equivalent to the normal accounting deduction from profits for the depreciation of machinery and plant used for the purposes of a trade. Consistently with this purpose, s 24(1) requires that a trader should have incurred capital expenditure on the provision of machinery or plant for the purposes of his trade. When the trade is finance leasing, this means that the capital expenditure should have been incurred to acquire the machinery or plant for the purpose of leasing it in the course of the trade. In such a case, it is the lessor as owner who suffers the depreciation in the value of the plant and is therefore entitled to an allowance against the profits of his trade.
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> [40] These statutory requirements, as it seems to us, are in the case of a finance lease concerned entirely with the acts and purposes of the lessor. The Act says nothing about what the lessee should do with the purchase price, how he should find the money to pay the rent or how he should use the plant. As Carnwath LJ said in the Court of Appeal ([2003] STC 66 at [54]):
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>> '[T]here is nothing in the statute to suggest that "up-front finance" for the lessee is an essential feature of the right to allowances. The test is based on the purpose of the lessor's expenditure, not

> the benefit of the finance to the lessee.'
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> …
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> [42] If the lessee chooses to make arrangements, *even as a preordained part of the transaction for the sale and lease back*, which result in the bulk of the purchase price being irrevocably committed to paying the rent, that is no concern of the lessor. From his point of view, the transaction is exactly the same. No one disputes that BMBF had acquired ownership of the pipeline or that it generated income for BMBF in the course of its trade in the form of rent chargeable to corporation tax. In return it paid £91m. The *circularity of payments* which so impressed Park J and the Special Commissioners arose because BMBF, in the ordinary course of its business, borrowed the money to buy the pipeline from Barclays Bank and Barclays happened to be the bank which provided the cash collateralised guarantee to BMBF for the payment of the rent. But these were happenstances. None of these transactions, whether circular or not, were necessary elements in creating the entitlement to the capital allowances."[6]

To my mind, the House of Lords decision was entirely correct. Once one accepts, as even the Revenue would, that there is in general nothing objectionable in a trader who cannot utilise capital allowances in effect selling them to a financial institution by means of a sale and leaseback of the underlying assets, there were no features of the case which took it out of the general rule. In particular, neither the element of pre-ordination nor the circularity of payments made any difference.

While not for one moment disagreeing with their Lordships' decision, I would myself also place emphasis, as I did above, on the other reason capital allowances are given. While one purpose of conferring them is indeed "to provide a tax equivalent to the normal accounting deduction from profits for the depreciation of machinery and plant used for the purposes of a trade", the rates at which allowances are given are usually greater than the corresponding depreciation. (In the context of USA federal income tax this is referred to as "accelerated depreciation".) Capital allowances are thus used as an economic lever to stimulate the economy by in effect reducing the cost of investment.

2.8 *Inland Revenue Commissioners v Scottish Provident Institution* [2004] UKHL 52 [2005] STC 15

This case concerned exploitation of defective transitional provisions introducing the loan relationships regime for companies in 1996. The precise scheme was

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6 Italics supplied.

highly complex and is of historic interest only. The strategy adopted by Scottish Provident involved entering into two options which were likely, but not certain, to cancel each other out. It appears that Counsel for the taxpayer conceded that if the two options had been certain to cancel each other out, they could each be disregarded on the *Ramsay* principle. The defence appears to have been that the *Craven v White* test of pre-ordination was not satisfied.

The House of Lords held that one should look at the larger scheme by which the counterparty's buy option was "bound" to be cancelled by SPI's right to the same gilts. The innovation was that one ignored the fact that the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned. The uncertainty in the instant case arose from the fact that the parties had carefully chosen to fix the strike price for the B option at a level which gave rise to an outside chance that the option would not be exercised. There was no commercial reason for choosing that strike price. Thus the contingency on which SPI relied for there being no composite transaction was itself part of that composite transaction; chosen not for any commercial reason but solely to enable SPI to claim that there was no composite transaction.

This is, to a limited extent, a reversal of *Craven v White*. It is an important reminder that, where tax avoidance is concerned, the Courts are not beyond altering the law retrospectively.

3 *Ramsay* as a Rule of Interpretation v *Ramsay* as an Independent Doctrine

Returning to the December 1st 2004 speech, Lord Hoffmann rejected the notion that the interpretation of taxing statutes, especially for the purpose of deciding whether they apply to transactions designed to avoid tax, is a specialised craft. That, in my view, is uncontroversial. What I would add is that the interpretation of *any* statute *is* a specialised craft which is best left to those who specialise in the interpretation of statutes. In the case of taxing statutes it is best left to members of the Revenue Bar who, nowadays at least, are no longer marooned on some island of literal interpretation but are wide awake to the wider issues involved and keep their ear very firmly to the judicial ground and their eye fixed on the straws fluttering in the judicial wind. Over the last quarter of a century or so in which I have been in full-time practice, my own advice on tax avoidance schemes has become considerably more bearish. In part, I would like to think, that is because, whereas, when I was younger, I was more naive, now that I am older my judgment is more mature. Yet it is also a function of having enjoyed over the last decade or so an extensive litigation practice. For, at least in direct tax cases, successful junior counsel at the Revenue Bar have traditionally tended to engage in very little litigation before taking Silk. There is nothing like have to defend a scheme – whether one's own or someone else's – before the Courts. It is a sobering experience! There is nothing like appearing before a wide selection of judges in a variety of cases to give one a feel as to what they are or are not prepared to tolerate.

Lord Hoffmann suggested that useful lessons might be learned from problems which have arisen in the interpretation of the claims of patent specifications. He cited Judge Learned Hand in the United States Court of Appeals for the Second Circuit in *Helvering v Gregory*, one of Lord Millett's favourite cases, in which the question was whether shares issued to the taxpayer by the subsidiary of a company which she controlled were exempt from tax as a dividend because they had been issued "in pursuance of a plan of reorganisation". It was held that they were not because the shares had been issued to her as part of a scheme under which the subsidiary had acquired an asset pregnant with capital gain and Mrs Gregory wanted to obtain the benefit of that gain without paying tax; in other words the alleged "reorganisation" had no commercial purpose. This case was relied on heavily by Peter Millett QC, as he then was, for the Revenue in *Ramsay*.

Lord Hoffmann then turned to patent law and noted that whether there has been an infringement of a patent involves construction of the claims at the end of the patent specification, which are a succinct description of the product or process for which the patentee is granted the patent. What if the alleged infringer has made a product or used a process which works in the same way as the invention and produces the same result but appears to differ in some respect from the way the invention is described in the claims? His Lordship compared the problem to the situation where a taxpayer has entered into a transaction which, although having the same economic effect, is structured in a way which is intended to fall outside the terms of the statute.

He informed us that the American courts had invented what they called the "doctrine of equivalents". On the one hand, they construed claims literally but then gave protection outside the claims to cover products or processes which were in practical terms equivalent to those described in the claims. Judge Learned Hand was also involved in another leading case: *Royal Typewriter Co v Remington Rand Inc*.

Lord Hoffmann claimed out that the difficulty about both the doctrine of equivalents and the so-called business purpose rule in the construction of tax statutes is that their boundaries are extremely vague. "Once one has left the actual language of the claims or the statute behind, it is hard to know where to draw the line. What if something is an equivalent but the patents claims clearly indicate that the patentee did not mean to claim it? Or a transaction has no business purpose except to avoid tax in a way which the legislator must clearly have contemplated would be open to the taxpayer? The purpose of making a patentee state the limits of the monopoly in the claims is, as Lord Russell of Killowen said in a famous judgment "so that others may know the exact area within which they will be trespassers". Likewise, the purpose of stating the conditions of liability to tax in a statute is to enable citizens to know what transactions will attract tax."

Interjecting there, it might be said with considerable force that *any* purposive principle of construction of a statute is liable to give rise to great uncertainties. A recent example is *Greenalls Management Ltd v Commissioners of Customs and Excise*, decided by the House of Lords on May 12th 2005, which was not even a tax avoidance case.[7] Four Lords Justice of Appeal[8] found the construction of the regulations in question (dealing with liability for excise duties where goods have left a tax warehouse) extremely difficult. None was prepared to give them a literal interpretation, as Customs contended. In the Court of Appeal, Carnwath LJ fell back on the traditional canon of construction that a subject is not to be taxed except by clear words and therefore, like the rest of the Court of Appeal, found for the taxpayer. Yet in the House of Lords, while Lord Walker likewise found the regulations "remarkably obscure" and would have been prepared to give the innocent taxpayer the benefit of the doubt, Lord Hoffmann, who gave the lead speech, found them "perfectly clear"! The House allowed Customs' appeal. The main morals to be drawn from *Greenalls* are that the final result of litigation is usually uncertain – nothing is over until the House of Lords have sung – and that some judges are more prepared than others to come to the aid of Revenue authorities who have secured the passing of incompetently drafted legislation.

Lord Hoffmann claimed that while the United Kingdom courts had in patent cases contented themselves with purposive construction, yet in some tax avoidance cases, they had stepped outside the meaning of the statute and developed a general anti-avoidance doctrine based upon whether the transaction or parts of the transaction had a business purpose or not. The circumstances in which *Furniss v Dawson* was decided were not very dissimilar to those in which the nineteenth century American courts had produced the doctrine of equivalents. The American doctrine was a reaction to extreme literalism in the construction of claims which the courts felt that they were powerless to ameliorate by constructional tools.

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7 I must declare an interest in that, together with Rory Mullan, I represented the ultimately unsuccessful appellant. The reader will, I trust, allow for a certain amount of bias in this paragraph!

8 One decided the case after becoming, and another after retiring, a Lord Justice of Appeal.

Likewise, *Furniss v Dawson* was in reaction to the *Duke of Westminster* and "some of the more extraordinary cases of literalism" which followed.

This is a rare example of a member of the judiciary admitting that the king has no clothes. Even in *MacNiven*, Lord Hoffmann had made a valiant effort to try and "save the phenomena" by "explaining" important previous cases. Of those, *Furniss v Dawson* is in my view by far the most difficult and it is hardly surprising that even Lord Hoffmann's mammoth intellect was not quite up to the task of providing a convincing explanation of how the decision depended on statutory construction. It is a great tribute to his intellectual honesty that he bit the bullet in his Professor Roy Goode speech.

Lord Hoffmann then considered *Craven v White*, where there was a dispute over how seriously one took the requirement that there must have been a preordained scheme. Lord Hoffmann took the view that Lord Templeman had wanted to concentrate on the business purpose rule; if steps had been taken for no business purpose but solely to secure a tax advantage at a later stage when the opportunity for a further transaction presented itself, then the tax avoiding elements in the history of the taxpayer's dealings should be disregarded. (It is arguable whether Lord Templeman in fact went that far.) Lord Oliver, however, insisted upon the whole scheme being pre-ordained and said that Lord Brightman's principle applied: there must be "no practical likelihood" that the whole scheme will not work as planned. Neither side seemed to think that the answer might be different depending upon the language and purpose of the particular taxing provision which was being applied. The matter was treated as a general extra-statutory rule.

Lord Hoffmann then remarked that it was in *Inland Revenue Commissioners v McGuckian* that the primacy of the statutory language began to reassert itself. It was re-asserted that the principle was developed as a matter of statutory construction. He observed that it was only in *MacNiven* that the House was faced with a clear conflict between a purposive interpretation of the statute and an extra-statutory application of the *Furniss v Dawson* formula. This was a circular transaction, undertaken purely to save tax because the lender happened to be exempt from tax on the interest which it received and the payment generated a tax loss in the insolvent borrower which gave it some value in the market. The transaction satisfied the *Furniss v Dawson* formula, to say nothing of the more general business purpose rule supported by Lord Templeman: it was preordained and the payment was solely for the purpose of securing a tax deduction. But the House considered that the statute, on its true construction, required no more than that the interest liability should have been discharged by a payment which was taxable in the hands of the lender, or would have been taxable if it had not been exempt. The purpose of the payment was irrelevant.

I would respectfully agree that the House of Lords were right in *MacNiven* to concentrate on construing the statutory provision in question and that they construed it correctly. While *MacNiven* was an important case in clearing out a great deal of judicial rubbish, it did not in my view open up any opportunity for widespread tax avoidance (any more than has *Barclays Mercantile*). A very real commercial loss had been sustained, which would have been reflected in the borrower's statutory accounts, and the reason for the requirement that there should be a "payment" of interest in order for the loss to be relievable against profits for corporation tax purposes was a very limited one and was satisfied on the facts of the case.

Lord Hoffmann admitted that, in choosing the constructional approach rather than the *Furniss v Dawson* formula, the House had to rewrite history in a way which struck some people as a little disingenuous. The House said that the formula was not a freestanding principle but rather the effect of construing a taxing provision in a particular way. If the statute required a transaction which had a business purpose, like the plan of reconstruction in *Gregory v Helvering*, then steps which had no business purpose would not satisfy the statute. If the statute required something which had a real commercial existence, like a profit or loss, then a series of preordained transactions which taken together produced no profit or loss would not satisfy the statute. On the other hand, if all that the statute required was something which had a particular legal effect, like discharging a debt or passing title to property, then a transaction which had that effect satisfied the statute even if it had no business purpose. This part of the speech in particular helps to explain Lord Hoffmann's distinction between commercial and juristic concepts.

Lord Hoffmann's analysis of the effect of Lord Millett's judgment in *Collector of Stamp Revenue v Arrowtown Assets Ltd* was that the reason that the House of Lords had decided in *IRC v Burmah Oil Co Ltd* that a composite circular transaction had not caused Burmah to suffer a loss for capital gains tax, but that in *MacNiven* it did give rise to relief from corporation tax was that in *Burmah* the transactions did not produce a loss within the intendment of the statute, whereas in *MacNiven* they did. Lord Hoffmann accepted that Lord Millett had expressly denied that *Burmah Oil* depended upon an analysis of the meaning of the word "loss" or the nature of the concept which that word involves.

Lord Hoffmann concluded that the primacy of the construction of the particular taxing provision and the illegitimacy of rules of general application had been reaffirmed by the in *Barclays Mercantile Business Finance Ltd v Mawson*. He went on to add that it might be said that this case had killed off the *Ramsay* doctrine as a special theory of revenue law and subsumed it within the general theory of the interpretation of statutes, perhaps the interpretation of utterances of any kind.

I would respectfully agree, up to a point. I still consider that a view I first floated after *MacNiven* is worth considering, namely that one should distinguish between a general *Ramsay* approach and a specific *Ramsay* rule, each of which has their part to play. The *Ramsay* approach would simply involve following what is nowadays a virtually incontestable proposition, namely that the role of the Courts is to construe legislation, not to invent new law,[9] but that, in doing so, they are not only entitled but also bound to have regard to the purposes of the statutory provision in question, in so far as those purposes can be determined from a consideration of the provision in question in its context. This *Ramsay* approach is appropriate in virtually any statutory context and is certainly not limited to tax avoidance cases or even to tax statutes. It cannot require either a self-cancelling series of transactions or steps inserted into a transaction in either case with the intention of avoiding a charge to tax. Nor can there be a requirement of pre-ordainment.

That there is such a *Ramsay* approach is, I apprehend, not controversial. What is potentially more controversial is that there is also a *Ramsay* rule, which is much more specific, and which operates in much the same, limited, way that *Ramsay* was generally thought to operate, at least before *McGuckian* and *MacNiven*. In effect, *Scottish Provident*, a case not referred to in Lord Hoffmann's Professor Sir Roy Goode speech, was argued on the scope and application of traditional *Ramsay* case law, i.e. what I call the *Ramsay* rule. The question was really whether the House of Lords should, as the Revenue urged, move the goal posts *ex post facto* – a potential hazard which any tax avoider has always and will always face – by qualifying the preordination requirement apparently laid down without qualification in *Craven v White*. *Arrowtown* and *Carreras* are also cases which would be decided the same way on the application of the *Ramsay* rule.

Even if I am right on there being both a *Ramsay* approach and a *Ramsay* rule, that is not to say that the position is not now a great deal clearer than it was previously. As Lord Hoffmann correctly remarked, at the end of the day, the question is always one of construction of the statutory provision in question. That means that if the *Ramsay* rule and the *Ramsay* approach yield different results, that produced by the *Ramsay* approach must prevail. At the same time, the result of adopting the *Ramsay* approach may be difficult to predict in any given case, at which point the application of the more *Ramsay* specific rule may actually be much more helpful. I appreciate that this means that a great deal of judicial baggage which might otherwise have been jettisoned must still be kept on board. Yet if it were jettisoned, the law would have to acquire more judicial baggage and there would be a decade or more of crippling and expensive uncertainty in the process.

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9 This proposition, of course, holds good only in those areas such as taxation and patent law which are the creation of statute and not to common law or equitable rules which were engendered in case law.

4 A General Theory of Tax Avoidance

Lord Hoffmann then went on to consider whether one should have a general theory of tax avoidance rather than a case by case analysis of the statutory requirements. He wisely pointed out that the first difficulty is "What do you mean by tax avoidance?". He referred to Lord Templeman's statement at a conference held in 1997 said: "Tax avoidance reduces the incidence of tax borne by an individual taxpayer contrary to the intentions of Parliament.".[10] Now, says Lord Hoffmann, presumably the reason you ought to have paid tax is because Parliament intended you to pay it. But how do we know the intention of Parliament? There is only one way to know the intention of Parliament and that is to read the statute. So avoidance of tax assumes that you are not paying a tax which, on a fair reading of the statute, you ought to have paid. But why in that case are you not liable to pay it? How can the courts give the statute a construction which means that people do not pay the tax which the statute shows that Parliament intended them to pay?

Lord Hoffman's first answer to this question is that while in the old days – the last famous example being probably the decision of the House of Lords in *Inland Revenue Commissioners v Plummer*[11] – the courts construed taxing statutes so literally and so blinkered that they did not give effect to the plain intention of Parliament, yet this peculiar technique for construing revenue statutes was abandoned by the House of Lords in *Ramsay*. Since then we have been able to say that employees who are paid in platinum sponge which is held at a bank where it can be instantly converted into money are, for PAYE purposes, being paid in money,[12] or that a seller of shares who receives an interest free debenture redeemable a fortnight later is, for stamp duty purposes, being paid in money.[13] We need no superimposed anti-avoidance doctrine: the employees are not receiving payments in kind and the share vendor is not entering into a rearrangement of securities within the meaning of a taxing statute.

Again, I agree with Lord Hoffmann only up to a point. What he said is absolutely right in the context of his speech. I totally agree that the need for a general theory of tax avoidance has been very much reduced by the *Ramsay* approach. Yet, at the risk of being rather unfair to him, there are other contexts in which a general

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10 See *Tax Avoidance and the Law,* ed. Adrian Shipwright, published by Key Haven Publications 1997, at p. 1.

11 [1979] STC 793, not to be confused with Lord Hoffmann's own decision at first instance, *IRC v Plummer*, reported at [1987] STC 698.

12 The reference is presumably to *NMB Holdings v Secretary of State for Social Security* (2000) 73 TC 85.

13 This must be a reference to the *Carreras* case.

theory of tax avoidance or a general anti-avoidance rule could achieve a purpose which even the *Ramsay* approach could not. Take the *Carreras* case itself, where the Privy Council admitted that the legislation was so defective that if the debentures had had more of a substantial existence, they would not have been able by mere construction of the statute to deprive the taxpayer of the exemption from tax. Indeed, I very much doubt that Lord Hoffmann would disagree.

Then again, Parliament has itself recognised that there can be successful tax avoidance; for otherwise it would not legislate against it. This is exemplified in *Inland Revenue Commissioners v Willoughby*.[14] Taxes Act 1988 contains a section 739 which, in essence, can deem income of a non-UK resident to be for income tax purposes that of a United Kingdom resident individual if the income of the non-UK resident arose to it as the result of a transfer of assets made by the individual. Section 741 provides, however, that section 739 is not to apply if the individual can show "that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer …." was effected. The House of Lords was thus called upon to define "tax avoidance" and did so as "a course of action designed to conflict with or defeat the evident intention of Parliament". Consequently, the acceptance of an offer of freedom from tax which Parliament has deliberately made cannot be "tax avoidance", but only "tax mitigation".[15] I myself respectfully consider that that is a very useful test. There are contexts where, on the one hand, one can say Parliament has not imposed a charge to tax in certain circumstances and one might well say that the language Parliament has used is not to such as to evince an "intention" that there should be a charge to tax. "Intention", in particular in phrases such as "the intention of Parliament", is being used in a strict technical sense, which is so well explained in the *Spath Holme* case. Yet in *Willoughby*, the word is being used in a non-technical sense. To my mind, when Lord Nolan referred to the "evident intention" of Parliament, he had in mind not what Parliament has decreed but what it obviously would have decreed had it thought about the matter sufficiently.[16] I very much suspect that Lord Templeman was using the phrase "the intentions of

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14 [1997] STC 995 and [1997] 1 WLR 1071.

15 See per Lord Nolan at page 1003.

16 One important result of the language in which Lord Nolan's test is cast is that if the Revenue claims there has been tax avoidance there is a heavy onus on them to show that Parliament clearly would have wished to impose a charge to tax. In fact, in the vast majority of cases of alleged tax avoidance, it is perfectly clear to everyone that the taxpayer was exploiting a loophole which Parliament would certainly have closed had it been aware of it. Yet in other cases, such as *Lady Ingram's Executors*, referred to later in Lord Hoffmann's speech, it is by no means clear. Given that the taxpayer gets the benefit of any doubt, it is much easier for the courts to apply the *Willoughby* test of "tax avoidance" with confidence that they are not embarking on mere speculation.

Parliament" in very much the same sense.[17]

Lord Hoffmann returned to his parallel between patent law and tax law. Just as the doctrine of equivalents in patent infringement was necessary in the days of literal construction, so, perhaps, were general anti-avoidance principles in tax law. Yet Lord Hoffmann concluded that, as experience with the doctrine of equivalents and general anti-avoidance legislation has shown, the cure may be worse than the disease. It may produce an unacceptable degree of unpredictability which stifles invention on the one hand and commercial planning on the other. All of us who have to advise anyone who may be liable to taxation, even those who on no conceivable view could be regarded as tax avoiders, would echo that.

Lord Hoffmann then turned to an aspect of the problem, which judges do not, in my opinion acknowledge often enough, in their judgments[18] and to which those charged with drafting legislation or instructing those who draft legislation pay far too little heed. He remarked, with total justification, that it is not only literalism on the part of the judges which leads to what the Revenue regard as tax avoidance. There is also the way in which taxing statutes are often drafted. He fairly comments that the distinction sometimes drawn by judges between acceptable tax avoidance, like giving up smoking, and unacceptable tax avoidance, like schemes with platinum sponge, while based upon sound instinct, does depend upon the assumption that Parliament imposes taxation by reference to economic and other events in the real world. If only this were true. But Parliament, for various reasons, sometimes leaves the taxpayer a choice of achieving the same economic result by two different methods, one of which may attract tax and the other not. Worse still, Parliament may not be content to describe the economic event which should attract tax because it does not trust the courts to understand such a concept and apply it in a practical way. Instead, it enacts a mass of detailed rules which it is hoped will tie up the taxpayer in a net from which he cannot escape. But sometimes there are holes in the net and the courts find that they cannot plug them by appealing to the economic event which, at a higher level of generality, it appears that Parliament wished to tax. 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.

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17 Lord Nolan in *Willoughby* had made express reference to Lord Templeman's comments in *Ensign Tankers (Leasing) Ltd v Stokes* [1992] STC 226 at 240-241, echoing earlier comments of his in the Privy Council case of *Commissioner of Inland Revenue v Challenge Corporation Ltd* [1986] STC 548.

18 When I appeared before the Court of Appeal in 2004 in *Howell v Trippier*, the President complained bitterly during the hearing at the unnecessary obscurity and complexity of the relevant statutory provisions. And Dame Elizabeth Butler Sloss was absolutely right to do so. Yet there is scarcely a hint of her aggravation in the judgments.

This part of Lord Hoffmann's speech is instructive for two reasons. Firstly, his advice to, in effect, the Revenue authorities, is not to assume that they know it all. Time and time again, complex anti-avoidance provisions have been turned on their head and used to facilitate tax avoidance. The Revenue thought they had sewn the taxpayer up nicely. But the sewing of the mesh was not fine enough and taxpayers' advisers turned out to be cleverer than the Revenue's advisers. Perhaps the most striking example is Finance Act 2003 Schedule 22 (employee securities and options).

Second, it exposes the reality of the situation. Once the courts have in their own mind characterised what the taxpayer has done as tax avoidance, they will strain to make sure that it was ineffective. If there is any decent argument by which he can be made to lose, then he surely will. And in some cases he will lose even if the only arguments against him are less than decent. Tax avoidance in effect is a lottery depending on the degree of intellectual integrity of the judges who hear the case. Were I appearing for a tax avoider with what I thought was a technically sound case, I would prefer the appeal to be heard by some judges, who certainly include Lord Hoffmann, whose self-respect and intellectual integrity would tend to inhibit them from relying on faulty reasoning.

Lord Hoffmann went on to mention a case which is very dear to my own heart: *Lady Ingram's Executors v IRC* [1999] STC 97, which concerned the gift with reservation of benefit provisions, first enacted in the Customs and Inland Revenue Act 1889 and more lately re-enacted in Finance Act 1986. Lord Hoffmann remarked that the Inland Revenue were outraged that Lady Ingram should be able to give away her house and go on living in it. That, they said, was the very thing which the statute was intended to prevent. Legislation was quickly passed to restore the law to what the Revenue thought it had previously been.[19] It had however been clear for many years that one could have separate interests in the same house and if Parliament meant to prevent people from retaining any benefit from the same physical property, as opposed to the same legal interest in that property, it should have amended the statute about 80 years earlier.

I totally agree. As an advocate, I represent only taxpayers. This is not from choice, but because I obviously do not measure up to the standards expected of their barristers from HM Revenue and Customs.[20] As such, I am after all these

19 The legislation which was passed, in Finance Act 1999, in fact simply made a bigger pig's ear of the law before. The tradition of erecting on an unsound basis another tier of even more unsound legislation has been followed in spades in Finance Act 2004 Schedule 15 (previously owned assets).

20 I have, on reflection, edited out the part of the text which originally followed this sentence, to avoid embarrassment.

years used to sometimes losing tax cases for bad technical reasons. The one and only time I allowed the experience to get to me emotionally is when the Court of Appeal by a majority (Millett LJ, as he then was, dissenting) allowed the Revenue's appeal in *Lady Ingram*. I felt that if ever there was a case which I should have won, it was that. I confided in an old friend, who had already become a judge. He cheered me up by telling me that in one of his last cases while he was at the bar, counsel on both sides agreed the judgment of the court was completely indefensible. He added, with the modesty which is so characteristic of him, that he had then decided that henceforth he would be on the giving, rather than on the receiving, side of any dud judgments. I was therefore particularly pleased when the House of Lords unanimously allowed the appeal of Lady Ingram's executors. That pleasure was renewed when Lord Hoffmann singled out the case in his Professor Sir Roy Goode speech.

Lord Hoffmann went on to complain the Revenue appear to have no faith in the ability or willingness of the courts to recognise the economic effect beneath the varied forms and often prefer to legislate by reference to form rather than substance. In those circumstances, it is essential that those instructing the drafter should have a complete understanding of the way that particular activity is conducted. Before anyone can sit down to draft such a statute, it is necessary to be clear about what the Revenue wishes to achieve. Cases like *Ingram* arise out of legislation in which the objective has been left uncertain.

I only wish that I could be as certain the HM Revenue and Customs would heed this advice as I am that it is spot on.

Lord Hoffmann's conclusion is that the lesson is that tax avoidance in the sense of transactions successfully structured to avoid a tax which Parliament intended to impose should be a contradiction in terms. The only way in which Parliament can express an intention to impose a tax is by a statute which means that such a tax is to be imposed. If that is what Parliament means, the courts should be trusted to give effect to its intention. Any other approach will lead us into dangerous and unpredictable territory.

As already indicated, I agree with Lord Hoffmann only up to a point, albeit a very considerable point. As a former practising barrister, he is obviously as aware as those of us who are still practising of the pernicious effect on the economy of this country of the unpredictability of tax law.[21] I totally agree that we should keep out of dangerous and unpredictable territory. I also agree that the main solution is for Parliament to legislate in appropriate terms in the first place. That will often

21 This awareness is happily shared by the European Court of Justice. See the Opinion of Advocate-General Maduro in the *Halifax, BUPA* and *Huddersfield University* references.

involve taking advice from outside the Revenue.

At the risk of being pedantic, I think there is still some scope left for the concept of tax avoidance. There will inevitably be situations where Parliament has not appreciated how different parts of our highly complex tax fit together. A recent example is the decision of Park J in *Davies v Hicks* [2005] EWHC 847 (Ch) on 12th May 2005, where the drafter of the bed and breakfasting anti-avoidance provisions had understandably not contemplated their effect on the exit charge on settlements emigrating from the United Kingdom. What the trustees did can fairly be described as tax avoidance within Lord Nolan's test in Willoughby. No-one can doubt that if Parliament had been made aware of the result of its legislation it would have taken steps to avoid that result. Given that there was no provision, specific or general, in point which nullified the tax advantage because the trustees had indulged in tax avoidance simply means that this was a case where tax avoidance worked, as, even nowadays, it sometimes will.

5 Conclusion

Recent cases and Lord Hoffmann's speech have in some ways clarified the law yet have potentially opened up a new period of uncertainty in predicting how courts will construe tax statutes, especially in a tax avoidance context.

I suggest that it may be helpful in future to distinguish between a narrower *Ramsay* rule and a wider *Ramsay* approach.

It will continue to be vital for tax payers to obtain specialist advice. That advice is best given by those who not only understand the intricacies of our tax law but, through regular appearances before the courts as advocates, best understand the way judges are likely to react.