HIGH COURT OF JUSTICE (CHANCERY DIVISION)—24, 25, 30, 31 OCTOBER, 1 AND 9 NOVEMBER 1989(1)

COURT OF APPEAL—5 FEBRUARY(2), 11, 12, 13, 14 NOVEMBER 1991 AND 19 FEBRUARY 1992(3)

HOUSE OF LORDS—1, 2, 3, 4, 8, 9 AND 10 MARCH AND 1 JULY 1993(4)

Countess Fitzwilliam and Others *v.* Commissioners of Inland Revenue (and related appeals)(5)

Tax avoidance—Capital transfer tax—Whether composite transaction within the Ramsay principle—Whether series of transactions preordained—Whether reverter to settlor exemption applies—Settlor becoming absolutely entitled to property comprised in settlement—Whether property comprised in settlement originated from testator's estate—Whether testator a settlor of settlement—Whether property reverted to all settlors of the property—Finance Act 1975, *ss* 19, 20, 24, 47(1A), *and Sch* 5, *paras* 1, 4 *and* 5, *Finance Act* 1976, ss 86 *and* 87, *Finance Act* 1978, *s* 69(7).

Appeal—Procedure—Time for appeal to Court of Appeal—Extension of time—Service of notices of appeal a few days late—Whether time for appeal should be extended—RSC O3, *r*5 *and* 059, *r*4.

In 1979 E died, leaving his residuary estate (some £11m) on a discretionary trust whereby the trustees had a discretion, during the period of 23 months following his death, to appoint the residue amongst a class of beneficiaries, which included F, his widow, and H, her daughter. Subject to that the trustees were to pay the income of the residuary estate to F for life, with the remainder to H absolutely, provided that she survived E by one month, though the trustees also had a power to advance capital to F.

F was then aged 81 years and in poor health. The trustees were concerned about capital transfer tax. A heavy charge arose by reference to E's death, subject to reduction on any exercise of the power of appointment in favour of F (whether in terms of an absolute or a life interest), which would attract the surviving spouse exemption, but such an exercise might give rise to a heavy capital transfer tax charge on F's death in due course.

The solicitors to the estate, in consultation with counsel, devised a scheme by which the amount chargeable to capital transfer tax by reference to E's death would be reduced by £3.8m in such a way that that sum would,

(1) Pages 652B/685C *post.* (2) Pages 685F/689D *post.*
(3) Pages 689I/719H *post.* (4) Pages 720B/758E *post.*
(5) (Reported) (ChD) [1990] STC 65; (CA) [1992] STC 185; (HL) [1993] 1 WLR 1189; [1993] 3 All ER 184; [1993] STC 502.

A in the result, accrue to H, rather than to F, and would not potentially be liable to capital transfer tax on F's death in due course. In consequence, the following transactions were carried out:—

Step One

B On 20 December 1979, part of the residuary estate, to a value of £4m, was appointed out, to be held on trust for F absolutely.

Step Two

On 9 January 1980, F made a gift to H of £2m net of capital transfer tax.

C *Step Three*

On 14 January 1980, the trustees of the will appointed £3.8m net of the residue to be held on trust. The income was to be paid to F until the earlier of her death or 15 February 1980. Subject to this, one moiety was to be held for H absolutely ("the vested moiety") and as to the other moiety the capital was only to pass to H if she was living on the termination of F's interest in D possession ("the contingent moiety").

Step Four

On 31 January 1980, F assigned to H, for a consideration of £2m, her beneficial interest in the income of the contingent moiety.

E

Step Five

On 5 February 1980, H settled the sum of £1,000 on trust to pay the income to F until the earlier of her death or 15 March 1980. Subject to this, the trust fund was to be held for H absolutely. On 7 February 1980, H assigned to the trustees of this settlement her beneficial interest in the vested F moiety expectant on the termination of F's interest in the income. This interest was to be held as an accretion to the £1,000 as one fund for all purposes.

The Revenue determined:

(1) that the trustees, and F and H, had " ... by a sequence of asso- G ciated operations effected a composite transaction", whereby out of the estate, F received the sum of £4m and H the sum of £3.8m; that there were introduced into that composite transaction operations which were contrived for no purpose save an anticipated avoidance of capital transfer which would otherwise have been payable; and that that tax was chargeable as if those operations had not been taken and the trustees H had appointed those sums to F and H absolutely; alternatively

(2) capital transfer tax was payable on the terminations of F's interests in the vested moiety and in the contingent moiety, exemption not being available under para 4(5) Sch 5 Finance Act 1975 on the ground that, as to the vested moiety, E had provided the funds and was to be treated as the settlor for the purposes of that paragraph, and, as to I the contingent moiety, that the amounts of £2m in step 2 and step 4 " ... were not a gift and a payment of consideration but cancelling payments and never intended to take effect as they purported to do".

The taxpayers appealed. Before the Special Commissioners the Crown did not rely on s 44(1) Finance Act 1975 and para 1 of the notices of

determination was amended to exclude the phrase "associated operations". The Crown also did not rely on the alternative determination in relation to the contingent moiety, but submitted that, to the extent to which the £2m payment in step 2 was expressed to be a net gift, it was a sham.

Before the Special Commissioners detailed evidence was given about the evolution of the scheme. Counsel was first instructed, and gave advice, in October 1979. The appointment of 20 December 1979 gave effect to a decision reached by the trustees and certain family advisers. The scheme initially considered involved land, but that became impracticable following the death of the family's land agent in December. In early January the scheme, as ultimately put in effect with minor changes in detail, was formulated. F and H were not at the outset made aware of all the transactions, planned. In particular H was not told about steps 4 and 5 until after step 3 had been taken, and she was then given separate advice. The Special Commissioners, without ruling on the alternative contention contained in the notices of determination, upheld the notices of determination on the ground that each of the five steps was part of a preordained series of transactions, the essential features of which had all been determined on by the time the first transaction was effected, so that the conditions of the *Ramsay* principle were satisfied. They also held that a client who conferred on his solicitor freedom of action to proceed as he thought appropriate in the interests of his client could not plead ignorance of any of the steps taken within the scope of that authority. The Commissioners also held that the £2m payment was a real net payment as it professed to be.

The taxpayers appealed and the Crown (on the alternative contentions contained in the notices of determination) cross-appealed.

The Chancery Division held, allowing the taxpayers' appeals and dismissing the Crown's cross-appeal, that:

(1) the Special Commissioners' determinations could not have been reasonably concluded from the evidence; there could be no preordained scheme where a taxpayer has not finally decided, when the first steps are taken, what exactly the eventual tax-saving steps will be;

(2) as H's settlement was not in contemplation when E died, he could not be said to have provided any funds for the settlement; there must be some real connection linking the original provider of a fund and the settlement of that fund before the original provider can be said to have been the settlor;

(3) it was not open to the Crown, on the facts found by the Commissioners, to claim that the gift to H, to the extent that it was expressed to be a net gift, was a "pretence".

The Crown appealed. Time for service of notices of appeal against the High Court order expired on 20 December 1989 but, by error, service was effected by first class post only on 22 December, and the letter was received by the taxpayers' solicitors on 28 December. On application by the Crown for an extension of the time for appeal, the Registrar of Civil Appeals ordered an extension of time on terms as to costs. The taxpayers appealed.

Held, in the Court of Appeal, upholding the Registrar's order, that, while a strong case for an extension of time had to be made out by the

A applicant, the delay in service of the notices of appeal was not such as to justify a refusal of an extension of time and that conclusion was not affected by earlier delays on the part of the Revenue in making and pursuing the enquiries following E's death.

B In the appeal the Crown relied on both grounds contained in the notices of determination, contending for the application of the *Ramsay* principle in three different ways:—

(i) steps 1 to 5, or 2 to 5, were a single composite transaction; alternatively,

C (ii) steps 3 and 5 were a single composite transaction; alternatively,

(iii) steps 2, 3 and 4 were a single composite transaction.

The Court of Appeal held, dismissing the Crown's appeal, that:—

(1) H's participation in steps 4 and 5 was not preordained on 14
D January 1980 and, accordingly, there was no single composite transaction; each of the single composite transactions contended for by the Crown included step 3, so the essential question was whether, when step 3 was taken, it was preordained that H would participate in steps 4 and 5; H had an understanding and a will of her own and on 14 January 1980, she was about to take separate legal advice from a solicitor and
E counsel; there was a real possibility that the proposed scheme would not go through; the established tests for preordainment were, therefore, not satisfied; it could not have been said, at the time, that there was no "practical" or "real" likelihood that the scheme would not be completed; accordingly, the *Ramsay* principle could not apply in any of the ways
F contended for by the Crown;

(2) for a person to be treated as a settlor within para 1(6) Sch 5 Finance Act 1975, there had to be some real connection linking that person with the settlement beyond the mere historical fact that the fund had originated from him; the vested moiety was held solely on the trusts of H's settlement and it reverted to the settlor, within para 4(5) Sch 5
G Finance Act 1975, so that the exemption from capital transfer tax applied.

Per curiam: the Court was of the view that where the *Ramsay* principle applied the particular provisions of the taxing statute on which reliance was
H placed had to be identified. Once the single composite transaction had been identified the question was whether it was caught by the taxing statute on which the Crown relied. This did not usually involve a question of statutory construction, in the sense that the meaning of the statute was in doubt, the question was whether a statute whose meaning was clear, applied to the single composite transaction. The principle might be described as one of statu-
I tory application.

The Crown appealed on the basis that:

(i) all of the steps 2 to 5 constituted a preordained single composite transaction with the effect that, although the intermediate interests could not be disregarded, nonetheless, the exemptions claimed by the taxpayer

were not applicable as a matter of construction of the legislation; and in the alternative

(ii) even if H was a settlor, she was not the settlor of the vested moiety when it vested in her so as to enable the benefit of the reverter to settlor exemption to be claimed.

Held, in the House of Lords (Lord Templeman dissenting), dismissing the Crown's appeal, that:—

(1) (*per* Lord Keith, Lord Ackner and Lord Mustill) the correct approach to steps 2 and 5 was to ask whether realistically they constituted a single and indivisible whole in which one or more of them was simply an element without independent effect and whether it was intellectually possible for them to be treated in such a way; as steps 2 to 5 gave rise to a charge to income tax on H or F and there was potential charge to capital transfer tax, they could not be treated as effective for the purpose of creating a charge to tax under para 4(2) Sch 5 Finance Act 1975, but at the same time ineffective for the purpose of attracting the exemptions in sub-paras 4(4) and 5(5) Sch 5; when applying the preordained single composite transaction principle it is not legitimate to alter the character of a particular transaction in a series, or to pick bits out of it and reject other bits; since the Special Commissioners found that all the transactions were genuine it was not possible to argue that certain steps, such as steps 2 and 4, had a different character, namely that the gift was conditional rather than unconditional or that the assignment was gratuitous rather than for consideration; although steps 2 to 5 were preordained the series of transactions was not capable of being construed in such a way as to be inconsistent with the applications of the exemptions from liability to tax which the taxpayers wished to rely upon and which the series was intended to create;

(2) (*per* Lord Keith, Lord Ackner and Lord Mustill) in relation to the vested moiety, E did not provide funds directly or indirectly to H for the purposes of or in connection with the settlement which H created under step 5; there has to be a conscious association by the provider of the funds with the settlement in question; the fact that the funds historically derived from E was not sufficient for the purposes of para 1(6) Sch 5 Finance Act 1975: there was no conscious association of E with H's settlement, and accordingly, it could not be accepted H was not the settlor, or the only settlor, of the settlement created at step 5 so that the reverter to settlor exemption did not apply;

(3) (*per* Lord Browne-Wilkinson) when considering whether a tax-avoidance scheme constitutes a preordained single composite transaction, it is necessary to identify the real transaction carried out; if the real transaction is carried out by a series of artificial steps, the words of the relevant taxing provisions should be applied to the real transaction disregarding for fiscal purposes the steps that have been artificially inserted; the real transaction was the distribution out of E's estate of £4m to F and £3.8m to H; it was conceded that step 1, which was critical to the whole transaction, was not preordained; accordingly, as the real transaction could only be carried out by all of steps 1 to 5 the real transaction was not carried out by a preordained single composite transaction.

A

CASE

Stated under para 10 of Sch 4 to the Finance Act 1975 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

B 1(a) On 21, 22, 23, 24, 25, 29, 30 September 1987 and 1 October 1987 we, two of the Commissioners for the Special Purposes of the Income Tax Acts, sat to hear the appeals by each of the Appellants in the main appeal and of the Respondents in the cross-appeal ("the executors and/or trustees") against a notice of determination given by the Commissioners of Inland Revenue ("the Board") to each of them on 8 October 1986 under para 6 of C Sch 4 Finance Act 1975 in relation to transactions (in which they participated) entered into following upon the death on 21 September 1979 of the Right Honourable William Thomas George, Tenth Earl Fitzwilliam. The executors and/or trustees are the surviving trustees of the will of the Tenth Earl. The Honourable Elizabeth-Anne Marie Gabrielle, Lady Hastings ("Lady Hastings") and Mr. Hugh Gordon Alexander Ross are the survivors D of the three executors who proved the will (power to prove was reserved to the Right Honourable Joyce Mary, Countess Fitzwilliam).

(b) At the same time we heard appeals by Sir Stephen Lewis Edmonstone Hastings and Mr. Nicholas Wellard Smith against similar notices of determination given to each of them by the Board on 8 October E 1986 in relation to the same series of transactions. These notices were given to Sir Stephen and Mr. Smith in their capacity of trustees of an *ad hoc* settlement made by Lady Hastings on 5 February 1980 as one of the said transactions.

F (c) All the notices are in precisely the same terms. A copy of the notice given to Lady Fitzwilliam(1) is annexed to our written decision to which we refer below.

2. A bundle of agreed documents was put in evidence before us. It is divided into six sections marked A, B, C, D, E and F respectively and each G section is preceded by a detailed list of the documents contained within that section. Copies of the documents are available for inspection by the Court if required. There is also a document marked G which is a proof of the evidence of Mr. Nicholas Powell, a partner in the firm of Messrs. Currey & Co., solicitors for the Appellants. This, however, is not an agreed document.

H 3(a) The names of the witnesses who gave evidence before us, the questions for our determination, our findings of fact, the contentions of the parties and our conclusion (confirming para 2 of each of the notices of determination as amended during the course of the hearing) appear from our decision (covering all the appeals) which we delivered in writing on 23 November 1987. A copy of our decision is annexed hereto marked A and I forms part of this Case.(2)

(b) At the request of Messrs. Currey & Co. we record that on 3 September 1987 the Board, in response to a notice served on them under s 2 Civil Evidence Act 1968 that the Appellants desired to give in evidence a

(1) Pages 648G/651E *post*. (2) Pages 621D/648F *post*.

statement made in a proof of evidence of Lady Fitzwilliam dated 21 November 1985, served a counter-notice requiring her to give oral evidence. We were told by Mr. Robert Walker Q.C., who appeared for the Appellants, that it had been hoped that the calling of Lady Fitzwilliam (who is 90 years of age) to give evidence could have been dispensed with in view of her age and of her deafness and that we should, for those reasons, treat her evidence with caution. We found Lady Fitzwilliam to be remarkably fit and alert for her age. We are satisfied that she had little or no difficulty in hearing the questions put to her in the course of her examination and cross-examination and in replying to them (making all due allowances for the not uncommon difficulty, caused by lapse of time, in recalling to memory much of the detail) in a manner which showed that she had understood them.

(c) Shorthand writers were present throughout the hearing of the evidence. The transcripts are available to the Court if required.

4. The following cases were cited in argument in addition to those referred to in our decision:—*Pilkington & Another* v. *Commissioners of Inland Revenue & Others*(1) 40 TC 416; *D'Abreu* v. *Commissioners of Inland Revenue*(2) 52 TC 352; *Challenge Corporation Ltd.* v. *Inland Revenue Commissioners*(3) [1986] STC 548; *Bird and Others* v. *Inland Revenue Commissioners*(4) [1987] STC 168; *Commissioners of Inland Revenue* v. *Duke of Westminster*(5) [1936] AC 1.

5. Each of the parties requested us within the statutory time-limit to state and sign a Case for the opinion of the High Court pursuant to para 10(1) of Sch 4 to the Finance Act 1975. The request by the Board was expressed to be made on the ground that they wished to argue the alternative grounds in sub-paras 1a and 2 of para 3 of each of the notices of determination on which, having decided in favour of the Board on their primary contention, we refrained from giving an opinion. We are of the opinion that it was unnecessary for the Board to have made such request in order to keep alive their right to argue their alternative grounds in the High Court. We so informed them and drew their attention to *Muir* v. *Commissioners of Inland Revenue*(6) 43 TC 367. The Board have, however, persisted in their request on the grounds that *Muir* is distinguishable and that they wish to avoid the possibility of being faulted on a technical procedural point. In the circumstances we have acceded to their request and have stated and signed this Case accordingly.

6(a) The questions for the opinion of the Court in the appeals by the executors and/or trustees are:

(i) Whether the evidence relied on by us is sufficient to justify our findings of fact and the inferences which we drew from the primary facts and, in particular, the findings set out in Appendix 2 to a letter dated 30 March 1988 from Currey & Co. to our Clerk. A copy of this letter together with copies of the Appendix and of our Clerk's reply thereto dated 16 May 1988 are annexed hereto marked B(7).

(ii) Whether our conclusion set out in para 14 of our decision is erroneous in point of law.

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(1) [1964] AC 612. (2) [1978] STC 538. (3) [1987] AC 155.
(4) 61 TC 238. (5) 19 TC 490. (6) [1966] 1 WLR 1269.
(7) Not included in the present print.

(b) The question for the opinion of the Court in the cross-appeals by the Board is whether, if our decision is erroneous in point of law, the notices of determination should be upheld in whole or in part on either of the alternative grounds in sub-paras 1a and 2 of para 3 in each of the notices.

A. K. Tavare
T. H. K. Everett
} Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
98 High Holborn
London WC1V 6LQ

16 November 1993

DECISION

1. Each of the Appellants appeals against a notice of determination given by the Commissioners of Inland Revenue on 8 October 1986 under para 6 of Sch 4 Finance Act 1975 ("the 1975 Act") in relation to transactions entered into following upon the death on 21 September 1979 of the Right Honourable William Thomas George, Tenth Earl Fitzwilliam. Each of the notices is in precisely the same terms. A copy of the notice given to Lady Fitzwilliam is annexed to this decision. The main question in issue is whether the principle enunciated by the House of Lords in *W. T. Ramsay Ltd.* v. *Commissioners of Inland Revenue*[1] 54 TC 101, as developed and explained in subsequent cases, is applicable to capital transfer tax ("CTT") and, if so, whether some or all of the said transactions fall to be treated as a single composite transaction giving rise to a charge to CTT in the circumstances to which we shall be referring.

The charge to CTT is imposed by s 19(1) of the 1975 Act on " ... the value transferred by a chargeable transfer". Subsection (2) of s 20 provides, subject to exceptions not material to these appeals, that

> " ... a transfer of value is any disposition made by a person ('the transferor') as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition: and the amount by which it is less is the value transferred by the transfer."

Section 21 and Sch 5 of the 1975 Act contain a comprehensive set of provisions dealing with settled property. We shall have to refer to several of these provisions during the course of this decision and where we do so we shall call this part of the 1975 Act "Schedule 5".

The basic principle is that a person beneficially entitled to an interest in possession in settled property is treated as beneficially entitled to the property in which the interest subsists (para 3(1) of Sch 5).

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[1] [1982] AC 300.

2(a) The Tenth Earl was Lady Fitzwilliam's second husband. By her earlier marriage she had two daughters, the Honourable Mrs. Ward (who plays no part in any of the matters with which these appeals are concerned) and the Honourable Mrs. Elizabeth-Anne Marie Gabrielle Hastings (to whom we will refer as "Lady Hastings"). Lady Hastings was twice married, first to Sir Vivyan Naylor-Leyland, Bart, by whom she had a son (Mr. Naylor-Leyland) and secondly, in 1975, to Mr. Stephen Hastings (since 1983 Sir Stephen Hastings) who was a Conservative Member of Parliament from 1960 to 1983. She was fully occupied as a part-time regional representative for Christies operating in the East Midlands, an honorary research assistant in the Department of Egyptology at the University of London and chairman of the Milton (Peterborough) Estates Co. which looked after Milton Hall, the family residence, and other family properties. She lived with her husband in London. The laundry room at Milton Hall had been converted into a flat for their use as and when their duties in London permitted.

(b) By his will, made on 13 December 1977, the Tenth Earl appointed as his general executors and trustees Lady Fitzwilliam and Lady Hastings together with two friends, namely, Mr. Henry Nathan Sporborg (the deputy chairman of Hambros Bank) and the fourth Appellant, Mr. Hugh Ross (the senior partner of the Tenth Earl's stockbrokers, J. & A. Scrimgeour Ltd.). The will was proved on 30 November 1979 by the general executors other than Lady Fitzwilliam. She did not wish to be troubled with the detailed administration of the estate and power to prove was reserved to her. This arrangement was not intended to and did not prevent Lady Fitzwilliam from acting with the three executors as a trustee. Thus, all executorship matters and decisions were handled by the three proving executors ("the executors") while all the trusteeship matters and decisions were handled by all four trustees ("the trustees").

(c) Messrs. Currey & Co., solicitors, of 21 Buckingham Gate, London SW1, acted as solicitors to the Tenth Earl throughout his life and had acted for his father before him since about 1870. Mr. Bosanquet, the senior partner until the beginning of this year, when he retired, for many years looked after the family affairs of the Tenth Earl assisted, since about 1970, by Mr. Powell, a junior partner. Mr. Powell gradually took over more and more of the Fitzwilliam work until, by the time of the Tenth Earl's death, he had taken over responsibility for his affairs generally. In particular, he was solely responsible for all tax-planning aspects. Mr. Bosanquet continued, however, to look after Lady Fitzwilliam personally.

3. The Tenth Earl's death at the age of 75 after a brief illness was quite unexpected. This combined with the death of her only sister just two weeks later caused considerable distress to Lady Fitzwilliam, then aged 81, and Lady Hastings, who had always been very close to her mother, reorganised her life in order to be with her mother whenever required.

4(a) The Tenth Earl's estate was large and contained a variety of assets. He owned Milton Hall, near Peterborough, a large mansion dating back to the 16th century (valued for probate at £400,000) which was his principal home, and a valuable collection of furniture and works of art there. He also owned a landed estate called "Wentworth" in South Yorkshire, plus shares in various family companies and stock exchange-quoted companies. Its net value for probate purposes was some £11.6m.

(b) By his will the Tenth Earl gave legacies of £250,000 each to Lady Fitzwilliam and Lady Hastings and several smaller legacies to members of staff and others. The residue was directed to be held on trust. Under clause 8(c) the trustees had discretion during the period of 23 months from the date of death ("the discretionary period") to appoint the residue among a class of beneficiaries ("the beneficiaries") consisting of Lady Fitzwilliam, Lady Hastings, Mr. Naylor-Leyland, Lady Hastings' remoter issue and the trustees of a charity. The power was in a form wide enough to permit the trustees to appoint to the beneficiaries absolutely or to set up new trusts in their favour. It was clearly drafted with s 47(1A) of the 1975 Act (as substituted by s 121(1) Finance Act 1976) in mind. This provides, so far as relevant for present purposes, that where property comprised in a person's estate immediately before his death is settled by his will and, within a period of two years after his death and before any interest in possession has subsisted in the property, a distribution payment (within the meaning of para 6 of Sch 5) is made out of the property then the CTT provisions shall apply as if the will had provided that on the testator's death his property shall be applied as it is applied by the distribution payment. Such a "distribution payment" is defined in para 11(7) of Sch 5 as (*inter alia*) any payment (including a transfer of assets other than money) which is not the income of any person for any of the purposes of income tax and is not a payment in respect of costs and expenses.

Clause 8(b) of the will provides that, subject (*inter alia*) to the above-mentioned power of appointment, the trustees shall have power to accumulate income and add it to capital and subject thereto shall pay or apply income during the discretionary period to or for the benefit of all or any one or more of the beneficiaries in such shares and proportions as they shall in their absolute discretion think fit. Subject to these trusts and powers under clause 8, the residue is to be held for Lady Fitzwilliam for life under clause 9 with power for the trustees to pay or apply capital to or for Lady Fitzwilliam's benefit under clause 10 and with remainder to Lady Hastings (if she survives the Tenth Earl for a month) under clause 11.

5(a) The Tenth Earl's death gave rise to a substantial charge to CTT which could be reduced retrospectively by taking advantage of s 47(1A) and the surviving spouse exemption under para 1 of Sch 6. This could be achieved by exercising the powers of appointment under clause 8(c) or 10 of the will in favour of Lady Fitzwilliam. However, this would bring only temporary relief to the family because it was evident that there would be a very heavy charge to CTT (some £7.5m) at Lady Fitzwilliam's death if her free estate, worth some £0.25m at the Tenth Earl's death, were to be substantially increased by transfers from his residuary estate or if she were to take a life interest in residue under the will during or at the expiration of the discretionary period. Although normally in reasonable health Lady Fitzwilliam had been dealt a severe blow by the loss of both her husband and her sister in quick succession and the possibility of her early demise had to be faced. In these circumstances Currey & Co. were instructed by the executors and trustees through Mr. Sporborg to explore as a matter of some urgency all possible ways of avoiding what Mr. Powell described as "this massive anticipated tax charge". Of the two professional executors and trustees, Mr. Sporborg played the most active part so far at least as tax-planning matters were concerned. Mr. Ross, we infer, was content to leave all such matters to Mr. Sporborg and Currey & Co. Of particular concern to the family was the

retention of Milton Hall which Lady Hastings described as " ... the one place that mattered to all of us" and which Lady Fitzwilliam described as "her life"—she wished very much to continue to live there.

(b) Although CTT was payable in respect of the residuary estate without the benefit of the surviving spouse exemption (with the right to claim repayment if and when Lady Fitzwilliam took an interest in possession upon her acquiring a life interest) the Inland Revenue account submitted by the executors had been prepared by Mr. Powell on the basis that that relief was immediately available in respect of the entire residuary estate notwithstanding the existence of the clause 8(b) discretionary trust and the clause 8(c) power to appoint to persons other than Lady Fitzwilliam. The result was that £895,271 only was paid in respect of the Tenth Earl's net free estate of some £11.6m to secure the grant of probate on 30 November 1979. Strictly some £9m should have been paid and claims to repayment would have arisen in respect of any interests subsequently arising or appointed to Lady Fitzwilliam. Mr. Powell's explanation was that this was the first will which his firm had had to prove since the advent of CTT in 1975 in which an initial discretionary trust was created and he and his partners were not sure of the correct treatment. In his letter of 7 February 1980 to the Capital Taxes Office (CTO) on the matter Mr. Powell said

> " ... it was firmly anticipated ... that Lady Fitzwilliam would either have property appointed to her in exercise of the clause 8 powers or would be allowed to take the life interest conferred upon her subject to those powers by clause 9. In other words, the initial discretionary trust ... was ignored ... and it was assumed that Lady Fitzwilliam would one way or another take an interest in possession in the entire residuary estate in accordance with section 47(1A) ... "

Mr. Powell told us that he had felt some unease about the procedure adopted which proved to be well founded when in a later case the CTO referred to it as an abuse of the self-assessment system. He said that his unease coloured the advice he was to give subsequently and that he would have been extremely unhappy to have seen the trustees make an appointment over any part of the residue which was not consistent with the basis on which the Inland Revenue account had been prepared and submitted. Whether or not this was so is not a matter upon which we need comment because we accept the submission of Mr. Robert Reid Q.C. (who appeared, with Mr. Christopher McCall Q.C., for the Revenue) that Mr. Powell's anxieties and the basis upon which tax had been paid at the probate stage cannot affect the outcome of these appeals.

6(a) As a result of the exploration by Mr. Powell, with the assistance of counsel, of means of mitigating CTT on the death of Lady Fitzwilliam the following steps, which are the subject-matter of these appeals, were taken:—

Step 1

On 20 December 1979 the trustees in exercise of the power conferred by clause 8 of the will appointed and declared that " ... a part of the ... residuary estate to the amount or value of £4m shall henceforth be held in trust as to both capital and income" for Lady Fitzwilliam absolutely ("the £4m appointment"). As soon as conveniently practicable the trustees were to make an appropriation in order to give effect to the appointment.

Step 2

On 9 January 1980 Mr. Powell, on behalf of Lady Fitzwilliam, handed to Lady Hastings Lady Fitzwilliam's cheque for, ("the £2m payment") accompanied by a letter which read as follows:—

> "Dear Elizabeth-Anne,
>
> I shall to-day be giving you a cheque for £2,000,000 as an outright gift to you. I advise you to have the cheque presented and cleared without delay. I wish to record that I intend this gift to be net of transfer tax—in other words I shall myself pay all capital transfer tax in respect of the gift.
>
> Yours affectionately,
>
> Joyce Fitzwilliam."

Step 3

On 14 January 1980 the trustees, in exercise of the clause 8 power, appointed and declared that a part of the available residue to the amount or value of £3.8m should henceforth be held upon the following trusts:—

> (a) the income of the appointed fund to be paid to Lady Fitzwilliam until "the vesting date" i.e. whichever is the earlier of (i) 15 February 1980 and (ii) the date of death of Lady Fitzwilliam;
>
> (b) subject as aforesaid the appointed fund and future income thereof to be held in trust (i) as to one equal moiety thereof for Lady Hastings absolutely and (ii) as to the other equal moiety thereof for Lady Hastings if she is living on the vesting date and subject thereto for Mr. Naylor-Leyland absolutely.

We will refer to this step as "the £3.8m appointment" to the two moieties as "the vested moiety" and "the contingent moiety" respectively.

Step 4

On 31 January 1980 Lady Fitzwilliam by her attorney, Mr. Bosanquet, executed a deed whereby she assigned to Lady Hastings in consideration of the payment of the sum of £2m her beneficial interest in the income of the contingent moiety.

Step 5

On 5 February 1980 Lady Hastings made an *ad hoc* settlement of the sum of £1,000 to be held by the trustees (Mr. Nicholas Wellard Smith, a partner in Currey & Co. and Sir Stephen Hastings) " ... upon trust to pay the income thereof to [Lady Fitzwilliam] until her death or until 15 March 1980 whichever shall first occur and subject thereto upon trust as to both capital and income for [Lady Hastings] absolutely".

On 7 February 1980 Lady Hastings assigned to the trustees of her *ad hoc* settlement her beneficial interest in the vested moiety expectant on the termination of the interest of Lady Fitzwilliam in the income thereof to hold as an accretion to the £1,000 and as one fund therewith for all purposes.

(b) It is said on behalf of the Appellants that the effect of each of these steps was as follows:—

Step 1

The appointment of £4m to Lady Fitzwilliam fell within s 47(1A) and attracted the surviving spouse exemption.

Step 2

The £2m payment, having been made free of tax, fell to be grossed up to ascertain the value transferred thereby. The gross amount was estimated at £6,965,500 and CTT of some £5m was payable accordingly. This sum was well in excess of Lady Fitzwilliam's immediate resources. CTT was not, however, payable for six months (para 12(1) Sch 4 of the 1975 Act) and Mr. Powell "hoped" that subsequent steps taken during this period would nullify the charge.

Step 3

The £3.8m appointment, which was otherwise chargeable to CTT by virtue of para 3(1) of Sch 5 (a person beneficially entitled to an interest in possession in settled property to be treated as beneficially entitled to the property in which the interest subsists), attracted the surviving spouse exemption by reason of s 47(1)(A). There was a prospective charge to CTT on the termination of Lady Fitzwilliam's limited interest in income under para 4(2) of Sch 5 which provides:

> "Where at any time during the life of a person beneficially entitled to an interest in possession in any property comprised in a settlement his interest comes to an end, tax shall be charged, subject to the following provisions of this paragraph, as if at that time he had made a transfer of value and the value transferred had been equal to the value of the property in which his interest subsisted."

Step 4

(a) The payment of the £2m consideration (which falls to be treated as a gift by Lady Hastings—s 69(7) Finance Act 1978) has the effect of removing the prospective charge in respect of the termination of Lady Fitzwilliam's interest in the income of the contingent moiety by virtue of para 4(4) of Sch 5 which provides so far as relevant:—

> "If the interest [in possession] comes to an end by being disposed of by the person beneficially entitled thereto and the disposal is for a consideration in money or money's worth, tax shall be chargeable under this paragraph as if the value of the property in which the interest subsisted were reduced by the amount of the consideration;"

The value of the property subject to the contingent interest is £1.9m (half of £3.8m) which, being less than the amount of the consideration, is reduced to nil.

(b) The £2m payment at step 2 is treated as an exempt transfer by virtue of the mutual transfers provisions in ss 86 and 87 Finance Act 1976. These provide, so far as relevant, as follows:—

> "**86.**—(1) This section and section 87 below have effect where—

A (*a*) a person ('the donor') makes a chargeable transfer ('the donor's transfer') which increases the estate of another person ('the donee'); and

(*b*) the donee subsequently makes a transfer of value ('the donee's transfer') which either—

B (i) is made in the donor's life-time and increases the value of the estate of the donor or his spouse; or

(ii) ...

(2) The donee's transfer shall be an exempt transfer to the extent to C which the value thereby transferred does not exceed—

(*a*) the amount by which his estate was increased by the donor's transfer; or

(*b*) ...

87.—(1) The donor may, within six years after the donee's transfer, D claim that for the purposes of this section the value transferred by the donor's transfer shall be treated as cancelled by the donee's transfer to the extent specified in subsection (3) below; and thereupon—

(*a*) tax on the cancelled value paid or payable (whether or not by the claimant) shall be repaid to him by the Board or, as the case E may be, shall not be payable; and

(*b*) ...

(2) ...

(3) The amount of the value transferred to be treated as cancelled F by a donee's transfer shall be such amount thereof as, after deduction of the tax charged on it, is equal—

(*a*) ... to the value restored by the transfer;

(*b*) ...

G and where the cancelled amount is less than the whole of the value transferred it shall be treated as the highest part of that value.

(4) ...

(5) For the purposes of subsection (3) above the value restored by the donee's transfer is so much of the value thereby transferred as does H not exceed—

(*a*) the amount by which the donee's estate was increased by the donor's transfer; or

(*b*) ... "

I The analysis by Mr. Robert Walker Q.C. (who appeared for the Appellants with Mr. Mark Herbert) of these complex provisions in relation to these appeals, which is not challenged by the Revenue, is helpful in understanding them and is as follows:—

(a) All mutual transfers involve a donor's transfer and a donee's transfer. In the present case the donor's transfer was Lady Fitzwilliam's

gift of £2m to Lady Hastings. The donee's transfer was the payment of £2m by Lady Hastings to Lady Fitzwilliam in consideration for the purchase of Lady Fitzwilliam's beneficial interest in the contingent moiety.

(b) By the donor's transfer Lady Fitzwilliam's estate was reduced by £2m plus the grossing-up slice if Lady Fitzwilliam paid the tax. Lady Hastings' estate was increased by £2m, satisfying s 86(1)(a). By the purchase of Lady Fitzwilliam's interest in the contingent moiety Lady Fitzwilliam's estate was simultaneously increased by £2m and decreased by £1.9m (half of £3.8m). This increased the value of the donor's estate, satisfying s 86(1)(b).

(c) The disposal of Lady Fitzwilliam's interest in possession was not an actual transfer of value: para 4(1) of Sch 5; but it was treated as the termination of her interest and, therefore, a deemed transfer of value: para 4(2); the value transferred being the capital value of the contingent moiety (£1.9m) reduced by the amount of the consideration: para 4(4). The value transferred by the deemed transfer of value was, therefore, nil.

(d) *Prima facie* Lady Hastings' estate was simultaneously reduced by the amount of the consideration (£2m) and increased by the capital value of the contingent moiety (£1.9m) in which she became beneficially entitled to an interest in possession: para 3(1). But the effect of para 3(1) is to be ignored under s 69(7) Finance Act 1978, so that the value transferred is £2m (reduced by the actual value on 30 January 1980 of Lady Fitzwilliam's interest in the contingent moiety, which was negligible).

(e) The donee's transfer is exempt up to the amount by which the donee's estate was increased by the donor's transfer (£2m): s 86(2) Finance Act 1976.

(f) For cancellation of the donor's transfer the first amount to be ascertained is the value transferred by the donee's transfer (almost £2m), up to the amount by which the donee's estate was increased by the donor's transfer (£2m): s 87(5). That is the amount "restored" by the donee's transfer: s 87(3). Up to that amount the donor's transfer is cancelled, and CTT is not payable: s 87(1).

Step 5

When Lady Fitzwilliam's limited interest in the vested moiety terminated by effluxion of time the property in which it subsisted reverted to Lady Hastings, the settlor, with the consequence that by virtue of para 4(5) of Sch 5 the termination did not attract CTT under para 4(2).

A claim was duly made under s 87(1). If each of the steps is effective Lady Hastings will have received £3.8m in money or money's worth without any liability to CTT having been incurred on the way. Lady Fitzwilliam will have received £4m without having incurred any liability to tax in respect of the £2m payment.

7(a) We have now to make our findings regarding the circumstances in which the above-mentioned steps were taken. We have had the benefit of the oral evidence of Lady Fitzwilliam, Lady Hastings, Mr. Powell, Mr. Bosanquet and Mr. Smith and of a very full disclosure of documents, includ-

ing instructions to counsel with relevant extracts from their opinions and solicitors' attendance notes.

(b) On 11 October 1979 Mr. Powell sent to counsel (Mr. Edward Nugee Q.C. and Mr. Robert Walker), with instructions to advise, a memorandum headed "Outline Plan" which he had prepared setting out in outline a "possible arrangement for saving duty" on the Tenth Earl's estate (document F5). The saving was to be effected by selecting from the estate assets " ... to be passed to Lady Hastings free of CTT" by taking a series of steps there set out. On 17 October 1979 counsel advised in conference attended by Mr. Powell, Mr. Bosanquet, Mr. Sporborg (who had been provided with a copy of the instructions and of the memorandum and was present only for some of the time) and Mr. J. M. Forster, a partner in Messrs. Hays Allan (the family accountants). Mr. Nugee took no further part in the tax-planning exercise and Mr. Walker alone was thereafter consulted. An "Outline of a possible revised scheme" was prepared by Mr. Walker in a memorandum dated 18 October 1979 (F8). Further instructions were on 26 October 1979 sent to Mr. Walker to advise on sundry matters, including the prospects of success of a "reverter to settlor" scheme. Mr. Walker advised in conference at which Mr. Powell and Mr. Forster were present. Mr. Powell continued to have discussions and correspondence with Mr. Walker and in particular wrote to him on 5 November 1979 (F16). In this letter Mr. Powell sought further advice on the use of the mutual transfers provisions (ss 86 and 87) which had been discussed in conference. In particular he was concerned that a gift by Lady Fitzwilliam net of CTT might be attacked as a sham if it were to be so large that she could not in reality pay tax on it and suggested that a net £2m (equivalent to £7,129,000 grossed up) could be justified. Subject to Mr. Walker's agreement with this suggestion he put forward for consideration a further revised plan. The relevant part of his letter reads as follows:—

" ... I think further consideration could be given to a plan on the following lines:—

1. £2m land distributed to Lady Fitzwilliam. (I think we would do best to forget the idea of including chattels in the plan partly because of your point about delivery.) Point to be considered: which Trustees should make the distribution.

2. Lady Fitzwilliam gives £2m land to [Lady] Hastings as a net gift. Stamp duty £40,000. This might be done without the subsequent steps having been explained to Lady Fitzwilliam or [Lady] Hastings, or to the Trustees.

3. Trustees appoint £1.8m fund 'to be raised' to Lady Fitzwilliam for a short-term interest, and subject thereto for [Lady] Hastings. Points to be considered: (a) should the Trustees have power to release capital to Lady Fitzwilliam and if so should this subsist after the expiry of the short-term interest? (b) should there be some other power to ensure that property remains 'settled property' after sale of short-term interest? (c) which Trustees should make the appointment?

4. [Lady] Hastings borrows £2m on the security of the land.

5. She uses this sum to purchase her mother's short-term interest. Stamp duty £40,000. No valuation difficulty as the interest is in an unappropriated fund worth £1.8m.

6. [Lady] Hastings becomes absolutely entitled to the fund and the Trustees appropriate assets to it, either more land or possibly at this stage chattels (no delivery problems?).

7. After a respectable interval, Lady Fitzwilliam settles the £2m cash on trust for herself for a short-term and subject thereto for [Lady] Hastings. [Lady] Hastings settles her reversion on trust for Lady Fitzwilliam for a further term with reverter to herself. Stamp duty (after allowing for possible CTT at 60%) say £16,000.

8. [Lady] Hastings becomes absolutely entitled to the £2m cash on expiry of the second term and uses it to repay the borrowing.

Net result [Lady] Hastings becomes entitled to £3.8m of assets, free of CTT if both limbs work."

By letter dated 15 November 1979 to Mr. Powell (F19) Mr. Walker made some favourable comments on the revised plan and agreed that it could proceed on the lines indicated. He suggested a form of resolution by the trustees which would " ... add substance to Lady Fitzwilliam's intention to make a gift" and agreed that step 2 could " ... be completed without any overall plan having been explained to, and adopted by, the clients".

On 20 November 1979 a meeting of the Fitzwilliam co-ordinating committee was held. This is the name given to meetings between the Tenth Earl and his family advisers, which were convened at some two-monthly intervals over a period of 15 years or so before his death. It continued to meet after his death. This meeting took place, as was customary, at the office of Mr. Forster (who kept the minutes) and was attended by Mr. Sporborg, Lady Fitzwilliam, Lady Hastings and her husband, Mr. Ross, Mr. Thompson (the family's chief land agent at Milton), Mr. Keeping (senior partner in Messrs. Newman & Bond, the family's solicitors in Yorkshire), Mr. Bosanquet, Mr. Powell and Mr. Forster. Mr. Carr, the land agent who looked after the Yorkshire estates, was unable to be present. Members of the committee had, prior to the meeting, been provided with a copy of a memorandum prepared by Mr. Powell on 14 November 1979 setting out the CTT problems which arose consequent on the Tenth Earl's death (B1). They were told that Currey & Co. were exploring with counsel what steps Lady Fitzwilliam and the trustees might be advised to take and they, Currey & Co., hoped to be able to report at the meeting on 20 November. It was suggested that action should be taken soon; that Lady Fitzwilliam's personal financial position was so secure that she could well afford to give up very substantial amounts of property which could be allowed to pass to Lady Hastings; but that this was primarily a matter for Lady Fitzwilliam to decide in view of the CTT that would be chargeable in respect of appointments in favour of persons other than Lady Fitzwilliam.

As the minutes of the meeting (B2) record, Mr. Powell's memorandum of 14 November 1979 was approved in principle and his firm were authorised " ... to proceed with the appropriate plans". Mr. Powell explained that in the interest of flexibility it would be appropriate for the trustees to "release" to Lady Fitzwilliam absolutely a substantial proportion of the assets, perhaps as much as £4m, and it was agreed that this should be done.

Mr. Powell said in evidence that he did not make a full report to the committee as his discussions with counsel had not yet resulted in a totally

developed plan. We record at this stage our finding that Mr. Powell did not at any stage intend to, and did not in fact, disclose the details of any plan, developed or otherwise, to any member of the family whether at meetings of the committee or otherwise. Indeed, he told us that he was anxious that decisions should be taken on the various steps in the CTT arrangements by the family and the executors and trustees on their own merits and without regard to the tax repercussions. We do not accept this explanation as most of what was done in the course of implementing the arrangements was done for tax reasons and did not make sense otherwise. Non-disclosure of the circumstances in which each of the five steps was taken was, we find, an essential tactic adopted in an endeavour to secure the successful implementation of the overall tax-saving plan. There was no difficulty in this respect so far as Lady Fitzwilliam was concerned because she had such complete confidence in Currey & Co., whom she regarded as very erudite and whose advice she would follow implicitly, that she gave them *carte blanche* to make all necessary tax arrangements. She did not wish to be concerned with the details. As to Lady Hastings she was content that Currey & Co. should proceed with the tax-saving arrangements without reference to her where her participation was not required. Like her mother she attended upon them to execute documents and receive advice on transactions to which she was a necessary party. Unlike her mother she had no difficulty in understanding such advice as she was from time to time given and by and large she readily accepted it. On one matter, however, the prospect of the 1980 Budget providing substantial CTT relief, she took an active part in a discussion with Mr. Smith on 22 January 1980 and expressed some views of her own. We shall be referring to this discussion later on in our decision. Such discussions as she had with Mr. Powell and Mr. Smith on technical matters never otherwise wandered outside the bounds of the particular transaction then being dealt with.

Lady Hastings acknowledged that she knew that Mr. Powell was looking into means of reducing CTT. The evidence as a whole, however, goes further than that and leads us irresistibly to the conclusion, and we so find, that Lady Hastings was at all relevant times aware that Mr. Powell was putting into effect a tax-saving scheme and that she did not know what form that scheme took because she did not at any time inquire. She hoped, however, that whatever was being done would enable Milton Hall to be retained in the family.

As to the figure of £4m, that was suggested to the committee at the said meeting by Mr. Powell without giving reasons because, besides being sensible in his view on its merits, it fitted in with the arrangements which he was making with the assistance of Mr. Walker. The larger the amount of capital appointed to Lady Fitzwilliam the easier it would be to advise her to make a substantial net gift to her daughter (Mr. Powell's letter of 23 November 1979 to Mr. Walker—F21).

As to Lady Fitzwilliam's reaction to the decision of the committee to appoint £4m, she had been given to understand that such a sum would in due course be available and indeed that £2m of it would be available quite soon. She further understood that it would be exempt from CTT. The decision was particularly welcome to her because it would enable her for the first time to make an immediate substantial gift to her daughter. Apart from that she had little idea what it was all about. She relied fully on her solicitors and was content to leave them to do whatever was necessary.

In his letter of 23 November 1979 Mr. Powell instructed Mr. Walker to settle the £4m deed of appointment and explained that there would have to be an appointment of an unidentified part of the residuary estate because the agent (Mr. Carr) who looked after the Wentworth estate and would have to deal with the selection of land and its valuation was ill and temporarily unavailable. As to the prospective gift by Lady Fitzwilliam, there was little ready cash in the estate but there was a possibility of cash becoming available from the sale of two farms (the executors had received a tentative offer of £1.4m for Maplebeck in Lincolnshire and a firm offer of £1.15m for Paper Hall Farm in Norfolk) some of which might be available for release to Lady Fitzwilliam; to the extent that cash should not be available some land from the Wentworth estate would be appropriated to enable the gift to be made.

Mr. Walker, on 29 November 1979, settled the £4m appointment and a form of resolution to be used by the trustees if they should appropriate land in or towards satisfaction of Lady Fitzwilliam's entitlement.

The trustees (other than Lady Fitzwilliam) executed the £4m appointment at Mr. Powell's office on 12 December 1979. Execution by Lady Fitzwilliam was deferred pending her making a new will. She signed this on 20 December 1979 at a meeting with Mr. Bosanquet, at which Mr. Powell was present, and at the same time executed the £4m appointment. Lady Fitzwilliam then informed them that she intended to take a holiday in Kenya for about five weeks from 15 January 1980. She was told that this would affect the timing of various stages in the plan her solicitors had in mind which needed to be completed before the next Budget. They would draw up a timetable of events accordingly.

Further disruption to the timing of the steps came with the sudden death of Mr. Carr on Christmas Day. There was no other person who could advise authoritatively on the selection of land and its value for the purpose of appropriation to Lady Fitzwilliam.

On 28 December 1979 Mr. Powell sent further instructions to Mr. Walker (F32) to advise in the light of the changed circumstances. A copy was sent to Mr. Sporborg. With the tax-saving plan under way Mr. Powell needed to get £2m worth of ascertained property into Lady Fitzwilliam's hands before she set off for Kenya to enable the gift to Lady Hastings to proceed. By 3 January Mr. Walker had considered his instructions and after a discussion with Mr. Powell over the telephone Mr. Walker dictated the following time-table (F35–38) using the numbers corresponding to those for the various steps in Mr. Powell's letter to Mr. Walker of 5 November 1979 (F17–18):—

"Step 1	20.12.79	Appointment of a £4m fund to Lady Fitzwilliam absolutely, assets yet to be appropriated to it.
Step 1A	9.1.80	[The] Trustees borrow £2m, and pay this to Lady Fitzwilliam on account of her £4m fund.
Step 2	11.1.80	Lady Fitzwilliam gives £2m to [Lady] Hastings by cheque. This cash gift involves no stamp duty. At the same time she hands [Lady] Hastings a letter indicating that Lady Fitzwilliam will bear any capital transfer tax on this gift.

Step 3	14.1.80	The ... Trustees appoint new trusts over a further separate designated fund of the residuary estate valued at £3.8m, with assets to be raised out of residue generally and appropriated to the fund later. The trusts will provide a short-term interest for Lady Fitzwilliam in the income to end on 15 February 1980 and subject thereto for half the fund to be held for [Lady] Hastings absolutely if living on 15 February (with remainder to Philip) and the other half to be held for [Lady] Hastings absolutely.
Step 3A	14.1.80	Lady Fitzwilliam gives a general power of attorney in common form to some independent individual in the UK.
Step 3B	28.1.80	[Lady] Hastings makes an *ad hoc* settlement of a nominal sum with an initial income interest in favour of Lady Fitzwilliam to end on 15 March 1980 with remainder to [Lady] Hastings.
Step 3C	30.1.80	[Lady] Hastings assigns to the Trustees of her *ad hoc* settlement her reversionary interest in an undivided half share of the designated fund, being the indefeasibly vested half share. This assignment will attract some *ad valorem* stamp duty.
Step 4		This step has disappeared from the plan, the borrowing now having taken place at Step 2.
Step 5	7.2.80	[Lady] Hastings purchases for £2m Lady Fitzwilliam's short-term income interest in the other half of the designated fund being the half share dependent on her survival to 15 February 1980 Lady Fitzwilliam making this sale by her attorney.
Step 5A	10.2.80	Lady Fitzwilliam uses part of the £2m to buy assets from the ... Trustees to the extent necessary to provide them with cash with which to repay their borrowing at Step 1A. (It may be that the ... Trustees will have raised cash from other sources and used it to repay their borrowing in part.) The assets Lady Fitzwilliam might purchase include chattels which could be passed by delivery or land the legal estate in which could be left outstanding, in either case avoiding *ad valorem* stamp duty. This transaction would probably have to be carried out by Lady Fitzwilliam's attorney so that the borrowing could be repaid at the earliest opportunity.
Step 6	15.2.80	[Lady] Hastings becomes absolutely entitled to the half share of the designated fund in which she purchased an interest at Step 5.

Step 7	15.3.80	[Lady] Hastings becomes absolutely entitled to the other half share in the designated fund.
Step 8	When convenient	The ... Trustees make appropriations:—

(a) of £2m-worth of assets to Lady Fitzwilliam to satisfy the remainder of the original £4m fund appointed to her at Step 1. This appropriation might include chattels of exempt quality which it would be helpful to have in Lady Fitzwilliam's estate at her death, but probably there would be at least £1m of cash appropriated which Lady Fitzwilliam would use for living expenses thereafter.

(b) Assets worth £3.8m would be appropriated to [Lady] Hastings on account of the designated fund—these would probably be Wentworth land."

Mr. Walker advised that one of the advantages of Lady Fitzwilliam's absence abroad was that it would help in demonstrating that Lady Fitzwilliam had not been advised of the settlement at step 3B. In this connection he suggested that serious consideration be given to Lady Hastings being advised on this aspect of the matter by another partner in Currey & Co. and possibly by separate counsel, but he thought this question could be taken up later.

Later on that day Mr. Powell spoke to Mr. Sporborg over the telephone about Mr. Walker's revised plan and in particular about the possibility of an arrangement with Hambros. Mr. Sporborg inquiries of Hambros and a little later on was able to inform Mr. Powell that an unsecured loan of £2m would be made available immediately for a period of one month from the date of drawing at a rate of interest of 1 per cent. over Hambros' base rate (see letter from Hambros to Mr. Sporborg of 4 January 1980—B15). The interest on this loan was, by resolution of the trustees (other than Lady Fitzwilliam) made on 14 January 1980 (A28), in exercise of the power conferred by clause 10 of the will, to be paid out of capital of the residuary estate.

On 7 January 1980 Mr. Walker settled the £3.8m deed of appointment, a memorandum and receipt in respect of the payment of £2m by the trustees to Lady Fitzwilliam by means of the Hambros' loan and the letter to be written by Lady Fitzwilliam to her daughter regarding the £2m payment. Having collected these documents from Mr. Walker's chambers, Mr. Powell proceeded to discuss with Mr. Forster at some length over lunch the revised programme taking each step in turn. They decided to proceed with the revised plan " ... as only mechanics and not the substance of the scheme had been altered" (see Mr. Powell's note of the meeting—F56).

Mr. Powell then informed Mr. Walker over the telephone that he was happy with all his drafts subject to two queries on the deed of appointment which were dealt with. Mr. Walker approved the arrangements made for the payment of the £2m to Lady Fitzwilliam and emphasised the importance of the money passing into her bank account. He confirmed that he saw no objection to the money being lent to Currey & Co. rather than being deposited in her bank if for tax reasons that would be more beneficial to her.

Finally, on 7 January 1980 Mr. Powell was present at a meeting between Lady Fitzwilliam and Mr. Bosanquet at which she executed a general power of attorney in favour of Mr. Bosanquet and Mr. Forster jointly and severally. She also executed a trustee power in favour of Mr. Ross. She confirmed that she would be leaving the country on 15 January for about five weeks. Mr. Bosanquet referred to the £4m appointment and explained that the trustees had yet to decide what assets to put into this fund; that following discussion with counsel the trustees were going to be advised to make her a payment of £2m on account by means of the Hambros' loan; and that subject to the approval of the other trustees the moneys would be telegraphed to her account on 9 January. Lady Fitzwilliam said this would suit her and in anticipation she signed the memorandum of receipt to be kept by Mr. Bosanquet and dated after the money had reached her account.

Mr. Bosanquet then raised the question of what Lady Fitzwilliam should do with the £2m. She said she had no need of the money at that time and it seemed a golden opportunity to make it available to her daughter and that she would make out a cheque, post-dated to 9 January, in favour of her daughter which could be picked up at her flat in Belgrave Square on the following day. Mr. Bosanquet then advised Lady Fitzwilliam on the CTT implications of making a net gift and that he felt sure the trustees would, if necessary, come to her assistance to help her meet any liability. Lady Fitzwilliam told us in evidence which we accept that there was so much talk about taxation at the time that she was not conscious of her own potential liabilities though these were no doubt explained to her. She understood that the £2m was available. She did not know where it came from. She decided to give it to her daughter and bear the tax herself. Mr. Bosanquet told her that ways of reducing the tax were being considered and she agreed that if any ways were found she had no objection to their doing whatever was necessary in her absence. She signed the letter to her daughter in the terms settled by Mr. Walker.

Mr. Bosanquet then passed on to the £3.8m appointment. Lady Fitzwilliam could not attend a meeting of the trustees at which, she was informed, they would be advised to execute this as a further partial distribution of the estate. The contents of the deed of appointment were explained to her and she signed it there and then so that it could be put into operation as soon as it had been signed by the other trustees.

Lady Fitzwilliam's attitude towards the £4m and £3.8m appointments and the partial distributions was, in her own words, to treat them as a matter of course, or as an expediency, or as something that happens on a death.

On 9 January 1980 Lady Hastings called on Mr. Powell and signed the Hambros' loan forms. She was handed her mother's cheque for £2m and the letter. She was told that her mother had been keen to have some assets out of the estate to enable her to make a substantial gift to her daughter, that it had not been possible to arrange for land to be appropriated as had once been planned and that Mr. Sporborg had negotiated the loan as a temporary measure. She was also told that her mother had wished to act quickly before leaving for Kenya and two days earlier had signed the cheque and letter. She was, she said, dumbfounded and rather touched by her mother's generosity. After discussing the matter with Mr. Powell she decided to deposit the

money in her own bank account. She realised that there would be CTT on the gift but she had no idea how much.

Mr. Powell then told Lady Hastings that having discussed the matter with counsel it was proposed that before Lady Fitzwilliam went on holiday a further appointment of £3.8m be made to her mother by the trustees. He recommended the appointment on the basis that it would be consistent with the Inland Revenue account lodged with the application for probate. The terms of the appointment were explained as being such as kept options open so far as her mother was concerned. No reasons were given to Lady Hastings as to why one-half of her interest was contingent and the other-half vested. Lady Hastings thereupon executed the deed of appointment as she would not be available to attend the trustees' meeting arranged for the following week. She was not aware of the progress made with regard to CTT planning by Currey & Co., nor did she inquire.

Mr. Sporborg and Mr. Ross called on Mr. Powell on 14 January 1980 and signed the £3.8m appointment.

At this stage Mr. Powell, following Mr. Walker's advice, approached Mr. Smith who agreed to consider the whole matter and to advise Lady Hastings on the steps that remained to be taken. Mr. Smith had not been involved in any of the earlier discussions nor had he ever met Lady Hastings. On 15 January 1980 Mr. Powell prepared a note for Mr. Smith briefly summarising the present position (B24–25) and requested Mr. Smith to seek counsel's advice from someone other than Mr. Walker who had been advising the trustees. The summary did not refer to the tax-avoidance schemes which Mr. Powell had in mind for Lady Hastings. Mr. Smith, however, discussed the note with Mr. Powell and it could, he said, have been in the course of that discussion that he was made aware of the schemes or the schemes may have been obvious to him. One way or another Mr. Smith was aware of them at an early stage.

A meeting of the co-ordinating committee was held on 18 January 1980 at which Lady Hastings, Mr. Powell and others were present. One of the matters discussed was the repayment of the Hambros' loan. If, as appeared likely, there would be insufficient cash in the estate at the due date it was thought that Lady Hastings would have to purchase Maplebeck (the sale of which had only reached the draft contract stage) from the executors in order to put them in funds (B28). The committee had before it a report by Mr. Powell (B26), para 1 of which reads as follows:—

> "The steps already taken by the Will Trustees mean that:—
>
> (a) Lady Fitzwilliam has become entitled to assets of the estate to a value of £4.25m (but she has given £2m of these to [Lady] Hastings as a cash gift)
>
> (b) Lady Hastings will within the next month have become entitled to assets of the estate to a value of £4.05m (subject to a serious CTT liability which it is hoped to find some way of mitigating)
>
> and
>
> (c) the remainder of the estate will continue to be held by the Will Trustees on trust for Lady Fitzwilliam for life with remainder to [Lady] Hastings."

Each of the sums in (a) and (b) included the legacy of £0.25m bequeathed to each beneficiary. The committee approved Mr. Powell's note in principle and authorised Currey & Co. " ... to proceed on these lines" (B29).

On 18 January 1980 Mr. Smith, in advance of his seeing Lady Hastings, instructed Mr. Herbert to advise on the mutual transfers and reverter to settlor schemes. Mr. Herbert and Mr. Walker were members of the same chambers and, although Mr. Powell may have suggested that Mr. Herbert should be instructed, Mr. Smith thought it would have been natural for him to have instructed Mr. Herbert because he, Mr. Herbert, had considered similar ideas for another client during the previous year and they would not be new to him. Mr. Smith told us, quite frankly, that he thought it likely that Mr. Herbert's advice would be exactly the same as Mr. Walker's. He instructed Mr. Herbert to advise " ... on the above proposals and questions and to settle the [*ad hoc*] settlement, deed of assignment and any other documents he thinks appropriate". Mr. Herbert was not invited to advise generally.

On 22 January 1980 Lady Hastings called upon Mr. Smith who, in the presence of Mr. Powell, proceeded to advise her on the steps which remained to be taken by her, this time in her personal capacity. Mr. Herbert's advice had yet to be received. The CTT problem was urgent and there were, he felt, only two schemes which he could recommend to Lady Hastings but before dealing with these he wished to dispose of a third possibility i.e. that decisions should be deferred until the Conservative government had had an opportunity to carry out a review of CTT to which it had committed itself. Neither Mr. Smith nor Lady Hastings, however, thought there was any immediate prospect of any substantial benefits to the estate in the next Budget and, as Lady Hastings reminded Mr. Smith, they had to face up to the possibility of her mother's death in view of her then state of health. Mr. Smith then proceeded to explain each of the two schemes. Lady Hastings understood them perfectly at the time. Mr. Smith explained that there was bound to be uncertainty with such a new tax as CTT but both he and Mr. Powell were hopeful that both schemes would succeed and there seemed little to lose and a worthwhile prize to be gained by proceeding with them. Lady Hastings authorised Mr. Smith to go ahead with the schemes if they were supported by Mr. Herbert.

Lady Hastings was, when considering the £3.8m appointment and the subsequent steps, very conscious of the enormous liability to CTT arising out of the £2m payment net of tax and of the problems to which it gave rise. The only alternative to going ahead with these steps was to unscramble those that had already been taken. She regarded it "as quite a conundrum" though it was never seriously suggested to her that there should be any unscrambling.

On 23 January 1980 the sale of Paper Hall Farm was completed. After paying off the executors' loan account at Barclays Bank, Peterborough, which had been used for CTT and administration expenses, there was a balance of £793,722.68 which was credited on 24 January to their loan account with Hambros. A further £240,000 was credited to that account on 25 January 1980, most of which represented redemption moneys from an investment.

Mr. Herbert's opinion and draft documents were received by Mr. Smith on 30 January 1980. Mr. Herbert agreed that the most promising way of avoiding the CTT liabilities in question was the combination of the two schemes mentioned to him in his instructions but advised that the order of execution of the documents should differ from that put forward in his instructions (which was the order envisaged in Mr. Walker's plan of 3 January 1980)—the deed of assignment on sale of Lady Fitzwilliam's interest in the contingent moiety should be executed a few days before the *ad hoc* settlement and the subsequent assignment by Lady Hastings of her interest in the vested moiety. Mr. Powell discussed this advice with Mr. Bosanquet who was happy with it. Mr. Powell also telephoned Mr. Walker to inquire whether he had seen Mr. Herbert's drafts and approved them. Mr. Walker said that he had and that he had also discussed with Mr. Herbert the alteration in the order of execution of the documents. They both felt that the revised order was the most natural order. Mr. Walker advised that the deed of assignment on sale should be executed within the next two days even though that meant withdrawing the £2m consideration from deposit and a forfeiture of seven days' interest amounting to some £2,000 net of top rate income tax.

On 31 January 1980 there was a meeting with Lady Hastings at which Mr. Bosanquet, Mr. Smith and Mr. Powell were present. Lady Hastings was informed of Mr. Herbert's favourable opinion and proceeded to execute the deed of assignment to her of Lady Fitzwilliam's interest in the contingent moiety fully understanding that she was paying £2m for an interest of very little value in the hope that she would thereby solve the CTT problem created by the £2m net payment. Lady Hastings handed to Mr. Bosanquet, as her mother's attorney, an instruction to her bank to hold the sum of £2m to the order of her mother or her attorney, Mr. Forster (Mr. Bosanquet was about to go abroad for some time). Mr. Bosanquet, as attorney, then executed the deed of assignment. Notice was given to the trustees on 8 February 1980.

By purchasing her mother's interest, Lady Hastings had put it out of her power to purchase Maplebeck from the executors and so put them in funds wherewith to repay the Hambros' loan. Mr. Forster, however, on 31 January 1980 came to their rescue when he agreed in principle, as Lady Fitzwilliam's attorney, to purchase Maplebeck from them at a price to be agreed but which he hoped could be based on a recent valuation of £1,260,000.

On 5 February 1980 Sir Stephen and Lady Hastings met Mr. Smith and executed the *ad hoc* settlement.

On the same day, 5 February 1980, a contract was signed by Mr. Forster for the purchase by Lady Fitzwilliam of Maplebeck for the sum of £1,260,000. Completion took place on 7 February when the consideration was paid (the sale being left in contract) and the trustees repaid the balance of the Hambros' loan with interest amounting to £21,584.16.

Sir Stephen and Lady Hastings attended upon Mr. Powell on 7 February 1980 and executed the deed of assignment of Lady Hastings' interest in the vested moiety expectant on the termination of Lady Fitzwilliam's interest in the income thereof. Sir Stephen had his position as trustee of the *ad hoc* settlement explained to him. Notice was given to the trustees on 20 February.

The trusts under Lady Hastings' *ad hoc* settlement terminated on 15 March 1980 when she became absolutely entitled to the assets then comprised therein.

Appropriations in satisfaction of the £4m appointment and the £3.8m appointment were made as and when the trustees were able to identify properties which could safely and properly be so dealt with and the process was completed by 9 October 1980.

The Ramsay principle—contentions and conclusion

8(a) Each of the notices under appeal was given on 8 October 1986. Notice was given to Lady Fitzwilliam, Lady Hastings and Mr. Ross in their capacity of trustees of the will. Mr. Sporborg, the other trustee, had by this time died. Notices were given to Sir Stephen Hastings and Mr. Smith in their capacity of trustees of Lady Hastings' *ad hoc* settlement.

(b) Paragraph 2 of each notice sets out the Board's determination under the *Ramsay* head. During the course of the hearing Mr. Reid abandoned any intention to rely on "associated operations" within s 44(1) of the 1975 Act. This paragraph was, accordingly, varied and, substituting our expressions for those used in the notice, now reads as follows:—

> "By the following operations, namely the £4m appointment, the £3.8m appointment, the £2m payment and Lady Hastings' *ad hoc* settlement together with the assignment to the trustees of that settlement of Lady Hastings' interest in the vested moiety, the trustees of the Tenth Earl's Will (of whom Lady Hastings was one) Lady Fitzwilliam and Lady Hastings effected a composite transaction whereby out of the estate of the Tenth Earl Lady Fitzwilliam received the sum of £4m and Lady Hastings the sum of £3.8m. There were introduced into such composite transaction the operations aforesaid which were contrived for no purpose save an anticipated avoidance of the CTT which would have been payable had the Trustees effected the said transaction without the undertaking of such operations. In the premises CTT is chargeable on the estate of the Tenth Earl in accordance with s 47(1A) of the 1975 Act (as amended) as if such operations had not been undertaken and the Trustees had appointed such sums to Lady Fitzwilliam and Lady Hastings in each case absolutely."

(c) The *Ramsay* principle is to be found in the well-known passage in the speech of Lord Wilberforce in that case, 54 TC 101, at page 185B/C[1].

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

9(a) The first question for our determination is whether the principle applies to CTT. The answer to this, says Mr. Walker, depends upon the true

[1] [1982] AC 300, at pages 323G/324A.

construction of the CTT legislation and he cites as authority the passage from Lord Wilberforce's speech in *Ramsay*, at page 187D/F, *ibid*(1):—

> "The capital gains tax was created to operate in the real world, not that of make-belief ... To say that a loss (or gain) which appears to arise at one stage of an indivisible process; and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function."

Lord Fraser made a similar observation in *Burmah* 54 TC 200, at page 220H(2):—

> "The question in this part of the appeal is whether the present scheme, when completely carried out, did or did not result in a loss such as the legislation is dealing with, which I may call for short, a real loss."

(b) In Mr. Walker's submission there is, on the true construction of the CTT legislation, no room for the application of the *Ramsay* principle because it is clear that Parliament has thought about the manner in which composite transactions should be dealt with in the context of CTT. CTT is a tax on the value transferred by a chargeable transfer. Such a transfer is a species of disposition. Section 51(1) of the 1975 Act extends the meaning of "disposition" to include " ... a disposition effected by associated operations". "Associated operations" are defined in s 44, subs (1)(b) of which provides that the expression means " ... any two operations of which one is effected with reference to the other, or with a view to enabling the other to be effected or facilitating its being effected, and any further operations having a like relation to any of those two, and so on ... ". On the true construction of the legislation, and having regard in particular to the provisions regarding "associated operations", there is no need or room for judicial intervention to the same or a similar effect.

10. The *Ramsay* principle is expressed in perfectly general terms. It is a principle which the courts will apply when seeking to ascertain the true nature of a transaction and to give effect it (see judgment of Warner J. in *Inland Revenue Commissioners* v. *Bowater Property Developments Ltd.*(3) [1985] STC 783, at page 798; cited with approval by Slade L.J. on appeal, at page 318 of [1987] STC 297). In none of the reported cases is there any suggestion that it is restricted to any particular tax. Indeed, Lord Brightman said in *Furniss* v. *Dawson* 55 TC 324, at page 401E, referring to the end result of a composite transaction(4): "Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied". In *Ingram* v: *Inland Revenue Commissioners*(5) [1985] STC 835 it was held that *Ramsay* applied to stamp duty notwithstanding that it is a tax on instruments and not on transactions. Of particular significance is the observation in *Ingram* of Vinelott J., at page 851:—

> "If as counsel for the taxpayer submits, the *Ramsay* principle is treated as having no application in the field of stamp duty, the court would be compelled to the conclusion that a preordained series of transactions would fall to be treated as a single transaction having one legal

(1) [1982] AC 300, at page 326D/E. (2) [1982] STC 30, at page 38b.
(3) 62 TC 1. (4) [1984] AC 474, at page 527E. (5) [1986] Ch 585.

consequence for the purpose of taxes other than stamp duty and as a series of different transactions having different consequences for the purpose of stamp duty."

In the opinion of the learned Judge such disparity of treatment, which he illustrated by reference to the facts in *Furniss* v. *Dawson*, cannot have been intended. Likewise, we would not expect to find any such disparity of treatment where CTT is concerned.

We accept Mr. Reid's submission that *Ramsay* lays down a basic general principle of construction and that clear words would be required in the statute in question to restrict or abrogate it. The principle is applied for the purpose of identifying the true disposition (if any) which falls to be charged to tax, that is to say in the case of CTT the disposition which is a transfer of value within s 20 of the 1975 Act and in the case of capital gains tax (CGT) the disposal charged by s 1 Capital Gains Tax Act 1979 (CGTA). CTT and CGT interact in certain circumstances (see para 4 Sch 10 of the 1975 Act and s 79(5) Finance Act 1980) and it would, as Mr. Reid said in the course of argument, be remarkable if in those circumstances the basic principles of construction applying to these taxes differed. In our judgment, they do not. The *Ramsay* principle of construction is equally applicable to both.

We do not accept Mr. Walker's argument that a distinction must be drawn because "disposal" is not defined in CGTA whereas "disposition" is given an extended meaning in the CTT legislation. We do not understand how the necessary implication for excluding *Ramsay* can be drawn from the mere extension for CTT purposes of the meaning of basic words ("disposal" and "disposition") that, but for the extension, have precisely the same meaning.

It is not suggested that the *Ramsay* principle is coextensive with the statutory concept of "associated operations" and can, therefore, be treated as otiose for CTT purposes. Mr. Walker would not be resisting the application of *Ramsay* if that were so and clearly it is not so because "associated operations" do not have to satisfy the *Ramsay* conditions to which we shall be referring in the next part of our decision; in particular they do not have to be preordained. In *Craven* v. *White; Inland Revenue Commissioners* v. *Bowater Property Developments Ltd; Bayliss* v. *Gregory*[1] [1987] 3 WLR 660, at page 679, Slade L.J. observed that if the CGT legislation had included the "associated operations" provision the Crown's basic contention which failed in those cases (that a preparatory transaction entered into before a vendor has gone into the market to find a purchaser comprises a composite transaction with the subsequent sale) might have been easily sustainable. Operations effected may or may not as a matter of construction make up a composite transaction within *Ramsay* and may or may not at the same time satisfy the requirements of s 44 of the 1975 Act. To determine whether they satisfy *Ramsay* it is necessary to go back to the beginning to ascertain what the persons in question set out to do and how they proposed to do it. To determine whether s 44 is satisfied it is merely necessary to look, *ex post facto*, at what has been done.

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[1] 62 TC 1.

In raising a charge to CTT the primary question that has to be asked is, it seems to us, whether there has been a "disposition" for the purpose of s 20 of the 1975 Act regardless of the extension of the meaning in s 51(1). That raises a general question of contruction which requires the application of the *Ramsay* principle. If on the proper application of that principle there is found to be a disposition effected by a composite transaction that is an end of the matter and the CTT provisions take effect accordingly. If, however, there should be found to be no such disposition it is then, and only then, necessary to see whether what has been done falls within the extended meaning given to "disposition" by s 51(1).

We, conclude, and so hold, that there is nothing in the CTT legislation which excludes, expressly or impliedly, the application of the general principle of construction enunciated in *Ramsay* a with a view to the identification of the real transaction carried out by the parties. We, therefore, answer the first question in the affirmative.

11(a) The second question for our determination under this head is whether the limitations of the *Ramsay* principle have been complied with in the case before us. The limitations (or conditions—see Slade L.J. in *Craven* [1987] 3 WLR 660, at page 673) are laid down in the now familiar passage from the speech of Lord Brightman in *Dawson* [1984] AC 474, at page 527C/E(1):—

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

These limitations have recently been considered by the Court of Appeal in *Craven*, *Bowater* and *Baylis supra*. The judgments were handed down on 24 March 1987 and leave to appeal to the House of Lords has been granted in each case. Meanwhile, the judgments represent the most recent authority on the limitations and we must be guided by them accordingly. At pages 679–80, Slade L.J. (with whose judgment Parker L.J. was in agreement) expressed the existing state of the law as follows(2):—

> "As things are, as a matter of general principle, I conclude that two successive transactions, each of which has legal effects, are not properly to be regarded as a pre-ordained series or as a single composite transaction within the meaning of the first *Ramsay* condition as stated by the House of Lords unless, at the time when the first transaction was effected, all the essential features, not merely the general nature, of the second transaction had already been determined by a person or persons

(1) 55 TC 324, at page 401C/E. (2) 62 TC 1, at page 109G/H.

A who had the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction."

Mustill L.J. arrived at very much the same conclusion by reference to the expressions used in the speeches delivered in the House of Lords in *Ramsay*, *Burmah* and *Dawson* (see [1987] 3 WLR 660, at page 714).

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(b) In Mr. Walker's submission *Craven* is conclusive in his favour because there was, he says, on the facts of the case before us no clear understanding on the part of all the parties to the CTT saving scheme (let alone any binding obligation) to carry it though to completion, and no directing individual or individuals " ... who had the firm intention, and for practical purposes the ability, to procure [its] implementation". The decisions in the present case were taken step by step and the clients did not agree in advance to follow a plan. Mr. Powell, said Mr. Walker, showed great ingenuity but he was not a "single mastermind" in the sense of Lord Diplock's remarks in *Burmah* 54 TC 200, at page 214.

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(c) Mr. Reid submits that Messrs. Currey & Co. were acting throughout on the instructions of the trustees (in their capacities, where appropriate, of executors and trustees) in the formulation and implementation of the CTT saving scheme and that no distinction can, therefore, be drawn between what they knew and what their advisers knew. What the advisers knew must be attributed to the clients and they, the trustees, cannot be heard to say that they did not know what was going on. There was in existence at all relevant times a scheme made up of a series of preordained transactions, or a single composite transaction, which was in all essential respects pursued step by step to the end. It could not be said that there was no likelihood in practice that one step would not be followed by the next step and so on until the desired objective, the payment of £4m to Lady Fitzwilliam and £3.8m to Lady Hastings, had been achieved, hopefully free of any liability to CTT.

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12. As to the circumstances in which knowledge may be attributed to persons who allow their advisers to proceed with a scheme without knowing what their advisers are doing we were referred to *Crossland* v. *Hawkins*[1] 39 TC 493 and *In re Montagu's Settlement*, *Duke of Manchester* v. *National Westminster Bank Ltd.* [1987] Ch 264.

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In *Hawkins* the question in issue was whether the Respondent Taxpayer had entered into an "arrangement" for the purpose of s 397 Income Tax Act 1952 (settlements on children). It was found as a fact that he was aware that steps were being taken to put into effect proposals of his accountants and solicitors but that he was not consulted in regard to them. At page 508 of 39 TC 493, Pearce L.J. said[2]:—

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"A man does not avoid the incidence of Section 397 by merely being absent from, and leaving to his solicitors and accountants, certain parts of the legal machinery, if he is aware of the proposals for an 'arrangement' or a settlement and actively forwards them by personally carrying out and assisting in the vital parts in which his performance and co-operation are necessary. Nor can he avoid liability by merely giv-

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(1) [1961] Ch 537. (2) *Ibid*, at pages 553/554.

ing his solicitors *carte blanche* to effect some scheme for the benefit of his family and refusing to concern himself with its precise form." A

Montagu was concerned with the question whether knowledge of a breach of trust by trustees of a settlement should be imputed to a beneficiary who was not a party to the breach and thereby make him a constructive trustee of assets wrongly transferred to him by the trustees. That is a question far removed from the questions in issue in this case. In *Montagu* the trustees were not acting on instructions from the beneficiary. As is clear from the judgment of Sir Robert Megarry V.-C., knowledge of a breach of trust will only be imputed to a person so as to impose on him a constructive trust of the "knowing receipt" type where there is a want of probity which justifies such imposition. At page 285G, the Vice-Chancellor drew a distinction between that type of case and one where the beneficiary has employed the solicitor to investigate his right to the bounty or has done something else that can be treated as accepting that the solicitor's knowledge should be treated as his own, the implication being, it seems to us, that in the latter case the knowledge of the solicitor will be treated as the knowledge of the beneficiary. B C D

We conclude from these authorities that a client who expressly or impliedly confers on his solicitor freedom of action to proceed in such manner as he thinks appropriate in the interests of the client to achieve a certain objective cannot plead ignorance of any of the steps taken by the solicitor within the scope of the authority so conferred on him. The question of probity or lack of probity has no relevance to such a situation. The knowledge of the solicitor is, regardless of such considerations, the knowledge of the client. E

13. By 20 November 1979 Mr. Powell had, on the instructions of the trustees (meaning thereby the executors and trustees) conveyed to him through Mr. Sporborg, settled with Mr. Walker the five essential steps in a CTT avoidance scheme. The overall scheme was not novel. In particular, the reverter to settlor and the mutual transfers parts of the scheme had been used by Currey & Co. on at least one other occasion. At the meeting of the co-ordinating committee on 20 November 1979, at which each of the trustees was present, approval in principle was given to Mr. Powell's note of 14 November 1979 (a copy of which had been sent to each member of the committee in advance) and it was decided, at the suggestion of Mr. Powell, that £4m should be released to Lady Fitzwilliam. That was to be the first step in the CTT scheme which Mr. Powell had agreed in outline with Mr. Walker to the knowledge of Mr. Sporborg. At or about the same time Lady Fitzwilliam had been given to understand by Mr. Sporborg and her professional advisers that some £2m would soon be available out of the estate to her personally. This was, unknown to Lady Fitzwilliam, a net sum which Mr. Powell and Mr. Walker, who knew of Lady Fitzwilliam's desire to make a gift to her daughter, had agreed was the largest net amount which could be given without demonstrably being a sham. Lady Fitzwilliam decided that if that sum should be available she would give it to her daughter. That decision, which we accept was made in all good faith by Lady Fitzwilliam with every intention of making a gift, had been anticipated by Mr. Powell and it slotted neatly into the overall scheme precisely as Mr. Powell had intended from the outset that it should. Everything proceeded smoothly until Christmas when the death of Mr. Carr made it impracticable to appropriate land to the value of £2m to Lady Fitzwilliam and resort was had to the Hambros' loan at great expense to the estate to enable the scheme to proceed and the £2m pay- F G H I

ment to be made before Lady Fitzwilliam departed for Kenya. The scheme was rescheduled to take account of her absence abroad.

So far as Lady Fitzwilliam is concerned she was completely in the hands of her solicitors, whom she trusted implicitly and to whom she had given *carte blanche* to do whatever was necessary. Before she went abroad she had executed the £4m appointment, had on advice from Mr. Bosanquet made the necessary arrangements to pay £2m to her daughter, executed the £3.8m appointment and executed a general power of attorney which the donees were authorised to use to take whatever steps were necessary in her absence to reduce the CTT liability. The advice given by Mr. Bosanquet was clearly given in the context of the CTT scheme. He knew that Lady Fitzwilliam did not have the resources to enable her to pay the duty on the £2m payment and that if the trustees had had to come to her rescue the retention of Milton Hall would have been seriously put at risk. We find that the advice was given in the expectation that the liability would be cancelled out by the mutual transfers step in the scheme, a necessary precursor to which was the execution of the £3.8m appointment. This appointment, but for the scheme, could not have been justified as being in Lady Fitzwilliam's best interests because it would have deprived her of all chance of paying the tax on the £2m payment and would also have deprived her of all but the most transitory interest in the £3.8m fund. While Lady Fitzwilliam was abroad one or other of her attorneys sold her worthless interest in the contingent moiety for £2m and used the major part of that sum to purchase from the executors a property, Maplebeck, which Lady Fitzwilliam had no desire to own. Circumstances dictated that she should assume the ownership. The trustees were in need of funds to pay off the balance of the Hambros' loan which had been raised to enable the implementation of the scheme to proceed. Maplebeck was, therefore, sold to Lady Fitzwilliam as a temporary measure with a view to its being sold on when the market was right. The £2m went round in a circle and finished up where it started, in the hands of Lady Fitzwilliam, before being applied for the temporary acquisition of Maplebeck.

We find that, so far as Lady Fitzwilliam is concerned, each of the steps taken was part of a preordained series of transactions, the essential features of which, i.e. the five steps, had all been determined, by the time when the first transaction (the £4m appointment) was effected, by Lady Fitzwilliam through her solicitors and her attorneys to whom she had delegated all necessary and unfettered authority. Their knowledge was her knowledge and there was, therefore, we find, a sufficient degree of preordainment to comply with the conditions of the *Ramsay* principle and to satisfy the test as expounded by Slade L.J. in *Craven*, *Bowater* and *Bayliss*.

The facts so far as Lady Hastings is concerned are not, as we have already indicated, so very different. As an executor and trustee she conferred a wide-ranging authority on Currey & Co. She was aware from the outset (when the co-ordinating committee met on 20 November 1979) that a CTT saving scheme was to be set up but Mr. Powell did not, for the reasons which we have found, impart to her any details of the steps taken or to be taken in the course of that scheme until a stage was reached when it became necessary for her to participate. Even then she was given the minimum amount of information necessary regarding the particular step or transaction with which she was concerned. Lady Hastings was content that this should be so. Indeed, so confident was Mr. Powell that there would be no difficulty in

securing Lady Hastings' agreement to steps taken in advance of her participation that the Hambros' loan was arranged on 4 January 1980. The first Lady Hastings knew of the loan was on 9 January 1980 when Mr. Powell handed her the loan forms for signature. Mr. Powell had also been counting on Lady Hastings' agreement when he told her, at his meeting with her on 9 January 1980, that Lady Fitzwilliam had been informed on 7 January 1980 that the trustees would on the later date be appropriating £2m to her on account of her £4m fund. Lady Hastings had not been aware before then that she was going to be asked to agree to the appropriation nor did she know until then that the £2m, the borrowed money, was, after appropriation, to be paid to her by way of gift from her mother. We find that she had been quite content to leave such matters to Mr. Powell and Mr. Sporborg. There was no practical possibility of her refusing to acquiesce in them. We accept Lady Hastings' evidence that she treated the £2m payment as a genuine, unconditional and irrevocable gift by her mother. Lady Hastings thought that liability to tax arising out of the gift, and the possibility of her bearing the tax herself, must have been mentioned to her at the time but she could not remember what was said. She did not think that she had appreciated that the tax would be much greater if her mother bore it or if she' herself bore it and she did not think she would have asked. As was the case with Lady Fitzwilliam, Lady Hastings' view of the £2m payment came as no surprise to Mr. Powell. He had anticipated it and fitted it in to his CTT avoidance plan. He did not seek to enlighten Lady Hastings as to what was proposed to be done with that £2m. Lady Hastings was not aware of the progress made with the scheme thus far. She just hoped, she said, that they were making some progress. She did not inquire. She did not think of spending any of that money for her own use nor was it suggested to her that she might do so. On the contrary, the advice given to her ensured that it was safely credited to her bank deposit account and allowed to remain there until required at a subsequent stage of the scheme.

At the same meeting on 9 January 1980 Lady Hastings executed the deed of appointment of £3.8m. Such explanations as were given to her by Mr. Powell with regard to this were accepted by her without question.

We find that all the steps taken up to and including the execution of the £3.8m appointment were steps taken in pursuance of the CTT scheme for which instructions had been given by or on behalf of Lady Hastings and her co-trustees with her knowledge and that in the circumstances which we have recited there must be attributed to her a full understanding of the scheme and the purpose of each step within it as and when it was taken. The intention of Mr. Powell and other members of his firm to implement the scheme and the state of their knowledge at each step must, we find, be attributed to Lady Hastings from which it follows, and we so find, that the conditions for the application of the *Ramsay* principle are satisfied, so far as Lady Hastings is concerned, during this period of time.

We then come to the meeting between Lady Hastings and Mr. Smith on 22 January 1980. Mr. Walker submits that what happened at this meeting is the most crucial element in the case and that Lady Hastings was faced with a real choice. Should she proceed with the scheme or should she not? There was, in his submission, no practical certainty that she would proceed in view of the doubt cast upon the wisdom of doing so by the political considerations and the possibility of relief from the next Budget. We do not take the same view of the facts. Nobody was seriously considering unscrambling the steps

so far taken. The scheme was then well under way. It was well understood that the CTT problem arising out of the £2m payment needed to be dealt with as a matter of urgency in view of the then state of Lady Fitzwilliam's health and the steps, which Mr. Smith felt he could recommend to Lady Hastings for dealing with it, had been set up and received the approval of Mr. Walker. The approval of Mr. Herbert, which could not be seriously in doubt, was awaited. The political questions were undoubtedly a topic for discussion and were indeed referred to somewhat tentatively by Mr. Powell in his memorandum of 14 November 1979 (B1). They did not, however, offer any realistic prospect of a solution and furthermore there was, in the circumstances, no realistic prospect of Lady Hastings calling a halt on their account to the final implementation of the scheme. Instead, having disposed of the political aspects of the discussion, Lady Hastings, who had at the time a thorough understanding of what remained to be done, readily gave instructions to Mr. Smith to go ahead subject to his receiving the support of Mr. Herbert who had already been instructed. Mr. Herbert, as was expected, gave his approval subject to what Mr. Reid aptly described as a minor cosmetic change in the order of the reverter to settlor and mutual transfers steps. We, therefore, find that nothing that happened at the meeting of 22 January, or thereafter, did anything to sever the steps then taken from the steps previously taken. They were all part of an indivisible process in a preordained series of transactions.

14. Our conclusion on the facts is, therefore, that steps 1 to 5 were the essential steps taken to implement the CTT avoidance scheme and that they satisfy the conditions of the *Ramsay* principle. Everything else that was done was subsidiary to those steps and changes such as the substitution of cash for assets by means of the Hambros' loan and the change in the order of events advised by Mr. Herbert were, in our judgment, mere changes of detail which did not break the sequence of the preordained steps. At the time when the £4m appointment was made all the essential features of the subsequent steps had been determined either personally or through their advisers by persons all of whom had the firm intention, and for all practical purposes the ability, to procure their implementation. We, therefore, confirm para 2 of each of the notices of determination as amended during the course of the hearing. In other words we find, in so far as it is a matter of fact, and hold, in so far as it is a matter of law, that (a) the operations comprised in steps 1 to 5 effected a composite transaction whereby "out of the estate of the Tenth Earl" Lady Fitzwilliam received the sum of £4m and Lady Hastings the sum of £3.8m; (b) the said operations were introduced into the composite transaction for no purpose apart from the avoidance of CTT which would have been payable had the trustees effected the said transaction without the undertaking of such operations; and (c) accordingly, CTT is chargeable on the estate of the Tenth Earl in accordance with s 47(1A) of the 1975 Act (as amended) as if such operations had not been undertaken and the trustees had appointed such sums to Lady Fitzwilliam and Lady Hastings in each case absolutely.

Alternative issues

15. In view of our decision on the *Ramsay* point it is unnecessary for us to deal with the alternative issues raised by para 3 of each notice of determination. We, however, record that during the course of the hearing Mr. Reid abandoned any intention to rely on para 3.3. He conceded that the sum of £2m paid by Lady Hastings to her mother fell to be treated as consideration

in law notwithstanding the negligible value of Lady Fitzwilliam's interest in the contingent moiety for which it was paid.

In case it should be relevant at some later stage, in particular to the mutual transfers part of the scheme, we must find any necessary additional facts to enable consideration to be given to Mr. Reid's submission that to the extent to which the £2m payment was expressed to be a net gift it was a sham. In other words, " ... while professing to be one thing, it is in fact something different" (*per* Lord Wilberforce in *Ramsay*, at page 184 of 54 TC 101). This was an argument which Mr. Powell had foreseen in his correspondence with Mr. Walker (F16/17 and Mr. Walker's reply at F19). Insofar as this submission raises a question of fact our finding is that the payment was not a sham. Lady Fitzwilliam gave *carte blanche* to Currey & Co. to make all necessary tax arrangements on her behalf and in the carrying-out of their instructions they decided that a net payment should be made by her. Lady Fitzwilliam adopted the figure of £2m because she had been told that that was the amount or value which would soon be available to her. She did not grasp the explanations given to her by Mr. Bosanquet regarding her potential liability to CTT and was quite content to leave it to him to sort out that matter. Mr. Powell and Mr. Walker had satisfied themselves that there were just about sufficient resources available one way or another to enable the CTT liability in respect of the net gift to be met if it should come to that. It seems to us that Lady Fitzwilliam must, in all the circumstances, accept the decision made on her behalf regarding the £2m payment and that that payment must, accordingly, be treated as a real net payment as it professes to be.

A. K. Tavaré
T. H. K. Everett
} Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
98 High Holborn
London WC1V 6LQ

23 November 1987

"

ANNEXE

Capital Transfer Tax
Notice of Determination
under Finance Act 1975, Schedule 4, paragraph 6
To
Name The Rt Hon Joyce Elizabeth Mary, Countess Fitzwilliam **date** 8th October 1986
Address c/o Messrs Currey & Co, 21 Buckingham Gate **ref** L 3000081/80 LONDON SW1E 655

The Commissioners of Inland Revenue have determined—

[In relation to—

1. The Will dated 13 December 1977 of the Right Honourable William Thomas George, Tenth Earl Fitzwilliam (hereinafter called 'the Testator') who died on 21 September 1979;

2. An Appointment (hereinafter called 'the Advance' dated 20 December 1979 and made by the Testator's Executors (hereinafter called 'the Executors' advancing £4 million to the Right Honourable Joyce Elizabeth Mary Dowager Countess Fitzwilliam (hereinafter called 'the Mother');

3. A payment of £2 million (hereinafter called 'the Mother's payment') purportedly made by the Mother to the Honourable Elizabeth-Anne Marie Gabrielle Hastings (hereinafter called 'the Daughter') by way of gift on 9 January 1980;

4. An appointment (hereinafter called 'the Appointment') dated 14 January 1980 and made by the Executors whereby moieties of the property subject thereto (hereinafter called 'the Vested Moiety' and 'the Contingent Moiety') were appointed to the Daughter (subject to an interest reserved or purportedly reserved to the Mother) for a vested interest or a contingent interest respectively;

5. A purported sale (hereinafter called 'the Purported Sale') effected on 31 January 1980 by the Mother to the Daughter of the interest of the Mother in the Contingent Moiety;

6. A Settlement (hereinafter called 'the Daughter's Settlement') made by the Daughter on 5 February 1980; and

7. An Assignment (hereinafter called 'the Daughter's Assignment') made by the Daughter on 7 February 1980.

THAT—

1. In this Notice the following expressions shall have the following meanings:—

a. 'the Mother' shall mean the Right Honourable Joyce Elizabeth Mary Dowager Countess Fitzwilliam;

b. 'the Daughter' shall mean the Honourable Elizabeth-Anne Marie Gabrielle Hastings;

c. 'the Testator' shall mean the Right Honourable William Thomas George Earl Fitzwilliam deceased;

d. 'the Executors' shall mean the Executors of the Testator;

e. 'the Daughter's Settlement' shall mean the Settlement made by the Daughter to the joint effect of a Settlement dated 5 February 1980 and an Assignment dated 7 February 1980;

f. 'the Appointment' shall mean an Appointment made by the Executors dated 14 January 1980;

g. 'the Advance' shall mean the release of £4 million effected by the Executors in favour of the Mother on 20 December 1979;

h. 'the Mother's Payment' shall mean the payment of £2 million purportedly made by the Mother to the Daughter by way of gift on 9 January 1980;

i. 'the Vested Moiety' and 'the Contingent Moiety' shall mean those moieties of the property comprised in the Appointment to which the Daughter thereby became entitled (subject to an interest reserved or purportedly reserved to the Mother) for a vested interest or a contingent interest (as the case may be);

j. 'the Purported Sale' shall mean the purported sale effected on 31 January 1980 by the Mother to the Daughter of the interest of the Mother in the Contingent Moiety;

k. 'associated operations' shall bear the meaning attributed to it by section 44(1) of the Finance Act 1975;

2. By the following operations namely the Advance, the Appointment, the Mother's Payment, the Purported Sale and the Daughter's Settlement the Executors (of whom the Daughter was one) the Mother and the Daughter by a sequence of associated operations effected a composite transaction whereby out of the estate of the Testator the Mother received the sum of £4 million and the Daughter the sum of £3,800,000. There were introduced into such composite transaction the operations aforesaid which were contrived for no purpose save an anticipated avoidance of the capital transfer tax which would have been payable had the Executors effected and the said transaction without the undertaking of such operations. In the premises capital transfer tax is chargeable on the estate of the Testator in accordance with Section 47(1A) of the Finance Act 1975 (as amended) as if such operations had not been undertaken and the Executors had appointed such sums to the Mother and the Daughter in each case absolutely.

3.1. In the alternative if which is not admitted there was no such single composite transaction such that the estate of the Testator falls to be taxed as aforesaid capital transfer tax is chargeable on the Vested Moiety and on the Contigent Moiety as follows:—

a. as to the Vested Moiety on the footing that a beneficial interest in the possession of the Mother determined either on 15 February 1980 or on 15 March 1980 in such circumstances that a charge to tax arose under Schedule 5 paragraph 4 of the Finance Act 1975;

b. as to the Contingent Moiety on the footing that a beneficial interest in the possession of the Mother determined on the making of the Purported Sale and that a charge to tax arose thereon under the said Schedule 5 paragraph 4.

3.2. As to the Vested Moiety no exemption from such charge is available under paragraph 4(5) of the said Schedule 5 in so far as the Daughter was not the settlor of the settlement whereunder the beneficial interest of the Mother subsisted. If and in so far as the Daughter provided any property for the purpose of such settlement it was property indirectly provided out of the estate of the Testator and so provided in the course of and in connection with a sequence of associated operations constructing a settlement by way of a disposition by associated operations and of such a settlement the Daughter cannot be shown to have been the settlor (whether or not she was a settlor).

3.3. As to the Contingent Moiety no exemption from such charge is available under paragraph 4(4) of the said Schedule 5. The Mother's Payment was made for the purpose of enabling the Daughter to repay the sum so paid to her as purported consideration for assignment of the Mother's beneficial interest in the Contingent Moiety the value whereof was negligible in comparison with such purported consideration and in the premises the Mother's Payment was the purported consideration paid by the Daughter to the Mother were not a gift and a payment of consideration but cancelling payments and never intended to take effect as they purported to do. In the premises each such payment falls to be disregarded."

Right of appeal

If you wish to appeal against this determination (or any part of it), you should within 30 days after service of this notice give notice of appeal in writing, specifying the grounds of appeal, to the Capital Taxes Office,

Insert	Minford House
Address	Rockley Road
	LONDON
	W14 ODF

If you do not appeal the determination will be in accordance with paragraph 6(5) of Schedule 4 to the Finance Act 1975

The case was heard in the Chancery Division before Vinelott J. on 24, 25, 30 and 31 October, and 1 November 1989 when judgment was reserved. On 9 November 1989 judgment was given against the Crown, with costs.

Robert Reid Q.C., Christopher McCall Q.C. and *Launcelot Henderson* for the Crown.

Robert Walker Q.C. and *Judith Bryant* for the taxpayers.

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Duke of Westminster* v. *Commissioners of Inland Revenue* 19 TC 490; [1936] AC 1; *British Launderers' Research Association* v. *Hendon Borough Rating Authority* [1949] 1 KB 462; *D'Abreu* v. *Commissioners of Inland Revenue* 52 TC 352; [1978] STC 538; *Floor* v. *Davis* 52 TC 609; [1980] AC 695; *Chinn* v. *Collins* 54 TC 311; [1981] AC 533; *Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.* 54 TC 200; [1982] STC 30; *Street* v. *Mountford* [1985] AC 809; *Ingram* v. *Inland Revenue Commissioners* [1986] Ch 585; *Commissioners of Inland Revenue* v. *Bowater Property Developments Ltd.* 62 TC 1; [1985] STC 783; *Baylis* v. *Gregory* 62 TC 1; [1986] 1 WLR 624; *Commissioner of Inland Revenue* v. *Challenge Corporation Ltd.* [1987] AC 155; *Macpherson* v. *Inland Revenue Commissioners* [1988] 2 WLR 1261; *Bird & Others* v. *Commisioners of Inland Revenue* 61 TC 238; [1989] AC 300; *Antoniades* v. *Villiers and Another* [1990] AC 417; *Commissioners of Customs & Excise* v. *Faith Construction Ltd.* [1990]

1 QB 905; *Ensign Tankers (Leasing) Ltd.* v. *Stokes* 64 TC 617; [1989] 1 WLR 1222.

Vinelott J.:—I have before me appeals by the taxpayers and cross-appeals by the Crown against a decision of the Special Commissioners. The appeals to the Commissioners raised complex issues of fact and law. Before explaining these issues and the Commissioners' conclusions it will, I think, be convenient to set out in summary the background to the transactions which they had to consider.

The Tenth and last Earl Fitzwilliam died on 21 September 1979. He was survived by his wife. He was 75 years old at his death: she was 81. She had been married once before to Viscount Fitzallen of Derwent, by whom she had had two children, both daughters, Alathea and Elizabeth-Anne. There were no children of her marriage to the Tenth Earl. Her daughter Elizabeth-Anne married first, Sir Vivyan Naylor-Leyland. That marriage was dissolved in 1960. There was one child of the marriage, a son Philip Vivyan. She married secondly, a Mr. Stephen Hastings. That marriage was childless. He was knighted in 1983. He and his wife are referred to in the Commissioners' decision as Sir Stephen Hastings and Lady Hastings and I shall follow the Commissioners in so referring to them though, of course, in the contemporaneous documents they are referred to as Mr. and Mrs. Hastings.

The Tenth Earl made his will on 13 December 1977. He appointed Lady Fitzwilliam, Lady Hastings, a Mr. Sporborg (deputy chairman of Hambros Bank) and a Mr. Ross (the senior partner of J. & A. Scrimgeour Ltd.) to be his executors and trustees. His will was proved by the executors other than Lady Fitzwilliam. However, she did not renounce her office as trustee.

By his will the Tenth Earl gave legacies of £250,000 free of duty to each of Lady Fitzwilliam and Lady Hastings. He gave a number of other pecuniary legacies free of duty amounting in all to approximately £167,000. He gave his residuary estate to his trustees to hold on the following trusts:

(a) the trustees were given power during a period of 23 months after his death to appoint the residue amongst a class comprising Lady Fitzwilliam, Lady Hastings, Mr. Philip Naylor-Leyland, Lady Hastings' remoter issue (there was no likelihood of her having further children) and the trustees of a charity;

(b) in default of exercise of that power the trustees were given power to accumulate income during the 23-month period and were directed to distribute income not so accumulated amongst the class of objects of the power of appointment, and after the expiration of the 23-month period to pay the income of the residuary estate to Lady Fitzwilliam during her life with power for the trustees other than Lady Fitzwilliam to pay capital to her and with remainder to Lady Hastings (if she survived the Tenth Earl by one month) absolutely;

(c) the trustees were authorised to exercise their power of appointment over the residuary estate notwithstanding that administration of the estate was not complete or that probate had not been granted and it was provided

A that any of the trustees might join in exercising any power given to them jointly notwithstanding that he or she might have a personal interest in the mode of exercising the power or might abstain from acting except in a purely formal capacity.

The purpose of interposing the discretionary trust before Lady B Fitzwilliam's life interest was to take advantage of s 47(1A) of the Finance Act 1975 (introduced by s 121(1) of the Finance Act 1976) which provides that where within two years after a death and before any interest in possession comes into existence an event occurs on which capital transfer tax (which I shall abbreviate to "CTT") would otherwise be chargeable in respect of the estate of a deceased person tax is not to be charged on that event but C that tax is to be chargeable as if the will or intestacy had provided for the estate to be held as it was after that event. Taken in conjunction with the surviving spouse exemption in Sch 6 to the Finance Act 1975 this had the practical effect that if the power of appointment were exercised in such a way as to give Lady Fitzwilliam an interest in possession in part of the estate that part would escape CTT both on the exercise of the power and on the Tenth D Earl's death. Similarly, if Lady Fitzwilliam survived the 23-month period, any part of the residuary estate in which she then took an interest in possession would escape duty both on the Tenth Earl's death and by reference to the termination of the discretionary trust and the arising of her life interest.

The executors other than Lady Fitzwilliam proved the will on 30 E November 1979. The net estate was certified as just under £11.6m. That was later corrected in January 1980 by a further account which increased the estate to just over £12.4m. The executors paid CTT on a part of the estate sufficient after payment of duty to pay those of the legacies which were not exempt from duty on the Tenth Earl's death—that is, the legacies other than the legacy to Lady Fitzwilliam. Lady Fitzwilliam in fact later renounced her F legacy—that was in March 1980—and Lady Hastings passed her legacy on to her son. But nothing turns on these later events. The duty paid was just under £900,000. The residue, after payment of duty and the pecuniary and other legacies (other than the legacies to Lady Fitzwilliam and Lady Hastings) and after paying probate fees was approximately £11.3m. Currey & Co., who acted for the executors and trustees (and who had acted for the G Tenth Earl and his predecessors for many years) were criticised by the CTT office for taking this course. Mr. Walker, who appeared for the taxpayers in these appeals, submitted that Currey & Co. were right in treating the balance of the estate as conditionally exempt and in taking the view that duty would be payable on it only if and to the extent that on the expiration of or within the 23-month period the estate devolved for an interest in possession on H someone other than Lady Fitzwilliam. I do not need to decide this question but as the criticism made by the CTT office is recited in the Commissioners' decision I think I should say that it is apparent from the documentary evidence that Currey & Co. consulted the Probate Office and were told that it was a proper course. It would in fact have been very difficult for the executors to have delayed probate until a sum sufficient to pay the whole of the I CTT had been raised. The larger part of the estate consisted of agricultural land and chattels. There was very little liquid capital. I should perhaps mention at this stage that the family's principal home was a house and estate known as Milton Hall which has been in the possession of the Fitzwilliam family since the reign of Elizabeth I, though for many years after the estates of the Earls Fitzwilliam and the Marquess of Rockingham were as it were

joined in matrimony the principal family home was at Wentworth Woodhouse. Lady Fitzwilliam was very attached to Milton. So was Lady Hastings. She had a flat in a converted laundry. Lady Fitzwilliam and during his lifetime the Tenth Earl lived in the main house. Lady Hastings and her husband spent their weekends at Milton Hall. She also had a flat in London where they spent the middle of the week at least while the House of Commons was sitting, her husband being a Member of Parliament.

Following the death of the Tenth Earl the trustees and the family were faced with a very difficult situation. Lady Fitzwilliam was 81. The death of the Tenth Earl, which was unexpected, had come as a considerable shock to her. Then her sister died only two weeks later. These successive deaths had greatly distressed her. Her family, in particular Lady Hastings and her co-trustees and advisers, felt considerable concern about the state of her health. Lady Hastings, in her oral evidence before the Commissioners, said that she was weak and seemed to have lost the will to live. If the trustees did nothing and if she died within the 23-month period the whole of the residuary estate would attract CTT on the Tenth Earl's death at the full rate of 75 per cent. If an appointment was made giving Lady Fitzwilliam an interest in possession duty on the Tenth Earl's death would be saved but duty would be payable on her death, and so steep was the gradation of the charge at that time that the average rate of duty would not be significantly less than 75 per cent. Lady Fitzwilliam, I should observe, had free estate—apart from her legacy under the Tenth Earl's will—of between £250,000 and £500,000. She had inherited an estate in Yorkshire but she had made it over to her nephew Lord Manton because she thought that it should devolve with the title. The Prime Minister had announced following the recent change of government that legislation would be introduced which would "draw the teeth" of CTT, so at least some reduction in the rate of CTT could be expected. But that might not happen in Lady Fitzwilliam's lifetime.

Faced with this situation Currey & Co. started to consider ways in which the crushing burden of CTT (on the death of the Tenth Earl or on the death of Lady Fitzwilliam) could be avoided. They consulted Mr. Walker Q.C. (then junior counsel). A number of possibilities were considered. I shall have to examine later the way in which those proposals developed and the question whether, as the Commissioners thought, the proposals could be said to have constituted a single composite transaction carried through in accordance with a preordained scheme within the principles stated by the House of Lords in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*[1] [1982] AC 300, as interpreted and developed in later decisions of the House of Lords.

At this stage it will I think be convenient to set out in summary the transactions that were in fact entered into and the fiscal effects which they were designed to achieve. In so doing I shall follow the Commissioners in referring to them as "steps" though without, of course, prejudging the question whether they were steps in a preordained scheme. The steps were as follows.

Step 1

On 20 December 1979 (one month after the grant of probate) the trustees executed a deed of appointment ("the £4m apppointment") whereby they appointed that a part of the residuary estate to the value of £4m should be held in trust for Lady Fitzwilliam absolutely and that as soon as

(1) 54 TC 101.

conveniently practicable the trustees would make appropriations to satisfy it. It was then intended that land would be appropriated shortly thereafter in satisfaction of the £4m. However, the estate's principal land agent, a Mr. Carr, died on Christmas Day 1979 and an early appropriation became impracticable.

Step 2

On 7 January Lady Fitzwilliam drew a cheque for £2m post-dated to 9 January in favour of Lady Hastings. Arrangements had been made by Currey & Co. to borrow £2m from Hambros Bank and to appropriate that sum towards satisfaction of the £4m appointed to Lady Fitzwilliam. The trustees did not in fact complete the necessary forms to enable the £2m loan to be drawn down or resolve to appropriate it towards Lady Fitzwilliam's £4m appointment until 9 January. On 7 January Lady Fitzwilliam also signed a letter to her daughter dated 9 January in which she stated that the cheque was an outright gift and that it was given with the intention that it should be free of CTT, which would be paid by Lady Fitzwilliam. The CTT prospectively payable (six months from the date of the gift) is given in the evidence at different places as £5.2m or £4.95m. It does not matter which figure is taken. On any view it was potentially a very heavy burden and in excess of Lady Fitzwilliam's immediate resources. The cheque and letter were handed to Lady Hastings when she called at the offices of Currey & Co. on their invitation on 9 January. She also signed the confirmation required by Hambros and the resolution appropriating the £2m towards Lady Fitzwilliam's £4m appointment. The cheque was cleared and the proceeds were credited to a deposit account. She had recently opened an account at the Peterborough branch of Barclays Bank because it was conveniently close to Milton, where by now she spent most of her time so as to be near her mother.

Step 3

By a deed of appointment dated 14 January 1980 ("the £3.8m appointment") the trustees appointed that a part of the balance of the residuary estate to the value of £3.8m should be held on trust to pay the income to Lady Fitzwilliam until her death or until 15 February 1980 if earlier and thereafter as to one moiety ("the vested moiety") on trust for Lady Hastings absolutely and as to the other moiety ("the contingent moiety") on trust for Lady Hastings if living at the death of Lady Fitzwilliam or on the earlier termination of her interest and if not for her son Mr. Philip Naylor-Leyland absolutely. The deed was executed by Lady Fitzwilliam on 7 January after she had signed the cheque and the letter; it was executed by the last of the trustees on 14 January and, accordingly, it was dated 14 January. Lady Fitzwilliam in fact left England on 15 January to spend a five-week holiday in Kenya. On 7 January she gave a general power of attorney in usual form to a Mr. Bosanquet, the senior partner of Currey & Co., and a Mr. Forster, a partner in Hays Allan, a firm of chartered accountants which acted for the trustees. She also gave a trust power of attorney to Mr. Ross. Then on 14 January the trustees other than Lady Fitzwilliam resolved that interest on the £2m borrowed from Hambros should be paid out of and borne by the residue of the Tenth Earl's estate.

Step 4

By a deed dated 31 January 1980 and made between Lady Fitzwilliam and Lady Hastings ("the first assignment") Lady Fitzwilliam in consideration of the sum of £2m paid by Lady Hastings assigned to Lady Hastings her determinable life interest in the contingent moiety. This deed was executed on behalf of Lady Fitzwilliam by Mr. Bosanquet, one of her attorneys.

Step 5

By a settlement dated 5 February 1980 and made between Lady Hastings as settlor and a Mr. N. W. Smith, a partner in Currey & Co., and Lady Hastings' husband as trustees ("Lady Hastings' settlement") Lady Hastings settled a nominal sum of £1,000 on trust to pay the income to Lady Fitzwilliam until her death or until 15 March 1980 if earlier with remainder to herself, and by an assignment dated 7 February 1980 ("the second assignment") she assigned her reversionary interest in the vested moiety to hold as an accretion to the trust fund.

Those were the steps that were taken. There is only one other matter that I need add at this stage. The loan from Hambros was a short-term loan, for a period of one month. It was hoped to repay it from sales of land in the residuary estate within that period. In fact one sale (of the Maplebeck estate in Lincolnshire) held fire, and Lady Fitzwilliam herself bought that piece of land. The purchase price, together with the proceeds of other sales, sufficed to repay Hambros.

The £3.8m appointment, the first assignment, Lady Hastings' settlement and the second assignment were designed to exploit what were perceived as anomalies or loopholes in the CTT legislation, which, of course, was then relatively new. The relevant provisions of the CTT legislation and the way in which they were exploited are shortly as follows.

(1) *The contingent moiety*. The assignment of Lady Fitzwilliam's short-term interest in the contingent moiety fell to be treated under para 4(2) of Sch 5 to the Finance Act 1975 as a transfer of value by Lady Fitzwilliam to Lady Hastings (as assignee of the interest) of property equal in value to the contingent moiety. However, para 4(4) of Sch 5, which was designed to ensure that the purchase of an interest in possession did not give rise to a double charge to CTT, provided that if the disposal of an interest in possession was a disposal for value tax should be charged only on the value of the property in which the interest subsisted reduced by the amount of the consideration. So, inasmuch as the consideration paid Lady Hastings exceeded the value of the contingent moiety the contingent moiety would escape CTT on the disposal of Lady Fitzwilliam's interest and, of course, it would not attract duty on the absolute vesting of Lady Hastings' reversionary interest on the death of Lady Fitzwilliam or on 15 March 1980 if Lady Fitzwilliam was still living because Lady Hastings would have had an interest in possession throughout.

So far, however, the transactions would not have achieved any saving of CTT because the liability to CTT in respect of Lady Fitzwilliam's net gift of £2m would remain. The reduction in the tax payable in respect of this gift turned not on para 4(4) but on ss 86 and 87 of the Finance Act 1976 which introduced an exemption when a donee returned a gift wholly or in part within a limited period. Lady Fitzwilliam having made a chargeable transfer

which increased the estate of Lady Hastings, a transfer by Lady Hastings would not fall to be treated as a gift by her to the extent to which her estate had been increased by Lady Fitzwilliam's transfer (s 86(1) and (2)); and Lady Fitzwilliam would be entitled to claim within six years that the value transferred by her transfer should be treated as cancelled by Lady Hastings' transfer to the extent that the value transferred by her after deduction of tax was equal to the value restored by Lady Fitzwilliam's transfer (s 87(1) and (3)).

Until the passing of the Finance Act 1978 the relief obtainable in respect of the gift by Lady Fitzwilliam would have been very small because by virtue of para 3(1) of Sch 5 Lady Fitzwilliam's estate fell to be treated as including the contingent moiety and the value returned to Lady Fitzwilliam by Lady Hastings would, accordingly, have been only £100,000, the difference between the consideration paid by Lady Hastings and the value of the contingent moiety. However, the provisions of Sch 5 were modified by s 69(7) of the Finance Act 1978. That subsection provided that

> "Where a person becomes entitled to an interest ... in settled property as a result of a disposition for a consideration in money or money's worth, any question whether and to what extent the giving of the consideration is a transfer of value or chargeable transfer shall be determined without regard to paragraph 3(1) of ... Schedule 5."

That subsection was introduced to nullify ingenious avoidance schemes which are explained in *Dymond's Capital Transfer Tax*, 2nd Edition, at page 1086. However, the subsection opened up another, and I think probably simpler route for escaping CTT. Applied to the contingent moiety it has the consequence that virtually the whole of the consideration paid by Lady Hastings (£2m less the value of Lady Fitzwilliam's limited interest, which was trivial) could be treated as a net gift and set against the net gift made by Lady Fitzwilliam under s 87(3).

(2) *The vested moiety*. The relevant provisions are far simpler. Paragraph 4(2) of Sch 5 provided that on the coming to an end of an interest in possession in settled property during the lifetime of the person entitled to the interest tax should be charged as if he had made a transfer of value of an amount equal to the value of the property in which his interest subsisted. Paragraph 4(5) contained an exemption which applied when the interest came to an end and on the same occasion reverted to the settlor: subject to an immaterial exception tax was not then to be chargeable under para 4(2). The case for the taxpayer is that Lady Fitzwilliam's interest did not come to an end on 15 February; it was continued by the joint effect of Lady Hastings' settlement and the second assignment until 15 March; and on 15 March it passed by virtue and by virtue only of Lady Hastings' settlement and the second assignment, and under Lady Hastings' settlement and the second assignment reverted to Lady Hastings, who was the settlor of the property in which Lady Fitzwilliam's interest in possession had subsisted after 15 February. The Crown claimed before the Commissioners that Lady Hastings was not the only settlor. I shall have to return to this contention and to other contentions that were developed before me at the end of this judgment.

The notice of determination.

The relevant documents were supplied to the capital transfer tax office in April 1980. The taxpayers' contentions were fully set out in a letter to the

capital taxes office dated 25 July 1980. Correspondence followed. In the course of it the capital taxes office asked for details of the instructions given to counsel and of his advice. That was refused, though Currey & Co. indicated that they would reconsider the point if when the official view had been formulated it seemed that counsel's advice might be relevant. They had to wait a very long time. There was correspondence in which the application of the *Ramsay* principle in the field of CTT was debated. Currey & Co. pressed for the claim to be formulated in a formal notice of assessment. It was not forthcoming until October 1986, more than six years after the last of the relevant steps had been taken. A separate notice of assessment was served on each of the trustees of the will and the trustees of Lady Hastings' settlement. The first claim made (para 2) was that by the £4m appointment, the £3.8m appointment, the gift by Lady Fitzwilliam, the first assignment, Lady Hastings' settlement and the second assignment, Lady Fitzwilliam and Lady Hastings([1])

> " ... by a sequence of associated operations effected a composite transaction whereby out of the estate of the Testator the Mother received the sum of £4 million and the Daughter the sum of £3,800,000."

The claim continues([2]):

> "There were introduced into such composite transaction the operations aforesaid which were contrived for no purpose save an anticipated avoidance of the capital transfer tax which would have been payable had the Executors effected the said transaction without the undertaking of such operations."

Then in the next paragraph it is claimed in the alternative that tax became chargeable on the vested moiety under para 4(2) in that Lady Hastings was not the true settlor. That ground is elaborated in para 3.2 of the notice in the following way([3]):

> "If and in so far as the Daughter provided any property for the purposes of such settlement it was property indirectly provided out of the estate of the Testator and so provided in the course of and in connection with a sequence of associated operations constituting a settlement by way of a disposition by associated operations and of such settlement the Daughter cannot be shown to have been the settlor (whether or not she was a settlor)."

As to the contingent moiety it was claimed in the alternative (in para 3.3 of the notice) that Lady Fitzwilliam's gift([4])

> " ... was made for the purpose of enabling the Daughter to repay the sum so paid to her as purported consideration for the assignment of the Mother's beneficial interest in the Contingent Moiety the value whereof was negligible in comparison with such purported consideration and in the premises the Mother's payment and the purported consideration paid by the Daughter to the Mother were not a gift and a payment of consideration but cancelling payments and never intended to take effect as they purported to do. In the premises each such payment falls to be disregarded."

([1]) Page 650D *ante*. ([2]) Page 650D/E *ante*.
([3]) Page 650I *ante*. ([4]) Page 651A/B *ante*.

Appeals were duly lodged, and the hearing before the Commissioners was fixed for 21 September 1987. On 29 July Currey & Co. sent the Solicitor of Inland Revenue bundles of documents including all internal minutes, memoranda and correspondence. They waived privilege to the extent of the documents disclosed but not in respect of instructions to or advice from counsel. That privilege was later waived though not until 17 September. Lady Fitzwilliam, Lady Hastings, Mr. Powell, Mr. Smith and Mr. Bosanquet were called to give evidence and were cross-examined. Thus the Commissioners had before them an unusually complete account of the way in which the proposals for escaping CTT on the death of the Tenth Earl and in respect of dispositions by Lady Fitzwilliam were developed, of the way in which the proposals were carried into effect and of the roles played by Lady Fitzwilliam, Lady Hastings and the partners in Currey & Co.

Before the Commissioners the Crown abandoned any reliance on the specific associated operations provisions in the CTT legislation. They were clearly right to do so. The associated operations provisions in the CTT legislation have a very limited scope. The Crown contended (as indicated in para 3.3 of the notice) that the gift by Lady Fitzwilliam to the extent to which it was expressed to be a net gift was a sham. The Crown accepted that the gift, if taken as a net gift, together with the £3.8m appointment and the first assignment treated as independent transactions escaped tax; that is, that para 4(4) of Sch 5 and ss 86 and 87 of the Finance Act 1976 and s 69(7) of the Finance Act 1978 operated in the way that I have indicated.

The Commissioners' conclusion, given after eight days of evidence and argument, was that[1] " ... steps 1 to 5 were the essential steps taken to implement the CTT avoidance scheme" and satisfied the *Ramsay* principle. They found that when the £4m appointment was made[2] " ... all the essential features of the subsequent steps had been determined either personally"—that is, by Lady Fitzwilliam and Lady Hastings—" ... or through their advisers by persons all of whom had the firm intention, and for all practical purposes the ability, to procure their implementation". The effect of the composite transaction was that Lady Fitzwilliam received £4m and Lady Hastings £3.8m; operations had been introduced into the composite transaction for no purpose except the avoidance of the CTT that would have been payable if it had been directly effected.

The Commissioners did not express any conclusion whether, apart from the *Ramsay* scheme, the vested moiety would have been exempt on the footing that the reverter to settlor provisions applied to it. However, they rejected the Crown's contention that the gift to the extent that it was expressed as a net gift was a sham. They concluded[3]:

> "Lady Fitzwilliam adopted the figure of £2m because she had been told that that was the amount or value which would soon be available to her. She did not grasp the explanations given to her by Mr. Bosanquet regarding her potential liability to CTT and was quite content to leave it to him to sort out that matter. Mr. Powell and Mr. Walker had satisfied themselves that there were just about sufficient resources available one way or another to enable the CTT liability in respect of the net gift to be met if it should come to that. It seems to us that Lady Fitzwilliam must, in all the circumstances, accept the decision made on her behalf regard-

(1) Page 647E *ante*. (2) Page 647F *ante*. (3) Page 648C/E *ante*.

ing the £2m payment and that that payment must accordingly be treated as a real net payment as it professes to be." A

The main issue in this appeal is whether the *Ramsay* principle applies to all or any combination of the steps identified by the Commissioners as steps 1 to 5. I have referred in detail to the other claims advanced because as will be seen at the hearing before me the Crown advanced yet further grounds for supporting the Commissioners' decision, at least in part. B

Before turning to examine the reasoning which led to the Commissioners' conclusion on the main issue and the evidence relied on as founding that conclusion I must, I think, say something about a preliminary question which has been fully argued before me—that is, whether a conclusion by Commissioners that a series of transactions constitutes a single composite transaction is what is sometimes called an inference of fact, and if it is the extent to which the Court is entitled in an appeal by way of Case Stated to review their decision. C

Fact or law? D

I pointed out in *Shepherd* v. *Lyntress Ltd.* and *News International plc* v. *Shepherd*(1) [1989] STC 617, that there is an apparent contradiction between the statement by Lord Wilberforce in the *Ramsay* case, at page 324, that(2) " ... in such cases ... the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction or a number of independent transactions" and a statement by Lord Brightman in *Furniss* v. *Dawson*(3) [1984] AC 474. At page 528 Lord Brightman, having referred to the observations of Lord Denning in *Marriott* v. *Oxford and District Co-operative Society Ltd. (No. 2)*(4) [1970] 1 QB 186 [192A] that " ' ... the primary facts were not in dispute. The only question was what was the proper inference from them. That is a question of law with which this court can and should interfere' ", went on to say(5): E F

"Similar observations occur in other reported cases. I agree with the proposition only if it means that an appellate court, whose jurisdiction is limited to questions of law, can and should interfere with an inference of fact drawn by the fact-finding tribunal which cannot be justified by the primary facts. I do not agree with it if it is intended to mean that, if the primary facts justify alternative inferences of fact, an appellate court can substitute its own preferred inference for the inference drawn by the fact-finding tribunal. I think this is clear from the tenor of the speeches in this House in *Edwards* v. *Bairstow*. The point does not seem to have been the subject matter of explicit pronouncement in any of the reported cases, at least your Lordships have been referred to none, and both propositions have from time to time emerged in judgments as a matter of assumption rather than decision. But for my part I have no doubt that the correct approach in this type of case, where inferences have to be drawn, is for the commissioners to determine (infer) from their findings of primary fact the further fact whether there was a single composite transaction in the sense in which I have used that expression, and whether that transaction contains steps which were inserted without any commercial or business purpose apart from a tax advantage; and for the G H I

(1) 62 TC 495. (2) [1982] AC 300; 54 TC 101, at page 185E/F.
(3) 55 TC 324. (4) [1969] 3 All ER 1126, at page 1128I.
(4) 55 TC 324, at pages 401H/402C.

A appellate court to interfere with that inference of fact only in a case where it is insupportable on the basis of the primary facts found."

Mr. Walker submitted that in so far as there is a conflict between these two statements the statement by Lord Wilberforce should prevail; although the House of Lords has power to reverse its own decisions it should not be B taken as having departed from a considered statement of principle in a recent decision with which the majority concurred unless they had that statement of principle clearly in mind. Mr. Reid, who appeared for the Crown, submitted that if there is a conflict the later statement by Lord Brightman should prevail; Lord Roskill and Lord Bridge, who agreed with the speech of Lord Brightman, also agreed with the speech of Lord Wilberforce and the point of C difference, if there was one, must have been present to their minds.

As in *Shepherd* v. *Lyntress Ltd.* and *News International plc* v. *Shepherd* I do not find it necessary to decide whether the observations of Lord Wilberforce or those of Lord Brightman, if and in so far as they conflict, are binding on me or to attempt to reconcile them. The observations of Lord D Brightman must be interpreted in the light of the principles explained by the House of Lords in *Edwards* v. *Bairstow & Another*[1] [1956] AC 14. It is important in understanding that case to bear in mind that the House of Lords overruled a decision of the Court of Appeal (which had upheld a decision of Wynn-Parry J.) that a transaction entered into by the Respondent Taxpayer was not an adventure in the nature of trade. Viscount Simonds E said, at page 29[2]:

> "Before, however, examining the authorities in any detail, I would make it clear that in my opinion, whatever test is adopted, that is, whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact or as the determination of a question of law or of mixed law and fact, the same result F is reached in this case. The determination cannot stand: this appeal must be allowed and the assessments must be confirmed. For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it G appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

I do not propose to read the passage in the speech of Lord Radcliffe which is most frequently cited but an earlier passage where Lord Radcliffe, having observed that " ... the law does not supply a precise definition of the H word 'trade' ", went on to say [at page 33][3]:

> "But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the Commissioners, Special or I General, to the effect that a trade does or does not exist is not 'erroneous in point of law'; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being upset by the court on appeal. I except the occasions when the commissioners,

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(1) 36 TC 207. (2) *Ibid*, at page 224. (3) *Ibid*, at page 227.

although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the case that they have misunderstood the law in some relevant particular."

He concluded with a passage which clearly reflects the passage from the speech of Viscount Simonds to which I have referred. He said, at page 38:

"As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

I have referred to these passages at length because it is I think clear from them that it is impossible to mark out any definable category of inferences which lie solely within the province of the Commissioners and with which the Court cannot interfere. The question must always be whether on the evidence before the Commissioners and where the evidence is uncertain or conflicting or where the credibility of oral evidence is in issue on the primary facts properly found by the Commissioners " ... the only reasonable conclusion ... is inconsistent with the determination come to". If the facts are such that " ... it could not be said to be wrong to arrive at a conclusion one way or the other", then unless the Commissioners " ... show by some reason they give or statement they make in the body of the case that they have misunderstood the law in some relevant particular" the inference is not, as Lord Radcliffe observed a little later(at page 36), incapable of being itself a finding of fact. That as I understand it is what is meant and all that is meant by describing an inference as an "inference of fact".

As I have said, the issue in *Edwards* v. *Bairstow & Harrison* was whether the transaction was an adventure in the nature of trade. But everything said by Viscount Simonds and Lord Radcliffe must apply *a fortiori* where the question is whether an apparently independent series of transactions can be said to constitute a single composite transaction within the *Ramsay* principle, a question the resolution of which involves the application of a complex conception of law which has required elucidation by the House of Lords in more than one case since *Ramsay* was decided. That question is closely analogous to the question considered by the Court of Appeal in *Crossland* v. *Hawkins*[2] 39 TC 493, where the Court of Appeal reversed the decision of the Special Commissioners that a series of transactions did not amount to an

(1) 36 TC 207, at page 231. (2) [1961] Ch 537.

A "arrangement" within s 397 of the Income Tax Act 1952 of which the taxpayer, Mr. Hawkins, was the settlor.

The main question in these appeals is whether the Commissioners' conclusion that steps 1 to 5 constituted a single composite transaction is consistent with the evidence and the facts found by them. To answer that question
B it will be necessary to examine the factual foundation of their conclusion in some detail. I will start by outlining the evolution of the proposals which were later carried into effect.

The evolution of "the scheme"

C (1) On 11 October 1979 Currey & Co. sent instructions to Mr. Nugee Q.C. and Mr. Walker (then junior counsel) and asked them to advise on, in particular, the merits of proposals set out in an attached memorandum. The proposals were that assets would be made over to Lady Fitzwilliam and that she would then give them to Lady Hastings. Lady Fitzwilliam would then borrow a substantial sum and settle it on trusts under which she took an
D interest in possession for a short period with remainder (subject to a power to appoint an income interest to Mr. Philip Naylor-Leyland) to Lady Hastings. Lady Hastings would then purchase Lady Fitzwilliam's income interest for a sum equal to the value of the property, so taking advantage of s 69(7) of the Finance Act 1978. On the expiry of Lady Fitzwilliam's interest and the release of the power to appoint to Mr. Philip Naylor-Leyland the
E settled property would belong to Lady Hastings.

(2) Following the conference Mr. Walker wrote a note putting forward a revised scheme which incorporated a modified version of Currey & Co.'s scheme but which was more extensive. The trustees were to raise £5.6m by the sale of land; £2.9m would be given to Lady Fitzwilliam who would make
F a corresponding gift to Lady Hastings; the trustees would then appoint £2.7m on trusts under which Lady Fitzwilliam would take a short-term interest with remainder to Lady Hastings; Lady Hastings would purchase Lady Fitzwilliam's interest for £2.9m; Lady Fitzwilliam would then use the £2.9m to create a settlement which would found a scheme taking advantage of the reverter to settlor exemption. It is important to note that that last scheme
G was not the one that was later adopted; it involved an initial settlement by Lady Fitzwilliam. It is unnecessary to explain how it was expected to work. It should be noted also that the final result of these proposals was that Lady Fitzwilliam would take nothing; Lady Hastings would take £5.6m.

(3) On 24 October Currey & Co. sent Mr. Walker further instructions to
H advise Mr. Powell and Mr. Forster in conference. Apart from questions as to the mechanics of raising the very large sums involved which are not material Currey & Co. asked him to advise as to the prospects of success of a "reverter to settlor" scheme as compared with a "mutual gifts" scheme.

(4) There was a conference with Mr. Walker on 26 October. The pro-
I posals were further modified. The trustees were to borrow and make over a sum of £3m to Lady Fitzwilliam which she would then give to Lady Hastings. The trustees would appoint a sum of £2.8m on trusts under which Lady Fitzwilliam would take a short-term income interest with remainder to Lady Hastings and Lady Hastings would then buy Lady Fitzwilliam's short-term interest for £3m. Lady Fitzwilliam would settle the £3m in such a way

that it would become the property of Lady Hastings but would be exempt from CTT under the reverter to settlor provisions. Lady Hastings would buy land to the value of £3m from the trustees, who could then repay the loan they had raised. Again I do not need to go into the details of the second part of the scheme. At the end of the day Lady Fitzwilliam would take nothing and Lady Hastings would take £5.8m.

(5) An alternative scheme was put forward on the same occasion. It differed only in that land to the value of £3m would be made over to Lady Fitzwilliam (in place of the £3m (borrowed) under the other scheme) which would be exchanged for Lady Fitzwilliam's short-term interest under the appointment; the land would then be used for the reverter to settlor scheme.

(6) On 29 October Mr. Powell wrote to Mr. Walker explaining the steps that were being taken to obtain an early grant of probate. He asked whether it was "desirable to proceed to step 2" (the distribution of £3m in cash or land to Lady Fitzwilliam) " ... as an independent transaction without any reference or advice having been given by us to the family or the Trustees about the subsequent steps we have in mind?"

(7) There was then a telephone conversation between Mr. Powell and Mr. Walker on or shortly before 5 November when the operation of ss 86 and 87 of the Finance Act 1976 was discussed. Then in a letter dated 5 November Mr. Powell wrote to Mr. Walker explaining his anxiety that if the gift by Lady Fitzwilliam to Lady Hastings were a net gift of too large an amount it might be attacked as a sham with the consequence that the value restored on the subsequent purchase of her short-term interest under the appointment would fall to be treated as made for a consideration equal to the net amount of the gift after CTT. He concluded that the only safe course was to reduce the net gift to an amount which could not be attacked as a sham and, after explaining that Lady Fitzwilliam's net estate was £0.5m (a figure which, I think, included her legacy) and that the net residue was approximately £10m, he expressed the opinion

> " ... that a lady of the age of Lady Fitzwilliam could reasonably decide to give to her daughter the great bulk of her property retaining only what is reasonably sufficient to meet her foreseeable financial needs during her remaining years plus a small margin; I would have thought it possible successfully to resist a 'sham' argument if Lady Fitzwilliam's net gift is of £2.0 million, equivalent to a gross £7,129,000."

(That last figure may have been an overestimate; a figure of just under £5m is given as the CTT payable in later documents). He asked Mr. Walker's comments on this point and set out a scheme revised to take account of the reduction in the amount of the gift, which would then be of land of the value of £2m, the appointment of the short-term interest being similarly reduced to £1.8m. Lady Fitzwilliam would again use the £2m paid to her by Lady Hastings to carry through a reverter to settlor scheme, and Lady Hastings would end up with assets to the value of £3.8m.

(8) Mr. Walker replied by letter dated 15 November. The reply dealt for the most part with immaterial matters of detail and machinery. But Mr. Walker agreed that the gift of £2m to Lady Hastings " ... can be completed without any overall plan having been explained to, and adopted by, the clients". He went on to comment on yet another scheme which had been

discussed in conference or on the telephone and which is not reflected in any earlier written advice. It involved taking out linked policies with an insurance company. Mr. Walker thought it was risky and it was not pursued.

(9) Shortly before Mr. Walker wrote that last letter there had been an important development. There were regular meetings of what was known as "the Fitzwilliam Co-ordinating Committee" attended by the Tenth Earl during his lifetime and by the trustees after his death. They were also attended by representatives of Currey & Co., by the principal land agent, Mr. Carr, by Mr. Forster and by other advisers. A meeting was planned for 20 November. Before the meeting took place Mr. Powell circulated a note explaining the very heavy actual and potential liabilities to CTT. He expressed the hope that in the next Budget rates of CTT would be reduced possibly to 60 per cent. He explained that Currey & Co. were exploring with counsel what steps Lady Fitzwilliam might be advised to take and that he hoped to report further to the committee on 20 November. Lastly, he suggested:

> "(i) there is a strong case for taking action soon rather than waiting until after the Budget, in spite of the likelihood of capital taxes being reduced; (ii) Lady Fitzwilliam's personal financial position is so secure that she can well afford to give up very substantial amounts of property, which could be allowed to pass to Mrs. Hastings; (iii) however, this is primarily a matter for Lady Fitzwilliam to decide because if the Trustees appoint property to anyone other than her they bring down on themselves an immediate charge to C.T.T., whereas if they release property to Lady Fitzwilliam outright there is no charge to C.T.T.; and (iv) the very large prospective charges to tax, either on Lady Fitzwilliam's death or on a lifetime transfer by her, make it necessary to continue the policy of converting into cash any readily realisable assets in Lord Fitzwilliam's residuary estate—in other words, sales on the Wentworth Estate should continue at the present or an accelerating rate."

(10) The minutes of the meeting of 20 November record that

> "Messrs. Currey & Co.'s note of 14th November 1979 was approved in principle and Currey & Co. were authorised to proceed with the appropriate plans. Mr. Powell explained that in the interest of flexibility it would be appropriate for the Executors to release to Lady Fitzwilliam absolutely a substantial proportion of the assets, perhaps as much as £4m and it was agreed this should be done."

I should, I think, mention that at that meeting a very wide range of practical questions concerning the administration of the estate and the ways in which moneys could be raised to pay CTT were discussed. The minutes run to four foolscap pages. Mr. Powell's note was only one item. Following the meeting Mr. Powell made a note for his own purposes. It records that

> " ... the most sensible step which should now be taken was for the Trustees of Lord Fitzwilliam's Will to agree to release a substantial part of the residuary estate to Lady Fitzwilliam outright so that it might be dealt with more flexibly than if it continued to be subject to the trusts established by the Will. This recommendation was accepted in principle. NP said it was very difficult to decide how much property should be so released, but Currey & Co.'s present thinking was that the Trustees should release assets to the value of £4m to Lady Fitzwilliam. Currey &

Co. would discuss this with Counsel, but it was agreed that unless he objected a resolution should be prepared to this effect." A

(11) The decision made on 20 November to give consideration to the release of assets to Lady Fitzwilliam was reported to Mr. Walker by Mr. Powell in a letter dated 23 November, when Mr. Walker was asked to settle a resolution by the trustees releasing capital to Lady Fitzwilliam. Mr. Powell commented that he thought there was much to be said for making the distribution to Lady Fitzwilliam a good deal larger than the gift since B

"The more free capital she has the easier it becomes to advise her to make a substantial net gift, and possibly it may also be preferable for the release to be of a quite different sum and to be made as a result of a quite independent decision by the Trustees." C

He suggested a sum of £4m. He explained that Mr. Carr was ill and suggested that the resolution should be to release land of a value of £4m and be appropriated later. As to the "prospective gift" by Lady Fitzwilliam he expressed doubt whether it could proceed before assets had been appropriated to Lady Fitzwilliam but explained that the gift might be partly or wholly in cash because an offer of £1.15m for a farm had been received and negotiations were proceeding for the sale of another farm for £1.4m. D

(12) Mr. Walker settled a draft deed of appointment of £4m (to be appropriated) on 29 November with a form of resolution appropriating land in satisfaction of the £4m. These drafts were collected by Currey & Co. on 30 November. In an accompanying note Mr. Walker expressed his agreement with the proposals in Mr. Powell's letter of 23 November and added some immaterial observations on matters of detail. E

(13) The deed of appointment was executed on 20 December. It is I think of the greatest importance to bear in mind that under the proposals under consideration between Mr. Powell and Mr. Walker before 20 November Lady Fitzwilliam would be left with nothing at the end of the series of transactions in contemplation; Lady Hastings could be left with £3.8m which it was hoped would be free of CTT. The decision to distribute £4m to Lady Fitzwilliam was made by the co-ordinating committee on 20 November. It is not clear whether when Mr. Powell decided to recommend a distribution of £4m it was intended that she should be left with £2m or whether the £2m remaining after the gift to Lady Hastings would be used together with the consideration of £2m paid by Lady Hastings to found a larger reverter to settlor scheme than was contemplated on 5 November—so that Lady Fitzwilliam would again be left with nothing and Lady Hastings with £5.8m (as under the proposals considered on 26 October). It is also important to bear in mind that throughout the reverter to settlor scheme involved a settlement by Lady Fitzwilliam (of £2m or £4m) and not a settlement by Lady Hastings. F G H

(14) Mr. Carr died on Christmas Day. It was impractical thereafter to proceed expeditiously with appropriations of land. Also shortly after Christmas Currey & Co. (but surprisingly not Lady Hastings) learned that Lady Fitzwilliam planned to go to Kenya for a protracted holiday leaving on 15 January. Mr. Powell consulted Mr. Walker and in his instructions he reported these developments and asked Mr. Walker whether a share of the appointed fund could be the subject-matter of a gift to Lady Hastings. I

Dealing with Lady Fitzwilliam's departure he explained that the only way of completing the scheme seemed to be

> " ... to explain the proposals to Lady Fitzwilliam before she leaves and, if she approves, to arrange for her to give a General Power of Attorney to enable the sale of her short term interest to be effected and a Trust Power of Attorney to enable the Will Trustees to appoint the £1.8 millon fund and possibly, later, to appropriate assets to that fund."

He also asked Mr. Walker whether he thought it essential for

> " ... all the steps 1–6 including the appropriation of assets to the £1.8 millon fund to be completed before the 'reverter to settlor' limb of the plan is put into operation? In particular, it is supposed that an attorney could not create the settlement by Lady Fitzwilliam at step 7"—that is for the purposes of the reverter to settlor scheme—"and Counsel is therefore asked to advise whether it would be preferable for that settlement to be brought forward and made by Lady Fitzwilliam before her departure or for it to be deferred until her return."

(15) There was a telephone conversation between Mr. Walker and Mr. Powell on 3 January when Mr. Walker put forward a further alternative, namely, the scheme that was in fact adopted. The revised scheme was set out with a detailed timetable and was that on 9 January the trustees would borrow £2m and appropriate it to Lady Fitzwilliam's £4m appointment; on 11 January she would give Lady Hastings £2m in cash with a letter expressing her intention that the gift would be a net gift; on 14 January the trustees would appoint a fund worth £3.8m (to be appropriated later) on trust for Lady Fitzwilliam until her death or until 15 February if earlier and with the remainder I have already explained; on the same day Lady Fitzwilliam would give a general power of attorney; on 28 January Lady Hastings would settle a nominal sum in favour of Lady Fitzwilliam until her death or until 15 March if earlier and on 30 January would assign her interest in the vested moiety to the trustees; on 7 February she would buy Lady Fitzwilliam's interest in the contingent moiety for £2m; and then on 10 February Lady Fitzwilliam would buy assets from the trustees sufficient to enable them to repay their borrowing.

Mr. Walker commented:

> "It would be more difficult for the Revenue to say in attacking the reverter to settlor limb that Mrs. Hastings was not the true settlor. It would be impossible for them to demonstrate that Lady Fitzwilliam was the settlor and they would be thrown back on arguing that the true settlor was Lord Fitzwilliam, but this would be an extremely difficult argument given that the scheme had in no way been in contemplation during his lifetime."

He then added:

> "It would help in demonstrating that Mrs. Hastings had not been advised of the settlement at Step 3B"—that is the creation of a settlement of £1,000—"for her mother to have been absent for a period."

He also suggested that Currey & Co. should consider whether Lady Hastings should not be advised by another partner in Currey & Co. and by

separate counsel. At about that time, I think probably after Mr. Powell had spoken to Mr. Walker, he arranged with Mr. Sporborg for a loan of £2m to be made for a term of one month by Hambros Bank.

(16) Mr. Powell set out the steps proposed by Mr. Walker in more detail with comments as to the practical problems that would have to be resolved in a "suggested programme". Mr. Walker settled the £3.8m appointment, a resolution by the trustees to charge interest on the loan against the capital of the residuary estate and the letter to be handed by Lady Fitzwilliam to Lady Hastings. The drafts are all dated 7 January and they were collected by Mr. Powell in the morning of 7 January. (He went on to the Law Society, where he had lunch with Mr. Forster. I shall have to say something about their conversation at lunch later). Mr. Walker attached to this draft deed of appointment a note that

> " ... although it may not be essential for Mrs. Hastings to have a vested reversionary interest in one-half of the appointed fund and a contingent reversionary interest in the other half, it seems convenient to make this distinction in order to make the two halves readily identifiable, and to emphasise that Mrs. Hastings will (if she resettles the first moiety) be the only settlor in respect of that moiety."

(17) On 7 January Lady Fitzwilliam signed a cheque post-dated to 9 January in favour of Lady Hastings and signed the letter drafted by Mr. Walker. She also signed the documents required by Hambros and the resolution charging interest to the capital of the residuary estate. Later on the same day she executed the £3.8m appointment and the general and trust powers of attorney.

(18) On 9 January Lady Hastings called at Currey & Co.'s offices where she saw Mr. Powell and signed the letter of acceptance required by Hambros and a letter requesting them to telegraph the £2m to Lady Fitzwilliam's account. Mr. Powell left her while he arranged for these documents to be sent to Hambros. On his return he gave Lady Hastings her mother's cheque and letter. In her oral evidence Lady Hastings said that she was "dumbfounded and rather touched" by her mother's generosity. It was agreed that the money should be deposited with her bank. Mr. Powell explained that repayment of the loan from Hambros would have to wait on the sale of land but that one sale was due to be completed in the following week. Mr. Powell also explained that he and, after discussion, counsel proposed that a further appointment should be made of a fund slightly less than £4m before Lady Fitzwilliam left for Kenya. His attendance note records that he explained that the appointment should be

> " ... made to Lady Fitzwilliam because capital transfer tax had been computed on Lord Fitzwilliam's death on the footing that Lady Fitzwilliam would take an interest in possession in the entire residuary estate. At present of course that estate was held on discretionary trusts and strictly speaking C.T.T. at 75 per cent. should have been paid on the entire estate with a refund claimed later once an interest had been appointed to Lady Fitzwilliam but that would have been an extremely inconvenient procedure to adopt and so we had paid on the basis that Lady Fitzwilliam would have an interest in possession. Hence it was desirable now to give her one. To keep matters flexible we were not proposing that she have an interest appointed in the entire residue but we thought she should take an interest in the majority of the estate

A hence the proposed fund of £3.8 million as an addition to the fund of £4.0 million already appointed."

Then, having explained the precise terms of the £3.8m appointment, he explained that

B " ... this kept options open because Lady Fitzwilliam's interest could either be allowed to terminate or could be enlarged later by a further deed by which Mrs. Hastings would give up some of her entitlement to her mother. We thought it best to keep matters as flexible as possible in this way."

C There was no further discussion about the purpose of the £3.8m appointment or the steps which he and Mr. Walker had in mind to escape CTT on the gift and the £3.8m. There was a good deal of discussion on other related matters—whether Lady Hastings should insure her life, whether the payment of legacies should be postponed to limit bank borrowing and matters of that kind. The interview lasted about two hours.

D

(19) Mr. Powell saw Lady Hastings again on 15 January. He had written to her about a proposal that she should make a will and there were also proposals to wind up her marriage settlement. He told her that tax arrangements were being made for her to consult another partner in Currey & Co., Mr. N. W. Smith, to discuss proposals for reducing the CTT payable on the E gift and the £3.8m. Lady Hastings was introduced to Mr. Smith after a meeting of the co-ordinating committee on 22 January. There was a long discussion between Mr. Smith and Lady Hastings in the course of which Mr. Smith explained the two schemes which he and Mr. Powell had in mind. He said that he had submitted a case to counsel to advise on them on Lady Hastings' behalf. I shall have to come back to what was said at this crucial interview F later.

(20) The instructions to Mr. Herbert are dated 18 January. He wrote an opinion on 30 January. He also settled drafts of Lady Hastings' settlement, the first assignment and the second assignment. I need mention only three points which are dealt with in his opinion. He suggested that the first assign- G ment should precede Lady Hastings' settlement and the second assignment and not follow them as suggested in Mr. Walker's and Mr. Powell's proposals. He had already discussed this modification with Mr. Walker who had expressed his concurrence with it. He advised against a refinement suggested by Mr. Smith, which was that Lady Hastings should assign her reversionary interest in the contingent moiety to the trustees of the pilot settlement before H buying Lady Fitzwilliam's income interest so that, in Mr. Herbert's words, the contingent moiety " ... would be the subject of two avoidance schemes at the same time". Lastly, he advised that to give greater reality to the scheme some income should be paid to Lady Fitzwilliam by the trustees of the settlement created by Lady Hastings between 15 February and 15 March.

I (21) Mr. Powell spoke to Mr. Walker on the telephone on 30 January after he had seen Mr. Herbert's drafts. Mr. Walker confirmed that he had approved the change in the order of events. There was a discussion whether the purchase of Lady Fitzwilliam's interest in the vested moiety should be brought forward. She had put her £2m on deposit on seven days' call and bringing this part of the scheme forward would mean a loss of seven days'

interest—some £2,000 net of tax. It was agreed that this was a small price to pay. Mr. Walker also advised that all the documents should be executed on the dates borne by them, and the documents were executed on the dates I have already given.

(22) The rest is machinery. Part of the borrowing from Hambros was paid off out of the proceeds of a farm which was sold before the end of January. The other expected sale did not materialise and on 7 February a hasty sale of this land to Lady Fitzwilliam was arranged so that the balance of the loan could be paid off before the due date. A contract was signed on 5 February, the consideration payable under the contract being payable on 7 February.

The Ramsay scheme

I have already summarised the Commissioners' conclusion. It is, in my judgment, an impossible one. At the time of the meeting of the co-ordinating committee on 20 November the proposals that had been evolved between Mr. Powell and Mr. Walker were that land to the value of £2m would be appointed to Lady Fitzwilliam, that she would give the land to Lady Hastings, that the trustees would appoint a fund of £1.8m on trust to pay the income to Lady Fitzwilliam for a short period with remainder to Lady Hastings, that Lady Hastings would use her £2m to buy Lady Fitzwilliam's income interest, and that Lady Fitzwilliam would use the purchase price to create a settlement which would be the starting point of a reverter to settlor scheme. By the time of the meeting of the co-ordinating committee Mr. Powell had decided to suggest to the co-ordinating committee that the appointment to Lady Fitzwilliam should be of land to the value of £4m. As I have said it is not clear from the documentary evidence or from the oral evidence before the Commissioners whether it was intended that she would be left with £2m at the end of the scheme or whether the £2m would be added to the moneys which were to be the subject of the reverter to settlor scheme. However, under the proposals that were later carried into effect Lady Fitzwilliam was left with £4m. Lady Hastings took £3.8m but of that £1.9m had been appointed to Lady Fitzwilliam for a short period with remainder to Lady Hastings and had been settled by her. In these circumstances it cannot be said that all the steps that were in fact taken were taken in pursuance of a single composite scheme of which the first step was the appointment of £4m to Lady Fitzwilliam and the end result of which would be that Lady Fitzwilliam would be left with £4m and Lady Hastings with £3.8m, for it was not in contemplation until after 3 January that under the arrangements that were being made and were constantly evolving Lady Fitzwilliam would be left with £4m. Moreover, it was not until 3 January that the proposal that Lady Fitzwilliam would make a settlement which would be used to take advantage of the reverter to settlor exemption was dropped and an appointment of a further fund of £1.9m in which Lady Fitzwilliam would take a short-term interest later enlarged by an assignment by Lady Hastings of her reversionary interest was substituted.

In reaching the contrary conclusion the Commissioners were influenced by a note which Mr. Powell made following his discussions over lunch at the Law Society with Mr. Forster on 7 January. Mr. Powell's note records that

> "Mr. Forster asked whether the programme had been seen and approved by anyone else and NP explained that the original programme had been sent to Mr. Sporborg who had approved it but Lady

A Fitzwilliam and Mr. Hastings were not aware of it. There had not been time to acquaint Mr. Sporborg with details of the revised programme (apart from the dealings with the Hambros money) but it was agreed to proceed as only mechanics and not the substance of the scheme had been altered."

B At that stage, of course, the scheme that was actually carried into effect had been formulated save for the alterations in the timetable later suggested by Mr. Herbert. However, whatever view Mr. Powell may have expressed in conversation with Mr. Forster over lunch, the scheme that was into operation was not a scheme in contemplation in its entirety on 20 December. C Whether a part or parts can be said to have been the subject of a composite transaction or more than one composite transaction raises questions which I shall consider later.

It is of some significance to trace the way in which the evolution of these proposals is recorded in the Commissioners' decision. In para 13 on page 36 D of their decision they say(1):

> "By 20 November 1979 Mr. Powell had, on the instructions of the trustees (meaning thereby the executors and trustees) to him through Mr. Sporborg, settled with Mr. Walker the five essential conveyed steps in a CTT avoidance scheme".

E That observation is correct if regard is had to the use of the indefinite article. On the next page, referring to Mr. Bosanquet's evidence that he advised Lady Fitzwilliam on 7 January that arrangements had been made which would make it possible for Lady Fitzwilliam to give £2m in cash to F Lady Hastings, they say(2):

> "The advice given by Mr. Bosanquet was clearly given in the context of the CTT scheme."

Thereafter they refer consistently to "*the* scheme". So, on page 39, they find G that(3)

> " ... all the steps taken up to and including the execution of the £3.8m appointment were steps taken in pursuance of *the* CTT scheme for which instructions had been given by or on behalf of Lady Hastings and her co-trustees with her knowledge and that in the circumstances ... there must be attributed to her a full understanding of *the* scheme and H the purpose of each step within it as and when it was taken."

The move from "a scheme" to "the scheme" and each step in it masks the very real difficulty in concluding that when the appointment of 20 December was executed it was executed as the first step in a preordained I scheme which barring some unavoidable and unforeseen event would once started be carried through to its predetermined end and that " ... the preordained events did in fact take place" (see the fourth of the essentials summarised by Lord Oliver in *Craven* v. *White*(4) [1989] AC 398, at page 514).

(1) Page 644E/F *ante*. (2) Page 645B/C *ante*.
(3) Page 646F/G *ante*. (4) 62 TC 1, at page 200E.

The Crown's case faces another and, to my mind, equally serious difficulty. I will return to that when I have explained the Crown's alternative submission.

The modified Ramsay scheme

The Crown's alternative submission (which was I understand also developed before the Commissioners) was that all the steps from and including the gift of £2m by Lady Fitzwilliam to Lady Hastings were part of a single composite transaction. Mr. Walker objected that the Commissioners having found that there was a single composite transaction of which the first step was the appointment of £4m to Lady Fitzwilliam it cannot be said that if they had not reached this erroneous conclusion they would inevitably have found that there was a single composite transaction, the first step in which was the gift of £2m by Lady Fitzwilliam to Lady Hastings. I am not persuaded that in the context of this case there is any real substance in this objection. The question is whether, given the Commissioners' findings of fact (including what can properly be called inferences of fact), the conclusion that there was a single composite transaction starting with the gift of £2m to Lady Hastings follows as a matter of law. However, I do not need to express any final conclusion on this point. The Crown's case, in my judgment, faces another and insuperable difficulty which equally confronts the claim that all the steps starting with the appointment of £4m to Lady Fitzwilliam were part of a single composite transaction.

The difficulty is quite simply that given that there was in the minds of Mr. Powell and Mr. Walker a scheme (which had been disclosed to some extent to Mr. Sporborg though to precisely what extent is not clear) and which was in fact carried into effect albeit with some modifications (which can I think be regarded as not affecting the substance of the scheme) the scheme could be carried into effect without the co-operation of Lady Fitzwilliam and Lady Hastings, nor indeed could it succeed unless Lady Fitzwilliam, whose expectation of life was in doubt, survived until 15 March. The details of the scheme were not known to either of them on 7 and 9 January respectively. The way in which the Crown sought to circumvent this difficulty was to seek to establish that Lady Fitzwilliam and Lady Hastings were mere actors in a play reading a prepared script. These submissions were accepted by the Commissioners. Taking first the position of Lady Fitzwilliam, they found that(1)

> "So far as Lady Fitzwilliam is concerned she was completely in the hands of her solicitors, whom she trusted implicitly and to whom she had given *carte blanche* to do whatever was necessary."

The reference to Lady Fitzwilliam having given *carte blanche* to her solicitors is (as the Commissioners later made clear in correspondence between their Clerk and Currey & Co. after they had given their decision) a reference to a passage in the evidence of Lady Fitzwilliam. I shall come back to it later.

The Commissioners, building on this foundation, found that the steps that were taken were(2)

> " ... part of a preordained series of transactions, the essential features of which, i.e. the five steps, had all been determined, by the time

(1) Page 645A/B *ante*. (2) Page 645F/G *ante*.

A when the first transaction (the £4m appointment) was effected, by Lady Fitzwilliam through her solicitors and her attorneys to whom she had delegated all necessary and unfettered authority. *Their knowledge was her knowledge* and there was, therefore, we find, a sufficient degree of preordainment to comply with the conditions of the *Ramsay* principle ... " (my emphasis).

B

They founded the proposition that Currey & Co.'s knowledge was hers on the decisions of the Court of Appeal in *Crossland* v. *Hawkins*[1] and of Sir Robert Megarry V.—C. in *In re Montagu's Settlement Trusts, Duke of Manchester* v. *National Westminster Bank Ltd.* [1987] Ch 264. Neither case, in my judgment, supports a proposition as wide as that stated by the C Commissioners.

In *Hawkins'* case the taxpayer entered into an agreement with a newly-formed company with an authorised capital of 100 £1 shares under which the taxpayer agreed to render his services as an actor to the company for a nominal consideration. The two subscriber shares had been taken up by articled D clerks in the employment of his solicitors. Then his father-in-law settled £100 in trust for his children and the remaining 98 shares were taken up at par by the trustees. The company exploited its rights under the service agreement by arranging for him to take part in a film at a very substantial fee. Apart from the settlement and the issue of shares in the company to the trustees there was nothing unusual in these arrangements. It often used to happen that film E actors and people in a similar position would "shelter" their earnings by accumulating them inside a company of this kind. The question was whether the taxpayer was the "settlor" of income afterwards distributed by the company and applied by the trustees for the benefit of his children.

The taxpayer's claim that he was not the settlor seems in retrospect to be F an absurd one because as Donovan L.J. (as he then was) observed, at page 503, it was plain that the articled clerks could not claim to be beneficially entitled to the subscriber shares and if they held as nominees of the taxpayer he in substance provided the 98 shares that were issued to the trustees at par after the company had entered into a very beneficial contract with him. (It is not clear from the report what happened to the subscriber shares). However, G apart from that objection (which was apparently not taken before the Commissioners) the taxpayer clearly provided the income which was distributed. He entered into a service agreement with a company of which he was a director, at an inadequate and uncommercial rate in order to put his earnings into the company. Clearly he knew what he was doing and knew that the proposals by his solicitors and accountants were designed to divert H his income to a family settlement. Pearce L.J. (as he then was) after pointing this out went on to say, at page 508[2]:

"The mere fact that he did not concern himself with some of steps in the legal machinery involved does not make it any the less his arrangement within the Section. A man does not avoid the incidence of I Section 397 by merely being absent from, and leaving to his solicitors and accountants, certain parts of the legal machinery, if he is aware of the proposals for an 'arrangement' or a settlement and actively forwards them by personally carrying out and assisting in the vital parts in which his performance and co-operation are necessary. Nor can he

(1) 39 TC 493. (2) [1961] Ch 537, at pages 553/554.

avoid liability by merely giving his solicitors *carte blanche* to effect some scheme for the benefit of his family and refusing to concern himself with its precise form. The Commissioners would appear, by the wording of the Case, to have been unaware of this principle, and in my judgment it must have been this error that led them to a wrong conclusion."

I do not think that that case or the passage from the judgment of Pearce L.J. which I have cited and which is relied on by the Commissioners has any bearing on the instant case. It is no doubt possible to imagine circumstances, though I think they would be very unusual circumstances, in which the knowledge and purpose of solicitors who designed and carried through an artificial tax-saving scheme could be attributed to the client—if, for instance, he gave them authority to carry through any scheme they could devise or purchase and undertook to sign any documents put before him without cavil. The position of the solicitors might perhaps then be said to be analogous to that of the purveyor of a ready-made scheme and the client compared to one of the actors in Templeman L.J.'s well-known analogy in his judgment in the Court of Appeal in *W. T. Ramsay Ltd.* v. *Commissioners of Inland Revenue*(1). But nothing of the sort happened here. Lady Fitzwilliam's evidence was that at the time (she was 81 and in full possession of her faculties) she always read documents and had them explained to her before she executed them. In her evidence she said in a striking passage (Day 2, at page 8): "You pay lawyers—being rather rude—to help you carry out your wishes or what wishes you have at the moment". When she executed the appointment of £4m, signed the cheque in favour of and the letter to Lady Hastings and executed the £3.8m appointment she was advised by Mr. Bosanquet, the senior partner in Currey & Co. On 7 February Mr. Bosanquet did his best, and was bound as a responsible solicitor to do his best, to explain the effect of the transaction which then took place to Lady Fitzwilliam. He found it difficult to satisfy himself that she fully understood the consequences of making a net gift of £2m to Lady Hastings, but he satisfied himself that he had adequately explained the risk that she was taking. The cheque and letter were signed before Lady Fitzwilliam executed the £3.8m appointment. Mr. Bosanquet was concerned about the effect of the appointment on the ability of the trustees to help her to meet the CTT on the net gift if she was called to pay it. He satisfied himself that if the balance of the residuary estate was made over to her for that purpose she would be left on the available figures with about £0.75m. It is suggested elsewhere that £0.5m would have been a more accurate estimate. Nothing turns on this difference: £0.5m or £0.75m was in this context a comparatively small sum. On the other hand, Lady Hastings would have the £2m gift and the balance of £3.8m after duty (some £3m in all) with which she could purchase and maintain Milton. She and her mother were very close and both were anxious to keep Milton and to go on living there. Thus Lady Fitzwilliam would have no great need for free capital once Lady Hastings had been provided for.

The problem of meeting CTT on the gift if nothing could be done to mitigate it was one which faced the family and not Lady Fitzwilliam alone. Mr. Bosanquet thought it was inconceivable that her daughter would allow her mother to suffer and equally inconceivable that the trustees would not make the balance of the residuary estate available to meet any liability. Mr. Bosanquet did his best to explain the effect of this complex deed to Lady Fitzwilliam and explained that proposals would be made to Lady Hastings

(1) 54 TC 101.

which might result in saving duty on the gift and on the £3.8m. Later he executed the first assignment on her behalf under the power of attorney. The first assignment was for all practical purposes a gift from Lady Hastings and he saw no reason why he should not execute it on Lady Fitzwilliam's behalf without reference to her.

There is nothing in the Commissioners' decision which indicates that they did not believe this evidence and in the light of that evidence I do not see how it can be said that from the inception of the scheme Lady Fitzwilliam gave *carte blanche* to Currey & Co. to carry the whole scheme into effect on her behalf and on behalf of Lady Hastings.

As I have already indicated the Commissioners were very much influenced in reaching the conclusion that knowledge of all the steps which Currey & Co. proposed should be imputed to Lady Fitzwilliam by a passage in the cross-examination of Lady Fitzwilliam which I should, I think, deal with fully. A statement by Lady Fitzwilliam had been put in under the Evidence Act. Although she was then 87 years old and becoming very deaf the Crown insisted that she should be called and cross-examined. Mr. Walker asked her a few introductory questions in elaboration of her statement. Mr. Reid early in his cross-examination probed her relationship with Currey & Co. The cross-examination proceeded as follows:

"(Q) You have told us that you regarded Currey & Co. as marvellously erudite lawyers. (A) Yes.

(Q) Is it fair to say that so far as you are concerned, you would follow their legal advice implicitly? (A) Absolutely, completely.

(Q) And in relation to matters such as taxation and the saving of tax. (A) Absolutely. I know nothing about that. I could not work it out for myself. I cannot work out my stocks and shares without people telling me, but when I am told things, I can quite clearly understand them, for the moment, but I could not have done it myself alone.

(Q) So as far as you were concerned they had carte blanche to make the necessary tax arrangements? (A) Yes, absolutely. I completely trusted them in every way, and admired their good advice."

The reference to Lady Fitzwilliam giving her solicitors *carte blanche* seems to have been designed to found an argument on the observations of Pearce L.J. in the *Hawkins* decision which I have cited. I do not think that any weight can be attached to it. The question was very general and it was no doubt true that Lady Fitzwilliam and indeed other trustees gave Currey & Co. a very wide discretion in arranging for instance the payment of duty on the estate and in obtaining probate of the will. But if it were to be suggested that Lady Fitzwilliam signed the £3.8m appointment and the letter and the cheque without being given any explanation or understanding any explanation that was given as to the effect of what she was doing—that she had given Currey & Co. *carte blanche* to design and carry through a scheme for avoiding CTT without any reference to her except when her signature was required, and that she would sign whatever was put before her—that question should have been put to her clearly and specifically.

Much the same kind of suggestion was made later in the cross-examination when she was asked: "In effect, given the meeting of 7 January, the

script had been carefully written so that the £2 million was available for you?", to which she answered, "Yes". In re-examination it transpired that she had not heard the word "script". I doubt very much whether she would have appreciated the significance that Mr. Reid would later have later attached to it even if she had heard that word: the question was designed to elicit an answer which could then be relied on as showing that the transaction had all the marks of the charade instanced by Templeman L.J.

The decision of Sir Robert Megarry in *In re Montagu's Settlement Trusts* concerned the circumstances in which knowledge of a breach of trust can be imputed to a person whom it is sought to make liable as a constructive trustee if facts from which the breach of trust should have been plain were known to his solicitors. In my judgment, it has no bearing on the question whether a person can be said to have played a part in a scheme falling within the *Ramsay* principle on the ground that the knowledge of his solicitors of steps that were to be taken in the future should by some means be attributed to him.

Pausing at this point, the position at 7 January was that the trustees had appointed a part of the residuary estate of a value of £4m to Lady Fitzwilliam. That appointment did not attract capital transfer tax. The trustees knew that Lady Fitzwilliam would want to make a substantial gift to Lady Hastings out of the £4m and that Currey & Co had in mind a scheme which would enable her and Lady Hastings to escape duty on the subject-matter of the gift. Neither the trustees nor Lady Fitzwilliam nor Lady Hastings knew what scheme Currey & Co. had in mind.

On 3 January, faced with the practical difficulty that an early appropriation of land in satisfaction of the £4m would not be practicable, Currey & Co. arranged for £2m to be borrowed from Hambros and appropriated to the £4m appointment. They expected and had every reason to expect that Lady Fitzwilliam would want to give this sum to Lady Hastings. To that extent the making of the gift was (if Lady Fitzwilliam survived) foreseeable. Currey & Co. had had the £3.8m appointment drafted by Mr. Walker again in the expectation that Lady Fitzwilliam would execute it. If she did, the stage would be set for a tax-mitigation and avoidance scheme to be operated by Lady Hastings. It is thus her role, and not that of Lady Fitzwilliam, that is of crucial importance.

The Commissioners found that(1)

> " ... all the steps taken up to and including the execution of the £3.8m appointment were steps taken in pursuance of the CTT scheme for which instructions had been given by or on behalf of Lady Hastings and her co-trustees with her knowledge and that in the circumstances we have recited there must be attributed to her a *full understanding of the scheme* and the purpose of each step within it as and when it was taken. The intention of Mr. Powell and other members of his firm to implement the scheme and the state of their knowledge at each step must, we find, be attributed to Lady Hastings ... "

There is no evidence that Lady Hastings actually knew of the proposals which Currey & Co. intended to put before her for saving CTT on the vested moiety and on the contingent moiety (or the gift) at the time when the gift was made or when the £3.8m appointment was executed. Mr. Powell's and

(1) Page 646G/H *ante*.

A Lady Hastings' evidence was to the contrary, and indeed the Commissioners found that(1)

> "Lady Hastings was at all relevant times aware that Mr. Powell was putting into effect a tax-saving scheme and that she did not know what form that scheme took because she did not at any time inquire."

B Later in their decision they say(2):

> "Mr. Powell then told Lady Hastings that having discussed the matter with counsel it was proposed that before Lady Fitzwilliam went on holiday a further appointment of £3.8m be made to her mother by the trustees. He recommended the appointment on the basis that it
C would be consistent with the Inland Revenue account lodged with the application for probate. The terms of the appointment were explained as being such as kept options open so far as her mother was concerned. No reasons were given to Lady Hastings as to why one-half of her interest was contingent and the other-half vested. Lady Hastings thereupon exe-
D cuted the deed of appointment as she would not be available to attend the trustees' meeting arranged for the following week. She was not aware of the progress made with regard to CTT planning by Currey & Co., nor did she inquire."

That last paragraph, of course, reflects the note by Mr. Powell which I
E have already cited. It was suggested to Lady Hastings on 15 January that she should consider proposals to mitigate CTT and that she should be advised by another partner of Currey & Co. on the merits of these proposals. She met Mr. Smith for the first time on 22 January. By that time, of course, he had already taken the step of instructing Mr. Herbert.

F It is, I think, important in considering the decision of Lady Hastings to go ahead with the proposals that were made to her to have in mind the situation with which she was faced. Her mother had made an unconditional gift to her of £2m. She knew that the gift had given rise to a very substantial CTT liability. She knew that an appointment of £3.8m had been made on very unusual terms under which Lady Fitzwilliam took an interest for a very short term with
G remainder to herself. She knew that (in the words of the report submitted by Mr. Powell to the co-ordinating committee on 18 January) she would in the course of time " ... become entitled to assets of the estate to a value of £4.05 million" (the £3.8m together with her legacy) "(subject to a serious C.T.T. liability which it is hoped to find some way of mitigating)".

H Mr. Smith made a very complete note of his interview with Lady Hastings. I do not understand the accuracy or completeness of that note to be in dispute. There is no suggestion in the Commissioners' decision that they did not believe the evidence of Lady Hastings or Mr. Smith as to what took place on 22 January and clearly if they had disbelieved that evidence it would have been their duty to say so. The note records that Mr. Smith
I explained that there were two schemes which he thought he could recommend to Lady Hastings but that there was a third possibility which she ought to consider first. That was for her to return the £2m gift from Lady Fitzwilliam and to assign to Lady Fitzwilliam her interest in the £3.8m fund. That would defer the CTT problem until Lady Fitzwilliam's death and in the

(1) Page 631F *ante.* (2) Page 636A/C *ante.*

meantime the impact of CTT on settled property might be substantially modified. There was in fact another and simpler possibility—that Lady Hastings could agree to treat the £2m gift as a gross gift. There is nothing in the CTT legislation which expressly provides for a donor to elect to pay tax on a gift expressed to be a net gift, but I was told by Mr. Reid that in practice the Revenue allow a donor so to elect; in effect they treat the expressed intention by the donor to pay the duty as an undertaking to make a further gift which is capable of being released.

Mr. Smith, having explained these possibilities (except the last), expressed the opinion that the restructuring of CTT lay very much in the future and that the better course would be to take steps to mitigate CTT before the Budget and to review the position thereafter. Lady Hastings agreed. Mr. Smith then explained the schemes and expressed the view that

> "At the worst a liability which had already been triggered but which could as explained be deferred until Lady Fitzwilliam's death would become payable this year. At best there would be savings running into millions of pounds."

Lady Hastings agreed to go ahead if Mr. Herbert supported the scheme. Lady Hastings in her oral evidence said that Mr. Smith asked her what her husband, who was a Member of Parliament, thought of the prospect of a radical change in the CTT legislation in the forthcoming Budget. Lady Hastings had already discussed this point with her husband after seeing Mr. Powell's memorandum of 14 November and both had formed the view that it was unlikely that any radical change would be made or that any change that were made would be retrospective. She thought Mr. Smith's advice was

> " ... really very sensible. Clearly the Capital Transfer Tax was a new tax to everybody and this was an anomaly in the drafting of the Act and it seemed it would have been stupid not to take advantage of it" (see Day 2 of the evidence, at page 55).

But she thought that the decision was a " ... difficult decision and a rather sensitive one" and " ... something of a conundrum". In cross-examination she elaborated this by saying: "It was a gamble either way. It was a gamble on my mother living for a long time, or trying to do something which might or might not be efficacious". She also said that although Mr. Smith saw merit in the scheme " ... he absolutely did not try to influence me either way".

Mr. Smith did not see Lady Hastings again until 30 January when he saw her in the presence of Mr. Powell and Mr. Bosanquet and when she executed the first assignment. Mr. Smith explained that she was being asked to pay £2m for an interest that was virtually worthless in the hope that she would solve the CTT problem created by Lady Fitzwilliam's gift. Mr. Bosanquet also executed the document but only after Lady Hastings had signed an instruction to her bankers to hold the sum of £2m in her deposit account to her mother's order—a step which Mr. Bosanquet as a cautious solicitor insisted on.

I must, I think, now cite the conclusion of the Commissioners as to the part played by Lady Hastings in full. They say([1]):

([1]) Pages 646I/647D *ante*.

A "Nobody was seriously considering unscrambling the steps so far taken. The scheme was then well under way. It was well understood that the CTT problem arising out of the £2m payment needed to be dealt with as a matter of urgency in view of the then state of Lady Fitzwilliam's health and the steps, which Mr. Smith felt he could recommend to Lady Hastings for dealing with it, had been set up and received B the approval of Mr. Walker. The approval of Mr. Herbert, which could not be serious in doubt, was awaited. The political questions were undoubtedly a topic for discussion and were indeed referred to somewhat tentatively by Mr. Powell in his memorandum of 14 November 1979 ... They did not, however, offer any realistic prospect of a solution and furthermore there was, in the circumstances, no realistic prospect of C Lady Hastings calling a halt on their account to the final implementation of the scheme. Instead, having disposed of the political aspects of the discussion, Lady Hastings, who had at the time a thorough understanding of what remained to be done, readily gave instructions to Mr. Smith to go ahead subject to his receiving the support of Mr. Herbert who had already been instructed. Mr. Herbert, as was expected, gave his D approval subject to what Mr. Reid aptly described as a minor cosmetic change in the order of the reverter to settlor and mutual transfers steps. We, therefore, find that nothing that happened at the meeting of 22 January, or thereafter, did anything to sever the steps then taken from the steps previously taken. They were all part of an indivisible process in a preordained series of transactions".

E

In my judgment, the Commissioners' findings and their conclusion that everything that happened at the meeting on 22 January was " ... part of an indivisible process in a preordained series of transactions" is simply inconsistent with the evidence and indeed with the earlier findings which I have cited. It is one which they would not have reached if they had properly understood F the expression "a preordained series of transactions".

The position so far as Lady Hastings was concerned was that Mr. Powell and Mr. Walker had designed a scheme which, if Lady Fitzwilliam made the expected gift and if the trustees executed the £3.8m appointment might enable Lady Hastings to escape duty on the gift and on the vested G moiety. It was her decision whether or not to adopt those proposals. The £2m gift was her money and the reversion to the £3.8m fund was her property. She was being asked to return the £2m gift for an income interest of no value. The Commissioners accept that Lady Hastings on 22 January had " ... a thorough understanding of what remained to be done" and that she " ... gave instructions to Mr. Smith to go ahead subject to his receiving the H support of Mr. Herbert". Lady Hastings, I should say, was then 45 years old. She was a part-time regional representative for Christies in the East Midlands and a research assistant in the Department of Egyptology at London University. She had attended meetings of the co-ordinating committee of the Fitzwilliam estates for many years. She was not putty in the hands of her solicitors. The choice whether to adopt the proposals was her choice.

I

The Commissioners, it seems to me, also misunderstood the role of Mr. Herbert. They attached significance to the fact that in his instructions he was not instructed to advise generally. It is said it was not open to him to put forward any alternative proposals. I do not think that any significance can be attached to the form of Mr. Herbert's instructions. He was asked to advise

on the proposals and it was clearly open to him to put forward other proposals if he thought they had a better chance of success. Nor, in my judgment, can any significance be attached to the fact that he was in the same chambers as Mr. Walker. It was professional duty to give wholly independent advice to Lady Hastings. The Commissioners attach significance to the fact that (as appears from his instructions) Mr. Smith knew that he had advised on and had approved similar schemes in the past. That, I think, rests on a misconception of the function of counsel in a case of this kind. In advising a client whether he should adopt and carry into effect what was on any view a very artificial scheme which rested (in particular as regards the contingent moiety) on a plain blunder in the legislation counsel must weigh on the one hand the chance that the scheme will work or that it will in effect be aborted by retrospective legislation and on the other the alternatives open to the client. It may be—I do not know—that in the other cases in which Mr. Herbert had advised there was nothing to be lost except the costs of the scheme if it was carried into effect and failed either on its merits or as a result of retrospective legislation. In the case of Lady Hastings there were other courses open to her. Then again (as Mr. Smith pointed out in his oral evidence) Mr. Herbert might have come across some scheme which he thought might have a better chance of success. It is apparent from Mr. Herbert's opinion that he did not in fact think it was necessary to see Lady Hastings to explain the scheme and the risks inherent in it and any other available courses. He had been told in his instructions that the proposals had been explained to her and that she had agreed subject to his advice to put them into effect. I do not think that it follows that it was inevitable in the circumstances relied on by the Commissioners that he would approve the proposals on Lady Hastings' behalf.

The Ramsay sub-schemes

The Crown then put forward as an alternative submission that there were two sub-schemes, each of which comprised a self-contained composite scheme within the *Ramsay* principle. Mr. Walker submitted that this contention was not put or was not put in precisely these terms before the Commissioners and that as in the case of the modified *Ramsay* scheme there are no specific findings by the Commissioners on which these submissions can be founded.

I do not find it necessary to express any concluded view whether the Crown can without unfairness to the taxpayer be allowed to rely on these alternative claims. The first sub-scheme relied on comprises the gift to Lady Hastings, the £3.8m appointment and the first assignment; the second comprises the £3.8m appointment and the settlement and the second assignment. If I am right in my view that it cannot be predicated that at the time when the gift was made and when the £3.8m appointment was executed there was no practical likelihood that Lady Hastings would not adopt the proposals for dealing with the gift and her interest in the vested moiety, then those claims must fail and for the same reasons that, in my judgment, are fatal to the modified *Ramsay* scheme.

The contingent moiety

The Crown then advanced a novel claim for CTT which if it were well founded would cast a considerable liability on Lady Hastings personally and not as trustee. As I have already explained before the Commissioners the Crown abandoned any reliance on the "associated operations" provisions in

A the CTT legislation. The Crown advanced the contention that if the *Ramsay* principle could not be relied upon the gift to Lady Hastings in so far as was expressed a net gift should be tried as a sham. As to that I have already cited the Commissioners' findings. There is no appeal against that part of their decision. Lastly, before the Commissioners the Crown conceded that if the gift was not a sham and if the *Ramsay* principle had application the gift and
B the contingent moiety escaped duty.

When Mr. Walker explained the course the proceedings had taken before the Commissioners and the concessions that had been made Mr. Reid did not interpose to say that a new ground of which no notice formal or informal had been given would be relied on. However, which he came to
C address the Court he submitted that in the light of the decision recently reported of the Court of Appeal in *Aslan* v. *Murphy (Nos. 1 and 2)*, *Wynne* v. *Duke*[1] [1989] 3 All ER 130, it is open to the Crown to claim that to the extent that the gift was expressed to be a net gift it was, though not a sham, a pretence. The consequence of treating the gift as a gross gift is that the value transferred was only £760,000 and that, as the consideration paid by
D Lady Hastings under the first assignment falls to be treated (to the extent of the surplus over Lady Fitzwilliam's virtually worthless interest in the contingent moiety) as a gross gift, she made a gift which grossed up by CTT amounts to £3,931,000 on which tax of £2,689,625 is payable.

Mr. Walker submitted that it is not open to the Crown to advance a
E new ground which the Commissioners were not invited to consider and on which if it had been advanced the taxpayers might have wished to ask the Commissioners to make a finding of fact. I agree with that submission. However, the Crown's contention is, in my judgment, also misconceived.

In an often-cited passage in *Snook* v. *London & West Riding Investments*
F *Ltd.* [1967] 1 All ER 518, [at page 528H] Diplock L.J. (as he then was) explained that a document can be said to be a sham document only if it is intended by the parties[2].

> " ... to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the
G actual legal rights and obligations (if any) which the parties intend to create."

In *Aslan* v. *Murphy* an agreement between the owner and an occupier of a flat contained provisions which were only consistent with the creation of a licence and which were inconsistent with the creation of a tenancy. The
H County Court Judge had held that the agreement was not a sham. The Court of Appeal held that parts of the document did not reflect the true bargain between the parties and that those parts could nonetheless be disregarded as a "pretence". Sir John Donaldson said, at page 133[3]:

> "Quite apart from labelling, parties may succumb to the temptation
I to agree to pretend to have particular rights and duties which are not in fact any part of the true bargain. Prima facie the parties must be taken to mean what they say, but given the pressures on both parties to pretend, albeit for different reasons, the courts would be acting

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[1] [1990] 1 WLR 766. [2] [1967] 2 QB 786, at page 802.
[1] [1990] 1 WLR 766, at pages 770G/771A.

unrealistically if they did not keep a weather eye open for pretence, taking due account of how the parties have acted in performance of their apparent bargain. This identification and exposure of such pretences does not necessarily lead to the conclusion that their conclusion that their agreement is a sham, but only to the conclusion that the terms of the true bargain are not wholly the same as that of the bargain appearing on the face of the agreement. It is the true rather than the apparent bargain which determines the question: tenant or lodger?"

Then, having referred to the decision of the County Court Judge that the agreement was not a sham, he said [at page 135][1]:

"Where he went wrong was in considering whether the whole agreement was a sham and, having concluded that it was not, giving effect to its terms, i.e. taking it throughout at face value. What he should have done, and I am sure would have done if he had known of the House of Lords approach to the problem, was to consider whether the whole agreement was a sham and, if it was not, whether in the light of the factual situation the provisions for sharing the room and those depriving Mr. Murphy of the right to occupy it for 90 minutes out of each 24 hours were part of the true bargain between the parties or were pretences. Both provisions were wholly unrealistic and were clearly pretences."

As I understand it what the learned Master of the Rolls is there saying is that a document which is not wholly sham may contain provisions that are sham and that in circumstances such as those which obtained between the owner and the occupier in the case the Court was entitled to disregard that part which could be seen to be sham and to give effect to the true bargain—the legal rights and liabilities which the parties intended to create.

In the instant case the Crown's contention before the Commissioners was that the gift and the expressed intention in the accompanying letter that it was an unconditional gift were not sham but that that part of the letter in which Lady Fitzwilliam expressed her intention to make a net gift and to bear the CTT herself was sham. That contention was rejected by the Commissioners. It makes no difference, as I see it, whether that part of the letter is described as sham or as pretence.

The vested moiety

Paragraph 1(2) of Sch 5 to the Finance Act 1975 contains a definition of "settlement" in terms which are not dissimilar from the definition of that word in the estate duty legislation, which was derived in turn from the definition of "settlement" in the Settled Land Act 1882. Paragraph 1(8) provides:

"Where more than one person is a settlor in relation to a settlement and the circumstances so require, this Schedule and section 25(3)(*d*) of this Act shall apply in relation to it as if the settled property were comprised in separate settlements."

Before the Commissioners it was contended by the Crown that the Tenth Earl's will, the £3.8m appointment, Lady Hastings' settlement and the second assignment together constituted a settlement within the definition in para 1(2) and that it could not be said that in relation to that settlement Lady Hastings was "*the* settlor" to whom the settled property reverted on 15

[1] [1990] 1 WLR 766, at pages 772G/773A.

March 1980 within the meaning of the exemption in para 4(5) of Sch 5. Reliance was placed, as I understand it, upon the fact that on 15 March no appropriation had been made to satisfy the vested moiety; it was said that inasmuch as the trustees still had a power to determine the initial constitution of the vested moiety the compound settlement must have continued at least until after 15 March. The case for the taxpayers was that after 15 February the trusts of the will and of the £3.8m appointment no longer applied to the vested moiety; Lady Hastings' vested reversion became an absolute interest in possession and that thereafter she was the settlor and the only settlor of the settlement constituted by the joint effect of her settlement and of the second assignment. As I have said, the Commissioners did not make any finding on this issue.

The Crown's case as it was developed before me was shortly this. It was said that the trustees of the will provided the vested moiety through the trustees acting as the representatives of the Tenth Earl and that he is, accordingly, to be treated as the settlor for the purposes of para 4(5). That proposition is plainly too wide. If, for instance, the Tenth Earl had given a legacy of £1.9m to Lady Hastings and if she had then decided to settle it on trusts under which her mother or anybody else took a limited interest with remainder to herself it would clearly have been Lady Hastings and not the Tenth Earl who provided the settled fund. That would be so even if at the date of the settlement by Lady Hastings the trusts of the Tenth Earl's will had not been fully administered or if his executors had had a power to appropriate specific assets in satisfaction of the legacy which they had not then exercised. I cannot see that it makes any difference that the fund settled by Lady Hastings was derived from an appointment made under a power conferred by the Tenth Earl's will, nor that her interest at the time when she made her settlement was still in reversion, nor again that when the interest fell into possession no assets had been appropriated in satisfaction of it.

Mr. Reid then submitted that on the facts of the instant case the reversionary interest was provided by the Tenth Earl "in connection with" Lady Hastings' settlement within the meaning of those words in para 1(6) of Sch 5 which provides that

> " 'Settlor', in relation to a settlement, includes any person by whom the settlement was made directly or indirectly, and in particular (but without prejudice to the generality of the preceding words) includes any person who has provided funds directly or indirectly for the purpose of or in connection with the settlement or has made with any other person a reciprocal arrangement for that other person to make the settlement."

I find it difficult to see how the Tenth Earl can be said to have provided funds "in connection with" a settlement which was not in contemplation when he died. However, I do not find it necessary to express any opinion on this question or on the further questions whether analogy with the principles explained in *Muir or Williams* v. *Muir & Others* [1943] AC 468, at page 474, and *In re Pilkington's Will Trusts*(1) [1964] AC 612, the £3.8m appointment might be treated for these purposes as if it had been made by the Tenth Earl. The insuperable difficulty which faces the Crown's contentions is that however widely the words "in connection with" are construed (and they are

(1) 40 TC 416.

undoubtedly capable in an appropriate context of bearing a very wide meaning) construed in the context of para 1(6) there must be some real connection linking the original provider of a fund and the settlement before the former person can be said to have been the settlor—some connection, that is, beyond the mere fact that historically the selected fund originated with him. Otherwise, in a case where, for instance, "A" gave a sum of money to his son which his son then settled entirely of his own volition, "A" would fall to be treated as "a settlor" or "the settlor" of the fund for the purposes of Sch 5—a conclusion which seems to me self-evidently absurd. It may be that if there was some understanding or arrangement even falling short of an enforceable agreement between "A" and his son that "A" would settle the moneys provided by "A", "A" would fall to be treated as the settlor; and it may be that in this case if there had been such an arrangement or understanding between the trustees and Lady Hastings at the time when the £3.8m appointment was made it could be said that they were or that the Tenth Earl was to be treated as the settlor. I express no opinion on that. On the evidence before the Commissioners the settlement made by Lady Hastings was made of her own volition; there was no such arrangement or understanding. She did not learn of the proposal that she should settle the vested moiety until 22 January.

In my judgment, therefore, the Crown fail on this ground also.

Conclusion

For the reasons I have given in my judgment the taxpayers' appeals succeed and the Crown's cross-appeals fail.

I should, however, add a few words on one issue in the case which I have not found it necessary to explore. All their Lordships who heard the appeals in *Craven* v. *White*[1] stress that the *Ramsay* principle is a question of construction. The question is whether looking at the real consequences of a composite transaction they fall within a charging or an exempting provision—whether the transaction gave rise to a real allowable loss or whether a disposal of shares to a holding company was a real disposal. It is important that when the Revenue invoke the *Ramsay* principle they should make it clear what fiscal consequences they attach to what is said to be a single composite transaction and under which provision of the taxing statutes a charge to tax arises or a claim for exemption or relief fails. This is of particular importance in the field of capital transfer tax. The provisions of the legislation charging capital transfer tax as they applied to settled property were complex and framed in such a way as to give rise to a fictional transfer of value on the happening of events which did not give rise to any disposition or even devolution of property in the real world—the arising or cessor of an interest in possession and, to the extent of the periodic charge, the expiry of an interval of time. The taxpayer might, therefore, be able so to arrange matters that an interest in possession would cease or (as in the case of the well-known *Franco* schemes) would arise in circumstances which would fall within an exemption.

In the instant case the Revenue claimed that the composite transaction comprising steps 1 to 5 fell to be taxed as if distribution payments of £4m and £3.8m respectively had been made to Lady Fitzwilliam and to Lady Hastings. However, it is not easy at least in the case of the gift and the contingent moiety to see under what provision tax would have been chargeable if steps 2 to 4 had constituted a single composite transaction. The

(1) 62 TC 1.

Commissioners have held that the gift to Lady Hastings was a net gift of £2m. The effect of para 4(4) of Sch 5 and of s 69(7) of the Finance Act 1978 (taken in conjunction with ss 86 and 87 of the Finance Act 1976) is that the subsequent payment of £2m by Lady Hastings to Lady Fitzwilliam falls to be treated both as consideration for the acquisition of the contingent moiety and to the event that it exceeded the value of Lady Fitzwilliam's income interest as a return of Lady Fitzwilliam's gift. I do not think that the Crown was able to explain precisely how these transactions treated as a single composite transaction gave rise to a charge to capital transfer tax. However, as I have reached the conclusion that these transactions cannot properly be treated as a single composite transaction I do not need to explore this question further.

I think the right course is to allow the taxpayers' appeals and to dismiss the Crown's cross-appeals, to reverse the decision and to quash the notice of determination.

Appeals allowed and cross-appeals dismissed, with costs.

The taxpayers' appeal against an order by the Registrar of Civil Appeals for an extension to the Crown's time for appeal was heard in the Court of Appeal (Fox L.J.) on 5 February 1991 when judgment was given in favour of the Crown, with no order as to costs.

Robert Walker Q.C. for the taxpayers.

Christopher McCall Q.C. and *Launcelot Henderson* for the Crown

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Fox L.J.:—This is an appeal by the taxpayers from a decision of the Registrar of Civil Appeals, extending the Inland Revenue's time for appealing from a decision of Vinelott J. in relation to the Judge's decision regarding a claim by the Inland Revenue for capital transfer tax, which he rejected. There were in fact four conjoined cases involved.

Notices of determination in relation to the liability of the taxpayers to capital transfer tax were issued by the Inland Revenue in 1986. Notices of appeal were given, and in due course those appeals where heard by the Special Commissioners in 1987. In November 1987 the Special Commissioners gave their decision which was in favour of the Inland Revenue. The taxpayers appealed to the High Court, and the Case Stated was signed in May 1988. Those appeals were heard by Vinelott J. between 24 October and 1 November 1989, who gave judgment on 9 November of that year, allowing the taxpayers' appeals. On 22 November the order of the Judge was formally entered. The result was that the time for appealing to the Court of Appeal from the decision of Vinelott J. expired on 20 December, being a four-week period from the entry of the order.

On 21 November the Solicitor of Inland Revenue delivered to leading and junior counsel, Mr. McCall and Mr. Henderson, instructions to settle notices of appeal to the Court of Appeal. On 14 (or possibly 15) December,

the Solicitor received the draft notices of appeal settled by Mr. Henderson— Mr. McCall apparently at that time being indisposed. The draft notices of appeal settled by Mr. Henderson were typed and on 18 December the Solicitor received those draft notices of appeal in the same form signed by both Mr. McCall and Mr. Henderson. On 19 December the notices were signed on behalf of the Commissioners of Inland Revenue by Mr. Furey, a solicitor in the office of the Solicitor of Inland Revenue. The notices were handed by him to an Executive Officer in the appeals section at Somerset House, with instructions to arrange for their service on the solicitors to the taxpayers.

Mr. Furey deposes to the fact that he specifically drew the attention of that Executive Officer to the fact that time for service of the notices of appeal expired on the next day, 20 December. He states, however, that he did not specify that service should be effected personally (and not by post) as he had assumed that as time expired on the following day service by post would not be attempted.

In addition, in the previous week of that month Mr. Furey had warned the Executive Officer that the notices of appeal were unlikely to be available before 18 or 19 December, and he deposes to the fact he was assured by her that she could deal with that.

On 20 December Mr. Furey enquired of the appeals section if his instructions as to service had been complied with and it appears he was assured that that was so. However, service was in fact effected by first class post at 11a.m. on 22 December by posting in the post-box outside King's College in the Strand, accompanied by a covering letter of 22 December enclosing the notices of appeal. On that same day, 22 December, copies of the notices of appeal were taken by an Administrative Assistant in the Solicitor's Office to the Civil Appeals Office in the Law Courts to be set down. He was informed by the Registry officials that the notices of appeal could not be set down because they were out of time. Unfortunately, neither Mr. Furey nor any of his professional colleagues at Somerset House was informed of this position until 8 January. It in not in doubt that that represented a deplorable lapse on the part of the Inland Revenue.

The notices of appeal were received by the taxpayers' solicitor on 28 December. On 4 January 1990 a letter was received in the office of the Solicitor of Inland Revenue from the taxpayers' solicitors stating that they were unable to accept service of the notices of appeal as they were out of time. On 5 January the taxpayers' solicitors were asked over the telephone to consent to an extension of time for service, but that request was refused.

The Executive Officer, to whom the duty of serving these notices of appeal had been entrusted, apparently only had experience of service by post. She did not appreciate the importance of the notices reaching the taxpayers' solicitors before the expiration of the time limited by the Rules and she believed that, since the order was entered on 22 November, the time for service of the notices of appeal expired on 22 December. However, that period was not one month; it was four weeks from the date of the entry of the notices so that led to a series of unfortunate blunders by the Inland Revenue.

The Executive Officer had apparently drafted a letter to accompany the notices of appeal on 19 December, but because of delays in the typing pool

A prior to Christmas, a colleague in the office had in fact typed out the covering letter.

On 10 January 1990, the Inland Revenue issued a summons requesting an extension of time for the service of the notices of appeal. That was heard by Mr. Registrar Adams who extended time upon the following terms as to
B costs: (1) that the Inland Revenue, if successful on an appeal, would not seek to interfere with the order for costs made in the taxpayers' favour in the High Court; and (2) that they would not seek costs in the Court of Appeal. The Inland Revenue do not seek to interfere with those terms if I grant an extension of time.

C The Revenue accept, as they must, that there were lamentable failures in the appeals section at Somerset House. They also accept that the onus is upon them to establish that this is a proper case for extension of time. It is not in doubt that a strong case must be made out; the Rules are there and must be complied with.

D Leaving aside one matter to which I shall return later, namely the delay which occurred at an earlier stage of the dispute in the 1980's, there are a number of matters to which I should refer:

(1) The "muddle" which occurred was essentially a failure by the Revenue's junior staff, there being no delay, as it seems to me, to set in
E motion the appeals procedure from the decision of Vinelott J. whose substitute order was entered on 22 November. On 21 November instructions had been given to leading and junior counsel to settle the notices of appeal and on 14 December those notices were received in draft from Mr. Henderson, and on 18 December the notices signed by both leading and junior counsel were received.
F

On 19 December the notices were formally signed on behalf of the Commissioners of Inland Revenue. So at that stage everything was in order.

(2) The delay which occurred before the taxpayers' solicitors actually received the notices which were sent by post was only four working days, and
G it has to be remembered that this was in the middle of the Christmas holiday period.

(3) There was nothing here which could be regarded in any way as a contumelious delay; such delay was caused by errors on the part of junior staff.
H

(4) There is nothing to suggest that the taxpayers were induced to act to their detriment in consequence of the delay. By 5 January they were aware that the Inland Revenue intended to make an application to the Registrar for an extension of time.

I Thus far it seems to me that, although there had been serious errors in the appeals section, this is not a case where the Court would be justified in refusing to extend time. Indeed, Mr. Walker accepted that there were some grounds for granting an extension. However that is not an end of the matter. There is another aspect of the case upon which Mr. Walker relied. He submits that the delay which occurred in the service of notices of appeal

must be looked at against the whole background of the case and in addition I emphasise again it must be looked at on the basis that the Revenue must make out a strong case if they are to succeed in upholding the order of the Registrar.

An additional problem is this: the Revenue's enquiries into the facts of the cases lasted until about August 1982. During the next two years they were awaiting the decision of the House of Lords in *Furniss* v. *Dawson*[1] [1984] AC 474—which was in fact given in February 1984—and for some five months within the period which I have mentioned the Revenue were considering an offer made by the taxpayers—which was ultimately rejected. There was also subsequently a further offer relating to liability which was rejected.

Notices of determination were given by the Revenue in October 1986 so there is undoubtedly substance in the complaint of delay over an extensive period of time, which is a material consideration in the case.

The matters relevant to delay are, in my view, as follows:

(1) The delay was with reference to a period in which Parliament had not seen fit to impose any time-limits whatsoever. There is no relevant period of limitation laid down by Parliament in relation to that period, and in particular there is no relevant time-limit in relation to the issues raised by the Revenue in the notices of determination.

(2) This is not a matter in which the taxpayers are, at this point in time, exposed to the situation of facing any future trial in which material but stale facts have to be determined. The facts in this case have long since been determined by the Special Commissioners.

(3) The delay which occurred in the early 1980's would not be a matter of relevance in the appeal itself; that is to say, had the Revenue served the notices of appeal in time the delay in the 1980's would not have had any bearing on the determination of the issues which now are to be determined, namely the question of liability of the taxpayers if an appeal is already in existence on leave being granted upon the present application.

(4) The case, it seems to be, is one of public importance, involving an amount of some £3m of capital transfer tax. If the taxpayers' case is right, they have avoided, quite lawfully, £3m of tax by means of transactions which (I understand it to be accepted) were artificial.

It has been pointed out that the Revenue succeeded before the Special Commissioners, who were the judges of fact, and that the facts in relation to the application of the *Ramsay* principle (which is of importance in the determination of the present case) are matters of the greatest importance.

Further, I have been referred to comments made in the British Tax Review (No. 11 (1990)) and the Capital Taxes and Estate Planning Quarterly, which suggest that the issues in the case are of importance in Revenue law.

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[1] 55 TC 324.

A I appreciate that it is difficult upon an application of this kind to reach informed conclusions concerning the importance of a case involving matters of considerable complexity, as does the present case, but, in my view, the probability is it that is a case of public importance, both in relation to the amount involved, the manner in which the scheme was effected and the general implications of tax-planning law.

B

Therefore, looking at the whole matter and considering the facts in relation to the delay and the issues which arise in the case, although there was delay in the 1980's I do not consider that the delay is such as would cause me to conclude that this is not a proper case in which to grant an extension of time. As I have already indicated, the delay which occurred in 1989 by reason of the late service of the notices of appeal, is not such as would itself justify a refusal to grant an extension of time and also, for the reasons I have indicated, I do not feel able to conclude that the delay which occurred in the 1980's affects that view. In the circumstances, therefore, I conclude that this is a proper case in which time should be extended. I bear in mind, in relation to the matters which I have mentioned, the fact that the Registrar imposed stringent terms as to costs as a condition of his giving leave to appeal.

C

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I would dismiss the appeal and affirm the order of the Registrar.

Appeal dismissed, with no order as to costs.

E

The Crown's appeal against the High Court order was heard in the Court of Appeal (Nourse L.J., Staughton L.J. and Sir Christopher Slade) on 11, 12, 13 and 14 November 1991 when judgment was reserved. On 19 F February 1992 judgment was given against the Crown, with costs.

Robert Reid Q.C. and *Christopher McCall Q.C.* for the Crown.

Robert Walker Q.C. and *Mark Herbert* for the taxpayers.

G The following cases were cited in argument in addition to the cases referred to in the judgment:—*Duke of Westminster* v. *Commissioners of Inland Revenue* 19 TC 490; [1936] AC 1; *Muir or Williams* v. *Muir & Others* [1943] AC 468; *Royal Choral Society* v. *Commissioners of Inland Revenue* 25 TC 263; [1943] 2 All ER 101; *Mills* v. *Commissioners of Inland Revenue* 49 TC 367; [1975] AC 38; *Inland Revenue Commissioners* v. *Trustees of Sir John* H *Aird's Settlement* [1984] Ch 382; [1983] 3 All ER 481; *Bird & Others* v. *Commissioners of Inland Revenue* 61 TC 238; [1989] AC 300.

I **Nourse L.J.**:—In 1986 the Commissioners of Inland Revenue, by an application of the *Ramsay* principle (see *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*[1] [1982] AC 300 and later authorities), determined that capital transfer tax ("CTT") was payable by virtue of a series of transactions affecting the estate of the Tenth and last Earl Fitzwilliam, who died as

(1) 54 TC 101.

long ago as 1979. The determination, having been upheld by the Special Commissioners, was quashed by Vinelott J., against whose decision the Crown has appealed to this Court. The taxpayers now accept that the *Ramsay* principle is capable of applying to a scheme for the avoidance of CTT. Broadly stated, they argue that the individual transactions were not preordained and did not make up a single composite transaction; further or alternatively, that even as a composite transaction they did not produce the fiscal results for which the Crown contends. The Crown maintains an alternative claim, not based on the *Ramsay* principle, which was also rejected by the learned Judge.

Towards the end of his judgment [1990] STC 65, at page 120f, Vinelott J. said(1):

> "It is important that when the Revenue invoke the *Ramsay* principle they should make it clear what fiscal consequences they attach to what is said to be a single composite transaction and under which provision of the taxing statutes a charge to tax arises or a claim for exemption or relief fails. This is of particular importance in the field of capital transfer tax."

Later he said that he did not think that the Crown had been able to explain precisely how the individual transactions, treated as a single composite transaction, gave rise to a charge to CTT. With these observations, which go to the taxpayers' alternative argument, I wholly agree. Because the Judge had already concluded that the individual transactions could not properly be treated as a single composite transaction he did not have to explore the matter further. But because it has assumed a greater importance in the argument in this Court it must be mentioned at the outset.

The Judge's difficulties in understanding the basis of the fiscal results for which the Crown contends must have been caused in large part by shortcomings in the notices of determination. In the course of argument we invited counsel the Crown to submit an amended notice of determination precisely formulating its claims. An amended version was, accordingly, produced. It has, to my mind, clarified both the essentials of the Crown's claims and its inability to sustain them. The outcome of the appeals must be decided by reference to the amended version and none other.

The facts as admitted or found by the Commissioners are set out in their decision which, with the judgment of Vinelott J., is fully reported at [1990] STC 65(2). That enables me to state them more briefly.

The Tenth Earl did not have issue. By clauses 7 to 11 of his will dated 13 December 1977 he directed his trustees, who included his widow Joyce Elizabeth Mary, Countess Fitzwilliam and her daughter Elizabeth-Anne Marie Gabrielle (now Lady Hastings), to hold his net residuary estate upon trusts and subject to powers and provisions which, so far as material, can be summarised as follows. During a period which could not exceed 23 months after the Tenth Earl's death, the trustees had power to appoint capital or income in favour of a class of beneficiaries which included Lady Fitzwilliam, Lady Hastings and her son, Mr. Philip Naylor-Leyland. Subject to that power, the trustees had a further power during the same period to accumulate income, subject to which there was a discretionary trust to distribute

(1) Page 684F *ante*. (2) Pages 652B/685C *ante*.

income amongst the beneficiaries. The foregoing powers were expressed to be exercisable notwithstanding that the administration of the estate might be incomplete or that probate might not have been granted. At the end of the 23-month period and subject to any exercise of the power of appointment, the trustees were directed to pay the income to Lady Fitzwilliam during her life, with power for (other than Lady Fitzwilliam herself) to pay her capital at their discretion, and with an ultimate trust in favour of Lady Hastings absolutely contingently on her surviving the Tenth Earl by one month.

The Tenth Earl died on 23 September 1979 at the age of 75. Lady Fitzwilliam and Lady Hastings were then aged 81 and 45 respectively. The will was proved on 30 November 1979 by the executors named therein other than Lady Fitzwilliam, who did not, however, renounce her office as a trustee. The net value of the estate was certified at just under £11.6m, later corrected to just over £12.4m.

The seemingly eccentric form of the initial dispositions of the residuary estate was explained by Vinelott J. [1990] STC 65, at page 94d(1):

> "The purpose of interposing the discretionary trust before Lady Fitzwilliam's life interest was to take advantage of s 47(1A) of the Finance Act 1975 (introduced by s 121(1) of the Finance Act 1976) which provides that where within two years after a death and before any interest in possession comes into existence an event occurs on which ['CTT'] would otherwise be chargeable in respect of the estate of a deceased person tax is not to be charged on that event but that tax is to be chargeable as if the will or intestacy had provided for the estate to be held as it was after that event. Taken in conjunction with the surviving spouse exemption in Sch 6 to the Finance Act 1975 this had the practical effect that if the power of appointment were exercised in such a way as to give Lady Fitzwilliam an interest in possession in part of the estate that part would escape CTT both on the exercise of the power and on the Tenth Earl's death. Similarly, if Lady Fitzwilliam survived the 23-month period any part of the residuary estate in which she then took an interest in possession would escape duty both on the Tenth Earl's death and reference to the termination of the discretionary trust and the arising of her life interest."

Thus the interposition of the discretionary trust gave the trustees an opportunity of reviewing the position at the Tenth Earl's death. If Lady Fitzwilliam's health had then been good, no doubt they would have appointed her a life interest, at any rate in a substantial part of the residuary estate, thus postponing a charge to CTT on the appointed assets until her death. As it happened, the Tenth Earl's death was quite unexpected. Combined with the death of her only sister just two weeks later, it caused considerable distress to Lady Fitzwilliam. As the Commissioners found, [1990] STC 65, at page 70j(2):

> "Although normally in reasonable health Lady Fitzwilliam had been dealt a severe blow by the loss of both her husband and her sister in quick succession and the possibility of her early demise had to be faced."

The dilemma which confronted the trustees was described by Vinelott J., at page 95d(3):

(1) Page 653B/D *ante*. (2) Page 623H *ante*. (1) Page 654C/D *ante*.

"If the trustees did nothing and if she died within the 23-month period the whole of the residuary estate would attract CTT on the Tenth Earl's death at the full rate of 75 %. If an appointment was made giving Lady Fitzwilliam an interest in possession duty on the Tenth Earl's death would be saved but duty would be payable on her death, and so steep was the gradation of the charge at that time that the average rate of duty would not be significantly less than 75 %."

The trustees, therefore, instructed their solicitors, Currey & Co., to explore as a matter of some urgency all possible ways of avoiding the prospective liability to CTT.

In support of their primary argument, the taxpayers claim that between 11 October 1979 and 30 January 1980 no fewer than seven successive schemes for the avoidance of CTT were produced under the advice of Currey & Co. and the counsel whom they instructed. For reasons which will appear in due course, it is unnecessary to investigate the merits of that particular claim. It is enough to say that between those dates solicitors and counsel deliberately strove to produce and perfect a scheme which would have the desired effect. The Commissioners found (see below) that the details of the plans were intentionally not disclosed to the members of the family. They clearly thought that that was a significant feature of the case. Although the point was not investigated in argument, it has since occurred to me that the legal advisers may have been seeking to avoid the application of the "associated operations" provisions of the CT legislation; see s 44 of the Finance Act 1975. The Crown initially relied on those provisions, but abandoned that part of its case before the Commissioners.

Before considering the steps which were ultimately taken, I think it desirable to make a number of preliminary observations, all of them axiomatic and some of them trite. First, before the emergence of the *Ramsay* principle, there was nothing unlawful in the avoidance, as opposed to the evasion, of a fiscal imposition. Secondly, that liberty of action has not been curtailed by the *Ramsay* principle, whose only effect is to procure that a series of transactions which would otherwise have avoided the imposition will no longer do so. Thirdly, by the autumn and winter of 1979–80, no doubt because of the very much higher level of charge, schemes for the avoidance of CTT, formerly of estate duty, had for many years been promoted, often with the assistance of the Court under the Variation of Trusts Act 1958, far more commonly than schemes for the avoidance of any other fiscal imposition and with well-established practices for the interested parties to receive separate advice when necessary. Fourthly, the present scheme having been promoted before the emergence of the *Ramsay* principle, it was incumbent on the Commissioners to find the material against a background of the law as it was then understood and the practices which then prevailed.

At [1990] STC 65, at pages 71h to 72g, the Commissioners set out the five successive steps, all or some of which are said by the Crown to have attracted the application of the *Ramsay* principle. At pages 95j to 97a, they were set out by Vinelott J. at somewhat greater length. In essence they were these:

Step 1

By a deed of appointment dated 20 December 1979 the trustees appointed that a part of the residuary estate to the amount or value of £4m should thenceforth be held in trust as to both capital and income for Lady Fitzwilliam absolutely. The deed further provided that the trustees should as soon as conveniently practicable make an appropriation in order to give effect to the appointment.

Step 2

On 7 January 1980 Lady Fitzwilliam drew a cheque for £2m, post-dated to 9 January, in favour of Lady Hastings. The £2m was raised by the trustees on loan from Hambros Bank and appropriated towards Lady Fitzwilliam's £4m appointment. On the same day Lady Fitzwilliam signed a letter addressed to Lady Hastings, also post-dated to 9 January, in which she stated that the £2m was an outright gift and that she intended it to be net of CTT, which would be paid by her. The cheque and the letter were handed to Lady Hastings by Currey & Co. on 9 January, the cheque being subsequently cleared and its proceeds credited to a deposit account of hers.

Step 3

By a deed of appointment ("the £3.8m appointment") dated 14 January 1980 the trustees appointed that a part of the balance of the residuary estate to the amount or value of £3.8m should be held upon trust to pay the income to Lady Fitzwilliam until whichever was the earlier of 15 February 1980 and the date of her death; subject thereto as to one moiety ("the vested moiety") in trust for Lady Hastings absolutely and as to the other moiety ("the contingent moiety") in trust for Lady Hastings contingently on her being alive at the date of the determination of Lady Fitzwilliam's income interest; and subject thereto in trust for Mr. Philip Naylor-Leyland absolutely.

Step 4

By a deed of assignment ("the first assignment") dated 31 January 1980 and made between Lady Fitzwilliam of the one part and Lady Hastings of the other part Lady Fitzwilliam, by her attorney and in consideration of the sum of £2m then paid by Lady Hastings to Lady Fitzwilliam, assigned to Lady Hastings for her own use and benefit absolutely her interest in the income of the contingent moiety.

Step 5

By a settlement ("Lady Hastings' settlement") dated 5 February 1980 and made between Lady Hastings of the one part and two trustees of the other part Lady Hastings settled a sum of £1,000 on trust to pay the income thereof to Lady Fitzwilliam until her death or until 15 March 1980 (whichever should first occur) and subject thereto upon trust as to both capital and income for Lady Hastings absolutely. By a deed of assignment ("the second assignment") dated 7 February 1980 and made between Lady Hastings of the one part and the trustees of Lady Hastings' settlement of the other part Lady Hastings assigned to those trustees her absolute reversionary interest in the vested moiety to be held by them as an addition to the funds of Lady Hastings' settlement.

At [1990] STC 65, at pages 97c to 98e, Vinelott J. described the relevant provisions of the CTT legislation and the way in which the £3.8m appointment, the first assignment, Lady Hastings' settlement and the second assignment were designed to exploit what were perceived as anomalies or loopholes in these provisions. Since the Crown now accepts that each of the five steps had the effect in law which it purported to have and that none of them, if viewed in isolation, gave rise to a charge to CTT, it is unnecessary for the Judge's description, which I gladly adopt in its entirety, to be expanded or repeated. If the Judge's decision stands, CTT at a very high rate on assets worth £7.8m will have been avoided.

The *Ramsay* principle, as it now stands, is drawn from the decisions of the House of Lords in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*(1) [1982] AC 300, *Inland Revenue Commissioners* v. *Burmah Oil Co. Ltd.*(2) [1982] STC 30, *Furniss* v. *Dawson*(3) [1984] AC 474 and *Craven* v. *White*(4) [1989] AC 398, principally from the speeches of Lords Brightman and Oliver of Aylmerton in the third and fourth of those cases respectively. In *Furniss* v. *Dawson* [1984] AC 474, at page 527C/D, Lord Brightman expressed it thus(5):

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

Lord Oliver's speech in *Craven* v. *White*, to which I refer below, deals mainly with what is required in order that a series of transactions may be treated as a single composite transaction.

I turn to the taxpayers' primary argument, which is that the steps on which the Crown relies were not preordained and did not make up a single composite transaction. To the extent that a conclusion on such a matter depends, as it must ultimately depend, on inferences drawn from primary facts, there has been some debate as to whether the Commissioners' decision was one of fact or of law. It is suggested that there is a conflict between what was said by Lord Wilberforce in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners* [1982] AC 300, at page 324D and by Lord Brightman in *Furniss* v. *Dawson* [1984] AC 474, at pages 527G-582D. Vinelott J. has more than once expressed the view that there is an apparent contradiction between these observations; see [1990] STC 65, at page 100e, where the material passages are quoted. For my part, I do not think that there is. What Lord Wilberforce said was(6):

> "In such cases (which may vary in emphasis) the Commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions."

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(1) 54 TC 101. (2) 54 TC 200. (3) 55 TC 324. (4) 62 TC 1.
(5) 55 TC 324, at page 401D/E. (6) 54 TC 101, at page 185E/F.

A I think that Lord Wilberforce's reference to the facts found by the Commissioners must be taken to include inferences drawn from primary facts. Accordingly, there is no contradiction. If there was, I would certainly think that we were bound to apply Lord Brightman's test, which was propounded after a specific consideration of the point and with the apparent approval of all their Lordships. So the question for this Court is whether the B Commissioners' inference that there was a single composite transaction is. supportable on the basis of the primary facts found by them. If it is not, the taxpayers' primary argument will succeed and the Crown's appeals, so far as they are based on the *Ramsay* principle, must fail.

C It is important to acknowledge that when the Commissions decided the present case the decision of the House of Lords in *Craven* v. *White* had not been pronounced. In regard to the limitations of the *Ramsay* principle they were guided primarily by a passage in the judgment of Slade L.J. in that case [1989] AC 398, at page 420D-E, which has since been superseded by the speeches of the majority in the House of Lords. Thus, at page 479F, Lord D Keith of Kinkel said(1):

> "The most important feature of the principle is that the series of transactions is to be regarded as a whole. In ascertaining the true legal effect of the series it is relevant to take into account, if it be the case, that all the steps in it were contractually agreed in advance or had been determined on in advance by a guiding will which was in a position, for E all practical purposes, to secure that all of them were carried through to completion."

Lord Oliver's speech in *Craven* v. *White* has been fairly described by Mr. Walker Q.C., for the taxpayers, as being long and closely reasoned. Undoubtedly it deserves to be read in its entirety. But for present purposes F the most material passage is at pages 509F-G to 514H, from which I have selected two observations as being especially apt. At page 512D-E, Lord Oliver said(2):

> "There are, no doubt, many circumstances in which transactions are so closely linked as realistically to be regarded as a single indivisible G composite whole—a concept which may be summed up in homely terms by asking the question whether at the material time the whole is already 'cut and dried'."

At page 514G, he said that one of the essentials emerging from *Furniss* v. *Dawson* was that there should, at the time when the inserted step was H entered into, be "no practical likelihood" that the pre-planned events would not take place in the order preordained. At page 533D, Lord Jauncey of Tullichettle suggested "no real likelihood" as being the appropriate test.

I shall refer to the amended notice of determination more fully when dealing with the taxpayers' alternative argument. At this stage it is enough to I say that the Crown contends for the application of the *Ramsay* principle in three different ways:

> (1) by treating steps 1 to 5, or 2 to 5, it matters not which (see below), as a single composite transaction; or

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(1) 62 TC 1, at page 170H/I. (2) *Ibid*, at page 210F/G.

(2) by treating steps 3 and 5 as a single composite transaction; or

(3) by treating steps 2, 3 and 4 as a single composite transaction.

It will be observed that each of those suggested transactions includes a step in which Lady Hastings participated on 31 January 1980 or some later date. Moreover, each of them includes step 3. Accordingly, the essential question arising under the taxpayers' primary argument is whether, when step 3 was taken on 14 January, it was preordained that Lady Hastings would participate in steps 4 and 5. If it was not, none of the composite transactions for which the Crown contends can properly be treated as such.

Before considering the findings of the Special Commissioners, I must introduce the legal advisers who acted in the transactions. For many years prior to the Tenth Earl's death the partner in Currey & Co. who had looked after his family affairs was Mr. D. G. Bosanquet, assisted, since about 1970, by his partner Mr. N. R. D. Powell. By the time of the Tenth Earl's death Mr. Powell had taken over responsibility for his affairs generally. In particular, he was solely responsible for all tax-planning aspects. However, Mr. Bosanquet continued to look after Lady Fitzwilliam personally. Mr. Powell originally instructed both leading and junior counsel, but from 18 October 1979 onwards advice was given by junior counsel, Mr. Robert Walker, alone. On or about 14 January 1980 Mr. N. W. Smith, another partner in Currey & Co., agreed to advise Lady Hastings. On 18 January Mr. Smith instructed Mr. Mark Herbert of counsel to advise Lady Hastings.

The Commissioners' conclusion "on the facts" was that steps 1 to 5 were the essential steps taken to implement the CTT avoidance scheme and that they satisfied the conditions of the *Ramsay* principle; see [1990] STC 65, at page 90b. In the process of arriving at that conclusion they made a number of important findings. However it is viewed, the conclusion can only be supported if it was open to them to infer that the participation of both Lady Fitzwilliam and Lady Hastings was, at the material time, in the words of Lord Oliver "cut and dried" or, that they were, in the words of Vinelott J., "mere actors in a play reading a prepared script"; see page 110g.

The Commissioners found that Mr. Powell intentionally did not at any stage disclose the details of any plan, developed or otherwise, to any member of the family and that the non-disclosure of the circumstances in which each of the five steps was taken was an essential tactic adopted in an endeavour to secure the successful implementation of the overall tax-saving plan. At page 77a, they continued(1):

> "There was no difficulty in this respect so far as Lady Fitzwilliam was concerned because she had such complete confidence in Currey & Co, whom she regarded as very erudite and whose advice she would follow implicitly, that she gave them carte blanche to make all necessary tax arrangements. She did not wish to be concerned with the details. As to Lady Hastings she was content that Currey & Co. should proceed with the tax saving arrangements without reference to her where her participation was not required. Like her mother she attended on them to execute documents and receive advice on transactions to which she was a necessary party. Unlike her mother she had no difficulty in understanding such advice as she was from time to time given and by and

(1) Page 631C/E *ante*.

large she readily accepted it. On one matter, however the prospect of the 1980 Budget providing substantial CTT relief, she took an active part in a discussion with Mr Smith on 22 January 1980 and expressed some views of her own."

In regard to the role played by Lady Fitzwilliam, the Commissioners expressed their conclusion, at page 88f-g(1):

> "We find that so far as Lady Fitzwilliam is concerned each of the steps taken was part of a preordained series of transactions the essential features of which, ie the five steps, had all been determined, by the time when the first transaction (the £4m appointment) was effected, by Lady Fitzwilliam through her solicitors and her attorneys to whom she had delegated all necessary and unfettered authority. Their knowledge was her knowledge and there was, therefore, we find, a sufficient degree of preordainment to comply with the conditions of the *Ramsay* principle and to satisfy the test as expounded by Slade LJ in *Craven*.
>
> The facts so far as Lady Hastings is concerned are not, as we have already indicated, so very different."

As to that last sentence, my own opinion is that the facts so far as Lady Hastings is concerned are of an entirely different order. The Commissioners' findings demonstrate that she had both an understanding and a will of her own. In my judgment, the inference that her participation was, on 14 January, cut and dried or that she was a mere actor in a play reading a prepared script is insupportable. For this reason, and because it is enough for the taxpayers' purposes that the inference should be rejected in the case of Lady Hastings alone, I do not dwell on its supportability in regard to Lady Fitzwilliam. Admittedly the facts in her case were stronger. I do not say that they were strong enough. I do not express a view one way or the other.

I preface my consideration of the role played by Lady Hastings by pointing out that Vinelott J. unequivocally rejected the notion that step 1 was part of a preordained series of transactions; see [1990] STC 65, at pages 108h to 110. I entirely agree and would adopt that part of the Judge's reasoning as my own. Although the Crown has continued to rely on step 1, the taxpayers accept that it is enough to establish the main composite transaction contended for if steps 2 to 5 were all preordained. On that footing the Crown argues that there was a preordained scheme as from 3 January 1980 when Mr. Walker dictated the necessary steps and a time-table for them over the telephone to Mr. Powell; see page 78c. At that stage it was known that Lady Fitzwilliam was leaving for a five weeks holiday in Kenya on 15 January. At page 79f, the Commissioners continued(2):

> "Mr Walker advised that one of the advantages of Lady Fitzwilliam's absence abroad was that it would help in demonstrating that Lady Fitzwilliam had not been advised of [Lady Hastings' settlement]. In this connection he suggested that serious consideration be given to Lady Hastings being advised on this aspect of the matter by another partner in Currey & Co. and possibly by separate counsel, but he thought this question could be taken up later."

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(1) Page 645F/H *ante*. (2) Page 634D/E *ante*.

Accepting, first, that the steps and the time-table dictated by Mr. Walker on 3 January were in substance steps 2 to 5 as they were later taken and, secondly, that the participation in the scheme of Lady Fitzwilliam was thenceforth cut and dried, I am nevertheless unable to see how it can be said to have been "preordained" in the sense that that concept has been understood and applied in any of the previous decisions, or indeed in any other sense. In the very breath in which he had dictated the steps and the time-table counsel had suggested that serious consideration be given to Lady Hastings being advised by another partner in Currey & Co. and possibly by separate counsel. Mr. Powell did not demur to that suggestion, which was followed within the fortnight. If Mr. Powell's had been the guiding will which was in a position, for all practical purposes, to secure that the scheme was carried through to completion, it thenceforth ceased to be so. Now Lady Hastings, an individual with an understanding and a will of her own, would receive advice from others, to whom all the details of the scheme would have to be disclosed.

What could be the purpose of her receiving such advice? In the absence of some finding to the contrary, and none was made, it could only be to ensure that it was in her best interests to participate in the scheme. At that juncture the tax-free gift of £2m was a bird in the hand whose projected release deserved careful consideration on her part. Different proposals might have been put forward on her side. In the absence of some finding to the contrary, and none was made, the suggestion that Lady Hastings should receive separate advice could only have been made in a recognition that it might not be in her best interests to participate and, moreover, that she might decide not to do so, at any rate in the scheme which was then proposed. The Commissioners did not find that Mr, Walker's suggestion was for the enactment of some charade played out to give the appearance of a loop-hole of escape which was never intended to be a reality. Against the background of the law as it was then understood and the practices which then prevailed they could only have inferred that inherent in the suggestion was a recognition of a real possibility that the scheme proposed would not go through. So none of the tests for preordainment expressed in the speeches of the majority in *Craven* v. *White* was satisfied. There was no "guiding will". Lady Hastings' participation was not "cut and dried". It could not have been said that there was no "practical" or "real" likelihood that the scheme would not be completed.

For these reasons I am of the opinion that it was not open to the Commissioners to infer that any scheme was preordained on 3 January. Furthermore, so far as Lady Hastings was concerned, there was no material change of circumstances between then and 14 January, when step 3 was taken. On 9 January she called on Mr. Powell and signed the Hambros' loan forms. She was also handed Lady Fitzwilliam's cheque for £2m and her letter; see under step 2 above. I take up the Commissioners' findings, at page 80j(1):

> "Mr Powell then told Lady Hastings that having discussed the matter with counsel it was proposed that before Lady Fitzwilliam went on holiday a further appointment of £3.8m be made to her mother by the trustees. He recommended the appointment on the basis that it would be consistent with the Inland Revenue Account lodged with the application

(1) Page 636A/F *ante*.

for probate. The terms of the appointment were explained as being such as kept options open so far as her mother was concerned. No reasons were given to Lady Hastings as to why one half of her interest was contingent and the other half vested. Lady Hastings thereon executed the deed of appointment as she would not be available to attend the trustees' meeting arranged for the following week. She was not aware of the progress made with regard to CTT planning by Currey & Co. nor did she inquire.

[The other two trustees] called on Mr Powell on 14 January 1980 and signed the £3.8m appointment.

At this stage Mr Powell, following Mr Walker's advice, approached Mr Smith who agreed to consider the whole matter and to advise Lady Hastings on the steps that remained to be taken. Mr Smith had not been involved in any of the earlier discussions nor had he ever met Lady Hastings. On 15 January 1980 Mr Powell prepared a note for Mr Smith briefly summarising the present position and requested Mr Smith to seek counsel's advice from someone other than Mr Walker who had been advising the trustees. The summary did not refer to the tax avoidance schemes which Mr Powell had in mind for Lady Hastings. Mr Smith, however, discussed the note with Mr Powell and it could, he said, have been in the course of that discussion that he was made aware of the schemes or the schemes may have been obvious to him. One way or another Mr Smith was aware of them at an early stage."

There is nothing in these findings to show that there was any greater degree of preordainment on 14 January than there had been on 3 January. Indeed, the finding that it was at the stage when the other two trustees executed the £3.8m appointment (i.e. when step 3 was completed) that Mr. Powell approached Mr. Smith clearly demonstrates that, so far as Lady Hastings was concerned, there had been no material change of circumstances since 3 January.

The Commissioners expressed their conclusion in regard to the role played by Lady Hastings up to 14 January, at page 89e([1]):

"We find that all the steps taken up to and including the execution of the £3.8m appointment were steps taken in pursuance of the CTT scheme for which instructions had been given by or on behalf of Lady Hastings and her co-trustees with her knowledge and that in the circumstances which we have recited there must be attributed to her a full understanding of the scheme and the purpose of each step within it as and when it was taken. The intention of Mr Powell and other members of his firm to implement the scheme and the state of their knowledge at each step must, we find, be attributed to Lady Hastings from which it follows, and we so find, that the conditions for the application of the *Ramsay* principle are satisfied, so far as Lady Hastings is concerned, during this period of time."

For the reasons I have given, this conclusion of the Commissioners is insupportable on the facts found by them. In particular, it ignores the fact that the "intention" of Mr. Powell and other members of his firm to imple-

([1]) Page 646G/H *ante*.

ment the scheme must be taken to have been qualified by the suggestion, apparently acted on by 14 January, that Lady Hastings should receive separate advice and by a consequential recognition of a real possibility that the scheme proposed would not go through. Such a qualification is fatal to the application of the *Ramsay* principle. Accordingly, on 14 January, when step 3 was taken, it was not preordained that Lady Hastings would participate in steps 4 and 5.

On this view of the matter, it is unnecessary to look further in order to see that the taxpayers' primary argument succeeds and that the Crown's appeals, so far as they are based on the *Ramsay* principle, must fail. Moreover, there is nothing in the Commissioners' findings as to later events which could have supported the inference, so far as Lady Hastings was concerned, that the scheme was preordained either on 14 January or on any other material date before 31 January, when step 4 was taken. On this part of the case I am broadly content to adopt the reasoning of Vinelott J. At page 113j, he said that it was the role of Lady Hastings and not that of Lady Fitzwilliam that was of crucial importance. Between that point in his judgment and page 117e the learned Judge conducted a thorough review of the Commissioners' findings as to the parts played by Lady Hastings, Mr. Smith and Mr. Herbert and explained why their conclusion could not be supported.

I would like to emphasise my agreement with Vinelott J. in two particular respects. First, between pages 114g and 116c the Judge gave careful consideration to the very important meeting which took place between Lady Hastings and Mr. Smith on 22 January. At 116c, having cited the Commissioners' conclusion as to the part played by Lady Hastings (see pages 89h to 90b), he continued(1):

> "In my judgment the commissioners' findings and their conclusion that everything that happened at the meeting on 22 January was 'part of an indivisible process in a pre-ordained series of transactions' is simply inconsistent with the evidence and indeed with the earlier findings which I have cited. It is one which they would not have reached if they had properly understood the expression 'a preordained series of transactions'."

I agree. Here it is important to repeat that the Commissioners did not have their Lordships' speeches in *Craven* v. *White* to guide them. If they had, it would have been very difficult for them to infer that the participation of Lady Hastings was, at any material time, preordained.

Secondly, as will be apparent, I agree with Vinelott J. that the Commissioners misunderstood the role of counsel in general and of Mr. Herbert in particular; see pages 116f-117b. Whatever may be said about Lady Fitzwilliam, it is simply unrealistic to suppose that Mr. Smith, still less Mr. Herbert, were puppets dancing to the will of Mr. Powell, Mr. Bosanquet and Mr. Walker. Certainly it is a supposition which could not fairly have been entertained without specific cross-examination of the professional people whose interest it was to refute it. Even if it had been appropriate for the Commissioners to look at the matter through post-*Ramsay* spectacles, the supposition would, without such cross-examination, have been unrealistic.

(1) Page 679E/F *ante*.

A I now come to the taxpayers' alternative argument, which is that even as single composite transactions none of them produced the fiscal results for which the Crown contends.

At this point it is necessary to refer more fully to the amended version of the notice of determination. In regard to the main scheme and disregarding B step 1, para 2 of the notice alleges that by each of steps 2 to 5:

> " ... the Executors the Mother and the Daughter effected a composite transaction whereby in the end result out of the estate of the Testator the Daughter received the sum of £3.8 million ... [T]here were introduced into such composite transaction the operations aforesaid C which were contrived for no purpose save an anticipated avoidance of the capital transfer tax which would have been payable in respect of the sum so taken by the Daughter had the Executors effected the said transaction without the undertaking of such operations. In the premises capital transfer tax is payable either (i) on the footing that such end result should be deemed to have occurred on the 14th January 1980 and that D accordingly on that date a payment of £3.8 million was made out of the estate of the Testator to the Daughter which sum is taxable on the death of the Testator accordingly under the joint effect of section 47(1A) and section 22 of the Finance Act 1975 such sum being not exempt from tax under Schedule 6 paragraph 1 of the said Act because it was not property which became comprised in the estate of the Mother (the spouse of E the Testator) or (ii) on the footing that such end result should be deemed to have occurred as to the Contingent Moiety on the 15th February 1980 and as to the Vested Moiety on the 15th March 1980 and that accordingly on each of those dates a payment of £1.9 million was made out of the estate of the Testator which sum is taxable on his death as set out in subparagraph (i) above or (iii) on the footing that in the F ascertainment of such end result the interest conferred on the Mother by the Appointment is not to be disregarded but that (a) so far as concerns the Contingent Moiety the payments made by the Mother to the Daughter and by the Daughter to the Mother are to be disregarded and accordingly tax is chargeable on the termination of the interest of the Mother therein on the 31st January 1980 under paragraph 4(2) of G Schedule 5 to the Finance Act 1975 on the footing that there was no giving of 'consideration' within the meaning of that word for the purposes of the exemption conferred by paragraph 4(4) of such Schedule and (b) so far as concerns the Vested Moiety on the footing that notwithstanding the assignment of the reversionary interest therein by the Daughter H to the trustees of the Daughter's Settlement tax is chargeable on the termination of the interest of the Mother therein on the 15th March 1980 under paragraph 4(2) of such Schedule because the Daughter was not a 'settlor' within the meaning of that word for the purposes of the exemption conferred by paragraph 4(5) of such Schedule."

I Paragraph 3 of the notice then alleges in the alternative that composite transactions were effected as to the vested moiety by the joint effect of steps 3 and 5 and as to the contingent moiety by the joint effect of steps 2, 3 and 4 and continues:

> " ... and as to the Vested Moiety tax is accordingly payable either in accordance with paragraph 2(i) or 2(ii) or 2(iii)(b) above and as to the

Contingent Moiety tax is accordingly payable either in accordance with paragraph 2(i) or 2(ii) or 2(iii)(a) above." A

In *Craven* v. *White* each of their Lordships said that the *Ramsay* principle is one of statutory construction. That is without doubt true in the sense that once the single composite transaction has been identified the question is whether it is caught by the taxing statute on which the Crown relies. B

However, it does not always or even usually involve a question of statutory construction in the sense that the meaning of the statute is in doubt. Usually the question is whether a statute whose meaning is clear applies to the single composite transaction. The principle might equally be described as one of statutory application. C

Do the provisions of the CTT legislation referred to in the amended notice of determination apply to any of the suggested composite transactions so as to raise the charges to tax for which the Crown contends? For the reasons given in the judgment to be delivered by Sir Christopher Slade, with which I am in full agreement, I too would answer that question in the negative. Treating the matter broadly, and at the risk of some repetition, I add some observations of my own. D

The second requirement for the application of the *Ramsay* principle, as stated by Lord Brightman in *Furniss* v. *Dawson*, is that there must be steps inserted into the series of transactions which have no business purpose (here no trust purpose) apart from the avoidance of a liability to tax. So the question is whether steps 2 to 5 can be said to have had no trust purpose apart from the avoidance of a liability to CTT. The Crown's inability to establish that there was no such purpose is conclusively demonstrated by a consideration of the £3.8m appointment (step 3), the transaction which is common to all its *Ramsay* claims. By that appointment Lady Fitzwilliam was given the income of the appointed assets for a period which could not last beyond a month and a day. It is true that it was made partly, let it be accepted in very large part, for the purpose of avoiding a liability to CTT. But it cannot be said that it was made for no other purpose. Part of its purpose, even if a very small one, must have been to give Lady Fitzwilliam the income of the appointed assets over a brief, but more than fleeting, period. The genuineness of that purpose is attested by her subsequent receipt of a duly apportioned part of the trust income. E F G

There is an allied and equally formidable objection to the application of the *Ramsay* principle. Once the two requirements for its application are satisfied, the inserted steps must be disregarded for fiscal purposes. It must be implicit in that that the inserted steps are, as a practical matter, capable of being so disregarded, as indeed they were in all the previous cases to which the principle has been held to apply, including *Furniss* v. *Dawson*[1] where, for a fleeting period, Greenjacket took a beneficial interest in the shares. A consideration of the £3.8m appointment again demonstrates that here the case is different. That appointment gave Lady Fitzwilliam an interest in possession in the appointed assets, thus avoiding a charge to CTT on those assets on the death of the Tenth Earl. But at one and the same time it exposed them to a charge on the death of Lady Fitzwilliam, should she die before 15 February. As the Commissioners' findings show, that was a real possibility which had had to be faced. If she had died before that date, the H I

(1) 55 TC 324.

A Crown would have been entitled, indeed bound, to raise that charge. So it is impossible to say that the £3.8m appointment was, as a practical matter, capable of being disregarded for CTT purposes.

Having rejected the Crown's *Ramsay* claims, I refer finally to the alternative claim, which relates only to the vested moiety. This claim is formu-
B lated in the notice of determination as follows(1):

> "3.1 In the alternative if which is not admitted there was no such single composite transaction such that the estate of the Testator falls to be taxed as aforesaid capital transfer tax is chargeable on the Vested Moiety ... as follows:
>
> C
>
> a. as to the Vested Moiety on the footing that a beneficial interest in the possession of the Mother determined ... on 15 March 1980 in such circumstances that a charge to tax arose under Schedule 5 paragraph 4 of the Finance Act 1975 ...
>
> 3.2 As to the Vested Moiety no exemption from such charge is
> D available under paragraph 4(5) of the said Schedule 5 in so far as the Daughter was not the settlor of the settlement whereunder the beneficial interest of the Mother subsisted."

Under the combined effect of the Tenth Earl's will, the £3.8m appointment, Lady Hastings' settlement and the second assignment and in the events
E which happened, the vested moiety was held on trust to pay the income thereof accruing between 14 January and 15 March 1980 to Lady Fitzwilliam and subject thereto in trust for Lady Hastings absolutely. In that state of affairs there was a *prima facie* charge to CTT on the vested moiety under para 4(2) of Sch 5 to the Finance Act 1975 when Lady Fitzwilliam's interest in possession in it came to an end on 15 March. However, the taxpayers contend that there was
F then a reverter of the vested moiety to the settlor, Lady Hastings, within para 4(5) of that Schedule which, so far as material, provides that:

> "If the interest comes to an end during the settlor's life and on the same occasion the property in which the interest subsisted reverts to the settlor, tax shall not be chargeable under this paragraph."
>
> G

The taxpayers accept that that exemption only applies if Lady Hastings was, at the date of the reverter, the sole settlor.

The Crown contends that she was not.

H By para 1(6) of Sch 5 to the 1975 Act:

> " 'Settlor', in relation to a settlement, includes any person by whom the settlement was made directly or indirectly, and in particular (but without prejudice to the generality of the preceding words) includes any person who has provided funds directly or indirectly for the purpose of
> I or in connection with the settlement or has made with any other person a reciprocal arrangement for that other person to make a settlement."

In regard to that definition Mr. Reid Q.C., for the Crown, submitted that because the vested moiety had formed part of the Tenth Earl's estate

(1) Page 650F/I *ante*.

and because the £3.8m appointment was made for the purpose of enabling it to be settled on the trusts of Lady Hastings' settlement the Tenth Earl was a person who had " ... provided funds ... indirectly for the purpose of or in connection with" Lady Hastings' settlement. As to that argument Vinelott J. said this, at page 120a(1):

> "The insuperable difficulty which faces the Crown's contentions is that however widely the words 'in connection with' are construed (and they are undoubtedly capable in an appropriate context of bearing a very wide meaning) in the context of para 1(6) there must be some real connection linking the original provider of a fund and the settlement before the former person can be said to have been the settlor—some connection, that is, beyond the mere fact that historically the settled fund originated with him. Otherwise, in a case where, for instance, 'A' gave a sum of money to his son which his son then settled entirely of his own volition, 'A' would fall to be treated as 'a settlor' or 'the settlor' of the fund for the purposes of Sch 5—a conclusion which seems to me self-evidently absurd."

I agree. The Judge went on to say that on the evidence before the Commissioners Lady Hastings' settlement was made of her own volition, so that the necessary connecting link with the Tenth Earl was not there. For the reasons which I have already expressed in regard to the Crown's *Ramsay* claims, I also agree with that part of the Judge's reasoning. So the validity of the Crown's alternative claim must be tested by reference to the position on 15 March 1980. At that date the vested moiety was held, as it had been held since the trusts of the £3.8m appointment came to an end on 15 February, solely on the trusts of Lady Hastings' settlement. It follows that it did then revert to the settlor within para 4(5), so that the exemption from tax applied.

For these reasons, I would also reject the Crown's alternative claim. I would affirm the decision of Vinelott J. in its entirety and dismiss the Crown's appeals accordingly.

Staughton L.J.:—There are three points which, in my opinion, can be decided without undue difficulty, before one comes to the main issues in these appeals. First, I do not regard step 1 as an essential feature of the pre-ordained plan alleged by the Revenue. By that step the sum of £4m was, on 20 December 1979, appointed to Lady Fitzwilliam outright. Pursuant to the appointment she later received £2m in cash. Later still she purchased the Maplebeck property from the executors for £1.26m; and other assets were appropriated to her in due course in satisfaction of the balance of £2m still due to her under the appointment.

Thus Lady Fitzwilliam at or before the start of any scheme or plan was to receive £4m in money or money's worth, and she did receive it. There would have been no need for this transaction or any part of it, if she had already owned £2m which she could transfer to her daughter and later receive back. As it happened she did not have that amount; hence an outright transfer to her of £2m or more by the estate was necessary. But it was not, in my opinion, an essential part of the preordained plan which the Revenue seek to rely upon.

(1) [1990] STC 65; pages 683I/684B *ante*.

Secondly, I do not consider that minor changes in a preordained plan (if there is one), which occur in the course of its operation, can avoid the *Ramsay* doctrine. In *Craven* v. *White* [1989] AC 398, at page 524, Lord Goff of Chieveley said that(1)

> " ... for the whole transaction to be planned it is not necessary that the details of the second step should be settled at the time when the first step was taken, nor that they should exactly correspond with those planned in advance."

Although this was said in a dissenting speech, I think the difference of view on that point was one of degree. The majority agreed with the proposition, provided that it was in truth only detail which remained to be decided: see Lord Oliver of Aylmerton, at page 517, and Lord Jauncey of Tullichettle, at page 532.

Clearly there may be room for argument as to what is mere detail, such that it can be changed in the course of the execution of a preordained plan without affecting the application of the *Ramsay* doctrine. But in this case it cannot, in my judgment, be said that there was any change of significance after 3 January 1980, when a revised plan incorporating steps 2 to 5 was agreed between Mr. Powell and Mr. Walker. In particular, I do not regard the changes recommended by Mr. Herbert, and subsequently carried into effect, as of any importance. They related only to the order in which some documents were executed.

Thirdly, I consider that there can be a preordained plan within the *Ramsay* doctrine even if it is not formed by, or known to, the taxpayer herself, but only by her solicitor or accountant. It may, for all I know, be less common than it once was for wealthy people to entrust all their substance to what used to be called a man of affairs, and even for elderly widows to do so. But I would have no doubt that, if a taxpayer tells her solicitor or accountant to devise a plan for saving tax, on the understanding that she will do whatever he advises, there can arise a relevant preordained plan in the mind of the solicitor or accountant. Indeed Mr. Walker accepted in argument that, if a taxpayer said to her adviser that she would sign every document without question and without comprehension, the *Ramsay* principle applied. Mr. Walker later observed that the Revenue appeared no longer to rely on the cases of *Crossland* v. *Hawkins*(2) [1961] Ch 537 and *In re Montagu's Settlement Trusts, Duke of Westminster* v. *National Westminster Bank Ltd.* [1987] Ch 264 in support of this doctrine. I do not think it was necessary for the Revenue to do so.

I now turn to the two major questions in these appeals, which are (1) whether on the facts there was the appropriate degree of certainty that the preordained plan would be carried out, and (2) if so, whether the *Ramsay* doctrine leads to the conclusion that tax is payable.

(1) *The degree of certainty on the facts*

The relevant date for this enquiry appears to me to be 9 January 1980, which was when step 2 took place: Mr. Powell, on behalf of Lady Fitzwilliam, handed her cheque for £2m to Lady Hastings, together with her

(1) 62 TC 1, at page 212F. (2) 39 TC 493.

letter saying that it was an outright gift and net of capital transfer tax. At that stage Mr. Powell had in mind, and intended to bring about if he could, the whole of steps 2 to 5. That has not been disputed. Indeed he would otherwise have been rash to advise Lady Fitzwilliam to make a net gift of £2m when she did not have, and had no certainty of receiving, the money with which to pay the capital transfer tax of £5m within six months.

Lady Fitzwilliam and Lady Hastings, on the other hand, did not know and were not told about the remaining steps in the scheme: they had been told only of the £3.8m appointment: and Lady Fitzwilliam as a trustee had executed it.

The degree of certainty required for the *Ramsay* doctrine to operate has been expressed in various ways. In *Craven's* case (at page 514) Lord Oliver of Aylmerton said that there must have been(1)

> " ... no practical likelihood that the pre-planned events would not take place in the order ordained ... "

He also used the expression "cut and dried" (page 512), but did not require "absolute certainty" (page 517). Lord Keith of Kinkel considered that there had to be(2)

> " ... a guiding will which was in a position, for all practical purposes, to secure that all of them [the steps] were carried through to completion." (page 479).

Lord Jauncey of Tullichettle considered that there must be "no real likelihood" that the subsequent steps would not be completed (page 533).

Judgments, even in the House of Lords, are not to be construed as statutes; and the temptation to take that course is reduced if, as here, slightly different language is used from time to time. One then has a comprehensive notion as to how judges of fact are to direct themselves.

The Special Commissioners found, as far as concerned Lady Fitzwilliam, that " ... she had delegated all necessary and unfettered authority" to her solicitors and her attorneys. That finding was made in the context of step 1, which occurred on 20 December 1979. Whether or not it could be questioned at that date, I am confident that it must stand at 9 January 1980. By then she knew and approved that her solicitors were devising a way to save tax; she was due to leave the country for five weeks on 15 January; and she had executed a general power of attorney in favour of her solicitor and her accountant. There was ample evidence on which the Commissioners could find that Lady Fitzwilliam would not prove an obstacle to the completion of the remaining steps.

As to Lady Hastings, the Commissioners found that " ... there was no practical possibility of her refusing to acquiesce" in those steps; that the approval of Mr. Herbert "could not seriously be in doubt"; and that there was " ... no realistic prospect of Lady Hastings calling a halt" in the hope of more favourable fiscal legislation. How could Lady Hastings sensibly veto the rest of the transaction, when to do so would (i) leave her mother with a capital transfer tax bill for £5m which her mother could not afford to meet,

(1) 62 TC 1, at page 203H. (2) *Ibid*, at page 170I.

A and (ii) either deprive herself of 13.8m in a few weeks' time, or else render her liable to capital transfer tax on that sum? The *Ramsay* doctrine, it must be remembered, had not then been enunciated. It is true that the steps taken thus far might have been unscrambled; but the Commissioners found that " ... nobody was seriously considering" that.

B It will be apparent that I see considerable force in the argument that the Commissioners found a preordained scheme in steps 2 to 5 with the relevant degree of certainty that it would be carried out. However, Nourse L.J. and Sir Christopher Slade have far greater experience than I do in matters of taxation; and they take the view that there was no such finding, or that it was one which the Commissioners could not properly make. Vinelott J. also has C great experience, and he too reached that conclusion.

In those circumstances I am not prepared to hold affirmatively that we are bound by the Commissioners' findings, and, accordingly, that there was a preordained scheme. Even if there was, I do not consider that the fiscal consequences which the Revenue contend for are justified, as I now seek to D show.

(2) *The Ramsay doctrine*

All five members of the House of Lords in the *Craven* case recognised that this doctrine is a principle of statutory construction. See, for example, E Lord Jauncey ([1989] AC 358, at page 529)[1]:

> "Both Lord Fraser and Lord Wilberforce in the passage which he cites and to which I have already made reference used words such as 'a loss such as the legislation is dealing with.' In so doing they were implicitly recognising that what has become generally known as the *Ramsay* principle is a principle of construction to be applied in determining what F is meant by such words as 'loss' or 'disposal'."

So the first task of the Court, when faced with any novel application of the doctrine, must be to ascertain what statutory provision is to be construed.

G Vinelott J. (at page 120 of the report in Simon's Tax Cases) observed that the Revenue had been unable to explain precisely how the single composite transaction gave rise to a charge to capital transfer tax. In this Court too I felt difficulty in determining what provision of which statute we are being asked to construe. It is not, I think, s 47(1A) of the Finance Act 1975, H inserted by s 121(l) of the Finance Act 1976. That is no more than a necessary preliminary to the claim which the Revenue make: as Vinelott J. said (at page 94), its effect is that where an event occurs on which capital transfer tax would otherwise be chargeable on the estate of a deceased person, tax is not to be chargeable on that event if the conditions mentioned in the subsection are satisfied, but is to be chargeable as if the will had provided for the estate I to be held as it was after that event.

In my opinion, it is primarily the surviving spouse exemption in Sch 6 of the Finance Act 1975 which the Revenue here seek to construe by reference to the *Ramsay* doctrine. That is in Par. 1 para 1(1):

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(1) 62 TC 1, at page 217E/F.

" ... a transfer of value is an exempt transfer to the extent that the value of the estate of the transferor's spouse is increased."

The appropriation from the estate of £4m to Lady Fitzwilliam was, of course, exempted by that provision. Nobody disputes that. But the main contention of the Revenue amounts, I think, to this: there never was a transfer of the subsequent £3.8m to Lady Fitzwilliam, even for a limited interest, because the composite transaction ensured that her interest lasted, and was designed to last, only for a few days or weeks.

One only has to state the proposition in that way to appreciate how difficult it is to substantiate. Lady Fitzwilliam did in fact receive an interest in the £3.8m, which was originally appointed to her until 15 February 1980 or her earlier death. Even when the rest of the scheme was implemented, she in fact enjoyed an interest in half of the total amount until 15 March 1980, and in the other-half (or "moiety" as the draftsman called it) until 31 January 1980. Income was duly credited to her in the accounts for those periods, and in the absence of evidence to the contrary I would assume that it was paid—and that income tax was charged upon it.

The amount of income was of course relatively trivial. So, no doubt, was the true value of the interest which Lady Fitzwilliam received. But the capital transfer tax does not—subject to an exception which I will mention—have anything so sophisticated as a means of arriving at the value of an interest that is short, or at any rate terminable on the death of a lady aged 81. Schedule 5 para 3(1) of the 1975 Act provides that

"A person beneficially entitled to an interest in possession in settled property shall be treated as beneficially entitled to the property in which the interest subsists."

I do not doubt that the Revenue would have relied on that paragraph if Lady Fitzwilliam had met with some misfortune in Kenya between 14 and 31 January 1980, and charged capital transfer tax on the whole of £3.8m at the rate appropriate to her estate.

In my judgment, the *Ramsay* doctrine, even if there was a preordained scheme comprising steps 2 to 5, cannot have the result that Lady Fitzwilliam's interest is to be ignored as a matter of construction of Sch 6 para 1(1). It was a real interest which had real consequences, not an intermediate step which can be discharged.

(3) *The mini-Ramsay: steps 2, 3 and 4*

I must go on to consider whether any lesser combination of steps 2 to 5 can operate under the *Ramsay* doctrine to render tax payable.

The first combination which the Revenue rely on is steps 2, 3 and 4. By those steps Lady Fitzwilliam gave £2m to Lady Hastings, the trustees appointed 11.9m to Lady Fitzwilliam until 15 February or her death, with a remainder to Lady Hastings if she was then living and otherwise to Mr. Naylor-Leyland, and Lady Hastings bought Lady Fitzwilliam's interest for £2m.

The fiscal effect of those steps, considered separately, was that no capital transfer tax was payable on Lady Fitzwilliam's gift of £2m, because it was returned to her; and no capital transfer tax was payable on her transfer of

her limited interest in £1.9m, because she received consideration in the sum of £2m. It is at once apparent that the £2m payment by Lady Hastings does duty twice over.

The second of those consequences is said to flow from para 4(4) of Sch 5 in the Finance Act 1975:

> "If the interest comes to an end by being disposed of by the person beneficially entitled thereto and the disposal is for a consideration in money or money's worth, tax shall be chargeable under this paragraph as if the value of the property in which the interest subsisted were reduced by the amount of the consideration ... "

It was not in fact necessary, as it seems to me, that Lady Hastings should pay £2m or anything like that amount, in order to acquire the limited interest of Lady Fitzwilliam. The value of that interest was negligible in the context of the figures in this case; it was *not* the value of the property in which the interest subsisted by virtue of para 3(1) of Sch 5, because for this purpose the paragraph was disapplied by s 69(7) of the Finance Act 1978.

I do not see how, by ignoring some intermediate step, it can be said that on the true construction of para 4(4) of Sch 5 there was not "consideration in money or money's worth" for the transfer of Lady Fitzwilliam's limited interest. It is not even clear to me what intermediate step is supposed to be ignored, for the purposes of the Revenue's case. At most it can be said that some trivial part of the £2m which Lady Hastings paid should be regarded as the consideration for the transfer of Lady Fitzwilliam's limited interest in £1.9m, with the result that somewhat less than the whole of the £2m can be regarded as the return of Lady Fitzwilliam's gift. That would mean that a tax liability in some negligible amount remained in respect of the gift. But this case is not about trivial amounts, and I would ignore it. There was, in my judgment, no relevant mini-*Ramsay* in steps 2, 3 and 4.

(4) *The mini-Ramsay: steps 3 and 5*

The trustees appointed the vested-half of the £3.8m to Lady Fitzwilliam until 15 February or her death, with remainder to Lady Hastings absolutely. Lady Hastings assigned her beneficial interest expectant on the termination of Lady Fitzwilliam's interest to the trustees of a settlement which she had made, in favour of Lady Fitzwilliam until 15 March or her death and thereafter for herself absolutely. This is said to have the result that no capital transfer tax is payable, first, because Lady Fitzwilliam was a surviving spouse, and secondly, because on 15 March the property in which her interest subsisted reverted to the settlor within para 4(5) of Sch 5.

The Revenue challenge the second part of that conclusion. They say, both on *Ramsay* grounds and independently of *Ramsay*, that Lady Hastings was not the sole settlor of the settlement that she made.

Paragraph 1(6) of Sch 5 provides:

> " 'Settlor', in relation to a settlement, includes any person by whom the settlement was made directly or indirectly, and in particular (but without prejudice to the generality of the preceding words) includes any person who has provided funds directly or indirectly for the purpose of

or in connection with the settlement or has made with any other person a reciprocal arrangement for that other person to make the settlement."

When there is such a detailed definition, it seems to me that there is little or no scope for the *Ramsay* doctrine to provide any other meaning. So I approach this issue not as a mini-*Ramsay*, but an ordinary question of the construction of para 1(6).

The argument for the Revenue was that the Tenth Earl Fitzwilliam was a settlor, because he " ... provided funds directly or indirectly for the purpose of or in connection with the settlement". It is, I think, acknowledged that Lady Hastings was also a settlor; but it is said that the property must revert to all the settlors for the exemption in para 4(5) to be available. Presumably it would follow that all the settlors must be still alive when the interest comes to an end, as another requirement of para 4(5).

I am in grave doubt whether a reversion to one of several settlors is sufficient, or whether the property must revert to all. But, in my judgment, the Tenth Earl was not a settlor, because he did not provide funds even indirectly for the purpose of this settlement. No doubt the money came from his estate. It may also, perhaps, be said to have come from his tenants or his ancestors. But the person who provided it for the purpose of the actual settlement that was made in 1980 was Lady Hastings, and nobody else. I would reject this ground of appeal by the Revenue.

In the result, I would dismiss this appeal.

Sir Christopher Slade:—Nourse L.J. has identified in his judgment the five steps in the relevant transactions of which all or some are claimed to give rise to a charge to capital transfer tax ("CTT"). It is now common ground that

(i) fiscal considerations apart, each of these five steps had the effect in law which it purported to have;

(ii) none of these five steps, if viewed in isolation, gave rise to a charge to CTT;

(iii) save possibly in regard to the alternative claim referred to at the end of Nourse L.J.'s judgment and relating to "the vested moiety", the claim to CTT can succeed, if at all, only by reference to the *Ramsay* principle.

I do not wish to add anything to the reasons given by Nourse L.J. for rejecting that alternative claim relating to "the vested moiety", so far as it is not based on the *Ramsay* principle.

As he has pointed out, the Crown contends for the application of the *Ramsay* principle in three different ways, namely:

(1) by treating steps 1 to 5 or 2 to 5 as a single composite transaction; or

(2) by treating steps 3 and 5 as a single composite transaction; or

(3) by treating steps 2, 3 and 4 as a single composite transaction.

I make this preliminary observation. In the present case the Commissioners found as a matter of fact, and held insofar as it was a matter of law ([1990] STC 65, at page 90d), that for the purpose of the *Ramsay* doctrine, the operations comprised in steps 1 to 5 effected a "composite transaction" whereby out of the estate of the 10th Earl Lady Fitzwilliam received £4m and Lady Hastings received £3.8m. Their findings of primary fact on which this conclusion was based, in my opinion, bind this Court, save insofar as interference may be justified within the narrow limits set out in *Edwards* v. *Bairstow & Another*(1) [1956] AC 14. However, in considering the limitations of the *Ramsay* principle and the existence or otherwise of a "composite transaction", the Commissioners did not have the benefit of the guidance of the House of Lords' decision in *Craven* v. *White*(2). Instead, they took the existing state of the law as I had stated it in a passage in my judgment when that case was before the Court of Appeal: (see [1990] STC 65, at pages 60d-e and 89g). The House of Lords, however, in *Craven* v. *White* did not approve this passage as representing an accurate statement of the law, but expounded the limitations of the *Ramsay* principle in somewhat different terms. In these circumstances, I think it plain that, subject to what I have said concerning their findings of primary fact, this Court is not bound by the Commissioners' ultimate finding of a "composite transaction" inasmuch as it was based, or partly based, on a view of the relevant law which has been superseded subsequently by higher authority.

For the reasons given by Nourse L.J., I am satisifed that none of the combinations of steps relied on by the Crown can properly be regarded as a single composite transaction within the relevant principles enunciated by the House of Lords in *Furniss* v. *Dawson*(3) [1984] AC 474 and *Craven* v. *White* [1989] AC 398. The fatal objection, if no other, to any such proposition in relation to any such combination is that when step 3 was taken on 14 January 1980, it was not preordained that Lady Hastings would participate in steps 4 and 5; it could not have been said that there was no practical likelihood that she would fail to do so. She was a lady who, on the Commissioners' findings, had an independent mind and will of her own. As at 14 January 1980, so far from having committed herself to any such transactions as steps 4 and 5, she was about to take separate legal advice from a solicitor, Mr. Smith, and from counsel, Mr. Herbert. No one could predicate with certainty what advice would be given to her or whether she would follow it. Whether or not they would be better alternatives, a number of future courses of action, other than that which Mr. Powell had in mind, would clearly have been open to her legal advisers to consider or to her to follow. The Commissioners found [1990] STC 65, at page 77b that" Unlike her mother she had no difficulty in understanding such advice as she was from time to time given and by and large she readily accepted it". They did not, however, find that she followed such advice without question or had no mind or will of her own. They said (*ibid*, at page 77b): "On one matter ..., the prospect of the 1980 Budget providing substantial CTT relief, she took an active part in the discussion with Mr. Smith on 22 January 1980 and expressed views of her own". In my judgment, as at 14 January 1980, there was unquestionably a live possibility, to put it no higher, that for one reason or another Lady Hastings would not participate in steps 4 and 5.

If, as I would thus hold, none of the combinations of steps relied on by the Crown can properly be regarded as a single composite transaction within

(1) 36 TC 207. (2) 62 TC 1. (3) 55 TC 324.

the relevant principles, this alone must suffice to dispose of this appeal. Nevertheless, in case I am wrong on this point, I think it necessary to explore further the fiscal consequences that would follow on that footing. It must not be too readily assumed, without sufficiently full analysis of the relevant statutory provisions, that a finding of the existence of composite transactions as claimed would by itself substantiate a claim or claims to CTT.

As Lord Goff of Chieveley pointed out in *Craven* v. *White* [1989] AC 398, at page 520B-C(1):

> "Any idea that the principle in *Ramsay* is a moral principle, or that it is designed to catch any step taken to avoid tax, is, in my opinion, destroyed by the recognition of the *Ramsay* principle as a principle of statutory construction. Indeed the principle cannot be independent of the statute, for the obvious reason that your Lordships have no power to amend the statute."

It follows that if in any given case the *Ramsay* principle is to be successfuly invoked, it does not, in my judgment, suffice for the Court merely to find the existence of a single "composite transaction". It has to identify the particular provisions of the taxing statute on which reliance is placed in asserting (or resisting) the claim to tax. The question for the Court then is whether or not, on the proper construction of the statutory provisions, the transactions relied on by the Crown as constituting the composite transaction cause the charging provisions to bite. In earlier cases where the principle had been successfully invoked there was never any doubt as to the charging provision which fell to be construed. Thus, for example in *Ramsay* itself, the issue was whether the Appellants had suffered an allowable "loss", within the meaning of s 23 of the Finance Act 1965 which they were entitled to set against the admitted capital gains. In *Furniss* v. *Dawson*(2) [1984] AC 474, the essential issue was whether there had been one "disposal" of the relevant shares for capital gains tax purposes within the meaning of s 22 of the Finance Act 1965 (namely by Dawsons to Wood Bastow) or two "disposals", (namely by Dawsons to Greenjacket and by Greenjacket to Wood Bastow). Ultimately, it was the acceptance by the House of Lords of the former of these two constructions which gave rise to the charge for tax in that case; on no other footing could the charge have arisen.

Until the hearing of these appeals, I do not think that the Crown had identified with any precision the particular provisions of the taxing statute on which it placed reliance. During the hearing before this Court, however, it was accepted that the notice of determination originally served was not in wholly appropriate form and an amended notice of determination ("the amended notice") was submitted to us. Nourse L.J. has already quoted its most material contents. It was clearly the ultimate product of close prior thought and discussion. I see no reason why we should not test the validity or otherwise of the Crown's claims to CTT by reference to it.

As will be seen, the amended notice puts forward claims to CTT on a number of alternative bases, asserting as the date or dates on which a charge or charges to tax arose, 14 January 1980, 31 January 1980, 15 February 1980 and 15 March 1980. I will consider these alternative claims in turn. In doing so, I shall use each of the expressions "the testator", "the daughter's

(1) 62 TC 1, at pages 208I/209A. (2) 55 TC 324.

A settlement", "the vested moiety" and "the contingent moiety" in the same sense as it bears in the amended notice. In doing so, I shall further assume that contrary to my view, as at 14 January 1980, when step 3 was implemented, steps 4 and 5 were preordained in the relevant sense so that steps 3, 4 and 5 should be regarded as a single composite transaction.

B *Did a charge for CTT on the testator's death arise on 14 January 1980 as asserted in para 2(i) of the amended notice?*

The alleged single composite transactions relied on under this head are steps 1 to 5, or alternatively steps 2 to 5. The claim is founded on the proposition that on 14 January 1980 a payment of £3.8m should be "deemed to" C have been made to Lady Hastings on that date. This in turn must involve the implicit proposition that the appointment of 14 January 1980 ("the settled appointment") should be deemed to have been an outright appointment of that sum in favour of Lady Hastings absolutely, without the interposition of any prior limited interest in favour of Lady Fitzwilliam.

D The claim is explicitly based on the joint effect of ss 47(1A) and 22 of the Finance Act 1975 ("the 1975 Act"). Section 47(1A) provides:

> "Where property comprised in a person's estate immediately before his death is settled by his will and, within the period of two years after his death and *before any interest in possession has subsisted in the property*, [emphasis added] a distribution payment (within the meaning of E para 6 of Sch 5 to this Act) is made out of the property or an event occurs on the happening of which a capital distribution would (apart from this subsection) be treated as so made under paragraphs 6(2) or 15(3) of that Schedule, then—
>
> (*a*) the making of the distribution payment shall not be a capital F distribution, and paragraphs 6(2) and 15(3) shall have effect on the happening of the event as if the references in them to a capital distribution were references to a distribution payment, and
>
> (*b*) this Part of this Act shall apply as if the will had provided that on the testator's death the property should be applied or held as G it is applied by the distribution payment or held after the happening of the event."

Section 22(1) provides:

> "On the death of any person after the passing of this Act tax shall H be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death, but subject to the following provisions of this section."

Paragraph 6(2) of Sch 5 to the 1975 Act (referred to in s 47(1A)), so far as I material, provides:

> "Where a person becomes entitled to an interest in possession in the whole or any part of the property comprised in a settlement at a time when no such interest subsists in the property or that part, a capital distribution shall be treated as being made out of the property or that part of the property ... "

Paragraph 1(1) of Sch 6 to the 1975 Act ("the spouse's exemption") provides: A

> "Subject to the provisions of Part II of this Schedule and the following provisions of this paragraph, a transfer of value is an exempt transfer to the extent that the value of the estate of the transferor's spouse is increased."

B

If the settled appointment *had* taken the form of an outright appointment of the £3.8m in favour of Lady Hastings as sole beneficiary, the following consequences would, in my opinion, have ensued:

> (A) On 14 January 1980, " ... before any interest in possession subsisted in the property", an event would have occurred on the happening of which a capital distribution would (apart from s 47(1A)) have been treated as made under para 6(2) of Sch 5; C
>
> (B) nevertheless, by virtue of s 47(1A)(a), para 6(2) of Sch 5 would have had effect on 14 January 1980 as if the reference in it to a "capital distribution" were merely a reference to a "distribution payment";
>
> (C) by virtue of s 47(lA)(b), Part IV of the 1975 Act would have applied as if the will had provided that on the testator's death the £3.8m should be held on trust for Lady Hastings absolutely; D
>
> (D) the sum of £3.8m would, accordingly, have been taxable on the testator's death by virtue of s 22(l) of the 1975 Act;
>
> (E) no relief would have been available under para 1(l) of Sch 6 to the 1975 Act because in respect of the £3.8m "the value of the estate of the transferor's spouse" would not have been increased. E

By this present claim to CTT, the Court is being invited to reconstruct the settled appointment and to construe and apply the statutory provisions referred to in (A) to (E) above as if (a) Lady Fitzwilliam had been given no interest whatever in the appointed property, and (b) Lady Hastings had been given an accelerated interest, which entitled her to an interest in possession in the appointed property on 14 January 1980 and gave rise to the tax consequences emerging from those statutory provisions. With due deference to Mr. Reid's presentation of the argument, it seems to me quite unsustainable. It is not suggested that the settled appointment was not a wholly valid appointment, which operated according to its terms as a matter of trust law. It is common ground that it operated to confer on Lady Fitzwilliam an entitlement to the income of the £3.8m until 15 February 1980 if she should so long live. It is not suggested that the grant of this limited interest was a sham which had no practical effect. Even when the rest of the scheme was implemented, Lady Fitzwilliam remained entitled to the income of the contingent moiety until 15 March 1980, and such income was duly credited to her in the trust accounts for those periods. F G H

In the context of the claim now under discussion, in my judgment, it would be immaterial that steps 1 to 5 or steps 2 to 5 constituted a single composite transaction, even if they were properly so to be regarded. Even if that were the case, the *Ramsay* doctrine cannot entitle the Court to ignore Lady Fitzwilliam's interest in possession in construing and applying the spouse's exemption contained in para 1(1) of Sch 6. Nor, in my judgment, can it entitle the Court, when considering the construction and possible application of s 47(1A), read in conjunction with para 6(2) of Sch 5 and s 22, I

to reconstruct the settled appointment so as to attribute to Lady Hastings an interest in possession in the £3.8m on 14 January 1980 which she did not have. "*Ramsay* is concerned not with re-forming transactions but with ascertaining their reality".: (*Craven* v. *White* (*supra*) at page 515, *per* Lord Oliver).

I would, therefore, reject the claim for CTT made under para 2(i) of the amended notice on the additional ground that the provisions of the CTT legislation relied on by the Crown under this head would not give rise to the suggested charge to CTT even if, contrary to my view, either of the two combinations of transactions referred to in para 2 of that notice was to be regarded as a single composite transaction.

Did a charge for CTT on the testator's death arise in respect of the contingent moiety on 15 February 1980 and in respect of the vested moiety on 15 March 1980 as asserted in para 2(ii) of the amended notice?

The alleged single composite transactions relied on under this head are again steps 1 to 5, or alternatively steps 2 to 5. This claim, however, is based on the proposition that a payment of £1.9m should be deemed to have been made to Lady Hastings on 15 February 1980 (the date when she became entitled to an interest in possession in the contingent moiety under the terms of the settled appointment) and a further payment of £1.9m should be deemed to have been made to her on 15 March 1980 (the date when she became entitled to an interest in possession in the vested moiety under the combined effect of the settled appointment and the daughter's settlement).

Once again the claim is explicitly based on the joint effect of ss 47(1A) and 22 of the 1975 Act. It has at least the merit of refraining from attributing to Lady Hastings an interest in possession in the £3.8m on 14 January 1980, when on no conceivable footing she had such an interest. Once again, however, it invites the Court to construe and apply the string of statutory provisions referred to in (A) to (E) above without regard to the interest in possession conferred by the settled appointment on Lady Fitzwilliam. To sustain this claim, which is a claim for CTT on the testator's death, the Crown has not only to negative the spouse's exemption, but to rely affirmatively on s 47(1A), which applies only where the relevant event occurs " ... before any interest in possession has subsisted in the property". If the claim is to be sustained, it, therefore, has to be shown that for the purpose of construing and applying s 47(1A) and para 1(1) of Sch 6, Lady Fitzwilliam is not to be treated as having had an "interest in possession" in the £3.8m by virtue of the settled appointment. I recognise that in *Furniss* v. *Dawson* the House of Lords, as a matter of construction of the capital gains tax legislation, was apparently prepared to disregard the real (albeit fleeting) beneficial interest of Greenjacket in the relevant shares, in deciding that there had been a disposal by Dawsons to Wood Bastow. It could be said, however, that in substance and reality that was what had occured on the facts of that particular case. The present case is quite different. For this Court to construe and apply the relevant statutory provisions as if Lady Fitzwilliam had never had an "interest in possession" in the £3.8m would, in my judgment, involve doing wholly impermissible violence to the language of the statute.

I would, therefore, reject the claim for CTT made under para 2(ii) of the amended notice on the additional ground that the provisions of the CTT legislation relied on by the Crown under this head would not give rise to the

suggested charge to CTT even if, contrary to my view, either of the two combinations of transactions referred to in para 2 of that notice were to be regarded as a single composite transaction.

Did a charge for CTT arise in respect of the contingent moiety on 31 January 1980 under para 4(2) of Sch 5 to the 1975 Act as asserted in paras 2(iii)(a) and 3 of the amended notice?

Paragraph 4(2) of Sch 5, subject to certain exceptions and exemptions, gives rise to a charge for CTT in a case " ... where at any time during the life of a person beneficially entitled to an interest in possession in any property comprised in a settlement his interest comes to an end". The alternative claim now under consideration is, if I may say so, a somewhat more realistic one than those previously discussed because it accepts and asserts that Lady Fitzwilliam was for a period of time beneficially entitled to an interest in possession in the contingent moiety. Furthermore, that beneficial interest indubitably came to an end on 31 January 1980 when Lady Fitzwilliam assigned to Lady Hastings her beneficial interest in the contingent moiety.

In the context of this claim, the issue is whether the exemption conferred by para 4(4) of Sch 5 is applicable, so as to negative the charge which would otherwise have arisen under para 4(2). Para 4(4), so far as material, provides:

> "If the interest comes to an end by being disposed of by the person beneficially entitled thereto and the disposal is for a consideration in money or money's worth, tax shall be chargeable under this paragraph as if the value of the property in which the interest subsisted were reduced by the amount of the consideration ... "

Prima facie this exemption does negative the charge for CTT because the amount of the consideration (*prima facie*) was £2m and this exceeded the value of the contingent moiety.

The Crown, however, asserts that the application of the *Ramsay* principle to the construction of para 4(4) produces the result that Lady Hastings gave no "consideration" within the meaning of para 4(4) for the acquisition of Lady Fitzwilliam's limited income interest in the contingent moiety. This is the relevant point of statutory construction in the present context.

The combination of steps on which the Crown relies in this context as constituting the relevant composite transaction are steps 1 to 5 or steps 2 to 5 (see para 2(iii)(a) of the amended notice) or alternatively (see para 3 of the amended notice) merely steps 2, 3 and 4 (unattractively referred to in the notice as a "mini-*Ramsay*"). Steps 1 and 5, in my judgment, can add nothing to the strength of the Crown's case in this context, except as a matter of history, so I direct my attention to steps 2, 3 and 4.

In doing so, I shall as before assume that contrary to my view, as at 14 January 1980, when step 3 was implemented, steps 4 and 5 were preordained in the relevant sense, so that steps 3, 4 and 5 should be regarded as a single composite transaction. It would not, however, follow from this assumption that steps 2, 3 and 4 also constituted a single composite transaction and to this important point I now turn.

By step 2, Lady Fitzwilliam gave Lady Hastings £2m by a gift expressed to be free of CTT. By step 3, the testator's will trustees on 14 January 1980

A appointed the £3.8m to Lady Hastings for life or until 15 February 1980, whichever should be the shorter, and subject thereto as to one-half (the vested moiety) to Lady Hastings absolutely, and as to the other-half (the contingent moiety) to Lady Hastings if she was living on 15 February 1980. By step 4, on 31 January Lady Fitzwilliam, in consideration of £2m paid to her by Lady Hastings, assigned to Lady Hastings her beneficial interest in B the income of the contingent moiety.

In *Craven* v. *White* [1989] AC 398, at page 514, Lord Oliver identified the essentials emerging from *Furniss* v. *Dawson* (*supra*) as four in number(1):

> "(1) that the series of transactions was, at the time when the inter-
> C mediate transaction was entered into, pre-ordained in order to produce a given result; (2) that that transaction had no other purpose than tax mitigation; (3) that there was *at that time* [emphasis added] no practical likelihood that the pre-planned events would not take place in the order ordained, so that the intermediate transaction was not even contemplated practically as having an independent life, and (4) that the pre-
> D ordained events did in fact take place. In these circumstances the Court can be justified in linking the beginning with the end so as to make a single composite whole to which the fiscal results of the single composite whole are to be applied."

If steps 2, 3 and 4 taken together are to be regarded as a single compos-
E ite transaction, which results in no "consideration" having been given by Lady Hastings for the assignment of 31 January 1980, it must, in my judgment, at least be shown that *at the time when the gift of £2m was made by Lady Fitzwilliam* not only were steps 3 and 4 preordained, but that there was *at that time* no practical likelihood that steps 3 and 4 would not take place in the order preordained, so that the gift was not even contemplated practically
F as having an independent life. If this much had been found by the Commissioners, I accept that the fiscal consequences contended for by the Crown might well have followed, even though at the date of the gift of £2m there was no question of Lady Hastings being under any contractual obligation to enter into either step 3 or step 4.

G The Commissioners' findings, however, do not go nearly so far as this. They found ([1989] STC 65, at page 89a) that *at the meeting of 9 January 1980* Lady Hastings had acquiesced in the bank loan of £2m arranged by the will trustees, the appropriation of this sum by the will trustees to Lady Fitzwilliam and the gift by Lady Fitzwilliam of this sum to Lady Hastings. They further found that at this meeting " ... there was no practical possibil-
H ity of her refusing to acquiesce" in *those* transactions. Significantly, however, they did *not* find that at the time when the gift of the £2m was made by Lady Fitzwilliam, there was no practical likelihood that steps 3 and 4 would not take place. Nor did they find that at the time when it was made the gift of the £2m was not contemplated as having an independent life of its own. On the contrary ([1989] STC 65, at page 89b) they accepted Lady Hastings' evi-
I dence that(2) " ... *she treated the £2m payment as a genuine unconditional and irrevocable gift by her mother*". They further found (*ibid*, at page 89c) that at the date of the gift she did not know what her legal advisers contemplated would be done with the £2m.

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(1) 62 TC 1, at pages 203G/204A. (2) Page 646C *ante*.

In short, it emerges from the findings of the Commissioners, that Lady Hastings accepted the £2m payment as a genuine and unconditional gift. By that time Currey & Co. had already formulated proposals for its future use by way of strategic tax planning. However, at the time when she accepted it, while she had the general intention of co-operating with such tax-avoidance arrangements as her legal advisers might thereafter submit to her, she had no contemplation that she would thereafter use the £2m as the consideration for any form of subsequent purchase from her mother—still less as the consideration for the purchase of a right of very small value. She had not bound herself to use the £2m in this manner. It could not be said that as at the date of the gift either Lady Fitzwilliam or any of the legal advisers concerned, or anyone else, were in a position for all practical purposes to secure that Lady Hastings did so: (compare *Craven* v. *White* [1989] AC 398, at page 481A, *per* Lord Keith of Kinkel). She had, as I have already said, an independent mind and will of her own (and indeed subsequently had the benefit of independent legal advice from Mr. Smith and Mr. Herbert). In these circumstances, a further finding by the Commissioners that as at the date of the gift involved in step 2 there was no practical likelihood that steps 3 and 4 would not be implemented would, in my judgment, have been unsustainable. As I have already said, no such finding was made.

It follows, in my view, that there are no grounds upon which it can be held that steps 2, 3 and 4 constituted a single composite transaction in the relevant sense and that, accordingly, Lady Hastings gave no "consideration" within the meaning of para 4(4) of Sch 5 to the 1975 Act for the acquisition of Lady Fitzwilliam's interest in the income of the contingent moiety. The exemption in para 4(4) is, in my judgment, applicable on any footing and the claim for CTT based on para 4(2) must, accordingly, fail.

Did a charge for CTT arise in respect of the vested moiety on 15 March 1980 under para 4(2) of Sch 5 to the 1975 Act as asserted in paras 2(iii)(b) and 3 of the amended notice?

Immediately before 15 March 1980, Lady Fitzwilliam was beneficially entitled to an interest in possession in the vested moiety by virtue of the preceding transactions. On that date the interest in that beneficial interest came to an end and reverted to Lady Hastings by virtue of the provisions of the daughter's settlement. Accordingly, a claim for CTT would have arisen on that event under para 4(2) unless the exemption contained by para 4(5) applied. Paragraph 4(5), so far as material, provides:

> "If the interest comes to an end during the settlor's life and on the same occasion the property in which the interest subsisted reverts to the settlor, tax shall not be chargeable under this paragraph ..."

The Crown's contention is that Lady Hastings was not "the settlor" within the meaning of para 4(5) and that the exemption, is therefore, inapplicable.

Paragraph 1(6), so far as material, defines "settlor" in relation to a settlement as including

> " ... any person by whom the settlement was made directly or indirectly, and in particular (but without prejudice to the generality of the preceding words) ... any person who has provided funds directly or indirectly for the purpose of or in connection with the settlement ... "

A *Prima facie* para 4(5) does negative the charge for CTT because *prima facie* Lady Hastings, as the settlor of the daughter's settlement, was the settlor of the property in which the relevant interest subsisted. The taxpayers accept that she must have been the *sole* settlor if the exemption is to apply. The Crown, however, asserts that the application of the *Ramsay* principle to the construction of para 4(5) produces the result that Lady Hastings was *not* B "the settlor", or at least not the sole settlor of this property. This is the relevant point of construction in the present context.

The combination of steps on which the Crown relies in this context as constituting the relevant composite transaction are steps 1 to 5 or steps 2 to 5 (see C para 2(iii)(b) of the amended notice) or alternatively (see para 3 of the amended notice) merely steps 3 and 5. Steps 1, 2 and 4, in my judgment, add nothing to the strength of the Crown's case in this context, so I direct my attention to steps 3 and 5 (the settled appointment and the daughter's settlement).

As already indicated, I do not for my part see how these two steps, even D taken together, could properly be regarded as a single composite transaction for the purpose of applying the *Ramsay* principle. Nevertheless, assuming that they could, I cannot see how this could justify the Court in holding that Lady Hastings was not the (sole) "settlor" for the purpose of applying the provisions of para 4(5), having regard to the definition of "settlor" in para 1(6) of Sch 5. Even on this footing, it seems to me Lady Fitzwilliam could E not possibly be regarded as a "settlor" in respect of the relevant property. The only other possible candidate as "settlor" would be the testator from whose estate the money was derived. In my judgment, however, on the application of any permissible canons of construction, it cannot be said that the testator provided property "directly or indirectly for the purpose of or in connection with" a further settlement which was not even in contemplation F at any time during his life. I do not wish to add anything further to what Nourse L.J. has said in this context, with which I am in full agreement.

The claim for CTT under this final head is, in my judgment, ill-founded, whether or not all or any of steps 1 to 5, taken together, constituted a single composite transaction. G

Conclusion

The course which the argument has taken before this Court has clearly been materially different from that which it took before Vinelott J. Nevertheless, I think that he reached the right conclusion and, for the rea- H sons which I have given, I too would dismiss these appeals.

Appeal dismissed, with costs.

I The Crown's appeal was heard in the House of Lords (Lords Keith of Kinkel, Templeman, Ackner, Browne-Wilkinson and Mustill) on 1, 2, 3, 4, 8, 9 and 10 March 1993 when judgment was reserved. On 1 July 1993 judgment was given against the Crown (Lord Templeman dissenting), with costs.

Christopher McCall Q.C. and *Launcelot Henderson* for the Crown.

E. G. Nugee Q.C. and *Mark Herbert* for the taxpayers. A

The following cases were cited in argument in addition to the cases referred to in the speeches:—*Edwards* v. *Bairstow & Harrison* 36 TC 207; [1956] AC 14; *Crossland* v. *Hawkins* 39 TC 493; [1961] Ch 537; *In re Montague's Settlement Trusts, Duke of Manchester* v. *National Westminster Bank Ltd.* [1987] Ch 264; *Hatton* v. *Inland Revenue Commissioners* [1992] STC 140. B

Lord Keith of Kinkel:—My Lords, the Tenth Earl Fitzwilliam died unexpectedly on 21 September 1979 at the age of 75, leaving no issue. He was survived by his widow Lady Fitzwilliam, then aged 81, and by her daughter by a previous marriage Elizabeth Anne, then Mrs. Hastings but who later became Lady Hastings through a knighthood having been conferred upon her husband. Lady Hastings had a son by a previous marriage, Mr. Philip Naylor-Leyland. By his will dated 13 December 1977 Earl Fitzwilliam directed his trustees, who were Lady Fitzwilliam, Lady Hastings, a Mr. Sporborg and a Mr. Ross, *inter alia*, to hold his net residuary estate upon trust during a period which could not exceed 23 months from the date of his death with power to appoint capital or income in favour of a class of beneficiaries which included Lady Fitzwilliam, Lady Hastings and Mr. Philip Naylor-Leyland. The trustees were given a further power during the same period to accumulate income, subject to which there was a discretionary trust to distribute income among the beneficiaries. At the end of the 23-month period and subject to any exercise of the power of appointment, the trustees were directed to pay the income to Lady Fitzwilliam during her life, with power for them (other than Lady Fitzwilliam herself) to pay her capital at their discretion, with an ultimate trust in favour of Lady Hastings absolutely, contingently upon her surviving Earl Fitzwilliam by one month. C D E F

As explained by Vinelott J.(1) [1990] STC 65, 94, who dealt with the case at first instance, the purpose of interposing the discretionary trust before Lady Fitzwilliam's life interest was to take advantage of s 47(1A) of the Finance Act 1975 (introduced by s 121(1) of the Finance Act 1976) together with the surviving spouse exemption from capital transfer tax in para 1(1) of Sch 6 to the Act of 1975. The effect of these provisions would be that if the power of appointment were exercised so as to give Lady Fitzwilliam an interest in possession in any part of the estate that part would escape capital transfer tax both on Earl Fitzwilliam's death and on the exercise of the power. Further, if Lady Fitzwilliam survived the 23-month period any part of the residuary estate in which she then took an interest in possession would escape the tax both on Earl Fitzwilliam's death and by reference to the termination of the discretionary trust and the arising of her life interest. G H

The trustees thus had the opportunity to review the capital transfer tax position following the death of the Earl. Probate was, in fact, obtained on the basis of paying capital transfer tax only in respect of certain legacies, on the footing that Lady Fitzwilliam would in due course take either an absolute interest or a life interest in the residue. The situation was, however, complicated by the fact that Lady Fitzwilliam, though normally in reasonably good health for her age of 81, had suffered a severe blow by the death of her husband and by that of her sister, which followed two weeks later, so that I

(1) Page 653B/D *ante*.

the possibility of her early demise had to be contemplated. If she died within the 23-month period without the trustees having done anything the residuary estate, which amounted to about £11m, would attract capital transfer tax on Earl Fitzwilliam's death at the top rate of 75 per cent. If an interest in possession had been appointed to Lady Fitzwilliam tax on the Earl's death would have been saved but tax on Lady Fitzwilliam's death would have been charged at much the same rate.

In these circumstances the trustees instructed their solicitors, Currey & Co., in October 1979, to explore urgently ways and means of reducing liability to capital transfer tax. Currey & Co. instructed Mr. Walker, of counsel, to advise them in the matter. A considerable number of communications passed between Mr. Powell, the partner in Currey & Co. dealing with the matter, and Mr. Walker during the months following, and a number of conferences took place at which various proposals were considered. These are described in the judgment of Vinelott J. [1990] STC 65,102–106. Eventually in the course of a telephone conversation with Mr. Powell on 3 January 1980, Mr. Walker put forward the scheme which was in due course put into effect. The course which it took is thus summarised in the judgment of Nourse L.J. in the Court of Appeal: [1992] STC 185, 191–192. It is to be noted that the first of the steps there described took place before Mr. Walker had finalised the details of the scheme; and that before entering into steps 4 and 5 Lady Hastings was separately advised by Mr. Smith, a partner in Currey & Co. previously unconnected with the matter, and by Mr. Herbert, of counsel[1]:

"Step 1

By a deed of appointment dated 20 December 1979 the trustees appointed that a part of the residuary estate to the amount or value of £4m should thenceforth be held in trust as to both capital and income for Lady Fitzwilliam absolutely. The deed further provided that the trustees should as soon as conveniently practicable make an appropriation in order to give effect to the appointment.

Step 2

On 7 January 1980 Lady Fitzwilliam drew a cheque for £2m, post-dated to 9 January, in favour of Lady Hastings. The £2m was raised by the trustees on loan from Hambros Bank and appropriated towards Lady Fitzwilliam's £4m appointment. On the same day Lady Fitzwilliam signed a letter addressed to Lady Hastings, also post-dated to 9 January, in which she stated that the £2m was an outright gift and that she intended it to be net of capital transfer tax, which would be paid by her. The cheque and the letter were handed to Lady Hastings by Currey & Co. on 9 January, the cheque being subsequently cleared and its proceeds credited to a deposit account of hers.

Step 3

By a deed of appointment (the £3.8m appointment) dated 14 January 1980 the trustees appointed that a part of the balance of the residuary estate to the amount or value of £3.8m should be held on trust to pay the income to Lady Fitzwilliam until whichever was the earlier of 15 February 1980 and the date of her death; subject thereto as to one moiety (the vested moiety) in trust for Lady Hastings absolutely and as

(1) Pages 692I/693H *ante*.

to the other moiety (the contingent moiety) in trust for Lady Hastings contingently on her being alive at the date of the determination of Lady Fitzwilliam's income interest: and subject thereto in trust for Mr. Philip Naylor-Leyland absolutely.

Step 4

By a deed of assignment (the first assignment) dated 31 January 1980 and made between Lady Fitzwilliam of the one part and Lady Hastings of the other part Lady Fitzwilliam, by her attorney and in consideration of the sum of £2m then paid by Lady Hastings to Lady Fitzwilliam, assigned to Lady Hastings for her own use and benefit absolutely her interest in the income of the contingent moiety.

Step 5

By a settlement (Lady Hastings' settlement) dated 5 February 1980 and made between Lady Hastings of the one part and two trustees of the other part Lady Hastings settled a sum of £1,000 on trust to pay the income thereof to Lady Fitzwilliam until her death or until 15 March 1980 (whichever should first occur) and subject thereto on trust as to both capital and income for Lady Hastings absolutely. By a deed of assignment (the second assignment) dated 7 February 1980 and made between Lady Hastings of the one part and the trustees of Lady Hastings' settlement of the other part Lady Hastings assigned to those trustees her absolute reversionary interest in the vested moiety to be held by them as an addition to the funds of Lady Hastings' settlement."

On 8 October 1986 the Commissioners of Inland Revenue made a determination for capital transfer tax purposes addressed to Lady Fitzwilliam and maintaining that the whole of steps 1 to 5 constituted a single composite transaction which had the same effect as if the trustees of Earl Fitzwilliam had appointed £4m to Lady Fitzwilliam and £3.8m to Lady Hastings absolutely, so that in relation to the £3.8m a charge to capital transfer tax arose on the estate of the Earl under s 47(1A) of the Finance Act 1975, as amended. It was maintained in the alternative that if there was no single composite transaction such as to result in a charge to tax on the Earl's estate capital transfer tax was chargeable on the vested moiety and the contingent moiety on the basis (a) as to the vested moiety that a beneficial interest in possession of Lady Fitzwilliam determined either on 15 February 1980 or on 15 March 1980 so as to attract a charge to tax under para 4 of Sch 5 to the Finance Act 1975, and (b) as to the contingent moiety that a beneficial interest in possession of Lady Fitzwilliam was determined by the first assignment. As regards the vested moiety it was said that Lady Hastings was not the settlor of it or not the only settlor, so that the exemption in para 4(5) of the Schedule (reverter to settlor) did not apply, and as regards the contingent moiety that Lady Fitzwilliam's gift to Lady Hastings of £2m, and Lady Hastings' payment of that sum in consideration of the assignment of Lady Fitzwilliams interest in that moiety were self-cancelling transactions. so that the exemption under para 4(4) of Sch 5 (disposal of an interest in settled property for money or money's worth) did not apply.

At this point it is convenient to introduce a brief account of the manner in which the scheme was intended to operate from the point of view of the particular provisions of the capital transfer tax legislation of which it was designed to take advantage. In the first place. the appointment made under step 3, which gave Lady Fitzwilliam an interest in possession, gave rise to no

charge to tax because of the surviving spouse exemption in para 1(1) of Sch 6 to the Act of 1975 and s 47(1A) of the same Act, referred to above. As regards the contingent moiety, the termination as a result of step 4 of Lady Fitzwilliam's short-term interest in possession would, *prima facie*, by virtue of para 4(2) of Sch 5 to the Act of 1975, have fallen to be treated as a transfer of value equal to the value of the contingent moiety (£1.9m) so as to attract a charge to tax accordingly. However, para 4(4) provided:

> "If the interest comes to an end by being disposed of by the person beneficially entitled thereto and the disposal is for a consideration in money or money's worth, tax shall be chargeable under this paragraph as if the value of the property in which the interest subsisted were reduced by the amount of the consideration; ... "

The consideration of £2m exceeded the value of the property comprised in the contingent moiety by £100,000, so no charge arose on the termination of Lady Fitzwilliam's interest in possession. Lady Fitzwilliam's gift of £2m to Lady Hastings, however, was liable as a lifetime transfer of value to capital transfer tax payable at the end of the sixth-month period after it. But ss 86 and 87 of the Finance Act 1976 introduced an exemption from tax where the donee of a gift returned it within a certain limited period. By virtue of s 87(1) and (3) Lady Fitzwilliam could claim that the value of her transfer should be treated as cancelled by Lady Hastings' transfer to the extent that the value transferred by her after deduction of tax was equal to the value restored to her by Lady Hastings' transfer. Further, by virtue of s 86(1) and (2) Lady Hastings could claim that the transfer by her should not fall to be treated as a gift by her to the extent that her own estate had been increased by Lady Fitzwilliam's transfer. These provisions would, however, have been of no avail but for s 69(7) of the Finance Act 1978. By virtue of para 3(1) of Sch 5 to the Act of 1975 Lady Fitzwilliam, as having an interest in possession in the contingent moiety, fell to be treated as beneficially entitled to the property comprised in it, namely, £1.9m. In that state of affairs the value returned to Lady Fitzwilliam by Lady Hastings would have been only £100,000, the difference between the £2m which she paid and the value of the property comprised in the contingent moiety. So £1.9m of Lady Fitzwilliam's gift would have remained uncancelled. But s 69(7) of the Act of 1978 provided:

> "Where a person becomes entitled to an interest ... in settled property as a result of a disposition for a consideration in money or money's worth, any question whether and to what extent the given of the consideration is a transfer of value or chargeable transfer shall be determined without regard to paragraph 3(1) of ... Schedule 5."

The result of this provision, considering that the value of Lady Fitzwilliam's short-term interest in possession was minimal, was that almost the whole of Lady Hastings' payment of £2m fell to be treated as a gift and set against the net gift of £2m made to her by Lady Fitzwilliam, through the application of s 87(3). Thus is will be seen that Lady Hastings' payment of £2m, as observed by Staughton L.J. in the course of his judgment in the Court of Appeal, was intended to do double duty by negating the application of two different charging provisions.

Then, as regards the vested moiety, para 4(2) of Sch 5 to the Act of 1975 provided that on the coming to an end of an interest in possession in settled property during the lifetime of the person entitled thereto tax should be

charged as if he had made a transfer of value of an amount equal to the value of the property in which the interest subsisted. However, para 4(5) provided:

> "If the interest comes to an end during the settlor's life and on the same occasion the property in which the interest subsisted reverts to the settlor, tax shall not be chargeable under this paragraph unless the settlor had acquired a reversionary interest in the property for a consideration in money or money's worth."

The reasoning which invokes this provision is that the interest in possession in the vested moiety until 15 February 1980 which was given to Lady Fitzwilliam under step 3 was continued until 15 March 1980 by virtue of Lady Hastings' settlement and the assignment contained in step 5, and that on 15 March 1980 the property in which the interest subsisted reverted to Lady Hastings as settlor of it.

The taxpayers appealed to the Commissioners for the Special Purposes of the Income Tax Acts against the determination of liability to capital transfer tax. The Crown did not contest that each of the steps 1 to 5, considered in isolation, had the effect claimed by the taxpayers, subject only to the argument that Lady Hastings was not the settlor or the only settlor of the vested moiety. The Crown's contention was that all five steps constituted one composite transaction such as to attract application of the principle laid down in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*[1] [1982] AC 300. The Special Commissioners dismissed the appeal, and at the request of the taxpayers stated a Case for the opinion of the High Court. In para 14 of the Case the Commissioners stated[2]:

> "Our conclusion on the facts is, therefore, that steps 1 to 5 were the essential steps taken to implement the CTT avoidance scheme and that they satisfy the conditions of the Ramsay principle. Everything else that was done was subsidiary to those steps and changes such as the substitution of cash for assets by means of the Hambros' loan and the change in the order of events advised by Mr. Herbert were, in our judgment, mere changes of detail which did not break the sequence of the preordained steps. At the time when the £4m appointment was made all the essential features of the subsequent steps had been determined either personally or through their advisers by persons all of whom had the firm intention, and for all practical purposes the ability, to procure their implementation. We, therefore, confirm para 2 of each of the notices of determination as amended during the course of the hearing. In other words we find, in so far as it is a matter of fact, and hold, in so far as it is a matter of law, that (a) the operations comprised in steps 1 to 5 effected a composite transaction whereby 'out of the estate of the Tenth Earl' Lady Fitzwilliam received the sum of £4m and Lady Hastings the sum of £3.8m; (b) the said operations were introduced into the composite transaction for no purpose apart from the avoidance of CTT which would have been payable had the trustees effected the said transaction without the undertaking of such operations; and (c) accordingly, CTT is chargeable on the estate of the Tenth Earl in accordance with s 47(1A) of the 1975 Act (as amended) as if such operations had not been undertaken and the trustees had appointed such sums to Lady Fitzwilliam and Lady Hastings in each case absolutely."

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(1) 54 TC 101. (2) Page 647E/H *ante*.

The taxpayers' appeal was heard by Vinelott J. in the Chancery Division, and on 9 November 1989 he delivered judgment allowing it. An appeal by the Crown was dismissed by the Court of Appeal (Nourse and Staughton L.JJ. and Sir Christopher Slade) on 19 February 1992. The Crown now appeals, with leave given here, to your Lordships' House.

The essential problem facing Earl Fitzwilliam's trustees was how to save capital transfer tax on the death of Lady Fitzwilliam. Tax on Earl Fitzwilliam's death could be avoided quite simply and effectively, thanks to the surviving spouse exemption, by appointing the residue to Lady Fitzwilliam either absolutely or for life with remainder over. As it has turned out, changes in the law since 1979 have very substantially reduced the burden of capital transfer tax, which has been superseded by inheritance tax. Agricultural property, which comprised a very large proportion of the residue, is entitled to 100 per cent. relief, the top rate of tax has been reduced to 40 per cent. and lifetime transfers made over 7 years before death are exempt. Lady Fitzwilliam, as it happens, is still living(1). However, all that was not capable of being foreseen, although consideration was given, particularly by Lady Hastings whose husband was a Member of Parliament, to the prospect that some amelioration might be introduced in the March 1980 Budget by the Conservative administration which had taken office in 1979 upon an election manifesto which contained a commitment to review this field of law. But as mentioned above, the state of health of Lady Fitzwilliam gave some cause for concern, so it was natural for the trustees to consider whether any steps might usefully be taken without delay such as could reduce the incidence of tax on her death by way of what might not improperly be described as strategic tax planning. Steps of that character had been undertaken, in a vast number of cases, under the estate duty régime which came to an end with the introduction of capital transfer tax in 1975, by way of arrangements approved by the Court, under the Variation of Trust Act 1958, on behalf of minor and unascertained beneficiaries of a settlement.

The Crown seeks to establish that this case is caught by the principle of *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners* [1982] AC 300 as extended by *Furniss* v. *Dawson*(2) [1984] AC 474. It does not support the decision of the Special Commissioners that the sum of £3.8m is liable to capital transfer tax in respect of the death of Earl Fitzwilliam. Further, it accepts that step 1 (the appointment of £4m to Lady Fitzwilliam) did not form part of any preordained single composite transaction, and it no longer argues (as it did before the Court of Appeal) that steps 2 and 4 formed an independent preordained single composite transaction, or that steps 3 and 5 did so. The Crown's argument is that steps 2, 3, 4 and 5 constituted a preordained single composite transaction, and it adheres to the argument that in relation to the vested moiety Lady Hastings was not the settlor, or not the only settlor, so that the reverter to settlor exemption is not applicable.

In *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners* and the companion case of *Eilbeck* v. *Rawling*(3) [1982] AC 300, each of the taxpayers had made substantial chargeable gains and in order to avoid tax on these gains had purchased from tax-avoidance advisers a scheme designed to produce allowable losses capable of being set against them. Moneys borrowed by the taxpayer from a finance house or a company controlled by the

(1) Lady Fitzwilliam died in June 1995, aged 97. (2) 55 TC 324. (3) 54 TC 101.

advisers went round in a circle through a complicated series of transactions designed to secure for the taxpayers a capital gain which was not chargeable to tax and a loss which was allowable for tax purposes. At the end of the day the borrowed money was repaid and the taxpayer was no worse off financially than it had been before the scheme was entered into, apart from the fee paid for it. It was held in this House that neither taxpayer had incurred, within the meaning of the relevant legislation, such a loss as was capable of being allowed against the pre-existing chargeable gains. Lord Wilberforce, after referring, *inter alia*, to the principle to be derived from *Inland Revenue Commissioners* v. *Duke of Westminster*(1) [1936] AC 1, said, at page 326(2):

> "I have a full respect for the principles which have been stated but I do not consider that they should exclude the approach for which the Crown contends. That does not introduce a new principle: it would be to apply to new and sophisticated legal devices the undoubted power and duty of the courts to determine their nature in law and to relate them to existing legislation. While the techniques of tax avoidance progress and are technically improved. the courts are not obliged to stand still. Such immobility must result either in loss of tax, to the prejudice of other taxpayers, or to Parliamentary congestion or (most likely) to both. To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process. In each case the facts must be established, and a legal analysis made: legislation cannot be required or even be desirable to enable the courts to arrive at a conclusion which corresponds with the parties' own intention.
>
> The capital gains tax was created to operate in the real world, not that of make-belief. As I said in *Aberdeen Construction Group Ltd.* v. *Inland Revenue Commissioners* [1978] A.C. 885, it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function."

A similar result was arrived at in *Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.* 54 TC 200, where the taxpayer company had sought to transform a bad debt, which could not be made the subject of an allowable loss, into share capital which could be. This was done by a series of book entries backed by a completely circular series of payments. Lord Diplock said, at page 214(3):

> "It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that *Ramsay's* case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in

(1) 19 TC 490. (2) 54 TC 101, at page 187B/F. (3) [1982] STC 30, at page 32e/f.

A the absence of those particular steps would have been payable. The difference is in approach."

The reference to a "pre-ordained" series of transactions recognises that the directors of the taxpayer company had formulated the scheme and then carried it through to completion in accordance with a decision made at the B outset. The reference to the insertion of steps which have no commercial purpose apart from the avoidance of liability to tax indicates that this is a feature which demonstrates the artificiality of the interrelated transactions as a whole.

Neither in *Ramsay's* case nor in the *Burmah Oil* case did the series of C transactions include the achievement of any commercial end at all. In each case the series of transactions was circular and self-cancelling and aimed solely at the achievement of a fiscally beneficial purpose. That was also so in *Ensign Tankers (Leasing) Ltd.* v. *Stokes*(1) [1992] 1 AC 655, as to the bulk of the expenditure claimed for capital allowance purposes, and in *Moodie* v. *Inland Revenue Commissioners*(2) [1993] 1 WLR 266. The position was differ- D ent in *Furniss* v. *Dawson*(3) [1984] AC 474. The taxpayers (the Dawsons) owned all the shares in two family companies. They reached an informal agreement to sell the shares at an agreed price to a purchaser (Wood Bastow). On 16 December 1971 the Dawsons incorporated a company (Greenjacket) in the Isle of Man, and draft agreements were made for the purchase by Greenjacket of the shares in the family companies in exchange E for the issue to the Dawsons of 151,500 shares of 1p each in Greenjacket at a premium of 99p and for the sale of the family company shares by Greenjacket to Wood Bastow at the price of £151,500. On 20 December 1971 the share transfer and the sale to Wood Bastow took place. The object of the exercise was to postpone any charge to capital gains tax until such time as the Dawsons disposed of their shares in Greenjacket. This would be achieved F if Greenjacket, in exchange for the issue of its shares to the Dawsons, obtained control of the family companies, that being the effect of paras 4(2) and 6(1) of Sch 7 to the Finance Act 1965. It was held by this House that the Dawsons were liable to capital gains tax as if they had sold the shares in the family companies to Wood Bastow directly in consideration of the price of £151,500 paid to Greenjacket. The intermediate transfer of the shares to G Greenjacket, since it had no business purpose apart from the deferment of capital gains tax, fell to be disregarded for fiscal purposes so that Greenjacket never acquired control of the family companies. Lord Brightman, who delivered the leading speech, said, at pages 526–527(4):

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

(1) 64 TC 617. (2) 65 TC 610.
(3) 55 TC 324. (4) *Ibid*, at pages 400G/401C.

several steps are pre-ordained rather than pre-contracted. For example, in the instant case tax will, on the *Ramsay* principle, fall to be assessed on the basis that there was a tripartite contract between the Dawsons, Greenjacket and Wood Bastow under which the Dawsons contracted to transfer their shares in the operating companies to Greenjacket in return for an allotment of shares in Greenjacket, and under which Greenjacket simultaneously contracted to transfer the same shares to Wood Bastow for a sum in cash. Under such a tripartite contract the Dawsons would clearly have disposed of the shares in the operating companies in favour of Wood Bastow in consideration of a sum of money paid by Wood Bastow with the concurrence of the Dawsons to Greenjacket. Tax would be assessed: and the base value of the Greenjacket shares calculated, accordingly. *Ramsay* says that this fiscal result cannot be avoided because the pre-ordained series of steps are to be found in an informal arrangement instead of in a binding contract. The day is not saved for the taxpayer because the arrangement is unsigned or contains the words 'this is not a binding contract'."

The significance of this passage, which contains the essential *ratio decidendi* of the case, is that it demonstrates the intellectual basis upon which the House was able to reach the conclusion that the fiscal consequences which would ordinarily have resulted from a transfer to Greenjacket in exchange for shares in the latter followed by a sale by Greenjacket to Wood Bastow for cash were not attracted. All the parties involved had informally agreed upon what was to happen but were not formally bound to bring that about. The *Ramsay* principle made it possible to hold that the final result for fiscal purposes was the same as it would have been if the parties had been so formally bound.

In *Craven* v. *White*[1] [1989] AC 398, this House decisively rejected the argument for the Revenue that any transaction entered into for the purpose of avoiding tax upon some later transaction was on that ground alone to be disregarded for fiscal purposes. There were three cases involved, of which *Craven* v. *White* itself bore a close resemblance on the facts to *Furniss* v. *Dawson* [1984] AC 474. The difference was that at the time when the shares which the taxpayers proposed to sell were transferred to the intermediate company no agreement, however informal, had yet been reached with the ultimate purchaser. Negotiations were in progress, but it was uncertain whether agreement would be reached or what the terms of any agreement would be. Agreement was reached some 21 days after the intermediate transfer. It was held by a majority that the intermediate transfer could not be disregarded for fiscal purposes, so that the relevant provisions of Sch 7 to the Finance Act 1965 applied to the effect of deferring any charge to capital gains tax.

Lord Oliver of Aylmerton, in the course of a closely reasoned speech agreed with by myself and Lord Jauncey of Tullichettle, said, at page 498, after referring to the passage from Lord Brightman's speech in *Furniss* v. *Dawson* quoted above[2]:

"The transactions which are before your Lordships in these three appeals all display the same basic pattern as the *Furniss* v. *Dawson* [1984] A.C. 474 transactions in the sense that there has been an ultimate purchase of property originally in the beneficial ownership of the tax-

(1) 62 TC 1. (1) *Ibid*, at pages 188G/189A.

payer which, before the completion of the purchase, has been vested in an intermediate company or companies controlled by the taxpayer or, in the case of the *Bowater* appeal, by the parent company of the taxpayer. In each case, however, one or more of the salient features present in the *Furniss* v. *Dawson* transactions is missing. In particular the transactions which, in each appeal, the Inland Revenue seeks now to reconstruct into a single direct disposal from the taxpayer to an ultimate purchaser were not contemporaneous. Nor were they pre-ordained or composite in the sense that it could be predicated with any certainty at the date of the intermediate transfer what the ultimate destination of the property would be, what would be the terms of any ultimate transfer or even whether an ultimate transfer would take place at all. In none of the three appeals therefore do the facts match with the criteria set out in Lord Brightman's speech."

Later, at page 509, Lord Oliver said([1]):

"My Lords, for my part I find myself unable to accept that *Furniss* either established or can properly be used to support a general proposition that any transaction which is effected for the purpose of avoiding tax on a contemplated subsequent transaction and is therefore 'planned' is, for that reason, necessarily to be treated as one with that subsequent transaction and as having no independent effect even where that is realistically and logically impossible. The particular question which fell to be determined in *Furniss* was, as it is in the present appeals, whether an intermediate transfer was, at the time when it was effected, so closely interconnected with the ultimate disposition that it was properly to be described as not, in itself, a real transaction at all but merely an element in some different and larger whole without independent effect. That is, I think, necessarily a question of fact but it has to be approached within the bounds of what is logically defensible."

In dealing with the Revenue argument, which he regarded as involving the proposition that any transaction effected for the sole purpose of saving tax payable on another transaction is to be treated fiscally as indivisible from that other transaction, Lord Oliver said, at page 512([2]):

"This result follows from standing the decision in *Ramsay* on its head and concentrating on the tax-saving purpose as the key element rather than, as *Ramsay* teaches, upon looking at the transactions as a whole and asking whether realistically they constitute a single and indivisible whole and whether it is intellectually possible so to treat them. It does not appear to me to be either a rational or a permissible approach because it involves substituting a determination to prevent the avoidance of tax for which there is no statutory, moral or logical basis for a rational, factual and intellectually possible appraisal of what is the reality of the position at the time when the relevant transaction is undertaken. I cannot, for my part, derive this from *Furniss* and I am quite sure that this House was not seeking to construct so irrational a doctrine."

In the present case, therefore, the correct approach to a consideration of the four steps in the tax-saving plan which the Revenue say were ineffective for the purpose is to ask whether realistically they constituted a single and indi-

([2]) 62 TC 1, at page 199A/C. ([3]) *Ibid*, at page 201D/F.

visible whole in which one or more of them was simply an element without independent effect and whether it is intellectually possible so to treat them.

Step 2 was the gift on 9 January 1980 by Lady Fitzwilliam to Lady Hastings of £2m net of capital transfer tax. The Commissioners found that Lady Hastings accepted this as a genuine unconditional and irrevocable gift by her mother. Lady Hastings became entitled to and received the income from this sum until under step 4 she paid £2m to Lady Fitzwilliam on 31 January 1980. She was liable for income tax on that income and may be presumed to have paid it. Under step 3 the trustees appointed £3.8m on trust to pay the income to Lady Fitzwilliam until 15 February 1980 or her earlier death, and subject thereto in trust as to the vested moiety for Lady Hastings absolutely and as to the contingent moiety for Lady Hastings contingently on her being alive at the date of determination of Lady Fitzwilliam's income interest, with a gift over to Mr. Philip Naylor-Leyland. Lady Fitzwilliam became entitled to and received the income of the contingent moiety, and no doubt paid tax on it, until 31 January 1980 when under step 4 she assigned her income interest in it to Lady Hastings in consideration of £2m paid to her by Lady Hastings. Lady Hastings became absolutely entitled to the contingent moiety on 15 February 1980. Under step 5 Lady Hastings on 7 February 1980 settled her reversionary interest in the vested moiety upon trust to pay the income therefrom to Lady Fitzwilliam until 15 March 1980 or until her earlier death, and subject thereto upon trust as to both capital and income for herself absolutely. Lady Fitzwilliam thus became entitled to and received the income of the vested moiety from 15 February until 15 March 1980, and would have been liable for tax on it but for s 446 of the Income and Corporation Taxes Act 1970, which made Lady Hastings liable for the tax, since she retained an interest in the settled property.

The case for the Crown on the *Ramsay* principle is that the contingent moiety became liable to capital transfer tax, under para 4(2) of Sch 5 to the Act of 1975, when Lady Fitzwilliam's income interest in that moiety terminated, by virtue of step 4, on 31 January 1980, and that the vested moiety became similarly liable when her income interest in it terminated, by virtue of step 5, on 15 March 1980. This involves an acceptance that step 3 was wholly effective in giving Lady Fitzwilliam an income interest in the whole £3.8m until 15 February 1980 and in giving Lady Hastings a vested and a contingent interest respectively in the capital of each of the two moieties. It also involves an acceptance that by step 4 Lady Fitzwilliam effectively assigned to Lady Hastings her limited income interest in the contingent moiety, and that by step 5 Lady Hastings effectively conferred on Lady Fitzwilliam an income interest in the vested moiety until 15 March 1980. The argument then seeks to assimilate the situation to that which would have existed had there been a contract between Earl Fitzwilliam's trustees, Lady Fitzwilliam and Lady Hastings, under the terms of which Lady Hastings agreed to accept the £2m from Lady Fitzwilliam on condition that she would return it after the appointment by the trustees under step 3 which the trustees under the contract agreed to make, so that in effect Lady Hastings gave no consideration for Lady Fitzwilliam's assignment to her of the latter's limited income interest in the contingent moiety and thus could not take advantage of para 4(4) of Sch 5 to the Act of 1975. As regards the vested moiety the postulated contractual terms were that, on condition of the trustees creating the reversionary interest in her favour under step 3, Lady Hastings agreed to settle that interest upon the trusts of step 5. Thus Lady

Hastings did no more than comply with the condition upon which the reversionary interest was conferred upon her.

In my opinion, this cannot be regarded as a realistic or intellectually possible view of the matter. It does not depend on disregarding for fiscal purposes any one or more of the transactions involved in steps 2 to 5, as having been introduced for fiscal purposes only and as having no independent effect for those purposes, nor on treating the whole series of steps as having no such effect. Each of the steps 2, 3, 4 and 5 had the fiscal effect of giving rise to a charge to income tax on Lady Hastings or on Lady Fitzwilliam for a period of time, and there was a potential charge to capital transfer tax if either had died while in enjoyment of the income. Although the Commissioners found as a fact that Lady Hastings accepted the £2m as a genuine unconditional gift from her mother, the Crown's case seeks to make it a conditional gift. Further, although all the transactions were accepted by the Commissioners as genuine, the Crown's case seeks to make out that step 4 was not an assignment for a consideration but a gratuitous assignment. No case applying the *Ramsay* principle has yet held it to be legitimate to alter the character of a particular transaction in a series to pick bits out of it and reject other bits. In *Furniss* v. *Dawson*[1] [1984] AC 474 the transfer to the intermediary company Greenjacket was disregarded for fiscal purposes because of the pre-existing informal agreement and of the manner in which the two transactions were carried out, which made it intellectually possible to hold that Greenjacket never had control of the operating companies within the meaning of the statute. No comparable exercise is possible here.

As regard the concept of preordainment, the expression "pre-ordained" was first used by Lord Diplock in the course of his speech in the *Burmah Oil* case 54 TC 200, the relevant passage from page 214 being quoted above. That was in the context of a self-cancelling series of transactions, designed to produce a loss which turned out not be a true loss within the meaning of the statute. In *Furniss* v. *Dawson* [1984] AC 474 Lord Brightman picked up the expression and applied it to a situation which involved not a self-cancelling series of transactions but two transactions which had a definite business purpose. By treating "pre-ordained" as equivalent to "pre-contracted" he was able to reach the conclusion that the true effect of the two transactions was that of a single tripartite contract. so that the intermediate company never obtained control of the family companies within the meaning of the relevant legislation. In the present case I would accept that steps 2, 3, 4 and 5 were preordained in the sense that they all formed part of a preplanned tax-avoidance scheme and that there was no reasonable possibility that they would not all be carried out, notwithstanding the pause while Lady Hastings as an individual took independent legal advice. But the fact of preordainment in this sense is not sufficient in itself, in my opinion, to negative the application of an exemption from liability to tax which the series of transactions is intended to create, unless the series is capable of being construed in a manner inconsistent with the application of the exemption. The series in *Furniss* v. *Dawson* was capable of being so construed, for the reasons explained by Lord Brightman. In my opinion, the series in the present case cannot be. The problem for the Crown is that, as regards the contingent moiety it has to rely on step 3 as creating an income interest in Lady Fitzwilliam until 15 February 1980 and on step 4 as terminating that interest. As regards the

(1) 55 TC 324.

vested moiety it relies on step 3 as creating an income interest in Lady Fitzwilliam until 15 February 1980 and on step 5 as prolonging that interest to 15 March 1980 and then terminating it. There is no question of running any two or more transactions together, as in *Furniss* v. *Dawson* or of disregarding any one or more of them. I am unable to perceive any rational basis upon which steps 2, 3 and 4 can be treated as effective for the purpose of creating a charge to tax under para 4(2) of Sch 5 of the Act but ineffective for the purpose of attracting the exemption in para 4(4) and that in para 4(5).

I conclude that the case does not fall within the *Ramsay* principle as extended by *Furniss* v. *Dawson* and I do not consider that any of the findings of the Commissioners preclude that conclusion. The Commissioners regarded the whole of steps 1 to 5 as one composite transaction leading to a charge to capital transfer tax in respect of the death of Earl Fitzwilliam, a result which is not now supported by the Crown. More importantly, they did not have the benefit of the decision of this House in *Craven* v. *White*[1] [1989] AC 398 the majority speeches in which, particularly that of Lord Oliver of Aylmerton, shed important light on the rationale and scope of the *Ramsay* principle, in particular by emphasising the necessity from the construction point of view of it being possible realistically and intellectually to treat a series of transactions as one composite whole, which is essentially a question of law.

There remains to be considered the Crown's contention, in relation to step 5 and the vested moiety, that the exemption from tax contained in para 4(5) of Sch 5 to the Act of 1975 was not available because Lady Hastings was not the settlor, or not the only settlor, of the property comprised in the vested moiety, so that when Lady Fitzwilliam's income interest in that property came to an end on 15 March 1980 a charge to tax arose under para 4(2).

Paragraph 1(6) of Sch 5 defines "settlor" as follows:

> " 'Settlor', in relation to a settlement, includes any person by whom the settlement was made directly or indirectly, and in particular (but without prejudice to the generality of the preceding words) includes any person who has provided funds directly or indirectly for the purpose of or in connection with the settlement or has made with any other person a reciprocal arrangement for that other person to make the settlement."

The argument for the Crown is that, by virtue of the appointment contained in step 3, property was provided to Lady Hastings directly or indirectly for the purpose of or in connection with the settlement which Lady Hastings later made under step 5. The person who provided that property is said to be Earl Fitzwilliam, because the appointment by the trustees falls to be read back into his will, under the principle of *Muir or Williams* v. *Muir & Others* [1943] AC 468 and *Pilkington & Another* v. *Inland Revenue Commissioners & Others*[2] [1964] AC 612. These cases decided that for the purposes of the Scottish rule against successive life rents and the English rule against perpetuities the exercise of a power of appointment must be written into the instrument creating the power. Earl Fitzwilliam is, therefore, to be treated as the settlor so far as concerns the trust purposes contained in the appointment made by his trustees under step 3, but he cannot reasonably be regarded as having provided property directly or indirectly for the purpose of or in connection with the settlement made by Lady Hastings under step 5.

(1) 62 TC 1. (2) 40 TC 416.

A The words "for the purpose of in connection with" connote that there must at least be a conscious association of the provider of the funds with the settlement in question. It is clearly not sufficient that the settled funds should historically have been derived from the provider of them. If it were otherwise anyone who gave funds unconditionally to another which that other later set-
B tled would fall to be treated as the settlor or as a settlor of the funds. It is clear that in the present situation there cannot possibly have been any conscious association of Earl Fitzwilliam with Lady Hastings' settlement.

My Lords, for these reasons I would dismiss the appeal.

C **Lord Templeman**:—My Lords, immediately before 31 January 1980 a trust fund of £1.9m known in these proceedings as "the contingent moiety" was held in trust to pay the income to Lady Fitzwilliam until 15 February 1980 and subject thereto in trust as to capital and income for her daughter Lady Hastings if she survived that date. By an assignment dated 14 January 1980 Lady Fitzwilliam assigned her interest in the contingent moiety to Lady
D Hastings.

The question is whether that assignment was made for a consideration of £2m or whether the assignment was gratuitous.

By an appointment dated 14 January 1980 a trust fund of £1.9m known
E in these proceedings as "the vested moiety", was appointed by the trustees upon trust to pay the income of the vested moiety to Lady Fitzwilliam until 15 February 1980 and subject thereto in trust as to capital and income for Lady Hastings absolutely. By a settlement dated 7 February 1980 Lady Hastings settled the vested moiety upon trust to pay the income of the vested
F moiety to Lady Fitzwilliam from 15 February 1980 until 15 March 1980. The question is whether on 15 March 1980 the vested moiety reverted to Lady Hastings as settlor.

This appeal concerns a tax-avoidance scheme which involves two separate devices. The first device consists of self-cancelling payments. When a
G trust fund is settled on a person ("the life tenant") for a life or less interest in possession, capital transfer tax is charged on the capital of the trust fund when that interest comes to an end. To avoid double taxation the legislation provides that any consideration received by a life tenant if his interest comes to an end by surrender to the remainderman shall, for the purposes of the tax, be deducted from the value of the trust fund. The trust fund in the pre-
H sent case known in the scheme as the contingent moiety was worth £1.9m. The scheme provided for £2m to be given by the life tenant to the taxpayer remainderman and then for £2m to be paid by the taxpayer to the life tenant upon the surrender of the interest in possession of the life tenant. The object of the scheme was to avoid capital transfer tax on the contingent moiety on
I the surrender without the life tenant receiving or the taxpayer suffering any consideration as an overall result of the scheme. The two payments cancelled each other out. In *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*[1] [1982] AC 300 ("*Ramsay*") self-cancelling payments were held by this House to be ineffective.

(1) 54 TC 101.

The second device consists of carrying out one transaction by means of two transactions. To avoid double taxation the legislation provides that when a trust fund belonging to a settlor is settled by him on a life tenant with remainder to the settlor then if the interest of the life tenant comes to an end in the lifetime of the settlor, tax is not payable when the trust fund reverts to the settlor. The trust fund in the present case known as the vested moiety, also valued at £1.9m, was held upon trusts whereunder the trustees had power to appoint to the life tenant an interest in possession until 15 March 1980 with remainder to the taxpayer absolutely. The scheme divided such an appointment into two. Trustees appointed to the life tenant an interest until 15 February 1980 with remainder to the taxpayer. The taxpayer then settled the trust fund upon trust for the life tenant between 15 February 1980 and 15 March 1980 and contended that on 15 March 1980 the trust funds reverted to "the settlor". In *Furniss* v. *Dawson*[1] [1984] AC 474 transactions divided into two were held by this House to be ineffective; for the purpose of the tax sought to be avoided, the two transactions are to be regarded as one single transaction carried out by the person who possessed power to effect that one single transaction.

The taxpayer in the present case sought to distinguish *Ramsay* and *Furniss* v. *Dawson* and other authorities to the same effect on the grounds that on the advice of counsel who drafted and recommended the scheme, no explanation was given to the taxpayer by her legal advisors until after the scheme had been partly implemented. An explanation and advice were then tendered by a second counsel who had not been concerned in the authorship of the scheme. The taxpayer decided to complete and did complete the scheme. The Special Commissioners were not impressed by these suggested distinctions which, however, found favour with Vinelott J. and the Court of Appeal (Nourse, Staughton L.JJ. and Sir Christopher Slade). The Revenue now appeal.

By his will dated 13 December 1977, the tenth and last Earl Fitzwilliam gave his residuary estate to his four trustees Mr. Sporborg and Mr. Ross, the Earl's widow Lady Fitzwilliam and her daughter Lady Hastings upon discretionary and accumulation trusts for 23 months after his death and subject thereto upon trust for Lady Fitzwilliam for life with power to pay her capital, and with remainder to Lady Hastings absolutely. The beneficiaries during the 23-months discretionary period included Lady Fitzwilliam and Lady Hastings. The discretionary trusts included power for the trustees to appoint income or capital to Lady Fitzwilliam or Lady Hastings. The Earl died on 21 September 1979 leaving a residuary estate worth over £11m.

Section 19(1) of the Finance Act 1975 directs that capital transfer tax shall be charged on the value transferred by a chargeable transfer. By s 20 a chargeable transfer is any transfer of value other than an exempt transfer and a transfer of value is any disposition made by a person as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; the amount by which it is less is the value transferred by the transfer. By s 20(4) a disposition is not a transfer of value if it is shown that it was not intended, and was not made in a transaction intended, to confer any gratuitous benefit on any person. A gift is a typical transfer of value.

By s 22(1) on the death of any person " ... tax shall be charged as if, immediately before his death, he had made a transfer of value and the value

(1) 55 TC 324.

transferred by it had been equal to the value of his estate immediately before his death ... ". Thus the residuary estate of the Earl became charged with capital transfer tax on his death. By para 1(1) of Sch 6 to the Act a transfer of value is an exempt transfer to the extent that the value of the estate of the transferor's spouse is increased.

By s 47(1A) of the Act of 1975 as inserted by s 121 of the Finance Act 1976, where property comprised in a person's estate is settled by his will and within the period of two years after his death and before any interest in possession has subsisted in the property, a distribution is made out of the property, then the provisions of the Act relating to capital transfer tax shall operate as if the will had provided that on the testator's death the property should be applied or held as it is applied by the distribution payment or held after the happening of the event. If, therefore, the trustees of the will of the Earl made appointments in favour of Lady Fitzwilliam, the surviving spouse of the Earl, the spouse exemption would apply as if the terms of the appointment had been included in the will.

By para 3(1) of Sch 5 to the Act of 1975, a person beneficially entitled to an interest in possession in settled property shall be treated as beneficially entitled to the property in which the interest subsists. By para 4(2) where at any time during the life of a person beneficially entitled to an interest in possession in any property comprised in a settlement his interest comes to an end, tax shall be charged, as if at that time he had made a transfer of value and the value transferred had been equal to the value of the property in which his interest subsisted.

In the result, if the trustees appointed capital to Lady Fitzwilliam out of the residuary estate of the Earl, then capital transfer tax would cease to be payable by reference to the death of the Earl but would be payable if and to the extent that Lady Fitzwilliam either gave away that capital in her lifetime or was possessed of that capital at her death. If the trustees appointed a life or less interest in possession to Lady Fitzwilliam, then capital transfer tax would cease to be payable by reference to the death of the Earl but would be payable when the interest in possession of Lady Fitzwilliam came to an end on her death or in her lifetime.

By para 4(4) of Sch 5 to the Act of 1975, if an interest in settled property comes to an end

> " ... by being disposed of by the person beneficially entitled thereto and the disposal is for a consideration in money or money's worth, tax shall be chargeable under this paragraph as if the value of the property in which the interest subsisted were reduced by the amount of the consideration ... "

So if a life or less interest in possession were appointed to Lady Fitzwilliam with remainder to Lady Hastings and if Lady Fitzwilliam then sold and assigned her interest in possession to Lady Hastings for a consideration then provided the consideration was equal in value to the capital of the trust fund no capital transfer tax would be payable on the coming to an end of Lady Fitzwilliam's interest in possession. The object of this provision is to prevent double taxation.

By para 4(5) of Sch 5 if an interest in possession in settled property comes to an end and " ... on the same occasion the property in which the interest subsisted reverts to the settlor ... ", tax shall not be chargeable. The object of this provision also is to prevent double taxation.

By s 86 of the Act of 1976 where a person ("the donor") makes a "chargeable transfer" which increases the estate of another person ("the donee") and the donee subsequently makes "a transfer of value" which increases the value of the estate of the donor, the value transferred by the donee's transfer shall be an exempt transfer to the extent that the value of the donee's transfer does not exceed the amount by which his estate was increased by the donor's transfer. By s 87 the donor may claim that " ... the value transferred by the donor's transfer shall be treated as cancelled by the donee's transfer to the extent of ... the value restored" by the donee's transfer. In the result if Lady Fitzwilliam made a transfer of value by giving £2m to Lady Hastings, capital transfer tax would be payable by reason of the gift. If, however, subsequently Lady Hastings made a transfer of value by giving £2m to Lady Fitzwilliam, capital transfer tax on the gift by Lady Fitzwilliam would be cancelled and if that tax had been paid it could be recovered. The object of this provision is to prevent double taxation.

In 1979 Lady Fitzwilliam was 81. Lady Fitzwilliam and Lady Hastings and the independent trustees were aware that a burden of tax hung over the estate of the Earl. If any part of the estate were appointed to Lady Fitzwilliam so as to give her an absolute interest or an interest in possession then capital transfer tax would cease to be chargeable by reason of the death of the Earl but would be charged not later than the death of Lady Fitzwilliam.

The trustees were liable to pay capital transfer tax out of the estate of the Earl, but were not personally liable beyond the value of the assets. Capital transfer tax would be payable out of the estate before Lady Hastings came into her inheritance. The rate was 75 per cent. Lady Fitzwilliam, Lady Hastings and the independent trustees hoped that their solicitors, Messrs. Currey & Co., would find some way in which Lady Hastings could inherit the estate but avoid the payment of tax. Curreys consulted Mr. Walker, a Queen's Counsel practising at the Chancery Bar and specialising in trusts and tax avoidance to see if he could find a way.

Curreys first consulted Mr. Walker on 11 October 1979 with a proposal for a tax-avoidance scheme. Counsel amended the scheme from time to time and finally advised the implementation of the scheme by steps to be taken in accordance with an arranged timetable. The scheme was accepted by Curreys and was carried out between 20 December 1979 and 7 February 1980 by the following steps:

Step 1

By an appointment dated 20 December 1979 the trustees appointed £4m out of the estate of the Earl to Lady Fitzwilliam absolutely.

Step 2

On 9 January 1980 Lady Fitzwilliam gave £2m to Lady Hastings and undertook to "pay all capital transfer tax in respect of the gift". Step 2 was a chargeable transfer and tax became payable on £2m at the rate of 75 per cent., namely £1,500,000 on 31 July 1980. If Lady Fitzwilliam fulfilled her

undertaking, which was not binding in law, she would have to pay tax on £2m grossed up to over £5m. This would have about exhausted her resources and if the trustees provided money out of the estate of the Earl, that estate would, of course, be correspondingly depleted.

Step 3

By an appointment dated 14 January 1980 the trustees appointed £3.8m which was settled in two moieties. The contingent moiety of £1.9m was settled on Lady Fitzwilliam until 15 February 1980 with remainder to Lady Hastings if she survived that date. A further £1.9m, the vested moiety, was settled upon Lady Fitzwilliam until 15 February 1980 with remainder to Lady Hastings absolutely. This appointment was not a chargeable transfer but conferred on Lady Fitzwilliam an interest in possession in the contingent moiety and the vested moiety. On 15 February 1980 when that interest came to an end as a result of the trusts declared by the appointment, capital transfer tax would be charged on the aggregate value of the contingent moiety and the vested moiety. The tax would amount to £2,850,000.

Step 4

By an assignment dated 31 January 1980 Lady Fitzwilliam assigned her interest in the contingent moiety to Lady Hastings. The assignment was expressed to be in consideration of £2m and Lady Hastings paid that sum to her mother. Lady Fitzwilliam and Lady Hastings later claimed and the Revenue conceded that the £2m, paid on 31 January 1980, was a "restoration" of the gift made by Lady Fitzwilliam at step 2 within s 87 of the Act of 1976. In these proceedings Lady Hastings claims that the £2m paid on 31 January 1980 also constituted "consideration" for the purposes of para 4(4) of Sch 5 to the Act of 1975. Thus step 4, it was claimed, put an end to the capital transfer tax charged on the gift at step 2 and put an end to the capital transfer tax which would otherwise have been chargeable on the contingent moiety when the interest in possession of Lady Fitzwilliam came to an end.

Step 5

By a settlement dated 7 February 1980 Lady Hastings settled the vested moiety in trust for Lady Fitzwilliam from 15 February until 15 March 1980. On behalf of Lady Hastings it is claimed this settlement put an end to the charge for capital transfer tax on the vested moiety which pursuant to the appointment in step 3 would have been charged when the interest in possession of Lady Fitzwilliam came to an end. It is also claimed that when the interest in possession of Lady Fitzwilliam came to an end on 15 March 1980 no capital transfer tax became payable because when the settled property reverted to Lady Hastings she was the settlor for the purposes of para 4(5) of Sch 5.

The Revenue contend that steps 2, 3, 4 and 5 constituted a preordained series of transactions. Steps 2 and 4 were inserted solely for the avoidance of a liability to capital transfer tax which would otherwise have been paid in respect of the contingent moiety. Steps 2 and 4 on the authority of decisions binding on this House must be disregarded for that purpose and for that purpose alone with the result that capital transfer tax became payable on 31 January 1980 at step 4 when the life interest in possession of Lady Fitzwilliam came to an end. The Revenue also contend that step 5 was inserted solely for the avoidance of a liability to capital transfer tax which would otherwise have been payable in respect of the vested moiety and must

be treated for the purpose of capital transfer tax as part of an appointment by the trustees until 15 March 1980 with the result that capital transfer tax became payable on 15 March 1980 when the interest in possession of Lady Fitzwilliam came to an end.

In my opinion, so far as the contingent moiety is concerned, the relevant effects of Mr. Walker's scheme and their consequences for capital transfer tax were as follows:

(1) On 9 January 1980 at step 2 Lady Fitzwilliam made a gift of £2m to Lady Hastings. Capital transfer tax became charged on the gift and was payable on 31 July 1980 unless in the meantime Lady Hastings restored the gift of £2m to her mother.

(2) On 31 January 1980 at step 4, Lady Hastings paid £2m to Lady Fitzwilliam and the interest in possession conferred on Lady Fitzwilliam in the contingent moiety by step 3 came to an end.

(3) Although the assignment dated 31 January 1980 asserted that the £2m paid at step 4 was paid in consideration of the assignment, Lady Hastings and Lady Fitzwilliam subsequently claimed, as they were always intended to claim by the scheme, and the Revenue accepted that the £2m had been paid by way of "restoration" of the gift at step 2.

(4) On 31 January 1980 at step 4 capital transfer tax became charged on the contingent moiety as the result of the coming to an end of the interest in possession of Lady Fitzwilliam. The assignment was inaccurate when it asserted that the £2m had been paid "in consideration" of the assignment. The £2m had been paid in restoration of the gift at step 2.

The sum of £2m paid by Lady Hastings to Lady Fitzwilliam on 31 January 1980, unlike the loaves and fishes, could only serve one purpose. If Lady Hastings had wished to restore the gift of £2m and to pay £2m by way of consideration for the assignment, she would have been obliged to raise and pay £4m. The deed of assignment said that the £2m had served one purpose; Lady Hastings, Lady Fitzwilliam and the Revenue agreed that the £2m had served another purpose. The same sum of £2m could not serve two purposes. On 31 January 1980 Lady Fitzwilliam received no consideration let alone £2m, for the assignment of her trivial entitlement to the income of the contingent moiety during the next fortnight. The answer to the first question raised by this appeal is that the assignment was gratuitous.

So far as the vested moiety is concerned the relevant effect of Mr. Walker's scheme was to confer on Lady Fitzwilliam an interest in possession which came to an end on 15 March 1980. Capital transfer tax then became payable. The vested moiety did not revert to Lady Hastings as settlor because Mr. Walker provided by the scheme that the vested moiety should be vested in Lady Fitzwilliam until 15 March 1980 by steps 3 and 5. As Curreys later pointed out to Mr. Walker,

> "We have seen no very easy way of answering the question why, if property is to be transferred to Lady Hastings, the transfer is not made by an exercise of the trustees' discretionary powers rather than via Lady Fitzwilliam."

A The honest answer to the question posed by Curreys is that the settlement by Lady Hastings was only interposed for the purpose of avoiding capital transfer tax which would otherwise be payable. The answer to the second question raised by this appeal is that the vested moiety never reverted to Lady Hastings as settlor.

B The evolution of Mr. Walker's scheme after 11 October 1979 when Curreys proposed the scheme in outline was as follows.

On 5 November 1979 Curreys wrote to Mr. Walker saying with reference to step 2:

C > " ... there is a real risk of an attack on the basis that Lady Fitzwilliam's so called net gift is a sham if the gift is so large that she could not in reality pay the tax on it ... The conclusion is that Lady Fitzwilliam's gift should be expressed as a net gift but be sufficiently small to prevent the sham argument succeeding."

D Curreys then suggested a net gift of £2m and proposed that the gift: " ... might be done without the subsequent steps having been explained to Lady Fitzwilliam or Mrs. Hastings or to the trustees". They also suggested that steps 1, 2 and 3 should be followed "after a respectable interval" by step 5 and said that in the result Lady Hastings would become entitled to £3.8m E of assets free of capital transfer tax.

On 23 November Curreys informed Mr. Walker that at a trustees' meeting they had in furtherance of step 1:

F > " ... put forward the suggestion that they might resolve to release £4 million to Lady Fitzwilliam and the trustees are prepared to do this if you think it appropriate."

In discussing steps 1 and 2 Curreys commented that:—

G > "It is desirable that a release to Lady Fitzwilliam should take place as soon as possible partly for Capital Gains Tax reasons and partly because there could then be an interval, albeit a short one, before Lady Fitzwilliam's gift is made ... You will have gathered that we are trying to dissociate the release to Lady Fitzwilliam from the gift she may make to Mrs. Hastings. This is because we have seen no very easy way of answering the question why, if property is to be transferred to Mrs. Hastings, H the transfer is not made by an exercise of the trustees' discretionary powers rather than via Lady Fitzwilliam, bearing in mind that an appointment by the trustees would avoid ad valorem stamp duty."

This revealing comment shows that steps in the scheme must be considered as a whole and that the scheme involved inserted steps.

I On 28 December 1979, after step 1 had been completed but no other step had been taken, Curreys informed Mr. Walker that Lady Fitzwilliam had decided to go to Africa for about five weeks leaving on 15 January. Counsel slightly revised the scheme and on 3 January 1980 commented that one advantage of the scheme as revised was that:

"It would help in demonstrating that Mrs. Hastings had not been advised of the settlement at step 3b for her mother to have been absent for a period." A

Step 3b became step 5.

On 3 January 1980 counsel discussed the revised scheme over the telephone with Curreys and their notes recorded a suggestion that step 5 should not be discussed with Lady Hastings before her mother's departure from England and should be made on "independent advice". The net result of the scheme should be that Lady Fitzwilliam "is absolutely entitled to a £4 million fund ... that Mrs. Hastings is absolutely entitled to a £3.8 million fund ... and that the residue of Lord Fitzwilliam's estate continues to be held by the will trustees on trust for Lady Fitzwilliam for life with remainder to Mrs. Hastings". In my opinion, this statement makes it quite clear that steps 2, 3, 4 and 5 constituted a preordained series of transactions to be implemented for the sole purpose of avoiding capital transfer tax which would otherwise be payable. B C

On 18 January 1980, after step 3, Mr. Herbert of counsel was asked by Curreys to advise Lady Hastings. Mr. Herbert was a member of Mr. Walker's chambers. Mr. Herbert was given the following instructions: D

"Counsel is asked to read the note which outlines a problem of some magnitude. He will appreciate that any proposals aimed at mitigating the serious Capital Transfer Tax position which already exists will have to be implemented swiftly ... Counsel is asked ... to advise only on [steps 4 and 5 and to discuss the matter with Mr. Walker]." E

Counsel was furnished with the documents which recorded steps 1, 2 and 3 and was informed that:

"Instructing solicitors are particularly concerned over the C.T.T. consequences of the £2 million gift to Mrs. Hastings which appears to have triggered a tax liability of nearly £5 million. Although this liability is prima facie payable by Lady Fitzwilliam the consequences for Mrs. Hastings and her son could be very serious as they expect to be the principal beneficiaries under Lady Fitzwilliam's will. Mrs. Hastings should also perhaps bear in mind that in the event of Lady Fitzwilliam refusing to meet the liability Mrs. Hastings might be assessed ... " F G

The "serious Capital Transfer Tax position" had, of course, been deliberately generated by step 2 and 3.

After step 5, as I have already recounted, Lady Fitzwilliam and Lady Hastings asserted and the Revenue accepted that £2m paid by Lady Hastings to Lady Fitzwilliam at step 4 was a transfer of value which pursuant to ss 86 and 87 of the Act of 1976 cancelled the capital transfer tax payable in respect of the gift of £2m at step 2. Lady Hastings now claims that £2m paid at step 4 was also consideration for the assignment at step 4. The Revenue having conceded that £2m at step 4 was a gift which cancelled the gift at step 2 now resist the claim by Lady Hastings that the same payment consisted of consideration for the assignment at step 4. H I

The Special Commissioners heard oral evidence including the testimony of Lady Fitzwilliam, Lady Hastings, Mr. Powell, who was a partner in Curreys and dealt with the Fitzwilliam family, and Mr. Smith, who was a

A partner in Curreys and advised Lady Hastings after step 3. The Special Commissioners made the following material findings(1):

First

" ... Mr. Powell did not at any stage intend to and did not in fact, disclose the details of any plan, developed or otherwise, to any member B of the family ... Non-disclosure of the circumstances in which each of the five steps was taken was, we find, an essential tactic adopted in an endeavour to secure the successful implementation of the overall tax-saving plan."

C Second(2):

"The evidence as a whole ... leads us irresistibly to the conclusion, and we so find, that Lady Hastings was at all relevant times aware that Mr. Powell was putting into effect a tax-saving scheme and that she did not know what form that scheme took because she did not at any time inquire."

D

Third(3):

" ... Lady Fitzwilliam ... had little idea what it was all about. She relied fully on her solicitors and was content to leave them to do whatever was necessary."

E Fourth(4):

"We find that, so far as Lady Fitzwilliam is concerned, each of the steps taken was part of a preordained series of transactions, the essential features of which i.e. the five steps, had all been determined, by the time when the first transaction (the £4m appointment) was effected, by Lady F Fitzwilliam through her solicitors and her attorneys to whom she had delegated all necessary and unfettered authority."

Fifth(5):

"We find that all the steps taken up to and including the execution of the £3.8m appointment were steps taken in pursuance of the CTT G scheme for which instructions had been given by or on behalf of Lady Hastings and her co-trustees with her knowledge and that in the circumstances which we have recited there must be attributed to her a full understanding of the scheme and the purpose of each step within it as and when it was taken. The intention of Mr. Powell and other members of his firm to implement the scheme and the state of their knowledge H each step must, we find, be attributed to Lady Hastings ... "

Sixth(6):

"We then come to the meeting between Lady Hastings and Mr. Smith on 22 January 1980. ... Nobody was seriously considering unscrambling the steps so far taken. The scheme was then well under I way. It was well understood that the CTT problem arising out of the £20m payment needed to be dealt with as a matter of urgency in view of the then state of Lady Fitzwilliam's health and the steps, which

(1) Page 631A/C *ante*. (2) Page 631F *ante*. (3) Page 631H/I *ante*.
(4) Page 645F/G *ante*. (5) Page 646G/H *ante*. (6) Pages 646I/647D *ante*.

Mr. Smith felt he could recommend to Lady Hastings for dealing with it, had been set up and received the approval of Mr. Walker. The approval of Mr. Herbert, which could not be seriously in doubt, was awaited. The political questions were undoubtedly a topic for discussion ... They did not, however, offer any realistic prospect of a solution and furthermore there was, in the circumstances, no realistic prospect of Lady Hastings calling a halt on their account to the final implementation of the scheme. Instead, having disposed of the political aspects of the discussion, Lady Hastings, who had at the time a thorough understanding of what remained to be done, readily gave instructions to Mr. Smith to go ahead subject to his receiving the support of Mr. Herbert who had already been instructed. Mr. Herbert, as was expected, gave his approval ... We, therefore, find that nothing that happened at the meeting of 22 January or thereafter, did anything to sever the steps then taken from the steps previously taken. They were all part of an indivisible process in a preordained series of transactions."

Seventh[1]:

"On 31 January 1980 there was a meeting with Lady Hastings at which Mr. Smith and Mr. Powell were present. Lady Hastings was informed of Mr. Herbert's favourable opinion and proceeded to execute the deed of assignment to her of Lady Fitzwilliam's interest in the contingent moiety fully understanding that she was paying £2m for an interest of very little value in the hope that she would thereby solve the CTT problem created by the £2m net payment."

Eighth[2]:

" ... we find, in so far as it is a matter of fact, and hold, in so far as it is a matter of law, that (a) the operations comprised in steps 1 to 5 effected a composite transaction whereby 'out of the estate of the Tenth Earl' Lady Fitzwilliam received the sum of £4m and Lady Hastings the sum of £3.8m; (b) the said operations were introduced into the composite transaction for no purpose apart from the avoidance of CTT which would have been payable had the trustees effected the said transaction without the undertaking of such operations; and (c) accordingly, CTT is chargeable on the estate of the Tenth Earl in accordance with s 47(1A) of the 1975 Act (as amended) as if such operations had not been undertaken and the trustees had appointed such sums to Lady Fitzwilliam and Lady Hastings in each case absolutely."

Mr. Nugee, on behalf of Lady Hastings and the other Respondents, submitted that steps 2, 3, 4 and 5 were separate transactions. Step 1 had no capital transfer tax repercussions. The gift at step 2 created a capital transfer tax charge but that step was avoided by step 4. Step 3 created a capital transfer tax charge on the contingent moiety on 15 February 1980 but that charge was avoided by step 4. Step 3 also created a capital transfer tax charge on the vested moiety on 15 February 1980 but that charge was avoided by step 5.

The Revenue contend that steps 2, 3, 4 and 5 contain a preordained series of transactions which must be considered as a whole. Steps 2 and 4 were inserted in the scheme for the purpose of avoiding tax on the contingent moiety and must be disregarded for that purpose and that purpose only. The

(1) Page 638D/E *ante*. (2) Page 647G/H *ante*.

payments of £2m at steps 2 and 4 simply cancelled one another out. The Revenue also claim that step 5 was inserted into the scheme for the purpose of avoiding capital transfer tax on the vested moiety and must be disregarded for that purpose; an appointment until 15 March 1980 was divided into two.

Mr. Nugee submitted that the findings of the Special Commissioners should be ignored because the Special Commissioners held that there was a preordained series of transactions consisting of steps 1 to 5 whereas the Revenue now concede that step 1 was a separate transaction. In my opinion, this concession did not prevent the Revenue arguing and succeeding in this House on the basis that steps 2, 3, 4 and 5 were not separate transactions but were parts of a preordained series of transactions to which the principles laid down by this House apply. Step 1 is a separate transaction because the appointment of £4m to Lady Fitzwilliam did not make step 2 inevitable and involved no tax consequences. Step 2 was not a separate transaction because the gift of £2m to Lady Hastings created a tax burden which could only be avoided by Lady Hastings restoring £2m to Lady Fitzwilliam. The scheme provided that this restoration should be made by means of steps 3 and 4 with the object of avoiding tax on the contingent moiety. There was no practical possibility that step 2 would not be followed by steps 3, 4 and 5.

The principles applicable to a preordained series of transactions have been laid down by this House as follows:

First[1]:

> "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." *per* Lord Wilberforce in *Ramsay* [1982] AC 300, 323.

Second[2]:

> "It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that *Ramsay's* case did not mark a significant change in the approach adopted by this House in its judicial role to a preordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable;" *per* Lord Diplock in *Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.* 54 TC 200, 214 ("*Burmah*").

Third[3]:

> "The true principle of the decision in *Ramsay* was that the fiscal consequences of a preordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately." *Per* Lord Fraser of Tullybelton in *Furniss* v. *Dawson* [1984] AC 474, 512.

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(1) 54 TC 101, at page 185B/C. (2) [1982] STC 30, at page 32e/f.
(3) 55 TC 324, at page 388C/D.

Fourth[1]:

> " ... there must be a pre-ordained series of transactions or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end ... Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax—not 'no business *effect*'. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied." *Per* Lord Brightman in *Furniss* v. *Dawson* [1984] AC 474, 527.

Fifth[2]:

> " ... the court must first construe the relevant enactment in order to ascertain its meaning; it must then analyse the series of transactions in question, regarded as a whole, so as to ascertain its true effect in law; and finally it must apply the enactment as construed to the true effect of the series of transactions and so decide whether or not the enactment was intended to cover it. The most important feature of the principle is that the series of transactions is to be regarded as a whole." *Per* Lord Keith of Kinkel in *Craven* v. *White* [1989] AC 398, 479.

In *Ramsay* the taxpayer made a contrived deductible loss matched by a contrived non-chargeable gain. Overall he made no real loss and, therefore, no fiscal loss. For the purposes of capital gains tax, the gain and the loss were self-cancelling. In *Furniss* v. *Dawson* the taxpayer exchanged British shares with a foreign company, "Greenjacket", and then procured the sale of the British shares to the purchaser. The two transactions were treated as one transaction for the purposes of capital gains tax.

The *Ramsay* principle requires three features: (1) A preordained series of transactions. (2) Steps inserted into that series of transactions. (3) The inserted steps must have no commercial purpose apart from the avoidance of a liability to tax which in the absence of the particular steps would have been payable.

In *Craven* v. *White* [1989] AC 398, 479 Lord Keith of Kinkel said this[3]:

> "In ascertaining the true legal effect of the series it is relevant to take into account, if it be the case, that all the steps in it were contractually agreed in advance or had been determined on in advance by a guiding will which was in a position, for all practical purposes, to secure that all of them were carried through to completion. It is also relevant to take into account, if it be the case, that one or more of the steps was introduced into the series with no business purpose other than the avoidance of tax."

In the present case the Revenue contend and I agree that all the steps had been determined in advance by a guiding will (Lady Hastings) who was in a position, for all practical purposes, to secure that all the transactions were carried into operation. Lady Hastings was the taxpayer who would suffer if capital transfer tax was paid out of the contingent moiety or the vested moiety. Lady Hastings was the taxpayer who benefited from the transactions

(1) 55 TC 324, at page 401/C/E. (2) 62 TC 1, at page 170G/H.
(3) *Ibid*, at page 170H/I.

A at the end of the day. Lady Hastings is the only person who has a direct financial interest in the outcome of this appeal. Lady Hastings was in a position to secure that all the steps in the series of transactions were completed because the only other participants, Lady Fitzwilliam and the independent trustees, were at all times prepared to follow the advice of Curreys which was in turn based on the advice of Mr. Walker. There is no doubt that Curreys, B quite properly, secured and were always able to secure the participation of Lady Fitzwilliam and the other trustees.

The Earl had selected Lady Fitzwilliam and Lady Hastings both as beneficiaries and as trustees. In 1980 no distribution of income could take place and no appointment of capital could be made unless both Lady Fitzwilliam C and Lady Hastings consented. In default of appointment the capital and income of the residuary estate of the Earl, including any accumulated income, would from 21 August 1981 be held in trust for Lady Fitzwilliam for life with remainder to Lady Hastings absolutely. The other trustees Mr. Sporborg and Mr. Ross were entitled to give effect to any tax-avoidance scheme and to concur in any exercise of the trustees' power of appointment D over the residuary estate which was necessary to give effect to a scheme designed to vest £3.8m in Lady Hastings free of capital transfer tax. The advice of Mr. Walker that such a scheme could properly be implemented for the purpose of avoiding capital transfer tax for the benefit of Lady Hastings was a complete protection for all the trustees.

E Mr. Nugee submitted that the series of transactions was not preordained because Lady Hastings was kept in ignorance of the scheme until after step 3 and Lady Hastings took "separate advice" after step 3 before she decided to implement steps 4 and 5. The ignorance of Lady Fitzwilliam is irrelevant; she quite properly followed and was always prepared to follow the advice of Curreys. It is significant, however, that if step 2 had been a separate step and F not part of a preordained series of transactions, Lady Fitzwilliam could never have been advised to make a gift of £2m at step 2 and to enter into an undertaking which would involve her in the payment of capital transfer tax on 31 July 1980 on a capital sum of £5m. If step 3 had been a separate step and not part of a preordained series of transactions, Lady Fitzwilliam could not have been advised to join in making an appointment which conferred on G her a derisory interest in possession for a period of four weeks and involved a charge of capital transfer tax amounting to £2,850,000 on 15 February 1980. Curreys advised Lady Fitzwilliam to make the gift of £2m and to enter into the undertaking at step 2 and to join in making the appointment at step 3 because these steps were preordained steps in a series of transactions and were designed without benefit to Lady Fitzwilliam to avoid a capital transfer H tax liability which would otherwise be payable.

Lady Hastings was content to accept the gift of £2m at step 2 and the undertaking from her mother and she was content to enter into the appointment at step 3 with its eccentric interest conferred on her mother on the advice of her own solicitors, Curreys.

I

Mr. Nugee submitted that the scheme was not a preordained series of transactions because Lady Hastings was "separately advised" after step 3. As part of the scheme conceived by Mr. Walker, Lady Hastings consulted another counsel, Mr. Herbert, after step 3 and the scheme was then explained to her and she then decided to implement steps 4 and 5. The position of

Lady Hastings was no different from that of a taxpayer who embarks on a scheme involving five transactions on the advice of one counsel and then after step 3 consults another counsel and, receiving confirmatory advice, proceeds with and duly completes the scheme. The "separate advice" given to Lady Hastings as part of Mr. Walker's scheme did not convert steps 2, 3, 4 and 5 from a preordained series of transactions into separate transactions.

In my opinion, a solicitor owes his client a duty not to embroil the client in a tax-avoidance scheme or any other substantial transaction without full prior explanation and express instructions. A taxpayer who is kept in ignorance by his own solicitors when taking part in transactions which when completed form a preordained series of transactions for his benefit cannot thereafter claim that the transaction did not constitute a preordained series of transactions because of his initial ignorance. A preordained series of transactions is not converted into separate transactions because at some stage the taxpayer who is able to procure completion of the scheme hesitates and takes advice before deciding to complete the series. If Curreys had given an explanation and obtained instructions from their clients, Lady Fitzwilliam, Lady Hastings, Mr. Sporborg and Mr. Ross on 3 January 1980, the meeting would have been recorded roughly on the following lines:

> "(1) Mr. Powell said that the estate of the Earl was liable to capital transfer tax at the rate of 75 per cent. payable when Lady Hastings inherited the estate from her mother. Counsel had drafted a scheme to avoid liability on £3.8m part of the estate.
>
> (2) Lady Fitzwilliam would make the gift of £2m which she intended to make to Lady Hastings and would undertake to pay the capital transfer tax in respect of that gift. The trustees would appoint £3.8m to Lady Fitzwilliam until 15 February 1980.
>
> (3) Lady Hastings would then take an assignment of the interest appointed to Lady Fitzwilliam in £1.9m. That assignment would be expressed to be in consideration of £2m but no money would be required other than the £2m gift which would be restored to Lady Fitzwilliam. Lady Hastings would settle the other appointed £1.9m on Lady Fitzwilliam until 15 March 1980. Counsel advised that if the scheme were completed, capital transfer tax on £3.8m would be avoided and no tax would be payable on the gift of £2m which would be restored to Lady Fitzwilliam.
>
> (4) There was one other ingredient of the scheme. After the appointment by the trustees, Lady Hastings must seek the advice of another counsel before deciding to complete the scheme. Lady Hastings asked what would happen if she decided not to complete the scheme. Mr. Powell said that in that case the gift of £2m must still be restored or capital transfer tax amounting to £1.5m paid on 31 August 1980. Capital transfer tax would be charged on the capital of £3.8m on 15 February 1980 unless counsel was able to suggest some new scheme which could be completed before 15 February 1980.
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> (5) It was unanimously agreed that the scheme be undertaken and Mr. Powell was instructed accordingly."

The Special Commissioners with ample material, found as a fact that(1) "Lady Hastings was at all relevant times aware that Mr. Powell was putting

(1) Page 631F *ante*.

into effect a tax-savings scheme and that she did not know what form that scheme took because she did not at any time inquire". I find it hard to believe that all the participants in the scheme did not have a good idea that each of the steps 2, 3, 4 and 5 was part of a scheme to avoid the capital transfer tax threat which was known to exist.

A preordained series of transactions can be identified by the fact that the first transaction is bound to be followed by the other transactions: see *Eilbeck* v. *Rawling* decided together with *Ramsay*(2) [1982] AC 300 and see *Furniss* v. *Dawson*(3) [1984] AC 474. In *Craven* v. *White*(4) [1989] AC 398 the majority held that there was no preordained series of transactions precisely because at the time of the first transaction it was not certain that the purchaser who was a necessary participant in the second transaction would be willing to participate.

Curreys were at all times acting for Lady Hastings when Curreys procured steps 2, 3, 4 and 5 to be taken. Immediately before step 2 it was quite certain that Lady Fitzwilliam would participate in steps 2, 3 and 4 on the advice of Curreys. Immediately before step 2 it was quite certain that the independent trustees would participate in step 3 on the advice of Curreys. Immediately before step 2 it was quite certain that Lady Hastings would participate in steps 2 and 3 on the advice of Curreys.

After step 3 there was no practical possibility that Lady Hastings would not take part in step 4. The gift of £2m must be restored to prevent capital transfer tax of at least £1.5m being payable within six months thereafter. If the return of the £2m gift was expressed to be paid in consideration of the assignment at step 4, then Mr. Walker believed and Curreys believed and Mr. Herbert believed and some other tax-avoidance practitioners believed, before the decision in *Ramsay*, that the restoration payment of £2m would also avoid the liability to capital transfer tax on the contingent moiety which in the absence of step 4 would be payable.

After step 3 there was no practical possibility that Lady Hastings would not take part in step 5. That step would cost nothing, and Mr. Walker believed, Curreys believed, Mr. Herbert believed and some other tax-avoidance practitioners believed, before the decision in *Ramsay*, that step 5 would avoid and was the only means of avoiding the liability to capital transfer tax on the vested moiety which in the absence of step 5 would be payable.

If Lady Hastings had for any reason or for no reason decided not to implement step 4 there would have been no completed scheme affecting the contingent moiety and if she had decided not to implement step 5 there would have been no completed scheme affecting the vested moiety. But, having decided to complete and having completed the scheme Lady Hastings cannot now assert that there was no scheme or that the scheme consequences, real and fiscal, are different from the consequences which would have followed if she had understood and authorised the scheme before step 2.

Steps 2, 4 and 5 had no purpose other than the avoidance of tax on the contingent moiety and the vested moiety which would otherwise be payable; they are only explicable by the fact that they form part of a preordained

(1) 54 TC 101. (2) 55 TC 324. (3) 62 TC 1.

series of transactions for the purpose of avoiding tax. In the real world, a donor does not give an undertaking to pay tax he cannot afford, a lady of 81 is not appointed an interest in possession in funds amounting in the aggregate to £3.8m for a period of four weeks; a purchaser does not pay £2m as consideration for the acquisition of the income of a fund of £1.9m for a period of two weeks; a daughter does not settle £1.9m on her mother for a period of four weeks.

Mr. Nugee submitted that there were inserted steps within the *Ramsay* principle. The description of the *Ramsay* principle by Lord Wilberforce in *Ramsay* [1982] AC 300, 323 and by Lord Fraser of Tullybelton in *Furniss* v. *Dawson* [1984] AC 474, 512 do not require any inserted steps. In a preordained series of transactions all that is necessary is to ascertain the real results of the series as a whole and then apply the taxing statute.

Applying the formulation of the *Ramsay* principle from the statements made by Lord Diplock in *Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.*(1) 54 TC 200, and by Lord Brightman in *Furniss* v. *Dawson* [1984] AC 474, 527 inserted steps are steps which have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable.

Steps 2 and 4 were inserted steps because they had no purpose other than the avoidance of a liability to capital transfer tax which in the absence of steps 2 and 4 would have been payable on the contingent moiety when the interest in possession of Lady Fitzwilliam came to an end.

Although inserted steps have no commercial purpose other than the avoidance of a particular tax, inserted steps may have "enduring legal consequences". Those enduring legal consequences and their fiscal consequences are not to be disregarded: see Lord Brightman in *Furniss* v. *Dawson* [1984] AC 474, 525.

In *Furniss* v. *Dawson* [1984] AC 474 the inserted step was the exchange by the taxpayer of the English shares for the shares in Greenjacket. That inserted step had enduring legal consequences. Greenjacket became entitled to the English shares and became entitled to the purchase price paid by the purchaser. The taxpayer became entitled to the Greenjacket shares and to any dividends and other rights attached to those shares. These enduring legal consequences involved fiscal consequences including, for example, income tax on any dividends received by the purchaser. The argument that *Ramsay* did not apply to an inserted step which had enduring legal consequences had been developed by Vinelott J. and by the Court of Appeal (Oliver, Kerr and Slade L.JJ.) and was decisively rejected. The argument of Oliver L.J. that the *Ramsay* principle involved double taxation was also rejected. The Courts below were warned not to emasculate the *Ramsay* principle: pages 514–515, 525–526. The rejected arguments have been revived in this case.

In the present case steps 2 and 4 had enduring legal consequences. But that did not prevent them from being inserted steps for the purposes of the *Ramsay* principle. As a result of step 2 Lady Hastings enjoyed income of £2m until step 4. After step 4 Lady Fitzwilliam ceased to be entitled and Lady Hastings became entitled to the income of the contingent moiety. These legal consequences had fiscal consequences. But it was made quite clear in *Furniss* v. *Dawson* that the fact that an inserted step had legal consequences and fiscal consequences does not mean that it is not an inserted step for the purpose of

(1) [1982] STC 30.

A the principle in *Ramsay*. In the present case although steps 2 and 4 had enduring legal and fiscal consequences they were inserted for no purpose apart from avoiding a liability to capital transfer tax on the contingent moiety which in the absence of steps 2 and 4 would have been payable. Steps 2 and 4 must be disregarded for that purpose and so disregarded Lady Fitzwilliam received no consideration for the assignment of her interest in possession in the contingent
B moiety. The payments are disregarded because they are self-cancelling.

Step 5 was also an inserted step. Step 5 had no purpose except for the avoidance of a liability to capital transfer tax which in the absence of step 5 would have been payable on the vested moiety. Step 5 had enduring legal consequences in that Lady Fitzwilliam became and Lady Hastings ceased to be
C entitled to the income of the vested moiety between 15 February 1980 and 15 March 1980 and those enduring legal consequences had fiscal consequences. But step 5 must be disregarded for the purpose and only for the purpose of the liability to capital transfer tax which would otherwise be charged when the interest in possession of Lady Fitzwilliam came to an end. That interest came to an end on 15 March 1980 and capital transfer tax then became payable on
D the vested moiety. Step 3 so far as it dealt with the vested moiety and step 5 were two parts of a single appointment just as the two steps in *Furniss* v. *Dawson* [1984] AC 474 were two parts of a single disposition.

The *Ramsay* principle has been applied to two types of tax-avoidance scheme. In the first type of scheme the inserted steps involve payments of
E money made in the course of the scheme which are self-cancelling or circular.

In *Ramsay* the inserted steps consisted of transactions of sale and purchase by the taxpayer. If each transaction was considered separately and each payment was considered separately the taxpayer made a non-chargeable gain and a deductible loss and avoided a liability to capital gains tax which
F would have been payable in respect of transactions which were not included in the scheme. If the scheme transactions were considered as a whole, the inserted scheme payments cancelled one another out and fell to be disregarded, no real loss was sustained and no fiscal loss was deductible.

Eilbeck v. *Rawling* was decided together with *Ramsay* [1982] AC 300. In
G that case; "The scheme was, briefly, to split a reversion into two parts so that one would be disposed of at a profit but would fall under the exemption and the other would be disposed of at a loss but could be covered by the exception. Thus there would be an allowable loss but a non-chargeable gain". *Per* Lord Wilberforce in *Ramsay*(1), at page 330. The inserted steps involved payments made in the course of transactions of borrowing and sale between the
H taxpayer and other participants in the scheme. If each scheme transaction was considered separately and if each scheme was considered separately, the taxpayer made a non-chargeable gain and a deductible loss and avoided or postponed a liability to capital gains tax which would, in the absence of the inserted payments, be payable on real gains which he had made in transaction not involved in the scheme. If the scheme transaction were considered as
I a whole, the payments cancelled once another out, no real loss was sustained and no fiscal loss was deductible.

In *Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.* 54 TC 200, 221 Lord Fraser of Tullybelton said(2):

(1) 54 TC 101, at pages 190H/191A. (2) [1982] STC 30, at pages 38j/39b.

"The result was that although Burmah apparently suffered the loss of almost the whole price that it had paid ... it suffered no real loss because it got back all the money ... If the argument for Burmah is right, this would be one more case in which the taxpayer had achieved the apparently magic result of creating a tax loss that was not a real loss. In my opinion they have not achieved that result because in the same was as in *Ramsay's* case, when the scheme was carried through to completion there was no real loss and no loss in the sense contemplated by the legislation."

In *Moodie* v. *Inland Revenue Commissioners & Another*(1) [1993] 1 WLR 266 payments were made in the course of a series of transactions between the taxpayer and his scheme associates. If each transaction was considered separately and if each payment was considered separately the taxpayer made payments of an annuity and thereby reduced his liability to income tax in the amount which would have been charged in the absence of the payment. If the transaction were considered as a whole the payments cancelled each other out and fell to be disregarded, no real payments were made and no annuity was paid in the sense contemplated by the legislation.

In *Fitzwilliam* the inserted steps with regard to the contingent moiety were steps 2 and 4. The payments thereunder were made in the course of a series of transaction. If each transaction is considered separately and if each payment is considered separately, Lady Hastings paid £2m in consideration of the assignment by Lady Fitzwilliam of the interest in possession of Lady Fitzwilliam in the contingent moiety. The payment of capital transfer tax which would, in the absence of the payments, be payable on the contingent moiety by reason of the coming to an end of the interest in possession of Lady Fitzwilliam, would be avoided. If the transactions are considered as a whole, the payments of £2m at step 2 and step 3 cancel one another out, they fall to be disregarded, no real consideration was paid and there was no consideration in the sense contemplated by the legislation. In the *Ramsay*-type scheme of tax avoidance there lurks a pretence. In *Ramsay* and *Burmah* the taxpayer pretended to have made a loss. In *Moodie* the taxpayer pretended to have paid an annuity. In the present case the taxpayer pretends to have paid consideration for the assignment of the interest in possession of Lady Fitzwilliam in the contingent moiety.

The second type of tax-avoidance scheme to which the *Ramsay* principle applies is a scheme in which one single transaction is carried into effect by two or more transactions for no business purpose other than the avoidance or postponement of a liability to tax which otherwise would be payable. The scheme transactions are considered as a whole and the real result dictates the fiscal result.

In *Furniss* v. *Dawson* [1984] AC 474 the single transaction was a disposition of English shares by the taxpayer to the purchaser which was liable to capital gains tax. The transaction was carried out by two transactions for no business purpose other than the postponement of a liability to capital gains tax which would otherwise be payable. The two transactions consisted of the exchange by the taxpayer of the English shares for shares in Greenjacket and the sale by Greenjacket of the English shares to the purchaser. If the two transactions were considered as a whole the real result was that one single

(1) 65 TC 610.

A transaction had been carried out by the taxpayer who alone had power to dispose to the purchaser and capital gains tax became payable accordingly. The taxpayer pretends that there are two transactions when in fact there is only one.

In *Fitzwilliam* there was one single transaction dealing with the vested B moiety, namely the appointment by the trustees to Lady Fitzwilliam of an interest in possession in the vested moiety until 15 March 1980. That single transaction was carried into effect by two transactions, namely an appointment by the trustees of an interest until 15 February 1980 and the settlement by Lady Hastings which extended that interest until 15 March 1980. There C was no purpose in carrying out this single transaction by means of the appointment and the settlement other than the avoidance of capital transfer tax which would be paid on the vested moiety if the single transaction were carried out by a single appointment.

I have read a draft of the speech of my noble and learned friend Lord D Keith of Kinkel. I am unable to follow his reasoning or to agree with his conclusions.

Lord Keith refers to "strategic tax planning". This expression takes no account of the distinction between tax mitigation and tax avoidance explained in *Commissioner of Inland Revenue* v. *Challenge Corporation Ltd.*(1) E [1987] AC 155. In confirming this distinction my noble and learned friend Lord Goff of Chieveley in *Ensign Tankers (Leasing) Ltd.* v. *Stokes* [1992] AC 655 said, at page 681(2):

> "Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic F wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed. These structures are designed to achieve an adventitious tax benefit for the taxpayer, and in truth are no more than raids on the public funds at the expense of the general body of taxpayers. and as such are unacceptable."

G

In the present case the scheme conjured out of the air "consideration" where there was no real consideration, and a "reverter" to a settlor who was not the real settlor.

The Variation of Trusts Act 1958 mentioned by Lord Keith is irrelevant. H Since *Ramsay* in 1982 it would be improper and ineffective for an arrangement under the Act of 1958 to be approved if the arrangement broke the *Ramsay* principle.

The application of the *Ramsay* principle to the present case does not revive the Revenue argument that any transaction entered into for the I purpose of avoiding tax upon some later transaction was ineffective on that ground alone. That argument was rejected in *Craven* v. *White*(3) [1989] AC 398 by all five members of the Appellate Committee. The facts in the present case involve a straightforward application of *Ramsay* so far as the

(1) [1986] STC 548. (2) 64 TC 617, at pge 746E/F. (3) 62 TC 1.

contingent moiety is concerned and a straightforward application of *Furniss* v. *Dawson* so far as the vested moiety is concerned. A

The Revenue arguments in the present case do not involve asserting that steps 2, 4 or 5 were not genuine, unconditional and irrevocable and do not require all the real fiscal consequences of those steps to be ignored. The gift at step 2 was genuine and irrevocable and all the subsequent steps were genuine and irrevocable. Each step produced real and fiscal consequences. At step 2 Lady Hastings became entitled to invest the £2m gift and to enjoy the income subject to tax. At step 4 Lady Hastings became entitled to the income of the contingent moiety subject to tax. But step 2 and step 4 were inserted steps which had no purpose because the £2m paid at step 2 was always intended to be cancelled by the £2m paid at step 4. The only purpose of steps 2 and 4 was to avoid liability to capital transfer tax which otherwise would have been payable. *Ramsay* requires that steps 2 and 4 must be disregarded for this purpose and for no other purpose. Step 5 was an inserted step, the settlement of income for the period of one month serving no purpose. The only purpose of step 5 was to avoid capital transfer tax which would otherwise have been payable. *Furniss* v. *Dawson* requires that step 5 must be ignored for this purpose and for no other purpose. B C D

Throughout his speech Lord Keith treats steps 2, 4 and 5 as separate transactions. The correspondence and the findings of the Special Commissioners show that the only realistic and intellectually possible view of the matter is that steps 2, 3, 4 and 5 were a preordained series of transactions which must be considered as a whole. E

It is not clear to me whether Lord Keith's conclusions would have been different if the scheme had been explained to Lady Hastings before step 2 or before step 3 or had never been explained to her until after step 5. It is not clear to me whether Lord Keith's conclusions would have been different if Lady Hastings had taken "separate advice" before step 2 or before step 3 or had not taken separate advice at all. The initial ignorance of the taxpayer Lady Hastings and the provision for separate advice were both ingredients in the scheme devised by Mr. Walker but these ingredients cannot prevent the scheme being considered as a whole and it was in fact implemented and completed for the benefit of Lady Hastings and nobody else. In any event the position was "cut and dried" after steps 2 and 3. The gift at step 2 must be restored and step 4 was drafted to effect that restoration. The appointment at step 3 on 14 January 1980 created a capital transfer tax charge of £2,850,000 on 15 February 1980. The only way that tax could be avoided was by the planned steps 4 and 5. F G H

I cannot agree that Mr. Powell is properly to be regarded as the hand of the trustees and Lady Fitzwilliam. Mr. Powell, on behalf of Curreys, had four clients. The independent trustees had no interest in avoiding tax. They were willing and anxious to assist Lady Hastings to avoid tax. Lady Fitzwilliam had no interest in avoiding tax. She was willing and anxious to assist her daughter to avoid tax. The only person who had an interest in avoiding tax was Lady Hastings and on her behalf Mr. Powell sought, obtained and implemented a scheme for enabling her to avoid capital transfer tax. I

The material points on which I differ from Lord Keith are six in number as follows:—

(1) People should be judged by the results of their actions and not by the language of documents intended to mislead. Lord Keith assumes that £2m was paid in consideration for the assignment because the deed of assignment asserted that it was so paid. But when all the facts are considered it transpires clearly that the one sum of £2m was paid by Lady Hastings, received by Lady Fitzwilliam and accepted by the Revenue as being in restoration of the gift of £2m at step 2 and not in consideration for the assignment at step 4.

(2) An appellate judge is bound by the findings of fact of the Special Commissioners. These findings show clearly that Mr. Walker's scheme employed the very devices which proved ineffective in *Ramsay* and *Furniss* v. *Dawson.* Lord Keith dismisses the findings of the Special Commissioners on the grounds that they did not enjoy the benefit of the speeches of the majority in *Craven* v. *White.* But in *Craven* v. *White* there was no initial scheme and the co-operation of the purchaser could not be guaranteed. In the present case the scheme existed from the very beginning and Lady Fitzwilliam and the trustees were at all times ready, willing and able to execute any document drafted by Mr. Walker.

(3) Legal advisors should not conceal their activities from their clients in the hope of deceiving the Revenue. A client who subsequently adopts, ratifies and claims the benefit of the actions of his solicitors cannot deny the real consequences or avoid the fiscal consequences on the grounds of personal ignorance. Lord Keith does not condemn the concealment practised by Curreys with the approval of Mr. Walker and does not even acknowledge that Lady Hastings was the client of Curreys and Mr. Walker although the scheme was planned, concealed, implemented and completed for the benefit of Lady Hastings and nobody else.

(4) "Separate advice" is only necessary when different clients have conflicts of interest. There was no conflict in the present case. A taxpayer who implements and completes a tax-avoidance scheme does not escape the principles of *Ramsay* or *Furniss* v. *Dawson* by arguing that he might have been advised not to complete the scheme and might have decided not to complete the scheme. The "separate advice" was planned as part of the scheme, was deliberately withheld until after step 3, and was supported by instructions to Mr. Herbert which were disingenuous. By the time Mr. Herbert was instructed the gift at step 2 had triggered a tax liability of at least £1.5m and the appointment at step 3 had triggered a further tax liability of £2.85m. The only advice which Mr. Herbert or any other counsel could give was that step 4 would restore the gift and eliminate tax on the gift and that it was at least possible that steps 4 and 5 would avoid tax on the appointment. This advice was a foregone conclusion.

(5) The Special Commissioners found and I agree that after step 3 there was no practical possibility that Lady Hastings would not take steps 4 and 5 which could not do her any harm and which, so she was bound to be advised by Mr. Walker and Mr. Herbert, would avoid capital transfer tax on the contingent moiety and the vested moiety. Lord Keith suggests that Lady Hastings might have restored the gift of £2m and settled the vested moiety and the contingent moiety while repudiating Mr. Walker's scheme. Of course she would not have done anything of the sort. If she had not completed steps 4 and 5 she would at worst

have caused an immediate claim for capital transfer tax and at best would only have succeeded in postponing the charge to capital transfer tax until the death of Lady Fitzwilliam who, as Lord Keith himself points out, was not expected to live for very long. It is inconceivable that Lady Hastings would have decided against steps 4 and 5 and in any event the facts are that she adopted and completed Mr. Walker's scheme which must, therefore, be considered as a whole.

(6) Mr. Walker's scheme, which trembled on the brink of a sham, employed the devices which proved ineffective in *Ramsay* and *Furniss* v. *Dawson*. Lord Keith does not provide any satisfactory reason for distinguishing the present case from the precedents which bind this House. Lord Keith does not explain how the same sum of £2m could at one and the same time restore a gift and constitute consideration for an assignment. Lord Keith, insisting on treating each transaction as though it were a separate transaction, despite the evidence afforded by the correspondence between Curreys and Mr. Walker, does not consider whether, if Mr. Walker's scheme is considered as a whole, the contingent moiety reverted to Lady Hastings as settlor.

I have read in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. It is true that the Revenue originally claimed that capital transfer tax was chargeable on a distribution of £3.8m out of the estate of the Earl. But the Revenue have always contended in the alternative that capital transfer tax was chargeable on the contingent moiety because the interest in possession of Lady Fitzwilliam in the contingent moiety came to an end on 31 January 1980 and that capital transfer tax was chargeable on the vested moiety because the interest in possession of Lady Fitzwilliam in the vested moiety came to an end on 15 March 1980. The Revenue submitted and I agree that the *Ramsay* principle as explained in *Furniss* v. *Dawson* and applied in other cases requires the Court to ascertain the real (and not pretended) actions of the taxpayer and his associates, the real consequences of those actions and the fiscal consequences which ensue. The real actions of the participants in Mr. Walker's scheme, the real consequences of those actions and the fiscal consequences, so far as capital transfer tax is concerned, are as follows:

(1) On 20 December 1979 the trustees appointed £4m out of the estate of the Earl to Lady Fitzwilliam (step 1). There were no capital transfer tax consequences.

(2) On 9 January 1980 Lady Fitzwilliam gave £2m to Lady Hastings (step 2). The capital transfer tax consequence was that tax became charged on the gift and was payable on 31 July 1980.

(3) On 14 January 1980 the trustees conferred on Lady Fitzwilliam interests in possession in the contingent moiety and the vested moiety with remainder to Lady Hastings (step 3). There were no immediate capital transfer tax consequences but tax would be charged when the interest in possession came to an end.

(4) On 31 January 1980 Lady Hastings paid £2m to Lady Fitzwilliam (step 4). This payment cancelled and restored the gift at step 2 and eliminated the charge for capital transfer tax incurred by step 2.

(5) On 31 January 1980 Lady Fitzwilliam assigned her interest in possession in the contingent moiety to Lady Hastings and that interest

A came to an end (step 4). Capital transfer tax became charged on the contingent moiety. The statement in the deed of assignment that the £2m paid at step 4 was consideration for the assignment is an inaccurate pretence. Lady Hastings and Lady Fitzwilliam claimed, the Revenue accepted and the application of the *Ramsay* principle confirmed that the £2m paid at step 4 cancelled out the £2m paid at step 2. The one sum of
B £2m could not also constitute consideration for the assignment.

(6) On 7 February 1980 the interest in possession of Lady Fitzwilliam in the vested moiety was, pursuant to Mr. Walker's scheme, extended from 15 February to 15 March 1980 (step 5). The settlement at step 5 had no business purpose other than the avoidance of capital
C transfer tax which would otherwise be payable. The settlement must be disregarded for the purposes of capital transfer tax save for its enduring result, namely the extension of the interest in possession of Lady Fitzwilliam until 15 March 1980. If step 5 is thus disregarded there was no reverter to settlor; steps 3 and 5 were only two parts of one transaction, namely the conferment on Lady Fitzwilliam of an interest in pos-
D session which came to an end on 15 March 1980. Capital transfer tax, therefore, became charged on the vested moiety on 15 March 1980.

The earliest case in which a tax-avoidance scheme appears to have been considered as a whole and held to be ineffective for the purpose of the tax sought to be avoided was *Lupton* v. *F.A. & A.B. Ltd.*[1] [1972] AC 634. That
E was a dividend-stripping device.

Since the dividend-stripping cases there have been several cases in which a tax-avoidance scheme has been considered as a whole and in which the device of self-cancelling or circulating payments has been held to be ineffective for the purpose of the tax sought to be avoided. These cases are *Black*
F *Nominees Ltd.* v. *Nicol*[2] 50 TC 229, *Ramsay*[3], *Eilbeck* v. *Rawling*[3], *Burmah*[4] and *Moodie* v. *Inland Revenue Commissioners & Another*[5] [1993] 1 WLR 266. The scheme in the present case with regard to the contingent moiety provides another example.

There have been several cases in which a tax-avoidance scheme has been
G considered as a whole and in which the device of dividing one transaction into two or more has been held to be ineffective for the purpose of the tax sought to be avoided. These cases are *Floor* v. *Davis*[6] [1978] Ch 95 (*per* the dissenting judgment of Eveleigh L.J. subsequently approved by this House [1982] AC 300), *Chinn* v. *Hochstrasser*[7] [1981] AC 533, *Furniss* v. *Dawson*[8] [1984] AC 474 and *Ensign Tankers Ltd.* v. *Stokes*[9] [1992] 1 AC 655.

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The scheme in the present case with regard to the vested moiety provides another example. Lord Keith was a party to the decisions in *Ensign Tankers (Leasing) Ltd.* v. *Stokes* [1992] 1 AC 655 and *Moodie* v. *Inland Revenue Commissioners & Another* [1993] 1 WLR 266.

I All decisions of this House are founded on justice, principle and precedent. If an individual taxpayer employs a device to avoid tax the result is unjust because the Revenue are deprived of money intended by Parliament to

(1) 47 TC 580. (2) [1975] STC 372. (3) 54 TC 101.
(4) 54 TC 200. (5) 65 TC 610. (6) 52 TC 609.
(7) 54 TC 311. (8) 55 TC 324. (9) 64 TC 617.

be available for the common good. A decision in favour of the taxpayer, Lady Hastings in this case, would enable an individual taxpayer to drive a coach and horses through any Revenue legislation by ingenious drafting and nothing else. On principle, transactions such as tax-avoidance schemes which are intended to operate as a whole must be judged by the results of those transactions considered as a whole, not by the language of each transaction considered separately. Decisions of this House dealing with tax-avoidance schemes are decisive of the present appeal.

In common with my predecessors I regard tax-avoidance schemes of the kind invented and implemented in the present case as no better than attempts to cheat the Revenue. Applying principle and precedent to produce a just result, I would allow the appeal.

Lord Ackner:—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it and for the reasons he gives, I too would dismiss the appeal.

Lord Browne-Wilkinson:—My Lords, I have had the advantage of reading in draft the speeches to be delivered by my noble and learned friends Lord Keith of Kinkel and Lord Templeman which set out fully the relevant facts and statutory provisions.

I have reached the conclusion that this appeal should be dismissed for one reason which can be shortly stated. Whatever the exact scope of the principles laid down in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners* [1982] AC 300 as developed and elucidated in *Furniss* v. *Dawson* [1984] AC 474 and *Craven* v. *White* [1989] AC 398, the basic principle cannot be in doubt. The Commissioners or the Court must identify the real transaction carried out by the taxpayers and, if this real transaction is carried through by a series of artificial steps, apply the words of the taxing provisions to the real transaction, not disregarding for fiscal purposes the steps artificially inserted. The provision of the taxing statute is to be construed as applying to the actual transaction the parties were effecting in the real world, not to the artificial forms in which the parties chose to clothe it in the surrealist world of tax advisors.

In the present case there is no doubt what the real transaction was: it was to distribute out of the estate of Earl Fitzwilliam £4m to Lady Fitzwilliam and £3.8m to Lady Hastings without attracting capital transfer tax on the latter. On the advice of lawyers, this transaction was carried through, not by making appointments direct to the two ladies, but by a series of artificial transactions, steps 1 to 5. If the other requirements for the application of the *Ramsay* principle had been satisfied, I would have held that the real transaction included a distribution of £3.8m to Lady Hastings out of the estate thereby giving rise to a charge to capital transfer tax under s 47(1A) of the Finance Act 1975. This result could only have been achieved by disregarding, for the purposes of construing the statutory provision in question, steps 1 to 5 as being mere artificial devices.

That was the primary basis on which the Inland Revenue sought to establish the claim before the Commissioners in the present case and which the Commissioners upheld. However, on appeal Vinelott J. held that such a case could not be established because, on the facts, the whole scheme was not preordained until after step 1 was taken. Therefore, one of the essential

Ramsay requirements was not satisfied. The Revenue did not appeal that decision. Instead, the Revenue have sought to extract tax on the basis of a "mini-*Ramsay*" i.e. that steps 2 to 5 (omitting step 1) constituted a pre-ordained series of transactions, the scheme having become cut and dried before step 2 was taken.

It is at this point that I am unable to accept that the *Ramsay* doctrine has any application. If, on the facts of a particular case, the real transaction which the parties were effecting was a distribution to Lady Hastings out of the estate) step 1 was a critical step. It was at step 1 that there was extracted from the estate the £2m given to Lady Hastings at step 2 and used by her to finance step 4. The fact that the Revenue were unable to demonstrate the requirements necessary, under *Ramsay*, to make step 1 part of the preordained series of transactions, does not alter the nature of the real transaction which the parties were engaged upon: that transaction remained a scheme to transfer assets from the estate to Lady Hastings and can only legitimately be taxed as such.

The Revenue, by seeking to set up a "mini-*Ramsay*" are attempting to attach fiscal consequences to all or some of steps 2 to 5 which are, on their true analysis and as found by the Commissioners, artificial devices designed to achieve the transfer of assets from the estate to Lady Hastings. As artificial devices, they are to be disregarded for fiscal purposes. In my view, it is not legitimate to attach fiscal consequences to artificial transactions designed to carry out the real transaction in question just because an attempt to demonstrate that steps 1 to 5 constituted one transaction failed for some extraneous reason i.e. that they were not preordained prior to step 1. On this short ground I would dismiss the appeal.

However, I should add that if, contrary to my view, it is legitimate to approach steps 2 to 5 (or some combination of them) as "mini-*Ramsays*", I would agree with Lord Templeman that they were preordained. I agree with Lord Templeman that the device of keeping clients in the dark as to the totality of the scheme (adopted by Mr. Powell on the advice of counsel) is ineffective for tax purposes. Lady Hastings, as trustee, had instructed Mr. Powell to prepare a scheme to mitigate tax. Mr. Powell's knowledge acquired in the course of preparing and carrying through such scheme is Lady Hastings' knowledge: she cannot be heard to say that she was ignorant of what was proposed and agreed by Mr. Powell.

Nor do I think that the mere fact that Lady Hastings was only separately advised after step 3 prevents the steps from having been preordained prior to step 2. Lady Hastings, in her capacity as trustee, had given instructions for the scheme to be prepared thereby indicating that she wished some tax-saving scheme to be implemented. By the time she was separately advised after step 3 the only practical way of carrying through any such scheme was to proceed to steps 4 and 5. Lady Hastings could have called the whole scheme off: but that was not her wish or intention. Having caused the scheme to be prepared she had no real option but to carry it through as the speech of Lord Templeman demonstrates. In my judgment, it is not possible to achieve the result that a scheme is not preordained just by inserting an occasion on which one party is to be separately advised when the only advice that can be tendered in such circumstances is to pursue the scheme or abandon it. If the scheme is carried through, that scheme was preordained.

Finally, I must mention a point which I wish to reserve. The CTT legislation (unlike the capital gains tax legislation considered in *Ramsay* and the other cases) contains provisions which render taxable dispositions effected by "associated operations": the Finance Act 1975, s 51(1). "Associated operations" are defined by s 44(1)(b) to include " ... any two operations of which one is effected with reference to the other, or with a view to enabling the other to be effected or facilitating its being effected, and any further operation having a like relation to any of those two, and so on". This amounts to a statutory statement, in much wider terms, of the *Ramsay* principle which deals with transactions carried through by two or more operations which are inter-related. In the present case, the Revenue originally claimed tax in reliance on the statutory associated operations provisions. The *Ramsay* principle is essentially based on the construction of statutory taxing provisions. It can, therefore, be argued that there is no room for the Court to adopt the *Ramsay* approach in construing an Act which expressly provides for the circumstances and occasions on which transfers carried through by "associated operations" are to be taxed. It is not necessary in the present case to express any concluded view on this point.

For these reasons, I would dismiss the appeal.

Lord Mustill:—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it and for the reasons he gives, I too would dismiss the appeal.

Appeal dismissed, with costs.

[Solicitors:—Solicitor of Inland Revenue; Messrs. Currey & Co.]