COURT OF APPEAL—27, 28 AND 29 APRIL, AND 7 JULY 1999, AND 11 OCTOBER 1999

HOUSE OF LORDS—11, 12, 13 AND 14 JUNE, AND 11 OCTOBER 2001

EUROPEAN COURT OF HUMAN RIGHTS—10 SEPTEMBER 2002

Regina v. *Dimsey* ([1])
Regina v. *Allen* ([2])

Crime—Common Law offence—Cheating public revenue—Control of company—Company's undeclared profits—Whether individual in control of company guilty of cheating—Whether jury correctly directed on test whether companies were resident in the UK—Whether jury correctly directed on issue whether certain assets beneficially owned by accused—Whether Human Rights Act applied so that a conviction prior to 2 October 2000 might be regarded as unsafe for breach of rights under Human Rights Convention—Whether breach of right to fair trial by reason of notice given to accused to supply information or by inducement not to prosecute given to obtain schedule of assets falsity of which was relied on in prosecution—Taxes Management Act 1970 ss 8(1), 20(1) and 105 Human Rights Act 1998, Part I, European Convention on Human Rights Arts 5 and 6.

Crime—Confiscation order—Whether fact that tax remained due and payable prevented order—Criminal Justice Act 1988, ss 71 and 72. European Convention of Human Rights, Art 1 of Protocol No 1.

Income tax—Transfer of assets abroad—Transfers to foreign companies—Whether imposition of tax liability on UK residents had effect of excluding tax liabilities of foreign companies—Whether such exclusion to be implied—Income and Corporation Taxes Act 1988, ss 739(2) and 743(1)—Human Rights Act 1998 Part II, Art 1.

Income tax—Shadow directors—Whether shadow directors liable to tax under Sch E in respect of benefits in kind and accommodation—Income and Corporation Taxes Act 1988, ss 19, 145, 154, 167 and 168.

D, a Jersey resident, provided financial services to clients via a company. C, one of the clients, pleaded guilty to eight counts, and was convicted on two further counts, of cheating the Revenue. All of the counts related to off-shore companies formed by D on C's instructions.

([1]) Reported (CA) [2000] QB 744; [2000] 3WLR 273; [1999] STC 846; (HL) [2001] UKHL46; [2001] 3WLR 843; [2001] 4 All ER 786; [2001] STC1520.

([2]) (CA) [2000] QB 744; [2000] 3WLR273; [1999] STC 846; [2000] 2 All ER 142; (HL) [2001] UKHL 45; [2001] 3WLR 843; [2001] 4 All ER 768; [2001] STC 1537.

By a further count C, D, and C's solicitor, were charged with conspiracy to cheat the Revenue between 1 January 1993 and 8 July 1994. The essential particular under this count was failure to make full and complete disclosure of profits made by three named off-shore companies which C was said to manage and control. All three defendants were, in March 1997, convicted on this count.

A was, in February 1998, convicted on thirteen counts of cheating the Revenue relating to years from 1980 to 1995. Seven of the counts related to concealment from the Revenue of, or failure to disclose to the Revenue, the existence of profits made by seven off-shore companies. The Crown's case was that A dishonestly concealed the fact that he managed and controlled in the UK the business of these companies in order to give the false impression that they were not resident in the UK, so as to evade their being charged with corporation tax.

On five of the remaining six counts the Crown's case was that A had delivered false tax returns by concealing the provision of living accommodation and benefits, received from off-shore companies, for which he was liable to income tax as a shadow director.

The final count (Count 11) was in respect of delivery to an Inspector of Taxes of a false schedule of assets by omission of various items relating to off-shore companies. A contended that he was not the true owner of those items.

D and A appealed against the convictions.

The Court of Appeal held, dismissing both D's and A's appeals, that the convictions were safe, because:—

(1) The offence of cheat is constituted by any form of fraudulent conduct having the purpose and effect of depriving the Revenue of money due to it; fraudulent conduct included omission to act; if an individual, having total de facto control of a company, so arranges its affairs that the company makes profits but does not declare them to the Revenue, he is obviously cheating the Revenue;

Rex v. *Bembridge* (1783) 22 St Tr 1 followed,

(2) the Judge had not misdirected the jury as to the correct test for determining whether the off-shore companies were resident in the UK; the concept of central management and control of the business of a company provided a composite test, and did not involve a distinction between management and control; but directions to a jury were to be considered as a whole, and on that footing these had been no misdirection;

(3) where s 739(2) Income and Corporation Taxes Act 1988 applied, so that income of a person resident or domiciled outside the UK was deemed to be the income of a person having power to enjoy it, s 739(2) did not have effect to deem the income of the person resident or domiciled outside the UK not to be his income; s 739(2) has effect only for the purposes of the Income Tax Acts, and not for the purposes of the Corporation Tax Acts, as defined in s 831(1);

A (4) on the true construction of ss 19, 145, 154, 167 and 168 of the 1988 Act, a shadow director is liable for tax in respect of benefits in kind and the provision of living accommodation;

(5) the jury had been fairly and squarely directed on the issue under Count 11 whether A was the beneficial owner of the relevant assets, and there was B overwhelming evidence to that effect.

A appealed against a confiscation order which had been made by the Crown Court in the sum of £3,137,165, with seven years' imprisonment in default, the Crown having undertaken that, upon a confiscation order being made, it would not pursue A for payment in respect of pre-existing tax liabilities. A also sought permission to appeal against the substantive sentence of seven years' C imprisonment passed by the Crown Court. A and D also sought permission to appeal to the House of Lords against the decision by which the Court of Appeal upheld the convictions.

The Court of Appeal held, dismissing the appeal and applications, that:

D (1) The fact that the tax remained due and payable (leaving aside the Crown's undertaking) did not mean that A had not obtained a pecuniary advantage within s 16(2)(a) Theft Act 1968, because the ordinary and natural meaning of "pecuniary advantage" included a case where a debt was evaded or deferred; confiscation orders and compensation orders differed, because a confiscation order was made to deprive the offender of the proceeds of his crime, E whereas a compensation order was made to compensate the victim of the crime; further, s 71 (1C), its predecessor (s 72(3)), and s 72(7) of the Criminal Justice Act 1988, demonstrated that the legislature intended that confiscation orders might be made in cases where the sum confiscated in reality represented a debt or part of a debt which was not forgiven and remained outstanding; and, so far as corporation tax was concerned, the proposition that the pecuniary advantage F accrued to the companies concerned made no difference, because the corporate veil fell to be lifted where companies were used as a vehicle for fraud;

(2) it was beyond argument to suggest that the sentence of seven years was one with which there would be any justification for interference;

(3) while two points of law should be certified as of general public G importance, permission to appeal should not be granted.

D and A sought to appeal, and sought to raise fresh arguments under the Human Rights Act 1998. The House of Lords granted leave to appeal on a limited basis.

H

The House of Lords held, dismissing D's appeal, that:—

(1) the effect of s 739(2) was solely to treat income as the income of the settlor; it was not to be construed as extending to provide that the income should not be treated as the income of the person whose income that actually was; both I in the Act in which s 739(2) originated, ie Finance Act 1938, and elsewhere, Parliament had used express wording where legislation was to have that extended

consequence; likewise s 743(1), and its predecessors, showed that Parliament had paid attention to possible double taxation, and, particularly as the issue was more a theoretical point than a real one, it was clear that s 739(2) was not intended to exclude the normal tax liability that would lie on a transferee in respect of its income;

Vestey v. *Commissioners of Inland Revenue* [1980] AC 1148 distinguished;

(2) In relation to Art 1 of the 1st Protocol to the Human Rights Convention, s 739(2), so construed, was well within the margin of appreciation allowed to member states in respect of tax legislation; the public interest requires that legislation designed to combat tax avoidance should be effective that public interest outweighed objections, mainly theoretical, to that construction; nothing in Art 1 of the 1st Protocol required a different construction of s 739(2) in order to render it Convention compliant.

The House of Lords held, dismissing A's appeal, that:—

(1) it was the intention of Parliament in enacting the concluding part of s 168(8) that accommodation and benefits in kind received by a shadow director should be taxed in the same way as those received by a director, and ss 145, 167 and 168 were effective to achieve that purpose; a statutory circularity was built into the provisions, so that as a shadow director is to be regarded as a director; it followed that living accommodation and benefits received by him should be treated as emoluments falling to be assessed under Sch E;

(2) the Human Rights Act 1998 could not operate retrospectively to make unsafe, by reason of a breach of Art 6 of the Human Rights Convention, a conviction prior to 2 October 2000 which was safe under English Law at the time the conviction took place;

R. v. *Lambert* [2001] 3 WLR 206 applied;

(3) in any event there had been no breach of Art 6 because:

(a) as a State, for the purpose of collecting tax, is entitled to require a citizen to inform it of its income and to enforce penalties for failure, a notice under s 20(1) Taxes Management Act 1970 cannot, any more than a notice under s 8(1) requiring a tax return to be made, constitute a violation of the right against self-incrimination;

Funke v. *France* (1993) EHRR 297, *Saunders* v. *United Kingdom* (1996) 23 EHRR 313, and *Brown* v. *Scott* [2001] 2 WLR 817 considered; and

(b) the delivery of the schedule of assets had not been "involuntary", having been induced by a promise that A would not be prosecuted if he furnished the required information; a confession which was involuntary, having been obtained by an inducement, may be excluded on the ground that it would be unsafe to rely on the confession as having been true; but that principle does not apply where, as here, there is an inducement to give true and accurate information, but false information was then given;

A *R.* v. *Barker* [1941] 2 KB 381 overruled; *Ibrahim* v. *R* [1914] AC 599 considered.

A applied to the European Court of Human Rights on ground of breach of his rights under the European Convention of Human Rights in terms of Art 6 (right to a fair hearing), Art 1 of Protocol No 1 (right to peaceful enjoyment of
B possessions) and Art 5 (right to liberty and security).

Held, by the European Court of Human Rights (Fourth Section), that A's application was inadmissible as manifestly ill-founded, because:—

(1) the facts did not disclose any infringement of the right to silence or
C privilege against self-incrimination, or any other unfairness, contrary to Art 6; A had lied, or perjured himself through giving inaccurate information about his assets; that was not an example of forced self-incrimination; it was the offence itself; the privilege against self-incrimination could not be interpreted as giving a general immunity to actions motivated by the desire to evade investigation by the Revenue authorities;

D *Funke* v. *France* (1993) EHRR 297, *Saunders* v. *United Kingdom* (1996) 23 EHRR 313, *J.B.* v. *Switzerland* (1996) (No. 31827/96 ECHR 2001-111) and *Heaney and McGuinness* v. *Ireland* (2001) 33 EHRR 12 distinguished;

(2) Art 1 of Protocol No 1 had no application, as A had not argued that the undertaking given by the Revenue not to pursue the pre-existing tax liabilities
E was unenforceable, and there was therefore no real risk of an attempt by the Revenue to recover the same amount twice;

(3) there was no basis on which to find that A's detention after conviction was not "in accordance with a procedure prescribed by law" within Art 5.

F

Dermot Jeremy Dimsey appealed to the Court of Appeal against his conviction in the Crown Court at Guildford on 21 March 1997 on a count of conspiracy to cheat the public revenue.

Brian Roger Allen appealed to the Court of Appeal against his conviction
G in the Crown Court at Knightsbridge on 19 February 1998 on thirteen counts of cheating the public revenue.

The appeals were heard by the Court of Appeal (Laws L.J., Moses J., and HH Judge Crane) on 27, 28 and 29 April 1999, when judgment was reserved. On 7 July 1999 judgment was given, dismissing the appeals.

H

The facts are stated in the judgment.

Robert Venables Q.C.; *Peter Doyle* and *Amanda Hardy* for Dimsey.

Alan Newman Q.C. and *James Kessler* for *Allen.*

I

Peter Rook Q.C.; *Jonathan Fisher* and *Timothy Brennan* for the Crown.

The cases referred to in the judgment are as follows:—*De Beers Consolidated Mines Ltd.* v. *Howe* [1906] AC 455; (1906) 5 TC 198; *Edwards (HMIT)* v. *Clinch* [1982] AC 845; [1981] 3 WLR 707; [1981] 3 All ER 543; (1981) 56 TC 367; [1981] STC 617; *Inland Revenue Commissioners* v. *Metrolands (Property finance) Ltd.* [1981] 1WLR 637; [1981] 2 All ER 166; (1982) 54 TC 679; [1981] STC 193; *Marshall (HMIT)* v. *Kerr* [1993] STC 360; [1995] 1 AC 148; [1994] 3 WLR 299; [1994] 3 All ER 106; (1994) 67 TC 56; *R. v. Bembridge* (1783) 22 St Tr.1; *Snook.* v. *London and West Riding Investments Ltd.* [1967] 2QB 786; [1967] 2 WLR 1020; [1967] 1 All ER 518; *Taxpayer FL, In re Special Commissioners' Decision* 3099/93 and 3100/93 *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1148; [1979] 3 WLR 915; [1979] 3 All ER 976; (1979) 54 TC 503; [1980] STC 10.

The following cases were cited in oral/skeleton argument:—*Attorney-General's Reference* (No. 1 of 1975) [1975] QB 773; [1975] 3 WLR 11; [1975] 2 All ER 684; *A.G. Securities.* v. *Vaughan* [1990] 1 AC 417; [1988] 3WLR 1205; [1988] 3 All ER 1058; *American Thread Co.* v. *Joyce* (1912) 6 TC 1, CA. (1913) 6 TC 163, (HL) *Bye (HMIT)* v. *Coren* (1986) 60 TC 116; [1986] STC 393; *J. Bibby and Sons, Ltd.* v. *Inland Revenue Commissioners* (1945) 29 TC 167; *British-American Tobacco. Ltd.* v. *Inland Revenue Commissioners* [1943] AC 335; [1943] 1 All ER13; (1942) 29 TC 49. *Calcutta Jute Mills Co. Ltd.* v. *Nicholson* (1876) 1 TC 83; *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* [1921] 2 KB 403; *Cesena Sulphur Co. Ltd.* v. *Nicholson* (1876) 1 TC 88; Company, In re A [1985] BCLC 333; *Craven (HMIT).* v. *White* [1989] AC 398; [1988] 3 WLR 423; [1988] 3 All ER 495; (1988) 62 TC 1; [1988] STC 476; *Denver Hotel Co. Ltd.* v. *Andrews* (1895) 3TC 356; *Egyptian Hotels Ltd* v. *Mitchell* (1914) 6 TC 152; [1914] 3 KB 118; [1915] AC 1022; *Fitzwilliam (Countess).* v. *Inland Revenue Commissioners* [1993] 1 WLR 1189; [1993] 3 All ER 184; (1993) 67 TC 614; [1993] STC 502; *Furniss (HMIT)* v. *Dawson* [1984] AC 474; [1984] 2 WLR 226; [1984] 1 All ER 530; (1984) 55 TC 324; [1984] STC 153; *Gramophone and Typewriter Ltd.* v. *Stanley* [1908] 2 KB 89; *H (restraint order; Realisable Property)* In re [1996] 2 All ER 391; *Hitch.* v. *Stone (HMIT)* [1999] STC 431; (2001) 73 TC 600; *Inland Revenue Commissioners.* v. *Aken* [1990] 1WLR 1374; *Inland Revenue Commissioners.* v. *Bracket* (1986) 60 TC 134; [1986] STC 521; *Inland Revenue Commissioners.* v. *McQuckian* [1997] 1 WLR 991; [1997] 3 All ER 817; (1997) 69 TC 1; [1997] STC 908; *Inland Revenue Commissioners.* v. *Plummer* [1980] AC 896; [1979] 3 All ER 775; (1979) 54 TC 1; [1979] STC 793; *Laidler.* v. *Perry (HMIT)* [1966] AC 16; [1965] 2 All ER 121; (1965) 42 TC 351; *Little Olypian Each Ways Ltd,* In re [1995] 1 WLR 560; [1994] 4 All ER 561; *Liverpool and London and Globe Insurance Co.* v. *Bennet* [1913] AC 610; (1913) 6 TC 327; *Lord Advocate.* v. *McKenna* (1989) 61 TC 688; [1989] STC 485; *Luke.* v. *Inland Revenue Commissioners* [1963] AC 557; [1963] 1 All ER 655; [1963] 2 WLR 559; (1963) 40 TC 630; *Manisty's Settlement,* In re [1974] Ch 17, [1973] 2 All ER 1203; *Midland Bank Trust Co. Ltd.* v. *Green* [1980] Ch 590; [1979] 3 WLR 167; [1979] 3 All ER 28; *R.* v. *Alford (J.F.) Transport Ltd.* [1997] 2 Cr App R. 326; *R.* v. *Anderson* (1992) 12 Cr App R. (S) 564; *R.* v. *Bourne* (1952) 36 Cr App R. 125; *R.* v. *Chalkley* [1998] QB 848; [1998] 3 WLR 146; [1998] 2 All ER 155; *R.* v. *Charlton* [1996] STC 1418; (1995) 67 TC 500; *R.* v. *Cogan* [1976] QB 217; [1975] 3 WLR 316; [1975] 2 All ER 1059; *R.* v. *General Commissioners of Income Tax for Freshwell* (ex party Clarke) [1974] QB 220; [1973] 3WLR 673; [1972] 1 All ER 545; (1971) 47TC 691; *R.* v. *Hudson* [1956] 2 QB 252; [1956] 2 WLR 914; [1956] 1 All ER 814; *R.* v. *Hunt* [1994] STC 819; (1994) 68 TC 132; *R.* v. *Jefferson* [1994] 1 All ER 270; *R.* v. *Lawrence* [1982] AC 510; [1981] 2 WLR 524; [1981] 1 All ER

974; *R.* v. *Less The Times,* 30 March 1993; *R.* v. *Litanzios* (30 July 1998 unreported); *R.* v. *Macdonald* (1998) Archbold News 1; *R.* v. *Mavji* [1987] 1WLR 1388; [1987] 2 All ER 758; *R.* v. *Mullen* [1999] 3 WLR 777; *R.* v. *Redford* (1988) 89 Cr App R1; *R.* v. *Simpson* (1993) 99 Cr App R. 48; [1998] Crim LR 481; *R.* v. *Tonner* [1985] 1 WLR 344; [1985] 1 All ER 807; *San Paulo (Brazilian) Railway Co. Ltd.* v. *Carter* [1895] 1 QB 580; [1896] AC 31; *Somma* v. *Hazelhurst* [1978] 1 WLR 1014; [1978] 2 All ER 1011; *Union Corporation Ltd.* v. *Inland Revenue Commissioners* [1953] AC 482; [1952] 1 All ER 646; (1953) 34 TC 207; *Unit Construction Co. Ltd.* v. *Bullock (HMIT)* [1960] AC 351; [1959] 3 WLR 1022; [1959] 3 All ER 831; (1959) 38 TC 712.

R. v. Dimsey
R v. *Allen*

JUDGMENT OF THE COURT

LAWS L.J.—This is the judgment of the Court, to which all three members have contributed.

On 21 March 1997, before His Honour Judge Addison in the Crown Court at Guildford, Dermot Jeremy Dimsey was convicted (by a majority of 10 to 2) upon what was count 3 of an amended indictment of the offence of conspiracy to cheat the public revenue. On 30 April 1997 he was sentenced to 18 months' imprisonment. He had served his sentence before his appeal was listed for argument in this Court. There were two co-accused, Chipping and Da Costa. On 23 January 1997 Chipping pleaded guilty to 8 counts of the common law offence of cheating the public revenue. On 21 March 1997 he was convicted upon two further counts of cheating the public revenue, and also (along with Dimsey) of the conspiracy. On 30 April 1997 he was sentenced to 8 concurrent terms of 12 months' imprisonment in respect of the charges to which he had pleaded guilty, and also to 3 concurrent terms in respect of the offences of which he had been found guilty by the jury, so that his total sentence was one of 3 years' imprisonment. He has not applied for leave to appeal. Da Costa was also on 21 March 1997 found guilty of the conspiracy, and on 30 April 1997 was sentenced to 12 months' imprisonment. He has abandoned his application for leave to appeal against conviction.

On 19 February 1998, before His Honour Judge Hordern in the Crown Court at Knightsbridge, Brian Roger Allen was convicted upon 13 substantive counts of cheating the public revenue of income tax and corporation tax by concealing or failing to disclose profits made by offshore companies which were managed and controlled by him in the United Kingdom. On 20 February 1998 he was sentenced to 13 concurrent terms of 7 years' imprisonment. A confiscation order was made against him pursuant to s 71 of the Criminal Justice Act 1988 in the sum of £3,137,165 with a consecutive term of 7 years' imprisonment in default.

Each Appellant now appeals against his conviction by leave of the single Judge.

Dimsey: the facts

Chipping was a man of 56 who had worked in the avionics industry for many years. Da Costa was 41, a solicitor and partner in Stuart Wallace and Company in Gerrards Cross. He was retained by Chipping to act for him in an Inland Revenue investigation which began in 1993.

Dimsey was aged 52, resident in Jersey. He ran a company called DFM Consultants Ltd. ("DFM") in St. Helier. DFM provided various financial services, including the formation of offshore companies for clients and the administration of such companies for a fee.

In 1987 Mr. Adam, consultant to Racal Avionics, was approached in South Africa about the possible supply of avionic equipment from Germany to a company in South Africa, Hurbarn Electronics Ltd. Such supply was contrary to sanctions then in force against South Africa. The South Africans wished to deal with an intermediary rather than direct with the manufacturer. Mr. Adam contacted Chipping. He asked Chipping whether he was interested in being involved in such supply and Chipping confirmed that he was. Mr. Adam subsequently introduced Chipping to Mr. Chalklin of Astronautics GmbH of Munich, who were to supply the equipment. Mr. Adam arranged two meetings in London between Mr. Chalklin and Chipping. Mr. Adam then dropped out of the picture and Chipping took over as the middleman. There were at least three further meetings between Mr. Chalklin and Chipping. Mr. Chalklin dealt mostly with Chipping, but also communicated with Dimsey in Jersey by telephone and fax.

Between 1985 and 1993 Dimsey by arrangement received bank statements on Chipping's personal and savings accounts held at the Royal Trust Bank (Jersey) Ltd., which he passed to Chipping from time to time either personally in Jersey or by post on Chipping's instructions. Dimsey formed two companies, Thomlyn Supplies Ltd. ("Thomlyn") and later Glenville Supplies Ltd ("Glenville"), to deal with the contracts which Chipping had obtained. The relevant contracts were signed in Jersey by Dimsey on behalf of the companies. Dimsey applied on behalf of Thomlyn and Glenville for credit cards for Chipping's use principally for personal expenditure; Dimsey arranged for payment of the credit card liabilities by the companies.

Mr. Adam received commission from Thomlyn for his introductory services. At chipping's suggestion, Mr. Adam flew to Jersey late in 1988 or early in 1989 to collect an advance payment of £25,000. He was introduced to Dimsey by Chipping at Dimsey's office. There was discussion between Chipping and Dimsey about business matters. Then Mr. Adam, accompanied by Dimsey and Chipping, went to the bank where Dimsey had arranged for £15,000 to be available in cash for Mr. Adam. Later, when Chipping informed Mr. Adam that the contracts had been completed, Mr. Adam again visited Jersey. His further commission was paid into an account in Jersey administered by Dimsey. During his dealings with Chipping, Mr. Adam contacted Chipping about six times on his home telephone number; he would contact Chipping to resolve problems. On one occasion he spoke to Dimsey about a delay in the establishment of a letter of credit. Mr. Adam thought that Dimsey was Chipping's accountant. He thought that Thomlyn and Glenville were effectively one and the same.

Mr. Barnes of Hurbarn Electronics regarded Chipping as the middleman for the placing of the order and for the shipping, operating through Thomlyn and Glenville. Mr. Barnes dealt with Chipping at Thomlyn by fax and telephoned him at his home. He spoke to Dimsey, who appeared to deal with Thomlyn's finance, about a letter of credit. He dealt with Chipping about increased prices, the letter of credit and his commission. He dealt only with Chipping about the condition of the goods. It was Chipping who refused to change the shippers. He sent details of the export licence to Chipping and Dimsey sent a fax to him requesting that Chipping should not be mentioned in that connection. In cross-examination on behalf of Dimsey, he said he thought that Chipping worked full-time for Thomlyn and/or Glenville and that there was no difference between those companies.

There were six contracts for supplies by Astronautics GmbH to Thomlyn, four of which were channelled by the suppliers through a Swiss intermediary, Parago. There were eight contracts for supplies to Glenville, none involving Parago. A freight company operated by Allen usually dealt with the transport. The profits made by Thomlyn were £664,057, in respect of which £220,000 in corporation tax was allegedly due. The profits made by Glenville were £582,000 in respect of which £175,000 in corporation tax was allegedly due.

Some of the equipment for the Glenville contracts was obtained by Chipping from Omni Aviation Ltd. ("Omni"). Mr. Brian Alexander of Omni dealt only with Chipping over the actual supply of items to Thomlyn and Glenville. Mr. Alexander visited Jersey and was introduced by Chipping to Dimsey, who paid Omni's bill. Chipping required Omni to use Allen for transport. Mr. Alexander received about £30,000 in commission from Thomlyn and Glenville, which was paid into a bank account at the Royal Trust Bank in Jersey.

The supply of other equipment was obtained by Chipping from a company called Sperry in the United States, but Sperry would not deal directly with Glenville. The Mann Group sold $742,400 worth of equipment to Glenville between February 1990 and April 1992, having purchased it from Sperry. The Mann Group received commission of $61,000.

A third company, Lantau Investments Ltd. ("Lantau") was acquired by Dimsey. It was not a trading company. It was the prosecution case that Chipping used this company to receive some of the profits of the contracts, which were used by Lantau to acquire a flat in the United Kingdom for Chipping's daughter. It was the prosecution case that Dimsey administered Lantau for Chipping and that although nominee directors and shareholders were appointed for Lantau, the company was managed and controlled by Chipping from his home and office in England.

On 7 March 1990 $194,066 was in fact paid from a bank account in Thomlyn's name at the Algemeine Bank in Switzerland into a bank account in Lantau's name. In September 1990 a flat at Milford was bought by Lantau for £50,000. Da Costa acted as solicitor for Lantau. Chipping viewed the flat and gave the impression that he was buying it for his daughter. Chipping's daughter occupied the flat. In March 1993 Chipping told Mr. Hibbert, his financial adviser, that his daughter lived in a flat owned by a Jersey trust which he had set

up in Jersey and that the total assets of the trust were valued at £200,000. Subsequently Chipping asked Mr. Hibbert to delete the reference to the Jersey trust from his records. In March 1993 there was a total balance of £154,631 in the Lantau bank account. In interview Chipping said that he had received £200,000 as a reward for services which he had undertaken on behalf of Thomlyn and Glenville and that this sum was held on trust in Jersey.

Chipping was a 50:50 partner with Mr. Brian Alexander in a joint venture company called Chaltech Aviation Ltd. Chipping's shares were issued to Lantau. In due course Lantau purchased Mr. Alexander's shares. The sum of £50,000 held in a bank account in the name of Chaltech on account of commission paid to Chipping was subsequently paid into a Lantau bank account.

Chipping held four accounts at the Royal Trust Bank in Jersey in which a total of £40,000 had been invested. He received interest of over £6,000 between 1985 and 1991. These accounts were administered by Dimsey for Chipping. An unexplained payment of £21,920 in relation to which Chipping pleaded guilty was paid into one of these accounts.

The Inland Revenue started an investigation into Chipping's tax affairs after information was received from Germany about Astronautics GmbH. Miss Christine Barclay, an Inland Revenue officer, interviewed Chipping and three directors of the Mann Group on 21 September 1993. Chipping said that he had never heard of Thomlyn and had nothing to do with Glenville.

As part of her inquiries Miss Barclay had already interviewed Mr. Adam. It was Mr. Adam's evidence that he was interviewed by the Inland Revenue in May 1993 after Dimsey had told him what to say. Dimsey told him not to mention Chipping's name, but to say that Dimsey was in charge of Thomlyn. He told Mr. Adam to suggest that he had met Mr. Adam in London. Mr. Adam thought that implausible, and it was agreed at his suggestion that he would say that he had met Dimsey through an American contact. Mr. Adam gave this account to the Inland Revenue. Dimsey telephoned Mr. Adam after his meeting with the Inland Revenue. Dimsey appeared relieved on being told that Chipping's name had not been mentioned.

In cross-examination on behalf of Dimsey, Mr. Adam made certain concessions. He accepted that he had been confused about whether Chipping had been a director of Thomlyn. He agreed that when he met the Inland Revenue there was a danger that he might be forced to speculate about the roles of individuals in the transaction. He agreed that it was a possibility, although it had not occurred to him, that the mood of his meeting with Dimsey was that Dimsey told him not to volunteer Chipping's name or speculate about his full role, because if he speculated he might make mistakes. He agreed that "If you're not asked about Chipping, don't mention him" was virtually what Dimsey said. He accepted that Dimsey told him he could inform the Inland Revenue that he (Dimsey) was his contact in Jersey and was in control in Jersey. He accepted that what Dimsey told him reflected his understanding of the true position.

In re-examination Mr. Adam said that Dimsey had told him that he (Dimsey) was running Thomlyn. He found it difficult to say whether Dimsey had put it on the basis "If you're not asked about Chipping, don't mention him". The

A suggestion that he (Mr. Adam) had met Dimsey in London was made because Dimsey did not want Chipping's name to come up in connection with the inquiry and Thomlyn.

Chipping and Da Costa were involved in drafting letters to the Inland Revenue. Dimsey was sent draft letters by them and his comments sought. He
B responded. Dimsey was also asked to provide information about the corporate history and structure of the offshore companies. The letters submitted to the Inland Revenue by Da Costa on Chipping's behalf were misleading in that they suggested that the South African Business started when Dimsey telephoned Chipping. The letters stated that Chipping's role was as consultant with Thomlyn and Glenville. The letters made no mention of three of the Royal Trust
C (Jersey) bank accounts, the credit cards or Lantau.

On 1 October 1993 Chipping wrote to Dimsey requesting copies of the Royal Trust Bank statements in relation to one of the four bank accounts. Dimsey confirmed on 5 October 1993 that an account had been opened at the Royal Trust Bank in Jersey on 11 October 1985. Copy bank statements were sent
D by Dimsey to Chipping on 18 October 1985. On 16 October 1993 Chipping sent Dimsey some notes which were to be passed to Da Costa with a view to responding to the Inland Revenue. In his notes Chipping stated that Thomlyn had been formed in order to further discussions with a customer in relation to a business opportunity. Dimsey checked the notes and made some alterations, to make it appear that Thomlyn had been incorporated to transact certain types of
E aviation business. The text was designed to minimise Chipping's role in Thomlyn and Glenville.

On 15 November 1993 Chipping and Da Costa visited Dimsey's office in Jersey and examined files. Da Costa then prepared a draft disclosure letter on 18 November 1993 which he sent to Chipping and Dimsey for approval. The letter
F included reference to one of the four Royal Trust Bank accounts. The deposit account, the dollar account and the current account into which £21,920 had been paid were not mentioned. The letter stated that Chipping had received only two BMW cars and £3,000 from Thomlyn and Glenville. It suggested that Chipping had first become involved when Dimsey had telephoned him to say that he had a client, Thomlyn, and wondered if he could help in respect of a transaction which
G Thomlyn was undertaking.

On 29 November 1993 Chipping faxed to Da Costa amendments to the draft disclosure letter. A copy was faxed to Dimsey on 1 December. Dimsey sent to Da Costa notes made by Chipping, with his own comments and amendments. Dimsey commented:

H

> "I need to clarify with Brian who negotiated the deal with Parago, as I would not wish Parago to provide details to the Inland Revenue of the initial transaction being negotiated with Brian".

The prosecution contended that the second reference to "Brian" was to
I Chipping, but Chipping accepted in cross-examination on behalf of Dimsey that the reference was to Brian Allen.

Da Costa produced a second draft of a letter to be sent to the Inland Revenue dated 2 December 1993. This letter contained the reference to one of the bank accounts at the Royal Trust Bank in Jersey. On 3 December Chipping sent a fax to Da Costa from Dimsey's offices, signed by Dimsey, which included the following passage:

> "In my conversations with Dermot today we both feel that the reference to the Royal Trust Bank account is still a touchy matter to discuss. Is there anything else we can say or alternatively can we dispense with the paragraph?"

In a letter dated 10 December 1993 written on Chipping's behalf by Da Costa to Miss Barclay, Chipping told the Inland Revenue that the South African business started when Dimsey phoned Chipping, which was untrue. The letter omitted to disclose the existence of any of the Royal Trust Bank accounts, of Lantau and/or £200,000 held in a Jersey trust, or of the use by Chipping of credit cards in the names of Thomlyn and Glenville. Da Costa denied in cross-examination on behalf of Dimsey that a copy of this letter was sent to Dimsey.

On 16 December 1993 Chipping confirmed at a meeting with Miss Barclay in the presence of Da Costa that all points relevant to his tax affairs had been included in his income tax returns. Chipping said that he did not have any interest in any companies other than the Mann Group.

Dimsey continued to be consulted by Chipping and Da Costa on the content of correspondence with the Inland Revenue in respect of Chipping's financial affairs. It was the prosecution case that this enabled him to monitor and vet replies with a view to covering up the extent of Chipping's financial affairs and the extent of Chipping's tax liabilities arising from his involvement with Thomlyn and Glenville. On 24 May 1994 Miss Barclay wrote to Chipping asking for a certificate of complete disclosure. On the 8 July 1994 Da Costa replied that Chipping had nothing further to add and that everything had been previously disclosed.

Chipping's case was that he was only a consultant to the offshore companies. He did not know what profits they made. He denied receiving £200,000 and the existence of a trust fund, although he had made admissions when interviewed by the Inland Revenue. The letters written to the Revenue were designed to put off having to make full disclosure. Da Costa's case was essentially that he was acting on Chipping's instructions and had no personal knowledge of the matters. He realised that some matters were not being disclosed to the Revenue, but that did not in the circumstances amount to deception.

Dimsey was not interviewed. He did not give evidence at the trial. The case argued on his behalf was that it was legitimate for him to manage and control companies registered in Jersey. Chipping was merely a consultant to Thomlyn and Glenville. Even if Chipping controlled and managed Lantau, that company did not make profits. He had reason to think that Max Braendli, who lived in Switzerland, was the owner. Thomlyn had a Swiss bank account. He had reason to think that Chipping wanted to hide his activities from his previous employers at Mann Avionics. The sole purpose of any false or misleading documents was

A to avoid the sanctions against South Africa, not to cheat the Revenue. He had no reason to concern himself with the tax affairs of Chipping, who had a solicitor acting for him.

Allen: the facts

B Allen is a man of 50, a successful businessman involved in a series of different activities. It was the prosecution case that his income and assets were held by offshore companies. The properties in which he and his family lived were bought and sold in the name of offshore companies. Offshore companies were used to pay for personal expenditure, including holidays, school fees and ordinary household expenses.

C There were 13 offshore companies, incorporated at various dates between 1978 and 1992 in Jersey or Liberia. Five of the companies were used as vehicles by Allen for controlling and managing his portfolio of properties, which had a total value of £2,083,325. The companies were administered by Dimsey through DFM in Jersey. They had bank accounts in Jersey, administered by Dimsey for Allen in accordance with Allen's instructions. Dimsey and his office undertook D administrative work relating to the offshore companies and Allen's personal assets. It was the prosecution case that Allen himself managed and controlled the companies in the United Kingdom. That aspect of the prosecution case is not challenged for the purposes of this appeal.

Amongst the papers recovered from DFM in Jersey was a schedule of assets E purporting to show Allen's assets in July 1993. It listed the bank balances of the offshore companies and the Rock settlement as assets of Allen. The net balance was approximately £750,000. Numerous draft letters were recovered showing that Allen was giving instructions Dimsey to send letters on behalf of the offshore companies.

F When Allen's home address, Warleys, was searched in February 1995, there were found numerous detailed cash statements and lists in respect of the offshore companies, cheque books in respect of the companies where blank cheques had been signed by the authorised signatories, and bank statements of the companies annotated by Allen. There was evidence that Allen paid the directors' fees of certain of the offshore companies.

G Da Costa undertook most of the property transaction for Allen.

The facts relating to the individual counts can be summarised shortly.

Counts 1 to 7 concerned profits made by the offshore companies. Count 1 concerned Meldrette Investments Ltd., which made the most substantial profits, H over £5 million, on which over £2 million in corporation tax was alleged to be due. Counts 2 to 7 concerned Colander Investments Ltd., Peche d'Or Investments Ltd., Tanin Holdings Ltd., Berkshire Investment Ltd., Escorin Investments Ltd. and Iles Investments Ltd.

Counts 8 to 10, 12 and 13 related to failures to declare personal income and I benefits received by Allen from the offshore companies. Counts 8 and 9 alleged incomplete returns. Counts 10, 12 and 13 related to an absence of returns. It is

sufficient to summarise the kinds of income and benefits received. Meldrette provided £80,000 in premium bonds to the Allen family. Warleys, the house in which the Allen family lived, was held in the name of Peche d'or. Allen and members of his family had credit cards in the names of Meldrette and Peche d'Or, which were used to pay household and personal bills and for holidays and education. School fees for four of Allen's children were paid by Peche d'Or.

Count 11 concerned a schedule of assets provided by Allen to the Inland Revenue during a Hansard investigation into his affairs. The schedule did not list certain shares in the offshore companies, bank accounts of those companies and properties of those companies. Those assets purported to belong to two discretionary trusts, the Rock Settlement and the Burberry Settlement, set up in Gibraltar and Jersey in 1979 and 1988 respectively. The only named beneficiaries were the Red Cross and Oxfam. There was power to appoint additional beneficiaries, but the power had not been exercised. The issue placed before the jury at the trial was whether the two trust deeds were genuine or a sham. The shares of the various companies were held by individuals or others described as nominees of the trustees of the two settlements.

The "no duty to disclose" point (both appeals)

It was submitted to us on behalf of both Appellants that the offence of cheating the Revenue in principle cannot be made out where the alleged *actus reus* consists only in an omission, unless the omission is in breach of a duty imposed by the law on the defendant. Mr. Newman Q.C. for Allen went so far as to contend that this was a general principle of the criminal law: there can be no crime by omission unless there is duty to act. He would not doubt accept that the position might be altered by statute; but cheat is a common law crime.

It is convenient first to summarise the statutory provisions relevant to this argument's application in these appeals. Section 6(1) of the Income and Corporation Taxes Act 1988 ("ICTA") provides: "Corporation tax shall be charged on profits of companies". Section 10(1) of the Taxes Management Act 1970 ("TMA") requires a company which is chargeable to corporation tax but which has not made a return to give notice to the Tax Inspector that it is so chargeable. Sections 10(2) and (3) provide for monetary penalties where no notice is given. Sections 108(1) of Taxes Management Act provides in part:

> "Everything to be done by a company under the Taxes Acts shall be done by the company acting through the proper officer of the company . . ."

Section 108(3)(a):

> "the proper officer of a company which is a body corporate shall be the secretary or person acting as secretary of the company . . ."

It is submitted that the only duty to notify the Revenue of the relevant company's liability to corporation tax was owed under s 108 by the "proper officer": and neither Mr. Allen nor Mr. Chipping filled that role; and so, it is said, neither Appellant (in Dimsey's case, through the conspiracy route) can be fixed with any criminal liability, however much they knew, and however much they set out to conceal.

A In our judgment this argument has no merits. It is obvious that any failure by the proper officer to perform his s 108 duty cannot relieve the company of its liability to corporation tax under s 6(1) of Income and Corporation Taxes Act. If an individual, having total *de factor* control of a company, so arranges its affairs that the company (a) makes profits but (b) does not declare them to the Revenue, he is obviously cheating the Revenue. A *fortiori* if the company is B actually established to operate in this way.

Here, the case made by the Crown was that the Appellant Allen and Dimsey's co-defendant Chipping *themselves* intended to cheat the Revenue, in each case by deliberately declining to notify the Revenue of company profits which they knew or believed (a) would be taxable and (b) would not be disclosed C by anyone else—proper officer or otherwise. This was (as the jury in each case must have accepted) a deliberate course of conduct designed and intended to defraud the Revenue of tax due. The fact that s 108 of Taxes Management Act imposes an express duty on the company secretary to make the relevant disclosure is neither here nor there. The secretary's statutory duty does not render the conduct here in question either less deliberate, or less dishonest. It is D nothing but a red herring. So is the more general proposition that no omission can amount to a cheat unless it is in breach of duty. The offence of cheat is perfectly simple: it is constituted by any form of fraudulent conduct having the purpose and effect of depriving the Revenue of money due to it. In any event it is simply artificial, on the facts which we have recounted, to suggest that these were cases of mere omission. These were deliberate plots, involving overt acts in the way of correspondence and so forth, to bring about a state of affairs in which E the Revenue was to be defrauded.

Mr. Rook Q.C. for the Crown has referred to much authority. We do not find it necessary to set out any of it, save a citation from Lord Mansfield in *Bembridge* (1783) 22 St Tr 1 at 155:

F > "So long ago as the reign of Edward III, it was taken to be clear that an indictment would lie for an omission or concealment of a pecuniary nature, to the prejudice of the King."

The Appellants' submissions on this part of the case, if they were accepted, would provide nothing but a licence for cynical and deliberate tax evasion. We G reject them without hesitation.

The "Central Management and Control" point (Dimsey's appeal)

In his first ground of appeal the Appellant Dimsey submits that the Judge misdirected the jury as to the correct test for determining whether Thomlyn, H Glenville and Lantau were resident in the United Kingdom. It is contended that the jury may have reached its conclusion that these three companies were resident in the United Kingdom in the erroneous belief that it was sufficient for the prosecution to prove that because Mr. Chipping was closely involved in the day to day profit making activities of Thomlyn and Glenville within the United Kingdom, those companies were resident in the United Kingdom. Alternatively, I they may have concluded that, as owner of the share capital of the company, Chipping controlled the *company* in the United Kingdom.

The law

There was no dispute between the Crown and the Appellant as to the true test of residence. A company is resident where the central management and control of its business abides. For nearly a century the test enunciated by Lord Loreburn has been applied. In *De Beers Consolidated Miles Ltd* v. *Howe, Surveyor of Taxes* [1906] AC 455, at 458; (1906) 5 TC 198 at, 213 he said:—

> "A company resides, for purposes of income tax, where its real business is carried on . . . and the real business is carried on where the central management and control actually abides."

The paradigm of central management and control of the business of the company is the exercise of such management and control by directors of a company sitting as a board. Residence will be where the board habitually meets and decides matters of fundamental policy. The test of corporate residence must, therefore be distinguished from questions as to:—

(a) *the control of the company itself.* Shareholders control the company, directors exercise central management and control over the business of the company. In the case of a limited liability company owned by shareholders they will collectively have the power to ensure that the affairs of the company are conducted in accordance with their wishes, exercising that power through general meetings of the company but they do not exercise central management and control of the business of the company.

(b) *where the business of the company is carried on or where its profits are earned.* There are many decisions in Tax Cases in which the conclusion has been reached that a company was resident in the United Kingdom although all profits were earned in far way countries.

The Summing up

The Judge directed the jury as follows:—

> "The test of whether a company is resident in the UK is whether its real business is carried on here. The real business of the company is carried on where the central management and control are exercised. Management and control are two different words having slightly different meanings. Management for these purposes means the day-to-day running of the business of the company. Control refers to the making of policy decisions and exercising the final say in business matters. The word central means overall or top-level. The prosecution case is that although these companies were registered in Jersey, their business was really conducted by Mr. Chipping and he conducted it in this country. The defence case is that the companies were not only registered in Jersey but their real business was conducted by Mr. Dimsey in Jersey and that Chipping was only a consultant. If that is correct, then they were not subject to UK corporation tax. You must look at the circumstances concerning each of these companies and decide whether the prosecution have made you sure that they were centrally managed and controlled in the UK rather than in Jersey or elsewhere. The test is where they were

A in fact centrally managed and controlled, not where they should have been managed or where they appear to have been managed.

So what matters should you look at when applying this test? These are some suggestions. Firstly, what did the business of the company in fact consist of? Secondly, what role was played by each individual in the running of that business? Thirdly, where did the people
B running the business carry it on? Where did they hold their meetings and make their decisions? Where were the contracts discussed? Where were telephone calls made from and where was correspondence sent? Fourthly, where was the administrative work of the company conducted? Where were the records kept? Fifthly, where were the company bank accounts held, and in particular, from
C where instructions were sent to those banks? You may think that for the most part Mr. Chipping carried on his activities in England although he did go to Jersey from time to time. Mr. Dimsey, on the other hand, was mainly in Jersey. You may think that possibly the simplest way of formulating a test in the circumstances of this case is are you sure that Chipping was in reality managing and controlling these companies or may it have been Dimsey or some other person
D or persons?"

This passage is criticised because, it is said, it was likely to lead the jury to believe that it was sufficient to prove that Mr. Chipping was concerned with the day to day running of the business. The combination of the distinction the Judge
E made between management and control (at 13H) and the questions at 14F to 15A were likely to divert the jury from the central issue, namely where the high policy in relation to the business of the company was determined. It led them to focus, erroneously, on the many activities which Mr. Chipping undertook in the United Kingdom.

F We agree that it was undesirable for the Judge to split the concept of management and control. The test is composite; it is designed to identify where decisions of fundamental policy are made as opposed to the place where the day to day profit earning activities are undertaken. Further, we agree that the series of questions the Judge asked, taken on their own, directed as they were to the daily activities of the business, could theoretically be misleading.

G

However, it is vital that the directions are considered as a whole. It is not permissible to criticise sections of the summing up without regard to their overall effects in the context of the facts of the case. The factual issues in the case centred on the question whether it was Mr. Dimsey who managed and controlled the companies, with Mr. Chipping merely acting as a consultant who undertook
H work in England on behalf of the companies. The jury were presented with a simple choice. There was no subtle distinction between the function of Mr. Dimsey and the function of Mr. Chipping. So long as the prosecution could satisfy the jury so that it was sure that Mr. Chipping was not a consultant but in fact not only undertook the day to day running of the business but made all the decisions whilst Mr. Dimsey carried out the functions of administration in
I Jersey, no sophisticated or difficult questions of central management and control arose.

This simple issue was clearly laid before the jury by the Judge:— A

> "You may think that for the most part Mr. Chipping carried on his activities in England although he did go to Jersey from time to time. Mr. Dimsey, on the other hand, was mainly in Jersey. You may think that possibly the simplest way of formulating a test in the circumstances of this case is are you sure that Chipping was in reality managing and controlling these companies or may it have been Dimsey or some other person or persons?" B

Before reminding the jury of the detailed evidence of Chipping's activities in the United Kingdom the Judge returned to the essential factual dispute:—

> "Members of the jury, I shall remind you shortly of the evidence C of the people who were involved in the details of how the contracts were carried out. The prosecution case is that Mr. Chipping was really the linchpin of the whole business, that he had both the technical expertise and the business and financial knowledge to negotiate and carry out these contracts. They say that effectively he D simply used Thomlyn and Glenville to do his business for him, that those companies were just convenient facades or fronts set up for the purpose. The defence case is that those companies were or at least may have been genuine trading companies controlled at least in Jersey and that Mr. Chipping was merely a consultant."

E

Between pages 50 and 70 the Judge summarised the evidence as to the activities of the companies in relation to the contracts to which he referred at page 48. It emerged that Mr. Dimsey signed the contracts, arranged for Mr. Adams' commission to be collected from the bank, chased late payments and dealt with invoices. In the light of the issue left to the jury it is not possible in our judgment to entertain the idea that the jury may have thought that merely F because the day to day profit earning activity had been undertaken by Mr. Chipping as a consultant in England the companies were resident there. We reject that criticism of the summing up.

Further criticism is advanced to the effect that the Judge confused control G of the companies with control of the business. It is true that from time to time in his summing up he referred to central management and control of the companies as opposed to central management and control of the business of the companies. It is contended on behalf of the Appellant that the jury may have been mislead into concluding that the companies were resident in the United Kingdom because Mr. Chipping was the beneficial owner of the shares in the companies. H Again we reject that criticism. The question of control by shareholders of a company was never argued before the jury. It was never mentioned by the Judge. Accordingly, we do not think that it would have even occurred to the jury to conclude that because Mr. Chipping was the beneficial owner of shares in the company those companies were resident in the United Kingdom. We refer, again, to the way in which the Judge dealt with the essential factual argument I before the jury. Read in the light of that factual issue we do not think there was any misdirection in the respect here contended for. We reject the first ground of appeal.

The s 739 point (both appeals)

A We understand the Revenue to accept that s 739(2) of Income and Corporation Taxes Act, which we shall shortly set out, applied on the facts in both appeals, so that the income of the offshore companies was in each case deemed respectively to be the income of Chipping and Allen. But it is contended for the Appellants that, in consequence, the income in question is thereby deemed also *not* to be the income of the companies. If that is right, then none of B the companies was liable to any corporation tax in respect of such income: it was not their income. It is said that that has the following results.

(1) There was no evidence on which Dimsey could properly have been found guilty of the conspiracy with which he was charged. The evidence showed (as the jury must have found) that he conspired to pretend that Chipping did not have the central management and control of the business of the three companies C in question, in order to give the false impression that the companies were not resident in the UK. But the only point in doing so would be to avoid corporation tax chargeable against the companies. Since the companies were not liable to corporation tax, there was no actual or potential loss to the Revenue which could possible flow from the conspiracy in which Dimsey took part. But it is a constituent element of the common law offence of cheating the Revenue that D there should exist such an actual or potential loss. In its absence there could be no cheat, and therefore no conspiracy to cheat: there can be no criminal conspiracy unless it is shown that the alleged conspirators agreed to bring about a state of affairs which would itself amount to a crime.

(2) There was no evidence on which Allen could properly have been found E guilty of the "corporation tax counts" in the indictment laid against him (counts 1–7). The Crown's case was that he had dishonestly concealed the fact that he had the central management and control of the businesses of the companies in question in his case, again in order to give the false impression that the companies were not resident in the UK. But, as in the Dimsey appeal, the only point in doing so would be to avoid corporation tax chargeable against the companies. Since F the companies were not liable to corporation tax, Allen's alleged (and proved) dishonesty could not have led to any actual or potential loss to the Revenue, so that, for want of an essential element in the offence, he could not be guilty of cheat.

(3) Nor could Allen have properly be found guilty on the "income tax G counts" (counts 8–10, 12–13): the money from which the benefits in question were derived was, by operation of s 739, his own, and he is plainly not liable to income tax on benefits which he has paid for himself.

Section 739 of ICTA 1988 provides so far as relevant as follows:

> "(1)... the following provisions of this section shall have effect for H the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside of the United Kingdom.
>
> I (2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an

individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts."

Section 741:

"Sections 739 . . . shall not apply if the individual shows . . . to the satisfaction of the Board either—

(a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or

(b) that the transfer and any associated operations were *bona fide* commercial transactions and were not designed for the purpose of avoiding liability to taxation . . ."

Section 742, so far as relevant:

"(2) An individual shall, for the purposes of section 739, be deemed to have power to enjoy income of a person resident or domiciled outside the United Kingdom if—[five sets of circumstances are then set out, at least one of which—(d)—shows that the 'power to enjoy' may be contingent on events outside the control of the individual having the power, who may possibly never receive the income in question or any benefit derived from it . . .

(8) For the purposes of sections 739 to 741, any body corporate incorporated outside the United Kingdom shall be treated as if it were resident outside the United Kingdom whether it is so resident or not."

Section 743(1) and (4):

"(1) Income tax at the basic rate or the lower rate shall not be charged by virtue of section 739 in respect of any income to the extent that it has borne tax at that rate by deduction or otherwise but, subject to that, income tax so chargeable shall be charged under Case VI of Schedule D . . .

(4) Where an individual has been charged to income tax on any income deemed to be his by virtue of section 739 and that income is subsequently received by him, it shall be deemed not to form part of his income again for the purposes of the Income Tax Acts."

Section 744(1):

"No amount of income shall be taken into account more than once in charging tax under the provisions of section 739 . . . ; and where there is a choice as to the persons in relation to whom any amount of income can be so taken into account—

A (a) it shall be so taken into account in relation to each of them, and if more than one in such proportions respectively, as appears to the Board to be just and reasonable . . ."

Section 831, the interpretation section, is important. Subsection (1) provides:

B "In this Act, except so far as the context otherwise requires—

(a) the 'Corporation Tax Acts' means the enactments relating to the income and chargeable gains of companies and of company distributions . . .

(b) the 'Income Tax Acts' means the enactments relating to income tax, including any provisions of the Corporation Tax Acts which C relate to income tax."

In light of a submission advanced by Mr. Venables Q.C. for Dimsey, it is also necessary to set out s 9(1) of Income and Corporation Taxes Act 1988:

"Except as otherwise provided by the Tax Acts, the amount of any D income shall for purposes of corporation tax be computed in accordance with income tax principles, all question as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment." E

As we have foreshadowed, the sole question for determination on this part of the case is whether s 739(2) has effect to deem the income of the relevant person resident outside the United Kingdom not to be his income, as well as deeming it to be the income of the individual or individuals having "power to enjoy" it. Mr. Venables (whose argument was adopted by Mr. Newman Q.C. for Allen) F submitted that the section should not be read as empowering the Revenue to tax the same income twice.

In our judgment this point is concluded in the Revenue's favour on the true construction of the Act. The deeming provision in s 739(2) has effect "for all the purposes of the Income Tax Acts". It cannot, therefore, have effect for any other G purpose. The "Income Tax Acts" are defined by s 831(1)(b), which we have set out. This definition and that of the "Corporation Tax Acts" are, plainly, mutually exclusive. In our judgment it follows that the deeming provision contained in s 739(2) has no impact whatsoever on the actual or potential liability to corporation tax of a company which for the purposes of s 739(2) constitutes a person "resident . . . out of the United Kingdom".

H

Mr. Venables sought to refute this conclusion by reference to s 9(1) of Income and Corporation Taxes Act 1988. He submitted, as is plainly the case, that this subsection incorporates "income tax principles" into the provisions relating to corporation tax, so that income tax principles have to be applied for the ascertainment of a company's chargeable income for the purposes of I corporation tax. Upon this he sought to build the further proposition that by virtue of the application of income tax principles, the effect of s 739(2) is that the

relevant offshore company is taken to have a nil income. But this is a *non sequitur*. The fact that income tax principles fall, by virtue of s 9(1), to be applied in the ascertainment of a company's liability to corporation tax cannot have the consequence that the scope of the deeming provision in s 739(2) is wider than the subsection states, that is (reading in the s 831(1)(b) definition) "for all the purposes of [the enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax]". In short (as was submitted by Mr. Brennan, junior counsel for the Crown) the deeming provision does not affect corporation tax.

Mr. Venables also submitted that a deeming provision such as that contained in s 739(2) must be taken to its logical conclusion, and its logical conclusion here entails that the income in question, once deemed to be that of the transferor, must therefore also be deemed to be *not* that of the transferee. He cited *Marshall* v. *Kerr* (1994) 67 TC 56; [1995] 1 AC 148. But the entailment is false. There is nothing self-contradictory in the proposition that the income belongs to the transferee but is in addition deemed by s 739(2) to belong to the transferor. If that is an objectionable conclusion, it is so on grounds that a liability to taxation on the same income is generally objectionable; but that is an objection of policy, not logic (and as such it is one that we shall deal with directly). As regards *Marshall* v. *Kerr*, We would accept Mr. Brennan's submission that the extinction of liability to corporation tax in the case of a s 739(2) transferee offshore company lies outside the purposes of the statutory fiction, and is not demanded by it. It seems to us that this conclusion is in line with what was said by Nourse J. as he then was, in *IRC* v. *Metrolands (Property Finance) Ltd.* [1981] 1 WLR 637, 646, cited with approval in the Court of Appeal by Peter Gibson L.J. in *Marshall* v. *Kerr* (1994) 67 TC 56, 76:

> "When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purpose of the fiction, it should be applied."

Certain prudential considerations militate also in favour of this conclusion. As we have pointed out in parenthesis in referring to s 742(2), the category of persons having the "power to enjoy" is so widely drawn as to include individuals who may never receive the income in question or any benefit derived from it. It is possible that a case might arise in which the Revenue would thus be unable to collect income tax under s 739(2) and, if Mr. Venables is right, neither would any corporation tax be due from the offshore company. Moreover Mr. Venables' argument seems to us to entail the conclusion (as Mr. Brennan submitted) that the statutory scheme might be manipulated so as to achieve the avoidance of corporation tax on the part of the offshore company: as for example by ensuring that liability was fixed upon an impecunious individual transferor.

A We acknowledge that this position gives rise, in theory at least, to the possibility of double taxation: for income tax against the individual tax-avoider who has transferred assets offshore, and for income tax or corporation tax against the person resident or domiciled out of the United Kingdom to whom assets have been transferred. But this is far from being the *systematic* result of our approach to s 739(2). It is important to notice that in such a situation the B transferee's liability to tax is not, of course, created by s 739 and would only arise in the case of an offshore company if its central management and control is in the United Kingdom. Such a company is treated as resident outside the United Kingdom for the purposes of s 739: see s 742(8). However it remains resident in the United Kingdom for the purpose of the charge to corporation tax. If the transferee company is *not* centrally managed and controlled in the United C Kingdom, no liability to corporation tax could arise. Where the transferee is a natural person, his residence/domicile outside the United Kingdom will generally immunise him from any liability to income tax.

In reply Mr. Venables cited *Vestey* v. *IRC* [1979] 3 WLR 915; [1980] AC 1148. In that case the Revenue claimed that the predecessor of s 739 (section D 412(2) of the Income Tax Act 1952) operated so as to deem the relevant income to be the income of a large number of trust beneficiaries, some of whom on the facts received relatively modest amounts from the discretionary trusts in question, and had certainly not been involved in the transfer of assets, done for the avoidance of tax which had given rise to the section's application; yet, said the Revenue, they all had "power to enjoy" given the breadth of that expression's E scope (by virtue of what is now s 742(2)). And the Revenue asserted a right to tax any or some or all of them on the whole amount, which was very large, or any part of it. Lord Wilberforce said [1979] 3 WLR 915, at 925-6; [1980] AC 1148, at 1172:

> "Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a F taxpayer, and the amount of his liability is clearly defined.
>
> A proposition, that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body, represents a radical departure from constitutional principle. It may be that the Revenue could persuade Parliament to enact such a proposition in such terms that the courts G would have to give effect to it: but, unless it has done so, the courts, acting on constitutional principles, not only should not, but cannot, validate it.
>
> The Revenue's contentions to the contrary, however moderate and persuasive their presentation by Mr. Nolan, fail to support the proposition.
>
> H They say that the income tax legislation gives them a general administrative discretion as to the execution of the Acts, and they refer to particular instances of which one is section 115(2) of the Act of 1970 (power to decide period of assessment). The Judge described the comparison of such limited discretions with that now contended for as 'laughable.' Less genially, I agree. More generally, they say I that section 412 imposes a liability upon each and every beneficiary for tax in respect of the whole income of the foreign transferees: that

> there is no duty upon the commissioners to collect the whole of this from any one beneficiary, that they are entitled, so long as they do not exceed the total, to collect from selected beneficiaries an amount decided upon by themselves.
>
> Mr. Lords, I must reject this proposition. When Parliament imposes a tax, it is the duty of the commissioners to assess and levy it upon and from those who are liable by law. Of course they may, indeed should, act with administrative commonsense. To expend a large amount of taxpayer's money in collecting, or attempting to collect, small sums would be an exercise in futility: and no one is going to complain if they bring humanity to bear in hard cases. I accept also that they cannot, in the absence of clear power, tax any given income more than once. But all of this falls far short of saying that so long as they do not exceed a maximum they can decide that beneficiary A is to bear so much tax and no more, or that beneficiary B is to bear no tax.
>
> This would be taxation by self-asserted administrative discretion and not by law. As the Judge well said [1979] Ch 177, 197: 'One should be taxed by law, and not be untaxed by concession.' The fact in the present case is that Parliament has laid down no basis on which tax can be apportioned where there are numerous discretionary beneficiaries."

In our judgment the Revenue's contentions as to s 739 in this case bear no resemblance whatever to their stance excoriated by the House of Lords in *Vestey*. There is a theoretical liability to double taxation. We were told that the practice is not to exact tax twice. We wholly accept that the subject is not to be taxed by discretion. Were a situation to arise in which, contrary to their plain statement to this court, The Revenue sought in a s 739 case to exact tax both from the transferor (or other person with "power to enjoy") and the offshore transferee, the High Court might be invited to prohibit it as an abuse of power (Section 744(1), which we have set out, shows that the Revenue may not take into account more than once any amount of income in charging tax under s 739, that is, against persons having "power to enjoy".)

On this part of the case Mr. Newman had an additional argument based on Article 1 Protocol 1 of the European Convention on Human Rights, but it added nothing.

The "shadow director" point (Allen's appeal)

Introduction

Counts 8, 9, 10, 12 and 13 alleged that the Appellant had omitted to declare benefits in kind and the provision of living accommodation between 1989 and 1995. The Appellant contends that as a shadow director he was not liable to tax in respect of such benefits. If the Appellant is correct, his convictions for cheating the Revenue by failing to declare the benefits to which those counts refer were unsafe. The resolution of the issue is a question of pure statutory construction. Accordingly we now turn to the relevant statutory provisions.

The statutory provisions relevant to the liability of a shadow director to tax on benefits

"Section 19 Schedule E

(1) The Schedule referred to as Schedule E is as follows:—

SCHEDULE E

1. Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one or more than one of the following Cases:—

Case I: any emoluments for any year of assessment in which the person holding the office or employment is resident and ordinarily resident in the United Kingdom, subject however to section 192 if the emoluments are foreign emoluments (within the meaning of that section) . . . ;

Case II: any emoluments, in respect of duties performed in the United Kingdom, for any year of assessment in which the person holding the office or employment is not resident (or, if resident, not ordinarily resident) in the United Kingdom, subject however to section 192 if the emoluments are foreign emoluments (within the meaning of that section);

Case III: any emoluments for any year of assessment in which the person holding the office or employment is resident in the United Kingdom (whether or not ordinarily resident there) so far as the emoluments are received in the United Kingdom;

and tax shall not be chargeable in respect of emoluments of an office or employment under any other paragraph of this Schedule . . .

5. The preceding provisions of this Schedule are without prejudice to any other provision of the Tax Acts directing tax to be charged under this Schedule and tax so directed to be charged shall be charged accordingly.

(2) References in the Tax Acts to Cases I, II and III of Schedule E shall be taken as referring to the Cases under which tax is chargeable under paragraph 1 of that Schedule.

(3) Part V contains further provisions relating to the charge to tax under Schedule E."

It should be noted, at this stage, that the charge on emoluments under Sch E is subject to territorial limitation under all three cases.

Both ss 145 and 154 fall under Part V, described as: "PROVISIONS RELATING TO THE SCHEDULE E CHARGE".

But s 145 appears in Chapter I headed "SUPPLEMENTARY CHARGING PROVISIONS OF GENERAL APPLICATION" whereas s 154 appears in Chapter II headed "employees earning £8,500 or more and directors".

Section 145 provides in part:—

"(1) Subject to the provisions of this section where living accommodation is provided for a person in any period by reason of his employment, . . . he is to be treated for the purposes of Schedule E as being

in receipt of emoluments of an amount equal to the value to him of the accommodation for the period, less so much as is properly attributable to that provision of any sum made good by him to those at whose cost the accommodation is provided . . .

(8) For the purposes of this section:—

(b) the expressions 'employment', . . . 'director', . . . shall be construed in accordance with subsections (2), (4) and (8) to (12) of section 168 as if this section were included in Chapter II of this Part."

Section 154 provides in part:—

"(1) Subject to section 163, where in any year a person is employed in employment to which this Chapter applies and:—

(a) by reason of his employment there is provided for him, or for others being members of his family or household, any benefit to which this section applies; and

(b) the cost of providing the benefit is not (apart from this section) chargeable to tax as his income,

there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to whatever is the cash equivalent of the benefit."

Before April 1989 Chapter II was headed "Supplementary Charging Provisions Applicable to Directors and Hired Paid Employees and Office Holders" and the words "employment to which this Chapter applies" read "directors or higher paid employment".

By s167(1):—

"(1) This Chapter applies:—

(a) to employment as a director of a company (but subject to subsection (5) below), and

(b) to employment with emoluments at the rate of £8,500 a year or more."

Interpretation provisions are contained in s168:—

"(1) The following provisions of this section apply for the interpretation of expressions used in this Chapter.

(2) Subject to section 165(6)(b), 'employment' means an office or employment the emoluments of which fall to be assessed under Schedule E; and related expressions shall be construed accordingly . . .

(8) Subject to subsection (9) below, 'director' means:—

(a) in relation to a company whose affairs are managed by a board of directors or similar body a member of that board or similar body;

(b) in relation to a company whose affairs are managed by a single director or similar person, that director or person; and

A (c) in relation to a company whose affairs are managed by the members themselves, a member of the company, and includes any person in accordance with whose directions or instructions the directors of the company (as defined above) are accustomed to act.

(9) A person is not under subsection (8) above to be deemed to be a person in accordance with whose directions or instructions the
B directors of the company are accustomed to act by reason only that the directors act on advice given by him in a professional capacity."

Mr. Kessler, junior counsel for the Appellant, submits that a shadow director is not liable to tax upon benefits in kind because the provisions of s154 only apply to a shadow director if:

C

(a) he is in true employment, and

(b) he has emoluments which are chargeable under Sch E.

Thus, the provisions only have application to a person who is an employee
D with emoluments of £8,500 (originally £5,000 in 1976, raised to £8,500 in 1978, and never raised since) or to a shadow director who is an employee but has emoluments of less than £8,500. They have no application to a shadow director in the position of the Appellant who was not employed and had no emoluments at all.

E This submission rests upon three alternative arguments:

(1) Even if the extended definition of director under s168(8) has the effect that a shadow director is deemed to hold an office, he has no emoluments chargeable under Sch E.

F (2) The extended definition of director does not imply that a shadow director holds an office.

(3) In any event the extended definition of director under s 168(8) has no application to s19 which appears in Part I of Income and Corporation Taxes Act.

G The Appellant's first argument focuses upon the reference in s168(2) to:—

"Emoluments . . . which fall to be assessed under Schedule E".

The Appellant, it is contended, had no such emoluments. The requirement is necessary in order to impose a territorial limitation. Absent such a limitation
H the section imposes a charge on benefits provided to a foreign employee by a foreign employer. The only way a territorial limitation can be imposed under s154 is to construe s168(2) as referring to actual emoluments coming within s19 and one or more of the Cases thereunder. If a shadow director is only in receipt of benefits which are deemed to be emoluments under s154, no territorial restriction exists. In support of that contention Mr. Kessler relies upon a decision of the
I distinguished Special Commissioner Dr. Avery Jones who concluded in the context of what is now s145 that the purpose of the definition in s168(2) was to

provide the very territorial limitation which would otherwise be absent (see Re Taxpayer F1 SC 3099/93 and 3100/93). A

We do not agree. Section 154 imposes a charge upon the cash equivalent of the benefits to which s154 applies by treating the cash equivalent of the benefits as emoluments of the employment and "accordingly chargeable to income tax under Schedule E". B

Assuming that the Appellant was an office-holder, he was in receipt of benefits the cash equivalent of which are emoluments chargeable under Sch E.

However, those emoluments would only fall to be assessed if they fell within one or more of the Cases under Sch E. Those Cases themselves impose a territorial limitation. If the deemed emoluments are outwith those three Cases they will not fall to be assessed under Sch E, and accordingly the shadow director would not be within the definition of employment in s168(2). The territorial limitation is imposed by the requirement in s168(2) that the deemed emoluments fall to be assessed under Sch E. The Appellant's argument fails to give adequate weight to the wording of the requirement, which implies that there could be emoluments which did not fall to be assessed under Sch E, for example emoluments which do not fall within one of the three Cases. Although the Appellant was in receipt of emoluments chargeable to income tax under Sch E, he would not be in employment for the purposes of Chapter II unless those emoluments *fell to be assessed* under Sch E. The Appellant's benefits were received in the United Kingdom. They did fall to be assessed under Sch E. We reject the first argument. C D E

The Appellant's second argument challenges the Revenue's concept of a deemed office holder. It is plain that a shadow director does not in reality hold an office; there is no appointment and there can be no vacation of such a post (see *per* Lord Wilberforce in *Edwards* v. *Clinch* (1981) 56 TC 367 at 410) [1982] AC 845, at 861. There is, so it is contended, no reference in the statutory provisions to a deemed office. In our judgment no such reference was required. Chapter II of Part V applies to *employment as a director* (see s167(1)(a)). *Employment* means an office or employment (see s168(2)). *Director* has the extended definition given in s168(8) which includes those who manage the affairs of a company who are not directors, and shadow directors. In our judgment since the word "employment" in s167(1)(a) means an office as well as employment properly so called and since the word "director" includes those who are not directors, the application of the definition in s168(2) and of the extended definition in s168(8), to s167(1)(a) has the effect of deeming those who fall within the extended definition of director to hold an office. The submission of the Appellant fails to give full effect to the meaning of "employment" and "director" in s167(1)(a) as defined in s168(2) and (8). By virtue of those two definitions a person who falls within the extended definition of director holds an office as director. F G H

Such a construction has the merit of giving content to s 168(9). If the Appellant is correct then the purpose of the extended definition of director is only to catch shadow directors who are employees with emoluments of less than £8,500. If the extended definition is so restricted it is difficult to see how anybody, whose directions or instructions were given in a professional capacity, would be caught under subs(8) and thus require exclusion under subs(9). So much is I

A accepted by Mr. Kessler, but he says that such a conclusion should not deflect us from acceptance of his submissions since it is clear that the exclusion in s168(9) derived from s94 of the Companies Act 1928 and subsequent consolidations. We prefer a construction which gives content to subs(9) and does not rely upon an accident of repetition.

B It is true, as the Appellant contends in his third argument, that ss167 and 168, being within Chapter II of Part V, have no application to s19 which refers under paragraph 1 to "any office or other employment". But in our judgment the effect of s154 is to deem the cash equivalent of the benefit to which s154 applies to be "emoluments of the employment and accordingly chargeable to income tax under Schedule E". The statutory fiction under s154 must be carried through to C s19 and there is no warrant for imposing any further requirement, such as that the emoluments should derive from an actual office, before the cash equivalent of the benefit is subject to charge under Sch E.

For these reasons we conclude that the Appellant as a shadow director was liable to tax on benefits which fell within s154.

D The counts in the indictment cover both benefits to which s154 applies and benefits consisting of the provision of living accommodation under s145(1). Since the counts cover both, it is strictly unnecessary further to analyse the provisions of s145 since the convictions would be safe even if the provision of living accommodation to the Appellant did not fall within s145(1). But for the sake of completeness we should add that, in our judgment, the provision of living E accommodation to this Appellant as shadow director does fall within s145. By virtue of s145(8)(b), the definition of employment in s168(2) and the extended meaning of director in s168(8) are carried through to the meaning of employment in s145. Section 145 applies where a person is provided with living accommodation by reason of the fact that he holds an office. For the reasons we have already given the combined operation of s168(2) and (8) have the effect that F the holder of an office includes one who falls within the extended definition of director. For those reasons, therefore, we conclude that the Appellant was in receipt of living accommodation chargeable to tax under s145(1) because he was a shadow director.

The "Hansard" point (Allen's appeal—count 11)

G As we have said the allegation here was that Allen provided a false schedule of assets during the course of a "Hansard" investigation. Allen was alleged to have omitted from the schedule his

> "beneficial interest in shares issued by offshore companies, his beneficial interest in properties held in the names of offshore H companies, and his beneficial interest in bank accounts held in the United Kingdom and in Jersey in the names of offshore companies"

His case was that all these items were properly omitted, because the shares were in truth the property of one or other of two discretionary trusts, the Rock Settlement and the Burberry Settlement, as was shown by the relevant trust I deeds; and the property and bank accounts were beneficially owned by the offshore companies.

The Judge first directed the jury thus:

> "But here the question is, was Mr. Allen the beneficial owner the true owner of the shares, the properties and the bank balances in question? If he was then clearly the schedule of assets which he provided to the Revenue in answer to their enquiries was entirely wrong. If he appreciated that he should have declared [them] to the Revenue, then he was cheating the Revenue by failing to do so . . .
>
> That is entirely right [viz that the assets belonged to the trusts] unless you are satisfied that the various very lengthy trust deeds you have seen are a sham, that is to say, documents which purport to show a legal situation which is other than the real one intending to give the appearance of creating legal rights different from the actual legal rights, if these trust deeds are a sham then it is open to you to find that the defendant was the beneficial owner of the various assets, knew that he was, and was cheating the Revenue in not disclosing the various [assets] in the schedule of assets which he was required to give them."

Mr. Newman rightly made no criticism of this passage; it is entirely in accordance with Lord Diplock's description of the nature of a "sham" transaction in *Snook* v. *London & West Riding Investment Ltd.* [1967] 2 QB 786, 802, which we need not set out.

The Judge returned to count 11 at page 86. He said:

> "So you have to decide about those trusts . . . they are in virtually identical terms, one set up in Gibraltar, knowing [sic: 'bearing' is meant] the date the 26th February 1979 the other one set up in Jersey bearing the date the 8th February 1988 it is said to you that the various [meaning the trust deeds] are perfectly standard discretion trusts. Yes and no. No doubt they are in a form very frequently used but you have seen that the only named beneficiaries are the Red Cross and Oxfam. You have seen that the trustees of each trust have the power to appoint additional beneficiaries . . . So far as we are aware no deeds [sc. Appointment of further beneficiaries] have ever been executed . . . you may think it extremely unusual for a person who is really wanting to put money into a trust not to specify at least the classes of people whom it is intended to benefit.
>
> Which grandfather will set up a trust in favour of . . . any child reaching the age of 21 of his daughter . . . so that the trustee can choose . . . which child they benefit. They have a class of people and you may think that that is a good deal more usual than an open trust in which the trustee can benefit any person in the world that he wishes except a resident of Jersey. That is the way that formally these trusts are set up. But you may think that the real test is this; consider the trusts assets, it is said that [materials in the documents before the court] show the trust assets . . . Again, yes and no if those documents are accurate. You will notice that . . . the shares in Colander are $500 US$ bearer shares, and that . . . the shares in Peche D'Or are $500 US$ shares. They are shares . . . perhaps likely nowadays to be very very much out of fashion the reason being that they are like cash . . .

A bearer shares are owned by the person who has them in his hand . . . It is usual for bearer shares to be held in a bank . . . to the order of a particular person. We don't know w[h]ere they are. We do not know to whose order they are held. But . . . if you were to conclude . . . that in practice Mr. Allen used any monies or assets belonging to any of the various companies as if they were his own then . . . that would be B an indication that the various trusts do not set out the true position.

An owner of things is the person generally who has the say so about what happens to them. You are entitled to say whether you keep your motor car or you sell it for instance. Take one absolutely particular example and if you concluded that Mr. Allen actually did whatever he liked with any of the assets or monies of any of these C companies that would be powerful evidence that these documents, lengthy as they are, are . . . simply pieces of paper."

This passage is criticised by Mr. Newman, first, on the footing that the Judge has categorised as unusual—and therefore impliedly suspicious—aspects of the trust deeds which are in fact perfectly normal and unexceptionable, or which, at D least, cannot throw light on the question whether they were "sham" documents. Thus, the power to nominate a wide (even unlimited) class of beneficiaries is nothing unusual, and the fact that the assets included bearer shares is simply neutral: it cannot cast light on the issue as to "sham". Moreover it is argued that since the trustees were entitled to prefer any beneficiary over any other, the fact that a particular individual, Allen, enjoys all the use of the trust property as if it E were his own is entirely consistent with the existence of a trust.

We take the view, and apprehend that the Crown was inclined to accept, that those features relating to the width of the discretionary trusts and the existence of bearer shares among the assets were not indicative of anything sinister at all in the documents; and so far as the Judge suggested otherwise, he should not have done so. But this criticism of the summing-up has to be viewed in context. The F plain fact is that if the jury found that Allen was the beneficial owner of the assets in question, they must inevitably have convicted him on count 11. They were fairly and squarely directed to that effect. And there was in fact, overwhelming evidence that the assets were Allen's to dispose of as he would, that he treated them as such, and that there was no question of the trustees possessing any real power or discretion in the matter. The evidence in question is summarised at pp G 17-19 of the Crown's skeleton, and since it is not disputed by Mr. Newman we need not set it out.

In our view it is impossible to conclude that the jury may have been misled by the Judge's mistaken emphases.

H Mr. Newman advanced a further argument, conspicuous for its imaginative quality. He submitted that if he was wrong upon the issue of "sham", then the corporation tax counts and the income tax counts against Allen—that is, the rest of the indictment—were fatally infected: it would mean that all the assets of the companies belonged to Allen, so that there would be nothing on which to charge corporation tax; and Allen could not be liable to income tax on benefits in kind, I since they would, in effect, be gifts to himself. He referred to Income and Corporation Taxes Act s8(2): "A company . . . shall not otherwise be chargeable

to corporation tax on profits accruing to it in a fiduciary or representative capacity . . ." But, as Mr. Rook submitted, the fact that Allen owned the companies did not imply that they generated no profits. A company's profits are not earned "in a representative capacity" on behalf of its shareholders; nothing could be more elementary. Allen, as beneficial owner of the companies, was entitled to a distribution of profits, which is what he got.

All these convictions are perfectly safe, and the appeals are dismissed.

Appeals dismissed.

Brian Roger Allen appealed against the confiscation made by the Crown Court in the sum of £3,137,165, with seven years' imprisonment in default. He also sought permission to appeal against the substantive sentence of seven years passed by the Crown Court. Further, he and Dermot Jeremy Dimsey sought permission to appeal to the House of Lords against the convictions upheld by the Court of Appeal.

On 11 October 1999 the appeal and applications were dismissed by the Court of Appeal (Laws L.J., Moses J., and HH Judge Crane).

Alan Newman Q.C. and *James Kessler* for Allen.

Amanda Hardy and *Tina Davey* for Dimsey.

Peter Rook Q.C. and *Jonathan Fisher* for the Crown.

The cases referred to in the judgment are as follows:—

DPP v. *Turner* [1973] 3 All ER 124; [1974] AC 357; [1973] 3 WLR 352; *R* v. *Martin; R.* v. *White* [1998] 2 Cr App R. 385; *R.* v. *Tighe* [1996] 1 Cr App R. (S) 314; *R.* v. *Travers* [1998] Crim LR 655; *US Government* v. *Montgomery* [1999] 1 All ER 84; *Vestey* v. *IRC* [1977] 3 All ER 1073.

LAWS L.J. On 7 July 1999 this Court dismissed appeals brought by Brian Roger Allen and Dermot Jeremy Dimsey against their convictions, in Dimsey's case of an offence of conspiracy to cheat the public revenue, and in Allen's case of 13 substantive counts of cheating the public revenue (see [1999] STC 846).

On that occasion the Court also granted permission to appeal in Allen's case against a confiscation order, made in the Crown Court at Knightsbridge on 20 February 1998, in the sum of £3,137,165 with seven years' imprisonment in default. The Court ordered that should the default sentence fall to be served it should be consecutive to the term of seven years' imprisonment imposed for the 13 offences of which Allen had been found guilty.

Allen's appeal relating to the confiscation order is now before this Court together with his renewed application for permission to appeal against the substantive sentence of seven years. In addition, both Appellants ask the Court to certify a point of law of general importance, in Allen's case a series of points,

said to arise out of the Court's judgment of 7 July 1999 and to grant permission to appeal to the House of Lords.

The facts of these cases are described in detail in our judgment of 7 July 1999 and we do not repeat them now.

We turn first to the appeal relating to the confiscation order. In the Crown Court it was agreed between counsel that the amount of the Appellant's benefit arising from his offences was £4m and that his realisable assets amounted to £3,137,195. In addition, the Crown gave an undertaking that upon a confiscation order being made it would not pursue the Appellant for pre-existing tax liabilities, in effect the shortfall of £900,000, out of any income which he might acquire in the future. The Judge accepted these figures and the Crown's undertaking and made the confiscation order in the sum we have stated of just over £3m.

Mr. Newman Q.C., for the Appellant Allen, submits that the confiscation order is unlawful essentially because a statutory precondition required to be met before a confiscation order can be made has not been fulfilled. He says that the Appellant has not obtained a pecuniary advantage by his fraudulent failure to pay or declare tax due. At least he has certainly not obtained a pecuniary advantage to the tune of £4m; and a pecuniary advantage has to be shown if the confiscation order is to be a lawful one.

The power to make confiscation orders was first introduced into the law by the Drug Trafficking Offences Act 1986 and extended so as to cover offences other than drug trafficking by the Criminal Justice Act 1988. The relevant provisions of that statute were amended by the Proceeds of Crime Act 1995, which, so far as material, came into effect on 1 November 1995. The Appellant's offending straddled periods before and after that date. The essential change in the legislation was that, whereas under the original 1988 Act the Court was empowered to make a confiscation order if certain conditions were met, under the 1995 Act it was, subject to exceptions, required to do so.

The central provisions for present purposes are s 71(4) and (5) of the 1988 Act, which were not amended in 1995 and which provide:

> "(4) For the purposes of this Part of this Act a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained.
>
> (5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Part of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage."

In the light of counsel's argument we should also note s 72(3) of the unamended statute and s 71(1C) of the amended Act which is the substitute of s 72(3). Section 72(3) provided:

> "When considering whether to make a confiscation order the court may take into account any information that has been placed before

> it showing that a victim of an offence to which the proceedings relate has instituted, or intends to institute, civil proceedings against the defendant in respect of loss, injury or damage sustained in connection with the offence."

Section 71(1C) of the amended Act provided:

> "If, in a case falling within subsection (1B) above, the court is satisfied that a victim of any relevant criminal conduct has instituted, or intends to institute, civil proceedings against the defendant in respect of loss, injury or damage sustained in connection with that conduct—(a) the court shall have a power, instead of a duty, to make an order under this section;
>
> (b) subsection (6) below shall not apply for determining the amount to be recovered in that case by virtue of this section; and (c) where the court makes an order in exercise of that power, the sum required to be paid under that order shall be of such amount, not exceeding the amount which (but for paragraph (b) above) would apply by virtue of subsection (6) below, as the court thinks fit."

We should add that s 71(1B) and subs (6) require the Court to make an order in a sum equal to the benefit derived by the offender from his offence or his realisable assets whichever is the less. Those provisions are thus modified in a case to which s 71(1C) applies.

Section 72(7), which was not amended in 1995, is also to be borne in mind:

> "Where—(a) a court makes both a confiscation order and an order for the payment of compensation under section 35 of the Powers of Criminal Courts Act 1973 against the same person in the same proceedings; and (b) it appears to the court that he will not have sufficient means to satisfy both the orders in full, it shall direct that so much of the compensation as will not in its opinion be recoverable because of the insufficiency of his means shall be paid out of any sums recovered under the confiscation order."

Mr. Newman in essence advances two arguments. (1) The Appellant's failure to pay or declare tax due did not, on the facts of the case, offer him any pecuniary advantage because the tax remains due and payable. Had he, perhaps between the commission of the offence or one of the offences and its coming to light, gained interest on the money withheld, that might have been a pecuniary advantage, but the principal sum of tax due, says Mr. Newman, cannot amount to a pecuniary advantage. It remains due and payable to the Revenue. (2) As regards the corporation tax liability evaded by the Appellant, counts 1 to 7 in the indictment, the tax liability was that of the offshore companies in the case. The only pecuniary advantage which the Appellant might have gained would have been an increase in the value of the shares by virtue of the non-payment of corporation tax, but, Mr. Newman submits by his skeleton argument, the evasion scheme reduced the value of the shares.

We turn to the first of these arguments. Pecuniary advantage is not defined in the 1988 Act and should, in our judgment, be accorded its ordinary meaning. In *US Government* v. *Montgomery* [1999] 1 All ER 84 at 96 Stuart-Smith L.J.

indicated that there was no reason to accord a restricted meaning to the expression in s 71(5) of the 1988 Act. So much, I think, would not be disputed by Mr. Newman. The ordinary and natural meaning of pecuniary advantage must surely include the case where a debt is evaded or deferred. The sense of the expression matches, in our judgment, with that accorded to the same phrase in another statutory setting, namely s 16(2)(a), now repealed, of the Theft Act 1968 under which a pecuniary advantage arose where: "Any debt or charge for which he makes himself liable or is or may be liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred". Discussing this subsection, Lord Reid said in *DPP* v. *Turner* [1973] 3 All ER 124 at 127, [1974] AC 357 at 365: "An obligation is evaded if by some contrivance the debtor avoids or gets out of fulfilling or performing his obligation". In short, the fact that the tax remains due does not mean that its evasion did not confer a pecuniary advantage, nor indeed that that pecuniary advantage consisted of the whole of the tax withheld, the value of the liability that was evaded. By his crime the Appellant evaded payment of £4m tax. That sum constituted the proceeds of the offence. On the agreed figures, as we have indicated, he had realisable assets of £3.1m. The fact that he remained in law liable to pay the tax, the fact even, were it so, that the Revenue might later recover it, does not, in our judgment, yield the proposition that the proceeds of his crime were one penny less than the whole of the tax evaded.

It is of interest to note what was also said in *Turner*'s case, to which we have briefly referred. Lord Reid said:

> "An obligation is reduced if the creditor agrees with the debtor that the amount owed shall be reduced. An obligation is deferred if creditor and debtor agree that the date of performance shall be postponed. An obligation is evaded if by some contrivance the debtor avoids or gets out of fulfilling or performing his obligation. In the days when such things happened, a welshing bookmaker not only evaded his pursuers, he also evaded his obligations. Evasion does not necessarily mean permanent escape. If the bookmaker evaded his pursuers on Monday, the fact that he is caught and made to pay up on Tuesday does not alter the fact that he evaded his obligations on Monday. Unlike reducing and deferring an obligation, evading an obligation is a unilateral operation. It leaves the obligation untouched and does not connote any activity on the part of the creditor. When the evasion ceases he can seek to recover the debt in any way open to him." (See [1973] 3 All ER 124 at 127; [1974] AC 357 at 365–366.)

We bear in mind, as was emphasised by Mr. Newman, that s 16(2)(a) of the 1968 Act was regarded by the House of Lords as a deeming provision, and it bears no analogue in the 1988 Act. But Lord Reid's remarks about the nature of the evasion of a debt, with great respect, seem to us to be wholly apposite to a case of the present kind. Had these very grade frauds succeeded then, in crude terms, Mr. Allen would have been better off to the tune of £4m. That represents, in our judgment, the measure of his pecuniary advantage.

We also consider that there is force in the Crown's submission that a confiscation order falls to be clearly distinguished from a compensation order which may be made under s 35 of the Powers of Criminal Courts Act 1973. The

amount of a confiscation order is referrable to the applicant's benefit arising from the commission of his crime, not the loss suffered by the victim. As the Revenue's skeleton argument, para 28, puts it: "The confiscation order is made to deprive the offender of the proceeds of his crime. A compensation order is made to compensate the victim of the crime". A

Section 72(3) of the 1988 Act in its original form, s 71(1C), which was its substitute in 1995, and also s 72(7)—all of which we have set out—demonstrate to our mind that the legislature intended that confiscation orders should, or at any rate, might be made in cases where the sum confiscated in reality represented a debt or part of a debt which was not forgiven and remained outstanding. B

Mr. Newman has urged upon us the proposition that if the Crown's arguments are accepted the way is open, in theory at least, to double recovery on the part of the Revenue against a person in Mr. Allen's position in relation to the sum of money due. He has referred us to some authorities of the European Court of Human Rights which—we hope without injustice—we may fairly summarise as indicating the emphasis placed by that court on the need for certainty in the law. C D

In our judgment, whether or not the Revenue may hereafter seek to recover tax against the Appellant which forms all or part of the tax due represented by the confiscation order simply does not go to the scope of s 71(5) of the 1988 Act. Questions that may arise if the Revenue were to seek to take such action hereafter would fall to be decided in different proceedings in a different court. We bear in mind the fact of the Revenue's undertaking, to which we have already referred, given on 20 February 1998. E

Accordingly, as it seems to us, Mr. Newman's complaint as to the possibility of double recovery, his reference to the well-known passage in Walton J'.s judgment in *Vestey* v. *IRC* [1977] 3 All ER 1073 at 1098. "One should be taxed by law, and not be untaxed by concession" are not here in point. F

In short, there is, in our judgment, nothing in Mr. Newman's first argument. G

Moreover, it is to be noted that there are a number of cases where the Court of Appeal has upheld confiscation orders in relation to Revenue offences where payment of tax has been dishonestly withheld. They are referred towards the close of the Crown's skeleton argument where there are cited, *R. v. Tighe* [1996] 1 Cr App R(S) 314, *R.* v. *Travers* (1998) Crim LR 655, 9 July 1997 and *R. v. Martin, R.* v. *White* [1998] 2 Cr App R. 385. H

The second point taken by Mr. Newman in his skeleton argument was, as we have indicated, that the corporation tax liability, which in fact formed the greater part of the sum of more than £4m, was a liability of the offshore companies in the case, so that any pecuniary advantage arising from its withholding would be their advantage and not the Appellant's. However, it is plain from authorities cited by the Crown that the corporate veil may fall to be lifted where companies are used as a vehicle for fraud. Here the companies in question were the Appellant's alter ego: we refer to our judgment of 7 July 1999 for the full facts. I

A On this part of the case it seems to us that the Crown's position is simply incontestable. In those circumstances the appeal against the making of the confiscation order will be dismissed.

Mr. Newman has also advanced short argument in support of his application for permission to appeal against the concurrent substantive B sentences of seven years' imprisonment, passed for the 13 offences of which the jury found his client guilty.

The Appellant is a man of 51, married, with a previous good character. All of those matters of course, go in mitigation. Obviously he has not the mitigation of a plea of guilty. These offences were conducted in a determined and C sophisticated manner over a long period of time and involved colossal sums of money. In those circumstances, it seems to us wholly beyond argument to suggest that the sentence of seven years was one with which there would be any justification for this court's interference. In the circumstances, that application will also be refused.

We indicated at the outset of this judgment that applications were before us D to certify points of general importance. We do not propose to give a narrative judgment relating to any of the points. They were all canvassed at some length and, we hope, with sufficient clarity in the judgment of 7 July. Suffice it to say, we have concluded that it would be right to certify for their Lordships' House two points of general public importance. The first is this, and I will cite the words of the question which were drafted by the Crown in each case but counsel will E ensure that the exact wording is agreed between the parties and lodged with the court. The words I have from earlier correspondence with counsel are as follows:

> "(1) Whether s 145 and/or s 154 of the Income and Corporation Taxes Act 1988 impose a charge to tax under Schedule E in respect of relevant benefits received from a company by an individual who, while having no actual office or employment with that company, nonetheless falls F within the extended meaning of director under s 168(8) of the Act.
>
> (2) Whether s 739(2) of the Income and Corporation Taxes Act 1988 has either of the additional effects in relation to income which it requires to be deemed to be income of an individual ordinarily resident in the United Kingdom: (a) of requiring for corporation tax purposes that same income to be deemed not to be the income of a company G incorporated outside the United Kingdom whose income it actually is; (b) of requiring for income tax purposes that same income to be deemed not to be the income of the person whether an individual or a company resident or domiciled outside the United Kingdom whose income it actually is."

H Counsel will kindly check the wording.

Those two questions will be certified by this court. We refuse leave to appeal to the House of Lords.

I The House of Lords gave leave for appeals on the two points certified by the Court of Appeal as of general public importance, and also gave leave for Brian

Roger Allen to argue that there had been a contravention of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that his right not to incriminate himself was breached. A

The appeals were heard in the House of Lords (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn, Lord Hutton, and Lord Scott of Foscote) on 11, 12, 13 and 14 June 2001, when judgment was reserved. On 11 October 2001 judgment was given, dismissing the appeals. B

The facts are stated in the Opinions.

Robert Venables Q.C.; Peter Doyle; Timothy Lyons and *Amanda Hardy* for Dimsey. C

Alan Newman Q.C.; and *James Kessler* for Allen.

David Milne Q.C.; Peter Rook Q.C.; Jonathan Fisher and *Rupert Baldry* for the Crown. D

The cases referred to in the Opinions are as follows:— *Brown* v. *Stott* [2001] 2 WLR 817; [2001] 2 All ER 97; *Edward (HMIT)* v. *Clinch* [1982] AC 845; [1981] 3 WLR 707; [1981] 3 All ER 543; (1981) 56 T C 367; *Funke* v. *France* (1993) 16 EHRR 297; *Gasus Dosier -und Födertechnik GmbH* v. *The Netherlands* (1955) 20 EHRR 403; *Howard de Walden* v. *Inland Revenue Commissioners* [1942] 1 KB 389; [1942] 1 All ER 287; (1941) 25 TC 121; *Inland Revenue Commissioners* v. *Garvin* [1981] 1 WLR 793; (1981) 55 TC 24; [1981] STC 344; *Ibrahim* v. *the King* [1914] AC 599; *Marshall (HMIT)* v. *Kerr* [1995] 1 AC 148; [1994] 3 WLR 299; [1994] 3 All ER 106; (1993) 67 TC 56; [1994] STC 638; *National and Provincial Building Society and Others* v. *United Kingdom* (1977) 25 EHRR 127; (1997) 69 TC 540; [1997] STC 1466; *R. v. Baldry* (1852) 2 Den 430; *R. v. Barker* [1941] 2 KB 381; [1941] 3 All ER 33; *R. v. Lambert* [2001] UKHL 37; [2001] 3 WLR 206; [2001] 3 All ER 577; *R. v. Sang* [1980] AC 402; [1979] 2 All ER 1222; *R. v. Warwickshall* (1783) 1 Leach 263; *Saunders* v. *United Kingdom* (1996) 23 EHRR 313; *Secretary of State for Trade and Industry* v. *Deverell* [2001] Ch 340; [2000] 2 WLR 907; [2000] 2 All ER 365; *Sheffield and Horsham* v. *United Kingdom* (1998) 27 EHRR 163; *Sporrong* v. *Sweden* (1982) 5 EHRR 35; *Taxpayer FL, In Re Special Commissioners* 3099/93; *Vestey* v. *Inland Revenue Commissioners* (Nos. 1 & 2); [1980] AC 1148; [1979] 3 WLR 915; [1979] 3 All ER 976; (1979) 54 TC 503; [1980] STC 10; E F G

The following cases were also cited:— *Abas* v. *The Netherlands* [1997] EHRLR 418; *A-G's Reference* (No. 7 of 2000) 2001 Times 12 April.; *A-G for Northern Ireland* v. *Gallagher* [1963] AC 349; [1961] 3 All ER 299; *AP, MP and TP* v. *Switzerland* (1997) 26 EHRR 541; [1998] EHRLR 88; *American Thread Co.* v. *Joyce* (1912) TC I; (1913) 6 TC 163; *Arrows Ltd.* (No. 4) In re [1995] 2 AC 75: [1994] 3 All ER 814; *Bendenoun* v. *France* (1994) 18 EHRR 54; *Bird and Others* v. *Inland Revenue Commissioners* [1989] AC 300; [1988] 2 WLR 1237; [1988] 2 All ER 670; (1988) 61 TC 238; [1988] STC 312; *Brind* v. *Secretary of State for Home Department* [1991] 1 AC 696; [1991] 1 All ER 720; *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners* [1943] AC 335; [1943] 1 All ER 13; (1942) 29 TC 49; *Calcutta Jute Mills Co. Ltd.* v. *Nicholson* (1876) 1 TC 83; *Canadian Eagle Oil Co. Ltd.* v. *The King* [1946] AC 119; [1945] 2 All ER 499; (1945) 27 TC H I

205; *Cesena Sulphur Co. Ltd.* v. *Nicholson* (1876) 1 TC 88; *Chamberlain* v. *Inland Revenue Commissioners* [1943] 2 All ER 200; (1943) 25 TC 317; *Commissioners of Inland Revenue* v. *Auckland Harbour Board* [2001] UK PC 1; [2001] STC 130; *Condron* v. *United Kingdom* (2001) EHRR 1; *De Beers Consolidated Mines Ltd.* v. *Howe* [1906] AC 455; (1906) STC 198; *Denver Hotel Co. Ltd.* v. *Andrews* (1895) 3 TC 356; *Deweer* v. *Belgium* (1980) 2 EHRR 439; *Doorson* v. *Netherlands* (1996) 22 EHRR 330; *East End Dwelling Co. Ltd.* v. *Finsbury Borough Council* [1952] AC 109; [1951] 2 All ER 587; *Fayed* v. *United Kingdom* (1994) 18 EHRR 393; *Georgiou* v. *United Kingdom* [2001] STC 80; *Golder* v. *United Kingdom* (1975) 1 EHRR 524; *Grape Bay Ltd.* v. *A-G of Bermuda* [2000] 1 WLR 574; *Hannah* v. *Larche* (1960) 363 US 420; *Herbert (Lord)* v. *Inland Revenue Commissioners* [1943] KB 288; [1943] 1 All ER 336; (1943) 25 TC 93; *Iatridis* v. *Greece* (1999) 30 EHRR 97; *IJL* v. *United Kingdom* (2000) 9 BHRC 222; *Inland Revenue Commissioners* v. *Brackett* [1986] STC 521; (1986) 60 TC 134; *Inland Revenue Commissioners* v. *B W Noble Ltd.* (1926) 12 TC 911; *Inland Revenue Commissioners* v. *Clifforia Investments Ltd.* [1963] 1 WLR 396; [1963] 1 All ER 159; (1962) 40 TC 608; *Inland Revenue Commissioners* v. *FS Securities Ltd.* [1965] AC 631; [1964] 1 WLR 742; [1964] 2 All ER 691; (1964) 41 TC 666; *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.* [1945] 1 All ER 667; (1945) 29 TC 167; *Inland Revenue Commissioners* v. *McGuckian* [1997] 1 WLR 991; [1997] 3 All ER 817; (1997) 69 TC 1; [1997] STC 908; *Inland Revenue Commissioners* v. *Metrolands (Property Finance) Ltd.* [1981] 1 WLR 637; [1981] 2 All ER 166; (1982) 54 TC 679; [1981] STC 193; *J. B.* v. *Switzerland* (1996) (No. 31827/96 ECHR 2001-111) *Khan* v. *United Kingdom* (2000) 8 BHRC 310; *King* v. *Weldon* (unreported) 18 May 2001; *Lam Chi-Ming* v. *R* [1991] 2 AC 212; [1991] 3 All ER 172; *Latilla* v. *Inland Revenue Commissioners* [1943] AC 377; [1943] 1 All ER 265; *Lithgow* v. *United Kingdom* (1986) 8 EHRR 329; *Little Olympian Each Ways Ltd,* In re [1995] 1 WLR 560; [1994] 4 All ER 561; *Mitchell* v. *The Egyptian Hotels Ltd.* [1915] AC 1022; (1915) 6 TC 542; [1914] 3 KB 118; *Murphy* v. *Ingram (HMIT)* [1973] CH 434; [1973] 2 All ER 523; (1974) 49 TC 410; [1973] STC 309; *Murray* v. *United Kingdom* (1995) 19 EHRR 193; *Nichols* v. *Gibson (HMIT)* [1996] STC 1008; (1996) 68 TC 611; *Powell-Cotton* v. *Inland Revenue Commissioners* [1992] *R. v. Benjafield* [2001] 3 WLR 75; [2001] 2 All ER 609; *R. v. Barroclough* [1906] 1 KB 201; *R. v. Clowes (No. 2)* [1994] 2 All ER 316; *R. v Director of Public Prosecutions* ex parte *Kebilene* [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801; *R. v. Director of the Serious Fraud Office* [1993] AC 1; [1992] 3 WLR 66; [1992] 3 All ER 456; *R. v. Graham* [1997] 1 Cr App R. 302; *R. v Hertfordshire County Council*, ex parte *Green Environmental Industries Ltd.* [2000] 2 AC 412; [2000] 2 WLR 373; [2000] 1 All ER 773; *R. v. Hunt* [1994] STC 819; (1994) 68 TC 132; *R. v. Inland Revenue Commissioners*, ex parte *TC Coombs & Co.* [1991] 2 AC 283; [1991] 2 WLR 682; [1991] 3 All ER 623; (1991) 64 TC 124; [1991] STC 97; *R. v. Lawrence* [1982] AC 510; [1981] 2 WLR 524; [1981] 1 All ER 974; *R. v. Less and Depala* (unreported) 2 March 1993; *R. (on the application of Fleurose)* v. *Securities and Futures Authorities Ltd.* [2001] EWHC Admin 292; *R. v. Sinclair* [1968] 1 WLR 1246; [1968] 3 All ER 241; *R. v. Staines and Morrisey* [1997] 2 Cr App R. 426; *R. v. Criminal Cases Review Commission*, ex parte *Hunt* [2001] 2 WLR 319; (2000) 73 TC 406; *R. v. Secretary of State for the Home Department*, ex parte *Brind* [1991] 1 AC 696; [1961] 2 WLR 588; [1991] 1 All ER 720; *R. v. Secretary of State for the Home Department*, ex parte *Simms* [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400; *R. v. A Special Commissioner* ex parte *Morgan Grenfell & Co. Ltd.* [2001] EWCA Civ 329; [2001] STC 497; TC Leaflet 3633; *Salabiaku* v. *France* (1988) 13 EHRR 379; *Schenk* v. *Switzerland* (1988) 13

EHRR 242; *San Paulo (Brazilian) Railway Co. Ltd.* v. *Carter* [1896] AC 31; (1895) 3 TC 407; *Silver* v. *United Kingdom* (1983) 5 EHRR 347; *Spacek Sro* v. *Czech Republic* (2000) 30 EHRR 1010; *Sporrong* v. *Sweden* (1982) 5 EHRR 35; *Stanley* v. *The Gramophone and Typewriter Ltd.* [1908] 2KB 89; (1908) 5TC 358; *Sunday Times* v. *United Kingdom* (1979) 2 EHRR 245; *Teixeira de Castro* v. *Portugal* (1998) 28 EHRR 101; *Thomson Newspapers Ltd.* v. *Canada (Direction of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425; *Unit Construction Co. Ltd.* v. *Bullock (HMIT)* [1960] AC 351; [1959] 3 All ER 831; (1959) 38 TC 712; [1959] 3 WLR 1022; *United States* v. *Monia* (1943) 317 US 424; *Untelrab Ltd.* v. *McGregor (HMIT)* [1996] STC (SCD)1; *Wai Yu-tsang* v. *R* [1992] 1 AC 269; [1991] 4 All ER 664; *Welham* v. *DPP* [1961] AC 103; [1960] 1 All ER 805.

R. v. Dimsey

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote. For the reasons he gives I would answer the certified question as he proposes and dismiss the appeal.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. For the reasons he gives I too would dismiss this appeal.

LORD STEYN

My Lords,

3. I have read the opinion of my noble and learned friend Lord Scott of Foscote. For the reason he gives I would also dismiss the appeal.

LORD HUTTON

My Lords,

4. I have had the benefit of reading in draft the speech of my noble and learned friend Lord Scott of Foscote with which I am in full agreement. For the reasons he gives I too would dismiss this appeal.

LORD SCOTT OF FOSCOTE

My Lords,

A 5. Section 18 of the Finance Act 1936 enacted important and far-reaching provisions designed to counter tax avoidance by the transfer of assets abroad. Various amendments and additions to the original provisions have been made since then but the broad scheme established in 1936 remains in force. The current provisions are to be found in ss 739 to 746 of the Income and Corporation Taxes Act 1988.

B

6. Subsection (1) of s 739, which in s 18 of the 1936 Act took the form of a preamble, expresses the purpose of the statutory provisions:

> "(1) Subject to section 747(4)(b), . . . the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom
C of liability to income tax by means of transfers of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom."

Subsection (2) contains the principal provision whereby the tax avoidance
D consequences of the transfer abroad are sought to be negated:

> "(2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income
E of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts."

F 7. The potential breadth of this provision was cut back by the decision in your Lordships' House in *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1148; (1979) 54 TC 503. It was held that the provision (then s 412(1) of the Income Tax Act 1952) applied only to the individual or individuals who had sought to avoid tax by transferring assets abroad and did not apply to individuals simply because they might become the recipients of income or capital derived
G from those assets. A tax liability was later imposed by s 45 of the Finance Act 1981 (now s 740 of the 1988 Act) on the actual recipients of income or capital derived from the transferred assets.

8. My Lords, the issue on this appeal is a short one. It is whether s 739(2), deeming the income of the foreign transferee to be the income of the tax avoider/
H transferor, impels the corollary that that income is for tax purposes to be deemed not to be the income of the foreign transferee.

9. This issue does not arise out of a dispute between the Revenue and a foreign transferee as to the tax liability of the latter. This should not be thought surprising. Foreign transferees are in general chosen by tax avoiders for their
I invulnerability to tax demands by the Revenue. They do not submit tax returns and then engage in disputations with the Revenue as to the extent of their

liability. This issue arises out of criminal proceedings taken against the tax avoider and his associates. I must explain how it comes about.

The facts

10. The Appellant, Dermot Jeremy Dimsey, is resident in Jersey. Via a Jersey company, DFM Consultants Ltd., the Appellant provides financial services to clients. These services include setting up off-shore companies for persons resident in the United Kingdom and the administration of these companies. One of the Appellant's clients was a Mr. Chipping, a resident in the United Kingdom. Mr. Chipping became involved as an intermediary in the supply of avionic equipment to South Africa. On Mr. Chipping's instructions the Appellant formed two off-shore companies, Thomlyn Supplies Ltd. ("Thomlyn") and Glenville Supplies Ltd. ("Glenville") to deal with the South African contracts that Mr. Chipping had obtained. Mr. Chipping was the beneficial owner of the shares in and was in control of the two companies.

11. The South African contracts were signed by the Appellant in Jersey on behalf of the companies. The profits made by Thomlyn were £664,057 and by Glenville were £582,000 (see the judgment of the Court of Appeal given by Laws L.J. [2000] QB 744, at page 751. The Appellant arranged for the issue of credit cards in the names of the two companies but for the personal use of Mr. Chipping. He arranged for the payment by the companies of liabilities incurred through Mr. Chipping's use of these cards for personal expenditure.

12. The Appellant acquired a third off-shore company, Lantau Investments Ltd. ("Lantau") for Mr. Chipping. Lantau was not a trading company but was used as a receptacle for some of the profits derived from the South African contracts. A flat in England for the use of a member of Mr. Chipping's family was acquired by Lantau.

13. In September 1993 the Revenue began an investigation into Mr. Chipping's tax affairs. The Appellant assisted Mr. Chipping in providing false and misleading information to the Revenue regarding the three off-shore companies, the South African contracts and certain bank accounts that Mr. Chipping held in Jersey. A solicitor in England, Mr. Da Costa, had been retained by Mr. Chipping to act for him in the Inland Revenue investigation. He, too, played a part in the provision of this false and misleading information.

14. In due course the Revenue commenced criminal proceedings against Mr. Chipping, Mr. Da Costa and the Appellant. There were eleven counts. All bar one, count 10, were counts under which Mr. Chipping alone was accused of cheating the Revenue. He pleaded guilty to counts 1 to 8, which related to undeclared taxable income for the years 1986–87 to 1993–94 and to income and benefits derived from Thomlyn, Glenville and Lantau. He was convicted at trial on the other two counts of cheating the public revenue. One of these counts related to £200,000 odd, which had been paid by Thomlyn and/or Glenville to Lantau as, in effect, nominee for Mr. Chipping. The other count charged Mr. Chipping with cheating the Revenue of corporation tax by concealing the existence of profits made by the off-shore companies.

15. Count 10, the only count under which the Appellant and Mr. Da Costa were charged, alleged a conspiracy contrary to s 1(1) of the Criminal Law Act 1977. The alleged conspirators were Mr. Chipping, Mr. Da Costa and the Appellant. The particulars were that the three accused:

> "Between 1 January 1993 and 8 July 1994, conspired together, with intent to defraud and to the prejudice of Her Majesty the Queen and the Commissioners of Inland Revenue, to cheat Her Majesty the Queen and the Commissioners of Inland Revenue of public revenue by failing to make full and complete disclosure to the Commissioners of Inland Revenue of:
>
> (i) [Mr. Chipping's] worldwide assets and liabilities;
>
> (ii) income and benefits which had derived from off-shore companies which he, [Mr. Chipping], managed and controlled, namely [Glenville, Lantau, Thomlyn];
>
> (iii) profits made by the said off-shore companies which he [Mr. Chipping] managed and controlled;
>
> (iv) interest received by [Mr. Chipping] which was derived from bank accounts held at the Royal Trust Bank (Jersey) Ltd."

16. Particular (i) was deleted during the course of the trial. Particular (ii) related only to the sum of £200,000 odd that had been paid to Lantau and to the sums charged to the Thomlyn and Glenville credit cards. Particular (iv) related to interest on the Jersey bank accounts. The Revenue have conceded that a conviction could not be upheld on the basis of particular (iv) alone.

17. Particular (iii) is, for present purposes, the most important. At the trial the Revenue ran their case under particular (iii) on the footing that the conspirators had attempted to cheat the Revenue of corporation tax due from the three off-shore companies. These companies, it was said, were liable to corporation tax because they were resident in the United Kingdom. They were resident in the United Kingdom because the management and control of their respective businesses took place in the United Kingdom. The profits of the three companies were, therefore, liable to attract corporation tax. There was no mention at the trial of s 739 of the 1988 Act. No one took the point that under s 739 the income of each of the three companies was deemed to be the income of Mr. Chipping. This point only emerged in the Court of Appeal.

18. The jury convicted all three defendants on count 10. Mr. Doyle, one of the junior counsel for the Appellant, has pointed out that it is not possible to know which of the particulars constituted the basis on which the jury brought in their verdict of guilty. It may well have been particular (iii) alone. Accordingly, if a conviction based on particular (iii) cannot be upheld the conviction, he submits, is unsafe.

19. My Lords, this submission is, in my opinion, well-founded. Particular (i) has been withdrawn, particular (iv) cannot suffice on its own and particular (ii) concentrated on Mr. Chipping's personal tax liability. The Appellant's evidence was that he had had nothing to do with Mr. Chipping's personal tax returns or tax liabilities and had advised Mr. Chipping to obtain expert tax advice. It is quite possible that the jury accepted this evidence and convicted the

Appellant on the basis of particular (iii) alone. It must follow that if a conviction on the basis of particular (iii) cannot be upheld, the Appellant's conviction cannot stand.

20. Mr. Chipping, who had pleaded guilty to eight counts and had been convicted on all three counts, was sentenced to three years' imprisonment. He has not appealed. Mr. Da Costa was sentenced to 12 months' imprisonment. He, too, has not appealed. The Appellant was sentenced to 18 months' imprisonment. He alone has appealed. He had served the sentence before his appeal came to be heard in the Court of Appeal.

The issues

21. Before the Court of Appeal and before this House the Appellant's appeal has been based upon the proposition that the three off-shore companies were not in law liable to pay United Kingdom corporation tax on their profits. If the companies were not in law liable to pay corporation tax, there could be no such thing as an offence of cheating, or conspiring to cheat, the Revenue of corporation tax payable by the companies. This must be right.

22. Mr. Rook Q.C., counsel for the Revenue, has pointed out that count 10 refers to "public revenue", not to "corporation tax". If the income of the companies is, under s 739, deemed to have been the income of Mr. Chipping for income tax purposes, then the concealing of that income would be depriving the Revenue of "public revenue", ie income tax payable by Mr. Chipping, whether or not corporation tax was payable by the companies. Mr. Rook's point is, in my opinion, correct but it cannot avail the Revenue on this appeal. The prosecution was conducted at trial on the footing that corporation tax payable by the companies was the "public revenue" of which the three accused had conspired to cheat the Revenue. The Appellant, and presumably the other two accused, defended the case on the basis on which it was prosecuted. In bringing in a verdict of guilty the jury must have been satisfied that each of the accused had had the requisite *mens rea* in relation to a conspiracy to cheat the Revenue of tax payable by the companies. If the Revenue's case had been based on conspiracy to cheat the Revenue of tax which, under s 739, was payable by Mr. Chipping, the questions put to and evidence given by the Appellant might have been different. The jury's view as to whether the Appellant had the intention requisite for guilt might have been different. It is, in my opinion, too late for the prosecution to alter the basis of its case. It cannot now attempt to uphold the conviction on a basis not explored at trial. If it is right that, in law, the three off-shore companies were not liable to pay United Kingdom corporation tax, the Appellant is, in my opinion, entitled to succeed in his appeal.

23. There were two grounds on which it was argued before the Court of Appeal that a conviction on the conspiracy count based on particular (iii) should be set aside.

24. It was argued, first, that the trial Judge misdirected the jury as to the correct test for determining whether Thomlyn, Glenville and Lantau were resident in the United Kingdom. Residence in the United Kingdom was, of course, a necessary condition of their liability to corporation tax. In giving the judgment of the Court Laws L.J. set out the relevant passages from the Judge's

summing-up, summarised the law and concluded that there had been no misdirection.

25. The second ground was the s 739 point. As I have said, this point was raised for the first time before the Court of Appeal. This was not the Revenue's fault. It was not until course of the trial that the Revenue first became aware that Mr. Chipping was the beneficial owner of the shares in the three off-shore companies and that s 739 might apply. That is why, at trial, the Revenue concentrated, in regard to particular (iii), on the companies' liability to corporation tax. In the Court of Appeal the s 739 point was raised by counsel for the Appellant, not by the Revenue. It was submitted on behalf of the Appellant that s 739(2) applied, with the result that the income of each of the off-shore companies was deemed for income tax purposes to be the income of Mr. Chipping. So, it was submitted, it followed that the income must be deemed not to be the income of the companies. If that were right, then none of the companies could be liable to corporation tax in respect of that income. The Revenue accepted that, having regard to the facts that had emerged at trial, s 739(2) did apply, but did not accept that the section required that the companies' income be deemed not to be theirs for tax purposes. The Court of Appeal agreed with the Revenue and dismissed the appeal.

26. The Court of Appeal certified the s 739 point as a point of law of general public importance but refused leave to appeal. Leave to appeal to this House on the s 739 point was granted by an Appeal Committee. The Appellant, at the commencement of the hearing of the appeal, sought leave to appeal also on the corporate residence point. Your Lordships declined, however, to entertain an appeal on this point. As is pointed out in the Respondents' case, there was no dispute between the parties as to the correct test in law of corporate residence. The only question was whether that test had been accurately reflected in the Judge's summing up. That issue had been fully considered in the Court of Appeal.

27. No mention had been made in the Court of Appeal of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The hearing in the Court of Appeal took place in 1999 before the incorporation of the Convention into domestic law under the Human Rights Act 1998. The relevant sections of the Act came into effect on 2 October 2000. With the leave of the Appeal Committee, the Appellant was permitted to base an argument on article 1 of Protocol No. 1 to the Convention.

28. There are, therefore, two issues before your Lordships. The first is whether under s 739(2) of the 1988 Act the income of the three off-shore companies, which is deemed to be the income for income tax purposes of Mr. Chipping, must also be deemed not to be the income of the companies. The second issue only arises if the companies' income, notwithstanding that under s 739(2) it is deemed to be the income of Mr. Chipping for tax purposes, remains for tax purposes the income of the companies. The issue is whether this state of affairs is inconsistent with the right to property guaranteed by article 1 of Protocol No. 1 to the Convention.

29. I should add that both in the Court of Appeal and before your Lordships' House the Appellant's appeal has been heard together with an appeal

brought by Brian Roger Allen, another of the Appellant's clients. The s 739 point arises on both appeals. And Mr. Allen, like the Appellant, has raised before the House a Convention point, albeit a different Convention point from the Appellant's Protocol No. 1 point. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hutton in Allen's case. The remarks about retrospectivity and *R. v. Lambert* [2001] 3 WLR 206 made by my noble and learned friend in para 20 of his opinion apply also to the Convention point raised by the Appellant. If the Appellant's conviction was safe before the incorporation of the Convention into domestic law, it has not ceased to be safe because of that incorporation.

The section 739 issue

30. The thrust of the submission made by Mr. Venables Q.C. on behalf of the Appellant is that the deeming provision in s 739(2) must be carried through to what he contends is its logical conclusion. He cites Peter Gibson L.J. who in *Marshall* v. *Kerr* [1993] STC 360 (1994) 67 TC 56, at page 79, said:

> "...I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

31. So, Mr. Venables submits, one must treat as real the statutory deeming required by s 739(2). The income of the transferee is deemed to be that of the transferor. One must then treat as real the consequences and incidents flowing from or accompanying that deemed state of affairs. If the income were the income of the transferor it would not be the income of the transferee.

32. This approach to s 739(2) is, Mr. Venables submits, fortified by a presumption against double taxation and a presumption that Parliament intends taxation according to law and not according to administrative fiat.

33. As to double taxation, if the Revenue are right in their submissions on this appeal, then Mr. Chipping is liable under s 739(2) to income tax on the companies' income and the companies are liable to corporation tax on the same income. In the course of the hearing before your Lordships Mr. Milne Q.C., counsel for the Revenue, gave an assurance on behalf of his clients that in seeking to recover income tax against a transferor under s 739(2) credit would always be given for any tax that had been paid on the same income by the transferee, and vice versa. But, as Lord Wilberforce remarked in *Inland Revenue Commissioners* v. *Garvin* [1981] 1 WLR 793, at page 799; (1981) 55 TC 24, at page 86, the avoidance of double taxation "should be a right and not merely a privilege".

A 34. As to taxation according to law and not according to administrative fiat, this House in *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1148 rejected the Revenue's contentions that every beneficiary was taxable on the whole of the trust income regardless of whether he or she had received any, that "there is no duty upon the commissioners to collect the whole of this [tax] from any one beneficiary", and that "[the Commissioners] are entitled, so long as they B do not exceed the total, to collect from selected beneficiaries an amount decided upon by themselves." Lord Wilberforce said [1980] AC 1148, at page 1173; (1979) 54 TC 503, at page 582:

> "I accept . . . that they cannot, in the absence of clear power, tax any given income more than once. But all of this falls far short of saying that so long as they do not exceed a maximum they can decide C that beneficiary A is to bear so much tax and no more, or that beneficiary B is to bear no tax."

35. However, the issue before your Lordships is one of construction of s 739(2). If the section on its true construction does leave the transferee liable to be taxed on its actual income notwithstanding that that income is the deemed income on which the transferor is liable to be taxed then, subject to the Human D Rights Act point, that is that. The issue, of course, only arises in relation to income of a transferee on which the transferee is liable to pay United Kingdom tax. But on the premise that the three off-shore companies were resident in the United Kingdom at the material time, it is common ground that, leaving aside s 739(2), they would have been liable to pay corporation tax on their profits (see s 6 of the 1988 Act). And the income each company received in the tax year in E question would have had to be brought into the computation of its taxable profits.

36. Section 739(2) is expressed to deem the transferee's income to be the income of the transferor "for all purposes of the Income Tax Acts". Section 831(1) of the 1988 Act has separate definitions of "the Corporation Tax Acts" F and "the Income Tax Acts" and the Court of Appeal concluded, accepting a submission made by counsel on behalf of the Revenue, that the deeming provision did not affect the liability to corporation tax of transferee companies: *per* Laws L.J. [2000] QB 744, at page 764:

> "In short (as was submitted by Mr. Brennan, junior counsel for the Crown), the deeming provision does not affect corporation tax."

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37. There is a possible implication in this language that in the view of the Court of Appeal the deeming provision would affect the income tax liability of a transferee who was not a company but an individual. Suppose the case of a transferee resident and domiciled abroad to whom assets have been transferred as part of a tax avoidance scheme and where the tax avoider has power to enjoy H income of the transferee so as to attract s 739(2). For as long as the transferee remains non-resident the present problem does not arise. The transferee is not liable to pay United Kingdom tax on income generated abroad. But suppose, whether through inadvertence or by design, the transferee becomes resident in the United Kingdom. What would be the tax liability of the transferee in respect of the income which, under s 739(2), is deemed to be the income of the transferor I "for all the purposes of the Income Tax Acts"? Is it the case that the transferee, if a company, would have to bring that income into its computation of profits for

corporation tax purposes but if a non-corporate individual would not be liable to income tax in respect of that income?

38. I am unable to accept that a distinction between the position of a transferee company and a transferee who is an individual can accord with what Parliament intended. The contrary view requires that the deeming words in s 739(2) be read as follows:

> "shall . . . for all purposes of the Income Tax Acts be deemed to be the income of that individual and not the income of any other individual."

This wording would, I think, justify drawing a distinction between a transferee company and a transferee who is an individual.

39. By contrast, Mr. Venables, for the Appellant, would have the deeming words read:

> "shall . . . for all tax purposes be deemed to be the income of that individual and not the income of any other person."

This reading would prevent any distinction being drawn between the liability of a company transferee to corporation tax and the liability of an individual transferee to income tax.

40. Mr. Milne, on the other hand, would simply leave the words as enacted and confine the deeming provision to its literal meaning. He would, that is to say, confine its effect to the transferor and decline to treat as real the consequences that would follow the deemed state of affairs if the deemed state of affairs were real (see *Marshall* v. *Kerr* (1994) 67 TC 56, at page 79; [1993] STC 360 at 366).

41. In my opinion, the legislative history of s 739 and the other provisions in Chapter III of Part XVII of the 1988 Act, the comparison of s 739(2) with other tax avoidance provisions and the tax avoidance purpose of s 739 all suggest that Mr. Milne's approach is the right one.

The legislation

42. The original enactment was s 18 of the Finance Act 1936. Subsection (1) of s 18 was the ancestor of s 739(2). When the 1936 Act was enacted, and until 1965 when corporation tax was introduced, companies paid income tax not corporation tax. A distinction between company transferees and individual transferees based upon the reference to "the Income Tax Acts" would not have been possible under s 18, or, indeed, until 1965. The deeming provision would either have exonerated from liability to tax the income of all transferees or of no transferees.

43. By the time corporation tax was introduced, in 1965, s 18 of the 1936 Act had become s 412 of the Income Tax Act 1952. Companies were still liable to income tax on their income. There was still no distinction that could be drawn as to the effect of the deeming provision on the tax liability of company transferees compared with individual transferees.

A 44. No amendment was made to s 412(1) when, in 1965, corporation tax was introduced and companies were no longer liable to income tax on their income. It is not possible to suppose that Parliament, in introducing corporation tax, intended without any mention or discussion to draw a distinction between the effect of the s 412(1) deeming provision as between company transferees and individual transferees.

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45. Section 412 of the 1952 Act was replaced by s 478 of the Income and Corporation Taxes Act 1970. The deeming provision in subs (1) was in the same terms as in its statutory predecessors. Section 478 of the 1970 Act was in turn replaced by s 739 of the 1988 Act.

C 46. This legislative history makes it impossible, in my opinion, to attribute to Parliament any intention that there should be a distinction between the effect of the deeming provision on the liability to tax of a company transferee and its effect on the liability to tax of an individual transferee. In my opinion, therefore, either s 739(2) exonerates both company transferees and individual transferees from liability to tax on their income or it exonerates none of them.

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47. Section 18 was not the only provision in the 1936 Act that sought to combat tax avoidance. Section 21 dealt with settlements made by a settlor on his children. Subsection (1) provided that any income of a settlement paid to or for the benefit of an unmarried infant child of the settlor. . .

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> "shall . . . be treated for all the purposes of the Income Tax Acts as the income of the settlor . . . *and not as the income of any other person.*" (emphasis added).

48. Confronted by the express words in s 21(1), ". . . and not as the income of any other person", it seems to me very difficult, if not impossible, to argue that F those words, or something similar, which are notably absent from s 18(1) should be an implied addition to s 18(1). A comparison between s 18(1) and s 21(1) suggests strongly that the omission of any such words from s 18(1) was deliberate.

49. Section 24 of the 1938 Act fortifies the point. The section deals with the G case where an owner of securities has transferred to someone the right to receive interest payable in respect of the securities while himself remaining the owner of the securities. Subsection (1), which provides in paragraph (a) that the interest "shall be deemed to be the income of the owner . . .", provides also, in paragraph (c), that the interest "shall not be deemed to be the income of any other person". Section 730 of the 1988 Act reproduces the deeming provisions originally to be H found in s 24 of the 1938 Act. Paragraphs (a) and (c) are to all intents and purposes in the same terms as in the 1938 Act.

50. In other statutory deeming provisions, too, there is express reference to the tax liability of persons other than the person at whom the deeming provision is principally aimed. Section 660 of the 1988 Act deals with short term I dispositions. Subsection (1) provides that the income of the property thus disposed of—

> "shall be deemed for all the purposes of the Income Tax Acts to be the income of the person, if living, by whom the disposition was made, and not to be the income of any other person."

51. The wording in these tax avoidance provisions strongly supports, in my opinion, Mr. Milne's approach to the deeming provision in s 739(2).

The double taxation point

52. Mr. Venables submitted that it was to be presumed that Parliament did not intend the same income to be taxed twice, once in the deemed hands of the transferor and also in the actual hands of the transferee. This is, to my mind, a submission of weight but it is not a conclusive one. It is apparent that the draftsman of the legislation did give thought to the need to avoid double taxation. Subsection (6) of s 18 of the 1936 Act incorporated the provisions of the 2nd Schedule to the Act. Paragraph 1 of the 2nd Schedule said:

> "Tax at the standard rate shall not be charged by virtue of the principal section in respect of income which has borne tax at the standard rate by deduction or otherwise."

53. This provision would have dealt with the case where the transferee's income included income sourced in the United Kingdom and from which tax had already been deducted at source. But the words "or otherwise" show that the provision would have covered also any case in which the transferee had paid tax on its income. It is worth repeating that in 1936 income tax was payable by individuals and by companies. This provision, too, did not distinguish between individual transferees and company transferees. It did not need to.

54. In 1965, when companies became liable to corporation tax, the provision should, I think, have been amended so as to prevent a transferor being charged tax on deemed income where the transferee had paid corporation tax on the actual income. Section 480(1) of the 1970 Act replaced s 413(1) of the 1952 Act which had replaced para 1 of the 2nd Schedule to the 1936 Act. All were in the same terms. Section 743(1) of the 1988 Act provided:

> "Income tax at the basic rate shall not be charged by virtue of section 739 in respect of income which has borne tax at the basic rate by deduction or otherwise."

55. The provision, like its predecessors, caters for the deduction of tax at source. It would cater also for a case where the transferee, being an individual, had paid tax at the basic rate (or, now, the lower rate or Sch F ordinary rate) on the income in question. But it does not cover, expressly at any rate, the case of a company transferee that has paid corporation tax on the income. It seems to me clear that this must be the result of an inadvertent oversight. If the point ever arose for decision I would be attracted by the view that s 743(1) should be construed so as to cover income which had been included in the computation of profits on which a company had paid tax. That construction would, in my opinion, accord with the Parliamentary intention. But it is not necessary to decide the point now. All that is necessary is to notice that Parliament did pay attention to possible double taxation and the possibility that the income of the s 739 transferee might have borne tax. Section 743(1) and its statutory

predecessors show, in my opinion, that s 739(2) is not intended to exclude the normal tax liability that would lie on a transferee in respect of its income.

56. Section 743(1), like its predecessors, is looking at the double taxation problem from the point of view of the transferor on whom the liability to pay tax on deemed income is being imposed. There is no comparable provision protecting the transferee in a case where, under s 739(2), the transferor has paid tax on his deemed income.

57. This, however, is more a theoretical point than a real one. It is in practice highly unlikely that UK tax can be recovered from a s 739 transferee. Transferees are chosen by tax avoiders in order to avoid UK tax. Non-resident and foreign domiciled transferees are likely to be chosen. They do not submit tax returns to the Revenue. In the present case it is only because Mr. Chipping, the transferor, so involved himself in the affairs of his off-shore companies that they became resident in the UK that their liability to corporation tax arose.

58. Accordingly, the double taxation possibilities that the Revenue's case undoubtedly leaves theoretically open do not seem to me to carry weight in considering the correct construction of s 739(2).

59. This conclusion does not seem to me to detract in the least from the principles expressed by this House in the *Vestey* case [1980] AC 1148; (1979) 54 TC 503. The Revenue's contention in *Vestey* was that each of the beneficiaries, none of whom was a transferor, was caught by s 412(1) of the 1952 Act and liable to tax on the whole of the income of the trustees, the transferees. The situation for which the Revenue was contending was not simply one of double taxation. It was one of multiple taxation. The Revenue was contending for an administrative discretion which would enable them to assess one or more of the beneficiaries in such sums as they, the Revenue, thought fit subject only to the limitation that the total income of the trustees should not be taxed more than one. This was the context which led Lord Wilberforce to say at [1980] AC 1148, at page 1172; (1979) 54 TC 503, at page 581:

> "Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined. A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle. It may be that the Revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it; but, unless it has done so, the courts, acting on constitutional principles, not only should not, but cannot, validate it."

60. None of this, in my opinion, bites in the present case. There is no doubt about the liability in principle of companies resident in the United Kingdom to corporation tax. There is no constitutional problem. The question is whether Parliament, in imposing the s 739 tax liability on tax avoiders, intended thereby to relieve the transferees of their normal liability to tax on their income, the income which forms the basis of the tax liability imposed on the tax avoider.

Vestey's case does not, in my opinion, assist in answering this question. I would answer the question in the negative. Section 739(2) on its true construction does not, in my opinion, relieve transferees of their normal liability to pay tax on their income.

The Human Rights Act 1998

61. Mr. Milne accepted that the 1988 Act must now be construed, so far as it is possible to do so, in a way compatible with Convention rights (see s 3, Human Rights Act 1998).

62. Article 1 of the 1st Protocol to the Convention says:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

63. Mr. Lyons, the other junior counsel for the Appellant, has submitted that a construction of s 739(2) that would leave the transferor liable to tax on its deemed income and the transferee liable to tax on its actual income, leaving it to the discretion of the Revenue which liability to seek to enforce and to what extent, would be inconsistent with this article.

64. In *Gasus Dosier-und Fördertechnik GmbH* v. *Netherlands* [1995] 20 EHRR 403, the European Court of Human Rights said this about article 1:

> "62. According to the Court's well-established case law, the second paragraph of article 1 of Protocol No. 1 must be construed in the light of the principle laid down in the article's first sentence. Consequently, an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued." (page 435)

65. Mr. Milne submitted that such element of discretion as the Revenue enjoyed in deciding whether to pursue the transferee for tax on its actual income or the transferor for tax on the deemed income was proper, as a matter of public policy, in order to enable tax to be collected. Section 739 is, after all, a provision designed to combat tax avoidance.

66. *Lord Howard de Walden* v. *Inland Revenue Commissioners* [1942] 1 KB 389; (1941) 25 TC 121 is in point. The taxpayer appealed against assessments to income tax and surtax made against him in respect of income deemed to be his under s 18 of the 1936 Act. The taxpayer actually received assets representing only a small part of the income of the transferee companies but he was assessed

A to tax in respect of the whole of their income. The Court of Appeal declined to accept the invitation of the taxpayer's counsel to construe the section so as to limit the charge to tax to the benefit which the taxpayer had actually obtained. Lord Greene M. R. said this, [1942] 1KB 389, at page 397; (1941) 25 TC 121, at page 134:

> B "... even if the only alternative to Mr. Tucker's construction is the second of the three constructions, we are not prepared to say that it is necessarily as unjust as he contends. The section is a penal one and its consequences, whatever they may be, are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest. For years a battle of manoeuvre has been waged between the legislature and C those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects ... It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain ...".

D 67. In *National & Provincial Building Society* v. *United Kingdom* [1997] STC 1466; (1998) 25 EHRR 127 the European Court of Human Rights had to consider the effect of article 1 of Protocol No. 1 on legislation which retrospectively validated certain regulations which had been held to be invalid and which had imposed a tax liability on building societies in respect of past interest payments. The Court, in holding there had been no violation of the Convention, said, at page 169:

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> "76. Having regard to a Contracting State's margin of appreciation in the tax field and to the public interest considerations at stake, it could not be said that the decisions taken by Parliament to enact these measures with retrospective effect were manifestly without reasonable foundation or failed to strike a fair balance between the demands of the general interest of the community and F the protection of the rights of the applicant societies."

68. In considering the implications of article 1 in a s 739 case, it is necessary, in my opinion, to distinguish between the position of the tax avoider/transferor and that of the transferee. The tax avoider/transferor has a tax liability imposed upon him. The income of the transferee is deemed to be his for tax purposes. The G tax avoider cannot, however, be taxed on income of the transferee which has already borne tax (see s 743(1) and paras 48 to 51 above). There is no element of administrative discretion involved here.

69. The tax liability being imposed on the tax avoider does not depend on his having actually received any benefit from the income or assets of the H transferee. The liability may be regarded as having a penal character and as intended to discourage United Kingdom residents from seeking to avoid tax by transferring assets abroad. The imposition of such a tax liability is, in my opinion, well within the margin of appreciation allowed to member states in respect of tax legislation.

I 70. What about the transferee? The transferee will usually be resident abroad and will not be liable to pay United Kingdom tax on its income generated

abroad. If, however, in any tax year the transferee becomes resident in the United Kingdom, it will have the normal tax liability of any other UK resident. Recovery by the Revenue of the tax may be difficult if the transferee, although resident, has no assets in the United Kingdom, and I imagine that in such cases the Revenue would usually not try to do so but instead would prefer to recover tax under s 739(2) from the transferor. I do not follow, however, how this state of affairs could possibly be represented as constituting an infringement of the transferee's article 1 rights.

71. In my opinion, s 739(2), construed so as to deem the transferee's income to be the income of the transferor, the tax avoider, for income tax purposes but so as to leave the liability of the transferee to pay tax, income tax or corporation tax as the case may be, on its income unaffected by the deeming provision, is well within the margin of appreciation allowed to member states in respect of tax legislation. The public interest requires that legislation designed to combat tax avoidance should be effective. That public interest outweighs, in my opinion, the objections, mainly theoretical, that Mr. Venables has taken to the effect of s 739(2) construed as I would construe it. There is nothing, in my opinion, in article 1 of Protocol No. 1 that requires a different construction of s 739(2) in order to render it Convention compliant.

Conclusion

72. For the reasons I have given the three off-shore companies, resident in the United Kingdom through Mr. Chipping's activities as the jury must have found, were in law liable to corporation tax. It follows that there was no legal impediment standing in the way of a conviction of the Appellant, and the others, of the offence of conspiring to cheat the Revenue of corporation tax payable by the three companies.

73. I would, therefore, dismiss this appeal.

Appeal dismissed.

R. v. Allen

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Hutton, with which I am in full agreement. For the reasons he gives I would dismiss this appeal.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hutton. For the reasons he gives I too would dismiss this appeal.

A LORD STEYN

My Lords,

3. I have read the opinion of my noble and learned friend Lord Hutton. For the reasons he gives I would also dismiss the appeal.

B

LORD HUTTON

My Lords,

C 4. The Appellant, Brian Roger Allen, was charged before His Honour Judge Hordern and a jury in the Crown Court at Knightsbridge on 13 counts of cheating the Public Revenue of income tax and corporation tax. He was convicted on 19 February 1998 on all counts and on 20 February he was sentenced to 13 concurrent terms of seven years' imprisonment. A confiscation order was made against him pursuant to s 71 of the Criminal Justice Act 1988 in the sum of £3,137,165 with a consecutive term of seven years' imprisonment D in default.

5. Each of the first seven counts charged the same offence of cheating the public revenue of corporation tax by concealing and/or otherwise failing to disclose the existence of profits made by an off-shore company, which was managed and controlled by the Appellant in the United Kingdom. Count 1 was E as follows:

"STATEMENT OF OFFENCE

Cheating Her Majesty the Queen and the Commissioners of Inland Revenue, contrary to common law.

PARTICULARS OF OFFENCE

F BRIAN ROGER ALLEN, between 1 January 1980 and 31 March 1992, with intent to defraud and to the prejudice of Her Majesty the Queen and the Commissioners of Inland Revenue, cheated Her Majesty the Queen and the Commissioners of Inland Revenue of public revenue, namely corporation tax, by concealing from and/or otherwise failing to disclose to the Commissioners of Inland Revenue for the purposes of the Taxes Acts G the existence of profits made by an off-shore company, namely Meldrette Investments Ltd, which was managed and controlled by him in the United Kingdom during the said period."

Counts 2 to 7 charged the same offence in relation to six different off-shore companies.

H

6. Counts 8, 9, 10, 12 and 13 charged the same offence of cheating the public revenue of income tax by delivering and/or causing to be delivered a tax return for a particular year showing income which was false, misleading and deceptive in that it omitted to declare all the income and benefits which the Appellant received during that period.

I

Count 8 was as follows:

"STATEMENT OF OFFENCE

Cheating Her Majesty the Queen and the Commissioners of Inland Revenue, contrary to common law.

PARTICULARS OF OFFENCE

BRIAN ROGER ALLEN, on or about 3 April 1992, with intent to defraud and to the prejudice of Her Majesty the Queen and the Commissioners of Inland Revenue, cheated Her Majesty the Queen and the Commissioners of Inland Revenue of public revenue, namely income tax, by delivering and/or causing to be delivered to an Inspector of Taxes a tax return for the year 1989/1990 showing income for the year to 5 April 1989 in respect of himself which was false, misleading and deceptive in that it omitted to declare all the income and benefits which he received during the said period.

Particulars of omitted income and benefits are—income and benefits received from:

(i) Peche D'Or Investments Ltd;

(ii) Meldrette Investments Ltd."

Count 9 related to the year 1990–1991, count 10 related to the year 1991–1992, count 12 related to the year 1992–1993 and count 13 related to the year 1994–1995. Counts 9 and 10 related to the omission of income and benefits received from (i) Peche D'Or Investments Ltd. (ii) Meldrette Investments Ltd. Count 12 related to the omission of income and benefits received from (i) Peche D'Or Investments Ltd, (ii) Meldrette Investments Ltd. and (iii) Berkshire Investments Ltd. Count 13 related to the omission of income and benefits received from Peche D'Or Investments Ltd.

7. The Crown case against the Appellant on counts 1 to 7 was that he had dishonestly concealed the fact that he managed and controlled in the United Kingdom the businesses of the respective companies specified in those counts in order to give the false impression that the companies were not resident in the United Kingdom so as to avoid corporation tax being charged against those companies.

The Crown case against the Appellant on counts 8 to 10 and 12 to 13 was that the Appellant concealed the provision of living accommodation and benefits received from the off-shore companies for which he was liable to income tax as a shadow director.

Count 11 was as follows:

"STATEMENT OF OFFENCE

Cheating Her Majesty the Queen and the Commissioners of Inland Revenue, contrary to common law.

PARTICULARS OF OFFENCE

BRIAN ROGER ALLEN, on or about 3 April 1992, with intent to defraud and to the prejudice of Her Majesty the Queen and the Commissioners of Inland Revenue, cheated Her Majesty the Queen and the Commissioners of Inland Revenue of public revenue, namely income tax, by delivering and/or causing to be delivered to an Inspector of Taxes a schedule

of assets as at 31 January 1991 in respect of his assets and the assets of his minor children which was false, misleading and deceptive in that it omitted to disclose divers assets which were owned by him.

Particulars of the omitted assets are—his beneficial interest in shares issued by off-shore companies, his beneficial interest in properties held in the names of off-shore companies, and his beneficial interest in bank accounts held in the United Kingdom and in Jersey in the names of off-shore companies."

8. The Appellant appealed against his convictions to the Court of Appeal on a number of grounds, and his appeal was dismissed and the convictions affirmed [2000] QB 744. One ground of appeal advanced before the Court of Appeal and rejected by it was that under s 739(2) of the Income and Corporation Taxes Act 1988 the income of the off-shore companies was deemed to be the income of the Appellant and that the income was also deemed not to be the income of those companies. In consequence none of the companies was liable to any corporation tax as the income was not their income and therefore the Appellant's dishonesty could not have caused any loss to the Revenue and he could not be guilty of the offence of cheating the Revenue.

9. In respect of this issue the Court of Appeal certified the following point of law:

> "Whether section 739(2) of the Income and Corporation Taxes Act 1988 has either of the additional effects, in relation to income which it requires to be deemed to be income of an individual ordinarily resident in the United Kingdom
>
> (a) of requiring, for corporation tax purposes, that same income to be deemed not to be the income of a company incorporated outside the United Kingdom whose income it actually is;
>
> (b) of requiring for income tax purposes, that same income to be deemed not to be the income of the person (whether an individual or a company) resident or domiciled outside the United Kingdom whose income it actually is".

10. The Appellant's appeal was heard together with the appeal of Dermot Jeremy Dimsey who had administered on behalf of the Appellant the off-shore companies (and their bank accounts) specified in the indictment against the Appellant and who had been convicted of the offence of conspiracy to cheat the Public Revenue. On the Appellant's appeal before this House his counsel, Mr. Newman, Q.C. adopted the argument of counsel for Dimsey, Mr. Venables Q.C. on the s 739(2) point. For the reasons given in the speech of my noble and learned friend Lord Scott of Foscote in the case of Dimsey, with which I am in full agreement, I would reject the Appellant's ground of appeal in relation to s 739(2).

The shadow director point

11. Another ground of appeal advanced before the Court of Appeal and rejected by it was that as a shadow director the Appellant was not liable to tax in respect of the provision of living accommodation and benefits in kind. In respect of this issue the Court of Appeal certified the following point of law:

"Whether section 145 and/or section 154 of the Income and Corporation Taxes Act 1988 impose a charge to tax under Schedule E in respect of relevant benefits received from a company by an individual who, while having no actual office or employment with that company, nonetheless falls within the extended meaning of 'director' under section 168(8) of the Act."

12. Under the provisions of Chapters I and II of Part V of the Income and Corporation Taxes Act 1988 (the ICTA) where, by reason of his employment, a person is provided with living accommodation or he or members of his family or household are provided with benefits in kind, the value of the accommodation or the cash equivalent of the benefits is to be treated as emoluments of his employment for the purposes of Sch E.

13. Secton 145(1) in Chapter I provides in relation to the provision of living accommodation:

"Subject to the provisions of this section, where living accommodation is provided for a person in any period by reason of his employment, . . ., he is to be treated for the purposes of Schedule E as being in receipt of emoluments of an amount equal to the value to him of the accommodation for the period, less so much as is properly attributable to that provision of any sum made good by him to those at whose cost the accommodation is provided."

Section 145(8) provides:

"For the purposes of this section—

(b) the expressions 'employment', 'family or household', 'director', 'full-time working director', 'material interest' and (in relation to a body corporate) 'control' shall be construed in accordance with subsections (2), (4) and (8) to (12) of section 168 as if this section were included in Capter II of this Part."

Section 154(1) in Chapter II provides in relation to benefits in kind:

"Subject to section 163, where in any year a person is employed in employment to which this Chapter applies and—

(a) by reason of his employment there is provided for him, or for others being members of his family or household, any benefit to which this section applies; and

(b) the cost of providing the benefit is not (apart from this section) chargeable to tax as his income,

there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to whatever is the cash equivalent to the benefit."

Section 167(1) sets out the employment to which Chapter II relates:

"This Chapter applies—

(a) to employment as a director of a company (but subject to subsection (5) below), and

A (b) to employment with emoluments at the rate of £8,500 a year or more."

Section 168 provides:

"(1) The following provisions of this section apply for the interpretation of expressions used in this Chapter.

B (2) Subject to section 165(6)(b), 'employment' means an office or employment the emoluments of which fall to be assessed under Schedule E; and related expressions shall be construed accordingly. . . .

(8) Subject to subsection (9) below, 'director' means—

C (a) in relation to a company whose affairs are managed by a board of directors or similar body, a member of that board or similar body;

(b) in relation to a company whose affairs are managed by a single director or similar person, that director or person; and

(c) in relation to a company whose affairs are managed by the members themselves, a member of the company,

D and includes any person in accordance with whose directions or instructions the directors of the company (as defined above) are accustomed to act.

(9) A person is not under subsection (8) above to be deemed to be a person in accordance with whose directions or instructions the E directors of the company are accustomed to act by reason only that the directors act on advice given by him in a professional capacity."

Schedule E set out in s 19 in Part 1 of Income and Corporation Taxes Act provides in paras 1 and 5:

F "1. Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one or more than one of the following Cases—

[Case I: any emoluments for any year of assessment in which the person holding the office or employment is resident and ordinarily resident in the United Kingdom, subject however to section 192 if the G emoluments are foreign emoluments (within the meaning of that section) and to section 193(1) if in the year of assessment concerned he performs the duties of the office or employment wholly or partly outside the United Kingdom;

Case II: any emoluments, in respect of duties performed in the United Kingdom, for any year of assessment in which the person H holding the office or employment is not resident (or, if resident, not ordinarily resident) in the United Kingdom, subject however to section 192 if the emoluments are foreign emoluments (within the meaning of that section);

Case III: any emoluments for any year of assessment in which the person holding the office or employment is resident in the United I Kingdom (whether or not ordinarily resident there) so far as the emoluments are received in the United Kingdom;]

> and tax shall not be chargeable in respect of emoluments of an office or employment under any other paragraph of this Schedule. . .
>
> 5. The preceding provisions of this Schedule are without prejudice to any other provision of the Tax Acts directing tax to be charged under this Schedule and tax so directed to be charged shall be charged accordingly."

14. The argument of the Crown can be briefly summarised as follows. A director of a company is treated by ss167(1) and 168(2) as being in "employment" for the purposes of Chapter II of Part V, even if he is not actually employed by the company. Therefore the effect of s167(1)(a) is that the Chapter applies to a director who has no actual employment. The effect of the concluding part of s168(8) is that for the purposes of the Chapter and in particular for the purposes of s168(2) a shadow director is treated as holding the office of director. Accordingly the Appellant as a shadow director was chargeable under Sch E in respect of the value of the living accommodation and benefits in kind received from the companies.

15. Mr. Kessler, junior counsel for the Appellant, advanced two main arguments. The first argument was that in *Edwards* v. *Clinch* [1982] AC 845, at page 861; (1981) 56 TC 367, at page 410E ([1981] STC 617) Lord Wilberforce stated that the word "office" must "connote a post to which a person can be appointed, which he can vacate and to which a successor can be appointed". Therefore a shadow director does not hold an office. Section 168(8) states that a "director" includes a shadow director, but it should not be read as deeming a shadow director to hold an office. The purpose of s168(8) was to avoid the repetition of the words "director or deemed director" when the word "director" is used numerous times in Chapter II. The purpose was not to extend the meaning of other words such as "office".

16. The second argument was that even if the effect of the concluding part of s168(8) is that a shadow director has an "office", he does not have "employment" within the meaning of s168(2) because he does not have an office "the emoluments of which fall to be assessed under Sch E". Two reasons were advanced in support of this argument. The first was that in respect of the deemed office of a director, it is not one the emoluments of which fall to be assessed under Sch E. On this point the Crown's argument was circular because it assumed this requirement to be satisfied in order that the emoluments can be regarded as falling to be assessed under Sch E. The second reason was that the charge which the Crown seeks to impose is one to which para 5 of Sch E relates and that paragraph does not impose a territorial limitation. In consequence the Crown's argument would result in a charge to tax without territorial limitations so that shadow directors throughout the world provided with living accommodation or benefits would be caught, which cannot have been the legislative intention. Mr. Kessler relied on the acceptance of this argument by a Special Commissioner, Dr John Avery Jones, who, in respect of the equivalent section in the Finance Act 1977 to s145, stated in *In re Taxpayer FI* (SC 3099/93):

> "As we have seen, the definition of employment has the effect of providing a territorial limitation; if the employment is within that limitation, section 33 deems there to be Schedule E emoluments unrelated to any Case of Schedule E. If one could use the deemed

A emoluments under the section to complete the circle in the definition of employee and make the section apply, there would be no territorial limitation to the section and all employees in the world provided with living accommodation would be caught. This cannot have been intended. This seems to me to be a compelling reason why one cannot use the deemed emoluments to make the section apply."

B

17. Mr. Kessler supported his two arguments on the construction of the statutory provisions by a third argument of a more general nature relating to the undesirable and anomalous consequences of the construction contended for by the Crown. He submitted that it is a world-wide practice to use companies as a vehicle to hold wealth. It is normal practice for persons resident but not domiciled in the United Kingdom to hold assets situated in the United Kingdom C via an offshore company for the object of mitigating inheritance tax. In order to make the disposal of a foreign home easier, it is also normal practice for persons resident and domiciled in the United Kingdom to hold that home via an offshore company. The judgment of Morritt L.J. in *Secretary of State for Trade and Industry* v. *Deverell* [2000] 2 WLR 907; [2001] 1 Ch 340, gives a wide meaning to the words in s 22(4) of the Company Directors Disqualification Act 1986 which D are very similar to the concluding words of s168(8) so that a person is regarded as a shadow director if the properly appointed directors surrender their discretion and give effect to directions or instructions from that person.

18. In consequence on the Crown's argument the scope of the living accommodation and benefit in kind provisions would be very wide. Mr. Kessler E further submitted that in many cases the link between the services rendered to the company by the alleged shadow director and the provision of living accommodation or benefits alleged to be emoluments would be tenuous or non-existent. There is a valid distinction between taxing benefits flowing from the holding of a real office or employment subject to charge under Sch E and taxing a benefit which is not in reality attributable to an office or employment but is F attributable to a person's direct or indirect ownership of a company.

19. My Lords, I am unable to accept this argument. It is clear that it was the intention of Parliament that living accommodation and benefits in kind provided by a company for a director should be taxed as emoluments received by him from his office. Whilst in some cases the link between the services provided by a shadow director and the accommodation or benefits which he G receives from the company may be tenuous, there will be many cases where the services of a shadow director are as valuable as those of an actual director and there would be no valid distinction between the services provided by a director and those provided by a shadow director. If the Appellant's arguments were correct it would be simple for a person who is a director in all but name to avoid the charge to tax under ss145 and 154. In my opinion it was the intention of H Parliament in enacting the concluding part of s168(8) that accommodation and benefits in kind received by a shadow director should be taxed in the same way as those received by a director, and I consider that the statutory provisions relied upon by the Crown are effective to achieve that purpose.

20. I am unable to accept Mr. Kessler's first argument on the construction I of the provisions. Under the concluding part of s168(8) a shadow director is taken to be a director and therefore under s167(1)(a) and s168(2) he is employed

in the office of a director if the emoluments of that office can be regarded as falling to be assessed under Sch E. Taking account of the intention of Parliament in enacting the concluding part of s168(8) that a distinction should not be drawn between directors and shadow directors I consider that Mr. Kessler's circularity argument does not enable a shadow director to escape the charge to tax. In my opinion Mr. Milne Q.C. for the Crown was correct in submitting that there is a statutory circularity built into the provisions, so that as a shadow director is to be regarded as a director it follows that living accommodation and benefits received by him should be treated as emoluments falling to be assessed under Sch E.

21. I am also unable to accept Mr. Kessler's second argument in relation to territorial limitations. He submitted that the tax imposed by ss145(1) and 154(1) was charged under para 5 of Sch E, which did not contain a territorial limitation, and not under one of the three Cases set out in para 1. However para 5 relates to other provisions of the Tax Acts directing tax to be charged "*under* this Schedule". The concluding words of para 1 state: "tax shall not be chargeable in respect of emoluments of an office or employment under any other paragraph of this Schedule." Therefore when another provision of a Tax Act directs that benefits are to be charged to tax as emoluments under Sch E, I consider that those emoluments will fall within para 1 and are not to be regarded as falling within para 5. A territorial limitation is contained within each of the three Cases in para 1, and accordingly a territorial limitation is present in respect of the tax imposed by s 145(1) and s 154(1). Accordingly I would hold that the Appellant was rightly convicted as a shadow director and that the convictions on counts 8, 9, 10, 12 and 13 are safe.

Self-incrimination

22. The Crown case against the Appellant on count 11 was that in a schedule of assets provided by him to the Revenue during the course of a Hansard investigation into his affairs he omitted to list his beneficial interest in shares issued by off-shore companies. Before the Court of Appeal as a ground of appeal the Appellant criticised part of the Judge's summing up on the issue whether certain trust deeds were a sham. This ground of appeal was rejected by the Court of Appeal and the ground has not been renewed before this House.

23. However, with the leave of the House, the Appellant was permitted to argue a new point relating to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). This argument consisted of two parts and can be briefly summarised as follows. First, under s 20(1) of the Taxes Management Act 1970 the Revenue requested the Appellant to provide certain information, and then under the Hansard procedure the Revenue both threatened and induced the Appellant to produce the schedule of assets to which count 11 related. In consequence the Appellant's right to a fair trial under article 6 was violated because his right not to incriminate himself was breached. Secondly, although the trial and conviction of the Appellant took place before the relevant sections of the Human Rights Act 1998 came into force on 2 October 2000 the Appellant was entitled, pursuant to s 7(1)(b) and 22(4) of the Act to rely in an appeal heard after 2 October 2000 on rights conferred by the Convention and incorporated into English law by the Act. The House heard the submissions of the parties before the House gave

judgment on 5 July 2001 *R. v. Lambert* [2001] UKHL 37; [2001] 3 WLR 206. In *Lambert*'s case the House held that the 1998 Act did not operate retrospectively to make unsafe by reason of a breach of article 6 a conviction prior to 2 October 2000 which was safe under English law at the time the conviction took place. Therefore, on that ground the Appellant's argument in respect of his conviction on count 11 must fail. However, as the issue whether there was a violation of the Appellant's rights under article 6 was fully argued and as the point is one of general importance I propose to express my opinion on it.

24. As I have stated, the Crown case against the Appellant on count 11 related to the schedule of assets referred to in that count in which the Appellant omitted to specify his very substantial interests in offshore companies. Section 20 of the Taxes Management Act 1970 provides:

> "(1) Subject to this section, an inspector may by notice in writing require a person—
>
> (a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to—
>
> (i) any tax liability to which the person is or may be subject, or
>
> (ii) the amount of any such liability, or
>
> (b) to furnish to him such particulars as the inspector may reasonably require as being relevant to, or to the amount of, any such liability . . .
>
> (7) Notices under subsection (1) or (3) above are not to be given by an inspector unless he is authorised by the Board for its purposes; and—
>
> (a) a notice is not to be given by him except with the consent of a General or Special Commissioner; and
>
> (b) the Commissioner is to give his consent only on being satisfied that in all the circumstances the inspector is justified in proceeding under this section."

Section 98(1) of the 1970 Act provides:

> "Subject to the provisions of this section and section 98A below, where any person—
>
> (a) has been required, by a notice served under or for the purposes of any of the provisions specified in the first column of the Table below, to deliver any return or other document, to furnish any particulars, to produce any document, or to make anything available for inspection, and he fails to comply with the notice, or
>
> (b) fails to furnish any information, give any certificate or produce any document or record in accordance with any of the provisions specified in the second column of the Table below,
>
> he shall be liable, subject to subsections (3) and (4) below—
>
> (i) to a penalty not exceeding £300, and
>
> (ii) if the failure continues after a penalty is imposed under paragraph (i) above, to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the

day on which the penalty under paragraph (i) above was imposed (but excluding any day for which a penalty under this paragraph has already been imposed)."

25. On 9 May 1991 the Appellant was served with a notice pursuant to s20(1) of the 1970 Act. The notice required a variety of information, including requirement 6, which stated: "I require a certified statement of all your assets and liabilities as at 31 January 1991".

The Appellant failed to comply with the notice and he received a summons dated 13 August 1991 to appear before the General Commissioners:

"IN THE DIVISION OF LEEDS

To Mr. B R. Allen of The Warleys, Hammerpond Road, Plummer Plain, Horsham, West Sussex

INFORMATION has been laid this day by Mr. G W Young of Inland Revenue, Special Office

one of Her Majesty's Inspectors of Taxes that—

1. you were served for the purposes of section 20(1) of the Taxes Management Act 1970 with a notice dated 9 May 1991 requiring you to deliver to Mr. A R. Maxwell one of Her Majesty's Inspectors of Taxes, not later than 31 July 1991 the following document(s)—

Per schedule attached.

2. you have failed to comply with the notice thereby rendering yourself liable under the provisions of section 98(1) of the Taxes Management Act 1970 to a penalty not exceeding fifty pounds.

YOU ARE THEREFORE hereby summoned to appear before the Commissioners for the general purposes of the Income Tax for the above-named Division sitting at 29 Park Place, Leeds on the 3rd day of September next at the hour of 2 o'clock in the afternoon to answer the information and to be further dealt with according to law.

Dated the 13th day of August 1991

Your attention is drawn to the statutory provisions overleaf and in particular to those relating to penalties."

This summons was signed by two of the Commissioners for the general purposes of the income tax for the Division.

26. The Appellant still failed to comply with the s 20(1) notice and at a meeting between the Appellant and his accountant and officials of the Revenue the officials adopted what is termed "the Hansard procedure" whereby one of the officials formally read out to the Appellant the reply of the Chancellor of the Exchequer to a Parliamentary Question on 18 October 1990 which was in the following terms:

"The practice of the board of Inland Revenue in cases of fraud in relation to tax is as follows:

(1) The board may accept a money settlement instead of instituting criminal proceedings in respect of fraud alleged to have been committed by a taxpayer.

(2) It can give no undertaking that it will accept a money settlement and refrain from instituting criminal proceedings, even if the taxpayer has made a full confession and has given full facilities for investigation of the facts. It reserves to itself full discretion in all cases as to the course it pursues.

(3) Nevertheless, in considering whether to accept a money settlement or to institute criminal proceedings, its decision is influenced by the fact that the taxpayer has made a full confession and has given full facilities for investigation into his affairs and for examination of such books, papers, documents or information as the board may consider necessary." (Hansard (HC Debates), 18 October 1990, written answers, *col 882*),

At this meeting further questions relating to his financial affairs were also put to the Appellant. Subsequently the Appellant provided answers to the various questions put to him, and in compliance with requirement 6 of the s 20(1) notice he delivered to the Revenue the schedule of assets referred to in count 11.

27. Mr. Newman Q.C., on behalf of the Appellant, submitted that in obtaining from the Appellant the schedule of assets upon which the prosecution case was based the Revenue had breached his right to a fair trial under article 6 because the Appellant had been compelled under threat of penalty to incriminate himself by providing the schedule of assets. Mr. Newman also submitted that the Appellant had been subjected to an inducement to provide the schedule by the assurance implicit in the Hansard statement that if the taxpayer makes a full confession criminal proceedings would not be instituted against him.

28. In support of his submission relating to self-incrimination Mr. Newman relied on the judgment of the European Court of Human Rights in *Funke* v. *France* (1993) 16 EHRR 297, 326, para 44 in which it was held that the right to a fair trial given by article 6(1) includes the right "to remain silent and not to contribute himself to incriminating itself". Mr. Newman also relied strongly on the judgment of the European Court in *Saunders* v. *United Kingdom* (1996) 23 EHRR 313. In that case the Secretary of State for Trade and Industry appointed inspectors to investigate the affairs of Guinness Plc pursuant to ss 432 and 442 of the Companies Act 1985. During the course of that investigation Mr. Saunders made statements to the inspectors in reply to questions from them. Mr. Saunders was subject to legal compulsion to give evidence to the Inspectors. He was obliged under ss 434 and 436 of the 1985 Act to answer the questions put to him by the Inspectors in the course of the interviews which they conducted with him. A refusal by him to answer the questions put to him could have led to a finding of contempt of court and the imposition of a fine or committal to prison for up to two years, and it was no defence to proceedings consequent on a refusal that the questions were of an incriminating nature. In the course of the subsequent criminal trial in which he was charged with offences relating to an illegal share support operation the transcripts of Mr. Saunders' answers to the inspectors, whether directly self-incriminating or not, were used against him by the prosecution in a manner which sought to incriminate him. Mr. Saunders

lodged an application with the European Commission of Human Rights complaining that the use at his trial of statements made by him to the Inspectors under their compulsory powers deprived him of a fair hearing in violation of article 6(1) of the Convention. Both the European Commission and the European Court upheld Mr. Saunders' complaint. In its judgments the European Court stated, (1996) 23 EHRR 313, at pages 337-340, paras 68-74:

> "68. The Court recalls that, although not specifically mentioned in article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of the Convention.
>
> 69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. . .
>
> In the present case the Court is only called upon to decide whether the use made by the prosecution of the statements obtained from the applicant by the Inspectors amounted to an unjustifiable infringement of the right. This question must be examined by the Court in the light of all the circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in article 6(1) of which the right not to incriminate oneself is a constituent element.
>
> 70. ...the Government have emphasised, before the Court, that nothing said by the applicant in the course of the interviews was self-incriminating and that he had merely given exculpatory answers or answers which, if true, could serve to confirm his defence. In their submission only statements which are self-incriminating could fall within privilege against self-incrimination.
>
> 71. The Court does not accept the Government's premise on this point since some of the applicant's answers were in fact of an incriminating nature in the sense that they contained admissions to knowledge of information which tended to incriminate him. In any event, bearing in mind the concept of fairness in article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature—such as exculpatory remarks or mere information on questions of fact—may later be deployed in criminal proceedings in support of the prosecution case for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise . . .

A 74. Nor does the Court find it necessary, having regard to the above assessment as to the use of the interviews during the trial, to decide whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances.

It does not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such B fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without C distinction, from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the D fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right."

29. My Lords, the present case is one which relates to the obligation of a citizen to pay taxes and to his duty not to cheat the Revenue. It is self-evident E that the payment of taxes, fixed by the legislature, is essential for the functioning of any democratic State. It is also self-evident that to ensure the due payment of taxes the State must have power to require its citizens to inform it of the amount of their annual income, and to have sanctions available to enforce the provision of that information. In the United Kingdom this power is contained in the provisions of the Taxes Management Act 1970. Section 8(1) provides:

F "For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—

(a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as G may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents relating to information contained in the return, as may reasonably be so required."

H Section 93 provides:

"(1) This section applies where—

(a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act (or either of those sections as extended by section 12 of this Act) to deliver any return, and

I (b) he fails to comply with the notice.

(2) The taxpayer shall be liable to a penalty which shall be £100.

(3) If, on an application made to them by an officer of the Board, the General or Special Commissioners so direct, the taxpayer shall be liable to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction (but excluding any day for which a penalty under this subsection has already been imposed)."

Further subsections make provisions for additional penalties if the taxpayer still fails to make a return.

30. The Tax Return for the year ended 5 April 2001 sent to every individual taxpayer contains the following notice on its first page:

> "This Notice requires you by law to send a Tax Return for the year from 6 April 2000 to 5 April 2001. Give details of all your income and capital gains using:
>
> — this form and any supplementary Pages you need. . . .
>
> Make sure your Tax Return, and any documents I ask for, reach me by:
>
> — 30 September 2001 if you want me to
>
> — calculate your tax, OR
>
> — collect any tax you owe (less than £2,000) through your PAYE code for 2002–2003, OR
>
> — 31 January 2002 at the latest, or you will be liable to an automatic penalty of £100.
>
> Make sure your payment of any tax you owe reaches me by 31 January 2002, or you will have to pay interest and perhaps a surcharge.
>
> Any Tax Return may be checked. Please remember that there are penalties for supplying false information."

It is clearly permissible for a State to enact such provisions and there could be no substance in an argument that there is a violation of article 6(1) if the Revenue prosecuted a citizen for cheating the Revenue by furnishing a standard tax return containing false information. Similarly in the present case, viewed against the background that the State, for the purpose of collecting tax, is entitled to require a citizen to inform it of his income and to enforce penalties for failure to do so, the s 20(1) notice requiring information cannot constitute a violation of the right against self-incrimination. The present case is therefore clearly distinguishable from *Saunders* on that ground. As Lord Bingham of Cornhill stated in *Brown* v. *Stott (Procurator Fiscal, Dunfermline)*[2001] 2 WLR 817, at page 836:

> "The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. . . . The Court has also recognised the need for a fair balance between the general interest of

A the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong and Lönnroth* v *Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham* v *United Kingdom* (1998) 27 EHRR 163, 191, para 52."

B 31. In respect of his argument that there had been a breach of article 6(1) because the delivery of the schedule of assets had been "involuntary" having been induced by a promise implicit in the Hansard statement that the Appellant would not be prosecuted if he furnished the required information, Mr. Newman Q.C. relied on the decision of the Court of Appeal in *R* v *Barker* [1941] 2 KB 381. In that case at an interview a Revenue official read an earlier version of the Hansard C statement to the taxpayer and his accountant, the Appellant Barker. This statement differed from the later statement made in October 1990 because it stated that where the taxpayer voluntarily disclosed the fact of his past frauds and furnished full information to the Revenue "the board will not institute criminal proceedings, but will accept the pecuniary settlement" (see page 382). After the statement had been read to them, the Appellant and the taxpayer produced to the Revenue official two ledgers which had been fraudulently D prepared to induce the Revenue authorities to believe that the irregularities amounted to £7,000 in all. At a later interview two further ledgers and working papers were produced which showed that the earlier ledgers were incomplete and had been brought into existence to deceive the Revenue. Subsequently a letter was written which made it clear that the full amount of the irregularities was about £10,400. The Appellant and the taxpayer were prosecuted and convicted E of the offences of conspiring to cheat the Revenue and of having delivered false statements of account with intent to defraud.

32. Before the Court of Appeal counsel for the Appellant argued that the statement read from Hansard was partly a promise or an inducement, and the Appellant had produced the books or documents as a result of the promise, F inducement or threat. Consequently his action was not free and voluntary and the books or documents should not have been admitted in evidence. This argument was accepted by the Court of Appeal and Tucker J. stated, [1941] 2 KB 381, at pages 384–385:

> "The court . . . does not desire to question that there may be cases in which evidence can be given of facts the existence of which have come G to the knowledge of the police as the result of an inadmissible confession. But in the present case the promise or inducement which was implied in this extract from Hansard expressly related to the production of business books and records, and the court is of opinion that if, as a result of a promise, inducement or threat, such books and documents are produced by the person or persons to whom the promise H or inducement is held out, or the threat made, those documents stand on precisely the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement or threat.
>
> The result is that, in the opinion of the court, these vital documents and books, namely, the ledgers and the working papers of the appellant, I were wrongly admitted in evidence and in those circumstances the conviction of the appellant cannot stand."

The effect of this decision was reversed by s105 of the Taxes Management Act 1970 (which replaced an earlier and similar provision) and which provides:

> "(1) Statements made or documents produced by or on behalf of a person shall not be inadmissible in any such proceedings as are mentioned in subsection (2) below by reason only that it has been drawn to his attention that—
>
> (a) pecuniary settlements may be accepted instead of a penalty being determined, or proceedings being instituted, in relation to any tax, and
>
> (b) though no undertaking can be given as to whether or not the Board will accept such a settlement in the case of any particular person, it is the practice of the Board to be influenced by the fact that a person has made a full confession of any fraudulent conduct to which he had been a party and has given full facilities for investigation,
>
> and that he was or may have been induced thereby to make the statements or produce the documents.
>
> (2) The proceedings mentioned in subsection (1) above are—
>
> (a) any criminal proceedings against the person in question for any form of fraudulent conduct in connection with or in relation to tax, and
>
> (b) any proceedings against him for the recovery of any tax due from him, and
>
> (c) any proceedings for a penalty or on appeal against the determination of a penalty."

33. Section 76(4) of the Police and Criminal Evidence Act 1984 provides:

> "The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence—
>
> (a) of any facts discovered as a result of the confession; or
>
> (b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so."

Cross and Tapper on Evidence, 8th edn. (1995), page 535 footnote 4 comment unfavourably on *R.* v. *Barker and say:*

> "The extremely unsatisfactory case of *R.* v. *Barker* [1941] 2 KB 381, [1941] 3 All ER 33 which appeared to assimilate false accounts with a confession of false accounting, and which was overturned on its facts by Finance Act 1942, s 34 (see now Taxes Management Act 1970, s 105), appears to be inconsistent with s 76(4)(a) as a matter of law, and can be supported now only upon the basis of the judge's discretion, see Lord Diplock in *R.* v. *Sang* [1980] AC 402 at 435, [1979] 2 All ER 1222 at 1229."

34. My Lords, I am unable to accept Mr. Newman's submission and to follow the reasoning of the Court of Appeal in *R.* v. *Barker*. In that case the Court stated, at page 385: "Those documents stand on precisely the same footing as an oral or a written confession which is brought into existence as a result of

such a promise, inducement or threat". In my respectful opinion this is not so. When the Crown relies on an oral or written confession made by the accused and puts it in evidence it does so because it considers that the confession is true. When the Courts have excluded a confession because it was involuntary having been obtained by an inducement they have done so on the ground that it was unsafe to rely on the confession as being true. As Lord Sumner explained in *Ibrahim* v. *R* [1914] AC 599, at pages 610-611:

> "The rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. 'A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it': *R* v. *Warwickshall.* It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice: *R* v. *Baldry*."

35. However, in *Barker* and in this case the respective accused did not give information contained in the documents and the schedule respectively which the Crown claimed was true, both accused gave false information and were prosecuted for giving that false information. To the extent that there was an inducement contained in the Hansard statement, the inducement was to give true and accurate information to the Revenue, but the accused in both cases did not respond to that inducement and instead of giving true and accurate information gave false information. Therefore, in my opinion, the Appellant's argument in this case that he was induced by hope of non-institution of criminal proceedings held out by the Revenue to provide the schedule and that its provision was therefore involuntary is invalid. If, in response to the Hansard statement, the Appellant had given true and accurate information which disclosed that he had earlier cheated the Revenue and had then been prosecuted for that earlier dishonesty, he would have had a strong argument that the criminal proceedings were unfair and an even stronger argument that the Crown should not rely on evidence of his admission, but that is the reverse of what actually occurred.

36. Accordingly, I would dismiss the Appellant's appeal.

LORD SCOTT OF FOSCOTE

My Lords,

37. One of the grounds of appeal argued on behalf of the Appellant was that under s 739(2) of the Income and Corporation Taxes Act 1988 the income of the off-shore companies (referred to in the judgment of the Court of Appeal [2000] 3 WLR 273 at 282) was deemed to be the income of the Appellant and that the income must therefore be deemed not to be the income of the companies (see para 5 of my noble and learned friend Lord Hutton's opinion).

38. As Lord Hutton has explained in para 7 of his opinion, counsel for the Appellant, Mr. Newman Q.C. dealt with the s 739(2) point before your Lordships by adopting the argument on that point advanced before your

Lordships by counsel for Dimsey. In a separate opinion which I have prepared for the purposes of Dimsey's appeal, I have set out my reasons for rejecting his ground of appeal based on s 739(2). For the same reasons I would reject Allen's s 739(2) ground of appeal.

39. Accordingly, for those reasons and for the reasons given by my noble and learned friend, with which I am in full agreement, I too would dismiss this appeal.

Appeal dismissed

Brian Roger Allen made application to the European Court of Human Rights on 16 October 2001, complaining of breaches of his human rights under Articles 5 and 6 of, and Article 1 of Protocol No.1 of, the European Convention for the Protection of Human Rights and Fundamental Freedoms. On 10 September 2002 the application was declared inadmissible by the Fourth Section of the Court (Mr. M. Pelonpaa, President, and Judges Sir Nicolas Bratza, Mr. A. Pastor Ridruejo, Mrs E. Palm, Mr. R. Maruste, Mr. S. Pavlovschi, and Mr. L. Garlicki).

Alan Newman Q.C. and James Kessler for Allen.

DECISION

THE FACTS

The applicant, Mr. Brian Roger Allen, is a United Kingdom national, who was born in 1948 and is currently serving a sentence of imprisonment in HM Prison Coldingley, Surrey. He is represented before the Court by Mr. Newman and Mr. Kessler, lawyers practising in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 9 May 1991, the applicant was served by the Inland Revenue with a Notice pursuant to s 20(1) of the Taxes management Act 1970, which, *inter alia*, required the applicant to provide a certified statement of his assets and liabilities as at 31 January 1991.

On 13 August 1991, when the applicant had failed to comply, he was summonsed to appear before the General Commissioners. The summons warned him that failure to comply with the notice rendered him liable to a penalty not exceeding 50 pounds sterling (GBP) pursuant to s 98(1) of the 1970 Act. (The penalty had in fact been increased to GBP 300).

A On 30 October 1991, the applicant still having failed to comply was presented with the "Hansard Warning". This involved the reading out to him of the reply of the Chancellor of the Exchequer to a Parliamentary question on 18 October 1991. This outlined the practice of the Inland Revenue in cases of fraud indicating that it might accept a money settlement instead of instituting criminal proceedings and that its decision as to whether to accept a settlement or institute
B criminal proceedings would take into account whether the taxpayer had *inter alia* given full facilities for investigation into his affairs.

On or about 3 April 1992, the applicant delivered to the Inland Revenue a schedule of his assets as at 31 January 1991 as required by the notice.

C The applicant was later charged with 13 counts of cheating the public revenue of income tax and corporation tax. Count 11 specified:

> "STATEMENT OF OFFENCE
>
> Cheating Her majesty the Queen and the Commissioners of Inland Revenue, contrary to common law.
>
D PARTICULARS OF OFFENCE
>
> [The applicant] on or about 3 April 1992 with intent to defraud...cheated Her Majesty the Queen and the Commissioners of Inland Revenue of public revenue namely income tax, by delivering...to an Inspector of Taxes a schedule of assets as at 31 January 1991 in respect of his assets and the assets of his minor children which was false,
E misleading and deceptive in that it omitted to disclose divers assets which were owned by him. Particulars of the omitted assets are—his beneficial interest in shares issued by off-shore companies, his beneficial interest in properties held in the names of off-shore companies and his beneficial interest in bank accounts held in the United Kingdom and in Jersey in the names of off-shore companies."

F

The applicant was convicted of all counts on 19 February 1998. On 20 February 1998, he was sentenced to 13 concurrent terms of seven years' imprisonment and a confiscation order made in the sum of 3,137,165 pounds sterling (GBP). This sum was calculated as being the lesser of the two sums, namely the amount of benefit from the offences (GBP 4 million) and the
G applicant's total realisable assets (GBP 3,137,165).

On 7 July 1999, the Court of Appeal dismissed his appeal against conviction and on 11 October 1999, dismissed his appeal against sentence. In relation to the applicant's argument that he remained liable to pay the outstanding unpaid tax,
H it noted the undertaking given by the Inland Revenue on 20 February 1998 that it would not pursue the applicant for pre-existing tax liabilities out of any income which he might acquire in future.

On 10 October 2000, the House of Lords, reversing an earlier refusal, allowed his petition for leave to appeal from the Court of Appeal on a number
I of points and also permitted him to raise a new point relating to Article 6 of the Convention as concerned his conviction on count 11.

On 11 October 2001, the House of Lords dismissed his appeal. Lord Hutton giving judgment noted the applicant's arguments under the Convention in which he relied in particular upon the cases of *Funke* v *France* and *Saunders* v. *the United Kingdom*, that the prosecution case against him breached his right to a fair trial as he had been compelled under threat of penalty to incriminate himself by providing the schedule of assets and found as follows ([1]):

> ". . . the present case is one which relates to the obligation of a citizen to pay taxes and to his duty not to cheat the Revenue. It is self-evident that the payment of taxes fixed by the legislature is essential for the functioning of any democratic State. It is also self-evident that to ensure the due payment of taxes the State must have power to require its citizens to inform it of the amount of their annual income and to have sanctions available to enforce the provision of that information . . ."

He proceeded to review the tax legislation which required taxpayers to make tax returns ([2]):

> "It is clearly permissible for a State to enact such provisions and there could be no substance in an argument that there is a violation of Article 6 (1) if the Revenue prosecuted a citizen for cheating the Revenue by furnishing a standard tax return containing false information. Similarly, in the present case, viewed against the background that the State, for the purpose of collecting tax, is entitled to require a citizen to inform it of his income and to enforce penalties for failure to do so, the s 20(1) notice requiring information cannot constitute a violation of the right against self-incrimination. The present case is therefore clearly distinguishable from *Saunders* on that ground . . ."

COMPLAINTS

The applicant complained that the Hansard warning procedure infringed Article 6 (1) as it infringed the privilege against self-incrimination and his right to silence. He was placed under both threat and inducement to give information and the schedule of assets which he then gave comprised the totality of the evidence against him on count 11 of the indictment.

The applicant also complains that he has been victim of a double punishment. Though the confiscation order was set having regard to the tax liability which he had evaded, the applicant's tax liability remained payable. This results in confiscation of all his assets and continuation unabated of his tax liability which he argues is disproportionate and unfair. In that context, he invokes Article 1 of Protocol No. 1.

The applicant also invokes Article 5 of the Convention, alleging that he has been deprived of his liberty not in accordance with a procedure prescribed by law.

([1]) Page 329D *ante*. ([2]) Page 330F *ante*.

A THE LAW

1. The applicant complains that he was required to incriminate himself contrary to Article 6 (1) of the Convention which provides as relevant: "In the determination . . . of any criminal charge against him, everyone is entitled to a fair . . . hearing . . . by an independent and impartial tribunal established by law".
B The Court recalls its established case-law to the effect that, although not specifically mentioned in Article 6 of the Convention, the rights invoked by the applicant, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rational lies, *inter alia,* in the protection of the accused against improper compulsion by the authorities, thereby
C contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (see the *John Murray* v. *the United Kingdom* judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996-I, pp. 49-50, paras 44-47). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression
D in defiance of the will of the accused. In this sense the right in question is closely linked to the presumption of innocence contained in Article 6 (2) of the Convention (the above-cited *Saunders* judgment, para 68).

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent in the context of criminal
E proceedings and the use made of compulsory obtained information in criminal prosecutions. It does not per se prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs (see the above mentioned *Saunders* judgment, where the procedure whereby the applicant was required to answer the questions of the Department of Trade Inspectors was not in issue). In the present case, therefore, the Court finds that the requirement on the applicant to make a declaration of his assets to the Inland
F Revenue does not disclose any issue under Article 6 (1), even though a penalty was attached to a failure to do so. The obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is indeed a common feature of the taxation systems of Contracting States and it would be difficult to envisage them functioning effectively without it.

G The Court notes that in this case the applicant does not complain that the information about his assets which he gave the Inland Revenue was used against him in the sense that it incriminated him in the commission of an offence due to acts or omissions in which he had been involved prior to that moment. His situation may therefore be distinguished from that of the applicant in *Saunders* (judgment cited above). Nor was he prosecuted for failing to provide information
H which might incriminate him in pending or anticipated criminal proceedings, as in the cases of *Funke, Heaney and McGuinness* and *J.B. (Funke* v. *France* judgment of 25 February 1993, Series A no. 256-A; *Heaney and McGuinness* v. *Ireland,* no. 34720/97, (2001) 33 EHRR 12; *J.B.* v. *Switzerland,* no. 31827/96, ECHR 2001-III). The applicant was charged with and convicted of the offence of making a false declaration of his assets to the Inland Revenue. In other words,
I he lied, or perjured himself through giving inaccurate information about his assets. This was not an example of forced self-incrimination about an offence

which he had previously committed; it was the offence itself. It may be that the applicant lied in order to prevent the Inland Revenue uncovering conduct which might possibly be criminal and lead to a prosecution. However, the privilege against self-incrimination cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation by the Revenue authorities.

Furthermore, not every measure taken with a view to encouraging individuals to give the authorities information which may be of potential use in later criminal proceedings must be regarded as improper compulsion (see the above-mentioned *John Murray* v. *the United Kingdom* judgment, para 46). The applicant faced the risk of imposition of a penalty of a maximum of GBP 300 if he persisted in refusing to make a declaration of assets, which may be contrasted with the position in the *Saunders* case, where a two year prison sentence was the maximum penalty (above mentioned judgment, para 70). Nor does the Court consider that any improper inducement was brought to bear through the use of the so-called "Hansard Warning" which informed the applicant of the practice of the Inland Revenue of taking into account the co-operation of the taxpayer in deciding whether to bring any prosecution for fraud. There is no indication that the applicant was misled as to the effect of the warning, accepting that it could not be interpreted as any kind of guarantee of freedom from prosecution.

Consequently, the Court does not find that the facts of this case disclose any infringement of the right to silence or privilege against self-incrimination or that there has been any unfairness contrary to Article 6 (1) of the Convention. It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 35 paras 3 and 4 of the Convention.

2. The applicant complains of remaining subject to tax liability after imposition of a confiscation order on his assets, invoking Article 1 of Protocol No. 1 which provides

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

The Court recalls that the applicant was sentenced on conviction to a confiscation order calculated with reference to the amount of his gain from his offences, namely the amount of tax evaded and the amount of his assets. While it appears that the applicant remains liable under the applicable tax provisions for the amount of outstanding tax, this point was raised on appeal and the Court of Appeal found that it had no substance as the Inland Revenue had given an undertaking not to pursue the outstanding tax. The applicant has not argued that this undertaking would not be enforceable. The Court is not therefore persuaded that he remains subject to a real risk of an attempt by the Inland Revenue to recover the same amount of tax twice.

A This complaint must therefore be rejected as manifestly ill-founded within the meaning of Article 35 paras 3 and 4 of the Convention.

3. Finally, the applicant invokes Article 5 of the Convention which provides as relevant:

> "1. Everyone has the right to liberty and security of person. No one
> B shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court."

The applicant was convicted of various offences and sentenced after trial to
C a term of 14 years' imprisonment. He raised grounds of appeal concerning his conviction which were rejected by the Court of Appeal and House of Lords. The Court finds no basis on which to find that his detention after conviction was not "in accordance with a procedure prescribed by law" or justified in terms of Article 5 para 1(a) above. Accordingly it rejects this complaint as manifestly ill-founded within the meaning of Article 35 paras 3 and 4 of the Convention.

D For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'Boyle
Registrar

Matti Pellonpää
President

E [Solicitors: Saunders & Co (for D), Goulders (for A); Solicitors of Inland Revenue.]