Appeal number
UT/2016/0133

Capital Gains Tax – tax avoidance scheme taking advantage of section 144ZA Taxation of Chargeable Gains Act 1992 – sale of shares by Scottish Trustees to Irish Trustees pursuant to exercise of put option followed by sale by Irish Trustees – whether single composite transaction

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) THE TRUSTEES OF THE MORRISON 2002 MAINTENANCE TRUST **(2) THE TRUSTEES OF SIR FRASER MORRISON'S 1989 TRUST** **(3) THE TRUSTEES OF SIR FRASER MORRISON'S 1995 TRUST** **(4) SIR FRASER MORRISON**	**Appellants**
- and –	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

Tribunal: The Hon Mr Justice Arnold and Judge Roger Berner

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 10-11 July 2017

Kevin Prosser QC and Charles Bradley, instructed by Maclay Murray & Spens LLP, for the Appellants
Graham MacIver (of the Scots Bar), instructed by the Office of the Advocate General for Scotland, for the Respondents

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DECISION

Introduction

1. This is an appeal from a decision of the First-tier Tribunal (Tax) (Judge J. Gordon Reid QC and Ian Malcolm JP) ("the FTT") dated 13 April 2016 [2016] UKFTT 250 (TC) dismissing an appeal by the Appellants against closure notices issued by the Commissioners of Her Majesty's Revenue and Customs ("HMRC") amending the Appellants' self-assessment returns for the tax year 2004/05 so as to increase the chargeable gains accruing for Capital Gains Tax ("CGT") purposes to the Appellants on disposals by the First to Third Appellants ("the Scottish Trustees") of listed shares in AWG plc ("the AWG shares"). The disposal was effected by means of a tax avoidance scheme involving the setting up of Irish trusts, the grant and exercise of put options resulting in the acquisition of the AWG shares by the Irish trusts, the sale of the shares by the Irish trusts, and the repatriation of the Irish trusts to the UK. The FTT held that the scheme was ineffective because the sales of the AWG shares amounted to a single composite transaction in which the Scottish Trustees disposed of those shares at or about market value on which substantial CGT is chargeable.

The legislation

2. The Taxation of Chargeable Gains Act 1992 ("TCGA") provided, so far as relevant to this appeal and as in force in November 2004, as follows:

"**1. The charge to tax**

(1) Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets.

…

2. Persons and gains chargeable to capital gains tax, and allowable losses

(1) Subject to any exceptions provided by this Act, and without prejudice to sections 10 and 276, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom.

(2) Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment …

17. Disposals and acquisitions treated as made at market value

(1) Subject to the provisions of this Act, a person's acquisition or disposal of an asset shall for the purposes of this Act be deemed to be for a consideration equal to the market value of the asset—

(a) where he acquires or, as the case may be, disposes of the asset otherwise than by way of a bargain made at arm's length …

144. Options and forfeited deposits

(1) Without prejudice to section 21, the grant of an option … is the disposal of an asset (namely of the option), but subject to the following provisions of this section as to treating the grant of an option as part of a larger transaction.

(2) If an option is exercised, the grant of the option and the transaction entered into by the grantor in fulfilment of his obligations under the option shall be treated as a single transaction and accordingly—

(a) …

(b) if the option binds the grantor to buy, the consideration for the option shall be deducted from the cost of acquisition incurred by the grantor in buying in pursuance of his obligations under the option.

(3) The exercise of an option by the person for the time being entitled to exercise it shall not constitute the disposal of an asset by that person, but, if an option is exercised then the acquisition of the option (whether directly from the grantor or not) and the transaction entered into by the person exercising the option in exercise of his rights under the option shall be treated as a single transaction and accordingly—

(a) …

(b) if the option binds the grantor to buy, the cost of the option shall be treated as a cost incidental to the disposal of what is bought by the grantor of the option.

144ZA. Application of market value rule in case of exercise of option

(1) This section applies where—

(a) an option is exercised, so that by virtue of section 144(2) or (3) the grant or acquisition of the option and the transaction resulting from its exercise are treated as a single transaction, and

(b) section 17(1) ('the market value rule') applies, or would apply but for this section, in relation to—

(i) the grant of the option,

(ii) the acquisition of the option (whether directly from the grantor or not) by the person exercising it, or

(iii) the transaction resulting from its exercise.

…

(3) If the option binds the grantor to buy—

(a) the market value rule does not apply for determining the cost of acquisition incurred by the grantor, but without prejudice to its application (in accordance with section 144(2)(b)) where the rule applies for determining the consideration for the option;

(b) the market value rule does not apply for determining the consideration for the disposal of what is bought, but without prejudice to its application (in accordance with section 144(3)(b)) where the rule applies for determining the cost of the option.

(4) To the extent that, by virtue of this section, the market value rule does not apply for determining an amount or value, the amount or value to be taken into account is (subject to section 120) the actual amount or value.

(5) In this section 'option' has the same meaning as in section 144."

3. Two points should be noted about section 144ZA. First, section 144ZA was introduced to reverse the decision in *Mansworth v Jelley* [2002] EWCA Civ 1829, [2003] STC 53. In that case it was held that an employee who had exercised a share option on favourable terms was to be treated, on a subsequent disposal of the shares, as having acquired them at market value. He therefore sold them for no gain. By virtue of what is now section 144(2) TCGA, the grant of the option in favour of the employee and his exercise of it were to be considered as a single transaction, which was an incident of the taxpayer's employment. The transaction was therefore not at arm's length so the market value rule under what is now section 17(1) TCGA applied. The market value rule thus operated in the employee's favour.

4. Secondly, on 20 July 2005 section 144ZB entered into force, having effect with respect to options exercised on or after 2 December 2004. Section 144ZB provides an exception to section 144ZA which is designed to address tax avoidance schemes of the kind employed in the present case. Section 144ZB does not apply to this case, however.

The applicable principles of statutory interpretation

5. Starting with *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300, there has been a series of decisions of the House of Lords and Supreme Court which have established the modern approach to the interpretation of tax statues. In *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13, [2016] 1 WLR 1005, Lord Reed (with whom the other members of the Supreme Court agreed) explained this approach in the following terms:

“61. As the House of Lords explained in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, in a single opinion of the Appellate Committee delivered by Lord Nicholls of Birkenhead, the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in the way which best gives effect to that purpose. Until *WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300, however, the interpretation of fiscal legislation was based predominantly on a linguistic analysis. Furthermore, the courts treated every element of a composite transaction which had an individual legal identity (such as a payment of money, transfer of property, or creation of a debt) as having its own separate tax consequences, whatever might be the terms of the statute. As Lord Steyn said in *Inland Revenue Comrs v McGuckian* [1997] 1 WLR 991, 999, in combination those two features—a literal interpretation of tax statutes, and an insistence on applying the legislation separately to the individual steps in composite schemes—allowed tax avoidance schemes to flourish to the detriment of the general body of taxpayers.

62. The significance of the *Ramsay* case was to do away with both those features. First, it extended to tax cases the purposive approach to statutory construction which was orthodox in other areas of the law. Secondly, and equally significantly, it established that the analysis of the facts depended on that purposive construction of the statute. Thus, in *Ramsay* itself, the terms ‘loss’ and ‘gain’, as used in capital gains tax legislation, were purposively construed as referring to losses and gains having a commercial reality. Since the facts concerned a composite transaction forming a commercial unity, with the consequence that the commercial significance of what had occurred could only be determined by considering the transaction as a whole, the statute was construed as referring to the effect of that composite transaction. As Lord Wilberforce said, at p 326:

> ‘The capital gains tax was created to operate in the real world, not that of make-belief. As I said in *Aberdeen Construction Group Ltd v Inland Revenue Comrs* [1978] AC 885, it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function.’

63. ‘Unfortunately’, the Committee commented in *Barclays Mercantile* [2005] 1 AC 684, para 34, ‘the novelty for tax lawyers of this exposure to ordinary principles of statutory construction produced a tendency to regard *Ramsay* as establishing a new jurisprudence governed by special rules of its own’. In the *Barclays Mercantile* case the Committee sought to achieve ‘some clarity about basic principles’: para 27. It summarised the position at para 32:

> ‘The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description … As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8: “The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.”’

As the Committee commented, this is a simple question, however difficult it may be to answer on the facts of a particular case.

64. This approach has proved to be particularly important in relation to tax avoidance schemes as a result of two factors identified in *Barclays Mercantile*, para 34. First, ‘tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, “in the real world”’. Secondly, tax avoidance schemes commonly include ‘elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge’. In other words, as Carnwath LJ said in the Court of Appeal in *Barclays Mercantile* [2003] STC 66, para 66, taxing statutes generally ‘draw their life-blood from real world transactions with real world economic effects’. Where an enactment is of that character, and a transaction, or an element of a composite transaction, has no purpose other than tax avoidance, it can usually be said, as Carnwath LJ stated, that ‘to allow tax treatment to be governed by transactions which have no real world purpose of any kind is inconsistent with that fundamental characteristic.’ Accordingly, as Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454, para 35, where schemes involve intermediate transactions inserted for the sole purpose of tax avoidance, it is quite likely

that a purposive interpretation will result in such steps being disregarded for fiscal purposes. But not always.

65. As was noted in *Barclays Mercantile* [2005] 1 AC 684, para 35, there have been a number of cases since *Ramsay* in which it was decided that elements inserted into a transaction without any business or commercial purpose did not prevent the composite transaction from falling within a charge to tax, or bring it within an exemption from tax, as the case might be. Examples include *Inland Revenue Comrs v Burmah Oil Co Ltd* 1982 SC (HL) 114, *Furniss v Dawson* [1984] AC 474, *Carreras Group Ltd v Stamp Comr* [2004] STC 1377, *Inland Revenue Comrs v Scottish Provident Institution* [2004] 1 WLR 3172 and *Tower MCashback LLP 1 v Revenue and Customs Comrs* [2011] 2 AC 457. In each case the court considered the overall effect of the composite transaction, and concluded that, on the true construction of the relevant statute, the elements which had been inserted without any purpose other than tax avoidance were of no significance. But it all depends on the construction of the provision in question. Some enactments, properly construed, confer relief from taxation even where the transaction in question forms part of a wider arrangement undertaken solely for the purpose of obtaining the relief. The point is illustrated by the decisions in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 and *Barclays Mercantile* itself.

66. The position was summarised by Ribeiro PJ in *Arrowtown Assets* 6 ITLR 454, para 35, in a passage cited in *Barclays Mercantile* [2005] 1 AC 684, para 36: ‘The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.’

67. References to ‘reality’ should not, however, be misunderstood. In the first place, the approach described in *Barclays Mercantile* and the earlier cases in this line of authority has nothing to do with the concept of a sham, as explained in *Snook* [1967] 2 QB 786. On the contrary, as Lord Steyn observed in *McGuckian* [1997] 1 WLR 991, 1001, tax avoidance is the spur to executing genuine documents and entering into genuine arrangements.

68. Secondly, it might be said that transactions must always be viewed realistically, if the alternative is to view them unrealistically. The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in *Ramsay*, the relevant fact is the overall economic outcome of a series of commercially

linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in *MacNiven* and *Barclays Mercantile*, then other transactions, although related, are unlikely to have any bearing on its application."

6. In *RFC 2012 plc v Advocate General for Scotland* [2017] UKSC 45 at [12]-[14] Lord Hodge (with whom the other members of the Supreme Court agreed) cited Lord Nicholls of Birkenhead's speech in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 at [28]-[36] and Lord Reed's judgment in *UBS* at [62] as stating the correct approach to statutory interpretation in this context.

<u>The facts</u>

7. There is no dispute as to the facts, which the FTT set out in meticulous detail in its decision at [30] and commented on elsewhere. The FTT's findings were based partly on an agreed statement of facts prepared by the parties, partly upon documentary evidence and partly upon the evidence of four witnesses called by the Appellants. Reference should be made to the FTT's decision for its full findings of fact, but for the purposes of this decision it is sufficient to set out an abbreviated account.

8. The Scottish Trustees are Scottish resident trustees of three trusts ("the Scottish Trusts") established by the Fourth Appellant, Sir Fraser Morrison, between 1989 and 1992 for the benefit, broadly speaking, of his family, and in particular his wife Lady Morrison and their three children. The precise details of the Scottish Trusts do not matter for present purposes. The governing law of the Scottish Trusts is Scots law. From 8 November 2004 the Scottish Trustees were Lady Morrison and two trust companies managed by the Appellants' solicitors.

9. In the autumn of 2004 the Scottish Trusts held a total of 1,933,612 AWG shares whose combined market value amounted to about £14.5 million. The AWG shares constituted about 2% of AWG's issued share capital and represented about 35% in value of the Morrison family assets. The price of the AWG shares had risen significantly over the course of 2004. The Morrison family and the Scottish Trustees wished to diversify the Scottish Trusts' holdings. A sale of the AWG shares by the Scottish Trustees to the market would have incurred a liability to CGT of around £3-4 million, the value of the shares having appreciated considerably since they were acquired.

10. In October 2004 the Scottish Trustees obtained legal advice. As a result, a tax avoidance scheme was devised involving the following main steps:

    (i) the establishment of three Irish trusts whose terms essentially mirrored those of the Scottish Trusts ("the Irish Trusts");

(ii) the settlement of cash into the Irish Trusts by Lady Morrison, which was financed by borrowing;

(iii) the grant of put options by the trustees of the Irish Trusts ("the Irish Trustees") entitling the Scottish Trustees to sell the AWG shares at base cost (plus indexation);

(iv) the exercise of those options by the Scottish Trustees and the consequential sale of the AWG shares to the Irish Trustees;

(v) the sale of the AWG shares by the Irish Trustees to the market; and

(vi) the repatriation of the Irish Trusts to the UK.

11. Save in one respect, the scheme was implemented as planned. The Irish Trusts were established on 10 November 2004. The Irish Trustees were a trust company managed by a firm of Irish solicitors instructed by the Appellants' solicitors and that company's finance director. The Irish Trustees met on the same day and recorded that they expected to be invited by the Scottish Trustees to grant put options in relation to the AWG shares, that the shares were performing well, that it was proposed to diversify the wealth which was concentrated in the AWG shares and that Merrill Lynch had been identified as a possible financial advisor.

12. On 10 November 2004 Lady Morrison settled £5,030,000 into the Irish Trusts. She borrowed this money, with £3 million coming from one of the Scottish Trusts.

13. The creation of the Irish Trusts had no purpose other than the avoidance of tax. They would not have been created otherwise. The FTT found that the Scottish Trustees had no formal control over the Irish Trustees, but that it was unrealistic to assume that they would do anything significantly to contradict the views of the Scottish Trustees and the beneficiaries that the trust assets should be diversified by selling the AWG shares. It was expected that the Irish Trustees would sell the AWG shares if the Scottish Trustees resolved to exercise the options.

14. On 19 November 2004 the Irish Trustees met and resolved to grant put options to the Scottish Trustees in respect of the AWG shares. They also noted that, if the put options were exercised, they would seek advice on the possible implementation of a policy of diversification and that they had had preliminary discussions with Merrill Lynch. Later the same day the Irish Trustees granted the Scottish Trustees five put options, two of which are not relevant for present purposes. The options with which we are concerned were only exercisable if the Relevant Event occurred, the Relevant Event being an exchange rate between the US dollar and the pound lower or higher than specified levels within a specified period. The inclusion of the Relevant Event was an anti-*Ramsay* device. It was not relied upon by the Appellants before the FTT or on this appeal, however, and therefore it can be ignored. The

various option prices were equivalent to the base cost for CGT purposes of the AWG shares held by the Scottish Trustees (including indexation).

15. On 22 November 2004 the Irish Trustees resolved to appoint Merrill Lynch to provide investment advice.

16. On 23 and 24 November 2004 the beneficiaries signed indemnities (or, in the case of Sir Fraser, a waiver) relating to any liabilities arising from any exercise by the Scottish Trustees of the put options. This allayed concerns which the Scottish Trustees had had about a possible breach of trust.

17. The Relevant Event occurred at the close of the market on 23 November 2004 and the Scottish Trustees and the Irish Trustees were notified on the afternoon of 24 November 2004. On 25 November 2004 the Scottish Trustees decided to exercise the put options. Until that date, it was likely, but not certain, that they would exercise the option unless the market price of AWG shares fell significantly. By 1 December 2004 the AWG shares had been transferred to the Irish Trustees and the price for them had been paid.

18. On 1 December 2004 the Irish Trustees sold the AWG shares to Merrill Lynch under a "risk bid" arrangement whereby Merrill Lynch paid a guaranteed minimum price of £7.40 per share within five days. In the event, the price received by the Irish Trustees was £7.43 per share. Merrill Lynch bought the AWG shares as principal and then sold them to the market. The sale to Merrill Lynch as principal rather than to the market directly was the only variation on the scheme as planned. This variation occurred as a result of advice given by Merrill Lynch to the Irish Trustees.

19. On 11 March 2005 the Irish Trustees retired and were replaced by the same persons who held the office of Scottish Trustees. The Irish Trusts were thereby repatriated to the UK to serve as replacement trusts to the Scottish Trusts with respect to the value represented by the AWG shares.

20. The net effect of the scheme, if it works, is as follows:

    (i) The disposal of the AWG shares by the Scottish Trustees on 25 November 2004 realised a total of £4,494,041. The Appellants contend that the Scottish Trustees did not thereby incur any liability to CGT due to the effect of section 144ZA TCGA: because the disposal was through the exercise of an option and not at arm's length, the market value rule is disapplied, and instead the actual price paid falls to be applied for the purposes of determining whether there has been a gain.

    (ii) The disposal of the same AWG shares by the Irish Trustees on 1 December 2004 realised a total of £14,294,867 net for the Irish Trusts. The Irish Trustees incurred an Irish CGT liability of €53,639 on this disposal.

    (iii) The repatriation of the Irish Trusts prevented a CGT liability arising on Lady Morrison by virtue of section 86 TCGA.

(iv) Following the repatriation of the Irish Trusts, the trustees held the net proceeds of the sale of the AWG shares on essentially the same trusts and for same beneficiaries as the Scottish Trustees had previously held the AWG shares.

21. Counsel for the Appellants pointed out that the closure notices were premised on the understanding that the price which the Irish Trustees received for the AWG shares was £7.40 per share, whereas it is now known that in fact they received £7.43 per share. Although he relied upon this as illustrating the importance of the intervention of Merrill Lynch, he did not suggest that, in itself, this mis-statement of the price was relevant to the Appeal.

The FTT's decision

22. The FTT considered the matter in considerable detail. Reference should be made to the FTT's decision for its full reasons, but for present purposes its reasoning can be summarised as follows:

(i) The statutory purpose of sections 1 and 2 TCGA was that (subject to any relevant qualifications, exceptions and thresholds) gains on the disposal of assets were subject to CGT, and that included gains on the disposal of assets of a trust in the course of the administration of a trust ([87]-[88]).

(ii) Viewed realistically, the present case involved a single composite transaction, namely the disposal by the Scottish Trustees of the AWG shares to the market at or about market value. The planned intermediate steps of the Scottish Trustees disposing of the shares to the Irish Trustees and the Irish Trustees disposing of the shares to the market were simply steps forming part of that transaction which had been artificially inserted for tax avoidance purposes. Thus this was properly to be viewed as a single disposal from A to C rather than successive disposals from A to B and B to C ([90]-[99], [120]-[127]).

(iii) It was immaterial that certain contingencies and doubts attached to the scheme. In particular, viewed as at 25 November 2004 when the Scottish Trustees exercised the options, there was no practical likelihood that the Irish Trustees would not immediately re-sell the AWG shares to the market ([100]-[112], [129]-[131]).

(iv) It was also immaterial that, in the event, the Irish Trustees sold the AWG shares to Merrill Lynch rather than directly to the market. This was simply a mechanism to ensure that the Irish Trustees received a good price ([113]-[118], [119], [131]).

The appeal

23. The Appellants contend that, in deciding that the disposal of the AWG shares amounted to a single composite transaction, the FTT erred in law. There is no

dispute that the question whether a sequence of steps is properly to be categorised as a single composite transaction for the purposes of the TCGA is reviewable as an issue of law. Nor is there any dispute that it is not the function of this Tribunal simply to substitute its own assessment for that of the FTT. The question is whether the FTT has fallen into error.

24. The Appellants contend that the FTT made three main errors. First and foremost, the Appellants contend that the FTT failed properly to apply the decision of the House of Lords in *Craven v White* [1989] AC 389. Secondly, the Appellants contend that the FTT was wrong to treat the involvement of Merrill Lynch as immaterial. Thirdly, the Appellants contend that the FTT was wrong to analyse the question as at 25 November 2004 and that it should have analysed the question as at 19 November 2004. We will consider these contentions in turn.

Craven v White

25. It is common ground that, ignoring the intervention of Merrill Lynch for the moment, the issue in this case can be analysed as being whether the key steps in the scheme, namely (i) the exercise of the options by the Scottish Trustees resulting in the sale of the AWG shares to the Irish Trustees and (ii) the sale of the AWG shares by the Irish Trustees, constituted, as HMRC contend, a single composite transaction involving a disposal by A to C, or, as the Appellants contend, two separate disposals by A to B and by B to C.

26. The Appellants submit that the key authority on this issue is *Craven v White*. It is necessary to begin, however, with the case which preceded it, *Furniss v Dawson* [1984] AC 474. In that case the Dawsons had agreed in principle to sell shares in certain operating companies to a company called Wood Bastow. Then, pursuant to a tax avoidance scheme, the Dawsons exchanged their shares in the operating companies for shares in a newly incorporated Isle of Man company, Greenjacket, and on the same day Greenjacket sold those shares to Wood Bastow for the price previously negotiated and agreed between the Dawsons and Wood Bastow. The aim of the scheme was that the share exchange would qualify for relief from CGT, so that there would be no charge to CGT unless and until the Dawsons disposed of their shares in Greenjacket.

27. Lord Brightman, with whom the rest of their Lordships agreed, said at 526G-H:

> "My Lords, in my opinion the rationale of the new approach is this. In a pre-planned tax saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) a like series of steps which are followed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of

> the contractually agreed results. … *Ramsay* says that the fiscal result is to be no different if the several steps are pre-ordained rather than pre-contracted."

28. Lord Brightman went on to say at 527D-E:

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

29. Turning to *Craven v White*, as counsel for the Appellants pointed out, the decision was a 3-2 majority decision. Accordingly, it is necessary to concentrate on the reasoning of the majority (Lords Keith of Kinkel, Oliver of Aylmerton and Jauncey of Tullichettle). One of the Appellants' criticisms of the FTT's decision is that the FTT cited passages from the speech of Lord Goff of Chieveley, who was one of the dissenters (together with Lord Templeman).

30. It is also important to focus on the *Craven v White* case itself, rather than the two other appeals which were heard with it. In that case the Whites were in negotiations with Cee-N-Cee over a merger of Queensferry's business with that of Cee-N-Cee. At the same time, they were in negotiations with Oriel for a sale of their shares in Queensferry. In the course of these two sets of negotiations, the Whites acquired an off-the-shelf Isle of Man company, Millor, and transferred the Queensferry shares to Millor by way of share exchange. One of the purposes of that transaction was to avoid CGT in the event of a sale to Oriel, but another purpose was for Millor to act as a holding company in the event of a merger, and there was no certainty at that time that the sale to Oriel would take place. Three weeks later, the Whites agreed that Millor should sell the Queensferry shares to Oriel's subsidiary, Jones.

31. All three members of the majority were agreed that the case was to be distinguished from *Furniss v Dawson*, because it was not proper to view the transfers of the Queensferry shares from the Whites to Millor and from Millor to Jones as a single composite transaction. Since both Lord Keith and Lord Jauncey concluded their speeches by agreeing with the reasons expressed by Lord Oliver in his speech, it is appropriate to begin with the latter.

32. At 498G-H Lord Oliver said that the transactions in issue were not "pre-ordained or composite in the sense that it could be predicated with any certainty at the date of the intermediate transfer what the ultimate destination of the property would be, what would be the terms of any ultimate transfer or even whether an ultimate transfer would take place at all". At 509G-510D he said the question which fell to be determined in *Furniss* and in the instant appeals was "whether an intermediate transfer was, at the time when it was effected, so closely interconnected with the ultimate disposition that it was properly to be described as not, in itself, a real transaction at all but merely an element in some different and larger whole without independent effect". At 510B-D he explained that he did not accept the wider view of *Furniss* which interpreted "pre-ordained" simply as "preconceived" or "planned". At 512E he observed that there were "many circumstances in which transactions are so closely linked as realistically to be regarded as a single indivisible composite whole - a concept which may be summed up in homely terms by asking the question whether at the material time the whole is already 'cut and dried.'"

33. In an important passage at 514F-H, Lord Oliver summarised his analysis of the law in the following terms (emphasis added):

> "As the law currently stands, the essentials emerging from *Furniss v. Dawson* [1984] A.C. 474 appear to me to be four in number: (1) that the series of transactions was, at the time when the intermediate transaction was entered into, pre-ordained in order to produce a given result; (2) that that transaction had no other purpose than tax mitigation; (3) that there was at that time *no practical likelihood* that the pre-planned events would not take place in the order ordained, so that the intermediate transaction was not even contemplated practically as having an independent life, and (4) that the pre-ordained events did in fact take place. In these circumstances the court can be justified in linking the beginning with the end so as to make a single composite whole to which the fiscal results of the single composite whole are to be applied."

He reiterated this at 516H-517B (emphasis added):

> "Another identifying feature is that all the stages of what is claimed as the composite transaction are pre-ordained to take place in an orchestrated sequence and, in my opinion, that must mean more than simply 'planned or thought out in advance.' It involves to my mind a degree of certainty and control over the end result at the time when the intermediate steps are taken. That does not, I think, mean absolute certainty in the sense that every single term of the transaction which ultimately takes place must then be finally settled and agreed. But it does seem to me to be essential at least that the principal terms should be agreed to the point at which it can be said that there is *no practical likelihood* that the transaction which actually takes

> place will not take place. Nor is it sufficient, in my opinion, that the ultimate transaction which finally takes place, though not envisaged at the intermediate stage as a concrete reality, is simply a transaction of the kind that is then envisaged …"

34. Turning to Lord Keith, he expressed the test to be applied in very similar, if not identical, terms. Thus at 479F-G he said (emphasis added):

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

Similarly, at 480H-481B he said (emphasis added):

> "But I do not think that the transaction embodied in the final disposal can be said to be pre-ordained, a matter to be ascertained as at the time of the share exchange, when at that time it is wholly uncertain whether that disposal will take place, or a fortiori when neither the identity of the purchaser nor the price to be paid nor any of the other terms of the contract are known. In my opinion both the transactions in the series can properly be regarded as pre-ordained if, but only if, at the time when the first of them is entered into the taxpayer is in a position *for all practical purposes* to secure that the second also is entered into."

35. So far as *Craven v White* itself was concerned, Lord Keith said at 483A-B (emphasis added):

> "It is clear, in my opinion, … that on 19 July [the date of the transfer to Millor] there was no certainty that the sale to Oriel would take place. On that date the taxpayers were by no means in a position *for all practical purposes* to secure that the sale went through."

36. As for Lord Jauncey, he also expressed the test in very similar terms in a passage at 532D-533E which for reasons that will appear it is necessary to quote at some length (emphases added):

> "It must be remembered that in *Dawson* when the first transaction took place all the arrangements for the second transaction had already been made and indeed that transaction was completed within a very short time, possibly within only minutes, after the first. There was accordingly, to quote the words of Lord Wilberforce in *Ramsay*, at the time of

completion of the first transaction '*no likelihood in practice*' that the second would not be completed. I therefore have no difficulty in concluding that situation (3) suggested by Mr. Nugee does not fall within the ambit of the principle.

On the other hand, I consider that Slade L.J. in the Court of Appeal, ante, p. 420D-F, confined the ambit of the *Ramsay* principle too closely by his reference to all the essential features of the second transaction having been determined at the time when the first was effected. There might be circumstances in which at the time of the first transaction arrangements for the effecting of the second transaction had reached a stage at which it could properly be found as a fact that the first transaction was interdependent although a final price or specific buyer had not then been identified. Arrangements for a sale by auction might be such a situation. I read his reference to ability to procure the implementation of the second transaction as covering both the case where there was a binding contract to effect the second transaction as well as the case where there was no such contract but where there was an expectation that it would be effected and *no likelihood in practice* that it would not.

My Lords, in determining whether a number of transactions of which at least one has no purpose other than tax avoidance (the tax step) should be treated for fiscal purposes not as independent but as forming part of one composite linear transaction from which tax consequences flow certain factors must be taken into account. These include: (1) the extent to which at the time of the tax step negotiations or arrangements have proceeded towards the carrying through as a continuous process of the remaining transactions; (2) the nature of such negotiations or arrangements; (3) the likelihood, at the time of the tax step, of such remaining transactions being carried through; and (4) the extent to which after the tax step negotiations or arrangements have proceeded to completion without genuine interruptions. I do not suggest that this list is exhaustive and there may well be other factors of equal or greater importance in particular cases.

If it were appropriate to prepare a formula defining 'composite transaction' in the light of the passages in the speeches in *Ramsay*, *Burmah* and *Dawson* to which I have referred I should be tempted to suggest the following:

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

> or arrangements for the carrying through as a continuous process of a subsequent transaction which actually takes place had reached a stage when there was *no real likelihood* that such subsequent transaction would not take place and if thereafter such negotiations or arrangements were carried through to completion without genuine interruption.'

However, I am conscious that this may well constitute too rigid an approach to the problems and I therefore put it forward as a tentative guide rather than as a definitive exercise."

37. So far as *Craven v White* itself was concerned, Lord Jauncey said at 535F-G (emphases added):

> "… if, at the date of the share exchange agreement, the question had been asked whether to use Lord Wilberforce's words there was *any likelihood in practice* that the sale to Jones would not be completed I think that it would have been very difficult to say that there was *no such likelihood*."

38. Notwithstanding the similarities between the ways in which the three members of the majority expressed the test ("no practical likelihood" per Lord Oliver, "for all practical purposes" per Lord Keith and "no likelihood in practice" or "no real likelihood" per Lord Jauncey), closer examination of their speeches reveals a difference between Lord Keith on the one hand and Lord Jauncey on the other hand that is of some significance for the present case, while Lord Oliver did not expressly advert to the point. It can be seen from the second passage we have quoted from Lord Keith's speech that he thought there could not be a single composite transaction when "neither the identity of the purchaser nor the price to be paid nor any of the other terms" of the second sale were known at the time of the first sale. It can also be seen from the first passage we have quoted from Lord Jauncey's speech that he thought there could be a single composite transaction "although a final price or specific buyer" for the second sale "had not … been identified" at the time of the first sale, giving the example of a sale by auction. In this respect, Lord Jauncey was closer to the views of the minority, since Lord Goff also considered that there could be a single composite transaction where the second step was an auction (see 524C and 524H-525A).

39. In addition to *Craven v White*, the Appellants also rely upon the decision of Vinelott J in *News International plc v Shepherd* [1989] STC 617, although they acknowledge that it is not binding on this Tribunal. In that case News International held listed shares standing at a gain. It acquired two companies with pre-existing allowable losses ("the loss companies"). It then sold the shares to the loss companies, which sold the shares in the market on the London and Australian stock exchanges two days later. The rationale for the interposition of the loss companies was to enable them to acquire the shares intra-group, and then to sell the shares on the stock exchange and realise gains which they could set off against their pre-existing losses. When the shares

were transferred to the loss companies, a decision had already been taken by those responsible for the conduct of the group's affairs to sell the shares on the stock exchange, but no arrangements had been made for that sale. Vinelott J held in those circumstances the Special Commissioners had been wrong to conclude that the two sales constituted a single composite transaction.

40. There are two passages in Vinelott J's judgment which are of some importance for present purposes. The first is at 657j-658g:

> "Counsel for the Crown fastened on the references in the speeches of Lord Goff and Lord Jauncey to an auction sale. He submitted that there can be no distinction in principle between a case where an asset is transferred to a company with a view to it being sold by auction and a case where marketable securities are transferred to a company with a view to their being sold through the Stock Exchange. In both cases the sale can be said to be 'preordained' in the sense that the transfer is made as a step in a planned sale which the person arranging the transfer has the practical ability to procure. I do not think that Lord Jauncey had in mind that a transfer by A to B with the intention that it should forthwith be put up for sale by auction by B followed by a sale by auction should be treated as a single composite transaction—a sale by A. The reference to a sale by auction in the speech of Lord Jauncey must be construed in its context. The first of Lord Jauncey's guiding factors is that 'the extent to which at the time of the tax step', the transfer from A in B, 'negotiations or arrangements have proceeded towards the carrying through as a continuous process of the remaining transaction'. The reference to 'the carrying through as a continuous process' is repeated in his suggested formula. Looked at in its context I think the situation envisaged by Lord Jauncey as possibly falling within the *Ramsay* principle is one where, at the time of the transfer by A to B, A has already made the necessary arrangements for a sale by auction and the transfer is made in the confident expectation that the asset will be sold at a satisfactory price.
>
> It is not difficult to conceive of circumstances where a sale by auction would not differ in any material respect from the sale to Wood Bastow in *Dawson*; for instance, if property were put up for sale by auction to meet some contractual requirement binding on the vendor with a reserve price at a time when it was known that a particular purchaser was willing to pay that price and that there was no practical likelihood that any other purchaser would outbid him. If the property were transferred shortly before the auction sale took place the outcome might then be as probable as was the prospect that the sale to Wood Bastow would take place at the time when the shares were transferred to Greenjacket. The question whether the *Ramsay* principle should be applied in such a case or in a case where

> arrangements had been made for a sale by auction before the transfer from A to B, there being then no purchaser in mind and no practical certainty that the property would reach a reserve price, are questions that will have to be determined when they arise. It is sufficient for the present to say that I do not think that Lord Jauncey, who agreed with the speech of Lord Oliver, could have had in mind that a transfer of an asset by A to B with the intention that the property should be sold by B by auction followed by a sale by auction arranged by B might constitute a single composite transaction within the *Ramsay* principle Such a situation would not differ in any material respect from the situation in *Craven v White* where equally the shares were transferred to a holding company with the intention that they be sold and at a time when discussions with the company which was the front runner in negotiations for the disposal of the shares had been resumed and were likely to result in a sale. Save in rare circumstances where property is put up for auction there can be no certainty that it will reach a realistic reserve (if one is set) or the price contemplated if there is no reserve or indeed that it will necessarily be sold at all."

41. The second passage is at 659g-660a:

> "There is one other observation that I should make on this point. The brevity of the period between a transfer to a holding company and a sale by the holding company to the intended purchaser may be an important or even a decisive factor in determining whether the two steps were part of a single composite transaction. In *Dawson*, as has been often observed, all the essential steps were carried through between breakfast and lunch. But there is an important factual difference between a sale of, for instance, shares in an unlisted company and a sale of shares in a listed company. Negotiations for the sale of shares in an unlisted company are often, or indeed normally, protracted. Accountants and legal advisers are brought in to negotiate, for example, the extent of the warranties to be given by the vendors. So, if the sale follows shortly after the transfer to the holding company the tribunal may infer that everything was cut and dried when the shares were transferred to it. A sale of a holding of shares of a listed company through the Stock Exchange is very different. There, all that is normally required is a telephone call to a stockbroker. In the instant case the shares were transferred to [the loss companies] at a time when [News International] had decided that they were ripe for sale. But there is no ground for inferring from the brevity of the period between the transfer of the … shares [to the loss companies] and the sale of those shares on the Australian Stock Exchange alone that arrangements had been made for the sale before the transfers, nor indeed that those shares would

> have been sold if the price had collapsed on the day following the transfer."

42. We are respectfully unable entirely to agree with Vinelott J's reasoning in these two passages. So far as the first passage is concerned, we agree with Vinelott J that, in considering whether the second of a series of two sales was pre-ordained at the time of the first so that the two are properly to be viewed as a single composite transaction, the fact the second sale is a sale by auction does not necessarily mean that the answer is no: it depends on the facts. We are unable to agree that it is a correct reading of Lord Jauncey's speech that the answer must be no if the identity of the purchaser and/or the price are not known at the time of the first sale. On the contrary, Lord Jauncey was explicit that the answer could be yes in appropriate circumstances.

43. As to the second passage, we agree with Vinelott J that, in considering whether the second of a series of two sales was pre-ordained at the time of the first so that the two are properly to be viewed as a single composite transaction, the relevance of the brevity of the period between the two must depend on the circumstances. But in so far as Vinelott J was suggesting that a sale of listed shares through the stock exchange was unlikely to have been pre-ordained at the time of a prior sale, we disagree. It is not difficult to imagine circumstances where such a sale would be virtually inevitable. Moreover, we consider that, in general and depending on the circumstances, a sale of listed shares through the stock exchange is more easily analysed as forming part of a composite transaction even though the identity of the buyer(s) and the exact price was unknown at the time of a prior sale than is a sale by auction.

44. As counsel for the Appellants rightly accepted, *Craven v White* has been qualified by the decision of the House of Lords in *Inland Revenue Commissioners v Scottish Provident Institution* [2004] UKHL 52, [2004] 1 WLR 3172, although he submitted that the qualification was not material to the present case given that the Appellants do not rely upon the Relevant Event. In that case Lord Nicholls, delivering the opinion of all their Lordships, said:

> "21. Mr Aaronson said that a test of 'no practical likelihood' derived from the speech of Lord Oliver of Aylmerton in *Craven v White (Stephen)* [1989] AC 398, 514 and assented to by Lord Keith of Kinkel and Lord Jauncy of Tullichettle. In that case, however, important parts of what was claimed by the Revenue to be a single composite scheme did not exist at the relevant date. As Lord Oliver said, at p 498:
>
> > 'the transactions which, in each appeal, the Inland Revenue seeks now to reconstruct into a single direct disposal from the taxpayer to an ultimate purchaser were not contemporaneous. Nor were they pre-ordained or composite in the sense that it could be predicated with any certainty at the date of the intermediate transfer what the ultimate destination of the property would be, what would be the terms of any

> ultimate transfer or even whether an ultimate transfer would take place at all.'

> 22. Thus there was an uncertainty about whether the alleged composite transaction would proceed to completion which arose, not from the terms of the alleged composite transaction itself, but from the fact that, at the relevant date, no composite transaction had yet been put together. Here, the uncertainty arises from the fact that the parties have carefully chosen to fix the strike price for the SPI option at a level which gives rise to an outside chance that the option will not be exercised. There was no commercial reason for choosing a strike price of 90. From the point of view of the money passing (or rather, not passing), the scheme could just as well have fixed it at 80 and achieved the same tax saving by reducing the Citibank strike price to 60. It would all have come out in the wash. Thus the contingency upon which SPI rely for saying that there was no composite transaction was a part of that composite transaction; chosen not for any commercial reason but solely to enable SPI to claim that there was no composite transaction. It is true that it created a real commercial risk, but the odds were favourable enough to make it a risk which the parties were willing to accept in the interests of the scheme.

> 23. We think that it would destroy the value of the *Ramsay* principle of construing provisions such as section 150A(1) of the 1994 Act as referring to the effect of composite transactions if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. We would be back in the world of artificial tax schemes, now equipped with anti-*Ramsay* devices. The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned."

45. In our view the *Scottish Provident* case is relevant not merely because it prevents the Appellants from relying upon the Relevant Event. The last sentence we have quoted is of general application.

46. We now turn to consider the reasoning of the FTT. Although counsel for the Appellants criticised the phraseology of a number of passages in the FTT's decision, we did not understand him seriously to dispute that the FTT had purported to apply the test laid down by the majority in *Craven v White*, namely to consider whether, at the time of the first sale from A to B, there was "no practical likelihood" that the second sale from B to C would not proceed. In any event, we consider that it is clear that the FTT did purport to apply that test: the FTT referred to the test at [43], [73], [74] and [79] and purported to apply it at [111], [119] and [129].

47. Counsel for the Appellants nevertheless submitted that the FTT had reached the wrong conclusion. Leaving aside the involvement of Merrill Lynch and the question of the correct date of assessment, which we will consider below, he made two main criticisms of the FTT's reasoning.

48. First, he submitted that it could not be said that there was a single composite transaction involving the disposal of shares where, as here, neither the identity of the ultimate purchaser(s) nor the price was known at the time of the sale from A to B. We do not accept this submission. While it receives support from Lord Keith's speech in *Craven v White*, it is not supported by Lord Jauncey's speech and thus there was no majority in the House of Lords for the proposition. Moreover, the facts of the present case are clearly distinguishable from those in *Craven v White*, where at the critical date it was uncertain even whether there would be a sale to one party or a merger with another party. To the extent that the submission receives support from *News International v Shepherd*, we decline to follow that decision.

49. Secondly, he submitted that, even if (contrary to his first submission) there could be a single composite transaction in such a case, that could only be the case where arrangements had already been made for the sale from B to C at the time of the sale from A to B. Specifically, where the second sale was a sale to the market, then arrangements for that sale must have been in existence as the time of the sale from A to B. The difficulty we feel with this submission is that it depends on what is meant by "arrangements". As Vinelott J pointed out in *News International v Shepherd*, listed shares can be sold to the market by making a telephone call to a broker. If that is what is planned, very little in the way of concrete prior arrangements is required. The weight to be attached to this factor must depend on the nature of the relevant asset, and the extent to which prior arrangements are a necessary ingredient of a disposal.

50. In any event, the question does not fall to be considered in the abstract, but on the specific facts of this case. The AWG shares were listed shares for which there was a rising market demand. The FTT found that on 24 November 2004, the day before the Scottish Trustees exercised the put options, they were advised that the share price was around £7.29. The FTT also found that it was not likely that the price would fall in the period between the exercise of the put options and the sale of the shares to the market. It is plain that the Scottish Trustees anticipated that the Irish Trustees would have no difficulty whatsoever in immediately selling the shares to the market at the prevailing market price. Moreover, it is not the case that no arrangements at all had been made by the time of the first sale. By 19 November 2004 the Irish Trustees had been advised that the AWG shares were performing well and of the Morrison family's desire to diversify the trust assets, and the Irish Trustees were already in discussions with Merrill Lynch. By 24 November 2004 the Irish Trustees had resolved to appoint Merrill Lynch. In those circumstances we consider that the FTT was entitled to conclude that, viewed as at either date, there was no practical likelihood that the Irish Trustees would not sell the AWG shares to the market at market value.

Merrill Lynch

51. It is common ground that the scheme did not proceed as planned to the extent that the Irish Trustees sold the AWG shares to Merrill Lynch, who re-sold them to the market, rather than directly to the market. Counsel for the Appellants submitted that this was significant, since it meant that the sequence of transactions that was ultimately executed was A to B to D to C, and not simply A to B to C as planned. Moreover, as noted above, he submitted that the importance of Merrill Lynch's involvement was illustrated by the fact that it affected the price obtained for the shares, and hence the gain which was sought to be charged to CGT by HMRC.

52. The FTT held that the involvement of Merrill Lynch made no material difference. In our judgment the FTT was entitled to reach that conclusion. It is clear from the FTT's findings of fact that the only reason why the Irish Trustees sold the AWG shares to Merrill Lynch rather than directly to the market was that the Irish Trustees accepted Merrill Lynch's professional advice that that was the best way to ensure that a good price was achieved given the size of the shareholding in AWG. The evidence before the FTT was that the decision to sell via Merrill Lynch acting as principal was simply one of choosing the most effective mechanism for selling the shares to the market. As Paraic Madigan, an Irish lawyer who advised the Irish Trustees, stated in a passage in his witness statement to which counsel for the Appellants drew our attention:

> "The 'risk bid' being proposed by Merrill Lynch enabled us to benefit from the share price then prevailing. The shares would be placed on the market over a period of a few days but the trusts would be insulated from any market fluctuations during that period. The outcome was subject to an agreed minimum share price. We therefore obtained the benefit of a sale to the market but at a price that was, in effect, underwritten by Merrill Lynch."

53. Consistently with this evidence, the FTT made no finding that the adoption of this mechanism resulted in the Irish Trustees receiving a lower price than they would otherwise have received. Indeed, the price achieved was higher than the price on the basis of which the Scottish Trustees decided to exercise the put option.

Date of assessment

54. The FTT proceeded on the basis that the date as at which it was necessary to decide whether there was any practical likelihood that the Irish Trustees would not sell the AWG shares to the market was 25 November 2004, that being the date when the Scottish Trustees decided to exercise the put options. The Appellants contend that the correct date was 19 November 2004, that being when the Irish Trustees granted the put options.

55. Although logically this question comes first, we have left it until last because it is the least important. As counsel for the Appellants himself submitted, if the Appellants are right about either the effect of *Craven v White* or the involvement of Merrill Lynch, then it does not matter if the right date is 19 or 25 November 2004.

56. In any event, we consider that the FTT was correct to consider the position as at 25 November 2004. The issue in the present case is whether, for CGT purposes, the Scottish Trustees are properly to be treated as having disposed of the AWG shares to the Irish Trustees, as the Appellants contend, or as having disposed of them to the market, as HMRC contend. Section 144(3) provides that the grant and exercise of an option are to be treated as a single transaction. If the Appellants are correct, the effect of section 144ZA is that the option exercise price is treated as the consideration for the disposals. HMRC can only succeed if the exercise of the options formed part of a single composite transaction. Accordingly, the critical date is the date of the exercise of the options, not the date of the grant of the options.

57. It is therefore not necessary for us to address the Appellants' argument that, assuming the correct date is the date of the grant of the option, then there was no single composite transaction because it was not certain until 25 November 2004 that the Scottish Trustees would exercise the options, still less was it certain that the Irish Trustees would sell the shares. Nevertheless, we think it is right to say that we are not persuaded by this argument. On the FTT's findings of fact there was no practical likelihood that the Scottish Trustees would not exercise the options, nor that the Irish Trustees would not sell.

Conclusion

58. For the reasons given above, the appeal is dismissed.

Mr Justice Arnold and Judge Berner

Release date: 3 August 2017