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Special Edition: Tribute to the late Professor John Tiley

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‘Managing Tax Avoidance: Recent UK experience’

John Tiley – Annual lecture Melbourne 2007

with comments by Ann O'Connell¹ (in blue)

*When John Tiley retired from his position at the University of Cambridge in 2008, his many distinguished friends and colleagues contributed to a book entitled *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley*.² Many of the contributors to the book noted the impact that John Tiley had had not just on their views on taxation but also on the formulation of tax policy and the legitimacy of taxation as an area of study within law schools. It appeared that John Tiley could be all things to all people – he was admired by the profession, especially in the UK where he had taught many of them, by governments as a policy adviser and by academics all over the world for his ability to analyse cases, critique policy proposals and to convey his genuine enthusiasm for the subject of taxation. An article entitled the “Joy of Tax”³ was emblematic of John’s mischievous style and his understanding of the need to encourage academic study of a discipline that was often viewed as number crunching. With this in mind he initiated the hugely successful, invitation only, History of Tax conferences in 2002⁴ which soon became the hottest ticket in town. He formed the Centre for Tax Law in 2000 and went about persuading visiting academics and judges to share their thoughts with those in the UK. John also travelled the world welcoming insights into the practices and policies adopted in other jurisdictions. He was a prolific writer of thoughtful articles containing theoretical and comparative approaches to his chosen subject.⁵ The Melbourne Law School was therefore delighted when he agreed to deliver the third Annual Tax Lecture in 2007.*

¹ Ann O'Connell, Professor, Law School, University of Melbourne; Fellow, Taxation Law and Policy Research Group, Monash University.

² John Avery Jones, Peter Harris and David Oliver (eds), Cambridge University Press, 2008.

³ *The Reporter*, 2003, being the journal of the Society of Legal Scholars previously the Society of Public Teachers of Law.

⁴ The conferences were organized by John and his wife Jillinda at Lucy Cavendish College where Jillinda is a Fellow. The proceedings of each conference were published as *Studies in the History of Tax Law* Vols 1 to 6 by Hart Publishing. The proceedings of the 2012 conference were published shortly after John’s death in 2013.

⁵ In addition to the articles referred to in the lecture I came across more than 12 other articles written by John on the substantive topic of tax avoidance.

*The topic he chose for the lecture was 'Managing Tax Avoidance: Recent UK experience'. It involved an analysis of the position in the UK to that point, starting with the House of Lords decision in *WT Ramsay Ltd v IRC*,⁶ as well as setting out his preference for judicial development of anti-avoidance rules rather than the introduction of a statutory general anti-avoidance rule (a GAAR). Before his death John had agreed to revise the lecture to bring it up to 2013 with a view to publishing it. Based on those discussions, I have revised the lecture, divided it into 6 parts and included a postscript to cover the more immediate period. The 6 parts are:*

- 1. Introduction*
- 2. The development of the 'so-called' Ramsay doctrine*
- 3. Other ways of dealing with avoidance*
- 4. The 1997 GAAR proposal*
- 5. Ramsay to Barclays*
- 6. Conclusions*

Professor Tiley commenced his lecture with brief comments about the previous two Annual Tax Lectures and referred briefly to the 'US doctrines' that he had spent a year trying to understand. But, as John would say, more of that later.

*A clue to his own views on the subject of dealing with tax avoidance can be discerned from his reference to the remarks of Lord Scarman in *Furniss v Dawson*⁷...*

1 INTRODUCTION

Thank you for inviting me. It is a great honour to be asked to give the third Annual Tax Lecture especially when I have two such eminent and 'assiduous' predecessors. I have read their slightly contrasting comments and will try to steer a middle course. The Ramsay case of 1981 will be my equivalent of *Myer Emporium* for Justice Young. I was much taken by Allan Myers' point that Chief Justice Barwick's attitudes could be traced back to the pre-WWII era of individualism soon to be overtaken in the wartime and post-war eras by the need, constantly demonstrated in films and plays as well as judicial decisions, to pull together. I was wondering whether attitudes might swing back when I came across a report of a survey by the Henley Centre for Forecasting,⁸ a prestigious and independent body in the UK. This showed that, for the first time in 10 years, a majority now believe that the quality of life is best improved by putting the individual first.⁹ The report notes that such individualism has its price; the Association of Graduate Recruiters found many candidates far too self-

⁶ [1981] 1 All ER 865, [1982] AC 300.

⁷ [1984] 1 All ER 530, [1984] AC 474.

⁸ The Henley Centre, University of Reading.

⁹ In 1997 when Tony Blair came to power 70% adopted a community first approach. [I could not find a reference for this but assume it refers to the policies of New Labour, such as set out in Blair's speech to the Fabian Society in 1998 where he said: 'Our mission is to promote and reconcile the four values which are essential to a just society which maximises the freedom and potential of all our people - equal worth, opportunity for all, responsibility and community.' See *The Independent* 21 September 1998: <http://www.independent.co.uk/arts-entertainment/new-politics-for-the-new-century-1199625.html>]

centred to employ - more than half its members would fail to fill their vacancies this year.¹⁰

It is a great pleasure to be back in Melbourne. My links began with Harold Ford and I spent two months here in 1979. Since then I have tended to spend some of my sabbatical leave in North America not least in 1985—86 when I had the pleasure of being in Case Western Reserve University Law School in Cleveland, Ohio. I spent the year with Leon Gabinet, Erik Jensen and Karen Moore (now a Federal Judge) trying to make sense of the American materials which had just been cited enigmatically by the House of Lords in *Furniss v Dawson*.¹¹ The overwhelming message I came away with was that the US system with its doctrines such as form and substance, step transactions, economic substance and sham were all very well in their natural habitat but I was not at all sure that they would fit well in the UK where, it seemed to me, we place great emphasis on finding rules that are justiciable. As Lord Scarman said in *Furniss v Dawson*: 'the determination of what does, and what does not, constitute unacceptable tax evasion is a subject suited to development by judicial process.'¹²

You will note that Lord Scarman uses the term 'evasion' rather than 'avoidance' thereby showing that he had not taken his basic course in taxation. However Lord Scarman was far too great a judge - and classical scholar¹³ - to have done that without thought and a revisiting of the terminology is overdue – but not this evening.

In Part 2 Professor Tiley outlined the judicial approach to tax avoidance in the UK starting with the House of Lords decision in Ramsay in 1981. Having made the point that he preferred the judicial approach, he took the view that the House of Lords in Ramsay adopted a novel approach but without overturning what had been accepted as the cardinal rule of the Duke of Westminster, and really this was all just a matter of statutory interpretation.....

2 THE DEVELOPMENT OF THE 'SO-CALLED' RAMSAY DOCTRINE

I presented these views in a series of articles in the *British Tax Review*¹⁴ which attracted interested comment from a variety of American scholars. Some suggested that I had over-dramatised the situation by presenting their doctrines as hard rules rather than as devices for use in interpreting statutes. I had not intended to do so but, as my purpose was precisely to prevent the House from turning them into hard rules, I should not complain. As it happened, the English courts did try to treat their own words as rules so my caution was justified. The articles formed part of the taxpayer's paperwork in *Craven v White*¹⁵ in 1988. Now in 2007 we have ended up with a situation not unlike the US in that we have now reduced our questions to ones of interpretation rather than hard rules. But that is simply clearing the decks for a new game. As I like to say, less chaos more uncertainty.

¹⁰ *The Association of Graduate Recruiters*: <http://www.agr.org.uk/>

¹¹ [1984] 1 All ER 530, [1984] AC 474.

¹² [1984] AC 474 at 513.

¹³ Lord Scarman was a classical scholar at Radley College and then Brasenose College, Oxford University where he obtained First Class degrees in the two famous classical exams known as Mods and Greats.

¹⁴ John Tiley, Judicial Anti-Avoidance Doctrines [1987] *British Tax Review* 180 and 220; [1988] *British Tax Review* 63 and 108.

¹⁵ [1988] STC 479, [1989] AC 398.

My, rather large, brief is to talk about how we manage avoidance in the UK, our judicial/legislative responses, including recent UK developments and our 'rash' of anti-avoidance legislation. It includes my views on the approach of the House of Lords as compared, say, to the use of a general anti-avoidance rule (GAAR) or detailed legislation countering specific tax schemes. I must also cover the UK approach to notification or registration of tax schemes and the role of the tax advisor, given your own promoter penalties legislation. We shall look at the work of a new player in our fiscal legislative process, the House of Lords Select Committee on the Finance Bill. This Committee brings the considerable financial expertise existing on all sides of the House to inform consideration of the Finance Bill during its passage through Parliament. However it must not encroach on the financial privileges of the House of Commons and therefore does not address questions involving the rates or incidence of tax but focuses on technical matters of tax administration, clarification or simplification.¹⁶

My own attitude or, if I am on the European mainland, my philosophy, is that I approve of what we call the 'Ramsay approach' or the composite transaction doctrine (what to call it has been the cause of vexed and heated debate as we shall see later) and am hostile to avoidance schemes. I think these schemes give rise to complex legislation and in turn there are increases in costs for everyone. It can also lead to a breakdown of trust between tax authorities and the taxed and such trust, if mutual, is important. Some of you may find this last point an odd, eccentric or even pernicious way of talking and wonder if I also believe in Father Christmas.

Let us turn to the facts of the scheme in *Ramsay v IRC*,¹⁷ peddled in the 1970s, so you will see what I mean. *Ramsay* concerned capital gains tax (CGT). A company (R) had a large gain (£187,977) and wished to create an allowable loss which could be set against the gain and so offset its liability for tax. R bought a scheme from advisers on terms which made the amount of the fee vary with the amount of tax saved. We now enter the fantasy land of tax planning. R bought shares in another company (C) and proceeded to make two, apparently long term, loans to C, each of £218,750 at 11% (a genuine commercial rate at that time) and repayable at par (ie £218,750) after 30 and 31 years respectively. C was entitled to make earlier repayment, if it wished to but was obliged to do so if it went into liquidation. If either loan were repaid before its maturity date, it had to be repaid at par or at its market value, whichever was the higher. As C did not have £437,500 lying around, it borrowed that sum from a bank associated with the scheme's vendors. R had the right to decrease the rate of interest on one loan, on one occasion only, provided there was a corresponding increase on the other loan. R exercised the right causing the rate on one loan (L1) to drop to nil; this meant that the rate of interest on the other loan (L2) had to move in the opposite direction and by the same amount. So the interest rate on L2 rose to 22%, making it a significantly valuable asset, and L2 was sold by R for its market value price of £391,481, a gain of £172,731. Subsequently C paid off L1, at par as it was obliged to do. The very directly connected value of the shares in C dropped and the shares were sold by R at a large consequential loss (£175,731).

R argued that, while the loss on the shares should be recognized, the gain on the loan should not. This was because of a rule that a gain on a debt, as opposed to a debt on a

¹⁶ House of Lords, Select Committee on Economic Affairs, Report on the Finance Bill 2003, 17 June 2003, paras 7–8.

¹⁷ [1982] AC 300.

security, should not be recognised. Accepting a new line of argument based on treating a series of transactions such as these as one composite transaction, the House of Lords decided there was no relevant loss for CGT purposes. The House was surely right. No system can tolerate a situation in which taxpayers up and down the country have a choice – to pay the Revenue or pay a tax adviser. The scheme failed in the Court of Appeal and in the House of Lords.

The approach of the House of Lords in *Ramsay* was a novel one – it was novel because this was the first time that the composite transaction point had been put to one of our courts; it was put by Peter Millett QC, (later Lord Millett) counsel for the Revenue. The members of the House were very conscious of the novelty of the point and Lord Wilberforce was at pains to point out that their decision did not, in his view at least, undermine what he called 'the cardinal principle' of *Inland Revenue Comrs v Duke of Westminster*¹⁸ that where a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance.¹⁹ I think Lord Wilberforce is right on this – we must not undermine the cardinal principle but we can be a little more realistic in our approach to the facts. The *Duke of Westminster* case and others from that era are rightly taken as examples of a strict approach to the interpretation of tax legislation. That was the nature of the judicial approach in many other areas. In 2007 we no longer believe in a strict approach; we prefer a purposive approach. As was said in the *Barclays* decision in 2004,²⁰ the old strict approach went hand in hand with a very formalist approach to the facts and gave rise to an insistence on the part of the court on treating every transaction which had an individual legal identity as having its own separate tax consequences. So the courts were both literal and blinkered. *Ramsay* liberated the court from both these vices.

So the composite transaction approach enabled the court to find a modern real commercial characterisation of the facts. As Lord Wilberforce had said in *Ramsay* the court's task was to ascertain the legal nature of any transaction to which it was sought to attach a tax or a tax consequence and if that emerged from a series or combination of transactions, intended to operate as such, it is that series or combination which must be considered.²¹ This did not upset the cardinal principle set out above but enables the court to be less blinkered in deciding what the genuine transaction is.

The story by which we moved from *Ramsay* in 1981 to *Barclays* in 2004 forms the last – and longest – part of this lecture. It can be seen as a story of judicial development in the traditional common law way – of development followed by doubts, of advance followed by circumspection. While Lord Wilberforce did not treat the case of *Ramsay* as creating a judicial GAAR, it clearly had the potential to do so if further and wider arguments were advanced in later cases or if judges left things less tidily than he had done. Lord Wilberforce does not appear in the later cases – he retired soon afterwards but virtually all the later cases take his comments in *Ramsay* as their starting point. The story that does emerge of the way in which the various decisions were first of all argued by counsel and then how they were viewed by the various participants or, as we now have to call them, stakeholders reacted – by stakeholders I

¹⁸ [1936] AC 1.

¹⁹ [1982] AC 300 at 323.

²⁰ *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] 1 AC 684 paras 28-32.

²¹ [1982] AC 300 at 322-3.

mean the lower courts, the legal and accounting professions and, above all, Her Majesty's Revenue and Customs (HMRC).

After *Barclays* the question for HMRC will be whether they will be content to accept that approach indicated by the judges. It is not an approach which will stop all instances of what HMRC now call 'abuse'. They have been tempted to look again at a GAAR but I think the temptation is going to be resisted. My feeling about this is that they are not yet willing to set up the sort of rulings system that practitioners think would be needed. The HMRC view of rulings in the context of a GAAR was spelt out by the department's star witness before the House of Lords Committee last year:

...I think there is a very significant issue that arises there: how sensible would it be to offer pre-transaction clearances for what were very clearly tax avoidance arrangements? Again, how sensible is it to offer arrangements like that which then enable planners to refine their product again and again and again, as we have seen with some of our existing clearance measures, until they have got something that they think works. So there are very difficult issues to be sorted out.²²

In Part 3, Professor Tiley outlined some of the other ways in which tax avoidance was being dealt with in the UK. This included the use of targeted anti-avoidance rules, the possibility of retrospective legislation, imposition of penalties for tax advisers, as well as improved relationships with large business. He also discussed the recently introduced (at that time) disclosure of tax avoidance schemes (DOTAS).

3 OTHER WAYS OF DEALING WITH TAX AVOIDANCE

These remarks are of course directed to issues of rulings and avoidance. Elsewhere some progress has been made. In November 2006 the Varney Committee reviewed links with large businesses. The Chancellor announced that he would implement the review in full; hence HMRC has now agreed to bring in advance rulings.²³ However, as far as I can tell, it is not a general system. Its purpose is to give business certainty about the tax consequences of significant investments and corporate reorganisations. I note a) it is confined to business, b) it may be confined to large businesses, c) it is not aimed at Mr Hartnett's avoidance schemes but is available only for those who provide clear plans for investment, reconstructions and reorganisation.²⁴

Even without a GAAR, HMRC can still do much to counter perceived abuse. Over the 40 or so years I have been dealing with our tax system, we have not been short of provisions, some narrow others broad, countering avoidance. Like you we have over the years had many provisions designed to shore up the income tax in response to court decisions or planning schemes that came to light. We pay various prices for all this highly prescriptive legislation; one price pointed out by Lord Hoffman, is that the courts are driven to a non-purposive approach even though this leads to holes in the

²² David Hartnett, Director General of HMRC quoted in House of Lords, Select Committee on Economic Affairs, Report on Finance Bill 2006, para 62.

²³ HM Treasury, Press Release 92/06, 17 November 2006, Proposal 4.6 The Review itself is available via www.hmrc.gov.uk/largecompanies/reviewlinks-largebus.shtml

²⁴ One may contrast the treatment of big business with that meted out to two taxpayers by the Court of Appeal in what is known as the Arctic Systems case, more formally *Jones v Garnett* [2006] 1 WLR 1123. [The decision was overturned by the House of Lords: [2007] UKHL 35.]

net HMRC have persuaded Parliament to enact.²⁵ In recent years we have had a series of major reforms to our corporate tax base. Mercifully each set of provisions has its own code and perhaps not so mercifully for some, though in my view quite properly, each code has its own anti-avoidance rule or targeted anti-avoidance rule (TAAR). Here is the one for capital expenditure on Intangibles:²⁶

111 (1) Tax avoidance arrangements shall be disregarded in determining whether a debit or credit is to be brought into account under this Schedule or the amount of any such debit or credit

(2) Arrangements are 'tax avoidance arrangements' if their main object or one of their main objects is to enable a company—

(a) to obtain a debit under this Schedule to which it would not otherwise be entitled or of a greater amount than that to which it would otherwise be entitled, or

(b) to avoid having to bring a credit into account under this Schedule or to reduce the amount of any such credit.

(3) In this paragraph—

'arrangements' includes any scheme, agreement or understanding, whether or not legally enforceable; and

'brought into account' means brought into account for tax purposes.

You will find slightly longer ones in terms of non-allowable purposes in our legislation on loan relationships,²⁷ on derivative contracts²⁸ (which used to be called financial instruments) and on manufactured payments.²⁹ We have similar provisions to try to counter capital loss schemes for corporation tax - to be extended beyond the corporate sector.³⁰ There is an interesting general rule in the tax credits legislation aimed at those who deprive themselves of income for the purpose of securing entitlement to tax credits.³¹ The year 2005 saw many provisions dealing with avoidance involving financial arrangements.³² As with many changes in 2005 and later, we are able to trace these back to the new information gathering power – the duty to notify (discussed below). There is also a view that moving to an accounting based system of profit determination would reduce avoidance but that raises too many other issues.³³

²⁵ Lord Hoffmann, Tax Avoidance [2005] *British Tax Review* 197 at 205.

²⁶ *Finance Act 2002*, Sch 29 has 143 relatively easy-to-read paragraphs.

²⁷ *Finance Act 1996* Sch 9 para 13 (last amended) 2006-7 version.

²⁸ *Finance Act 2002* Sch 26 paras 23 and 24.

²⁹ *Finance Act 2004* s 137.

³⁰ *Taxation of Chargeable Gains Act 1992* s 8 as amended by *Finance Act 2006* s 69; further amendments promised in 2007. [See *Finance Act 2007* s 27 that inserted a new s 16A entitled 'Restrictions on Allowable Losses'.]

³¹ *Tax Credits (Definition and Calculation of Income) Regulations 2002* para 15 'Claimants depriving themselves of income in order to secure entitlement'.

³² *Finance Act (No 2) 2005* s 39 and Sch 7.

³³ See generally Wolfgang Schoen, 'The Odd Couple: A Common Future for Financial and Tax Accounting?' (2005) 58(2) *Tax Law Review/New York University School of Law*, 111 esp at 144.

HMRC may also increase the price of abuse by retrospective or retroactive legislation. We had a spectacular example of this when we removed loss relief from commodity straddles with effect from a date two years earlier.³⁴ Today, such legislation is only used in clearly delineated circumstances and with clear warnings. For example the employment income tax rules, some will remember as Schedule E, were rewritten as part of the ongoing Rewrite programme in the *Income Tax (Earnings and Pensions) Act 2003*. In an effort to prevent avoidance these had to be immediately revised by the *Finance Act 2003*. Although Revenue spokesmen were optimistically assuring everyone that they had foreseen all that was to be foreseen they were wrong. On 2 December 2004 the Minister, Dawn Primarolo, informed by the schemes reported under the new rules, made a written statement to the House of Commons that new changes would take effect as from that date. She also said that when arrangements designed to frustrate the government intention that a proper amount of tax should be paid arose, further legislation would be introduced to close them down.³⁵ Anecdotal evidence suggests that this has had the hoped for effect.³⁶ We also sometimes change the tax effects of transactions entered into in earlier years, most recently in our inheritance tax. This slightly different technique conforms to the words of Dickson J, the great Canadian judge, who once said 'no one has a vested right to continuance of the law as it stood in the past.'³⁷

In the hope of inducing changes in behaviour we have also found very senior officials from HMRC going into offices to talk with Boards of Directors in an effort to wean them off avoidance schemes. We have the usual corporate governance issues. We also have a more aggressive stance from HMRC when investigating avoidance. As Chris Tailby, now Director of HMRC's Anti-Avoidance Group, but formerly one of our most distinguished private practitioners, has written:³⁸

HMRC's intention is to make avoidance risky for businesses to undertake. Our approach is to deploy our resources in the business areas where the risk to the tax base is greatest... [and] to take them out of the areas of lowest risk to leave business to concentrate on its core activities.From the perspective of HMRC it is difficult to see how it will normally be in the best interest of the client to adopt an arrangement which only arguably escapes the damaging label 'abusive practice' and even then may not succeed in reducing tax liability... The top... professionals will advise their clients to put clear blue water between themselves and any arrangement that might even arguably be described as an abusive practice.³⁹

Like you we have used the criminal law and have put tax advisers, even members of the Bar, in prison for the offence of conspiring to defraud the Revenue when they

³⁴ *Finance Act 1978* now *Income and Corporations Taxes Act 1988* s 399.

³⁵ House of Commons Hansard, Written Statements, 2 December 2004, col 46.

³⁶ Few schemes were notified after that date: Tolley's Yellow Handbook [*presumably 2004-2005*], LexisNexis 71.

³⁷ *Gustafson Drilling (1964) Ltd v MNR* [1971] 1 SCR 271 at 282-3, cited G T Loomer, 'Taxing out of time: Parliamentary supremacy and retroactive tax legislation' (2006) *British Tax Review* 64 at 67. Note that the retrospective *Finance Act 1978* provisions on losses were held compatible with our Convention on Human Rights in *A B C and D v the United Kingdom*, (Application 8531/79) and see the comment by Philip Baker 'Retrospective tax legislation and the European Convention on Human Rights' (2005) *British Tax Review* 1.

³⁸ Writing about *Halifax PLC v Customs and Excise Commissioners* (Case C 255/02) [2006] STC 919.

³⁹ C Tailby, 'Halifax - a Basis for Optimism?' *Tax Journal*, Issue 833, 17 April 2006, 4 at 6.

advised on schemes which failed.⁴⁰ Since 1 January 2001 we have had an offence of being knowingly concerned in the fraudulent evasion of income tax.⁴¹

It is time to talk, briefly, about our notification powers.⁴² We now have four separate regimes: direct taxes, stamp duties,⁴³ VAT and National Insurance.⁴⁴ I will concentrate on the direct taxes. The rules require a promoter⁴⁵ and sometimes the taxpayer (or client) to provide the Revenue with information about a) notifiable arrangements and b) proposals for notifiable arrangements.⁴⁶ For a scheme to be notifiable it must enable, or might be expected to enable, any person to obtain a tax advantage in relation to any tax so prescribed in relation to the arrangements. It is also necessary that the main benefit or one of the main benefits that might be expected to arise from the arrangements is the obtaining of that advantage. There is protection for legal privilege.⁴⁷ So, the key question is whether the tax advantage is the 'main benefit'. The HMRC Guidance says:

In our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve. Therefore we expect it will be obvious (with or without detailed explanation) to any potential client what they are buying and the relationship between the tax advantage and any other financial benefits. The test is objective and considers the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed.⁴⁸

In the direct tax area the obligation to notify generally falls upon the promoter of the scheme. It falls on the user of the scheme if the promoter is resident outside the UK and no promoter is resident within the UK.⁴⁹ If there is no promoter (ie the scheme is designed 'in house') the duty to notify falls on those entering into any transaction which is part of the notifiable arrangements.⁵⁰ The same applies where the promoter is prevented by legal professional privilege from making a full disclosure.⁵¹

The promoter must inform HMRC when the notifiable proposal is made available for implementation or, if earlier, when the promoter becomes aware of any transaction

⁴⁰ See John Tiley, *Revenue Law*, 5th ed 2005, Hart Publishing Oxford §4.5.3 and cases such as *R v Cunningham, Charlton, Wheeler and Kitchen* [1995] EWCA (Crim) J0222-1. For a particularly robust criticism see R Venables, 'Double Taxation Treaties: The Antidote to Anti-Avoidance Provisions?' (1996) *Offshore Tax Planning Review* 151.

⁴¹ *Finance Act 2000* s 144. The offence, on summary conviction, is punishable with imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both; and on conviction on indictment, imprisonment for a term not exceeding seven years or a fine, or both.

⁴² I am indebted to Rachel Tooma's article on the Australian provisions: 'New Tax Laws to Deter Promoters of Tax Avoidance Schemes' (2006) 2(1) *Journal of Australasian Tax Teachers Association* 158-177.

⁴³ The stamp duty rules apply if the property is not wholly residential and the applicable value is at least £5m: Stamp Duty Land Tax (Prescribed Description of Arrangements) Regulations 2005 SI 2005/1868.

⁴⁴ On the scope of HMRC powers re direct taxes, see *Finance Act 2004* s 318(1) definition of 'tax'.

⁴⁵ Defined in *Finance Act 2004* s 307.

⁴⁶ Defined in *Finance Act 2004* s 306.

⁴⁷ See *Finance Act 2004* s 314. On the scope of legal advice privilege, see *Three Rivers District Council v Bank of England* [2005] UKHL 48. Section 314 is reinforced by the Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004, para 6 added by SI 2004/2613.

⁴⁸ HMRC Guidance on Disclosure of Tax Avoidance Schemes: Income Tax, Corporations Tax, Capital Gains Tax and Stamp Duty Land Tax (June 2006) para 5.2.

⁴⁹ *Finance Act 2004* s 309.

⁵⁰ *Finance Act 2004* s 310.

⁵¹ The Tax Avoidance Schemes (Information) Regulations 2004 (SI 2004/1864) reg 4 (5A).

forming part of the proposed arrangements.⁵² The promoter does not have to notify HMRC if someone else has already done so.⁵³ Once HMRC has been informed, they may give the arrangements a reference number while further provisions deal with the obligations of promoters and parties to pass the number around.⁵⁴ The normal time limits by which a promoter must disclose a scheme are within 5 days of first making the scheme available for implementation or within 5 days of first becoming aware of a transaction implementing the scheme, whichever is the earlier. Those who fail to comply with a statutory obligation to disclose a scheme - or to advise a client of a scheme reference number issued by HMRC - are liable to penalties. Our approach is different from yours – we want compliance. There is an initial fine (£5, 000) and then a daily fine (£600) until the failure is remedied.

How well are the notification powers working? In 2006 the House of Lords Select Committee on Economic Affairs was pleased to note a broad consensus among witnesses from the private sector that the rules were working well, in particular by excluding unnecessary disclosures:

Setting up the necessary reviewing machinery has created more work for tax professionals and the burden is ultimately passed on to their clients in costs. *However, judged by the results described to us by HMT and HMRC, we concluded that this compliance burden was proportionate and justified by the outcome in terms of reducing the tax gap.*

At the risk of appearing a touch cynical what this shows is that the sort of people who provide evidence to House of Lords Committees are generally content. Before we let all this go to our heads we should note that the Committee has so far considered only the powers as enacted in 2004. In that first flush they were aimed just at certain types of arrangements connected with employment, especially employment related securities, and with financial products. There were also conditions or 'hallmarks' with regard to premium fees and confidentiality.⁵⁵

What were the 2004 rules trying to do? They were designed to improve transparency in the system and to enable the Revenue to counter 'sophisticated and aggressive avoidance schemes [that] thrive on concealment and secrecy'.⁵⁶ They were 'aimed at those marketing and using certain tax avoidance schemes and arrangements [and to ensure] early detection of such schemes and enable more effective targeting of avoiders'.⁵⁷ Our rules are not aimed at mass marketed schemes – we go wider than that. What they were after was not direct blocking, though that might follow, but speed of response by the Revenue. This was thought important because during the 1970s, in the *Ramsay* era, it was often a condition of buying a scheme that claims for the relevant relief should be delayed until the last possible moment). By 2004 it was

⁵² On multiple promoters and multiple proposals see *Finance Act 2004* ss 308(4) and (5).

⁵³ *Finance Act 2004* s 308(3).

⁵⁴ *Finance Act 2004* ss 311–13.

⁵⁵ The Tax Avoidance Scheme (Prescribed Description of Arrangements) Regulations 2004 (SI 2004/1863) Regs 5A and 8 (now repealed).

⁵⁶ Gordon Brown, Chancellor of the Exchequer, Pre-Budget Report 2004, House of Commons Hansard c 329.

⁵⁷ *Ibid.*

apparent that the Revenue needed to know about schemes earlier.⁵⁸ In relation to employment related securities this has been achieved.

The 2006 rules widen the net for direct taxes.⁵⁹ The obligation to notify now arises not where there are those two types of arrangement but with any arrangements when there are 'hallmarks'. The HMRC Guidance includes a useful flowchart.⁶⁰ In theory a person can implement a scheme within the time frame but there is no evidence that HMRC are concerned about this - at present. The 'hallmarks' include tests such as confidentiality, a premium fee, the presence of off-market terms and being a standardised tax product. There are also distinct hallmarks for schemes involving losses and, separately, leases. Most of the tests apply for income tax, capital gains tax, corporation tax and national insurance contributions (NICs). Unfortunately one has to dig through each rule to find that in most cases they do not apply to small and medium size enterprises (defined in European Commission law terms),⁶¹ and that only rarely do they apply to individuals.

One fear was that there would be too many returns; another that there would be too few. So how many have there been? To the end of September 2006 the provisional total of schemes reported was 1,143 of which financial schemes accounted for 443, employment schemes for 198 and Stamp Duty Land Tax (SDLT) for 506. The total for schemes coming within the hallmarks test was 34. Who provided those returns? The Big Four accounting firms provided 353; other accounting firms 194; legal firms 434; financial institutions and others 166. Most of the disclosures (399) by legal firms related to SDLT.⁶²

So how about there being too few? The *Finance Bill 2007* will contain clauses improving the rules. At present the Revenue are limited in what they can do to investigate non-compliance with the notification rules. There are rumoured to be two penalty cases pending but what HMRC wants is earlier information. As HMRC admitted in their note of the 2006 consultation, disclosure is, for the moment, effectively a self-regulatory regime.⁶³ Non-compliance not only undermines the purpose of the disclosure regime (to provide early information about avoidance schemes), it also creates distortions and puts those promoters who comply at a competitive disadvantage.

How do HMRC find out about schemes that are not notified? They monitor disclosures received and developments in the market place for tax schemes through published material, intelligence received and feedback from promoters. They also

⁵⁸ For comment see R Fraser 'Current Notes' [2004] *British Tax Review* 281-96 and 'Finance Act Notes: Tax Scheme Disclosure Provisions ss 19 and 306-19 [2004] *British Tax Review* 454-59.

⁵⁹ 2006/1543 Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006

⁶⁰ HMRC, Guidance on Disclosure of Tax Avoidance Schemes, June 2006 (Available on HMRC website) 18.

⁶¹ European Commission recommendation concerning the definition of micro, small and medium-sized enterprises, 6 May 2003 [*adopted 2005*].

⁶² L Narain, 'Tax Avoidance Disclosure: An Update' (2006) *Tax Adviser*, (September), 4.

⁶³ HMRC, Consultation Paper 'Ensuring Compliance with the Tax Avoidance Disclosure Regime' December 2006, para 14.

increasingly obtain evidence from enquiries into the tax returns of companies and individuals who have used schemes.⁶⁴

Some defaulters tell HMRC nothing more than that they have systems in place to identify whether or not their products are notifiable and that they are satisfied that the particular scheme is not. Such promoters will generally refer to Counsel's opinion they hold that the scheme is not notifiable, but do not explain why the scheme is not notifiable. The proposed new rules are designed to resolve disputes about what is and what is not notifiable. They may well include a power to get more information and a pre-disclosure enquiry to help HMRC get clearer reasons why a promoter thinks the scheme is not notifiable. Where there is a doubt about notifiability there may be a procedure by which HMRC can ask the [First-tier] Tribunal to order that scheme be treated as if it were notifiable – you can imagine the problems of the burden of proof here. Even more dramatically, where there is such a doubt, there may be a procedure by which HMRC can ask the Tribunal to determine that the scheme is notifiable.⁶⁵

In Part 4 Professor Tiley considered the proposal for a UK GAAR put forward by the Tax Law Review Committee of the Institute of Fiscal Studies. He is not a fan. Tellingly he said that in his view a GAAR is 'an admission of failure'. He does not say whose failure: he may be referring to the legislation or HMRC or the judges or the system as a whole.....

4 THE 1997 GAAR PROPOSAL

We have had GAARs in the excess profits taxation rules introduced for the First and Second World Wars.⁶⁶ Similar powers were part of profits tax⁶⁷ and the special charge in 1967.⁶⁸ However, the impetus for the introduction of a GAAR with more general application was provided in the 1990s by the Institute for Fiscal Studies (IFS), our leading tax research organisation and a fiercely independent one. Under the chairmanship of Graham Aaronson QC, the Institute's Tax Law Review Committee (TLRC) produced a report which, without actually recommending a General Anti Avoidance Rule (or GAAR) suggested that a GAAR with proper safeguards might well be preferable to the then uncertain state of case-law and explored what a GAAR should look like if it was to be acceptable;⁶⁹ it looked at a number of other countries including your own.⁷⁰ The Committee recommended first that specific anti avoidance provisions should continue to be used. As to a GAAR it set out certain elements and safeguards.

⁶⁴ HMRC, notes to draft clauses Pre Budget Report 6 December 2006: If HMRC obtains information that indicates a notifiable scheme may not have been disclosed, the normal practice is for HMRC to approach the promoter and invite explanation as to why the scheme has not been disclosed.

⁶⁵ The proposed clauses are 308A, 313A, 306A and 314A.

⁶⁶ On the history, see P Ridd 'Excess Profits Duty' in *Studies the History of Tax Law* Volume 1, J Tiley ed, Hart Publishing, 2004 chapter 5 and 'Excess Profits Litigation' Volume 2, 2007; see his comments on *Finance Act 1941*, s 35 etc and the decision in *Crown Bedding Co Ltd v IRC* [1946] 1 All ER 452; 34 TC 107 (CA) at pp 168-174.

⁶⁷ *Finance Act 1951*, s 32; see J Silberrad, 'Avoidance of Profits Tax Again Counteracted' (1964) *British Tax Review* 129.

⁶⁸ *Finance Act 1968*, s 50.

⁶⁹ Institute of Legal Studies, Tax Law Review Committee, 'Tax Avoidance Report' November 1997, the draft clause is in Appendix II.

⁷⁰ *Ibid*, Chapter 3 and Appendix 1.

The TLRC GAAR had several elements. In broad terms it proposed a purpose clause to deter or counteract transactions designed to avoid tax in a way which conflicted with or defeated the evident intention of Parliament. The basic rule contrasted a 'tax-driven' transaction with a normal transaction; a person was to be taxed in accordance with the normal transaction. Where, because the tax-driven transaction did not have a non-tax objective and so there is no normal transaction, tax was to be charged as if the transaction had not taken place. Among the safeguards was the notion of a 'protected transaction' to which the rule would not apply. An annual report by HMRC would be made to Parliament giving full details of the operation of the rule.

The tax elite of the nation had worked on the TLRC report so the Revenue had to consider it; they produced a consultative document with its own clause.⁷¹ Opinion within the Revenue was divided. Opinion in the profession - outside the 'elite' - was almost completely hostile. In turn the TLRC were severely critical of the Revenue's proposal.⁷² The truth is probably that the GAAR would have worked only with a proper system of rulings. The government was not willing to pay the financial cost of such a system, nor was it willing to pay the political cost of trying to force such a system onto taxpayers.

As we have seen earlier the rejection of a GAAR has not stopped the extensive use of provisions based on 'avoidance' and each major amendment to the tax base, usually corporation tax, has contained its own mini GAAR in the form of an unallowable purpose test—and without the protection of a statutory advance rulings system.⁷³

Since 1997 the Chancellor and the Paymaster *[this position appears to be similar to our Finance Minister]* have often said that they did not plan to bring forward a GAAR but, as it was in their thoughts, HMRC are carrying out a legal study of these sorts of rules around the world. Indications are that HMRC accept that the rules produced very mixed results.⁷⁴ Having read Allan Myers' address I do not think I need say more.

My view of the GAAR is that I regard it as a confession of failure *[emphasis added]*. Moreover it may be too late. Recent - and so far unpublished - work done by the TLRC reviewed the *Finance Acts* from 1997 to 2006. The conclusion reached was that of almost 200 changes in the law reviewed very few would be dealt with better by a GAAR.⁷⁵ More specifically, it was difficult to see how a GAAR could deal with avoidance structured around specific rules and definitions.

⁷¹ Inland Revenue 'General Anti Avoidance Rule for Direct Taxes, A Consultative Document' October 1998. *[The Inland Revenue was replaced by Her Majesty's Revenue and Customs in 2005.]*

⁷² Tax Law Review Committee, 'Response to Inland Revenue's Consultative Document' (IFS, February 1999).

⁷³ *Finance Act 1996* Sch 9 para 13, (Loan Relationships and since 2002 foreign exchange), *Finance Act 2002* Sch 26 para 23 (Derivatives) Sch 29 para 111 (Intellectual Property), *Finance Act 2004* s 137 adding *Taxes Act 1988* Sch 23A para 7A (Manufactured Overseas Dividends) and *Finance Act 2004* s 38 inserting a new *Taxes Act 1988* s 75 (Management Expenses) noting especially s 75(5); see also the reasons for removing annual payments from the category of charges on income in Finance Bill 2005 clause 132 and Inland Revenue Notes on the Bill.

⁷⁴ *[Professor Tiley may have been referring to the work being done at the IFS (see fn 75) where the following comment appears at para 14.2: 'It is clear that no jurisdiction has found a perfect solution and, in particular, the use of GAARs in varying forms has had mixed success.' The survey by the TLRC is Appendix E of the Discussion Paper.]*

⁷⁵ *The Tax Law Review Committee published a Discussion Paper 'Countering Tax Avoidance in the UK: Which Way Forward?' IFS, February 2009. The Discussion Paper considers the Finance Acts from 1997 to 2008: Appendix D.*

With all the activity, legislative and administrative, and with an objective of what HMRC would see as raising the level of taxpayer behaviour by informal means, it is not the right time to make the dramatic and politically demanding switch to a GAAR. I have to acknowledge that in so far as this activity is legislative, the effects on the length of our statute book have been dire. Some see a GAAR as a way of shortening the statute book. You can tell me whether it has that effect here. I believe we can do at least as well - and probably better - with our existing approach, especially as it seems to mesh in well with our schedular approach to the definition of income. We have neither a general definition of income nor a general system of deductions and we are systematically mean on loss reliefs across the schedules.

In Part 5 Professor Tiley charted the development of the judicial approach to tax avoidance in the UK from Ramsay in 1981 through to Barclays in 2004.

5 FROM RAMSAY TO BARCLAYS

It is time to return to the story to what our judges have been up to. We left *Ramsay* (1981) as it had been expounded in *Barclays* (2004) where it was said:

The modern approach to statutory construction is to have regard to the purpose of the particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. Until the *Ramsay* case, however, revenue statutes were 'remarkably resistant' to the new non-formalist methods of interpretation. The particular vice of formalism in this area of law was the insistence of the courts on treating every transaction which had an individual legal identity (such as a payment of money, transfer of property, creation of debt etc) as having its own separate tax consequence, whatever might be the terms of the statute. The *Ramsay* case liberated the construction of revenue statutes from being both literal and blinkered....Unfortunately, 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.⁷⁶

This tendency, the House of Lords acknowledged, had been encouraged by two features characteristic of tax law:

The first is that tax is generally imposed by reference to economic activities or transactions which exist as Lord Wilberforce said 'in the real world'. The second is that a great deal of intellectual effort is devoted to structuring transactions in a form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute.⁷⁷

It is to the story of the 'special rules' in *Ramsay* that we now turn. In the era of 1936 using strict construction and a blinkered view of the facts, the view was that the *Duke of Westminster* was right and, probably, more than right – it was proper. The 1970s with high income tax rates (in 1978 the top rate was 98%)⁷⁸ and a rather unsatisfactory

⁷⁶ *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] 1 AC 684 paras 28-32.

⁷⁷ *Ibid* para 34.

⁷⁸ In 1974 this was made up of a top rate of 83% plus the investment income surcharge of 15%.

capital gains tax, saw the advent of marketed avoidance schemes. The Revenue continued to argue in traditional ways and so lost cases such as *IRC v Plummer*⁷⁹ or got the right answer by a slightly strained construction as in *Floor v Davis*⁸⁰ where the House divided 3-2 with Lords Diplock and Wilberforce on opposite sides

As we saw, 1981 brought the House of Lord's decision in *Ramsay* the facts of which involved an artificial, circular, self-cancelling transaction: was there a chargeable gain or allowable loss? At the risk of quoting something very familiar to you I repeat Templeman LJ's classic analysis in *Ramsay* in the Court of Appeal:

The facts as set out in the case stated by the Special Commissioners demonstrate yet another circular game in which the taxpayer and a few hired performers act out a play; nothing happens save that the Houdini taxpayer appears to escape from the manacles of tax.

The game is recognisable by four rules. First, the play is devised and scripted prior to performance. Secondly, real money and real documents are circulated and exchanged. Thirdly, the money is returned by the end of the performance. Fourthly, the financial position of the actors is the same at the end as it was in the beginning save that the taxpayer in the course of the performance pays the hired actors for their services. The object of the performance is to create the illusion that something has happened, that Hamlet has been killed and that Bottom did don an asses head so that tax advantages can be claimed as if something had happened.

The audience are informed that the actors reserve the right to walk out in the middle of the performance but in fact they are the creatures of the consultant who has sold and the taxpayer who has bought the play; the actors are never in a position to make a profit and there is no chance that they will go on strike. The critics are mistakenly informed that the play is based on a classic masterpiece called 'The Duke of Westminster' but in that piece the old retainer entered the theatre with his salary and left with a genuine entitlement to his salary and to an additional annuity.⁸¹

After *Ramsay* in the House of Lords we had to ask ourselves what the House had done. Lord Wilberforce concluded that nothing the House was doing upset the cardinal principle about substance and form. However, it was not clear what the House would do next. The fact that we can now say, post-*Barclays* in 2004, that it was all a question of construction does not alter that fact that at the time very different views were held. Was the House just adopting a realistic up-to-date approach to questions of fact and law or, was it a watershed case, like *Donoghue v Stevenson*,² rewriting the law and creating at least the opportunity for the development of a judicial GAAR? If the latter, what hedging doctrines or limits would the court develop? If it was less than a GAAR and more like a step transaction doctrine, when was it to be applied? Always or selectively? If selectively, then on what basis? Life was uncertain – and, for an academic at least, great fun. For others things were more serious. What should the Revenue do with their success?

⁷⁹ [1979] STC 793.

⁸⁰ [1979] STC 379.

⁸¹ *W T Ramsay v IRC* [1979] STC 582 (Court of Appeal).

The year 1982 brought the decision in *Burmah Oil*.⁸² The UK corporate reorganisation tax rules did not have a business purpose requirement until the *Finance Act 1978*. In *Burmah Oil*, the House of Lords was dealing with facts which occurred before that Act came into force. With Lord Diplock to the fore, they used *Ramsay* to prevent a company from using corporate reorganisation rules to turn worthless debt into worthless equity. There was little guidance on doctrine; just that *Ramsay* had changed the judicial approach.⁸³ The only distinction from *Ramsay* – in the eyes of the judges – was that here the scheme was tailor-made for *Burmah Oil* not mass-produced and that was not enough of a distinction. The important thing was that *Ramsay* was applied, possibly without too much thought, to a normal corporate planning provision being used by a major taxpayer with very respectable advisers. It was probably right to view it as a circular transaction – like *Ramsay*

And so to 1984 and the high point, *Furniss v Dawson*,⁸⁴ another corporate reorganisation case dealing with pre-1978 facts but this time clearly a linear transaction. D, a shareholder wished to sell his stake in a company (Op Co) to another company, Wood Bastow (WB). He went to respectable solicitors and, as a result, implemented a straightforward plan, the effect of which would be to defer payment of tax until he was ready to receive the proceeds. D first exchanged his shares in Op Co for shares in another company, Greenjacket (GJ), a company resident in the Isle of Man. GJ then sold the shares in Op Co to WB. This left D holding shares in GJ and the money paid by WB still sitting in GJ – so D had not yet got his hands on the cash but could do so by liquidating GJ or, but less likely, causing GJ to pay a dividend.

Using hypothetical numbers, we now need to see what is going on. Suppose D's shares in Op Co had a base cost of £1 and the sale to WB was going to be at £4. If D had simply sold the shares to WB, D would have had a capital gain of £3. Under the scheme D exchanged shares in Op Co for shares in GJ. Provided that the court was satisfied that D had fulfilled the terms of the corporate reorganisation rules for share-for-share exchanges, D would then be treated as acquiring the shares in GJ not at £4 but at his base cost for the original shareholding being exchanged – £1 – so that there would be no gain at this time. GJ would not be liable to tax on any gain as it was non-resident and so, under our rather self-denying rules, not subject to UK tax on any gain. If in the fullness of time D sold the shares in GJ D would pay tax on the gain of £3 – ie £4 price less base cost of £1. So D was really deferring his liability to tax – unless he did anything else in the meantime – like dying or, probably less painfully, going to

⁸² *IRC v Burmah Oil Co Ltd* [1982] SC (HL) 114, 54 TC 200, STC 30.

⁸³ Thus Lord Diplock in *IRC v Burmah Oil Co Ltd* at [1982] SC (HL) 114 at 124 said: 'It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that *Ramsay*'s case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transaction (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable. The difference is in approach. It does not necessitate the overruling of any earlier decisions of this House; but it does involve recognising that Lord Tomlin's oft-quoted dictum in *IRC v Duke of Westminster* [1936] AC 1 at 19, 19 TC 490 at 520, 'Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be', tells us little or nothing as to what methods of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would attach to them if business transactions were conducted in a straightforward way.'

⁸⁴ [1984] AC 474; [1984] STC 153; 55 TC 324.

reside in another jurisdiction. It is important to note that D had not liquidated GJ - that would have been caught by *Floor v Davis*.⁸⁵

I regard *Furniss v Dawson* as presenting the classic problem of determining the ratio of the case – especially as Lord Brightman was quite determined to make it difficult. The passage which is always quoted begins with denying a distinction:

... [T]he 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 serially..... *Ramsay* says that the fiscal result is to be no different if the several steps are preordained rather than pre-contracted.⁸⁶

So *Ramsay* is an approach to schemes whose steps are 'preordained' rather than contractually binding. Then we have 'the rule', taken from Lord Diplock in *Burmah Oil*, who had expressed what Lord Brightman called the 'limitations' of the *Ramsay* principle:

First, there must be a preordained 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 (ie business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the taxpayers 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.⁸⁷

In the instant case the inserted step was the introduction of GJ as a buyer from the taxpayers and as a seller to WB. That inserted step had no business purpose apart from the deferment of tax, although it had a business effect. What do we make of these as words? What was going on? Were they creating a judicial GAAR? Or simply applying the words of the legislation? Can we make the later cases consistent with this formulation? As with *Ramsay*, but even more so, the judges in *Furniss v Dawson* were very anxious to stress that it was still early in the *Ramsay* era and all seemed content with the lack of intellectual infrastructure or any rigour. The Court had applied the composite transaction doctrine to a linear transaction which was main stream stock of tax practice. Was its doctrine – assuming that it is the right word to use – to be applied in all statutory contexts or only in some? The Court did not seem to mind about the practical uncertainty. It was not clear what arguments the Revenue were going to produce next and the members of the House of Lords were not going to pre-empt things.

⁸⁵ [1979] STC 379

⁸⁶ [1984] AC 474; 2 WLR 226; BTC 71 at 83.

⁸⁷ Ibid.

In 2007, with our new understanding that it is all a question of interpretation, that there is no doctrine or rule, just an approach, things seem different. The difference is shown by one of my favourite paragraphs. It comes from the speech of Lord Nicholls in the *MacNiven* case⁸⁸ in 2001. Anticipating what he was to say in the *Barclays* case in 2004, Lord Nicholls came down decisively in favour of simply applying the words of the legislation. I will quote it and comment (with interpolations and emphasis⁸⁹) as I go:

My Lords, I readily accept that the factual situation described by Lord Brightman is one where, typically, the *Ramsay* approach will be a valuable aid [**JUST A VALUABLE AID, AND IF SO TO WHAT?**]. In such a situation, when ascertaining the legal nature of the transaction and then relating this to the statute, application of the *Ramsay* approach may well have the effect stated by Lord Brightman. **But, as I am sure Lord Brightman would be the first to acknowledge**, the *Ramsay* approach is no more than a useful aid [**CRUX**]. This is not an area for absolutes [**MORE CRUX**]. The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.

I am not convinced that Lord Brightman would have made that acknowledgment but I think he would not have rejected it either. It was far more likely that he would have said that it was too early to say. But Lord Nicholls pushes his argument further:

As I have sought to explain, *Ramsay* did not introduce a new legal principle. [**AND SO**] It would be wrong, therefore, to set bounds to the circumstances in which the *Ramsay* approach may be appropriate and helpful [**NO HEDGING DEVICES NEEDED**]. The need to consider a document or transaction in its proper context, and the need to adopt a purposive approach when construing taxation legislation, are principles of general application.⁹⁰

You can decide whether it is breathtakingly brilliant or brilliantly breathtaking!

That is all very well but let us be practical - how should the Revenue have carried out their legal duty to collect tax in accordance with the law? Thankfully – for us – the Revenue carefully arranged for three appeals to be heard together in 1988.⁹¹ Of the panel of five hearing the appeals, none had sat in the earlier cases at House of Lords level. These cases resolved the question whether the House of Lords had formulated a judicial GAAR or a more confined composite (or preordained) transaction doctrine – [**IT HAD NOT**] and, by a majority, gave a very narrow interpretation to when transactions were preordained – the ‘no practical likelihood’ test.

It may be best to mention *Bayliss v Gregory* first.⁹² Here the House of Lords looked at another corporate reorganisation similar to *Furniss v Dawson*. However, here the share for share exchange was not followed by a consummation of the later steps. In fact, the company was sold on to a quite different purchaser on quite different terms some 18 months later. This did not affect the fact that the original share for share

⁸⁸ [2001] UKHL 6; [2003] 1 AC 311 at para 8.

⁸⁹ *In bold and capitals*.

⁹⁰ *Ibid*.

⁹¹ *Craven v White*; *IRC v Bowater Property Developments Ltd*; *Bayliss v Gregory* [1988] AC 398; STC 476 and 1 BTC 268.

⁹² *Ibid*.

exchange had been tax driven. The House of Lords held, unanimously and without effort, first that the tax avoidance purpose was not enough to invalidate the exchange⁹³ and secondly that the eventual sale to someone else did not fit the composite transaction test.⁹⁴

*Craven v White*⁹⁵ was more difficult; the House of Lords split 3-2. Once more there was a share for share exchange with an Isle of Man company. This time though the sale *did* go through to the intended purchaser, but only just. At the time of the share exchange (11 July) the prospects for the sale to a company called Oriel (O) did not look promising and an alternative disposal was considered. However, on the same day, O asked for a further meeting. The Commissioners had held that the primary objective of the share exchange was the sale to O and that the taxpayer company was keeping its options open. Following further negotiations, including one 'stormy meeting', the sale to O finally went through on 9 August of the same year. This time the House of Lords said 'no' avoidance, but by a bare majority. The majority consisted of Lord Oliver and the two Scottish law lords – Keith and Jauncey.

Lord Oliver refers to a series of transactions preordained in order to produce a given result and there being at that time no practical likelihood that the pre-planned events would not take place in the order ordained; in such circumstances the intermediate transaction was not even contemplated practically as having an independent life.⁹⁶ Lord Templeman and Lord Goff dissented – they would have said the steps made one transaction. The majority view is current orthodoxy. As Lord Nicholls put it in the *Scottish Provident* case in late 2004:

...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.⁹⁷

Sadly, I must pass by cases in which the House of Lords required that the rearrangement for which the Revenue contended should make sense.⁹⁸ Even more sadly I pass by *IRC v Moodie*⁹⁹ where the House of Lords faced with identical facts to those in *IRC v Plummer*,¹⁰⁰ just before *Ramsay*, proceeded to apply the *Ramsay* approach to reach a different conclusion. Lord Hoffmann's name appears in this case but as the first instance judge. Lord Hoffman thought he could apply *Ramsay*; the Court of Appeal thought he was wrong. I gloss over the interesting 1992 non-recourse finance capital allowance case of *Ensign Tankers Leasing Ltd v Stokes*.¹⁰¹ I do so reluctantly because there is a particularly masterful speech by Lord Goff.

⁹³ Among many matters which troubled the House, as they had troubled the Court of Appeal, was what the legal status of the first transaction would be while one waited to see what might ensue, and, in particular, the status of any assessments to tax which might have been made on the basis of that first transaction (as might have occurred in the *Bowater* case).

⁹⁴ [1988] 1 BTC 268. See, for example, Lord Keith at 284 and Lord Goff at 314.

⁹⁵ [1988] AC 398; STC 476 and 1 BTC 268.

⁹⁶ [1988] 1 BTC 268 per Lord Oliver at 302.

⁹⁷ *IRC v Scottish Provident Institution* [2005] HL (SC) 33 at paras 21 and 22.

⁹⁸ *Fitzwilliam v IRC* [1993] STC 502.

⁹⁹ [1993] STC 188.

¹⁰⁰ [1979] STC 793.

¹⁰¹ [1992] 1 BTC 110; STC 226; 1 AC 655.

We move fast forward to late 1997 and *IRC v McGuckian*.¹⁰² The importance of this case lies first in the way in which Lord Steyn and Lord Cooke in particular traced *Ramsay* as an example of purposive construction – to which Lord Nicholls referred in *Barclays*. From their words it appeared that a court could reach a judgment in favour of the Revenue without using the composite transaction approach just by a purposive construction. So this left construction as leading to yet wider powers in the court – and to arguments by HMRC – to counteract avoidance.

In the late 1990s I appeared in a debate with Graham Aaronson QC. You will recall that the TLRC Report's case for a GAAR was driven by his critique of the case law. We can perhaps more clearly comprehend the nature and depth of his unhappiness. For him, relying on case law was unsatisfactory first because, as compared with a GAAR, it was retrospective (like all court decisions);¹⁰³ secondly, the judicial doctrine was too restrictive (in its insistence on having a preordained transaction and a tightly drawn sense of 'preordained'); thirdly, it was arbitrary (in that when it applied it simply knocked out steps). It was also insufficiently targeted as one could not rely on judges to carve out the TLRC GAAR's notion of a 'protected' transaction. Other epithets he used were 'hypocritical' and 'unprincipled' (by falsely presenting itself as a matter of simple interpretation when it was actually a matter of complex application); and uncontrolled (through the lack of any clearance procedure).

And so to 2001 and the new Millennium. Just when we had got our minds round the widening approach in *McGuckian* – and the Revenue were wondering how to make use of it – the Revenue invited the House of Lords to adopt a strong version of the composite transaction doctrine in *MacNiven v Westmoreland Investments Ltd*.¹⁰⁴ They came unstuck. First, the House rejected the strong doctrine.¹⁰⁵ Then, they held that even a weak version of the doctrine was not going to get the Revenue home. It was agreed that the composite transaction doctrine was a question of interpretation (or application). However the judges held that the logically prior question – was the provision one to which the composite transaction doctrine could apply? – was itself to be a question of construction. So even though they had proved that it was 'practically certain' that the various steps would succeed each other, the Revenue might still lose. In what may have begun with points made in argument but became the centrepiece of Lord Hoffmann's speech, with which the other judges expressly agreed though adding points of their own, Lord Hoffmann drew his celebrated – or notorious – distinction between concepts which were commercial (where the doctrine was useful) and those which were legal or juristic where there was no reason to use the test.¹⁰⁶

Westmoreland (W) was a property company that owed £70m including £40m arrears of interest on loans from a pension fund; the pension fund was its only shareholder. If

¹⁰² [1997] 1 WLR 991; 3 All ER 817; STC 907.

¹⁰³ For example, see *Moodie v IRC* [1993] STC 188 where the House of Lords decision reversed its own earlier decision in *Plummer v IRC* [1980] AC 896. The scheme in *Plummer* involved the sale of an annuity to a charity. On the scheme, see M Gillard 'In the Name of Charity: the Rossminster Affair', Chatto and Windus, London 1987, chapter 3.

¹⁰⁴ [2001] UKHL 6; [2003] 1 AC 311; STC 237.

¹⁰⁵ So Lord Hoffmann, *ibid* at para 29 'My Lords, I am bound to say that this does not look to me like a principle of construction at all.... Mr McCall's formulation looks like an overriding legal principle, superimposed upon the whole of revenue law without regard to the language or purpose of any particular provision, save for the possibility of rebuttal by language which can be brought within his final parenthesis.'

¹⁰⁶ The (vigorous) dissenting speech which Lord Templeman would have given if he had not retired is published in 'Tax and the Taxpayer' [2001] 117 *Law Quarterly Review* 565.

the interest could be *paid*, W would be able at that time, thanks to s 338 of the *Taxes Act 1988*, to use that payment as a charge on income so creating a loss which could be set against profits the company might earn in later years, even, subject to s 768 of the *Taxes Act 1988*, profits earned following a change of ownership. The scheme enabled this payment to be made.¹⁰⁷ The pension fund's shareholders lent the money to W, which passed it back as a payment of interest. The facts thus disclosed a preordained series of transactions carried out in order to secure a payment of interest and a tax advantage in that W now had an allowable loss. Lord Hoffmann held that the term 'payment' was to be construed juristically as opposed to commercially. In this case, the juristic meaning was that there was a payment if the legal obligation to pay interest had been discharged. It followed that there was no room for the Revenue's broadly formulated principle.

Of the other members of the House – Lords Nicholls, Hobhouse, Hope and Hutton – only Lord Hobhouse gave a simple concurrence. If you actually want to understand the case however you need to look at Lord Nicholls speech. He confessed that his initial view, which remained unchanged for some time, was that a payment comprising a circular flow of cash between borrower and lender, made for no commercial purpose (other than gaining a tax advantage), would not constitute payment within the meaning of s 338. However, eventually he concluded that in deciding whether a debt had been paid one should not worry how that had come about. Once that was accepted, he did not see it could matter that there was no business purpose other than gaining a tax advantage. A genuine discharge of a genuine debt could not cease to qualify as a payment for the purpose of s 338 by reason only that it was made solely to secure a tax advantage. He also noted that what was upsetting the Revenue was the ability of the pension scheme trustees to reclaim the tax deducted by W from the payments. That was the consequence of the tax exempt status of the pension scheme. For him the concept of payment in s 338(3)(a) could not vary according to the tax status of the person to whom the interest is owed.

There is no time to rehearse criticisms hurled at Lord Hoffmann's distinction¹⁰⁸ but simply to record that from 2001 to the end of 2004 everyone involved in these affairs solemnly did exactly what Lord Hoffmann may have asked them to do which was: first, to identify the concept then ask whether it was commercial or legal and then apply the answer to the facts. Such an intellectual straitjacket was rejected by the House of Lords in 2004 in *Barclays*.¹⁰⁹ I do not doubt the sincerity with which Lord Hoffmann floated the distinction but experience showed that it was not workable; the classification was hard to apply and there is the prior problem of identifying the particular concept which was to be classified.¹¹⁰

¹⁰⁷ It is a nice question whether the problem would not arise under the loan relationship rules in the *Finance Act 1996*. If the connected party rules apply the deduction would be given only if, as in the present case, the interest was actually paid.

¹⁰⁸ For criticism of Lord Hoffmann's distinction see Justice Ribeiro PJ in *Collector of Stamps Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 para 40 and Lord Millet in paras 148–151 citing the problems expressed by the Court of Appeal in *Barclays Mercantile Business Finance Ltd v Mawson* [2002] EWCA Civ 1853; [2003] BTC 81; STC 6 by Peter Gibson LJ at para 44 and Carnwath LJ at paras 69 and 73.

¹⁰⁹ [2004] UKHL 51; [2005] 1 AC 684; STC 1 at para 32.

¹¹⁰ See Court of Appeal in *Barclays Mercantile Business Finance Ltd v Mawson* [2002] EWCA Civ 1853; [2003] BTC 81; STC 6.

And so to 2004 and two decisions: *Barclays Mercantile Business Finance Ltd v Mawson*¹¹¹ and *IRC v Scottish Provident Institution*.¹¹² *Barclays* is the case which stripped out the excrescences which had come to mar what Lord Wilberforce had begun and gives us our new beginning. The courts will not develop a wide ranging GAAR – they have no power to do so. They will scrutinise legislation purposively and interpret words in context. This is a matter of approach not of bright line rules. So they will apply the composite transaction doctrine selectively – but not irrationally. What reasons will they give? What reasons will work? We do not know. This is why *Barclays* is not the end, there never can be an end to Lord Scarman's role, but a new beginning.

In *Barclays*, an Irish company, BGE, had built a pipeline. They sold the pipeline to the taxpayers, Barclays Mercantile Business Finance (BMBF), for £91.3m. BMBF leased the assets back to BGE which granted a sub-lease onwards to its UK subsidiary. The question was whether BMBF was entitled to a capital allowance in respect of the £91.3m spent, as BMBF argued, to acquire an asset used in its business of finance leasing. The simple finance deal was then hedged around with many complex money flows; BMBF argued that the purpose of these arrangements was to ensure that the sums due from BGE under the lease arrangements would actually come through. In the Chancery Division, Park J said that the underlying purpose of Parliament in relation to finance leasing had been to enable capital allowances to be used so as to provide finance to lessees at attractive rates for them to use and to develop their real business activities. So it was not to enable cash payments to be made annually to third parties who were able to provide a major item of machinery or plant which satisfied one of the conditions for a finance lessor to claim the allowances. That was not in accordance with 'the purpose and spirit of the legislation'.¹¹³ The Court of Appeal¹¹⁴ – and the House of Lords¹¹⁵ – could find no warrant for so restricted a view.

The decision in *Barclays* was a very determined effort to clean the law up. Once Park J's analysis of the purpose of the legislation was rejected the taxpayer was going to win. However, this does not end the matter. We are back with Lord Scarman's assertion in *Furniss v Dawson* in 1984 that the determination of what does, and what does not, constitute unacceptable tax [avoidance] is a subject suited to development by judicial process.

The last case I wish to consider is the other 2004 House of Lords case *IRC v Scottish Provident Institution*¹¹⁶ where the House of Lords unanimously gave a slightly wider effect to the composite transaction doctrine. A company had entered into what was clearly a composite transaction within the rule. The parties had then added a term which had the effect that there was now a chance that the rights would not be exercised. As it happened the rights were exercised. The chances of the relevant event, a price movement was, the Special Commissioners held, like an outsider winning a horse race. The House of Lords held that the Special Commissioners had erred in law in concluding that because there was a realistic possibility of the options

¹¹¹ [2004] UKHL 51; [2005] 1 AC 684; [2005] STC 1.

¹¹² [2004] UKHL 52; [2005] STC 15.

¹¹³ [2002] EWHC 1527 (Ch) at para 51.

¹¹⁴ [2003] EWCA (Civ) 1853.

¹¹⁵ HL [2004] UKHL 51; [2005] 1 AC 684; STC 1.

¹¹⁶ [2004] UKHL 52; [2005] STC 15.

not being exercised simultaneously, therefore the scheme could not be regarded as a single composite transaction. At para 23 they state:

We think that it would destroy the value of the *Ramsay* principle 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.

6 CONCLUSION

The notification regime is working well; there is, in my view, no need as yet for a GAAR unless one can simplify the principles or in some areas create them. Nothing is going to stop the drive of legislation from year to year or the endless and quite justified efforts on the part of HMRC to identify and police the areas of abuse.

While the story of the cases may not emerge smoothly and inevitably, it does represent a marvellous example of what courts can do. I have watched all the twists and turns and even participated in some. My view has been that the *Ramsay* approach is, or at least should be, one of statutory interpretation and application and so Lord Nicholls and his colleagues have held. One can trace a coherent thread throughout – but only if one chooses the right thread. It also illustrates Lord Goff's famous statement, in his 1983 Maccabean Lecture on Jurisprudence,¹¹⁷ that the common law develops pragmatically on a case by case basis. He also said, quoting a German student, that in the common law system, unlike the civil law, it is the judge, not the professor, who is God.¹¹⁸ Where the courts go next will depend on which issues are argued and what arguments are used. I think the judges come out of this tolerably well. They have presented their thoughts in wonderful prose sprinkled with occasional irony. They have quite often allowed themselves to become fixated with phrases – and so everyone else has had to too – but they have ended up in a position which is intellectually and constitutionally sustainable. It is however a situation in which, as Lord Nicholls¹¹⁹ said, there will be differences of opinion; that is the nature of issues of interpretation. They have reached a situation which meets some but not all of Graham Aaronson's criticisms. Where the judges, or the system, do not come out of it well is in relation to the American authorities. Lord Wilberforce asked for these – and some Australian ones – in *Ramsay*. They were also cited in *Furniss v Dawson* in 1984. I have not seen what was submitted to the Court but the results are not impressive. In *Craven v White* in 1988 the House of Lords simply told counsel for the Revenue that there was no need for him to take them on his proposed world tour.

¹¹⁷ 'The Search for Principle' 1983 Maccabean Lecture on Jurisprudence, Proceedings of the British Academy, 69.

¹¹⁸ *Ibid.* Lord Goff recalled a brilliant German student saying to him 'In Germany the professor is God; in England the judge is God.' Lord Goff acknowledged that the academic lawyer had an important role to play in the 'search for principle' but concluded that 'the dominant power should be that of the judge, because the dominant element in the development of the law should be professional reaction to individual fact situations rather than theoretical development of legal principle.'

¹¹⁹ Lord Nicholls was on the House of Lords from 1994 to 2007 and sat on many of the significant tax avoidance cases. This appears to be a reference to his judgment in *McNiven v Westmoreland Investments Ltd* [2001] UKHL 6; [2003] 1 AC 311; STC 237.

Now that we have a rule which does not need 'limitations' or hedging devices it may be time to take a closer look at the American experience. They have developed at least three tests of interdependence for their step transaction doctrine; some may be worth looking at. We do not need to be trapped by the strictness of the practical certainty test in those situations where the approach can be used. As Lord Nicholls has told us: it is all a matter of interpretation and so anything can be considered.¹²⁰ What we need is for someone to do the work so that counsel can inform the court.

7 POSTSCRIPT: BEYOND 2007

As Professor Tiley predicted, Barclays was not the end of the story. By 2010 there were renewed calls for a GAAR in the UK. The reasons for this are complex – a global financial crisis from 2008 and beyond, a new coalition government elected in the UK in 2010 imposing strict austerity measures and, perhaps most significantly, a number of high profile tax avoidance cases that made the payment of tax appear to be optional. Although Professor Tiley had articulated a preference for judicial construction of tax legislation over a GAAR, he was a member of the Study Group established by the coalition government to consider the proposal for a statutory GAAR.¹²¹

Perhaps the most significant tax avoidance cases since 2007 are Tower MCashback LLP v HMRC¹²² in 2011 heard by the Supreme Court (which replaced the House of Lords Judicial Committee in 2009) and HMRC v Mayes also in 2011 which was a decision of the Court of Appeal. Tower MCashback was a case that involved circular movements of money with the aim of claiming capital allowances and was decided in HMRC's favour. The Supreme Court held that although capital expenditure was incurred, only some of it was attributable to plant and machinery. The remaining expenditure was part of a payment loop designed to inflate the allowances being claimed, which did not have any real link with the plant and machinery acquired. Accordingly, only part of the expenditure qualified for capital allowances. The Supreme Court adopted a similar approach to Ramsay and confirmed that Barclays and Ensign Tankers¹²³ were still good law.

Mayes may have been the 'last straw'. Mr Mayes was one of a number of participants in a tax avoidance scheme known as SHIPS2. The participants in the scheme were all UK-resident taxpayers with high earnings or significant capital gains. The purpose of the scheme was to minimise the tax liabilities of the participants. The scheme involved the taxpayers purchasing second-hand life assurance policies and surrendering them in order to obtain a deduction for income tax and capital gains tax purposes. The scheme depended on the implementation of seven pre-determined steps. HMRC accepted that all the steps were genuine, but argued that steps three and four, when applying the legislation, should be ignored, on the basis that they constituted a singly, wholly self-cancelling, pre-planned transaction for tax avoidance purposes which had no commercial purpose.

Following conflicting decisions by both the Special Commissioners and the High Court, on 12 April 2011 the Court of Appeal dismissed HMRC's appeal and held that

¹²⁰ Ibid at para 8.

¹²¹ Graham Aaronson, Report by GAAR Study Group (11 November 2011) (Aaronson Report).

¹²² [2011] UKSC 19; 2 AC 457.

¹²³ [1992] BTC 110.

*the High Court was correct to allow Mr Mayes' claim for relief.*¹²⁴ Special leave to appeal to the Supreme Court was refused.

Even before the decision in *Mayes* was handed down, in December 2010, the government asked Graham Aaronson QC, (who had also chaired the 1997 TLRC study) to chair a study program into the introduction of a GAAR.¹²⁵ The study group was to consider whether a GAAR was possible and if so, the form that it would take.¹²⁶ In the 2011 Budget the government also released a document entitled 'Tackling Tax Avoidance'¹²⁷ that outlined an 'ambitious package of measures' to tackle tax avoidance including a new anti-avoidance strategy, the announcements of reviews in high-risk areas of the tax system, options to reduce the cash-flow advantage from using avoidance schemes and targeted responses to specific avoidance risks. In May 2011 HMRC released a Consultation Paper entitled 'High Risk Tax Avoidance Schemes'¹²⁸ including proposals to introduce legislation to remove cash-flow advantages of entering into certain schemes by providing that users of such schemes would be subject to an additional charge on amounts that were underpaid.

The Study Group chaired by Graham Aaronson did propose a statutory GAAR but the proposal had a number of features that were designed to make it more targeted than those of countries such as Australia.¹²⁹ The GAAR, described as a 'general anti-abuse rule', is contained in Part 5 and Schedule 43 of Finance Act 2013 and came into force on 17 July 2013. It applies to income tax; capital gains tax; Inheritance tax; corporation tax; petroleum revenue tax; stamp duty land tax; and the annual residential property tax.

The GAAR applies to 'tax arrangements' which are 'abusive'. In broad terms a tax arrangement is any arrangement which, viewed objectively, has the obtaining of a tax advantage as its main purpose or one of its main purposes.¹³⁰ 'Tax advantage' in this context is also broadly defined.¹³¹ The broad definitions of 'tax advantage' and 'tax arrangements' set a low threshold for initially considering the possible application of the GAAR. A much higher threshold is then set by confining the application of the GAAR to tax arrangements which are 'abusive'.¹³² The Guidance provided to taxpayers sets out what it is that makes the UK GAAR different:

It is recognised that under the UK's detailed tax rules taxpayers frequently have a choice as to the way in which transactions can be carried out, and that differing tax results arise depending on the choice that is made. The GAAR does not challenge such choices unless they are considered abusive. As a result in broad terms the GAAR only comes into operation when the course of action taken by the taxpayer aims to achieve a favourable tax result that Parliament did not anticipate when it introduced the tax rules in

¹²⁴ [2011] EWCA (Civ) 409; STC 1269; All E R (D) 116.

¹²⁵ HMRC, Study of a General Anti-Avoidance Rule, Terms of Reference, 6 December 2010.

¹²⁶ Ibid.

¹²⁷ UK Treasury, Tackling Tax Avoidance, 28 March 2011: <https://www.gov.uk/government/publications/tackling-tax-avoidance--2>

¹²⁸ HMRC, High Risk Tax Avoidance Schemes, Consultation Paper, May 2011.

¹²⁹ The Aaronson Report, n 120, para 3.18

¹³⁰ Section 207(1) Finance Act 2013.

¹³¹ Section 208 Finance Act 2013.

¹³² As defined in s 207(2) Finance Act 2013.

*question and, critically, where that course of action cannot reasonably be regarded as reasonable.*¹³³

Another important feature of the UK GAAR is that a number of safeguards are built into the GAAR rules. These include:

- *Requiring HMRC to establish that the arrangements are abusive (so that it is not up to the taxpayer to show that the arrangements are non-abusive);*
- *Applying a 'double reasonableness' test. This requires HMRC to show that the arrangements 'cannot reasonably be regarded as a reasonable course of action'. The 'double reasonableness' test sets a high threshold by asking whether it would be reasonable to hold the view that the arrangement was a reasonable course of action. The arrangement falls to be treated as abusive only if it would not be reasonable to hold such a view;*
- *Allowing the court or tribunal to take into account any relevant material as to the purpose of the legislation that it is suggested the taxpayer has abused, or as to the sort of transactions which had become established practice at the time when the arrangements were entered into. HMRC has with an interim Advisory Panel developed Guidance.....; and*
- *Requiring HMRC to obtain the opinion of an independent advisory panel (the GAAR Advisory Panel) as to whether an arrangement constituted a reasonable course of action, before they can proceed to apply the GAAR.*¹³⁴

John Tiley's contribution to the law relating to taxation has been widely commented on. His specific contribution to combatting tax avoidance is also considerable. His academic contributions set out his views of the case law, his understanding of approaches to the problem in other jurisdictions and in his 2007 Lecture he provides a carefully argued case for judicial doctrine as opposed to legislative intervention. His opposition to the proposal for a statutory GAAR in 1997 gave way to participation in the Aaronson study group which produced a different kind of proposal and, it would seem, a change in attitude. One obituary after John's death suggested that he was sceptical about the final legislative proposal for the GAAR.¹³⁵ However, there is no suggestion of that in his written work or conference presentations as the GAAR proposal came to fruition and the observation may simply represent the dismay of those who see their work translated into legislative form. Whatever John thought of the final provisions, the coming into force of Part 5 and Schedule 42 of the Finance Act 2013 just 17 days after his death represents just one more achievement of a man who dedicated his working life to making the tax system more efficient and the place of tax in the academic world more secure.

Vale Professor John Tiley, CBE, FBA, QC. Born February 25 1941, died June 30 2013.

¹³³ HMRC, GAAR Guidance, approved by the GAAR Advisory Panel with effect from 15 April 2013, Part B, para 11.1.

¹³⁴ *Ibid*, para 12.1.

¹³⁵ *The Times*, Professor John Tiley Obituary 8 July 2013.