[2016] UKFTT 250 (TC)

TC05025

Appeal numbers: TC/2014/01624; TC/2014/01627; TC/2014/01628; TC/2014/02532

CAPITAL GAINS TAX – Tax avoidance scheme; trusts; sale of shares; put option; effect of contingencies, whether sale of trust assets to Irish trust under option agreement, subsequent sale for market value and "repatriation" of the trust to Scotland avoids liability to capital gains tax; or whether there is a single composite transaction on which Capital Gains Tax on market value is chargeable; Taxation of Chargeable Gains Act 1992 ss2, 17, 18, 86, 144, 144ZA; appeals dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE TRUSTEES OF THE MORRISON 2002 MAINTENANCE TRUST, THE TRUSTEES OF SIR FRASER MORRISON'S 1989 TRUST, THE TRUSTEES OF SIR FRASER MORRISON'S 1995 TRUST, and SIR FRASER MORRISON — **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE J GORDON REID QC FCIArb
IAN MALCOLM, BSc, BA, JP

Sitting in public at the Royal Courts of Justice, Strand, London on 21-23 September 2015, and at George House, Edinburgh on 2 November 2015

Kevin Prosser QC and Charles Bradley instructed by Maclay Murray & Spens for the Appellant

Graham MacIver, advocate, instructed by the Office of the Advocate General for HM Revenue and Customs, for the Respondents.

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DECISION

Introduction

1. These appeals all raise the same issue, namely whether a tax avoidance scheme to sell certain Scottish trust shareholdings in AWG plc involving the setting up of Irish trusts, the exercise of *put* options, the purchase and sale of the shareholdings by the Irish trusts, the replacement of these trustees with the original trustees under the Scottish trusts and the consequent repatriation of these trusts, has worked and the disposal of these trust assets incurs no or minimal liability to capital gains tax, or whether the scheme, or part of it, falls to be treated as a single composite transaction, namely the disposal, in the market, of Scottish trust shareholdings at market value on which substantial capital gains tax is chargeable.

2. We bear in mind throughout that the mere fact that parties intend to obtain a tax advantage is not, in itself, enough to make a statutory relief inapplicable or impose a fiscal liability. Rather, we assess the scheme by reference to its reality, its substance rather than its form, in order to determine whether the facts here, viewed realistically, satisfy the statutory conditions (construed purposively) which impose the fiscal liability in issue.[1]

3. A Hearing took place at the Royal Courts of Justice, London on 21, 22 and 23 September 2015, and at George House, Edinburgh on 2 November 2015. The appellants were represented by Kevin Prosser QC and Charles Bradley, barrister, on the instructions of Maclay, Murray & Spens LLP, solicitors, Glasgow (MMS). Graham MacIver, advocate, appeared on behalf of the respondents (HMRC) on the instructions of Eric Brown, principal solicitor of the Office of the Advocate General.

4. Mr Prosser led the evidence of Lady Morrison, Andrew Biggart, solicitor and partner of MMS; he was also a director of two MMS trustee companies, Vindex Trustees Ltd and Defensor Ltd, Paraic Madigan, solicitor and a partner of Matheson Ormsby Prentice, solicitors, Dublin; he was also a director of the trust company Matsack Trust Ltd; and Ms Gwen Soutar, an accountant also of MMS. All spoke to signed witness statements which they supplemented in evidence. All four witnesses were cross-examined. Mr MacIver led no evidence.

5. The usual bundles of correspondence, documents, witness statements, and authorities were lodged, along with a Statement of Agreed Facts and Skeleton Arguments. Much of this material was eventually made available in electronic form for which the tribunal is grateful. On the last day of the Hearing, parties produced a Note on the Evidence and proposed findings of fact.

6. The first three days of proceedings were recorded using *Live Transcript* facilities in real time. Daily transcripts were produced and distributed in hard copy and in electronic form.

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[1] See *UBS v HMRC* [2014] STC 2278 (Ct of Appl) at paragraph 43 quoting *Astall v HMRC* [2010] STC 137 (Ct of Appl) at paragraph 34

7. These appeals involve three Scottish and three Irish trusts all governed by Scots law. The principal solicitor for HMRC, Eric Brown, is based in Edinburgh. He instructed Scottish Counsel. The appellants were represented by MMS, a large, well known and well respected firm of Solicitors based principally in Edinburgh and Glasgow. The appeals have been handled by their Glasgow office. It is therefore surprising that HMRC's request, by email dated 19 September 2014, to transfer the proceedings to Edinburgh from London, where curiously, they began, was refused (by a differently constituted tribunal) because the appellants apparently wished the appeals to be heard in London. Neither party has been disadvantaged by such refusal.

8. However, at the conclusion of the hearing on 23 September 2015, all evidence having been led and submissions partly completed, it was agreed that as the majority of the remaining participants were based in Scotland, concluding submissions should be heard at George House, Edinburgh. The (Scottish) tribunal is grateful to parties for doing so.

9. We should also record that we were persuaded at the outset of the hearing in London, to proceed throughout in accordance with generally accepted English procedure. Mr Prosser made a lengthy but thorough and excellent opening statement. Thereafter, his witnesses gave evidence. Mr McIver then opened his case with detailed submissions which he completed when we resumed in Edinburgh. Mr Prosser then addressed us on factual findings he wished us to make as did Mr MacIver.

10. We accept that we sat as an *English* tribunal. We accept any consequences relating to precedent and subsequent appeals, flowing from that. At the end of the day, however, there was no issue of precedent by which we may have been bound as an English tribunal, but not as a Scottish tribunal, that has affected our decision or the reasons for it. Neither party has said that there are any particular points of Scots law involved, which would or might affect our decision.[2] The composition of the Upper Tribunal, should there be further appeals, and whether any appeal from the Upper Tribunal should lie to the Court of Session or the Court of Appeal are matters outwith our province. We simply record that the parties are alive to these issues.

Procedure

11. Following the opening of enquiries into the tax returns of the appellants for the tax year ended 5 April 2005, HMRC issued three closure notices[3] dated 30 September 2013 relating to the three sets of trustees[4] and a further closure notice dated 21 October 2013 relating to Sir Fraser Morrison.

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[2] From our perspective, as a *Scottish* UK tribunal sitting in England, there are no peculiarities of English law which would or might affect our decision.

[3] Under TMA 1970 s28A(1)&(2)

[4] By November 2004, each trust had the same trustees.

12. These Notices disclosed a chargeable gain of-

- £2,578,870, on the disposal of 348,919 shares at the price of £2,582,000 (the 1989 Trust-TC/2014/01627) giving rise to a liability of £733,660.80.
- £1,874,730 on the disposal of 253,644 shares at the price of £1,876,95 (the 1995 Trust-TC/2014/01628) giving rise to a liability of £562,418.80.
- £5,361,086 on the disposal of 1,331,049 shares at the price of £9,849,762 (the 2002 Trust-TC/2014/01624) giving rise to a liability of £2,144,434.40.

13. The closure notice relating to Sir Fraser Morrison (TC/2014/02532) is in respect of an attributed gain from the 2002 Trust.

14. The disposals under the scheme were disclosed as notifiable under Part 7 of the Finance Act 2004 (DOTAS).

15. Following a request for statutory internal review, the trust closure notices were upheld by letters dated 20 February 2014. The closure notice relating to Sir Fraser Morrison was upheld by letter dated 10 April 2014.

16. These letters indicated briefly that the closure notices were being upheld for the reasons already given, noting that *Shepherd v Lyntress,*[5] relied on by the appellants, did not, on its facts, provide a general precedent which favoured the appellants. This flowed from earlier correspondence in which HMRC expressed the view that the transactions forming the arrangements were pre-ordained, so that in accordance with principles said to have been established in *Furniss v Dawson,*[6] the composite transactions fell to be taxed as one for the disposal of the shares in the market by the original trusts with the chargeable gains accruing to those trusts. The appellants, for their part, relied, through their solicitors, on s144ZA of TCGA 1992 and *Shepherd.*

17. HMRC do not appear to dispute the soundness of that analysis as such, but say, in effect, that it is trumped by the application of the *Ramsay* approach, the realistic assessment being that there was a substantial gain through the sale of the AWG shares in the market which falls to be taxed under TCGA in the usual way.

Statutory Background

18. We are concerned principally with the applicable legislative framework in the tax year 2004/2005. Since then, the legislative framework has changed somewhat but we do not need to consider these changes in any detail.

19. The principal, relevant charging provision of the Taxation of Chargeable Gains Act 1992 (TGCA) is as follows:-

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[5] [1989] STC 617; also referred to as *News International*

[6] 1984 1 AC 474

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

> (1) …. 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……..
>
> (2) Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment during any part of which he is resident in the United Kingdom….

20. There are general rules about the application of market value to a disposal which is not at arm's length, and disposals between connected persons.[7] Here, it is accepted by the appellants that the transaction between the Scottish Trustees to the Irish Trustees was not at arm's length. It is also accepted that the transaction was between connected persons.[8] There are further provisions that enact, in relation to options, that the acquisition of the option and its exercise are to be treated as a single transaction.[9] The interpretation of these provisions is not in dispute.

21. S144ZA TGCA is of some significance in these appeals. It arose as a consequence of the decision in *Mansworth v Jelley.*[10] It could not be described as tax avoidance case. There, it was held in favour of an employee who had exercised a share option on favourable terms, that he was to be treated, on subsequent disposal of the shares as having acquired them at market value (because the grant of the option was not at arm's length) plus the statutory deemed base cost over and above. He therefore sold them at what was an arithmetical loss. The grant of the option in favour of the employee and his exercise of it were to be considered as a whole and thus a single overall 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 s17 TGCA applied. The market value rule thus operated in the employee's favour.

22. S144ZA,[11] and in particular subsections (3) and (4) rectified the position by disapplying the market value rule to options. Here, the Scottish Trustees take or purport to take advantage of that provision by selling the AWG shares through the medium of option agreements at an undervalue. By virtue of s144ZA, the market value rule is disapplied for determining the consideration for the disposal of the shares disposed of through the grant and exercise of an option, and the actual price falls to be applied. Accordingly, there is no gain on the disposal of the AWG shares by the Scottish Trustees to the Irish Trustees. HMRC do not challenge that analysis as such but say it and s144ZA are irrelevant as the *Ramsay* approach requires the transaction

[7] TCGA ss17 & 18

[8] S286 TGCA

[9] TCGA s144

[10] [2003] STC 53

[11] subsequently amended by s144ZB for options exercised on or after 2 December 2004.

to be considered as a disposal by the Scottish Trustees to Merrill Lynch[12], the disposal to and by the Irish Trustees being disregarded. The effect of the application of the *Ramsay* approach is that a considerable gain is made on disposal by the Scottish Trustees which would be taxable under TCGA in the usual way.

5 23. S144ZB contained further amending legislation which was brought into effect from 2 December 2004. If s144ZB had applied the result would have been (had each disposal been respected) that the Scottish Trustees would be treated as having disposed of the AWG shareholding to the Irish Trustees at market value, rather than the undervalue (essentially base cost) specified in the put options.

10 24. It was also assumed that the Irish Trustees would be deemed to have acquired the AWG shares under the exercised options at market value for Irish tax purposes. Accordingly, the subsequent disposal of the AWG shares in the market by the Irish Trustees would attract liability for the equivalent of capital gains tax only if the market value of the AWG shares increased. Thus, all or the bulk of the gains on 15 disposal of the AWG shares which formed a substantial part of the trust assets held by the Scottish Trustees would avoid capital gains tax or its equivalent.

25. Ss86 and 87 TGCA are also relevant to the tax planning under discussion although, again their interpretation and general effect are not in dispute. Where there is an offshore trust with non UK resident trustees (such as the Irish Trustees), a gain 20 may come into charge to UK tax. The liability may fall on the settlor or the beneficiaries under ss86 or 87. However, it is a condition of their applicability that the trustees are *not* resident in the United Kingdom during any part of the relevant year of assessment. Here, the Irish Trustees demitted office and the Scottish Trustees assumed office, becoming the Irish Trustees under the Irish Trusts (as well as 25 remaining as the Scottish Trustees). They did so in March 2005 and thus during the tax year 2004/05; they therefore became resident in the United Kingdom during a part of that tax year. Thus, the (non) residence condition was not met and the effect of ss86 and 87 elided.

26. However, the (new) Irish Trustees thus came within the scope of the UK charge 30 to capital gains tax for the tax year 2004/2005. They claimed double taxation relief from the charge on the disposal of the AWG shares under the UK/Ireland Double Taxation Treaty. HMRC have not challenged that claim.

Facts

27. We set out below the parties' Statement of Agreed Facts (SoAF). We have 35 inserted additional factual findings in ***bold italics*** as a result of our examination of the evidence and parties' submissions. Both parties proposed a range of additional findings of fact. Where there was substantial agreement between the parties we have generally incorporated what has been proposed, whether we consider the proposed

[12] Who were agents for and provided investment advice to the Scottish Trustees and subsequently the Irish Trustees; ultimately as the SoAF discloses they acted as principals in the sale of the AWG shares by the Irish Trustees to them.

fact relevant or germane to the issues. In that regard, HMRC proposed some fifty additional findings of fact. Mr Prosser objected to four of them.[13] He, in turn, while producing a substantial written *Note on Evidence,* proposed three additional findings of fact, all of which we have carefully considered along with a number of *key facts* set out in the appellants' Skeleton Argument.

28. Some aspects of the evidence are discussed below. We have endeavoured to maintain and supplement the logic and chronology of the SoAF.

29. The thrust of Mr Prosser's case was, however, that the facts were not seriously in dispute and these appeals largely concerned the law rather than the evidence. We tend to agree, but lest something may turn on the facts we have endeavoured to amplify the SoAF in accordance with the written and oral testimony, and the documents produced.

Statement of Agreed Facts (as supplemented)

30. **The Scottish Trusts**

1. By deed executed on 6 March 1989, Sir Fraser Morrison established a trust ('**the 1989 Trust**') for the benefit of his children and issue. At the material time, pursuant to the trust deed and to a subsequent deed of appointment executed on 27 March 1995, the trust funds were held on trust to pay each of Peter Morrison, Claire Morrison and Sarah Jane Morrison the free income, or otherwise allow each of them the liferent use and enjoyment, of a one-third share; subject to those liferents those one-third shares were held on trust for Peter, Claire and Sarah Jane's children or issue respectively contingently on their attaining the age of 40. There was power in the trustees, while and so long as an interest in possession in the whole or any part of the trust funds subsisted, (a) to advance to any person in right of such interest in possession the whole or part of the capital subject thereto and (b) to create interests in possession in and to advance the whole or any part of the capital of the trust fund in which an interest in possession subsisted to any qualifying beneficiary (defined as Sir Fraser's children and their issue) and a 'long-stop' provision in favour of the estate of the last to die of the persons who had been qualifying beneficiaries.

2. By deed executed on 27 March 1995 Sir Fraser established a second trust ('**the 1995 Trust**'). The trust funds were held on trust to pay each of Peter, Claire and Sarah Jane the free income, or otherwise allow each of them the liferent use and enjoyment, of a one-third share; subject to those liferents those one-third shares were held on trust for Peter, Claire and Sarah Jane's children or issue respectively contingently on their attaining the age of 40. There was an overriding power of appointment exercisable during the Trust Period (defined as the period lasting until two years after the death of the survivor of Sir Fraser and his wife Lady Patricia Morrison) in favour of any of the primary beneficiaries (defined as any widow of Sir Fraser's, Peter, Claire, Sarah Jane, their spouses and issue and such other objects or persons as might be added as beneficiaries by Sir Fraser by deed during the Trust Period) and a 'long-stop' provision in favour of the estate of the last to die of Sir Fraser's issue.

3. By deed executed on 26 July 2002, Sir Fraser established a third trust ('**the 2002 Trust**'). The trust funds were held on trust to pay to Sir Fraser the free income or otherwise allow him the liferent use and enjoyment thereof during his lifetime, with power to pay capital to him free of the liferent; subject to that to pay to Lady Morrison the free income or otherwise allow her the liferent use and enjoyment thereof during her lifetime, with power to pay capital to her free of

[13] Nos. 25, 37, 49d and 50

the liferent; subject to that on trust for Peter, Claire and Sarah Jane or their issue contingently on their attaining the age of 45. There was an overriding power of appointment exercisable during the Trust Period (defined as the period lasting until twenty one years after the death of the survivor of Sir Fraser and Lady Morrison) in favour of any of the primary beneficiaries (defined as Sir Fraser, Lady Morrison, Peter, Claire, Sarah Jane and their issue) and a 'long-stop' provision in favour of the estate of the last to die of Sir Fraser's issue.

4. The 1989 Trust, 1995 Trust and 2002 Trust are referred to collectively as **'the Scottish Trusts'**. The governing law of the Scottish Trusts was Scots law.

4A ***For convenience, we record here that nothing turns upon the precise beneficial interests in these three trusts.***

4B ***The "Morrison family" consisted of Sir Fraser, Lady Morrison and their three adult children, mentioned above. The Scottish Trusts were created for the benefit of their collective interests.***

5. Following deeds of appointment, conveyance and minutes of resignation executed on 8 November 2004, the trustees of all three Scottish Trusts were Lady Morrison, Vindex Trustees Ltd and Defensor Trustees Ltd (together, **'the Scottish Trustees'**). Vindex Trustees Ltd and Defensor Trustees Ltd were trustee companies managed by Maclay Murray & Spens LLP (**'MMS'**), solicitors. The Scottish Trustees were at all material times resident in the UK.

5A ***Lady Morrison has been a trustee of each trust since its inception.***

5.B ***The Scottish Trustees are still the trustees of all three Scottish Trusts. They are also the trustees of the Irish Trusts referred to below.***

5C ***The Scottish Trustees were, in effect, a partner of MMS (from 8 November 2004, Andrew Biggart, in his capacity as a director of the two trustee companies) and Lady Morrison. MMS, through Mr Biggart (and his predecessor), provided legal advice to the Scottish Trustees; this advice included tax advice. Mr Biggart therefore wore two hats, one as trustee and one as solicitor providing legal advice and acting on the instructions of the Scottish Trustees. The Scottish Trustees generally gave instructions to MMS, usually through Lady Morrison, after considering advice received and after consulting the rest of the Morrison Family.***

6. On 8 November 2004, the Scottish Trustees executed supplementary declarations declaring that the administrative powers conferred upon them by the respective Scottish Trust deeds included the power to exercise put options in the form in schedules attached to the declarations, provided that such exercise was for the benefit of the beneficiaries of the Scottish Trusts pro rata to their entitlements for the time being under the Scottish Trusts.

The tax planning proposal

7. As at autumn 2004, the assets in all three Scottish Trusts included a substantial quantity of shares in AWG plc.

7A ***The Scottish Trustees held 348,919 shares (with a market value of about £2.547m) in AWG Plc in relation to the 1989 Trust, 253,644 shares (with a market value of about £1.852m) in relation to the 1995 Trust, and 1,331,049 shares (with a market value of about £9.716m) in relation to the 2002 Trust. This amounted to about £14.5m in total.***

7B ***The Scottish Trusts had acquired a very substantial holding in AWG plc which was about 2% of AWG's issued capital. These holdings represented about 35% in value of the Morrison family assets.***

8. ***In or around October 2004 the Morrison family and the Scottish Trustees wished to diversify the holdings in the Scottish Trusts.*** In early October 2004, Andrew Macfie, the director of the Morrison family's corporate finance company, and Peter Morrison, Mr Macfie's assistant and one of the beneficiaries under the Scottish Trusts, instructed MMS on behalf of the Scottish Trustees to provide tax advice in respect of a potential reduction of the holding of AWG shares in the Scottish Trusts.

9. Following a consultation with counsel and further discussion with Mr Macfie and Peter Morrison, MMS were asked to explore the possibility of tax planning involving the grant by the trustees of three new Irish trusts of put options over the AWG plc shares to the Scottish Trustees, the exercisability of such options depending on a 'contingent event'. The steps in the arrangement, if followed through, would involve (i) the establishment of trusts with Irish-resident trustees similar but not identical in their terms to the Scottish Trusts, (ii) the settlement of cash into the Irish trusts, (iii) the grant by the Irish trustees to the Scottish Trustees of put options for the sale of the AWG plc shares for a price equal to the Scottish Trustees' capital gains tax base cost plus indexation (if any), (iv) the exercise of that option *(by the Scottish Trustees)*, (v) the acquisition of the AWG plc shares by the Irish Trustees and (vi), in the event that the Irish trustees made a substantial disposal of the AWG plc shares, the replacement of the Irish trustees by trustees resident in the United Kingdom before the end of the tax year, ***that tax year ending on 5 April 2005***.

9A These steps of the tax planning arrangement were ultimately carried into effect as planned in the order specified above, beginning with the establishment of the Irish Trusts on 10 November 2004 and ending with the disposal of the AWG shares to Merrill Lynch on 1 December 2004, followed by the replacement of the Irish Trustees in March 2005.

9B Had the Scottish Trustees, instead, sold the AWG holdings directly in the market, a capital gains tax liability of in the order of £3m-£4m would have arisen.

10. In late October 2004, MMS instructed Matheson Ormsby Prentice (**'MOP'**), a firm of solicitors in Dublin, on behalf of the Scottish Trustees to advise on the Irish tax law aspects of the planning and to prepare draft trust deeds. On 29 October 2004 Gwen Souter, head of MMS' tax department sent a "Briefing and Instruction Paper" to MOP explaining the tax planning being proposed. MOP were instructed to prepare three draft trust deeds to be with counsel by the close of business on 2 November 2004. It was agreed that MOP would provide trustee services should the Morrison family decide to go ahead with the establishment of the Irish trusts. Paraic Madigan, a partner in MOP, also attended a further consultation with counsel in London on 4 November 2004.

10A The Briefing and Instruction Paper, dated 29 October 2004, also noted that as Sir Fraser and Lady Morrison were expected to be unavailable in the UK during part of the planning process, changes were to be made to the composition of the trustees of the three trusts to ensure that at all times there would be a majority of UK trustees available to execute documents in connection with the planning.

10B Paragraph 1 thereof recorded the wish of the Scottish Trustees to diversify the spread of assets held by the respective trusts.

10C Paragraph 2.5 provided that if the options were exercised the question of whether diversification was the right strategy for the AWG shares would be a matter for the Irish Trustees and their advisers taking into account the interest of the beneficiaries.

10D Paragraph 4.2.8 noted that the Scottish Trustees were advised by Merrill Lynch.

10E ***Paragraph 5.3 noted inter alia that "It is, however, important that the sale to the Irish trust is not pre-ordained. As a result, conditions in the option mean the planning is not certain to be completed".***

10F ***Paragraph 6.2 sought confirmation of the tax consequences on a disposal by the Irish Trustees of the AWG shares.***

10G ***Paragraph 6.3 sought confirmation of the tax consequences if the Irish trusts were exported to another jurisdiction.***

11. On 5 November, there was a meeting of the Scottish Trustees at which Peter Morrison, Claire Morrison-Ball (another beneficiary under the Scottish Trusts), Mr Macfie and Gwen Souter, Norman Kennedy and Lorna Tutty, all of MMS, were also present. Ms Souter talked through a presentation (entitled "Morrison Capital Tax Planning") on the tax planning proposal, which was then discussed by those present. The members of the Morrison family present advised that they were happy to explore the proposed arrangements further and for the Irish trusts to be set up.

11A ***At that meeting, it was inter alia decided to establish the Irish Trusts and to transfer the AWG shares to the CREST settlement system (which facilitates onward transfer) to facilitate transfer to the Irish Trusts. The relevant forms were signed on that day. Lady Morrison undertook to borrow over £5m in order to settle the Irish trusts. Following the meeting the Scottish Trustees undertook expenditure of over £100,000 in connection with the tax planning scheme.***

11B ***MMS had in place a contingency fee arrangement whereby MMS would be paid £60,000 on success of the scheme, in addition to the fee of £75,000 for their professional services.***

11C ***At the meeting Lady Morrison and others expressed a preference that the Irish Trustees appoint Merrill Lynch, with whom it was said the Morrison family already had a relationship.***

11D ***The presentation, which appeared to take the form of slides, included the following:-***

Irish Trustees likely to diversify shareholding

Before 6 April 2005. ….Irish Trustees may decide to resign

In a slide headed Tax Risks, inter alia, the following is noted

> ***Attack based on the decision in Ramsay that the whole series of transactions is pre-ordained***

The Irish Trusts

12. The Irish Trust deeds were put in final form by MOP on 9 November and signed on 10 November 2004. Lady Morrison settled £20,000, £10,000 and £5,000,000 respectively on trusts known as the Morrison No 1 Trust (**'the No 1 Trust'**), the Morrison No 2 Trust (**'the No 2 Trust'**) and the Morrison No 3 Trust (**'the No 3 Trust'**). The provisions of the No 1 Trust mirrored those of the 1989 Trust, the provisions of the No 2 Trust mirrored those of the 1995 Trust and the provisions of the No 3 Trust mirrored those of the 2002 Trust.

12A ***On 10 November 2004, Matsack Trust Limited, an MOP trust company managed by MOP, and Pat Synnott, an accountant and finance director of MOP, resolved to act as the Irish Trustees. The Irish Trusts were established the same day.***

12B ***The Minutes of their meeting held that day recorded inter alia that the Irish Trustees 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 their price had increased by 40% in 2004; that in relation to a proposal to diversify there was a need to develop a strategic way forward through investment as much of the family wealth (35%) was concentrated in AWG plc; and that Merrill Lynch was a possible candidate as financial adviser. The concentration of the capital of the trusts in AWG shares meant that there was a need to diversify whether that capital was held by the Scottish Trustees or the Irish Trustees. The Irish Trustees were aware of this before the options were exercised.***

12C ***On the same day (10 November), two of the beneficiaries under the Scottish Trusts met with the Irish Trustees to discuss the scheme. The appointment of Merrill Lynch as financial advisors was discussed at the meeting. The Irish Trustees subsequently appointed Merrill Lynch. Mr Madigan had regular dealings with Merrill Lynch and knew them to be a well-respected firm; that firm also had background knowledge of the Morrison family.***

12D ***By loan agreement dated 11 November 2004, Lady Morrison borrowed £3.03m from the 2002 Scottish Trust by way of interest free loan which was repayable on demand. She also borrowed the remaining £2m or thereby.***

12E ***The creation of the Irish Trusts had no commercial, business or trust related family purposes apart from the avoidance of liability to tax. Their creation was essential to the tax avoidance scheme to eliminate or minimise liability to capital gains tax on the diversification of the assets held by the Scottish Trustees by the disposal of the AWG shares and re-investment of the sale proceeds.***

13. The No 1 Trust, No 2 Trust and No 3 Trust are referred to collectively as **'the Irish Trusts'**. The governing law of the Irish Trusts was Scots law. ***The Irish Trusts contained a power to grant put options.***

14. The Trustees of all three Irish Trusts were Matsack Trust Ltd, a trust company managed by MOP, and Pat Synnott (together, **'the Irish Trustees'**). The Irish Trustees were at all material times resident in Ireland.

14B ***The Scottish Trustees had no formal control over the Irish Trustees but it was unrealistic to assume that the Irish Trustees would do anything that significantly contradicted the views of the Scottish Trustees and the beneficiaries that the trust assets be diversified by selling the AWG shares.***

14C ***The Irish Trusts were created specifically as a vehicle to carry out the scheme to enable capital gains tax to be avoided on the sale of the AWG shares. If not for the scheme, the Irish Trusts would never have been created. They had no independent commercial purpose.***

14D ***The Irish Trustees were conscious of their obligations to act in the beneficiaries' interests. It was expected that the Irish Trustees would sell the AWG shares if the Scottish Trustees resolved to exercise the three options specified below.***

The Put Options

15A ***The Irish Trustees met on 19 November 2004 and resolved to grant the put options referred to below. They also noted that if the put options were exercised they would seek advice on the possible implementation of a policy of diversification through investment in UK centred assets. They also noted that preliminary discussions had already taken place between them and Merrill Lynch.***

15. By an agreement entered into on Friday 19 November 2004, the trustees of the No 1 Trust granted the trustees of the 1989 Trust a put option over 348,919 ordinary 19 181/201p AWG shares. The option price was £3,130 if the option was exercised over all of those shares or an amount reduced pro rata if the option was exercised over only some of those shares. ***This proceeded upon a letter dated 18 November 2004 from MMS on behalf of the Scottish Trustees requesting the Irish Trustees to do so, and enclosed a detailed draft option agreement.***

16. The option was exercisable only if the Relevant Event occurred, the Relevant Event being a closing exchange rate between the US dollar and Sterling lower than US$1.8393 : £1 or higher than US$1.8609 : £1 as certified by Investec Bank on any day during the Relevant Period, being the period of seven days from the date of the agreement. There was a 10% chance of the Relevant Event not occurring. If the Relevant Event did occur, the option was exercisable within the period of 20 years following either the parties confirming in writing their agreement that the Relevant Event had occurred or the determination of the same by an independent expert.

16A The Relevant Event was an anti-Ramsay device. No other reason was given for selecting this particular mechanism as the trigger for the entitlement to exercise the option. [14]

17. Also on 19 November 2004, four other put option agreements were entered into by the Scottish and Irish Trustees ***following similar letters from MMS***. The terms of two of these agreements were the same as that just described save for the number of AWG shares over which the option was granted and the option price and were as follows:

(i) The trustees of the No 2 Trust granted the trustees of the 1995 trust a put option over 253,644 AWG plc shares at an option price of £2,235.

(ii) The trustees of the No 3 Trust granted the trustees of the 2002 Trust over 1,331,049 AWG plc shares at an option price of £4,488,676.

(iii) ***The other two options (there were five in total) are not relevant for present purposes.*** [15]

18. The various option prices were equivalent to the base cost for capital gains tax purposes of the AWG plc shares held by the Scottish Trustees.

18A The strike price reflected the price of acquisition by the Scottish Trustees, with an allowance made for indexation:

a £3,130 in respect of 348,919 AWG shares held by the 1989 Trust, being approximately 0.897 pence per share;

b £2,235 in respect of 253,644 AWG shares held by the 1995 Trust, being approximately 0.881 pence per share; and

c £4.488,676 in respect of the 1,331,049 AWG shares held by the 2002 Trust, being approximately 337.228 pence per share.

19. ***On 22 November 2004, the Irish Trustees resolved to appoint Merrill Lynch to provide investment advice subject to a suitable letter of engagement being agreed.*** On 23 November,

[14] The Relevant Event clause is not now relied upon by the appellants as an *anti-Ramsay device* (Transcript D1/26-29); it was initially inserted as such a device.

MMS prepared and issued another briefing paper to the trustees and beneficiaries. This document is item 41 of the joint bundle of documents. ***It provided a comprehensive review of the background and tax planning relating to the AWG shares. It was drawn to their particular attention that the transfer to the Irish Trustees would be at a substantial undervalue raising concerns as to breach of trust by the Scottish Trustees.***

19A The Scottish Trustees were conscious of their fiduciary duties. They considered the transfer of the AWG shares at an undervalue might be a breach of trust. There was no reason for them to exercise their option to transfer at an undervalue, outside implementation of the scheme.

20. *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 option* **all prepared by MMS. This allayed the concerns of the Scottish Trustees about a possible breach of trust.**

21. The Relevant Event occurred at the close of the market on Tuesday 23 November 2004 and the Scottish Trustees and the Irish Trustees were notified on the afternoon of Wednesday 24 November 2004.

22. That afternoon, the Scottish Trustees held a telephone conference with MMS and Peter Morrison. A minute of the meeting is at item 58 of the joint bundle of documents. ***That minute notes inter alia that the AWG interim results had been generally regarded as good and that the share price was around £7.29 having been about £4.88 in early January 2004.*** At a meeting on Thursday 25 November 2004, the Scottish Trustees resolved to exercise in full three of the put options granted by the Irish Trustees. On the same day the Scottish Trustees served the Irish Trustees with the relevant option exercise notices.

22A The three option exercise notices were prepared by MMS and signed by Mr Biggart as director of the two corporate trustees.

22B The Scottish Trustees did not take any decision to exercise the put options before 25 November 2004. Until that date, it was not certain but it was likely that they would exercise the options unless the market share price of the AWG shares fell significantly.[16] Such a fall in price was not likely shortly before 25 November 2004. Nor was it likely thereafter until at least after the AWG shares had been sold to Merrill Lynch and by Merrill Lynch in the market.

22C Accordingly, at the meeting, the Scottish Trustees were of the view that it was in the best interests of the beneficiaries that they should implement the tax planning arrangements by exercising the options and selling the AWG shares to the Irish Trustees.

23. Also on Thursday 25 November 2004, Gwen Souter of MMS sent to HMRC two forms disclosing in terms of section 308 of Finance Act 2004 (Disclosure of Tax Avoidance Schemes ("DOTAS")) the arrangements under consideration by the Scottish Trustees (under the names Put Option 1 and Put Option 2).

23A MMS were concerned that such notification constituted a breach of client privilege of confidentiality exercisable by the Scottish Trustees. The Scottish Trustees waived that privilege by Deed dated 25 November 2004.

[16] This is a variation of the finding proposed by the appellants at paragraph 15(a) of the Appellants' Note on Evidence (ANoE)

24. On 26 November 2004, HMRC assigned the arrangements the scheme reference numbers 26535990 and 09457215 respectively.

25. On Monday 29 November 2004, the Scottish Trustees gave instructions for the relevant AWG shares to be transferred to the Irish Trustees. ***By 1 December 2004, the AWG shares had been transferred to the Irish Trustees and the price paid therefor.***

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The sale of the AWG shares

26. On Wednesday 1 December 2004, the Irish Trustees sold the entirety of the AWG shares under a 'risk bid' arrangement with Merrill Lynch whereby Merrill Lynch purchased the shares from the Irish Trustees with a guaranteed base price of £7.40 per share with settlement in T+5 days. In the event the price received by the Irish Trustees was £7.43 per share.

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26A The sale by the Irish Trustees was carried out on the day of the Irish budget, and the day before the UK budget. The Irish Trustees subsequently incurred Irish capital gains tax liability of €53,638.82 in doing so.

26B Under that "risk bid" arrangement, Merrill Lynch acted as principals and not as agents. Merrill Lynch, in turn, sold on to the market. The Irish Trusts thereby achieved the certainty of a minimum price for the AWG holdings, Merrill Lynch underwriting the sale at a particular value with the possibility of a higher price being achieved depending on a subsequent sale to market by Merrill Lynch. In the event, the minimum price was 740p. A higher price was subsequently achieved, namely 743p.

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27. Mr Madigan advised MMS that day of the sale and on 2 December 2004 Mr Madigan told Peter Morrison and the other beneficiaries that the AWG plc shares had all been sold.

27A The Merrill Lynch transaction confirmation documents (tabs 82-84) disclosed an error, namely that they acted as agent for the Irish Trustees.

Change of trustees of Irish Trusts

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28. On 11 March 2005, the Irish Trustees retired as trustees of the Irish Trusts in favour of Lady Morrison, Vindex Trustees Ltd and Defensor Trustees Ltd ***who all assumed office on or about that date. They were the same persons who were the Scottish Trustees from 8 November 2004.***

28A Thus, the Scottish Trustees also became the Irish Trustees. The trustees of the Irish Trusts and the Scottish Trusts remain trustees and all are resident in the United Kingdom. Thus, the Irish Trusts "migrated" to the United Kingdom. The trust funds of the Irish Trusts included the sale proceeds of the AWG shares, now under the control of the Scottish Trustees acting in their capacity as the Irish Trustees under trusts to all intents and purposes identical to the Scottish Trusts.

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28B Upon export to the UK, the Irish Trusts served as replacement trusts to the Scottish Trusts for the value which was represented in the Scottish Trusts prior to November 2004 by those trusts' holdings in AWG.

28C Had the Irish Trustees not demitted office as aforesaid before the end of the tax year 2004/05, a capital gains tax liability would have arisen on their settlor, Lady Morrison, by virtue of s86 TGCA.

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29 The net effect of the tax planning scheme, if it works, is inter alia as follows:-

***a** The Scottish Trustees disposed of their AWG shares without incurring a liability to capital gains tax, realising a total of £4,494,041 on 25 November 2004.*

***b** The disposal of the same AWG shares by the Irish Trustees on 1 December 2004 realised a total of £14,294,867.48 net for the Irish Trusts on or about that date.*

5 ***c** The Irish Trusts were "exported" to the UK on 11 March 2005 by the resignation of the Irish Trustees and the simultaneous assumption of the Scottish Trustees who thereby became both the Scottish Trustees and the Irish Trustees under separate trusts with essentially the same purposes and with the same beneficiaries. As the Irish Trustees, Lady Morrison, Vindex Trustees Ltd and Defensor Trustees Ltd thereby came to hold as trust 10 assets the net proceeds of the sale to Merrill Lynch of the AWG shares, namely about £14m.*

***d** As a result of the sale of the AWG shares to Merrill Lynch, the Irish Trustees incurred an (Irish) capital gains tax liability of €53,638.82.*

***30** The AWG plc Historic Share (mid-price) Price graph shows a generally upward trend 15 throughout 2004 from about £5.20 in January to around £8 at the end of the year, being around £7 at the beginning of November and around £7.50 by early December. There was no significant fall in price in November or December 2004.*

***31** The tax planning scheme or arrangement was carried out almost exactly as planned. The only variation was minor, namely the AWG shares were sold first to Merrill Lynch and then 20 in the market.*

The Trust Deeds

31. They are sufficiently described in the Statement of Agreed Facts. Nothing appears to turn on their detail.

The Issues

25 32. The broad issue in each of the appeals is whether, having regard to the facts as we have found them to be (which are largely undisputed), the scheme to sell the AWG shares held by the Scottish Trustees in a way that purports to avoid any significant liability to capital gains tax, works. In particular, the question is whether the *Ramsay* approach enables HMRC to treat the scheme or part of it as a disposal of the AWG 30 shares to Merrill Lynch, disregarding the actual disposal in exercise of the specially created options to the specially created Irish Trustees, and the latter's actual disposal to Merrill Lynch. The onus lies on HMRC to show that the *Ramsay* approach applies as they assert. If they do not discharge that onus, then all the appeals must be allowed.

35 33. Although we have made various findings of facts about the figures and sums involved (accepting without checking them as they were not challenged), there was no dispute canvassed before us about the extent of the fiscal liability in each appeal.

Submissions

Appellants

34. In summary, the appellants say that the transactions, namely the grant and exercise of the put options on 19 and 25 November 2004, and the sale of the shares by the Scottish Trustees to the Irish Trustees on 1 December 2004 must be respected for capital gains tax purposes. They do not constitute a single composite transaction, namely the disposal of the shares by the Scottish Trustees to Merrill Lynch. The transfer to the Irish Trustees cannot be ignored. Thus s144ZA(3)(b) and (4) TCGA applied and no chargeable gains accrued to the Scottish Trustees.

35. The essential issue was whether for capital gains tax purposes, the disposals of the shares by A (the Scottish Trustees) to B (the Irish Trustees), and by B to Merrill Lynch (C) must be respected as separate transactions; or whether, as HMRC contend, they must be treated as a disposal directly by A to C, ignoring the disposal by A to B (and by B to C), and applying what HMRC regard as the *Ramsay* approach.

36. The notion that no distinction should be drawn between the capacity in which each set of trustees held property (shares or their sale proceeds) should be rejected as contrary to principle. Reference was made to *Roome v Edwards*[17] and to TCGA s69 which provides that the trustees are deemed to be a single and continuing body, ie a deemed body of persons distinct from the individuals who may be trustees from time to time. However, as we understand it, HMRC do not even appear to argue that there is only one settlement. In any event, it does not bear upon the question whether there was a disposal by A to C rather than A to B and B to C.

37. For the *Ramsay* approach to apply, the appellants submit that one must determine when the sale to Merrill Lynch was pre-ordained. It was either the date of the grant of the options or the date of their exercise. While it does not matter for the purposes of the appellants' argument as they contend that the sale to Merrill was not pre-ordained until 1 December 2004, the appellants' submission, based on *Mansworth* was that the grant of the options and their exercise should be looked at as a single transaction which began with the grant; so the date of the grant is the date when it must be established that the sale to Merrill Lynch was pre-ordained. However, the evidence showed that nothing was cut and dried when the options were granted. No decision to exercise the options was taken until 25 November 2004. Even then there was no decision to sell by the Irish Trustees, no buyer identified, no price fixed, and no terms agreed.

38. In his Skeleton Argument and in his concise, and ably presented submissions, Mr Prosser referred to *WT Ramsay Ltd v IRC; Ellbeck v Rawling*[18] *Furniss v Dawson,*[19] *Craven v White,*[20] *News International plc v Shepherd (otherwise Lyntress)*[21]

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[17] [1981] AC 279

[18] [1982] AC 300 at 324B-D

[19] [1984] AC 474 526G, 527D-E

IRC v Scottish Provident Institution.[22] He pointed out that *Furniss, Craven* and *News International* were all linear transactions cases.

39. He drew our attention to the refinement made in *Scottish Provident* to the *no practical likelihood* test set out in *Craven.* For this reason, he said, the appellants do not contend that the *Relevant Event* clause in the option agreements, of itself, negatives the existence of a single composite transaction. However, the *Scottish Provident* case did not cast doubt on the general approach to whether something was a composite transaction or not.

40. The Scottish Trustees ran a genuine risk by passing control of the shares to the Irish Trustees. They took indemnities and waivers to guard against the risk of everything going wrong.

Respondents

41. In summary, Mr MacIver invited us, initially, to approach the evidence of each of the witnesses with *a degree of caution as to its reliability.* It was said that some aspects of Lady Morrison's oral evidence lacked detail and that she was unable to *articulate her thinking* on various matters. He made various criticisms of other witnesses (which he subsequently withdrew) which we do not need to specify.

42. Mr MacIver submitted that a purposive approach should be taken to the interpretation of TCGA. S2 was concerned with the end result ie a real capital gain or loss. The legal nature of the transaction in question, viewed realistically, should be ascertained; this may involve considering a series of transactions. A series of transactions is to be treated as a single composite transaction where there is an expectation that the series is to be carried out. Intermediate steps may be regarded as mere machinery and disregarded in identifying the transaction. But genuinely uncertain steps should not be so regarded. A commercially irrelevant contingency does not prevent a scheme from being considered a composite transaction.

43. The court should consider the commercial unity of the transaction and should not be distracted by peripheral steps. S2 TGCA applies. The reality is that there was a single composite transaction which yielded a real capital gain. The various events occurring between October 2004 and March 2005 supported this conclusion. Tax planning was the priority. There was no other purpose. The various steps took place as intended and expected; they took place speedily. There was no real uncertainty in the scheme at all. The series of steps was pre-ordained; it was all pre-planned; there was no practical likelihood of their not occurring; all tax law is subject to change; that is not the kind of uncertainty that defeats the *Ramsay* approach; rather that was a risk the appellants were prepared to take. The appellants inserted a risk as an anti-*Ramsay* device but now recognise that it does not work; there is no other. As the sale was to

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[20] [1989] AC 398 at 480D-481A, 509G, 512E, 513C-G, 524G-H, 515A-B, 516E-517A

[21] [1989] STC 617 at 695e-660a, 660f

[22] [2005] STC 15 paragraph 23

be in the market no question of being unable to find or identify a buyer arises. The intermediate steps should be disregarded. The scheme disposed of shares at a substantial gain which attracts fiscal liability. The assessments should therefore be upheld

5 44. Mr MacIver referred to *Barclays Mercantile Business Finance v Mawson*[23], *Explainaway Ltd v HMRC,*[24] *Aberdeen Asset Management plc v HMRC,*[25] *Andrew Berry v HMRC,*[26] *Ramsay, Furniss,*[27] *Craven*[28] *Hatton v IRC,*[29] *Scottish Provident,*[30] *Eyretel Unapproved Pension Scheme Trustees v HMRC,*[31] *Astall v HMRC*[32].

Discussion of some aspects of the evidence

10 *General*

45. Mr MacIver was critical of the reliability of the evidence of Lady Morrison and Mr Biggart. The appellants' response was to submit that the only purpose of this attack was to bring the credibility of these witnesses into question; and that there were no grounds for doing so. It was submitted by Mr Prosser, under reference to *Markem*
15 *Corporation v Zipher*[33] and *Okola v RCC*[34] that it would be unfair and improper to challenge credibility in this way. It was not put to these witnesses fairly and squarely that their written evidence was not to be believed in any respect. The rules of natural justice and professional practice require that to be done.

46. As we have noted, the criticisms of the evidence of Mr Biggart, Mr Madigan
20 and Mr Soutar, were all withdrawn.

Lady Morrison

47. Mr MacIver submitted that we should approach Lady Morrison's evidence with a *degree of caution as to its reliability on certain matters.* The appellants treated these and other criticisms as an unjustified attack on her credibility, although it

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[23] [2005] 1 AC 684 paragraph 35

[24] [2012] STC 2525 paragraphs 45, 46, & 48

[25] 2014 SC 271 paragraph 25

[26] [2011] UKUT 81 (TCC) paragraph 31

[27] at 526

[28] per Lord Oliver

[29] [1992] STC 140

[30] at paragraphs 22 and 23

[31] [2009] STC (SCD) 17

[32] [2009] EWCA Civ 1010 paragraphs 34, 50, 51

[33] [2005] EWCA Civ 267 at paragraphs 50-61

[34] [2012] UKUT 416 (TCC) paragraph 34

seemed reasonably plain to us that Mr McIver was not attacking the credibility of Lady Morrison.

48. However, we regret that we did not fully understand Mr MacIver's submissions or what effect, if well-founded, they would have on our decision-making process, particularly in relation to our factual findings. Even if we had held that Lady Morrison's evidence to some extent lacked credibility in the sense that we thought she was not telling the truth and disbelieved her or that some aspects of her evidence were unreliable (for example she was quite uncertain of the sources of the very large funds she borrowed to settle on the Irish Trusts[35]) and either should not be accepted or should carry little weight, that does not seem to assist HMRC's case at all.

49. The reason is that this is all largely irrelevant. The basic facts are not in doubt. It is our assessment of these facts, viewing them realistically that matters having heard the witnesses, full submissions and considered over 2000 pages of documents. What occurred was a carefully planned tax avoidance scheme to enable trust assets to be diversified (ie sold and the proceeds reinvested) without or with minimal liability to capital gains tax. That has never been denied. The question is whether it works or the application of the *Ramsay* approach treats the scheme as a sale of trust assets in the market for gain to which the ordinary fiscal consequences of such a disposal apply.

50. While it is true that Lady Morrison did not have complete mastery of the detailed facts and the law (as Mr Prosser did), her present lack of familiarity with the detail, more than ten years after the events in question, is hardly surprising.

51. We found Lady Morrison to be a credible witness, that is to say she was doing her genuine best to tell the truth. It is true that she did not have all the details at her fingertips and it may be that when tested against contemporaneous documents, her recollection in some matters of detail may not have been entirely accurate and complete. She appeared to us to be nervous when giving evidence. All this is wholly unsurprising and we make no criticism of her evidence. However, HMRC did not identify any critical factual matter to which Lady Morrison spoke which was said to make a material difference to our fact finding or the outcome of the appeal.

52. It is therefore unnecessary to examine in detail the powerful rebuttal of Mr MacIver's attack on the reliability of Lady Morrison's evidence, contained in the *Appellants' Note of Evidence* produced for the fourth day of the Hearing.

53. We note that when the Options were granted on 19 November 2004, Lady Morrison said she assumed that the AWG shares would be sold in the market.[36] We accept she made that assumption. That the AWG shares would be sold in the market was part of the pre-arranged plan. That was the point of exercising the options.

[35] D2/44-45 (cross)

[36] D2/8 (chief)

54. We also note that in evidence Lady Morrison said that at the time the options were exercised (25 November 2004) she hoped and anticipated that the Irish Trustees would sell the AWG shares.[37] We accept that evidence. She also accepted that the possibility of the Irish Trustees not acquiring the AWG shares was not a matter of discussion.[38]

Andrew Biggart

55. Mr Biggart was somewhat uneasy about the scheme, particularly in relation to the possibility of the Scottish Trustees being in breach of duty. He, however, rationalised, correctly, in our view, that there would be no liability and probably no breach of trust as the beneficiaries' interests remained the same or substantially the same whether under the Scottish Trusts or the Irish Trusts. No loss would have been suffered. Moreover, the administrative and legal costs undertaken in carrying the scheme into effect were incurred on the basis of professional, legal and tax advice given and acted upon in good faith. The beneficiaries even took separate legal advice and various indemnities and waivers were given shortly before the options were exercised.

56. Such was the detailed attention given to the planning and implementation of the scheme, that MMS also prepared a deed of waiver of the privilege of confidentiality (in relation to DOTAS disclosure) which the Scottish Trustees executed on 23 November 2004.

57. Overall, Mr Biggart, gave his evidence in a careful manner. His written statement was thorough and detailed as one would expect of a competent and experienced Scottish solicitor. We found his evidence to be credible and reliable.

58. We also note that when the options were exercised on 25 November 2004, he had a reasonable expectation that the AWG shares would be sold in the market by the Irish Trustees.[39] We take that to mean that he did so in his capacity as solicitor acting on behalf of the Scottish Trustees and in his capacity as the majority of the Scottish Trustees (as director of each of the two MMS trustee companies). Although, as a highly experienced solicitor, who appeared to adopt a conservative approach to such matters, he plainly had reservations as to whether it was proper for him to give the *green light*, as Gwen Soutar put it in her witness statement, to the scheme which had been created, he nevertheless did so having regard to, among other matters, the expert tax advice the Scottish Trustees were receiving from other quarters. He must therefore be taken to have had considerable confidence in the scheme and its outcome.

Gwen Soutar

59. We found her evidence to be reliable and credible. We note that she expressed the view with reference to paragraph 4.1.5 of the Briefing Paper to the Scottish

[37] Day 2/53 (cross)

[38] Day 2/45 (cross)

[39] Day 2/79 (cross)

Trustees dated 23 November 2004 that it was quite likely that the Irish Trustees would in due course resign[40].

Paraic Madigan

60. We found his evidence to be reliable and credible.

5 *Additional Findings of Fact*

61. We comment on some of the additional findings of fact which we have made.

62. *Decision to exercise put options (Finding of Fact 22B and 22C).* The value of the AWG shares was buoyant in November 2004. The scheme (if it worked) was bound to result in a substantial saving of capital gains tax unless the price of the 10 shares dropped very dramatically (by at least 50%) between the decision to exercise and the disposal in the market. While there was evidence that there was a real risk that the share price might fall, there was no evidence that there was a real risk of such a dramatic fall in the market share price. There is always a risk of movement of share prices on the stock market.

15 63. The fact that indemnities and a waiver were taken[41] on 23 and 24 November 2004, is in our view, a further feature pointing to the likelihood that the Scottish Trustees would decide, in accordance with the overall plan or scheme, to exercise the options. While the evidence does not disclose how and when these documents were prepared, they are significant legal documents which would have 20 taken some time to prepare, revise, advise upon, execute and deliver. They proceed upon the assumption that the options will be exercised in accordance with the scheme or plan. They also apparently proceeded on the basis that independent legal advice had been taken by the granters of these documents.

64. *Control over the Irish Trustees (Finding of Fact 14B-D).* It is correct that the 25 Irish Trustees were not controlled by the Scottish Trustees, the beneficiaries or MMS, and that they were entitled to exercise an independent discretion. It is also correct that the evidence discloses that they acted in good faith throughout. The Irish Trusts were, however, governed by Scots law.

65. The Scottish trusts had been in place for some time. Lady Morrison was a 30 trustee. The beneficiaries were all family members. Their interests were consulted. The attitude and views of the Scottish trustees and the beneficiaries were likely to be the same in relation to both sets of trusts, which were essentially mirror images of each other. The Irish trusts were set up and the options entered into at the behest of MMS acting on behalf of the Scottish Trustees.

35 66. Viewing matters realistically, it seems to us most unlikely that the Irish Trustees would act in a manner contrary to the views of MMS or the Scottish Trustees.

[40] Day 3/47-50 (cross)

[41] See Biggart D2/87-8, written statement paragraph 19.3

Realistically, they would have known of the plan or scheme and that the proposal was that they would be expected forthwith to sell the AWG holding on its receipt to maximise its currently good share price and take advantage of the minimal liability for the equivalent capital gains tax in Ireland. As previously noted, the share price would have had to fall dramatically before the Irish Trustees would have hesitated about proceeding with the tax avoidance scheme. There was no dramatic fall in price and the plan proceeded as intended and as anticipated; the AWG shares were sold in the market.

67. As has been pointed out above, Lady Morrison hoped and anticipated that the Irish Trustees would decide to sell the shares[42] and Mr Biggart expected that this would be done.[43] It is reasonable to assume that, absent any major shift in the markets, any such professional advice would be much the same as the advice the Scottish Trustees received which led to the exercise of the options in the first place. The plan was known; there was no need for discussion between the Irish Trustees and the Scottish Trustees or MMS; and there was none.

68. The Irish Trustees were aware of the concentration of the Morrison family wealth in the AWG shares. That was the reason for deciding to diversify by disposing of these shares and investing the proceeds elsewhere. That consideration applied whether the shares were held by the Scottish Trustees or the Irish Trustees. There were no other relevant considerations which would have caused the Irish Trustees to take a different view. Diversification was the wish of the beneficiaries, who were the same under each set of trusts. The Scottish Trustees agreed and sold to the Irish Trustees. It seems plain that they would inevitably do the same because there was nothing significant on which to base a contrary view. This appears from the evidence of Mr Madigan[44].

Further Discussion and Decision

The Ramsay Approach

69. In summary, the tax planning scheme was set in motion in October 2004. The Irish Trust deeds were finalised on 9 November 2004; they were executed on 10 November 2004. The Irish Trustees granted put options (which had already been drafted by MMS) on 19 November 2004. The Scottish Trustees exercised them on 25 November 2004 and thus agreed to sell the AWG shares to the Irish Trustees at an undervalue (essentially cost price). The scheme was notified to HMRC on the same day. On 29 November 2004, the Scottish Trustees instructed MMS to have the relevant AWG shares transferred to the Irish Trustees. The Irish Trustees sold them on 1 December 2004. In March 2005, the Irish Trustees demit office and the Scottish Trustees become the Irish Trustees as well as the Scottish Trustees. The proceeds of

[42] Day 2/53

[43] Day 2/79 (cross)

[44] Day 2/124-128

sale of the diversification exercise are once more under the control of the Scottish Trustees.

70. The tax planning scheme was carried into effect more or less as it had been intended to be carried out in spite of all the alleged doubts, uncertainties and contingencies. As we shall explain, the fact that the shares were sold initially to Merrill Lynch and then in the market makes no difference. Nor does it matter that the choice of new Irish Trustees was not determined until 2005.

71. We attempt to review these and other facts in a realistic and common sense way in order to determine whether, in accordance with the *Ramsay* approach, the relevant charging provisions of the TGCA construed purposively, apply to the facts as we have found them to be, so that the disposal of the AWG shares falls to be treated as a disposal by the Scottish Trustees to Merrill Lynch and the intermediary steps of selling to the Irish Trustees through the medium of the option agreements and the sale by the Irish Trustees to Merrill Lynch fall to be disregarded. If so, then the Scottish Trustees are liable for capital gains tax as HMRC contend. If not, there is no such liability and the appeals must be allowed

72. *Ramsay* was a capital gains tax case involving a series of circular steps to demonstrate that that taxpayer had made a loss for the purposes of capital gains tax without actually making a financial loss.

73. HMRC submitted that a convenient summary of the *Ramsay* approach was to be found in *Berry v HMRC*[45] as follows:-

> "i) The Ramsay principle is a general principle of statutory construction (Collector of Stamp Revenue v Arrowtown Assets Ltd (2004) ITLR 454 (§ 35); *Barclays Mercantile Business Finance Ltd v Mawson [2005] STC 1* (§ 36)).
>
> ii) The principle is twofold; and it applies to the interpretation of *any* statutory provision:
>
> > a) To decide on a purposive construction exactly what transaction will answer to the statutory description; and
> >
> > b) To decide whether the transaction in question does so (Barclays Mercantile Business Finance Ltd v Mawson (§ 36)). Finance Ltd v Mawson (§ 32); *Astall v HMRC [2010] STC 137* (§ 44)).
>
> iii) It does not matter in which order these two steps are taken; and it may be that the whole process is an iterative process (Barclays Mercantile Business Finance Ltd v Mawson (§ 32); *Astall v HMRC [2010] STC 137*(§ 44)).
>
> iv) Although the interpreter should assume that a statutory provision has some purpose, the purpose must be found in the words of the statute itself. The court must not infer a purpose without a proper foundation for doing so (Astall v HMRC (§ 44)).
>
> v) In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole (WT Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101 , 184; Barclays Mercantile Business Finance Ltd v Mawson (§ 29)).

[45] [2011] STC 1057 at paragraph 31, per Lewison J (as he then was).

vi) However, the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words. (This, I think, is what Arden LJ meant in Astall v HMRC (§ 34). As Lord Hoffmann put it in an article on Tax Avoidance: "It is one thing to give a statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there": See *Mayes v HMRC [2010] STC 1* (§ 30)).

vii) In looking at particular words that Parliament uses what the interpreter is looking for is the relevant fiscal concept: (MacNiven v Westmoreland Investments Ltd [2001] STC 237 (§§ 48, 49)).

viii) Although one cannot classify all concepts a priori as "commercial" or "legal", it is not an unreasonable generalisation to say that if Parliament refers to some commercial concept such as a gain or loss it is likely to mean a real gain or a real loss rather than one that is illusory in the sense of not changing the overall economic position of the parties to a transaction: WT Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101 , 187; Inland Revenue Commissioners v Burmah Oil Co Ltd (1981) 54 TC 200 , 221; *Ensign Tankers Ltd v Stokes [1992] 1 AC 655* , 673, 676, 683; MacNiven v Westmoreland Investments Ltd (§§ 5, 32); Barclays Mercantile Business Finance Ltd v Mawson (§ 38).

ix) A provision granting relief from tax is generally (though not universally) to be taken to refer to transactions undertaken for a commercial purpose and not solely for the purpose of complying with the statutory requirements of tax relief: (Collector of Stamp Revenue v. Arrowtown Assets Ltd (§ 149)). However, even if a transaction is carried out in order to avoid tax it may still be one that answers the statutory description: (Barclays Mercantile Business Finance Ltd v Mawson (§ 37). In other words, tax avoidance schemes sometimes work.

x) In approaching the factual question whether the transaction in question answers the statutory description the facts must be viewed realistically. (Barclays Mercantile Business Finance Ltd v Mawson (§ 36).

xi) A realistic view of the facts includes looking at the overall effect of a composite transaction, rather than considering each step individually: (WT Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101 , 185; *Carreras Group Ltd v Stamp Commissioner [2004] STC 1377* (§ 8); Barclays Mercantile Business Finance Ltd v Mawson (§ 35).

xii) A series of transactions may be viewed as a composite transaction where the series of transactions is expected to be carried through as a whole, either because there is an obligation to do so, or because there is an expectation that they will be carried through as a whole and no likelihood in practice that they will not: (WT Ramsay Ltd v Commissioners of Inland Revenue (1981) 54 TC 101 , 185).

xiii) In considering the facts the fact finding tribunal should not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way in which the scheme was intended to operate: (Astall v HMRC (§ 34)).

xiv) In considering whether there is no practical likelihood that the whole series of transactions will be carried out, it is legitimate to ignore commercially irrelevant contingencies and to consider it without regard to the possibility that, contrary to the intention and expectation of the parties it might not work as planned: (Commissioners of Inland Revenue v Scottish Provident Institution (2004) 76 TC 538 , 558 § 23). Even if the contingency is a real commercial possibility it may be disregarded if the parties proceeded on the basis that it should be disregarded: (Astall v HMRC (§ 34))."

74. We recall that Lord Wilberforce in *Ramsay* was considering what the relevant transaction was; and that the decision maker was not bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. He said that the decision maker was not bound to do so where there is *an expectation that it will be so carried through, and no likelihood in practice that it will not*.[46] He observed that such cases might vary in emphasis and that the conclusion in law from the facts found will determine whether what is in issue is a composite transaction or a number of independent transactions.

75. The factual issues highlighted are therefore whether there is an expectation that the scheme will be carried through in successive steps, and no likelihood in practice that it will not. Our assessment of the evidence, then, should focus on expectations about the scheme and whether looking at matters from a practical point of view it can be said at the time that it would or would not probably be carried through in successive steps. This might be summarised by whether there was an expectation that the scheme would proceed in successive steps and whether that expectation was justified.

76. In *Furniss* Lord Brightman described the *Ramsay* approach as a *series of steps which are followed through by virtue of an arrangement which falls short of a binding contract.* He uses the word *pre-ordained* to describe such an arrangement. He does not say how far short of a binding contract the arrangement has to be before the *Ramsay* approach applies. That is consistent with Lord Wilberforce in *Ramsay* where he refers to cases varying in emphasis. It is at least questionable whether the word *pre-ordained* where what occurs falls short of a binding obligation considered in isolation, imposes a different and higher standard of proof than *expectation* and *likelihood.*

77. In *Craven,* Lord Keith expressed the view that the transaction in question could not be said to have been pre-ordained because at the time of the share exchange (step A to B) it was *wholly uncertain* whether the final disposal (step B to C) would take place.[47] He put matters slightly differently later in the same passage by stating that the transactions in the series could not be said to be pre-ordained unless at the time the first of them is entered into the taxpayer was in a position *for all practical purposes to secure that the second is also entered into.*

78. This seems to us to leave a grey area where the position is to an extent uncertain but not wholly uncertain, and where the way is clear to proceed, but the final decision has been set up so as to rest with a third party who is likely if not almost bound to follow the taxpayer's wishes and carry the second step into effect.

79. Lord Oliver set out the essential ingredients for the application of the *Ramsay* approach, namely (i) the series of transactions was, at the time when the intermediate transaction was entered into, pre-ordained in order to produce a given result, (ii) that that transaction had no other purpose than tax mitigation, (iii) that there was at that

[46] [1982] AC at 324B-D

[47] [1989] AC at 480D-481A

time no practical likelihood that the pre-ordained events would not take place in the ordained order, so that the intermediate transaction was not even contemplated practically as having an independent life, and (iv) that the pre-ordained events did in fact take place. Thus the beginning is linked to the end to make a single composite whole and a single and indivisible process, to which the relevant legislation is applied.

80. Lord Oliver also emphasised the need for an orchestrated sequence, something more than simply planned or thought out in advance; there had to be a degree of certainty and control over the end result at the time when the intermediate steps are taken. One must know to whom and on what terms the ultimate disposition will be made.

81. In *News International*, Vinelott J, in considering whether two steps (transfer of shares by A to B and sale by B of those shares on the stock market) were part of a single composite transaction, noted an important difference between the sale of shares in an unlisted company and shares in a listed company. Negotiation for the sale of shares in an unlisted company are normally protracted. Thus, if such a sale was not on the Stock Exchange but very quickly to another unlisted company, it might be inferred that everything was *cut and dried* when the shares were transferred and subsequently quickly sold to another unlisted company.[48] By contrast, where the shares are sold on the stock market, that can be done by a telephone call to a stockbroker. No inference of a composite transaction could be drawn because of the brevity of the period between transfer and sale.[49] However, Vinelott J recognised more generally that the brevity of the period between transfer and sale might be an important or even a decisive factor in determining whether the two steps were part of a single composite transaction.[50]

82. Various words and phrases have been used in the cases to describe schemes or transactions which are caught by the *Ramsay* approach. These include *pre-ordained, cut and dried,* and *lined-up.* Lord Goff in *Craven* referred to *pre-ordained* as meaning *decided in advance* or *planned as a single scheme*[51] and as showing that *pre-ordained* indicates that a series of transactions constitutes a composite transaction. He pointed out that the mere fact that a series of transactions planned as part of a single scheme may not in fact be carried out to the end, does not prevent those transactions, if performed, constituting a composite transaction for the purposes of the *Ramsay* principle.[52]

83. Mr Prosser submits that a finding that there has been a *plan* is not good enough presumably because it lacks that degree of certainty which the phrase *pre-ordained* may express.

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[48] [1989] STC at 659g-h

[49] 659j

[50] 659g

[51] At 523E-F

[52] At 524G-H

84. Concentration on such terminology is useful but not determinative. Ultimately, the question is whether the relevant statutory provision imposing fiscal liability, construed purposively, applies to the facts viewed realistically. Of course, no decision maker, whether sitting in a court or elsewhere, attempts to view facts unrealistically. The contrast is, perhaps, viewing facts literally, in isolation and possibly superficially, and thus unrealistically. The correct approach, in our view, is to apply common sense and experience, probe what appears on the surface, and identify the underlying substance of facts, which paint the true overall picture, when one stands back and assesses what in the real world, whether in a business or family context, has occurred. The decision maker must then consider whether it was the intention of Parliament, legislating in the real world of profit and loss, acquisitions, disposals and gains, that the statutory provision in question was intended to apply to the substance of the transaction, however disguised or embellished, whether by some artificial, uncommercial or other elements.

85. At its simplest, the AWG shares, a substantial asset, were sold, after being held for a number of years, in the market at or about market price, at a substantial gain. That is the substance of the transaction. That is the legal nature of a transaction to which tax consequences under TGCA would normally be attached.[53] It has been embellished but not disguised. A number of artificial arrangements (without any commercial purpose other than obtaining a tax advantage) have been weaved into the transaction, the creation of the Irish Trustees, the grant and exercise of options at an undervalue, the express insertion of an anti-*Ramsay* device, the acquisition of the shares by the Irish Trustees, their subsequent sale almost immediately and the resignation of the Irish Trustees, leaving two virtually identical trusts with the same structure, purposes, trustees and beneficiaries, holding the as yet untaxed sale proceeds of the shares.

86. Some tax avoidance schemes do work. They avoid tax by adopting a legitimate, justifiable and commercially sensible structure to achieve a result which could be achieved by other legitimate and justifiable means. Where, however, that structure is artificial or has no purpose other than the avoidance of tax, it will be examined with particular care. Intermediate steps only inserted as part of the tax planning process will more readily not be respected and will, or at least, may be disregarded to determine whether what truly occurred falls within the scope of the relevant part of the statute construed purposively. If it does, the tax may not be avoided and the legislation will bite triggering fiscal liability.

Statutory Purpose

87. The modern approach to statutory construction is to have regard to the particular provision and interpret its language, so far as possible, in a way which best give effect to that purpose.[54] Here, the basic statutory purpose is clear. Subject to numerous

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[53] *Barclays* at paragraphs 30-31. per Lord Nicholls of Birkenhead.

[54] *Barclays* at paragraph 28 per Lord Nicholls of Birkenhead

qualifications, exceptions and thresholds, gains (having a commercial reality[55]) on the disposal of assets are subject to capital gains tax. The tax was created to operate in the real world, not that of make-belief.[56] There, as here, Lord Wilberforce was considering a scheme of which the totality had no purpose other than tax avoidance.[57]

5 88. The statutory purposes of TGCA therefore plainly embrace gains on the disposal of trust assets in the course of the administration of a trust. This can be seen from ss1 and 2. Further, the statutory provisions relating to the grant and exercise of options, were equally plainly *not* intended to be deployed as part of artificial arrangements designed to eliminate liability to capital gains tax in respect of a
10 disposal of assets such as trust assets. A tribunal or court will much more readily disregard intermediate steps (here disposals A to B, and B to C), where the entire scheme is contrived, artificial, and has no commercial or economic purpose other than the obtaining of a tax advantage, namely the avoidance of liability to capital gains tax where the normal consequence would attract such liability.

15 89. Thus, the introduction of a company or trust for the sole purpose of facilitating a tax avoidance scheme is bound to be viewed with a degree of scepticism and suspicion. The actings of and dealings with such an entity will be examined carefully and realistically to determine their effect and whether their supposed fiscal consequences are justified.

20 *Application of the facts, viewed realistically*

90. Our task therefore is to ascertain whether the relevant statutory provisions, construed purposively, apply to the facts viewed realistically[58].

91. Should the ingenuity of tax advisors be allowed to deprive HMRC and thus the general taxpayer of the portion of the gains generated by a transaction of this nature
25 which is essentially the disposal of an asset to which the charge to capital gains tax normally applies. It seems to us entirely appropriate to look through arrangements to identify what they really are. It is not a question of respecting each individual step and concluding that, as they are formally and individually immune from challenge, no fiscal liability can attach. Rather, it is a question of looking at the reality of the facts
30 and the purposes of the relevant statutory provisions. *Ramsay* and its development, as expounded in the authorities to which we have referred, do just that.

92. The tax planning scheme in question was a carefully crafted and detailed plan. Each step was meticulously planned. Linking the beginning with the end so as to make a single composite whole which the fiscal results of the single composite whole

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[55] *Barclays* at paragraph 31 per Lord Nicholls of Birkenhead

[56] *Ramsay* at [1982] AC 300 at 326 per Lord Wilberforce.

[57] See *Craven* at 528B per Lord Jauncey

[58] *Aberdeen Asset Management plc v HMRC* 2015 SC 271 (Inner House) at paragraphs 25, 38, and 43 per Lord Drummond Young

are to be applied,[59] is relatively straightforward. The Scottish Trustees decided that the trusts' shareholdings should be diversified and to achieve that they decided, in effect, to sell the AWG holdings in the market and re-invest the proceeds.

93. That was the beginning, although to reach the stage of taking the decision to sell, a number of arrangements had to be and had already been made. The Irish Trusts were created. This involved drafting trust deeds, securing the appointment of trustees, settling funds on those trustees, drafting and granting the options, and securing various indemnities (and a waiver). That was all carried out swiftly and efficiently.

94. Once set in motion, it was reasonable to assume that the next stage would be carried out, namely the sale of the AWG shares in the market by the Irish Trustees. Although independent and having a discretion, and thus not being formally controlled by the Scottish Trustees, there was no reason to think that the Irish Trustees would exercise their discretion differently. The risk that they would was minor. The share price would have had to fall dramatically. There was no sign of it doing so and that did not happen. As we have explained above,[60] there were no other significant considerations or factors that might have led the Irish Trustees to decline to sell forthwith or to give effect to the views of the Scottish Trustees and their decision to exercise the options. We consider this aspect further below under the heading "Contingencies/Doubts".

95. The next stage was the sale of the AWG shareholdings by the Irish Trustees when the price was high. That objective was fulfilled. In essence, this was a disposal of trust assets, the gains on disposal of which would normally be expected to attract the fiscal consequence of capital gains tax liability.

96. These two steps, the disposal by the Scottish Trustees in exercising specially created options granted by specially created trustees (the Irish Trustees) to those trustees (disposal by A to B), and the disposal by the Irish Trustees in the market (B to C) were the essential ingredients of the scheme to sell the AWG shares held by the Scottish Trustees in the market (disposal by A to C), making a gain that would not be chargeable to capital gains tax. That is the legal nature of the transaction to which HMRC seek to attach a tax consequence.

97. The final element was the subsequent *repatriation* of the Irish Trusts before the end of the tax year 2004/05 to avoid the application of ss86 and/or 87 TGCA. These provisions, if applicable, could have imposed a charge on the settlor of the Irish Trusts (Lady Morrison) or the beneficiaries (the Morrison children).

98. There clearly was a strong interconnection between the disposal to B and the disposal to C. The identity of the ultimate purchaser was the market.[61] In the *Craven* appeals, there was a commercial background of negotiations and deals; it was wholly

[59] *Craven* at 514G per Lord Oliver

[60] See, in particular, paragraphs 64-68

[61] See Lord Keith of Kinkel in *Craven* at 480F-G

uncertain whether the final disposal would take place.[62] That is in stark contrast with the scheme here, where there was no underlying commercial deal or negotiations. If the scheme operated as intended, and it did, subject only to minor variation which was immaterial to the efficacy of the scheme, the AWG shares would be sold in the market. They were.

99. It seems to us that the only conclusion that can be reached was that what occurred was the disposal of the AWG shares in the market in pursuance of a policy of diversification of trust assets as the Morrison family wealth was concentrated (to the extent of about 35%) in one holding, the AWG shares. The creation of additional unnecessary trusts, and the grant and exercise of what would otherwise be imprudent and uncommercial options do not negate that view. The exercise of the options and consequent sale to the Irish Trustees were steps within a single composite transaction. That transaction was the sale of the AWG shares in the market. The steps were constituent parts proceeding in a planned or orchestrated sequence.

Contingencies/Doubts

100. The appellants rely on various features of the scheme and a variety of background circumstances to show that there was no practical certainty that the scheme would be carried into effect. Therefore, so the argument runs, there can be no single composite transaction to which the *Ramsay* approach applies, triggering fiscal liability on the part of the Scottish Trustees for the disposal of the AWG shares in pursuance of the policy of diversification.

101. A number of uncertainties were identified in a briefing paper dated 23 November 2004 presented at the meeting of the Scottish Trustees on that date. In summary, it recorded what were said to be uncertainties, namely (i) the possibility of a change in the law affecting s144ZA TGCA, (ii) the possibility of a change in Irish tax law, (iii) the decision in *Scottish Provident* which was due to be handed down on 25 November 2004, (iv) the possibility of a change in the AWG share price making immediate sale in the market more attractive than exercising the put options and transferring the shares into the Irish Trusts, (v) the Scottish Trustees considering that exercise of the option is not in the best interests of the beneficiaries, or outwith their powers as trustees.

102. None of these doubts or uncertainties caused the Scottish Trustees from refraining from exercising the options. Although there was a risk that the government might block the scheme, that had not been done by 25 November 2004. No change in s144ZA occurred which affected the disposal. There was no relevant change in Irish law. While such changes were theoretically possible, anti-avoidance or corrective or even retrospective fiscal legislation is an ever present risk to which tax avoidance schemes are exposed. That risk in the background does not in our view, bear on the likelihood of the scheme proceeding.

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[62] Ibid at 481A

103. The *SPI* case[63] was another matter being considered. The decision in *Scottish Provident* was discussed on the day it was issued. However, it was quite different on its facts. Ultimately, it did not apparently trouble the Scottish Trustees' tax advisers. The Scottish Trustees decided to proceed following obtaining tax advice about the effect of the decision. By deciding to proceed, they put whatever risk it contained to one side. The risk in the background of such a pending decision does not in our view, bear on the likelihood of the scheme proceeding. Like the possibility of anti-avoidance or corrective fiscal legislation, the risk of an adverse judicial decision of high authority is also ever present.

104. A very significant fall in the share price would have been required before it became prudent simply to sell direct to the market rather than through what was then thought to be the effective medium of the option agreements and their exercise and the Irish Trusts. This did not happen. The option price was deliberately fixed at a very significant undervalue. A catastrophic collapse of the AWG share price would have been required. There was no practical certainty or likelihood of that happening. Accordingly, the Scottish Trustees decided to proceed. The decision (disposal by A to B) was made in the expectation that a disposal of the AWG shares by the Irish Trustees would shortly follow (B to C) thus achieving the overall objective of disposing of the AWG shares in the market.

105. The Scottish Trustees must, albeit after some hesitation and careful thought, have concluded that with the agreement of the beneficiaries (which they had) and indemnities in respect of liability for breach of trust, which they obtained, the exercise of the options, as part of a planned scheme to dispose of the AWG shares, was within their powers. Whatever residual doubts they had did not prevent them from proceeding.

106. The only real possible doubt was that the Irish Trustees, over whom the Scottish Trustees had no formal control, would decide not to sell forthwith or at all in a buoyant market in circumstances where they acquired the shares at a significant undervalue, the market was currently strong, and a planned sale in such circumstances was known from the outset of their involvement, which could be achieved with ease through the CREST system and at speed.

107. In these circumstances, it would be remarkable if the Irish Trustees, in the exercise of their undoubted discretion chose to hold the shares rather than sell them. They knew what the Scottish Trustees and the beneficiaries wanted. It would be reasonable for them to infer that MMS were of the same view as Mr Biggart represented two thirds of the Scottish Trustees.

108. The Scottish Trustees had decided to sell. There was nothing which they had in contemplation which would have led them to believe that the Irish Trustees might take a contrary view. It is difficult to envisage that the Irish Trustees, acting as prudent men of business in relation to Scottish trusts, could, in the circumstances, have reached a different view. The shares were holding strong. There was nothing to

[63] *IRC v Scottish Provident Institution* 2005 SC (HL) 33

suggest they were about to fall dramatically. At least a 50% fall in the share price would have been required before the scheme would even begin to look uneconomic.

109. It can be accepted, as we do, that the Irish Trustees genuinely considered matters carefully over a short period. It is true that there was, at least in theory, a risk that the Irish Trustees might take a different view and the scheme might not have worked as intended, but, as in *Scottish Provident,* the odds were plainly enough to make it a risk which the Scottish Trustees and the beneficiaries were willing to accept in the interests of the scheme.[64] The reality was that there was no practical likelihood of the Irish Trustees faltering and reaching a different view. That did not happen. It seems to us, therefore, that the possibility of the Irish Trustees acting contrary to the clear wishes of the beneficiaries and the Scottish Trustees was remote.

110. At the time the Scottish Trustees were making their decision to exercise the options there was therefore every likelihood or, to put it another way, it was a practical certainty that the Irish Trustees *would* reach the same view.

111. We accordingly draw from the evidence and the factual background as a whole and viewing matters realistically that, as at 25 November 2004, when the Scottish Trustees exercised the options, if not before, there was every practical likelihood that the AWG shares would forthwith be re-sold in the market. Put another way, viewing the facts realistically, there was no practical likelihood that the AWG shares would not forthwith be re-sold in the market by the Irish Trustees. That is what they did. The proof of the pudding is in the eating.[65]

112. The fact that the AWG shares came into the hands of the Irish Trustees, over whom the Scottish Trustees had no control, does not, in the circumstances, negate the conclusion that the scheme or at least the critical elements of it, namely the decision to sell (through the exercise of the options) and the further sale to Merrill Lynch, was a single composite transaction. That single composite transaction was the disposal by the Scottish Trustees to Merrill Lynch (a disposal by A to C disregarding the disposals by A to B and B to C). That was the end result.

Sale to Merrill Lynch

113. The overall scheme proceeded according to plan except that the shares were sold to Merrill Lynch and then to the market rather than to the market through the agency of Merrill Lynch. But that did not matter as long as a good price was achieved. Selling to Merrill Lynch was the means of achieving a price that was certain to be good. The price was buoyant and the savings to be made by avoiding UK capital gains tax were massive.

114. While there was no deadline, the Irish Trustees must have moved swiftly and proceeded forthwith to sell as envisaged by the scheme or plan. The Scottish Trustees

[64] *Scottish Provident* at paragraph 22

[65] *Astall* at paragraph 56

had instructed the transfer of shares on 29 November 2004 and the Irish Trustees sold the shares two days later on 1 December 2004.

115. From the email and telephone discussions between the Irish Trustees and Merrill Lynch, it was quite difficult to see what advice the Irish Trustees were receiving beyond saying in effect:- the price could go up or down, you could instruct us to sell in the market in tranches or in a whole lot (though no one was advising which was better), or a risk bid could be entered with you (the Irish Trustees) selling to us (Merrill Lynch) as principals at a guaranteed price.

116. Merrill Lynch ultimately acted as principals offering to buy and as professional advisers advising the seller what to do. The paper work rather ignored the fact that, at the end of the day, they purchased as principals. No one suggested that there might be a conflict of interest here. Perhaps this was because a minimum price of £7.40 per share, which (given the earlier prices of about £4.88 in early January 2004 and about £7.29 on about 24 November 2004) was obviously acceptable. How Merrill Lynch reconciled their professional duties as adviser and their interest as purchaser need not be explored.

117. This step, the sale to Merrill Lynch sufficiently corresponded to the scheme as planned.[66] It does not therefore matter that step A to C is to Merrill Lynch rather than to the market. This made no difference to the Scottish Trustees, and had no effect on the overall planning or its execution. It would be extraordinary if the application of the *Ramsay* approach could be defeated by the sale being *to* brokers rather than to the market *by* brokers on behalf of the Irish Trustees.

118. It seems to us not only intellectually and logically possible to treat the disposals A to B and B to C as a single disposal by A to C, it is intellectually and logically inevitable to do so in the circumstances of this case and treat what occurred as a single and indivisible whole. The disposals are so closely linked that they are realistically to be regarded as a single and indivisible composite whole. Once the decision to sell was taken by the Scottish Trustees in the then prevailing market, the immediate onward sale should be regarded as practically certain.

Overall Assessment

119. While the existence or non-existence of a practical likelihood or practical certainty is not something that may be measured precisely, our overall assessment looking realistically at this meticulously planned scheme and the detailed evidence of it, is that it was a scheme that was expected, planned, and likely to be carried into effect. The likelihood became stronger as the plan proceeded from step to step. By the date of the exercise of the options, at the latest, there was no practical likelihood that the AWG shares would not be sold. There was every practical likelihood that they would be sold. What occurred was what was always intended to occur namely that the AWG shares were sold at or about market value. It makes no difference that

[66] *Craven* per Lord Goff at 524B

they were sold to Merrill Lynch under the risk bid arrangement. That has no bearing on a realistic assessment of the facts or the application of the TGCA to those facts.

120. Construing the facts as a whole, there was thus a single composite transaction, namely the disposal of the AWG shares at or about market value. The intermediate step (A to B) of selling through the medium of artificially granted options by artificially created Irish Trusts (neither serving any purpose than the obtaining of a tax advantage), should not be respected as the appellants contend. The transaction should be regarded as what in reality it was, namely a disposal in the market (A to C) to which the normal fiscal consequences of the application of the TGCA in accordance with its statutory purpose flow. These elements (A to B and B to C) were intended to operate together. The overall effect and economic result was the disposal of the AWG shares at or about market value (A to C).

121. We have no difficulty in holding that the *Ramsay* approach may, in appropriate circumstances, be applied to a tax avoidance scheme which becomes more focussed as it proceeds, as the various steps (all created for the sole purpose of obtaining a tax advantage) are carried out until the final step in the arrangement is executed. It is clear that by the date of the exercise of the options on 25 November 2004, there was an expectation on the part of the Scottish Trustees that the AWG sales would be sold in the market when the price was relatively high and every practical likelihood that this would occur as planned. That was the only reason to exercise the options when they did. The share price was good. A sale in the market could be achieved quickly and substantial gains would accrue to the beneficiaries of the Irish Trusts, who were also the beneficiaries under the Scottish Trusts. As we have explained, there were no considerations liable to lead to the Irish Trustees taking a different or contrary view.

122. Further adminicles of evidence all point to the clear practical likelihood that once the options were exercised, the AWG shares would be sold forthwith by the Irish Trustees; (i) arrangements had to be made for Lady Morrison to borrow over £5m to create the trust estate of the Irish Trusts; this gave the Irish Trustees the funds to pay for the AWG shares if the options were exercised; (ii) diversification of the trust holding was regarded as a priority,[67] and this applied to both sets of trusts; (iii) there was little or no discussion at all about what the Irish Trustees would do with these funds if the options were not exercised[68]; and (iv) it was always envisaged that the Irish trust would be *re-patriated,*[69] indicating that the duration of their office would be short-lived, their essential function being a conduit for the disposal of the shares in accordance with the scheme.

123. While the planned scheme carried no implication in 2004 that it was in any way reprehensible or other than perfectly honest and respectable, the ingredients of the scheme, nevertheless, served no purpose other than avoiding a liability to tax; this facilitates analysis of the scheme as an integrated whole and in particular the disposals

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[67] Da 2/74-5. Mr Biggart (cross)

[68] Day 2/45-6, Lady Morrison (cross)

[69] D2/54, Lady Morrison (cross)

A to B and B to C as in reality a disposal by A to C.[70] The absence of any commercial purpose (other than obtaining a tax advantage) thus underlines the interrelated transactions and enables them to be disregarded; they were not intended to produce anything other than an artificial fiscal result.[71]

5 124. Moreover, the 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 Scottish Trustees, it might not work as planned.[72] Viewed realistically, the critical element of the scheme was a disposal of assets in the market to which the normal consequences of liability to capital gains tax attached, thus giving effect to the very 10 purpose for which legislation in question was enacted. That seems to us to be the obvious and inescapable reality.[73]

125. If the scheme in question works, it has, in effect, enabled a trust to dispose of its principal shareholding, the value of which had substantially increased since its acquisition, without liability to capital gains tax. Effective gains of over £9m would 15 elide liability to capital gains tax which would otherwise arise.

126. The disposal by the Scottish Trustees to the Irish Trustees was an element in the overall scheme which was to dispose of the AWG shares in the market without incurring any significant liability to tax. There was no underlying commercial scheme of which that element formed part. The reality was the sale of the AWG 20 shares in the market by the Scottish Trustees; that reality normally attracts fiscal liability. The arrangements were structured to have the same or substantially the same economic effect as a taxable disposal but outwith the normal charge to tax for such a disposal.

127. In considering whether the disposal of the AWG shares to the Irish Trustees 25 should be respected (step A to B as Mr Prosser put it), our assessment of the facts is therefore that when the decision to sell was being made there was every likelihood that the shares would forthwith be sold in the market (step B to C). The, or a purpose of TCGA was to make disposal of such shares chargeable to capital gains tax. The purpose of s144ZA was not to facilitate a tax avoidance scheme by means of artificial 30 or uncommercial arrangements such as the creation and exercise of the options.

128. Such arrangements designed to obtain a tax advantage through the creation of artificial conditions might also be described as *abusive* in another context, having no economic justification, explanation or commercial rationale other than that of creating such an advantage; leading to the re-definition of the transactions by disregarding the 35 abusive steps, and thus re-establishing the situation that would have prevailed in the absence of such abusive arrangements - a disposal in the market by the Scottish

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[70] *Craven* at 506C per Lord Oliver

[71] Ibid 507C

[72] *Scottish Provident* at paragraph 23

[73] *Aberdeen Assets Management plc v HMRC* 2014 SC 271 at paragraph 7, per Lord President Gill

Trustees. Although we do not need to rely on this line of thought (based as it is on certain general principles of the law of the European Union), the parallel is marked.

129. There was no likelihood, practical or otherwise, that the AWG shares would not have been sold in the market. The TGCA was intended to apply to a disposal of such shares in the market. The creation and insertion of artificial steps to defeat that purpose is just the sort of arrangement the *Ramsay* approach says should be disregarded. Doing so yields the consequence that the arrangements are treated as a chargeable gain on the disposal of shares in the market. This simply reflects the reality. There is no intellectual or logical difficulty about such a conclusion. The Scottish Trustees and the beneficiaries are not being penalised. They are simply being called upon to meet or bear the effect of the fiscal liabilities in consequence of a disposal which led to a chargeable gain.

130. It is true that the overall scheme, as it was developing, contained a number of doubts, uncertainties and contingencies. As it progressed, these diminished and the likelihood of it being carried into effect as planned increased. By the successive stages of the creation of the Irish Trusts (which involved Lady Morrison obtaining very large loans), the granting of the options, and the exercise of the options, these doubts, uncertainties and contingencies, continued to diminish. Thus, we do not doubt their existence as established by the witness evidence and the documents produced.

131. However, viewing matters overall, it seems clear to us that it became increasingly obvious that the scheme would be carried into effect as expected, planned and intended. Put in the language of the authorities, there was no practical likelihood of the options being exercised without the AWG shares being sold forthwith by the Irish Trustees in the then buoyant market or its equivalent (the risk bid arrangement). There was, in our assessment of the facts as we have found them to be, every likelihood that this would occur. It was a matter of practical certainty that this would occur.

132. Finally, any views the witnesses might have had about the practical likelihood or certainty that the AWG shares would be sold forthwith in the market once the options were exercised are simply views or opinions. As opinions, they would be generally inadmissible (not being expert evidence) and to which no or little weight could properly be attached. What counts is not their assessment of likelihood or practical certainty but our assessment in the light of the facts, as we have found them to be, viewed realistically. What may or may not have been put to any of the witnesses on this topic is, at the end of the day, of little or no relevance, and, at best, a matter for comment.

Disposal

133. In the foregoing circumstances, for the foregoing reasons, the appeals are dismissed.

134. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

J GORDON REID QC FCIArb
TRIBUNAL JUDGE

RELEASE DATE: 13 APRIL 2016