TC06524

Appeal numbers: TC/2016/03705, TC/2016/03706, TC/2016/03708, TC/2016/03709,TC/2016/03710 TC/2016/03711, TC/2016/03712 and TC/2016/03717

INHERITANCE TAX – "death-bed" avoidance scheme – whether a reduction in value of deceased's estate – creation of £1 million liability on acquisition of trust "Income Interest" – whether transfer of value – whether intention to confer a gratuitous benefit within section 10 IHTA – whether an "element of bounty" required for the definition of "settlement" and "settlor" in ss 43and 44 IHTA- appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) ALBERTO NADER **Appellants**
(As Executor of Estate of Jill Belleden Dickins deceased)
(2) ALBERTO NADER
(3) ALISON NADER
(4) HAROLD DICKINS
(5) PETER DICKINS
(6) PAULINE REA-DICKINS
(7) JAMES DICKINS
(8) MARK GILL

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Taylor House, London on 27 February – 1 March 2018 and subsequent written submissions

Patrick Way QC and Philip Goeth, instructed by BDO LLP, Accountants, for the Appellant

Akash Nawbatt QC and Marika Lemos, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. These appeals relate to what is known as a "death-bed" Inheritance Tax ("IHT") avoidance scheme implemented by the late Miss Jill Belleden Dickins ("Miss Dickins") shortly before her death in December 2010.

2. The first seven appellants ((1) to (7) above) are six individuals. Dr Alberto Nader ("Dr Nader") appears first in his capacity as the executor of the will of Miss Dickins and secondly, in his capacity as one of the beneficiaries in respect of a trust. Dr Nader is married to Miss Dickins' niece.

3. The eighth appellant is Mr Mark Gill ("Mr Gill") from whom Miss Dickins bought a trust interest as part of the IHT planning arrangement just before her death.

4. The appellants have appealed Notices of Determination issued under Inheritance Tax Act 1984 ("IHTA") on 13 February 2015.

5. The IHT scheme, in broad terms, involved Miss Dickins borrowing money to buy a life income interest ("the Income Interest") in an offshore trust. The appellants' case was that the effect of that transaction was to ensure that the value of Miss Dickins's estate was subsequently reduced by the amount of the loan owed to the trust on her death. The arrangements were all implemented in the weeks prior to Miss Dickins' death at a time when it was clear that she had only a short time left to live.

6. The respondents ("HMRC") argue that Miss Dickins' estate was not reduced by the loan and that, instead, the purchase of the Income Interest involved a transfer of value under section 3(1) IHTA.

7. The parties are also in dispute about whether the provisions of section 10 IHTA apply to prevent a transfer of value occurring on the basis that there was no intention to confer a gratuitous benefit when Miss Dickins bought the Income Interest.

8. HMRC also advanced an alternative argument to the effect that Miss Dickins was a "settlor" in relation to the Northwich Settlement.

The evidence

9. Most of the primary facts were not in dispute.

10. For the appellants, Dr Nader gave evidence and was cross-examined.

11. For HMRC, Mr Brian Watson ("Mr Watson"), a director of H. E. Foster & Cranfield Ltd, gave evidence as an expert witness in relation to the valuation of the Income Interest acquired by Miss Dickins. Mr Watson was cross-examined by Mr Goeth.

The facts

12. On 20 February 2004, a Mr David Clark settled £100 on trust ("the Redcar Settlement"). The principal beneficiary of the Redcar Trust was Mr Gill, an employee and director of Mercator Trustees Ltd. Mr Clark was a director of a company called Mercator Holdings Group.

13. Clause 19 of the trust deed establishing the Redcar Settlement gave the trustees wide powers to amend the terms of the settlement. On 9 August 2010, by an Instrument of Variation, the Redcar Settlement was amended to allow the trustees to appoint new trusts for the benefit of the Redcar Settlement beneficiaries.

14. Next, by a Deed of Appointment dated 9 November 2010, the trustees of the Redcar Settlement created the Northwich Settlement and appointed £1,000 to Mercator Trustees Ltd, as trustee of the Northwich Settlement. The Northwich Settlement contained wide powers of appointment but until those were exercised the trustee had the power to pay income to Mr Gill and, on 2 January each year, were obliged to pay income arising to the trust to Mr Gill (Clause 5(a) and (b)). The relevant terms of the Northwich Settlement, which were contained in the Second Schedule, were follows:

- Clause 1(b) defines the beneficiaries under the trust, as follows:

  > "'Beneficiaries' means the following objects or persons (whether such objects or persons are now in existence or come into existence during the Trust Period):-
  >
  > (i) the Principal Beneficiary which has the meaning given in clause 1 (m) hereof; and
  >
  > (ii) the persons if any specified in the Third Schedule hereto; and
  >
  > (iii) such other persons as are added to the class of Beneficiaries in exercise of the power conferred upon the Trustees by clause 7(1) hereof."

- Clause 1 (g) defined the "First Principal Beneficiary" as Mr Gill;

- Clause 1 (m) defined "the Principal Beneficiary" in the following terms:

  > "'the Principal Beneficiary' shall mean the person or persons entitled to the Income Interest from time to time including for the avoidance of doubt (i) any assignee of any previous such Principal Beneficiary pursuant to clause 7(1)(b)(i) hereof, and (ii) the Nominated Principal Beneficiary on acceptance of nomination pursuant to clause 7(1)(b)(ii) hereof and the first such Principal Beneficiary shall be the First Principal Beneficiary."

- Clause 1(t) defined the "Trust Period" as follows:

  > "'the Trust Period' means a period from the date of this Deed until the earlier of:
  >
  > (i) 19 February 2014; or

(ii) such day as the Trustees shall by instrument in writing declare to be the end of the Trust Period not being a date earlier than the date of such instrument or later than a date previously specified."

- Clause 4 conferred wide powers of appointment on the trustees, as follows:

"(1) The Trustees shall hold the capital and income of the Trust Fund upon such trusts in favour or for the benefit of all or such one or more of the Beneficiaries exclusive of the other or others of them in such shares or proportions if more than one and with and subject to such powers and provisions for their respective maintenance education or other benefit or for the accumulation of income… as the Trustees may by any deed or deeds revocable (but revocable during the Trust Period only) or irrevocable and executed during the Trust Period appoint PROVIDED ALWAYS that no exercise of this power shall invalidate any prior payment or application of all or any part or parts of the capital or income of the Trust Fund made under any other power or powers conferred by this Settlement or by law.

(2) The Trustees may by Deed appoint that the Trust Fund or any part or share thereof (together with the income thereof) thenceforth be held by such person or persons resident or such body incorporated in any part of the world (in this clause referred to as 'the specified trustee') as may be specified in such deed freed and discharged from all the trusts powers and provisions herein declared and contained and upon, with and subject to such new trusts, powers and provisions as may be declared and contained in any instrument either previously executed by the specified trustee and expressly referred to in such deed or newly declared to the intent that such instrument and the new trusts powers and provisions therein declared and contained shall be construed and take effect in accordance with such law (whether or not being the Proper Law) as may be or be declared to be the proper law of such instrument.

…

(4) Provided that such new trusts, powers and provisions shall be trusts, powers and provisions for the benefit of the Beneficiaries or such one or more of them exclusive of the other or others add at such age and time or respective ages and times in such event or events and in such manner and if more than one in such shares or for such respective interests) whether being interests in income or capital) and with such gifts over between them upon and subject to such conditions and restrictions and with such rights and powers and otherwise as may be declared in the instrument creating the same but so that no such trusts shall be such as shall infringe any rule against perpetuity's accumulations for the time being existing applicable to this Settlement."

- Clause 5 set out the trusts in default of appointment and defined the "Income Interest" acquired by Ms Dickins as follows:

"Until and subject to and in default of any appointment under Clause 4:

(a) Subject to paragraph (b) hereof, the Trustees shall have power throughout the Trust Period to pay or apply the income of the Trust Fund to or for the benefit (whether immediate or deferred) of the Principal Beneficiary at such time or times and in such manner and in such form as they shall in their absolute discretion think fit.

(b) on 2nd January in each year of the Trust Period and on the day on which the Trust Period shall end (if that day shall not be 2nd January) the Trustees shall pay to the Principal Beneficiary (whether out of income or capital of the Trust Fund) an amount equal to the amount (if any) by which the income arising from the Trust Fund (less the amount of any tax or other expenses paid or payable or otherwise borne by the Trustees and properly attributable to the income) received by the Trustees during the immediately preceding period of twelve months… exceeds the amount (or aggregate amount) (if any) paid or applied by the Trustees during the said period of twelve months to or for the benefit of the Principal Beneficiary as mentioned in paragraph (a) above.

(c) the entitlement of the Principal Beneficiary under paragraphs (a) and (b) above is herein called the "Income Interest".

…

(e) The Income Interest of any person who is the Principal Beneficiary shall cease upon

(i) the death of that person; or

…

(iii) that person assigning the Income Interest pursuant to the power conferred by Clause 7(1)(b)(i);

…

(g) Subject to the above and to the trusts powers and provisions of this Deed, in so far as the Trust Fund shall not be wholly disposed of thereby, the Trust Fund and its income shall be held upon trust the such charity as the Trustees shall in their absolute discretion determine.

…"

- Thus, the terms of the trust conferred an Income Interest on the Principal Beneficiary. In default of appointment, the Trust Fund was to be held for such charity as the trustees would determine.

- Clause 7 permitted the trustees to add and exclude beneficiaries, and prescribed the consequences that would flow from an assignment by the Principal Beneficiary of his or her interest. Clause 7(1)(a) provided:

"The Trustees shall have power at any time or times during the Trust Period to add to the class of Beneficiaries such one or more persons as the Trustees shall in their absolute discretion determine."

- Clause 7(1)(b)(i) provided as follows:

"The Principal Beneficiary may at any time assign the Income Interest to any person, such assignment to be in writing signed by the Principal

Beneficiary and assignee and effective upon the actual delivery to the Trustees whereupon the Trustees shall add the assignee to the class of Beneficiaries and the assignee shall immediately become the Principal Beneficiary for all purposes. For the avoidance of doubt upon the addition of the assignee to the class of Beneficiaries the assignor Principal Beneficiary shall cease immediately to be Principal Beneficiary."

15. On 11 November 2010, Dr Nader telephoned BDO LLP ("BDO"). Dr Nader informed them that Miss Dickins was suffering from terminal cancer and had "a very impaired lifespan". The total chargeable estate was recorded as being £1.1-1.2 million. The note of the telephone conversation records "there was a discussion regarding IHT mitigation and [BDO] mentioned that estimated fees in relation to a trust fund with a value of £1 million would be £75k charged directly by the third party."

16. On 12 November 2010 there was a further telephone conversation between Dr Nader and BDO. The note of that conversation records the Dr Nader wanted to have a better grasp of the IHT planning because there was to be "a family conference." The note records that BDO explained in detail the stages of the proposed planning. A number of emails were exchanged between BDO and Dr Nader on or around 16 November 2010 which described how it was envisaged the scheme was intended to work.

17. By a letter dated 25 November 2010, Mr Gill offered to sell the Income Interest to Miss Dickins. The offer stated that the total value of the trust fund "will be" £1 million "at the time of the assignment". The purchase price of the Income Interest was stipulated to be £1,075,000 (which included a £75,000 fee). A separate fee of £25,000 was paid subsequently to BDO for their advice in relation to the scheme and its implementation.

18. Mr Gill's offer was accepted on behalf of Miss Dickins by a letter dated 6 December 2010.

19. At around this time, Dr Nader instructed a firm of London solicitors to advise in relation to the documents which it was proposed should be entered into in connection with the IHT scheme. There was no indication that they advised Dr Nader in relation to the price to be paid for the Income Interest.

20. By a Deed of Appointment dated 9 December 2010, the Redcar Settlement appointed the sum of £999,000 to the Northwich Settlement.

21. By an Irrevocable Instrument of Restriction of Powers dated 13 December 2010, the trustee of the Northwich Settlement gave up its power under Clause 7(2) to exclude the Principal Beneficiary i.e. after Miss Dickins had signed the offer letter which committed her to acquire the Income Interest.

22. On 16 December 2010, Ms Dickins entered into a loan agreement under which she agreed to borrow £1 million from Storrier Trading Limited, the proceeds of which were to be used to purchase the Income Interest. Pursuant to the terms of the loan

agreement, the deceased was obliged to repay the loan by 22 December 2010 and the loan was to be drawn only by way of a direct payment to Mercator. The loan was guaranteed by Mercator Trustees Ltd.

23. Pursuant to a Deed of Assignment dated 16 December 2010, Mr Gill assigned the Income Interest to Miss Dickins for a purchase price of £1,075,000.

24. In addition, on 16 December 2010, the Northwich Settlement was amended so that Mr Gill and his family were excluded from being beneficiaries of the Northwich Settlement. Also, on the same date, under an Irrevocable Instrument of Addition of Beneficiaries executed by Mercator Trustees Ltd as trustee of the Northwich Settlement, Miss Dickins was added to the class of beneficiaries under the Northwich Trust.

25. Various documents evidenced the following transactions having taken place on 16 December 2010:

- Receipt of £1 million loan monies by Miss Dickins from Storrier Trading Limited held on a Mercator Trust Company Limited client account for the benefit of Miss Dickins (Mercator client account statement).
- Payment of £75,000 by Miss Dickins to Mercator Trust Company Limited client account (Miss Dickins' statement with Rathbones, Miss Dickins' investment managers, and a Mercator client account statement).
- Two payments made by Miss Dickins to Mercator Trustee Company Limited using money held on Mercator Trust Company Limited client account of £1 million and £75,000 (Mercator Trust Company Limited client account statements).

26. On 20 December 2010, Mercator Trustees Limited agreed to advance £1 million to Miss Dickins by means of a specialty debt deed. Clause 4.1 of the Deed provided that the loan was repayable within 30 days of receipt by Miss Dickins of a written demand from the trustee (i.e. Mercator Trustees Ltd). On the same day, a letter records Miss Dickins (acting through her niece, Alison Nader, on her behalf) requesting Mercator Trust Company Limited to use the amount agreed to be lent to repay Storrier Trading Limited. Thus, the result was that Miss Dickins would now owe £1 million to the trustee of the Northwich Settlement.

27. On 20 December 2010, Miss Dickins received £1 million by way of loan from the Northwich Settlement. On the same day, Miss Dickins repaid Storrier Trading Limited the £1 million loan that it had previously made to Miss Dickins.

28. On 27 December 2010, Miss Dickins died.

29. On 29 December 2010 a payment of £5547.95 was made on behalf of the late Miss Dickins in respect of a loan arrangement fee and interest to Storrier Trading Limited.

30. On 4 January 2011, Dr Nader emailed BDO asking what was envisaged in relation to the inheritance tax planning. BDO replied, stating:

> "We will forward the above items to the trustees and liaise with them regarding the appointment of the trust assets (the loan receivable from the estate to the beneficiaries of the Will).
>
> As previously discussed, the estate currently owes £1 million to the trust. In the event that the trustees appoint this loan to the beneficiaries of the Will (in proportion to the value of the specific legacies in the Will), then the estate will owe this amount to the various individuals which can be satisfied by transferring the estate assets to them in line with the specific legacies.
>
> …
>
> Once the loan has been appointed out of the trust it can then be wound up. In theory the appointment of the loan to the beneficiaries could happen at any stage but the estate assets cannot be transferred to the beneficiaries until probate has been granted to the executors by the court."

31. Probate was granted to Dr Nader on 4 July 2011. BDO received a sealed copy of the grant of probate to Miss Dickins' estate on 7 July 2011.

32. On 8 August 2011, the trustees added the appellants to the class of beneficiaries of the Northwich Settlement. On 25 August 2011, pursuant to a Deed of Appointment of the Trust Fund and Termination of Trust of the Northwich Settlement, the assets of the Northwich Settlement (i.e. the loan receivable) were appointed to Dr Nader as to £164,335.65, Pauline Rea-Dickins as to £164,335.65, James Dickins as to £174,626.69, Peter Dickins as to 174,626.69, Harold Dickins as to £174,626.69 and Alison Nader as to £174,626.69.

33. I should add that Mr Gill was an employee and director of Mercator Trustees Limited, a director of Mercator Trust Company Limited, a director of Storrier Trading Limited, a director of Mercator Secretaries Limited and a director of Mercator Holdings Limited.

34. In summary, therefore, Miss Dickins borrowed money (£1 million) from Storrier Trading Limited to buy the Income Interest in the Northwich Settlement (£1 million, ignoring the £75,000 fee). That loan was repaid out of and replaced by a £1million loan to Miss Dickins from the Northwich Settlement. Miss Dickins then died. The beneficiaries under Miss Dickins' Will were then appointed as beneficiaries under the Northwich Settlement. After probate of Miss Dickins' Will was granted, the trustees of the Northwich Settlement distributed the benefit of the loan (£1 million) amongst the beneficiaries of Miss Dickins' Will.

35. HMRC opened an enquiry into the IHT return and subsequently issued the appellants with Notices of Determination on 13 February 2015, against which the appellants now appeal.

The evidence of Dr Nader

36. Dr Nader confirmed that Miss Dickins had been diagnosed with a brain tumour in mid-October 2010 and was only given a few weeks to live. She was given treatment in November and December but died on 27 December 2010.

37. Dr Nader was the primary point of contact between Miss Dickins' family and BDO in the conception and execution of the scheme. Miss Dickins had entrusted him with the task of ascertaining whether there was anything that could be done to mitigate IHT at what was, obviously, a very late stage. He was the person who discussed the elements of the scheme with BDO. Miss Dickins was too ill to participate in those discussions. Her participation in the scheme and its various steps was through her relatives (particularly her niece, Alison Nader) acting on her behalf under a power of attorney.

38. Dr Nader's evidence was that it was envisaged at the outset that the beneficiaries under Miss Dickins' Will would be appointed as beneficiaries under the Northwich Trust and that the trustees would appoint the benefit of the £1 million loan, made to Miss Dickins, to those beneficiaries. He confirmed that this was always the intention of the parties. The purpose of the scheme was to create a £1 million liability in Miss Dickins' estate the benefit of which would be passed on to her beneficiaries and thereby minimise IHT.

39. Mr Nawbatt referred Dr Nader to Clause 4.1 of the Specialty Loan Deed dated 20 December 2010 by which the trustee of the Northwich Settlement lent £1 million to Miss Dickins. This provided that the loan was repayable on 30 days' notice. Mr Nawbatt suggested that, although the clause looked onerous, Dr Nader knew that the trustee would not be requesting repayment of the loan, because everybody knew and understood that benefit of the loan would be assigned to the beneficiaries of Miss Dickins' Will. Dr Nader confirmed that this was so and said that that was the understanding of all parties involved in the period 16-20 December 2010.

40. When asked, in cross-examination, whether Dr Nader understood that Miss Dickins was paying £1 million to acquire only the income generated from the £1 million trust fund in the Northwich Settlement, Dr Nader replied that he thought that the £1 million was for the acquisition of the trust funds. Dr Nader said that he did not understand what an Income Interest was and that he did not understand trusts.

41. Dr Nader confirmed that he did not seek any advice in relation the value of the Income Interest or its purchase price. No independent valuation was obtained – Dr Nader said that he did not see the point of doing so. There was no negotiation about the price.

42. In cross-examination, Dr Nader was also asked why there was no negotiation on price given that he did not understand what an Income Interest was and had not sought any advice on the purchase price or the value of the trust fund. Dr Nader's response was "No, it was offered at that price, and we thought the price was correct. There was no negotiation."

43. Dr Nader was asked about the relevance of the Trust Fund being £1 million. He replied that "we" (by which I understood him to mean Miss Dickins and her family, including Dr Nader) "wanted to make sure that the value of what we were investing in was protected."

5 44. The estimated value of Miss Dickins' estate was £1.1-£1.2 million and Dr Nader had informed BDO of this estimated value. It was also estimated that Miss Dickins would need approximately £2000-£3000 per month for medical and living expenses. Dr Nader accepted, in cross-examination, that given the estimated value of Miss Dickins' estate, the £1million purchase price amount for the Income Interest was 10 not co-incidental. Dr Nader confirmed that BDO had said that it would be possible to reduce the value of the estate by £1 million and thereby obtain protection from IHT of £1 million.

45. He understood that the trustees had an absolute discretion to appoint beneficiaries, but said that the trustees had proved trustworthy and had done what they 15 were asked to do. Essentially, however, Dr Nader confirmed that because the benefit of the £1 million loan would end up with the beneficiaries under Miss Dickins' Will, it was this benefit for which Miss Dickins was paying when she bought the Income Interest.

46. Prior to undertaking the IHT planning, Dr Nader had not heard of Mr Gill or the 20 Mercator Group.

The evidence of Mr Watson

47. Mr Watson is a director of H E Foster & Cranfield Ltd and a Fellow of the Institute of Actuaries. He produced an expert witness report on behalf of HMRC.

48. Foster & Cranfield was established in 1843 as auctioneers and valuers of 25 financial rights and interests. The supply of trust instruments, at least since 1990, had been limited. However, whenever such interests were offered for sale they attracted interest from investors, who were usually individuals.

49. His experience included advising clients on apportionment of trust interests between beneficiaries and advising clients who were considering selling a financial 30 interest, such as a trust interest, on the price for which they might expect to be able to sell their interest at auction.

50. Mr Watson noted that there was a small, but active, market in reversionary interests in Will Trusts under which a life tenant had the right to live in a property owned by the Trust (or to receive income from the Trust's assets) for the rest of their 35 lifetime. A remainderman who was entitled to a share of the Trust's assets on the death of life tenant may wish to sell some, or all, of his/her interest before the life tenant's death. Mr Watson gave some examples of such sales.

51. There was also a very small market in life interests under a Trust under which the life tenant received income from the Trust's assets for the rest of his/her life. Again, Mr Watson gave certain examples.

52. In addition, in April 2009, Foster & Cranfield had sold at auction the right to receive future royalties arising from specified books of poems.

53. From these various transactions, Mr Watson summarised the key features which were relevant:

> (a) there was a prescribed event (e.g. the death of an individual, the end of the royalty period) when investors knew that, in the case of a reversionary interest, they would be able to realise their investment or, in the case of a life interests, that their income would come to an end;
>
> (b) although in the case of a reversionary interest there may be potential complications, such as other parties with an interest in the asset in question, there was unlikely to be any serious impediment to realising the asset (i.e. the other parties would want to realise the asset or the Courts would support the investor's desire to realise their investment);
>
> (c) in the case of contingent reversionary interests and life interests, investors may not be willing to take the mortality risk associated with such interests; instead they may insist on life insurance being in place to protect their investment; and
>
> (d) in all cases the interests were well-defined and the trustees had no discretionary powers other than investment powers set out by the settlor.

54. Mr Watson then referred to a number of actuarial papers dealing with the valuation of trust interests. He noted that the lack of more recent literature (the latest publication he referred to was dated 1977) was probably the consequence of the limited market in trust interests. In particular, he referred to a publication authored by *Beard & Prevett* entitled "*Actuarial Valuations of Interests in Settled Property*" (1973). In section 1.5, entitled "*Discretionary Trusts*", the authors stated:

> "Trustees are sometimes given extremely wide powers of discretion as to how income and/or capital should be shared between a number of beneficiaries. Trusts drawn on more precise lines may nevertheless contain an over-riding clause empowering the trustees, if they consider that special circumstances justify it, to make additional payments of income or capital to certain beneficiaries at the expense of others. Such trusts are unlikely to concern an actuary because the uncertainties preclude any accurate assessment of the separate interest of each beneficiary…."

55. Mr Watson's evidence was that he included this paragraph from *Beard & Prevett* in his report to support his conclusion that there was no interest in buying such trust interests. In Mr Watson's view the authors were not saying that there was no actuarial methodology for valuing such interests.

56. At paragraphs 6 and 7 of his report, Mr Watson expressed his views on valuation and summarised his conclusions as follows:

"**6.0 Valuation of the Income Interest as at 16th December 2010**

6.1 I understand that the valuation must assume that a sale of the Income Interest would take place on the date in question assuming that all of the pre-and post-sale considerations and practicalities that normally attend such a sale had been completed.

6.2 Miss Dickins died on 27 December 2010. She had been suffering from terminal cancer.

6.2 [sic] The key features of the Income Interest which a potential investor would have taken into account are;

(a) the history of the income which had been paid to Miss Dickins (and Mr Gill when he was Principal Beneficiary)

[(b) Miss Dickins being entitled to income from the Settlement until the end of the Trust Period or her earlier death – her age and state of health would therefore be relevant][1]

(c) The Trustees having discretionary powers to change the Trust Period thereby bringing the income being paid to Miss Dickins, or anyone to whom she had assigned her interest, to an end

(d) the Trustees having the overriding power of appointment that might be exercised at any time to the detriment of Miss Dickins, or anyone to whom she had assigned her interest.

I think that before bidding at auction potential investors would have asked about Miss Dickins' state of health and would have understood that she had limited life expectancy.

6.3 based on my experience of the risks that investors considering buying a trust, or other, financial interests are prepared to take I do not believe that in investor would have been willing to take the risk that the trustees, over whom the investor would have no influence, would not exercise their discretionary powers to the investor's detriment by shortening the Trust Period or by exercising their overriding powers of appointment.

6.4 This being the case I believe that the market value of Miss Dickins' Income Interest in the Settlement on 16 December 2010 was £nil.

7.0 Summary

There is a small but active market in financial interests in trusts. Foster & Cranfield's experience of the market shows that investors buying such interests are prepared to accept a number of risks such as owning an asset:

(a) which it may not be easy to sell

(b) that they will not be able to realise until an unknown date in the future (e.g. the death of an individual)

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[1] Mr Watson in his oral evidence said that he should have deleted paragraph 6.2 (b) – see [64].

(c) with an unknown future value, but

(d) where they have the option of insuring against the risk that mortality might deprive them of some or all of their investment.

That same experience leads me to the conclusion that investors would have no interest in buying the Income Interest in the Settlement described above where the wide-ranging discretionary powers of the Trustees mean that an investor might be deprived of some or all of their investment at any time."

57. The type of interest that was normally sold on the life interest market was, according to Mr Watson, as follows: a husband who dies leaving a portfolio of stocks and shares in his will to his wife for her life and, on her death, to her children.

58. The purchasers of trust interests were usually knowledgeable and intelligent investors, who often business men or women.

59. Mr Watson said that the Income Interest in the Northwich Settlement differed from the kind of life interests normally offered for sale. First, the documentation evidencing the trust interest was much longer and more complex than that which he would normally expect to see. Usually, the interest would be evidenced by a will with, perhaps, 2-6 pages, which was reasonably comprehensible to a layperson, rather than 30 pages of "legalese". Secondly, he had never seen a trust where the life interest beneficiary was replaced by the person acquiring it or a life interest based on the life of the buyer. Thirdly, the trust conferred very wide powers and discretions on the trustees not usually seen in the type of interests in which Foster & Cranfield dealt.

60. In his view, a reasonably prudent purchaser would look at the terms of the Northwich Settlement and see that the Trust Fund could have gone ultimately to Miss Dickins' family.

61. Mr Watson was asked, in examination in chief, what, in his opinion, was the market for an Income Interest which was subject to the following restrictions: (1) the trustees' power to fore-shorten the trust period; and (ii) the wide powers of appointment; and (iii) the power to appoint additional beneficiaries. Mr Watson's evidence was simple: he said that prudent and sensible people, doing their due diligence by looking at the documents before making an offer at auction, would not have any interest in buying a trust interest with those constraints.

62. Mr Nawbatt asked Mr Watson if he had seen a life interest for sale which was based on the life of the buyer and he replied that he had not.

63. In his report, Mr Watson stated: "The value of the assets of the Settlement on 16 December 2010 was £1 million." Mr Watson accepted that he was unsure on what basis he had made the statement, but thought it could have been from email sent to him or the large bundle of documents that he received as part of his instructions.

64. Mr Watson also noted that he needed to know the level of income received by Mr Gill and Miss Dickins in order to place a value upon it, but he had received no such information. He also agreed that a willing buyer of an asset in the open market

would have to consider what return the asset would yield. He said that an investor would make a projection of cash flows, that he would assess the probability of cash flows and would make a risk/profit assessment.

65. Also, in examination in chief, Mr Watson clarified paragraph 6.2 (b) of his report. He explained that when he wrote paragraph 6.2 (b) it was on the assumption that Foster & Cranfield's usual auction conditions applied. Therefore, an investor looking to buy the interest at the relevant time would have known that Miss Dickins had a limited life expectancy and would know that the sale would complete within five weeks of the bid. Therefore, they would be concerned that the sale would be rescinded after she had died. Mr Watson said that he had been advised that he should take the position that all practicalities and legalities would be in place on 16 December 2010. He had therefore added paragraph 6.1, which made those assumptions clear, but had mistakenly failed to remove paragraph 6.2 (b). Mr Watson confirmed that the deletion of paragraph 6.2 (b) did not affect his valuation of the Income Interest.

66. Mr Watson confirmed that the examples of transactions to which he referred in his report were not comparable to the transaction carried out by Miss Dickins because the trust documents conferring the interests were not comparable. He had no experience of a transaction such as act carried out by Miss Dickins, but he would have been aware of any transaction involving such Income Interests that would be taking place in a public forum. He was not aware of any other market for trust interests other than the public auctions arranged by Foster & Cranfield.

67. Mr Watson accepted that individuals might be carrying out similar transactions to the one carried out by Miss Dickins without being aware of it. He acknowledged that there may be many cases of private investments in illiquid assets but he had no knowledge of such transactions in his expert capacity. He accepted that there could be a market for an asset, sold privately, outside of a public auction. However, Mr Watson said that he could only speak of people willing to buy and sell trust interests in public auctions or sales advertised in a newspaper (of which he would be aware).

68. Mr Watson did not consider that the risks identified in paragraph 6.2 (c) and (d) were materially overstated. He explained that he gave his opinion based on the type of people he dealt with. He did not think that a reasonable person in the market that he knew would buy the kind of Income Interest purchased by Miss Dickins.

69. Mr Watson did not consider that a reasonable investor would investigate the identity of the trustee. They would simply read the terms of the trust would not go further. Specifically, he considered that the people that typically bought life interests would not place trust in the exercise of trustees' discretion.

70. Mr Watson was asked whether he had seen a trust like the Northwich Settlement. He replied that he had not seen a similar trust where the interest had been offered for sale. He was unaware of Miss Dickins' acquisition until he was informed of it by HMRC.

71. Mr Watson was asked to comment on Dr Nader's evidence that, in respect of the £1 million loan, it was a clear and common understanding that Mercator would not be requesting re-payment of the loan and that all concerned knew that the Trust Fund would be appointed to Miss Dickins' family. Mr Watson stated that where a hypothetical investor was considering buying an Income Interest, such as that in the present appeals, and there were discretionary powers (and no legal documentation to reassure a hypothetical investor) his opinion was that the hypothetical investor would not have invested in the Income Interest. A hypothetical investor would, in his opinion, look at the trustees' discretionary powers, look at the trust deed of the Northwich Settlement, note that there was no guarantee or legal document or evidence of the trustees waving their powers, and would consequently refrain from investing. He confirmed, however, that he did not take into account the possibility that a hypothetical investor would assume that Miss Dickins' heirs would be excluded from benefiting under the trust.

72. Mr Watson was asked why he had not provided any actuarial or other data or any valuation methodology. His response was that, although he was aware, being an actuary himself, that actuaries applied methodologies to determine values (e.g. mortality tables), those methodologies would not be used in a case where the interest was worth nothing because it was of no interest to a potential buyer.

73. Mr Watson was asked why he had not applied a discounted cash flow methodology and he explained that that methodology had no relevance in the present case. He said that the type of investors that he encountered would want a return of 8-10%. The investor would have to assess the risk of not getting a return. Because of the breadth of the trustees' powers, Mr Watson's opinion was that the risk was in the region of 100% with the result that any cash flow would be wholly discounted. In any event, Mr Watson noted that there would have to be an expected cash flow. In the absence of any income history and information as to investment policy, it was not possible to determine what the expected cash flow would be. Thus, even if a discounted cash flow valuation were to be adopted, Mr Watson's opinion was that the value of the Income Interest would be nil. Mr Watson confirmed, in answer to a question from Mr Goeth, that he had not used any data to back up his assessment of the nature of the risk that the trustees would exercise their discretion in a manner adverse to the interests of the Principal Beneficiary – it was simply his experience that investors would not typically buy an interest where such a discretion existed.

74. Mr Watson was asked whether an investment would still be worthwhile, even if the investor was very old very ill, if his or her heirs would inherit the investment. Mr Watson confirmed that such an investment could be sold in the market and that in such circumstances life expectancy would not be relevant.

75. Mr Goeth challenged Mr Watson's view that a reasonable independent investor would assign 100% risk to the exercise of the trustee's discretion (i.e. in a manner adverse to the investor's interests). Mr Watson's experience was that the nature of purchasers of trust interests was that the lengthy documents and the powers of appointment would discourage investors from investing. That was so even though a potential investor would step into the shoes of Miss Dickins.

76. In cross-examination, Mr Watson confirmed that he had never worked in a professional Trust Management Company and that he was therefore unaware of the proceedings common in that industry.

Statutory framework

5 77. The following are the relevant statutory provisions, all contained in the IHTA:

> **1 Charge on transfers**
>
> Inheritance tax shall be charged on the value transferred by a chargeable transfer.
>
> **2 Chargeable transfers and exempt transfers**
>
> 10 (1) A chargeable transfer is a transfer of value which is made by an individual but is not (by virtue of Part II of this Act or any other enactment) an exempt transfer.
>
> (2) A transfer of value made by an individual and exempt only to a limited extent—
>
> 15 (a) is, if all the value transferred by it is within the limit, an exempt transfer, and
>
> (b) is, if that value is partly within and partly outside the limit, a chargeable transfer of so much of that value as is outside the limit as well as an exempt transfer of so much of that value as is within the 20 limit.
>
> (3) Except where the context otherwise requires, references in this Act to chargeable transfers, to their making or to the values transferred by them shall be construed as including references to occasions on which tax is chargeable under Chapter III of Part III of this Act (apart from 25 section 79), to their occurrence or to the amounts on which tax is then chargeable.
>
> **3 Transfers of value**
>
> (1) Subject to the following provisions of this Part of this Act, a transfer of value is a disposition made by a person (the transferor) as a 30 result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer.
>
> (2) For the purposes of subsection (1) above no account shall be taken of the value of excluded property which ceases to form part of a 35 person's estate as a result of a disposition.
>
> (3) Where the value of a person's estate is diminished, and the value—
>
> (a) of another person's estate, or
>
> (b) of any settled property, other than settled property treated by section 49(1) below as property to which a person is beneficially 40 entitled,
>
> is increased by the first-mentioned person's omission to exercise a right, he shall be treated for the purposes of this section as having

made a disposition at the time (or latest time) when he could have exercised the right, unless it is shown that the omission was not deliberate.

(4) Except as otherwise provided, references in this Act to a transfer of value made, or made by any person, include references to events on the happening of which tax is chargeable as if a transfer of value had been made, or, as the case may be, had been made by that person; and "transferor" shall be construed accordingly.

3A Potentially exempt transfers

[(1) Any reference in this Act to a potentially exempt transfer is a reference to a transfer of value—

(a) which is made by an individual on or after 18th March 1986 but before 22nd March 2006; and

(b) which, apart from this section, would be a chargeable transfer (or to the extent to which, apart from this section, it would be such a transfer); and

(c) to the extent that it constitutes either a gift to another individual or a gift into an accumulation and maintenance trust or a disabled trust;

. . ..

(1A) Any reference in this Act to a potentially exempt transfer is also a reference to a transfer of value—

(a) which is made by an individual on or after 22nd March 2006,

(b) which, apart from this section, would be a chargeable transfer (or to the extent to which, apart from this section, it would be such a transfer), and

(c) to the extent that it constitutes—

(i) a gift to another individual,

(ii) a gift into a disabled trust, or

(iii) a gift into a bereaved minor's trust on the coming to an end of an immediate post-death interest.

(1B) Subsections (1) and (1A) above have effect subject to any provision of this Act which provides that a disposition (or transfer of value) of a particular description is not a potentially exempt transfer.

(2) Subject to subsection (6) below, a transfer of value falls within subsection (1)(c) or (1A)(c)(i) above, as a gift to another individual,—

(a) to the extent that the value transferred is attributable to property which, by virtue of the transfer, becomes comprised in the estate of that other individual, or

(b) so far as that value is not attributable to property which becomes comprised in the estate of another person, to the extent that, by virtue of the transfer, the estate of that other individual is increased, ...

(3) Subject to subsection (6) below, a transfer of value falls within subsection (1)(c) above, as a gift into an accumulation and

maintenance trust or a disabled trust, to the extent that the value transferred is attributable to property which, by virtue of the transfer, becomes settled property to which section 71 or 89 of this Act applies.

(3A) Subject to subsection (6) below, a transfer of value falls within subsection (1A)(c)(ii) above to the extent that the value transferred is attributable to property which, by virtue of the transfer, becomes settled property to which section 89 below applies.

(3B) A transfer of value falls within subsection (1A)(c)(iii) above to the extent that the value transferred is attributable to settled property (whenever settled) that becomes property to which section 71A below applies in the following circumstances—

(a) under the settlement, a person ("L") is beneficially entitled to an interest in possession in the settled property,

(b) the interest in possession is an immediate post-death interest,

(c) on or after 22nd March 2006, but during L's life, the interest in possession comes to an end,

(d) L is beneficially entitled to the interest in possession immediately before it comes to an end, and

(e) on the interest in possession coming to an end, the property—

(i) continues to be held on the trusts of the settlement, and

(ii) becomes property to which section 71A below applies.

(4) A potentially exempt transfer which is made seven years or more before the death of the transferor is an exempt transfer and any other potentially exempt transfer is a chargeable transfer.

(5) During the period beginning on the date of a potentially exempt transfer and ending immediately before—

(a) the seventh anniversary of that date, or

(b) if it is earlier, the death of the transferor,

it shall be assumed for the purposes of this Act that the transfer will prove to be an exempt transfer.

(6) Where, under any provision of this Act , tax is in any circumstances to be charged as if a transfer of value had been made, that transfer shall be taken to be a transfer which is not a potentially exempt transfer.

(7) In the application of this section to an event on the happening of which tax is chargeable under section 52 below, the reference in subsection (1)(a) [or (1A)(a)] above to the individual by whom the transfer of value is made is a reference to the person who, by virtue of section 3(4) above, is treated as the transferor.

4 Transfers on death

(1) On the death of any person tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death.

(2) For the purposes of this section, where it cannot be known which of two or more persons who have died survived the other or others they shall be assumed to have died at the same instant.

5 Meaning of estate

(1) For the purposes of this Act a person's estate is the aggregate of all the property to which he is beneficially entitled, except that—

(a) the estate of a person—

(i) does not include an interest in possession in settled property to which section 71A or 71D below applies, and

(ii) does not include an interest in possession that falls within subsection (1A) below [unless it falls within subsection (1B) below, and

(b) the estate of a person immediately before his death does not include excluded property [or a foreign-owned work of art which is situated in the United Kingdom for one or more of the purposes of public display, cleaning and restoration (and for no other purpose)].

(1A) An interest in possession falls within this subsection if—

(a) it is an interest in possession in settled property,

(b) the settled property is not property to which section 71A or 71D below applies,

(c) the person is beneficially entitled to the interest in possession,

(d) the person became beneficially entitled to the interest in possession on or after 22nd March 2006, and

(e) the interest in possession is—

(i) not an immediate post-death interest,

(ii) not a disabled person's interest, and

(iii) not a transitional serial interest.

(1B) An interest in possession falls within this subsection if the person—

(a) was domiciled in the United Kingdom on becoming beneficially entitled to it, and

(b) became beneficially entitled to it by virtue of a disposition which was prevented from being a transfer of value by section 10 below.

(2) A person who has a general power which enables him, or would if he were sui juris enable him, to dispose of any property other than settled property, or to charge money on any property other than settled property, shall be treated as beneficially entitled to the property or money; and for this purpose "general power" means a power or authority enabling the person by whom it is exercisable to appoint or dispose of property as he thinks fit.

(3) In determining the value of a person's estate at any time his liabilities at that time shall be taken into account, except as otherwise provided by this Act.

(4) The liabilities to be taken into account in determining the value of a transferor's estate immediately after a transfer of value include his liability for inheritance tax on the value transferred but not his liability (if any) for any other tax or duty resulting from the transfer.

(5) Except in the case of a liability imposed by law, a liability incurred by a transferor shall be taken into account only to the extent that it was incurred for a consideration in money or money's worth.

10 Dispositions not intended to confer gratuitous benefit

(1) A disposition is not a transfer of value if it is shown that it was not intended, and was not made in a transaction intended, to confer any gratuitous benefit on any person and either—

(a) that it was made in a transaction at arm's length between persons not connected with each other, or

(b) that it was such as might be expected to be made in a transaction at arm's length between persons not connected with each other.

(2) Subsection (1) above shall not apply to a sale of unquoted shares or unquoted debentures unless it is shown that the sale was at a price freely negotiated at the time of the sale or at a price such as might be expected to have been freely negotiated at the time of the sale.

(3) In this section—

"disposition" includes anything treated as a disposition by virtue of section 3(3) above;

"transaction" includes a series of transactions and any associated operations.

43 Settlement and related expressions

(1) The following provisions of this section apply for determining what is to be taken for the purposes of this Act to be a settlement, and what property is, accordingly, referred to as property comprised in a settlement or as settled property.

(2) "Settlement" means any disposition or dispositions of property, whether effected by instrument, by parol or by operation of law, or partly in one way and partly in another, whereby the property is for the time being—

(a) held in trust for persons in succession or for any person subject to a contingency, or

(b) held by trustees on trust to accumulate the whole or part of any income of the property or with power to make payments out of that income at the discretion of the trustees or some other person, with or without power to accumulate surplus income, or

(c) charged or burdened (otherwise than for full consideration in money or money's worth paid for his own use or benefit to the person

making the disposition) with the payment of any annuity or other periodical payment payable for a life or any other limited or terminable period,

or would be so held or charged or burdened if the disposition or dispositions were regulated by the law of any part of the United Kingdom; or whereby, under the law of any other country, the administration of the property is for the time being governed by provisions equivalent in effect to those which would apply if the property were so held, charged or burdened.

(3) A lease of property which is for life or lives, or for a period ascertainable only by reference to a death, or which is terminable on, or at a date ascertainable only by reference to, a death, shall be treated as a settlement and the property as settled property, unless the lease was granted for full consideration in money or money's worth; and where a lease not granted as a lease at a rack rent is at any time to become a lease at an increased rent it shall be treated as terminable at that time.

(4) …

(5) …

44 Settlor

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

(2) Where more than one person is a settlor in relation to a settlement and the circumstances so require, this Part of this Act (except section 48(4) to (6)) shall have effect in relation to it as if the settled property were comprised in separate settlements.

49 Treatment of interests in possession

(1) A person beneficially entitled to an interest in possession in settled property shall be treated for the purposes of this Act as beneficially entitled to the property in which the interest subsists.

(1A) Where the interest in possession mentioned in subsection (1) above is one to which the person becomes beneficially entitled on or after 22nd March 2006, subsection (1) above applies in relation to that interest only if, and for so long as, it is—

(a) an immediate post-death interest,

(b) a disabled person's interest, or

(c) a transitional serial interest,

or falls within section 5(1B) above.

(1B) Where the interest in possession mentioned in subsection (1) above is one to which the person became beneficially entitled before

22nd March, subsection (1) above does not apply in relation to that interest at any time when section 71A below applies to the property in which the interest subsists.

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

(3) . . . .

160 Market value

Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time.

199 Dispositions by transferor

(1) The persons liable for the tax on the value transferred by a chargeable transfer made by a disposition (including any omission treated as a disposition under section 3(3) above) of the transferor are—

(a) the transferor;

(b) any person the value of whose estate is increased by the transfer;

(c) so far as the tax is attributable to the value of any property, any person in whom the property is vested (whether beneficially or otherwise) at any time after the transfer, or who at any such time is beneficially entitled to an interest in possession in the property;

(d) where by the chargeable transfer any property becomes comprised in a settlement, any person for whose benefit any of the property or income from it is applied.

(2) Subsection (1)(a) above shall apply in relation to—

(a) the tax on the value transferred by a potentially exempt transfer; and

(b) so much of the tax on the value transferred by any other chargeable transfer made within seven years of the transferor's death as exceeds what it would have been had the transferor died more than seven years after the transfer,

with the substitution for the reference to the transferor of a reference to his personal representatives.

(3) A purchaser of property, and a person deriving title from or under such a purchaser, shall not by virtue of subsection (1)(c) above be liable for tax attributable to the value of the property unless the property is subject to an Inland Revenue charge.

(4) For the purposes of this section—

(a) any person who takes possession of or intermeddles with, or otherwise acts in relation to, property so as to become liable as executor or trustee …, and

(b) any person to whom the management of property is entrusted on behalf of a person not of full legal capacity,

shall be treated as a person in whom the property is vested.

(5) References in this section to any property include references to any property directly or indirectly representing it.

268 Associated operations.

(1) In this Act "associated operations" means, subject to subsection (2) below, any two or more operations of any kind, being—

(a) operations which affect the same property, or one of which affects some property and the other or others of which affect property which represents, whether directly or indirectly, that property, or income arising from that property, or any property representing accumulations of any such income, or

(b) any two operations of which one is effected with reference to the other, or with a view to enabling the other to be effected or facilitating its being effected, and any further operation having a like relation to any of those two, and so on.

whether those operations are effected by the same person or different persons, and whether or not they are simultaneous; and "operation" includes an omission.

272 General interpretation

…

"property" includes rights and interests of any description but does not include a settlement power."

The transfer of value issue

Outline submissions

78. Mr Way submitted that the Income Interest had been acquired for its market value and, accordingly, there was no loss to Miss Dickins' estate because there was no transfer of value for the purposes of section 3 IHTA.

79. Mr Way referred to the definition of "market value" in section 160 IHTA. The price paid by Miss Dickins for the Income Interest was freely negotiated between unconnected parties and was therefore a payment equal to the market value of the Income Interest.

80. In any event, assets of slightly in excess of the £1 million value were transferred to the beneficiaries under Miss Dickins' Will (the total amount paid was £1,027,178).

There was, said Mr Way, real justification for fixing the price it at £1 million: it was supported by the quantum of the valuable assets within the trust fund.

81. In support of his argument, Mr Way referred to *CIR v Crossman* [1936] 1 All ER 762 ("*Crossman*") and, in particular, the comments of Lord Roche at 791:

> "In this respect I agree with the Court of Appeal in Ireland that the language of the Act requires a case where no actual sale is either possible or contemplated that a sale in the open market of notional character is to be assumed."

82. Mr Way also referred to HMRC's Shares and Assets Valuation SVM107100 which reads:

> "In any case involving sales between connected persons your first task is to consider whether any possible element of bounty is involved. In doing so you should have regard to the overall circumstances, for example the relationship and the reason for the "disposal", and form a view as to whether the parties were, in fact, at arm' s length. If they were you must have a very good reason to interfere: a view that on a hypothetical statutory market bases the value might be different is not in itself a good reason where the parties were clearly at arm's length."

83. Further, Mr Way referred to the Valuation Office Agency's Practice Note 1 – "Valuations for Revenue Purposes" which read as follows:

> **"6.1.3 Where the actual sale price differs from that reasonably expected to result from a Hypothetical Sale**
>
> The possibility exists, therefore, that an actual sale might result in a price which would differ from that which might reasonably be expected to result from a hypothetical sale (as in *Crossman* and *Lynall*). Consequently, when the property to be valued is sold, either immediately before or after the valuation date, the sale price may have to be rejected as evidence of open market value, if the sale does not conform with the hypothesis. However, where it is considered proper to depart from the actual sale price, [District Valuers] will need to show very good grounds for rejecting the market evidence."

84. In referring to another passage from *Crossman*, Mr Way relied on the speech of Lord Blanesburgh at 779 as demonstrating that when considering the open market price of a transaction, all the features of Miss Dickins' acquisition of the Income Interest had to be considered:

> "The same conclusion is thus put by the Chief Baron in *Jameson's* case. The hypothetical sale and purchase, he says, at page 683,:
>
> 'must be a sale of the property which the deceased had in the shares at the time of his death – that is, of course the entire legal and beneficial interest therein of that interest by virtue of which the deceased had been and had been entitled to be a member of the company in respect of such shares: assailed by virtue of which the purchaser thereat would

have been entitled to have had that which he had bought vested in him in the same manner as it had been vested in the deceased and consequently under which he would be entitled to be registered as a member in respect of the shares.'"

5 85. *Jameson's* case was referred to in Valuation Office Agency's Practice Note 1 – "Valuations for Revenue Purposes", to which Mr Way drew attention:

> "**5.2.3 The" Jameson Case" (The Right to stand in the Vendor's Shoes)**
>
> In *AG (I) v Jameson* (1905) 2 Ir R 218 it was held that the open market
> 10 is a place where it is free for everyone who has the will and the money to come in and bid and the prices that which a purchaser would pay for the right to stand in the vendors's shoes with good title to get into them and remain in them and to receive all the prophets subject to all the liabilities of the position."

15 86. Mr Way submitted that the price paid by Miss Dickins to Mr Gill for the Income Interest was agreed between two parties with separate and distinct interests. They had each agreed terms with a mind solely to their own respective interests and they had no reason to consider any interest other than their own (see *Mansworth v Jelley* 75 TC 1 at 12 *per* Lightman J) ("*Mansworth*"). This was, Mr Way submitted, clear from the
20 evidence of Dr Nader. It was plain from his evidence that there was an expectation that the £1 million was going to become a debt available to the beneficiaries under Miss Dickins' Will, by virtue of their intended appointment as beneficiaries under the Northwich Settlement.

87. As regards Mr Watson's evidence, this came in for heavy criticism from Mr
25 Way and Mr Goeth.

88. First, Mr Way submitted that Mr Watson's report was inappropriate for the present case. He cited *Isaac Oren v Red Box Toy Factory Ltd* [1999] EWHC Patents 255 at [11] where Jacob J said:

> "I do not think, generally speaking, that "expert" evidence of this
> 30 opinion sort (i.e. as to what ordinary consumers would see) in cases involving registered designs for consumer products is ever likely to be useful. There is a feeling amongst lawyers that one must always have an expert, but this is not so. No one should feel that their case might be disadvantaged by not having an expert in an area where expert
> 35 evidence was unnecessary. Evidence of technical or factual matters, as opposed to consumer "eye appeal" could on the other hand, sometimes have a part to play, that would be to give the court information or understanding which it could otherwise not provide itself."

89. Mr Way also referred to *Armstrong v First York Ltd* [2005] EWCA Civ 277
40 were Brooke LJ said at [27] and [28]:

> "In my judgment there is no principle of law that an expert's evidence in an unusual field – doing his best, with his great experience, to reconstruct what happened to the parties based on second-hand material he received in this case – must be dispositive of liability in

> such a case and that a judge must be compelled to find that, in his view, to palpably honest witnesses have come to court to deceive him in order to obtain damages, in this case a small amount of damages, for a case they know to be a false one."

5 90. In Mr Way's submission, Mr Watson's report was not binding on this Tribunal when compared with the evidence of Dr Nader in cross-examination.

91. Secondly, Mr Way submitted that Mr Watson's report did not amount to expert evidence. It was just a personal opinion but it was not based on a methodology or data that an expert the expert could share with the court.

10 92. Mr Way noted that in cross-examination the following exchange took place with Mr Watson:

> "Q: So this is just a personal opinion, like any other opinion of people concerned with the trust business, but it is not backed up with anything methodical or any data that you could share with us?
>
> 15 A: Yes"

93. Mr Way commented that Mr Watson had confirmed that in the present case no methodology existed that could be applied and that he had not based his assessment on any methodical procedure which could be scrutinised and tested by the Tribunal. Mr Watson had confirmed that he had not used any data to back up his assessment of 20 the nature of the trustee risk (i.e. that the trustee of the Northwich Settlement would not act in the way everyone intended that it should). Next, Mr Way noted that Mr Watson confirmed that he had never worked in a professional trust Management company and was therefore unaware of the proceedings in common in such an industry.

25 94. Mr Watson's evidence also came in for criticism on the basis that it was unduly brief i.e. a total of 19 lines in his report.

95. Furthermore, according to Mr Way, the relevant market experience of Mr Watson was limited. In Section 5 of Mr Watson's report, Mr Watson described only the public auction market. He could only enumerate very few transactions and trust 30 instruments. In any event, the examples of transactions Mr Watson provided were of a different character – none of the transactions included a trust where the Trustees had an overriding power of appointment. Mr Watson had confirmed that the limitation of his experience in auctioning of trust instruments was based on supply-side limitations i.e. lack of people offering such trust instruments in public auction. He had also 35 confirmed that he had no experience of transactions and trust instruments other than at auction. He was unaware of Miss Dickins' acquisition until he was informed of it by HMRC. Once he became aware of Miss Dickins' transaction, Mr Watson did not enquire of HMRC or anyone else whether parties had entered into similar transactions. Indeed, Mr Watson had confirmed that it might be possible that there 40 may be other transactions of similar nature of which he was unaware.

96. Furthermore, according to Mr Way and Mr Goeth, Mr Watson had used an inadequate valuation framework. He had confirmed in cross-examination that he was

not aware in any detail of the legal framework under which he should make his valuation. He had also confirmed that he was unaware of the Valuation Office Agency's Practice Note 1 ("Valuations for Revenue Purposes").

97. In addition, Mr Watson had confirmed that his assessment was based on the notion that he would auction the Income Interest of Miss Dickins at one of his auctions and that no investor known to him would in his opinion be interested in the asset. In this scenario, Mr Watson had confirmed that various material aspects of Miss Dickins' transaction were ignored by him. First, there would be no exclusion of Miss Dickins' heirs from the potential beneficiaries (as opposed to Mr Gill's heirs when Miss Dickins acquired the interest). Secondly, the Income Interest would end when Miss Dickins would die. Thirdly, there would be no assurance that the heirs of the hypothetical investor would be appointed to as beneficiaries under the Northwich Trust and, therefore, would get the trust assets distributed to them.

98. Thus, Mr Watson ignored the principles as outlined in *Crossman* and *Jameson* that the valuation must be based on the hypothesis that an investor stepped into the shoes of the current investor and took on his/her position as a willing investor.

99. Next, it was submitted that Mr Watson was wrongly instructed. HMRC's instruction of Mr Watson placed material emphasis on the existence of the discretionary powers of the trustee of the Northwich Settlement. However, HMRC did not point out to Mr Watson that it was generally accepted between the parties (including the trustee) that the final step in the scheme would be that the heirs under Miss Dickins' Will would be appointed as beneficiaries under the Northwich Settlement and would receive the assets of the Settlement in the course of the administration of the estate.

100. Finally, Mr Way observed that Mr Watson had confirmed that the transaction entered into by Miss Dickins could have had a material market value, if all the circumstances were considered. He confirmed that if a hypothetical buyer stepped into the shoes of Miss Dickins and considered all the elements of the transaction she entered into, and if one ignored the risk of the trustee's "misuse of power", then an analogy of that would be the purchase of a reversionary interest in a trust with a 90 year old person with terminal illness and that there was, so the submission went, certainty that the beneficiaries would get the funds.

101. Mr Goeth also submitted that in the present case there was an open market transaction between unconnected parties (i.e. Miss Dickins and Mr Gill). In the circumstances, the value assigned to the transfer of the Income Interest was its open market value and the burden of proof was reversed: it fell to HMRC to show that the market price was different from the section 160 IHTA value.

102. Mr Way also addressed the alternative argument advanced in HMRC's skeleton argument, namely that the payment of £1 million by Miss Dickins was an immediately chargeable transfer of value into the Northwich Settlement by virtue of Miss Dickins being a "settlor" of the Northwich Settlement within the meaning of section 44 IHTA. Mr Way argued that the payment of £1 million by Miss Dickins for

the Income Interest did not result in Miss Dickins becoming a settlor. There was no "settlement" for the purposes of section 43 IHTA because there was "no element of bounty" which was a requirement for a settlement for IHT purposes and the definition of "settlor" (*IRC v Plummer* [1979] 3 All ER 775 at 782-783 and *Commissioners of Inland Revenue v Leiner* 41 TC 589 at 596).

103. Mr Nawbatt did not accept the appellants' contention that there was no reduction in the value of Miss Dickins's estate because, as they contended, the Income Interest was worth £1 million. Mr Nawbatt did, however, accept that £75,000 fee paid as part of the purchase price of the Income Interest was not a transfer of value because there was no gratuitous intent.

104. The case put forward by Mr Way was, according to Mr Nawbatt, based on an assertion that there was a presumption that the Income Interest was bought for market value because it was "bought and sold on the open market, freely negotiated and agreed between connected persons."

105. This was, Mr Nawbatt submitted, an artificial analysis. The correct approach was that of Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, at [35]:

> "[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

106. In Mr Nawbatt's submission, there was no presumption such as that contended for by Mr Way. The Income Interest was not bought and sold on the "open market" and the transaction was not freely negotiated: Miss Dickins (acting through her family) had no information on which she could value the Income Interest that she was acquiring. In fact, it was plain from Dr Nader's evidence that the buyer did not even understand the nature of the Income Interest.

107. The appellants' case was, Mr Nawbatt said, based on argument that it was not Miss Dickins' expectation to (personally) receive any material proportion of the consideration by way of trust distribution – a proposition derived from the appellants' own submissions. Mr Nawbatt agreed with this proposition.

108. It was argued, Mr Nawbatt noted, that this proposition supported the further assertion by the appellants that the valuation of the Income Interest had to take account the value of the interests to be assigned to Miss Dickins' heirs after her death. Thus it was argued by the appellants that the value of the Income Interest acquired by Miss Dickins was to be determined not only by reference to the value of the right acquired for her benefit, but also by reference to the value of the bundle of interests in the trust and the benefits which were expected to be conferred on her heirs after her death.

109. Mr Nawbatt submitted that it was impossible to reconcile these assertions with the language and structure of IHTA which brought into charge to IHT a reduction in the value of the transferor's *estate* immediately *after* the disposition (section 3(1) IHTA). This was the "last donor" principle (see *Trustees of the Nelson Dance Family Settlement v HMRC* [2009] STC *per* Sales J at 813g-814f). Section 5(1) IHTA defined a person's estate as "the aggregate of all the property to which he is *beneficially entitled*." (Emphasis added). This was the difference between the appellant's and HMRC's cases. The appellants did not value the relevant property but, rather, valued an amalgam of interests of Miss Dickins and her expectations and those of her heirs; but those expectations were not part of her estate in accordance with section 5(1) IHTA. Property was defined by section 272 IHTA as including "rights and interests of any description".

110. The obligation, in valuing those "rights and interests", to "stand in the shoes" of the person owning the property merely made it clear that the valuation exercise required by section 160 IHTA required one to identify what the property was that being valued – it did not change the nature of the property.

111. Accordingly, Mr Nawbatt submitted that the interest which Miss Dickins had under the Northwich Settlement was:

- the right, on 2 January each year, to receive all other income net of taxes and expenses arising during the preceding year and not otherwise appointed (Clause 5(b))
- The right to assign her interest as Principal Beneficiary at any time during her life (Clause 7(1)(b)(i))
- She also appears to have had the right to disclaim her interest or that she be an excluded person (Clause 7(2)(b))

112. At the date of the disposition none of the other family members held any interest under the Northwich Settlement; at best, Mr Nawbatt submitted, they were potential beneficiaries. It was only once Miss Dickins had died and the trustee of the Northwich Settlement had resolved to appoint them as beneficiaries and to transfer to them the benefit of the loan owed by Miss Dickins' estate, that her heirs would have had property in their estates which was capable of valuation.

113. Mr Nawbatt noted that in the period between Miss Dickins' death and the appointment of the loan to the beneficiaries under her Will, the Northwich Settlement had no Principal Beneficiary. The future of the trust was dependent on the exercise of the trustee's powers. The trustee was not bound to exercise in a specific manner, although Miss Dickins before her death and her family had an expectation that they would be exercise in the latter's favour.

114. In those circumstances, all that a valuer could value after the transaction was Miss Dickins' Income Interest.

115. Having made his submissions on the nature of the property to be valued, Mr Nawbatt then addressed the correct approach to be applied in carrying out the "open

market" test. Mr Nawbatt referred to the judgment of Lewison J in *HMRC v Bower* [2009] STC 510 where the correct valuation principles to be applied were summarised in the headnote as follows:

> "Under s 160 of the 1984 Act, the value of the property was the price which it might reasonably be expected to fetch if sold in the open market. The property had to be assumed to have been capable of sale in the open market, even if in fact it was inherently unassignable or held subject to restrictions on sale. The question was what a purchaser in the open market would have paid to enjoy whatever rights attached to the property at the relevant date. It had to be assumed that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. Although the sale was hypothetical, there was nothing hypothetical about the open market in which it was supposed to have taken place. Thus, the hypothetical vendor and purchaser were serious men of business of the kind who bought and sold the asset in question. If in the real world there were no speculators in the kind of asset in question, then the statutory hypothesis did not require them to be invented. Therefore, although the special commissioner was entitled to consider possible purchasers, he was not entitled to invent them; he was not entitled to invent hypothetical speculators. The assumption of a buyer in order to give effect to the statutory hypothesis did not indicate the price which the buyer was assumed to have paid. If in the real world an asset was worthless, the statutory hypothesis did not make it valuable. The necessary consequence of a finding of fact that an asset was not commercially saleable coupled with the assumption that a sale was assumed to have taken place was that it had a nominal value."

116. Thus, Mr Nawbatt submitted, Lewison J warned against "inventing" a market and reaching a conclusion not based on the evidence before the Tribunal.

117. In the present case, in HMRC's view, the appellants had failed to provide any evidence to discharge the burden of establishing the value of the Income Interest. There was no evidence as to the subject matter of the transactions, the market value of the Income Interest or indeed of any market for this type of trust interest. There was no evidence from Mr Gill, the vendor of the Income Interest, even though he is an appellant and there was no evidence produced in relation to the parties to the transactions e.g. the Mercator Group. There was no evidence that there was a market or possible purchasers for a trust interest such as the Income Interest.

118. Mr Nawbatt then considered the decision in *Crossman* in relation to "special purchasers". Viscount Hailsham LC said at page 771:

> "The evidence which the learned judge seems to have accepted was that of Lord Plender [the valuer], who was called on behalf of the petitioners; upon the basis of his figures, the learned judge fixed the value, on the hypothesis which I have held to be the correct one, at £351 in the Crossman case and £355 in the other. In fixing those figures, it appears from the judgment that Lord Plender "did not exclude anybody or include anybody in particular; he considered the

> matter generally." In my opinion that is the right way in which to arrive at the value in the open market. But the learned judge goes on to say that evidence was called for the Crown which indicated that a particular trust company would be willing to give a good deal more than the ordinary market price, because of certain particular attractions which the prospect of getting upon the share register would hold out for such a company. The learned judge says that he excluded trust companies from the possible buyers because he had evidence to satisfy him that the directors would not have consented to put them upon the register. I cannot think that this is a proper reason in the view which I have taken as to the construction to be put upon the subsection of the Act. On the other hand, I think it is a fair construction to put upon the learned judge's judgment that the extra sum which could be obtained from trust companies was not an element of the value in the open market, but rather a particular price beyond the ordinary market price which a trust company would give for special reasons of its own. I do not think that it would be right to appreciate the value of the shares because of this special demand for a special purpose from a particular buyer."

119. Mr Nawbatt submitted, on the authority of *Crossman*, that special purchasers should be disregarded as possible buyers as the higher price obtainable from them was due to their particular needs and this was not a normal factor in the ascertainment of the ordinary market price. The supported HMRC's view that the focus should be on the value of the Income Interest and that it was not appropriate to take into account the higher price which Miss Dickins was willing to pay because of the possible IHT saving.

120. Mr Watson's evidence, said Mr Nawbatt, was that there was no market for an interest in the nature of the Income Interest. The appellants, however, had adduced no evidence of any kind of market in such an interest and it was not for Mr Watson or the Tribunal to invent one. The criticism of Mr Watson's evidence by the appellants (on the basis that the interests to which he referred were not identical or comparable to the Income Interest) was misconceived. Mr Watson could not invent a market for such an interest if, in his experience, none existed.

121. Instead, Mr Watson had extensive experience, in Mr Nawbatt's submission, of the trust interest market. His evidence was that he had never seen a life or income interest sold in the open market which was subject to the wide-ranging trustee's discretionary powers such as those to which the Income Interest was subject. He said that he had never seen a life interest for sale which was based on the life of the buyer.

122. It followed, according to Mr Nawbatt, that if no investor would have been willing to take the risk that the Trustee of the Northwich Settlement would exercise their discretionary powers to the investor's detriment, the value of the interest acquired by Miss Dickins was nil.

123. Mr Nawbatt noted that the appellants suggested that in the absence of the market the asset had to be valued using a valuation model. This was, submitted Mr

Nawbatt, an odd proposition given the aim of section 160 was to determine market value and was inconsistent with *Bower*.

124. In any event, Mr Nawbatt's submission was that Mr Watson had pointed out that, even applying a discounted cash flow method of valuation, the value would still be nil because it was not possible to determine what income (if any) would be received – there was no income history or any indication of future investment intentions.

125. Mr Watson's evidence was the only evidence regarding valuation before the Tribunal. Thus, Mr Nawbatt submitted, the only finding that the Tribunal could make was that the value of Miss Dickins' Income Interest was nil.

126. As regards the appellants' objections to the status of Mr Watson's evidence as expert evidence, the authorities merely indicated that the weight of expert evidence will depend on the facts and the context. In this case, Mr Watson was an expert on the sale of trust interests in the open market – his expertise and evidence was plainly relevant to the assessment of market value under section 160 IHTA.

127. Mr Nawbatt submitted that it was self-evident that because the Income Interest was limited by a lifetime, it must be worth substantially less than the principal/capital sum from which the income was derived. This was even more obvious if the interest was capable of being defeated or diluted by the exercise of the trustee's powers.

128. Further, Mr Nawbatt contended that Mr Watson's evidence was unsurprising in the light of the following features pertaining to the Income Interest:

- under the terms of the Northwich Settlement, Miss Dickins was entitled to the Income Interest but had no absolute right either to the income as it accrued or to the capital in the trust.
- Instead, Miss Dickins had to wait until 2 January each year to receive a payment. Moreover, it was an interest which was subject to the very wide powers (see below) of the trustee that could – quite properly – be exercised to defeat or dilute Miss Dickins' interest. Those powers were:
    - Clause 1(t)(ii) which empowered the trustees to foreshorten the trust period. The default trusts provided by the Settlement were in favour of such charity as the Trustee shall appoint (Clause 5 (g)). Thus, the Income Interest could be defeated simply by shortening the Trust Period;
    - Clause 4 which conferred a wide power of appointment on the trustee which could be exercised in favour of any Beneficiary (as defined); and
    - Clause 7 (1) (a) which conferred on the trustee a wide power to add any person to the class of beneficiaries.
- Notwithstanding the appellants' assertion about the fact that it was unlikely that the trustees would exercise their discretion to the disadvantage of Miss Dickins, BDO was sufficiently concerned to raise with Mercator the point that Miss Dickins should not be in a position

where the trustee could exclude her under Clause 7 of the Northwich Settlement. This led to the Irrevocable Instrument varying the terms of the Settlement to restrict the trustee's ability to exclude Miss Dickins from the Settlement.

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- The Principal Beneficiary could not have called for the funds of the Northwich Settlement to be applied for her benefit (i.e. in accordance with the rule in *Saunders v Vautier* [1841] EWCA Ch 82).

- There was no track record on which to estimate the future expected income from the trust Fund of the Northwich Settlement (the £1 million was only appointed to the Settlement 10 December 2010) to be assessed and no investment strategy was determined.

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129. Mr Nawbatt submitted, therefore, that "in the real world" (*per* Lewison J in *Bower*), the serious prudent business person would not have been interested in acquiring the Income Interest and would not have borrowed £1 million to do so.

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130. In applying section 3 IHTA to the facts it was necessary to apply the approach of Lord Reed in *UBS AG v Revenue and Customs Commissioners; Deutsche Bank Group Services (UK) Ltd v Revenue and Customs Commissioners* [2016] STC 934 at [61]-[68]. The transactions of 16 December 2010 in this appeal fell squarely within the second factor identified by Lord Reed at [64] and section 3 IHTA construed purposively was plainly intended to apply to the 16 December 2010 transactions viewed realistically.

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131. In this case, Mr Nawbatt submitted that Dr Nader's evidence was that, but for the desire to create a liability deductible against Miss Dickins' estate to enable the beneficiaries under her Will to inherit the estate free from IHT, the transactions of 16 December 2010 would not have been entered into.

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132. Thus, the transactions occurring on 16 December 2010 constituted a chargeable transfer of value either because:

- it was a failed potentially exempt transfer to Mr Gill because Miss Dickins did not survive the transfer by seven years; or

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- because the payment of £1 million was an immediately chargeable transfer of value to the Northwich Settlement by Miss Dickins as "settlor" (of the Northwich Settlement) within the meaning of section 44 IHTA, construed purposively.

133. As regards his alternative "settlor" argument mentioned above, Mr Nawbatt referred to section 44 IHTA and, in particular, to the words in section 44(1): "includes any person who has provided funds directly *or indirectly* for the purposes of or in connection with the settlement…." (Emphasis added).

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134. Mr Nawbatt explained that HMRC were advancing this alternative argument as a result of the new basis upon which the appellants had put their case. Mr Nawbatt noted that the appointment of £999,000 to the Northwich Settlement on 9 December 2010 took place only after Miss Dickins had accepted the offer to acquire the income

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interest. This was followed by the payment of £1 million by Miss Dickins which should be analysed as the indirect provision of funds "in connection with" the Northwich Settlement.

135. Mr Nawbatt did not accept that the definition of "settlement" in section 43 and the definition of "settlor" in section 44 IHTA required that there be an "element of bounty". The authorities relied upon by Mr Way (i.e. *Plummer* and *Leiner*) both involved the much wider income tax definition of "settlement" and the implication of the requirement of bounty was explained by Lord Wilberforce at 782-783 in *Plummer*. The IHTA definition of "settlement" was much narrower and there was, therefore, no justification for any requirement of bounty. Furthermore, section 10 IHTA was intended to ensure that no charge to IHT arose in respect of "commercial transactions" by providing that a disposition not intended to confer a gratuitous benefit on any person should not be treated as a "transfer of value". Moreover, there were a number of exceptions from the charge to IHT in respect of "commercial" trusts (e.g. Employee Benefit Trusts) which would be redundant if there was a requirement of an element of bounty in order for trusts to be a "settlement" within section 43 IHTA.

136. Mr Nawbatt noted that if this alternative (i.e. "settlement") analysis was correct, it may be that Mr Gill's estate could not be regarded as having been increased by £1 million. Therefore, Mr Gill would only be liable to IHT due on Miss Dickins' death by virtue of section 199(1)(c) IHTA and not section 199(1)(b) IHTA. Mr Nawbatt argued that the Tribunal had jurisdiction to vary a determination (e.g. in relation to Mr Gill) was derived from section 224 IHTA.

Discussion of the transfer of value issue

137. It was common ground that the burden of proof lay upon the appellants to displace the determinations made against them (section 224 IHTA).

138. In this context, it seems to me that the burden of proof to establish the open market value of the Income Interest falls upon the appellants. Specifically, I reject Mr Goeth's argument that simply because the transaction between Miss Dickins and Mr Gill was one between unconnected parties that fact somehow reversed the burden of proof and required HMRC to show that the open market value of the Income Interest was different from the £1 million (ignoring the £75,000 paid in fees) actually paid.

139. The open market value of the Income Interest is an essential ingredient in the analysis of whether a transfer of value within section 3 IHTA occurred. The determinations made against the appellants proceeded on the basis that there was a transfer of value by Miss Dickins and it is up to the appellants to displace those determinations.

140. In this case, the appellants provided no direct valuation evidence (save to the extent that Mr Way relied on statements made by Dr Nader in cross-examination). Essentially, Mr Way's argument was that the Income Interest was worth £1 million to Miss Dickins (acting through her relatives) because the overall inheritance tax

planning scheme would ensure, as a practical matter, that £1 million would be distributed to her heirs under her Will free from IHT. The difficulty with this argument is that it is necessary to assess whether there was a transfer of value immediately after the disposition by Miss Dickins of £1 million and not in the light of subsequent events (e.g. the appointment of the beneficiaries under Miss Dickins' Will as beneficiaries under the Northwich Settlement and the distribution of the £1 million liability to them). Section 3 (1) IHTA states:

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

141. On Miss Dickins' death, her heirs had no beneficial interest in the Trust Fund of the Northwich Settlement. All they had was an expectation and all Miss Dickins had was the Income Interest and a similar expectation.

142. I do not accept that the simple fact that Miss Dickins and Mr Gill were unconnected parties is enough to establish that the price paid by Miss Dickins to Mr Gill of £1 million was an open market transaction and that that price represented "the price which the property might reasonably be expected to fetch if sold in the open market" (section 160 IHTA).

143. Section 160 IHTA provides:

> "Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time."

144. Section 160 IHTA must be construed purposively. In this context, in my judgment, Parliament intended the open market value of property to be the true and objective economic value of the property in question to be ascertained regardless of the particular circumstances or aspirations of the actual parties concerned and, indeed, disregarding any manipulation of the value of the asset (see, in the context of capital gains tax, *Blumenthal v HMRC* [2012] UKFTT 497 (TC) at [107]-[109] where a debt security's value had been artificially and temporarily reduced). That true and objective economic value is to be established by assuming a sale in the open market.

145. Consequently, it is also clear that the determination of the open market value of an asset for the purposes of section 160 IHTA must be carried out without regard for "special purchasers". To allow the taxpayer's special concerns and requirements to affect the determination of the extent by which the value of the transferor's estate was reduced for the purposes of section 3(1) IHTA would undermine Parliament's intention that open market value should be determined objectively and independently of the parties' views. In this respect, I consider that the comments of Viscount Hailsham LC in *Crossman* at 771 to be applicable:

"…the extra sum which could be obtained from trust companies was not an element of the value in the open market, but rather a particular price beyond the ordinary market price which a trust company would give for special reasons of its own. I do not think that it would be right to appreciate the value of the shares because of this special demand for a special purpose from a particular buyer."

146. In the present case, it was clear from Dr Nader's evidence that he had little real understanding of the nature of the Income Interest. This fact alone indicates to me that the £1 million value assigned to the Income Interest cannot reflect its true open market value for the purposes of section 160 IHTA. It is impossible to value the Income Interest without a full understanding of the terms and conditions imposed on the Income Interest by the Northwich Settlement.

147. Instead, Dr Nader's focus was on the potential IHT saving, to be achieved by the distribution of the £1 million liability (generated by the purchase of the Income Interest by Miss Dickins) to the beneficiaries under Miss Dickins' Will (following their appointment as beneficiaries under the Northwich Settlement). In fact, as the evidence clearly established, the amount of £1 million paid for the Income Interest was determined, not by the value of the Income Interest, but by the size of the liability required to shelter Miss Dickins' estate from IHT.

148. I have already quoted the head note from the decision in *Bower* where Lewison J considered the "open market" provisions of section 160 IHTA. In the body of his judgment Lewison J said:

> [5] In *Walton v IRC* [1996] STC 68 Peter Gibson LJ also returned to the general theme. He said (at 85):
>
> '… The statute assumes a sale. That means that however improbable it is that there would ever be a sale of the property in the real world, for example because of restrictions attached to the property, nevertheless the sale must be treated as capable of being completed, the purchaser then holding the property subject to the same restrictions (see *IRC v Crossman* [1937] AC 26). It also means that the vendor, if he is offered the best price reasonably obtainable in the market, cannot be assumed to say that he will not sell because the price is too low as inadequately reflecting some feature of the property nor can the purchaser be assumed to say that he will not buy because the price is too high. Because the market is the open market, the whole world is to be assumed to be free to bid. But the valuer will inquire into what sort of person will be in the market for the property in question and what price the possible purchaser would be likely to pay …'
>
> [6] Thus, although the whole world is in theory free to bid, there must be an inquiry into who is in the market. This is an inquiry, not an assumption, and in my judgment, an inquiry is an inquiry into the facts.
>
> [10] In asking whether the sale in the open market contemplates that a sale must take place in 'some sort of conventional market manner', it is not at all clear to me that the special commissioner appreciated that the hypothetical sale takes place in the real world. He was of course not wrong in saying that he was entitled to consider other possible purchasers, and I do not consider that the possibility of other possible purchasers is necessarily precluded. There must, of course, be an

> assumed buyer in order to give effect to the statutory hypothesis that the sale takes place.
>
> …
>
> [11] But although the special commissioner was, in my judgment, entitled to consider possible purchasers, he was not entitled to invent them. The assumption of a buyer in order to give effect to the statutory hypothesis in addition tells you nothing about the price which the buyer is assumed to have paid. If in the real world an asset is worthless, the statutory hypothesis does not make it valuable. It is not, in my judgment, lip service to the hypothesis, as [counsel for the taxpayer] argued, in those circumstances to ascribe a nominal value to an asset. On the contrary, it is the necessary consequence of a finding of fact that an asset is not commercially, as opposed to legally, saleable coupled with the assumption that a sale must be assumed to have taken place."

149. The appellants, on whom the burden of proof lies, have failed to establish that there was any market or potential purchasers for the Income Interest. They put forward no evidence to show that there was a market of willing potential purchasers. Therefore, even the on the statutory assumption that a sale of the Income Interest took place (and that there was a hypothetical buyer), its value must, in my view, be nil.

150. In any event, I accept the evidence of Mr Watson that the value of the Income Interest was nil. Mr Watson was an auctioneer of trust interests. It is true that he had no experience of selling a trust interest which was similar to the Income Interest, but that was because, in my view, the Income Interest was a trust interest which was clearly of a bespoke nature – one which was entirely designed for the IHT avoidance scheme for which it was created. Mr Watson gave evidence of the nature of the buyers who typically bought trust interests and his reasons for concluding that the Income Interest would not be attractive to those buyers seemed to me entirely sensible.

151. Mr Goeth criticised Mr Watson's evidence on the basis that he gave no methodology for his valuation. It seems to me that that was putting the cart before the horse. Mr Watson's expert opinion was that there was no market for the Income Interest and, on that basis, there was no point considering different valuation methodologies – the Income Interest was unsaleable. I accept Mr Watson's conclusion. As Lewison J put it in *Bower* at [11]: "If in the real world an asset is worthless, the statutory hypothesis does not make it valuable… [I]t is the necessary consequence of a finding of fact that an asset is not commercially saleable, as opposed to legally, saleable coupled with the assumption that a sale must be assumed to have taken place."

152. Moreover, Mr Goeth's criticism to the effect that Mr Watson was unaware of possible private transactions in which interests similar to the Income Interest might be bought and sold seemed to me an argument which failed to get airborne. Quite apart from the question whether it was proper to take account of private (i.e. off-market) transactions, there was no evidence whatsoever that any such transactions took place. Mr Goeth's submission was one of speculative criticism.

153. Furthermore, I reject Mr Goeth's dismissal of Mr Watson's evidence for being based solely on his experience of the public auction market. On the contrary, it seemed to me that this was an entirely suitable form of experience to bring to bear in expressing an expert opinion on this valuation issue.

154. In my judgment, therefore, the appellants have simply failed to discharge the burden of proof to show that the open market value of the Income Interest was £1 million (i.e. the amount paid by Miss Dickins to acquire the Income Interest). In any event, as I have stated, I accept the evidence of Mr Watson that the open market value of the Income Interest was nil. Therefore, subject to the issue of section 10 IHTA, to which I now turn, I have concluded that there was a transfer of value of £1 million by Miss Dickins to Mr Gill on 16 December 2010.

Was there an intention to confer a gratuitous benefit – section 10 IHTA?

Outline submissions

155. Mr Way submitted that HMRC's argument, to the effect that section 10 IHTA could not be relied upon where the payment from Miss Dickins was part of a series of transactions that was intended to confer a benefit on the beneficiaries under her Will, was wrong. The subsequent transfer to those beneficiaries could not affect the earlier arms-length transaction (between unconnected parties) as regards the application of section 10.

156. Mr Way accepted that associated operations had to be taken into account in the context of section 10, but there were limitations, so that one took into account only those operations which affected the price which was being considered. If an arm' s length price had been paid for an asset and then that asset was given away, the mere fact that there was such a subsequent gift did not in any way affect the consideration that had been previously paid, nor did it make the earlier arms-length transaction gratuitous. The later transfer to Miss Dickins's heirs was not relevant in determining whether the earlier transfer was at arm's length.

157. The only other situation where associated transactions might have an implication for section 10 was, according to Mr Way, where those other transactions were part and parcel of a deliberate attempt to drive down the value of the transaction between Miss Dickins and Mr Gill e.g. transactions which enabled an amount less than market value to be paid by Miss Dickins or something similar. That was not the case in the present appeals. Clearly, there was no intention that Miss Dickins should make a gratuitous transfer to Mr Gill – a complete stranger who was not "connected" with Miss Dickins for tax purposes. Miss Dickins' purchase of the Income Interest was for the full freely negotiated market value price which was paid without any gratuitous intent.

158. The definition of "transaction" in section 10(3) had to be read sensibly, Mr Way argued, otherwise there was no limit on section 10. The associated operations rule requires consideration of the particular transaction and *relevant* associated operations. It was necessary to identify whether the value in that transaction has, or would be,

artificially reduced pursuant to that transaction or related associated operations the associated operations rule did not extend to other transactions which might validly occur by way of gift.

159. Mr Way relied on the decision of the House of Lords in *MacPherson v IRC* [1988] STC 362 ("*MacPherson*"). In *MacPherson* the trustees of a discretionary settlement entered into a transaction on 29 March 1977 ("the 1977 agreement") which had the effect of reducing the value of that part of the settled property comprising certain pictures. The effect of the 1977 agreement was to limit the liability of Mr David Robertson respect of the insurance and loss of certain pictures which were in his possession. It was accepted that the 1977 agreement was gratuitous and had the effect of driving down the value of the relevant settled interest in which the pictures were comprised. Secondly, on 30 March 1977, the trustees executed a deed of appointment by which they appointed a trust interest which included valuable pictures subject to and with the benefit of an earlier agreement which had just been varied by the 1977 agreement.

160. Thus, submitted Mr Way, there were two gratuitous events in *MacPherson*. This was different from the facts in the current appeal where there was a commercial arm's length purchase of the Income Interest by Miss Dickins followed by a gratuitous distribution of assets from her estate to the beneficiaries under her Will. There was no devaluing of the property in respect of the assets which Miss Dickins acquired, in contrast to the position in *MacPherson*.

161. Mr Nawbatt submitted that section 10 IHTA was intended to relieve dispositions from IHT when the transfer of value was the result of an unintended bad bargain, but only where that bad bargain was the result of a transaction at arm's length (see e.g. *IRC v Spencer-Nairn* [1991] STC 60).

162. Section 10 IHTA had been drafted to ensure that the question of intention was not examined in the blinkered faction but, instead, it had to be shown (by the taxpayer, on whom the burden of proof lay) that there was no intention to confer *any* gratuitous benefit on *any* person.

163. It was not enough to show that the parties to the transaction were unconnected. It was clear from the use of the word "and" in section 10(1)(a) IHTA that the transaction in question had also to be "at arm's length".

164. Mr Nawbatt argued that the appellants had led no evidence to discharge the burden of proof.

165. As regards the intention of Miss Dickins, it was common ground that by acquiring the Income Interest, the transfer of value resulting from that acquisition was plainly made in a transaction (or part of a series of transactions and/or associated operations) intended to confer gratuitous benefits on the beneficiaries under Miss Dickins' Will. Dr Nader's evidence was that the Income Interest was acquired in order to facilitate the provision of benefits under Miss Dickins' Will free from IHT. His evidence was that Miss Dickins knew and intended that the Northwich Settlement

was to continue after her imminent death for the purpose of providing benefits to the beneficiaries under her Will.

166. In the light of Mr Watson's evidence on the valuation of the Income Interest Mr Nawbatt submitted that there was a disposition which resulted in a transfer of value from Miss Dickins' estate. Accordingly, the burden on the appellants of proving that the acquisition of the Income Interest was not intended to confer a gratuitous benefit on any person had not been discharged.

167. Mr Nawbatt submitted that it was not possible to "square" any part of the appellants' case in relation to section 10 IHTA with the assertions made in the appellants' skeleton argument:

- at paragraph 53 that: "it was clearly not the [Deceased's] expectation to (personally) receive a large or in fact any material proportion of the consideration by way of trust distribution"; and

- at paragraph 54: "What [Miss Dickins] did apparently rely upon was the professional trust administrator, acting as trustee, would, after her death, assign the trust assets to her heirs as appointed by the executive. As evidenced by the facts in this case, this is not only what she could reasonably have expected from the trustees, but also exactly what happened in reality."

168. Factors which were relevant in determining whether a transaction was at "arm's length" included, in Mr Nawbatt's submission, for example: (a) whether the parties had separate legal or other professional representation; (b) whether there was *bona fide* negotiation; (c) whether the interest was advertised for sale; (d) whether (perhaps most pertinent to this appeal) any independent advice as to valuation of the income interest was obtained. (see, for example, *IRC v Spencer-Nairn* [1991] STC 60 ("*Spencer-Nairn*") *per* the Lord President (Hope) at 70 2g-j; *per* Lord Allanbridge at 75b *et seq*; and *per* Lord Wylie at 70 7g-j).

169. Mr Nawbatt submitted that none of these factors was present in this case:

- There was no evidence of separate representation or of any *bona fide* negotiation between Miss Dickins (and those representing her) and Mr Gill;

- No one asked what assets the trust fund was invested in; no one checked how the trust fund "will be" funded prior to acceptance of the offer to acquire the Income Interest, or how this might affect the value of that interest;

- No one asked what the value of the Income Interest (as opposed to the Trust Fund) actually was/would be. No independent opinion on valuation was sought;

- Some concerns were raised about the wide terms of the Northwich Settlement, which was subsequently narrowed, but this happened only after Miss Dickins had already signed the offer letter committing to

acquire the Income Interest, and the concerns raised were unconnected to any concerns about the value of the Income Interest that Miss Dickins had agreed to acquire.

170. Therefore, according to Mr Nawbatt, when the facts were viewed realistically Miss Dickins (and those acting on her behalf) were only interested in securing was the IHT advantage. There was no evidence that anyone gave a second thought to the value or nature of the Income Interest. Therefore, the acquisition of the Income Interest was manifestly not a transaction at "arm's length" within the meaning of section (1)(a) IHTA.

171. For these reasons, the relevant transaction or series of transactions and associated operations by which Miss Dickins sought to secure IHT saving for the beneficiaries of her estate resulted in a transfer of value from her estate, and the conditions for exemption from charge under section 10 (1) IHTA were not satisfied.

Discussion of the section 10 IHTA issue

172. In my view, the appellants have not demonstrated that section 10 IHTA applies to prevent Miss Dickins' acquisition of the Income Interest constituting a transfer of value.

173. First, section 10(1) IHTA requires that the taxpayer show that the disposition in question "was not intended, and was not made in a transaction intended, to confer any gratuitous benefit on any person". The word "transaction" is defined by section 10(3) IHTA to include "a series of transactions and any associated operations." The term "associated operations" is given a very wide meaning by section 268 IHTA and section 272 IHTA defines "disposition" to include "a disposition effected by associated operations."

174. I accept Mr Nawbatt's submission that it was clear that Miss Dickins' acquisition of the Income Interest was part of a series of transactions which was intended to culminate in the distribution of the loan owed by Miss Dickins to the beneficiaries under her Will (following their appointment as beneficiaries under the Northwich Settlement). Indeed, that was the thrust of Dr Nader's evidence. The acquisition of the Income Interest by Miss Dickins and the sequence of events that led to the distribution of the loan thereby created (i.e. the loan from the trustee of the Northwich Settlement to Miss Dickins which was used to repay the loan from Storrier Trading Limited) were all part of a pre-planned series of transactions which was intended to result in the conferment of a gratuitous benefit on those beneficiaries. Accordingly, it is clear to me that this "series of transactions" was intended to confer a gratuitous benefit on the beneficiaries under Miss Dickins' Will. Therefore, it is not possible for the appellants to rely on section 10 IHTA to prevent the acquisition of the Income Interest constituting a transfer of value.

175. I therefore reject Mr Way's argument that the subsequent transfer of the loan receivable to the beneficiaries under Miss Dickins' Will was not a relevant transaction. It seems to me that the whole purpose of the definition of "transaction" in section 10(3) – including a series of transactions and the reference to "associated

operations" (as defined in section 272 IHTA) – was to prevent a taxpayer from avoiding the application of section 3(1) by entering into a transaction which taken in isolation would or might otherwise be within section 10 but which, looked at in the context of other transactions, effected a transfer of value. Thus a transfer of an asset from X to Y may be on a commercial (and non-gratuitous) basis as between them but be taxable as part of a series of transactions or associated operations designed to confer a benefit on Z.

176. Secondly, to the extent that Mr Way argued that, because Miss Dickins and Mr Gill were not connected parties, the acquisition of the Income Interest was a bargain at arm's length, this seems to me an impossible argument to sustain. It is quite clear that section 10(1)(a) IHTA requires both that the transaction be at "arm's length" *and* "between persons not connected with each other". Thus, the requirement that the acquisition of the Income Interest be at "arm's length" is independent of the requirement that the parties be unconnected. It is not enough, therefore, to say that because Mr Gill and Miss Dickins were not connected with each other that the bargain that they struck in relation to the acquisition of the Income Interest (and the price paid therefor) was automatically one concluded at arm's length.

177. As regards the question of whether the purchase of the Income Interest was a transaction at arm's length, in *Mansworth v Jelley* [2002] S.T.C. 1013 (a capital gains tax case) Lightman J said that the phrase "bargain at arm's length" connotes "a transaction between two parties with separate and distinct interests who have each agreed terms (actually or inferentially) with a mind solely to his own respective interests".

178. Some of the factors to be taken into account in determining whether a transaction was concluded at arm's length were considered by the Court of Session in *Spencer-Nairn*. [1991] STC 60 at 75c and f. Lord Allanbridge referred to certain matters which could be taken into account in determining whether a transaction was "at arm's length." First, a relevant factor was whether the parties had separate legal or professional representation. A second relevant factor was the presence or absence of *bona fide* negotiation.

179. In *Spencer-Nairn*, the two factors cited by Lord Allanbridge were derived from Whiteman, Gammie and Herbert *Capital Gains Tax* 4th edition para 9-33 where the learned authors, in the context of similar provisions in the capital gains tax code, stated:

> "However, it can perhaps be suggested that the following matters would be taken into account (though the list may not be exhaustive):
>
> 1. the presence or absence of bona fide negotiation between the parties as to the terms of the transaction (including particularly the consideration);
>
> 2. the degree to which the terms of the transaction compare with those found in similar commercial transactions;
>
> 3. whether the parties have separate legal or other professional representation;

> 4. the relationship between the parties independently of the transaction in question; and
>
> 5. the character of any comparable prior dealings between the parties."

180. I should say, however, that whether a transaction is a transaction at arm's length is largely a question of fact and the factors listed in *Spencer-Nairn* and the observations made by Lightman J in *Mansworth v Jelley* are not rules of law but simply helpful factors and guidance to be taken into account. Ultimately the question is an evaluative exercise taking account of all the relevant facts and circumstances of the particular case.

181. In my judgment, there is no doubt that the acquisition by Miss Dickins of the Income Interest from Mr Gill was not a transaction at arm's length. Dr Nader, acting on behalf of Miss Dickins, had very little understanding of the nature of the Income Interest. He said that he did not understand trusts. He took no valuation advice in relation to the Income Interest. He took it on trust that, once the Income Interest was acquired, the trustee of the Northwich Settlement would do what it was supposed to do. No enquiry was made of the type of investments held by the Northwich Settlement. The whole tenor of Dr Nader's evidence was that he and Miss Dickins' family were focused primarily on the IHT saving rather than on the details of the mechanism by which that saving was to be achieved.

182. It was part of a pre-packaged sequence of events designed to achieve an IHT saving. There was no independent assessment of whether the acquisition of the Income Interest made commercial sense and whether the price paid represented a fair market value. In fact, as Dr Nader's evidence demonstrated, the price paid for the Income Interest seemed primarily to be related to the value of Miss Dickins' estate rather than the value of the Income Interest itself. Indeed, the acquisition of the life interest in a right to income (on a principal amount which was broadly equivalent to the price paid for the income) seems a very strange bargain. One would not normally acquire, for example, the right to interest on a debt security for the full face value of the principal amount owed (unless, perhaps, the security was very long-dated or the interest coupon was in excess of market rates). Moreover, the acquisition of a life interest by someone who had very little time left to live might of itself call for some explanation, but none was forthcoming save for Dr Nader's view that it was necessary to achieve the IHT saving.

183. It is impossible, in these circumstances, to conclude that the acquisition by Miss Dickins of the Income Interest from Mr Gill was a transaction at arm's length.

184. Moreover, in my judgment the decision of the House of Lords in *Macpherson v IRC* [1988] STC 362, relied on by Mr Way, provides no support for the appellants' case and, in fact, undermines his case. In that appeal, the trustees of a discretionary trust, which held valuable pictures, leased them for 14 years to a connected person (so reducing their value) ("the 1977 agreement") and, on the next day, appointed them to a beneficiary ("Timothy"). The Revenue contended that the lease and the appointment were associated operations and that IHT was payable on the unreduced value. The trustees argued that the appointment, though an associated operation, was not a

relevant associated operation or transaction; but their argument was rejected by the House of Lords. Lord Jauncey said at 368j-369a-b:

> "If the extended meaning of 'transaction' is read into the opening words of s 20(4) [the forerunner of s 10 IHTA] the wording becomes—
>
> 'a disposition is not a transfer of value if it is shown that it was not intended, and was not made in a transaction including a series of transactions and any associated operations intended, to confer any gratuitous benefit ...'
>
> So read it is clear that the intention to confer gratuitous benefit qualifies both transactions and associated operations. If an associated operation is not intended to confer such a benefit it is not relevant for the purpose of the subsection. That is not to say that it must necessarily per se confer a benefit but it must form a part of and contribute to a scheme which does confer such a benefit. In this case it is common ground that the appointment conferred a gratuitous benefit on Timothy. It is clear from para 17 of the trust solicitor's affidavit that the appointment would not have been made if the 1970 agreement had not been varied by that of 1977. It follows that the 1977 agreement was not only effected with reference to the appointment but was a contributory part of the scheme to confer a benefit on Timothy. So viewed there can be no doubt that the 1977 agreement, being the disposition for the purposes of s 20(4), was made in a transaction, consisting of the agreement and the appointment, intended to confer a gratuitous benefit on Timothy."

185. It seems to me that Mr Way was wrong to contend that the only relevant transaction for present purposes was the purchase of the Income Interest by Miss Dickins on 16 December 2010. Section 10(3) extends the meaning of the word "transaction" to include "a series of transactions or associated operations."

186. It is clear from Dr Nader's evidence that the intention of Miss Dickins (acting through her representatives) was to confer a gratuitous benefit on the beneficiaries under her Will, once they had been appointed as beneficiaries under the Northwich Settlement. This was what happened and what was always intended to happen. This series of transactions plainly falls within the extended meaning of "transaction" in section 10(1) and (3) IHTA. It follows, therefore, that the appellants have not demonstrated that the purchase of the Income Interest was not made in a transaction (or a series of transactions and any associated operations) intended to confer any gratuitous benefit on any person.

187. In *MacPherson*, the depreciatory transaction preceded the transaction by which the property was eventually transferred to its ultimate beneficiary. It seems to me, therefore, that the comments of Lord Jauncey should be considered in that context. Nonetheless, in that case the depreciatory transaction was not intended to confer a gratuitous benefit (see *per* Lord Jauncey at 367d) but the subsequent appointment to Timothy did (and was intended) to confer a gratuitous benefit (at 369a). As Lord Jauncey observed (at page 369a) it was not necessary that a transaction must

necessarily per se confer a [gratuitous] benefit "but it must form part of and contribute to a scheme where it does confer such a benefit."

188. It therefore seems to me that, far from assisting Mr Way's argument, Lord Jauncey's observations are against him. In the present case, the acquisition of the Income Interest was for a consideration which, as I have found, was represented an overvaluation. It was followed by a series of transactions intended to confer a gratuitous benefit on Miss Dickins' heirs. The situation is therefore analogous to that in *Macpherson*.

189. In any event, the appellants must show that there was no intention to confer a gratuitous benefit on "any" person. It is, therefore, not enough, as Mr Way argued, to show that Miss Dickins did not intend to confer a gratuitous benefit on Mr Gill – it was enough that there was an intention ultimately to confer a gratuitous benefit on the beneficiaries under her Will.

190. It is also informative to note that in *MacPherson* Lord Jauncey (at 367b), citing with approval the comments of Slade LJ in the Court of Appeal ([1987] STC 73 at 78-79), pointed out "three hurdles" that the taxpayer had to show in establishing a defence under (what is now) section 10 IHTA:

> "They must show (1) that the disposition was 'not intended to confer any gratuitous benefit on any person'; (2) that the disposition was not 'made in a transaction intended to confer any gratuitous benefit on any person'; and (3) that it was such as might be expected to be made in a transaction at arm's length between persons not connected with each other."

191. It is clear that it is for the appellants to discharge the burden of proof in establishing the section 10 IHTA defence. In my view neither of the second or third "hurdles" has been overcome by the appellants. I have therefore concluded that the transactions in the present appeal are not exempted from IHT by virtue of section 10 IHTA.

Settlement issue

192. In the light of my conclusions, it is not necessary for me to deal with the alternative argument advanced by Mr Nawbatt in response to the manner in which the appellants put their case. Nonetheless, because the point was addressed in argument, I can deal with the issue relatively briefly.

193. Essentially, Mr Nawbatt argued that, on a realistic view of the facts, there was a transfer of value by Miss Dickins as "settlor" into the Northwich Settlement within the meaning of section 44 IHTA construed purposively. Mr Nawbatt drew attention to the following sequence of events:

- On 9 November 2010, the Northwich Settlement was created with an appointment of £1000.

- On 25 November 2010, Mr Gill made an offer to Miss Dickins for her to acquire an interest in a Trust Fund that "will be worth" £1 million. On the same date, a copy of the trust deed was emailed to her advisers. Thus, Miss Dickins (or her advisers) must be taken to have become aware of the terms peculiar to the Northwich Settlement, including the provisions by which Miss Dickins was to be substituted as "Principal Beneficiary of the Northwich Settlement, once the Income Interest was assigned to her.

- On 7 December 2010 by an email attaching the signed the offer letter and certain other documents, the Deceased's agreement to the terms of the offer letter was communicated to Mr Gill.

- 9 December 2010, i.e. only after Miss Dickins had accepted the offer to acquire the Income Interest, £999,000 was (purportedly) appointed to the Northwich Settlement.

- 10 December 2010, draft documents were sent to Mr Nader on behalf of Miss Dickins, including the Deed of Assignment of the Income Interest and the Loan Agreement with Storrier Trading Limited.

- On 16 December 2010, the Loan Agreement and Deed of Assignment of the Income Interest signed on behalf of Miss Dickins were sent to Mr Gill. The remainder of the fee of £75,000 was paid, and the Income Interest was assigned on that date, Miss Dickins was added to the class of beneficiaries of the Northwich Settlement and Mr Gill was excluded as a beneficiary.

194. Construing these facts realistically, Mr Nawbatt argued that Miss Dickins fell within the statutory definition of a "settlor" for the purposes of section 44 IHTA and that Miss Dickins had provided funds to the Northwich Settlement.

195. It was accepted by both parties that the definition of "settlor" in section 44 IHTA was broadly the same as the income tax definition. Mr Nawbatt submitted, however, that the key difference was the definition of "settlement" in section 43 IHTA, which was significantly narrower than the corresponding income tax definition.

196. Section 44 IHTA provides:

> **"43 Settlement and related expressions**
>
> (1) The following provisions of this section apply for determining what is to be taken for the purposes of this Act to be a settlement, and what property is, accordingly, referred to as property comprised in a settlement or as settled property.
>
> (2) "Settlement" means any disposition or dispositions of property, whether effected by instrument, by parol or by operation of law, or partly in one way and partly in another, whereby the property is for the time being—
>
> (a) held in trust for persons in succession or for any person subject to a contingency, or

(b) held by trustees on trust to accumulate the whole or part of any income of the property or with power to make payments out of that income at the discretion of the trustees or some other person, with or without power to accumulate surplus income, or

(c) charged or burdened (otherwise than for full consideration in money or money's worth paid for his own use or benefit to the person making the disposition) with the payment of any annuity or other periodical payment payable for a life or any other limited or terminable period…."

197. In *Barclays Wealth Trustees (Jersey) Ltd and another v HMRC* [2017] EWCA Civ 1512 Henderson LJ observed at [30] that:

> "The definition of "settlement" therefore requires a combination of two things: first, a disposition or dispositions of property, and secondly, a state of affairs brought about by that disposition or those dispositions, whereby the property is held in various ways, or would be so held if the conditions at the end of subsection (2) were satisfied. In broad terms, paragraph (a) of subsection (2) covers fixed-interest trusts… while paragraph (b) covers discretionary trusts…."

198. Henderson LJ continued at [35]:

> "In *Rysaffe Trustee Co (CI) v IRC* [2002] EWHC 1114 (Ch), [2002] STC 872, Park J made the important point, with which I respectfully agree, that the provisions of the 1984 Act relating to settlements are, in the absence of special provision, for the most part left to be interpreted in accordance with the general understanding of trust practitioners: see his judgment at [18] to [21]."

199. That the definition of "settlement" in the IHTA is significantly narrower than the definition of "settlement" for income tax purposes is clear from the decision of the House of Lords in *Inland Revenue Commissioners v Plummer* [1979] STC 793. Lord Wilberforce noted at page 800:

> "The applicable definition of a 'settlement' is to be found in s 454(3): it is 'any disposition, trust, covenant, agreement or arrangement'. It is not disputed that if the agreement in this case (of 15 March 1971) was a 'settlement' within this definition, s 457 would apply and the income, i.e. the annuity payments, would be treated as the income of the settlor, i.e. of the taxpayer and not as the income of any other person.
>
> This raises a question of some difficulty and general importance. Are the words of the definition to be given the full unrestricted meaning which apparently they have, or is some limitation to be read into them, and if so what limitation? If given the full unrestricted meaning, the section would clearly cover the present agreement, and would also cover a large number of ordinary commercial transactions.
>
> My Lords, it seems to me to be clear that it is not possible to read into the definition an exception in favour of commercial transactions whether with or without the epithet 'ordinary' or 'bona fide'. To do so would be legislation not interpretation: if Parliament had intended such an exception it could and must have expressed it.

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> But it still becomes necessary to enquire what is the scope of the words 'settlement' and 'settlor' and of the words which are included in 'settlement' in the context in which they appear. If it appears, on the one hand, that a completely literal reading of the relevant words would so widely extend the reach of the section that no agreement of whatever character fell outside it, but that, on the other hand, a legislative purpose can be discerned, of a more limited character which Parliament can reasonably be supposed to have intended, and that the words used fairly admit of such a meaning as to give effect to that purpose, it would be legitimate, indeed necessary, for the courts to adopt such a meaning."

200. After considering the statutory context, Lord Wilberforce continued at page 801 in an important passage which is worth quoting in full:

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> "These sections, in other words, though drafted in wide, and increasingly wider language, are nevertheless dealing with a limited field, one far narrower than the field of the totality of dispositions, or arrangements, or agreements, which a man may make in the course of his life. Is there then any common description which can be applied to this?
>
> The courts which, inevitably, have had to face this problem, have selected the element of 'bounty' as a necessary common characteristic of all the 'settlements' which Parliament has in mind. The decisions are tentative, but all point in this direction. The first clear indication of this was given by Lord Macmillan in *Chamberlain v Inland Revenue Comrs* [1943] 2 All ER 200 at 204, 25 Tax Cas 317 at 331. Dealing with a case arising under the predecessor of s 447 of the 1970 Act he said that he agreed that the settlement or arrangement—
>
> 'must be one whereby the settlor charges certain property of his with rights in favour of others ... it must confer the income of the comprised property on others, for it is this income so given to others that is to be treated as, nevertheless, the income of the settlor.'
>
> I do not think that this passage is affected by the observations of Lord Green MR in *Hood-Barrs v Inland Revenue Comrs*. In *Inland Revenue Comrs v Leiner* (1964) 41 Tax Cas 589 at 596, Plowman J said that it was common ground, ie accepted by the Crown, that 'it is implicit in the fasciculus of Sections of which [Chapter II of Part XVI of the 1970 Act] forms a part that some element of bounty is necessary to make the Sections apply ...' and this point was made explicit by Pennycuick J in *Bulmer v Inland Revenue Comrs*. Dealing with a case under the predecessor of Chapter III of Part XVI of the 1970 Act he followed the previous cases in holding that a sufficient context existed for a restriction in the scope of the definition and that he accepted the 'element of bounty' test.
>
> My Lords, I think that in so doing the judge was well within the limits of permissible interpretation, and that with the 'element of bounty' test we have a definition which is in agreement with the intention of Parliament as revealed through the whole miniature code of Part XVI. I would compare with this the reasons of this House in *Thomas v*

> *Marshall* (*Inspector of Taxes*). In that case the contention was that the word 'settlement' did not extend to an outright gift. Their Lordships rejected this, holding that the intention was clearly to enlarge the meaning of settlement so as to include gifts. Enlargement in one direction and restriction in another are both part of a balanced process of judicial interpretation directed towards implementing but not exceeding the general legislative purpose."

201. Mr Way submitted that Miss Dickins was not a "settlor" in relation to the Northwich Settlement because it was necessary that there should be an "element of bounty". He said that in the acquisition of the Income Interest there was no element of bounty and, therefore, there could be no "settlement" for the purposes of section 43 and that Miss Dickins could not be a "settlor" of the Northwich Settlement for the purposes of section 44 IHTA.

202. Mr Way referred to the decision of Plowman J in *Commissioners of Inland Revenue v Leiner* 41 TC 589 ("*Leiner*"). This was a decision on the income tax definition is of "settlement" and "settlor" in, respectively sections 403 and 401(1) Finance Act 1958 which were as follows:

> Section 403:
>
> " 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets; 'settlor' in relation to a settlement includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the preceding words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or eater into the settlement".
>
> Section 401(1):
>
> "In the case of any settlement where there is more than one settlor, this Chapter shall, subject to the provisions of this section, have effect in relation to each settlor as if he were the only settlor."

203. Plowman J said at page 596:

> "it is common ground that it is implicit in the fasciculus of Sections of which Section 401 forms a part that some element of bounty is necessary to make the Sections apply and that a bona fide commercial transaction would be excluded from their operation: see *Copeman v Coleman*, 22 TC 594."

204. Mr Way submitted that because the wording of the definition of "settlor" in section 403 Finance Act 1958 was the same as that in section 44 IHTA, it followed that Miss Dickins could not be a "settlor" in the present case because the purchase of the Income Interest did not involve an element of bounty.

205. I do not accept Mr Way's argument. The concept of the "element of bounty" test was set out in the decision of the House of Lords in *Plummer* in the context of the wider definition of "settlement" for income tax purposes. The introduction of the

concept of an "element of bounty" was an attempt to make the very wide income tax definition of "settlement" one which was workable. The IHT definition of "settlement" in section 43 IHTA (to which the definition of "settlor" in section 44 cross-refers) is much narrower than the concept of a "settlement" for income tax purposes. I think it follows, therefore, that the reasoning of Lord Wilberforce in *Plummer* does not operate in relation to the definition of "settlement" for IHT purposes i.e. for section 43 IHTA and does not mean that the definition of "settlor" in section 44 IHTA (which clearly must be read together with the definition of "settlement") requires that the provider of funds should be providing an element of bounty. Similarly, *Leiner* was a decision on the income tax definition of "settlement" and "settlor" and it seems to me that, for the same reasons, it provides no support for Mr Way's submissions on this point.

206. In my judgment, the definition of "settlement" and "settlor" in sections 43 and 44 IHTA respectively do not require an "element of bounty". It seems to me clear from the scheme of IHTA that Parliament intended that "non-bounteous" settlements should be included within the section 43 definition and that the definition of "settlor" IHTA should be construed accordingly; otherwise, it would be difficult to understand the various exceptions and exclusions from the definition of "settlement" contained in IHTA. For example, as regards section 43(2)(c) if an "element of bounty" was required for a trust arrangement to constitute a "settlement" would be hard to see why the exclusion for property charged or burdened "otherwise for full consideration" was necessary.

207. Similarly, the requirement of an "element of bounty" would be otiose in relation to section 58(1)(c):

> " **Relevant property**
>
> (1) In this Chapter "relevant property" means settled property in which no qualifying interest in possession subsists, other than—
>
> …
>
> (e) property comprised in a trade or professional compensation fund…."

208. Similar examples can be found in section 58(1)(ea) (property comprised in an asbestos compensation settlement), section 58 (1)(eb) (property comprised in a decommissioning security settlement), section 86 (trusts for benefit of employees) and section 87 (newspaper trusts).

209. Finally, I also accept Mr Nawbatt's submission that the definition of "settlement" in section 43 IHTA does not require an "element of bounty" is supported by the existence of section 10 IHTA which is intended to ensure that no charge arises for IHT purposes in respect of "non-gratuitous arrangements".

210. My view, therefore, is that, when construed in statutory context, the definition of "settlement" in section 43 IHTA (and therefore the definition of "settlor" in section 43 IHTA) does not require "an element of bounty". Accordingly, I reject Mr Way's

argument that the arrangements in the present case do not constitute a "settlement" and that Miss Dickins could not be a "settlor".

211. Therefore, had it been necessary to decide the point, I would have been minded to accept Mr Nawbatt's submission that, viewed realistically:

- the appointment of £999,999 to the Northwich Settlement after Miss Dickins had accepted the offer to acquire the Income Interest for £1 million;
- followed by the payment of £1 million by Miss Dickins to acquire the Income Interest

constituted an indirect provision of funds "in connection with" the Northwich Settlement. Therefore, Miss Dickins was a "settlor" within the meaning of section 44 IHTA.

212. HMRC accepted that, on this basis, Mr Gill's estate could not be regarded, as having been increased by £1 million. Therefore, Mr Gill would be liable to IHT on Miss Dickins's death by virtue of section 199 (1)(c) IHTA (rather than section 199 (1)(b) IHTA). Had it been necessary to do so, I would therefore have exercised my power under section 224 IHTA to vary HMRC's determination and held that Mr Gill was liable under section 199(1)(c) IHTA. I would also have varied the determination issued to Dr Nader in his capacity as an executor.

Disposition

213. I therefore hold that the transactions described above resulted in a transfer of value from Miss Dickins's estate of £1million and that the conditions for exemption from charge under section 10(1) IHTA are not satisfied. I therefore uphold the determinations and dismiss these appeals.

Rights of appeal

214. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 15 MAY 2018