

INTERPRETING TAX STATUTES: TAX AVOIDANCE AND THE INTENTION OF PARLIAMENT

I. INTRODUCTION

THERE are very few tax cases known to the wider legal community but *Ramsay*¹ is one of them. In 1982, the *Ramsay* case seemed to herald the introduction in the United Kingdom of a judicially-developed “new approach” to counteract tax avoidance schemes. For a time it seemed that this new approach was firming up into a judicial doctrine or at least a principle attempting to counter tax avoidance. Now, in a series of cases leading up to and including *Barclays Mercantile Business Finance Ltd v Mawson* (“*BMBF*”),² doubt has been cast upon whether there is or ever was such a judicial principle in the United Kingdom. Arguably though, as will be discussed below, the House of Lords applied the principle in the *Scottish Provident* case on the very same day that it denied it.³

The first part of this article examines whether there is any content to the *Ramsay* approach following the decision in *BMBF*. If it is now nothing more than an application of general rules of statutory interpretation, there must be a serious question about the adequacy of the judicial approach to counter tax avoidance. The development of the UK case law over the last 25 years has not been impressive. It has failed to produce a clear framework for dealing with tax avoidance cases, with the result that an increasing amount of specific anti-avoidance legislation is necessary, coupled with extensive disclosure requirements, which have to be followed up regularly by yet more specific provisions.⁴ Distinctions have been introduced into the cases only to be found to be unsustainable.⁵ Attempts have been made to distinguish tax avoidance from tax mitigation,⁶ but

¹ *W.T. Ramsay Ltd v IRC* [1982] A.C. 300; [1981] S.T.C. 174.

² *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 A.C. 684; [2005] S.T.C. 1 (“*BMBF*”). See also *IRC v McGuckian* [1997] 1 W.L.R. 991, HL; [1997] S.T.C. 908; *MacNiven v Westmoreland Investments* [2001] UKHL 6; [2003] 1 A.C. 311; [2001] S.T.C. 237, especially Lord Hoffmann at [29].

³ *IRC v Scottish Provident Institution* [2004] UKHL 52; [2004] 1 W.L.R. 3172; [2005] S.T.C. 15.

⁴ Disclosure provisions were introduced in ss.19 and 306–319 of the Finance Act 2004, influenced by similar requirements in the United States, and extended by The Tax Avoidance Schemes (Prescribed Description of Arrangements) Regulations 2006 (SI 2006/1543). See R. Fraser, “Tax Scheme Disclosure Provisions” [2004] B.T.R. 282 and 454 and A. Granwell and S. McGonigle, “U. S. Tax Shelters: a U.K. Reprise?” [2006] B.T.R. 170. A number of disclosed schemes have already been stopped by detailed specific legislation.

⁵ For example, the distinction between commercial and juristic meaning put forward by Lord Hoffmann in *Westmoreland*, above, fn.2, discussed further below.

⁶ *CIR v Challenge Corp Ltd* [1986] S.T.C. 548, per Lord Templeman.

subsequently rejected as unhelpful.⁷ The judiciary are limited by the tools at their disposal and the poor state and nature of tax legislation. If the only available test is whether specific legislation is effective to achieve the intention of Parliament, then everything rests on the nature and quality of that specific legislation. It is argued here that there is still some life in the *Ramsay* approach to composite transactions, and even that there is an element of seeking economic substance in this approach, despite denials by the courts to the contrary, but that the lack of transparency about when a composite transaction will be found to exist renders the current law unsatisfactory.

The second part of the article examines the problem of ascertaining the intention of the legislature in tax cases, and observes the striking similarities, but also the differences, in the way in which the issues have developed from different juridical backgrounds in the United Kingdom, Canada, Australia and the European Court of Justice (“ECJ”). In the *Halifax*⁸ case, the ECJ has applied to VAT the principle that Community legislation cannot be extended to cover abusive practices. Some jurisdictions have statutory general anti-avoidance rules (“GAARs”) but these have met with varying degrees of success and much criticism. Against this background, this part of the article considers to what extent, if at all, a statutory general anti-avoidance principle, or set of principles, might assist with the problems of statutory interpretation in the United Kingdom. The proper way to ascertain the intention of the legislature is at the heart of the debate on tax avoidance and this is an area which is developing rapidly in the United Kingdom as a result of developments in other areas. Statutory interpretation may be the process of discovering parliamentary intention, but this intention, never a straightforward concept, is especially difficult to ascertain in tax legislation, where complex legal concepts are often used to achieve economic ends.⁹ A standard, though not uncontroversial, definition of tax avoidance is “a course of action designed to conflict with the evident intention of Parliament”.¹⁰ The limits of this

⁷Lord Hoffmann stated in *Westmoreland*, above, fn.2, at [62]: “when statutory provisions do not contain words like ‘avoidance’ or ‘mitigation’ I do not think it helps to introduce them. The fact that steps taken for the avoidance of tax are acceptable or unacceptable is the conclusion at which one arrives by applying the statutory language to the facts of the case. It is not a test for deciding whether it applies or not”. The language of avoidance and mitigation is discussed and defended in J. Kessler, “Tax Avoidance Purpose and Section 741 of the Taxes Act” [2004] B.T.R. 375.

⁸*Halifax Plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v Commissioners of Customs and Excise* (Case C-255/02) [2006] S.T.C. 919.

⁹It is no coincidence that *Pepper v Hart* [1993] A.C. 593 was a tax case: there is often some ambiguity about the meaning of tax legislation. This case permits limited recourse to non-statutory material in the form of ministerial statements in restricted circumstances and when legislation is ambiguous. See the Rt Hon. Lord Steyn, “*Pepper v Hart*: a Re-examination” (2001) 21 O.J.L.S. 59; A. Kavanagh, “*Pepper v Hart* and Matters of Constitutional Principle” (2005) 121 L.Q.R. 98; S. Vogenauer, “A Retreat from *Pepper v Hart*? a Reply to Lord Steyn” (2005) 25 O.J.L.S. 629.

¹⁰*IRC v Willoughby* [1997] 1 W.L.R. 1071, HL; [1997] S.T.C. 995 at 1004, per Lord Nolan; but see below, fn.80, and text thereto.

definition are apparent immediately. As many commentators have pointed out, if the legislation does not have a coherent policy rationale, judges cannot be expected to remedy the situation and neither can a GAAR do so.¹¹ Whilst a GAAR cannot be expected to fill the gaps left by poor policy making, it is argued here that a GAAR which comprises a number of principles, including, but not limited to, directions about the significance of economic substance and of the manner of carrying out a scheme, may be able to operate, in conjunction with new approaches to legislation, to support the judiciary better in their task of statutory interpretation.

The third and concluding part of the article considers whether the difficulties experienced in the United Kingdom and elsewhere in ascertaining the intention of the legislature in a tax context could be mitigated by special legislative mechanisms which could declare or signal principles of taxation law as set out by Parliament. The operation of paramount provisions which overlay other legislation such as those under the Human Rights Act and in European Community Directives, may point the way forward here.¹² Parliament may need to indicate its intentions by layered legislation, with detailed specific provisions being overlaid with principles. The UK judiciary has shown a recent willingness to embrace this new approach to statutory interpretation. As can be seen from jurisdictions where there is a GAAR, however, the interaction between legislative principles and specific rules has to be spelt out carefully if it is to achieve its intended result.

II. IS *RAMSAY* DEAD?

Following the decision in *BMBF*, Lord Hoffmann commented that:

“The primacy of the construction of the particular taxing provision and the illegitimacy of rules of general application has been reaffirmed by the recent decision of the House in [*BMBF*]. Indeed it may be said that this case has killed off the *Ramsay* doctrine as a special theory of revenue law and subsumed it within the general theory of the interpretation of statutes . . .”¹³

This raises a number of questions. First, was the *Ramsay* doctrine ever a special theory of revenue law or was it always simply an application of statutory construction? Secondly, if there ever was a special rule for tax statutes, what remains of this? Thirdly, how might the judicial approach

¹¹For a very clear expression of this view see M. Gammie, “*Barclays and Canada Trustco: Further Comment from a U.K. Perspective*” (2005) 53 Can. Tax J. 1047.

¹²See A. Kavanagh, “The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998” (2006) 26 O.J.L.S. 179, discussing *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 and, in a tax context, see *Revenue and Customs Commissioners v IDT Card Services Ireland Ltd* [2006] EWCA Civ 2; [2006] S.T.C. 1252, discussed further below.

¹³The Rt Hon. Lord Hoffmann, “Tax Avoidance” [2005] B.T.R. 197 at 203.

to tax avoidance develop in the future in the light of *BMBF* and other recent case law in the United Kingdom and at ECJ level?

An analysis of the voluminous literature spawned by the *Ramsay* line of cases, much of it written by those who were also arguing or deciding the case law, reveals deep concerns, not a little disingenuous reasoning, and very little progress over the years.¹⁴ Many problems were encountered as the case law unfolded: all predictable and predicted.¹⁵ Whilst the problems were predictable, the outcome of cases involving tax avoidance schemes remains unpredictable at the margins.

(a) *The uneasy creation of a new approach.*

The description of *Ramsay* as a new approach was not an invention of the commentators. Whilst Lord Wilberforce was clear in the House of Lords in *Ramsay* that he was not introducing a new *principle* he did not hide his view that the judicial approach to tax avoidance was developing. He linked this development specifically to the requirements of dealing with new tax avoidance techniques, stating, “While the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still.”¹⁶

Lord Wilberforce was explicit that the new approach respected established principles. He emphasised, in particular, that a subject is to be taxed only on clear words and not on “intendment” or on the “equity” of an Act. What are clear words, however, is to be ascertained on normal principles and these do not confine the courts to a literal interpretation. Further he reiterated the well-known *Duke of Westminster*¹⁷ “principle” that a subject is entitled to arrange his affairs so the tax attaching under the appropriate Acts is less than it otherwise would be. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. Lord Wilberforce also stressed that the fact-based distinction between a sham and a genuine transaction remained unchanged after the *Ramsay* decision.¹⁸ Most significantly for

¹⁴For some of the most notable examples, in addition to Lord Hoffmann, *ibid.*, see P. Millett (now the Rt Hon. Lord Millett), “A New Approach to Tax Avoidance Schemes” (1982) 98 L.Q.R. 209; Law Society Revenue Law Committee, *Tax Law in the Melting Pot* (1985); M. Gammie, “The ‘Implications of *Furniss v Dawson*’” (1985) *Fiscal Studies* 52; Special Committee of Tax Law Consultative Bodies, *Tax Law after Furniss v Dawson* (1988); J. Tiley, “Judicial Anti-avoidance Doctrines: the U.S. Alternatives” (Pts I and II) [1987] B.T.R. 180 and 220; the Rt Hon. Lord Oliver of Aylmerton, “A Judicial View of Modern Legislation” (1993) 14 Statute L.R. 1; *Special Issue on Tax Avoidance* [1998] B.T.R. No.2; the Rt Hon. Lord Templeman, “Tax and the Taxpayer” (2001) 117 L.Q.R. 575; the Rt Hon. Lord Walker of Gestingthorpe, “*Ramsay* 25 years On: Some Reflections on Tax Avoidance” (2004) 120 L.Q.R. 412; *Special Issue on Tax Avoidance* [2004] B.T.R. No.4.

¹⁵Tiley, fn.14 above; Millett, fn.14 above.

¹⁶*Ramsay*, fn.1 above, at S.T.C. 181.

¹⁷*IRC v Duke of Westminster* [1936] A.C. 1.

¹⁸For a discussion of these concepts see B. McFarlane and E. Simpson, “Tackling Avoidance” in J. Getzler (ed.), *Rationalizing Property, Equity and Trusts, Essays in Honour of Edward Burn* (2003); but see also M. Gammie, “Sham and Reality: the Taxation of Composite Transactions” [2006] B.T.R. 294.

the purposes of the discussion in this article, Lord Wilberforce relied upon previous case law, such as *Chinn v Collins*,¹⁹ to justify the application of the legislation to a series or combination of transactions, intended to operate as such.²⁰ In *Chinn v Collins* the Special Commissioners had decided that there was never any possibility that the appellant taxpayers would not proceed from one step to another of a multi-step scheme. Based on these findings and also “its own analysis in law”, the House of Lords in that case reached the conclusion that the court could examine the scheme as a whole and should not be confined to a step-by-step examination. The emphasis that Lord Wilberforce puts on this being a question of law, a point developed in later cases as we shall see, arises from the treatment in *Chinn v Collins* of the construction of the documentation setting out the scheme as a question of law.²¹ It is not the statute that is being construed here, but the nature of the transaction. As Lord Wilberforce states:

“It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or tax consequence and if that emerges from a series or a combination of transactions, intended to operate as such, it is that series which may be regarded.”

In this approach to construction of documents lies the seed of what might be thought to be a judicial doctrine going beyond statutory construction.

Subsequently, in *IRC v Burma Oil Co Ltd*, Lord Diplock confirmed the judicial view that a development of the jurisprudence was taking place, stating that *Ramsay*'s case marked a significant change in the approach adopted by the House of Lords to a pre-ordained series of transactions, a process which continued with the decision in *Furniss v Dawson*.²²

At this point there appeared to be a *Ramsay* “approach” which required the court to ascertain the legal nature of the transaction to which it sought to attach tax or a tax consequence by looking at a series or combination of transactions intended to operate as such rather than in isolation from each other (known as a “composite transaction”). The statute in question was applied to this new type of analysis of the transaction or series of transactions (this analysis itself being a question of law). The net result depended upon this combination of statutory construction and the special analysis of the composite transaction. This seems to be a judicially-created

¹⁹*Chinn v Collins* [1981] A.C. 533.

²⁰The other cases relied upon were *Floor v Davis* [1978] Ch. 295 (dissenting judgment of Eveleigh L.J. in the Court of Appeal); *IRC v Plummer* [1980] A.C. 896.

²¹See particularly Lord Russell in *Chinn v Collins*, fn.19 above, at [8]. For further discussion of whether the nature of a contract is a question of law see *Moore v Garwood* (1849) 4 Exch. 681 discussed by Lord Hoffmann in *Carmichael v National Power Plc* [1999] 1 W.L.R. 2042, HL; and see also the further discussion at fn.74 below.

²²*IRC v Burma Oil Co Ltd* [1982] S.T.C. 30, HL; *Furniss v Dawson* [1984] A.C. 474.

rule of construction that requires the analysis of the transaction as an indivisible whole in given circumstances.²³ Generally,

“the meaning of a word within a statute is a question of law which it is for the judge to determine, but how that word applies to a particular situation may simply be a matter of common sense or ordinary usage which the courts will treat as a question of fact.”²⁴

In the *Ramsay* cases, however, according to Lord Wilberforce, the meaning of the word is bound up with its application to the facts in a way that makes that application a question of law also. This might have been derived initially from the construction of the documentation as a matter of law but seems then to take on the look of a more independent principle, related to the nature of multiple-step transactions rather than to the particular documentation in question. It does not seem to be “anchored in the meaning of the statute”.²⁵ The alternative view, which, as we shall see, is expounded by the House of Lords in the most recent cases,²⁶ is that the *Ramsay* approach was never anything more than an application of the normal rules of statutory construction.²⁷

Whether or not *Ramsay* ever did contain some elements of an independent rule, it is correct to say that *Ramsay* did not develop into a business-purpose doctrine along the lines of the US doctrine and was not intended to do so by its creators—counsel or judiciary.²⁸ Such a doctrine requires that taxpayers have a reason other than the avoidance of taxes for undertaking a transaction or a series of transactions if their actions are to be tax effective.²⁹ In an article published in this *Review* shortly after the decision in *Ramsay*, Mr Peter Millett Q.C. (now Lord Millett), who had appeared as counsel for the Crown in that case, claimed that the fact that the transactions in question were entered into with the sole motive of obtaining a tax advantage formed no part of the *ratio* of the American cases cited to the House of Lords in *Ramsay*—these were not business-purpose doctrine cases.³⁰ In any event, he explained, these

²³Nourse L.J. in *Fitzwilliam v IRC* [1992] S.T.C. 185 described this as a “principle of statutory application”. See also Sir Anthony Mason N.P.J. in *Wing v Commissioner of Estate Duty* (2000) 3 H.K.L.R.D. 77 and Carnwath L.J. in the Court of Appeal in *BMBF* [2003] S.T.C. 66 at [65] and [66], discussed further below.

²⁴J. Bell and G. Engle, *Cross, Statutory Interpretation* (3rd edn, 2004), at p.59.

²⁵A phrase taken from Lord Hoffmann, who argues that the US “business-purpose rule” is not anchored in the meaning of the statute: above, fn.13, at 199.

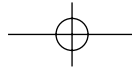
²⁶See *McGuckian, Westmoreland* and *BMBF*, above, fn.2.

²⁷A.G.J. Berg, “Avoidance Schemes after *Craven v White*” (1989) J.B.L. 45 wrote 16 years ago that the so-called *Ramsay* principle was nothing but one of statutory interpretation and, as such, was as relevant to legislation in other fields as it was to tax law.

²⁸R. Ballard and P. Davison, United Kingdom Branch Report in *Cahiers de droit fiscal international*, Vol.LXXXVIIa *Form and substance in tax law* (2002) (“*Cahiers*”).

²⁹W.P. Streng and L.D. Yoder, United States Branch Report in *Cahiers*.

³⁰Above, fn.14. The cases were especially *Knetsch v United States* 364 U.S. 361 (1960) (the sham transaction doctrine, which differs substantially from the UK notion of sham) and *Gilbert v Commissioner*



US cases were not cited as binding or persuasive authority but only for the purpose of demonstrating the kind of reasoning that might be applied “from principles accepted in England.”³¹

Ramsay was also not intended to introduce a substance over form doctrine, enabling the courts to bypass the language of the statute to look at the economic consequences of a transaction, despite the fact that such a doctrine exists in the United States, but the case illustrates the confusion that can be created by referencing cases from other jurisdictions in the context of our rather different system.³² The dangers seem even greater when there is neither comprehensive discussion nor explanation of the extent to which they are supposed to apply, as was the position here. Mr Millett knew that the hare he had set running might not go in quite the direction he had expected. He argued that the ratio decidendi of *Ramsay* was that

“where the taxpayer claims to have entered into a transaction which is incapable of appreciably affecting his financial position except to give rise to a reduction of his tax liability, it is to be disregarded.”³³

In his view, this ratio was reached through statutory construction. Following the American *Gilbert* case, upon a fair construction of the taxing statutes “we cannot suppose that it was part of the purpose of the Act to provide an escape from the liabilities it sought to impose”.³⁴ This suggested *ratio* was, perhaps, an expression of hope rather than actuality and proposes a wide view of statutory construction which others can be forgiven for having read as an overriding principle. Mr Millett was aware of the dangers of this and was open about his concern that the House of Lords had actually gone further than he had proposed they should, and “in doing so created difficulties which are likely to perplex taxpayers, their advisers and the courts for some time to come”. This should not have surprised him, given the route he had taken in argument. In *Ramsay*, both Lord Wilberforce and Lord Fraser of Tulleybelton expressly approved the dissenting view of Eveleigh L.J. in the earlier case of

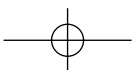
of *Internal Revenue* 248 F.2d 399 (1957) (economic substance doctrine). In addition to these two doctrines, the courts use the business-purpose doctrine, the substance over form doctrine and the step-transaction doctrine. These are not always treated as distinct doctrines. For a detailed discussion of the current US case law, see “IRS Audit Technique Guide on Abusive Tax Shelters and Transactions” (2005) TNT 102-14; for recent developments, see K.C. Burke, “*Black & Decker* in the Fourth Circuit: Tax Shelters and Textualism” (2006) TNT 74-28; C. Tandon, “Senior IRS Officials Tout Tax Shelter Victories” (2006) TNT 179-1.

³¹*Gregory v Helvering* 293 U.S.465 (1935), which, according to Streng and Yoder, above, fn.29, was probably the origin of the business-purpose doctrine in the United States, was not referred to in the opinions in *Ramsay*.

³²See J. Tiley and E. Jensen, “The Control of Avoidance: the United States Experience” [1998] B.T.R. 161.

³³Above, fn.14, at 222.

³⁴*Gilbert*, above, fn.30.



Floor v Davis,³⁵ which could be argued to be based on the American step-transaction doctrine.³⁶ Mr Millett considered it unsatisfactory that their Lordships did not give their reasons for denying all legal effect to the intermediate steps within the *Ramsay* arrangements, as distinct from merely construing them in their context as part of an indivisible whole. So, having opened Pandora's box, Mr Millett wanted to close it again. This may have happened now, but not before causing considerable confusion.

Subsequently, Lord Brightman, in *Furniss v Dawson*,³⁷ developed his well-known formulation of the *Ramsay* principle, which referred to business purpose, although not on the same lines as the American business-purpose doctrine. For the principle to apply, he stated:

“First, there must be a pre-ordained series of transactions or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end . . . Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of liability to tax—not ‘no business effect’. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.”

It should be noted that even in this strong formulation of the “principle”, lack of business purpose alone was not enough to remove the effectiveness of a tax avoidance scheme and all was said to depend upon the wording of the statute. The precision with which this formula is spelt out, however, does suggest the existence of some kind of judicial rule going beyond statutory construction. Lord Oliver recognised this extra-judicially.³⁸ In his view *Ramsay* and *Furniss* did introduce a principle, imported from the United States, and it was a dangerous and insidious type of fiction

“for it poses as an exercise in statutory construction, when in fact it is nothing of the sort. The construction of the statute is not in doubt. The court construes it according to its terms and finds that, so construed, it enables tax to be saved or minimized. It then assumes a parliamentary intention that the steps which Parliament has enjoined or authorized for the saving or minimizing of tax shall not be effective if they are carried out *for that* purpose but are only to be effective if carried out for some other ‘legitimate’ business purpose. This is not construction. It is legislation in an area in which Parliament itself has

³⁵Above, fn.20.

³⁶Above, fn.30.

³⁷Above, fn.22.

³⁸Lord Oliver, above, fn.14.

not thought it right to legislate and thus, in my view, it steps outside the judicial function.”

Lord Oliver had done his best on the bench in *Craven v White*³⁹ to limit this principle and to declare that it was in truth a rule of statutory construction, but in this article, written some five years later, he was still clearly concerned that this was not really the case. The constitutional propriety of a judge-made rule was his primary objection. Ironically, Lord Oliver’s attempt to limit the principle, by adding further conditions to what was required to constitute a single indivisible composite transaction, made the principle look even less like a rule of construction and more like a judicial doctrine than previously, especially when it is remembered that the House of Lords in *Ramsay* had said that what amounts to a composite transaction is a question of law.⁴⁰ Subsequently, though, further judicial voices were added arguing that there is no *Ramsay* principle beyond a doctrine of statutory construction. This path has led us to *BMBF*.⁴¹

(b) *The destruction of the new approach?*

The reinterpretation of some of the older cases as being based purely on statutory construction involves a certain amount of revisionism.⁴² In his extra-judicial writing, Lord Hoffmann has admitted, with characteristic frankness, that:

“In choosing the constructional approach rather than the *Furniss v Dawson* formula, the House had to rewrite history in a way that struck some people as a little disingenuous.”⁴³

Lord Hoffmann admitted that in *Furniss v Dawson* Lord Brightman stated “the principle in general terms which contain no mention of the statutory language”,⁴⁴ although, as we have seen above, Lord Brightman did make reference immediately after his formulation of the principle to the terms of the taxing statute. As Lord Hoffmann noted himself in *Westmoreland*, the spelling out of conditions requiring a pre-ordained, circular, self-cancelling transaction with a step or steps having no commercial purpose other than the obtaining of a tax advantage looks very much like an overriding legal principle superimposed on revenue law.⁴⁵ The Law Lords in *Westmoreland* rejected this as a principle and described it as “no

³⁹[1989] A.C. 398.

⁴⁰As discussed above.

⁴¹*IRC v McGuckian*, above, fn.2; *Westmoreland*, above, fn.2.

⁴²Ballard and Davison, above, fn.28, at 578.

⁴³Lord Hoffmann, above, fn.13. For a response to Lord Hoffmann, highlighting where there has been some “re-interpretation” of the basis of case law, see B. Staveley, “The Quest for the Allowable Loss: Reflections on Lord Hoffmann’s Approach to *Ramsay*” [2005] B.T.R. 609.

⁴⁴Lord Hoffmann, above, fn.13, at 200.

⁴⁵*Westmoreland*, above, fn.2, at [29].

more than a useful aid”,⁴⁶ much to the chagrin of the by now retired Lord Templeman, who responded in this *Review* that the “considered pronouncements of an eminent generation of modern Law Lords applying principles to tax avoidance schemes” could not be so downgraded.⁴⁷

In *Westmoreland*, having used his impressive powers of analysis to explain away the previous cases on the basis of statutory construction, Lord Hoffmann then arguably fell into the same temptation to state general rules as had some of his predecessors. He rejected the Brightman formula but appeared to be creating a new legal principle: a distinction between commercial and juristic concepts. Any attempt to apply this as a method of classification a priori would have been the very negation of purposive construction, as was “explained” in *BMBF*, and the distinction was soon abandoned.⁴⁸ In practice this was simply a way of stating that in some circumstances, economic substance should override legal form, but given that their Lordships have never considered themselves to have the power to introduce such a rule, it could not survive and Lord Hoffmann’s formulation contained insufficient guidance to be workable in any event.

The latest instalment of the long-running tax avoidance saga in the House of Lords contains a somewhat exasperated expression of annoyance with revenue lawyers from their Lordships. The Appellate Committee of the House of Lords in *BMBF*, delivering a joint opinion, complained that all attempts at clarification of the “principles of construction” applied in *Ramsay* appear only to have raised fresh doubts and further appeals.⁴⁹ The Committee accepted that it was not going to be able to remove all difficulties in the application of these principles, because it is in the nature of questions of construction that there will be borderline cases about which people will have different views, but it expressed the hope that it would achieve some clarity about “basic principles”.⁵⁰

It is questionable whether their Lordships have achieved their expressed aim of clarification in *BMBF* and in the accompanying opinion in *Scottish Provident*. Despite their intention of producing *clarity* it should be noted that their Lordships do not purport to be aiming at *certainty*. For obvious reasons, *certainty*, in the sense of a precise road map for those designing tax avoidance schemes, would not be desirable.⁵¹ What is needed is *clarity*

⁴⁶*ibid.*, per Lord Nicholls at [8].

⁴⁷Lord Templeman, above, fn.14, at p.582.

⁴⁸*BMBF*, above, fn. 2, at [38]. Lord Templeman, thought this distinction reflected “ingenuity but no principle” (above, fn.14, at p.584) whilst in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46; (2004) 1 H.K.L.R.D. 77, Lord Millett observed that the attempted introduction of these concepts had led to an “arid debate”.

⁴⁹At [26].

⁵⁰At [27].

⁵¹Canada, *Report of the Royal Commission on Taxation* (Carter Commission) (1996), Vol.3, at 554–556, cited in G.S. Cooper, “Conflicts Challenges and Choices” in G.S. Cooper (ed.), *Tax Avoidance and the Rule of Law* (1997); D. McBarnet and C. Whelan, “The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control” (1991) 54 M.L.R. 848.

in the sense of knowing the principles to be applied and their constitutional source and authority.

The central claim of the House of Lords in *BMBF* was that the *Ramsay* case simply rescued tax law from “some island of literal interpretation” and brought it within generally-applicable principles.⁵² According to this view, the “new approach”, introduced with such a fanfare by the House of Lords in *Ramsay*, was merely the process of bringing tax law into the fold and aligning it with other areas of the law. The implication of this is that the area of taxation requires no special treatment, and can be dealt with by the legislature and the courts in the same way as any other topic of legislation. This is a questionable assumption in view of the complexity and artificiality of the tax system itself, its use for a multiplicity of objectives and the amount of financial advantage that can be at stake in tax cases.⁵³ Tax law also combines the use of legal and economic concepts in a way that makes interpretation very difficult. Given the layers of conceptual difficulty in the area of tax legislation and the problems with ascertaining the objectives of this legislation, the burden placed on normal rules of statutory interpretation, and the challenge posed to the Parliamentary draftsman, are very great indeed if there are no special rules or doctrines to assist the courts.⁵⁴

The issue in *BMBF* was whether *expenditure* was incurred on a pipeline so as to enable a finance company within the Barclays group (“BMBF”) to claim capital allowances for tax purposes. This highlights the question of whether the legislation was intended to reflect economic substance or whether there had been expenditure merely in a narrower sense of money paid out. Lord Hoffmann might have described this latter as the legal sense of the word had he not had to retract his analysis in *Westmoreland* in the face of criticism. The conclusion of the House of Lords was not altered by this change of approach, however. The facts were complex and the degree to which this complexity was the result of commercial considerations, and how far it was for tax planning purposes was disputed.⁵⁵ The taxpayer lost both before the Special Commissioners and in the High Court⁵⁶ but won decisively in the Court of Appeal and House of Lords. The facts given here are of necessity a simplified version. The Irish Gas Board, which already owned the pipeline, sold it to BMBF but then leased it back

⁵²*BMBF*, HL, above, fn.2, at [33] citing Lord Steyn in *McGuckian*, above, fn.2, S.T.C. at 915. The *Ramsay* approach was indeed applied in non-tax cases, for example, *Gisborne v Burton* [1989] Q.B. 390 (Ralph Gibson L.J. dissenting).

⁵³See J.A. Kay and M.A. King, *The British Tax System* (5th edn, 1990), at p.19; I.F.S. (Meade Committee), *Structure and Reform of Direct Taxation* (1978), at p.11.

⁵⁴For an example of the problems encountered see below, fn.96.

⁵⁵The Barclays team claim that form of the arrangements was in part to ensure that UK banking capital adequacy rules were met: J. Tiley, “*Barclays Mercantile* and *Scottish Provident*: Avoidance and Highest Courts: Less Chaos but More Uncertainty” [2005] B.T.R. 273.

⁵⁶Park J., [2002] EWHC 1527; [2002] S.T.C. 1068 dismissing an appeal from the Special Commissioners ([2002] S.T.C. (SCD) 78).

again. The Irish Gas Board did not have control of the purchase money because the agreement required that sum to be deposited as security for the rental payments with a company that had a relationship with Barclays. There was a genuine (not sham) legal sale of the pipeline between arm's length parties.⁵⁷

In the Court of Appeal it was held that the fact that the essential purpose of the arrangement was to obtain a tax advantage in the form of capital allowances did not detract from the genuineness of BMBF's trading purpose as a leading finance company.⁵⁸ Although finding for the taxpayer, Carnwath L.J. made it clear that he viewed the *Ramsay* principle as something more than a "pure rule of statutory interpretation in the normal sense" because, in his view, under *Ramsay* the transactions are "reconstituted" for fiscal purposes (though not for other purposes).⁵⁹ This takes us back to Mr Millett's complaint about the *Ramsay* decision. He did not wish the House of Lords to reconstitute the facts in this way, but this did not prevent them from doing so in *Ramsay* and other cases, and it takes a sleight of hand to explain this away as the consequence of statutory construction. It is the legal analysis of the *facts* that is key to the final determination in these cases. Like Lord Oliver, Carnwath L.J. interpreted *Ramsay* as a principle in order to give it a narrow, rather than a wide, application. The House of Lords achieved the same practical result but by the different route of arguing that to apply *Ramsay* was to apply normal rules of statutory construction.

When *BMBF* reached the House of Lords, their Lordships, in a single opinion delivered on their behalf by Lord Nicholls of Birkenhead, commented that it was going too far to suggest that transactions or elements of transactions with no commercial purpose were always to be disregarded for tax purposes. There are two steps to the question: first, on a purposive construction, what transaction will answer to the statutory description? Secondly, does the transaction in question do so? This is a very interesting difference in reasoning from that of the Court of Appeal. There was in the opinion of the House of Lords in *BMBF* no attempt to justify the inserted steps in terms of policy, they are simply said not to be relevant to the application of the capital allowances provisions in this case.⁶⁰ This is wholly dependent on the way in which *the transaction* is analysed. Here, the analysis of the House of Lords was that the relevant legislation was concerned entirely with acts of the lessor. The Act said nothing about what the lessee should do with the purchase price or how he should find the money to pay the rent. All that mattered here was that there

⁵⁷See above, fn.18.

⁵⁸*BMBF*, CA, above, fn.23, at [54].

⁵⁹*ibid.*, at [65].

⁶⁰Contrast [32] in the CA with [42] in the HL.

was expenditure by BMBF on the pipeline, and all the other payments and steps were “happenstances” and not necessarily elements in creating the entitlement to the capital allowances. That these other elements introduced a circularity into the arrangements was therefore irrelevant. They were not included in the “scheme” so as to enable the statute to apply to the overall result rather than the expenditure itself. The legislation applied and the capital allowances were available. This was based on an analysis of the transaction on which the House of Lords felt able to overturn the Commissioners. It was a question of law, as in *Ramsay*, how the facts should be interpreted, but it was a view based not only on documentation but also on the view taken of the surrounding circumstances which, on the facts here, the House of Lords took to mean that the expenditure in question should be viewed in isolation and not as part of a composite transaction.

(c) *The re-emergence of a principle?*

Although the decision in *BMBF* is presented as being entirely a decision on statutory interpretation, it is arguable that the decision-making process involved more than that. Crucial to the decision was a question of law, unrelated to the wording of the statute: whether there was a composite transaction. This is more readily appreciated by reviewing the contrast between the approach of the House of Lords in *BMBF* and in *IRC v Scottish Provident Institution* (hereafter *Scottish Provident*)⁶¹ in which an Appellate Committee of the House of Lords of exactly the same composition gave its opinion on the same day. The House of Lords considered that the proper interpretation of the transactions in question was a question of law in each case and thus reversible by the higher courts. They decided to reverse the court of first instance (the Special Commissioners) in each of these cases. Whilst in *Ramsay*, based on *Chinn v Collins*,⁶² the question was treated as one of law because it was an issue about the proper construction of documents, in these two later cases, as will be explored further below, the House of Lords take the view that it is the characteristics of a composite transaction that are a question of law and these characteristics must be viewed “realistically”. On one interpretation, this comes close to being a decision to examine substance and not form in certain circumstances but not others. Their Lordships, however, presented the case as being purely one of statutory construction in the sense of how the statute should apply to this composite transaction, once it was held to exist.

The line drawn by the House of Lords between *BMBF* and *Scottish Provident* in holding that in one case there was a composite transaction

⁶¹ Above, fn.3.

⁶² Above, fn.19.

to which the statute applied, whilst in the other there was not, has been regarded as obviously “correct” by most practitioners and other commentators,⁶³ but it is worth noting that this view of the correctness was not so obvious to the experienced Special Commissioners of taxation in each case and to the High Court judge in *BMBF*, Mr Justice Andrew Park, who was a highly respected member of the tax Bar throughout his career as a barrister, all of whom decided these cases differently from the House of Lords. In practice, it was critical to the success of the taxpayers in *BMBF* at both Court of Appeal and House of Lords level that capital allowances were widely known to be key drivers of the finance leasing industry.⁶⁴ This made it more difficult to argue that the result for which the taxpayer contended was outside the policy and intention of the legislation, although it is interesting that Park J. thought that the “overall transaction was not ‘standard commercial finance leasing’ at all”.⁶⁵

The Court of Appeal in *BMBF* linked its line of policy reasoning to whether there was a commercial purpose to the transaction as a whole. The House of Lords, on the face of it, took a much narrower view of the policy aspects, looking only at “what the statute actually requires” through its wording—that is that capital expenditure “be incurred”.⁶⁶ This, however, depended entirely on deciding that the surrounding events were not relevant because they were not necessary elements in creating the entitlement to the capital allowances. These surrounding events could have been construed differently. Park J. said in the High Court that expenditure was not incurred on a pipeline but rather on the creation of a complex network of agreements.⁶⁷ In practice what resulted in the House of Lords analysing the transactions as they did was their view of the broader background policy. Had they believed that the circularity of the scheme was relevant, they would have analysed the transaction as a composite whole. The reason they did not do so related to the nature of the scheme, not the statute. This goes further than pure statutory construction, even of a purposive nature, since the outcome of the application of the statutory words depends upon this special style of transaction analysis and not just a reading of the wording in the statute. Whatever they might have said

⁶³ See for example M.Gammie, above, fn.18, writes, “In *BMBF*, the question was did the taxpayer incur expenditure to acquire these assets? The answer was obviously yes; where he got the money to acquire them and what the vendor did with it afterwards was irrelevant to the statutory questions. In *Scottish Provident*, the question was whether these were the type of contracts that parliament had in mind? The answer was no.” It is easy to state the question so that the answer is “obvious”, but much depends upon the way the question is posed.

⁶⁴ Significant changes have been introduced in s.81 of and Sch.8 to the Finance Act 2006. In effect, this legislation looks at substance rather than form; something that the House of Lords considered would run counter to the intention of the previous legislation. The new disclosure provisions, above, fn.4, specify leasing to be a hallmark that requires disclosure in some circumstances.

⁶⁵ *BMBF*, HC above, fn.56, at [47].

⁶⁶ *BMBF*, above, fn.2, at [39].

⁶⁷ *BMBF*, HC above, fn.56, at [58].

about the need for a closer analysis of what the *statute* actually requires, it was a close analysis of the *transaction* that gave them the result they reached. They admitted as much in quoting Ribeiro P.J. in *Arrowtown*,⁶⁸ who stated:

“The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.”⁶⁹

Viewing the transaction “realistically” allowed the House of Lords to bring in wide policy considerations in deciding whether to look at economic substance. This meant looking beyond the wording of the statute and accepting the evidence of the taxpayer about what constituted “the ordinary trade of finance leasing”.⁷⁰

That this approach amounts to more than purposive construction can be seen even more clearly in *Scottish Provident*, where the House of Lords found that a scheme entered into by the taxpayer (“SP”) was ineffective for tax purposes. The taxpayers were attempting to use the transition to a new legislative regime, which was being introduced to tax derivative contracts based on gilts and bonds on which gains and losses had previously not been taxable. The scheme was designed to take advantage of this transition and had no other purpose. If effective, it would achieve a non-taxable gain and an allowable income loss. Under the scheme, SP granted to Citibank (the bank which devised the scheme) an option to buy gilts at a price representing a heavy discount from market price in return for a correspondingly large premium. This was not taxable as a gain under the old system. After the new tax regime came into force, Citibank exercised the option and SP had to sell the gilts at a loss, which under the new system was allowable for tax purposes. Commercially the transactions would cancel each other out, subject to price movements in between the times of the two transactions. In tax terms there was a loss and no gain. Had the parties been content with that, they might well have succeeded in “sailing through the gap”, according to their Lordships.⁷¹

There remained, however, a commercial risk of a real loss or profit if prices fluctuated during the currency of the option. Thus Citibank’s option was matched by a grant by Citibank to SP of an option to buy the same amount of gilts (the SP option). This was designed to remove the risk of a real gain or loss if prices changed. The figures had to be carefully worked out for the scheme to work; the options could not just match or they would cancel each other out and the purpose of the scheme would

⁶⁸ *Collector of Stamp Revenue v Arrowtown Assets Ltd*, above, fn.48.

⁶⁹ *BMBF*, above, fn.2, at [36].

⁷⁰ *ibid.*, at [41].

⁷¹ *Scottish Provident*, above, fn.3, at [26].

not be achieved. The SP option price was also made close enough to the market price to allow for some possibility that it would not be exercised.

This second option was a form of risk management, much like the deposit in *BMBF*. It could have been construed as “happenstance”, as was the deposit in *BMBF*. The operation of the tax scheme was not dependent on the grant of the second option. The Special Commissioners found as a fact that:

“There was a genuine commercial possibility and a real practical likelihood that the two options would be dealt with separately. Likewise, there was a genuine commercial possibility and a real practical likelihood that [the SP option] would not be exercised.”⁷²

The House of Lords recognised that it was not entitled to disturb this finding of fact, but said that a question of law existed. There was a contingency arising from the documents that might have prevented the composite transaction from being completed. The Special Commissioners concluded that there was a realistic possibility of this contingency arising. The House of Lords held that the Commissioners had erred in law in concluding that this meant that the scheme could not be a composite transaction, when in fact the contingency had not arisen.⁷³ This looks very little like a decision about construction of a document and rather more like a principle about the nature of a composite transaction for these purposes. It has nothing to do with the particular wording of the statute before the court and looks very like a judicial ruling about the factors to be taken into account in cases where there are transactions that in fact cancel each other out as a matter of substance. This finding of law clearly sets a precedent about the characteristics of a composite transaction, which would apply where the statute in question was worded completely differently from that in this case.⁷⁴

The central question was said by the House of Lords to be whether the Citibank option gave it an *entitlement* to gilts so that this would be a *qualifying contract* as defined in the legislation.⁷⁵ Only then would there be an income loss for tax purposes. If the option was part of a larger

⁷²[2003] S.T.C. 1035 at 1043, Finding 5.18, echoing the language in *Craven v White* [1989] A.C. 398, which was distinguished by the House of Lords in *Scottish Provident*.

⁷³*Scottish Provident*, above, fn.3, at [16] and [24]. On this process of asserting judicial control through finding an issue of law see the Rt Hon. Sir J. Laws, “Law and Fact” [1999] B.T.R. 159.

⁷⁴There seems to have been no attempt in *Scottish Provident* to link this to the documentation rather than the surrounding facts: contrast, for example, Lord Templeman in *Ensign Tankers v Stokes* [1992] S.T.C. 226 at 232 where the analysis of the transaction as a composite transactions was based on a reading of the documents in question as being interdependent and so read as a whole. Arguably, if what was at issue was not a document but a “series of acts and things done”, then its proper construction was a question of fact and not law at all: see Lord Hoffmann in *Carmichael*, above, fn.21 citing *Moore v Garwood*, above, fn.21.

⁷⁵The relevant wording is from s.154(1), Finance Act 1994 as amended by the Finance Act 1996; see *Scottish Provident*, above, fn.3, at [18].

scheme, by which the rights to the gilts were bound to be cancelled by SP's rights to the same gilts, then it could be said that there was no such entitlement and so no income loss. The statutory language was given a "wide practical meaning" and it was found that there was no entitlement. Their Lordships held that:

"Since the decision of this House in [*Ramsay*] it has been accepted that the language of a taxing statute will often have to be given a wide practical meaning of this sort which allows (and indeed requires) the court to have regard to the whole of a series of transactions which were intended to have a commercial unity."

In this sense, there was emphasis on the language of the legislation, but it was the application of this legislation to the facts, subject to the judicial rule on composite transactions described above, that was important in reaching this conclusion. If what amounts to a composite transaction is a question of law, it seems inevitable that the precedents will build again and that the Brightman formula, or something like it, will re-emerge. What is this, if not a judicial principle? The House of Lords stated that it would destroy the value of the *Ramsay* principle of construing provisions as referring to composite transactions if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. This focus on the transaction, rather than the statute, takes this "principle" beyond ordinary purposive statutory interpretation. Arguably, the *Scottish Provident* elaboration marks an important development of *Ramsay*-style thinking, so heralding the development of a new style *Ramsay* principle. Given that the detailed characteristics of a composite transaction are a question of law, and that it is the existence of such a transaction that affects the tax outcome, rather than merely the purposively construed wording of the legislation, the *Ramsay* approach does not appear to be dead, only transmogrified.

To the extent that one can discern a distinction between the legal analysis in *BMBF* on the one hand, and *Scottish Provident* on the other, from the wording of the Appellate Committee's opinions in these two cases, it rests on whether the court was prepared to look at the wider transactions involved in each as a composite transaction or as a happenstance. The focus was on their Lordships' understanding of the policy of the legislation, but going beyond purposive construction by combining this with a view of the surrounding circumstances of the particular transaction in question. In *Scottish Provident* there was a gap, which looked very much as if it had arisen from legislative oversight. In *BMBF* the taxpayer was relying on a deliberately created tax incentive: some would say not in the way the Parliament intended, but others would

disagree. The line drawn between these two cases is based on the judicial view of the intention of Parliament, but that view does tacitly include the issue of whether the legislation can have imposed upon it an intention to look at legal concepts only or whether it can be applied to the transaction in question so as to take account of economic substance. The approach here is wider than a normal purposive construction. It is arrived at partly by looking at the legislation in context, in the normal way, but in part by a review of the nature of and manner of carrying out the scheme in question so as to reach an assessment of its economic substance.

As we shall see, this is the very same process as is created by the Australian statutory GAAR. If the court is to apply such wider policy perspectives then, it is argued in the next section of this article, it would be preferable for these to be derived from a GAAR which had itself been enacted by Parliament and therefore explicitly represented its intention. This process would have the advantage of providing a transparent framework for this decision-making. This proposal requires further discussion of the meaning of the intention of Parliament and an examination of experiences in other jurisdictions that have GAARs.

III. ASCERTAINING THE INTENTION OF THE LEGISLATURE: UNITED KINGDOM AND OTHER EXPERIENCES

(a) *The meaning of Parliamentary intention*

In the past, Lord Templeman attempted to draw a bright line between tax avoidance, on the one hand and tax mitigation or tax planning on the other.⁷⁶ Other descriptions of avoidance thought to encompass activities that should not be effective include unacceptable,⁷⁷ impermissible,⁷⁸ aggressive and abusive.⁷⁹ One widely-used definition is that of Lord Nolan in *Willoughby*, that tax avoidance is a course of action designed to conflict with or defeat the evident intention of Parliament; although it should be noted that he was discussing tax avoidance in the context of a particular statutory provision providing for a clearance mechanism if the taxpayer could show that his purpose was not tax avoidance but not purporting to give a general definition.⁸⁰ The phrase may also be used more widely in opposition to evasion, to cover all legal tax activity which reduces the liability to tax that would arise if another route were followed. This wide use includes what is known as mitigation, which does not defeat the

⁷⁶See Lord Templeman, above, fn.14 and in *CIR v Challenge Corp Ltd*, above, fn.6.

⁷⁷Criticised by Lord Hoffmann in *Westmoreland*, above, fn.2.

⁷⁸A term developed in South Africa—see South African Revenue Service, *Discussion Paper on Tax Avoidance* (November 2005) (hereafter “SARS”).

⁷⁹*Halifax*, above, fn.8. For a detailed examination of terminology and its origins see Kessler, above, fn.7.

⁸⁰Income and Corporation Taxes Act 1988, s.741; see *Willoughby*, above, fn.10.

intention of Parliament, as well as avoidance in the narrow sense, which, under this definition, does. Lord Nolan's classification suggests that there is a clear line between avoidance in its narrow, pejorative, sense and mitigation, but if this distinction does depend upon the "evident intention of Parliament" then we are back to asking what that is, and to whom it must be evident, and that is not a simple dividing line.

Lord Hoffmann has dealt with the problem by stating that

"... tax avoidance in the sense of transactions successfully structured to avoid a tax which Parliament intended to impose should be a contradiction in terms. The only way in which Parliament can express an intention to impose a tax is by a statute that means that such a tax is to be imposed. If that is what Parliament means, the courts should be trusted to give effect to its intention. Any other approach will lead us into dangerous and unpredictable territory."⁸¹

According to this view, successful tax avoidance cannot exist, since any scheme that is held by the supreme tribunal to be effective is, by definition, not avoidance. This relies on a very particular view of Parliamentary intention, of course, and one that can only be ascertained once the highest court has heard a case. A more commonly-held view is that expressed in the Institute for Fiscal Studies Green Budget in 2006:

"There will have been no avoidance if the judges decide that Parliament misfired, so that arrangements fall within the letter of the law—however much it may appear that Parliament may not have intended its language to cover the particular arrangements entered into by the taxpayer. As a matter of law, that is what Parliament has prescribed and a taxpayer does not avoid tax by limiting his or her liability to what the law prescribes."⁸²

These commentators assume that actual parliamentary intention may differ from that which the language states and the courts decide it to be. This depends upon what is meant by parliamentary intention. The tax debate is often distracted by the notion that individual members of Parliament have not considered, or do not understand, the tax issues before them or that the legislature as a whole has not considered a particular matter.⁸³ This is often the case, and parliamentary procedure for the passing of tax legislation could be much improved if it could be removed rather more from the political arena of the annual budget and given more time for

⁸¹ Above, fn.13.

⁸² S. Bond, M. Gammie and J. Whiting, *Institute for Fiscal Studies Green Budget* (2006), at p.174.

⁸³ For example, see Tax Law Review Committee ("TLRC") Report, *Tax Avoidance* (1997); E. Troup, "The Consultative Document on a General Anti-avoidance Rule for the United Kingdom" [1999] B.T.R. 5.

reflection⁸⁴; but these comments misunderstand the role of legislation as an expression of the intention of Parliament as an institution rather than as a collection of individuals. As Waldron puts it, “an institution has no occurrent thoughts”. He writes:

“This means abandoning all talk of legislative intentions apart from the intentionality that is part and parcel of the linguistic meaning . . . of the legislative text itself.”⁸⁵

It is helpful to think about parliamentary intention in this way. The debate is not then sidetracked into questions of majority and minority views, or the views of Government as opposed to the legislature as a whole. Understood in this way, the intention of Parliament is not a fiction.⁸⁶ The legislative intention is the product of the process that produces the text.⁸⁷

This is an argument for the authoritativeness of the text. But it is not an argument for exclusion from consideration of all other types of material. Certain types of statement by members of the legislature, “made in a canonical form established by the practice of legislative history, should be treated as themselves acts of the state personified.”⁸⁸ As Waldron puts it:

“the judges are developing a practice of recognizing such statements as acts of the legislature and the legislators are responding to that recognition by producing statements that are intended to be taken in that way.”⁸⁹

Thus the argument about the role of *Pepper v Hart* statements or explanatory memoranda can take place within this framework because these may or may not come to be recognised as acts of the legislature, as a matter of policy.⁹⁰

Nor is this approach to parliamentary intention an argument for literalism. Although Lord Hoffmann’s view places great weight on the words used to express the intention of Parliament, his is certainly not a literalist view. He argues for the courts to be trusted to give effect to the intention of Parliament, so, very definitely, he sees a role for the judges. What he criticises is the unwillingness of Her Majesty’s Revenue & Customs (“HMRC”), which issues instructions to the parliamentary draftsman, to legislate by reference to substance rather than form. In his

⁸⁴TLRC Working Party (Chair, Sir Alan Budd) *Making Tax Law* (2003).

⁸⁵J. Waldron, *Law and Disagreement* (1999), at p.142.

⁸⁶Cross, above, fn.24, cited in F. Bennion, *Statutory Interpretation* (4th edn, 2002), s.164.

⁸⁷“In seeking for the intention of Parliament we are seeking not what Parliament meant but the true meaning of what they said”: *per* Lord Reid in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591 at 613 cited in Cross, above, fn.24, at p.26.

⁸⁸R. Dworkin, *Law’s Empire* (2000), p.343.

⁸⁹*ibid.*, at pp.342–343; Waldron, above, fn.85, at p.146.

⁹⁰See above, fn.9.

view, this denies the courts the opportunity to recognise the economic effect of transactions.⁹¹ Although, in practice, as argued above, the effect of the approach of the House of Lords in cases falling within the revised *Ramsay* “principle of construction” may be to take account of economic substance, this is not explicit or openly acknowledged by the courts, since it would be considered to go beyond the powers of the judiciary.

Much has been made, from *Ramsay* onwards, of tax being created to operate in the real world, not that of make-belief.⁹² The true position, however, as Lord Hoffmann recognises here, is that the tax system is often not based on *economic* reality, and this would make it difficult to apply any kind of economic substance test in such cases. Some taxes, of which capital gains tax is a good example, are based on legal concepts of property or contract and are of their essence a matter of legal form rather than economic substance. Other areas of taxation are based on business or accounting concepts, but these may be modified for tax purposes. “Reality” is an unhelpful notion in this context since, as Lord Hoffmann has pointed out himself elsewhere, “something may be real for one purpose but not for another”.⁹³ Legal substance has its own reality, but economics is not its basis. It is where these legal concepts clash with economic substance that problems often arise. Indeed, successful tax schemes work with the legal concepts and precise wording of the statute, complying with these concepts very precisely, which is why it is so difficult to combat them. As Lord Hoffmann suggests, this can be dealt with only by the legislature spelling out its intention more clearly.

Ideally this would be done in the specific legislation, but for cases where this has not been achieved, a general parliamentary intention to give effect to economic substance could be made explicit in a GAAR: a general legislative provision intended to apply certain principles, presumptions or overriding tests to the interpretation of specific tax legislation.⁹⁴ For the reasons explained above, there are instances where it may not be reasonable or even possible to apply an economic substance test. If the basis of the specific tax legislation in question differs conceptually from economic reality, this will need to be taken into account as now, but the examination of whether economic substance could and should be relevant would be sanctioned clearly by Parliament. This would not remove all problem cases, particularly in respect of legislation passed prior to the GAAR; but the existence of such a principle would assist in focusing the

⁹¹ Above, fn.13, at p.206.

⁹² See Lord Wilberforce in *Ramsay*, above, fn.1, at 82: “The capital gains tax was created to operate in the real world, not that of make-belief”; but see too the discussion in *Staveley* above, fn.43 and above, fn.54 and text thereto.

⁹³ *Westmoreland*, above, fn.2, at [40]. This was in the context of Lord Hoffmann’s now-abandoned distinction between juristic and commercial meaning but the point itself remains valid. See also the discussion in *Staveley*, above, fn.43.

⁹⁴ For examples of GAARs in other jurisdictions see below.

minds of legislators in the course of introducing new specific legislation on the basis of the tax in question.⁹⁵ In this way, the concept of economic substance could become a useful tool, as Lord Hoffmann would like to see happen; but if economic substance is to override legal concepts then this needs to be clearly understood and integrated into the legislative process, and the GAAR must also give further guidance as to when it is to apply.⁹⁶

This suggests that the way forward, for future legislation at least, is not more detailed drafting but policy-based, principles-based drafting⁹⁷ together with a GAAR applying an economic substance test, unless this is expressly excluded. The detailed mass of rules we currently have nevertheless leaves holes in the net that the courts cannot plug by referring to economic substance at a higher level of generality since there is no direction to them to do so. Indeed, at present it may be inappropriate for them to do so since this has not been considered as an option by the legislators. As Lord Hoffmann puts it:

“It is one thing to give the statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there.”⁹⁸

It is not the function of a GAAR, any more than of the judiciary, to fill gaps left by the failure to set out parliamentary intention. Parliamentary intention can, however, be expressed at a number of levels. A general

⁹⁵For a similar suggestion in the US context, see M.A. Chirelstein and L.A. Zelenak, “Tax Shelters and the Search for a Silver Bullet” (2005) 105 Col. L.R. 1939. The authors propose a “silver bullet (or perhaps a broad-spectrum antibiotic) that would kill a variety of tax shelters, and do so in such a way that the government would no longer always be playing catch up.” Their proposal focuses on non-economic losses and deferrals; it was written before a number of Inland Revenue Service wins in tax shelter cases under the judge made US economic substance rule (see Burke, above, fn.30 and below, fn.124), but proposes something more specific than that rule, though not narrowly tailored to a particular scheme.

⁹⁶Lord Hoffmann specifically refers to *Ingram v IRC* [2000] 1 A.C. 293 in his B.T.R. article. This is a good example of the clash between economic and legal reality. Many commentators and the revenue authorities considered the court did not give effect to the “obvious” intention of Parliament but Lord Hoffmann considered that he was giving effect to that intention by applying the concepts of what he called “highly sophisticated English land law”. The issue was what amounted to a separate interest in property. If Parliament had wanted to override legal substance by looking at economic substance, it would have needed to do so explicitly. Tax law must operate in the “real world”, but it is a very special real world of legal rules, as discussed below. The particular scheme in *Ingram* was the subject of highly complex, specific anti-avoidance legislation (Finance Act 1986, s.102A). Taxpayers continued to find ways around the legislation, resulting in another anti-avoidance provision (Finance Act 2004, Sch.15).

⁹⁷This approach was suggested by J.F. Avery Jones in “Tax Law: Rules or Principles?” [1996] B.T.R. 580. See also J. Braithwaite, “Making Tax Law More Certain: a Theory” (2003) 31 A.B.L.R. 72; D. Weisbach, “Formalism in the Tax Law” (1999) 66 U.Chi.L.R. 860 and S. Picciotto, “Constructing Compliance: Game-playing, Tax Law and the Regulatory State” (forthcoming, *Law and Policy*). For a discussion on the differences between rules and principles in this context see J. Freedman, “Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle” [2004] B.T.R. 332 at 353. Principles-based drafting is the subject of an experiment in Australia—see G. Pinder, “*The Coherent Principles Approach to Tax Law Design*” (Australian Treasury, 2005), <http://tofa.treasury.gov.au/content/downloads/coherent-principles.pdf> discussed further below.

⁹⁸Lord Hoffmann, above, fn.13, at p.205.

anti-avoidance principle or set of principles⁹⁹ could set out references to economic substance, to the manner of creation and implementation of the scheme in question and to other objective factors that would reveal the motive for the scheme and whether it was consistent with the legislation. This would have a double function of reminding the legislator to consider and spell out the basis of new legislation as well as supplying direction to the courts to enable them to apply the specific legislation before them in the way intended by Parliament. It seems probable that a statutory GAAR will achieve something more than a normal rule of statutory construction only if it has sufficient power and content. This means that it needs to be based on express principles and criteria, rather than on a broad instruction to look at whether the purpose of the legislation has been abused, or merely at the motive of the taxpayer. If the principles are to modify the meaning of a specific statute they must do more than simply direct the court back to that statute. This is not to say that the specific statute is to be ignored; rather that it will be modified by the GAAR explicitly subjecting it to an overriding principle or principles. A broad GAAR that merely applies a purpose test and refers to abusive or impermissible actions will simply be read by the court as an instruction to look at what is impermissible or abusive under the normal rules of statutory construction. Something more is needed. The judiciary will be very reluctant to create such principles for fear of overstepping their jurisdiction but, if properly directed by the legislation, will be well able to develop the principles provided by the legislature. This is well illustrated by contrasting the outcome of recent cases on the GAARs in Canada and Australia.

(b) Experience in other jurisdictions

No jurisdiction has yet managed to produce a definition of activities that fall on the “unacceptable”, “impermissible” or “aggressive” side of the line, although some have attempted to draw up objective factors or characteristics that might indicate the existence of such an activity, either in their GAAR (as is the case with Australia¹⁰⁰ and as is proposed in South Africa)¹⁰¹ or in a non-legislative document.¹⁰² For a lawyer, the difficulty

⁹⁹See Freedman, above, fn.97. The description “GANTIP” was used in this earlier article to differentiate the general anti-avoidance principle from a general anti-avoidance rule—for the purposes of the present article GAAR is used to describe a general principle-based provision since GAAR is the more familiar term.

¹⁰⁰Income Tax Assessment Act 1936, Pt IVA operative from 1981. See J. Cassidy, *Are Court Decisions Changing our Old Taxes?* (2006 ATTA Conference), <http://pandora.nla.gov.au/tep/23524>; G. Cooper, *The Emerging High Court Jurisprudence on Part IVA* (Sydney Law School Legal Studies Research Paper No.06/09, August 2006), <http://ssrn.com/abstract=919480>.

¹⁰¹SARS, above, fn.78 and see also South African Revenue Service, *Tax Avoidance and Section 103 of the Income Tax Act, 1962*, Revised Proposals, September 2006 (“SARS 2”).

¹⁰²In Israel, the term “aggressive tax planning” has not been defined but a commission has detailed its characteristics: A. Lapidoth, “New Legislative Measures in Israel to Counter ‘Aggressive Tax Planning’”

is that the line in question is not between legal and illegal activity. None of these activities amounts to evasion provided they are fully disclosed, but if they are on the “wrong side” of the line they simply may not save tax as intended. The characteristics used to distinguish the ineffective from the effective transactions *ex ante* tend to rely on artificiality, circularity, abnormality and a discrepancy between economic substance and legal form. As we have seen above, these characteristics are not explicitly at the forefront of the UK case law since *BMBF*; although they are present in the background in terms of the configuration of the facts. In *BMBF*, all these issues are simply folded into a blanket of “statutory construction”, although unfolded a little by the discussion of composite transactions in *Scottish Provident*, which does, tangentially at least, recognise the significance of circularity.

(i) Canada: back to statutory interpretation?

In Canada, the statutory GAAR in s.245 of the Federal Income Tax Act 1985 operates to deny a “tax benefit” that would otherwise result from an “avoidance transaction” or a “series of transactions” of which the avoidance transaction is a part, provided that the transaction, or series of transactions, result in a misuse of provisions of the Act or other regulations, or is an abuse having regard to those provisions read as a whole.¹⁰³ Two recent cases, *Canada Trustco* and *Mathew*, have highlighted the problems with this legislation.¹⁰⁴ The taxpayer won in *Canada Trustco*, which related to financial leasing and was very similar on its facts to *BMBF*, but was defeated in *Mathew*, which was decided at the same time. A leading commentator has suggested that the decision in *Canada Trustco* may render the GAAR largely meaningless.¹⁰⁵ The parallels with *BMBF* and *Scottish Provident* are clear. The Canadian cases would almost certainly have been decided in the same way in the United Kingdom without a GAAR. This has been used as ammunition by opponents of a GAAR, who argue that the policy of the specific legislation was unclear in *Canada Trustco*, so that no other outcome could be expected.¹⁰⁶ Supporters of the GAAR criticise the Supreme Court for not looking at the economic substance of the transaction, but the problem

(2006) Bul. for Int. Tax 255. The United Kingdom has “hallmarked tax schemes” as part of its disclosure regime (above, fn.4), but these hallmarks determine the liability to disclose rather than the existence of a particular type of avoidance.

¹⁰³s.245 of the Federal Income Tax Act RSC 1985, c.1 (5th Supp.), as amended. This summary of the provision is taken from B. Alarie, S. Bhattia and D. Duff, “Symposium on Tax Avoidance after *Canada Trustco* and *Mathew*: Summary of Proceedings” (2005) 53 Can. Tax J. 1010.

¹⁰⁴*Canada Trustco Mortgage Co v Canada* [2005] 2 S.C.R. 601; 2005 S.C.C. 54, *Mathew v Canada* [2005] 2 S.C.R. 643; 2005 S.C.C. 55. For a full discussion see J. Freedman, *Converging Tracks? Recent Developments in Canadian and U.K. Approaches to Tax Avoidance* (2005) 53 Can. Tax J. 1038.

¹⁰⁵See B. Arnold, “Confusion Worse Confounded: the Supreme Court’s GAAR Decisions” (2006) 54 Can. Tax J. 167.

¹⁰⁶Alarie *et al.*, above, fn.103; Gammie, above, fn.11.

is that the GAAR is not explicit that this is its function, whilst the specific legislation in relation to which the court is being asked to apply the GAAR was not drafted in an environment where economic substance had been highlighted as an issue by the GAAR.¹⁰⁷ This is an indictment of the value of the Canadian GAAR as it stands now, but it does not necessarily mean that a GAAR is doomed to failure: rather it suggests that an improved GAAR is needed, with a clearer relationship to the specific legislation and an express policy on economic substance as well as other criteria.

The key problem is that the Canadian GAAR, in s.245, does not provide directions to the courts on the meaning of “abusive”. A business-purpose test was rejected in the case of *Stubart*¹⁰⁸ in 1984 and this was what led to the introduction of the GAAR. The GAAR was clearly intended to go beyond normal purposive statutory interpretation, since principles of construction that allowed the courts to look at the object and spirit of legislation had already been endorsed by *Stubart*. Unfortunately the *Stubart* principles of construction were not robust enough to ensure that strict statutory interpretation would not return.¹⁰⁹ Even so, to give the current GAAR some meaning it must be required to go beyond the guidelines in *Stubart*. But how far and to what effect is not explained by the Supreme Court, which unhelpfully states¹¹⁰:

“The GAAR’s purpose is to deny the tax benefits of certain arrangements that comply with a literal interpretation of the provisions of the Act, but amount to an abuse of the provisions of the Act. But precisely what constitutes abusive tax avoidance remains the subject of debate.”¹¹¹

The requirement is that there should be an abuse of the provisions of the Act or the Act read as a whole,¹¹² but the Supreme Court rejected a two-stage interpretation of s.245(4) on the basis that there is no way one could abuse the Act as a whole without abusing its provisions. Thus the court was forced back to a simple rule of statutory interpretation. It stated that s.245

¹⁰⁷For an argument that the Canadian GAAR was intended to be based on economic substance, as indicated in the explanatory notes to the provision, see J. Li, “Economic Substance: Drawing the Line Between Legitimate Tax Minimization and Abusive Tax Avoidance” (2006) 54 Can. Tax J. 23.

¹⁰⁸*Stubart Investments Ltd v The Queen* [1984] 1 S.C.R. 536. The case rejected the *Ramsay* “new approach” as then understood.

¹⁰⁹Indeed there was a reaffirmation of a literalist approach in the form of the plain meaning rule in *Canada v Antosko* [1994] 2 S.C.R. 312 and *Friesen v Canada* [1995] 3 S.C.R. 103. This development is examined in detail in D. Duff, “Interpreting the Income Tax Act—Part I: Interpretive Doctrines” (1999) 47 Can. Tax J. 464.

¹¹⁰One of the problems here is that the extent of the *Stubart* guidelines was the subject of debate in subsequent cases (Duff, *ibid.*). This does not detract from the point that, given the reasons for enacting the GAAR, the court should feel obliged to give the GAAR some meaning which takes it beyond the guidelines in the *Stubart* case.

¹¹¹*Canada Trustco*, above, fn.104, at [16].

¹¹²s.245(4).

“does not rewrite the provisions of the Income Tax Act; it only requires that a tax benefit be consistent with the object, spirit and purpose of the provisions that are relied upon”.¹¹³

Given that this takes us no further than ordinary purposive construction, it puts the situations in the United Kingdom and Canada on exactly the same footing. Unlike the House of Lords in *Scottish Provident*, however, the Supreme Court was at pains to stress that, once the provisions of the Income Tax Act have been interpreted, it is a question of fact, not law, whether the minister (on whom the burden rests) has established abusive tax avoidance under the section.¹¹⁴ This gives the curious result that in the United Kingdom, where there is no GAAR, the question of what amounts to a composite transaction is a question of law, but in Canada, with its GAAR, the question of what is an abusive transaction is one of fact. Section 245 does not spell out any criteria that could be used to assist in deciding what is abusive. In particular it does not spell out that artificiality, or economic substance, are pertinent considerations. Although the Explanatory Notes to the section state that “subsection 245(4) recognizes that the provisions of the Act are intended to apply to transactions with real economic substance”, the Supreme Court rejects

“. . . any analysis under s.245(4) that depends entirely on ‘substance’ viewed in isolation from the proper interpretation of specific provisions of the Income Tax Act or the relevant factual context of the case.”¹¹⁵

In *Canada Trustco*, “cost” in the context of a claim for a capital cost allowance was given what Lord Hoffmann might have called in *Westmoreland* a “legal” meaning, and the mere fact that an economic or commercial purpose was not present was held to be insufficient to show that the transaction resulted in abusive tax avoidance. It was held that economic substance must be considered in relation to the proper interpretation of specific provisions. Here the relevant provisions did not refer to economic risk but to cost, which in the context of the relevant legislation is a well-understood *legal* concept.¹¹⁶ In *Mathew*, on the other hand, textual, contextual and purposive interpretation of the specific provisions in question resulted in the conclusion that Parliament could not have intended the scheme there used to be effective.

The Canadian courts in *Canada Trustco* came up against the same problem as was encountered by in the United Kingdom in *BMBF* and

¹¹³*Canada Trustco*, above, fn.104, at [54].

¹¹⁴*ibid.*, at [46].

¹¹⁵*ibid.*, at [60], discussed further in Arnold, above, fn.105. S.245(5) does permit recharacterisation of the nature of a payment or other amount, but only in determining the tax consequences of the section applying and not to determine whether it applies.

¹¹⁶*ibid.*, at [75].

indeed in *Ingram*.¹¹⁷ The revenue authorities argued for the application of an economic substance test, but the court considered that the specific legislation was based on purely legal concepts. In *Canada Trustco*, the Canadian Supreme Court took the view that although the purpose of the GAAR was to prohibit tax avoidance, this must be done without jeopardising consistency, predictability and fairness in tax law.

“These three latter purposes would be frustrated if the Minister and/or the courts override the provisions of the Income Tax Act without any basis in a textual, contextual and purposive interpretation of those provisions.”¹¹⁸

The problem is that the court in *Canada Trustco* did not consider whether its approach frustrated the purpose of the GAAR, and the intention of Parliament in passing s.245, which must have been to go further than the previous case law, was not given full consideration. The legislature must take some of the blame for this itself for not spelling out the principles sufficiently in the body of the GAAR, despite referring to economic substance in the explanatory notes to the legislation. The relationship between the GAAR and the specific legislation and the basis of the specific legislation requires greater consideration to ensure that the interaction between the two is effective. Stating this does not remove the difficulties inherent in integrating an economic substance rule with provisions based on legal concepts, but an express statement about economic substance in the GAAR would mean that this could be considered fully without undermining consistency, predictability or fairness. There would be transitional problems with specific legislation enacted prior to the GAAR, but ultimately, since all future legislation would have been enacted with the GAAR in the background, very clear words would be needed to displace its presumption that the courts could look at economic substance in the context of other criteria, criteria which should be listed in the GAAR.

(ii) New Zealand

The New Zealand GAAR legislation¹¹⁹ has encountered similar problems: this legislation can be mentioned only briefly, but it is worth reflecting that the picture is a familiar one. A key issue is the thin dividing line between attempting to override a specific statutory purpose through the GAAR, that is gap-filling, which is not permitted, and employing the GAAR as a tool to protect the specific legislation from frustration, which is. Another is the difficulty of applying a GAAR where the concepts in the specific

¹¹⁷ Above, fn.96.

¹¹⁸ *Canada Trustco*, above, fn.104, at [42].

¹¹⁹ New Zealand Income Tax Act of 2004, ss.BG1 and GB1, although based on much older legislation.

legislation seem to be pure tax concepts, with little relation to commercial reality.¹²⁰

The New Zealand legislation does not attempt to spell out what amounts to tax avoidance in the sense used by the legislation and this gives rise to difficulties, as is seen in *Peterson v Commissioner of Inland Revenue* in the Privy Council.¹²¹ Here, in another case on finance leasing, the majority, led by Lord Millett, found that it was entirely consistent with the specific legislation for the taxpayer to depreciate its costs, despite the surrounding facts which shifted risk away from the taxpayer. Given the facts as found by the lower courts, the taxpayers were simply relying on a tax incentive provided by Parliament. Reference was made to *BMBF* with which there are clear similarities. The strong dissent from Lord Bingham of Cornhill and Lord Scott of Foscote criticised the application by the majority of jurisprudential principles developed in the U.K. context, where there is no GAAR, and was prepared to look at the surrounding circumstances more widely than the majority (just as in *BMBF* the central question was whether the surrounding facts were part of what was to be considered or was mere "happenstance"). It is not clear as yet how significant the *Peterson* case will be for the development of the New Zealand GAAR, particularly as it was the last New Zealand tax case that will be heard by the Privy Council. Much depended on the way in which the facts had been dealt with in the lower courts and concessions made by the Commissioner, and Lord Millett indicated that the majority would have decided the case differently had it been differently argued.¹²² Nevertheless, it does indicate the difficulties encountered by the judiciary where they are given insufficient guidance about the relationship between the GAAR and the relevant specific legislation.¹²³

(iii) Objective tests: Australia and the ECJ

By contrast, recently the ECJ in a VAT context in *Halifax*¹²⁴ and the High Court of Australia have both shown a willingness to develop

¹²⁰See Richardson J. in *CIR v Challenge Corp Ltd* [1986] 1 N.Z.L.R. 513, CA and in *CIR v BNZ Investments Ltd* [2002] 1 N.Z.L.R. 450, CA, discussed in D. Dunbar, "Judicial Techniques for Controlling the New Zealand General Anti-avoidance Rule" (ATTA Conference, 2006), <http://pandora.nla.gov.au/tep/23524>.

¹²¹[2005] UKPC 5; [2005] S.T.C. 448, PC.

¹²²*ibid.*, at [4].

¹²³For a more thorough review of the New Zealand cases see Dunbar, above, fn.120.

¹²⁴*Halifax*, above fn.8. This section of this article mainly examines jurisdictions that have a statutory GAAR, but the contrast with the approach in other European countries is worth drawing, since the latter is now having an impact on the United Kingdom. The United States is not covered here, but is the prime example of a jurisdiction where effective genuine judicial doctrines have emerged without a statutory GAAR: Streng *et al.*, above, fn.29. Recently, there have been calls in the United States for codification of its judicial rules, largely due to a number of cases lost by the Inland Revenue Service ("IRS") on the basis of a textualist approach to statutes and a narrow view of the doctrine of economic substance. This tide may be turning as the IRS has now had major victories under the economic substance doctrine (e.g. *Coltec Industries Inc v United States* 454 F. 3d 1340 (2006); *Black and Decker v United States*, 436 F. 3d 431 (4th Cir. 2006)), but the scope of the judicial economic substance doctrine remains unclear. Calls for codification remain. See D. Hariton, "How to Fix Economic Substance" *Tax Notes*, April 28, 2003;

objective criteria for evaluating whether their general anti-avoidance principles should apply. In the case of the ECJ this is a judicial rule; in Australia there is a statutory GAAR, known as Pt IVA, which gives the courts the authority to pursue this path.¹²⁵ The Australian GAAR has been drafted specifically to deal with the problems encountered by the revenue authorities in trying to operate the jurisdiction's previous, less explicit, GAAR, which was emasculated by a narrow interpretation given by the courts. Thus, Australia can be said to have moved on a stage ahead of Canada, although some commentators would now say that it has gone too far.¹²⁶ South Africa is also proposing to strengthen its GAAR.¹²⁷ Following consultation, and heavily influenced by the Australian and Canadian experiences, it proposes, inter alia, to list five so-called abnormality factors as objective indicators of lack of commercial substance.¹²⁸ The Australian legislation already refers expressly to the economic substance of the arrangement as being a relevant factor for the courts to consider.

In Australia, the GAAR applies to a scheme through which the taxpayer derives a tax benefit, as defined, and the scheme must have been entered into for the sole or dominant purpose of obtaining a tax benefit. This purpose is tested by applying an objective determination using eight factors set out in the legislation. These are: the manner in which the scheme was entered into or carried out, the form and substance of the scheme, timing and length of period during which the scheme was carried out, the result that would be achieved apart from Pt IVA, any change in the financial position of the taxpayer and persons connected with him and any other consequence for the taxpayer and such persons and the nature of the said connection.¹²⁹ Whilst these factors may seem very obvious and might be matters which the courts might develop for themselves, the point is that the courts did not do this in Australia, and have not felt able to do so expressly in the United Kingdom or Canada either. Listing the factors in this way gives the judges the tools they need to go beyond normal rules of statutory construction to construe the specific legislation before them, not contrary to its purpose but according to these broader principles.

Chirelstein and Zelenak, above, fn.95; Burke, above, fn.30. Familiar key issues are whether the economic substance doctrine is an objective test and the problem of the weakness of statutory interpretation of specific legislation as a method of controlling avoidance. As in the United Kingdom, the US revenue authorities currently prefer disclosure requirements and adviser regulation to the idea of a GAAR.

¹²⁵Above, fn.100.

¹²⁶There is a vast Australian literature on the failure of the previous provision and much criticism of the new GAAR. For a starting point see C. J. Taylor, "Australia", in *Cahiers*, above, fn.28, p.95; R. Woellner, S. Barkoczy, S. Murphy and C. Evans, *Australian Taxation Law* (16th edn, 2006), paras 25-500-25-800; Cassidy, above, fn.100; Cooper, above, fn.100.

¹²⁷SARS, above, fn.78.

¹²⁸SARS 2, above, fn.101.

¹²⁹Pt IVA, above, fn.100, s.177D.

Problems may occur if these principles are applied too rigidly and on a checklist basis. They must all be considered, and are apparently exhaustive; but the courts have held that they do not need to be “unbundled from a global consideration of purpose and slavishly ticked off”.¹³⁰ This is valuable, since a more rigid approach could start to remove the nature of the GAAR as a broad principle and turn it into a detailed set of rules which could damage its essence. Used as principles, however, the value of these factors as directives to the courts about the factors to be taken into account when assessing the taxpayer’s purpose can be understood. The list declares that these purposes are relevant when assessing the applicability of the specific legislation to the scheme in question. As such they give content to the GAAR and enhance the ability of the judiciary to apply the specific legislation in accordance with Parliamentary intention, taking the specific legislation and the GAAR together. Moreover, since these are objective criteria, they exclude any inquiry into the subjective motives of taxpayers.¹³¹ Subjective motive tests are generally too easy to manipulate to be valuable in tax cases.¹³²

It is interesting to compare with this the judgment of the ECJ in *Halifax*,¹³³ which sets an objective test for determining whether the essential aim of the transaction is to obtain a tax advantage. In this case on the Sixth VAT Directive, the ECJ applied the concept of abusive practice, developed by the court in non-tax cases.¹³⁴ So, the right to deduct input VAT will be denied where the transactions from which the right derives constitute an abusive practice; that is, where there is a tax advantage which would be contrary to the purpose of the provisions in question. It must be apparent from objective factors that the essential aim is to obtain a tax advantage. The ECJ uses similar language to the Australian legislation in directing the national court to look at the artificial nature of transactions and the links of a legal, economic and/or personal nature between those involved in the scheme in order to assess this.¹³⁵ How this decision will be translated into law in the United Kingdom remains to be seen. HMRC seem inclined to leave it to the courts, which may feel able to develop such tests within a European context where they could not do so as a matter of purely UK law. Many civil systems of law have general anti-avoidance provisions but some also have general theories of abuse of law,

¹³⁰*FC of T v Consolidated Press Holdings Ltd (No.1)* (1999) A.T.C. 4945 cited in Woellner *et al.*, above, fn.126. See J. Dabner, *An Old Methodology in a New World: a Comment on our Current System of Judicial Decision Making in Tax Cases* (Australian Tax Teachers Association Conference (“ATTA”), 2006), <http://pandora.nla.gov.au/tep/23524>, arguing that the factors amount to no more than a “smell” test. For the reasons given here this author believes they have a greater value than this.

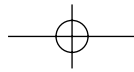
¹³¹*Commissioner of Taxation v Hart* [2004] A.T.C. 4599; (2004) 217 C.L.R. 216.

¹³²*Final Report of the Royal Commission on the Taxation of Profits and Income*, Cmnd.9474 (1955), paras 116–117.

¹³³*Halifax*, above, fn.8.

¹³⁴Notably, Case C-110/99 *Emsland Starke* [2000] E.C.R. I-11569.

¹³⁵*Halifax*, above, fn.8, at [81].



which overlap these specific tax provisions.¹³⁶ These doctrines seem to go beyond pure statutory interpretation. In the Netherlands, for example, the *fraus legis* doctrine, which is of general application¹³⁷

“can only be considered after interpretation and characterisation according to the normal interpretation methods have been fully utilised without this leading to an outcome that can be regarded as consistent for the purpose and intent of the law.”¹³⁸

The concept of abuse of law has been rejected in UK tax law in the past¹³⁹ but may now be entering into UK jurisprudence through this and other decisions of the ECJ. It is possible that the development of this jurisprudence in a European context could even have an influence on the development of the UK direct tax case law, although it is more likely that it will be confined to indirect tax. It could be that legislation will be needed to clarify the full effect of the *Halifax* case, although at present there is no sign of any intention to legislate.¹⁴⁰ If, however, legislation was found to be necessary to give full effect to the ECJ case law, the opportunity might be taken to deal with direct and indirect taxes in a single GAAR.¹⁴¹

The question of the characteristics to be sought in determining whether there has been abuse cannot be separated from the question of what constitutes the scheme or transaction to which these test are to be applied. Is it enough that there is an overall commercial purpose for what is done, even if steps are added which are not commercial? Is a commercial activity negated because it forms part of a wider scheme that vitiates its commerciality? This will depend on what is to be included in the scheme. As we have seen in the discussion of *BMBF* and *Scottish Provident*, in the United Kingdom the courts pose this as a question of law by asking what is part of the composite transaction, and the answer to this question is vital to the outcome of the case. In Australia, what is the scheme for the purpose of Pt IVA has also been central to the robust approach of the courts to the application of the GAAR.¹⁴²

¹³⁶F. Vanistendael, “Judicial Interpretation and the Role of Anti-abuse Provisions in Tax Law” in G. Cooper (ed.), *Tax Avoidance and the Rule of Law*, above, fn.51.

¹³⁷There is also a specific tax GAAR, *richtige heffing*. This can only be used with authorisation of the Secretary of State for Finance and has not been used since 1987 since the *fraus legis* has been developed to serve the purpose (Robert Ijzerman, Netherlands in *Cahiers*, above, fn.28).

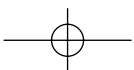
¹³⁸*ibid.*, see too S. Douma and F. Engelen, “*Halifax Plc*: the ECJ Applies the Abuse of Rights Doctrine in VAT Cases” [2006] B.T.R. 429.

¹³⁹*Bayliss v Gregory* [1986] S.T.C. 23, per Vinelott J. at 43: “The doctrine of abuse of right by a taxpayer which obtains in some continental countries has no place in our jurisprudence”; D.A. Ward *et al.*, “The Business Purpose Test and Abuse of Rights” [1985] B.T.R. 68.

¹⁴⁰C. Tailby “*Halifax*—a Basis for Optimism?” (2006) 833 *The Tax J.* 4. For another view see J. Collins and R. Shiers, “*Halifax*—a Little Xtra Help, Please?” (2006) 827 *The Tax J.* 5.

¹⁴¹For current HMRC thinking on a GAAR see below, fn.153.

¹⁴²Cooper, above, fn.100, describes how the “size of the scheme” is significant to the inter-relationships with other parts of the Pt IVA test such as the tax benefit and the dominant purpose.



This question of what amounts to a scheme was discussed in the recent Australian decision in *Hart*¹⁴³ where there was a mortgage arrangement, the overall commercial aim of which was to finance the purchase of two properties, one a home and one an investment. But the terms on which the loan was made (allowing for repayment in two unequal portions where interest on the investment loan part was tax deductible and on the home loan part it was not) were explicable only by the taxation consequences for the respondent. On one view, since the wider scheme had a clear non-tax purpose—to borrow money—it was not caught by the GAAR. This was the view of the Full Federal Court of Australia but when the matter came to the High Court it was rejected on the basis that the presence of a discernible commercial end does not determine the answer to the question posed by the eight factors set out in s.177D. Thus these factors were rolled into the decision about what constitutes a scheme. Here, the High Court was satisfied that the scheme could be defined in such a way that the dominant purpose under s.177D was that of obtaining a tax benefit. The application of the eight factors to a case like *BMBF* or *Canada Trustco* could have led to different decisions from those reached in Canada and the United Kingdom, since the manner of implementing the scheme would have been significant as well as the commercial objective of the borrowing.

There are commentators and members of the judiciary in Australia who argue that the *Hart* case has taken them a step too far, since the overall commercial objective should have been enough to permit the taxpayer to take advantage of a tax deduction provided in the specific legislation.¹⁴⁴ On the other hand, this was a marketed scheme, organised and sold quite blatantly as a tax-driven plan. If the presence of a commercial end result were to validate a tax scheme it would be much too easy for tax planners to escape the GAAR. Thus it is not enough for a GAAR to specify an economic substance test: the judges must also be given the tools to ascertain how to apply that test. As *Hart* shows, the manner in which the scheme was carried out (another of the eight factors) was also highly relevant. In this way the Australian GAAR gives the courts explicit authority to look at matters which the UK courts do in practice take into account, but under the awkward and not very convincing guise of statutory construction.

It is not claimed that a GAAR can solve all problems or that it means that no modifying legislation will ever be needed. There is no doubt a need in Australia also to pay more attention to the relationship between the GAAR and specific legislation, and the controversies surrounding tax avoidance are certainly not at an end.¹⁴⁵ The Australian experience does

¹⁴³ Above, fn.131.

¹⁴⁴ See especially the criticisms made by Hill J. in *Macquarie Finance Ltd v Federal Commissioner of Taxation* [2004] FCA 1170; [2004] A.T.C. 4866.

¹⁴⁵ Hence the Australian principles based drafting project: see above, fn.97.

suggest, however, that those who argue that a GAAR can do nothing more than a normal rule of statutory construction are mistaken.

IV. SIGNALS, DIRECTIONS AND PRINCIPLES

The principles behind tax legislation are not always clear. Policies are confused and objectives are obscure. The position is complicated by the use of the tax system made by governments to fulfil social and economic goals, even though taxation may not always be the best vehicle for this purpose. In addition, tax legislation is based on an uneasy combination of legal concepts and economic outcomes, which do not always mesh well together. Tax systems for a modern, sophisticated economy and complex legal system will inevitably reflect that complexity, but we have now reached a position where the length and intricacy of tax legislation is constantly under criticism from business and the professions.¹⁴⁶ Superimposed over the existing vast amount of statute law there is a constant flow of new legislation, much of it specific anti-avoidance provisions that can themselves create opportunities for avoidance through “creative compliance”.¹⁴⁷ Despite this, such evidence as there is suggests that there is still much avoidance activity, which is reducing the revenues that the state expects and needs in order to pursue its objectives.¹⁴⁸

There are some who argue that we should leave the judiciary to adjudicate at the margins through case law; that, in fact, the courts draw an appropriate line, and that in most cases taxpayers are aware of their position. A more sophisticated and persuasive version of this view is articulated by Edwin Simpson, who argues that the judges have the authority to overlay their own guiding constitutional principles in tax law and that *Ramsay* represents such a principle, though it may only be applied where the underlying principle of a body of tax law is tolerably clear.¹⁴⁹ The problem with this argument is that the judiciary have not yet succeeded in establishing such a constitutional principle, nor have they created a stable framework for their decisions. If the argument made above, that *Ramsay* lives on through the *Scottish Provident* decision, is correct, it is possible that guiding principles will yet emerge from the case law. But, as against this, the House of Lords has explicitly renounced the

¹⁴⁶See, for example, the Chartered Institute of Taxation, *Budget 2006 Representations* (2005): “All parties involved must surely acknowledge that the ever-growing accretion of tax law is not sustainable”; Tax Faculty of the Institute of Chartered Accountants in England and Wales, *Towards a Better Tax System* (1999); Institute of Directors, *Tax Avoidance* (2006): “The current approach is leading to an impossibly complex tax system.”

¹⁴⁷For the concept of “creative compliance” using the anti-avoidance legislation, see McBarnet and Whelan, above, fn.51.

¹⁴⁸For example, House of Lords Select Committee on Economic Affairs, *The Finance Bill 2005*, HL Paper 13-I (2005), at para.5.

¹⁴⁹E. Simpson, “The *Ramsay* Principle: a Curious Incident of Judicial Reticence?” [2004] B.T.R. 358.

power to create a judicial principle of revenue law and, even if we were to see such a development, we could equally well see it dashed to the ground by a subsequent House of Lords decision. Relying on the courts has not given us linear progression over 25 years. A “wait-and-see” policy will not be an adequate response for another quarter of a century.

There are others who argue that, in the corporate field at least, the temptation to indulge in avoidance schemes of a borderline nature can be curbed through pressures to conform to a standard through the activities of HMRC, the media and stakeholders demanding observance of corporate social responsibility principles.¹⁵⁰ There is some evidence that this approach is having an impact¹⁵¹; but the idea that the law is incapable of regulating this area is not only a worrying attitude to the role of law, but also leaves taxpayers with no obvious authoritative source of guidance in an area where “morality” will also not always supply widely-agreed answers.¹⁵² This is particularly problematic for taxpayers who have a responsibility to others such as trustees and company directors. Too much discretion is left to the administrators and unelected lobby groups, who can apply pressure based on their views of what Parliament intended, which is not the same as parliamentary intention. The new disclosure rules are also currently changing behaviour and reducing the appetite for tax schemes, but this deterrent effect can only be maintained if there is a readiness to introduce specific legislation whenever a scheme is discovered through this medium. This specific legislation is creating further complexity in tax law and broadly-drafted, motive-based clauses in this legislation are arguably creating as much difficulty for taxpayers who are broadly compliant as would a GAAR. In these circumstances, business and professional groupings might support a GAAR, although only if they felt that ultimately the volume of specific legislation would be reduced in this way, and they would almost certainly then press for a prior clearance mechanism, which HMRC would be likely to resist.¹⁵³ The point here is that the longer we wait before introducing a GAAR, the more specific legalisation is introduced. Once there, such legislation will be hard to remove.

¹⁵⁰For example, Henderson Global Investors, *Responsible Tax* (2005); SustainAbility, *Taxing Issues-Responsible Business and Tax* (2006); KPMG, *Tax in the Boardroom* (2004); HMRC, *Tax in the Boardroom* (2006); House of Lords Select Committee on Economic Affairs, *The Finance Bill 2006*, HL Paper 204-I (2006), at para.23. See Freedman, “The Tax Avoidance Culture” [2007] C.L.P. 359.

¹⁵¹Although legal regulation is more likely to change behaviour than the “softer” pressures described: see S. Morse, *The How and Why of the New Public Corporation Tax Compliance Norm* (May 15, 2006), <http://ssrn.com/abstract=905746>.

¹⁵²See T. Honoré, “The Dependence of Morality on Law” (1993) 13 O.J.L.S. 1. He argues that, whilst there is a moral obligation to pay taxes, this obligation is incomplete apart from law because the law has to fix the amount or rate of tax. He might have added that law has to fix the basis on which tax is payable. For further discussion on this point see Freedman, fn.97 above, 334 *et seq.*

¹⁵³House of Lords Select Committee on Economic Affairs, *The Finance Bill 2006* (2006) HL Paper 204-I, at para.65.

When a GAAR has been suggested in the United Kingdom¹⁵⁴ it has usually been dismissed as incapable of achieving certainty. This author does not argue that a GAAR would provide *certainty*, but it could provide *clarity* as to judicial powers and a framework for judicial development that does not exist at present. It would provide guidance to the judiciary about the way in which Parliament intended tax law to be construed and authority to develop the law in a way that currently occurs only spasmodically because of rightly held concerns about legitimacy.

For such a GAAR to be effective, the evidence from other jurisdictions suggests that two requirements must be fulfilled. First, the GAAR must contain principles that go beyond a normal rule of statutory construction. Thus, a reference to “abuse”, for example, is insufficient. The GAAR should refer to principles that can be applied to transactions in an objective way. The list should include, but not be confined to, economic substance.¹⁵⁵ Secondly, the drafting of specific legislation needs to become more explicit about the underlying principles of the legislation. Arguably, if the second condition were to be fulfilled, a GAAR would not be needed; but in view of the impossibility of drafting to cover all eventualities, and the skill of tax advisers in devising schemes based on the wording of legislation, a combination of better drafting and overriding general principles to which reference can be made seems the best way forward. It may appear that a GAAR along these lines would require the courts to override the intention of Parliament in relation to the specific legislation in question, something the courts would resist. As the Supreme Court of Canada has stated:

“To send the courts on a search for some overarching policy and then to use such a policy to override the wording of the provisions of the *Income Tax Act* would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped.”¹⁵⁶

If, however, the overarching policy is explicitly provided by Parliament itself, the judicial application of that policy does not contravene the judicial function. In fact, the exercise is intended to uphold the intention of Parliament by conforming the interpretation of the specific legislation to

¹⁵⁴Most notably by the TLRC, who withdrew their support by reason of the response from the Inland Revenue and its unwillingness to provide clearances, above, fn.83, and TLRC, *A General Anti-avoidance Rule for Direct Taxes* (1999). HMRC are once again examining the possibility of a GAAR, through a wide-ranging comparative legal study, but remain wary of offering pre-transaction clearances, which HMRC see as advice to planners on refining their schemes: see House of Lords Select Committee, fn.153 above, at paras 60–65.

¹⁵⁵It would also be important to have an appropriate administrative framework that would filter the cases in which the GAAR was to be applied through a committee, as in Australia.

¹⁵⁶*Canada Trustco*, above, fn.104, at [41].

the overriding principles which are also an expression of Parliament's intention. If we doubt the ability and willingness of the judiciary to implement such a scheme where proper directions are given through the legislation providing the principles, we need only look to the Australian experience or to the willingness of the UK courts to apply overriding principles in Human Rights Act and European law cases. As Kavanagh has argued, this modifies the focus on what Parliament intended in the specific legislation, but only to fulfil what in the tax context would simply be a broader principle of taxation.¹⁵⁷

The application of this idea in a tax context has already commenced in relation to the Sixth Directive on Value Added Tax in *IDT Card Services*.¹⁵⁸ Relying on the preamble to that directive, Arden L.J. was prepared to construe a provision of the UK Value Added Tax Act 1994 in the light of the wording of the Sixth Directive, to prevent non-taxation. Whilst this remains a rule of interpretation, it is a very special one, permitting the courts to adopt a construction "which is not the natural one".¹⁵⁹ Arden L.J. cited the Human Rights Act case of *Ghaidan v Mendoza*¹⁶⁰ in this context and was explicit that she was able to construe the legislation in this way "even if Parliament did not intend to limit relief in the way for which Customs and Excise now contend", because there is "no indication that Parliament specifically intended to depart from the Sixth Directive in this respect".¹⁶¹

If tax principles can be inserted into the law of the United Kingdom in this way then there seems to be less of an objection to a principles-based GAAR. There are of course limits on this approach to interpretation. As Arden L.J. points out in the same paragraph, the provision must not raise policy issues as to its effect which the court cannot, in performance of its role, resolve.¹⁶² Thus, this is not an argument that a GAAR can fill gaps, but that it could modify interpretation and introduce a new perspective to construing parliamentary intention. For example, economic substance could become a valid consideration in construing the legislation, openly and without having to resort to formulae about what amounts to a composite transaction. This would not prevent the legislature from abandoning economic substance expressly, but would enhance the ability of the courts to mesh economic substance with legal concepts where there

¹⁵⁷Kavanagh, above, fn.12.

¹⁵⁸Above, fn.12.

¹⁵⁹At [82].

¹⁶⁰Above, fn.12.

¹⁶¹At [113].

¹⁶²In *Fleming v Customs and Revenue Commissioners* [2006] EWCA Civ 70; [2006] S.T.C. 864 the majority of the Court of Appeal refused to go as far as Arden L.J., who dissented in interpreting legislation to give effect to Community law. The House of Lords are to hear *Fleming* and may limit the development commenced in *IDT Card Services*, but this approach to interpretation is unlikely to disappear completely.

was no express indication that Parliament intended to impose purely legal concepts.

It goes without saying that policy issues do need to be made as clear as possible in tax legislation; but, despite argument over many years, there has been little improvement and no thorough review of the underlying principles of tax law. It is not realistic to expect any such overhaul of the entire tax system to take place immediately, though we might continue to call for it, but improvements could be made. The experimental programme in Australia to introduce new legislation under a “coherent principles” approach to drafting is worth watching.¹⁶³ To understand what is being proposed here it is important to recognise, as Mr Pinder of the Australian Treasury writes in his paper on the topic:

“A principle is not just a less specific rule; it is a statement about the essence of all outcomes intended within its general field. When the principle works, it does so because the essence it captures appeals to readers at other than an abstract intellectual level; it means something to readers because it relates to their understanding of the real world.”¹⁶⁴

Pinder gives an example of treatment of shares as continuations of existing shares following a takeover and restructuring of a company. The concept used is of the shares in the old and new company being “reasonably regarded as matching”. The policy objective is made clear. There is a note included about a factor to be taken into account in deciding on reasonable matching, but it does not purport to be exclusive. The provision informs the reader of the intended outcome rather than the mechanisms being used to achieve that outcome.¹⁶⁵ This approach is controversial, with the usual comments being made from Australian academics, practitioners and the judiciary that it will reduce certainty. Difficulties are being encountered in implementation.¹⁶⁶ As Pinder points out, however, black-letter, detailed tax law is itself far from certain. As we have seen above, the courts in the United Kingdom are already engaged on policy analysis in deciding when to apply the judicial tools at their disposal, such as the notion of a composite transaction. Policy-based drafting, coupled with a GAAR, gives a proper framework for this activity and allows it to be developed in a transparent way. One major advantage of a stated policy of principles-based drafting combined with a GAAR could be that HMRC and Parliament could be required to address the interaction between any new scheme of legislation and the principles set out in a GAAR whenever

¹⁶³Pinder, above, fn.97.

¹⁶⁴*ibid.*

¹⁶⁵Income Tax Assessment Act 1936, s.139DQ(1).

¹⁶⁶For example, the Institute of Chartered Accountants in Australia, *Response to Taxation of Financial Arrangements Bill 2006*, March 1, 2006.

it introduced a new piece of legislation. This would be of value in itself.¹⁶⁷ This would not solve all the difficulties with existing legislation, but could be a way forward for the future.

V. CONCLUSION

The UK case law has failed to provide coherent guidance for dealing with tax avoidance. The House of Lords has admitted that all attempts at clarification have only raised fresh doubts and further appeals. The latest opinions in *BMBF* and *Scottish Provident* will not have ended this cycle, denying as they do the existence of a judicial doctrine of revenue law but apparently applying a strengthened version of the *Ramsay* principle on the very same day. Under the guise of purposive statutory interpretation the courts are making distinctions based not on the wording of the statute in context, but on external, policy considerations. The judicial approach requires a proper framework, which could be provided by layered legislation, including a principles-based GAAR.

Parliamentary intention can be expressed only through the text of the statute, albeit read in context. Obviously the best way to give effect to parliamentary intention in tax law will be to express policy clearly in the specific legislation and to have a coherent underlying framework for the tax system. Policy-based drafting could assist here. It is, however, unrealistic to suppose that full coherence will be introduced into the tax system in the near future or that legislation can be produced that will offer no opportunities to those skilled at devising tax schemes. A properly-drafted GAAR, referring to principles that included, but were not limited to, economic substance, could give the judiciary the powers it needed to give full effect to parliamentary intention and prevent the frustration of specific legislation. It would not create any greater uncertainty than exists at present, but would increase clarity, transparency and legitimacy. Such a provision would take the courts beyond the normal rules of statutory construction, towards the bolder approaches currently being developed by the UK courts in other contexts, applying layered legislation by reading specific provisions in the context of general principles. This would not override parliamentary intention but would give it full effect.

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¹⁶⁷B. Berkeley, KPMG Symposium 2006, <http://www.kpmg.co.uk/pubs/beforepdf.cfm?PubID=1744>.

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^{LT} Abuse of rights; Australia; Canada; Comparative law; EC law; Judicial decision-making; Legislative intention; New Zealand; Statutory interpretation; Tax avoidance