NCN: [2021] UKFTT 0012 (TC)

TC07998

Appeal number: TC/2016/02707
TC/2016/02709

INCOME TAX - settlements legislation - chapter 5 Part 5 Income Tax (Trading and Other Income) Act 2005 - meaning of "settlement" - meaning of "settlor" - whether dividend or distribution taxable under s383 Income Tax (Trading and Other Income) Act 2005 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHARON CLIPPERTON **STEVEN LLOYD**	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE HARRIET MORGAN

Sitting in public at the Taylor House, Rosebery Avenue, London on 3, 4 and 5 December 2018

Mr Michael Jones, counsel, for the Appellants

Ms Aparna Nathan (now QC) and Ms Laura Poots, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents ("HMRC")

distributed to the two shareholders. The tax advantages to the taxpayers of receiving the company's earnings as dividends rather than salary were that (a) National Insurance Contributions would have been payable on salary but were not payable on dividends and (b) the dividend payable to Mrs Jones was taxable at a lower rate than it would have been if added to the income of Mr Jones. For these reasons, it was contemplated from the outset that the company would pay Mr and Mrs Jones low salaries and distribute the rest of its income as dividends.

(3) HMRC's case was that the acquisition of the company and the transfer of one of the two shares in it to Mrs Jones, thereby enabling her to receive the expected dividends, was an "arrangement" for the purposes of the relevant provisions. HMRC argued that it was not a transaction at arms' length because Mr Jones would never have agreed to the transfer of half the issued share capital, carrying with it an expectation of substantial dividends, to a stranger who merely undertook to provide the paid services which Mrs Jones provided. That provided the necessary "element of bounty". The object of the arrangement was to keep the entire income within the family but to gain the benefit of using up Mrs Jones' lower rates. The dividends paid to Mrs Jones arose under the arrangement. By working for the company, Mr Jones provided it with the funds which enabled the dividends to be paid. He was therefore a "settlor". As Mrs Jones was the spouse of Mr Jones he was to be treated as having an interest in the income derived from her share and that income was therefore to be treated as his income.

176. Lord Hoffmann had noted, at [7], that not every transfer of property is a "settlement" for the purposes of the relevant legislation; there has to be an "element of bounty" in the transaction. He thought this was an "old-fashioned phrase" noting that it apparently derived from *Commissioners of Inland Revenue* v *Leiner* at 596 and was approved by the House of Lords in the *Plummer* case at 913. He thought that whilst "conjuring up the image of Lady Bountiful in *The Beaux' Stratagem*, is perhaps not the happiest way of describing a provision for a spouse or minor children. A donation to a spouse or child is traditionally expressed in a deed to be "in consideration of natural love and affection" rather than the donor's bounty", it is:

> "nevertheless exactly the kind of thing at which the anti-avoidance provisions are aimed. In *Chinn* v *Hochstrasser* [1981] AC 533, 555 Lord Roskill cautioned against treating the word "bounty" as if it had been included in the statute. It seems to me that *the general effect of the cases is that, under the arrangement, the settlor must provide a benefit which would not have been provided in a transaction at arms' length*." (Emphasis added.)

177. Lord Hoffmann noted, at [9], that Park J accepted HMRC's argument but the Court of Appeal (see [2006] 1 WLR 1123) did not. The reasons given by Sir Andrew Morritt were, at [73] of the Court of Appeal's decision, that Mrs Jones had acquired her share "for value", namely, for £1 "in the context of a joint business venture to which both parties made substantial and valuable contributions" and that what happened thereafter, namely, that Mrs Jones was paid a salary and in addition was paid dividends derived entirely from her husband's work, "was not part of the arrangement because these events depended upon the future business of the company and decisions on dividend policy by Mr Jones, all of which were uncertain. They could not therefore supply the necessary element of bounty".

178. Lord Hoffmann considered that analysis "is divorced from reality" on the basis that, at [10]:

> "Mrs Jones could not have been issued with a share without the agreement of her husband and when he agreed to that arrangement, it was expected that he would take a low salary and that substantial dividends would be distributed.

> That was the advice which they had received from the accountant. And that was what happened. Each year the salaries were set at a level suggested by the accountant and the rest retained or distributed as dividend. The decisions were tax driven and not commercially driven. And it was necessary, in order to gain the tax benefit, that Mr Jones should, in a broad sense, transfer some of his earnings to his wife."

179. Lord Hoffmann continued, at [11], that the authority for taking a broad and realistic view of the matter may be found in several cases of which the most relevant was *Hawkins*. He cited Donovan LJ's comments in that case in relation to there being "sufficient unity about the whole matter to justify it being called an arrangement" (see [13]) and noted that Pearce LJ pointed out, at page 553, that the whole scheme followed proposals put forward by the actor's solicitors and accountants and that: "The foundation for those proposals was his earning power and they needed not merely his assent but his active participation" (see [14]).

180. Having set out details of the decision in *Wildin*, Lord Hoffmann noted, at [18] and [19], that, as in *Jones*, there was no assurance in that case that dividends would ever be paid. That depended upon whether the company made a profit (see page 685) and, even if the company made a profit, upon the decision of the brothers who were at all material times the sole directors.

181. At [20], Lord Hoffmann explained that in the Court of Appeal's decision in *Jones*, Sir Andrew Morritt distinguished *Hawkins* on the ground that the arrangement included a binding contract by the actor to serve the company for £50 a week. Lord Hoffmann did not think that it made a difference that in *Jones* there was no such contract; the taxpayers agreed their salaries retrospectively from year to year on the advice of the accountant:

> "The Wildin brothers were not obliged to fund the development by the company. They could have stopped at any time. I agree with Park J, who said in this case (at [2005] STC 1667, 1709, para 39) that it would have made no difference if there had merely been expectations that [the actor] would work for the company at a salary to be fixed from time to time and that in practice the salary would be set at a low level. As the value of a share always depends upon expectations of future yield, such expectations would give the shares a far greater value than the nominal sum for which they were transferred."

182. At [21] he noted that Sir Andrew Morritt remarked, at [78] of his decision, that in *Wildin* Vinelott J appears to have considered that the acquisition of the shares, the agreement with British Rail and the development of the land were all part of one arrangement. Lord Hoffmann did not think that remark was right because Vinelott J said (at page 678) that "the relevant date for determining whether there was an arrangement by virtue of which income was paid to the brothers and to the children is the date when the company was acquired and its shares were allotted".

183. He continued, at [22], that that is not to say that a series of steps which are contemplated in advance cannot together constitute an "arrangement". He remarked that that appears to have been the case in *Hawkins* but he would have found it difficult to say that in *Wildin* the agreement with British Rail and the development were part of the "arrangement". They depended, as Sir Andrew Morritt said of this case, upon extraneous events and decisions which had not been made. It was:

> "the *expectation* of such events and the hope of profit which, together with the absence of any risk attached to the children's ownership of the shares, gives the "element of bounty" to the arrangement constituted by the allotment. What subsequently actually happened was not part of the arrangement but the way in which (as foreseen) income arose under the arrangement. I think that this analysis (which Keene LJ said he had initially found persuasive) is correct."

184. Lord Hoffmann said, at [23], that Carnwath LJ made a rather different point when he said, at [108] of the decision in *Jones* in the Court of Appeal, that this was the first time in which the revenue had sought to apply the concept of a "settlement" in the relevant provisions to "a normal commercial transaction between two adults, to which each is making a substantial commercial contribution, albeit not of the same economic value". He did not agree that this was a normal commercial transaction, at [24]:

> "It made sense only on the basis that the two adults were married to each other. If Mrs Jones had been a stranger offering her services as a bookkeeper, it would have been a most abnormal transaction. It would not have been an arrangement into which Mr Jones would ever have entered with someone with whom he was dealing at arms' length. It was only "natural love and affection" which provided the consideration for the benefit he intended to confer upon his wife. That is sufficient to provide the necessary "element of bounty"."

185. At [25] to [30] he rejected HMRC's argument that the exception for cases in which one spouse makes an "outright gift" to the other of the property from which the income arises did not apply.

186. Lord Walker agreed with Lord Hoffmann but added his own observations. Having set out the history of the relevant provisions, he noted at [47], that the term "arrangements" plainly included situations extending beyond a classic settlement:

> "*The inclusion in the statutory definition of the very wide word "arrangement" shows that Parliament recognised, as long ago as 1922, that a wealthy taxpayer might be advised to dispose of what would otherwise be his taxable income by relatively complicated or artificial means*. These might include a classic settlement, especially when the intended beneficiaries were minor children, but even in that case a classic settlement was not essential (*Copeman* v *Coleman*…is an early example). Other components of the arrangement might be the formation or acquisition of a private company with an unusual share structure, the declaration of abnormal dividends and the granting and exercise of options (as in *Vandervell v IRC* [1967] 2 AC 291) or entering service agreements on unusual terms (as in *Crossland v Hawkins*…)." (Emphasis added.)

187. He said, at [48], that an intention to avoid tax was not absolutely essential for there to be an arrangement although "usually an intention to avoid or minimise tax can readily be inferred" (and in that case it was candidly admitted) and "that intention is part of the factual material that has to be looked at in the round". He said that Sir Wilfred Greene MR put it trenchantly in *IRC* v *Payne* at 626 as follows:

> "It appears to me that the whole of what was done must be looked at; and when that is done, the true view, in my judgment, is that Mr Walter Payne deliberately placed himself into a certain relationship to the company as part of one definite scheme, the essential heads of which could have been put down in numbered paragraphs on half a sheet of notepaper. Those were the things which it was essential that Mr Payne should do if he wished to bring about the result desired. He did it by a combination of obtaining the control of the company, entering into the covenant, and then dealing with the company in such a way as to achieve his object. Now, if a deliberate scheme, perfectly clear-cut, of that description is not an 'arrangement' within the meaning of the definition clause, I have difficulty myself in seeing what useful purpose was achieved by the Legislature in putting that word into the definition at all."

188. Lord Walker continued, at [49], that some arrangements are planned in minute detail and carried out "with timetables, in almost military precision" (referring to Lord Wilberforce in *Plummer* at 907). He noted that highly artificial arrangements of that sort led to *Ramsay* and the other well-known cases which came in its train (which he thought there was no need to consider on that occasion). However, he considered that

"a high degree of complexity, artificiality and pre-planning is not essential in order to produce an arrangement" as was "well illustrated by" *Hawkins* and *Wildin*. He said that like Lord Hoffmann, he would:

> "adopt the passage in Donovan LJ's judgment in *Crossland* v *Hawkins* at 549, where he refers to "sufficient unity." The taxpayer's intention to minimise his tax liability by a "definite scheme, the essential heads which could have been put down in numbered paragraphs on half a sheet of notepaper" explains the rationale of the sequence of events, and gives it unity."

189. At [50] he said that the Court has been reluctant to try to lay down any precise test for identifying the components of an arrangement or for assessing the "sufficient unity" to which Donovan LJ referred. In his view this caution was well-advised:

> ""Arrangement" is a wide, imprecise word. It can ("like settlement" or "partnership", or indeed "marriage") refer either to actions which establish some sort of legal structure (in this case, a corporate structure through which the taxpayer's income could be channelled) or those actions together with the whole sequence of what occurs through, or under, that legal structure, in accordance with a plan which existed when the structure was established. The planned result may be far from certain of attainment. It may be subject to all sorts of commercial contingencies over which the taxpayer has little or no control. But if the plan is successful and income flows through the structure which he has set up, it is "income arising under the settlement"."

190. He concluded, at [51], that that seems to be the approach taken in most of the authorities. He referred to Donovan LJ's comments in *Hawkins* at page 550 and said that in referring to the relevant arrangements coming about by "instalments" Donovan LJ was referring (see page 549) to the formation of the company, the service agreement, the settlement and the transfer or issue of all the shares to the trustees. He noted that Donovan LJ did not seem to have regarded the actor's performance in the relevant film or the company's payment of a dividend as part of the arrangement, but as the arrangement being put to its intended use.

191. He thought, at [52], that Donovan LJ's approach was consistent with what Vinelott J said in *Wildin* at page 678:

> "The point that Vinelott J was making was that the Special Commissioner had misunderstood the facts and misdirected himself by focusing on the date of incorporation of an off-the-shelf company whose shares the taxpayers did not acquire until over two months later. It was during that period that the taxpayers came across their business opportunity. That opportunity might have come to nothing (the judge, at 685, clearly thought it a very risky venture). But when it did prove profitable the dividend income paid out by the company was income paid "by virtue or in consequence of" the statutory settlement constituted by the arrangement……"

192. At [53] Lord Walker said he had gone into these points in some detail because he thought they had a bearing on the "outright gift" issue. He noted that it has been said that it is necessary to identify "the arrangement": Vinelott J said that in *Wildin* (at 684), and the Master of the Rolls said much the same in *IRC v Payne* (at 626) nearly fifty years before:

> "Normally (there may be exceptions) the arrangement is to be identified by the constituent parts or components of the legal structure designed for a purpose, and not by what is done (sometimes months or even years later) in using the structure for its intended purpose."

193. At [54] he said that he did not accept the revenue's argument that the arrangement entered into by Mr and Mrs Jones included, but was larger than (and so different from) the establishment of the original corporate set-up under which each had half of the

issued share capital of the company. He noted that there was no written service agreement between the company and Mr Jones comparable to the service agreement between company and the actor. The establishment of the corporate set-up, together with the common intention that Mr and Mrs Jones would use it to minimise tax in accordance with their accountants' advice, was the essential "arrangement". What happened afterwards was that the "arrangement" was put to its intended use. He concluded, at [55], that the transfer of the share was:

> "not the sort of arrangement that would have been made between strangers dealing with each other at arm's length. Arctic was the chosen vehicle through which Mr Jones was to offer his valuable services as an IT consultant, and it was an act of bounty on his part to permit his wife to acquire half its equity for the nominal sum of £1. In my opinion that amounted to an outright gift of the share within the meaning of section 660A(6)."

194. Lord Neuberger agreed with the other Lords but wanted to express his views in his own words. He noted, at [75], that the definition of "settlement" in the relevant provisions appears, on its face, to be very wide indeed, and its ambit (or, to be more accurate, the ambit of its statutory predecessors) has been somewhat circumscribed by the courts. He thought that it was not surprising that the legislature and the courts have been content for the law to develop in this way. He noted that one of the principal purposes of the relevant provisions (save in certain circumstances) is:

> "to defeat arrangements between spouses, not conducted at arm's length, which seek to equalise their income, thereby reducing their aggregate liability to income tax and national insurance charges. The legislature has given effect to this by defining "settlement" in very wide terms, and the courts have then given the definition a limited effect, by means of the technique of purposive interpretation, through the introduction of the concept of "bounty" - see for instance per Lord Wilberforce in *Inland Revenue Commissioners* v *Plummer* [1980] AC 896 912E-F."

195. He also was not entirely comfortable with the use of the word "bounty" but considered it sufficed to express the relevant principle. He said, at [76], that the word "bounty" "rings slightly uncomfortably, at least to my ears" as a "somewhat outdated expression which smacks of condescension". However:

> "in the light of the judicial decisions on these provisions, it seems to me that the law is now tolerably clear and sensible, and, particularly given the need for clarity and the room for difficulties in this area, it would be inappropriate to risk introducing uncertainty or new complications by redefining the principles, even if only linguistically."

196. At [77] he noted that the counsel for the taxpayer said that there was no arrangement when one of the two subscriber shares was transferred to Mrs Jones because this lacked the necessary element of bounty. He relied on the fact that the company had no assets other than the £2 derived from the two subscriber shares: therefore, Mrs Jones got what she paid for. The profits which subsequently accrued to the company through the skill and efforts of Mr Jones were no more than a hope or at best, an expectation, that could not, counsel said, be counted as an asset of the company because the company had no legal right to require Mr Jones to work, whether for the company's benefit or at all, let alone for a reduced level of remuneration.

197. He said, at [78] and [79], that although the Court of Appeal was convinced by that argument, it is inconsistent with both authority and principle, and should be rejected:

> "It seems to me clear that, when considering whether there was an "arrangement"……i.e. an arrangement which involved an element of bounty, one should assess the position at the time that the alleged arrangement was made, but, in carrying out that exercise, one should not disregard what

happened thereafter. In particular, if the parties intended an element of bounty to accrue, and that element of bounty does indeed eventuate, then, absent any other good reason to the contrary, there is indeed an "arrangement" within the meaning of [the relevant provision].”

198. He continued, at [80] that, as long ago as 1940, in *Commissioners of Inland Revenue* v *Payne* (1940) 23 TC 610, Sir Wilfred Greene MR discussing a somewhat more simply drafted statutory predecessor of the sections in question here said the following, at page 626, (in relation to a scheme whose details Lord Neuberger did not consider to be significant for present purposes):

> “The word 'arrangement' is not a word of art. It is used, in my opinion, in this context in what may be described as a business sense, and the question is: can we find here an 'arrangement' as so construed? It is said that the only element in this transaction which falls within the definition of 'settlement' is the deed of covenant itself. I am unable to accept that argument. *It appears to me that the whole of what was done must be looked at*; and when that is done, the true view, in my judgement, is that Mr Walter Payne deliberately placed himself into a certain relationship to the company as part of one definite scheme......He did it by a combination of obtaining the control of the company, entering into the covenant *and then dealing with the company in such a way as to achieve his object*.” (emphasis added).

199. Lord Neuberger then went on to consider *Hawkins* and cited what was said by Donovan LJ at 547:

> “I will accept for the moment the proposition that the family settlement which followed was not decided upon at the outset; but what is important I think, is that the eventual enjoyment by some individual or individuals of the money which had escaped surtax must have been in contemplation at the outset. Otherwise, as I say, the scheme had no rational purpose.”

200. He said, at [82], that he was prepared to accept that in the present case the formation of the company and (more arguably) the allotment of shares had a “perfectly rational purpose”, even without the benefit of seeking to equalise the income of Mr and Mrs Jones. However, in his view, Donovan LJ’s essential point was that:

> “when considering the alleged "arrangement", or to put the same point in another way, in considering whether the arrangement involved an element of bounty, one looks at the whole of the purpose of the arrangement, and, in that connection, one does not shut ones eye to whether that purpose was achieved. That point is reinforced by what Donovan LJ went on to say at 550:
>
> > "Bearing in mind the ultimate object of securing money free from the burden - or the full burden - of surtax, can it matter for present purposes that the precise way of securing this result was not decided upon at the very outset? I think not".”

201. He noted, at [83], that Donovan LJ specifically disagreed with the view of the judge in the High Court that “the deed of settlement came later in date [and the commissioners had found] that there was no comprehensive arrangement at the outset of which the deed of settlement formed part”. He said:

> “It is true that, at that point, Donovan LJ was dealing with a question of the identity of the settlor. However, the definitions of settlement and of a settlor….are closely connected, and it appears to me to be perfectly proper to rely upon observations as to what can be taken into account when considering who is a settlor, when deciding whether there is a settlement.”

202. As regards the decision in *Wildin*, Lord Neuberger said, at [84], that the important feature was that Vinelott J concluded that there was a settlement, “notwithstanding that, at the time the shares in the company in that case were allotted, it had no right to the

benefit of the contract which was ultimately vested in it". He thought that the essential point was that the company was set up by the taxpayer, and "the shares were allotted, in the expectation, indeed with the intention, which duly eventuated, that the benefit of a potentially valuable contract being negotiated by the taxpayer would be taken in the name of, and for the benefit of, that company".

203. He noted, at [85], that counsel for the taxpayers suggested that these cases were distinguishable from *Jones* on the ground that the beneficiaries were the children or grandchildren of the taxpayer and not a spouse. However, he thought that the applicable principles as to whether a "settlement" has been created must be identical. At [86], he said that:

> "the main reason for allotting one share in the company to Mr Jones and the other share to his wife, and the only reason that Mr Jones was intending to accept, and duly accepted, an artificially low rate of remuneration for his work, was to distribute the income earned by Mr Jones roughly equally between him and his wife. That was the intention of Mr and Mrs Jones (or, perhaps more accurately, the intention of their accountants, which they were happy to adopt) at the time the company was set up, and it was what happened in each financial year (with the exception of two years when, for reasons not germane for the present purposes, owing to a misunderstanding of the law, Mr Jones was paid effectively a full salary). Accordingly, unless we are to overrule the approach adopted by the Court of Appeal in *Payne* and *Crossland*, and by Vinelott J in *Butler* v *Wildin*, it seems to me to follow that that there was here an arrangement… In my view, those cases laid down an approach which is workable and fair, which appears to give effect to the legislature's intention, and which, despite opportunities to do so, the legislature has been happy to accept by implication, in that nothing in the various re-enactments since section 38 of the 1938 Act has called the approach into question."

204. Lord Neberger continued to state, at [87], that he considered that the conclusion he had reached is consistent with principle:

> "The fact that the company had no legally enforceable right to require Mr Jones to work for it, either at all or at a reduced level of pay, does not mean that that was not something that the company and its shareholders expected to happen, and which therefore gave the shares value. As Lord Hoffmann pointed out in argument, valuation of an asset……..is very often based, at least to some extent, on profits which may be hoped or expected to be realised, but to which the owner of the asset has no present legal right."

205. In the same passage he noted that there was a curiosity in that the hope and expectation of profits accruing to the company were limited to the extent that the two shares were owned by Mr and Mrs Jones; Mrs Jones' share only had a substantial value at the date it was allotted to her as long as she was its owner and Mr Jones owned the other share. However, the notion that a particular piece of property has value (or has considerably enhanced value) only so long as it is owned by one particular person or class of person, because of some attribute which that person enjoys, or only so long as a particular state of affairs subsists, is conceptually unsurprising and not unfamiliar in practice.

206. He concluded, at [88], that "the essential point" was that, in the light of reasonable expectations as to what Mr Jones would achieve in terms of winning contracts for the company and would be prepared to accept by way of remuneration (which expectations were in due course fully realised), the value in 1992 to Mrs Jones of her share was considerably greater than the £1 which she paid. In those circumstances:

> "there was indeed an element of bounty involved in her acquisition of the share, and that bounty was provided through the expectation of what Mr Jones would

> do. The fact that the bounty primarily arose from an expectation of what he would do, rather than from what he had done, does not appear to me to be in point."

207. Finally, Lord Neuberger noted at [89], that there is an additional problem if the argument of the taxpayer is correct, namely, that "one should limit one's attention to the strictly legally enforceable rights of [the taxpayers] and the company at the time that Mrs Jones acquired her share, then":

> "that would open the door to a different approach. That approach would involve considering what transpired each year, when it was decided how much of the company's gross profit should be attributable to Mr and Mrs Jones' respective wages, and how much should be distributed by way of dividend…….when Mr Jones, as the sole director of the company, decides each year how to apportion the gross income of the company, I find it very hard to see why that should not be capable of being an arrangement within [the relevant provision], if it has been excluded from consideration as part of the arrangement when the shares were acquired by Mr and Mrs Jones. On that basis, I find it also very hard to see why Mr Jones decision each year not to take anything like a full salary, thereby increasing substantially the dividend payable to his wife, does not involve an element of bounty. Neither [counsel] was prepared to adopt this approach. Although it appears to me to be logically attractive, it would be inconvenient in practice, in that it would be difficult to administer, and it might well produce unfair, even arbitrary, results. However, the fact that it is not adopted by either party, seems to me rather to support the Revenue on the first issue."

Discussion and decision

Legislation and caselaw

208. To recap, the settlements code applies to treat income arising under a "settlement", as defined to include any "arrangement", as the income of the "settlor", as defined as the person who "made the settlement", and not of any other person if the income arises during the life of the "settlor" from property in which the "settlor" has an interest. For this purpose*:*

(1) A person is treated as having made a "settlement", if the person has "made or entered into the settlement directly or indirectly" which includes cases where the person "has provided funds or has undertaken to provide funds, directly or indirectly, for the purposes of the settlement".

(2) A "settlor" is treated as having an interest in property if there are any circumstances in which the property or any "related property" (a) is payable to the "settlor", (b) is applicable for the benefit of the "settlor", or (c) will, or may, become so payable or applicable. "Related property", in relation to any property, means "income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income from it".

209. In broad terms, the purpose underpinning the settlements code is to prevent taxpayers from reducing their tax liability by divesting themselves of what would otherwise be their taxable income by making gifts and settlements where prescribed conditions are met:

(1) In *Plummer* the relevant earlier settlement provisions were described as being "designed to bring within the net of taxation dispositions of various kinds….cases, in popular terminology, in which a taxpayer gives away a portion of his income, or of his assets, to such persons, or for such periods, or subject to

such conditions, that Parliament considers it right to continue to treat such income, or income of the assets, as still the settlor's income".

(2) In *Jones*, Lord Hoffmann described the relevant earlier settlements provisions as "anti-avoidance provisions intended in principle to prevent people from reducing their tax liabilities by settlements, gifts or similar arrangements which transfer income or income-producing assets to their minor children or under which they or their spouses retained an interest". Lord Walker said that the inclusion in the statutory definition of the very wide word "arrangement" shows that Parliament recognised that "a wealthy taxpayer might be advised to dispose of what would otherwise be his taxable income by relatively complicated or artificial means".

(3) In the earlier decision in *Chamberlain* Lord Macmillan similarly said that for an arrangement to be captured it "must be one whereby the settlor charges certain property of his with rights in favour of others…" and "must confer the income of the comprised property on others, for it is the income so given to others that is to be treated as nevertheless the income of the settlor". I note that the appellants interpret this as meaning that a person cannot be the "settlor" for the purposes of the settlements code unless, as a legal matter, he owns the property which then becomes the subject matter of the "settlement". I have addressed this below.

210. In *Jones* the House of Lords confirmed that as was held in *Plummer*, whilst there is no restriction as such on the meaning of the broad terminology used in the legislation, to constitute an "arrangement", as accords with the underlying purpose of the provisions, the relevant matters must involve "an element of bounty". Lord Hoffmann said that, in general terms, this means that "under the arrangement, *the settlor* must provide a benefit which would not have been provided in a transaction at arm's length" (emphasis added):

(1) As accords with the purpose of the provisions, Lord Hoffmann plainly envisaged that the "settlor" must provide a benefit to another party; hence his reference to a "transaction", which connotes some form of dealing between two or more parties. Moreover, this interpretation clearly accords with the natural meaning of the term "bounty", broadly, as a gift or donation or something given away by one person to another, in the sense that the recipient does not provide value or full value in return.

(2) I note that the appellants argued that a person may be a "settlor" even where he does not himself provide an "element of bounty"; the test set out in *Plummer* is simply that the "arrangement"/"settlement" must involve the provision of an element of bounty not that the "settlor" must himself provide it. However:

(a) That does not accord with Lord Hoffmann's plain statement and the descriptions given in the cases of the underlying purpose of the provisions.

(b) Moreover, in all the cases cited at the hearing in which the earlier settlements provisions were held to apply, the person who was found to be the "settlor" was also found to have provided an "element of bounty".

(c) Overall, I find it difficult to see that, on a purposive construction of the settlements code, a person can be regarded as having directly or indirectly "made", "entered into" or, "provided funds for the purposes of" an "arrangement" unless, broadly, that person is involved (albeit an indirect involvement suffices) in the provision of an "element of bounty".

211. In *Jones* the House of Lords endorsed Donovan LJ's comments in *Hawkins* that whether there is an "arrangement" depends on whether there is "sufficient unity" about

the whole matter to justify it being considered as such. It is inherent in such a formulation that there is no prescriptive set of rules for what constitutes an "arrangement". Indeed, it was suggested in *Jones* that a more precise test is not desirable; the "sufficient unity" test provides what is considered to be the necessary flexibility for the courts to take a "broad and realistic" view of the matter.

212. Whether the settlements code applies, therefore, depends on all the facts and circumstances of each particular case, but the cases give some further guidance. It is clear, for example, that the circumstances where there may be an "arrangement" include where a company is interposed as the vehicle through which the "settlor" provides an "element of bounty" to the intended recipients. Hence:

(1) in *Hawkins* and *Jones*, Mr Hawkins and Mr Jones were each held to be the "settlor" of a "settlement" as a result of them (a) facilitating and agreeing to an issue and/or transfer of shares in the relevant company to the intended recipient of an expected benefit (namely, the trustees of a trust set up for the benefit of the Mr Hawkins' children and Mr Jones' wife) for a nominal sum, and (b) agreeing that the company would provide their services to third parties in return for the company paying Mr Hawkins and Mr Jones an artificially low rate of remuneration so that any resulting profit arising in the company would be paid as dividends to the relevant shareholders; and

(2) in *Wildin*, the two brothers were held to be the "settlors" of a "settlement" as a result of them arranging for their children to subscribe for shares in a company for their "trifling" nominal value when the brothers expected to negotiate a valuable development deal for the company with the aim of ensuring that the company and so, indirectly, the children (to the extent of their shareholdings) took the benefit of the development deal at no cost or risk to themselves.

213. The majority of the House of Lords in *Jones* were of the same mind that whether there is an "arrangement" is to be judged by reference to events when the initial planning is put in place (such as, in that case, the setting up of the corporate structure) but that it is not necessarily a bar to there being an "arrangement" that, at that time, whether an "element of bounty" will be provided is subject to uncertain, contingent events. In their view, (a) the important feature in *Jones* (and in *Wildin*) was that when the corporate structure was put in place the relevant taxpayer had an *intention and expectation* that "bounty" would be provided through that structure, and (b) the arrangement may, depending on the particular facts and circumstances, constitute the initial structure and the intention to carry out the plan with such an intention and expectation or all of the steps involved in the plan:

(1) Lord Hoffmann rejected the argument that there was no "arrangement" in *Jones* because when Mrs Jones received a share in the company the payment of dividends to her depended on uncertain future events and, unlike in *Hawkins*, there was no binding contract with the company for Mr Jones to receive a low salary. He noted that in *Wildin* there was no guarantee that dividends would be paid and the brothers were not obliged to fund the development by the company. He thought that it would have made no difference to the outcome in *Hawkins* if there had merely been "expectations" that Mr Hawkins would work for the company at a low salary. He pointed out that the valuation of an asset, such as the share held by Mrs Jones, "is very often based, at least to some extent, on profits which may be hoped or expected to be realised…". He said that (a) a series of steps which are contemplated in advance may together constitute an "arrangement", as he thought was the case in *Hawkins,* but (b) he could not see that in *Wildin* the development was part of the "arrangement" given it depended

upon extraneous events and decisions which had not been made when the relevant shares were allotted. It was rather "the expectation of such events and the hope of profit which, together with the absence of any risk attached to the children's ownership of the shares", gave the "element of bounty". What subsequently actually happened was not part of the "arrangement" in that case but the way in which (as foreseen) income arose under the "arrangement".

(2) Lord Walker thought that Mr Jones' intention to minimise his tax liability by a "definite scheme, the essential heads which could have been put down in numbered paragraphs on half a sheet of notepaper" explained the rationale of the sequence of events and gave it "unity". He said that the courts were right not to lay down any precise test for identifying the components of an "arrangement". It could refer either to (a) actions which establish some sort of legal structure (such as a corporate structure through which the taxpayer's income could be channelled) or (b) those actions "together with the whole sequence of what occurs through, or under, that legal structure, in accordance with a plan which existed when the structure was established" notwithstanding that achieving the planned result may be far from certain and that it may be subject to "all sorts of commercial contingencies over which the taxpayer has little or no control". He said that if the plan is successful and income flows through the structure which he has set up, it is "income arising under the settlement".

(3) Lord Walker added that normally the "arrangement" is to be identified by the constituent parts or components of the legal structure designed for a purpose, and not by what is done later in using the structure for its intended purpose. Hence, in *Jones* the establishment of the corporate set-up, together with the common intention that Mr and Mrs Jones would use it to minimise tax in accordance with their accountants' advice, was the "arrangement." What happened afterwards was that the "arrangement" was put to its intended use.

(4) Lord Neuberger said that "one should assess the position at the time that the alleged arrangement was made" but in doing so "one should not disregard what happened thereafter". In particular, if the parties intended an "element of bounty" to accrue, and that eventuates, then, absent any other good reason to the contrary, there is an "arrangement". He thought that the important feature of *Wildin* was that there was a "settlement" even though, when the relevant shares were allotted, the company had no right to the benefit of the development contract. The essential point was that the company was set up by the taxpayer, and the shares were allotted, "in the expectation, indeed with the intention, which duly eventuated" that it would have the benefit of a potentially valuable contract which was then being negotiated by the taxpayer.

(5) Lord Neuberger held that, similarly, in *Jones* the main reason for allotting one share in the company to each of Mr Jones and his wife, and the only reason that Mr Jones intended to accept (and did accept) an artificially low rate of remuneration for his work, was to distribute the income earned from his work roughly equally between him and his wife. Like Lord Hoffmann, he considered that the fact the company and Mr Jones did not enter into a contract regarding his salary was not relevant. The company and its shareholders expected that he would work for the company for low pay and that gave the shares value (and he noted Lord Hoffmann's comments on share value). Hence, there was an "element of bounty" involved in Mrs Jones acquisition of the share provided through the expectation of what Mr Jones would do (in terms of winning contracts for the company and accepting low remuneration).

214. As noted, the appellants drew particular support from the decision in *Chamberlain* for their view that only Winn Yorkshire made a "settlement" for the purposes of the settlements code. The appellants suggested, in effect, that the House of Lords' decision in that case demonstrates that, in assessing the role of a corporate structure in deciding what constitutes an "arrangement", it is paramount that a company's separate legal personality is respected. In the appellants' view, HMRC's analysis fails to respect that fundamental principle. It involves, so they say, an impermissible piercing of the corporate veil given that (a) Winn Yorkshire and not the appellants owned the B share which became subject to the Trust, (b) its funds were used for the purposes of the planning, and (c), the appellants' involvement in the planning is confined to them acting in their role as directors of Winn Yorkshire (and Winn Scarborough); a company must necessarily act through its directors but that does not make the company's acts the acts of the directors.

215. To recap, in *Chamberlain* the majority in the House of Lords rejected the Inland Revenue's argument that:

(1) the taxpayer had made a single "arrangement"/"settlement" under which he (i) first, set up a company, Staffa, which he controlled and transferred a valuable asset into it, his shares in C Ltd, partly in return for shares in Staffa, and (ii) subsequently formed the March trust and the later December trusts primarily in favour of his children, into which he settled funds to enable the trustees to subscribe for shares in Staffa; and

(2) the taxpayer was taxable, therefore, on income which Staffa later received from C Ltd (which Staffa used to pay dividends to its shareholders (including the trustees) on the basis that the income arose under that single "settlement", from property comprised in it, namely, Staffa's assets.

216. The Inland Revenue accepted that their argument must fail if they were not correct that the whole of Staffa's assets (the shares in C Ltd) could be regarded as the property comprised in a "settlement" made by the taxpayer. The House of Lords held that, in fact, the property comprised in any "settlement" made by the taxpayer constituted only the funds which the taxpayer provided to the trustees for them to subscribe for shares in Staffa or those particular shares.

217. As the appellants emphasise, Lord Macmillan started his analysis by noting that, on a purposive approach, to come within the statute a "settlement" must be one whereby "the settlor charges certain property *of his* with rights in favour of others" (emphasis added) thereby conferring his income on others. He said that:

(1) The trusts were "settlements" within that meaning, but they did not comprise any property of Staffa. The trust funds were invested in shares of Staffa, which was "quite a different matter" and the whole assets of the company were not settled at all so as to dedicate the whole of its income to any trust purposes.

(2) Whilst he accepted that setting up the Staffa structure was an essential step towards effecting the taxpayer's object, the taxpayer himself retained a substantial interest in Staffa, namely, the shares he received in Staffa in return for the shares in C Ltd.

(3) It was not an accurate legal presentation to view the matter as a single scheme whereby the income from the shares in C Ltd ended up settled in favour of third parties given the taxpayer did not settle all of the shares in Staffa, and that further shares in Staffa might still have been issued.

(4) Moreover, it was "fallacious to confuse the steps taken by the [taxpayer] with a view to effecting a settlement or arrangement with the settlement or arrangement itself". The taxpayer did not make a "settlement" or "arrangement"

of the kind contemplated by statute when he put Staffa in place and transferred his shares in C Ltd to it. In fact, he did not settle any shares of Staffa but settled monies, with the intention, which he could carry out, that they should be invested in shares of Staffa. It was not until he granted the trust deeds that he entered the legal stage of the "settlement". All that he did previously was preparatory to making "settlements". Also, there was nothing to prevent the trustees from selling their shares in Staffa and investing the proceeds in other securities. He added that the trustees could have sold the shares in Staffa.

218. It is not clear to me that in making these comments Lord Macmillan meant, as the appellants seem to suggest, that (a) for a person to be a "settlor" of a "settlement" it is critical that he, rather than any company interposed in the structure, directly provides the property which can be identified as the subject matter of the "settlement" and/ or (b) the formation of a company can never be part of an "arrangement":

(1) In making the comments referred to at (2) and (3) above, Lord Macmillan appears to have been acting on the premise that, in principle, there could be a "settlement" as a result of the formation of the Staffa structure but the taxpayer could not be viewed, as the Inland Revenue agreed was necessary for them to succeed, as having charged his whole interest in the shares in C Ltd which he transferred to Staffa in favour of the beneficiaries of the trusts given that (a) he retained an interest in those shares himself indirectly through his ownership of shares in Staffa, and (b) in future he could have used the Staffa structure for other purposes by arranging for the issue of further shares to others.

(2) The only reason he gave for his broader view that the taxpayer did not make a "settlement" in setting Staffa up was that the taxpayer only entered the *legal stage* of the "settlement" when he later set up the trusts and all he did before that time was *preparatory* to that legal stage. That could be interpreted as meaning that the taxpayer could not be regarded, to use Lord Macmillan's own terminology, as having *charged* the shares in C Ltd with rights in favour of others when he transferred them to Staffa because, at that time, there was not a sufficiently certain arrangement in place for the Staffa structure to be used to provide his children with a benefit from the shares. In any event, Lord Macmillan was plainly not suggesting that there can be no circumstances where the routing of a taxpayer's asset/income through a company may constitute part of an "arrangement".

219. Moreover, Lord Romer evidently saw no conceptual difficulty with a person being viewed as having made a "settlement" by the indirect provision of property/a benefit through a corporate structure. Rather, Lord Romer was of the view that it was the fact that the taxpayer could not be regarded as having settled *the whole* of the assets held by Staffa meant the earlier settlements provisions did not apply. In effect, his approach foreshadows that taken in the later cases:

(1) Lord Romer considered that the formation of the Staffa structure and the making of the March trust may constitute a single "compound settlement" on the basis that all of the relevant steps were taken or caused to be taken by the taxpayer for the purpose of making provision for his children out of his interest in C Ltd while retaining control over C Ltd and Staffa. However, he considered that the taxpayer could not be regarded as having settled *the whole* of the C shares for substantially the same reasons as Lord Macmillan had given; namely, that the taxpayer retained an interest in those shares and setting up Staffa in this way "was capable of serving, and may well have been intended to serve, in the future other purposes as well".

(2) He thought that the December trusts should be viewed as separate "settlements" from this single "compound settlement" essentially on the basis that there was an insufficient link between the formation of the Staffa structure and those trusts: (a) when the March trust was made he saw nothing to suggest that it was in the contemplation of the taxpayer to settle further shares in Staffa (and he may not have done so but for later legislative changes), and (b) whilst in bringing about the December trusts, the taxpayer no doubt utilised the Staffa structure, the March and December trusts were "quite distinct from one another and could not properly be regarded as forming one comprehensive settlement". Whether this comprised a separate "settlement" or not he was satisfied that the property settled could not be said to consist of all the assets of Staffa for the same reasons as he had already set out in relation to the March trust.

220. Lord Tankerton (with whom Lord Atkin agreed) gave as reasons for his decision only that (a) while Staffa provided an available investment for the sums settled under the trusts, the continuance of that investment was not essential to the continuance of the trusts, (b) the sums settled under the trusts were the funds provided for the purpose of the "settlement", and (c) whilst Staffa was controlled by the taxpayer, it did not hold its assets as part of the provisions settled on the taxpayer's children. As in the case of Lord Macmillan, there is no real indication that Lord Tankerton considered that the fact that the relevant benefit was routed through a company was of itself necessarily fatal to the Inland Revenue's case; rather, on the facts, there was an insufficient nexus between the events for the formation of Staffa to be part of an "arrangement" together with the formation of the trusts.

221. In any event, as already set out, the later decisions plainly indicate that a "settlor" may be regarded as making a "settlement" where he routes a benefit through a company and that that may be the case even where he was not initially the owner of the property which becomes the subject of the settlement:

(1) In *Wildin*, *Hawkins* and *Jones*, the relevant individuals were held to be "settlors" notwithstanding that they had no formal legal interest in the shares which became subject to the relevant "settlement" (although there was a suggestion in *Hawkins* that Mr Hawkins may have had a beneficial interest in the relevant shares). The important factor was that each "settlor" (a) initiated the company structure and agreed to the issue and/or transfer of shares to those intended to benefit from the planning, and (b) when the structure was set up, either entered into further arrangements essentially for him to provide value, which would flow into those shares, or at least intended and expected that he would do so.

(2) In my view, in those cases the courts acknowledged, in effect, that, on a broad and realistic view of the matter, a person may achieve a similar result to that identified by Lord Macmillan as the target of the rules, namely, the conferring of a person's income on others, by adopting other methods than charging "certain property of his with rights in favour of others". The overall effect of the arrangements in *Wildin*, *Hawkins* and *Jones*, was that the "settlor" essentially conferred on others income which he generated or which he could have generated but for providing the relevant opportunity to do so to the company.

Conclusion on the application of the settlements code

222. I have concluded that, assuming at this stage of the analysis that the arrangements are not to be regarded as a distribution by Winn Yorkshire to the appellants in respect of their shares in that company, they constitute a "settlement" made by Winn Yorkshire as the "settlor":

(1) In my view the "arrangement" comprises at least the initial steps taken by Winn Yorkshire to implement the planning, namely (a) the establishment of Winn Scarborough on Winn Yorkshire subscribing for the A and B shares, (b) the subsequent almost immediate transfer by Winn Yorkshire of its beneficial interest in the B share to the trustee of the Trust on terms that the appellants were the primary beneficiaries of the Trust, and (c) the subscription by Winn Yorkshire for the additional A share for a premium of £200,000 with the expectation that Winn Scarborough would immediately cancel the share premium created on the share subscription to create distributable reserves for use in paying the B share dividend or, at any rate, the plan for that to happen.

(2) The appellants consider that the "arrangement" is confined to the settlement of the B share in the Trust. However, it seems to me that steps (a) and (c) are an integral part of Winn Yorkshire providing an "element of bounty". For all of the reasons already set out, each of these steps was essential to the provision of a benefit to the beneficiaries of the Trust, namely, the creation of income arising to the Trust in the form of the B share dividend:

> (a) The only reason for setting up Winn Scarborough with the corporate structure it had was for it to act as a conduit through which funds could be channelled from Winn Yorkshire into the hands of the appellants.
>
> (b) When the Trust was set up, given that Winn Scarborough was a shell with no intended activity, the B share would have had no value but for the intention and expectation that Winn Yorkshire would provide Winn Scarborough with £200,000 by subscribing for the additional A share so that Winn Scarborough could then create distributable reserves (by cancelling the share premium) and pay the B share dividend.

(3) I do not view the decision of the House of Lords in *Chamberlain* as supporting the view that, as Mr Jones argued, the creation of Winn Scarborough and issue of shares in it cannot be part of the "arrangement". As is plain from the analysis set out above, the House of Lords did not lay down a principle that the formation of a corporate structure can never be part of an "arrangement" whatever the surrounding circumstances.

(4) I note that it could be said that the "arrangement" in fact comprised all of the relevant steps involved in the planning given that all steps were clearly identified and planned from the outset and they were implemented within a short period of time (apart from the payment of the B share dividend which may constitute the "arrangement" being put to its intended use). In the words of Lord Walker in *Jones* the entire structure was plainly "a definite scheme, the essential heads of which could have been put down in numbered paragraphs on half a sheet of notepaper" which explained the rationale of the sequence of events, namely, to deliver the desired amount of cash from Winn Yorkshire, into the hands of the appellants/its shareholders, through the medium of Winn Scarborough and the Trust, on what was intended to be a tax-free basis.

(5) However, it makes no difference to my analysis whether the later steps are part of the "arrangements" or just the steps identified at (1). In either case, Winn Yorkshire is plainly the "settlor" of the arrangement as the party which:

> (a) entered into the relevant steps and/or directly provided the funds required for the purposes of the arrangement, namely, the cash resources it used to subscribe for the initial A and B shares and for the additional A share; and

(b) thereby provided an element of "bounty" in using its cash resources for the share subscriptions with the intention and expectation that the monies subscribed for the additional A share would be used to fund the B share dividend so creating income arising under the terms of the Trust for the beneficiaries of the Trust.

223. Turning to HMRC's arguments, I cannot see that the appellants can be viewed as the "settlors" of any "arrangement" comprising the planning or any part of it. HMRC's stance is that, on the correct statutory interpretation, the provisions setting out who is a "settlor", are broad enough to capture the appellants. In their view, on a broad and realistic view, the appellants can be regarded either as:

(1) *indirectly* having made or entered into an "arrangement" comprising the whole plan on the basis that they were the force behind the plan as the "controlling minds" of Winn Yorkshire and Winn Scarborough given that, in practical terms, as their sole directors, in effect, they can be regarded as having caused the companies to carry out each of the steps involved in the planning; or

(2) *indirectly* having provided funds for the purposes of that broad "arrangement" or for any more limited "arrangement", given that the actions they approved as directors included Winn Yorkshire using its funds to subscribe for shares in Winn Scarborough which enabled that company to issue the B share and later to pay the B share dividend. As the sole owners/managers of Winn Yorkshire, the appellants no doubt fully expected to benefit from Winn Yorkshire's funds which were used for the planning and, in practical terms, it was within their control to ensure that they could do so. In approving the use of the funds for the purposes of the planning, the appellants, in effect, agreed to their shares in Winn Yorkshire being reduced in value.

224. In my view, HMRC's analysis does not, as the appellants argued gives rise to an impermissible piercing of the corporate veil. HMRC's analysis simply raises the issue of the correct statutory interpretation of the provisions setting out when a person is to be regarded as a "settlor", in particular, as a result of "indirectly" making a "settlement".

225. As set out in full above, the decisions in *Hawkins*, *Wildin* and *Jones* amply demonstrate that a person may be viewed as the "settlor" of a "settlement" where he indirectly provides a benefit involving an element of bounty to others through a corporate structure. It is plain from those cases that a person does not have to be directly involved in each step of a plan constituting an "arrangement" for him to be a "settlor" in relation to it; the precise analysis will depend on all the surrounding facts and circumstances but active involvement as a director of a company in approving steps involved in the "arrangement" can be an important feature. For the reasons already set out, the earlier decision in *Chamberlain* does not provide authority to the contrary.

226. The appellants' clear intention and expectation from the outset was that each step involved in this "definite scheme" (as Lord Walker described that term in *Jones)* would be implemented in order to deliver cash into their hands on what was intended to be a tax-free basis. Moreover, as a practical matter, the implementation of this "definite scheme" was entirely within the appellants' control. As HMRC submitted, the appellants were the "controlling minds" of Winn Yorkshire and Winn Scarborough and their active participation was required for the implementation of each step involved as the sole directors of Winn Yorkshire and Winn Scarborough and the sole shareholders of Winn Yorkshire.

227. However, this case has some features which are markedly different to the circumstances in *Hawkins*, *Wildin* and *Jones*, as reflects the different underlying purpose of the arrangements from the perspective of the individuals involved:

(1) In those cases, the individual "settlors" used a company to provide a benefit *for others* (namely their children or wife) at least in part by using their *own resources or endeavours* (their earning-capacity and the negotiation of a valuable deal) to generate income which they arranged to flow into the shares in the company held by or for the intended recipient of the benefit.

(2) In this case, by contrast, the appellants, as the parties who HMRC consider to be the "settlors", as directors of the relevant companies, arranged for funds which belonged *to another person*, Winn Yorkshire, and which were generated by it in the usual course of its trading activities, to be provided *to the appellants themselves* (barring the minor sums paid to the charity and returned to Winn Yorkshire).

228. My view is that (a) the fact that the funds belonged to Winn Yorkshire does not of itself prevent the appellants from being viewed as having indirectly made a "settlement (whether the "arrangement" constitutes the entire plan or only some of the steps involved in it) but (b) it is fatal to HMRC's analysis that, under the planning, no material benefit was provided to any other party:

(1) On a purposive approach to the construction of the provisions, it seems unlikely that the legislature intended to draw a distinction between cases where, for the purposes of an "arrangement" (a) as in *Wildin*, *Hawkins* and *Jones*, an individual sets up an new company specifically so that he can make arrangements for income, which would otherwise have arisen to him, to flow into the company for the benefit of the relevant shareholders, and (ii) an individual who is the sole owner and director of a company in which profits have accrued, in effect, gives up the potential to receive those sums by arranging for the company to give the profits away. In both cases, on the natural meaning of the terms used viewed in context, the individual may be regarded as having *provided* funds *indirectly* for the purposes of the relevant "arrangement". For the reasons already set out, I do not consider that the decision in *Chamberlain* provides definitive authority to the contrary.

(2) However, broadly framed as the settlements code is, the courts have been clear and consistent in their view that, on a purposive approach to the construction of the rules, they are intended to subject a person to income tax, as the "settlor" of a "settlement", only where, under the relevant "arrangement", that person is involved in the provision of an "element of bounty" to another person. However, following through HMRC's analysis on its own terms, the appellants did not (whether directly or indirectly) provide to any material extent such an "element of bounty" under the plan. In causing the various steps involved in the plan to occur in their capacity as directors of the relevant companies, the appellants did not intend to and, the planning did not in fact, confer any material benefit on any *other* person. The sole purpose of the plan was for the vast majority of the relevant funds which Winn Yorkshire paid to Winn Scarborough to be received by the appellants themselves, as duly happened. Under the plan, the appellants simply went from potentially having the ability to access those funds as the owners and managers of Winn Yorkshire, to receiving the bulk of those funds directly into their own hands. Whilst a small amount of the funds were paid to a charity, for the reasons set out above, in effect, that was simply the price which the appellants were prepared to pay for the receipt of the rest of the funds, so they thought, as tax free sums.

229. For all the reasons set out above, at the most, the appellants could be regarded as having made a "settlement" for the purposes of the settlements code only in respect of the planning so far as it relates to the charity receiving the small sums it received (and,

for the reasons set out at [228(2)] I consider it doubtful that the appellants are to be regarded as having provided "an element of bounty" even to that extent). Otherwise, applying the provisions as they have been interpreted by the courts on a purposive basis, it is plain that the requirements for the appellants to be taxable under them in respect of the income in dispute are not met. The fact that the appellants caused the arrangements to occur purely for the purposes of avoiding income tax by ensuring that the settlements code applied to Winn Yorkshire cannot of itself affect that conclusion. On that basis, it is not necessary to consider the appellants' arguments as regards the application of s 644 (see 141(6)).

230. I note that the tribunal reached a different conclusion on the application of the settlements code in the *Dunsby* case but, given the different facts in that case, I do not consider it useful to carry out an analysis of that decision in that respect.

Conclusion

231. For all the reasons set out above, the appeal is dismissed.

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

HARRIET MORGAN

TRIBUNAL JUDGE

RELEASE DATE: 20 JANUARY 2021