the finding that the other court was better placed to hear the case implied that it would be in the best interests to transfer, whilst at the same time avoiding the temptation of going into the full merits of the case at this preliminary stage.

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DEFINING TAX AVOIDANCE: FLIRTING WITH CHAOS, AGAIN

THE decision in the conjoined appeals in *UBS v HMRC* and *DB v HMRC* [2016] UKSC 13 invites us to revisit a note published by John Tiley in 2005 concerning the decisions in *Barclays Mercantile Business Finance v Mawson* [2004] UKHL 51 and *Scottish Provident v IRC* [2004] UKHL 52 and subtitled "less chaos but more uncertainty" ([2005] B.T.R. 273). This is a richly textured piece that repays close reading; the central observation is that the cases reflected the settlement of long-running debates on the nature and scope of the *Ramsay* doctrine, which allows the courts to hold ineffective certain attempts at tax avoidance. As is well known, the years following *Ramsay v IRC* [1982] A.C. 300 itself were characterised by a tension between the need to clarify the circumstances in which the doctrine would apply and an understanding that too much clarity might allow taxpayers to circumvent the doctrine altogether.

One of the first attempts at regularisation was made by Lord Brightman in *Furniss v Dawson* [1984] A.C. 474, at 527, in which he set out two conditions for the operation of the *Ramsay* doctrine. Where there was (1) a "pre-ordained series of transactions; or … one single composite transaction" and (2) there were component steps with "no commercial (business) *purpose* apart from the avoidance of a liability to tax", the inserted steps could be disregarded for the purpose of applying tax legislation. This is a reasonable sketch but leaves unclear various important points. What is the source of the courts' jurisdiction to disregard real (i.e. not sham) transactions? Might this develop into a more thoroughgoing substance over form doctrine? How much attention should be paid to the exact words of the applicable legislation? Might taxpayers avoid the doctrine by ensuring that transactions are pre-planned but not precisely preordained?

The *Barclays* and *Scottish Provident* cases provided a simple and convincing answer to these questions, drawing on a gradual but sustained shift in judicial opinion: the importance of *Ramsay* was to confirm that purposive interpretation applies to tax statutes. In many although not all cases, tax provisions so interpreted will require composite transactions to be treated as a single event, so as to deprive taxpayers of advantages that would

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accrue were the legislation applied discretely to each step. Rather helpfully at least for pedagogical purposes, such an approach was found to be justified in *Scottish Provident* but not in *Barclays*; in the latter case, the legislation was held to confer entitlement to capital allowances based on an intermediate step in a tax plan. (It may or may not be relevant that the merits of the taxpayers' case in *Barclays* were relatively strong.) This close focus on statutory wording resolves in an orthodox manner the question of how courts justify their interference under the *Ramsay* principle, but equally judicial interpretation is not always easy to predict. This is what Tiley meant by "less chaos but more uncertainty".

At face value, the sole substantive judgment of Lord Reed in *UBS/DB* applies the new *Barclays* orthodoxy. A number of bankers received "restricted securities" in lieu of bonuses, with a view to paying 10% CGT rather than 40% income tax. These securities consisted of shares in offshore special vehicles, which were "restricted" by forced sale provisions that operated in pre-defined circumstances that were commercially arbitrary and unlikely to occur. Even if they did occur, there were hedging arrangements to protect the taxpayers from serious financial loss. As a matter of general law (see *Abbott v Philbin* [1961] A.C. 352), the market value of the shares would be charged to income tax at the date of grant, taking into account the depressing effect of the restrictions upon market value. However, in line with the law relating to employee share options, this position has been modified by statute into a "wait and see" treatment whereby no charge is made on grant. Instead, income tax is deferred until the restrictions are either lifted or confirmed permanently, at which point a more informed judgment can be made as to the genuine value of the shares to the taxpayer. A total exemption from income tax is also available under certain conditions, which, predictably, appeared to be met in the instant cases.

In summary, the schemes in *UBS/DB* sought to convert bonuses (40% income tax) into the receipt of restricted securities (income tax exempt) that could later be sold (10% CGT). The appeal of a *Ramsay*-style approach here is obvious, and it is evident from *IRC v McGuckian* [1997] 1 W.L.R. 991 that the doctrine can be applied to such attempts to re-characterise receipts. At a more detailed level, however, it is surprisingly difficult to apply *Ramsay* to the facts of *UBS/DB*. The First-tier Tribunals thought that the shares did not fall within a purposive reading of "restricted securities" but the Upper Tribunal and Court of Appeal disagreed. The shares were real securities and were subject to real restrictions; the meaning of "restricted" was also specified in detail in the Income Tax (Earnings and Pensions) Act 2003, hindering a broad purposive interpretation. The Supreme Court overruled the Court of Appeal, and held in favour of HMRC, by fixing on the word "provision" (i.e. of securities to employees) and holding that only a provision made for a business or commercial purpose would suffice. This conclusion was bolstered by the knowledge that

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the relevant legislation had been introduced in part to forestall avoidance (at [77]). The transfers of shares in the present cases were carried out not for business or commercial purposes, but purely to take advantage of restricted securities treatment; they therefore did not qualify as a "provision" under the statute.

An encouraging aspect of Lord Reed's judgment is his sustained effort to understand why the relevant sections were enacted and how they are situated within the tax system as a whole, rather than despairing of finding a sensible answer in the manner of *Mayes v HMRC* [2011] EWCA Civ 407. This readiness to rationalise complex and detailed provisions is a welcome and sometimes underrated tendency amongst tax specialists, and undoubtedly supported Lord Reed's interpretative conclusions.

Nevertheless, there are a number of troubling aspects to the decision. The first is the appeal to Parliament's intention to forestall tax avoidance. The present writer has spent much time reading pre-enactment documents relating to old Finance Bills, and remembers few instances in which tax avoidance was *not* mentioned. Does it follow that almost every statute can be interpreted as designed to combat avoidance, such that almost every avoidance scheme is without more contrary to the intention of Parliament? This may or may not be a good idea, but strays far from the nuanced and textual approach of *Barclays.*

Second, there is something a little arbitrary about the choice of the word "provision" as a conduit for the underlying purposes of the legislation. It almost seems that it was chosen because there were too many problems with "securities" and "restricted", and accordingly that the court was casting around for a suitable word upon which to project these purposes rather than genuinely seeking to understand the word "provision". The decision that the banks had made no "provision" of securities to their employees is not indefensible but is rather tenuous, and probably lies on the borderline of realistic interpretation of statutory provisions.

A final and connected point is that some of the language used by Lord Reed is uncomfortably redolent of Lord Brightman's judgment in *Furniss*, especially in the passage in which restricted securities treatment is held to be limited "to provision having a business or commercial purpose, and not to commercially irrelevant conditions whose only purpose is the obtaining of the exemption" ([2016] UKSC 13, at [85]). This has a flavour of those "sweeping generalisations about disregarding transactions undertaken for the purpose of tax avoidance" against which the House of Lords warned in *Barclays* ([2004] UKHL 51, at [37]), especially in view of the doubts expressed above concerning Lord Reed's selection and interpretation of the term "provision".

It is clear that Lord Reed was not seeking to defend the debunked view that there might be a judge-made rule of law requiring such non-commercial steps to be disregarded, independently of statutory context.

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Indeed, he recognised explicitly that everything "depends on the construction of the provision in question" ([2016] UKSC 13, at [65]). Yet the decision in *UBS/DB* sets a low bar for the disregarding of non-commercial steps, which might perhaps be developed by future courts into a presumption. In this connexion it is interesting that Lord Carnwath, one of the judges on the panel in *UBS/DB*, was counsel for the Crown in *Furniss*, along with Lord Millett, who has comparable views (see *Collector of Stamp Revenue v Arrowtown* [2003] HKCFA 46). Whether or not this explains the differences in approach, there is clearly a risk of subverting the closely textual approach of *Barclays* and reintroducing some of the "chaos" that Tiley believed had been consigned to history. It is up to the courts to decide whether to pursue such a path, but it should be done deliberately and not as an incremental extension of this rather borderline case.

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