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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE REVENUE COURT

SUIT NO. 3 OF 1999

BETWEEN	**CARRERAS GROUP LIMITED**	APPELLANT
AND	**THE STAMP COMMISSIONER**	RESPONDENT

Heard July 16, 17, 18, 2001 and November 14, 2001.

Richard Mahfood Q.C. and Ms. Yolande Whiteley, instructed by Philip Forest and Richard Ashenheim of Dunn, Cox, Orrett & Ashenheim, for the Appellant

Michael Hylton Q.C. and Garfield Haisley instructed by the Director of State Proceedings, for the Respondent.

ROY ANDERSON: J

This matter involving an appeal from a decision of the Commissioner of Stamp Duties and Transfer Tax, handed down on the 21st day of October, 1999, confirming an assessment of the Appellant to Transfer Tax under the Transfer Tax Act (the Act"), came on for hearing on the 16th, 17th and 18th of July 2001. At the end of the hearing, I reserved judgment and promised to put that judgment in writing when it was to be handed down. I apologize for the fact that it has taken this long to produce this judgment, but am now pleased to deliver it.

The facts which give rise to this appeal are briefly, as follows: The Appellant up to 1999, owned all the ordinary issued share capital and most of the preference shares in Jamaica Biscuit Company Limited ("The shares" and "Jamaica Biscuit"). General Holdings Limited is a Trindadian company of which Caribbean Brands Limited was a wholly owned subsidiary. The Appellant entered into a transaction with Caribbean Brands pursuant to which in exchange for, essentially its entire shareholding in Jamaica Biscuit, the Appellant received a debenture worth US$37,700,000.00. Naturally, the debenture has been redeemed by the Appellant. The Appellant claimed the benefit of the purported exemption from transfer tax on the basis of paragraph 6(1) of Part 1 of the First Schedule.

The Respondent denied that the transaction, the "exchange", fell within the provision claimed. The Appellant paid the tax under protest and subsequently filed an appeal against the decision of the Respondent referred to above.

The decision of the Stamp Commissioner was contained in a letter addressed to the attorney at law for the Appellant Company, and was in the following terms:

> "I refer to my letter dated July 7, 1999 and subsequent reminders dated August 27, 1999 and September 22, 1999 in which you were requested to submit documentary proof to substantiate your claim that "Carreras Group Ltd. of 60 Knutsford, Kingston 5 (hereinafter referred to as the Transferors) in pursuance of a scheme of reconstruction/reorganization does hereby transfer ....its shares in Jamaica Biscuit Company Limited..."
>
> To date no such evidence has been presented. The content of the Instrument has been construed in the ordinary way but the facts have not been established. From the documents examined through a field inspection carried out, the Share Capital of the Companies in question have not been reorganized/reconstructed or in any way changed by the transaction. The fact that you have not produced the evidence and the inspection failed to provide any additional or new evidence in support of your claim and the substance of the transaction remains a disposal and transfer of shares, I am unable to amend my assessment.
>
> In the absence of this evidence, I have no alternative but to confirm my assessment.
>
> If you disagree with my decision you may appeal to the Revenue Court within thirty (30) days of the date of receipt of this letter."

The letter confirmed the assessment which had previously been made by the Stamp Duty Department, and advised the taxpayer of its right to appeal to the Revenue Court within thirty (30) days of the date of the letter.

The Appellant filed its Notice of Appeal on November 12, 1999, and served the Notice on the same day.

The Notice of Appeal is set out below.

TAKE NOTICE that the Revenue Court will be moved so soon as the Appellant or its Attorneys-at-Law can be heard On Appeal from the whole of the decision herein of the Stamp Commissioner made on the 21st day of October 1999 and received by the Appellant's Attorneys-at-Law, Clinton Hart & Co. on the 22nd day of October 1999.

Whereby it was ordered that the decision of the Stamp Commissioner confirming her assessment made the 7th day May, 1999 whereby she assessed the Appellant to pay Transfer Tax in the amount of $107,791,368.75 in respect of a transfer by the Appellant of all the Appellant's shares in Jamaica Biscuit Company Limited to Caribbean Brands Limited.

For an Order that the said Assessment be discharged, that the Respondent refund to the Appellant the amount of $107,791,368.75 with interest thereon and that the Respondent do pay to the Appellant the costs of and incident to this Appeal.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are that the disposal of the shares in Jamaica Biscuit Company Limited by the Appellant to Caribbean Brands Limited was not a sale but a simple exchange of the said shares for debentures pursuant to paragraph 6(1) of the First Schedule to the Transfer Tax Act, and as such is treated as if it were a "reorganization" within the meaning of paragraph 4 of the First Schedule to the Transfer Tax Act, and therefore is not liable to Transfer Tax."

It will be noticed that the Ground of Appeal is that "the disposal of the shares in the Jamaica Biscuit Company Limited by the Appellant to Caribbean Brands Limited, was not a sale but a simple exchange of the said shares for debentures pursuant to paragraph 6(1) of the First Schedule to the Transfer Tax Act, and as such is treated as if it were a "reorganization" within the meaning of paragraph 4 of the First Schedule to the Transfer Tax Act, and is therefore not liable to Transfer Tax".

It is useful to set out the relevant parts of the Schedule to the statute referred to by the Appellant, and for completeness and ease of reference, I shall also set out paragraph 5 and paragraph 6(2) of the referenced paragraphs of the Schedule.

Reorganization of share capital, conversion of securities, etc.

4. (1) This paragraph shall apply in relation to any reorganization or reduction of a company's share capital; and for the purposes of this paragraph-

(a) reference to reorganization of a company's share capital include-

(i) any case where persons are, whether for payment or not, allotted shares in or debentures of the company in respect of and in proportion to (or as nearly as may be in proportion to) their holdings of shares in the company or of any class of shares in the company; and

(ii) any case where there are more than one class of share and the rights attached to shares of any class are altered; and

(b) "original shares" means shares held before and concerned in the reorganization or reduction of capital, and "new holding" means, in relation to any original shares, the shares in and debentures of the company which, as a result of the reorganization or reduction of capital, represent the original shares (including such, if any, of the original shares as remain).

(2) Subject to the following sub-paragraphs, a reorganization or reduction of a company's share capital shall not be treated as involving any disposal of the original shares. (Emphasis mine)

(3) Where, on a reorganization or reduction of a company's share capital, a person receives (or, without prejudice to the generality of any provisions of this Act, is deemed to receive) or becomes entitled to receive any consideration, other than the new holding, for the disposal of an interest in the original shares, and in particular-

(a) where under paragraph 3 of this Schedule he is to be deemed to have, in consideration of a capital distribution, disposed of an interest in the original shares; or

(b) where he receives (or; without prejudice as aforesaid is deemed to receive) consideration from other shareholders in respect of a surrender of

rights derived from the original shares, he shall be treated as having for that consideration transferred accordingly an interest in the original shares.

(4) Where on a reorganization of a company's share capital a person receives or becomes entitled to receive in respect of any shares a provisional allotment of shares in or debentures of the company, then, unless he neither accepts the allotment nor transfers his rights before or after the making of the allotment, those rights shall be treated in relation to him and in relation to any person acquiring them directly or indirectly from him as if they were the shares or debentures to which they relate and as if the consideration to be given for the shares or debentures were a liability attaching to the rights.

(5) References in the provisions of this paragraph to a reduction of share capital do not include the paying off of redeemable share capital, and where shares in a company are redeemed by the company otherwise than by the issue of shares or debentures, with or without consideration, and (without prejudice to any other provisions of this Act) otherwise than in liquidation, the shareholder shall be treated as transferring the shares to the company at the time of the redemption

5. (1) Paragraph 4 shall apply with any necessary adaptations in relation to the conversion of securities as it applies in relation to the reorganization or reduction of a company's share capital.

(2) For the purposes of this paragraph-

(a) "conversion of securities' includes-

(i) a conversion of securities of a company into shares in the company:
(ii) a conversion at the option of the holder of the securities converted as an alternative to the redemption of those securities for cash;

(iii) any exchange of securities effected in pursuance of any enactment (including an enactment passed after this Act) which provides for the compulsory acquisition of any securities in exchange for other securities;

(b) "securities" does not include shares.

Company amalgamations

6. (1) Subject as hereinafter provided, where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, paragraph 4 shall apply with any necessary adaptations as if the two companies were the same company and the exchange were a reorganization of its share capital.

> (2) This paragraph shall apply only where the company issuing the shares or debentures has or in consequence of the exchange will have control of the other company, or where the first-mentioned company issues the shares or debentures in exchange for shares as the result of a general offer made to members of the other company or any class of them (with or without exceptions for persons connected with the first-mentioned company) the offer being made in the first instance on a condition such that if it were satisfied the first-mentioned company would have control of the other company.

I have already quoted from the Notice of Appeal lodged by the Appellant with this Court. The Respondent failed at first, to file a Statement of Case within the time given by the Revenue Court Rules, but on March 13, 2000, the Court granted an extension of time to file the said Statement of Case, and this was done. It will be noted that in her response in the Statement of Case, the Respondent averred:

> "The transaction was not a simple exchange of shares for debentures to be treated as a reorganization under paragraph 4 of the First Schedule to the Transfer Tax Act. It was in fact a disposal and transfer of shares liable to Transfer Tax. The Respondent therefore did not err in law or in fact in making the said assessment".

Mr. Mahfood in outlining the Appellant's case, was at pains to point out to the court, that there were two (2) transactions which took place in 1999 involving the taxpayer/Appellant. The first was a takeover of Jamaica Biscuit Company Limited (a wholly-owned subsidiary of Carreras Group Limited) by Caribbean Brands Limited (a Trinidad Company). This, he says, was accomplished on April 27, 1999. The second transaction which he states occurred was the amalgamation of Jamaica Biscuit Company Limited (JBC), with Caribbean Brands Limited (CBL). He submitted that the amalgamation had nothing to do with the previous transaction in April 1999, nor indeed anything to do with the Appellant.

In his submission, the "simple issue of law" to be determined by the Court is this: Was the Respondent correct in her view as quoted above, that "the transaction was not a

simple exchange of shares for debentures to be treated as a reorganization under paragraph 4 of the First Schedule to the Transfer Tax Act"? Put another way, the question to be determined was whether on a proper construction of Part 1 of the First Schedule to the Transfer Tax Act, paragraphs 4 and 6, the transfer by the Appellant of all its shares in JBC to CBL, in exchange for a debenture dated as of the date of the transfer, (an exchange which both the Appellant and the Respondent agree took place), comes within the exemption contemplated by the Act. All the evidence in this matter is by way of affidavit, and the Court did not have the benefit of any viva voce.

The Appellant submits, and the court accepts, that if the transaction is properly within the terms of the exemption contemplated by Part 1 of the First Schedule to the Act, then the Revenue would be obliged to give effect to that exemption, the assessment would be wrong in law and the tax paid under protest, would have to be refunded. In this regard, it is submitted that it is trite law, that in construing a statute, the court must give effect to the clear and unambiguous provisions of such statute, even if the result would be that the Appellant is able to avoid payment of transfer tax on the transfer of the shares to CBL, and even if, as Mr. Mahfood suggested, the result "boggles the mind". As far as taxing statutes go, it is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language because, in some degree, they operate as penalties. As was stated by Rowlatt J:

> "In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. Nothing is to be read in. Nothing is to be implied. One can only look fairly at the language used". (*Cape Brandy Syndicate v IRC [1921] 1 K.B. 64, at page 71*, approved by Viscount Simon L.C. in *Canadian Eagle Oil Company Ltd., v R. [1946] A.C. 119*}

Mr. Mahfood further submitted that it is well settled that the subject is entitled to so arrange his affairs, as to reduce his liability to tax. Tax avoidance may only be dealt with by tax avoidance legislation. The court may not legislate by giving effect to what *it takes* to be the purported intention of the legislature. If the statute is bad, then the way to correct it is not by judicial intervention, but by legislation. The way to deal with tax

avoidance, is by way of anti-avoidance legislation, not by judicial activism. As was stated by Parker L.J. in the **Craven** case more fully discussed below at page 442 of the report, quoting Lord Wilberforce:

> "A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for the transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect".

The main dilemma in this case, is that the principle enunciated above is often antagonistic to another equally well-settled principle of tax lax. That is the principle that is urged by Counsel for the Respondent in the written submissions. "There is clear authority that (these are) exempting provisions (and as such) must be narrowly construed". Few would attempt to disagree with that statement of the law. By way of comment *en passant*, I should observe out that the comment in the submissions which follow that proposition to the effect that "The Appellant must show that this transaction is a genuine reorganization of the company's share capital", is really begging the question, because the central issue which the court has to decide, is whether the statute may be construed as imposing such an obligation. But that is an aside. Support for the proposition that exemptions are to be narrowly construed may be found in a case cited by Mr. Hylton, *Pan Jamaican Investment Trust Ltd., v The Stamp Commissioner for Jamaica (1979) 16 JLR 67*, where Marsh J, in dealing with the same provisions, observed:

> I accept that paragraphs 4 and 6 of the First Schedule are exempting provisions, in that they set out and define a category of property which, as a matter of legislative policy, is exempted from the tax by a legal fiction. It is settled law that such provisions are to be narrowly construed, and that a taxpayer seeking to bring himself under the umbrella of the exemption must show that his case falls squarely within the four corners of the enactment".

I shall return later to Marsh J's words above, but I am satisfied that they are a correct summation of the law. Mr. Mahfood, in the course of his submissions, dismissed certain matters raised by the Revenue in support of the decision, as being irrelevant. Thus, for example, he submitted that the fact that the debenture given to the Appellant in exchange for its shares in JBC was redeemed within days of its being delivered, is "of historical interest only" and does not affect the quality of the exchange and its legal implications.

Similarly, he submitted that notwithstanding any reference in any document from Price Waterhouse referring to paragraph 7(2) of the First Schedule, this is not a provision upon which the Appellant relies. Its only reliance is upon paragraph 6(1). Only an amalgamation of JBC and CBL, as indeed took place later, would have required reliance upon paragraph 7(2) of the Schedule. That subsequent transaction, however, had nothing to do with the Appellant's position. Paragraph 7(2) is set out below:

> Where any scheme of reconstruction or amalgamation involves the transfer of the whole or part of a company's business to another company, and the first-mentioned company receives no part of the consideration for the transfer (otherwise than by the other company taking over the whole or part of the liabilities of the business) no tax shall be charged in respect of the transfer as aforesaid of any property.

One reason why Counsel for the Appellant felt constrained to refer to this provision is that in an affidavit dated 5th April 2001, the attorney for the Appellant at the time of the transaction, Mr. Philip Forest, had stated that "the Respondent stated that his decision was based on paragraph 7 of the said First Schedule". This assertion was based upon notes of a meeting between the parties, (which notes were prepared by Mr. Forest himself). To the extent that these are his notes, the evidence is, at best, self-serving, and must be treated with some caution. In any event, in her affidavit in response to that of Mr. Forest, Judith Churnside of the Department of Stamp Duty and Transfer Tax explained that the reason why she had referred to that provision, was the letter which she had previously received from Price Waterhouse in regard to the transaction. In written submissions, Counsel for the Respondent had submitted that if the Appellant had received any consideration other than the debenture for the disposal of the shares, that would have been an additional ground for holding that the appeal should fail, given the terms of paragraph 7(2) quoted above. It was accepted that the payment for the option was <u>not</u> additional consideration. It was a straight payment for the option which was not later deducted from the price of the debenture issued in exchange for the shares. Accordingly, Counsel for the Respondent indicated that he did not intend to pursue this part of the written submissions and we may safely leave that issue out of our reckoning. I would however add, parenthetically, that *<u>if</u>* there had been credible evidence that the Commissioner did in fact base her decision on the said paragraph 7(2) of the First

Schedule, given the facts revealed herein, I would have been constrained to allow the appeal on just that narrow basis. There was, in the out-turn, no such evidence.

In essence, the submissions of Mr. Mahfood for the Appellant may be summarized as follows:

A. Once the transaction falls properly within paragraph 6(1), it is a "reorganization" and exempt.

B. The "exchange" of shares for debentures in the circumstances of this paragraph to be treated as if the two companies were the same and the exchange is deemed a "reorganization" of its share capital, within the terms of paragraph 4.

C. The transaction was such an "exchange" within the terms of the statute.

D. The only consideration for the disposal of the shares was the issue of the debenture.

E. The transaction is therefore exempt from Transfer Tax.

Counsel for the Appellant, in reviewing what he submitted was the applicable law, took as his point of departure *Wheatcroft & Whiteman* on *Capital Gains, 2nd Edition* (hereafter "Wheatcroft") and paragraph 11-14, 11-20, 11-25 and 11-31. Section 11-14, in relevant part, deals with the comparable position under the United Kingdom Capital Gains Tax legislation, and makes the point that a mere issue of bonus shares or cancellation of shares in a body corporate, should not be treated as a disposal or acquisition for purposes of the legislation, being merely examples of "reorganizations". The learned authors of the text, at page 182, state:

> "The Finance Act 1965 contains elaborate rules designed to preclude any such treatment for capital gains tax purposes, and to give effect to the general principle that an internal reorganization should not give rise to any tax liability. The rules are set out in detail in relation to holdings of shares in a single company, and then are applied, with necessary adaptations, to holdings of debentures and other securities (including Government securities) and to transactions such as takeovers and amalgamations involving more than one company".

These sections of Wheatcroft which deal with the relevant provisions of the United Kingdom Finance Act 1965, and Schedule 7 paragraph 4 thereof, (comparable to our First Schedule paragraph 4), explain the rules governing "reorganizations and reductions of share capital". In discussing the said paragraph 4, at page 183, the authors say that "the rules for shares apply to reorganizations and reductions of a company's share capital". Further, in referring to paragraph 4(2), they continue:- "The main rule in relation to a reorganization or reduction of share capital is that there is not a disposal of the original shares nor an acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (also taken as a single asset) are treated as the same asset acquired as the original shares were acquired". The rule referred to is that set out in paragraph 4(2) of the Finance Act 1965, which is in the same terms the First Schedule 4(2) of the Transfer Tax Act, as set out below.

> Subject to the following sub-paragraphs, a reorganization or reduction of a company's share capital shall not be treated as involving any disposal of the original shares.

In looking at Wheatcroft, it is also to be noted that after dealing with paragraph 4, it proceeds to consider paragraph 6, the same two paragraphs as we have to consider here. I find the following passage, dealing with paragraph 6(1), taken from page 190, instructive for reasons to which I will return later.

> "There are two situations where the rules considered in (paragraphs) 11-15 to 11-26 above as to reorganizations of a company's internal share capital apply with necessary adaptations where one company issues shares or debentures to a person in exchange for shares or debentures of another company; such a transaction is treated as if the two companies were one company and the exchange was a reorganization of its share capital. The two situations where that rule applies can both, for most purposes at least, be loosely described as take-over situations. More precisely, the first one is where the company issuing the shares or debentures has, or in consequence of the exchange will have, control of the other company, and the second is where the company issuing the shares, does so in exchange for shares (but not, in this situation, debentures), as a result of a general offer made to members, or any class of members of the other company...
>
> Thus, on a take-over of one company by another, to the extent that the shareholders of the former company are paid in shares or debentures of the latter, *neither a gain or a loss for capital gains tax will accrue to them*, and the shares or debentures they receive will be treated as having been acquired at the same date and for the same consideration as the shares

> transferred to the company effecting the take-over. It follows from the wording of paragraph six that it would apply where debentures only are issued for shares and vice versa.
>
> *The rules explained in the two preceding paragraphs deal with the comparatively simple transaction whereby one company acquires control of another. Further rules deal with potentially more elaborate transactions described as "schemes of reconstruction or amalgamation. A scheme of reconstruction or amalgamation is defined as a scheme for reconstruction of any company or companies or the amalgamation of any two or more companies"*. (Emphasis mine)

It was the burden of submissions by counsel for the Appellant that the circumstances in the instant appeal fall squarely within the four corners of the paragraphs quoted above, and particularly the paragraph which I have italicized

In looking at the provisions of the first scheduled and the relevant paragraphs Mr. Mahfood referred to paragraph 4 (1). This-sub paragraph indicates that the entire paragraph is to apply "in relation to any reorganization or reduction of the company's share capital". It goes on to state that reference to a reorganization includes those circumstances which are set out in paragraphs 4 (1) (a) (i) & (ii). Paragraph 4 (2) states that a reorganization or reduction of a company's share capital is not to be treated as a disposal of the original shares. The clear implication of this is that since the charge to tax under the Transfer Tax Act depends upon there having been a disposal, if there is no disposal then there can be no charge to transfer tax. Sub-paragraph (3) of the said paragraph 4, sets out circumstances where there would be a disposal for the purposes of the Transfer Tax Act. (See particularly paragraphs 4 (3) (a) (b). He then moves to paragraphs 6 of the first schedule and quotes paragraphs 6 (1) which I have set out above in following terms: "Subject as hereinafter provided, where a company issues share or debentures to a person in exchange for shares in or debentures of another company, paragraph 4 shall apply with any necessary adaptations as if the two companies were the same company, and the exchange were a reorganization of its share capital".

Mr. Mahfood submits that the inclusion of the critical words "as if" creates a state of affairs different to that which it might otherwise have been. In support of this proposition

he cites the case of ***East End Dwellings Co. v Finsbury Borough Council*** [1952] A.C. page 109, at page 133. He quotes the dictum of Lord Asquith of Bishopstone. The quote, repeated in Strouds Judicial Dictionary is as follows:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it come to inevitable corollaries of that state of affairs".

In the East End Dwelling Company Limited case, the House of Lords in overturning a decision of the Court of Appeal, held that where the statutes required that one ought to suppose an imaginary state of affairs, then it was not open to the Court to interpret it in a contrary manner, on the basis that the intendment of the legislature was different from the meaning conveyed by the ordinary words used in the statute. In that case, the legislation under consideration, the Town & Country Planning Act of 1947 required the Court to pretend that buildings which had been completely destroyed by enemy action in the Second World War, had in fact been rebuilt on the same site although it was obvious that no such building had taken place. The House of Lords held unanimously that the words of the statute were clear and had to be followed, although this had the effect that the plaintiff, in that case, received a much larger level of monetary war-damage compensation than it might otherwise have done.

In further support of his submissions, counsel for the Appellant referred the court to, and laid great store by, the decision of the House of Lords in **Craven v White, [1989] A.C. 398.** (I should note parenthetically, and it should come as no surprise in dealing with matters such as this, that Mr. Hylton for the Respondent, when he came to make his submissions, also found comfort in the opinions expressed by their Lordships, in that case). For the Appellant, Mr. Mahfood submitted that the court must give effect to the fact that shares were in fact exchanged for a debenture, (if I may paraphrase him), on the basis that the exchange was a single defined act specifically exempted from charge to the

tax it would otherwise suffer, but for the exemption. My emphasis, is a result of my understanding of Mr. Mahfood's focus.

Of the three appeals heard together in the **Craven v White** case, the first and third are most apposite. Both involved the exchange of securities and turned upon the construction of provisions in the United Kingdom Finance Act 1965, Schedule, and paragraphs which are in all material particulars, *ipsissima verba*, with the provisions of the Jamaican legislation with which we are here concerned. Those appeals involved the issue of whether, in certain circumstances of *a series of transactions*, (one of which involved the exchange of securities), the effect of which was to delay or avoid a charge to Capital Gains Tax, the taxpayer should be held liable to tax as falling within the relevant principles laid down in ***Ramsay (W.T.) Ltd v Inland Revenue Commissioners [1982] A.C. 300***, as further refined and extended by ***Furniss v Dawson [1984] A.C. 474.*** The principle in Ramsay was re-stated by Parker L.J. at page 447 of the Appeal Cases report of **Craven v White**, as articulated by Lord Fraser of Tullybelton, thus:

> "Lord Fraser of Tullybelton who in **Burmah Oil** case had identified the ratio of **Ramsay**, now identified its principle. He said at p 512:
>
> "The true principle of the decision in **Ramsay** [1982] A.C. 300 was that the fiscal consequences of a pre-ordained series of transactions intended to operate as such, are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separate. The principle was stated in the speech of Lord Wilberforce in **Ramsay** at page 324 A.C., especially where His Lordship said:
>
> "For the commissioners considering a particular case, it is wrong and an unnecessary self limitation to regard themselves as precluded by their own findings that documents or transactions are not 'shams' from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties the relevant transaction is. They are not, under the Westminster doctrine **[Inland Revenue Commissioners v. Duke of Westminster 1936 A.C. 1]** or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole".

In essence while none of their Lordships in the Ramsay case or the subsequent Furniss case resiled from the principles set out in the Duke of Westminster case of 1936, there

was a distinct uneasiness with extending that doctrine, and in fact, the direct result of Ramsay and Furniss is to allow the court to have a closer look at transactions, certainly in those circumstances where there is a concatenation of intrinsically bound-up transactions, and the issue of whether a tax liability arises is being canvassed.

The principle enunciated for the first time clearly in Ramsay and subsequently refined and extended in **Furniss v Dawson**, while not overruling the decision in **Inland Revenue Commissioners v Duke of Westminster**, referred to elsewhere in this judgment, left it open to a court reviewing a particular transaction, and certainly a series of transactions, to hold that they had a right to look behind the mere form ***** of the transactions. Thus Lord Bridge of Harwich was prepared to go further than the other Law Lords in Dawson and he said at page 517 of All England Report of the case:

> "When one moves however, from a single transaction to a series of interdependent transactions designed to produce a given result it is in my opinion perfectly legitimate to draw a distinction between the substance and the form of the composite transaction without in any way suggesting that any of the single transactions which make up the whole are other than genuine. This has been the approach of the United States Federal Courts enabling them to develop a doctrine whereby the tax consequences of the composite transactions are dependent on the substance not the form".

The conclusion to be drawn from the foregoing is, in my view, that **Ramsay** and then **Furniss v Dawson**, represented a revolt against the purity of the doctrine of the superiority of form over substance which has been assumed to be represented by the **IRC v Duke of Westminster** case from 1936. Henceforth, at any rate where there was a series of transactions or a so called "composite transaction", the court would be at liberty to look, not just at the individual events within the chain of transactions, but to look at the effect of the transaction as a whole. Notwithstanding that development however, it is clear that the Ramsay principle must be limited and Lord Diplock in **Inland Revenue Commissioners v Burmah Oil Co. Ltd. 1982 S.T.C. 30** at page 33 expressed the limitation of the Ramsay principle.

find additional support for his position in the judgment of Lord Oliver of Aylmerton in the **Craven** case. Lord Oliver at page 502 of the judgment confesses that he was not an enthusiastic supporter of the apparently activist role of the court as demonstrated by the case of **Furniss v Dawson**:

> "My Lords, I confess to having been a less than enthusiastic convert to Furniss v Dawson because I found, initially at any rate, some difficulty in following the intellectual process by which, in contradistinction to the cases which preceded it, it reconstructed the transaction which had taken place in that case in a way which disapplied the specific statutory consequences which, on the face of them, attached to the intermediate transfer which had in fact taken place and which the special commissioners had found as a fact was a genuine transaction. It has been said in the course of argument on the present appeals that **Furniss v Dawson** is "judge made law." So it is, but judges are not legislators and if the result of a judicial decision is to contradict the express statutory consequences which have been declared by parliament to attach to a particular transaction which has been found as a fact to have taken place, that can be justified only because, as a matter of construction of the statute, the court has ascertained that which has taken place is not, within the meaning of the statute, the transaction to which those consequences attach. It seems to me, therefore, that the first and critical point to borne in mind in considering the true ratio of **Furniss v Dawson**, is that it rests not upon some fancy principle that anything done with a mind to minimizing tax is to be struck down but on the premise that the intermediate transfer, whose statutory consequences would otherwise have resulted in payment of the tax being postponed did not, upon the true construction of the Finance Act 1965 constitute disposal attracting the consequences set out in paragraph 4 and 6 of Schedule 7 of the Act."

What counsel for the Appellant is, apparently urging is that despite the developments which have occurred since **Ramsay**, **Craven v White** is authority for the proposition, at any rate in the judgment of Lord Oliver, that it is not open to the courts to adopt a legislative posture although their ability to construe statutory provisions as to their effect on events which have taken place, may be exercised with a more critical focus.

In the course of his judgment, Lord Oliver also sought to distinguish the circumstances in which the court may be constrained to act against a scheme, which has as its object the avoidance, postponement or reduction of tax. He concedes that the court has a right to

enquire into the motives of the taxpayer for carrying out the transaction in the way it has. This enquiry as to "motives" of the taxpayer, which in Lord Oliver's view was introduced by Lord Diplock's comment in **Burmah Oil**, (see below) and which represented "the significant alteration in approach" over **Ramsay**, however, is not to be based upon any view as to moral correctness or turpitude. In fact, as he puts it at page 507 of **Craven**:

> "It does not, I think, arise from a moral judgment which the court is called upon to make, for Lord Fraser of Tullybelton in his speech, at page 220 stressed that the fact that the purpose of the scheme is tax avoidance, does not carry any implication that it is in any way reprehensible or other than perfectly honest and respectable. The reason must, therefore, be something else, and it is, I think, simply this: that the absence of any commercial motive underlines the artificiality of the interrelated transactions and entitles the court to disregard them because they are not intended to produce anything other that than artificial fiscal result".

Again, the section of **Craven** is cited with approval by counsel for the Appellant on the basis that in the instant case, the exchange which it alleges took place was not an artificial transaction, a "sham", but a real transaction. Further, that it was not one of a series of transactions; it was a one-off transaction, followed by a transaction done by the issuer of the debenture, with whom Appellant had no real or substantial connection, and over whom it had no control. Mr. Mahfood suggested that what the Respondent was asking the court to do was to legislate to fill in gaps in the legislation and that this should be rejected. The court must give effect to the legislation and he referred the court to page 508 of **Craven v White** where Lord Oliver delivers himself as follows:

> "Your Lordships are thus invited not simply to analyze the transaction, to construe the statute and then to apply it to the analysis of what the taxpayer has really done, but to construct a general catch-all formula for rendering ineffective any step undertaken with a view to the avoidance or minimization of tax on an anticipated transaction or disposition. That is an invitation to legislate and it goes a very long way beyond what, at any rate was expressed to be the ratio of **Ramsay** and of **Furniss v Dawson** itself, where the emphasis throughout was upon the pre-ordained sequence of the transactions which took place, their dependence upon one another and the necessity of being capable of being construed as one single composite whole. This is graphically underlined in the speech of Lord Russell of Killowen in **Chinn v Hochstrasser [1981] A.C. 533** at page

> 550, where he described as a matter of "crucial importance" that "the record on the turntable which was switched on, contained the whole story from beginning to end and there was no provision for switching if off half-way."

Although Lord Keith of Kinkel was in the majority (including Lord Oliver) in the **Craven v White** decision who felt that all the appeals should be dismissed, it is still useful to look at some of his contributions. At page 478-479 he stated what he deduced to be the ratio decidendi of the **Furniss v Dawson** as articulated by Lord Brightman in his (Brightman's) judgment in that case. I do not believe that it is necessary to set out, *in extensu,* Lord Keith's quotation from that judgment. However, it seems instructive in at least one view which may be taken of the effect of the three (3) cases discussed extensively in **Craven v White**, (**Ramsay, Furniss** and **Burmah Oil**). It is that, in order to ground a charge to tax, it is necessary to properly apply the principle to be derived from them. What is this principle? Lord Keith at page 479 states:

> My Lords, in my opinion the nature of the principle to be derived from the three cases is this: the court must first construe the relevant enactment in order to ascertain its meaning; it must then analyse the series of transactions in question, regarded as a whole, so as to ascertain its true effect in law; and finally it must apply the enactment as construed to the true effect of the series of transactions and so decide whether or nor the enactment was intended to cover it. The most important feature of the principle is that the series of transactions is to be regarded as a whole. In ascertaining the true legal effect of the series it is relevant to take into account, if it be the case, that all the steps in it were contractually agreed in advance or had been determined on in advance by a guiding will which was in a position, for all practical purposes, to secure that all of them were carried through to completion. It is also relevant to take into account, if it be the case, that one or more of the steps was introduced into the series with not business purpose other than the avoidance of tax.
>
> The principle does not involve, in my opinion, that it is part of the judicial function to treat as nugatory any step whatever which a taxpayer may take with a view to the avoidance or mitigation of tax. It remains true in general that the taxpayer, where he is in a position to carry through a transaction in two alternative ways, one of which will result in liability to tax and the other of which will not, is at liberty to choose the latter and to do so effectively in the absence of any specific tax avoidance provision such as Section 460 of the Income and Corporation Taxes Act of 1970".

contending, inter alia, that the principle of fiscal nullity (See **Dawson, Ramsay v Furniss**), could apply in respect of transactions in which no artificial steps had been inserted at all. It was held that in order for two or more transactions to be treated as one composite transaction the following conditions had to be satisfied. (1) The series of transactions, at the time when the intermediate transaction was entered into, had to be preordained in order to produce a given result. (2) That transaction had to have no other purpose than tax mitigation. (3) A the time of the transactions were entered into, there had to be no practical likelihood that the pre-planned events would not take place in order ordained. (4) The preordained events had in fact to have taken place.

Counsel for the Appellant urged upon the court, in particular, a section of the holding of Patten J, in that case on page 1012, applying the dicta of Lord Brightman in **Furniss v Dawson**, a case to which much reference has already been made.

> "If the court were to have ignored the terms of each option contract which provided for its independent assignment and exercise, and concentrated instead on the fact that if exercised together the options were guaranteed to produce a fixed return in favour of the taxpayer company, it would violate the principle that the court could not go behind the transactions and search for some supposed underlying substance which as a matter of ordinary legal analysis they did not possess"

It was further submitted that the tax treatment to be accorded to the transaction was to be determined by a legal analysis of the documents, that the language of the transaction and the contractual documents had to be considered, and that the statute applied to the legal nature of the transaction and not its economic effect, propositions advanced by counsel for the taxpayer in the Griffin case, and adopted by counsel for the Appellant. In the instant case, the language used by the taxpayer was that there was an "Exchange" of securities, shares for debentures. That fact is also averred in the affidavit of attorney for the Appellant at page 149 of the Judge's Bundle of documents, and there is no doubt that the exchange did in fact take place. Further, it was submitted that although a court was required to look at the plan as a whole, it was not entitled to disregard the legal form and nature of the transaction carried out. Authority for this submission was to be found in the judgment of Lord Wilberforce in **Chinn v Collins (Inspector of Taxes) [1981] A.C. 533**,

at page 547. It was also urged that dicta of Lord Wilberforce in the **Ramsay** at page 322-324, supported Appellant's contention. He said:

> "Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance... This is a cardinal principle that it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form. 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 combination of transactions, intended to operate as such, it is that series or combination which may be regarded."

Again, counsel for the Appellant reiterated that the agreement for the exchange of shares for debentures between the Appellant and Caribbean Brands, was not a sham, but was real and must be accepted at its face value.

Appellant's counsel also turned his attention to the question as to effect of the decision of Marsh J. in the Pan Jamaican case referred to above. He submitted that in that case, the main issue in that case was whether the taxpayer had received additional consideration. It was held there that the receipt of a bank guarantee was in fact additional consideration which took the transaction out of the protection of the relevant provisions of Part 1 of the First Schedule to the Act, and was therefore taxable. Mr. Mahfood however was of the view hat even in such a case, what would be taxable would be the "additional consideration" and not the entire consideration. He submitted further with respect to that case, that in any event, it had no precedential value, as it was based upon findings of fact on the evidence which the judge had before him in that case. Insofar as the issue of the "additional consideration" was concerned, I do not have to concern myself, as counsel for the Respondent conceded that the option money was not part of any purchase price, and indeed was not treated as part of the consideration by the Respondent for the purpose of assessing the tax due.

It was a further limb of Appellant's counsel's submissions that Revenue Court Rules 10 and 13, require that the Respondent's Statement of Case state its <u>reasons</u> for a decision. The rules provide:

> 10(1) The Respondent shall within the time stated in Rule 9 file and serve on the Appellant a Statement of Case following as closely as possible Form C referring to the decision appealed from and setting out the allegations of fact and points of law or other reasons upon which the Respondent intends to rely and containing an address at which documents may be served upon the Respondent. 10 (2) If the Respondent fails to file a Statement of Case within the time allowed by this Rule or within such further time as may be allowed under Rule 32, the Appeal may be allowed by the Court or Judge with costs.
>
> 13. Subject to Rule 12 it shall not be competent on the hearing of the Appeal for the Appellant or the Respondent to rely upon any facts not set out in the Notice of Appeal, Statement of Case or Reply as the case may be.

He submitted that there was no reason given by the Respondent for his finding, and indeed there was no specific finding of fact that the exchange of securities undertaken by the Appellant was a sham. He submitted that in confirming her decision, the Commissioner had in mind, a reconstruction or amalgamation under the provisions of paragraph 7(2). There was in his submission, no finding of fact averse to the evidence of the Appellant that the transaction was a simple exchange of shares for debenture; that the documentary evidence was all tending to prove that there was just a simple exchange.

Finally, counsel for the Appellant turns to the Respondent's case as indicated in the written submissions of counsel for the Respondent. He conceded that the heading of the document evidencing the exchange transaction was inappropriately headed "Reconstruction/Reorganization". It was not a reconstruction and should not have been so characterized. He refutes the submission in paragraph of Respondent's counsel's written submission, that the Appellant is conceding "that there has not been a reconstruction pursuant to paragraph 7". Mr. Mahfood also dealt with the several cases cited by Respondent's counsel, but I shall for the moment leave his response to those cases which was, in short, that the cases were inapplicable to the instant circumstances. He did, however, also submit that the submission in paragraph 14 of Respondent's written submissions to the effect that " a reorganization envisages the same persons owning and controlling the company although the nature of the holding may change", is wrong. The

question is he says, "What does reorganization in the First Schedule of the Act mean"? And in response to the evidence that the "surplus" on the exchange was treated as a gain in the accounts of the Appellant, he states that the accounting treatment is consistent with the statutory treatment. Nor, he adds, is the fact that a gain accrued, dispositive of the question. The central issue remains: "What does ***reorganization*** in the First Schedule of the Act mean?"

Mr. Michael Hylton Q.C. presented the case for the Respondent, with his accustomed succinctness and erudition. He submitted that essentially three issues arise on the facts, and the answer to these will determine the liability or otherwise of the Appellant. These he stated to be:

- Is the language of the agreement conclusive, or should the Court consider all the evidence to determine the true nature of the transaction?
- If the latter, is the transaction really a sale of shares disguised to look like a re-organization and not a simple exchange of shares for a debenture?
- Did the Appellant receive any consideration other that the debenture for the disposal of the shares?

The Respondent's first submission was to the effect that if the answer to either of the second or third of the questions posed above is in the affirmative, then the appeal must fail. It should be remembered, however, as mentioned above, that at the outset of his submissions, the Respondent abandoned the submission that the payment for the option represented "additional consideration" for the purposes of paragraph 4(3) of Part 1 of the First Schedule. This is accordingly an issue which need not trouble us. By way of further concession, he conceded that there were in fact two (20 separate transactions which took place in 1999, the purported exchange and the amalgamation, and that the Appellant was only involved in the first of these two transactions. That it is the first transaction with which the Court is concerned. He was also prepared to accept that the second transaction was an amalgamation with the meaning of paragraph 7(2) of Part 1 of the First Schedule.

Mr. Hylton submitted that there is clear authority for the proposition that where there is an exempting provision, and the taxpayer seeks to rely upon such a provision, the provision is to be narrowly construed. He relied upon the previously mentioned **Pan-Jamaican Investment Trust v The Stamp Commissioner for Jamaica (1979) 16 JLR 467**, and in particular Marsh J's dictum at page 473, that:

> "I accept that paragraphs 4 and 6 of the First Schedule are exempting provisions. in that they set out and define a category of transfers of property which, as a matter of legislative policy is exempted from tax by means of a legal fiction. It is settled law that such provisions are to be narrowly construed, and that a taxpayer seeking to bring himself under the umbrella of the exemption must show that his case falls squarely within the four corners of the enactment".

There is little doubt that this is an accurate statement of the law. He argued from this, that the Appellant's submission that the Stamp Commissioner had never challenged the fact of the exchange was an admission of that fact and therefore conclusive as to the effect which the Appellant sought to deduce from such factual exchange, was wrong. He did not agree that the Commissioner had not challenged the assertion of the Appellant that there was an exchange, or at any rate an objectively valid exchange. He referred in this regard to the Respondent's Statement of Case, and in particular the reasons given by the Respondent for her decision. The first reason given by the Respondent is that:

> "The transaction in question was not a simple exchange of shares for debentures to be treated as a "re-organization" under paragraph 4 of the First Schedule to the Transfer Tax Act. It was in fact a disposal and transfer of shares liable to Transfer Tax. The Respondent therefore did not err in law or in fact in making the said assessment".

This he said was equivalent to a finding of fact that the alleged "exchange" was really a "sham". While he was even prepared to concede the *fact of the exchange* as well as the validity of the debenture, he urged upon the Court, that the question of the effect did not depend upon whether an exchange took place, and certainly not upon what the Appellant

had called its document nor asserted to be its effect. The first limb of his submissions therefore was that the Court had to distinguish "form" from "substance", and that in pursuing that distinction, the court had a right to go behind the language used by a party. The **Pan Jamaican** case is cited as one that provides support for that proposition. Further support is to be found in the case of **Secretary of State in Council for India v Scoble [1903] A.C. 299**, and the words of Lord Halsbury L.C: "We must look at the nature of the transaction and not be bound by the mere use of words."

Mr. Hylton further referred to **Brooklands Selangor Holdings V Inland Revenue Commissioners, [1970] 2 AER p.76**, a case involving a purported reconstruction and the effect of certain exempting provisions on the transactions carried out by the parties. In that case (which I take to be more of an example of what is the correct meaning of "re-construction"), Pennycuick J. held that he had to look at the substance of the transaction and not merely the words. Mr. Hylton also cited as supportive of this view of the approach of the courts to construction of documents, **Baytrust Holdings Ltd v I.R.C. [1971] 3 AER 76**, **Lever Brothers Ltd. V I.R.C. [1938] 2 K.B. 518** and **Oswald Tillotson Ltd. V I.R.C. [1932] AER 965.** All of these cases deal with claims to exemption from the application of stamp duty pursuant to the exempting provisions of section 55 of the Finance Act of 1930. I have to say respectfully, that while these cases all provide extensive definitions and explanations of the meaning of "re-construction", I do not detect the level of support asserted by Mr. Hylton for the proposition that "substance is to be preferred to form". I am not going to say the principle is not inherent in some of the dicta, but there seems to be no predominant assertion of that principle. Indeed, if **Lever Brothers Ltd.,** is anything to go by, the opposite may be said to be true. For in that case, Sir Wilfred Greene Master of the Rolls, said: "In my opinion, the Crown's contention is correct. First of all, it is in accordance with the literal meaning of the words. ------ It seems to me that, on a literal meaning of the phrase, that condition has not been fulfilled in the present case. On the other hand, the contention of the appellants involves writing into this language qualifying words and extending the phrase which has been used to cover the case, not merely of an acquisition of a balance necessary to make 90 per cent, but of a balance necessary to make, with an existing holding, 90 per cent".

Mr. Hylton further submitted that the second issue which had to be dealt with is: "What is the true nature of the transaction"? He points to the finding of the Commissioner that the transaction was not really an exchange of securities but a disposal of shares, and submits that there is "substantial evidence" that the transaction was, in the words used by Marsh J. to describe the transaction in the **Pan Jamaican case,** "intrinsically that of sale and purchase, rather than of exchange". He then submits that "re-organization" in the relevant paragraphs of the First Schedule of the Act, upon the authorities which he referred to, was "merely a form of reconstruction". He refers to Halsbury's 4th Edition, Volume 5 paragraph 63, which, in dealing with the identical provision in the UK Finance Act of 1965 states:

> Special provisions apply to company reorganizations, reconstructions and amalgamations, and conversions of securities. The rationale of these provisions is that where there is a change in the form of a shareholding, or other interest, in the company, but the changed form substantially represents the original interest, as on a bonus issue or an exchange of shares, the change should not be treated as involving a disposal or acquisition for Capital Gains Tax purposes. (Emphasis supplied)

In further support for his submission that "reorganization" was merely a form of reconstruction, counsel for the Respondent cited the case of **Re: South African Supply and Cold Storage Company Limited 1904 2 Ch. 268**. In that case Buckley J. (as he then was), defined reconstruction in the following terms.

> " What does 'reconstruction' mean? To my mind it means this. An undertaking of some definite kind is being carried on and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on – that would be a mere sale – but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. Reconstruction involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or that all the shareholders of the old company shall be shareholders in the new company. Substantially, the business and the persons interested must be the same".

Proceeding therefore on the proposition that reorganization is merely a form of reconstruction, counsel for the Respondent asks whether the transfer of shares in Jamaica Biscuit to Caribbean Brands in exchange for debentures would result in "substantially the same business being carried on by substantially the same persons who were carrying it on before". It is clear that this would not be the case. The conclusion to be drawn, therefore, in counsel's view, is that this is not a "reconstruction" and therefore not a "re-organization" within the meaning of the relevant provisions. The cases cited by Respondent's counsel and referred to above including **Brooklands and Lever Brothers** are relevant to these submissions. In **Brooklands**, the question whether the taxpayer company was entitled to be relieved from stamp duty, turned on whether a reconstruction had taken place. As counsel noted, it was interesting that in this case most of the persons who were shareholders in the company before the reconstruction continued to be shareholders after, but there was a new shareholder who held most of the stock. In that case, counsel submitted, the Court held that a reconstruction denoted to the transfer of the undertaking or part of the undertaking of the existing company to a new company with substantially the same persons as members of the new company as were members of the old. Further, that the effect of the transaction in question was that the holders of stock in the taxpayer company were most substantially different from the holders of stock in the new company in that they consisted of approximately half only in value though the vast majority in number of the holders of stock in the new company.

Similar support is found in the **Lever Brothers** case, where the issue, as in the other cases mentioned before, was whether a reconstruction had taken place. It is not surprising therefore that in his concluding submissions, counsel for the Respondent submitted that the evidence which had been adduced in the instant case did not support a reconstruction. He said that this was the case because: (and I quote from the written submissions);

(a) "It was always the intention of the Appellant to divest itself of its interest and holding in Jamaica Biscuit and not to change the nature of that interest and holding.

(b) The Appellant kept changing the documentation on the structure of the transaction in order to arrive at something which would avoid the tax payable.

(c) The unsecured debenture was redeemed within days of being executed. In fact, it was redeemed either before or on the same day that the tax was paid.

(d) There was a gain on the disposal of the shares which is consistent with a sale or disposal of share and inconsistent with an exchange of shares for debenture or a reorganization.

It was also further submitted that: "Although the time of execution (of the document) is the material time for determining the effect of an instrument for stamp duty purposes, the Court will have regard to what is said and done thereafter, in order to discover the true position when the instrument was executed. In support of this proposition, counsel cited the case of **William Cory and Sons v The I.R.C. [1965] A.C. 1088**. I should note here that in his response to this reference by Mr. Hylton, counsel for the Appellant said that he felt that this case was not helpful. It will be recalled that the result of the decision in that case was that there was a recognition of the need to amend the Stamp Duty Act as indeed was done both in Jamaica and the United Kingdom. It may be that the case is more support for the proposition that where the legislation is inadequate to deal with a particular problem, it should be changed, rather than that for which counsel for the Respondent contends.

Mr. Hylton also made the point in the course of his submissions that in all the cases cited in the reference to Wheatcroft made by Mr. Mahfood (See above) were case where there was no change in ownership but only a change in the form of holding. There was no change in beneficial interest in the securities. This, says counsel for the Respondent, shows that cases on reconstruction are relevant to the issue of whether reorganization has taken place.

In further response to the submissions which had been made on behalf of the Appellant with respect to the effect of the **Pan Jamaican** case, of which Mr. Mahfood had been quite dismissive, Mr. Hylton argued that that case was not primarily about whether there was additional consideration paid, "other than the new holding", so as to make the

consideration subject to Transfer Tax. He submitted that in fact Marsh J. had made a number of important holdings which were relevant to the instant case. These included the following:

> (i) that the essential question which fell to be determined was whether the true nature of the transaction was to be ascertained from the contract, without reference to the subsequent agreement or whether both documents were to be read together.
>
> (ii) that on the true construction of paragraph 4 of the First Schedule of the Act that provision is an exempting provision and it is settled law that such provisions were to be narrowly construed and that a taxpayer seeking to bring himself under the umbrella of the exemption must show that his case falls squarely within the four corners of the enactment; accordingly, the reference to an exchange of shares in paragraph 6 of the First Schedule of the Act was to be construed as limited to a simple exchange of shares for debentures and no more.
>
> (iii) that so far as terminology can be a guide, there is no question that the contract reflected a transaction which was intrinsically that of sale and purchase, rather than exchange; further, by obtaining a bank undertaking, the Vendors had put themselves beyond financial risk and placed the contract on a footing indistinguishable from a contract for payment of the purchase money in cash; the contract was clearly therefore not a transaction of exchange but one of purchase and sale, and in any event the bank undertaking constituted "a consideration other than the new holdings" under paragraph 4 (3) of the First Schedule to the Act which would render the transaction liable to tax.
>
> (iv) that, on the question of the subsequent agreement removing the provision relating to the undertaking from the contract, as no reference was made in the proceedings below to that agreement, the attempt to produce that document in evidence in the Revenue Court was analogous to leading fresh evidence in the Court of Appeal and should be subject to similar restriction; the right to lead such evidence is not at large and may only be conferred where prior leave had been duly sought and obtained, however, rather than send the case back to the respondent, the document would be admitted in evidence.

Counsel for the Respondent next turned to the authorities cited by Appellant. He conceded that the authorities were current and relevant. In particular, he referred to the **Craven** case which has been quoted extensively herein. It was his submission that

Craven answers the first two (2) of the questions posed by him in delineating the issues, in favour of the Respondent. (See above at page 24). These related to whether the language of the agreement was conclusive as to the nature of the transaction; and secondly, whether the transaction was really a sale of shares disguised to look like a re-organization. He submitted that on the authority of **Craven, Ramsay and Furniss**, the Court is entitled to ask the question: "Is the transaction what it purports to be"? In this regard, he refers to the judgment of Lord Templeman who dissented, along with Lord Goff, in relation to the appeals against Brian and Stephen White, in the **Craven** case. These were the cases involving exchanges of securities. At page 483 of the **Craven** report, Lord Templeman states.

> "My Lords, an artificial tax avoidance scheme is carried out by an individual taxpayer to avoid (or reduce or postpone) payment of tax eligible in respect of a taxable transaction by means of one or more tax avoidance transactions which serve no business purpose apart from the avoidance of tax on the taxable transaction. This house has on four occasions decided that an artificial tax avoidance scheme does not alter the incidence of the tax sought to be avoided".

Lord Templeman then referred to a number of cases including **Ramsay**, **Furniss** and **Burmah Oil**, all having been referred to elsewhere in this judgment, and which explore the extent and the limitations of the case of **IRC v Duke of Westminster.** It was submitted that one is entitled to look at the intention manifested by the party. In this regard, the chronology of events commencing with the minutes of the Carreras Group Board Meeting of February 2, 1999; the grant of the option to General Holdings of Trinidad; the exercise of the option by General Holdings Ltd., wholly-owned subsidiary, Caribbean Brands Ltd, and the exchange of the shares for the debenture, which is the transaction at the heart of this action, is said to be of particular importance.

Mr. Hylton laid great store by the judgment of Lord Templeman in **Craven**, who would have found liability in the case of respondents, Brian and Stephen White. At the request of the court to expand upon the implications for the Respondent's case, of the Appellant's strong reliance upon the **Craven** case decided by a majority in the House of Lords, he

pointed out that that case could be distinguished because, there had been a commercial purpose served, and at the start of that transaction, there had been no firm decision taken to sell the shares held by the appellants therein. That transaction had started out as a planned merger. He made the further point that in **Craven,** there were three (3) separate cases heard together, and only that involving Brian and Stephen White turned on an exchange of securities. He referred the court to page 484 of the **Craven** report where Lord Templeman, after summarizing the decisions in the relevant cases from 1975 to 1984 stated:

> A principle emerges from the authorities and in particular from Ramsay, Burmah and Furniss. The principle is that an artificial tax avoidance scheme does not alter the incidence of tax. Ramsay, Burmah and Furniss concerned the Finance Act 1965 or its successors whereby capital gains tax, or in the case of companies, corporation tax, was:
>
> > "19(1) ...charged .....in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets"
>
> By section 20(4):
>
> > "Capital gains tax shall be charged ...on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting any allowable losses accruing to that person.....
>
> In Ramsay the taxpayer sought by the scheme to reduce his liability to tax without suffering the loss which entitled him to a reduction. The taxpayer began by a *taxable transaction,* when he made a real chargeable gain on the sale and "disposal" of a farm. To reduce the liability to an assessment of tax engendered by that disposal, the taxpayer entered into a *tax avoidance transaction*. The tax avoidance transaction was planned to produce and did produce a gain which was not a *"chargeable gain"*, matched by an equal *"allowable loss"*. By this tax avoidance transaction the taxpayer made neither a loss nor a gain. The taxpayer claimed to deduct the allowable loss from the chargeable gain on the farm. This would have enabled the taxpayer to enjoy the chargeable gain made on the disposal of the farm without paying any tax. The House held that the taxpayer was not entitled to deduct the loss. The artificial tax avoidance scheme did not alter the incidence of tax. (Emphases supplied)

These passages, he asserts, confirms that the same test ought to be applied to the language of the relevant provisions of our Act. This was because, before the Appellant gets to the effect of the words "as if" in paragraph 6(1), it must cross the hurdle of

establishing that the transaction was, in fact, a mere exchange of shares for debentures, and not a "sham" transaction, the essence of which was "tax avoidance". Secondly, in order to come within those transactions in which the court will hold that the exchange was the true nature of the transaction, it would have to be shown that there was no step which was a mere artificial step with "no commercial purpose other than the avoiding of tax". Unlike the Craven case, he submitted that the Appellant here is unable to show that this was the case.

Mr. Hylton urges the Court to find that the exchange is one of a *series of transactions* in furtherance of the Appellant's corporate decision to "get out of the business of food manufacturing and return to its core business". He asks whether there was any step in the series which had *no commercial purpose*, and the only effect of which was to reduce or postpone tax. He points out that, with respect to the debenture which is issued in return for the shares, it was unsecured; did not create a fixed or floating charge and thus provided no security; was interest-free, and the Appellant had therefore given up 1.3 billion dollars worth of shares without security or even the right to clam interest. The debenture was redeemed on or around the same day that the tax on the transaction was paid. The question arises he says as to whether there can be any commercial purpose served by this transaction. If there is none, then it would fall to be within the tests laid down by Lord Wilberforce in **Craven**, and should be taxable.

Finally he notes that the documents upon which the Appellant relied had internal inconsistencies. There was for example, the reference on the agreement to "Reconstruction/Re-organization", the reference to "reconstruction/amalgamation in the letter of the Appellant's auditors to the Stamp Commissioner dated 26th March 1999, and the characterization in the accounts of the Appellant company of a sum as a "profit on disposal of a subsidiary."

He accordingly submitted that there was ample evidence to support the findings of fact in the Respondent's decision and that the decision is eminently supportable by the law.

Mr. Mahfood in a brief response to the submissions of Mr. Hylton reminded the court of the concessions made by the Respondent that there had been an exchange, and there was a debenture. He urged the court not to give undue weight either to Lord Templeman's dissenting judgment in **Craven**, (for the reason that it was a *dissenting* judgment); nor to the judgment of Marsh J. in **Pan Jamaican**, which spoke to one fact situation and which ought not therefore to be seen as a precedent for a different fact situation. He submitted that the factual situation in **Craven** was also different in that there were more parties and several steps. Under the principles flowing from **Ramsay,** as outlined by Lord Brightman in **Furniss v Dawson**, there had to be a number of steps in the transaction before the court would be entitled to consider whether there was a "composite transaction". In the instant case, there was only one transaction, and the principles applicable to multi-step transactions, did not apply. He also urged that the essential principle in **Craven** was that the power of a court in applying statutory provisions is limited to the interpretation and having interpreted, applying the law to the factual situation. He again, as he had done several times in his initial submissions, reminded us that *the transaction* was an exchange of shares for the debenture. He noted also, with respect to Respondent's submission on the accounting treatment of the "gain on disposal of subsidiary" in Appellant's audited accounts, that the treatment was consistent with Generally Accepted Accounting Principles (GAAP).

Moreover, in response to the invitation of the Court to speak to the issue of a "commercial purpose" in the transaction, he referred to Appellant's press release that indicated an intention to return to its core business. This was the purpose and this is what it did. And it did it in a manner which the law clearly allowed it to do. The court should resist the invitation to legislate and find for the Appellant.

It seems to me that there are really two main alternative bases upon which the resolution of this case may depend. The first may be answered by reference to the question: Is the fact that the act done by the taxpayer, (the subject of the assessment by the Respondent) is within the literal words of the relevant provision, a determining factor in deciding whether a liability arises? Put in a slightly different way: Is it not only a necessary, but a

sufficient condition for the success of the taxpayer/Appellant, that he show that the literal words of the statute cover the situation which he avers is that in issue?

The second alternative formulation may be stated thus: To what extent is it relevant or necessary to consider the intent and indeed the actions of the taxpayer/Appellant in determining whether his act is what he says it is? This may also be framed in the following way: Is the implication of the cases of which **Ramsay** is seminal, and including **Furniss, Burmah Oil, Craven and Griffin**, that the court is always entitled to look behind the face of the transaction to deduce a purpose, upon the revelation of which it will be entitled to make its decision, at any rate where there is a series of transactions, but which may be regarded as one composite transaction?

The starting point in the case of either question above, is what does the statute say? I have already set out above in the introductory part of this judgment, the relevant provisions. In particular I refer to paragraph 6(1) of Part 1 of the First Schedule which is in the following terms:

> 6. (1) Subject as hereinafter provided, where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, paragraph 4 shall apply with any necessary adaptations *as if* the two companies were the same company and the exchange were a reorganization of its share capital.

What shall we make of this provision? Is it to be relegated to consideration *only after* getting over what Mr. Hylton refers to, as the "hurdle" of proving that the true nature of the transaction was an exchange of shares for debentures falling within the principles of a "reconstruction" as that term has been interpreted? I think not. It is my view that we can gain some assistance in determining how to approach the provision by returning to the quote from the judgment of Marsh J. in the **Pan Jamaican** case. He said: "I accept that the paragraphs are exempting provisions; in that, they set out and define a category of transfers of property which *as a matter of legislative policy, is exempted from the tax by* ***means of a legal fiction"***. (Emphasis mine). He continues: "It is settled law that such provisions are to be narrowly construed, and that a taxpayer seeking to bring himself

under the umbrella of the exemption must show that his case falls squarely within the four corners of the enactment". In the instant case, the taxpayer says: "The provision squarely covers the situation. The law exempts an exchange. I have done an exchange as permitted by the law. The Respondent has conceded that I have done an exchange. The mere fact that this fact allows me to escape the transfer tax is not, *ipso facto*, a basis for concluding that I am not entitled to rely on the provision."

I have come to the view that, particularly in light of the recognition that the relevant provisions represent a policy driven "legal fiction", it is for the Revenue to show that the taxpayer is subject to the impost. I say this without prejudice to a full acceptance of the principle that exemptions must be narrowly construed. In this regard, it is useful to look at the letter of the Stamp Commissioner dated October 21, 1999, confirming her assessment. The decision of the Commissioner refers to her "previous requests" that the Appellant "submit documentary proof to substantiate your claim that "Carreras Group Ltd. Of 60 Knutsford Boulevard Kingston 5 (hereinafter referred to as the Transferors) in pursuance of a scheme of reconstruction/reorganization does hereby transfer ....its shares in Jamaica Biscuit Company Limited....". It is not clear what was the nature of the "proof" that the Commissioner required. It continues: "To date no such evidence has been presented. The content of the document has been construed in the ordinary way but *<u>the facts</u>* have not been established". Again, it is not immediately clear as to whether the facts requested were as to the exchange, *<u>or</u>* to the nature of the transaction being a reconstruction/re-organization. I pause to say that the characterization of the instrument and the process as a "reconstruction/re-organization" was singularly unhelpful and unfortunate, and Mr. Mahfood had properly conceded some confusion in the preparation. If it were to be found that this characterization was dispositive of the issues in this case, the Appellant might well conclude that it was "hung on its own petard". But I do not believe that this is the case.

<u>I find as a fact that the charge to transfer tax imposed by section 3, of the Act, has been specifically waived in the instant case by virtue of the exemption. I find that the exchange of shares for a debenture by the Appellant, in the instant case, is "within the four corners</u>

of the enactment" as stated by Marsh J. in the Pan Jamaican case. I am not to be thought to be saying that any exchange of shares for debentures in any circumstances will give rise to this result. The court is always at liberty to view the circumstances and construe the statute in light of those circumstances. But in the context of the statute (and the exemption) which, if the views on its English predecessor are anything to go by, is aimed at encouraging and facilitating mergers of businesses, I believe that this is a case within that contemplation.

I wish to add, however, a few thoughts on the Act in general and the provisions in particular. It will be realized, as noted above, that the United Kingdom Finance Act 1965, provided the precedent for the provisions under consideration, in our Transfer tax Act. The UK statute however, was a capital gains tax statute. It was designed to charge allowable gains after allowing allowable losses. Its structure therefore, was premised upon the principle that there ought not to be a, what I would describe as a "*notional realization of gains*", in circumstances where there was no "real disposal". Instead, in order to avoid a charge on unrealized gains, or the double charging of gains, the statute treated a notional "gain on disposal" as not being a "gain on disposal for capital gains tax purposes", and the asset, the gain on which would otherwise have suffered tax, was treated as having changed hands at the cost of the asset for which it was exchanged. This meant two (2) things: firstly, that no chargeable gain arose; but secondly, and importantly, the base cost of the asset was established at that time, and would form the base cost for computing the chargeable gain on the ultimate disposal. There was no double charge of any disposal. On the other hand, the Jamaican Act is a tax on chargeable transfers. Once the transfer of the asset subject the transfer tax occurs, or indeed the contract to transfer is effected, the tax is payable.

I am of the view that importing into the Jamaican Transfer Tax Act the principle of deferment appropriate to a capital gains tax may be the source of the difficulty. Where the capital gain is to be taxed, then it is fair that a mere exchange should not give rise to a chargeable gain. The value received from the exchange fixes the base cost and ultimately, on disposal, the true gain suffers tax. Indeed, the subsequent "gain on disposal

of subsidiary" reflected in the Appellant's accounts, would then be subject to capital gains taxation, with a base cost of the original (par) value of the shares. If my view of this perceived anomaly in the Transfer Tax Act is correct, I would respectfully submit it is for the legislature to introduce corrective legislation to deal with the problem and not for the courts to solve it through judicial activism. In this regard I should go on record as being of the view that a comprehensive review of the Transfer Tax Act is well overdue. I would urge that this review be done as a matter of priority. Nothing is to be gained by leaving such an important area of tax legislation, essentially in the form it was, when introduced in 1971, thirty years ago, and substantially unchanged over the years.

If, however, I am wrong in the reasoning as to the application of the provisions in paragraph 4 & 6 of the First Schedule, I would still hold that in light of the persuasive authorities provided by the House of Lords in **Ramsay, Furniss, Craven and Griffin,** that on a proper construction of the First Schedule, and on an application of the principles enunciated in the line of authorities, the appeal ought to be allowed. It seems to me that counsel for the Respondent's first substantive line of opposition to the Appellant's case is: "Appellant is not within the exemption because (a) on a narrow construction of the exemption, the "exchange" per se, does not come within the four corners of the enactment; and (b) the exemption requires that there be an actual reconstruction and there has not been. The 'as if' in paragraph 6(1), cannot begin to apply, unless there has been a 'reconstruction'". If this argument does not succeed, Respondent then says that the court has a right to look behind the mere words/documents of the Appellant, and to consider whether Appellant's act is a "sham" or artificial transaction. Even if the transaction is not such, the court, under the emerging principles of adapting a more critical focus on actual transactions, may enquire whether the transaction is one of a series which together form a "composite transaction", the effect is to avoid tax, and one intermediate step in which has "no commercial purpose". I am satisfied that, having reviewed the cases, the exchange which is sought to be taxed in this case, does not fit within the criteria laid down and explained in the cases. In the first place, it has been conceded that there were two (2) transactions which took place in 1999 which have relevance to this case, but the Appellant was only involved in one (1). In so far as the question is as to whether the

exchange is a "sham", I hold it is not, and adopt the reasoning of Lord Wilberforce when he says:

> It is for the fact-finding commissioners to find whether a document, or a transaction, is genuine or a 'sham'. In this context to say that a document or transaction is a 'sham' means that while professing to be one thing, it is in fact something different. To say that a document or transaction is genuine, means that, in law, it is what it professes to be, and it does not mean anything more than that. **(Ramsay, [1982] A.C. 300 at 323-324).**

My point of departure in this analysis is the **Duke of Westminster** case, the authority for saying that the taxpayer is only liable to tax on the clear words of the statute and not on the perceived intention of the legislature. As was stated in that case:

> "Apart, however, from the question of contract with which I have dealt, it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "The substance of the matter," and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine give its quietus, the better it will be for the all concerned, for the doctrine seems to involve substituting "the incertain and crooked cord of discretion" for "the golden and straight metwand of the law." (I) Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however, unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable." **(per Lord Tomlin in IRC v Duke of Westminster [1936] AC page 1 at pages 19-20**.

The validity of the approach in **Westminster**, was affirmed by Lord Greene MR in *IRC v Wesleyan and General Assurance Society [1946] 30 T.C. 11 at page 16* where he said:

> In dealing with Income Tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of

> those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable. It is sufficient to refer to the quite common case where property is sold for a lump sum payable by installments. If a piece of property is sold for £1,000 and the purchase price is to be paid in ten installments of £100 each, no tax is payable. If, on the other hand, the property is sold in consideration of an annuity of £100 a year for ten years, tax is payable. The net result from the financial point of view is precisely the same in each case, but one method of achieving it attracts tax and the other method does not. There have been cases in the past where what has been called the substance of transaction has been thought to enable the Court to construe a document in such a way as to attract tax. That particular doctrine of substance as distinct from form was, I hope, finally exploded by the decision of the House of Lords in the case of ***Duke of Westminster v. Commissioners of Inland Revenue, 19 T.C. 490.'***

The dictum of Lord Wilberforce in ***Ramsay***, in dealing with the effect of a series or combination of transactions, shows how these transactions ("composite transactions") are to be approached. In speaking of multiple-step transactions, he said:

> "In these circumstances, your lordships are invited to take, with regard to schemes of the character I have described, what may appear to be a new approach. We are asked, in fact, to treat them as fiscally a nullity, not producing a gain or loss. Counsel for **Ramsay** described this as revolutionary, so I think it opportune to restate some familiar principles and some of the leading decisions to show the position we are now in. 1.A subject is only to be taxed on clear words, not on "intendment" or on the "equity" of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle. What are "clear words" is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Acts as a whole, and its purpose may, indeed should, be regarded: See ***I.R.C. v Wesleyan & General Assurance Society [1946] 2AllER 749 at 751.*** The relevant Act in these cases is the Finance Act of 1965, the purpose of which is to impose tax on gains, less allowable losses, arising from disposals. 2. A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect. 3. It is for the fact-finding commissioners to find whether a document, or a transaction, is genuine or a 'sham'. In this context to say that a document or transaction is a 'sham' means that while professing to be one thing, it is in fact something different. To say that a document or transaction is genuine, means that, in law, it is what it professes to be, and it does not mean anything more than that. I shall return to this point. 4. Given that a

> document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of **Inland Revenue Commrs. v Duke of Westminster [1936] AC 1, 19 Tax Cases 490**. This is a cardinal principle but it must not be overstated or over-extended".

I take this to mean that the principle articulated by Lord Tomlin in **Westminster** as to the approach to construction of taxing statutes, is still good law. If that is so, then the role of this court remains, the construction of the statute. It is clear that **Ramsay** sought to circumscribe the perceived breadth of **Westminster**. The **Dawson**, **Furniss** and **Burmah Oil** reasoning and decisions represent a restatement and further refinement of the **IRC v Duke of Westminster** case, and applicable to what has occurred in this instant case. As Patten J. noted in **Griffin**, at page 1036: "The beginnings of a recognition that even Ramsay did not leave the Westminster decision untouched can be found in Lord Diplock's speech in **Burmah Oil** (54 T.C. 200 at page 214) where he had warned:

> "It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax avoidance schemes to assume that Ramsay's case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of liability to tax which in the absence of these particular steps would have been payable. The difference is in the approach".

Thus Lord Wilberforce was able to state in **Ramsay (W.T.) Ltd v Inland Revenue Commissioners [1982] 300**, at page 323-324:-

> "If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing ... to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded... For the commissioners considering a particular case it is wrong, and an unnecessary self limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams', from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is. They are not... bound to consider individually each separate step in a composite

the decision was Ramsay and the criteria for the application of the Ramsay doctrine were those enunciated by Brightman.'"

In **Griffin**, it was held that although the first and fourth of the above conditions were present, the findings of fact did not support the second and third conditions, and the Crown therefore could not succeed. Further, it was also held in Griffin that:

"the test laid down which required the insertion of steps with no commercial purpose apart from the avoidance of a liability to tax was exhaustive and a necessary pre-condition for the application of the principle of fiscal nullity. There was not some underlying or residual principle which could apply to transactions of the kind in the instant case which had a clear commercial purpose......The court has a limited power in appropriate cases to reconstruct a series or sequence of transactions which are indissolubly linked and which comprised a pre-ordained series of transactions, or one single composite transaction and inserted steps which had no commercial purpose apart from the avoidance of tax. Outside those limitations, the principle of fiscal nullity could not be applied so as to convert genuine transactions such as the two options into something quite different. To do so would..............violate the principle that the court could not go behind the transactions and search for some supposed underlying substance which as a matter of ordinary legal analysis, they did not possess."

I come to the view finally, that even if in this case there were the elements of the test articulated by Brightman above in the circumstances of a concatenation of transactions, it is not axiomatic that a taxable result follows. Parker L.J., in his extremely well-reasoned decision in **Craven**, in commenting obiter on the passage from Lord Diplock quoted above at page 41, made the point that views of his Lordship were of importance for three reasons. (1) It defined the subject matter to which the new approach in **Ramsay** is to be applied; (2) it states that the difference in approach does not involve over-ruling any other decision of the House of Lords; (3) it accepts specifically Lord Tomlin's dictum in the Duke of Westminster case, but states that the new approach does involve recognizing that the dictum is silent or at least nearly silent as to its scope or ambit. He then adds:

It is important to realize that Lord Diplock was not saying that, given these elements, the tax which the inserted steps are designed to avoid is payable. He was saying only that, given those elements, it is a proper case for the new approach. That approach is one in which one must look for the real gain or loss. In my view, he could not have been going further than I have indicated, for ultimately, the question is one of construction of a taxing Act and, previous decisions not being over-ruled, they as well as the Ramsay principle must be applied. He cannot therefore have been saying that, given the elements mentioned, the result follows whatever the language.

In the circumstances I would be prepared to hold that even if the exchange were one of a series of transactions which were to be viewed as a single composite transaction, on the view that I take of the proper construction of the statutory provisions under question, that the appeal should be allowed and the tax repaid to the Appellant with interest consistent with the provisions of the Act.

Costs of the Appeal are also awarded to the Appellant.

So Ordered.

> "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. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawson's to Wood Bastow. It did not in **Ramsay**. Secondly there must be steps inserted which have no commercial {business} *purpose* apart from the avoidance of a 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 them look at the end result. Precisely how the end result. would be taxed, will depend on the terms of the taxing statues sought to be applied."

This quotation from the judgment of Lord Brightman in the **Furniss v Dawson** case is very useful and I find it of great assistance in seeking to determine the issues which are before this court. I shall return to this thought later.*******

In looking at the judgment of Parker L.J. in the Court of Appeal in the **Carven v White** decision, I find his concluding summary also very useful. It is clear that the effect of the Ramsay and Dawson decisions was to impose some limitations upon the strictness of the Duke of Westminster holdings. It is also clear that the court is able to look at separate transactions in a composite transaction to see whether a tax liability arises. However, I would quote from the judgment of Parker L.J. on page 451 of the Appeal Cases Report, where he states the following:

> "That for the commissioner to determine the fiscal end result of a series of transactions and then apply the statutes is a process which involves determining that a taxable transaction has occurred before looking at the language of the statutes instead of seeing whether and which words of the statutes can fairly be read as applying to what has taken place".

While Mr. Mahfood did not cite this particular section of the Court of Appeal judgment, I understand him to say two things: firstly, that if there are a series of transactions then one must first look at each discreet transaction to see whether it is covered by the statutory provision, rather than looking at the end of the transaction to see whether one might discern an intendment for the results to be subject to tax. Secondly, I understand him to say that in any event in this case the Appellant was only involved in a single transaction which was the exchange of shares for debentures. Counsel for the Appellant purported to

It would seem that, certainly among the majority in the House of Lords, there was a view which seemed to be consistent with maintaining the essential integrity of the **IRC v Duke** of Westminster decision, and subjecting the possibility of any erosion of that doctrine and extension of Dawson to the closest of scrutiny. At this stage, I could put it no higher than that.

The Appellant also cited in support of its appeal, the later case of **Griffin (Inspector of Taxes) v Citibank Investment Ltd. [2000] Simons Tax Cases**, page 1010. In that case, the taxpayer company purchased from another company within its group, two options, a capped call option and a floored put option. The return on the options was linked to the FTSE 100 Index such that a greater or lesser amount would be payable on the exercise of the call option and the put option respectively depending on the movement of the FTSE 100 Index, although the combined amount payable to the taxpayer on the simultaneous exercise of the options would always be a pre-determined sum consisting of the purchase price and an additional amount. The taxpayer had capital losses and the aim in entering into the transactions was to realize a capital gain. The Revenue took the view that taken together the options constituted a single composite transaction which was not a qualifying option within Section 128 of the Taxation of Chargeable Gains Act 1992, but a loan, and that the return therefrom, namely the additional sum which represented a sum of money for the use of the purchase price, fell to be taxed as profits or gain arising from loan relationships. It therefore raised assessments under Schedule D (income form trade), for the years 1994-1996 inclusive. The taxpayer appealed the assessments contending firstly, that each option was a separate transaction and a qualifying option and that the two options should not be treated, as a single composite transaction was a qualifying option within the meaning of Section 128. The special commissioners allowed the appeal of the taxpayer, holding that the two option contracts did not constitute a composite transaction.

They found that the purchase of the option was far removed from the scheme to which the principle of fiscal nullity had been intended to apply. There had been no artificial steps which could be subsequently disregarded for tax purposes. The Revenue appealed

> transaction intended to be carried through as a whole… the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions."

The principles to be drawn from the line of cases, is spelt out in the judgment of Patten J. in the **Griffin v Citibank** where for the Crown to succeed, it was necessary for the two options to be treated as a single composite transaction. In particular I should refer to page 1037 paragraphs 32 and 33 where he deals with the ability of the court to treat a number of transactions as a single composite transaction. I quote below from a section of Patten J's judgment set out at page 1037 of the **Griffin** case, where he adopts the reasoning of Lords Oliver and Brightman.

> "For the moment, I shall confine myself to what needs to be proved in order to make a finding that two or more transactions should be treated as composite for these purposes. It was common ground before me that the correct test is that set out by Lord Oliver in his speech in Craven. This case involved schemes similar in nature to that considered in Furniss v Dawson, and the only issue for decision was whether the transactions involved did or did not fall to be treated as composite having regard to the likelihood of each scheme being carried through to its conclusion In **Furniss v Dawson [1984] STC 153 at 166, 184 A.C. 474 at 526**, Lord Brightman had emphasized that no distinction was to be drawn between a series of steps followed through by virtue of an arrangement falling short of a binding contract and a like series of steps which the parties were contractually bound to follow. But in order to apply Ramsay to the first type of case there are, according to the decision in **Craven v White** four essential requirements to satisfy (see [1988] STC 476 at 507, 1989 A.C. 398 at 514-515 per Lord Oliver:
>
> > 'As the law currently stands, the essentials emerging from Furniss v Dawson appear to me to be four in number: (1) that the series of transactions was, at the time when the intermediate transaction was entered into, pre-ordained to produce a given result; (2) that that transaction had no other purpose than tax mitigation; (3) that there was at the time no practical likelihood that the pre-ordained events would not take place in the order ordained so that the intermediate event was not even contemplated practically as having an independent life; and (4) that the pre-ordained events did in fact take place. In these circumstances, the court can be justified in linking the beginning with the end so as to make a single composite whole to which the fiscal results of the single composite whole are to be applied. I do not, for my part, think that **Dawson** goes further than that. The intellectual basis for