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Case No: A3/2020/0965

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mrs Justice Andrews and Upper Tribunal Judge Poole
[2020] UKUT 62 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2021

Before:

LORD JUSTICE NEWEY
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- -

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
(1) PETER FISHER **(2) STEPHEN FISHER** **(3) ANNE FISHER**	**Respondents**

- -
- -

Mr David Ewart QC, Mr Oliver Conolly, Mr Brendan McGurk and Ms Barbara Belgrano (instructed by **General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**
Mr Philip Baker QC and Mr Rory Mullan QC (instructed by **Sharpe Pritchard LLP**) for the **Respondents**

Hearing dates: 6-8 July 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Wednesday 06 October 2021 at 10:30am

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Lord Justice Newey:

1. Over the years, the Fisher family built up a betting business which, from 1988, was run through a company, Stan James (Abingdon) Limited ("SJA"). In 2000, SJA sold much of its business to Stan James Gibraltar Limited ("SJG"). The present appeal concerns assessments to tax made on Stephen Fisher, his wife Anne and their son Peter pursuant to the transfer of assets abroad ("TOAA") code now to be found in chapter 2 of part 13 of the Income Tax Act 2007 on the basis that they had "power to enjoy" income of SJG. Stephen Fisher, Anne Fisher, Peter Fisher and his sister Dianne were the only shareholders of both SJA and SJG. For convenience, and without any disrespect, I shall refer to the members of the Fisher family simply as "Stephen", "Anne", "Peter" and "Dianne" in this judgment.

Basic facts

2. The Upper Tribunal ("the UT") helpfully summarised the facts as found by the First-tier Tribunal ("the FTT") in paragraphs 3-24 of its own decision. This section of this judgment is taken very largely from that summary.

3. While Anne has Irish nationality, both she and Stephen are and were at all material times resident and ordinarily resident in the UK. Peter was resident in the UK until about July 2004, as had Dianne been until about February 2000.

4. The Stan James business consisted, over time, of one or more betting shops in the UK, the taking of bets over the telephone ("telebetting") and, more recently, internet betting.

5. Stephen, Anne, Peter and Dianne became the only directors of SJA. In practice, Stephen dealt with the shops and administration and had overall responsibility for the company. He and Peter were responsible for the day-to-day running of the business and formulating future planning, and they provided the majority of input to decisions. Dianne worked on accounts administration for the telebetting side of the business. Anne had virtually nothing to do with the business from 1996 onwards and played no active part in the company's decision-making.

6. At first, each betting shop took its own telebets, but in 1992 SJA centralised its telebetting operations. It subsequently developed its own call centre software. In 1994, Peter became solely responsible for the telebetting business, which was becoming increasingly important. In 1996, SJA bought a new building to expand this strand of the business. By 1999, telebetting accounted for a major part of SJA's business.

7. Betting duty was charged on bets placed with SJA in accordance with the Betting and Gaming Duties Act 1981 ("the BGDA"). In 1999, UK betting duty was charged at a rate of 6.75% on the amount staked. On horse racing bets an additional levy of 1% had to be paid to the Horserace Betting Levy Board. It was common practice for bookmakers to incorporate the betting duty into the price that they charged, or the odds that they offered, to their customers. Typically, a bookmaker would levy a surcharge of 9% on each bet, which he would use to account for the duty, keeping the balance. Alternatively, customers might be given the option of having the 9% deducted from their total returns, meaning that, for example, for every £100 wager only £91 was placed, thereby reducing any winnings. On certain types of bet, a bookmaker might decide not to levy a surcharge, as SJA did for forecast and tricast bets. In that event, the bookmaker would bear the cost of the duty.

8. In 1999, a small minority of SJA's customers (about 3%) were responsible for 55-60% of its turnover. They would place between 25 and 50 bets per week and reinvest the winnings. The 9% surcharge was particularly relevant for such customers. Other than making sure that they were using a reputable bookmaker, there was little customer loyalty. If customers could bet more cheaply elsewhere, they would switch.

9. Until 2001, general betting duty was charged under section 1 of the BGDA on any bet "made with a bookmaker in the United Kingdom otherwise than by way of pool betting or coupon betting". It was legally possible for a bet to be placed by a UK

customer overseas without a liability for UK betting duty arising. However, whilst it was not unlawful for overseas bookmakers to accept bets placed abroad by UK customers, the regime made it difficult for them to attract a UK customer base. They were prohibited from advertising in the UK and from sharing resources with an entity based in the UK. Section 9 of the BGDA provided:

> "(1) Any person who –
>
> (a) conducts in the United Kingdom any business or agency for the negotiation, receipt or transmission of bets to which this section applies, or
>
> (b) knowingly issues, circulates or distributes in the United Kingdom, or has in his possession for that purpose, any advertisement or other document inviting or otherwise relating to the making of such bets, or
>
> (c) being a bookmaker in the United Kingdom, makes or offers to make any such bet with a bookmaker outside the United Kingdom,
>
> shall be guilty of an offence.
>
> (2) Except as mentioned in subsection 3 below, this section applies to –
>
> …
>
> (b) all bets made with a bookmaker outside the United Kingdom (whether or not made by way of pool betting or coupon betting)."

10. In 1997, SJA decided to set up a branch office in Gibraltar. The decision was prompted by the acquisition of a loss-making postal betting operation which was taking bets on German football games. SJA decided that this business might be run profitably from an offshore jurisdiction which charged little or no betting duty. Stephen and Peter eventually settled on Gibraltar, which charged only 1% betting duty. On about 1 October 1997, Peter met the Gibraltar Finance Minister, and it was decided that a branch could be used.

11. Stephen and Peter met representatives of HM Customs & Excise ("HMCE") before the decision was implemented. HMCE stipulated that there should be no UK advertising and that SJA should put in place controls to ensure that UK residents could not use the service. SJA agreed to this.

12. The branch's Gibraltar betting licence became operational on 1 April 1998. It took bets from non-UK customers over the telephone. Initially, it had only 6 employees.

13. After the branch was up and running, HMCE queried whether a separate legal entity was required. This appeared to be a change of position. There was an exchange of correspondence on the subject between HMCE, Stephen, and SJA's accountants,

James Cowper, with the latter expressing the view that duty would not be payable where a bet was placed with the Gibraltar branch by a person outside the UK.

14. On 2 November 1998, HMCE wrote to James Cowper in these terms:

> "General betting duty is charged on off-course bets made with a bookmaker in the United Kingdom …. 'Made' must refer to the bookmaker entering into a wagering contract. Where the contract is made is a question of fact ….
>
> In this case your client appears to have two places of business, one in the UK and one in Gibraltar. The latter has effectively been established as a separate trading entity. Having established a separate branch in Gibraltar it will be a question of fact as to whether punters are placing bets with that branch. Any such bets placed with that bookmaker will not incur a liability to general betting duty.
>
> For the sake of completeness I would point out that there are restrictions relating to overseas betting. These are contained in section 9 of the Betting and Gaming Duties Act 1981 …. You may wish to bring these to your client's attention if he is not already aware of them."

15. It was Stephen's understanding that a bet was not liable to duty if struck outside the UK and that the place where a bet was struck depended on where the bet was entered into the database. However, he was concerned about HMCE's apparent suggestion that the directors of SJA would be breaking the law if they operated the business in Gibraltar through a branch.

16. In March 1999, the established bookmaker Victor Chandler, which was a direct competitor to SJA with an operation of similar size, moved its entire telebetting business to a company incorporated in Gibraltar for that purpose. The move was widely reported and caused shockwaves through the UK betting industry. Once UK resident customers found out that it was possible to place a bet in Gibraltar and pay a much lower surcharge, they flocked to take advantage of this option. Victor Chandler's competitors reacted by taking steps to move their own UK telebetting operations overseas. Within nine months, there was no major telebetting operator left in the UK.

17. By July 1999, it had become clear to Stephen that advances in technology meant that it was no longer going to be possible for the UK government to prevent overseas bookmakers from taking bets from UK customers on terms which undercut those offered by UK bookmakers. In practice, unless the rate of duty payable in the UK were changed, the only way in which to save the Stan James business would be to move it to Gibraltar. As vice chairman of the bookmakers' trade association, Stephen became involved in lobbying for the rate of duty to be changed. He also discussed with Peter the reality that they would have to take bets from UK residents in Gibraltar. On 7 July 1999, Stephen wrote to HMCE informing them:

> "we are unable to continue our voluntary undertaking not to accept business from UK residents at our Gibraltar office …. Our moving to Gibraltar will not only mean the loss of £3.5 million in GBD, but also a decline in horserace levy, corporation tax, income tax contributions and the loss of 45 jobs. We strongly urge you to convey our feelings to your Minister…"

18. Stephen believed that UK sourced bets would need to be taken by a separate legal entity rather than through a branch. On 15 July 1999, Peter resigned as a director of SJA and, seven days later, SJG was incorporated in Gibraltar on Peter's instructions. On 3 August 1999, the four members of the Fisher family acquired all SJG's shares between them. Stephen and Anne each owned 47 shares (approximately 37.9% of the issued shares) and Peter and Dianne each owned 15 shares (approximately 12.1% of the issued shares). Peter was appointed as a director on 2 August 1999.

19. Meanwhile, in mid-July 1999, the High Court had ruled that Victor Chandler's advertisement of its Gibraltar operations on teletext was lawful. The decision was reversed by the Court of Appeal in February 2000, but in the intervening period Victor Chandler's competitors, including SJA, had also used teletext to advertise their operations in Gibraltar. SJA's branch began to accept bets placed by UK based customers and its business expanded to such an extent that it had to engage more staff, mainly to operate the telephones. By the time of the transfer of the business, there were between 22 and 24 staff in the Gibraltar office.

20. In August 1999, James Cowper, on behalf of SJA, sought advice from David Oliver QC on the implications of the High Court judgment in the Victor Chandler case and whether it could apply to SJA given that, unlike Victor Chandler which had incorporated a separate company, it operated through a branch in Gibraltar. Mr Oliver referred to the statutory prohibitions in section 9 of the BGDA and expressed the view that, to be sure of compliance, it was desirable to achieve as clean and clear a separation as possible between the UK aspects of SJA's betting operations and those conducted offshore. The most efficacious structure would be to conduct the offshore betting operations through a corporate entity entirely separate from the UK company. Mr Oliver went on to warn that, if SJA continued to operate under its present structure and extended its operations to UK residents, it would expose SJA and its directors to serious risks of infringement of the section 9 provisions and criminal sanctions.

21. At first, it was intended to transfer to SJG just the business conducted by the Gibraltar branch, but on 10 January 2000 it was decided that the remainder of SJA's existing telebetting operation and its other activities (except for its 12 shops) should also be transferred. A consultation with Mr Oliver was arranged for 20 January 2000, when further advice was sought on, among other things, draft sales and management agreements between SJA and SJG. It was decided that the whole of SJA's telebetting business would be transferred to SJG with effect from 29 February 2000. Separate advice was taken from Kevin Prosser QC on the direct tax implications of the proposed structure of the transfer. Independent valuers were instructed to value the business to be transferred, and lawyers in the UK and Gibraltar were instructed to carry out the transfer.

22. On 3 February 2000, Dianne resigned as a director of SJA. On 24 February 2000, SJG's share capital was increased to 50,000 shares of £1 and Dianne was appointed a director of the company, as were others who were not family members. Stephen resigned as a director of SJG with effect from 3 August 1999, but the Fisher family remained the sole shareholders. As at the date of the transfer of the business, Stephen and Anne each still held just less than 38% of the shares of SJA and Peter and Dianne each held just over 12%; as regards SJG, Stephen and Anne each held 26% of the issued share capital and Peter and Dianne each held 24%.

23. The agreement giving effect to the sale and transfer of the business between SJA and SJG was signed in early March 2000 by Stephen as duly authorised director on behalf of SJA, and by Peter as duly authorised director on behalf of SJG. The sale took place at the market value determined by the independent valuers. The business sold by SJA included the telebetting operation located at its premises in Abingdon, and the Gibraltar branch. Apart from book debts and cash, the transferred assets included a database of 30,000 names, a teletext facility, and four Freephone numbers. SJG began trading on 1 March 2000 and went into profit almost immediately. Between 25 and 30 staff and their families were relocated from SJA's operations in the UK to work for SJG. SJA's existing customers would have to call a new Freephone number and open a new account to bet with SJG.

24. SJG paid all taxes to which it was subject under Gibraltar law. From 2003 onwards, it developed internet betting and gaming platforms. In the course of 2003, SJG became the parent company of SJA (acquiring 51% of its issued share capital) and, in February 2009, it was re-registered as Stan James plc. SJA had continued with its other business streams until October 2001, when the UK betting duty regime changed and it became possible for UK bookmakers to compete with offshore bookmakers in taking telebets. Subsequent to the change, SJA re-established its own UK telebetting operation. In December 2008, Peter and Dianne bought their parents' shares in SJG.

25. Stephen, Anne and Peter were assessed by HMRC as liable to income tax on the profits of SJG for the years of assessment from 2000-2001 to 2007-2008 inclusive, on the basis that they were subject to charge under section 739 of the Income and Corporation Taxes Act 1988 ("ICTA") and section 720 of the Income Tax Act 2007. The amount of the charge in each case was based on an apportioned allocation between tax years of SJG's profits (which were accounted for on a calendar year basis) and allocation between Stephen, Anne and Peter by reference to their respective shareholdings in SJG (such that, in total, 76% of SJG's apportioned profit was allocated to them).

26. Stephen, Anne and Peter all appealed against their assessments. The FTT (Judge Swami Raghavan and Mrs Shahwar Sadeque) allowed Anne's appeals on the basis that the TOAA code was not compatible with European Union law rights which she enjoyed as an Irish citizen. The FTT also concluded that the assessments on Stephen and Anne for 2005-2006 and 2006-2007, and that on Peter for 2002-2003, were defective. Stephen and Peter's appeals were otherwise dismissed, however.

27. HMRC and the Fishers all appealed. The UT (Andrews J and Judge Poole) held that the TOAA code was not engaged at all and that, even if it had been, the Fishers would all have had available to them the motive defence formerly to be found in section 741 of ICTA. The UT further considered that both Anne and Stephen could invoke article

49 of the Treaty on the Functioning of the European Union. The Fishers' appeals were therefore allowed. The UT differed from the FTT on whether the assessments on Stephen and Anne for 2005-2006 and 2006-2007 were defective, but, given its conclusions on other issues, this did not matter. HMRC had not appealed against the FTT's determination that the assessment on Peter for 2002-2003 was invalid.

28. HMRC now challenge the UT's decision in this Court. The Fishers, in contrast, contend that that decision should be upheld both for the reasons the UT gave and on additional grounds.

The TOAA code

29. For the most part, the domestic legislation relevant to this appeal is to be found in chapter III of part XVII of ICTA, comprising sections 739-746. In 2007, those sections were superseded by chapter 2 of part 13 of the Income Tax Act 2007, but it was common ground before us that the 2007 Act did not alter the law in any relevant way and the parties therefore referred to the ICTA provisions in their submissions. I shall do the same in this judgment.

30. As its heading states, chapter III of part XVII of ICTA is concerned with "transfer of assets abroad". Section 739, which is headed "Prevention of avoidance of income tax", provides for circumstances in which income of a person resident or domiciled outside the UK is deemed to be income of an individual ordinarily resident in the UK who has "power to enjoy" the other person's income. So far as material, section 739 provides:

> "(1) Subject to section 747(4)(b), the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.
>
> (1A) Nothing in subsection (1) above shall be taken to imply that the provisions of subsections (2) and (3) below apply only if—
>
> (a) the individual in question was ordinarily resident in the United Kingdom at the time when the transfer was made; or
>
> (b) the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer was effected.
>
> (2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in

> the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.
>
> (3) Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment of which is in any way connected with the transfer or any associated operation, any income which, by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, has become the income of a person resident or domiciled outside the United Kingdom shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts ….”

Subsection (1A) was inserted by the Finance Act 1997.

31. Section 740 of ICTA is derived from the Finance Act 1981 and provides, as its heading says, for "Liability of non-transferors". As section 740(1) explains, the section has effect where:

> "(a) by virtue or in consequence of a transfer of assets, either alone or in conjunction with associated operations, income becomes payable to a person resident or domiciled outside the United Kingdom; and
>
> (b) an individual ordinarily resident in the United Kingdom who is not liable to tax under section 739 by reference to the transfer receives a benefit provided out of assets which are available for the purpose by virtue or in consequence of the transfer or of any associated operations".

32. Section 741 of ICTA limits the application of sections 739 and 740 by providing for a motive defence. It states:

> "Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either—
>
> (a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or
>
> (b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation.

> The jurisdiction of the Special Commissioners on any appeal shall include jurisdiction to review any relevant decision taken by the Board in exercise of their functions under this section."

33. Section 742 of ICTA both specifies when an individual is to be deemed to have "power to enjoy" income of a person resident or domiciled outside the UK and defines the expression "associated operation". By section 742(1), "an associated operation" means:

> "in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets".

Section 742 further provides, in subsection (9), as follows:

> "For the purposes of sections 739 to 741—
>
> (a) a reference to an individual shall be deemed to include the wife or husband of the individual;
>
> (b) *'assets'* includes property or rights of any kind and *'transfer'*, in relation to rights, includes the creation of those rights;
>
> (c) *'benefit'* includes a payment of any kind;
>
> …
>
> (e) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligations of any other person to whom, those assets, that income or those accumulations are or have been transferred."

34. Section 743 of ICTA contains supplemental provisions. By subsection (2):

> "In computing the liability to income tax of an individual chargeable by virtue of section 739, the same deductions and reliefs shall be allowed as would have been allowed if the income deemed to be his by virtue of that section had actually been received by him."

35. Like section 740, section 744 of ICTA, headed "No duplication of charge", can be traced back to the Finance Act 1981. It is in these terms:

> "(1) No amount of income shall be taken into account more than once in charging tax under the provisions of sections 739 and 740; and where there is a choice as to the persons in

> relation to whom any amount of income can be so taken into account—
>
> (a) it shall be so taken into account in relation to such of them, and if more than one in such proportions respectively, as appears to the Board to be just and reasonable; and
>
> (b) the jurisdiction of the Special Commissioners on any appeal against an assessment charging tax under those provisions shall include jurisdiction to review any relevant decision taken by the Board under this subsection.
>
> (2) In subsection (1) above references to an amount of income taken into account in charging tax are—
>
> (a) in the case of tax which under section 739 is charged on income, to the amount of that income;
>
> (b) in the case of tax charged under that section by virtue of section 743(5), to an amount of the income out of which the benefit is provided equal to the amount or value of the benefit charged;
>
> (c) in the case of tax charged under section 740, to the amount of relevant income taken into account under subsection (2) of that section in charging the benefit."

36. To a great extent, chapter III of part XVII of ICTA replicates section 18 of the Finance Act 1936 and, later, chapter IV of part XVIII of the Income Tax Act 1952 and then chapter III of part XVII of the Income and Corporation Taxes Act 1970.

The issues

37. The issues to which this case gives rise can be summarised as follows:

i) The transfer of the business having been effected by SJA rather than Stephen, Anne and Peter personally, was the TOAA code engaged at all? ["The Quasi-Transferor Issue"]

ii) Must income tax have been avoided for the TOAA code to apply? ["The Actual Avoidance Issue"]

iii) Was the motive defence available? ["The Motive Defence Issue"]

iv) Was the TOAA code compatible with European Union law and, if not, is it open to Stephen and Peter as well as Anne to rely on the breach? ["The EU Law Issue"]

v) Was some of SJG's income too remote from the transfer of the business to be the subject of a charge? ["The Remoteness Issue"]

vi) Were the assessments on Stephen and Anne for 2005-2006 and 2006-2007 defective having regard to the requirements of section 29 of the Taxes Management Act 1970 ("the TMA")? ["The Discovery Issue"]

The Quasi-Transferor Issue

38. The Fishers' case, which the UT accepted, is that, not having effected the transfer of the business to SJG personally, the TOAA code was not engaged and they could not be charged to tax. HMRC, however, contend that the TOAA code extends to what have been called "quasi-transferors" and that the transfer to SJG can be imputed to Stephen, Anne and Peter.

Case law

39. The earliest of the cases to which we were referred on this issue was *Lord Howard de Walden v Inland Revenue Commissioners* [1941] 1 KB 389. There, Lord Greene MR, giving the judgment of the Court of Appeal, said at 397 of section 18 of the Finance Act 1936 that it was a "penal" provision and that "its consequences, whatever they may be, are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest". Much later, but in a similar vein, Hoffmann J described what had become section 478 of the Income and Corporation Taxes Act 1970 as a "broad spectrum anti-avoidance provision which should not be narrowly or technically construed": see *Inland Revenue Commissioners v Brackett* [1986] STC 521, at 539.

40. *Congreve v Inland Revenue Commissioners* (1948) 30 TC 163 ("*Congreve*") arose out of complicated transactions as a result of which Mrs Congreve, who was ordinarily resident in England, acquired "power to enjoy", within the meaning of section 18 of the Finance Act 1936, the income of a number of foreign companies. Assessments to income tax which the Inland Revenue made under section 18 were challenged by Mrs Congreve on, among others, the basis that "a transfer was not within the mischief of the Section unless it was a transfer by the individual whom it was sought to charge with tax or by his agent" (to quote from Upjohn LJ's judgment in the Court of Appeal, at 195). Wrottesley J rejected at 186 the Revenue's contention that "all you have to do is to find a person ordinarily resident in the United Kingdom with power to enjoy income of a person outside the United Kingdom, then look and see if he got that power by a transfer", but considered that "a person who, by owning all or practically all of the capital of an investment company, is able to bring about such a transfer as is referred to in the Section, is for the purposes of such a Section, a person who has avoided tax by means of a transfer". On appeal, the Court of Appeal, disagreeing in this respect with Wrottesley J, held that section 18 could apply regardless of whether the relevant transfer had been made by or on behalf of the individual whom it was sought to charge to tax. However, Cohen LJ, giving the judgment of the Court, went on at 197:

> "But even if we were prepared to accede to the argument that the preamble connoted activity by the individual concerned, we think this condition would be fulfilled if the execution of the transfer were procured by the individual concerned, even though it was not actually executed by him or his agent. [Counsel for Mrs Congreve], in commenting on the judgment

> of the learned Judge in the Court below, said, and [counsel for the Crown] agreed, that execution by a company could not be said to be execution by the individual, even though the individual owned all or practically all the shares in the company. We think, however, that the decision of the learned Judge can be upheld on the ground we have stated, since it is, we think, in the present case, a reasonable inference from the facts found that the execution and performance of the transfers and associated operations in question by all the companies concerned were procured by Mrs. Congreve acting through her agent Mr. Glasgow. We should have been prepared, if it had been necessary, on this alternative ground to uphold the decision of the Commissioners."

41. One of Mrs Congreve's arguments had been that she could not be taxed on the income of a company referred to as "Humglas" because the only transfer of assets to Humglas had been by a company referred to as "Humphreys & Glasgow (England)" (see 195). The transfer in question must have taken place in December 1933 or at the very end of November since paragraphs 5 and 9 of the case stated record that Humglas was incorporated on 29 November 1933 and Humphreys & Glasgow (England) sold its foreign investments to Humglas "in 1933". It can also be seen from paragraph 5 of the case stated that in November and December 1933 Mrs Congreve held, via a company referred to as "Humphreys & Glasgow (Canada)", 65,000 of the 100,000 issued shares of Humphreys & Glasgow (England), the other 35,000 shares being held as to 28,083 by her father and the remaining 6,917 by "Other shareholders". It follows that the Court of Appeal did not think that the fact that Mrs Congreve had only a 65% interest in Humphreys & Glasgow (England) prevented that company's transfer of assets to Humglas from being one of "the transfers … procured by Mrs. Congreve acting through her agent Mr. Glasgow".

42. When *Congreve* reached the House of Lords in 1948, Lord Simonds at 204, giving the only reasoned speech, "agree[d] at all points" with the Court of Appeal's judgment on the question "whether the transfer of assets, upon which either alone or in conjunction with associated operations the liability is founded, must be … a transfer effected by Mrs. Congreve or her agent or may be … effected by anyone, father, friend, or company in which she has an interest great or small, so long as the result is reached that she has power to enjoy the relevant income". Lord Simonds explained at 205 that it had been suggested during argument that limiting words such as "effected by him or by his procurement" should be written in "for it was reasonably apprehended that to read the Section as excluding a case where an individual did not himself transfer assets but procured their transfer by another would be to ignore the substance of the Legislature's intention". However, Lord Simonds saw no reason for any limiting words, and it was held that "[i]f there has been such a transfer as is mentioned in the introductory words, and if an individual has by means of such transfer (either alone or in conjunction with associated operations) acquired the rights referred to in the Section, then the prescribed consequences follow" (see 205).

43. 30 years later, in *Vestey v Inland Revenue Commissioners (No 2)* [1980] AC 1148 ("*Vestey*"), the House of Lords took a much narrower view of what for relevant purposes had become section 412 of the Income Tax Act 1952. Mr Charles Potter QC,

appearing for beneficiaries of discretionary trusts which had been established by other members of their family some years earlier, argued that section 412 should be interpreted as applying only to "the transferor, i.e., the person who made, or 'engineered,' or, having power to stop it, allowed the transfer" (see 1159). Lord Wilberforce, with whom Lords Salmon and Keith expressed agreement, concluded at 1178 that *Congreve*, "as to its principal ratio and the following cases, should be departed from or overruled and the section interpreted as applying only where the person sought to be charged made, or, may be, was associated with, the transfer". Having noted at 1174 that in *Congreve* the Court of Appeal and House of Lords had "unambiguously" rejected the contention that Mrs Congreve could not be taxed in respect of assets transferred by her father, Lord Wilberforce observed that "the fact that they accepted an alternative argument to the effect that in any case Mrs. Congreve had organised or engineered transfers by her father does not prevent their rejection of the contention from being a ratio decidendi". So understood, *Congreve* produced in the case of discretionary trusts a result which was "arbitrary, unjust, and … unconstitutional". Numerous beneficiaries could each be liable to tax on the whole income of the trustees, yet the statutory provisions "give no guidance or indication whatever as to what is to be done if there is more than one individual to whom either subsection may apply" (see 1171). "[T]he better interpretation of the section is not that accepted in *Congreve v. Inland Revenue Commissioners*", Lord Wilberforce said at 1175, "but is one limiting its operation and charging effect to the transferors of assets".

44. Viscount Dilhorne similarly considered the principal ratio of *Congreve* to be wrong, though, he said at 1185, "the actual decision of the case can be upheld on the alternative ground stated by Cohen L.J. in his judgment". For his part, Lord Edmund-Davies likewise said that "the extension of section 412 by the judgment of this House in *Congreve v. Inland Revenue Commissioners* … to beneficiaries wholly disconnected with the original transferor or transferors was erroneous". Earlier in his speech, Lord Edmund-Davies had spoken at 1192 of the "primary holding" in *Congreve* having been that section 18 of the Finance Act 1936 "applied if the transfer was procured by the taxpayer, even though not actually executed by him", adding, "So far, so good". Finally, Lord Keith explained at 1197 that he was of "the firm opinion that the principal ground of decision in *Congreve* was indeed erroneous", having observed:

> "The House also accepted an argument that in any event certain transfers had been organised or brought about by the taxpayer herself, but this ground, though capable of supporting the correctness of the actual decision on liability to tax, was plainly a subsidiary one."

45. The implications of *Vestey* fell to be considered by Walton J in *Inland Revenue Commissioners v Pratt* [1982] STC 756 ("*Pratt*"). In that case, a company referred to as "M and J" had sold some land to a Bahamian company on the basis that, if planning permission were obtained, there would be "additional advantage" to M and J's shareholders. Planning permission having been granted, and the land re-sold at a large profit, sums accrued to the benefit of discretionary settlements for the benefit of families of M and J's shareholders. The three taxpayers were, among others, beneficiaries of one such settlement and had been directors and shareholders of M and

J when the original sale was effected. However, M and J's board had had five further members, and the taxpayers held between them only 12,268 of the 42,000 issued shares.

46. The taxpayers were assessed to tax for the years 1965-66 to 1968-69 pursuant to section 412 of the Income Tax Act 1952, and the Inland Revenue sought to sustain the assessments on the strength of the passage from Cohen LJ's judgment in *Congreve* quoted in paragraph 40 above. Having himself set out the passage, Walton J said at 792:

> "So here we have it established that a person who is not a transferor may nevertheless be liable as if he were a transferor, if he 'procured' the transfer. It is convenient to use the phrase of junior counsel for the Crown and call such a person a 'quasi transferor'."

Walton J observed at 791 that in *Vestey* "the House of Lords undoubtedly overruled one of the rationes decidendi of the *Congreve* case, but apparently not the other", and he said at 793:

> "What the Special Commissioners had to decide on this topic was, quite simply, notwithstanding that the transfer was a transfer made by M and J itself, was the reality of the matter that somebody else was the real transferor? To answer that question, nobody has so far produced a better suggestion than that of 'procurement'. It may not be completely apt, but it is far nearer an apt definition than anything else which has so far been suggested."

47. Walton J concluded that the Inland Revenue's case failed both as a matter of law and on the facts. With regard to the former, he said at 793:

> "As a matter of law, it appears to me that in the case of a plurality of transferors, if it is impossible to separate out their respective interests so as to be able to say, 'the first transferor transferred A% of the interest transferred, the second B%' and so on, the series adding up to 100, I do not think s 412 bites at all….
>
> Without in any way deciding that this is indeed the position, I can well see that if A and B own an asset jointly, and transfer it abroad, then one might for this purpose be able to separate out their beneficial interests as being equal, or, if the transfer was in fact a sale, according to the division between them of the purchase money. Something of the sort might even be possible in the case of quasi transferors, where two or three of them own the company which makes the transfer, but where it is not possible to do just that, s 412 does not bite at all."

48. Walton J identified two particular difficulties with the Inland Revenue's case. First, "the section provides no machinery whatsoever for attributing anything less than the

whole of the income referred to to any transferor" (793). Secondly, Walton J considered that section 412(3) (containing the motive defence) threw "another spanner into the works" in the context of a single transfer with multiple transferors. He said at 795:

> "There is a single transfer. That transfer was either made with the purpose or not with the purpose of avoiding liability to taxation. How could one apply that to, say, a two-transferor situation where A had the purpose of avoiding tax and B had only a simple commercial purpose? The answer of counsel for the Crown was to say that, in such a case, B should show that so far as he was concerned the purpose was a simple commercial purpose, and that will enable him to claim the benefit of that subsection. But this is not what the subsection says. It is not 'the transferor's purpose in effecting the transfer' but 'the purpose for which the transfer was effected'."

49. Walton J thus took the view that it was not possible to have a "multiple quasi transferor situation". Supposing, however, that to be wrong, he thought that the Inland Revenue failed on the facts. Mrs Congreve, he considered at 796, was a quasi-transferor "[b]ecause she could, by the exercise of her voting strength in the company, get it to do whatever she wanted". He went on:

> "How different—how very, very different—are the facts in the present case. The sale here was obviously a board matter, about which the board was duly consulted and approved. There was no question of any one of the three taxpayers in this particular case, either alone or in concert, assuming that that could be material, being able, either at board or at shareholder level, to 'procure' M and J to do anything. And, indeed, this is precisely why the submission from counsel for the Crown … adopts the words 'have a hand in' and 'associated with', which undoubtedly were used by Lord Wilberforce. But, as I have already observed, those words are not to be treated as if they were in a statute: they plainly are not.
>
> Nor, however widely one construes any wording to be found in s 412, is the substance of a person being 'associated with' or 'having a hand in' a transfer necessarily equivalent in any way to that person himself making the transfer. It may be stretching the words of the section—indeed, I think it is—to say 'la société anonyme, c'est moi', but the elastic will have snapped long before one can say, 'I had a hand in the transfer, therefore I made it', or, 'I am associated with the transfer, therefore I made it.'"

50. Although it was section 412 of the Income Tax Act 1952 which was at issue before Walton J, that provision had long since been superseded by chapter III of part XVII of the Income and Corporation Taxes Act 1970. Significant changes to that latter legislation were made by the Finance Act 1981. In the first place, section 45 of the 1981 Act imposed liability on "non-transferors" in much the terms of what

subsequently became section 740 of ICTA. Secondly, section 46 of the 1981 Act introduced provisions along the lines of the later section 744 of ICTA.

51. The TOAA code was again the subject of consideration by the House of Lords, twice, in 1996-1997. The first case was *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991 ("*McGuckian*"), to which I shall have to return later in this judgment. In the course of his speech, Lord Clyde said at 1005-1006:

> "The opening few lines of [section 478 of the Income and Corporation Taxes Act 1970] set out the purpose to be served by the enactment. That purpose is the prevention of avoidance by individuals ordinarily resident in the United Kingdom of liability to income tax by means of certain kinds of transaction. It is not required that the transaction should itself be carried out with that purpose. The statute is simply expressing the purpose of the section, not of the substance of the transaction."

52. The second House of Lords case was *Inland Revenue Commissioners v Willoughby* [1997] 1 WLR 1071 ("*Willoughby*"). It was there held that, for section 739 of ICTA to apply, a transferor had to have been ordinarily resident in the UK at the time of the transfer. Lord Nolan explained at 1076-1077:

> "The crucial words, as it seems to me, are those in subsection (1) which state that the section is to 'have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets,' coupled with the identification in subsection (2) , of 'such an individual' as the subject of liability. What can the words 'such an individual' refer to save for an individual of the kind described in subsection (1), that is an individual ordinarily resident in the United Kingdom seeking to avoid liability by means of transfers of assets? Although the point was not determined in *Vestey* [1980] A.C. 1148, the view there taken that the individual to be charged must be the individual who made the transfer seems to me to lead inevitably to the conclusion that the individual concerned must be the only type of transferor with which the section is concerned, and that is a transferor ordinarily resident in the United Kingdom. At the risk of seeming overconfident in expressing an opinion about language which has been construed in diametrically opposite senses by your Lordships' House in the past, I would say in the light of *Vestey* that this is the natural and plain meaning of the words used."

53. As, however, Lord Nolan went on to note, at 1077, Parliament had already, by section 81 of the Finance Act 1997, changed the law in respect of income arising on or after 26 November 1996. That provision inserted subsection (1A) into section 739 of ICTA, stipulating that nothing in subsection (1) is to be taken to imply that section 739(2) and (3) apply only if the individual in question was ordinarily resident in the UK at the time when the transfer was made or if the avoiding of liability to income tax was the purpose, or one of the purposes, for which the transfer was effected.

The FTT decision

54. The FTT concluded that Stephen, Anne and Peter could all be liable under section 739 of ICTA as "quasi-transferors". In the FTT's view, the introduction of section 744(1) of ICTA "put an entirely different complexion on the significance of *Pratt* and opens the door that would otherwise be shut on the possibility of the TOAA code applying to situations where there are multiple quasi transferors" (paragraph 186). "The necessity in Walton J's judgment [in *Pratt*] to separate out interests in such a way that the sum is a 100%" was, the FTT thought, "predicated on a fear that otherwise there would be double charging with no legal basis for reduction", but section 744(1) "provides precisely such a mechanism for dealing with concerns of apportionment" (see paragraphs 186 and 188). As to when a person is to be considered to have "procured" a transfer, the FTT observed in paragraph 195 that "[t]he term 'procure' is not a term which was set out in the statute and is, as Walton J put it in *Pratt*, a question of who the transferors are in reality". Here, the FTT said in paragraph 199:

> "All three appellants were directors and shareholders of SJA. Between them they had a controlling shareholding. Anne Fisher entrusted her responsibilities to Stephen Fisher and Peter Fisher and was happy to go along with their decisions. In playing an active role in achieving the transfer Stephen Fisher and Peter Fisher were not simply acting in their own capacities as directors and shareholders but were also acting under the authority of Anne Fisher in relation to her directorship and shareholder functions. We agree with HMRC the transfer was jointly procured by all three appellants. SJA was a family run business, and each of the appellants was in reality a transferor of the telebetting business."

The UT decision

55. Having noted that HMRC were contending that Stephen, Peter and Anne could be treated as "quasi-transferors" because they had "procured" SJA to make the transfer, the UT said in paragraph 64 that this was "a gloss on the statute which is nowhere to be found in the language used by the legislature" and, in paragraph 69, that the question of "procurement" did not arise on the facts of *Vestey*. While nothing had been said in *Vestey* to disapprove the subsidiary ground for the decision in *Congreve*, "in *Vestey* it was assumed that the individual who stood to benefit was actively seeking to avoid his or her liability to income tax by means of the transfer" and in *Congreve* "that was undoubtedly the situation". The UT continued in paragraph 69:

> "It is understandable why it would be accepted that such a person could not circumvent the statute by making someone else carry out the transfer. Nothing said in *Congreve* or in *Vestey* would justify putting a gloss on the interpretation of the statute to bring within its ambit someone who is not seeking to avoid a liability to income tax and whose income tax position is unaffected by the transfer."

56. In paragraph 70, the UT described the concept of "procurement" as "not particularly apt". It agreed with Walton J that the real question is "whether, notwithstanding that

the transfer was made by one person, was the reality of the matter that somebody else was the real transferor?" At paragraph 73, the UT "acknowledge[d] the force of the argument that the purpose of the statute would be substantially undermined if it did not apply in circumstances in which an individual was the architect of an income tax avoidance scheme, but the mechanics or formalities of the transfer were implemented by someone else acting on his direction and for his benefit". In most situations, the UT said, the person executing the transfer would be acting as an agent or nominee for the individual concerned, but "one can conceive of other contexts in which that individual might be in a position to direct the transferor to make the transfer – for example where the individual is a beneficiary and the transferor a trustee" and "[i]n those types of situation, even if not technically an agent, the actual transferor would simply be the instrument or means by which the transfer was brought about by the individual". While, however, "it is possible to conceive of situations in which a transfer made by a company might be treated as having been made by an individual who controls it, the company acting as a mere agent or instrument, so as to bring him or her within the purview of s.739" (paragraph 73), "[t]he judicial gloss on the word 'transfer' cannot apply to every transfer made by a company in which the individual concerned has a shareholding or is a director" (paragraph 74). "Whilst it is true in one sense that the directors of a company 'procure' the company to act in a particular way, that is not the sort of behaviour that the expression 'procure' was being used to describe in *Congreve*" and "[i]n fact, in making the decision and implementing it, the directors are acting on behalf of the company, and their actions are to be attributed to the company, not vice versa" (paragraph 77). "[A] director who is not a shareholder cannot be treated as being, in substance, the 'real' Transferor of the company's assets, and a director who is a shareholder but who does not have a controlling interest cannot be treated as the 'real' Transferor instead of the company, merely because he or she participated in the decision of the Board to agree to the sale, voted in favour, or took steps on behalf of the company to implement it" (paragraph 78).

57. The UT rejected the contention that the arrival of section 744(1) of ICTA rendered Walton J's analysis in *Pratt* inapplicable. "[T]he tail", the UT said in paragraph 89, "cannot be allowed to wag the dog in this way": the "introduction of a power to remedy a potential unfairness which would otherwise arise in consequence of the operation of the charging provisions of the statute, whereby tax would otherwise be payable on all the income of a non-resident transferee by each UK taxpayer among a group of people who has the power to enjoy some of that income (thus in principle allowing for multiple recovery of tax on the same income) cannot affect the construction of those primary charging provisions". Section 744(1), the UT said in paragraph 90, "affords no answer to Walton J's primary argument that there is nothing in the legislation to ascribe a percentage of a transfer of assets to each shareholder in a company, and without such a mechanism there is a fundamental conceptual difficulty in ascribing a transfer of all the assets to individuals whose collective interest in those assets falls short of 100%". In any event, section 744(1) "does not assuage the concerns expressed by Walton J in *Pratt* as to how the motive defence could operate in the case of multiple transferors", the UT said in paragraph 92, going on:

> "If there were two joint transferors and A had the purpose of avoiding tax, and B had a commercial purpose, then how could the purpose of the transfer be ascertained?"

58. On the facts, the UT said:

> "86. In the present case, none of the Fishers was able to, or did, tell SJA what to do. None of them individually had a controlling interest in SJA. Stephen and Peter were collectively responsible as directors for giving effect to the transfer, but together they held only 50% of the shares which is not a controlling interest. In any event, in making the transfer they were acting on behalf of SJA, not vice versa. It is only if one adds Anne's shareholding that one gets to a controlling interest of 88% - but even then, the three of them did not own 100% of the share capital of SJA, because Dianne held the remaining 12%. On HMRC's case, each of Anne, Stephen and Peter would be treated as having transferred 100% of the business of SJA, not a smaller percentage of it – even though Peter only had a 12% shareholding at the time of the decision, and Anne played no active part in the decision making but was happy to entrust the running of the company to her husband and son. That result cannot be achieved on any proper interpretation of the statute. None of the Fishers, individually or collectively, did anything which would justify treating each of them as being the 'real' Transferor of SJA's assets or treating SJA as a mere instrument or mechanism by which they each personally (and simultaneously) brought about the transfer of 100% of the assets.
>
> 87. Moreover, in finding that Anne Fisher 'procured' the transfer because she entrusted her responsibilities as director to Stephen and Peter, and they were 'acting under her authority,' when they made their decisions as directors, the FTT misinterpreted 'procure'. It does not mean passively allowing someone else to do something. It does not mean being content that someone else should take a decision, or agreeing to go along with whatever they decide. It means doing something positive to bring something about, and in the specific context in which it is used in *Congreve*, it means exerting a controlling influence on a company to make it effect the transfer. Anne Fisher did nothing to transfer the company's assets. She did nothing to influence what Peter or Stephen did. She did not use her voting power to bring anything about. Peter and Stephen were not acting in any sense as her agents. We consider that irrespective of whether it is possible to ascribe a transfer by a company to individual shareholders or directors it was not possible to treat Anne Fisher as having transferred assets in this case."

59. The UT concluded in paragraph 95:

> "We have concluded that the language of s.739 does not admit of the interpretation which found favour with the FTT. What happened in this case had no connection with the mischief

> against which the provisions of the TOAA code was aimed. If the assets had been transferred within the UK, or stayed where they were, the income tax position of the shareholders and directors of SJA would have been the same. There was no connection between the transfer of those assets abroad, and their liability to income tax. As the FTT found, avoidance of income (or corporation) tax was not the purpose, or even a purpose, of this transaction. That is enough to distinguish this case from the context in which the Court of Appeal in *Congreve* and the House of Lords in *Vestey* were willing to conceive that it would be possible to treat an individual as a 'quasi-transferor'. The transfer in this case was made by SJA and not by any of its individual shareholders or directors; there is no basis for treating any of them as the 'real' Transferor and SJA as merely an instrument by which they effected the transfer of the assets. The FTT fell into error in treating acts by SJA's directors as acts 'procuring' SJA to do something when in fact they were acts carried out for and on behalf of the company. It is not possible to impute the transfer to any of the taxpayers in this case as 'quasi-transferors'".

Discussion

60. The terms of section 739 of ICTA make it plain that, for the provision to apply, an individual resident in the UK must have "power to enjoy" income of a person resident or domiciled outside the UK as a result of transfer of assets. The section does not expressly call for the individual charged to tax to have had any involvement with the transfer of assets, but it is no wonder that such a requirement was held to exist in *Vestey*. As Lord Wilberforce explained in that case at 1175, Parliament could not be assumed from the "veiled language used" to have intended "so draconian a tax" to be "imposed upon persons who had no hand in the transfer, who may never benefit from it, who cannot escape from it, who remain under liability so long as they live or the settlement lasts". "To penalise is one thing", Lord Wilberforce said, "to visit the sins of the transferor on future generations is quite another".

61. However, *Vestey* does not establish that someone need have been a "transferor" in a strict sense for section 739 of ICTA to apply. Although Lord Wilberforce spoke of liability being limited to "the transferors of assets", counsel for the taxpayers had argued that what is now section 739 should apply only to "the transferor, i.e., the person who made, or 'engineered,' or, having power to stop it, allowed the transfer". Lord Wilberforce also referred to *Congreve* being overruled "as to its *principal* ratio" and of section 739 being interpreted as applying only where the person sought to be charged "made, or, may be, *was associated with*", the transfer (emphasis added in each case). Further, Viscount Dilhorne said that the actual decision in *Congreve* could be upheld "on the alternative ground stated by Cohen L.J in his judgment"; Lord Edmund-Davies endorsed the principle that section 739 applied "if the transfer was procured by the taxpayer, even though not actually executed by him"; and Lord Keith thought the argument that transfers had been "organised or brought about by" Mrs Congreve "capable of supporting the correctness of the actual decision on liability to tax".

62. In the circumstances, Walton J was, I think, right to conclude in *Pratt* that the House of Lords had not rejected the narrower basis for the decision in *Congreve*. That was that "the execution and performance of the transfers and associated operations in question by all the companies concerned were procured by Mrs. Congreve acting through her agent Mr. Glasgow". As can be seen from paragraph 40 above, Cohen LJ considered that any condition as to activity on the part of the person charged to tax "would be fulfilled if the execution of the transfer were procured by the individual concerned, even though it was not actually executed by him or his agent". It is evident, moreover, that Mrs Congreve was viewed as having procured a transfer even where she had merely an indirect 65% interest in the company effecting it.

63. That approach chimes with the nature and purpose of section 739 of ICTA. Section 739 has long been recognised to be a "penal" provision with a deterrent function and so a "broad spectrum anti-avoidance provision which should not be narrowly or technically construed". That being so, Parliament can be expected to have intended that the provision should be capable of applying to an individual who procured a transfer without himself executing it. It is to be remembered that someone in such a position will still escape any liability unless he has "power to enjoy" income of a person resident or domiciled outside the UK as a result of the transfer or if the exemption for which section 741 provides is applicable.

64. In *Pratt*, Walton J thought "procurement" to be "far nearer an apt definition than anything else which has so far been suggested". In the present case, the UT considered "procurement" to be "not particularly apt" and "a gloss on the statute which is nowhere to be found in the language used by the legislature". Echoing in this respect Walton J, the UT considered the real question to be "whether, notwithstanding that the transfer was made by one person, was the reality of the matter that somebody else was the real transferor?" The UT was prepared to accept in paragraph 79 that "there may be circumstances … in which [an individual shareholder with a controlling interest] can be said to have used their control over the company to bring about a transfer in their stead, so that the transfer can properly be ascribed to that individual rather than to the company which made it". As I read its decision, however, the UT was doubtful about when such a scenario might arise, instead stressing the "separate legal persona" of a company, the limited circumstances in which the Court will be prepared to "pierce the corporate veil" and the constitutional role and duties of company directors. The UT also made the observation that "[n]othing said in *Congreve* or in *Vestey* would justify putting a gloss on the interpretation of the statute to bring within its ambit someone who is not seeking to avoid a liability to income tax and whose income tax position is unaffected by the transfer" and, in its conclusion, said that the fact that "avoidance of income (or corporation) tax was not the purpose, or even a purpose, of this transaction" was enough to distinguish the present case from the context in which the Courts had previously been willing to conceive that an individual could be treated as a "quasi-transferor".

65. Taking the latter points first, I cannot myself see how the presence or absence of a tax avoidance motive can matter in the context of the present issue. The question whether an individual was seeking to escape income tax cannot determine whether he is to be seen as a "quasi-transferor". That will turn on his role in the transfer, not on whether he (or anyone else) is trying to avoid income tax, especially in the light of section 739(1A)(b) of ICTA (stating that nothing in subsection (1) is to be taken to imply that

the provisions of subsections (2) and (3) apply only if the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer is effected). Further, I doubt whether it is appropriate to talk of putting a "gloss" on the statute when section 739 does not explicitly limit its applicability to transferors and does not even use the word "transferor": in fact, the limitation of liability to "transferors" might itself be termed a "gloss". While, moreover, "procurement" might be said to be less than wholly precise, Cohen LJ used "procured" twice in the passage quoted in paragraph 40 above and it also features in the House of Lords speeches in *Congreve* and *Vestey* as well as Walton J's judgment in *Pratt*. More importantly, perhaps, it is not obvious to me that the UT has taken sufficient account of either the "broad spectrum anti-avoidance" nature of section 739 or, more specifically, of the decision in *Congreve*. It has, I think, to be recognised that an indirect 65% interest in a company can suffice for section 739 to apply.

66. In the present case, of course, HMRC wish to treat more than one person as a "quasi-transferor". In *Pratt*, Walton J thought a "multiple quasi transferor situation" impossible. He also considered that what is now section 739 of ICTA could not apply to "a plurality of transferors" unless their respective interests could be separated out so as to be able to say, "'the first transferor transferred A% of the interest transferred, the second B%' and so on, the series adding up to 100". In the present case, the UT did not consider Walton J's analysis to have been negated by the arrival of what is now section 744, and Mr Philip Baker QC, who appeared for the Fishers with Mr Rory Mullan QC, agreed: section 744, he argued, does not assist in defining the scope of the tax charge.

67. In the course of the hearing, Mr Baker was asked to consider a scenario in which two brothers each had a 50% shareholding in a company, they agreed that the company should transfer an asset abroad, and it was. If, Mr Baker said, neither brother had control over the other, neither had control over the company. The fact that the brothers might both have considered it to be in the company's interests to carry out the transaction and have voted for it would not allow it to be said that either brother had made the relevant transfer.

68. I am not sure that Walton J would himself have considered section 739 of ICTA inapplicable in such a situation. He referred to the possibility of separating out beneficial interests "in the case of quasi transferors, where two or three of them own the company which makes the transfer". Be that as it may, it would, as it seems to me, be surprising if section 739 were not in point. If one of the brothers had been the sole owner of the company, he could surely be said to have "procured" the transfer in a *Congreve* sense, and it would strike me as odd if the fact that both brothers were involved meant that section 739 did not apply to either of them. Why should Parliament have intended that?

69. At all events, the legislation at issue in *Pratt* contained, as Walton J pointed out, "no machinery whatsoever for attributing anything less than the whole of the income to any transferor". In the wake, however, of *Vestey*, the Finance Act 1981 introduced what is now section 744 of ICTA, allowing apportionment, as well as what is now section 740, providing for "non-transferors" to be liable on benefits they receive. Machinery now exists, therefore, under which no more than a proportion of income need be attributed to either a transferor or a quasi-transferor. The UT noted that section 744 could apply where the same income could be the subject of charges under

both section 739 and section 740, but, whether or not the proponents of what has become section 744 had that sort of overlap in mind, it is reasonable to assume that the provision was (also) intended to address the position of multiple transferors (and quasi-transferors). In any case, in so far as the absence of apportionment machinery was thought to prevent section 412 of the Income Tax Act 1952 from biting on multiple (quasi-)transferors, there is no longer any such obstacle. More than that, there was never such a difficulty under ICTA, which always contained section 744.

70. As Walton J saw things, what became section 741 of ICTA also threw a "spanner into the works", and the UT said in paragraph 94 that there was "no answer to the point he made". Walton J pointed out that the exemption for which section 741 provides depends on "the purpose for which the transaction was effected" and queried how that could be applied to, say, "a two-transferor situation where A had the purpose of avoiding tax and B had only a simple commercial purpose". However, it is by no means uncommon for tax legislation to require a single purpose or object to be identified in circumstances where individuals with different motivations may have been involved (see e.g. the legislation that was at issue in *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18 ("*Brebner*")). It is true that, if a transfer is considered to have had more than one (quasi-)transferor, a particular (quasi-)transferor might find himself unable to rely on section 741 because the overall purpose of the transfer was tax avoidance despite having no such purpose himself. In practice, however, cases of that kind can be expected to be rare: those promoting a transfer are likely to have had a common purpose. In the circumstances, I do not think it can be inferred from section 741 that there cannot be multiple (quasi-)transferors.

71. My own view is that, regardless of whether Walton J was correct that multiple quasi-transferors were impossible under section 412 of the Income Tax Act 1952, that is not the case with section 739 of ICTA. If two or more individuals "procure" a transfer, they may each, as I see it, be a quasi-transferor. Returning to the two brothers who cause the company they own 50:50 to transfer an asset abroad, they will, I think, jointly have "procured" the transfer and both be quasi-transferors to whom section 739 applies. More generally, it seems to me that if two or more individuals, acting for themselves (whether or not also acting as agents or company officers), together cause a company to effect a transfer, they will be quasi-transferors and within the scope of section 739. Approaching matters on that basis, section 739 will not apply to a director with no shares who promotes a transfer because he believes that to be in the company's interests: he will have acted exclusively as a company officer. Nor, to my mind, is section 739 applicable to someone who simply does nothing: the fact that he might have been in a position to *prevent* a transfer (say, as a controlling shareholder) will not mean that he "procured" it. If, on the other hand, a group of shareholders decided on a transfer and brought it about, they could all be considered quasi-transferors.

72. In the present case, the FTT asked itself whether Stephen, Peter and Anne had "procured" the transfer, approaching that on the basis that it involved "a question of who the transferors are in reality". It concluded that "the transfer was jointly procured by all three appellants" and "each of the appellants was in reality a transferor of the telebetting business". So far as Stephen and Peter are concerned, I do not think that conclusion can be faulted. The FTT cannot be said either to have misdirected itself as to the law or to have made a finding for which there was no evidential basis.

73. With regard to Anne, the FTT said that she "entrusted her responsibilities to Stephen and Peter and was happy to go along with their decisions". Elsewhere in its decision, however, the FTT explained that Anne "had virtually nothing to do with the business" after 1996 (paragraph 21), that she "played no active part in the decision making" (paragraph 337) and that she "did not have a motive" (paragraph 516). In the circumstances, I agree with the UT that Anne could not be a quasi-transferor. As the UT said in paragraph 87, "procure" means "doing something positive to bring something about", not "passively allowing someone else to do something".

74. In short, it seems to me that the UT was not entitled to interfere with the FTT's conclusion that Stephen and Peter were quasi-transferors to whom section 739 of ICTA applied, but that the UT was right to think that the FTT had been mistaken in regarding Anne as a quasi-transferor.

The Actual Avoidance Issue

75. It is the Fishers' case that section 739 of ICTA has no application unless income tax has been avoided and that, in the present case, no such avoidance been established. It can be seen from section 739(1), Mr Baker argued, that the section is directed at preventing "the avoiding by individuals … of liability to income tax". That being so, avoidance of income tax must be understood to be required if section 739 is to apply. While, moreover, the insertion of what became section 739(1A) means that an individual need not have had the *purpose* of avoiding income tax, the subsection says nothing about *actual avoidance* of such tax being unnecessary.

76. However, the FTT rejected these contentions, and in my view it was right to do so. Section 739 of ICTA nowhere states that income tax must in fact have been avoided and, had that been Parliament's intention, it could be expected to have spelled out what was required. It is apparent from section 739(1) that the legislation is aimed at *preventing* avoidance of income tax, but it simply does not follow that the section can be in point only where the tax has been avoided. Further, I agree with Mr David Ewart QC, who appeared for HMRC with Mr Oliver Conolly, Mr Brendan McGurk and Ms Barbara Belgrano, that it would be odd if the application of section 739 of ICTA were conditional on income tax having been avoided when there does not have to have been any purpose of avoiding the tax. It is significant, too, that, even on the Fishers' case, section 739 does not insist that the income charged to tax under section 739(2) should correlate in any way with income that has escaped income tax as a result of the relevant transfer. Were Mr Baker's submissions correct, income of any amount could fall to be taxed pursuant to section 739(2) even if income tax had been avoided to only a very small extent, but there could be no charge to tax if no income tax at all had been avoided. I find it hard to see that Parliament would have intended such random outcomes.

77. On top of that, Mr Ewart's submissions draw support from *McGuckian*. In that case, Mr McGuckian was assessed to tax under what was then section 478 of the Income and Corporation Taxes Act 1970 in circumstances where, had HMRC done so in time, they could have assessed Mr McGuckian under a different provision, section 470 of the 1970 Act. As Lord Browne-Wilkinson explained at 997, it was argued on behalf of Mr McGuckian that, "since the dividend would in any event have been taxable under section 470, section 478 does not apply", on the premise that, having regard to

the words of the preamble to section 478, "section 478 does not apply unless tax has *in fact* been avoided". However, Lord Browne-Wilkinson said at 997-998:

> "In my judgment, there is no warrant for this submission. The words quoted refer not to the intention of the transferor of the assets or the effect of such transfer but to the intention of Parliament in enacting the section. That parliamentary intention is certainly relevant in construing the section. But the words of subsection (1) make it clear that the actual avoidance of tax is not a precondition to the application of the section. The income is deemed to be the income of the United Kingdom resident 'whether it would or would not have been chargeable to income tax apart from the provisions of this section.' It is therefore clear that section 478 can still apply even though the effect of the transfer of assets abroad would not have been successful in avoiding United Kingdom income tax."

78. For his part, Lord Steyn said at 1002-1003 that Mr McGuckian's argument must fail for two reasons:

> "First, once the *Ramsay* principle is applied there is no scope for the application of section 470 because for fiscal purposes the assignment to Mallardchoice is disregarded. Secondly, I would reject the argument that it is a condition precedent to section 478 applying that there must be proof of an actual avoidance of tax liability. Such a construction treats section 478 as a power of last resort and it substantially emasculates the effectiveness of the power under section 478. Nothing in the language or purpose of section 478 compels such a construction. Properly construed the opening words of section 478 merely provide that there must be an intention to avoid liability for tax. The sensible construction is that section 478 can be applied even if there are other provisions which could be invoked to prevent the avoidance of tax. That the revenue authorities should have overlapping taxation powers is an unremarkable consequence. And such a construction cannot cause any unfairness to the taxpayer since he cannot be taxed twice in respect of the same income."

79. Mr Baker submitted that *McGuckian* is of no assistance to Mr Ewart because the House of Lords was there addressing a specific question as to whether section 470 of the 1970 Act deprived section 478 of effect and there was no doubt that income tax had been avoided. To my mind, however, that is an unduly narrow reading of *McGuckian*. It was submitted to the House of Lords that section 478 did not apply unless tax had in fact been avoided, and the House of Lords explicitly rejected that suggestion, Lord Browne-Wilkinson explaining that "the actual avoidance of tax is not a precondition to the application of the section" and Lord Steyn expressing disagreement with "the argument that it is a condition precedent to section 478 applying that there must be proof of an actual avoidance of tax liability".

80. Mr Ewart argued that, on the facts, income tax was in fact avoided in the present case and that, if needs be, the matter should be remitted to the FTT for further findings of fact to be made. Having, however, concluded that there is no requirement for income tax to have been avoided, I need not address these matters.

The Motive Defence Issue

81. Under section 741 of ICTA, section 739 does not apply if either (a) "the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected" or (b) "the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation".

82. There was no dispute but that "purposes" fall to be determined subjectively under section 741 of ICTA. We were referred in this connection to *Brebner*, which concerned a provision under which certain consequences followed if it were shown that transactions "were carried out … for bona fide commercial reasons … , and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained". Lord Pearce said at 27:

> "The 'object' which has to be considered is a subjective matter of intention. It cannot be narrowed down to a mere object of a company divorced from the directors who govern its policy or the shareholders who are concerned in and vote in favour of the resolutions for the increase and reduction of capital. For the company, as such, and apart from these, cannot form an intention. Thus the object is a subjective matter to be derived in this case from the intentions and acts of the various members of the group."

83. The relationship between section 741's two limbs was considered by Dr Avery Jones, sitting as a Special Commissioner, in *Carvill v Inland Revenue Commissioners* [2000] STC (SCD) 143. Dr Avery Jones said in paragraph 89:

> "Originally, in 1936 there was a single let-out provision exempting a transfer of assets 'effected mainly for some purpose other than the purpose of avoiding liability to taxation'. Section 28 of the Finance Act 1938 changed this to the present wording of s 741 which in para (a) applies a more stringent test of one of the purposes of the transfer (and associated operations) not being tax avoidance, and in para (b) merely refers to the transfer (and associated operations) not being designed for that purpose. Clearly, this cannot mean one of the purposes for which it was designed being tax avoidance, because otherwise para (b) would add nothing to para (a). It is odd that Parliament did not lay down any level of purpose in para (b) when it was replacing a test which depended mainly on tax avoidance with a test in para (a) depending on none of the purposes being tax avoidance. It was obviously clear from para (a) that a transfer could have more than one purpose and therefore in para (b) could be designed for more than one

> purpose. One must ask in para (b) whether the transfer was designed for the purpose of avoiding tax or not. This seems to me to require that the main purpose was not tax avoidance because if one has to categorise a transaction as being either designed for the purpose of tax avoidance or not, when it is clearly accepted that a transaction may be designed for more than one purpose, the only way to categorise the design into one purpose is to look at the main purpose of the design. I think, therefore, that the taxpayer's contention of sole purpose is too loose a test and the Revenue's contention of significant purpose is too stringent a test although it will in practice be difficult to determine the difference between a significant and a main purpose."

No one took issue with this analysis before us, and I see no reason to doubt it.

84. In the present case, it is now common ground that the transfer to SJG was a bona fide commercial transaction. The Fishers contend that the transfer was also "not designed for the purpose of avoiding liability to taxation" and, hence, that section 741(b) of ICTA applies. Having regard to *Sassoon v Commissioners of Inland Revenue* (1943) 25 TC 154, they did not deny that betting duty represents "taxation" within the meaning of section 741, while reserving their position on the point were the matter to proceed to the Supreme Court. However, they maintained, first, that a bookmaker such as SJA was not itself chargeable to betting duty but merely a collection agent; secondly, that the transfer to SJG involved no more than mitigation of betting duty, not "avoidance" of liability to the duty; and, thirdly, that the transfer of the business was anyway designed to save it rather than for the purpose of avoiding liability to taxation.

85. The Fishers relied in support of the second of these points on passages from Lord Nolan's speech in *Willoughby*. At 1079, Lord Nolan said that "[t]ax avoidance within the meaning of section 741 is a course of action designed to conflict with or defeat the evident intention of Parliament". A little earlier in his speech, Lord Nolan had adopted as a "generally helpful approach to the elusive concept of 'tax avoidance'" the following propositions:

> "Tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option."

Here, the Fishers argued, the business was transferred in order to ensure that there was no breach of section 9 of the BGDA. The arrangements were thus structured as they were to meet the dictates of Parliament and the parties were effecting tax mitigation (at most) in a commercial manner.

86. The FTT did not accept the Fishers' arguments. It concluded, first, that the legislation provided for betting duty to be recoverable from bookmakers, not customers, and that the "economic burden of the duty that is imposed by the legislation falls on the bookmaker" and "[t]he fact that bookmakers have chosen to incorporate the betting duty into the price they charge / the odds they offer is entirely a matter for them" (paragraph 325). Secondly, the FTT considered that "[t]aking bets from existing UK customers who would otherwise have bet in the UK was (legal) avoidance of betting duty" (paragraph 430) and that "taking UK bets in Gibraltar was not an option being offered by the betting duty legislation that Parliament had enacted" (paragraph 459). "If there had not been the betting duty avoidance", the FTT said in paragraph 431, "there would not have been a s9 issue" and "[o]n the facts it is plainly the case that Stephen Fisher's mind was not so consumed with an all encompassing fear of s9 that his desire that bets could be taken without UK betting duty being chargeable was overridden". Thirdly, the FTT held that, while it was not one of the purposes of the transfer to avoid income tax (paragraph 503), the main purpose was to avoid betting duty (paragraphs 502 and 533) and, accordingly, "avoiding liability to taxation". The FTT explained:

> "534. There was simply no other reason (that was not a consequence of the betting duty avoidance purpose) for the transfer. It is inconceivable the transfer would have gone ahead were it not for the betting duty being lower in Gibraltar.
>
> 535. The purpose the appellants rely on as the main reason for the transfer was survival of the business. But this is in the context of betting duty avoidance being the means for survival. We doubt whether in examining whether an avoidance purpose was the main purpose one can go as far as relying on the consequence of a tax avoidance reason. It cannot be the intention of the legislation that someone who looks beyond the tax avoidance to the consequences of that can be allowed to supplant those consequences as their main purpose. If it were, such consequences would virtually always operate to stop a tax avoidance purpose being the main purpose. Except in the theoretical case where the goal for which the transfer was designed was to avoid tax for the sake of it without any concern for the benefits that would bring, this part of the motive defence would for practical purposes always be available.
>
> 536. The appellants do not therefore succeed on the motive defence."

87. For its part, the UT agreed that there was "avoidance" of betting duty. The situation was one where "existing customers in Great Britain have been dealing with a bookmaker in Great Britain but arrangements are then made for those existing customers instead to be serviced by a bookmaker outside Great Britain". "If the course of dealing with such customers had carried on unchanged", the UT said in paragraph 135, "betting duty would have been due on their bets" and "it is difficult and, in our view wrong, to characterise as anything other than 'avoidance' arrangements such as those at issue in these appeals which are made in order to ensure that future dealings with those customers will be free of duty". The UT continued:

> "Clearly this analysis applies only in respect of the pre-existing customers, but if a set of transactions have such an effect then it is correct to apply the label of 'avoidance' to them."

88. None the less, the UT did not accept that "avoiding liability to taxation" had been the main purpose of the transfer, taking the view that, "to the extent betting duty avoidance was involved in the transactions, it was simply the means of achieving the main purpose of saving the business, for which main purpose the transactions were designed" (paragraph 146). The UT said in paragraph 145:

> "Parliament has legislated for two potential motive defences. The first requires a taxpayer to establish that there was no tax avoidance purpose at all for the relevant transactions; the second, only available where the relevant transactions were 'bona fide commercial transactions', requires the taxpayer to establish that the transactions were not 'designed for the purpose' of avoidance; as was observed in *Carvill*, it is implicit in this that tax avoidance may result from the transactions (as it did in *Brebner*) without disqualifying the taxpayer from benefiting from the second limb of the defence. If the FTT's analysis were correct, the existence of any tax avoidance purpose at all would always disqualify a taxpayer from reliance on the second limb of the motive defence, rendering it pointless and effectively overruling *Brebner*. This cannot be right. There is a qualitative difference between a situation in which a taxpayer voluntarily enters into a tax avoidance arrangement in order to save tax and a situation in which a taxpayer is effectively forced to restructure in the same tax efficient way as its competitors in order to secure the survival of the business."

89. Like the FTT, I do not think the Fishers can rely on section 741 of ICTA on the basis that betting duty was borne by customers rather than bookmakers or the transfer involved mitigation rather than avoidance of such duty. In the first place, section 2 of the BGDA provided that, in the case of a bet with a bookmaker, betting duty was to be paid by the bookmaker. It was therefore SJA, not its customers, which was liable for betting duty and, by transferring its business, it sought to escape that liability. The extent to which SJA was able to pass the economic burden of the duty on to its customers is neither clear nor, more importantly, relevant. Secondly, this is not a case in which a transaction which would have been effected anyway was structured in a particular manner to minimise tax. The transfer would not have been effected at all but for the desire to avoid betting duty. While, moreover, the Fishers were concerned not to breach section 9 of the BGDA, the FTT was amply entitled to take the view that there would have been no section 9 issue if there had been no betting duty avoidance and that "Stephen Fisher's mind was not so consumed with an all encompassing fear of s9 that his desire that bets could be taken without UK betting duty being chargeable was overridden".

90. That leaves the question whether section 741 of ICTA applies because, as the UT held, "to the extent betting duty avoidance was involved in the transactions, it was simply the means of achieving the main purpose of saving the business, for which main purpose the transactions were designed". In that connection, the UT said in

paragraph 145 that, if the FTT's analysis were correct, "the existence of any tax avoidance purpose at all would always disqualify a taxpayer from reliance on the second limb of the motive defence, rendering it pointless and effectively overruling *Brebner*". With respect, however, that must be a misconception. The FTT did not proceed on the basis that *any* tax avoidance purpose at all would preclude reliance on the second limb of section 741. It noted at paragraph 527 that a "main purpose" test was adopted in *Carvill* and, as it said in paragraph 533, "specifically considered whether it [was] the case that although betting duty avoidance was one purpose of the transfer … it was not the main purpose". It concluded that betting duty avoidance was the main purpose.

91. Further, the UT was not, in my view, entitled to interfere with the FTT's conclusion on the basis that the main purpose was saving the business and betting duty avoidance was "simply the means of achieving" that purpose. The avoidance of betting duty and saving of the business were inseparable. The main purpose of the transfer of the business was to avoid betting duty and thereby to save the business: the two were perceived as going together. Put slightly differently, there can be no question of section 741 of ICTA applying because a transferor hopes that an intended avoidance of liability to taxation will achieve some further end. It will rarely, if ever, be the case that a transferor wishes to avoid liability to tax for the sake of it; in normal circumstances, a transferor will be intending to use the avoidance of tax to attain another object. That being so, were someone able to escape section 739 by looking beyond the tax avoidance to its consequences, the motive defence would, as the FTT pointed out, be generally available. That will not have been Parliament's intention.

92. In the circumstances, the UT was, in my view, wrong to hold that the motive defence was available to the Fishers.

The EU Law Issue

93. Freedom of establishment is an aspect of one of the four freedoms at the heart of the European Union ("EU"). It is nowadays provided for by article 49 of the Treaty on the Functioning of the European Union ("the TFEU") (formerly article 43 of the Treaty establishing the European Community ("the TEC")), which states:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

94. The Court of Justice of the European Union ("the CJEU", an abbreviation which I shall also use to refer to its predecessor, the European Court of Justice) noted in Case C-194/04 *Cadbury Schweppes plc v Inland Revenue Commissioners* [2007] Ch 30 ("*Cadbury Schweppes*") at paragraph 42 of its judgment:

> "Even though, according to their wording, the provisions of the Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host member state in the same way as nationals of that state, they also prohibit the member state of origin from hindering the establishment in another member state of one of its nationals or of a company incorporated under its legislation".

95. The CJEU has adopted two different models when considering whether a measure infringes one of the EU's freedoms. One looks to whether the measure discriminates directly or indirectly by reference to nationality, the other to whether the measure is capable of hindering or rendering less attractive exercise of the freedom. In Case C-382/16 *Hornbach-Baumarkt AG v Finanzamt Landau* [2018] STC 1267 Advocate General Bobek noted at paragraph 28 of his opinion that it was "well recognised in academic literature that over the years the court has vacillated between these approaches" when analysing alleged infringements of freedom of establishment in the area of direct taxation.

96. Either approach needs to take account of the fact that Member States are recognised as having "fiscal autonomy" (to quote from paragraph 53 of the judgment in Case C-298/05 *Columbus Container Services BVBA & Co v Finanzamt Bielefeld-Innenstadt* [2009] 1 CMLR 8 ("*Columbus*")). Direct taxation is not specified as an area in which the EU has competence under articles 2-6 of the TFEU. Accordingly, the CJEU observed in paragraph 47 of its judgment in Case C-446/04 *Test Claimants in the FII Group Litigation v Inland Revenue Commissioners* [2012] 2 AC 436 ("*FII (No. 1)*"):

> "it is for each member state to organise, in compliance with Community law, its system for taxing distributed profits and, in particular, to define the tax base and the tax rate which apply to the company making the distribution and/or the shareholder receiving them, in so far as they are liable to tax in that member state".

97. The CJEU has repeatedly stressed that, none the less, Member States must exercise their competence in matters of direct taxation "consistently with Community law" (see e.g. *FII No. 1,* at paragraph 35 of the judgment). An obvious consequence is that it is illegitimate to discriminate on the basis of nationality. In that connection, article 49 of the TFEU expressly states that freedom of establishment includes the right to set up and manage undertakings "under the conditions laid down for its own nationals by the law of the country where such establishment is effected". Similarly, the CJEU said in paragraph 24 of its judgment in Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1996] QB 28 ("*Schumacker*") that what is now article 45 of the TFEU, providing for freedom of movement, must be interpreted as:

> "being capable of limiting the right of a member state to lay down conditions concerning the liability to taxation of a

> national of another member state and the manner in which tax is to be levied on the income received by him within its territory, since that article does not allow a member state, as regards the collection of direct taxes, to treat a national of another member state employed in the territory of the first state in the exercise of his right of freedom of movement less favourably than one of its own nationals in the same situation".

So far as companies are concerned, freedom of establishment "aims to guarantee the benefit of national treatment in the host member state, by prohibiting any discrimination based on the place in which companies have their seat" (Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation v Inland Revenue Commissioners* [2007] STC 404 ("*ACT*"), at paragraph 43 of the judgment).

98. The position is different as regards residence. Notwithstanding the fact that residence tends to correlate with nationality and so its use as a criterion can amount to indirect discrimination by reason of nationality, residence is generally accepted as a proper basis to impose tax. In fact, residence is internationally considered to be *the* legitimate ground of differentiation. Thus, the "principle of territoriality" involves residents of a country being taxed on their worldwide income while non-residents are taxed only on income arising from sources in the country in question. The CJEU has recognised the principle in, for example, *Schumacker*, where it noted in paragraph 32 of its judgment that "international tax law, and in particular the model double taxation treaty of the Organisation for Economic Co-operation and Development (O.E.C.D.), recognises that in principle the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the state of residence". On that basis, the CJEU concluded in *Schumacker* that, "[i]n relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable" (paragraph 31) and "the fact that a member state does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation" (paragraph 34). In the same vein, the CJEU said in Case C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] STC 1025 ("*Asscher*"), which concerned freedom of establishment, at paragraph 41 of its judgment:

> "In relation to direct taxes, the situations of residents and of non-residents in a given state are not generally comparable, since there are objective differences between them both from the point of view of the source of the income and from that of their ability to pay tax or the possibility of taking account of their personal and family circumstances (see *Wielockx* [1995] STC 876 at 887, [1995] ECR I-2493 at 2515, para 18, citing *Schumacker* [1995] STC 306 at 325, [1996] QB 28 at 52–53, para 31 et seq)."

99. Advocate General Geelhoed grappled with the implications of direct taxation lying within Member State competence in *ACT*, judgment in which was delivered on the same day as that in *FII No.1*. Having commented at paragraph 43 of his opinion that it is an inevitable consequence of the co-existence of discrete national tax systems that disparities, or variations, will exist between the systems, he said in paragraph 46:

> "The existence of these disparities has inevitable distortive effects on investment, employment and, in the case of companies and self-employed persons, establishment decisions. Clearly, differences between member states in levels of effective business taxation, of administrative tax burdens, and in the structure of national tax regimes influence the location of economic activity. However, as the court has recently confirmed in *Schempp*, and as I emphasised in my opinion in that case, possible distortions resulting from mere disparities between tax systems do not fall within the scope of the free movement provisions of the Treaty. In that case, which concerned a claim under the citizenship provisions of the Treaty, the court recalled that, 'the court has already held that the Treaty offers no guarantee to a citizen of the Union that transferring his activities to a member state other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the member states, such a transfer may be to the citizen's advantage in terms of indirect taxation or not, according to circumstances.' Precisely the same principle applies to claims under art 43 EC. Thus, obstacles to freedom of establishment resulting from disparities or differences between the tax systems of two or more member states fall outside the scope of art 43 EC. These may be contrasted with obstacles resulting from discrimination, which occurs as a result of the rules of just one tax jurisdiction."

100. Earlier in his opinion, Advocate General Geelhoed had suggested that it was misleading to use the term "restriction" to refer to disparities between national tax systems. He said in paragraph 38:

> "In reality, at issue here are distortions of economic activity resulting from the fact that different legal systems must exist side-by-side. In certain cases, these distortions provide disadvantages for economic actors; in other cases, advantages. While in the first case they are 'restrictive', in the second case they stimulate cross-border establishment activity. Although the court is as a rule faced with what can be termed the 'quasi-restrictions' flowing from these distortions, one should not forget that there is a second side to the coin—that is, where particular advantages arise for cross-border establishment. In the latter case, the taxable subject concerned does not generally invoke Community law."

101. While the CJEU has not itself, so far as I know, adopted the term "quasi-restriction", it is plain that the imposition by a host Member State of a particular tax or rate of tax cannot be invalidated simply on the basis that its existence is capable of hindering or rendering less attractive exercise of a freedom. The fact that, say, Member State A charges tax at 30% while Member State B does so at only 10% may deter a national of Member State B from working or setting up business in Member State A, but there is no question of Member State A's tax rate being vulnerable to challenge on that

account. In Case C-387/01 *Weigel v Finanzlandesdirektion Für Voralberg* [2004] 3 CMLR 42, the CJEU said in paragraph 55 that "the Treaty offers no guarantee to a worker that transferring his activities to a Member State other than the one in which he previously resided will be neutral as regards taxation". In *Columbus*, the CJEU explained in paragraph 51:

> "in the current state of harmonisation of Community tax law, Member States enjoy a certain autonomy. It follows from that tax competence that the freedom of companies and partnerships to choose, for the purposes of establishment, between different Member States in no way means that the latter are obliged to adapt their own tax systems to the different systems of tax of the other Member States in order to guarantee that a company or partnership that has chosen to establish itself in a given Member State is taxed, at national level, in the same way as a company or partnership that has chosen to establish itself in another Member State."

102. Another important limit on freedom of movement and freedom of establishment lies in the need for an inter-State element. In Case 175/78 *R v Saunders* [1980] QB 72, the CJEU explained in paragraph 11 of its judgment that freedom of movement provisions "cannot … be applied to situations which are wholly internal to a member state, in other words, there is no factor connecting them to any of the situations envisaged by Community law". In *Asscher*, the CJEU referred in paragraph 32 of its judgment to the fact that "the provisions of the Treaty relating to freedom of establishment cannot be applied to situations which are purely internal to a member state".

103. It will have been with that principle in mind that, in the course of the present proceedings, the UT referred to the CJEU questions which were construed as asking, "in essence, whether Article 355(3) TFEU, in conjunction with Article 49 TFEU or Article 63 TFEU, is to be interpreted as meaning that the exercise of the freedom of establishment or of free movement of capital by British nationals between the United Kingdom and Gibraltar constitutes, as a matter of EU law, a situation confined in all respects within a single Member State". The CJEU answered the question in the affirmative in a reasoned order dated 12 October 2017. Having explained in paragraph 6 that under EU law "Gibraltar is a European territory for whose external relations a Member State is responsible within the meaning of Article 355(3) TFEU and to which the provisions of the Treaties apply", it said that it had previously held that "Article 355(3) TFEU, in conjunction with Article 56 TFEU, is to be interpreted as meaning that the provision of services by operators established in Gibraltar to persons established in the United Kingdom constitutes, as a matter of EU law, a situation confined in all respects within a single Member State" (paragraph 23), that it was "settled case-law that both Article 56 TFEU, guaranteeing the freedom to provide services, and Articles 49 and 63 TFEU, relating, respectively, to the freedom of establishment and to free movement of capital, do not apply to a situation which is confined in all respects within a single Member State" (paragraph 25) and that "to treat trade between Gibraltar and the United Kingdom in the same way as trade between two Member States would be tantamount to denying the connection,

recognised in Article 355(3) TFEU, between that territory and that Member State" (paragraph 31).

104. However, the UT pointed out at paragraph 159 of its decision that "there may be circumstances in which what appears to be an entirely internal matter may still engage the fundamental freedoms under the TFEU because it has the requisite foreign element" and, in paragraph 173, agreed with the FTT that "the TOAA code restricted Anne Fisher's rights of freedom of establishment", considering it "irrelevant that the TOAA code applies to all UK residents irrespective of nationality". The UT also held, differing in this respect from the FTT, that Stephen could rely on article 49 of the TFEU. The UT said in paragraph 205 that "Stephen Fisher should be entitled to require the removal of the further impediment to the exercise by his wife of her freedom of establishment caused by his disadvantageous tax treatment". In contrast, the UT concluded in paragraph 210 that, in Peter's case, "there is no obligation to interpret the legislation in a way conforming with EU law".

105. The UT founded its decision that article 49 of the TFEU had been breached in Anne's case (and, hence, also in her husband's) very much on Case C-212/06 *Government of the French Community v Flemish Government* [2009] All ER (EC) 187 ("*Walloon*"). That case concerned a care insurance scheme established by the Flemish government which applied to persons who resided in the Dutch-speaking part of Belgium or in the bilingual region of Brussels-Capital and to those who worked in one of those regions while residing in another Member State. However, the scheme did not extend to persons who lived in other areas of Belgium even if they worked in the Dutch-speaking region or Brussels-Capital.

106. The CJEU concluded that legislation such as that at issue was contrary to articles 39 and 43 of the TEC (now articles 45 and 49 of the TFEU) in so far as the limitation on its scope affected nationals of other Member States or nationals of the Member State concerned who had made use of their right to freedom of movement. The CJEU said in paragraph 45 of its judgment that articles 39 and 43 of the TEC "militate against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty". The CJEU went on:

> "47. Legislation such as that as issue in the main proceedings is such as to produce those restrictive effects, inasmuch as it makes affiliation to the care insurance scheme dependent on the condition of residence in either a limited part of national territory, viz, the Dutch-speaking region and the bilingual region of Brussels-Capital, or in another member state.
>
> 48. Migrant workers, pursuing or contemplating the pursuit of employment or self-employment in one of those two regions, might be dissuaded from making use of their freedom of movement and from leaving their member state of origin to stay in Belgium, by reason of the fact that moving to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed. In other words, the fact that employed or self-employed workers

> find themselves in a situation in which they suffer either the loss of eligibility care insurance or a limitation of the place to which they transfer their residence is, at the very least, capable of impeding the exercise of the rights conferred by arts 39 and 43 EC."

The CJEU added in paragraph 49 that "[i]t is of little importance in this regard … that the differentiation at issue is based solely on the place of residence on national territory and not on any condition of nationality, with the result that it affects in the same way all workers, employed or self-employed, resident in Belgium".

107. Both the FTT and the UT considered there to be a compelling analogy with the present case. The UT said in paragraph 173:

> "Just as a French national living in the French-speaking sector of Belgium would have to move outside Belgium or into the Dutch-speaking area or Brussels-Capital in order to obtain the benefits in *Walloon*, Anne Fisher would have to move outside the UK or to Gibraltar in order to establish SJG's business without being made liable to pay income tax on SJG's profits. It is irrelevant that the TOAA code applies to all UK residents irrespective of nationality: in *Walloon* the measure applied without discrimination to people of all nationalities residing in certain areas of Belgium, but still unlawfully restricted freedom of movement and freedom of establishment."

108. Mr McGurk, who presented this part of HMRC's case, argued that the UT's approach, if correct, would have startling implications for Member States with federal or devolved structures. If, he said, a national from another Member State can complain that he will have to pay higher tax if he works or sets up business in one part of a Member State rather than another, how could it be permissible for, say, Scotland and England (or Catalonia and Madrid) to set different tax rates? To adapt what was said in *Walloon*, employed or self-employed workers could find themselves in a situation in which they suffered either extra tax or a limitation of the place to which they transferred their residence and that could impede their exercise of the rights conferred by articles 45 and 49 of the TFEU.

109. Mr Baker described as a "total red herring" the suggestion that the UT's approach would allow a French national arriving in Scotland to insist on being taxed at the lower rate applicable elsewhere in the UK. Nothing in *Walloon*, he said, required other Belgian regions to offer similar care schemes to that established by the Flemish government and, likewise, one part of the UK is not required to offer to tax a national of another Member State at the lowest tax rate charged in any other part of the UK. What makes *Walloon* applicable, he submitted, is the difference in treatment arising from section 739 of ICTA according to whether a company whose profits the taxpayer has power to enjoy is established in the UK or in Gibraltar.

110. I was not myself convinced by Mr Baker's explanation. It seems to me that, were *Walloon* to be as significant in the context of direct tax as the UT thought, it would afford scope for challenging aspects of a Member State's internal direct tax arrangements. In any case, the essential problem with the UT's analysis, as I see it, is

that it overlooks the importance of Member States' fiscal autonomy in matters of direct taxation. Absent discrimination (and none is suggested in the present case), there can, as I have said, be no objection to a host Member State imposing higher rates of direct tax across its territory than other Member States even though that might deter nationals of the latter from working or setting up business in the host Member State. No more, in my view, can there be any complaint about a host Member State making it less attractive to work or set up business in one part of the Member State rather than another. That, too, must be legitimate given Member States' competence as regards direct taxation and the fact that such arrangements will not affect the desirability of working or setting up business in a different Member State. If a Member State can legitimately structure its direct tax system in a way which discourages nationals of other Member States from working or setting up business in any of it, I cannot see how it could be improper for a host Member State to organise its direct tax system in a manner which disincentivised work or business in one or more parts of it. As a matter of EU law, that is what happened in the present case. The UK and Gibraltar are to be treated as belonging to the same Member State.

111. An authority on which Mr Baker placed particular reliance was Case C-112/14 *European Commission v United Kingdom* [2015] STC 591. That case concerned the compatibility with articles 49 and 63 of the TFEU of section 13 of the Taxation of Chargeable Gains Act 1992 ("the TCGA"). Section 13 laid down circumstances in which a UK resident holding more than 10% of the shares in a company resident outside the UK could be charged to tax on gains accruing to the company. The European Commission challenged the provision under article 63 of the TFEU (free movement of capital) or, in the alternative, article 49 of the TFEU, and the CJEU, concentrating on article 63, held in paragraph 31 of its judgment that, "by adopting and maintaining tax legislation concerning the attribution of gains to participators in non-resident companies which provides for a difference in treatment between domestic and cross-border activities, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations" under that article. Earlier in the judgment, the CJEU had said:

> "18. According to settled case law of the court, the measures prohibited by art 63(1) TFEU as restrictions on the movement of capital include those that are such as to discourage non-residents from making investments in a member state or to discourage that member state's residents from doing so in other states (see, inter alia, judgment in *European Commission v Finland* (Case C-342/10) [2013] STC 280, para 28 and the case law cited).
>
> 19. In the present case, it is common ground that the effect of s 13 of the TCGA is that taxable gains made by non-resident close companies, including those resident in another member state of the European Union, are immediately attributed for tax purposes to participators in those companies who are United Kingdom residents, if they hold rights over more than 10% of the gains. Those participators are then liable to tax on the amount of those gains, whether or not they have actually received them, the tax being calculated according to the gain

> made by the company itself. By contrast, for close companies resident in the United Kingdom, tax is charged only in the event of a distribution of the gains to the participators, or if the participators dispose of their interests in the company in question, the tax then being calculated, moreover, according to the amount actually received by the participator.
>
> 20. Consequently, in so far as that legislation is such as, first, to discourage residents of the United Kingdom, whether natural or legal persons, from contributing their capital to non-resident close companies and, secondly, to impede the possibility of such a company attracting capital from the United Kingdom, it constitutes a restriction of the free movement of capital, which is prohibited in principle by art 63 TFEU."

112. Mr Baker explained that on the same day that the European Commission issued a press release announcing that it had decided to refer the UK to the CJEU in relation to section 13 of the TCGA it also issued one announcing that it had decided to refer the UK to the CJEU in relation to the TOAA code. In the event, the Commission did not pursue the challenge to the TOAA code, but only, it appears, because the code was amended, in particular by the insertion into the Income Tax Act 2007 of section 742A, to ensure its compatibility with the TFEU. Mr Baker himself noted at the time in an article in the British Tax Review ([2013] BTR 407) that amendments to the Income Tax Act 2007 made by the Finance Act 2013 had been "introduced as a consequence of an infraction action brought by the European Commission in 2011 claiming that the existing legislation was incompatible with EU law".

113. Even so, I do not think *European Commission v United Kingdom* assists the Fishers. The CJEU held section 13 of the TCGA to be incompatible with the TFEU because it provided for a difference in treatment "between domestic and cross-border activities" and was such as "to discourage residents of the United Kingdom … from contributing their capital to non-resident close companies" and "to impede the possibility of such a company attracting capital from the United Kingdom". The complaint was thus that the UK, as a Member State of origin, had legislation deterring investment in another Member State. Nothing in the decision indicates that a measure can fall foul of EU law merely because it discourages investment in a different part of a single Member State.

114. Similar comments can be made about *Cadbury Schweppes* and Case C-135/17 *X GmbH v Finanzamt Stuttgart – Körperschaften* EU:C:2019:136, to which Mr Baker also took us.

115. In all the circumstances, it seems to me that section 739 of ICTA did not infringe Anne's freedom of establishment in any relevant way and, in consequence, that there can be no question of either Stephen or Peter being able to invoke EU law to defeat the assessments on them.

The Remoteness Issue

116. Section 739 of ICTA provides for liability where there is power to enjoy income of a person abroad "by virtue or in consequence of [a] transfer, either alone or in

conjunction with associated operations". By virtue of section 742(1), an "associated operation" is "an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets".

117. In the present case, SJG launched an internet betting website and an online casino in 2003 and introduced an online poker website in 2005. The FTT commented as follows:

> "240. The new ventures of the internet and casino businesses only got off the ground with income which arises in relation to the transferred assets and not with other funding. These new ventures do in our view relate to income from the transferred assets.
>
> 241. The position may be contrasted with the facts of *Fynn* where the company was not buying assets with income from the original transferred assets. Instead there was new money which came in. If SJG had been lent finance from elsewhere and used that to invest in the new businesses then we would accept the new business venture would not be in consequence (or only partly) in consequence of the transferred assets and to that extent it would fall out of charge.
>
> …
>
> 243. In relation to the poker business which was set up from a mixture of telebetting, and internet/casino profits, the question needs to be asked whether the poker venture is in relation to transferred assets, or more pertinently in relation to 'income arising from' the transferred telebetting assets?
>
> 244. In our view it follows from the setting up of the internet and casino ventures being associated operations that the internet / casino income is also income arising from the transferred assets. The question which is then posed is whether the poker venture can be said to be 'in relation to' the telebetting / internet /casino income. In our view the answer is yes. As to whether the poker venture results in income becoming payable to the person abroad the answer in our view is that it does."

118. Before us, Mr Baker submitted that the FTT had ignored the fact that SJG's profits arose from economic inputs beyond the business transferred to it by SJA and, in particular, should have had regard to loans which SJG took out. Mr Baker relied in support of his submissions on *Fynn v Inland Revenue Commissioners* [1958] 1 WLR 585. In that case, the taxpayer had sold investments to an Irish company he had caused to be incorporated and the company had subsequently bought further investments using money borrowed from a bank on the security of assets which had

been the subject of the original transfer. Later, the taxpayer made a £12,000 unsecured loan to the company. It was argued by the Inland Revenue that the right to receive repayment of the £12,000 was connected with the initial transfer or with the charging of the transferred assets because the £12,000 served to reduce the overdraft secured on the transferred assets, but Upjohn J said at 592 that he could "see no connexion whatever between the charge of transferred assets on the one hand and either the lending of the money or the right to receive payment on the other". Upjohn J further rejected the suggestion that the loan was an "associated operation", explaining at 592:

> "I cannot see that the making of the unsecured loan can be said in any ordinary use of language to have any relation to the previously created charge. It was an unsecured loan made on the facts of this case, not for the purpose of reducing the overdraft because the bank were pressing for payment; nor for the purpose of freeing the assets from the charge. It was made to Crescent [i.e. the Irish company] as an interest-free unsecured loan and Crescent could have used it in any way that it pleased. I cannot see that it bears any relation to any of the transferred assets or to the charge."

119. Mr Baker took us to SJG's 2004, 2005 and 2006 accounts in which, as he pointed out, there is reference to SJG having liabilities on bank loans. However, Mr Ewart explained that the Fishers had not relied on such loans before the FTT and that there is no evidence as to how they were used. At all events, the FTT made findings to the effect that the internet and casino businesses "only got off the ground with income which arises in relation to the transferred assets and not with other funding" and that the poker business was "set up from a mixture of telebetting and internet/casino profits". Moreover, the FTT specifically contrasted *Fynn*, on the footing that in that case "there was new money which came in". The UT likewise proceeded on the basis that "SJG did not borrow money from another source to set up these new ventures": see paragraph 99.

120. In substance, Mr Baker is seeking to challenge findings of fact. I do not think it is open to him to do so. It was incumbent on the Fishers to raise any arguments founded on SJG bank loans before the FTT, at which stage the loans and how they were used could have been the subject of investigation. The Fishers are not entitled to suggest for the first time on this second appeal that relevant profits of SJG were attributable to bank loans.

The Discovery Issue

121. It is Stephen and Anne's case that the "discovery" assessments made on them for 2005-2006 and 2006-2007 were invalid on the basis that the condition specified in section 29(5) of the TMA was not satisfied. The FTT accepted that submission, but the UT disagreed.

The legislative framework

122. The power to make a "discovery" assessment is conferred by section 29(1) of the TMA. At the relevant time, this was in these terms:

> "If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income … which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

123. By virtue, however, of section 29(3) of the TMA, no discovery assessment is possible in respect of a year for which the taxpayer has delivered a self-assessment return unless one of the two conditions specified in the next subsections is satisfied. The first of these, contained in section 29(4), was that:

> "the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf".

The second condition is to be found in section 29(5). This stated as follows:

> "The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

124. Section 29(5) of the TMA is supplemented by section 29(6). This provided as follows:

> "For the purposes of subsection (5) above, information is made available to an officer of the Board if—

> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;
>
> (b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;
>
> (c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice 5 under section 19A of this Act or otherwise; or
>
> (d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—
>
> (i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or
>
> (ii) are notified in writing by the taxpayer to an officer of the Board."

125. Section 29(7) explains that, in subsection (6), any reference to a taxpayer's return under section 8 or 8A of the TMA in respect of the relevant year of assessment, "includes … a reference to any return of his under that section for either of the two immediately chargeable periods".

126. Patten LJ, with whom Briggs and Simon LJJ agreed, summarised principles relating to section 29 of the TMA in these terms in *Sanderson v Revenue and Customs Commissioners* [2016] EWCA Civ 19, [2016] 4 WLR 67, at paragraph 17:

> "The power of HMRC to make an assessment under section 29(1) following the discovery of what, for convenience, I shall refer to as an insufficiency in the self-assessment depends upon whether an officer 'could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the insufficiency'. It is clear as a matter of authority:
>
> (1) that the officer is not the actual officer who made the assessment … but a hypothetical officer;
>
> (2) that the officer has the characteristics of an officer of general competence, knowledge or skill which include

a reasonable knowledge and understanding of the law: see *HMRC v Lansdowne Partners LLP* [2012] STC 544;

(3) that where the law is complex even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time: see *Lansdowne* at [69];

(4) that what the hypothetical officer must have been reasonably expected to be aware of is an actual insufficiency: see *Langham v Veltema* [2004] STC 544 per Auld LJ at [33]–[34]:

‘33. More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector’s objective awareness, from the information made available to him by the taxpayer, of ‘the situation’ mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency …;

(5) that the assessment of whether the officer could reasonably have been expected to be aware of the insufficiency falls to be determined on the basis of the types of available information specified in section 29(6). These are the only sources of information to be taken into account for that purpose: see *Langham v Veltema*, at [36]:

‘The answer to the second issue - as to the source of the information for the purpose of section 29(5) - though distinct from, may throw some light on, the answer to the first issue. It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a section 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question. If that other information when seen by the Inspector does cause him to question the assessment, he has the option of making a section 9A enquiry before the discovery

> provisions of section 29(5) come into play. That scheme is clearly supported by the express identification in section 29(6) only of categories of information emanating from the taxpayer. It does not help, it seems to me, to consider how else the draftsman might have dealt with the matter. It is true, as Mr Sherry suggested, he might have expressed the relevant passage in section 29(5) as "on the basis *only* of information made available to him", and the passage in section 29(6) as "For the purposes of subsection (5) above, information is made available to an officer of the Board if, *but only if,*" it fell within the specified categories. However, if he had intended that the categories of information specified in section 29(6) should not be an exhaustive list, he could have expressed its opening words in an inclusive form, for example, "For the purposes of subsection (5) above, information … made available to an officer of the Board … *includes any of the following*".'"

127. Patten LJ also endorsed, in paragraph 41, this passage from the decision of the Upper Tribunal (Norris J and Judge Berner) in *Charlton v Revenue and Customs Commissioners* [2013] STC 866:

> "[78] The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc provided by the taxpayer.
>
> [79] As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s 29 when applying the test of reasonableness."

The issues in the present case

128. The validity of the assessments at issue turns on whether as at 31 January 2008 (in relation to the 2005-2006 assessments) and 31 January 2009 (in relation to the 2006-2007 assessments) an officer of HMRC could reasonably have been expected to have been aware from information within section 29(6) of the TMA that there was an insufficiency of tax. As the UT explained in paragraph 253, that means that:

> "before HMRC would be entitled to make an assessment, it must be shown that the hypothetical inspector did not (at the relevant date) have imputed awareness of one or both of the elements of a s.739 liability for the particular year, namely (i) a transfer of assets (with or without associated operations), by virtue or in consequence of which (ii) the taxpayer had power (forthwith or in the future) to enjoy income of a non-resident person".

As the UT went on to note:

> "Clearly the second element itself requires both the existence of income for the non-resident person and the taxpayer's power to enjoy that income (forthwith or in the future), so if it can be established that the hypothetical inspector did not have imputed awareness of either the existence of the income or the power to enjoy, then there would be no bar to the making of an assessment."

129. The UT concluded that the 2005-2006 and 2006-2007 assessments were valid on the basis that:

i) The 2005-2006 assessments were based on a time-apportioned allocation of SJG's profits for the years to 31 December 2005 and 31 December 2006. Although HMRC had been provided with SJG's accounts to 31 December 2005 by 31 January 2008, it did not have the next year's accounts and, without those, the hypothetical officer could not have established the existence of income on which tax could be charged under section 739 of ICTA. "Whatever time apportioned part of the 31 December 2005 profit might have been allocated, there would have been no way of knowing whether there would be a loss in 2006, a time apportioned part of which could have eliminated the time-apportioned part of the 2005 profits", the UT said in paragraph 270;

ii) With regard to the 2006-2007 assessments, the FTT had been mistaken in considering that the contents of SJG's accounts to 31 December 2006 and 2007 should be imputed to the hypothetical officer as at 31 January 2009 and, that being so, he could not reasonably have been expected to have been aware by that date that there was an insufficiency of tax.

130. Stephen and Anne now challenge the 2005-2006 and 2006-2007 assessments on essentially two grounds:

i) Any charge for 2005-2006 had to be based on SJG's profits in the 12 months ending with the accounting date in that tax year and, hence, on SJG's accounts to 31 December 2005, which HMRC had before 31 January 2008. Time apportionment was not appropriate and so the hypothetical inspector did not need SJG's accounts to 31 December 2006;

ii) Correspondence between HMRC and the Fishers' advisers contained sufficient information for the hypothetical inspector reasonably to have been expected to have been aware of an insufficiency of tax.

2005-2006

131. Section 198 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") provides that "[t]he general rule is that the basis period for a tax year is the period of 12 months ending with the accounting date in that tax year". It is Stephen and Anne's case that that rule applies to income of a foreign company which is deemed to be the income of an individual under section 739 of ICTA. That being so, it is said, the income on which Stephen and Anne could have been charged to tax for the 2005-2006 tax year was SJG's income for the period of 12 months ending with the company's accounting date in that tax year: in other words, its income for the year to 31 December 2005. Since the hypothetical inspector had imputed knowledge of those accounts by 31 January 2008, he was in a position to make assessments by that date. No further information was needed for the hypothetical inspector to conclude that there was an "actual insufficiency" of tax for 2005-2006.

132. Rejecting this contention, the UT said this in paragraph 269:

> "In the present case, HMRC's assessments were based on a time apportioned allocation of SJG's profits for the two accounting years ended 31 December 2005 and 2006 …. We can see no other basis for proceeding, and certainly no warrant for applying income tax principles to calculate (and allocate amongst the Appellants) a notional amount of income to SJG for the tax year 2005-06 calculated by reference to a basis period which had no application or relevance to it."

133. Mr Ewart argued that the UT was correct to consider section 198 of ITTOIA inapplicable and that, even supposing the contrary to be arguable, the hypothetical inspector could not reasonably be expected to have taken section 198 of ITTOIA to apply. In that connection, Mr Ewart pointed out that it had hitherto been the practice to use apportionment to calculate income for the purposes of section 739 of ICTA and that the Fishers' own legal team had not thought to suggest otherwise to the FTT.

134. On balance, I agree that, regardless of whether section 198 of ITTOIA has a role in relation to section 739 of ICTA, the hypothetical inspector could not reasonably have been expected to discern an insufficiency on that basis. The hypothetical inspector would have known that the practice had been to determine income for section 739 purposes by means of apportionment, and should not be assumed to have known of, let alone accepted, the novel suggestion that section 198 of ITTOIA is applicable.

2006-2007

135. Mr Mullan pointed out that the information deemed to have been made available to the hypothetical officer in relation to 2006-2007 includes both information contained in documents produced or furnished by the taxpayer for the purposes of enquiries into a return for either of the two immediately preceding years and information the existence and relevance of which could reasonably be expected to be inferred from information in documents so produced or furnished. Here, James Cowper and Ernst & Young wrote to HMRC on the Fishers' behalf at length in connection with enquiries into preceding years' returns, notably in letters dated 18 January 2007 and 25 June 2007. The 25 June 2007 letter, in particular, addressed the transfer to SJG in great

depth. On top of that, HMRC had SJG's 2005 accounts. In the circumstances, Mr Mullan submitted, the hypothetical officer could reasonably be expected to have inferred that, as regards 2006-2007, Stephen and Anne were still shareholders in SJG, that that company was profitable and hence, on the assumption that section 739 of ICTA was otherwise applicable, that there was an insufficiency of tax.

136. On the other hand, the letters of 18 January 2007 and 25 June 2007 were focused on the transfer of the business and said nothing about either SJG's shareholders in 2006-2007 or whether the company had profits relevant to that period. Nor is it suggested that HMRC had been told in some other way by 31 January 2009 that Stephen and Anne remained shareholders of SJG in 2006-2007 or that the company was profitable at that stage. Further, HMRC had not been provided with SJG's accounts for 2006 or 2007, despite asking for them repeatedly, and Stephen and Anne had not answered "Yes" to the question at the beginning of their 2006-2007 tax returns asking "Have you, or could you have, received or enjoyed directly or indirectly, or benefited in any way from, income or payments of a foreign entity as a result of assets made in this or earlier years?" With regard to the last point, Mr Mullan queried whether the questions at the start of a tax return form part of the return "in the statutory sense", but (a) the questions are physically included the return and (b) supposing that that page does not technically represent part of the return, it must nonetheless fall within section 29(6)(a) of the TMA as a "[document] accompanying the return".

137. In the circumstances, it seems to me that, while a hypothetical officer might have surmised that there could be an insufficiency of tax for 2006-2007, he could not reasonably have been expected to be aware of an "actual insufficiency". He is not to be deemed to have known either that Stephen and Anne continued to be shareholders in 2006-2007 or that SJG enjoyed profits relevant to that period. On that basis, he might have been aware of the *possibility* of charges arising under section 739 of ICTA, but not of an "actual insufficiency".

Conclusions

138. I would allow HMRC's appeal as regards Stephen and Peter, but dismiss it as regards Anne. In my view, the UT was right to think that the FTT had been mistaken in regarding Anne as a quasi-transferor to whom section 739 of ICTA applied. On the other hand, it seems to me that the UT was not entitled to interfere with the FTT's conclusion that Stephen and Peter were quasi-transferors; that there is no requirement for income tax to be avoided; that the motive defence is not available to Stephen or Peter; that section 739 was not incompatible with EU law in any relevant way; that none of the income of the SJG which was the subject of the assessments is to be regarded as too remote from the transfer of the business; and that the 2005-2006 and 2006-2007 assessments on Stephen were not defective.

Lord Justice Arnold:

139. I agree with the judgment of Newey LJ.

Lord Justice Phillips:

140. I agree with all aspects of Newey LJ's judgment, save for (i) the analysis as to when a minority shareholder can be regarded as a quasi-transferor to whom section 739 of

ICTA applies and (ii) the conclusion that the UT was wrong to determine that Stephen and Peter (as well as Anne) were not quasi-transferors in that sense.

141. I see no difficulty, as a matter of principle or logic, with the proposition, drawn from the narrower basis for the decision in *Congreve,* that an individual who exercises their controlling interest in a company to procure a transfer by that company may be classified as a quasi-transferor. The more problematic issue, which arises in the present case, is whether and in what circumstances a party who holds only a minority interest in the transferor company may also be so classified.

142. The FTT recorded at [198] that, at the time of the transfer of the business, Stephen and Anne each held 26% of the shareholding in SJA and Peter held 24%, although elsewhere (see [93]) those proportions were stated to be 38% and 12% respectively. In any event, the FTT viewed each of those minority shareholders as quasi-transferors because "[b]etween them they had a controlling shareholding …[w]e agree with the HMRC the transfer was jointly procured by all three appellants. SJA was a family run business, and each of the appellants was in reality a transferor of the telebetting business" [199].

143. The FTT therefore appears to have taken the view that minority shareholders, who together hold a controlling interest, are to be taken to have procured a transaction (so as each to be a quasi-transferor) if, as in the case of Anne, they are "happy to go along with" the transfer by the company [199].

144. Newey LJ, in his judgment above, disagrees with the suggestion that a minority shareholder could be taken to have procured a transfer by the company through inaction, and so would acquit Anne of being a quasi-transferor [71]. But Newey LJ does consider that Stephen and Peter, each a minority shareholder, jointly "procured" the transfer. It is important, in my judgment to understand precisely what conduct of theirs is taken to amount to "procuring" the transaction. Newey LJ expressly disclaims any requirement that the minority shareholders must act as agents or officers of the company, so executive action in furthering the transaction is not required. Neither is it suggested that the shareholders must have acted pursuant to a prior agreement. The sole requirement, therefore, it seems, is that "a group of shareholders decided on a transfer and brought it about" (also [71]). As I understand it, that entails no more than that the minority shareholders in question each supported the making of the transfer qua minority shareholder, whether by formal vote or otherwise[1].

145. In my judgment it is wrong in principle, and illogical, to regard a minority shareholder as "procuring" an act by the company of which they are a member simply by voting in favour of (or otherwise supporting) that act. Unless such a shareholder forms some voting pact with other shareholders (by formal agreement or otherwise), a minority shareholder has no power themselves to procure any outcome, having to abide by the majority decision. If their vote contributes to a majority in favour of a transfer, they

[1] It may be said to be a requirement that the minority shareholders in question together had a majority holding (as the FTT appear to have thought), although it is unclear to me that Stephen and Peter together held more than 50% of SJA's shares.

have supported that transaction, such that the membership of the company authorised the transaction, but cannot sensibly be said to have themselves procured it any more than a single voter at an election "procures" a change of government.

146. Newey LJ postulates the case of two brothers, each with a 50% shareholding, who cause their company to transfer an asset abroad, expressing the view that they jointly have "procured" the transfer. But most (if not all) decisions of companies will, by definition, be taken by or with the underlying support of shareholders who, collectively, hold a controlling interest in the relevant company. If being part of a group of minority shareholders who vote in favour of a transaction is sufficient to render them all quasi-transferors, that must apply to thousands of shareholders in a PLC as much as to the two brothers, as Mr Ewart on behalf of HMRC accepted in the course of argument. Indeed, it would even apply, potentially, to a shareholder who has given a proxy to the board of a PLC which was proposing the effect the transfer.

147. Mr Ewart emphasised, by way of mitigation of that apparently unfortunate outcome, that a small shareholder in a PLC who votes in favour of a transfer of assets abroad would only incur liability under section 739 if they had the power to enjoy the income from the transferee. However, the likelihood or otherwise of a minority shareholder having an interest in both transferor and transferee companies is not, in my judgment, an acceptable answer to the illogicality of regarding a small shareholder in a PLC as procuring a transfer of assets by the company. As Newey LJ commented in the course of argument, that would be a rather odd result if you happen to be a 1,000th shareholder in each company.

148. It may be that, in the case of small companies that are in truth quasi-partnerships, subject to formal or informal shareholder agreements, the shareholders/partners may be said to be jointly procuring the company to effect a transfer of its assets. The FTT may have been reaching for that type of analysis when referring to SJA as a "family run business" and Newey LJ's example of the two brothers may also hint at such an arrangement. But that was not the basis on which the appeal was argued by HMRC, which sought to classify all shareholders who support a transfer of assets abroad as quasi-transferors, no matter how many shareholders the company in question may count in its membership.

149. For my part, I would dismiss the appeal in its entirety.