Neutral Citation Number: [2024] EWCA Civ 180

Case No: CA-2023-000316

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Adam Johnson and Upper Tribunal Judge Thomas Scott
[2022] UKUT 00351 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 February 2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between :

(1) SHARON CLIPPERTON
(2) STEVEN LLOYD **Appellants**

- and -

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS **Respondents**

- -
- -

Michael Jones KC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellants**

Aparna Nathan KC and **Laura Poots** (instructed by **HMRC Solicitor's Office**) for the **Respondents**

Hearing date: 16 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 29 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the Upper Tribunal (Tax and Chancery Chamber) (**"the UT"**) concerns a marketed tax avoidance scheme called Aikido which was designed to enable the owners of a company to extract funds from the company without incurring a charge to income tax.

2. The Appellants, Mrs Sharon Clipperton and Mr Steven Lloyd, at all material times held 50% each of the shares in a company called Winn & Co. (Yorkshire) Ltd (**"Winn Yorkshire"**). They were also its sole directors. Winn Yorkshire carried on business as accountants.

3. In early 2012 Winn Yorkshire had distributable reserves sufficient to enable it to pay dividends of £200,000 to the Appellants. In previous years it had paid them substantial dividends from the profits of its accounting business. These were subject to income tax pursuant to s. 383 of the Income Tax (Trading and Other Income) Act 2005 (**"ITTOIA"**) which imposes a charge to income tax on "dividends and other distributions of a UK tax resident company", the recipient being liable for the tax under s. 385 ITTOIA. Rather than pay themselves dividends of £200,000 and accept the tax consequences, however, the Appellants in January 2012 decided to use the Aikido scheme. This was marketed to them as:

   > "suitable for any UK resident company with the desire, and sufficient distributable reserves, to pay a dividend. It provides a means for a company to pay a dividend to its shareholders in a way that avoids the higher and additional rates of income tax on those dividends. In effect the dividends should be free of tax in the hands of the recipients."

   I give the details of the various steps taken in implementation of this scheme below, but stripped to its essentials Winn Yorkshire paid £200,000 into the scheme, of which, after a number of intervening steps, each Appellant ultimately received £98,465.

4. Each Appellant disclosed the arrangements in their self-assessment tax return for 2011/12 but did not include the sums received as their income (on the basis that the scheme had the effect that these sums were to be treated as the income of Winn Yorkshire and of no-one else). HMRC however opened enquiries into the returns and in March 2016 concluded that the sums received were taxable in the hands of the Appellants and amended the returns accordingly.

5. The Appellants appealed to the First-tier Tribunal (**"the FTT"**). The appeals were heard as "lead appeals" by Judge Harriet Morgan. She dismissed the appeals for the reasons given in a decision released on 20 January 2021 at [2021] UKFTT 12 (TC) (**"the FTT decision"**).

6. The Appellants appealed the FTT decision to the UT. The appeal was heard by Adam Johnson J and Upper Tribunal Judge Thomas Scott. They dismissed the appeal for the reasons given in a decision released on 20 December 2022 at [2022] UKUT 351 (TCC) (**"the UT decision"**).

7. The Appellants now appeal to this Court (with permission given by me). The appeal was very well argued, by Mr Michael Jones KC on behalf of the Appellants, and by both Ms Aparna Nathan KC and Ms Laura Poots on behalf of HMRC. For the reasons that follow, I would dismiss the appeal.

Facts

8. There was no dispute as to the facts. They are set out in detail in the FTT decision, and I can summarise them as follows:

(1) On 14 February 2012 a new company, Winn & Co. Scarborough Ltd (**"Winn Scarborough"**), was incorporated, with the Appellants as directors, as a subsidiary of Winn Yorkshire, Winn Scarborough's initial capital consisting of 199 A shares of £1, allotted as fully paid up to Winn Yorkshire, and 1 B share of £1, allotted as fully paid up to R T Corporate Trustee Ltd (**"the Trustee"**), which had agreed to hold it on trust as nominee for Winn Yorkshire. The A shares carried a right to vote, a right to participate in distributions, and a right to capital on liquidation or otherwise. The B share carried no right to vote or right to capital, but did carry a right to participate in distributions. Under the Articles distributions could be made to one class of shares to the exclusion of the other.

(2) By deed dated 22 February 2012 made between Winn Yorkshire as settlor and the Trustee as trustee, Winn Yorkshire established a trust of the B share called "The Winn & Co. (Yorkshire) Limited Interest in Possession Trust" (**"the Trust"**). Subject to certain overriding discretions, the Trustee was to hold any income arising during an Initial Period of 18 months on trust (i) as to the first £500 for Cancer Research UK, a registered charity; (ii) as to the next £500 for Winn Yorkshire; (iii) as to any further income, as to 0.5% for Cancer Research UK, as to 0.5% for Winn Yorkshire, and as to 99% on protective trusts for the Appellants equally. Subject thereto the Trustee was to hold the capital and income on trust for Winn Yorkshire absolutely.

(3) On 27 February 2012 a further A share was allotted to Winn Yorkshire. Winn Yorkshire paid a total of £200,001 for this share, of which £1 was the par value and £200,000 a premium.

(4) On 29 February 2012 Winn Yorkshire, as the sole voting member of Winn Scarborough, by written resolution resolved to reduce the share capital of Winn Scarborough by £200,000 by cancelling the share premium account and crediting the amount to distributable reserves.

(5) On 2 March 2012 the board of Winn Scarborough declared a dividend of £200,000 on the B share.

(6) On 5 March 2012 the £200,000 dividend was distributed to the beneficiaries of the Trust, and (after deduction of a £40 bank transfer fee in each case) the amounts received were:

(i) Cancer Research UK: £1,455 (ie £500 + (0.5% x £199,000) – £40).

(ii) Winn Yorkshire: £1,455 (as above).

(iii) Mrs Clipperton: £98,465 (ie (49.5% x £199,000) – £40).

(iv) Mr Lloyd: £98,465 (as above).

(7) Following implementation of the scheme, Winn Scarborough was reported to HMRC as being dormant (as at 23 May 2012); it had no funds or assets other than those it received under the scheme.

9. After setting out the facts Judge Morgan said in the FTT decision (at [16]):

> "I find that the sole purpose of the relevant parties in implementing the arrangements described above was to enable Winn Yorkshire to provide its shareholders with the funds they received as a return on their investment in shares in Winn Yorkshire without attracting the income tax charge which usually applies to dividends or distributions made to shareholders. I did not understand the appellants to dispute that was the case."

The legislation

10. There are two relevant sets of statutory provisions, both found in ITTOIA, one dealing with the taxation of distributions from UK resident companies, and the other dealing with the taxation of income under settlements. All references below to the legislation are to the provisions in force at the relevant time.

11. ITTOIA was passed to restate, with minor amendments, certain enactments relating to income tax on various types of income: see the Preamble. As explained in s. 1(1) it imposes charges to income tax on trading income (Part 2), property income (Part 3), savings and investment income (Part 4), and certain miscellaneous income (Part 5).

12. Chapter 3 of Part 4 (ss. 382 to 401B) concerns dividends and other distributions from UK resident companies. A charge to income tax on the amount of such dividends and other distributions is imposed on the recipient by ss. 383 to 385 as follows:

> "**383 Charge to tax on dividends and other distributions**
>
> (1) Income tax is charged on dividends and other distributions of a UK resident company.
>
> (2) For income tax purposes such dividends and other distributions are to be treated as income.
>
> (3) For the purposes of subsection (2), it does not matter that those dividends and other distributions are capital apart from that subsection.
>
> **384 Income charged**
>
> (1) Tax is charged under this Chapter on the amount or value of the dividends paid and other distributions made in the tax year.

…

385 Person liable

(1) The person liable for any tax charged under this Chapter is–

(a) the person to whom the distribution is made or is treated as made (see Part 6 of ICTA and sections 386(3) and 389(3)), or

(b) the person receiving or entitled to the distribution.

…"

13. By s. 989 of the Income Tax Act 2007 "distribution" in these provisions has the meaning given by Chapters 2 to 5 of Part 23 of the Corporation Tax Act 2010 (**"CTA"**). The relevant provisions for present purposes are ss. 1000 and 1113 CTA, the material parts of which are as follows:

"**1000 Meaning of "distribution"**

(1) In the Corporation Tax Acts "distribution", in relation to any company, means anything falling within any of the following paragraphs.

A. Any dividend paid by the company, including a capital dividend.

B. Any other distribution out of assets of the company in respect of shares in the company, except however much (if any) of the distribution—

(a) represents repayment of capital on the shares, or

(b) is (when it is made) equal in amount or value to any new consideration received by the company for the distribution.

For the purposes of this paragraph it does not matter whether the distribution is in cash or not.

…

1113 "In respect of shares"

…

(3) For the purposes of this Part a thing is regarded as done in respect of a share if it is done to a person—

(a) as the holder of the share, or

(b) as the person who held the share at a particular time.

..."

14. The second set of relevant provisions are those relating to settlements, found in Chapter 5 of Part 5 (ss. 619 to 648) of ITTOIA, which is headed "Settlements: Amounts treated as income of settlor or family". This is often referred to as **"the settlements code"**. The particular provisions which are relevant are ss. 619-20, 622, 624-5, and 644-5, the material parts of which are as follows:

"**619 Charge to tax under Chapter 5**

(1) Income tax is charged on–

(a) income which is treated as income of a settlor as a result of section 624 (income where settlor retains an interest),

…

620 Meaning of "settlement" and "settlor"

(1) In this Chapter–

"settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets (except that it does not include a charitable loan arrangement), and "settlor", in relation to a settlement, means any person by whom the settlement was made.

(2) A person is treated for the purposes of this Chapter as having made a settlement if the person has made or entered into the settlement directly or indirectly.

(3) A person is, in particular, treated as having made a settlement if the person–

(a) has provided funds directly or indirectly for the purpose of the settlement,

(b) has undertaken to provide funds directly or indirectly for the purpose of the settlement, or

(c) has made a reciprocal arrangement with another person for the other person to make or enter into the settlement.

…

622 Person liable

The person liable for any tax charged under this Chapter is the settlor.

624 Income where settlor retains an interest

(1) Income which arises under a settlement is treated for income tax purposes as the income of the settlor and of the settlor alone if it

arises–

(a) during the life of the settlor, and

(b) from property in which the settlor has an interest.

…

625 Settlor's retained interest

(1) A settlor is treated for the purposes of section 624 as having an interest in property if there are any circumstances in which the property or any related property–

(a) is payable to the settlor…

… or

(c) will, or may, become so payable or applicable.

…

(5) In this section "related property", in relation to any property, means income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income from it.

644 Application to settlements by two or more settlors

(1) In the case of a settlement where there is more than one settlor, this Chapter has effect in relation to each settlor as if that settlor were the only settlor.

(2) This works as follows.

(3) In this Chapter, in relation to a settlor–

(a) references to the property comprised in a settlement include only property originating from the settlor, and

(b) references to income arising under the settlement include only income originating from the settlor.

…

(6) See section 645 for the meaning of references in this section to property or income originating from a settlor.

645 Property or income originating from settlor

(1) References in section 644 to property originating from a settlor are references to–

(a) property which the settlor has provided directly or indirectly for the purposes of the settlement,

(b) property representing property so provided, and

(c) so much of any property which represents both property so provided and other property as, on a just and reasonable apportionment, represents the property so provided.

(2) References in section 644 to income originating from a settlor are references to–

(a) income from property originating from the settlor, and

(b) income provided directly or indirectly by the settlor.

(3) In this section references to property or income which a settlor has provided directly or indirectly–

(a) include references to property or income which has been provided directly or indirectly by another person under reciprocal arrangements with the settlor, but

(b) do not include references to property or income which the settlor has provided directly or indirectly under reciprocal arrangements with another person.

…”

The FTT decision

15. At [3]-[4] of the FTT decision Judge Morgan succinctly identified the rival arguments advanced before her. That for the Appellants was that the Aikido scheme was effective to require the income in dispute to be treated as the income of Winn Yorkshire alone. This was because Winn Yorkshire was the settlor of a settlement (the Trust); Winn Yorkshire had an interest in the settled property (the B share), in that some of the income from the B share was payable to Winn Yorkshire, and the B share was to revert to it (see s. 625(1)(a) and (c) and s. 625(5) ITTOIA); and hence by s. 624 ITTOIA the income arising under the settlement (including that payable to the Appellants) was treated for income tax purposes as "the income of the settlor and of the settlor alone".

16. HMRC had two alternative arguments why this was wrong and the Appellants were liable to income tax on the sums received. The first, called by Judge Morgan **"the *Ramsay* argument"**, was based on the principle established by the well-known case of *W T Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 (***"Ramsay"***). She accepted this argument, concluding (at [114]) that, on a purposive approach to the construction of ss. 383 to 385 ITTOIA and s. 1000 CTA and on a realistic view of the facts, Winn Yorkshire made a distribution to the Appellants in respect of their shares in it by providing funds to Winn Scarborough (in the shape of the funds used to acquire shares in it) with the sole purpose of thereby enabling Winn Scarborough to pay the B share dividend for the intended benefit of the Appellants, solely in their capacity as its shareholders.

17. HMRC's second argument, which Judge Morgan referred to as **"the settlements argument"**, was advanced in the alternative and was that the settlements code applied to subject the Appellants to income tax on the income in dispute on the basis that they were the settlors of any relevant settlement given that they, as sole directors and shareholders of Winn Yorkshire, arranged for all of the steps involved.

18. She considered this argument in case she was wrong on the *Ramsay* argument. But she did not accept it, concluding (at [222]) that if the arrangements were not to be regarded as a distribution by Winn Yorkshire to the Appellants in respect of their shares in that company, they constituted a settlement made by Winn Yorkshire as the settlor.

19. In the light of her conclusion on the *Ramsay* argument however she dismissed the Appellants' appeals.

The UT decision

20. The Appellants appealed her decision to the UT. HMRC cross-appealed her rejection of the settlements argument.

21. On the Appellants' appeal the UT concluded (at [76]) that the FTT had reached the correct conclusion on the *Ramsay* argument, and also rejected (at [101]) a further argument on behalf of the Appellants that even if this were so the settlements code applied (so as to prevent the income being that of the Appellants). They therefore dismissed the appeal.

22. That meant that they did not strictly need to decide HMRC's cross-appeal on the settlements code, but they proceeded to consider it. They concluded (at [136]) that under the settlements code the Appellants were settlors, and also rejected (at [165]) an argument that if both Winn Yorkshire and the Appellants were settlors, no income tax could be apportioned to them. They therefore would have allowed HMRC's cross-appeal.

Grounds of appeal

23. Four grounds of appeal were advanced by Mr Jones. These were that the UT erred in law:

   (1) in concluding that the B share dividend was taxable as a distribution made by Winn Yorkshire to the Appellants;

   (2) in concluding that it followed that the relevant income could not be regarded as arising under a settlement made by Winn Yorkshire as settlor;

   (3) in its interpretation and application of the "element of bounty" requirement within the settlements code; and

   (4) in concluding that where two settlors could be said to have provided the same property (one directly and one indirectly) for the purposes of a settlement, the settlements code should be interpreted so as to lead to double taxation.

Ground 1 – the Ramsay argument

24. The *Ramsay* principle has recently been described by the Supreme Court as having "reached a state of well-settled maturity": *Rossendale BC v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 (***"Rossendale"***) at [9] per Lord Briggs and Lord Leggatt JJSC (with whom Lord Reed PSC, Lord Hodge DPSC and Lord Kitchin JSC agreed). Their judgment contains a useful summary of the principle at [9]-[17]. It is not necessary on this appeal to examine it in any detail. Although frequently deployed in relation to tax avoidance schemes, the principle is not in its essentials particular to tax, being based upon the modern purposive approach to the interpretation of all legislation (see at [9]). At [15] Lords Briggs and Leggatt say this:

> "In the task of ascertaining whether a particular statutory provision imposes a charge, or grants an exemption from a charge, the *Ramsay* approach is generally described … as involving two components or stages. The first is to ascertain the class of facts (which may or may not be transactions) intended to be affected by the charge or exemption. This is a process of interpretation of the statutory provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they "answer to the statutory description" ([*Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684] at [32]). This may be described as a process of application of the statutory provision to the facts. It is useful to distinguish these processes, although there is no rigid demarcation between them and an iterative approach may be required."

That is a sufficient description of the principle for present purposes.

25. In the FTT, Judge Morgan held, applying this approach, that Winn Yorkshire made a distribution to the Appellants "in respect of [their] shares" within the meaning of s. 1113(3) CTA (and hence that the distribution by Winn Yorkshire was a "distribution out of assets of the company in respect of shares of the company" within s. 1000(1)(B) CTA, and so was a "distribution" for the purposes of s. 383(1) ITTOIA). The UT agreed, holding that the FTT did not err in law in reaching this conclusion.

26. Mr Jones accepted in terms that Winn Yorkshire made a distribution out of its assets, and that it did not matter that the £200,000 was paid as a share subscription. He submitted however that it was not a distribution to the Appellants in respect of their shares in Winn Yorkshire. By s. 1113(3)(a) CTA, a thing is done in respect of a share if it is done "to a person … as the holder of the share". But, he submitted, what Winn Yorkshire had done was subscribe for a share in Winn Scarborough, and that was not a thing done to the Appellants at all.

27. Mr Jones relied in particular on the recent decision of this Court in *Khan v HMRC* [2021] EWCA Civ 624, [2022] 1 WLR 539 (***"Khan"***). I will come to *Khan* and the argument based on it below, but subject to that argument, I would not accept his submission. I propose to consider first what the position would be in the absence of *Khan* (which was the position before the FTT as it had not then been decided), and then consider whether *Khan* requires a different answer.

In the absence of Khan

28. If *Khan* had not been decided, the analysis does not seem to me to pose any great difficulty. It is true that, viewed in isolation, the payment by Winn Yorkshire of £200,001 was not a payment to the Appellants; it was a payment to Winn Scarborough, as to £1 for the par value of the A share, and as to £200,000 as a premium on that share. But the whole basis of the *Ramsay* principle is that it can be an error to view steps in an overall scheme in isolation. This is especially true where the step in question is one of a series of pre-planned steps in a tax avoidance scheme, as explained by Lords Briggs and Leggatt in *Rossendale* at [12]:

> "Another aspect of the *Ramsay* approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. "

29. If one considers the scheme as a whole, I think there is little doubt that Judge Morgan in the FTT was entirely justified in her conclusion. The payment by Winn Yorkshire to Winn Scarborough was simply the first step in a scheme designed to distribute the majority of the money to the Appellants. The money was being distributed to them because they were the owners of Winn Yorkshire and wished to extract profits from the company into their own pockets. Everything else was just a means of enabling that to happen. That is clear from the factual finding of Judge Morgan, not challenged on this appeal, that "the sole purpose of the relevant parties in implementing the arrangements … was to enable Winn Yorkshire to provide its shareholders with the funds they received as a return on their investment in shares in Winn Yorkshire" (see paragraph 9 above). In those circumstances the conclusion that the money they ended up receiving (£98,465 each[1]) was a distribution by Winn Yorkshire out of its assets to the Appellants as holders of its shares seems to me not only one that was open to Judge Morgan, but obviously right.

30. Indeed the present case would seem to be a paradigm case for the application of the *Ramsay* principle. As explained by Lords Briggs and Leggatt in *Rossendale* at [15], the first stage of the requisite analysis is to "ascertain the class of facts … intended to be affected by the charge" (see paragraph 24 above). That requires a purposive construction of the statute. Subject always to the argument based on *Khan*, I see no reason to think that Parliament, which used widely expressed language ("any other distribution … in respect of shares in the company") intended by these words to charge only a distribution by a company directly to its shareholders and not a distribution intended to reach, and which in fact reached, its shareholders by a more circuitous route via steps inserted into the overall transaction that "have no business purpose and have as their sole aim the avoidance of tax": see *Rossendale* at [11]. As Lords Briggs and Leggatt there explain, such steps are often disregarded:

> "This is not because of any principle that a transaction otherwise effective to achieve a tax advantage should be treated as ineffective to do so if it

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1 When HMRC closed their enquiries they concluded that the amount chargeable to income tax in the case of each Appellant was in fact £98,505. No point has been taken on the extra £40, and I do not propose to consider if it should have been included or not.

> is undertaken for the purpose of tax avoidance. It is because it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance. As Judge Learned Hand said in *Gilbert v Comr of Internal Revenue* (1957) 248 F 2d 399, 411, in a celebrated passage cited (in part) by Lord Wilberforce in *Ramsay* [1982] AC 300, 326:
>
> > "If . . . the taxpayer enters into a transaction that does not appreciably affect his beneficial interest except to reduce his tax, the law will disregard it; for we cannot suppose that it was part of the purpose of the Act to provide an escape from the liabilities that it sought to impose." "

Equally it cannot readily be supposed that when Parliament enacted ss. 383 to 385 ITTOIA and thereby sought to impose a charge to income tax on distributions by a company to its shareholders, it only intended such distributions to be taxable if paid directly to them, and that such distributions should escape liability for the tax if the participants took two or more steps to achieve this rather than one. Or as Judge Morgan put it in the FTT (at [121]):

> "In my view, having regard to the natural meaning of the terms used in s 1000 CTA 2010 (as further explained in s 1113) and viewing those provisions in the overall context of Part 23 CTA 2010, the purpose of ss 383 to 385 as regards distributions is, in broad terms, to tax a shareholder on any value which a company delivers out of its assets into a shareholder's hands by some non-prescribed means (whether directly or indirectly) as a return on his shareholding except where one of the specified exemptions apply."

I agree.

31. It follows that the answer to the first stage of the enquiry is that "distribution … in respect of shares" is, on a purposive construction of the statute, wide enough to include a distribution by a company which is designed to reach, and does reach, the company's shareholders even if it does so as a result of a series of steps. That is the "class of facts intended to be affected by the charge". The second stage of the enquiry is to discover whether the relevant facts fall within that class, in the sense that they "answer to the statutory description". That is straightforward enough. The distribution by Winn Yorkshire, was, as to some 98.5% of the sum distributed, designed to reach, and did reach, the Appellants (its shareholders). It therefore answers the statutory description.

32. Subject to the argument based on *Khan* therefore, I consider that Judge Morgan was right to conclude that the distribution by Winn Yorkshire was in respect of shares in the company.

Does Khan compel a different conclusion?

33. Mr Jones however submitted that *Khan* required a different conclusion. That requires a careful analysis of the facts, the issues and the decision of the Court. These can all be found in the judgment of Andrews LJ (with whom Peter Jackson and Dingemans LJJ agreed), and references in this section to numbers in square brackets are to paragraphs

of her judgment.

34. The facts were as follows ([16]-[19]). A company called Computer Aided Design Ltd (**"CAD"**), with three shareholders (**"the vendors"**) and 99 issued shares, had distributable reserves of £1.95m. The vendors decided to extract all available funds from CAD and then go their separate ways. They agreed with Mr Khan, an accountant, that he would acquire CAD from them, at a net cost to him of £18,771 representing the net value of CAD's remaining assets.

35. This was effected by the following steps ([20]-[24]):

(1) Mr Khan agreed to buy all 99 shares from the vendors for (i) £1.95m and (ii) £18,771. This was documented in a share purchase agreement between Mr Khan and the vendors (**"the SPA"**).

(2) The cash for this purchase was provided by CAD transferring £1.95m to Mr Khan's account from where it went to his solicitor and then the vendors' solicitor, Mr Khan later providing the £18,771 from his own resources.

(3) Mr Khan became sole shareholder and sole director of CAD. In those capacities he agreed that CAD should purchase 98 of its own shares from him at £1.95m. This was documented in an off-market purchase agreement between CAD and him (**"the OMPA"**).

(4) All these steps took place at a sequence of meetings in short order on the same day, the OMPA being entered into less than 40 minutes after the SPA.

(5) The UT found that the SPA and the OMPA were agreed and implemented as one, there being no practical likelihood that the transactions would not have happened together.

(6) The UT also found that the payment of £1.95m from CAD to Mr Khan's account must have been by way of loan to enable him to acquire the shares from the vendors. His obligation to repay the loan was then set off against CAD's obligation to pay him the price of the 98 shares under the OMPA.

36. It was common ground that the payment made by CAD to Mr Khan to purchase its own shares was a distribution for the purposes of s. 383 ITTOIA ([25]). It is important to note that it was not the payment of the £1.95m as a loan to Mr Khan to enable him to buy the 99 shares from the vendors under the SPA that was the relevant distribution, but the later payment of the purchase price for the 98 shares under the OMPA, effected by the set-off ([26]).

37. On these facts HMRC concluded that Mr Khan was liable to income tax on the distribution under s. 385(1)(b) ITTOIA. I have set it out above but repeat it here for convenience:

"**385 Person liable**

(1) The person liable for any tax charged under this Chapter is–

…

> (b) the person receiving or entitled to the distribution."

38. Mr Khan appealed unsuccessfully to the FTT. He appealed further to the UT, where his argument was summarised by Andrews LJ as follows ([31]):

> "He then appealed to the UT on the basis that the FTT erred in failing to recognise the true substance of the transaction, namely that it was a single composite transaction whose effect was to make Mr Khan the owner of one share in [CAD] devoid of its distributable reserves, at a small net cost. For the purposes of section 383 and section 385(1)(b) ITTOIA he contended that, viewed realistically, the persons who received and were entitled to the distribution were the selling shareholders, even though they no longer owned the shares."

That was rejected by the UT, who decided that none of the matters relied on by Mr Khan meant that he did not receive the share buy-back proceeds or that he was not entitled to them ([37]).

39. Mr Khan appealed further to this Court. His argument was similar to that rejected by the UT, and was summarised by Andrews LJ as follows (at [39]):

> "Mr Sykes submitted that the UT erred in law in refusing to consider the sale and buy-back of the shares as a single composite transaction and consider its overall effect rather than concentrating on the machinery by which it was effected (ie the legal steps in the chain). In substance and in truth, Mr Khan was no more than a conduit for the selling shareholders to effect the buy-back of the 98 shares themselves and his intermediate role in that aspect of the transaction should be ignored. As a matter of practical reality, the 98 shares were never Mr Khan's to do with as he pleased, nor were the buy-back proceeds. He never had the benefit of nor control over the £1.95m and it was "absurd" to tax him on that sum, all the more so if the selling shareholders were liable to pay CGT on that sum (less their cost of acquiring the shares). "

In support of this it was submitted that it was insufficient to establish that a person was the legal and beneficial owner of the money distributed: in order for there to be a "receipt" for the purposes of s. 385(1)(b) ITTOIA, the person must also have an element of control over the money, and in order to meet the requirement of "entitlement", that person must benefit from their ownership, and Mr Khan did not [45].

40. By contrast the submission for HMRC was that on any reading of s. 385(1)(b), Mr Khan both "received" the payment (by way of set-off of his indebtedness under the loan) and was "entitled to" it as counterparty to the OMPA [47].

41. Andrews LJ begins her consideration of the rival submissions at [49], under the heading "Meaning of receipt or entitlement". Having referred to the *Ramsay* approach (by reference to what Lord Reed JSC said in *UBS AG v HMRC* [2016] UKSC 13, [2016] 1 WLR 1005 (***"UBS"***) at [68]) she continued:

> "51 It is unusual for a taxpayer to rely upon the *Ramsay* approach, which is generally invoked by HMRC when seeking to challenge artificial

> tax avoidance schemes (which this undoubtedly was not). However, the principles in *Ramsay* are of general application, and our focus must be upon whether the UT erred in refusing to look at the sale and buy-back transactions as a single composite whole and if so, whether that led to their reaching the wrong conclusion as to who "received or was entitled to" the distribution.
>
> 52 In my judgment, this is a case in which the legal nature of the transaction to which a tax consequence is attached does not emerge from looking at the connected transactions taken as a whole. On the contrary, the statutory provisions require the focus to be on the transaction under which the taxable distribution arose. However, even if one were to look at the transactions taken as a whole, they do not produce the end result contended for by Mr Sykes, namely, a distribution by the Company in respect of its shares to the vendor shareholders."

42. At [57] Andrews LJ concluded that the UT was right to interpret s. 385(1)(b) as concerned with the person who actually received the distribution and (if different) the person to whom the distribution belonged; in Mr Khan's case they were one and the same. She then considered whether there was a requirement of either control ([58]-[63]) or benefit ([64]-[70]), before turning to the question whether the UT should have looked at the composite transaction. Here she said that in some cases the identification of the person "to whom the distribution truly belongs" could involve looking at the matter realistically, ignoring artificial legal arrangements that might have been put in place. But the fact that the question is one of actual receipt or entitlement at the time of the distribution means that the statute requires the focus to be on the situation at that time, not on anything that happens to the money afterwards [72]. She continued:

> "73 On the face of it, therefore, section 385(1) is not a statutory provision that is concerned with the overall economic outcome of a series of commercially interlinked transactions, but only with the question of who was entitled to the distribution or who actually received it."

That was Mr Khan. Nobody else had a better right to the money [73]; the fact that payment of the distribution was by way of set-off against liability to repay the loan does not mean that there was no receipt; and he derived a real benefit from the payment because it extinguished that liability of his [81].

43. She then expressed her conclusion as follows:

> "83 Despite Mr Sykes' attractive presentation of the arguments, I am not persuaded that the concept of "receipt" in section 385(1)(b) contains an implicit requirement that the person who receives the distribution must also have practical control over it. "Entitlement" means no more than having the right to the taxable income, in this case, the distribution, and there is no further implicit requirement of benefit in the sense used in the group or consortium tax relief cases. If one asks the only pertinent question: "to whom did the purchase price of the 98 shares belong?" there is only one answer, and that is

> Mr Khan. However, even if there had been a requirement of benefit, Mr Khan did benefit from the distribution. As the UT held at [97] it was the fact that he was entitled to and did receive the distribution that enabled Mr Khan to discharge his liability to repay £1.95m to the Company."

44. I have set this out at some length because Mr Jones described *Khan* as the centrepiece of his argument. He naturally placed reliance on the statement by Andrews LJ at [52] that:

> "this is a case in which the legal nature of the transaction to which a tax consequence is attached does not emerge from looking at the connected transactions taken as a whole. On the contrary, the statutory provisions require the focus to be on the transaction under which the taxable distribution arose."

45. But like any statement in a judgment this has to be read in the context of the issue before the Court, and the arguments presented to it. The issue in *Khan*, as can be seen clearly from the parts of the judgment of Andrews LJ that I have referred to, was not over whether there was a distribution, nor whether there was a distribution in respect of shares in the company, nor what the distribution was. By the time the case reached this Court there was no dispute that there was a distribution in the shape of the payment of £1.95m by CAD to Mr Khan in respect of the 98 shares which CAD bought back from him under the OMPA, such payment being effected by set-off against his liability to repay the £1.95m earlier lent to him by CAD. The argument, and the only argument, was whether Mr Khan either received that distribution or was entitled to it. That required, in accordance with the *Ramsay* principle, a purposive construction of the statutory provision in question and a realistic view of the facts. The statutory provision in question was s. 385(1)(b), and specifically the words "received or entitled to". What Andrews LJ had to do, and did, was consider the argument put forward by Mr Sykes (as recorded at [45]) that as a matter of construction "receipt" required an element of control, and "entitlement" required the relevant person to benefit. It is in considering that argument that Andrews LJ says what she does at [52], as is shown by the fact that this part of her judgment is all under the heading "Meaning of receipt or entitlement". Her conclusion on the question of construction is that for the purposes of s. 385(1)(b) the person who "received" the distribution is the person who actually received it, and the person "entitled to" the distribution is the person to whom it belongs; and that there is no requirement of either control or benefit. On a realistic view of the facts there was then only one possible answer to the question to whom the purchase price of the 98 shares belonged, and that was Mr Khan.

46. It follows that Andrews LJ was dealing with a different question to the one before us. We are of course bound by her conclusion as to the construction of s. 385(1)(b) – nor indeed would I take any different view from her on that question – but she was not dealing with the question of what is a "distribution … in respect of shares" which is the issue before us. It seems to me therefore that *Khan* does not dictate the answer to that question.

47. Mr Jones said that this was too narrow a view of *Khan*. He submitted that in order to answer the question who was the person who received or was entitled to the distribution, you needed to know what the distribution was. So when Andrews LJ said that the

statutory provisions required a focus on the transaction under which the taxable distribution arose, she was in effect saying that one could not use the *Ramsay* approach to elide two things together to identify the relevant distribution. And that was directly relevant to the question in the present case, which is how one identifies the distribution.

48. Mr Jones advanced this submission skilfully but I do not accept it. It is no doubt true that before answering the question who received or was entitled to a distribution, you need to know what the distribution in question is. But, as I have said, in *Khan* that was simply not in issue by the time the case reached this Court. Not only was it agreed that there was a distribution, but there was no dispute what the distribution was – it was the payment by CAD to Mr Khan for the 98 shares bought back under the OMPA. Since that was a distribution in respect of shares in CAD, it followed that it was a taxable distribution under s. 383(1) ITTOIA. That is why Andrews LJ refers at [52] to a focus on "the transaction under which the taxable distribution arose". Once the distribution in question is identified as the payment for the 98 shares, then the only remaining question is who received, or was entitled to, *that* payment. That does indeed require a focus on the payment in question.

49. The question in the present case arises at an earlier stage of the analysis, which is what the relevant distribution was, and whether it was a distribution in respect of shares, and hence a taxable distribution, at all. For reasons that I have given earlier I think that does require a purposive construction of the statute in accordance with the *Ramsay* principle, and I do not think that what Andrews LJ quite rightly says in the context of identifying the recipient or person entitled for the purposes of s. 385(1)(b) can be transposed to the prior question as to what sort of distributions were intended by Parliament to be taxable. That was not a question before her either expressly or implicitly. It was not for example argued that the distribution in *Khan* was really the prior payment of £1.95m to the vendors for their shares. I do not propose to consider whether such an argument could have been made – there would appear to be certain difficulties with it – but if it had been, the Court would have had to grapple with the question of what the distribution in question was, and whether it was the earlier payment of £1.95m in respect of the vendors' 99 shares, or the later payment of £1.95m in respect of Mr Khan's 98 shares. But those were not the issues before the Court, and I do not think Andrews LJ meant to say, or did say, anything about how to identify the distribution.

50. I therefore do not think that *Khan* constrains us to decide the present case in favour of the Appellants. Once that is put on one side, then I consider, for the reasons given earlier, that Judge Morgan in the FTT was right to conclude that there was here a distribution in respect of shares to the Appellants.

51. Before leaving Ground 1, I should deal with one further submission by Mr Jones. He said that if the FTT were right, then it could cause problems in much more everyday cases. Suppose a case where a company A is wholly owned by a parent B which in turn is owned by a shareholder C. C wishes to extract funds from A, and so causes A to declare a dividend in favour of B, with a view to B declaring a dividend in favour of C, and B duly does so. On the FTT's analysis, said Mr Jones, why would that not be a distribution by A to C?

52. I do not think this example causes any problem. It is to be remembered that what s. 383 ITTOIA charges to tax are dividends and distributions, and that distributions are

distributions in respect of shares in the company. C in the example posited does not have any shares in the company (A). The only person who has shares in A is the parent B. Parliament plainly intended to tax dividends and distributions paid by A to its shareholder B, and one simply does not need to ask if there is a distribution by A to C as the question does not arise. In one sense there may be, but that is nothing to the point as a distribution to C is not a distribution in respect of shares in A, and so is not a taxable distribution. Nor I might add would that be a case where steps had been inserted into the arrangements that had no business purpose and whose sole aim was the avoidance of tax. Paying the dividends up from A to B and then from B to C is not only not artificial – it is the normal and proper way to do it given the corporate structure.

53. I would therefore dismiss Ground 1 of the appeal. Judge Morgan in the FTT was in my judgement correct in her conclusion on the *Ramsay* argument and the UT did not err in upholding it.

Ground 2 –the settlements code

54. Ground 2 is that even if the *Ramsay* argument meant that there was a distribution in respect of shares, it did not follow that the Appellants were liable to be taxed on it. There was still a settlement of which Winn Yorkshire was the settlor; the income arose under the settlement; and hence by application of the settlements code the income was the income of Winn Yorkshire and of no-one else, and so not the income of the Appellants.

55. Mr Jones pointed out that both tribunals dealt with this point very briefly. In the FTT Judge Morgan said this (at [138]):

> "The corollary of the finding that, on a purposive approach to the construction of the relevant provisions, Winn Yorkshire is to be regarded as having made a distribution to the appellants of a sum equal to the income in dispute is that that income is not to be regarded as arising under a "settlement" made by Winn Yorkshire as "settlor" for the purposes of the settlements code. In other words, in order to give effect to the correct characterisation of the arrangements for tax purposes, the fact that Winn Yorkshire declared a trust over its beneficial interest in the B share is to be ignored in the same way, for example, as the transfer of shares to an offshore entity was ignored in [*Furniss v Dawson* [1984] AC 474]."

56. The UT dealt with the point at [95]-[98]. At [95] they said they did not accept Mr Jones' argument. At [96] they said that the "true source" of the income in dispute was not the settlement but the shareholding in Winn Yorkshire, and that that justified the FTT's conclusion. At [98] they said:

> "We consider that in any event this ground fails for a more basic reason. That is because the dividend on the B share is not the same as the distribution in respect of shares by Winn Yorkshire. Once the FTT had correctly found that under the distribution code there was a distribution in respect of shares by Winn Yorkshire, that distribution could not be conjured away by the applicability of the settlements code to a different distribution."

57. Mr Jones submitted that both tribunals erred. So far as the FTT's reasoning was concerned, he said that one could not just ignore the settlements code as if it did not exist. The mere fact that there was a distribution did not by itself oust the settlements code. So far as the UT's reasoning was concerned, it was right that all income had a "true source". But that was not the statutory question. The statutory question was whether the income, whatever its true source, arose under a settlement. If it did, the settlements code applied to treat the income as that of the settlor.

58. I agree that the solution to this question is not to be found by simply asking what the true source of the income is. Whenever an income-producing asset (be it land let to a tenant, a loan which carries interest, a shareholding that earns dividends, or other asset) is settled by a settlor on a trust, the income that arises from that asset will have a source (the land, the loan, the shares) and will be taxable according to the relevant source. But that does not answer whose income it is. The effect of the settlements code where it applies is that by s. 624(1) the income arising from property in which the settlor retains an interest is treated as that of the settlor and of the settlor alone. The fact that it is taxed under ss. 383 to 385 ITTOIA does not mean that the settlements code is ousted. Otherwise it would mean that a settlor settling a parcel of ordinary equities (and retaining an interest in the settled property) would not be taxed on the dividends arising from them. That would be contrary to the intention of the settlements code.

59. Nevertheless I think the tribunals were right. I found the submissions of Ms Poots on this aspect of the appeal particularly helpful. We first have to identify the relevant distribution which is sought to be taxed. This is the distribution from Winn Yorkshire to the Appellants. That distribution starts with the payment of £200,001 by Winn Yorkshire to Winn Scarborough, and ends with £98,465 of that money being received by each Appellant, or £196,930 between them. It is that £196,930 which is the distribution in respect of Winn Yorkshire's shares.

60. It is true that that distribution as a matter of fact included as a step in the overall scheme the declaration of a dividend by Winn Scarborough on the B share. Looked at in isolation this would also be a dividend or distribution in respect of shares (and hence within s. 383 ITTOIA), but the UT was I think plainly right that this is not the same distribution as the one we are concerned with. It was made by a different company (Winn Scarborough) in respect of a different share (the single B share in Winn Scarborough rather than the Appellants' respective shares in Winn Yorkshire) and in a different amount (£200,000 payable to the Trustee rather than £196,930 payable to the Appellants). That distribution (which I will call **"the Winn Scarborough dividend"**) is therefore not the same as the distribution we are concerned with (which I will call **"the Winn Yorkshire distribution"**).

61. Now it is also true that viewed in isolation the Winn Scarborough dividend would be subject to the settlements code. The Trust is a settlement within the definition of s. 620(1); Winn Yorkshire was the settlor of the Trust within the definition of s. 620(1); the Winn Scarborough dividend would have arisen under the Trust and from the B share for the purposes of s. 624(1); Winn Yorkshire would be treated as having an interest in the B share under s. 625(1); and hence by s. 624(1) the Winn Scarborough dividend

would be the income of Winn Yorkshire and of Winn Yorkshire alone.[2]

62. But we are not concerned with the taxation of the Winn Scarborough dividend viewed in isolation. We are concerned with the taxation of the Winn Yorkshire distribution. That did not arise from the B share in Winn Scarborough, but from the Appellants' shares in Winn Yorkshire. Those shares were not settled into the Trust, nor does Winn Yorkshire retain any interest in those shares. So the income does not arise from property in which Winn Yorkshire as settlor retains, or is treated as retaining, any interest. So s. 624(1) does not apply to that distribution.

63. In those circumstances I do not think we need to decide whether the Winn Scarborough dividend was itself a transaction within s. 383 ITTOIA. Mr Jones said that there cannot have been *two* distributions of the same money as that cannot have been what Parliament intended, and this approach might give rise to absurd results.

64. Ms Poots said that there were two possible answers. The first is that there was indeed only one distribution, namely the Winn Yorkshire distribution. This was because in a case where the *Ramsay* approach leads to a composite transaction being taxed as one overall transaction, the individual elements in the overall transaction are just mechanics and are subsumed into the overall transaction. They have no separate existence for fiscal purposes. I think this argument is well founded: see *UBS* per Lord Reed at [64], where he refers to schemes that "involve intermediate transactions inserted for the sole purpose of tax avoidance" and says that it is quite likely that a purposive interpretation "will result in such steps being disregarded for fiscal purposes". If this is right, the Winn Scarborough dividend has no separate existence for tax purposes; it is not to be viewed in isolation but simply as part of the means by which the Winn Yorkshire distribution reached its intended recipients.

65. But even if this were wrong, and there were two separate distributions, Ms Poots said that it would not matter. The issue in the present case is not what the tax consequences of the Winn Scarborough dividend are, but what the tax consequences of the Winn Yorkshire distribution are. In fact it seems that there are *no* tax consequences of the Winn Scarborough dividend; the Aikido scheme was premised on the basis that if the Winn Scarborough dividend were treated as the income of Winn Yorkshire, the latter would pay no tax on it. But assuming this is right, that does not affect the taxability of the Winn Yorkshire distribution which as I have said is not the same thing. Again I accept this submission, which seems to me right.

66. Mr Jones had a further submission which is that "settlement" is very widely defined by s. 620(1) to include any "arrangement", and that the entire Aikido scheme is therefore a settlement for these purposes. The FTT had taken the view that at least the initial steps by Winn Yorkshire constituted a settlement (FTT decision at [122]); the UT went further and concluded that the arrangement comprising the settlement consisted of all the steps in the scheme (UT decision at [147]). On that basis Mr Jones said that the money in question "flowed through the structure", and is therefore income arising under the settlement: see *Jones v Garnett* [2007] UKHL 35, [2007] 1 WLR 2030 at [50] per

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[2] This assumes that despite the reference in s. 624(1)(a) to "the life of the settlor" a corporate settlor is within s. 624; this has never been in dispute in these proceedings, and although the point was touched on in argument, we do not need, and I do not propose, to address it.

Lord Walker.

67. But I think the answer to this point is that the settlements code does not treat all income of any settlement as income of the settlor. What s. 624(1) does is treat income that arises from property in which the settlor retains an interest as the income of the settlor. So one has to ask what the property is from which the income arises. That in the case of the Winn Yorkshire distribution is the Appellants' shares in Winn Yorkshire. As I have already said Winn Yorkshire does not have any interest in those shares or in the income from them. Nor do I think it makes any difference that £1,455 of the money put into the scheme reverted to Winn Yorkshire; the money that flowed through the scheme to the Appellants was the £196,930 which reached them, and that is the taxable income, as it was only that part of the money which was paid in respect of their shares. Winn Yorkshire had no interest in *that* money.

68. In my judgement therefore the tribunals were right that the settlements code did not apply to the £196,930 paid to the Appellants. It did not therefore fall to be treated as the income of Winn Yorkshire instead of that of the Appellants. I would dismiss Ground 2 of the appeal accordingly.

Grounds 3 and 4

69. In those circumstances Grounds 3 and 4 do not arise. They raise questions of some difficulty and I do not think it is either necessary or appropriate to consider them.

Conclusion

70. I would dismiss the Appellants' appeals.

Lord Justice Newey:

71. I agree.

Lord Justice Lewison:

72. I also agree.