COURT OF APPEAL—15, 16 AND 17 JANUARY AND 2 FEBRUARY 1979

HOUSE OF LORDS—28, 29 AND 30 JULY AND 11 DECEMBER 1980

B

Chinn *v*. Collins (H.M. Inspector of Taxes)(1)

Capital gains tax—Avoidance—Foreign trustees—Appointment to beneficiary of interest in shares contingent on survival for three days—Immediate sale by him to foreign company coupled with contract to repurchase shares on fourth day—
C *Whether scheme effective to avoid apportionment of gain to beneficiary—Finance Act* 1965 (*c* 25), *ss* 25(3) *and* 42(2) *and Sch* 7, *para* 13(1).

In 1960 a father, who with his two sons was domiciled and resident in the U.K., settled a fund on discretionary trusts for them and their families, the trustees having power, with his consent, to appoint any part of the fund to either son. By 1969 the fund included 369,000 shares in a public company
D (L Ltd.) in which the father and his family held substantial interests, and in that year the father, having taken professional advice and in collaboration with his sons, the trustees, and R Ltd., embarked on the following scheme with the object of obviating the payment of capital gains tax which would ordinarily become payable when either son became absolutely entitled to any of those shares:

E (1) on 31 March 1969 a majority of the trustees, hitherto all resident in the U.K., resigned and were replaced by trustees resident in Guernsey—viz., a subsidiary of R Ltd. and its two directors;

(2) on 24 October Z Ltd., another subsidiary of R Ltd. and resident in Jersey, paid premiums to insure the lives of each son for one month from 24 October for £350,000;

F (3) on 28 October (*a*) the new trustees (with the father's consent) appointed half the said shares to each son contingently on his surviving until 1 November; (*b*) each son sold his contingent interest therein to Z Ltd. for £352,705 (which Z Ltd. had not got) by cheques dated 1 November; (*c*) each son contracted to buy from Z Ltd. on 1 November 184,500 shares in L Ltd. for £355,162; subsequently

G (4) the trustees duly transferred half of their holding of 369,000 shares to each son.

Each son appealed against assessments to capital gains tax made on the footing that he (and not Z Ltd.) was at the first moment of 1 November (when the contingent interest vested) the beneficiary having an interest in the 184,500 shares which had been appointed to him, so that the chargeable gain (which
H would have been chargeable to the trustees, had they been domiciled and resident in the U.K. under s 25(3) of the Finance Act 1965) should be apportioned to him under s 42(2) of that Act.

The Special Commissioners held that at such first moment, Z Ltd. (and not either son) was the beneficiary having the requisite interest under the settlement *stricto sensu*, but upheld the assessments on the ground that the above

(1) Reported (Ch D) [1977] 1 WLR 1337; [1978] 1 All ER 65; [1977] STC 468; 121 SJ 678; (CA) [1979] Ch 447; [1979] 2 WLR 411; [1979] 2 All ER 529; [1979] STC 332; 123 SJ 165; (HL) [1981] AC 533; [1981] 2 WLR 14; [1981] 1 All ER 189; [1981] STC 1; 125 SJ 49.

facts disclosed "an arrangement" and therefore "a settlement" within s 42(7) of A the Act, and that each son was (while Z Ltd. was not) a beneficiary under that "arrangement", to whom the whole of the gain should be apportioned. Each son appealed.

The Chancery Division, dismissing the taxpayers' appeals, held that (1) the sale by each son of his interest, and his immediate contract to purchase shares were interdependent transactions, conditional upon each other in that B no party was free to enter into one and reject the other; the contract could not be regarded in isolation from the sale, and ignored; *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 TC 11 distinguished; (2) the contract made by each son impliedly referred to the settlement shares comprised in the appointment to him (and no others); (3) in all the circumstances *either* (*a*) each son became at the first moment of 1 November C absolutely entitled to those shares as against the trustees, subject to paying Z Ltd. the agreed repurchase price; or, alternatively, (*b*) the sons became beneficiaries under an "arrangement" within s 42(7) of the Finance Act 1965, and became at such first moment absolutely entitled to their shares as against the trustees of that "arrangement"; so (4) the chargeable gains then arising as aforesaid should be apportioned to each son equally under s 42(2) of that Act. D The taxpayers appealed.

The Court of Appeal, held unanimously allowing each of the taxpayers' appeals, that

(1) neither taxpayer was on 1 November a beneficiary under the settlement *stricto sensu*, because (*a*) each taxpayer's contract to buy 184,500 shares from Z Ltd., was for 184,500 unspecified shares in L Ltd., so neither had on E 1 November any equitable interest in the 184,500 shares to which at the first moment that day Z Ltd. became absolutely entitled as assignee of his said contingent interest; (*b*) alternatively, because even if each such contract was for the specific shares appointed to each taxpayer on 28 October, damages would have been a fully adequate remedy to each had Z Ltd. failed to perform its contract to deliver them on 1 November, so that no English court would have F awarded either taxpayer a decree of specific performance against Z Ltd.; so again neither had on 1 November any equitable interest in those shares; (*c*) alternatively—*per* Goff L.J. (Shaw L.J. concurring)—even if Z Ltd. had on 1 November become trustee for each taxpayer of the parcel of shares contingently appointed to him on 28 October, neither taxpayer thereby became more than a person having contractual rights against Z Ltd., the beneficiary in G respect of the trust property;

(2) neither taxpayer was a beneficiary under an "arrangement" within s 42(7) of the Act, because (*a*) before there could be such an arrangement there had to be someone (i) who could be described as a settlor, (ii) who by some act of bounty conferred a beneficial interest in property of his upon someone else. On the facts there was in relation to neither scheme, viz., between 31 March H and 28 October 1969, any act of bounty either by the father or by the trustees; hence there was no "settlor" and no "arrangement"; (*b*) alternatively—*per* Goff L.J. (Shaw L.J. concurring)—before the Crown could mount an alternative case based on an "arrangement" they had to show, and failed to show, that such arrangement in some way superseded the settlement *stricto sensu*. The Crown appealed. I

Held, in the House of Lords, unanimously allowing the Crown's appeal, that the whole of the trustees' gain in respect of the shares which arose on 1 November, was attributable to the taxpayers because

A (1) each taxpayer was on 1 November in equity entitled to the parcel of 184,500 shares in L Ltd. which were the assets contingently appointed to him on 28 October: this being the only way in which his agreement with Z Ltd. could be carried out, the parties must be presumed to have intended it. Specific performance was irrelevant: as soon as the son agreed to buy that parcel accompanied or followed by payment of the price, equitable
B title in it passed to him and all that was needed to perfect his title was notice to the trustee, which the latter had. The taxpayer was therefore when the occasion of charge arose (on 1 November) a beneficiary under the settlement *stricto sensu*;

(2) each taxpayer was, in addition, then a beneficiary under an "arrangement" within s 42(7) of the Act: because although before an
C "arrangement" could qualify as a "settlement" in the wider sense of that subsection there had to be an element of bounty in the transaction, the settlor's act of bounty in making the settlement was on 28 October completed by the trustees' exercise of the discretion given them by him, in making the appointment to each taxpayer.

Commissioners of Inland Revenue v. *Payne* 23 TC 610 approved: *Commis-*
D *sioners of Inland Revenue* v. *Plummer* 54 TC 1 applied.

CASE

Stated under the Taxes Management Act 1970, s 56, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

E 1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 29 and 30 January 1976, 26 and 27 February 1976 and 9 July 1976, Anthony Elliot Chinn (hereinafter called "Anthony") appealed against an assessment to capital gains tax in the sum of £130,000 for the year 1969–70.

2. Shortly stated, the question for our decision was whether any part of a
F gain deemed to have accrued to the trustees of the settlement on 1 November 1969 could be apportioned to Anthony under s 42 of the Finance Act 1965.

3. The following witnesses gave evidence before us:

(*a*) The Appellant, Anthony.

(*b*) His brother, Steven Clive Chinn (hereinafter called "Steven") whose appeal against a similar assessment to capital gains tax we heard together with
G Anthony's appeal. We have referred below to Anthony and Steven as "the Appellants".

(*c*) Steven's and Anthony's father, Norman Nathan Chinn (hereinafter called "the settlor").

(*d*) David Oswald Moon ("Mr. Moon") of Jersey, Channel Islands, a solicitor of the Royal Court of Jersey and a Notary Public, who was at all
H material times a director of Rozel Holdings Ltd. (hereinafter called "Rozel") whose registered office was 16 Hill Street, St. Helier, Jersey, where he practised as a solicitor.

(*e*) John Richard Martin of St. Peter Port, Guernsey, Channel Islands, a trust officer employed by N. M. Rothschild & Sons (CI) Ltd. (hereinafter called "NMR (CI)") of Hirzel Court, St. Peter Port, Guernsey. A

(*f*) Geoffrey Malcolm Chinn (hereinafter called "the solicitor"), solicitor and a partner in the firm of Berwin Leighton, solicitors of London, who acted at all material times as solicitors to the settlor, Steven and Anthony.

4. The following documents were proved or admitted before us: B

(A) A settlement dated 24 February 1960 (hereinafter called "the settlement") made between the settlor of the one part and trustees of the other part.

(A*a*) A deed of appointment of new trustees of the settlement dated 31 March 1969.

(B) A proposal form dated 13 and 24 October 1969 whereby Rozel made C a proposal to insure Anthony's life for £350,000 for one month and an acceptance of such proposal by the Royal Insurance Co. Ltd. dated 24 October 1969.

(C) The like proposal and acceptance upon Steven's life.

(D) A minute signed by the trustees of the settlement and dated 28 October 1969 recording the appointment of 184,500 shares in Lex Garages Ltd. D ("Lex") to Anthony, and 184,500 shares to Steven, contingent in each case on the appointee surviving three days.

(E) A deed of appointment of 28 October 1969 effecting the appointments referred to in (D) above.

(F) A minute of a meeting of the directors of Rozel held on 28 October 1969. E

(G) A cheque dated 1 November 1969 for £352,705 drawn by Rozel on Lloyds Bank, Jersey, payable to Anthony.

(H) A similar cheque payable to Steven.

(I) A deed of assignment dated 28 October 1969 between Anthony and Rozel whereby Anthony assigned his contingent interest in 184,500 Lex shares to Rozel. F

(J) A similar deed of assignment by Steven.

(K) An agreement made 28 October 1969 between Rozel and Anthony whereby Rozel agreed to sell 184,500 Lex shares to Anthony on 1 November.

(L) A similar agreement between Rozel and Steven.

(M) & (N) Counterparts of the agreements referred to in (K) and (L) above. G

(O) & (P) Letters to NMR (CI) dated 28 October 1969 from Anthony and Steven respectively requesting NMR (CI) to pay Rozel £355,162.50 on 1 November.

(Q) & (R) Policies issued by the Royal Insurance Co. Ltd. to Rozel insuring the lives of Anthony and Steven as mentioned in (B) and (C) above.

(S) A list of shareholdings of Lex shares under the surname "Chinn". H

A (T) A list of shareholdings of Lex shares owned by the settlor and his family.

(U) An extract from the articles of association of Lex (articles 21 to 37).

(V) A proof of evidence of Mr. de Vic Graham Carey, Guernsey advocate and English solicitor.

(W) A statement of agreed facts which we have incorporated into para 5
B below.

Copies of such of the above as are not included herein are available for inspection by the Court if required.

5. As a result of the evidence both oral and documentary adduced before us we find the following facts proved or admitted:

5(1) The settlement recited that the settlor had two sons, Anthony and
C Steven for whom he was desirous of making provision. The settled funds originally consisted of 500 ordinary shares of 5*s.* each in Lex, which is a public company whose shares are quoted on the London Stock Exchange. The settlor was at all material times director and joint chairman of Lex. The original trustees of the settlement were his wife Miriam, Rosser Chinn, Allan Albert Levy ("Mr. Levy") and Dr. Benjamin Rogol, all of whom were resident in
D England. Anthony was born on 30 November 1940 and Steven was born on 27 January 1947.

(2) The trusts of the settlement were, briefly, trusts for such of the beneficiaries (which, by definition, included spouses and issue of Anthony and Steven) as the trustees should appoint and, in default of appointment, trusts to pay or apply income for the benefit of the beneficiaries as the trustees
E in their discretion should think fit. By clause 4 of the settlement, the trustees were to hold the trust fund for Anthony and Steven on their attaining 35. By clause 5 income might be applied for the benefit of Anthony and Steven until they respectively attained the age of 21 and surplus income accumulated, and subject thereto, held upon protective trusts for their benefit. Clause 6 contained a gift over in favour of five named persons in the event of failure of
F the preceding trusts and powers. The settlor reserved the power to appoint new trustees.

(3) The settlor added further Lex shares to the funds of the settlement, which early in 1969 included 370,100 ordinary shares of Lex. The value of Lex shares had risen considerably over the years and the settlor was concerned about the incidence of capital gains tax. In or about February 1969 he consulted
G the solicitor, about the possibility of mitigating the tax. The solicitor advised him that it might be possible to mitigate the tax by means of a "contingent interest scheme" (described below), which would entail, *inter alia*, appointment of trustees who were not resident in the United Kingdom. The settlor instructed the solicitor to proceed with the scheme subject to Counsel's advice.

(4) The solicitor consulted Messrs. N. M. Rothschild & Sons, bankers
H (hereinafter "Rothschilds") in London. He had discussions with Mr. J. W. Vine and other officers of Rothschild's concerning the implementation of a "contingent interest scheme" to avoid liability to capital gains tax chargeable on the trustees of settlements. About that time Rothschilds were involved in about ten or twelve such schemes. The first step to implement the scheme was to be the appointment of NMR (CI) a company incorporated and having its
I registered office in Guernsey, as a trustee of the settlement, together with two of NMR (CI)'s directors. NMR (CI) was controlled by Rothschilds.

(5) On 31 March 1969 the settlor appointed NMR (CI), Stewart Alexander A
Faulkner, ("Mr. Faulkner") a director of NMR (CI) residing in Guernsey and Henry George Broughton ("Mr. Broughton") chartered accountant, a director of NMR (CI) also residing in Guernsey to be trustees of the settlement in the place of his wife, Miriam. (Mr. Rosser Chinn and Dr. Benjamin Rogol had by then ceased to be trustees.) At some time after 31 March 1969 but before 28 October 1969 the general administration of the settlement passed to B
Guernsey.

(6) In May 1969 the solicitor sent written instructions to Counsel to advise on the implementation of the contingent interest scheme. He had consultations with Counsel and received written advice in September 1969. He informed the settlor who instructed him to carry out the scheme and the solicitor proceeded to do so. The settlor told Anthony and Steven what was proposed to be C
done.

(7) In essence, the scheme was that Rothschilds would procure and finance the purchase by Rozel of contingent interests in Lex shares which Anthony and Steven would acquire by virtue of appointments to be made by the trustees of the settlement. Upon the vesting of those interests three days later Anthony and Steven would repurchase the Lex shares with the money received from the D
sale of their contingent interests. Rozel would be protected by insurance against the possible death of Anthony or Steven in the three-day interval.

(8) Rozel was incorporated on 18 September 1964 in Jersey and was at all material times resident in Jersey. Its registered office was at 16 Hill Street, St. Helier, Jersey. All its issued share capital of £150 was beneficially owned by Rothschilds through nominees. In 1969 its directors were Mr. Moon, his E
partner Mr. R. R. Jeune and two other senior partners of his firm, and a member of Rothschilds. Neither Anthony nor Steven had at any material time (except as mentioned below) any interest in the capital or assets of Rozel.

(9) On 24 October 1969 Mr. Moon on behalf of Rozel made to the Royal Insurance Co. Ltd. proposals to insure the lives of Anthony and Steven for £350,000 each, for one month; Anthony and Steven signed the declarations F
concerning the state of their health on 13 October 1969. Medical examinations of Anthony and Steven had already taken place. Payment of the premiums in respect of each proposal was effected by means of a cheque for £395 drawn on Rozel's bank account at the Jersey branch of Lloyds Bank Ltd. on 24 October and sent to the brokers by post that same day. The proposals were accepted by telephone prior to 28 October 1969. Copies of the respective proposals, G
acceptances and policies were produced in evidence before us and are documents B, C, Q and R above.

(10) Completion of the scheme was arranged for 28 October 1969 at Mr. Moon's firm's office at 16 Hill Street, St. Helier. On that date Anthony, Steven and the solicitor flew to Jersey. The solicitor had previously agreed with Rothschilds the terms of the documents mentioned in para 4 above lettered H
E, I, J, K, L, M and N. The solicitor explained the scheme in general terms to Anthony and Steven who had, prior to 28 October, not seen any of the documents.

(11) The meeting at 16 Hill Street, St. Helier, on 28 October (hereinafter referred to as "the meeting") was attended by Anthony, Steven and the solicitor; Mr. Moon and Mr. R. R. Jeune, as directors of Rozel; Mr. Vine I
representing Rothschilds; Mr. Faulkner, representing NMR (CI) and also in his capacity as second trustee of the settlement; Mr. Broughton and Mr.

Levy—the third and fourth trustees of the settlement—were not present but had been told about the scheme and had given their approval in advance to the transactions to be effected at the meeting.

(12) Before the meeting, the trustees of the settlement had resolved to appoint 184,500 Lex shares to Anthony contingent on him surviving a period of three days from 28 October 1969. A resolution in the same terms was passed in favour of Steven. A minute of the resolutions was prepared after the meeting by Mr. Martin and was signed by the trustees. Also before the meeting the trustees executed a Deed of Appointment in the following terms—

> "This Appointment is made the 28th day of October, One thousand nine hundred and sixty-nine By Allan Albert Levy of 1 Morcambe Gardens Stanmore Middlesex solicitor N. M. Rothschild & Sons (C.I.) Ltd. of Hirzel Court St. Peter Port Guernsey Stewart Alexander Faulkner of Hirzel Court aforesaid and Henry George Broughton of 10 Lefebvre Street St. Peter Port (hereinafter together called 'the Trustees') Whereas: (A) This Appointment is supplemental to a Settlement (hereinafter called 'the Settlement') dated the twenty-fourth day of February One thousand nine hundred and sixty and made between Norman Nathan Chinn (hereinafter called 'the Settlor') of the one part and Miriam Chinn Rosser Chinn the said Allan Albert Levy and Benjamin Rogol of the other part being a Settlement in favour of the Settlor's children. (B) In this Appointment the following expressions shall have the following meanings: (1) 'The Special Power' means the special power of appointment conferred on the trustees for the time being of the Settlement by Clause 3(a) thereof (which said special power is made exercisable only with the consent of the Settlor) (2) 'Anthony's Fund' means the investments specified in Part I of the Schedule hereto and the investments for the time being representing the same (3) 'Steven's Fund' means the investments specified in Part II of the Schedule hereto and the investments for the time being representing the same (4) 'The Specified Period' means the period of three days from the date hereof (C) The Trustees are the present trustees of the Settlement and with the consent of the Settlor have resolved to exercise the Special Power in manner hereinafter appearing. Now This Deed Witnesseth as follows: 1. The Appointment hereinafter contained is made by the trustees as such trustees as aforesaid with the consent of the Settlor in pursuance of the Special Power and all other (if any) powers hereunto them enabling 2. The Trustees with such consent as aforesaid hereby irrevocably appoint and direct that with effect from the date of this Deed: (a) Anthony's Fund shall be held in trust for Anthony Elliot Chinn if he shall survive the Specified Period (b) Steven's Fund shall be held in trust for Steven Clive Chinn if he shall survive the Specified Period In Witness whereof Allan Albert Levy Stewart Alexander Faulkner and Henry George Broughton have hereunto set their respective hands and seals and N. M. Rothschild & Sons (C.I.) Limited has caused its common seal to be hereunto affixed the day and year first above written
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> The Schedule above referred to Part I One hundred and eighty-four Thousand Five Hundred (184,500) Ordinary Shares of Five shillings (5/-) each of Lex Garages Limited. Part II One hundred and eighty-four Thousand Five Hundred (184,500) Ordinary Shares of Five shillings (5/-) each of Lex Garages Limited."

(13) Anthony and Steven then each made to the directors of Rozel present at the meeting an oral offer to sell to Rozel his contingent interest under the foregoing deed of appointment to Rozel for £352,705 payable on 1 November

1969. The directors of Rozel accepted the offers and Anthony executed a deed of assignment in the following terms—

> "This Deed of Assignment is made the twenty-eighth day of October One thousand nine hundred and sixty-nine Between Anthony Elliot Chinn of Parson Street Hendon London N.W.4. (hereinafter called 'Mr. Chinn') of the one part and Rozel Holdings Limited of 16 Hill Street St. Helier Jersey (hereinafter called 'Rozel') of the other part. Whereas: (A) Under or by virtue of a Settlement (hereinafter called 'the Children's Settlement') dated the twenty-fourth day of February One thousand nine hundred and sixty and made between Norman Nathan Chinn of the one part and Miriam Chinn, Rosser Chinn, Allan Albert Levy and Benjamin Rogol of the other part being a Settlement in favour of the children of the said Norman Nathan Chinn and a Deed of Appointment dated the twenty-eighth day of October One thousand nine hundred and sixty-nine and made by the said Allan Albert Levy, N.M. Rothschild & Sons (C.I.) Limited, Stewart Alexander Faulkner and Henry George Broughton. Mr. Chinn is contingently entitled upon his surviving the specified period therein mentioned to the investments now subject to the trusts of the Children's Settlement particulars of which are listed in the Schedule hereto. (B) Mr. Chinn has agreed with Rozel for the sale to it of the premises hereinafter expressed to be conveyed. Now This Deed Witnesseth as follows: 1. In consideration of the covenant on the part of Rozel hereinafter contained Mr. Chinn as beneficial owner Hereby Conveys unto Rozel All That the interest to which Mr. Chinn is entitled contingently upon his surviving the specified period as in the said Appointment defined of and in the investments specified in the Schedule hereto and of and in the investments property and proceeds of sale at any time hereafter representing the same or any part thereof. 2. In consideration of the Conveyance by Mr. Chinn firstly hereinbefore described Rozel hereby covenants with Mr. Chinn and that Rozel will on the first day of November One thousand nine hundred and sixty-nine pay to Mr. Chinn or his personal representatives the sum of Three hundred and fifty-two thousand seven hundred and five pounds (£352,705) being the purchase price of the contingent interest of Mr. Chinn hereinbefore described. 3. This deed shall be read and construed in all respects according to the laws of Jersey In Witness whereof Mr. Chinn has hereunto set his hand and Rozel has caused its common seal to be hereunto affixed the day and year first above written. The Schedule above referred to One hundred and eighty four Thousand Five hundred (184,500) Ordinary shares of Five shillings (5/-) each of Lex Garages Limited."

Steven executed a deed in similar terms. The two deeds had been prepared and were produced by the solicitor at the meeting. The consideration of £352,705 was inserted by the solicitor, and was based on the middle market price of Lex shares on the London Stock Exchange at close of business on 27 October 1969 less a negotiated discount. This basis had previously been agreed upon by the solicitor with Rothschilds in London. Immediately before executing the deeds Anthony and Steven were each handed by Mr. Moon a cheque dated 1 November 1969 for £352,705 drawn by Rozel on its account with Lloyds Bank Ltd., Jersey. The cheques were immediately handed over by Anthony and Steven to a representative of NMR (CI) at the meeting for the credit of accounts recently opened by Anthony and Steven with NMR (CI). Rozel's bank balance at the date of the meeting was insufficient to meet these sums.

(14) Next, Anthony and Rozel executed an agreement whereby Anthony agreed to buy 184,500 Lex shares for a consideration of £355,162 10*s*. payable on 1 November next. The agreement is as follows:

> "This agreement is made the twenty-eighth day of October One thousand nine hundred and sixty-nine Between Rozel Holdings Ltd. of 16 Hill Street St. Helier Jersey (hereinafter called 'the Vendors') of the one part and Anthony Elliot Chinn of Parson Street Hendon London N.W.4. (hereinafter called 'the Purchaser') of the other part Whereby It Is Agreed as follows: 1. The Vendor shall sell and the Purchaser shall purchase the investments specified in the Schedule hereto (hereinafter called 'the investments') free from all liens charges and other incumbrances and together with all rights attached thereto including the right to receive all dividends hereafter declared on the investments. 2. The purchase price for the investments shall be the sum of £355,162 10*s* 0*d* which shall be paid on completion 3. Completion shall take place at the office of N. M. Rothschild & Sons (C.I.) Limited on the first day of November One thousand nine hundred and sixty-nine when against payment of the purchase price the Vendor shall deliver the investments to the Purchaser. 4. Time shall be of the essence of this Agreement. 5. All payments to be made hereunder shall be made in Guernsey at the registered office for the time being of the said N. M. Rothschild & Sons (C.I.) Limited. 6. All liens and set-offs whatsoever by and between the parties in respect of the purchase price payable under this Agreement are hereby expressly waived and excluded. 7. This Agreement shall be read and construed in all respects according to the laws of Guernsey. In Witness whereof the Vendors have caused their Common Seal to be hereunto affixed and the Purchaser has hereunto set his hand and seal the day and year first before written. The Schedule above referred to One Hundred and Eighty-Four Thousand Five Hundred (184,500) Ordinary Shares of Five Shillings (5/-) each of Lex Garages Limited."

Steven entered into a similar agreement. The consideration of £355,162 10*s*. was equal to the middle market price of the Lex shares at close of business on the London Stock Exchange on 27 October 1969.

(15) The payments by Anthony and Steven to Rozel were made by letters signed by them, dated 28 October 1969, addressed to the manager, N.M. Rothschild & Sons (CI) Ltd., P.O. Box 58, St. Peter Port, Guernsey, which read: "On the 1 November 1969 please debit my account and pay the sum of £355,162 10*s* 0*d* to Rozel Holdings Limited." Anthony and Steven each handed to NMR (CI)'s representative their personal cheques for approximately £200 to complete the financing of the scheme. Rozel's cheques were duly cleared, NMR (CI) having arranged the necessary cross-entries with Lloyds Bank Ltd., Jersey.

(16) The trustees' holding of 370,100 Lex shares were at all material times registered in the name of Old Court Ltd., a company acting as nominee for NMR (CI). After 1 November 1969 notice was duly given to the nominee that 184,500 Lex shares were beneficially owned by Anthony and the like number by Steven. Notice of the assignments of their contingent interests in the Lex shares was duly given on behalf of Anthony and Steven to the trustees of the settlement.

(17) A proof of evidence of Guernsey and Jersey law to be given by Mr. de Vic Graham Carey, a Guernsey advocate and English solicitor, was put before us. The Crown accepted the evidence and we did not consider it necessary to call the witness.

6. We were referred to the following authorities: *Duke of Westminster* v. *Commissioners of Inland Revenue* 19 TC 490; [1936] AC 1; *Inland Revenue Commissioners* v. *Europa Oil (N.Z.) Ltd.* [1971] AC 760; *Ransom* v. *Higgs* 50 TC 1; [1974] 1 WLR 1594; *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 TC 11; [1948] 1 All ER 555; *John & E. Sturge Ltd.* v. *Hessel* 51 TC 183; *Broderip* v. *Salomon* [1895] 2 Ch 323; *Salomon* v. *A. Salomon and Co., Ltd.* [1897] AC 22; *Black Nominees Ltd.* v. *Nicol* 50 TC 229; *Henriksen* v. *Grafton Hotel, Ltd.* 24 TC 453; [1942] 2 KB 184; *Conqueror Property Trust, Ltd.* v. *Barnes Corporation* [1944] KB 96; *Napier* v. *National Business Agency, Ltd.* [1951] 2 All ER 264; *Alexander* v. *Rayson* [1936] 1 KB 169; *Johnson* v. *Jewitt* 40 TC 231; *Gray* v. *Lewis* (1872–73) LR 8 Ch App 1035; In re *Disderi & Co.* (1870–71) LR 11 Eq 242; *Universal Stock Exchange, Ltd.* v. *Stracham* [1896] AC 166; *Commissioners of Inland Revenue* v. *Horrocks* 44 TC 645; [1968] 3 All ER 296; *Adam* v. *Newbigging* (1888) 13 App Cas 308; *Campbell* v. *Commissioners of Inland Revenue* 45 TC 427; [1970] AC 77; *Prendergast* v. *Cameron* 23 TC 122; [1940] AC 549; *John Cronk & Sons, Ltd.* v. *Harrison* 20 TC 612; [1937] AC 185; *Mallaby-Deeley* v. *Commissioners of Inland Revenue* 23 TC 153; *Selangor United Rubber Estates Ltd.* v. *Cradock* [1968] 1 WLR 1555; *Greenberg* v. *Commissioners of Inland Revenue* 47 TC 240; [1972] AC 109; *Cleveleys Investment Trust Co.* v. *Commissioners of Inland Revenue* 47 TC 300; 1971 SC 233; *Oughtred* v. *Inland Revenue Commissioners* [1960] AC 206; In re *Smith (decd.) Executor Trustee and Agency Co. of South Australia Ltd.* v. *Inland Revenue Commissioners* [1951] Ch 360; *Snook* v. *London & West Riding Investments, Ltd.* [1967] 1 All ER 518; *Société Générale De Paris and G. Colladon* v. *Walker* (1885) AC 20; *Moore* v. *North Western Bank* [1891] 2 Ch 599.

7. It was contended on behalf of the Appellant that:

(*a*) in the year of assessment 1969–70 Anthony made no disposal of assets (not already charged to tax), save that effected by the deed of assignment dated 28 October 1969;

(*b*) by the said deed of assignment and on the date thereof the taxpayer disposed of "an interest created by or arising under a settlement" namely the settlement, he, being the person, for whose benefit that interest was created. That was an exempt disposal; para 13, Sch 7 to the Finance Act 1965;

(*c*) if Finance Act 1965, s 42, applies to any actual or deemed disposal by the trustees of the settlement (as to which no admission was made) then it cannot be shown that any part of any gain accruing to the trustees can properly be apportioned to Anthony under s 42;

(*d*) it cannot be shown that any one of the transactions constituted by the documents in this case was a sham, or that there was any agreement, promise, condition, trust or other obligation known to the law of which any one of the said transactions was part.

8. It was contended on behalf of the Inspector of Taxes that:

(*a*) the scheme was a single scheme and each step taken in it by any party thereto (i) had to be construed in the context of the scheme, (ii) was according to a clear and common understanding fettered to each other step: in particular, every party expected that Anthony and Steven should not in fact receive payment for their interests save in the deferred manner provided by the devised machinery; accordingly the sole legal effect of these "fettered transactions" was the effect of them all, viz. that the Lex shares became vested in the Appellants;

(*b*) in pursuance of the scheme, the moment the trustees had appointed a parcel of 184,500 Lex shares to each, each of the Appellants became entitled in equity to such parcel. Each Appellant's equitable rights could have been enforced, in relation to each such parcel, in the High Court (e.g. under RSC Ord 50, r 11). The supervening sale by each Appellant of his contingent interest to Rozel and agreement to repurchase such parcel, although it affected the ownership of the bare legal interest in each parcel at midnight on 31 October 1969, in no way affected the equitable rights of each in his parcel; and it was "Just and reasonable" to apportion the trustees' gain under the Finance Act 1965, s 42(2), in relation to each parcel, wholly to each Appellant, (as the persons having the equitable interests) and not at all to Rozel;

(*c*) the scheme was an arrangement and therefore a settlement within s 42(7). The Appellants were beneficiaries under the arrangement and the trustees' gain should be apportioned equally between them and not to Rozel who was not a beneficiary but a purchaser.

9. We, the Commissioners who heard the appeal, took time to consider our decision and gave it in writing on 30 March 1976 as follows:

(1) These two appeals raise the same question and we heard them together. The Appellants are the two sons of Mr. Norman Nathan Chinn who, by a settlement made on 24 February 1960 ("the settlement") settled shares in Lex Garages Ltd. on discretionary trusts in their favour. By mid-1969 the settled property consisted of 370,100 shares in Lex Garages Ltd. and some cash.

(2) We had the advantage of hearing evidence from the principal actors in the scheme (other than Mr. Vine and Mr. Faulkner) and our findings are as follows. There was a single scheme which was planned from the outset with the object of vesting one-half of 360,000 Lex shares in each of the Appellants absolutely without incurring liability to capital gains tax. The scheme was implemented in three stages: (i) the appointment on 28 October 1969 of contingent interests in Lex shares to the Appellants; (ii) the sale on 28 October 1969 by the Appellants of their respective contingent interests in Lex shares to Rozel; (iii) on the same day the Appellants agreed to purchase absolute interests in Lex shares from Rozel on 1 November 1969. All the formal steps to bring the scheme to fruition took place at Rozel's offices in Jersey in the course of a day trip to Jersey undertaken by the Appellants and their solicitor on 28 October 1969. Apart from the final calculations of the price, which depended on the Stock Exchange dealings in Lex shares on 28 October, all the material documents had been prepared in advance, and the basis on which the price was to be calculated had been agreed in advance with Rothschilds in London. There was never any possibility that the Appellants and Rozel would complete the sale (stage (ii) above) and not go on to execute and eventually complete the purchase (stage (iii) above), for that would have defeated the financial arrangements previously made and finally worked out on 28 October. Rozel was paid to participate in the purchase and sale for a pre-arranged fee. It was at all times intended that Rozel would sell the Lex shares it would acquire on 1 November to the Appellants. If, immediately after the execution of the assignments (stage (ii)), news had come by telephone of some calamity which would halve the value of the shares, it is unthinkable that Rothschilds would have allowed the Appellants to refuse to proceed with the purchase at the price the basis for which had been arranged, and equally unthinkable that they would have attempted to do so.

(3) On behalf of the Revenue it was said that all parts of the scheme were inter-dependent and that each step was fettered. The scheme, it was said, was

simply machinery whereby the Lex shares became vested in the Appellants. A
We think that, in the context of s 42(2) of the Finance Act 1965, it would be wrong to approach the matter in this way. The event which gave rise to a deemed disposal was the absolute entitlement of a person as against the trustee (s 25(3), Finance Act 1965). That event was the absolute vesting of an interest in the Lex shares in Rozel on 1 November. The Revenue's argument requires one to look at the vesting in Rozel for the purpose of a charge to tax, but then B
to treat that vesting as mere machinery. None of the authorities to which we were referred supports that approach. The tax cases are concerned with the quality of the end-product of a series of transactions which is not in point here. We reject this argument.

(4) It was also argued on behalf of the Revenue that by virtue of s 42(7) the scheme was an "arrangement" and the Appellants were beneficiaries under the C
arrangement. We agree that the scheme outlined above constituted an arrangement being as we have held, a single scheme conceived as a whole with the object mentioned above. For this purpose it matters not whether the parties to it were, as a matter of law, bound to complete every step. But it was said on behalf of the Appellants that, if there was an arrangement, s 42 could not operate unless there are to be found trustees (on whom the charge to tax is laid) D
and beneficiaries; and the Appellants (it was said) were not beneficiaries but purchasers. We see the force of the Appellants' argument. The extended definitions of "settlement" and "settlor" in s 454(3), Income and Corporation Taxes Act 1970, are aimed at a settlor who, putting it shortly, retained an interest in the settled funds, or a power of revocation, whereas s 42 is concerned only with apportionment of tax to a beneficiary. "Beneficiary" is not defined E
but we take it to mean a person who receives a benefit. We see no difficulty in ascertaining the trustee. The trustees of the settlement were the persons against whom Rozel became absolutely entitled to the Lex shares on 1 November, and who, upon the Appellants deducing their title under the arrangements, were bound to direct the transfer of the Lex shares to them. (The shares were registered in the name of a nominee.) Section 42 requires an apportionment of F
the gain to the "beneficiaries" according to the respective values of their interests, using, where appropriate, their receipts of income (subs (3)(*a*)), or capital (subs (3)(*b*)) as a yardstick. Who were the "beneficiaries" under the arrangement? The only possible candidates are Rozel and the Appellants. If one looks only at the 1960 settlement, the Appellants had ceased to be beneficiaries *quoad* the Lex shares on 28 October 1969. But when one looks at G
the arrangement they were the only persons who could aptly be described as beneficiaries, that is, persons who benefited by the arrangement. Before the arrangement was implemented they were objects of a discretionary trust. Afterwards they each had an absolute interest in half the Lex shares. We do not think that Rozel was a beneficiary under the arrangement. It bought and sold property and received full consideration in the shape of a fee on the turnover. H
We think that to confine "beneficiary" to persons entitled under the 1960 settlement is to deprive the wider definitions in s 42(7) of their force.

We dismiss the appeal in principle and apportion the gain made by the trustees to the Appellants equally. We leave the figures to be agreed and adjourn the appeal for that purpose.

10. Figures were not agreed and on 9 July we held a further hearing. The I
settlor and the solicitor gave evidence before us which evidence we have for convenience incorporated into para 5 above.

11. It was then further contended on behalf of the Appellant that:

(*a*) if the scheme constituted an "arrangement" within s 42(7) that arrangement commenced on 31 March 1969. On whatever date the arrangement started the trustees of the arrangement were to be treated as having then acquired the trust assets at their then market value;

(*b*) the trustees of the arrangement were a single continuing body within s 25(1) presumed to be resident and ordinarily resident in the United Kingdom. They superseded the trustees of the settlement;

(*c*) the arrangement did not have a settlor; alternatively the settlor was the trustee of the settlement immediately prior to or on 28 October 1969;

(*d*) any notional disposal by the trustees of the settlement to the trustees of the arrangement (see (*a*) above) might throw up a capital gain. This could not be apportioned to Anthony and Steven save on the conditions contained in Finance Act 1965, s 42.

12. It was contended on behalf of the Inspector of Taxes that:

(*a*) the arrangement did not arise on 31 March 1969. At whatever date the arrangement came into existence there was no disposal from the trustees of the settlement to the trustees of the arrangement;

(*b*) all the gain deemed to have accrued to the trustees of the arrangement should be apportioned to the Appellants who were the only beneficiaries thereunder.

13. We gave our decision in writing on 19 July 1976 as follows:

The parties being unable to agree the figures we heard further evidence and argument.

We find that the first positive step taken towards the implementation of the scheme was the appointment of new trustees on 31 March 1969. At that date the scheme was embarked upon in outline subject to the details being worked out by the Appellants' legal advisers.

It was contended that in consequence there was deemed to be "an acquisition" and disposal on 31 March 1969. Section 25(1) prevents an appointment of new trustees from operating as a chargeable disposal. Nowhere in s 42 can we find any justification for deeming there to be a disposal when, as here, the trustees of a settlement become parties to an "arrangement" involving funds which they hold as trustees. If there was a disposal on 31 March 1969 it could only be because new trusts were created on that date. In our view s 42(7) does not have that effect; it extends the meaning of "settlement" for the purpose of charging a beneficiary to the tax which would (but for non-residence) fall upon the trustees. We do not think it is permissible to read any further deeming provisions into the section, including, in particular, a notional disposal. In the present case the arrangement had merely commenced on 31 March 1969 and did not come to fruition until 28 October 1969. We can see no one point of time between these dates which is more appropriate than any other point to give effect to the Appellants' contentions, and we conclude that there was no disposal on 31 March 1969 or on any other date before 28 October 1969.

We reject the Appellants' further contentions and we determine the appeals by assessing the gain at £173,746 on each of the Appellants.

14. Immediately after the determination of the appeal Anthony declared A
to us his dissatisfaction therewith as being erroneous in point of law and on 20 July 1976 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56, which Case we have stated and do sign accordingly.

15. The question of law for the opinion of the Court is whether on the facts found by us we were correct in apportioning to Anthony part of the gain B
deemed to have accrued to the trustees of the settlement of 1 November 1969.

J. B. Hodgson
R. A. Furtado
Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House,
94–99 High Holborn,
London, WC1V 6LQ C

3 February 1977

The Case stated in *S. C. Chinn* v. *Hochstrasser* was in all material respects identical to the above Case.

The case came before Templeman J. in the Chancery Division on 6 and 7 July 1977, when judgment was reserved. On 20 July 1977, judgment was given D
in favour of the Crown, with costs.

D. C. Potter Q.C. and *C. H. McCall* for the taxpayers.

D. J. Nicholls Q.C. and *Peter Gibson* for the Crown.

The following cases were cited in argument in addition to that referred to in the judgment:—*Ransom* v. *Higgs* 50 TC 1; [1974] 1 WLR 1594; *John & E. Sturge Ltd.* v. *Hessel* 51 TC 183; [1975] STC 127 & 573; *Chamberlain* v. E
Commissioners of Inland Revenue 25 TC 317; *Bulmer* v. *Commissioners of Inland Revenue* 44 TC 1; [1967] Ch 145; *Commissioners of Inland Revenue* v. *Plummer* 54 TC 1; *Black Nominees Ltd.* v. *Nicol* 50 TC 229; [1975] STC 372.

Templeman J.—This is a tax avoidance scheme, and the question is whether it works. Capital gains tax is imposed when "a person becomes F
absolutely entitled to any settled property as against the trustee": s 25(3) of the Finance Act 1965. But, generally speaking, tax is not payable if the trustees and the beneficiary are not resident or ordinarily resident in the United Kingdom and the trust is administered outside the United Kingdom: ss 20(1), 25(1) and 42(2). The object of the scheme was to ensure that at the moment when the beneficiary became entitled to the settled property the conditions of exemption G
were satisfied.

By a settlement dated 24 February 1960 Mr. Norman Chinn, a settlor domiciled and resident in the United Kingdom, settled a trust fund on discretionary trusts for the benefit of his sons Anthony and Steven and their families. The settlement conferred on the trustees, who were resident and ordinarily resident in the United Kingdom, power, with the consent of the H
settlor, to appoint the trust fund to Anthony and Steven. In 1969 the trust fund

A included 369,000 shares in Lex Garages Ltd. The settlor wished 184,500 of
these settlement shares to be appointed to Anthony, and the remaining 184,500
settlement shares to be appointed to Steven. A straightforward appointment to
Anthony and Steven would incur capital gains tax based on a gain of nearly
£350,000 as a result of an increase in the value of the settlement shares since
the date when they were settled. Expert advisers produced the scheme
B now under consideration. The object of the scheme was to procure, without
breaking the law, that Anthony and Steven obtained the shares without any
liability for capital gains tax arising on anyone. To prevent a charge to capital
gains tax arising against the trustees of the settlement it was sufficient for a
majority of the trustees to be resident and ordinarily resident outside the
United Kingdom and for the general administration of the settlement trusts to
C be carried on outside the United Kingdom. By an appointment of new trustees
dated 31 March 1969, N.M. Rothschild & Sons (CI) Ltd., a Guernsey
company, and two of the directors of the Guernsey company who were resident
in Guernsey, were appointed trustees of the settlement. There remained one
continuing trustee, a solicitor in the United Kingdom. The appointment of new
trustees resulted in a majority of three out of four trustees being resident
D and ordinarily resident outside the United Kingdom. The administration of the
trusts of the settlement was transferred to Guernsey. By October 1969 the
trustees of the settlement were not liable for capital gains tax.

There remained the problem of ensuring that Anthony and Steven, who
were domiciled, resident and ordinarily resident in the United Kingdom, did
not become liable to capital gains tax. By an appointment dated 28 October
E 1969 the settlement trustees, with the consent of the settlor, appointed 184,500
of the settlement shares to Anthony, contingently on Anthony surviving the
period of three days from the date of the appointment. As a result of this
appointment "a person" was due to become, in the language of s 25(3) of the
Finance Act 1965, "absolutely entitled to . . . settled property" (namely,
184,500 of the settlement shares) as against the settlement trustees on
F 1 November 1969, if Anthony survived three days until 1 November 1969. By
a deed of assignment, also dated 28 October 1969, Anthony assigned his
contingent interest in the 184,500 settlement shares comprised in his appoint-
ment to Rozel Holdings Ltd., a Jersey company, which covenanted to pay
Anthony £352,705 on 1 November 1969. The Crown conceded that, if nothing
further had been done, but Anthony survived, as he did survive, until
G 1 November 1969, Rozel as assignee of Anthony would have been the
beneficiary absolutely entitled to the settled property (namely, 184,500 of the
settlement shares) as against the settlement trustees. Rozel was neither
resident nor ordinarily resident in the United Kingdom, and Rozel was
therefore not liable to capital gains tax. Anthony would have been entitled to
£352,705 from Rozel, but this sum was not liable to capital gains tax and
H Anthony would not have been a beneficiary entitled to settled property and
would not have been liable for capital gains tax on the 184,500 settlement
shares. In other words, the assignment replaced Anthony, a British resident, by
Rozel, a foreign resident. In these circumstances, neither the trustees nor the
beneficiary Rozel nor Anthony would have been liable to capital gains tax on
the 184,500 settlement shares. On 28 October 1969 Rozel drew a cheque for
I £352,705 dated 1 November 1969 on Lloyds Bank payable to Anthony. The
cheque was handed to N.M. Rothschild & Sons (CI) Ltd., although at that
stage there were no funds in Rozel's Lloyds Bank account sufficient to meet
the cheque. Rozel took out an insurance against Anthony's death before
28 October 1969 in the sum of £350,000. The cheque and the insurance were
part of the scheme. The scheme thus far did not achieve the desired result. The
appointment and the assignment left Rozel with the settlement shares free of

capital gains tax and entitled Anthony to cash from an account which had no cash sufficient for the payment. The sole object of the scheme was to procure that Anthony received the settlement shares free of capital gains tax. Rozel was not intended to take the 184,500 settlement shares comprised in the appointment to Anthony and in the assignment. Rozel was intended to be paid a modest fee of about £2,000 and expenses. A

On 28 October, the same day as the other documents, the last piece of jigsaw was fitted into place. By a written contract, Anthony agreed to purchase from Rozel 184,500 shares in Lex Garages Ltd. for £355,162 10*s*., completion to take place on 1 November 1969, and time to be of the essence. Anthony gave written instructions to N.M. Rothschild & Sons (CI) Ltd. to pay Rozel £355,162 10*s*. on 1 November 1969. At that date, N.M. Rothschild & Sons (CI) Ltd. did not hold £355,162 10*s*. on behalf of Anthony, but they did hold on his behalf sufficient moneys to meet the difference (namely, £2,457 10*s*.) between the assignment price payable by Rozel to Anthony and the contract price payable by Anthony to Rozel. If Anthony survived until 1 November 1969, N.M. Rothschild & Sons (CI) Ltd. would be able to complete the scheme. They could pay £355,162 10*s*. in satisfaction of the contract price to Rozel's account with Lloyds on being satisfied that Lloyds would simultaneously, out of the account thus made sufficient for the purpose, honour the cheque for £352,705 payable to Anthony pursuant to the assignment. Nothing could go wrong. N.M. Rothschild & Sons (CI) Ltd. were the agents of Rozel and the agents of Anthony with instructions to complete the scheme, and they were armed with power and sufficient net moneys to complete the scheme. N.M. Rothschild & Sons (CI) Ltd. were also trustees of the settlement, and they and the other trustees of the settlement had notice of the assignment, the contract and the whole scheme. Anthony survived, N.M. Rothschild & Sons (CI) Ltd. duly completed the scheme on 1 November 1969 and subsequently procured the transfer of 184,500 settlement shares to Anthony. On 1 November 1969, as a result of the completion, Rozel received, to meet their modest remuneration and expenses, the net sum of £2,457 10*s*., being the difference between the sum of £352,705 which Rozel paid to Anthony pursuant to the assignment and the sum of £355,162 10*s*. which Anthony paid to Rozel pursuant to the contract. A similar scheme was carried out for Steven's benefit with regard to the remaining 184,500 settlement shares which were appointed, assigned, sold and in due course transferred to Steven. B C D E F

Mr. Potter, on behalf of Anthony, argued that Rozel became the beneficiary and the person absolutely entitled as against the trustees by reason of the assignment, but that Anthony did not become the beneficiary by reason of the contract; the assignment and the contract were independent transactions. In my judgment, they were interdependent and conditional one upon the other. Although the assignment was executed before the contract was signed, no party was free in law to enter into the one and reject the other. Anthony would not have entered into the assignment, save in escrow, assigning his contingent equitable interest in the 184,500 settlement shares for £352,705, unless he was sure that if he survived until 1 November 1969 he would obtain the shares for £355,162 10*s*. Rozel would not have executed the assignment, save in escrow, thus purchasing the contingent interest of Anthony in the 184,500 settlement shares for £352,705, unless Rozel were sure that if Anthony survived until 1 November 1969 he would take the shares for £355,162 10*s*. G H I

Then it was submitted that the contract did not comprise the 184,500 settlement shares contingently appointed to Anthony; the shares which Anthony contracted to purchase by the contract need not necessarily have been

A satisfied by settlement shares the subject of the assignment. In my judgment, although the contract did not expressly so state, the shares which by the contract Rozel agreed to sell and Anthony agreed to purchase were the 184,500 settlement shares comprised in the appointment and the assignment, and no other shares. The purchase prices specified in the assignment and in the contract were based on the market price of the Lex shares on 28 October 1969,
B adjusted to give Rozel their fee and expenses. Not that the purchase prices mattered. Whatever the purchase prices, and whether the market price of Lex shares went up or down between 28 October 1969 and 1 November 1969, Rozel were intended and bound to pay for 184,500 shares £2,457 10*s*. less than they were bound to receive for the same shares. If Rozel purchased or otherwise acquired a second holding of 184,500 shares, Rozel would possess twice the
C number of shares they required for the scheme and would at the end of the scheme be left with 184,500 shares at the price they paid for the second holding. Rozel were not interested in acquiring Lex shares. They had only agreed, for a fixed remuneration and expenses amounting to £2,457 10*s*., to participate in a scheme under which, if they became entitled to 184,500 settlement shares under the assignment, they were bound to dispose of those shares to Anthony
D under the contract. Anthony was not interested in acquiring shares other than the settlement shares. If Rozel had been content to acquire and had the money and the opportunity to acquire 184,500 of the settlement shares for themselves at the market price prevailing on 28 October 1969 and if Anthony had been content to acquire and there were available for acquisition 184,500 shares which were not settlement shares at the market price prevailing on 28 October
E 1969 there was no need for the contract at all. Rozel could keep the settlement shares and Anthony could acquire a similar number of shares on the open market or elsewhere on 28 October 1969 for completion on or after 1 November 1969. Everyone would have been happy and no one would have paid capital gains tax. But Rozel and Anthony were not in fact contracting to deal with shares other than the settlement shares, even if other shares had been
F available. The contract ensured, and was intended to ensure, that under the contract the 184,500 settlement shares comprised in the appointment and the assignment came into the hands of Anthony, and that Rozel received from Anthony a contract sale price which exceeded the assignment purchase price by £2,457 10*s*. The scheme does not make sense unless the shares comprised in the appointment, the assignment and the contract were the same shares; namely,
G 184,500 settlement shares. When, therefore, the contingent interest appointed to Anthony vested on 1 November 1969 Rozel were entitled by virtue of the assignment to 184,500 settlement shares subject to paying Anthony £352,705, and Anthony was entitled by virtue of the contract to the same shares subject to paying Rozel £355,162 10*s*. Both sums were payable on 1 November 1969. Rozel could not require Anthony to pay £355,162 10*s*. unless Rozel simultan-
H eously paid Anthony £352,705. The trustees had notice of the scheme, the assignment and the contract. At no time on or after 1 November 1969 could the trustees as trustees have transferred 184,500 of the settlement shares to Rozel. The assignment and the contract dealt with an equitable interest in the shares. The trustees had notice that Rozel were only entitled in equity to the shares subject to Rozel paying £352,705 to Anthony, and that Anthony was entitled in
I equity to the same shares subject to his paying £355,162 10*s*. to Rozel. If the trustees had in fact transferred 184,500 settlement shares to Rozel it would have made no difference to the position in equity, which was that on 1 November 1969 the trustees held and Rozel would have held the shares in trust for Anthony subject to Anthony paying to Rozel the contract price, which exceeded the assignment price by £2,457 10*s*. At the moment when the contingent interest comprised in the appointment vested on 1 November 1969 Anthony became entitled to the 184,500 settlement shares comprised in the

appointment, and Rozel became entitled to the net sum of £2,457 10*s*. The trustees could have transferred, and were bound to transfer, the 184,500 settlement shares to Anthony on or at any time after 1 November 1969, on being satisfied that Anthony had paid or accounted for the net sum of £2,457 10*s*. to Rozel, but the trustees could never properly transfer the shares to Rozel or any person other than Anthony.

It was submitted that Rozel was the beneficiary entitled to the 184,500 settlement shares as against the trustees on 1 November 1969 because of differences between the assignment and the contract. The assignment was under seal; the assignment contained an express assignment by Anthony to Rozel of the contingent interest in the settlement shares in consideration for a covenant on the part of Rozel to pay the purchase price. The contract, on the other hand, did not refer to settlement shares (an argument I have already dismissed), was not under seal, did not contain an express assignment of any equitable interest and was not specifically enforceable in the Channel Islands. It was said that because of these differences Rozel became, as a result of the assignment, the beneficiary contingently entitled on 28 October and absolutely entitled on 1 November, when the contingent interest vested. It was submitted that Anthony did not become the beneficiary; he was only a purchaser who had not completed his contract. In my judgment, these are differences in form but not differences in meaning or effect. No particular form is necessary to deal with an equitable interest. Both the assignment and the contract dealt with an equitable interest in the 184,500 settlement shares. The legal estate was at all material times vested in registered shareholders who held as nominees for the trustees. By the assignment Rozel became absolutely entitled in equity to the 184,500 settlement shares if Anthony survived until 1 November 1969 and subject to Rozel paying Anthony £352,705. By the contract Anthony became absolutely entitled in equity to the same 184,500 settlement shares if Anthony survived until 1 November 1969 and subject to Anthony paying Rozel £355,162 10*s*.

It is significant that no single document was signed after 28 October. All parties assumed, and rightly assumed, that in the events which happened the contract sufficed to entitle Anthony to the shares. It is true that, when the contingent interest vested, Anthony had not paid the purchase price payable under the contract; but then, equally, Rozel had not paid the purchase price payable under the assignment and never was in a position to do so until after Anthony paid his purchase price. If, for the purposes of s 42(2) of the Finance Act 1965, as the Revenue conceded, the assignment sufficed to make Rozel the beneficiary in the place of Anthony, the contract equally sufficed to make Anthony the beneficiary in the place of Rozel. In the result, the beneficiary who on 1 November 1969, when the contingent interest vested, became absolutely entitled to the 184,500 settlement shares comprised in the appointment as against the trustees was Anthony, who, being resident and ordinarily resident in the United Kingdom, was liable under s 42(2) of the Finance Act 1965 to pay the capital gains tax which became payable under s 25(3) of the Act.

Mr. Potter, on behalf of Anthony, submitted that the contract must be ignored because of the principles to be found in *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 TC 11. The *Wesleyan* case decided that monthly loans which were bound to be advanced if demanded but which might in theory be repaid during the lifetime of the borrower did not become an annuity merely because the loans were bound to be repaid out of the proceeds of a single premium policy on the life of the borrower effected with the lender. The decision in the *Wesleyan* case was a result of a consideration of the true construction, meaning and effect of the two relevant documents, the life policy and the loan agreement. In the present case, it is necessary to ascertain the true construction, meaning and effect of the assignment and the contract in order to find the person who on 1 November 1969 became the beneficiary absolutely entitled to 184,500 settlement shares as against the trustees. When both documents are considered, it appears that Rozel became entitled under the assignment but were disentitled by the contract. Anthony was disentitled by the assignment but became entitled again under the contract. On the true construction of both documents, when the contingent interest created by the appointment vested, Anthony became the beneficiary absolutely entitled to the shares and Rozel became entitled to the cash payable under the contract, or, rather, to a net sum equal to the amount by which the contract price exceeded the assignment price. If Anthony had died before 1 November 1969 neither Rozel nor Anthony, nor anyone else, would have become absolutely entitled to the shares. For reasons which were not explained, Rozel were insured for only £350,000 against the death of Anthony before he attained the vested interest. The insurance moneys would have gone towards payment of the assignment price. Rozel could not complete the contract, but neither party could claim to have suffered damage. In the events which happened, however, the contingent interest vested, and at the moment of vesting Anthony was the beneficiary absolutely entitled to the shares as against the trustees.

In the alternative, the Crown claimed that if Anthony was not the beneficiary under the settlement, Anthony was, when the interest vested, the beneficiary under an arrangement. By s 42(7) of the Finance Act 1965 a settlement is defined so as to include an arrangement. On behalf of Anthony it was submitted that there were no trustees or settlor of any arrangement and that s 42(7) does not apply in the present circumstances. In my judgment, all the relevant events which took place between the appointment of new trustees dated 31 March 1969 and the final transfer of the shares to Anthony were part of an arrangement instigated by the settlor and carried into effect by him, by the trustees, by Rozel and by Anthony. The trust fund, the subject of the arrangement, consisted of 184,500 shares. That trust fund was vested in N.M. Rothschild & Sons (CI) Ltd. and the other three trustees of the settlement. They were the trustees of the arrangement because they held the trust fund which was comprised in the arrangement. Similarly, the settlor was the settlor of the arrangement because he was the person who had provided the trust fund comprised in the arrangement. There is no doubt that for the purposes of the arrangement the only beneficiary was Anthony, and that when the contingent interest vested he was, pursuant to the arrangement, absolutely entitled to the shares. Accordingly it seems to me that the Crown are entitled to succeed on this alternative ground also.

In the result, Anthony's appeal is dismissed, with costs. The appeal from Steven, which is based on precisely similar facts, is also dismissed, with costs.

Appeals dismissed, with costs.

The taxpayers' appeals were heard in the Court of Appeal (Buckley, Goff A and Shaw L.JJ.) on 15, 16 and 17 January 1979 when judgment was reserved. On 2 February 1979, judgment was given unanimously against the Crown, with costs.

D. C. Potter Q.C. and *C. H. McCall* for the taxpayers.

D. J. Nicholls Q.C., *Peter Gibson* and *A. Walton* for the Crown.

The following cases were cited in argument in addition to those referred to B in the judgments:—*Bulmer* v. *Commissioners of Inland Revenue* 44 TC 1; [1967] Ch 145; *De la Vega* v. *Vianna* (1830) 1 B & Ad 284.

Buckley L.J.—There are two appeals before this Court from decisions of Templeman J. contained in a single judgment delivered on 20 July 1977. The Appellants (to whom I shall refer for brevity as "Anthony" and "Steven") are C brothers. In each case the Appellant was assessed to capital gains tax for the year 1969–70 in a sum of £130,000 and seeks to avoid liability for the whole amount. The cases turn principally upon the effect on the facts of each case of the Finance Act 1965, s 42. The facts in each case are identical in all respects. It will be sufficient for me to deal in this judgment with Anthony's appeal. The result must be precisely the same in Steven's appeal. D

Shortly stated the facts are these. By a settlement dated 24 February 1960 the father of Anthony and Steven ("the settlor") settled a relatively small number of ordinary shares of 5*s*. each in Lex Garages Ltd. upon trusts under which the trustees had power with the consent of the settlor during his lifetime to appoint the trust fund in favour of (amongst others) Anthony and Steven. Subject to any such appointment the trust fund was to be held initially upon E discretionary trusts for a class consisting of Anthony, Steven, their spouses and issue, and Anthony and Steven were entitled to the fund in equal shares contingently on their respectively attaining the age of 35 years. There were four original trustees of the settlement, all resident in England. In the course of time further Lex shares were brought into the settlement and in 1969 the trust fund included 370,100 Lex ordinary shares. The settlor was concerned about F the prospective incidence of capital gains tax. In or about February 1969 he took legal advice about the possibility of mitigating this. His solicitor consulted Messrs. N.M. Rothschild & Sons, the bankers ("Rothschilds"). In consequence a scheme was devised by Rothschilds and the settlor's solicitor in London in pursuance of which in due course the following steps were taken.

(1) On 31 March 1969 the settlor appointed a company controlled by G Rothschilds and called N.M. Rothschild & Sons (CI) Ltd. ("NMR (CI)") which was incorporated in Guernsey and had its registered office and place of business there and two directors of that company, both resident in Guernsey, to be trustees of the settlement in the place of three of the original trustees. The majority of the trustees were thenceforth domiciled and resident, or normally resident, in Guernsey. H

(2) Between 31 March 1969 and 28 October 1969 the general administration of the settlement was moved to Guernsey.

(3) On 28 October 1969 a company called Rozel Holdings Ltd. ("Rozel"), which was a company incorporated and having its registered office in Jersey the whole share capital of which was owned by Rothschilds, insured the life of Anthony for £350,000 for one month, i.e. until 28 November 1969. I

A (4) On 28 October 1969 the trustees of the settlement with the consent of the settlor by deed appointed, in exercise of their power of appointment under the settlement, that 184,500 Lex ordinary shares and the investments for the time being representing the same should be held in trust for Anthony absolutely if he should survive three days from the date thereof (Case para 5(12)).

B (5) Thereupon on the same day Anthony by deed assigned to Rozel his contingent interest under the appointment in consideration of a covenant by Rozel to pay him or his personal representatives £352,705 by way of purchase price on 1 November 1969. The deed of assignment was to be construed in all respects in accordance with the law of Jersey (Case para 5(13)).

(6) A cheque for £352,705 drawn by Rozel on a Jersey bank dated 1
C November 1969 was handed to Anthony and was immediately handed by him to NMR (CI) for the credit of an account then recently opened by him with that company. Rozel's bank balance was on 28 October 1969 insufficient to meet this cheque and a similar cheque drawn in favour of Steven.

(7) Thereafter on the same day Anthony and Rozel executed an agreement whereby Rozel agreed to sell and Anthony agreed to buy 184,500 Lex ordinary
D shares free from all liens, charges or encumbrances at the price of £355,162 10*s*. to be paid in Guernsey on completion on 1 November 1969, time being of the essence. That document was to be read and construed in all respects according to Guernsey law (Case para 5(14)). The amount of £355,162 10*s*. was the middle market price of 184,500 Lex ordinary shares on the London Stock Exchange at the close of business on 27 October 1969.

E (8) Anthony signed a letter dated 28 October 1969 addressed to NMR (CI) in these terms: "On 1st November 1969 please debit my account and pay the sum of £355,162 10*s*. 0*d*. to Rozel Holdings Limited".

The trust holding of 370,100 Lex ordinary shares was registered in the name of a nominee company. After 1 November 1969 notice was given to the nominee that 184,500 of those shares were beneficially owned by Anthony. The
F trustees were duly notified of the deed of assignment. All the transactions carried out on 28 October 1969 were carried out in Jersey at a meeting at which Anthony and Steven, the settlor's solicitor and one of the Guernsey individual trustees were present, as well as representatives of Rothschilds, NMR (CI) and Rozel.

The relevant statutory provisions are the following. Under the Finance
G Act 1965, s 25(1), on the facts of this case the trustees of the settlement are not to be treated as resident or ordinarily resident in the United Kingdom. Consequently they are not liable to capital gains tax. The Finance Act 1965, s 25(3), reads as follows:

> "On the occasion when a person becomes absolutely entitled to any settled property as against the trustee all the assets forming part of the
> H settled property to which he becomes so entitled shall be deemed to have been disposed of by the trustee, and immediately reacquired by him in his capacity as a trustee within s 22(5) of this Act, for a consideration equal to their market value."

If on 1 November 1969 anyone became absolutely entitled as against the trustees of the settlement to the subject matter of the appointment in favour of
I Anthony, the trustees must be deemed to have then disposed of that subject

matter and to have immediately re-acquired it as trustees within s 22(5) at its market value. Section 22(5), so far as relevant to the present case, provides as follows:

> "In relation to assets held by a person . . . as trustee for another person absolutely entitled as against the trustee . . . this Part of this Act shall apply as if the property were vested in, and the acts of the . . . trustee in relation to the assets were the acts of, the person or persons for whom he is . . . trustee."

Special provision is made by s 42 for what are called non-resident trusts. Under s 42(1) that section is applicable to the present case. Section 42(2) is in the following terms:

> "Any beneficiary under the settlement who is domiciled and either resident or ordinarily resident in the United Kingdom during any year of assessment shall be treated for the purposes of this Part of this Act as if an apportioned part of the amount, if any, on which the trustees would have been chargeable to capital gains tax under section 20(4) of this Act, if domiciled and either resident or ordinarily resident in the United Kingdom in that year of assessment, had been chargeable gains accruing to the beneficiary in that year of assessment; and for the purposes of this section any such amount shall be apportioned in such manner as is just and reasonable between persons having interests in the settled property, whether the interest be a life interest or an interest in reversion, and so that the chargeable gain is apportioned, as near as may be, according to the respective values of those interests, disregarding in the case of defeasible interest the possibility of defeasance."

There can be no doubt that on 1 November 1969 Rozel, or Rozel and Anthony, or Anthony, became entitled to Anthony's appointed fund absolutely as against the trustees of the settlement. Accordingly, under s 25(3) the trustees must be deemed to have then disposed of that fund and to have immediately re-acquired it. Since, however, the trustees are not liable to capital gains tax because under s 25(1) they are not to be treated as having then been resident or ordinarily resident in the United Kingdom, no capital gains tax would be exigible unless the case falls within the terms of s 42(2). It is immaterial whether Rozel was a beneficiary under the settlement within the meaning of that subsection, for Rozel was not domiciled and either resident or ordinarily resident in the United Kingdom during the year of assessment in question. Anthony on the other hand was domiciled and either resident or ordinarily resident in the United Kingdom during that year. So, if he was on the facts of the case then a beneficiary under the settlement, he would be liable to capital gains tax on an apportioned part of the chargeable gain in respect of which the trustees would have been liable if they were treated as being resident or ordinarily resident in the United Kingdom in the year in question. To determine whether this is so one must first ascertain the legal effect of the transactions which were carried out without regard to fiscal consequences and, having done so, see how the fiscal statutory provisions operate upon the situation so ascertained (*Commissioners of Inland Revenue* v. *Wesleyan & General Assurance Society* 30 TC 11, *per* Lord Greene M.R., at page 16); and see *Commissioners of Inland Revenue* v. *Duke of Westminster*[1] [1936] AC 1, *per* Lord Tomlin, at pages 19–20.

The legal effect of the documents severally and collectively must depend upon their terms as construed in the light of any admissible extrinsic evidence.

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(1) 19 TC 490.

Subjective evidence of the intention of the parties is not admissible for this purpose, but the court of construction can properly have regard to what has been called the matrix of fact (*Prenn* v. *Simmonds* [1971] 1 WLR 1381, *per* Lord Wilberforce, at pages 1383–4), that is to say, the extrinsic circumstances surrounding the transactions. In this respect it is, I think, legitimate to have regard to the circumstance that all the transactions formed parts of an inter-related scheme which had been devised and worked out in detail before any of the documents were signed. The Commissioners found (Case para 9(2)) that there was a single scheme which was planned from the outset with the object of vesting one-half of 369,000 Lex ordinary shares in each of Anthony and Steven without incurring capital gains tax. The fiscal objective is not, I think, relevant to the immediate purpose of discovering the legal effect of the transactions, but it is or may be relevant that the transactions constituted a single scheme the object of which was that 184,500 shares should vest in each of Anthony and Steven. The Commissioners further found (Case para 9(2)) that Anthony and Steven and Rozel would not have completed the sales of the contingent interests without entering into and completing the share sale agreements, and that it was at all times intended that Rozel should sell to Anthony and Steven the shares it would acquire on 1 November 1969 under the operation of the settlement, the appointment and the deeds of assignment.

Approaching the transactions with this circumstance in mind, what on their true interpretation was their effect? Mr. Nicholls for the Crown has stressed that, as he says, Rozel was never intended to be more than a conduit through which 184,500 shares would pass from the trustees of the settlement to Anthony in consideration of Rozel receiving a fee of £2,457 10*s*., the difference between the price under the deed of assignment and the price under the share sale agreement. It has been a cardinal feature of his argument that the shares to be received by Anthony would be shares which the trustees (or their nominee) had actually held as part of the trust fund. This view was also, I think, a fundamental feature of Templeman J.'s judgment. He said[1]:

> "But Rozel and Anthony were not in fact contracting to deal with shares other than the settlement shares, even if other shares had been available. The contract ensured, and was intended to ensure, that under the contract the 184,500 settlement shares comprised in the appointment and the assignment came into the hands of Anthony, and that Rozel received from Anthony a contract sale price which exceeded the assignment purchase price by £2,457 10*s*. The scheme does not make sense unless the shares comprised in the appointment, the assignment and the contract were the same shares; namely, 184,500 settlement shares."

This view is frequently re-emphasised in the course of the judgment. I turn therefore to the documents to see whether this is the case. First it should be observed that the appointment did not appoint any specific shares to Anthony. It appointed "Anthony's fund" which was defined as the investment specified in part 1 of the schedule thereto and the investments for the time being representing the same. Reference to the schedule discloses that the investment there specified was 184,500 ordinary shares of 5*s*. each of Lex Garages Ltd. Steven's fund is described in the same document in precisely similar terms. No particular shares were then, or at any time before 1 November 1969, appropriated to either Anthony's fund or Steven's fund; nor was any appropriation made out of the 370,100 shares held by the trustees to answer the 369,000 shares dealt with by the appointment. The appointment was not an appointment of any specific shares but of an undivided share of the

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(1) Page 327 *ante*; [1977] 1 WLR 1337.

trust fund quantified by reference to a number of Lex ordinary shares. The A
deed of assignment followed the same pattern. What was assigned was the
interest of the assignor (Anthony) under the appointment in 184,500 Lex
ordinary shares and the investments, property and proceeds of sale at any time
representing the same. The share sale agreement made no reference to
the appointment or to the assignment. It is a straightforward agreement for
sale and purchase of 184,500 Lex ordinary shares without reference to the B
provenance of the subject matter. On the faces of these documents I can see no
justification for saying that the share sale agreement was a contract for the
sale and purchase of particular shares to which Rozel would become entitled
under the settlement and appointment. Of course it is clear that the parties
contemplated that Rozel's obligations under the share sale agreement would be
satisfied out of the shares available to Rozel under the appointment. Rozel was C
in the circumstances assured of being able to meet its obligation under the share
sale agreement punctually on 1 November 1969, so that the circumstance that
completion on that date was made essential by the terms of the contract would
cause Rozel no embarrassment provided that Anthony survived 1 November
1969. It is evident that the parties had in mind the possibility that Anthony
might not survive that date, for Rozel insured against that risk. Had Anthony D
died before 1 November 1969, Rozel would not have had shares available with
which to complete the share sale agreement; it would have had £350,000
instead. The 184,500 shares would in these circumstances remain in the hands
of the trustees upon the subsisting trusts of the settlement.

Mr. Nicholls has contended that all the parties intended that the 184,500
shares comprised in Anthony's fund should become the absolute property of E
Anthony on 1 November 1969 and that the scheme was devised to that end.
He relied upon the Commissioners' finding of fact (Case para 5(7)) that the
essence of the scheme was that upon the vesting of the appointed interests on
1 November 1969 Anthony and Steven would *repurchase* the Lex shares with
the money received from the sales of their contingent interests. He relied also
on the Commissioners' further finding of fact (Case para 9(2)) that it was at F
all times intended that Rozel would sell the Lex shares it would acquire on
1 November 1969 to Anthony and Steven. This was certainly the case, but
to achieve this result it is not necessary to construe the share sale agreement
otherwise than in accordance with its clear terms, that is, as a contract for sale
of 184,500 unidentified Lex ordinary shares. Mr. Nicholls also placed reliance
on two of the documents in evidence (documents S and T) which indicate that G
the number of Lex ordinary shares issued at 28 October 1969 was 4,111,068, of
which about 909,572 were held by members of the Chinn family or trustees of
Chinn family settlements. He said that the loss even for a short period of the
voting rights on 369,000 shares might be a serious matter. This, he claimed,
made clear that it was an important element of the scheme that Anthony's
184,500 shares should pass directly from the trustees to Anthony, Rozel serving H
merely as a conduit for this purpose. To achieve this desired result it was not
necessary that the share sale agreement should relate specifically to settled
shares. The result could be achieved by so devising the scheme that Rozel
would become absolutely entitled at midnight on 31 October/1 November to
sufficient Lex ordinary shares to enable it to fulfil its obligation to transfer
ownership of 184,500 Lex ordinary shares to Anthony before midnight on I
1 November/2 November. The identity of source of the 184,500 shares was of
no particular significance to Anthony. What was important was that he should
get 184,500 shares contemporaneously in effect with the trustees' parting with
that number of shares. If upon its true construction the share sale agreement
was a contract for the sale of specific settled shares, and if Anthony had died
before 1 November 1969 so that Rozel would not have become entitled to his J

fund under the appointment, Rozel would have been unable to comply with the strict requirements of the contract, because it would have had no settled shares with which to do so. Mr. Nicholls felt constrained to contend that in such circumstances the share sale agreement would have been inoperative. He submitted that a term should either be implied in that agreement or written into it by a process of rectification to the effect that it was conditional upon Anthony's surviving 31 October 1969 or (which would have a like effect) upon Rozel becoming entitled on 1 November 1969 to Anthony's appointed fund. There is, in my judgment, no basis for any such implication. For reasons which I have already indicated, the mechanism of the scheme was such that no such implication is necessary for its effective operation. So far as rectification is concerned there is no basis of fact found by the Commissioners which could support a claim to rectification.

I consequently reach the conclusion that on the true construction of the share sale agreement it was a contract for the sale of 184,500 unspecified shares. In this I differ from the learned Judge who held ([1]) that, although the contract did not expressly so state, the shares which by the contract Rozel agreed to sell and Anthony agreed to purchase were the 184,500 settlement shares comprised in the appointment and the assignment, and no other shares. From this basis he proceeded to the conclusion([2]):

> "At the moment when the contingent interest comprised in the appointment vested on 1 November 1969 Anthony became entitled to the 184,500 settlement shares comprised in the appointment, and Rozel became entitled to the net sum of £2,457 10*s*. The trustees could have transferred, and were bound to transfer, the 184,500 settlement shares to Anthony on or at any time after 1 November 1969, on being satisfied that Anthony had paid or accounted for the net sum of £2,457 10*s*. to Rozel, but the trustees could never properly transfer the shares to Rozel or any person other than Anthony."

If, as I think was the case, the share sale agreement was for the sale of unspecified shares, it would clearly not be liable to specific performance by a court and would not have conferred upon Anthony any equitable interest in any particular Lex shares. If this be the correct interpretation and effect of the share sale agreement, Anthony was not a beneficiary under the settlement at 1 November 1969, with the result that s 42(2) does not apply to him. I would allow this appeal on that ground.

But, in case I may be wrong in that conclusion, I shall proceed to consider whether Anthony ought to be regarded as having been a beneficiary under the settlement at 1 November 1969 if the share sale contract upon its true interpretation was a contract for the sale of 184,500 settlement shares. Unless Anthony could have obtained a decree of specific performance of the share sale agreement, that agreement could not have conferred on him any equitable interest in the subject matter of the contract. Where, however, a decree of specific performance could be obtained in respect of a sale contract, the vendor becomes, at least in some degree, a trustee for the purchaser of the subject matter of that contract (Lewin on Trusts, 16th edn (1964), page 153; Williams on Vendor & Purchaser, 4th edn (1936), page 545; Megarry & Wade on the Law of Real Property, 4th edn (1975), page 575). It was in this way that the learned Judge reached his conclusion that on 1 November 1969 Anthony was entitled to call upon the trustees for a transfer of 184,500 settlement shares.

([1]) Page 327 *ante*. ([2]) Pages 327–8 *ante*.

The share sale agreement was entered into in Jersey and was expressed to take effect according to Guernsey law. There was expert evidence before the Commissioners in the form of a proof of evidence which was accepted by the parties without formal proof (document V) to the effect that the remedy of specific performance would not be available in a Guernsey court. Mr. Nicholls has contended nevertheless that an order for the specific performance of the share sale agreement could have been obtained in England. In this respect he relied upon Dicey & Morris on the Conflict of Laws, 9th edn (1973), page 1099, r 204, and the statement at page 1101 to the effect that the nature of the plaintiff's remedy is a matter of procedure to be determined by the *lex fori*, and that thus if the plaintiff is by the *lex causae* only entitled to damages but is by English law entitled to specific relief, the latter type of remedy is available in England. We were referred to some of the authorities cited in Dicey in support of this statement. Mr. Nicholls submitted that Anthony could have sued Rozel for specific performance in England and have obtained leave to serve out of the jurisdiction under RSC Ord 11, r 1(1)(*f*)(ii).

These submissions, in my opinion, give rise to some rather difficult questions. First, the subject matter of the sale agreement was not Anthony's contingent interest in his appointed fund; it was, as for the present purpose I assume, 184,500 settled Lex shares to which Rozel would not become entitled until 1 November 1969. Anthony could not have sued for specific performance of that contract before that date. So, as it seems to me, Anthony could not have asserted against Rozel any equitable interest in those shares before that date arrived. Rozel could not be in any sense a trustee for Anthony of shares to which Rozel was not yet entitled. At the first moment of 1 November 1969 the right to Anthony's fund under the appointment—i.e. the right to 184,500 Lex shares—vested in Rozel and thereupon, if the share sale agreement was specifically enforceable, Anthony acquired an equitable interest in those shares. That equitable interest was not however an absolute one, for Rozel would still have an interest in the shares to the extent of any part of the purchase price which remained unpaid. A court would not have ordered specific performance of the share sale agreement unless and until the whole purchase price had been paid. Anthony had made provision for payment of the greater part of the purchase price by lodging Rozel's cheque for £352,705 with NMR (CI) and had instructed NMR (CI) to pay a sum of £355,162 10*s*. to Rozel on 1 November 1969, but there is no finding as to precisely when the whole of the latter sum was paid. In any case, Rozel was under no obligation to complete the share sale agreement until the last moment of 1 November 1969. Accordingly it seems to me at least arguable that Anthony did not immediately become entitled to any settlement shares upon his surviving 31 October 1969. Rozel became absolutely entitled to the shares upon the occurrence of that contingency. The shares thereupon ceased to be settled shares in the sense that Rozel had become absolutely entitled to them and the trustees of the settlement were no more than bare trustees of the shares for Rozel. If Anthony's right to have the shares transferred to him only arose after the occurrence of that event, it seems to me to be at least arguable that he cannot be said to have become entitled to the shares as a beneficiary under the settlement. But there is I think a further and more cogent ground for considering that the share sale agreement was not specifically enforceable with the consequence that Anthony did not become entitled to any shares as a beneficiary under the settlement. A court will not enforce a contract specifically if damages at common law would be an adequate remedy.

As I have already pointed out, the provenance of the shares which he was to receive was not of any importance to Anthony. What was important was that he should receive 184,500 shares and should do so on 1 November 1969. Lex Garages Ltd. is a public company whose shares are dealt in on the London Stock Exchange. There is no suggestion in the Case that there is not a free market in the shares. It might, no doubt, take a little time to buy so large a number of shares on the market but there is no reason to think that they could not have been had. So damages would appear to be a fully adequate remedy unless punctual delivery of the shares on 1 November 1969 was of exceptional importance. Mr. Nicholls has drawn attention to the large proportion of shares in the company held by the Chinn family and trustees of Chinn settlements, and has submitted that any substantial reduction in the aggregate size of those holdings might be damaging to the interests of the Chinn family including Anthony. The Case contains no findings of fact relating to this particular aspect of the case. We cannot tell whether the Chinn interests were all unanimous in their view about the conduct of the company's affairs, nor is there any indication to be found in the Case that in fact the temporary loss of voting rights in respect of 184,500 shares or of twice that number of shares taking Steven into account, would or might be damaging. In these circumstances, in my opinion, it was not established that damages would be an adequate remedy for breach of the share sale agreement. Accordingly, in my judgment, on the facts as found in the Case, an English court would not have decreed specific performance of that agreement. It follows that, in my judgment, even if the share sale agreement ought to be construed as a contract for the sale of settled Lex shares, Anthony did not become a beneficiary in respect of those shares under the settlement, with the consequence that s 42(2) does not apply to the present case.

There remains for consideration a quite separate point which arises on the definitions of "settlement" and "settlor" contained in s 42(7). That subsection at the relevant time read as follows: "In this section 'settlement' and 'settlor' have the same meaning as in Chapter III of Part XVIII of the Income Tax Act 1952 and 'settled property' shall be construed accordingly." That takes one to s 411(2) of the Income Tax Act 1952 (which has since been re-enacted in identical language in s 454(3) of the Income and Corporation Taxes Act 1970) which is in these terms:

> "In this Chapter, 'settlement' includes any disposition, trust, covenant, agreement or arrangement, and 'settlor', in relation to a settlement, means any person by whom the settlement was made; and a person shall be deemed for the purposes of this Chapter to have made a settlement if he has made or entered into the settlement directly or indirectly, and in particular (and without prejudice to the generality of the preceding words) if he has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement."

Mr. Nicholls contends that the scheme devised and carried out in this case, as I have described, was an "arrangement" within that subsection and that accordingly it was a settlement for the purposes of the Finance Act 1965, s 42, wholly distinct from the settlement made by the settlor on 24 February 1960. That view commended itself to the learned Judge. He held [1] that the transactions constituting the scheme were all part of an arrangement instigated by the settlor and carried into effect by him, by the trustees, by Rozel and by Anthony. In his view NMR (CI) and the other three trustees of the settlement were the trustees of the arrangement because they held the trust fund which

[1] Page 329 *ante*.

was comprised in the arrangement; the settlor was the settlor of the arrangement because he was the person who had provided the trust fund comprised in it; and Anthony was the only beneficiary under the arrangement. He held that, when the contingent interest vested Anthony was, pursuant to the arrangement, absolutely entitled to the shares comprised in his fund, so that s 25(3) then operated to effect a deemed disposal and s 42(2) had the effect of making the whole deemed capital gain apportionable to Anthony.

The definition of "settlement" uses very wide and general language. In construing it some limitation must be put on the wide words. In *Chamberlain* v. *Commissioners of Inland Revenue* 25 TC 317 the House of Lords considered the effect of the definition of "settlement" contained in the Finance Act 1938, s 41(4), which was in the same language as the definition with which we are concerned. Lord Macmillan, at page 331, said that he agreed with Lord Moncrieff (*Commissioners of Inland Revenue* v. *Morton*(1) 24 TC 259) that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of others. As I understand that observation, Lord Macmillan was saying that an arrangement to fall within the definition must be one which contains an act of bounty by the settlor in favour of others. In *Commissioners of Inland Revenue* v. *Plummer*(2) [1978] 3 WLR 459, this Court held that a transaction between parties which was a bona fide commercial transaction devoid of any element of bounty did not fall within the definition of "settlement" contained in s 454(3) of the Income and Corporation Taxes Act 1970. No doubt it is true that the definition is an enlarging one, as was pointed out by Lord Morton of Henryton in *Thomas* v. *Marshall* [1953] AC 543, at page 556, where, discussing a definition of "settlement" contained in the Income Tax Act 1952, s 42, which was framed in substantially the same language as the definition presently under consideration he said(3):

> "The object of the subsection is, surely, to make it plain that in section 21 the word 'settlement' is to be enlarged to include other transactions which would not be regarded as 'settlements' within the meaning which that word ordinarily bears. Its effect is that wherever the word 'settlement' occurs in section 21 one must read it as 'settlement, disposition, trust, covenant, agreement, arrangement or transfer of assets', and if 'by virtue or in consequence of' any of these transactions or deeds income is paid to or for the benefit of a child of the settlor, section 21 comes into operation."

In that case the House of Lords held that an outright gift fell within the definition. Accepting, however, that the definition is an enlarging one, bounds must be set to its scope in order to give it a sensible meaning. In my judgment, the authorities to which I have just referred indicate the test by reference to which those bounds ought to be set. In my view the word "settlement" itself in a context such as this suggests a transaction whereby someone described as a settlor confers a beneficial interest in property of his upon one or more people who acquire beneficial interests in that property in consequence of the settlor's act. A disposition, trust, covenant, agreement or arrangement may have this effect notwithstanding that it does not fall within the more ordinary meaning of the word "settlement" as a formal transaction by which a settlor vests property in trustees for the benefit of beneficiaries who very probably take successive interests. An outright gift is a good and simple example of the kind of transaction which falls within the definition but would not fall within the ordinary meaning of the word "settlement". But to constitute a "settlement" within the definition any transaction must, in my judgment, comprise some

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(1) 1941 SC 467. (2) 54 TC 1; [1979] Ch 63. (3) 34 TC 178, at p 202.

A element of bounty by the settlor in favour of some other person or persons.
Bounty requires someone from whom the bounty proceeds and must come
from that person's own resources.

I feel unable to agree with the learned Judge that the settlor in the present
case was the settlor for the purpose of any "settlement" constituted by the
scheme. The settlor parted with all his interest in the trust fund comprised in
B the settlement of 24 February 1960 when he made that settlement. Thereafter
he had no interest whatever in the trust fund and no power to dispose of it or
of any interest in it. He cannot, therefore, have conferred any bounty upon
anyone in relation to the trust property after that date. Whatever bounty
accrued to Anthony upon the execution of the appointment derived not from
anything done at the time of the appointment but from the settlor's original
C disposition at the time of the settlement. It is true that the settlor's consent was
necessary for the exercise of the power of appointment under the settlement,
but by consenting to the appointment the settlor did not, in my opinion, confer
any bounty upon Anthony. The appointment was an exercise by the trustees of
a discretion vested in them, which the settlor could not influence except by
way of embargo. He could unlock the door or keep it locked, but he could not
D open it: he could confer no bounty, although he could prevent the trustees
conferring a particular beneficial interest. To discover whether a particular
arrangement can be regarded as constituting a settlement within s 42(7) one
must clearly, in my opinion, look at the state of affairs when the arrangement
is put into effect. In this case the earliest date that could be selected in
this respect was 31 March 1969 when the new trustees were appointed: on the
E other hand no new beneficial interest was brought into existence until the
appointment was made on 28 October 1969. It is, in my opinion, impossible to
say that at either of those dates the settlor was in a position to confer any bounty
out of the trust fund upon Anthony or anyone else. The trustees of the
settlement could confer no bounty for, though they had a power of appoint-
ment, they had no beneficial interest in the trust fund out of which to confer any
F bounty upon anyone. The benefit conferred on Anthony by the appointment
was a fruit of an earlier act of bounty by the settlor on 24 February 1960.
It follows, in my opinion, that upon a true view of the facts the scheme
involved no act of bounty by anyone and consequently cannot have constituted
a settlement within the meaning and effect of s 42(2).

For these reasons I would allow this appeal. As I indicated at the outset of
G this judgment, the result of Steven's appeal must be the same. I would therefore
allow both appeals.

Goff L.J.—Save when it is necessary to refer to both Anthony's and
Steven's funds I shall for the sake of simplicity deal with Anthony only, but of
course precisely the same considerations apply to both these appeals. When
Anthony's interest under the appointment of 28 October 1969 vested
H absolutely at midnight on 31 October/1 November of that year there was by
virtue of s 25(3) of the Finance Act 1965 a deemed disposal by the trustees of
the settlement dated 24 February, which for certain purposes of the argument
on the Crown's alternative case was referred to as the "classic settlement", and
I will refer to it by that name. This deemed disposal gave rise to capital gains tax
on the gain obtained by the trustees and by virtue of s 22(5) that liability would
I fall on Rozel, but for the fact that Rozel is a Guernsey company. As under
s 25(1) the trustees are a single body and that body is also outside the
jurisdiction, the Crown cannot recover any of the tax unless it can make
Anthony liable under s 42(2), which it seeks to do in one or other of two
alternative ways.

The first is that the sale agreement was in effect or operation of law a A
reassignment in equity to Anthony of the share assigned by him to Rozel. This was rejected by the Special Commissioners but accepted by Templeman J. who said[1]:

> "No particular form is necessary to deal with an equitable interest. Both the assignment and the contract dealt with an equitable interest in the 184,500 settlement shares. The legal estate was at all material times vested B
> in registered shareholders who held as nominees for the trustees. By the assignment Rozel became absolutely entitled in equity to the 184,500 settlement shares if Anthony survived until 1 November 1969 and subject to Rozel paying Anthony £352,705. By the contract Anthony became absolutely entitled in equity to the same 184,500 settlement shares if Anthony survived until 1 November 1969 and subject to Anthony paying C
> Rozel £355,156 10*s*.

Again, the learned Judge said[2]:

> "In the present case, it is necessary to ascertain the true construction, meaning and effect of the assignment and the contract in order to find the person who on 1 November 1969 became the beneficiary absolutely entitled to 184,500 settlement shares as against the trustees. When both D
> documents are considered, it appears that Rozel became entitled under the assignment but were disentitled by the contract. Anthony was disentitled by the assignment but became entitled again under the contract."

In my judgment, however, with all respect to the learned Judge, that could not be so unless on its true construction the sale agreement was a contract to sell E
particular shares and not a certain number of unspecified shares, because the proposition necessarily involves the sale agreement being one amenable to the remedy of specific performance, which, there being a market for Lex shares, a contract to sell unspecified shares in that company would not be.

That then is the first question we have to decide. Was the sale agreement a contract to sell particular shares, or was it not? If it was, I do not for my F
part think it matters whether it was to sell to Anthony the shares received by Rozel as representing his own trust fund or to sell him 184,500 shares part of the total of 369,000 shares comprised in the two assignments. The Special Commissioners found (see the Case Stated, para 5(7)) that:

> "In essence, the scheme was that Rothschilds would procure and finance the purchase by Rozel of contingent interests in Lex shares which G
> Anthony and Steven would acquire by virtue of appointments to be made by the trustees of the settlement. Upon the vesting of those interests three days later Anthony and Steven would repurchase the Lex shares with the money received from the sale of their contingent interests."

If that be a finding of fact on the evidence of the witnesses as to their intention, it is inadmissible and cannot be allowed to affect the true construction of the H
sale agreement: see *Prenn* v. *Simmonds* [1971] 1 WLR 1381, at page 1385H. If, however, it is the Special Commissioners' view of the true construction of the documents, then that is a matter of law and open to review by us. Further, it is clear that in considering this question of construction we must put out of our minds the fact that the aim of the transactions was to escape capital gains tax. We must first construe the documents and then see what is the effect I

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[1] Page 328 *ante*. [2] Page 329 *ante*.

A taxwise, not bend the true meaning of the words used to effect or defeat the fiscal purpose. That is clearly established by the case of *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 TC 11, where Lord Greene M.R. said, at page 16:

> "In considering tax matters a document is not to have placed upon it a strained or forced construction in order to attract tax, nor is a strained
> B or forced construction to be placed upon it in order to avoid tax. The document must be construed in the ordinary way and the tax legislation then applied to it. If on its true construction it falls within a certain taxing category, then it is taxed. If on its true construction it falls outside the taxing category, then it escapes tax";

and see also *per* Lord Simon in the same case at pages 25–6.

C With these considerations in mind I turn to the sale agreement and the relevant parts for this purpose are clause 1, which reads as follows:

> "The Vendor shall sell and the Purchaser shall purchase the investments specified in the Schedule hereto (hereinafter called 'the investments') free from all liens charges and other incumbrances and together with all rights attached thereto including the right to receive all dividends
> D hereafter declared on the investments";

and the schedule: "One Hundred and Eighty-four Thousand Five Hundred (184,500) Ordinary Shares of Five Shillings (5/-) each of Lex Garages Limited". Now there is nothing there to identify the shares in any way either by reference to serial numbers or by reference to Anthony's fund under the classic settlement and the appointment, or even to the aggregate 369,000 shares. *Prima*
E *facie,* therefore, upon its true construction the sale agreement was one for the sale of unspecified shares. It is said, however, and rightly, that one must construe the sale agreement in the light of the two contemporaneous documents, namely the appointment and assignment, as part of the surrounding circumstances or matrix of facts. The precise correspondence of the quantities in all three documents, together with the very brief contingency
F period under the appointment, lead to the inference that the parties contemplated that Rozel would receive 184,500 Lex shares as representing Anthony's fund and would perform the sale agreement by the transfer of those same shares, or at least that they would receive 369,000 shares under the two assignments and use those to perform their obligations under the two sale agreements, but that does not in my judgment require or entitle us to cut down the obvious *prima*
G *facie* meaning of the sale agreement. One may only use the matrix to qualify the construction where it shows objectively what the commercial or business object of the transaction was and the words of the document to be construed, if literally construed, fail to implement it whereas some other construction which the words may fairly bear will give effect to it. This clearly appears from the speech of Lord Wilberforce in the *Prenn* case [1971] 1 WLR 1381, from which
H I cite at page 1385A:

> "It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact. Cardozo J. thought so in the *Utica Bank* case[1]. And if it can be shown that one interpretation completely frustrates that object to
> I the extent of rendering the contract futile, that may be a strong argument for alternative interpretations, if that can be reasonably found. But beyond that it may be difficult to go."

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(1) (1918) NE 607.

It will be observed that Lord Wilberforce speaks of rendering the agreement futile, which is a strong qualification.

Templeman J. said[1]: "The scheme does not make sense unless the shares comprised in the appointment, the assignment and the contract were the same shares; namely, 184,500 settlement shares", but with great respect that in my view flies in the face of the *Wesleyan and General Assurance* case[2], for it only makes sense if one construes the documents in the light of the tax saving purpose shown *aliunde*. One cannot in my judgment find from the matrix, or for that matter any other legitimate source, anything which requires one to limit the sale agreement to particular shares or which renders it futile unless so limited. Whether or not so limited the company would be exposed to liability in damages if the appointment failed, against which it largely covered itself by insurance, and in the absence of a finding, and there is none, that there was some magic in Anthony's obtaining particular shares he would be no worse off, or worse off only to a small extent remediable in damages, by having a contract for unspecified shares only. I can find nothing, therefore, to modify the *prima facie* view of the true construction of the sale agreement. Indeed, it seems to me that the indications in the matrix point the other way, for the appointment was itself not one concerning particular shares. Strictly speaking it was not necessarily an appointment of shares at all, but of a fund consisting of 184,500 Lex shares and the investments for the time being representing the same. However, the possibility that the trustees would vary that investment by disposing of some or all of the shares may perhaps be disregarded as the contingency period was so short, and having regard to the transactions as a whole, which were obviously intended to operate on Lex shares throughout, but even so the appointment manifestly related to unspecified shares only. For these reasons in my judgment the first way in which the Crown seeks to present its case fails *in limine*.

I will, however, assume that I am wrong on that and consider how the matter stands if the sale agreement ought, contrary to my view, to be construed as a contract to sell particular shares. Even on this hypothesis the Crown still has to satisfy the Court that the sale agreement was such as the Court should, in the event of breach, enforce specifically. Now the evidence showed that to be a remedy unknown to Guernsey law, and that must defeat the Crown's claim unless they can show that the contract could be enforced in England, in which case, notwithstanding it was expressly provided that the sale agreement should be "read and construed in all respects according to the laws of Guernsey", the English court could and would apply the English remedy of specific performance if an appropriate remedy by English law, see Dicey & Morris, The Conflict of Laws, 9th edn (1973), page 1099, r 204; and *Baschet* v. *London Illustrated Standard Co.* [1900] 1 Ch 73, at page 78, where Kekewich J. said:

> "But it is a very large step beyond that to say that, the right to sue once admitted, the plaintiff is to have no other remedies in the country in which he sues than he would have in the country of origin. Can it be contended that, sitting here as an English judge, I am only to apply the remedies of the French court, and, vice versa, that the French court can only grant English remedies, however out of face and inapplicable in that jurisdiction?"

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(1) Page 327 *ante*. (2) 30 TC 11.

and *per* Lord Pearson in *Boys* v. *Chaplin* [1971] AC 356, at page 394:

> "English law is the lex fori. The lex fori must regulate procedure, because the court can only use its own procedure, having no power to adopt alien procedures. To some extent, at any rate, the lex fori must regulate remedies, because the court can only give its own remedies, having no power to give alien remedies. For instance, the English court could not make provision in its order to enable the plaintiff, in the event of a possible future incapacity materialising, to come back and recover in respect of it. That is alien procedure or an alien remedy and outside the powers of an English court. On the other hand, an English court may sometimes be able to give in respect of a tort committed in a foreign country a remedy which the courts of that country would be unable to give. For instance, the foreign courts might have no power to grant an injunction or to make an order for specific performance or for an account of profits."

The Crown submits that all the negotiations for the scheme were conducted in England and they rely in particular on the following finding of fact in para 5(10) of the Case Stated: "The solicitor had previously agreed with Rothschilds the terms of the documents mentioned in para 4 above lettered E, I, J, K, L, M and N" being all the relevant documents for this purpose. This being so, they contended that the case falls within RSC Ord 11, r 1(*f*); and see the note 11/1/11 in The Supreme Court Practice (1979), page 84.

There is, however, no finding in the Case that in these negotiations Rothschilds were acting as agents for Rozel. Nevertheless it is clear that nobody else conducted any negotiations on their behalf and their officers executed the already agreed form of assignment and sale agreement as a *fait accompli*. It seems to me, therefore, that it is a proper inference from the facts that Rothschilds did in fact act as agents for Rozel, though very possibly without authority, and that Rozel must be taken to have ratified what they had done. If this be right then I think there is sufficient in the Case to enable us to hold that the sale agreement was wholly negotiated in this country so that it does fall within RSC Ord 11, r 1(*f*), and it may be, therefore, that the absence of specific performance as an appropriate remedy under Guernsey law does not matter, but the granting or withholding of leave to serve out of the jurisdiction is discretionary and it is generally undesirable to subject to the jurisdiction of English courts a foreigner who owes no allegiance here: see The Supreme Court Practice (1979), at the foot of page 81. I am, therefore, not entirely persuaded that this is a good answer to the objection based on Guernsey law, but I will assume that it is. Even so, however, the Crowns's case still fails, in my judgment, because damages would have been an adequate remedy for breach of the sale agreement and so, applying the principles of English law, specific performance is not an appropriate remedy.

Even if the sale agreement ought to be construed as a contract for the sale of particular shares, still in the absence of any finding that there was some reason why it was important to have these particular shares, any other Lex shares would do equally well, so that the only damage which could be suffered would be (1) the extent, if any, by which the costs of replacing the contract shares with other shares would exceed the contract price, which would obviously be perfectly remediable in damages; and (2) damages for delay in completion. The fact that the time for completion was made of the essence suggests that delay might have some special significance for Anthony. On the other hand, even all the branches of the family put together did not hold a controlling interest and there is no finding that delay would cause any irreparable or unascertainable damage and no finding of any facts leading to that conclusion. Thus on the findings specific performance would not be an appropriate remedy and thus the Crown's first case must in any event fail on this ground.

Mr. Potter, for Anthony, made one further submission on this part of the case. He said that although a contract by Rozel to re-assign the shares in the trust fund assigned to them must restore Anthony as beneficiary at all events as soon as the price was paid, yet the sale agreement, assuming all else against him, would still fail to do so because there is an essential difference between an assignment or contract to assign a share in a trust fund and an assignment or contract to assign particular assets constituting that fund. He submitted that, however extensively Rozel might have become a trustee for Anthony of the shares and even if the price under the sale agreement could be regarded as having been paid by the directions given by Anthony to N.M. Rothschild & Sons (CI) Ltd., as bankers to debit him and credit Rozel, still he did not thereby become a beneficiary under the trust, but only a person having contractual rights against the beneficiary in respect of the trust property. If necessary, in my judgment this further argument succeeds.

For these reasons, in my judgment, the first way in which the Crown have presented their case fails.

I turn next to the alternative claim. The Crown say that the appointment, the assignment and the sale agreement together constitute an arrangement, and therefore a settlement, within the meaning of the words "any disposition, trust, covenant, agreement or arrangement" in s 454(3) of the Income and Corporation Taxes Act 1970, which is incorporated into s 42 of the Finance Act 1965 by subs (7) of that section as amended by the 1970 Act. Strictly, as this case deals with an assessment for the year 1969–70, one should refer to the meanings of "settlement" and "settlor" in Chapter III of Part XVIII of the Income Tax Act 1952 in accordance with subs (7) as originally enacted; but for all material purposes there is no difference in this respect between the relevant sections of the 1952 and 1970 Acts, and for convenience the case has been argued upon the wording of s 454(3) of the 1970 Act.

Then the Crown argues that Anthony was, *qua* the 184,500 shares, a beneficiary under that settlement and so a person to whom some measure of liability should be apportioned under s 42(2) of the 1965 Act. Finally, they say that having regard to the brief interval during which the interest appointed to Anthony was contingent, his interest at that time, and certainly his interest immediately before the absolute vesting which gave rise to the disposal, was such that the benefit to him under the arrangement was so nearly 100 per cent. that any shortfall should be disregarded as *de minimis*, and so Anthony was the sole beneficiary under the arrangement to the entire exclusion for this purpose of Rozel.

The Special Commissioners having found (Case Stated, para 9(2)) that "there was a single scheme which was planned from the outset with the object of vesting one half of 369,000 Lex shares in each of the Appellants absolutely without incurring liability to capital gains tax", implemented in three stages (i) the appointment; (ii) the sale by the Appellants of their respective contingent interests in Lex shares to Rozel; and (iii) the agreement to purchase absolute

A interests in Lex shares from Rozel, agreed (para 9(4)) "that the Scheme outlined above constituted an arrangement". They appreciated the force of the Appellants' argument that if there was an arrangement s 42 could not operate unless there were beneficiaries under it and that the Appellants were not beneficiaries but purchasers; but after observing that they felt no difficulty in ascertaining the trustees of the settlement constituted by the arrangement,
B namely the trustees of the classic settlement of 24 February 1960, they concluded as follows:

> "Who were the 'beneficiaries' under the arrangement? The only possible candidates are Rozel and the Appellants. If one looks only at the 1960 settlement, the Appellants had ceased to be beneficiaries *quoad* the Lex shares on 28 October 1969. But when one looks at the
> C arrangement they were the only persons who could aptly be described as beneficiaries, that is, persons who benefited by the arrangement. Before the arrangement was implemented they were objects of a discretionay trust. Afterwards they each had an absolute interest in half the Lex shares. We do not think that Rozel was a beneficiary under the arrangement. It bought and sold property and received full consideration in the shape of a
> D fee on the turnover. We think that to confine 'beneficiary' to persons entitled under the 1960 settlement is to deprive the wider definitions in s 42(7) of their force."

The learned Judge, having found for the Crown on the first submission, dealt with this alternative claim quite briefly as follows[1]:

> "In my judgment, all the relevant events which took place between
> E the appointment of new trustees dated 31 March 1969 and the final transfer of the shares to Anthony were part of an arrangement instigated by the settlor and carried into effect by him, by the trustees, by Rozel and by Anthony. The trust fund, the subject of the arrangement, consisted of 184,500 shares. That trust fund was vested in N.M. Rothschild & Sons (CI) Ltd. and the other three trustees of the settlement. They were the trustees
> F of the arrangement because they held the trust fund which was comprised in the arrangement. Similarly, the settlor was the settlor of the arrangement because he was the person who had provided the trust fund comprised in the arrangement. There is no doubt that for the purposes of the arrangement the only beneficiary was Anthony, and that when the contingent interest vested he was, pursuant to the arrangement, absolutely entitled to
> G the shares. Accordingly, it seems to me that the Crown are entitled to succeed on this alternative ground also."

Mr. Nicholls conceded rightly that he could not contend in this Court that the assignment and the sale agreement were within the extended definition of "settlement" imported by s 42(7) because they contained no element of bounty and were effected for full consideration in money or money's worth: see
H *Commissioners of Inland Revenue* v. *Plummer*[2] [1978] 3 WLR 459, at page 470, but he submitted that taken with the appointment there was an arrangement within s 454(3). He reserved the right to withdraw this concession if the case went higher. Mr. Potter argued that in any event Anthony could not be a beneficiary under the arrangement, because he got the shares under the appointment, albeit subject to a liability for capital gains tax and the only
I benefit, if any, he could get from the arrangement would be freedom from that tax, which leads nowhere, because under subs (2) one does not apportion the benefit but the assessable gain and I would have thought more conclusively because, if subs (2) applies, then *ex hypothesi* Anthony does not get that benefit

(1) Page 329 *ante*. (2) 54 TC 1, at p 29; [1979] Ch 63.

because the subsection makes him liable. That would appear to be correct as far A as it goes, but I do not think it goes far enough, because if the appointment, the assignment and the sale agreement be an arrangement, Anthony does benefit under it, because he got an absolute share in the trust fund, reflected in his right to the sale price under the assignment and his contractual rights under the sale agreement and, had there been no arrangement, there might well have been no appointment. So I think if the case be brought within s 42(7), Anthony B might well be held to be a beneficiary under the arrangement.

In my judgment, however, there are two insuperable difficulties in the way of the Crown's case on their alternative claim, which, therefore, cannot succeed. First, I do not for myself see how the Crown can mount a case under s 42(7) unless they can show, which was not shown, that the arrangement in some way superseded the classic settlement. Under that settlement and in the C events which happened, Rozel was the only beneficiary within s 42(2) and would have been liable for the whole tax had it not been an overseas company, and I do not see how the Crown can escape that difficulty by looking to a different beneficiary under a different settlement, namely that constituted by the arrangement, but necessarily including the classic settlement itself, without in some way showing that the classic settlement taken alone had somehow D ceased to be operative at the moment of the deemed disposal under s 25(3) of the Finance Act 1965. Mr. Nicholls sought to skate over this thin ice by using a variety of descriptions of the position. He said the arrangement was "superimposed upon" or "flowed out of" or "was engrafted upon" the classic settlement, but the stark fact remains that I do not think you can have both operative at the same time and producing concurrently a different result. E

Secondly, in my judgment no arrangement can be a settlement within s 42(2) unless there be a settlor, because the applicability of s 42 as a whole is by subs (1) made to depend, *inter alia*, upon the domicile and residence of the settlor, and in the present case I can find no settlor in relation to the arrangement. Mr. Nicholls said that the settlor was the original settlor, Mr. Chinn, either alone or in combination with the trustees of the settlement, but F in my judgment that cannot be correct. The trustees could not be settlors since they had no dominion over the beneficial ownership of the trust funds other than fiduciary duties and powers. Mr. Chinn was, of course, the settlor who made the classic settlement for which he provided the funds. That, however, was ancient history and he had by 1969, and indeed from the start, divested himself of all his interest, both legal and equitable, in the settled funds. He had G not reserved to himself any power of appointment. Mr. Nicholls points out that Mr. Chinn's consent was necessary to any exercise by the trustees of their power of appointment, but that was a purely negative control. Lord Macmillan said in *Chamberlain* v. *Commissioners of Inland Revenue* 25 TC 317, at page 331: "I agree with Lord Moncrieff that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of H others." I respectfully adopt that, but it does not fit the case of one who merely consents to the exercise by trustees of a fiduciary power over property in or over which he himself has no right, title or interest.

For these reasons I too would allow this appeal.

Buckley L.J.—Shaw L.J., who, it will have been observed, is not present this morning, agrees with both judgments. I

Appeals allowed, with costs.

A The Crown's appeal came before the House of Lords (Lord Wilberforce, Viscount Dilhorne, Lords Fraser of Tullybelton, Russell of Killowen and Roskill) on 28, 29 and 30 July 1980 when judgment was reserved. Viscount Dilhorne died before judgment was given. On 11 December 1980 judgment was given unanimously in favour of the Crown, with costs.

D. C. Potter Q.C. and *R. Ham* for the taxpayer.

B *D. J. Nicholls Q.C.* and *Peter Gibson* for the Crown.

The following cases were cited in argument in addition to those referred to in the speeches:—*Duncuft* v. *Albrecht* (1841) 12 Sim 189; *Commissioners of Inland Revenue* v. *Prince-Smith* 25 TC 84; [1943] 1 All ER 434; *Commissioners of Inland Revenue* v. *Pay* 36 TC 109; *Chamberlain* v. *Commissioners of Inland Revenue* 25 TC 317; *Commissioners of Inland Revenue* v. *Morton* 24 TC 259;
C 1941 SC 467; *Eilbeck* v. *Rawling* 54 TC 101; *Khatijabai Jiwa Hasham* v. *Zenab* [1960] AC 316.

Lord Wilberforce—My Lords, this case involves consideration of s 42 of the Finance Act 1965, the Act which introduced the capital gains tax. For convenience I cite the relevant portions of this section:

D "42.—(1) This section applies as respects chargeable gains accruing to the trustees of a settlement if the trustees are not resident and not ordinarily resident in the United Kingdom, and if the settlor, or one of the settlors, is domiciled and either resident or ordinarily resident in the United Kingdom, or was domiciled and either resident or ordinarily resident in the United Kingdom when he made his settlement. (2) Any
E beneficiary under the settlement who is domiciled and either resident or ordinarily resident in the United Kingdom during any year of assessment shall be treated for the purposes of this Part of this Act as if an apportioned part of the amount, if any, on which the trustees would have been chargeable to capital gains tax under section 20(4) of this Act, if domiciled and either resident or ordinarily resident in the United Kingdom in that year of
F assessment, had been chargeable gains accruing to the beneficiary in that year of assessment; and for the purposes of this section any such amount shall be apportioned in such manner as is just and reasonable between persons having interests in the settled property, whether the interest be a life interest or an interest in reversion, and so that the chargeable gain is apportioned, as near as may be, according to the respective values of those
G interests, disregarding in the case of a defeasable interest the possibility of defeasance. . . . (7) In this section 'settlement' and 'settlor' have the same meanings as in Chapter III of Part XVIII of the Income Tax Act 1952 and 'settled property' shall be construed accordingly."

The question is as to the application of these provisions to a scheme admittedly devised to avoid a substantial charge to the tax. It is necessary to describe it in
H detail.

The antecedents of the scheme. On 24 February 1960 Mr. Norman N. Chinn, father of the taxpayer, made a settlement for the benefit of his family. All that it is necessary to know about it is that it contained an overriding power, exercisable by the trustees with the consent of the settlor, to appoint capital in favour of all or any of the settlor's sons Anthony and Steven and their
I respective wives, widows and issue. The settlor had also power to appoint new

trustees. In October 1969 the trustees held 370,100 ordinary shares in Lex A
Garages Ltd. (out of a total issued ordinary capital of 4,111,068 shares). Lex
was a public company whose shares were quoted on the London Stock
Exchange. These shares had risen considerably in value since acquisition and so
carried a potential liability to capital gains tax on any disposal. It was the
settlor's desire that (approximately) one half of the shares should be vested in
each of Anthony and Steven absolutely. In February 1969 the settlor consulted B
a solicitor about means of mitigating the liability to tax, was advised by him of
a "contingent interest scheme" operated by N.M. Rothschild and Sons
("Rothschild's"), and instructed him to proceed with such a scheme subject to
counsel's advice.

Preparation. On 31 March 1969 the settlor appointed, in the place of the
existing trustees who were resident in the U.K., a Guernsey company C
controlled by Rothschild's called N.M. Rothschild & Sons (C.I.) Ltd.
("NMR(CI)"), two directors of that company resident in Guernsey, and
one English resident trustee. The administration of the trusts of the settlement
passed shortly afterward to Guernsey. This operation clearly brought the case
within s 42(1) quoted above. The settlor then instructed the solicitor to
implement the "contingent interest scheme". As applied to the settlor's D
requirements it involved, after the appointment of foreign trustees, the
creation of contingent interests in the shares for Anthony and Steven to vest in
three days, the purchase of these contingent interests by a Channel Island
Rothschild subsidiary and, upon the vesting of the interests, repurchase of the
shares by Anthony and Steven with money obtained by them from the sale of
their contingent interest: the end result would be that each of Anthony and E
Steven would acquire approximately one half of the Lex shares held by the
trustees. It was expected that no capital gains tax would be payable upon the
disposals involved.

Implementation of the scheme. The series of operations to be carried out
and the documents to be used were, in accordance with Rothschild's practice,
all prepared in advance and there was a precise timetable for each step. This F
technique has become normal in tax avoidance schemes. On 28 October 1969
the trustees of the settlement with the consent of the settlor executed a deed of
appointment of two funds each of 184,500 Lex shares in favour of Anthony and
Steven contingently on surviving three days. Anthony and Steven, and the
solicitor, flew to Jersey and, also on 28 October, Anthony and Steven offered
to sell to a company called Rozel Holdings Ltd. ("Rozel") their contingent G
interests for, in each case, £352,705 payable on 1 November 1969. Rozel was a
Jersey company with an issued capital of £150 owned by Rothschild's. On the
same day Anthony and Steven executed deeds of assignment to Rozel of their
contingent interests in consideration of covenants by Rozel to pay the said sums
on 1 November 1969. Before they executed these deeds Rozel handed to
Anthony and Steven cheques, post-dated to 1 November 1969, for £352,705 H
drawn on Rozel's account with Lloyds Bank, Jersey, and Anthony and Steven
immediately handed these cheques to NMR(CI) for the credit of accounts
recently opened with NMR(CI). Rozel did not have sufficient credit balance
with Lloyds Bank to meet these cheques.

At the same meeting each of Anthony and Steven executed an agreement
to purchase from Rozel 184,500 Lex shares for £355,162 10*s*., completion to I
take place on 1 November 1969, and time to be of the essence of the contract.
Still on the same day (28 October 1969) Anthony and Steven each gave
letters to NMR(CI) instructing it on 1 November 1969 to debit their
respective accounts to pay £355,162 10*s*. to Rozel, and each gave NMR(CI)

A cheques for approximately £200 to complete the financing. Neither Anthony nor Steven had any credit with NMR(CI) apart from the (uncleared) cheques for £352,705 above mentioned and apart from a small sum sufficient to pay the difference between the sale price and the purchase consideration. The figure of £355,162 10*s*. was equal to the middle market price for 184,500 shares at the close of business on 27 October 1969 on the London Stock Exchange. The
B figure of £352,705 was based on that middle market price, less a negotiated discount sufficient to give Rozel its profit. These figures had been agreed in advance between the solicitor and Rothschild's. In due course the cheques mentioned were cleared by cross entries arranged between the banks. The trustees' holding of 370,100 Lex shares was at all material times registered in the name of a nominee for NMR(CI) and after 1 November 1969 advice was
C given to the nominee that 184,500 belonged to each of Anthony and Steven. There were also arrangements, made by Rozel, to insure against the risk of Anthony or Steven dying within the three-day period, but I think that these are neutral as regards the issues now arising, and that what might have happened as regards the shares if Anthony or Steven had so died throws no light on what did happen when, in fact, they survived.

D It is undisputed that the sale of the contingent interests, taken alone, brought about no charge to capital gains tax. But the Crown claims that tax is due upon three alternative bases. It is sufficient for the Crown to succeed upon any one of these.

1. It is claimed, in the first place, that the transactions are caught by the initial words of s 42(2) because each of Anthony and Steven (I shall confine
E myself to Anthony to whom this appeal relates) were "beneficiaries under the settlement" in respect of 184,500 settlement shares. Anthony, on the other hand, contends that it was Rozel that, on 1 November 1969, became beneficially entitled to these shares, and, being neither resident nor ordinarily resident in the U.K., was not liable to capital gains tax. The latter contention can only be valid, in my opinion, if the chain of operations set in motion on
F 28 October 1969 can be arrested on 1 November when the contingent interests were vested. It is said that on the documents, which it is not suggested were shams, it can and should be so arrested. In this context it is necessary to look at the findings of the Special Commissioners. They had narrated first, before making their formal findings, that in essence the scheme was that Rothschild's would procure and finance the purchase by Rozel of contingent interests in Lex
G shares which Anthony and Steven would acquire by virtue of appointments to be made by the trustees of the settlement. Upon the vesting of those interests three days later Anthony and Steven would repurchase the Lex shares with the money received from the sale of their contingent interests. (Case Stated para 5.) They went on to find that

> "There was a single scheme which was planned from the outset with
> H the object of vesting one half of 360,000 (sic) Lex shares in each of the appellants absolutely without incurring liability to capital gains tax . . . There was never any possibility that the appellants and Rozel would complete the sale (stage (ii) above) and not go on to execute and eventually complete the purchase (stage (iii) above), for that would have defeated the financial arrangements previously made and finally worked
> I out on 28 October. Rozel was paid to participate in the purchase and sale for a pre-arranged fee. It was at all times intended that Rozel would sell the Lex shares it would acquire on 1 November to the appellants. If, immediately after the execution of the assignments (stage (ii)), news had come by telephone of some calamity which would halve the value of the shares, it is unthinkable that Rothschild's would have allowed the

appellants to refuse to proceed with the purchase at the price the basis for which had been arranged, and equally unthinkable that they would have attempted to do so."

In relation to pre-arranged, pre-drafted, tax avoidance schemes I may repeat what I said in *Commissioners of Inland Revenue* v. *Plummer*(1) [1979] 3 WLR 689, at page 692:

"The plan now involved was explained by the brokers in great detail, and its intended accomplishment set out, with timetables, in almost military precision. This (as I ventured to suggest in *Inland Revenue Commissioners* v. *Church Commissioners for England*(2) (1977) A.C. 329) entitles and requires us to look at the plan as a whole. It does not entitle us to disregard the legal form and nature of the transactions carried out."

In this case the plan as a whole, by a chain of transactions set in motion on 3 March 1969, or, effectively, on 28 October 1969, and intended to be carried through without further action, called for the vesting in Anthony of 184,500 Lex shares previously held by the settlement. I have said "without further action" because NMR(CI) had, on instructions from Anthony and from Rozel, and as trustees of the settlement, the power, the duty, and the money, to complete the scheme as from 28 October 1969. The machinery had been started, and would follow out its instructions without further human initiative.

As regards the shares, it is clear that it was never the intention of Anthony, or of Rozel, that these should be purchased or held by Rozel: Anthony would never have agreed to assign his contingent interest unless he had established that he would get the shares on 1 November if he survived: Rozel would never have agreed to acquire the contingent interest (for £352,705 which it could not find) unless it had established that Anthony would buy the shares on 1 November for £355,162 10*s*.: its only interest was in earning the small sum of £2,457 10*s*. for its services.

It is contended by the taxpayer that, even granted the interdependence of the transaction of sale and purchase, there is nothing to show that the 184,500 shares acquired by Anthony were the shares previously held in the settlement. The contract it was said referred merely to the purchase of the specified number of shares and not to any particular shares. Reliance was placed on the agreement of 28 October 1969 in which the shares to be sold by Rozel were described as "184,500 ordinary shares of 5s. each of Lex Garages Ltd." without the addition of any words identifying these shares with the settlement shares. I regard this argument as wholly unreal. It was of course clear that there could be no question of Rozel going into the market in order to buy 184,500 shares in Lex Garages. It had no money with which to do so and there could be no certainty that it could have acquired so considerable a bloc at the quoted market price, still less deliver them on 1 November 1969, which date was of the essence of the contract. If by some inconceivable means it did, it would be landed with two parcels of 184,500 shares, only one of which Anthony had agreed to repurchase, for the other of which it could not pay on the settlement date. So the mutual intention can only have been that the shares to be sold to Anthony should be settlement shares and, since the transaction could only be carried out in this way, there was no need to specify in the sale agreement that the shares should come from this source. If an agreement can only be carried out in one way it is superfluous to mention that one way specifically in the agreement: the parties are presumed to intend it.

(1) 54 TC 1, at p 39; [1980] AC 896. (2) 50 TC 516.

Then the taxpayer contended that, granted the identity of the shares sold with the settlement shares, he could not be regarded as a beneficiary in respect of them because he could not get specific performance of the agreement. This was said to be because the law of Guernsey does not recognise specific performance. It may be open to argument whether this is so or not, and whether in any case specific performance could be obtained in England. But in my opinion the whole contention is misconceived. The legal title to the shares was at all times vested in a nominee for NMR(CI), and dealings related to the equitable interest in these required no formality. As soon as there was an agreement for their sale accompanied or followed by payment of the price, the equitable title passed at once to the purchaser, viz. Anthony, and all that was needed to perfect his title was notice to the trustees or the nominee, which notice both had at all material times. Consequently, the trustees were bound to transfer the shares to Anthony immediately the interests vested on 1 November 1969 and Anthony was the beneficiary, under the settlement, as regards the shares.

2. The second contention for the Crown was founded upon the terms of s 42(2) quoted above. It is said that it is sufficient for the purposes of this subsection for a beneficiary to be a beneficiary under the settlement at any time during the year of assessment in which the chargeable gain accrues. Since Anthony was such a beneficiary by virtue of the appointment, and even if thereafter Rozel became the beneficiary, the charge attaches. Support for this argument was drawn from other provisions in the Finance Act 1965. This argument was not raised in either Court below and appears not to have been put forward in any previous case. For this reason, and because I am not satisfied that the consequences of its success have been fully explored, I prefer to reserve my opinion on it for another occasion.

3. The Crown's third contention arises out of the definition of "settlement" in s 42(7). This incorporates the extension of the word to include any "arrangement". The scheme as a whole, it is said, constituted an arrangement, under which Anthony was a beneficiary. The word "arrangement" is wide in scope, and may include a combination, or series, of transactions some of which may be for consideration or of a commercial character (*Commissioners of Inland Revenue* v. *Payne* 23 TC 610). In *Commissioners of Inland Revenue* v. *Plummer*[1] (U.S.) it was decided, in order to place some limitation upon the extent of the word, that there must be an element of bounty in the transaction—a conception admittedly not without its difficulty. In this case I have no difficulty in finding this test satisfied. It was part, an essential part, of the arrangement that interests under the settlement should be appointed to Anthony (and Steven). This was done on 28 October 1969. Before that date the interest of each son was liable to be overridden by an exercise of the power of appointment, which might wholly exclude him: after that date each son had a contingent interest—likely to become vested after three days—in 184,500 shares. I fail to see how this can be regarded otherwise than as an act of bounty in their favour and that, taken together with the sale and repurchase, makes an arrangement. If it be said that there must be an act of bounty of the settlor and that the latter had fully divested himself of his settled property when he made the settlement, I would reply that his bounty was at that point incomplete and became completed only when an appointment was made—thereby, as it were, filling in the names of his intended beneficiaries. If one looks at the whole scheme more broadly, Anthony and Steven at the end of it became entitled to shares worth over £350,000 for which they had not provided consideration

(1) 54 TC 1.

(other than the small amount of Rozel's commission) and this was brought A about by the action of the settlor and of the trustees. If the word arrangement does not cover this, its presence in the definition is hard to appreciate.

I hold therefore that the Crown succeeds on each of the two points I have considered and, consequently, that the appeal should be allowed.

Lord Fraser of Tullybelton—My Lords, I have found the questions in this appeal more difficult than my noble and learned friends Lord Wilberforce and B Lord Roskill have done, but, having had the benefit of reading their speeches in draft, I now agree with their reasoning and with their conclusions that the first and third issues should be answered in favour of the Crown. Like my noble and learned friends I, too, reserve ny opinion on the second issue, as to whether it is sufficient for the purpose of s 42(2) for a beneficiary to be such at any time during the year of assessment. C

I would allow the appeal.

Lord Russell of Killowen—My Lords, I must admit that I have found the solution of this appeal one of great difficulty. I am in the end persuaded that the appeal should be allowed.

The fact that the purpose of the scheme was that the sons should become each beneficially entitled to an aliquot portion $\left(\frac{184500}{370100}\right)$ of the settled funds D without suffering capital gains tax does not of course mean that it must fail in that purpose: nor even that it ought to fail. As always in matters of taxation the question involved is the applicability of legislation to the methods adopted in carrying out the scheme.

There were in this case—I refer for convenience only to the son Anthony—as it seems to me, two matters of crucial importance. The first is that on E 28 October the record on the turntable which was switched on contained the whole story from beginning to end and there was no provision for switching it off half way. The second is that having regard to the scheme as a whole I find it quite unreal to construe the agreement by Anthony to purchase from Rozel and Rozel to sell (in which agreement time was of the essence) 184,500 shares in Lex as anything other than to repurchase the aliquot interest in the F settled funds which had been the subject of the contingent appointment on its expected maturing to an absolute interest. It is true that on 28 October Rozel became by assignment entitled under the settlement to Anthony's contingent aliquot share. But that entitlement was qualified and restricted by the contemporaneously accepted obligation to reinstate Anthony as entitled absolutely thereto on its maturing into an absolute interest. There was here no G question of specific performance. Throughout the parties were concerned with equitable interests in the aliquot share. The transactions were not "sham" in the sense that what was said in the documents was not intended. But what was said and intended had the effect which I have summarized above. It is said that if Anthony had died within the three days, Rozel would have not become entitled to the aliquot appointed share, having only acquired a contingent interest H which had failed to mature. In such case on the documents Rozel, it is said, would have had to pay the £352,000 odd to Anthony's estate and would on the construction of the share sale agreement have been obliged to acquire in the market 184,500 Lex shares with the help of the insurance moneys and sell to Anthony's estate for £355,000 odd. The situation which might have arisen had

A Anthony prematurely died, which incidently on analysis of the pros and cons
of the possible transactions in that event suggests that some aspects or
consequences may not have been fully thought out, does not persuade me to a
view other than that the share sale agreement, in the expected events which
happened, related to the aliquot interest of Anthony under the settlement upon
its maturing into an absolute interest.

B On the above basis I find myself in agreement with the conclusion of
my noble and learned friend Lord Wilberforce that the first of the three
contentions advanced by the Crown is correct, and that on that ground this
appeal should be allowed. On the third point of the Crown—the "arrange-
ment" point—I am also in agreement that it succeeds. But on the second point
of the Crown—the new point—I too would prefer to express no present
C opinion.

Accordingly, I too would allow this appeal.

Lord Roskill—My Lords, the issue for determination in this appeal is
whether a tax avoidance scheme, known as "the contingent interest scheme",
the architects of which seemingly were Messrs. N.M. Rothschild & Sons
("Rothschild's"), successfully achieved its avowed purpose enabling the
D taxpayer, Mr. Anthony Chinn (Anthony) and his brother, Steven Chinn
(Steven) to avoid liability for large sums claimed by the Inland Revenue in
capital gains tax. Only Anthony's case was argued before your Lordships'
House, it being common ground that Steven's case was indistinguishable and
must be governed by whatever result was reached in Anthony's appeal.

My Lords, this case has given rise to a remarkable, but perhaps not
E surprising, difference of judicial opinion. The Special Commissioners held
that the scheme did not achieve its objective. Templeman J. agreed.
Anthony's, and therefore Steven's appeal against the assessments respectively
made upon them, accordingly failed. But the Court of Appeal (Buckley, Goff
and Shaw L.JJ.) disagreed. Both Buckley and Goff L.JJ. delivered elaborate
judgments differing strongly from the views expressed by Templeman J. Shaw
F L.J. did not, however, deliver a separate judgment. From those judgments of
the Court of Appeal, and with the leave of that Court, the Crown appealed to
your Lordships' House.

My Lords, the story starts with a settlement made by Mr. Chinn senior
("the settlor"), the father of Anthony and Steven, on 24 February 1960. The
settlor was at that time the owner of a very large block of five-shilling ordinary
G shares in Lex Garages Ltd. ("Lex"). The settlor in due course transferred to
the trustees of this settlement 370,100 of those ordinary shares, some nine per
cent. of the total issued ordinary share capital of Lex, a public company with
its shares quoted on the London Stock Exchange. Until 31 March 1969 the
trustees of the settlement all resided in this country. The value of the Lex
shares in the settlement had greatly increased since the settlement was created
H in 1960. The settlement contained an overriding power of appointment
exercisable by the trustees with the consent of the settlor in favour, *inter
alios*, of Anthony and Steven. It also gave the settlor power to appoint new
trustees.

Between 1960, when the settlement was created, and 1969, when the
scheme with which your Lordships are concerned was put into effect, capital
I gains tax was imposed by Part III of the Finance Act 1965. That Act by s 19
provided for such tax to be charged "in respect of capital gains, that is to say,

chargeable gains computed in accordance with this Act and accruing to a A
person on the disposal of assets". If, therefore, the trustees were to exercise
their overriding power of appointment with, of course, the consent of the
settlor in favour of Anthony or Steven, or of both, in respect of all or any of
the Lex shares then held by them on the trusts of the settlement, there
would, or at least might, have been a "disposal of assets", attracting capital
gains tax, which on the then value of these shares was likely to be onerous. Not B
unnaturally the trustees and the settlor were anxious that Anthony and Steven
should acquire some or all of these Lex shares absolutely, but if possible,
without incurring any liability to capital gains tax. The Special Commissioners
found that from the outset, by which they clearly meant early in 1969, there
was a "single scheme"—I venture to stress those last two words—which was
planned with the object of vesting a large number of the relevant Lex shares in C
Anthony and Steven absolutely without incurring their liability to capital gains
tax.

The successive steps which this single scheme involved are very clearly
summarised in the Stated Case and in the judgments in the Courts below.
They are fully related in the speech of my noble and learned friend, Lord
Wilberforce, and are summarised in the judgment of Buckley L.J. in the D
Court of Appeal in [1979] 2 WLR 411, at pp 414–5[1]. They require no
further repetition by me. But to those statements I would add these further
considerations. First, legal title to all the Lex ordinary shares in question was,
at all material times, vested in Old Court Ltd., a Rothschild's company, as
nominee for N.M. Rothschild (CI) Ltd. referred to in the document as
"NMR(CI)", after that latter company became one of the non-resident trustees E
of the 1960 settlement. Secondly, none of these shares ever physically left
London but at all times remained in the possession of their legal owners.
Thirdly, the various interests the shares which were or purported to be the
subject of the several transactions with which your Lordships are now
concerned were equitable interests and, in the first instance, only contingent
equitable interests. Templeman J. held that as a result of these several transac- F
tions the beneficiary who, on 1 November 1969 when the contingent interest
vested, became as against the trustees, absolutely entitled to the 184,500
settlement shares comprised in the appointment was Anthony, who, being
resident and ordinarily resident in the United Kingdom, was liable under
s 42(2) of the Finance Act 1965 to pay the capital gains tax which became,
therefore, payable under s 25(3) of that Act. This was the principal ground G
upon which Templeman J. decided the appeal in favour of the Crown. It was
with this conclusion that the learned Lords Justices all disagreed, holding that
Anthony was not such a beneficiary.

The first question, as I have already indicated is therefore whether
Anthony was a beneficiary under the settlement so as to be liable to capital
gains tax under s 42(2). The second question argued in the Courts below was H
whether, by reason of the definition of settlement in s 42(7) and the consequent
importation into s 42 of the provisions of s 411(2) of the Income Tax Act 1952,
this settlement was an "arrangement" within that subsection. This question was
argued third before your Lordships since the Crown sought and obtained from
your Lordships leave to make a new submission based on s 42(2) of the Finance
Act 1965 which had not been argued below, and on which therefore your I
Lordships have not had the benefit of the views of Templeman J. and of the
Court of Appeal. This new submission was argued second before your

[1] Pages 330–1 *ante*; [1979] Ch 447.

A Lordships, but in view of the conclusion I have reached upon the two main issues argued below, I shall deal first with those issues.

My Lords, on the first issue the difference of opinion between Templeman J. and the Court of Appeal, though fundamental, in my judgment turns upon a somewhat narrow point of the interpretation of the relevant documents and of the facts found in the Stated Case. Templeman J. emphatically took the view
B that the shares which ultimately Anthony acquired from Rozel on 1 November 1969 on the performance of the last of the acts which this single scheme involved were the same shares as those Anthony's contingent interest in which Rozel had previously agreed to purchase from him, the trustees having already exercised their power of appointment in Anthony's favour, contingent upon his surviving for three days from 28 October 1969. That in the event the
C interest in the shares which actually passed from Anthony to Rozel and back to Anthony, was an interest in the same shares throughout is beyond question. But the crucial issue is whether the numerous complex documents to which this tax avoidance scheme gave birth necessarily involved that this should be so. The view which appealed to Buckley L.J. was that the scheme involved no appointment of any specific shares to Anthony, and that the share sale
D agreement (document K) was

> "a straightforward agreement for sale and purchase of 184,500 Lex ordinary shares without reference to the provenance of the subject matter. On the faces of these documents I can see no justification for saying that the share sale agreement was a contract for the sale and purchase of particular shares to which Rozel would become entitled under
> E the settlement and appointment." [1979] 2 WLR 411, at page 418.([1]))

Goff L.J. took the same view at page 426([2]). Before your Lordships this conclusion was further supported by the existence of the life policy on Anthony's life lest he did not survive the requisite three days, which was a pre-requisite for the completion of the scheme. The money payable under that policy, in the event of Anthony's premature death, could, it was submitted,
F have been available for the purchase by Rozel of the same number of Lex ordinary shares on the market.

It is entirely correct, as the learned Lords Justices emphasised, that the shares which were the subject of the successive transactions which this single scheme involved, were never specifically identified by number in any relevant document. They were identified in those documents solely by description.
G My Lords, I do not find this surprising since there was never any intention of the shares themselves being physically the subject of any transaction. As I have already mentioned, legal title to all the shares held by the trustees remained in Old Court Ltd., the shares themselves were at all times physically in London. The transactions involved the transfers of equitable or of contingent equitable interests only. Certainly document K, if read in isolation from all the other
H documents and the factual background against which these transactions fall to be considered, is on its face, a contract only for the sale and purchase of a stated number of shares of a particular description and class.

But, my Lords, with profound respect to those who have taken a different view, I find it impossible to construe document K in isolation from its companion documents and from the factual background especially in view of
I the finding that this was a single scheme. In the Courts below there was much

([1]) Page 334 *ante*. ([2]) Page 341 *ante*.

argument whether in English law specific performance would have been A
ordered of the relevant obligations. Before your Lordships this submission was barely touched upon by learned Counsel, but it was suggested that if the relevant documents, and especially document K, on their true construction were not dealing with the same specific shares throughout, document K could be rectified so as to give effect to what was said to have been, on the evidence, the clear prior common intention of all parties to the various documents. My B
Lords, I find it unnecessary to consider problems of specific performance or of rectification for I do not think either arise. The question is one of construction. If it had been permissible to ask any of the parties by reference to what block of shares they were dealing throughout, their answer must be to the same 184,500 of the larger number of Lex ordinary shares comprised in the settlement. But I do not find it necessary to go outside the relevant documents C
to reach the same answer as a matter of the true construction of those documents. I have not in reaching this conclusion lost sight of the point made upon the policy of life insurance. But I find it impossible to think, having regard to the narrow time limits involved, that the parties can ever have contemplated that the proceeds of this policy should be used to purchase the same number of shares on the open market which might subsequently be tendered to Anthony's D
personal representatives in fulfilment of Rozel's obligations under document K. This number of shares has represented a not unsubstantial proportion of the total issued share capital of Lex and it was never envisaged that immediate control of those shares should ever pass from members of the Chinn family. The clear intention was that the beneficial interest in the actual shares in question should pass from the trustees to Anthony. E

My Lords, on the first question I might have contented myself by saying that I am in complete agreement with the speech of my noble and learned friend, Lord Wilberforce, and with the judgment of Templeman J. But in deference to those who have taken a different view I have thought it right to set out my own reasons for my conclusions.

I turn to deal briefly with the question argued third before your Lordships, F
and second in the Courts below. Strictly, in view of the conclusion on the first question, it is not necessary to deal with this further question. But I think your Lordships should do so as the matter was fully debated in argument. My Lords, was this settlement and "arrangement" within s 411(2) of the Income Tax Act 1952, which as already stated, is incorporated into the Finance Act 1965 by s 42(7) of that Statute? Templeman J. held that it was such an G
arrangement—dealing with this question only briefly at the end of his judgment. The Court of Appeal who dealt with this question much more elaborately held that it was not. In *Commissioners of Inland Revenue* v. *Plummer*[1] [1979] 3 WLR 689, your Lordships have recently had to consider the problem to which this section gives rise. On the authorities as they now stand it seems clear that if the particular transaction is a commercial transaction H
devoid of any element of what has been called "bounty" it is not within the section and the majority of your Lordships in *Plummer's* case accepted that the transaction there in question escaped as being a commercial transaction without the necessary element of "bounty". My Lords, the relevant authorities go back long before s 411 was placed upon the statute book and first arose out of one of the statutory predecessors of that section. Those authorities are I
collected in the judgment of Buckley L.J. in the present case at [1979] 2 WLR 411, at p 422[2], and in your Lordships' judgments in *Plummer's* case and no useful purpose will be served by a further review of them. My Lords, the sole

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[1] 54 TC 1; [1980] AC 896. [2] Page 338 *ante*.

A question here is whether there was the requisite element of "bounty" in this
transaction so as to make it an "arrangement" within this subsection. It was
argued for the taxpayer that the settlor's "bounty" had been exhausted in 1960
when he created the settlement and that there was no exercise of "bounty"
by the trustees as they possessed no beneficial interest in respect of which they
could be bountiful. This was the view which appealed to the learned Lords
B Justices. My Lords, I would venture to point out that the word "bounty"
appears nowhere in the Statute. It is not a word of definition. It is a judicial gloss
upon the Statute descriptive of those classes of cases which are caught by the
section in contrast to those which are not. The courts must, I think, be
extremely careful not to interpret this descriptive word too rigidly. I would
recall some sapient observations of Frankfurter J. in *Tiller* v. *Atlantic Coast*
C *Line Railroad Co.* (1943) 318 US 54, at p 68, "A phrase begins life as a literary
expression; its felicity leads to its lazy repetition; and repetition soon
establishes it as a legal formula, undiscriminatingly used to express different
and sometimes contradictory ideas."

What the cases have sought to do is to distinguish between those cases
where the recipient has in return for that benefit which he has received accepted
D some obligation which he has to perform, either before receiving the benefit or
at some stated time thereafter, and those cases where the recipient benefits
without any assumption by him of any correlative obligation. In *Plummer's*
case[1] the transaction in question was for consideration. Under this scheme
there was an appointment without consideration. Anthony was among the
objects of the 1960 settlement but before the power of appointment was
E exercised there was no absolute certainty—however strong the probability—
that Anthony would receive any of the shares held by the trustees. In my
judgment there was a very real "bounty" conferred when the trustees with the
settlor's consent exercised the power of appointment in question in Anthony's
favour. As Mr. Nicholls Q.C., for the Crown, put it, when the power of
appointment was exercised a blank was filled in the original settlement which
F left blank how the final distribution of the trust's assets was to be made. That
in my judgment was a clear act of "bounty". It follows that on this question as
on the first, I find myself in complete agreement with Templeman J. and in
respectful disagreement with the Court of Appeal.

For those reasons, therefore, I would allow the appeal and restore the
judgment of Templeman J. confirming the determination of the Special
G Commissioners.

My Lords, there remains the third question argued second before your
Lordships, which your Lordships gave leave to raise for the first time in your
Lordships' House. The Crown's submissions arose under s 42(2) and ran thus.
If the 1960 settlement was a settlement within the subsection as it was submitted
it clearly was, then in order to be a "beneficiary" under that settlement, all
H that was necessary was that that description should be satisfied *at some*
time during the relevant year of assessment. That which would then fall to be
apportioned is that part of the amount to which the trustees would have been
chargeable if domiciled in the United Kingdom. The contrary submission,
stated briefly, was that the liability under the subsection arose only at the time
the chargeable gain accrued and support for this submission was sought from
I s 42(3)(*a*). But it was pointed out for the Crown that this submission involved
writing into the subsection words such as "at the time the chargeable gain

(1) 54 TC 1.

accrued"; such words were present in s 41(5) and therefore there was no justification for writing these words into s 42(2) where they did not appear. A

My Lords, I have thought it right briefly to record the rival submissions. The question is novel and to my mind difficult. It is not necessary to decide it in this appeal and I think your Lordships should leave it for decision until it is necessary to decide it. In the result I would allow the appeal by the Crown with costs here and below. B

Appeal allowed, with costs.

[Solicitors:—Berwin Leighton; Solicitor of Inland Revenue.]