HIGH COURT OF JUSTICE
(CHANCERY DIVISION)—24 FEBRUARY AND 27 MARCH 1981

COURT OF APPEAL—10 AND 25 MARCH 1983

HOUSE OF LORDS—12 AND 13 DECEMBER 1983 AND 26 JANUARY 1984

Pogson (H.M. Inspector of Taxes) *v.* Alfred William Lowe and George Frederick Lowe[1]

Income tax—Schedule D Case VI—*Development gains from land— Arrangements to negotiate a price—Whether owners had then "arranged . . . to dispose of land"—Finance Act* 1974, *s* 38 *and Sch* 4 *para* 4.

The taxpayers, who owned a market garden, were minded (*a*) to exchange part of it for an equivalent area owned by a neighbour (which they did sometime between 17 December 1973 and 6 May 1974), (*b*) to retain part for development as a garden centre, (*c*) to sell the remainder (including the part acquired by exchange) for housing purposes.

On 15 November 1973 they, their solicitors and the chief executive of the District Council met: most, but not all, of the important terms of the eventual contract to sell such remainder were then discussed: and soon after each party began to negotiate the price to be paid in the event of a sale. Negotiations expressly "without prejudice" and "subject to the approval of the Council and any Government Department concerned" proceeded past 17 December and up to 6 May 1974, the date of the contract.

On appeal against assessments to income tax Schedule D Case VI raised (under s 38 Finance Act 1974) on the taxpayers' gain in disposing of the land, the taxpayers contended that they had before 18 December 1973 "arranged (without entering into a binding contract) to dispose of" it to the Council, so that they were exempted from development gains tax by para 4 of Sch 4 to the 1974 Act. The General Commissioners, rejecting this contention as to the exchanged land but accepting it as to the said remainder, found that there had been a relevant arrangement on 15 November 1973, of which there was the necessary memorandum in writing (constituted by the correspondence). Liability to capital gains tax was not disputed. The Inspector appealed.

The Chancery Division, allowing the appeal held that (1) in construing the word "arrangement" in para 4 of Sch 4 no assistance could be derived from an analysis of that word in other statutory contexts; *Commissioners of Inland Revenue* v. *Payne* 23 TC 610, In *re British Slag Ltd.'s Application* [1962] 1 WLR 986, and In *re Mileage Conference Group of the Tyre Manufacturers Conference Ltd.'s Agreement* [1966] 1 WLR 1137 distinguished; (2) on the

[1] Reported (ChD) [1981] STC 408; 125 SJ 310; (CA) [1983] STC 365; 127 SJ 308; (HL) [1984] 1 WLR 182; [1984] STC 117; 128 SJ 100.

A facts found by the Commissioners the only arrangement made between the taxpayers and the Council before 18 December 1973 was for their respective valuers to meet and to negotiate a price which each could recommend to his clients. The taxpayers had not before that date "arranged to dispose of" the remainder within para 4 of Sch 4 since neither side had then regarded themselves as committed legally morally or comercially to accept whatever B price might be negotiated. Mere probability of acceptance was not enough; (3) alternatively, even if the negotiations before 18 December 1973 had amounted to a relevant arrangement, all the essential terms of that arrangement—which under para 4(*b*) of Sch 4 had not to differ materially from the terms of the eventual contract—had to be "evidenced by" some memorandum in writing: and there was no such memorandum either identifying the material land or C (semble) setting out any of these other material terms.

The Court of Appeal, allowing the taxpayers' appeal: held that (1), since, on the facts found by the Commissioners, there was ample material to support their conclusion that at the meeting of 15 November the taxpayers made an arrangement (without entering into any binding contract) to dispose of the land to the council at a price to be agreed between the District Valuer and the D taxpayers' surveyor, the Court could not interfere with this conclusion and the learned Judge was wrong to do so: (*Edwards* v. *Bairstow* 36 TC 207 HL [1956] AC 14; followed). (2) (Dillon L.J. dissenting) that on the true construction of para 4 a memorandum or note of an arrangement to dispose of the land need not evidence all the terms of the arrangement and it was sufficient if the interest in the land was identified and the note or memorandum evidenced an E agreement in principle or understanding that that interest would be disposed of to another. In the instant case, since the note or memorandum relied on not only did this but also identified the other person and recorded the machinery agreed upon for arriving at the price, there was therefore a sufficient note or memorandum for the purposes of para 4 (*a*). (3) (*Per* The Master of the Rolls and Sir George Baker) that, on the evidence before them, the Commissioners F were also entitled to conclude that the requirements of para 4(*b*) also were satisfied.

Held, in the House of Lords, allowing the Crown's appeal (1) (Lord Scarman dissenting) that prior to 18 December 1973 there had, as a matter of law, been no arrangement by the taxpayers to dispose of their interest in the land, because the agreement in principle of a price (or, exceptionally, of a price G to be determined by some form of arbitral machinery) was an essential ingredient of any arrangement capable of satisfying para 4 of Sch 4 to the Finance Act 1974, and no such agreement could here be suggested further(1), (2) (unanimously) that there was no mention in any note or memorandum in writing, which came into existence before that date, of four other essential terms of the arrangement(1).

H *Per* Lord Bridge: even if the taxpayers had succeeded on both the above, they would have had formidable difficulties in demonstrating that their disposal was pursuant to a conditional contract "made for a consideration not depending wholly or mainly on the value of the asset at the time the condition [as to the grant of planning permission] is satisfied", within the meaning of para 3 of Sch 4(2).

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(1) Page 534 post. (2) Page 535 post.

CASE

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

1. At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of Broxtowe South in the County of Nottingham held on 6 June 1978, Alfred William Lowe of 88 Cow Lane, Bramcote, Nottingham, and George Frederick Lowe of The Orchard, 40c Derby Road, Beeston, Nottingham, (hereinafter jointly called "the Appellants") appealed against assessments made on each of them for capital gains tax and income tax for the year 1974–75.

2. The assessments on Alfred William Lowe (A.W. Lowe) were capital gains tax £28,893 and income tax £313,399 and on George Frederick Lowe (G.F. Lowe) capital gains tax £30,417, income tax £313,399.

3. Shortly stated, the question for our determination was whether the sale of certain land at Derby Road, Beeston, Nottinghamshire, by the Appellants fell within the terms of s 38 of the Finance Act 1974 in which case the gain arising on such sale would in part be liable to income tax and part to capital gains tax or whether the disposal of the said land was exempted from the provisions of the said s 38 because it fell within para 4 of Sch 4 to the Finance Act 1974 thus making any gain subject only to capital gains tax. Liability to capital gains tax on the latter basis was accepted in principle by the Appellants.

4. At the hearing of the appeal the Appellants were represented by Mr. Peter Whiteman, Queens Counsel, instructed by Messrs. Acton Simpson and Hanson, of 2 King Street, Nottingham, and Her Majesty's Inspector of Taxes by Mr. Nicholas Jordan, of the Office of the Solicitor of Inland Revenue.

5. Mr. Jordan and Mr. Whiteman requested us to reach a decision in principle without finally determining the amounts of the assessments.

6. Mr. T.D. Hanson, the senior partner of Messrs. Turner, Fletcher and Essex, surveyors, of Nottingham, Mr. A.R. Hodder, the chief executive of Broxtowe District Council ("the Council"), Mr. H.J.B. Armstrong, senior partner of Messrs. Acton Simpson and Hanson, who at all material times acted as solicitor for the Appellants, Mr. A.W. Lowe, one of the Appellants and Mr. G.J. Cockman, formerly of the District Valuer's Office who represented the district valuer in the negotiations hereinafter referred to gave evidence before us.

7. There were proved or admitted before us a bundle of documents of which the following are exhibited to this case(1), the remainder being available if required:

Exhibit A: transcript of Mr. Armstrong's dictated note dated 16 November 1973 referring to events on 9, 12, 13 and 15 November 1973 (which we found accurately represented what took place at those times).

Exhibit B: letter from Mr. Armstrong to Mr. Newman of Kenneth Newman and More, chartered architects, dated 19 November 1973.

(1) Not included in the present print.

A Exhibit C: letter from Mr. Armstrong to Mr. Hodder dated 19 November 1973.

Exhibit D: letter from Mr. Hodder to the District Valuer dated 21 November 1973.

Exhibit E: letter from Mr. Hodder to the District Valuer dated 21 November 1973.

B Exhibit F: letter from Mr. Cockman to Turner Fletcher and Essex dated 6 December 1973.

Exhibit G: letter from Mr. Hanson to the District Valuer dated 7 December 1973.

Exhibit H(i): letter from Mr. Moppett (who was at all material times the District Surveyor for Beeston and Stapleford Urban District Council) to the C District Valuer dated 11 December 1973.

Exhibit H(ii): plan sent therewith.

Exhibit I: letter from Mr. Hodder to Mr. Hanson dated 17 December 1973.

Exhibit J: letter from the District Valuer to Mr. Hanson dated 19 December 1973.

D Exhibit K: letter from the District Valuer to Mr. Moppett dated 3 January 1974.

Exhibit L: letter from Mr. Moppett to the District Valuer dated 8 January 1974.

Exhibit M: letter from Mr. Hodder to the District Valuer dated 4 February 1974.

E Exhibit N: letter from Mr. Hanson to the District Valuer dated 8 February 1974.

Exhibit O: letter from Mr. Hanson to Mr. Armstrong dated 6 March 1974.

Exhibit P: letter from Mr. Hodder to Mr. Hanson dated 6 March 1974.

Exhibit Q: letter from Mr. Hanson to Mr. Hodder dated 12 March 1974.

F Exhibit R: letter from Mr. Hanson to the District Valuer dated 12 March 1974.

Exhibit S: letter from Mr. Hodder to the District Valuer dated 13 March 1974.

Exhibit T(i): Mr. Cockman's note of a telephone conversation between Mr. Hodder and himself, undated; and

Exhibit T(ii): a similar note dated 8 April 1974 (both of which we found accurately represented what was said during those conversations). A

Exhibit U: letter from Mr. Armstrong to Mr. Hodder dated 10 May 1974.

Exhibit V(i): agreement for sale of certain land by the Appellants to Broxtowe (the "Agreement") dated 6 May 1974;

Exhibit V(ii): plan annexed thereto.

8. As a result of the evidence both oral and documentary adduced before us we found the following facts were proved or admitted: B

(*a*) That the land in question (the land) comprised an area of approximately 38.45 acres and is shown edged pink and in part hatched green on the plan annexed to the Agreement dated 6 May 1974: see exhibit V (ii)([1]).

(*b*) That the land (other than the land hatched green on the said plan) had been for many years prior to 1973–74 and was at all material times occupied C by a company controlled by the Appellants carrying on business as nurserymen. The land hatched green was not acquired by the Appellants until May 1974.

(*c*) That the Appellants had for a number of years sought to dispose of the land and made their original application for planning permission on 28 September 1972 but planning permission was not actually granted until 7 May D 1974.

(*d*) On 9 November 1973 a Mr. Moppett telephoned Mr. Armstrong informing him that Mr. Hodder would like to meet the Appellants and their solicitors at the Town Hall, Beeston, with regard to discussing the possibility of acquiring the land. On 12 November 1973 Mr. Armstrong telephoned Mr. Moppett pursuant to Mr. Hodder's request for a meeting which was arranged E for 15 November 1973.

(*e*) At the meeting accordingly held on 15 November 1973 (the meeting) Mr. Hodder stated that the Council wanted to buy the land, and the Appellants, having retired to another room with Mr. Armstrong to consider the Council's offer in private, agreed to sell. At the meeting, which lasted about half an hour, most but not all of the important terms of the eventual F contract between the Appellants and the Council for the sale of the land were discussed. The terms discussed were as follows:—(i) that in accordance with the usual and established procedure when land is acquired by a local authority that each side would nominate a valuer to agree the price at which the land would be sold; (ii) that on a sale of the land the Appellants would have to retain a right-of-way over that land to give them access to other land which G was to be retained by them; (iii) that the Appellants would have to remain in occupation of the land for a period of time (approximately one year) after completion of the sale; (iv) that the sale by the Appellants to the Council of the land would be subject to an exchange of part of the land with an adjoining owner which was then being negotiated; (v) that the sale was subject to planning consent being granted. H

(*f*) As a result of the discussions at the meeting, Mr. Hodder and the Appellants believed that an agreement in principle had been reached for the purchase of the land, and both parties accordingly regarded themselves as

([1]) Not included in present print.

committed to the transaction. For his part, Mr. Hodder anticipated that the purchase of the land would proceed to a binding contract as in practice the District Valuer would nearly always reach agreement with a willing vendor. Following the preparation of a land availability study in November 1973, Mr. Hodder had full authority from the Council to enter into negotiations for the acquisition of the land and in his personal opinion the Council would be under a moral duty to go ahead once a price was agreed having regard to what took place at the meeting. Moreover, it was the normal procedure for him to enter into negotiations to purchase land, and for valuers for both sides there after to be appointed to agree a price. Where such an arrangement was made, Mr. Hodder would not refer the matter to his Council for its approval until a price had been agreed by the District Valuer. Once a price had been agreed the Council usually accepted it.

(*g*) Mr. Hanson gave similar evidence, which we accepted, that he could not remember a case where the normal and established procedure used in the present case had not resulted in an actual sale.

(*h*) Following the meeting both parties felt they were committed to the transaction. For the reasons set out above, Mr. Hodder, the District Valuer, the Appellants and their advisers anticipated that a binding agreement would ultimately be reached between the representatives of the Council and the Appellants.

(*i*) Mr. Lowe gave evidence, which we accepted, that he would not have considered negotiating with any other party following the meeting as he felt committed to a sale to the Council.

(*j*) Following the meeting on 15 November 1973 and prior to 18 December 1973 Mr. Hodder duly nominated the District Valuer to act on behalf of the Council and the Appellants through their solicitors nominated Mr. Hanson to act on their behalf.

(*k*) Following the meeting negotiations took place between the District Valuer and Mr. Hanson of Turner Fletcher and Essex who, having corresponded, met for the first time in connection with this matter during January 1974. The negotiations culminated in the agreement dated 6 May 1974 between the Appellants and the Council and during this period no other negotiations were taking place between the Appellants or their advisers and any other party.

(*l*) Broxtowe District Council replaced the Beeston and Stapleford Urban District Council as the local authority on 1 April 1974 and at that time became the district planning authority for the area in which the land in question is situated. Formerly the planning authority was the Nottinghamshire County Council.

(*m*) At all times the negotiations were between the Appellants and the representative of the Council albeit before Broxtowe District Council had finally replaced Beeston and Stapleford Urban District Council as the local authority following the reorganisation of local government.

(*n*) The price to be paid by the Council and certain terms of the sale agreement were not agreed until after 18 December 1973 and were finally evidenced by the agreement dated 6 May 1974.

(*o*) The agreement dated 6 May 1974 was subject to planning permission being granted for residential development on 27.74 acres of the land and for amenity purposes over the balance of 10.80 acres and this was granted on 7 May 1974. A

(*p*) On 18 December 1973 the Appellants had no legal estate or interest in the land hatched green on the plan attached to the agreement dated 6 May 1974 but acquired their interest therein between 18 December 1973 and 6 May 1974. B

9. We were referred to the following authorities:—*Crossland* v. *Hawkins* 39 TC 493;[1961]Ch 537; *Commissioners of Inland Revenue* v. *Payne* 23 TC 610; In re *British Basic Slag Ltd.'s Application—British Basic Slag Ltd.* v. *Registrar of Restrictive Trading Agreements* [1962]1 WLR 986; [1963] 1 WLR 727; In re *Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement* [1966] 1 WLR 1137; *Talbot* v. *Talbot* [1967] 1 All ER 601; C section 40, Law of Property Act 1925; Cheshire's Modern Law of Real Property 12th edn., pages 115 to 121; Halsbury's Laws, 4th edn., vol 9, para 265; Maxwell's Interpretation of Statutes, 12th edn., pages 137 and 138; *King's Motors (Oxford) Ltd.* v. *Lax and Another* [1970] 1 WLR 426.

10. It was contended on behalf of the Appellants that:

(*a*) although there was a disposal by the Appellants of their respective D interests in the land after 18 December 1973 within s 38 of the Finance Act 1974 there was at that date an arrangement within para 4 of Sch 4 to that Act and that as a result capital gains tax but not income tax was payable on any gain that arose;

(*b*) the said arrangement was made at the meeting and was one whereby the Appellants agreed to sell the land and Mr. Hodder on behalf of the Council E agreed to purchase the land at a price to be agreed between two valuers nominated for the purpose; in the event two valuers were appointed, they did agree on a price, and accordingly a contract was concluded;

(*c*) the arrangement was evidenced by the correspondence between the parties and their representatives and notes of meetings and that this formed a sufficient note or memorandum thereof; F

(*d*) the word "arrangement" is not defined in the Finance Act 1974 but that in three cases on the Restrictive Trade Practices Act 1956 namely In re *British Basic Slag Ltd.'s Application*(1), In re *Mileage Conference Group of Tyre Manufacturers' Conference Ltd's Agreement*(2) and *Colvilles Ltd.* v. *Registrar of Restrictive Trading Agreements*(1) it had been given a wide meaning and in those cases it had also been stated that it should be construed G in its ordinary or popular sense;

(*e*) by reference to the cases of *Crossland* v. *Hawkins*(3) and *Commissiners of Inland Revenue* v. *Payne*(4) it was argued that in the interpretation of

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(1) [1963] 1 WLR 727. (2) [1966] 1 WLR 1137. (3) 39 TC 493.
(4) 23 TC 610.

A Taxing Statutes the word arrangement had been given a similarly wide meaning and that meaning applied for the purposes of the Finance Act 1974;

(*f*) the case of *Talbot* v. *Talbot*(1) supported the view that there could be an enforceable agreement and certainly an arrangement in the ordinary sense of that word without a firm price having been fixed;

(*g*) it was erroneous to equate the essentials of a binding agreement with
B those of an arrangement and that references in statutes or otherwise to contracts were not relevant matters;

(*h*) both the Council and the Appellants felt morally bound to conclude the arrangement that they had entered into and that it was concluded on terms not more beneficial to the Appellants, the onus of proving the latter in any event being on the Revenue;

C (*i*) the copies of correspondence passing between the representatives of the Appellants and the Council and its representatives showed that an arrangement had been reached and machinery set in motion to agree the final price and details of the sale agreement.

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

(*a*) the onus of proving themselves to be within the exempting provisions
D of para 4 of Sch 4 to the Finance Act 1974 lay wholly upon the Appellants;

(*b*) "arrangement" was an ordinary word the scope of which was to be discovered from its context; the authorities relied upon by the Appellants were examples of the courts giving the word a wide meaning where that was necessary in order to defeat evasion of Parliament's intention;

(*c*) the "arrangement" contemplated by para 4 must be one whose
E benefit could be measured, because the eventual contract must if materially different be "not more beneficial". One cannot measure the benefit of an arrangement for the sale of land unless at least the extent, price, planning situation, date of completion and date of payments are known; none of those things were known or ascertainable before 18 December 1973;

(*d*) instructing named valuers to negotiate was not machinery for
F ascertaining price; it was merely an agreement to agree; *Talbot* v. *Talbot* was distinguishable;

(*e*) had the "arrangement" amounted to a binding conditional contract it would not have fallen within para 3 of Sch 4 since the consideration would have depended wholly on the value of the asset when the condition was satisfied; such a contract would therefore be caught by the new charge.
G Parliament could not have intended that a person who entered before 18 December into a mere arrangement could be in a better position than someone who had entered into a binding conditional contract;

(*f*) the phrase "memorandum or note thereof . . . in writing" was a term of art borrowed from s 40 of the Law of Property Act 1925; the matters which

(1) [1967] 1 All ER 601.

had to be arranged and evidenced in writing to constitute an "arrangement" within para 4 of Sch 4 were the same as those which must be agreed and evidenced in writing to constitute a s 40 memorandum; A

(*g*) the authorities under s 40 also established the form of the memorandum or written note; parole evidence was admissible to link up a number of documents into a single memorandum but not to add to its contents; everything necessary to the existence of an "arrangement" had to be established by the documentary evidence already in existence before 18 December 1973; B

(*h*) the agreement finally entered into on 6 May 1974 contained numerous provisions which had not been agreed or, in some cases, mentioned prior to 18 December 1973 and as a result it could not be said that the terms of the ultimate contract did not differ materially from the terms of the arrangement nor that they were not more beneficial to the Appellants; the alleged "arrangement" had no terms. C

12. We, the Commissioners who heard the appeal, decided to allow the appeal in principle against the assessments to income tax in so far as they related to the land edged pink on the plan annexed to the contract dated 6 May 1974 excluding the land hatched green exhibit V(ii). But we disallowed the appeals with regard to the land hatched green on the contract plan and adjourned the matter for agreement of figures and we also adjourned the appeals against the assessments to capital gains tax. D

13. The Inspector of Taxes and Mr. H.J.B. Armstrong on behalf of the Appellants immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and on 14 June 1978 the Inspector of Taxes 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 so sign accordingly. E

14. The question of law for the opinion of the Court is whether on the facts as found by us and set out in para 8 and on the documentary evidence produced or admitted before us and referred to in para 7 our decision as set out in para 12 of this Case is correct. F

22 May 1980

The case was heard in the Chancery Division before Vinelott J. on 24 February 1981 when judgment was reserved. On 27 March 1981 judgment was given in favour of the Crown. G

Robert Carnwath for the Crown.

L. Bromley Q.C. and *A. Walton* for the taxpayer.

The following cases were cited in argument in addition to those referred to in the judgment:—*Beckett v. Nurse* [1948] 1 KB 535: *Sansom v. Peay* 52 TC 1; [1976] 1 WLR 1073.

Vinelott J.—Part III of the Finance Act 1974, introduced a new scheme for the taxation of gains made on the sale of land in cases where, apart from the legislation, the gain would have been a capital gain not attracting income tax. In broad terms the effect of the legislation is to tax as income that part of the gain which results from the grant or the prospect of the grant of planning permission, leaving any increase in current use value to be taxed as a capital gain. The introduction of legislation to this effect was announced by the Chancellor of the Exchequer in the House of Commons on 17 December 1973. The legislation applies to gains which accrue on the disposal of an interest in land (that is, normally, at the conclusion of a binding and unconditional contract for the sale of the interest) made after 17 December 1973. However, transitional provisions in Sch 4 except certain cases where the disposal was made after 17 December 1973, but was made in pursuance of something done on or before that date. Paragraph 2 allows "roll-over" relief to be claimed if and to the extent that the proceeds of the disposal have been applied in the acquisition of other assets and the acquisition was completed before 18 December 1973, or after that date but pursuant to an unconditional contract for the acquisition entered into before that date, or under a contract to which sub-para (4) applies. Sub-paragraph (4) reads as follows:

> "This sub-paragraph applies to a contract made after 17th December 1973 if (*a*) the parties thereto had before 18th December 1973 arranged (without entering into a binding contract) to dispose of and acquire the interest in question on terms which do not differ materially from the terms of the contract subsequently made; and (*b*) the arrangement was made in writing, or is evidenced by a memorandum or note thereof so made before that date."

Paragraph 3 excepts the case where the disposal was a disposal under a conditional contract entered into before 18 December 1973, and the condition was one "not depending wholly or mainly on the value of the asset at the time the condition is satisfied". It thus reverses to that extent the usual rule for capital gains tax purposes that the date of disposal of an asset is the date on which an unconditional contract is entered into for the sale of the asset or the date on which a conditional contract becomes unconditional. Paragraph 4 is the provision which is in issue in this case, and I should read it in full:

> "Where an owner of an interest in land to which the principal section applies had before 18th December 1973 arranged (without entering into a binding contract) to dispose of that interest to another person and (*a*)the arrangement was made in writing, or is evidenced by a memorandum or note thereof so made before that date; and (*b*) he disposes of the interest to that other person under a contract entered into before 18th December 1974 of which the terms do not differ materially from the terms of the arrangement or, if they so differ, are not more beneficial to the said owner, the contract (i) if not conditional, shall be treated for the purposes of subsection (1) of the principal section as if made before 18th December 1973; or (ii) if conditional, shall be treated for the purposes of the preceding paragraph as if entered into before that date."

Paragraph 5 excepts the case where the disposal is to an authority exercising compulsory powers and where notice to treat was given, or under the legislation conferring compulsory powers falls to be treated as having been given, before 18 December 1973.

On 18 December 1973, the Respondents to this appeal, Alfred William Lowe and George Frederick Lowe (whom I will call "the Lowes"), owned a market garden at Beeston, near Nottingham. It was occupied by a company which they controlled. It was in an area which had been developed as a housing estate and was bounded on the south and west by houses fronting on to Derby Road (which is a main road) and Sandy Lane, and on part of the east side by David Grove, which is also a residential street. The houses in David Grove face the road which is the boundary of the nursery. The Lowes had for some time been minded to dispose of most of their land, retaining only a small area on the corner of Derby Road and Sandy Lane, on which they planned to build a garden centre. They made an application in September 1972 for planning consent for the development of the area they planned to sell by the erection of houses. They had also ascertained that a neighbour, a Mr. Willoughby, who owned an area of undeveloped land to the north of their land, would be willing to exchange part of his land for a similar area of their land. That would enable them to straighten up their northern boundary. The exchange in fact took place some time between 17 December 1973, and 6 May 1974. On 6 May 1974, they entered into a contract for the sale of 38.54 acres, described as "near Derby Road Beeston", to the Broxtowe District Council at the price of £900,000. The area sold was shown on an annexed plan and edged red. It excluded the small area which they wished to retain, shown as edged blue. It included the area taken under the exchange with Mr. Willoughby, shown hatched green, and excluded the area given up under that exchange.

The Inspector of Taxes assessed them to income tax and capital gains tax on the footing that the contract was a disposal of the whole of the land comprised therein falling within Part III of the 1974 1974 Finance Act and not falling within any of the exceptions in Sch 4. On that footing substantially the whole gain is taxable as income. The Lowes appealed against the assessments to the General Commissioners for the district. The General Commissioners found that the Lowes had arranged to sell the land comprised in the contract of 6 May 1974, other than the green hatched land, to the Beeston and Stapleford Urban District Council (the predecessors of the Broxtowe District Council) before 18 December 1973, and that the exemption in para 4 of Sch 4 to the 1974 Act accordingly applied save as regards the part of the consideration attributable to the green hatched land. From that decision the Inspector appeals. The question I have to decide is whether there was evidence before the Commissioners upon which they could properly reach the conclusion that there was such an arrangement.

There is no appeal by the Lowes as regards that part of the consideration attributable to the green hatched land. Although they had (as the Commissioners found) arranged to sell the whole of the land comprised in the contract of 6 May 1974, to the Council before 18 December 1973, and had entered into an arrangement with their neighbour for the exchange of part of their nursery for the green hatched land before that date, they did not own or have any contractual right to acquire the green hatched land on 17 December 1973, and accordingly it could not be said as regards the green hatched land that they had an interest in land which they had arranged to sell before 18 December 1973, falling within the definition of "an interest in land" in s 44(1) of the 1974 Act.

I turn now to describe in greater detail the course of the negotiations which resulted in the contract of 6 May 1974, and the facts on which the Commissioners founded their conclusion that the Lowes had arranged for the sale of the land comprised in that agreement before 18 December 1973. On 9

November 1973, one S.C. Moppett (the engineer and surveyor of the Beeston and Stapleford Urban District Council) telephoned one H.J.B. Armstrong (the senior partner of the firm of Acton, Simpson & Hanson, the solicitors acting for the Lowes). He told Mr. Armstrong that one A.R. Hodder, the chief executive of the Broxtowe District Council, wanted to meet the Lowes and their solicitor to discuss the possibility of the Council acquiring the Lowes' land. Under the reorganisation of local government then in progress, the Broxtowe District Council was due to take over from the Beeston and Stapleford Urban District Council as the local authority for the area on 1 April 1974.

Mr. Armstrong telephoned Mr. Hodder on 12 November 1973, and arranged a meeting for 15 November. Mr. Armstrong then telephoned one Desmond Hanson (the senior partner of Turner, Fletcher & Essex, the surveyors acting for the Lowes) to arm himself with information as to the price which Mr. Hanson thought the land would fetch before the meeting. Mr. Armstrong dictated a memorandum of this conversation shortly after it took place. The memorandum records: "He told us that the sort of price that the District Valuer would agree would take into consideration the type of planning that the County Council would be prepared to approve on the basis of Section 17 of the Land Compensation Act 1971." Mr. Armstrong also telephoned Mr. Alfred Lowe on the same day and advised him that if, at the forthcoming meeting, Mr. Hodder said he wanted to buy the land "it would be in his interest to agree in principle to sell the price of course being fixed by agreement between the District Valuer and Mr. Hanson". The meeting on 15 November was attended by the Lowes, Mr. Armstrong and Mr. Hodder. Mr. Armstrong again dictated a memorandum of the discussion at this meeting shortly after it took place. It reads as follows:

> "Attending with Messrs. Lowe at the Beeston Town Hall when the conversation followed the lines that we had imagined that it would follow. It would appear that the Council wanted the land for the council houses. The Lowes agreed in principle to sell and Mr. Hodder said that he would be instructing the District Valuer. It was left to me to fix up an appointment for the Lowes to instruct Mr. Hanson. Later attempting to fix an appointment with Mr. Hanson but he was out of town and I was unable to fix anything definite."

The Commissioners, who heard the oral evidence of Mr. Armstrong, Mr. Hodder and Mr. Alfred Lowe, found, in the Case Stated at para 8(*e*):

> "At the meeting accordingly held on 15 November 1973 ... Mr. Hodder stated that the Council wanted to buy the land, and the Appellants"—that is, the Lowes—"having retired to another room with Mr. Armstrong to consider the Council's offer in private, agreed to sell. At the meeting, which lasted about half an hour, most but not all of the important terms of the eventual contract between the Appellants and the Council for the sale of the land were discussed. The terms discussed were as follows: (i) That in accordance with the usual and established procedure when land is acquired by a local authority each side would nominate a valuer to agree the price at which the land would be sold. (ii) That on a sale of the land the Appellants would have to retain a right-of-way over that land to give them access to other land which was to be retained by them. (iii) That the Appellants would have to remain in occupation of the land for a period of time (approximately one year) after completion of the sale. (iv) That the sale by the Appellants to the Council

of the land would be subject to an exchange of part of the land with an adjoining owner which was then being negotiated. (v) That the sale was subject to planning consent being granted."

I should observe in relation to that finding that the Commissioners had earlier defined the expression "the land" as the land edged pink on the plan annexed to the contract of 6 May 1974.

On 19 November Mr. Armstrong wrote to one K.W. Newman (a partner in Kenneth Newman & More, the architects acting for the Lowes) to say that an approach had been made by Mr. Hodder to purchase the Lowes' land and that the Lowes had agreed in principle to the sale and had instructed Mr. Hanson to negotiate on their behalf with the district valuer. Then, having referred to an earlier letter from Mr. Newman, he said:

"In your letter you stated that the total area was 38.45 acres. We shall be much obliged if you will let us know the split of this area as between: (*a*) The area of land on which high density housing will be permitted. (*b*) The area of land on which low density housing will be permitted. (*c*) The area of land to be retained as open space."

On the same day Mr. Armstrong wrote to Mr. Hodder to say that Mr. Hanson's firm had been instructed to enter into negotiations with the district valuer. The letter continued:

"We should however like assurance on two points: 1. Has the District Council got such Ministerial approval as is necessary to enable the agreed price (assuming that a price is agreed) to be paid within, say, six weeks of the Contract being signed? 2. We feel that the Council should pay the valuation fee of Messrs. Turner Fletcher & Essex whether a sale is agreed or not and we shall be glad to have your confirmation."

On 21 November Mr. Hodder wrote to one D.P. Page, who was the district valuer. He explained that the Broxtowe District Council had agreed to establish a land bank and had instructed him "to enter into preliminary negotiations for the acquisition by the Broxtowe Council of certain specific sites, in total amounting to some 100 acres". The letter then continued:

"Accordingly, myself and Mr. Moppett are at present meeting various Owners with the objective of opening such negotiations, and to date we have been reasonably successful. Successful to the extent that I would now ask you formally to enter into negotiations on behalf of the Council for the acquisition of the following parcels of land."

There follow descriptions of three areas, including "Lowe's Nursery Site—40 acres (approx.)", and the letter continues:

"Mr. Moppett has been asked to work on this project with you and, for my part, I am thankful that he has agreed to do so and no doubt he will be letting you have all the relevant details. Again, Mr. Moppett is looking at all the other sites involved and we will advise you as developments take place."

He sent a copy of that letter to Mr. Moppett. Mr. Hodder wrote a further letter to Mr. Page on the same day enclosing a copy of Mr. Armstrong's letter of 19 November. The second paragraph of that letter reads as follows:

A "As you can see from this letter, the second point they raised is something that worries me and indeed we did discuss it when we met last Tuesday. However, perhaps you could give me your written advice regarding this question of the payment of the valuation fee."

One C.J. Cockman, a member of the district valuer's staff, wrote to Turner, Fletcher & Essex on 6 December. That letter reads as follows:

B "I understand that Messrs. Acton, Simpson and Hanson have instructed you to enter into negotiations with me concerning the above case. I am awaiting drawings and planning information from the Acquiring Authority and as soon as this information is available to allow me to proceed I will write to you again."

Mr Hanson replied on 7 December. The third paragragh of his letter reads as
C follows:

"We have made it clear through Messrs. Acton, Simpson and Hanson that to protect our clients it will be a requirement, before negotiations commence, that our valuation fee shall be paid to us on the basis of your valuation should negotiations prove to be abortive."

On 11 December, Mr. Moppett wrote to the district valuer enclosing a
D plan

"one which I have indicated the total area of land which I understand that Messrs. Lowes will consider selling, edged blue, and the area on which planning permission for residential development is likely to be given, coloured pink. The area of land left uncoloured will be incorporated into adjoining areas as public open space."

E He asked the district valuer to negotiate with Mr. Hanson. The plan enclosed with that letter shows the land then owned by the Lowes (that is, the nursery site) other than the land edged blue on the plan annexed to the agreement of 6 May and retained by the Lowes as the site of the proposed garden centre. It does not show the areas to be taken and given up by the Lowes under the proposed exchange with Mr. Willoughby, and it does not show two protruding
F strips of land, each 36 feet wide, which give access to the nursery from Sandy Lane.

It is apparent from the plan that although Mr. Moppett was the officer who had been nominated by Mr. Hodder to work on the proposed acquisition of the Lowes' land with the district valuer (in the letter of 21 November) he did not know precisely what land was to be acquired. However, in view of the
G Commissioners' findings that at the meeting of 15 November the Lowes agreed to sell "the land" (defined as the land edged pink on the plan annexed to the agreement of 6 May) and that the sale would be subject to the exchange, Mr. Carnwath, who appeared for the Crown, conceded that Mr. Moppett or the member of his staff who drafted this letter must have misunderstood the position.

H On 17 December Mr. Hodder wrote to Messrs. Turner, Fletcher & Essex to answer the two questions raised in their letter of 19 November. The last two paragraphs of that letter read as follows:

"With regard to the question of the Council agreeing that the Agent's fees should be paid whether or not the terms of the proposed

purchase of Lowes' land are agreed or not, I must say that the Broxtowe Council would not feel disposed to give this assurance. On the other hand we would be prepared to make such contribution towards the Surveyor's fees as is appropriate in the particular circumstances of the case if negotiations are begun and then broken off on the instigation of the Council. In general, the principle of "Quantum Meruit" will prevail. The questions relating to the Council's powers are quite clear. The Broxtowe District Council has the power now to acquire land, to borrow money to pay for this land and indeed to use compulsory purchase powers. The powers are covered by Section 120 and 121 of the Local Government Act 1972."

That is all that passed between the parties and their respective advisers before 18 December. However, I should briefly outline the later history of the negotiations which explain the form which the contract ultimately took. On 19 December the district valuer wrote to Messrs. Turner, Fletcher & Essex to say that he had been instructed to negotiate the acquisition of land which he described mistakenly as comprising an area of 11.15 acres, and asking them to complete a "questionnaire giving details of their interest and the terms upon which they are prepared to sell the land". He mentioned that the purchase would be subject to the provisions of the Land Compensation Act, 1961. The last paragraph reads as follows: "It must be understood that all negotiations are without prejudice and any agreement which may be arrived at will be subject to the approval of the Acquiring Authority and any Government Department concerned". On 3 January he wrote to Mr. Moppett enclosing a copy of "planning details now received" and commented:

> As you will see the planning situation is far from clear at the present time and until more information is available it will not be possible to proceed with the negotiations. In the meantime I shall be pleased to receive your comments regarding the areas so that the way will be clear to continue the case once the planning position is known."

Mr. Moppett replied on 8 January commenting:

> "The line indicated on my plan no. 632:E is the area which has been indicated by the County Director of Planning as the area likely to be released for development but, in my opinion, is not likely to be materially increased and I would be happy if negotiations were based on an overall residential price for the area of 26.86 acres or such revised area as may be agreed with the County Planning Department."

Mr. Page and Mr. Hanson met later in January. On 8 February Mr. Hanson wrote expressing concern as to the price provisionally negotiated. He said:

> "I think at this stage it would be unwise to make any report to Broxtowe until I have had a word with my clients as the more I think about this matter the less satisfied I am with the price we have talked about, especially after hearing that the Corporation have just recently acquired an acre site in The Park for something over £60,000."

However, on 6 March he wrote to Mr. Armstrong setting out proposed heads of terms which the district valuer had agreed to recommend to the Council. He mentioned two points which the district valuer required to be clarified. The second related to the two strips of land over which access could be obtained from Sandy Lane. The district valuer had apparently raised a

question whether the Lowes had a right-of-way to their land from Sandy Lane. In fact they owned the two strips of land running from Sandy Lane and had covenanted to pay the Urban District Council a sum of approximately £2,000 or such lesser amount as should represent the cost of making up the roads and had charged their land as security for the payment of this sum. Mr. Hodder commented:

> "It may be necessary to adjust the purchase price as the District Valuer is not aware of this charge. However, I recommend this should be left in abeyance as they may not use the most northerly access for developing the land. I must however advise the District Valuer of this position."

He then set out the proposed heads of terms. The principal terms were as follows. The price was to be £900,000, £700,000 payable on completion and £200,000 two years thereafter if the Lowes did not give vacant possession of the whole until then. The Lowes were to be given a licence to occupy the land for one year, and in the second year such part of the land as was not required by the Council for development. They were to have a right-of-way 36 feet wide from the nearest public road to the land to be retained by them. This would have to lead from Sandy Lane since the nearest public road, Derby Road, was a main road and access to it would have been objectionable on safety grounds.

On 12 March Mr. Hanson sent a copy of the proposed heads of terms to Mr. Hodder. On the same day he wrote to Mr. Page with regard to the outstanding points. As regards the covenant to meet the road charges in relation to the two strips of land leading from Sandy Lane he said:

> "As I understand the position this is purely a safeguard to ensure that whoever develops the nursery land shall make up the access roads and once this has been done they are absolved from any liability to Beeston and Stapleford Urban District Council. Obviously anyone developing the land and requiring access from Sandy Lane would expect to bear the cost of making up the access road or roads. It is not therefore, in my opinion, passing on a burden to the purchasers of the land. No doubt the solicitors concerned can check this."

Later in March there was anxiety on the part of the Broxtowe District Council as to the planning position. Mr. Hodder had heard that the new County Council (which would also take over on 1 April) had asked the existing County Council to refer the question of planning permission to them. He wrote to Mr. Page on 13 March to say that the agreement with the Lowes would have to be subject to the grant of planning permission. Later Mr. Hodder spoke to the County Director of Planning, who said that the question of planning could not be dealt with until after 1 April.

Mr. Hodder then telephoned Mr. Cockman. Mr. Cockman's note of this conversation records:

> "Mr Hodder said he did not know whether the new County Council would oppose development entirely or whether they would require a large part of the land to be used for Council houses. In the latter event Broxtowe District Council would not want to buy. I asked Mr. Hodder whether there was not also a danger of the new County Council reducing

severely the acreage available for housing. He said this, too, was a possibility and I pointed out that such a decision would affect our valuation greatly. Mr. Hodder said he did not think it desirable to disclose our misgivings to Desmond Hanson and that we should continue to negotiate on the previous planning assumptions."

The importance of this note is that it shows that even at that late stage Mr. Hodder contemplated that if planning permission for residential development of the area for which application had been made was granted but required a larger part of the land for which such permission was given to be used for council houses than that which the Council planned to use for that purpose, the Council would resile from the negotiations with the Lowes. The agreement of 6 May was entered into before planning permission was granted and was made conditional on planning consent being granted for residential development of 27.74 acres and amenity purposes as regards the balance of 10.80 acres. The terms are otherwise those set out in the heads of terms. The sale was made subject to a legal charge and a further charge securing the payment of the contribution to the cost of making up the access ways. The purpose and effect of this provision, as I understand it, was to pass the burden of the covenant to pay the cost of making up the two access roads from Sandy Lane (with the limit of £2,000-odd) on to the Council.

As I have said, the Commissioners heard the oral evidence of Mr. Armstrong, Mr. Hanson and Mr. Alfred Lowe. They also heard the oral evidence of Mr. Hodder and Mr. Cockman. In the Case Stated they set out their findings as to the result of the discussion which took place on 15 November, and as those findings must I think form the foundation of their conclusion that the Lowes had arranged to sell "the land" before 18 December, 1973, I should I think read their findings in full:

"(*f*) As a result of the discussions at the meeting, Mr. Hodder and the Appellants believed that an agreement in principle had been reached for the purchase of the land, and both parties accordingly regarded themselves as committed to the transaction. For his part, Mr. Hodder anticipated that the purchase of the land would proceed to a binding contract as in practice the district valuer would nearly always reach agreement with a willing vendor. Following the preparation of a land availability study in November 1973, Mr. Hodder had full authority from the Council to enter into negotiations for the acquisition of the land and in his personal opinion the Council would be under a moral duty to go ahead once a price was agreed having regard to what took place at the meeting. Moreover, it was the normal procedure for him to enter into negotiations to purchase land, and for valuers for both sides thereafter to be appointed to agree a price. Where such an arrangement was made, Mr. Hodder would not refer the matter to his Council for its approval until a price had been agreed by the district valuer. Once a price had been agreed the Council usually accepted it.(*g*) Mr. Hanson gave similar evidence, which we accepted, that he could not remember a case where the normal and established procedure used in the present case had not resulted in an actual sale.(*h*) Following the meeting both parties felt they were committed to the transaction. For the reasons set out above, Mr. Hodder, the district valuer, the Appellants and their advisers anticipated that a binding agreement would ultimately be reached between the representatives of the Council and the Appellants.(*i*) Mr. Lowe gave evidence, which we accepted, that he would not have considered negotiating with any

A other party following the meeting as he felt committed to a sale to the Council."

Mr. Bromley, who appeared for the Lowes, referred me to a number of cases in which the meaning of the word "arrangement" in other statutory contexts has been considered by the Courts. It is, of course, a word frequently used in modern legislation, more particularly in fiscal legislation. In B *Commissioners of Inland Revenue* v. *Payne* 23 TC 610, a case which turned on the definition of "settlement" in s 41 of the Finance Act 1938, the question was whether the taxpayer was the settlor of a settlement so defined. The taxpayer, by a deed of covenant dated 29 March 1938, had covenanted to pay to a company which he controlled for the remainder of his life or until an effective resolution was passed for the winding up of the company a weekly C sum on and from 1 April 1937, the first payment (for the period up to 31 March 1938) to be paid on that date. A resolution for the winding up of the company was passed on 6 October 1938. The question was whether the taxpayer could claim to deduct the monthly sums paid under the convenant (grossed up by the standard rate of tax) from his total income for surtax purposes. The Finance Act 1938, had introduced a provision in s 38 which, so D far as material, reads as follows:

> "If and so long as the terms of any settlement are such that (*a*) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor ... will or may cease to be E liable to make any annual payments payable by virtue or in consequence of any provision of the settlement; ... any sums payable by the settlor ... by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person."

Thus the question was whether the annual sums were payable under a F "settlement". That word was defined in s 41 as including "any disposition, trust, covenant, agreement or arrangement".

Sir Wilfred Greene, M.R. said at page 626(1):

> "Now the first question that arises in this appeal, a question which Lawrence J., answered in favour of the Crown, is whether or not there is here any settlement in relation to which Mr. Walter Payne was the settlor. G The word in the definition clause of 'settlement' which is relevant to that question is the word 'arrangement'. The word 'arrangement' is not a word of art. It is used, in my opinion, in this context in what may be described as a business sense, and the question is: can we find here an 'arrangement' as so construed? It is said that the only element in this transaction which falls within the definition of 'settlement' is the deed of H covenant itself. I am unable to accept that argument. It appears to me that the whole of what was done must be looked at; and when that is done, the true view, in my judgment, is that Mr. Walter Payne deliberately placed himself into a certain relationship to the company as part of one definite scheme, the essential heads of which could have been put down in

(1) 23 TC 610.

numbered paragraphs on half a sheet of notepaper. Those were the things which it was essential that Mr. Payne should do if he wished to bring about the result desired. He did it by a combination of obtaining the control of the company, entering into the covenant, and then dealing with the company in such a way as to achieve his object. Now, if a deliberate scheme, perfectly clear cut, of that description is not an 'arrangement' within the meaning of the definition clause, I have difficulty myself in seeing what useful purpose was achieved by the Legislature in putting that word into the definition at all."

In In re *British Basic Slag Ltd.'s Application* [1963] 1 WLR 727, two questions arose. The first was whether certain steel manufacturing companies, each of which had entered into an agreement with a marketing company, Basic Slag Ltd. (which I shall call "Basic") for the supply of ground basic slag, had thereby accepted restrictions in respect of one of the matters sepcified in s 6(1), paragraphs (*a*) to (*e*), of the Restrictive Trade Practices Act 1956. The second question was whether each of the steel companies had entered into an agreement within s 6 with each of the other steel companies whereby each accepted restrictions in respect of one or more of those matters. Section 6(2) defined an "agreement" as including "any agreement or arrangement whether or not it is intended to be enforceable ... by legal proceedings".

What had happened was that the steel companies had joined together to incorporate Basic, each having shares in it and the right to appoint a director. Each steel company then entered into an agreement with Basic under which it agreed to sell its whole output of ground basic slag to Basic and not to sell anything not required by Basic to anyone else without Basic's consent. The execution by each steel company of its agreement with Basic was not conditional on the execution of similar agreements by the other steel companies, but the circumstances were such that each of the steel companies could confidently expect each other steel company to enter into an agreement with Basic in terms similar to the agreement which it had entered into with Basic.

On the second question, the Registrar of Restrictive Trade Practices submitted that the steel companies were parties to an arrangement that each should enter into an agreement in standard form with Basic. On that point Cross J. said at [1962] 1 WLR 986 at page 995:

> "As I see it, all that is required to constitute an arrangement not enforceable in law is that the parties to it shall have communicated with one another in some way, and that as a result of the communication each has intentionally aroused in the other an expectation that he will act in a certain way. If that be right, then, as it seems to me, the member companies made an arrangement that they would each of them execute the relevant agreement with Basic. It was argued that they never communicated with each other. I cannot agree. Each had a director on the board of Basic and the discussions at the board, of which the directors who were not present were kept informed, were just as much discussions between the member companies as if they had written letters to one another."

His decision was affirmed in the Court of Appeal ([1963] 1 WLR 727). Diplock L.J., after reading the passage in Cross J.'s judgment that I have just read, said at page 747:

> "I think that I am only expressing the same concept in slightly different terms if I say without attempting an exhaustive definition, for

there are many ways in which arrangements may be made, that it is sufficient to constitute an arrangement between A and B, if(1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way, (2) such representation is communicated to B, who has knowledge that A so expected and intended, and (3) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way. Upon the evidence in the present case it is plain beyond a peradventure that the knowledge of each member company acquired at the board meetings of Basic from statements made by the nominees on that board of its fellow member companies that each of them was going to enter into a contract with Basic in the terms of the vertical contract,"—that is, the standard form of contract between each member and Basic—"or at any rate that any member company which entered into a contract for the sale of fertilisers to Basic would do so upon substantially the same terms as of those of the vertical contract, operated as an inducement to each member company itself to enter into a contract with Basic in the same terms as those of the vertical contract."

In *re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement,* [1966] 1 WLR 1137, was another case in which s 6(2) of the Restrictive Trade Practices Act 1956, fell to be considered. In 1961 the Restrictive Trade Practices Court had held that restrictions in an agreement between the members of the Group—under which, *inter alia,* the member tyre manufacturers agreed not to quote rates for keeping vehicles operated by fleet owners adequately tyred which were below the minimum rate fixed at a meeting of the member tyre manufacturers without notifying the others—infringed s 6(1) and were contrary to the public interest. Shortly before the restrictions were held to infringe s 6(1) the members entered into a scheme designed to achieve the same practical result as the earlier agreement, which they clearly expected to be held to be void. The scheme was in two parts. Under the first compulsory part the members had to notify the secretary of the rate which they had quoted to an operator. Under the second permissive part they could notify the secretary of the rates which they had decided to quote to an operator. Although not obliged to do so, all the members entered into the permissive part of the scheme and, while there was no discussion or intimation between them as to whether they would do so, each thought the others would enter into the scheme. They interpreted the permissive part as requiring them to notify the secretary of the rates which they were minded from time to time to quote to an operator and as requiring the secretary to circulate all such notifications to interested members.

It was conceded by Counsel for the members that if there had been an express intimation when the scheme came into operation by each member to each of the others of his intention to try to operate the permissive part of the scheme if the others did likewise, there would have been an arrangement which infringed s 6(1). But he submitted that there could be no arrangement if there was no such promissory representation. That argument was rejected by the Restrictive Trade Practices Court. Megaw J. said at page 1158([1]):

"Counsel for the member companies accepts that, if there had been an express intimation in August, 1961, by each member to each of the others of his intention to try to operate the permissive part of the scheme

([1]) [1966] 1 WLR 1137.

if the others did likewise, there would have been an arrangement. But, he contends, there cannot be an arrangement on the facts of this case because an arrangement necessarily presupposes a promissory representation, and here there was no representation. An arrangement, he submits, cannot arise out of observed conduct. Observed conduct, he submits, can only be evidence of a pre-existing, express, common assent; and if there was no such express assent, conduct cannot take its place. We do not accept that argument. When all that has happened is that a number of people, separately and individually, have decided to try to operate a scheme which involves mutuality, it may well be that at that stage there is no arrangement. But when thereafter, as happened here, it became clear to each of them by the acts of all of them that all had decided to operate the scheme, and were in fact operating it, and the essence of its operation—the only basis on which it could operate—rested in the acceptance of mutual obligations by all the participants towards each other, the scheme thereupon, if not before, became an arrangement. It makes no difference to the result that any one of them is entirely free to cease to operate it at any time, subject to the fulfilment of the moral obligations relating to a particular transaction in respect of which he has already given or received information under the scheme. An agreement is still an agreement, so long as it is operated, even though it is terminable at will. So it is an arrangement."

Later on page 1159 he said:

"There is no doubt that there was here a scheme. It was so described. It was operated. It is not without interest that the primary definition of 'scheme' in the Concise Oxford Dictionary is 'systematic arrangement, proposed or in operation'. There can be no doubt, for reasons which we have already given, that the operation of the permissive part of the scheme involved mutual obligations, not binding in law, but moral obligations binding in honour, as well as according with the individual interest of each member, because the continuance of the scheme depended on their general observance. The mutual representations, by conduct, and the resulting mutual moral obligations make the permissive part of the scheme an arrangement, consistent with the ordinary use of language and with the expositions of the meaning of the word 'arrangement' in the Act, to be found in the judgments of Willmer and Diplock L.JJ. in *British Basic Slag Ltd.*(1) ..."

Mr. Bromley, relying on these cases, submitted that the word "arranged" in para 4 should be construed in a sense corresponding to the sense in which the word "arrangement" had been construed in these cases (all of which were, of course, decided before the 1974 Act was passed) and that (adapting the words of Megaw J. in the *Mileage Conference Group*(2) case) the Lowes and the Council entered into a scheme involving mutuality (though not creating any legal relationship) on 15 November , and by 18 December (by which time both sides had instructed valuers who in turn had been in communication with each other with a view to meeting to discuss the price) had taken steps to implement this scheme. He submitted that in doing so each had accepted mutual obligations towards the other, and he relied upon the findings by the Commissioners in sub-paras (*f*), (*h*) and (*i*) of para 8, which I have read, that after 15 November both the Lowes and the Council felt that they were

(1) [1962] 1 WLR 986. (2) [1966] 1 WLR 1137.

committed to the transaction and thought that having appointed valuers a sale of the land would almost inevitably follow.

I do not think that a close analysis of the meaning that has been attributed to the word "arrangement" in other statutory contexts is of any assistance in construing para 4. The cases cited by Mr. Bromley are of assistance in so far as they illustrate and stress (what is I think in any event plain) that the word "arrangement" is not a term of art but a word in common use and one which in common usage has a wide and flexible meaning. The scope of the noun "arrangement" or the verb "arrange" can only be ascertained from the context. The word "arrange", it may be observed, does not always import an element of mutuality. Thus a man may be said to arrange his affairs with a view to mitigating the burden of tax upon his income although the scheme which he carries through may have been conceived and implemented by himself alone. Similarly, the word "arrangement" in the context of the definition of a "settlement" in s 38 of the Finance Act 1938, did not import any element of mutuality. The purpose of including this word in the definition of a "settlement" was clearly to extend the relevant provisions to cover the case where the taxpayer deliberately created a state of affairs which contained elements corresponding to the essential elements of a conventional settlement and in which something could be identified as equivalent to the income of settled property and as originating from him. In the context of the Restrictive Trade Practices Act the word "arrangement" was clearly used in the definition of "agreement" in order to extend the provisions of the Act to cover the case where persons carrying on a relevant business create a state of affairs which is such that restrictions are accepted because, although not legally binding, they are binding in honour or more simply because the situation created is such that it is in their interest to observe them. In both these contexts the essential question is whether a state of affairs having these characteristics was deliberately created or arranged. In the context of para 4 the question is not whether the taxpayer had entered into an arrangement. The word "arrangement" is not in fact used in the excepting parts of para 4 but only in the restrictions on the exceptions in sub-paras (*a*) and (*b*).

The question posed is whether the owner of an interest in land had, before 18 December 1973, arranged to dispose of it to another person. On the facts found by the Commissioners, which I have set out in full, it is in my judgment impossible to give an affirmative answer to that question. Of course, the Lowes and the Council before 18 December 1973, had entered into an arrangement. But what they had arranged was not the sale of the land. They had arranged for their respective valuers to meet and to negotiate a price which each could recommend to his respective client. Both expected that the valuers would be able to negotiate a price, that the price would be one acceptable to both parties and that a sale of the land at that price would follow. But it is quite clear from the documentary evidence that neither the Lowes nor the Council regarded themselves as committed legally, morally or commercially to accept the negotiated price, although, of course, it was improbable that the Lowes would not accept a price negotiated between their valuer and the district valuer bearing in mind the Council's powers of compulsory acquisition, and also probable that the Council would accept a price negotiated by the district valuer pursuant to an arrangement entered into by their chief executive (though it should be observed that whatever he had arranged the Council was strictly free to refuse its approval).

The relevant parts of the documentary evidence appear to me to be as follows. On 19 November 1973, Mr. Armstrong writing to Mr. Hodder reported that the Lowes' valuers had been instructed "to enter into negotiations with the district valuer"; Mr. Hodder writing to the district valuer on 21 November told him that he had been instructed to enter into preliminary negotiations with the owners of certain sites, including the Lowes' land, and that he and Mr. Moppett were meeting various owners, including the Lowes, "with the object of opening such negotiations, and to date we have been remarkably successful. Successful to the extent that I would now ask you formally to enter into negotiations on behalf of the Council for the acquisition of" among other areas the Lowes' land; on 7 December, Mr. Hanson writing to the district valuer made it clear that to protect the Lowes "it will be a requirement, before negotiations commence, that our valuation fee shall be paid to us on the basis of your valuation should negotiations prove abortive", a matter on which Mr. Armstrong had asked for an assurance from Mr. Hodder on 19 November; a counter-offer was made by Mr. Hodder on 17 December, when he indicated that the Council would be prepared to make a contribution to Mr. Hanson's fees if negotiations were begun and broken off on the instigation of the Council, the fee to be assessed on the basis of a *quantum meruit,* but, of course, that counter-proposal had not been accepted on 18 December; lastly, even as late as April 1974 Mr. Hodder in a telephone conversation with Mr. Cockman, to which I have referred, told him that if the new County Council insisted that a large part of the Lowes' land be used for council housing and not (as the Council wanted) for letting or sale to private clients, the Council "would not want to buy". Thus while the Lowes and Mr. Hodder may, on 18 December 1973, have regarded themselves as committed to *a* transaction, and may have thought that if either side had broken off negotiations before the valuers had had a full opportunity to see whether they could agree a price the other side would have been entitled to regard their conduct as a breach of good faith, neither the Lowes nor the Council regarded themselves as committed to a sale. Indeed, it is noteworthy that Mr. Armstrong and Mr. Hanson felt free to seek to introduce a new term, that if the negotiations proved abortive the Council should be liable to pay Mr. Hanson's firm's fees.

Mr. Bromley relied also on para 5 of Sch 4, which excepted from development gains tax cases where a disposal of an interest in land was made to an authority exercising compulsory powers pursuant to a notice to treat given before 18 December 1973. He submitted that the exception in para 4 must have been intended to cover the case where an authority having compulsory powers, instead of serving a notice to treat, enters into negotiations for the acquisition of land which it wishes to acquire and arranges and sets into operation a machinery for negotiating a price acceptable to the district valuer. I cannot accept that submission. Although the service of a notice to treat does not create a contract for the sale of land, the acquiring authority is committed to proceeding with the acquisition unless the notice to treat is withdrawn in the limited circumstances allowed by s 31 of the Land Compensation Act 1961, and once the compensation has been assessed if the notice is not withdrawn the owner can enforce his right to payment of the compensation. In the present case neither the Lowes nor the Council were committed to accepting the price negotiated with the district valuer.

In my judgment, therefore, the finding by the Commissioners that the Lowes had arranged the sale of their land to the Council before 18 December 1973, cannot be supported. That is sufficient to dispose of this case. However,

A the Crown has supported its appeal upon the alternative ground that even if there had been such an arrangement the conditions in sub-paras (*a*) and (*b*) of para 4 were not satisfied. As these further grounds have been fully argued, I should I think express my views, at least as regards the first of them. Sub-paragraph (*a*) requires that the relevant arrangements must be "made in writing, or ... evidenced by a memorandum or note thereof so made before" B 18 December 1973. This requirement is clearly modelled on s 40 of the Law of Property Act, 1925, which provides:

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person C thereunto by him lawfully authorised."

However, it differs in one important respect. Under s 40 the arrangement or the memorandum or note thereof relied on must be in writing signed by the party to be charged or some person "thereunto by him lawfully authorised". Sub-paragraph (*a*) requires that the arrangement be "in writing, or ... evidenced by a memorandum or note thereof". It is not clear, first, whether D the draftsman, by using the phrases "in writing" and "evidenced by", intended to incorporate the requirement in s 40 that an agreement if in writing or a memorandum or note thereof relied on must be signed by "the party to be charged or by some other person thereunto by him lawfully authorised"; or, secondly, if he did, whether he contemplated that the agreement or the memorandum would have to be signed by or on behalf of the owner or by or E on behalf of the intended disponee or by or on behalf of both of them; or, thirdly, if he did not, precisely what he intended by the requirement that the arrangement, if not in writing, be "evidenced by" a memorandum.

However, I do not need to consider these interesting and difficult questions. Before the Commissioners it was submitted that the alleged arrangement was evidenced by the "correspondence between the parties and F their representatives and notes of meetings and that this formed a sufficient note or memorandum thereof", and although the Inspector of Taxes argued that the material relied on as together constituting a sufficient memorandum of the arrangement did not contain all the essential terms of that arrangement, he did not argue that any part of this material could not be relied on as constituting part of a memorandum evidencing the arrangement. In these G circumstances, Mr. Carnwath accepts that for the purposes of this case all the documents which were put in evidence before the Commissioners and which came into existence before 18 December can be relied on as together constituting a memorandum of the arrangement. He submits that even if this concession is made there is no memorandum which includes all the terms of the alleged arrangement. In particular, there is no reference in the documents H relied on as constituting the memorandum to the terms set out in sub-paras (ii), (iii) and (v) of para 8(*e*) of the Case Stated.

Mr. Bromley's reply to this argument was that the arrangement was an arrangement in principle for the sale of the land at a price to be negotiated between the valuers, and that that arrangement was implemented when the valuers were instructed. The other terms set out in para 8(*e*) were, he I submitted, raised at the meeting on 15 November as matters which would have to be resolved in the course of the negotiations. They were not essential terms of the arrangement, and were relevant only in considering whether the terms of

the contract ultimately entered into differed materially from the terms of the arrangement for the purposes of the condition in sub-para (*b*) of para. 4.

I cannot accept that submission. The Commissioners have found that an arrangement was entered into on 15 November, and it is the terms of that arrangement which, under sub-para (*b*), must be compared with the terms of the contract subsequently entered into. In turn, all the essential terms of that arrangement must be "evidenced by" some memorandum in writing. Moreover, Mr. Bromely's submission in my judgment founders on another, more fundamental ground. Mr. Bromley concedes, I think rightly, that the memorandum must sufficiently identify the land which was the subject matter of the arrangement. Turning to the documents relied on, Mr. Armstrong's memoranda of the telephone conversations and meeting which took place on or before 15 November 1973, refer simply to "the land" and do not identify it. In Mr. Hodder's letter to the district valuer of 21 November 1973, one of the sites relied on is described as "Beeston—Lowe's Nursery Site—40 acres (approx.)". That cannot be relied on as sufficiently identifying the land which was the subject matter of the alleged arrangement because the arrangement was for the sale of an area which would include part only of the nursery site. It would include the green hatched land (not then part of the site) and exclude the part of the nursery site which would be given up under the exchange, and also the blue edged land to be retained by the Lowes. That is true also of the letter from Mr. Moppett to the district valuer dated 11 December, in which he indicated on an attached plan "the total area of land which I understand the Lowes will consider selling, edged blue". Again, the land edged blue on that plan was the nursery site owned by the Lowes before the exchange other than the land to be retained as the site of a garden centre. It also excluded the essential access ways leading to Sandy Lane.

That leaves the letter written by Mr. Armstrong to Mr. Newman on 19 November, in which he says: "In your letter you stated that the total area was 38.54 acres". The letter referred to is not in evidence. Mr. Bromley submitted that extrinsic evidence is admissible to identify the area of 38.54 acres as the area comprised in the arrangement and ultimately in the sale. He relied upon the decision of the Court of Appeal in *Plant v. Bourne* [1897]2 Ch 281. There, by a contract in writing the plaintiff agreed to sell and the defendant agreed to buy "twenty four acres of land, freehold, at T., in the parish of D ..., possession to be had on March 25 next. The vendor guaranteeing possession accordingly". There was evidence that, in the words of Lindley L.J. at page 287,

> "... there were only twenty four acres at Totmonslow in the parish of Draycott belonging to the vendor as to which the purchaser had any treaty at all. There was no ambiguity about it. There was a field of about 24 A. 1 R. 26 P., which was perfectly well known to both of them. They had been walking round this land some time before this agreement was drawn up, and it was that property about which they were negotiating. That is the evidence which the plaintiff is seeking to introduce. We have Sir William Grant's authority for introducing it; and if it is introduced it appears to me that nothing further can possibly be desired."

Chity L.J. said at page 290:

> "I think Mr. Plant means he is selling 'the twenty four acres we have been looking at,' or 'my twenty four acres.' It is not twenty four acres of land anywhere in England, but the place, the county, and the parish are all mentioned. It would be refinement, and not promoting justice, if we

were to hold this description fails because 'my' is not to be found before the 'twenty four', or the definite article 'the'."

The explanation of that case (which has always been regarded as marking the extreme limit to which Courts will go in allowing oral evidence to supplement a memorandum) is that the vendor had 24 acres at Totmonslow which could be identified as the subject matter of the agreement as being a field of about 24 acres well known to both parties which they had walked round and inspected. The field could be so identified as certainly as if it had been described as "the vendor's twenty four acres of land at Totmonslow" which had been so inspected. In the present case the Lowes had more than the 38.54 acres at Beeston at 18 December 1973, because, even assuming that the areas taken and given up under the exchange were exactly equal, they also owned the area edged blue which they were to retain. Further, on that assumption the 38.54 acres which they owned at 18 December 1973, excluding the land edged blue, was not the subject matter of the arrangement. Thus, extrinsic evidence to show what land the Lowes owned at the date of the arrangement would not serve to identify the land which was the subject matter of the arrangement. In turn, evidence identifying the land which was the subject-matter of the arrangement would be admissible to establish what the arrangement was but not to supplement the memorandum.

For the reasons which I have given, I think this appeal must be allowed. I will remit the matter to the Commissioners for the figures to be found if not agreed, and the Respondents must pay the Crown's costs of this appeal.

Appeal allowed, with costs.

The taxpayers' appeal was heard in the Court of Appeal (Sir John Donaldson M.R., Dillon and Sir George Baker L.JJ.) on 10 March 1983 when judgment was reserved. On 25 March 1983 judgment was given against the Crown (Dillon L.J. dissenting), with costs.

Robert Carnwath for the Crown.

P. G. Whiteman Q.C. and *T. Mowschenson* for the taxpayers.

The following cases were cited in argument in addition to those referred to in the judgments:—*Ben-Odeco Ltd.* v. *Powlson* 52 TC 459; [1978] 1 All ER 913; *Fitzwilliam's (Earl) Collieries Co.* v. *Phillips* 25 TC 430; [1943] AC 570; *Commissioners of Inland Revenue* v. *Payne, Commissioners of Inland Revenue* v. *Gunner* 23 TC 610; *Kidson* v. *MacDonald* 49 TC 503; [1974] Ch 339; *Leedale* v. *Lewis* 56 TC 501; [1982] 1 WLR 1319; *Sudbrook Trading Estate Ltd.* v. *Eggleton* [1982] 3 WLR 315.

Dillon L.J.—This is an appeal by the taxpayers, Mr. A. W. Lowe and his brother Mr. G. F. Lowe, against a decision of Vinelott J. given on 27 March 1981 whereby the learned Judge allowed an appeal by the Crown against a determination of the General Commissioners for the Division of Broxtowe South.

The case is concerned with the taxation of development gains from land under Chapter 1 of Part III of the Finance Act 1974 and it came before the

General Commissioners on appeal by the taxpayers against assessments for income tax and capital gains tax for the year 1974–75. We are not concerned with the details of the assessments, but only with the question of substance, which the General Commissioners decided in favour of the taxpayers but the Judge decided against them, whether the taxpayers are entitled to avail themselves of the transitional provisions in para 4 of Sch 4 to the Finance Act 1974.

Chapter 1 of Part III of the 1974 Act is deemed to have come into force on 18 December 1973. Subject to the transitional provisions in Sch 4, the charging section, s 38, applies to any disposal of any interest in land situate in the United Kingdom which was made after 17 December 1973 if the gain accruing on the disposal included a development gain. The significance of the dates is that on 17 December 1973 the then Chancellor of the Exchequer made a statement in the House of Commons announcing the intention of the then government to introduce legislation in the next Finance Bill to tax development gains. The previous position had been that an owner of land, who was not a dealer in land, could, if he obtained planning permission for the development of his land or if he sold the land conditionally on such permission being obtained by the purchaser, make very substantial gains on which he was only liable to pay capital gains tax and not income tax.

The taxpayers in the present case had for very many years before 18 December 1973 owned some land at Derby Road, Beeston in Nottinghamshire, which they had long used, through a company they controlled, for a business as nurserymen. This is the land shown edged pink on the plan V(ii) referred to in the Case Stated, other than the land hatched green on that plan. The land hatched green is land which at 18 December 1973 the taxpayers were negotiating to acquire from an adjoining owner; the negotiations were subsequently successful, but at 18 December 1973 the taxpayers did not have any interest, within the meaning of the 1974 Act, in the land hatched green. The land edged blue on the plan V(ii) is land which the taxpayers had owned for years before 18 December 1973, which was then also being used as part of the nursery, and which they continued to retain after they made the disposal to which I must now come.

By an agreement in writing dated 6 May 1974 and made between the taxpayers as vendors of the one part and the Broxtowe District Council as purchaser of the other part the taxpayers agreed to sell the land edged pink on the plan V(ii) including the land hatched green and amounting in all to approximately 38.54 acres to the Broxtowe District Council for a price of £900,000. The agreement was by clause 12 declared to be subject to planning permission being granted by the appropriate planning authority for residential development of 27.74 acres and for amenity purposes over the balance of 10.80 acres. That permission was duly granted the following day. There is no doubt that the price reflected a substantial development gain, and accordingly that the disposal effected by the agreement falls within s 38 of the 1974 Act unless the taxpayers can avail themselves of para 4 of Sch 4 to the Act. It is also not in doubt that they cannot avail themselves of para 4 in relation to the land hatched green because they had no interest in that at 18 December 1973. The issue is concerned with the land edged pink, other than the land hatched green. Paragraph 4 is in these terms:

> "Where an owner of an interest in land to which the principal section applies had before 18th December 1973 arranged (without entering into a binding contract) to dispose of that interest to another person and—(*a*)

A the arrangement was made in writing, or is evidenced by a memorandum or note thereof so made before that date; and (*b*) he disposes of the interest to that other person under a contract entered into before 18th December 1974 of which the terms do not differ materially from the terms of the arrangement or, if they so differ, are not more beneficial to the said owner, the contract—(i) if not conditional, shall be treated for the B purposes of subsection (1) of the principal section as if made before 18th December 1973; or (ii) if conditional, shall be treated for the purpose of the preceding paragraph as if entered into before that date."

The preceding paragraph there mentioned, para 3, should also be set out for completeness:

C "If the disposal of an asset under a conditional contract entered into before 18th December 1973 is made for a consideration not depending wholly or mainly on the value of the asset at the time the condition is satisfied, then for the purposes of subsection (1) of the principal section the contract shall in relation to the disposal be treated (on the condition being satisfied) as if it had never been conditional."

Two issues have been argued on this appeal:

D The first is whether the taxpayers had before 18 December 1973 arranged (without entering into a binding contract) to dispose of the land—the land edged pink other than the land hatched green—to another person. The taxpayers say that they had so arranged to dispose of it to the Beeston and Stapleford Urban District Council, which was the statutory predecessor of the Broxtowe District Council. No point has been taken as to any difference E between the two councils, since the replacement of the Beeston and Stapleford Council by the Broxtowe Council was merely part of the reorganisation of local government throughout England and Wales which took effect by statute in April 1974.

The second issue is whether if there was such an arrangement as the taxpayers assert there is adequate memorandum or note of it made in writing F before 18 December 1973 to satisfy para 4. The taxpayers accept that the arrangement itself was not made in writing. The point taken here by the Crown is that the arrangement itself included terms which are not reflected in any of the documents which are relied on by the taxpayers as constituting the note or memorandum.

As to the first issue, Vinelott J. said at page 517 in his judgment that the G word "arrangement" is not a term of art but a word in common use and one which in common usage had a wide and flexible meaning. With that I entirely agree and it is common ground between the parties. He commented a few lines earlier, and here again I respectfully agree, that he did not think that a close analysis of the meaning that has been attributed to the word "arrangement" in other statutory contexts is of any assistance in construing para 4.

H The learned Judge thought that the taxpayers had indeed entered into an arrangement (without any binding contract) with the Beeston and Stapleford Council before 18 December 1973. Where he differed from the General Commissioners on this issue, however, was that he thought that the arrangement was merely an arrangement for the parties' respective valuers to

meet and negotiate a price which each could recommend to his respective client, whereas the General Commissioners had found that the arrangement was an arrangement for the sale of the relevant land at a price to be agreed between the District Valuer and the taxpayers' surveyor.

The question what arrangement has been come to between two parties is pre-eminently a question of fact, and on a tax appeal it is the function of the Commissioners to decide questions of fact. Their determinations can only be reversed for an error of law. The learned Judge reminded himself of this at page 506 of his judgment, where he said that the question he had to decide was whether there was evidence before the Commissioners upon which they could properly reach the conclusion that there was such an arrangement as the taxpayers asserted.

The learned Judge then proceeded to set out the facts and to analyse some of the contemporary documents at length. He said at page 517 that on the facts it was impossible to give an affirmative answer to the question whether the taxpayers, as owners of an interest in land, had, before 18 December 1973, arranged to dispose of it to another person. Then at page 518 he reached the conclusion that the finding by the Commissioners that the taxpayers had arranged the sale of their land to the council before 18 December 1973 could not be supported. With every respect, however, it seems to me that what the learned Judge has actually done is merely to substitute his own interpretation of the facts for the Commissioners' interpretation of the facts.

The crucial occasion, on which the arrangement, whatever it was, was made, was a meeting on 15 November 1973 at the Town Hall in Beeston. The Commissioners' finding was that at that meeting Mr. Hodder, the Chief Executive of the Council, stated that the council wanted to buy the land and the taxpayers, having retired to another room with Mr. Armstrong, their solicitor, to consider the council's offer in private, agreed to sell. In fact Mr. Armstrong stated, both in his own contemporaneous attendance note of the meeting and in a letter of 19 November to the taxpayers' architect, that the taxpayers had agreed in principle to sell the land to the council. The area of the land is referred to in the letter of 19 November as 38.54 acres and the sale is said to be by private treaty. That the sale was to be to a local authority is significant in that, as the documents show, the council had powers of compulsory purchase which it could invoke to carry through its desire to acquire the land and in that the council could only buy at a price approved by the district valuer. The Commissioners refer in their findings to the usual and established procedures when land is acquired by a local authority that each side would nominate a valuer to agree the price at which the land would be sold. This was supported by Mr. Hodder's evidence, and the Commissioners also accepted the evidence of Mr. Hanson, the taxpayers' valuer, that he could not remember a case where the normal and established procedure used in the present case had not resulted in an actual sale.

The Commissioners found that following the meeting both parties, i.e. Mr. Hodder and the taxpayers, felt they were committed to the transaction and anticipated, as did the taxpayers' advisers and the district valuer, that a binding agreement would ultimately be reached. The Commissioners further accepted evidence from Mr. A. W. Lowe that he would not have considered negotiating with any other party following the meeting as he felt committed to a sale to the council.

On these findings there was, as it seems to me, ample material to support the conclusion of the Commissioners that at the meeting of 15 November 1973

A the taxpayers made an arrangement (without entering into any binding contract) to dispose of the land to the council at a price to be agreed between the district valuer and the taxpayers' surveyor. It follows, under *Edwards* v. *Bairstow*(1) [1956] AC 14, that the Court cannot interfere with the Commissioners' conclusion and the learned Judge was wrong, on this issue, to substitute his own interpretation of the evidence for the Commissioners' B conclusion. Indeed the learned Judge's statement on page 517 of his judgment that it is clear from the documentary evidence that the taxpayers, the Lowes, did not regard themselves as committed even morally to accept the negotiated price, contradicts the specific findings of fact of the Commissioners, who had heard the witnesses, in sub-paras (h) and (i) of para 8 of the case.

It is of course clear that both parties fully appreciated that no legally C binding agreement was made on 15 November 1973 or at any time before 6 May 1974. Documents after 18 December 1973 indicate at some stages temporary qualms about going ahead or consideration of possible alternative terms. That is however inherent in any arrangement which is not a binding contract, and it does not inevitably falsify the Commissioners' conclusions of fact.

D I turn now to the second issue, namely whether there is a sufficient memorandum or note of the arrangement made before 18 December 1973 to satisfy the requirements of para 4.

The argument here has been somewhat bedevilled by the way in which s 40 of the Law of Property Act 1925 has been brought into the argument. That section provides, as is well known in England, that:

E > "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

Sub-paragraph (*a*) of para 4 in Sch 4 to the 1974 Act requires that the F relevant arrangement must be "made in writing, or . . . evidenced by a memorandum or note thereof so made before" 18 December 1973. It has therefore been the primary submission of the Crown on this issue, which the learned Judge accepted, that the requirement of sub-para (*a*) is clearly modelled on s 40. Therefore the memorandum or note of the arrangement must record all the terms of the arrangement just as a memorandum or note to G satisfy s 40 must record all the terms of the relevant contract except—broadly speaking—those which the law would anyhow imply.

The riposte of the taxpayers' Counsel to this submission is to point out that the 1974 Act applies to the whole of the United Kingdom including Scotland, and to submit that it therefore ought not to be construed by reference to conveyancing technicalities only applicable in a part of the United H Kingdom, viz. England and Wales.

I do not for my part regard it as of any relevance whether sub-para (*a*) was or was not modelled on s 40. The function of the Court is to construe the words "evidenced by a memorandum or note thereof" in their context in para

(1) 36 TC 207.

4. Conversely, however, I regard the warning of the taxpayers' Counsel as to the construction of United Kingdom statutes as beside the point, since the conclusion that a memorandum to satisfy s 40 must record all the terms of the relevant agreement has been arrived at not by any conveyancing technicalities but on ordinary principles of construction of ordinary words in a statute, the Statute of Frauds, which preceded s 40. This is conveniently explained by Cockburn C.J. in *Williams* v. *Lake* (1859) 29 L.J.Q.B. 1, a case concerned with guarantees rather than land, when he said at page 3:

> "The statute requires that there shall be an agreement in writing or some memorandum or note of such agreement. It is very properly admitted that in an agreement, in order to be binding so as to satisfy the requirements of the statute, the names of both parties must appear in writing: but it is said that the terms are satisfied if the note of the agreement contains a proposal which is acceded to by words. But I cannot concur in that way of putting it; the only difference between an 'agreement' and the 'note' of an agreement is that in the one instance, a formal agreement is meant and in the other something not so particular in form and technical accuracy, but still containing the essentials of the agreement. The essentials of the agreement must be stated, that is to say the subject matter of it, the extent of the liability contracted thereby, if any, and the names of both parties to it; and, I think, not only is that the fair construction to be put upon the statute, but when we look at the mischief intended to be prevented it is clear that the writing which constitutes a liability on one side without stating the name of the other party to whom it was given would lead to the very thing which the statute was intended to prevent, namely fraud."

Sub-paragraph (*a*) of para 4 makes two alternative requirements. Either the arrangement itself, not amounting to a binding contract, was made in writing, or it is evidenced by a memorandum or note thereof made in writing before 18 December 1973. Obviously these are requirements for the protection of the Revenue against fraud; since ex hypothesi there is no binding contract writing is not needed as a protection between the parties to the arrangement. The most obvious form of fraud is a fraud over dates in the backdating to before 18 December 1973 of an arrangement in fact only made afterwards. But that is not the only possibility of fraud. Sub-paragraph (*b*) shows that para 4 is not to be available if the terms of an arrangement previously made have been materially improved in favour of the vendor after 17 December 1973. Just as there is a possibility of fraud by the whole arrangement being falsely backdated to before 18 December 1973, so there is a possibility of fraud by an improvement in terms in favour of the vendor being so backdated and referred to an earlier date. If the whole arrangement is in writing, the Revenue will see all the terms of it, and will for the purposes of sub-para (*b*) be able to compare all those terms with the terms of the contract ultimately entered into. Common sense indicates to me that if the arrangement is not in writing, but is merely evidenced by a memorandum or note in writing, that memorandum or note must indicate all the principal terms of the arrangement, the essentials of the arrangement, rather than merely indicating that some unspecified arrangement has been made.

Apart from that, in ordinary English a memorandum or note of a meeting would be expected to record the principal matters decided or discussed at the meeting, and not just that a meeting was held. Similarly a memorandum or note of an agreement would be expected to record the principal terms of the agreement, and not merely to record that an agreement was made. So it seems

A to me that a memorandum or note of an arrangement should record the essentials or principal terms of the arrangement.

On the findings of the Commissioners, there were four matters discussed and, as I read the case, agreed in principle at the meeting of 15 November, of which there is no mention at all in any document prior to 18 December 1973, viz.: (1) that on a sale of the land the taxpayers would have to retain a right of B way over the land to give them access to other land which was to be retained by them, viz. the land edged blue on the plan V(ii) already mentioned; (2) that the taxpayers would have to remain in occupation of the land for a period of time (approximately one year) after completion of the sale; (3) that the sale of the land would be subject to the taxpayers acquiring a part, the land hatched green, by an exchange with an adjoining owners, and (4) that the sale was C subject to planning consent being granted (since the council required the land for purposes for which planning permission was needed and the taxpayers would not have been interested in selling for a price based on agricultural values only).

Of these, point 4 may perhaps be regarded as a condition to be worked out through para 3 rather than para 4 of Sch 4 to the 1974 Act, while point 3 D may, on a view favourable to the taxpayers, be regarded as a matter of title to the land hatched green, being part of the land to be sold.

But points 1 and 2 were extremely important points for the taxpayers as they wanted to establish a garden centre on the land edged blue. For traffic reasons they needed the reserved right of way to do this and they needed possession for a year or more after completion to realise or transfer their E stocks of plants and ensure continuity of trading.

A memorandum or note of an arrangement for the disposal of land would be inadequate for the purposes of sub-para (*a*), in my judgment, if it failed to indicate the price or the machinery arranged for fixing the price. In the present case the various documents which came into being before 18 December 1973 do indicate how the price was to be reached, and do, I think, sufficiently F identify the land concerned. But they fail to indicate at all the highly important terms as to the right of way to the land edged blue and as to possession after completion (which would not have been implied by law).

Consequently, there is no sufficient memorandum or note of the arrangement and the taxpayers cannot in my judgment avail themselves of para 4.

G If (contrary to my view) the finding of the Commissioners that the points to which I have just been referring were discussed at the meeting of 15 November does not imply a finding that those points were agreed in principle at that meeting, it would follow that those points were not terms of the arrangement made before 18 December 1973. But if that were so, the taxpayers would face the difficulty that the terms of the arrangement were materially H altered in favour of the taxpayers when the agreement of 7 May 1974 was made, and the taxpayers would therefore be unable to satisfy sub-para (*b*) of para 4.

I would for my part dismiss this appeal.

Sir John Donaldson M.R.—I have had the benefit of reading in draft the judgment of Dillon L.J. and agree with him, for the reasons which he has stated, that the learned Judge was not entitled to overrule the General Commissioners' finding that the taxpayers arranged before 18 December 1973 to dispose of their interest in the land edged pink, other than that part of it hatched green, to the council. I also agree with him that it is wholly irrelevant whether sentence (*a*) in para 4 of Sch 4 to the Finance Act 1974 was or was not modelled on s 40 of the Law of Property Act 1925.

The only issue in this appeal which I have found difficult is whether, on the true construction of para 4, the memorandum or note has to evidence all the material terms of the arrangement reached between the parties or whether something less is sufficient to entitle the taxpayer to the benefit of the paragraph. On this I confess that I have reached different conclusions at different times.

It is clear that there are three strands or lines of thought running through para 4. The first is that the rigid cut-off point provided by s 38, namely that the new and more onerous charge to tax shall apply to any disposal made after 17 December 1973 should be softened to give relief to those who had reached a point in the process of preparing to dispose and disposing of an interest in land at which it could fairly be said that a disposal had been arranged. The second is that taxpayers should not be unduly tempted to try to persuade themselves and the Revenue that they had arranged to dispose of an interest in land before 18 December 1973 when in fact they had not reached this stage until that or a later date. The third is that as it is in the nature of an arrangement to dispose of an interest in land that negotiations may continue after the transaction has been arranged, that is to say after there has been an understanding or agreement in principle that the interest in land shall be disposed of to another, some provision had to be made for a situation in which what was originally arranged differed materially from what was ultimately agreed and did so in such a way that a part of the benefit of the transaction really accrued from post-17 December 1973 rather than pre-17 December 1973 arrangements.

The problem in a nutshell is whether the provision that the arrangement shall be in writing or be evidenced by a note or memorandum thereof made in writing before 18 December 1973 is intended to give moral fibre to the taxpayer and protection to the Revenue in respect not only of the fact that a disposal has been arranged before the witching date, but also in respect of all the terms so arranged.

I accept that a note or memorandum of a meeting, an agreement or whatever, must speak of its subject-matter, but it may speak of it either summarily or at length according to the purpose for which it was created and the taste and temperament of the maker. Indeed sentence (*a*) of para 4 in terms requires the note or memorandum to evidence something. But that something is that "an owner of an interest in land . . . had before 18th December 1973 arranged (without entering into a binding contract) to dispose of that interest to another person". It is not the terms upon which the arrangement was reached. The contrast between evidencing an arrangement and evidencing the terms of that arrangement seems to me to be emphasised by a comparison between sentences (*a*) and (*b*) in para 4. The latter refers to "the terms of the arrangement" whereas the former does not, and could easily have done so.

This is not to say that there are no minimum requirements for such a note or memorandum. The interest must be identified and the note or memorandum must evidence an agreement in principle or understanding that that

A interest will be disposed of to another. In the instant appeal the note or memorandum relied upon not only does this, but it identifies the other person and records the machinery agreed upon for arriving at the price. It seems to me that anyone faced with a note or memorandum of this nature at the time at which it was made would, if sufficiently curious, have said to the taxpayers "I see that you have arranged to dispose of your land at Derby Road to the B council. What terms did you arrange?" and not "Have you arranged to sell your land?" In my judgment this is sufficient to satisfy sentence (*a*) of para 4.

It is true that this does not enable the Crown to apply sentence (*b*) by looking at and comparing two documents, but if that was what Parliament intended to happen, I think that it would and should have provided in sentence (*a*) that the terms of the arrangement should be evidenced by a note or C memorandum if the arrangement itself was not made in writing.

The full terms of the original arrangement and of the ultimate agreement were proved to the General Commissioners who were satisfied that the requirements of the sentence were met. The only respect in which they could have erred in law was in having regard to terms which were not evidenced by a note or memorandum, but, for the reasons which I have given, I do not think D that in so doing they did err.

Accordingly I would allow the appeal and restore the decision of the General Commissioners.

Sir George Baker—I agree that for the reasons given by my Lord the Master of the Rolls this appeal should be allowed. As we are differing from the learned Judge and from the conclusion of Dillon L.J. I shall add a few words E of my own.

The intention of the transitional provisions of para 4 of Sch 4 of the Finance Act 1974 must have been to exclude from the penal rate of taxation applicable to certain sales of land after 18 December 1973 those cases in which an owner of an interest in such land had before 18 December 1973 genuinely arranged to dispose of that interest. That would be elementary fairness and F would avoid any appearance of retrospective taxation. That there was such an arrangement, or agreement in principle, or understanding, in the present case is beyond argument. The Lowes had for a number of years sought to dispose of the land (Case Stated para 8).

The next requirement is that "the arrangement was made in writing". That did not happen here, but there is an alternative: "or is evidenced by a G memorandum or note thereof" which must have been made before 18 December 1973. I emphasise that it is the "arrangement" which has to be "evidenced" and that this is different from an "arrangement made in writing". There is no requirement that the terms of the arrangement are to be set out in the memorandum or note. It is sufficient in my opinion if it can be fairly said to evidence that the arrangement to dispose of the interest in land H has been made. Here it seems to me the object of the provision is to prevent fraud by the taxpayer alleging an oral arrangement which would be difficult for the Revenue to challenge.

The next stage is that the terms of the contract, which has to be entered into before 18 December 1973 and is in this instance dated 6 May 1974, "do not differ materially from the terms of the arrangement".

It would have been simple to provide that the evidence is to be by a memorandum or note setting out the terms of the arrangement but the words used are "memorandum or note thereof" that is of the arrangement. It cannot be amended or added to after 18 December 1973. So the contrast is between the terms of the contract on the one hand and the memorandum or note of the arrangement on the other, which may or may not contain any or all of the further terms. If it does not, then the Revenue is in a stronger position to argue that the terms of the contract differ materially and for this reason I have failed to follow their argument that they must be able to compare like with like and cannot do so if all the terms do not appear in the memorandum or note.

The General Commissioners had the oral evidence of five witnesses as well as all the relevant documents. I need not recite their findings. They allowed the appeal of the taxpayer in principle against the assessments to income tax in so far as they related to the land edged pink on the plan annexed to the contract excluding the land hatched green. They disallowed the appeals with regard to the land hatched green. The Lowes did not own that strip in 1973. It was then owned by Mr. Willoughby. Between 18 December 1973 and 6 May 1974 (the contract) they exchanged other land which they did own for Mr. Willoughby's green hatched land. That appears to have made no difference to the total area of 38.54 acres but of course the green hatched land did not fall within para 4 of the Schedule, for the Lowes were not the owners and there could not have been an arrangement to sell it. So in effect it was severed from the contract and is no longer the subject of dispute. Other terms could I think be severed from the contract to bear income tax rather than the lower rate capital gains tax, but it is unnecessary to consider this further.

Finally there remains in para 4 the safeguard for the Crown that if the terms of the contract do differ materially from the terms of the arrangement they "are not more beneficial to the said owner". The two matters which for this consideration I shall assume to be material and are not mentioned in any document prior to 18 December (1973) although discussed and apparently agreed at the meeting of 15 November 1973 are: (1) the retention by the Lowes of a right of way; (2) their right to remain in occupation for a year (clause 9 of the contract) and for a second year of such part of the land as the purchaser did not require for occupation (clause 10). There are of course no findings whether either term is or is not more beneficial to the owner. Beneficial must in its context mean financially beneficial, and I am unable to envisage a finding that the Lowes would be financially better off by these terms, because theoretically at least the reservation of a right of way by, or continuing rights of occupation to, a vendor would be balanced by a diminution of the purchase price. As there was no evidence I would presume no additional financial benefit.

It follows that the answer I would give to the question posed by the General Commissioners in para 14 of the Stated Case is that their decision is correct.

Appeal allowed, with costs. Leave to appeal granted by the Appellate Committee of the House of Lords.

The Crown's appeal was heard in the House of Lords (Lords Fraser of Tuyllybelton, Scarman, Roskill, Bridge of Harwich and Brightman) on 12 and 13 December 1984 when judgment was reserved. On 26 January 1984 judgment was given unanimously in favour of the Crown with costs

A *D. R. Wooley Q.C.* and *Robert Carnwath* for the Crown.

P. Whiteman Q.C. and *T. Mowchenson* for the taxpayers.

The following cases were cited in argument: *Edwards* v. *Bairstow* 36 TC 207; [1956] AC 14; *Morgan* v. *Tate & Lyle Ltd.* 35 TC 367; [1955] AC 21; *Sudbrook Trading Estate Ltd.* v. *Eggleton* [1983] 1 AC 444; *Williams* v. *Lake* (1859) 29 L.J.Q.B. 1.

B

Lord Fraser of Tullybelton—My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich, and I agree with it. For the reasons stated in it I would allow this appeal.

Lord Scarman—My Lords, the issue in the appeal is as to the true effect C of the transitional provisions of the Finance Act 1974 which introduced a new scheme for taxation of gains realised from the development of land. Transitional provisions in the field of taxation inevitably produce hardship. They require a line to be drawn: on one side, however close you are to the line, tax is avoided: on the other, however close, you are liable.

The instant case is a misfortune for the taxpayer. There was no fraud D upon the Revenue, no scheme to evade tax: had "the cookie crumbled in a different way", all would have been well for him. But albeit reluctantly, I am driven to the conclusion that although the taxpayer entered into a bona fide "arrangement" to dispose of his land to the local authority before the deadline set for the new tax, i.e. 18 December 1973, the arrangement is not "evidenced by a memorandum or note thereof so made before that date". The E "arrangement" fails, therfore, for lack of written evidence existing before the deadline, to avoid the incidence of tax under the transitional provisions contained in Sch 4, para 4 of the 1974 Act.

The paragraph requires that the landowner must have before 18 December 1973 arranged (without entering into a binding contract) to dispose of his interest in the land to another and that the arrangement was "made in F writing or is evidenced by a memorandum or note thereof so made before that date". The Commissioners, after considering a substantial volume of evidence, oral and written, concluded that the parties had made an arrangement to dispose of the land at a price to be agreed between the district valuer and the taxpayers' surveyor. I respectfully agree with Dillon L.J., who delivered the first judgment in the Court of Appeal, that there was ample G evidence to support the conclusion. Knowing that I am in a minority of one in this House in so thinking, I refrain, however, from developing my reasons.

On the second question raised in the appeal I find myself in complete agreement with the view expressed by my noble and learned friend, Lord Bridge of Harwich.

Relief under the Schedule is not available unless the arrangement was H either made in writing, which it was not, or is evidenced by a memorandum or note made before the deadline. Immediately a question of construction arises. Must the memorandum or note (which may consist of one or more documents) contain all, or all the essential terms of the bargain: or is it enough that it evidences the fact of an arrangement having been made, leaving it open to prove the terms by oral evidence? The majority of the Court of Appeal

thought that written evidence of the fact of an arrangement sufficed: but I find myself in agreement with Dillon L.J. "The memorandum or note", he said, "must indicate all the principal terms of the arrangement, the essentials of the arrangement, rather than merely indicating that some unspecified arrangement has been made". If one bears in mind that the mischief which this provision is designed to prevent is a fraud upon the Revenue, it is, indeed, common sense to require that a writing evidencing the essential terms of the arrangement should have come into existence before the date on which the introduction of the new tax was announced. Such a construction also accords with the natural and ordinary meaning of the words used.

Two terms of high importance to the taxpayer, though they were discussed on 15 November 1973 (the date when the arrangement was made) unfortunately fail to appear in any of the documents which, arising before 18 December 1973, can be relied on as constituting a memorandum or note of the arrangement. They are a term reserving to the taxpayer a right of way to land which he was retaining and a term granting him a right to remain in occupation of the land for a period of time (approximately a year) after completion. I agree with Dillon L.J. in thinking that these terms were of critical importance to the taxpayer. Their absence is, therefore, decisive. Two essential terms are not evidenced in any memorandum or note made before the deadline.

For these reasons, which are those of Dillon L.J., I would, with reluctance and regret, allow the Crown's appeal against the decision (by a majority, Dillon L.J. dissenting) of the Court of Appeal. The matter must be remitted to the Commissioners for the figures to be found, if not agreed.

Lord Roskill—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bridge of Harwich. I agree with it in all respects and for the reasons he gives I would allow this appeal and restore the order of Vinelott J.

Lord Bridge of Harwich—My Lords, by an agreement dated 6 May 1974 the Respondent taxpayers agreed to sell 38.54 acres of land near Derby Road, Beeston to the Browtowe District Council for £900,000. The agreemnet was conditional on the grant of planning permission for residential development of 27.74 acres of the land and for amenity purposes of the balance of 10.80 acres. This condition was fulfilled by the grant of the appropriate permission on the following day.

Since this was the disposal of an interest in land made after 17 December 1973, a proportion of the gain accruing to the taxpayers on the disposal, calculated in accordance with a formula with which your Lordships are happily not concerned, was *prima facie* required by s 38 of the Finance Act 1974 (the Act) to be treated as income and became chargeable to income tax instead of capital gains tax. The then Chancellor of the Exchequer announced the Government's intention to introduce this new tax in the House of Commons on 17 December 1973. Hence the significance of that date in s 38(1) of the Act. As was to be expected, however, the Act embodied transitional provisions granting relief from the new tax in certain cases. The question raised by this appeal is whether the taxpayers are entitled to the benefit of that relief.

The relevant transitional provisions are found in paras 1, 3 and 4 of Sch 4 to the Act, which provide as follows:

> "1. in this Schedule 'the principal section' means section 38 of this Act. . . . 3. If the disposal of an asset under a conditional contract entered

into before 18th December 1973 is made for a consideration not depending wholly or mainly on the value of the asset at the time the condition is satisfied, then for the purposes of subsection (1) of the principal section the contract shall in relation to the disposal be treated (on the condition being satisfied) as if it had never been conditional. 4. Where an owner of an interest in land to which the principal section applies had before 18th December 1973 arranged (without entering into a binding contract) to dispose of that interest to another person and—(*a*) the arrangement was made in writing, or is evidenced by a memorandum or note thereof so made before that date; and (*b*) he disposes of the interest to that other person under a contract entered into before 18th December 1974 of which the terms do not differ materially from the terms of the arrangement or, if they so differ, are not more beneficial to the said owner, the contract—(i)if not conditional, shall be treated for the purposes of subsection (1) of the principal section as if made before 18th December 1973; or (ii) if conditional, shall be treated for the purposes of the preceding paragraph as if entered into before that date."

At all stages of this litigation until it reached your Lordships' House, the argument has been confined to two issues, viz. (1) whether the taxpayers had before 18 December 1973 arranged to dispose of the land which they then owned (the major part of the 38.54 acres eventually sold) to the Beeston and Stapleford Urban District Council (the statutory predecessor of the Broxtowe District Council); and (2) if so, whether there was a sufficient memorandum or note of the arrangement made in writing to satisfy the requirement of para 4(*a*) of Sch 4. It has been assumed that, if both these questions were answered affirmatively in favour of the taxpayers, they would be entitled to relief under para 4, and it is on this basis that the taxpayers' claim to relief was upheld by the General Commissioners and the majority of the Court of Appeal. At an early stage in the argument before your Lordships the question was raised whether this assumption was well founded. The concluding provisions of para 4 numbered (i) and (ii) distinguish between disposals made under unconditional and conditional contracts. The former are granted direct relief under para 4; the latter qualify for relief only if the requirements of para 3 are also satisfied. The point having been raised, the revenue sought and obtained leave to argue that, even if the points decided in favour of the taxpayers below had been rightly decided, the taxpayers must still fail since the relevant disposal was made under a conditional contract which was not "made for a consideration not depending wholly or mainly on the value of the asset at the time the condition is satisfied". This further argument presents formidable difficulties for the taxpayers. But these will never be reached unless they can sustain the decision of the Court of Appeal in their favour that they had made before 18 December 1973 an arrangement to dispose of their land evidenced by a sufficient memorandum or note in writing for the purposes of para 4.

Nothing turns on the change in the identity of the authority interested in acquiring the taxpayer's land when, on 1 April 1974, the Beeston and Stapleford Urban District Council was replaced by the Broxtowe District Council. It will be convenient to refer simply to "the council".

A representative of the council met the taxpayers and their solicitor on 15 November 1973. They discussed various aspects of a possible sale to the council of the land which was eventually sold under the contract dated 6 May 1974. Between the date of that meeting and 18 December 1973 the taxpayers

instructed their surveyor and the council instructed the District Valuer to enter into negotiations with a view to agreeing a price for the land. A

Somewhat curiously, the General Commissioners, in the case they have stated, nowhere make a finding in terms that the taxpayers had, before 18 December 1973, arranged to dispose of the interest in the land which they then owned to the council, but no doubt such a finding must be inferred from the Commissioners' decision to allow the taxpayers' appeals against assessments to income tax insofar as they related to that land. Such a finding could only be based on the discussion at the meeting on 15 November 1973 followed by the instruction of valuers to negotiate a price. B

It will be necessary later to consider in more detail the General Commissioners' findings as to what passed during the discussion on 15 November 1973. But for the purpose of deciding the first point raised by the appeal it is only necessary to observe that the arrangement between the parties certainly did not extend to the ascertainment of a figure acceptable in principle to both parties as the price to be paid for the land. Leaving aside the possible exceptional case where agreement in principle has been reached for the price to be determined by some form of arbitral machinery, which was certainly not this case, it seems to me that agreement of a price in principle is an essential ingredient of an arrangement to dispose of an interest in land capable of satisfying the requirements of para 4 of Sch 4 to the Act([1]). The operation of para 4 requires that "the terms of the arrangement" shall be compared with the terms of the contract later concluded to ascertain whether they differ materially and, if they do, whether the contract terms are more beneficial to the owner than the terms of the arrangement. If the arrangement is such as to leave the price to be paid for the land entirely at large, there can be no basis for making such a comparison. Accordingly on this point I agree with Vinelott J., who allowed the Crown's appeal from the General Commissioners, that there was no arrangement within the meaning of para 4. C D E

The Court of Appeal were unanimous in taking the view that the question whether there had been an arrangement made within para 4 was one of fact on which the conclusion of the General Commissioners could not be disturbed. For the reasons indicated in the foregoing para I respectfully disagree. But on the further question what was required to constitute a sufficient memorandum or note in writing of a para 4 arrangement the Court of Appeal were divided. The majority (Sir John Donaldson M.R. and Sir George Baker) Held that a memorandum or note evidencing the bare fact that an arrangement had been made to dispose of the relevant interest in land was sufficient. Dillon L.J. held that the memorandum or note must also evidence at least the principal terms of the arrangement. F G

As found by the General Commissioners, the terms of the arrangement resulting from the discussion on 15 November 1973 included the following: (i) the sale would depend on the acquisition by the taxpayers, by an exchange of land, of that part of the subject land which they did not already own; (ii) on the sale of the subject land the taxpayers would retain a right of way thereover to provide access to other land which they were to retain; (iii) the taxpayers would remain in occupation of the subject land for approximately one year H

([1]) Page 497 *ante*.

A after completion of the sale; (iv) the sale would be conditional on the grant of planning permission. It can perhaps be inferred from the commissioners' findings as a whole that the permission contemplated was for residential development, but the extent of the permission required was not specified.

All these four matters were of obvious importance. None of them is mentioned in any memorandum or note in writing which came into existence B before 18 December 1973(1). In the event the taxpayers were able to effect the exchange of land contemplated by (i) which enable them to sell the whole of the subject land. The contract did reserve to the taxpayers a right of way over the land sold. The contract did provide for the taxpayers to remain in occupation of the land for one year after completion and for up to a further year of such part of the land as was not required for occupation by the council. C Correspondingly payment of £200,000 of the purchase price was deferred until possession was given of the whole. Finally, as already mentioned, the contract was subject to a detailed condition with respect to the grant of planning permission.

The point arising on the construction of para 4(*a*) is a short one. Sir John Donaldson M.R. and Sir George Baker based their judgment on the contrast D between the express reference to "the terms" of the arrangement in para 4(*b*) and the omission of any such reference in para 4(*a*). With respect, I do not find this contrast significant. The context of para 4(*b*) essentially requires an express reference to the terms of the arrangement. Such a reference is not, however, required in para 4(*a*) any more than it was in the parallel language of s 40 of the Law of Property Act 1925 which the draftsman must have had in E mind in drafting this provision. What is to my mind of significance is that para 4(*a*) can be satisfied in one of two ways. The arrangement must either be "made in writing" or "evidenced by a memorandum or note thereof so made" (cf. s 40 of the Law of Property Act 1925 "unless the agreement . . . , or some memorandum or note thereof, is in writing"). An arrangement made in writing must necessarily embody in the writing all the terms arranged. It F would, in my view, be extremely surprising if the alternative of a written memorandum or note was sufficient to satisfy the statute if it merely recorded the fact that an arrangement had been made without setting out the essential terms arranged. But the language used points strongly against this conclusion. The key word in para 4(*a*) is "thereof". A memorandum or note recording that an arrangement has been made, of which the terms are not specified, G cannot accurately be described as a memorandum or note of that arrangement. The only document which can properly be so described is one in which the essential terms of the arrangement are recorded. Accordingly, on this point too, I agree with the learned Judge and Dillon L.J.

In the event it becomes unnecessary to deal with the conditional contract point. I would allow the appeal, restore the order of the learned Judge.

H **Lord Brightman**—My Lords, I would allow this appeal for the reasons given by my noble and learned friend, Lord Bridge of Harwich, with which I respectfully agree.

Appeal allowed, with costs.

[Solicitors:— Solicitor of Inland Revenue; Messrs. Swepston Walsh & Son.]

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(1) Page 497 *ante*.

Printed for Her Majesty's Stationery Office by Commercial Colour Press, London E7. 10/86, C44, Dd.738232.