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Common Law and Tax Avoidance : Back to the Future?

Abstract
[Extract]In a series of House of Lords decisions, commencing with the swinging judgments in WT Ramsay Ltd v IRC1 and followed by *Furniss v Dawson*,[2] it was established that where there is a preordained transaction or series of transactions having steps inserted for no commercial purpose other than tax avoidance, those steps can be disregarded and the relevant statutory provision will be applied to the end result.

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COMMON LAW AND TAX AVOIDANCE: BACK TO THE FUTURE?

By Andrew Halkyard[*]

The House of Lords: early days

In a series of House of Lords decisions, commencing with the swinging judgments in *WT Ramsay Ltd v IRC*[1] and followed by *Furniss v Dawson*,[2] it was established that where there is a preordained transaction or series of transactions having steps inserted for no commercial purpose other than tax avoidance, those steps can be disregarded and the relevant statutory provision will be applied to the end result.

Although generally couched in terms of statutory interpretation, the *Ramsay* approach – as it is now more commonly known – appeared to take on a life of its own as some of the former epithets applied to it vividly illustrate: 'the doctrine of disregard', 'the principle of fiscal nullity' and 'judge-made anti-avoidance weapon'.[3] These terms, either damning or laudatory depending on one's point of reference, nevertheless masked a significant degree of uncertainty as to exactly what *Ramsay* authorised revenue authorities to do. This tension was clearly illustrated by a later House of Lords decision, *Ensign Tankers (Leasing) Ltd v Stokes*,[4] where a thorough review of the United Kingdom tax avoidance cases commencing from *Floor v Davis*[5] to the well-known *Craven v White*[6] was undertaken.

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1 [1982] AC 300.

2 [1984] AC 474.

3 This matter is best illustrated by Lord Hoffmann in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 who stated at 332 that: 'in the first flush of victory after the *Ramsay*, … and *Furniss* cases, there was a tendency on the part of the Inland Revenue to treat Lord Brightman's words [in *Furniss v Dawson*] as if they were a broad spectrum antibiotic which killed of all anti-avoidance schemes, whatever the tax and whatever the relevant statutory provisions'.

4 [1992] 1 AC 655.

5 [1978] Ch 295.

6 [1989] AC 398.

In *Ensign Tankers* a company became a partner of a limited partnership that had acquired the right to produce the film '*Escape to Victory*'. Although 75% of the cost of making the film was financed by way of a non-recourse loan from the production company, the company claimed the benefit of depreciation allowances based upon the full amount of the production cost. The House of Lords disallowed the claim, but allowed depreciation calculated on the 25% of the cost for which the limited partnership was at risk. Following *Ramsay*, and in terms of the relevant statutory wording,[7] the House of Lords examined the transaction as a whole and concluded that the limited partnership had only '*incurred capital expenditure on the provision of machinery or plant*' of 25% and no more.

Analysed in terms of statutory interpretation, *Ensign Tankers* has provoked continued debate;[8] but it was perhaps Lord Templeman's judgment that aroused greatest controversy, where he stated, in typically direct and arresting language, that:[9] in terms of *CIR (NZ) v Challenge Corporation Ltd*[10] the transaction amounted to 'tax avoidance' since the company 'reduced [its] liability to tax without involving [it] in the loss or expenditure which entitles [it] to that reduction'; and in terms of *Ramsay* a tax avoidance scheme was carried out since the company attempted by an 'apparently magical result' to create a tax loss which was not a real loss. Stirring language, but hardly comforting to taxpayers and their advisers who wondered what *Ramsay* was really all about and where it was all going.

To provide further flavour of this tension, it is useful to recall that since the decision of the House of Lords in *Craven v White*,[11] courts in the United Kingdom have contrasted the concepts of 'unacceptable tax avoidance' and 'acceptable tax mitigation', a distinction first made by Lord Templeman in *Challenge Corporation*.

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7 Finance Act 1971 (UK) (c 68) s 41(1).

8 Contrast, most recently, *Barclays Mercantile Business Finance Ltd v Mawson* [2003] STC 66 (CA), a case involving a sale and leaseback transaction, financed by a Byzantine flow of funds (essentially circular where the purchase price never passed out of the network created by the various agreements and was never freely available to the vendor). The Court of Appeal rejected the Inland Revenue's claim that arrangements were all fiscal or financial engineering and that the purpose of the expenditure was not to acquire plant but rather to obtain depreciation allowances. The case is currently subject to an appeal by the Inland Revenue to the House of Lords.

9 Ibid 675, 676.

10 [1987] AC 155.

11 [1989] AC 398.

Lord Goff in *Ensign Tankers* explained the meaning of unacceptable tax avoidance in this way:[12]

Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed.

This dictum may, in turn, be contrasted with the subsequent House of Lords decision, *MacNiven v Westmoreland Investments Ltd*,[13] a case analysed in detail below, where Lord Hoffmann (with whom the other Law Lords agreed) examined the question whether it is possible to define the parameters of the *Ramsay* approach by asking whether the taxpayer's actions constitute acceptable tax mitigation or unacceptable tax avoidance. Lord Hoffmann held:[14]

The fact that steps taken for the avoidance of tax are acceptable or unacceptable is the conclusion at which one arrives by applying the statutory language to the facts of the case. It is not a test for deciding whether it applies or not. … It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes.

The Rejection of Ramsay in Australia and Canada

Although we will now depart, in terms of a strict time line, from a chronological history of the reception and development of the *Ramsay* approach in the United Kingdom, it was always clear – even without the benefit of hindsight – that the high-water mark would change, change rapidly, and (from some perspectives) change capriciously. It is little wonder then that other common law jurisdictions, such as Australia and Canada, which unlike the United Kingdom had enacted general anti-avoidance rules,[15] were hostile to the reception of this 'foreign' approach.

The early Australian cases, *Patcorp Investments Ltd v FCT*[16] and *Oakey Abattoir Pty Ltd v FCT*,[17] rejected the notion that the principles enshrined in cases such as *Ramsay* and

12 [1992] 1 AC 655, 681.

13 [2003] 1 AC 311.

14 Ibid 335 – 336.

15 See, respectively, the *Income Tax Assessment Act 1936* (Cth) s 260 and Part IVA (Australia) and the *Income Tax Act* (chap 63) s 245 (Canada).

16 76 ATC 4225.

Furniss v Dawson had any application to the Income Tax Assessment Act (Cth). These decisions indicated that it was not possible for the Commissioner to overcome any perceived weakness in section 260 (and by implication the later Part IVA) by invoking the so-called *Ramsay* doctrine.[18] A more authoritative case, which reached the same result, was the High Court decision in *John v FCT*.[19] It is important, however, to appreciate that these cases should be viewed in the context of the Commissioner attempting, at an early stage in the development of the *Ramsay* jurisprudence, to argue that a general concept of 'fiscal nullity' applied in Australia. Clearly, Australian courts were dismissive of any general judge-made principle of 'end result' or 'economic equivalence' in its tax jurisprudence, given the existence of general anti-avoidance statutory provisions available to the Commissioner.[20]

It is instructive, therefore, to note that by the early 1990's the Commissioner attempted to narrow the scope of argument by contending in *Sonenco (No 87) Pty Ltd v FCT*[21] that the *Ramsay* approach established:

> … that where a taxing statute makes liability depend upon the existence of a circumstance defined in terms of a legal concept (for instance, 'sale' or 'loss') and where the sole purpose of a pre-ordained series of transactions is to cause that circumstance to occur for a taxation purpose, the scheme fails because the 'true' definition of that circumstance in a taxing statute excludes a circumstance created for such a sole purpose.

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17 (1984) 15 ATR 1059. The Full Federal Court stated, at 1067, that any presumed general principle 'should be perceived as no more than rules governing the statutory interpretation of the United Kingdom legislation for the taxation of capital gains'.

18 See Upfold, 'A section 8-1 loss' (2004) 33 *AT Rev* 8, 16 – 18 for a useful summary of the current Australian jurisprudence on this topic. See further, Mossop, 'Tax Avoidance Legislation and the Prospects for Part IVA' (1997) 26 *Australian Tax Review* 70, 72-3; Slater, 'Sham and Substance' (1999) 28 *Australian Tax Review* 197, 215-7.

19 (1989) 20 ATR 1. In this case the High Court stated at page 11 that: '[The Commissioner] argued that s 51 should be construed so as to exclude therefrom a loss or outgoing that has been artificially contrived by a preordained series of transactions or a composite transaction into which there have been inserted steps which have no commercial purpose apart from the avoidance of a liability to tax. If that construction is to be reached as a matter of implication … [then] the presence of s 260 precludes that approach. If it is advanced as a matter excluded by the plain meaning of s 51, there is no occasion to resort to any new principle of construction. … We would thus reject the principle of fiscal nullity as one appropriate to be adopted in the construction of the Act generally, or one appropriate to be adopted in the construction and application of s 51.'

20 Upfold, 'A section 8-1 loss' (2004) 33 *Australian Tax Review* 8, 16.

21 (1992) 24 *Australian Tax Review* 375, 416, cited by Upfold, ibid 17.

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The response of the Full Federal Court was noteworthy for its clarity and brevity:[22]

> Although it may be accepted that there is no specific anti-avoidance provision in the sales tax legislation of the kind relied upon in *John*, we have difficulty in accepting either of the Commissioner's submissions.
>
> … If it be the case (and the position in the United Kingdom is not clear) that the *Ramsay* principle stands for a special rule of statutory interpretation in certain circumstances then, in our view, that rule does not extend to the sales tax legislation now in question.

Further Commonwealth authority, such as the Canadian Supreme Court decision in *Stubart Investments Ltd v R*[23] and the Hong Kong Inland Revenue Board of Review in *D 52/86,*[24] supported the conclusion reached in *John's* case. The common thread in all these cases is that the principles established in *Ramsay* and the subsequent decisions of the House of Lords applying and explaining it are not applicable where the relevant domestic taxation legislation contains a general anti-avoidance rule.[25]

Re-evaluation of *Ramsay* by the House of Lords?

It is, arguably, not entirely correct to speak of the 'Re-evaluation of *Ramsay'*, but it is entirely accurate to say that the more recent decisions of the House of Lords in *IRC v McGuckian*[26] and *MacNiven v Westmoreland Investments Ltd*[27] have re-emphasized the *Ramsay* approach as a principle of statutory interpretation rather than an over-arching anti-avoidance doctrine imposed upon taxation legislation.

The facts in *McGuckian* (involving a transfer of shares to a non-resident trust followed by the sale by the beneficiaries and controller of the company of the right to the dividends from the shares for a lump sum intended to be capital in nature) seemed to fall squarely within the ambit of *Furniss v Dawson*. It thus not surprising that the Inland Revenue was successful in this appeal. However, a majority in the House of

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22 Ibid.

23 [1984] 1 SCR 536; (1984) CTC 294.

24 (1987) 2 IRBRD 314.

25 This statement is repeated uncritically in several standard Australian texts. See, eg, CCH, *Australian Master Tax Guide 2004* at ¶30-000: 'The High Court has held that the doctrine of fiscal nullity, developed by the UK courts to strike down artificial tax avoidance arrangements, does not apply in Australia because of the general anti-avoidance provisions contained in Part IV (*John*).'

26 [1997] 1 WLR 991.

27 [2003] 1 AC 311.

Lords stressed that the *Ramsay* approach is ultimately concerned with statutory interpretation and, however it may operate, income or gains can only be assessed and deductions only allowed in accordance with the legislative wording. For instance, Lord Steyn stressed that all taxation must be interpreted in a 'purposive' way and that pure literalism must be rejected.[28] Thus, although a series of transactions may, following the *Ramsay* approach, be examined as a whole rather than as discreet transactions, the terms of the statute must still apply to the end result.[29] Lord Cooke stated:[30]

> [the *Ramsay*] approach to the interpretation of taxing Acts does not depend on general anti-avoidance provisions such as are found in Australasia. Rather, it is antecedent to or collateral with them.

MacNiven v Westmoreland Investments Ltd is the most recent pronouncement by the House of Lords on the scope of the *Ramsay* approach, and is worthy of detailed study given its finding in favour of the taxpayer and the bold, leading judgment delivered by Lord Hoffmann.[31] At the outset, Lord Hoffmann reiterated that taxation statutes must be interpreted in a 'purposive' manner to achieve the intention of the legislature. *Ramsay* and *Furniss v Dawson* are said to be examples of this fundamental principle. Nevertheless, Lord Hoffmann stressed that this is not a principle of construction but rather 'a statement of the consequences of giving a commercial construction to a fiscal concept'. Lord Hoffmann thus introduced a new, and seemingly very limiting, factor by explaining that the *Ramsay* approach relates to considering the meaning of 'commercial concepts' (namely, to which parliament intended to give a commercial meaning) such as 'profits', 'gains', 'disposal', 'loss' and 'capital'. This context must be distinguished from statutory provisions intended to reflect 'legal concepts' (namely, ones where a commercial man would say 'you had better ask a lawyer') such as 'conveyance on sale' or 'payment', which have no broader commercial meaning, and to which the *Ramsay* approach does not apply.

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28 [1997] 1 WLR 991, 1002.

29 An interesting illustration of this conclusion can be found in the Hong Kong estate duty case of *Shiu Wing Ltd v Commissioner of Estate Duty* [2000] 3 HKLRD 76, accessible electronically at http://legalref.judiciary.gov.hk under the heading 'Final Appeal (Civil)' (1999). In this case, Sir Anthony Mason NPJ, who gave the leading judgment (all other judges agreeing), held that although *Ramsay* could apply on the basis that 'round-robin' financing had no commercial purpose other than the avoidance of duty and thus could be disregarded, the end result did not disclose any dutiable assets located in Hong Kong as at the date of death.

30 [1997] 1 WLR 991, 1005.

31 [2003] 1 AC 311, 325-37.

Where, having construed the statutory language in question and having decided that it refers to a concept which parliament intended to be given a commercial meaning capable of transcending the juristic individuality of its component parts, then effect is given to the concept by having regard to the business substance of the matter. In Lord Hoffmann's words, this 'is not to ignore the legal position but to give effect to it'. But even this formulation has limits, since Lord Hoffmann goes on to state:[32]

> Even if a statutory expression refers to a business or economic concept, one cannot disregard a transaction which comes within the statutory language, construed in the correct commercial sense, simply on the ground that it was entered into solely for tax reasons.

By way of contrast, Lord Hoffmann stated that where parliament intended to give a legal meaning to a statutory term or phrase, then the *Ramsay* approach does not require or permit an examination of the commercial nature of the transaction. Rather, it requires a consideration of the legal effect of what was done.

In *Westmoreland Investments* (involving a claim to deduct interest 'paid' pursuant to a tax motivated transaction assisted by a tax exempt body), Lord Hoffmann examined whether the company had actually paid the interest and, if so, whether there was any reason to conclude that the legislature had not intended to allow the deduction of the interest in the circumstances. In the event, all the Law Lords could find no reason for giving the word 'paid' anything other than its normal legal meaning and it made no difference that the transaction had no business purpose. The obligation to pay the interest was genuine, the taxpayer had incurred the economic burden intended by the legislature, and the deduction was thus allowed.

Westmoreland Investments was followed by the UK Court of Appeal in *DTE Financial Services Ltd v Wilson*.[33] In that case, the term 'payment' in the context of the UK pay-as-you-earn legislation was found to be a commercial term and an arrangement involving the assignment by an employer of a contingent reversionary interest under a settlement to an employee, which fell into possession almost immediately thereafter providing the employee with a cash sum, was held to involve a direct payment of cash from the employer to the employee for the purposes of PAYE.

The decision in *Westmoreland Investments* has provoked a great deal of debate and controversy, and there is no doubt that further developments can be expected. One

32 Ibid 334.

33 [2001] STC 777.

reason is that *Westmoreland Investments* did not overrule any of the earlier cases, such as *Furniss v Dawson* and *McGuckian*; rather, Lord Hoffmann attempted to reconcile them with his approach to *Ramsay*. However, his approach does not sit well with these earlier cases. In addition, although the other judges, Lord Nicholls, Lord Hope and Lord Hutton, all expressly approved Lord Hoffmann's judgment, their comments may provide scope for differing applications of the *Ramsay* approach in the future.[34] Second, although *Westmoreland Investments* is another example of the common law courts seeking to limit the potential ambit of the *Ramsay* approach, it is not at all clear how Lord Hoffmann's statutory dichotomy between 'legal' and 'commercial' will be applied in future. In this regard, it seems fair comment that Lord Hoffmann has left us with a map or guide for statutory interpretation, but one without a legend.[35]

A further reason for anticipating future development in this area is that the purposive approach to statutory interpretation underlying the decision in *Westmoreland Investments* is simply inimical to formalistic tax planning which cloaks the economic substance of a transaction in legal form. As Lord Nicholls stated:[36]

> [The cases following *Ramsay*] cannot be understood as laying down factual pre-requisites which must exist before the court may apply the purposive, *Ramsay* approach to the interpretation of a taxing statute. … The need to consider a document or transaction in its proper context, and the need to adopt a purposive approach when construing taxation legislation, are principles of general application.

A brief South China perspective

The difficulties of accepting – and applying – Lord Hoffmann's reasoning in *Westmoreland Investments* were fully appreciated by Hong Kong's Court of Final Appeal in the stamp duty avoidance case, *Collector of Stamp Revenue v Arrowtown Assets Ltd*.[37] Lord Millett NPJ (a former judicial member of the House of Lords, with

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34 See Cape and Barrow, 'Tales of Hoffmann' *The Tax Journal* (9 April 2001) 21.

35 Ibid. For instance, in the *DTE Financial Services* case referred to above, the Court of Appeal concluded that, in the context of PAYE legislation, the concept of 'payment' was a practical commercial one and thus amenable to Lord Hoffmann's analysis. This is undoubtedly correct – but one is still tempted to compare the concept of 'paid' in *Westmoreland Investments* with 'payment' in *DTE Financial Services* and wonder where the difference lies. See further, Rycroft, 'And Payment Means …' *Taxation* (28 June 2001) 316. See further, n 38 below.

36 [2003] 1 AC 311, 319-20.

37 [2004] 1 HKLRD 77; accessible electronically at <http://legalref.judiciary.gov.hk/> under the heading 'Final Appeal (Civil)'.

whom all the other members of the court concurred) unequivocally stated that any limitation on the application of the *Ramsay* approach based on a supposed dichotomy between legal and commercial concepts appears based on a misunderstanding and is not supported by the authorities.

Ribeiro PJ stated that, although the *Ramsay* approach does not espouse any specialised principle of statutory construction applicable to tax legislation, whatever its language, it reasserts the need to apply orthodox methods of purposive interpretation to the facts viewed realistically. In Ribeiro PJ's view, this approach is untrammelled by any limits such as the 'commercial / legal' dichotomy espoused by Lord Hoffmann. A similar caution was expressed by Li CJ, who noted that it is confusing and complicating to treat judicial statements in cases following *Ramsay* as laying down a rigid code-like approach.

In summary, it is clear from the tenor of all the judgments in *Arrowtown* that the difficulties of fitting previous case law into Lord Hoffmann's legal or commercial classification are well recognised and, if a rigid dichotomy was indeed intended by Lord Hoffmann, then this should not be followed in Hong Kong. This conclusion makes eminent sense. As Lord Millett states:[38]

> In *Barclays Mercantile* [2003] STC 66 neither Peter Gibson LJ nor Carnwath LJ could understand [the supposed dichotomy between legal and commercial concepts], and counsel were unable to explain it. Nor is its source discernable.

Developments in New Zealand

The Australian High Court (*John*) and Canadian Supreme Court (*Stubart Investments*) cases on the pre-emption of the *Ramsay* approach by general anti-avoidance statutory provisions have been examined above.[39] Two subsequent Privy Council cases involving New Zealand law took a different view. In *O'Neil v CIR (NZ)*[40] a tax avoidance scheme (involving a distribution, using a conduit, of corporate profits to shareholders in a form re-labeled as a capital payment rather than dividends) fell squarely within the general anti-avoidance provision contained in the New Zealand

38 Above n 3, para 148.

39 See further, Arieli, 'The Law of Tax Avoidance in New Zealand' (2002) 31 *Australian Tax Review* 24, 37 who, writing from a comparative New Zealand perspective, concludes that: 'whether the fiscal nullity doctrine will be adopted in respect of New Zealand's tax legislation is yet to be authoritatively determined'.

40 [2001] STC 742.

Income Tax Act 1976.[41] Lord Hoffmann, however, took the approach that the principles of statutory construction followed in *Westmoreland Investments* were equally applicable to the interpretation of New Zealand statutes, even though New Zealand has a general anti-avoidance rule. Similarly, in *CIR (NZ) v Auckland Harbour Board,*[42] a case involving the application of a specific anti-avoidance provision in the New Zealand Income Tax Act, the approach taken was one of interpretation of the relevant statutory wording. In the course of his judgment, Lord Hoffmann said:[43]

Some of the work such [anti-avoidance] provisions used to do has nowadays been taken over by the more realistic approach to the construction of taxing acts exemplified by *WT Ramsay Ltd v IRC*, although their Lordships should not be taken as casting any doubt upon the usefulness of such tax avoidance provisions as a long stop for the Revenue.

Adopting this analogy, since *Ramsay* is apparently on the field (and not as 12th man), the question Lord Hoffmann has not addressed is how far back is the longstop?

Re-evaluation of Ramsay in Australia?

As explained above, the approach currently taken in Australia (as well as other common law jurisdictions such as Canada and Hong Kong) is that it is not possible for the Commissioner to rely on the *Ramsay* approach for income tax purposes, in light of the existence in the *Income Tax Assessment Act* of a general anti-avoidance provision. But this position, established well over a decade ago, may no longer be correct in light of *O'Neil v CIR (NZ)* and other cases such as *McGuckian*, which redefined the *Ramsay* approach and highlighted that it was essentially an aid to statutory interpretation and not a wide-ranging power allowing courts to simply disregard tax-motivated transactions.

One commentator has argued that:[44]

> The High Court [of Australia] probably does not want to see the matter reviewed, it being no doubt confident that Part IVA of the ITAA 1936 (more so than did s260, which was discussed in *John v FCT*), governs the matter, dealing as it specifically does in s 177D(b) with matters like 'form and substance'; and especially as it includes a reference to changes in the

41 Section 99.

42 [2001] 3 NZLR 289; (2001) NZTC 17,008.

43 [2001] 3 NZLR 289, 299.

44 Upfold, 'A section 8-1 loss' (2004) 33 *Australian Tax Review* 8, 17-18.

> taxpayer's financial position.
>
> … It is also suggested that the bludgeoning and smothering manner in which the matter was argued, as was done on behalf of the Commissioner in prior cases, soured the courts on the relevance [of the *Ramsay* approach] to Australian tax jurisprudence. Notwithstanding the finesse now placed on the *Ramsay* line of cases in the United Kingdom and whilst recognising the narrower view might have had some relevance to a s 260 situation, Part IVA easily fills the gap that might have existed and it is not therefore easy to see how any court would reinvigorate the debate.

Judged from the perspective adopted by Upfold in the above quotation, the argument is likely correct. Specifically, it seems clear that the courts in Australia have not given Part IVA an overly restricted application – although, as to be expected, the pendulum has swung alarmingly in individual cases. It thus appears that the scope of this general anti-avoidance regime is sufficiently wide to make any argument based on the common law developments in the United Kingdom, New Zealand and elsewhere largely academic.[45]

Notwithstanding this conclusion, however, on the basis of the recent decisions of both the House of Lords and the Privy Council discussed above, it is not implausible to suggest that Australian courts may in future be required to re-examine this issue. More significantly, the scope of the possible application of the *Ramsay* approach is, as we have seen from the New Zealand cases discussed above, wider than the question of whether it could overcome any perceived weakness or deficiency in Part IVA. For instance, as in *Auckland Harbour Board*, it may be open to the Commissioner to rely upon *Ramsay* in interpreting legislation where an arrangement was not challenged under the terms of Part IVA. This reliance flows from a recognition that *Ramsay* is an aid to statutory interpretation and not a wide-ranging power allowing courts to simply disregard tax-motivated transactions. However, this argument may well be double-edged. Specifically, if having applied the *Ramsay* approach to interpret a particular statutory provision the tax result achieved is what the legislature presumably intended would be achieved, it could then be very difficult for the Commissioner to argue that a tax benefit should be denied by virtue of Part IVA or by a specific anti-avoidance provision.[46]

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45 Support for this conclusion can be found in Canadian jurisprudence, where the first two cases involving Canada's general anti-avoidance rule resulted in robust judgments in favour of the Revenue: see Arnold, 'Revenue Canada: 2, Taxpayer: 0' *Tax Notes International* (May 5, 1997) 1423.

46 Compare 'Tax Avoidance: the Pendulum Returns?' *Residential Tax Conference, New Zealand*, 2001 (unpublished; copy of paper on file with the author).

Conclusion

To conclude, for the Commissioner to ask Australian courts to re-evaluate whether the *Ramsay* approach can be applied to the Income Tax Assessment Act involves a fine and interesting conundrum.[47] Intuitively, it seems in the interest of the Commissioner to do so, notwithstanding the decision of the High Court in *John's* case, and for taxpayers to resist. Yet, both the Commissioner (and tax advisers) well appreciate the utility (and danger) of having, in Lord Hoffmann's words, the penumbra of Part IVA acting as a 'longstop'. The dilemma is clear – if the *Ramsay* approach could now apply in Australia and if, as in *Westmoreland Investments*, this favoured the taxpayer, what effect would this have in similar cases where, on reflection, the Commissioner considers that Part IVA should be invoked?

Some readers may consider it preferable to leave matters exactly as they are – but history and human nature tells us that this is not always the best approach and that change is hard to resist, particularly when based upon a compelling doctrine that the intention of the legislature is crucial to proper statutory interpretation.[48] Whether the answer bolsters, or hamstrings, Part IVA is really not to the point.

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47 Pagone, 'Tax Planning or Tax Avoidance' (2000) 29 *Australian Tax Review* 96 poses a related, and thoughtful, question: 'At the heart of the riddle [of when tax planning becomes tax avoidance] lies a logical conundrum. The fundamental problem with any general tax avoidance provision is that it will necessarily seek to tax something which would not otherwise be taxable. The significance of this should not be underestimated because anti-avoidance provisions are necessarily aimed at otherwise effective and permissible tax planning.'

48 See generally, Lonnquist, 'The Trends Towards Purposive Statutory Interpretation: Human Rights at Stake' (2003) 13 *Revenue LJ* 18 who interestingly, whilst acknowledging the authority of this doctrine, argues in favour of the literal approach to statutory interpretation of taxation legislation, on the basis that this will enable taxpayers' rights to be best protected.

In the event, it seems inevitable that Australian courts will need to go back to *Ramsay* to see whether it really represents our future.[49]

49 With further apologies to Steven Spielberg.
Postscript: After writing this article, I discovered a further note by John Tallon QC, 'Back to the Future?' *Taxation* (25 March 2004) 619-21, who sets out his view of the ramifications of the *Arrowtown* case. Not only do the titles share the same cinematic predeliction, a common theme emerges when Tallon concludes:
'The Revenue will no doubt embrace *Arrowtown* warmly, although as I have mentioned it is capable of working against it. *Arrowtown* in my view introduces if not a fresh journey, at least a fresh detour from the journey on which we all thought we had embarked back in 1981. Many of the ramifications of *Arrowtown* are worrying and one can only hold one's breath to see what yet another panel of Law Lords will make of it' [perhaps sooner rather than later in the pending *Barclays Mercantile* appeal: see text accompanying n 38 above].