JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 153/2001

REVENUE COURT APPEAL NO: 3/1999

BEFORE: **THE HON. MR. JUSTICE FORTE, P**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE CLARKE, J.A. (AG.)

BETWEEN	**THE STAMP COMMISSIONER**	**APPELLANT**
A N D	**CARRERAS GROUP LIMITED**	**RESPONDENT**

B. St. Michael Hylton Q.C. Solicitor-General and **Garfield Haisley** instructed by **The Director of State Proceedings** for the Appellant

Richard Mahfood, Q.C. and **Miss Yolande Whitely** instructed by **Dunn Cox** for the respondent.

April 15, 16, 17, 18 ; May 13, 14 and July 31, 2002

FORTE, P:

I have read in draft, the judgment of Clarke, J.A. (Ag.) and agree with the conclusion therein. Nevertheless, I add a few words of my own.

The real question in the appeal is whether the respondent is exempt from the payment of transfer tax, as a result of the transfer of all its shares in Jamaica Biscuit Company to Caribbean Brands Ltd, a subsidiary of General Holdings Limited. The respondent maintains as the learned trial judge found, that the shares having been exchanged for a debenture by virtue of

paragraphs 4(1)(2) and (3) and 6 of the First Schedule to the Transfer Tax Act, no tax is payable on the transfer of the shares. These enactments have already been set out in the judgment of Clarke, J.A. (Ag.) and consequently there is no necessity to record them here. It is sufficient to say that paragraph 6, by virtue of its provisions provides that where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, the provisions of paragraph 4 as to the reorganization of one company shall apply "as if the two companies were the same company, and the exchange was a reorganization of its share capital." In effect, any exchange of shares for shares or for debentures made during the amalgamation of the two companies does not give rise to gains or losses for capital gains tax.

I agree with the contention of the appellant that the principle to be derived from, the cases of ***W.I. Ramsay v. IRC***, [1981] 1 All ER 865 ***I.R.C. v. Burmah Oil Co.,*** [1982] STC 30 ***Furniss v. Dawson*** [1984] 1 All ER 530, and ***Craven & White,*** [1988] 3 All E.R. 495 is that where there has been a pre-ordained series of transactions to achieve a commercial result, and steps have been inserted which has no commercial purpose apart from the avoidance of a liability to tax, the inserted steps are to be disregarded for fiscal purposes.

The following words of Lord Wilberforce at page 871 of the ***Ramsay*** case (supra) gives support to the contention of the appellants and in particular, shows the correct approach to the principle set down in the case of ***Inland Revenue Commissioners v. Duke of Westminster*** [1936] AC 1:

> "Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of ***Inland Revenue Comrs v. Duke of Westminster*** [1936] AC1, [1935] All ER Rep 259, 19 Tax Cas 490. This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transactions to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."

In ***MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd*** [2001] 1 All E.R. 865 at 868 Lord Nicholls was of the view that the ***Ramsay*** case established three points in particular. He said:

> "First, when it is sought to attach a tax consequence to a transaction, the task of the courts is to ascertain the legal nature of the transaction. If that emerges from a series or combination of transaction, ... it is that series or combination which may be regarded. Courts are entitled to look at a pre-arranged tax avoidance scheme as a whole. It matters not whether the parties' intention to proceed with a scheme through all its stages takes the form of a contractual obligation or is expressed only as an expectation without contractual force. ...
> Second, this is not to treat a transaction, or any step in a transaction, as though it were a 'sham', ...
> Third, having identified the legal nature of the transaction, the courts must then relate this to the language of the statute."

Indeed, Lord Diplock in ***Commissioner of Inland Revenue v. Burmah Oil*** [1982] STC 200, had already sounded the warning when he said (page 214):

> "It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that ***Ramsay's*** case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions ... into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable. The difference is in approach. It does not necessitate the over-ruling of any earlier decisions of this House; but it does involve recognising that Lord Tomlin's oft-quoted dictum in ***Commissioner of Inland Revenue v. Duke of Westminster*** [1936] AC 1 at page 19, 'Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than otherwise it would be', tells us little or nothing as to what methods of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would attach to them ...".

Then in ***Furniss (Inspector of Taxes) v. Dawson*** [1984] 1 All E.R. 530 Lord Brightman in following the path of the ***Ramsay*** Case, alluded to Lord Diplock's statement in the ***Burmah*** case in language which clearly indicates the correct approach to these cases. He said at page 543:

> "The formulation by Lord Diplock in ***Burmah*** expresses the limitations of the ***Ramsay*** principle. First, there must be a preordained series of transactions, or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (ie business) end. ... Second, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax, ... If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end

> result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied."

In the same case Lord Bridge of Harwich expressed similar views at page 535:

> "When one moves, however, from a single transaction to a series of interdependent transactions designed to produce a given result, it is, in my opinion, perfectly legitimate to draw a distinction between the substance and the form of the composite transaction without in any way suggesting that any of the single transactions which make up the whole are other than genuine. ... But I do suggest that the distinction between form and substance is one which can usefully be drawn in determining the tax consequences of composite transactions and one which will help to free the courts from the shackles which have for so long been thought to be imposed on them by the ***Westminster*** case."

Lord Keith in ***Craven v. White*** [1988] 3 All E.R. 495, conveniently summarizes what is in his opinion the nature of the principles to be derived from the ***Ramsay, Furniss and Burmah*** cases as follows:

> "...the court must first construe the relevant enactment in order to ascertain its meaning; it must then analyse the series of transactions in question, regarded as a whole, so as to ascertain its true effect in law; and finally it must apply the enactment as construed to the true effect of the series of transactions and so decide whether or not the enactment was intended to cover it. The most important feature of the principle is that the series of transactions is to be regarded as a whole. In ascertaining the true legal effect of the series it is relevant to take into account, if it be the case, that all the steps in it were contractually agreed in advance or had been determined on in advance by a guiding will which was in a position, for all practical purposes, to secure that all of them were carried through to completion. It is also relevant to take into account, if it be the case, that one or

> more of the steps was introduced into the series with no business purpose other than the avoidance of tax."

All these cases are consistent in the fact that, where there has been a preordained series of transaction to achieve a commercial result, and an intermediary step has been inserted which has no business purpose other than the avoidance of tax, then the transaction would not be free from tax liability.

How do these principles apply to the facts of this appeal? Was the exchange of shares for debentures an intermediary step which had no business purpose other than the avoidance of tax under the Act? Was the transaction looked at as a whole, preordained?

These questions are answered by an examination of the Agreement which is entitled "Agreement of Exchange of Securities Pursuant to a Scheme of Reconstruction/Reorganization of Jamaica Biscuit Company Limited."

Paragraphs 1 and 2 of the Agreement reads:

> "1. Carreras HEREBY AGREES to transfer to CBL the Shares in the form set out in the FIRST SCHEDULE hereto in exchange for a debenture to be issued by CBL in favour of Carreras in the total amount of THIRTY SEVEN MILLION SEVEN HUDNRED THOUSAND UNITED STATES DOLALRS (US$37,700,000.00)
>
> 2. The sole consideration for the transfer of the Shares shall be provided by the issue on April 30, 1999 (hereinafter and in the Third Schedule referred to as 'the Completion Date'), but not before the stamping of the said transfer and share certificates for the Shares duly noted as cancelled and the issue to CBL of a new share certificate for the Shares, of the aforesaid debenture in the form set out in the SECOND SCHEDULE hereto in favour of Carreras."

These paragraphs on the face, appear to be a transaction which involves the transfer of all the shares held by Carreras in Jamaica Biscuit Company to Caribbean Brands Limited in exchange for a debenture. This debenture was issued in favour of Carreras' by CBL to the total amount of US$37,700,000, which would bring the transaction within the relevant sections of the Act, making it exempt from tax liability.

However, the content of the Second Schedule discloses the terms of the unsecured debenture, and gives a different picture to the transaction. To begin with it makes provision for the redemption of the debenture on the 7th day of May 1999, less than two weeks after the sale agreement. It was to be redeemable by banker's cheque in favour of the holder, and it was also agreed that the Debenture shall be cancelled, on payment, and "The Company shall not be at liberty to re-issue it or keep it alive." Significantly, also it was agreed that no interest would be payable on the "principal sum". These provisions indicate clearly that the debenture was not to be held for any considerable length of time and indeed was redeemable on a specific date very shortly after the agreement. In fact, it was redeemed soon thereafter and the sums of US$19,900,000 and J$700,344,814 were received by City Bank New York and Jamaica respectively on the 11th May 1999.

It is indisputable that at the time of the agreement the parties contracted to and intended the passing of money in consideration for the shares by way of issuing an unsecured debenture in the first place and without interest, and thereafter redeeming it on a specified date in quick

time. In my view this is sufficient to conclude that this was a preordained scheme, as the parties contracted at the time to pass monetary consideration in respect of the transaction. This was a composite transaction with the insertion of a step involving the transfer of a debenture for shares, which had no business purpose other than the avoidance of tax liability. The ultimate purpose was the next step in the transaction and that is the redemption of the debenture by the payment of the monetary sum i.e. US$37,700,000. For those reasons, applying the principles stated in the cited cases, I agree with Clarke J.A. (Ag.) and consequently would allow the appeal.

PANTON, J.A.

I find myself in the unenviable situation of not being able to agree with my learned and distinguished brothers, the Hon. President and Clarke, J.A. (Ag.). Instead, I agree with the judgment of Anderson, J.

Both parties to this appeal say that they are agreed as to the facts; yet, we are faced with a complaint from the Solicitor General that the learned judge at first instance made no findings of facts. One thing that is certain is that the learned judge found that the exchange was no sham. The question therefore arises: what other facts was he expected to find?

I understand the common factual position to be as follows: Carreras owned all the ordinary issued shares and most of the preference shares in Jamaica Biscuit Company Limited. Carreras entered into a transaction with Caribbean Brands Limited wherein Carreras transferred its shares in Jamaica Biscuit Company Limited to Caribbean Brands Limited, and received from the latter debenture worth US$37.7 million. By virtue of this transaction, Carreras claimed exemption from transfer tax on the basis of paragraph 6(1), Part 1 of the First Schedule to the Transfer Tax Act. The Stamp Commissioner, the appellant in these proceedings, does not agree that Carreras, the respondent, is entitled to the exemption that is being claimed. The Stamp Commissioner is of the view that Carreras has not produced any evidence to substantiate the claim that the transfer of shares was in pursuance of a scheme of reconstruction/reorganization.

Carreras filed notice of appeal in the Revenue Court. The ground of appeal was that "the disposal of the shares in Jamaica Biscuit Company Limited ... to Caribbean Brands Limited was not a sale but a simple exchange of the said shares for debentures

pursuant to paragraph 6(1) of the First Schedule to the Transfer Tax Act, and as such is treated as if it were a "reorganization" within the meaning of paragraph 4 of the First Schedule to the Transfer Tax Act and therefore is not liable to transfer tax".

Anderson, J., after an exhaustive review of the cases said to be relevant to a determination of the problem, concluded that on a proper construction of the statutory provisions in question no transfer tax was payable by the respondent. I agree with the conclusion of the learned judge.

THE FIRST SCHEDULE

Section 12(1) of the Transfer Tax Act states:

> "In relation to matters provided for in Part 1 of the First Schedule with reference to shares and to debentures and other securities, the provisions of that Part shall have effect for the purposes of this Act".

Under the heading "Reorganization of share capital, conversion of securities, etc." the following paragraph appears:

> "4(2) Subject to the following sub-paragraphs, a reorganization or reduction of a company's share capital shall not be treated as involving any disposal of the original shares."

Paragraph 4(1)(b) defines "original shares" as shares held before and concerned in the reorganization or reduction of capital.

Under the heading "Company amalgamations" is to be found paragraph 6 which is now set out so far as is relevant:

> "6(1) Subject as hereinafter provided, where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, paragraph 4 shall apply with any necessary adaptations as if the two companies were the same company and the exchange were a reorganization of its share capital.

> (2) This paragraph shall apply only where the company issuing the shares or debentures has or in consequence of the exchange will have control of the other company..."

THE APPLICABILITY OF THE LAW TO THE FACTS

The agreed factual situation is that Caribbean Brands Limited (a company) issued a debenture to Carreras (a person) in exchange for shares in Jamaica Biscuit Company Limited (another company). According to paragraph 6(1), paragraph 4 is now applicable as if the two companies (Caribbean Brands Limited and Jamaica Biscuit Company Limited) were the same company and the exchange were a reorganization of its share capital. In looking at paragraph 4(2), it is seen that this reorganization of the company's share capital shall not be treated as involving any disposal of the original shares.

In my view, the legislation is very clear. I agree with the interpretation that Anderson, J. has given to it. This interpretation is not dissimilar to the approach taken by the authors of ***Wheatcroft and Whiteman*** on Capital Gains (2nd ed.) (page 190, para.11-29) in dealing with similar legislation. It is, with respect, very difficult to accept that Parliament, with the army of advisers in law and finance available to it, would not have contemplated the possibility of the debenture in such a situation as the present one being redeemed at an early stage. If it was seen as a mischief to be guarded against, Parliament would have so legislated. The learned judge below expressed the view that there is need for corrective legislation. He may be right. I do not know, as I have no information which suggests that there is a problem in this area of the law or of tax administration. The fact that a matter is, or may have been, a problem in some other country does not mean that the problem also exists in Jamaica.

In my respectful view, too much has been made of the decisions of the House of Lords in the ***Ramsay*** line of cases. Those decisions are, of course, persuasive in

relevant and applicable situations. As Lord Goff of Chieveley said (with reference to the so-called ***Ramsay*** principle) in ***Craven v. White*** [1988] 3 All ER 495 at 531c:

> "Indeed the principle cannot be independent of the statute, for the obvious reason that your Lordships have no power to amend the statute."

There can be no denying of the fundamental principle of construction that words are to be given their ordinary meaning unless the legislation provides otherwise. I see no reason to depart from this position. Accordingly, I am of the humble view that this appeal should be dismissed and the order of the Court below affirmed.

CLARKE, JA.(Ag.)

By an agreement in writing dated April 27, 1999, Caribbean Brands Limited issued a debenture in the amount of U.S $37,700,000.00 to Carreras Group Limited ("Carreras") in exchange for the latter company's shares in the Jamaica Biscuit Company Limited comprising 4,958,672 ordinary shares and 5,839 preference shares. Caribbean Brands Limited thereby acquired control of Jamaica Biscuit Company Limited.

On those bare but undisputed facts Anderson J sitting in the Revenue Court reversed the decision of the appellant confirming an assessment of Carreras to transfer tax. The learned judge held that transfer tax was not payable as the aforesaid transaction fell within the four corners of the exempting provisions of paragraphs 4 and 6 of the First Schedule to the Transfer Tax Act ("the Act") and accordingly did not constitute a chargeable disposal of the shares.

The effect of sections 3(1), 3(4)(c) and 2(1) of the Act (set forth below with emphasis supplied) is that a person who is disposing of his shares in a company is obliged to pay transfer tax:

> "**3 --(1)** Subject to and in conformity with the provisions of this Act, tax shall be charged at the rate of seven and one-half per centum of the amount or value of such money or money's worth as is, or may be treated under this Act as being, the consideration for each transfer after the 3rd day of April, 1984, of any property; and tax charged in respect of any such transfer shall be borne by the transferor.

...

(4) This section applies to property in any of the following classes --

...

(c) Securities

2. -- (1) "Securities" means securities of a company and include any shares therein..."

"Transfer" means any legal or equitable transfer by way of sale, gift, exchange, grant, assignment, surrender, release or other disposal..."

Nevertheless, by virtue of the combined effect of paragraphs 4 and 6 of the First Schedule to the Act (set forth below, also with emphasis supplied) transfer tax will not be payable if, as Mr. Hylton Q.C. puts it, the shareholder parts with his shares as part of a re-organisation of the company or companies which involves his exchanging his shares for other shares or for a debenture:

"FIRST SCHEDULE

...

4 -(1) This paragraph shall apply in relation to any re-organization or reduction of a company's share capital; and for the purposes of this paragraph –

(a)reference to reorganization of a company's share capital include –

(i) any case where persons are, whether for payment or not, allotted shares in or debentures of the company in respect of and in

proportion to (or as nearly as may be in proportion to) their holdings of shares in the company or of any class of shares in the company; and

(ii) any case where there are more than one class of shares and the rights attached to shares of any class are altered; and

(b) "original shares" means shares held before and concerned in the reorganization or reduction of capital, and "new holding" means, in relation to any original shares, the shares in and debentures of the company which, as a result of the reorganisation or reduction of capital, represent the original shares (including such, if any, of the original shares as remains).

(2) Subject to the following sub-paragraphs, a reorganization or reduction of a company's share capital shall not be treated as involving any disposal of the original shares.

(3)Where, on a re-organization, or reduction of a company's share capital, a person receives (or, without prejudice to the generality of any provisions of this Act, is deemed to receive) or becomes entitled to receive any consideration, other than the new holding, for the disposal of an interest in the original shares, and in particular -

(a) where under paragraph 3 of this Schedule he is to be deemed to have, in consideration of a capital distribution, disposed of an interest in the original shares; or

(b) where he receives (or, without prejudice as aforesaid, is deemed to receive) consideration

from other shareholders in respect of a surrender of rights derived from the original shares,

he shall be treated as having for that consideration transferred accordingly an interest in the original shares."

"**6.** -(1) Subject as hereinafter provided, where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, paragraph 4 shall apply with any necessary adaptations as if the two companies were the same company and the exchange were a reorganization of its share capital.

(2) This paragraph shall apply only where the company issuing the shares or debentures has or in consequence of the exchange will have control of the other company, or where the first-mentioned company issues the shares or debentures in exchange for shares as the result of a general offer made to members of the other company or any class of them (with or without exceptions for persons connected with the first-mentioned company) the offer being made in the first instance on a condition such that if it were satisfied the first-mentioned company would have control of the other company."

The grounds of appeal filed and argued on behalf of the appellant are as follows:

"1. The learned judge erred in law in failing to hold that:

(a) The Court is entitled and required to ascertain the true nature of the transaction and is not bound to accept that a transaction is what it purports to be.

(b) Where there are a series of transactions with a pre-ordained purpose, and one or more of the transactions in the series has no legitimate commercial purpose, the courts will not treat the

series as constituting a genuine transaction such as would avoid liability to taxation which would otherwise be payable.

(2) The learned judge erred in law in failing to hold that after a reorganization or re-construction, such as would result in exemption from transfer tax, the company would still be owned and controlled by the same persons, although the nature of their holdings may change.

(3) The learned judge erred in law in failing to have regard to the question as to whether the exchange of shares for debentures in this case was for the achievement of a legitimate commercial purpose.

(4) The learned judge erred in failing to consider the evidence which was before him, and to hold that the transaction was really a sale of shares disguised to look like a re-organisation and not a simple exchange of shares for a debenture".

At pages 212 –213 of the Record, Anderson J identified in the following terms the fundamental issue in the case as to the proper approach to the construction of the relevant provisions of the Act:

> "It seems to me that there are really two main alternative bases upon which the resolution of this case may depend. The first may be answered by reference to the question: Is the fact that the act done by the taxpayer (the subject of the assessment by the [Stamp Commissioner]) is within the literal words of the relevant provision, a determining factor in deciding whether a liability arises? Put in a slightly different way: Is it not only a necessary, but a sufficient condition for the success of the taxpayer... that he show that the literal words of the statute cover the situation which he avers is that in issue?

> The second alternative formulation may be stated thus: To what extent is it relevant or necessary to consider the intent and indeed the actions of the taxpayer... in determining whether his act is what he says it is? This may also be framed in the following way: Is the implication of the cases of which **Ramsay** is seminal , and including **Furniss, Burmah Oil, Craven and Griffin,** that the court is always entitled to look behind the face of the transaction to deduce a purpose, upon the revelation of which it will be entitled to make its decision, at any rate where there is a series of transactions, but which may be regarded as one composite transaction?"

The learned judge concluded that as there was in this case an exchange of shares for a debenture which came within the literal words of the exemption the court should not look behind the exchange to ascertain the true nature of the transaction as a whole. The critical issue that therefore arises on this appeal concerns whether, in the face of grounds 1,3 and 4, that approach of the learned judge was correct.

Mr. Mahfood Q.C. submitted that the following pronouncement of the learned judge is unimpeachable:

> "I find as a fact that the charge to transfer tax imposed by section 3, of the Act, has been specifically waived in the instant case by virtue of the exemption. I find that the exchange of shares for a debenture by [Carreras] in the instant case, is "within the four corners of the enactment" as stated by Marsh J in the ***Pan Jamaican*** case. I am not to be thought to be saying that any exchange of shares for debentures in any circumstances will give rise to this result. The court is always at liberty to view the circumstances and construe the statute in light of those circumstances. But in the context of the

> statute (and the exemption) which, if the views on its English predecessor are anything to go by, is aimed at encouraging and facilitating mergers of businesses, I believe that this is a case within that contemplation."

He further submitted that the purposive approach to statutory construction of taxing statutes as explained in ***W.T Ramsay Ltd. v Inland Revenue Commissioners*** [1981] 1 All E.R. 865 (loosely referred to as the ***Ramsay*** principle) is inapplicable to cases such as this where the statutory language to be construed refers to purely legal concepts rather than to commercial concepts. He argued that this is the situation in the instant case as the concept "exchange" in paragraph 6 of the Schedule to the Act is a purely legal concept which has no broader commercial meaning. The only conclusion on the admitted facts is that there was an "exchange" of shares for a debenture within the meaning of that legal concept. The legal consequence of such an exchange is that same by virtue of para 4(2) of the First Schedule to the Act " shall not be treated as any disposal of the original shares". He also submitted that in any event even if the **Ramsay** principle or approach is applicable, the issue of the debenture by Caribbean Brands Ltd. cannot be disregarded so as to treat the transfer of shares in Jamaica Biscuit Company Ltd. to Caribbean Brands Ltd. as a disposal under section 3 of the Act. To do so on the facts of this case would be to reverse or amend the statute, which would be impermissible.

Mr. Hylton Q.C. broadly submitted that the instant case falls squarely within the **Ramsay** principle. The Act imposes a tax on the disposal of shares. The Court must therefore consider whether looking at the transaction as a whole there has been a taxable disposal of shares in this case, and for that purpose any "artificial intermediate" steps should be disregarded.

So, what are the undisputed facts in this case? These were, in my view, properly kept at the forefront of Mr. Hylton's argument and accurately recounted by him in his written submissions thus:

> 1. Carreras owned all the ordinary issued shares and most of the preference shares ("the shares") in Jamaica Biscuit Company Limited.
>
> 2. General Holdings Limited, Bermudez Biscuit Ltd. and Caribbean Brands Limited are related companies, General Holdings Limited being the parent company of the other two. In February 1999 Carreras decided to come out of the biscuit business and to stick to its central business of manufacturing and selling tobacco products. It arrived at an agreement with General Holdings Ltd. that the latter would acquire Jamaica Biscuit Company Ltd. for US$37,700,000.00.
>
> 3. In order to effect this acquisition, the companies entered into a series of transactions in April/May 1999. The transactions included an "Agreement for exchange of securities pursuant to a scheme of reconstruction/re-organisation of Jamaica Biscuit Company Ltd." made between Carreras Group Ltd. and Caribbean Brands Ltd." This involved the transfer of shares to Caribbean Brands Ltd. in exchange for an unsecured debenture issued by the latter company to Carreras in the sum of US$37,700,000.00, followed

by the redemption of the debenture two weeks later.

4. As a result of these transactions:

(a) Caribbean Brands Ltd. now owns the shares;

b) Carreras received the sum of US$37, 700,000.00;

(c) Carreras has no further interest in Jamaica Biscuit Company Ltd. or Caribbean Brands Ltd.

Carreras' contention that the transaction involving, as it did, an exchange of shares for a debenture was a re-organisation of share capital pursuant to paragraphs 4 and 6 of the First Schedule to the Act cannot, in my judgment, hold water. While considering the same provisions, Marsh J. as for back as 1979, without having the benefit of the modern approach to tax avoidance schemes explained in detail in a number of highly persuasive decisions of the House of Lords in the 1980's and onwards starting with ***Ramsay***, correctly observed as follows:

> "... I accept that paragraphs 4 and 6 of the First Schedule are exempting provisions; in that they set out and define a category of transfers of property which, as a matter of legislative policy, is exempted from the tax by means of a legal fiction. It is settled law that such provisions are to be narrowly construed , and that a taxpayer seeking to bring himself under the umbrella of the exemption must show that his case falls within the four corners of the enactment". – ***Pan-Jamaican Investment Trust Ltd.*** *v* ***The Stamps Commissioner*** [1979] 16 JLR 467 at 473.

After reviewing the relevant document in that case Marsh J concluded at page 473 of the Report:

> "... it reflects a transaction which is intrinsically that of sale and purchase, rather than of exchange".

Mr. Hylton argued that in the case before this court the exchange of shares for a debenture was but an intermediate step with no commercial or business purpose other than to gain a tax advantage in a composite transaction which when looked at as a whole was, in the words of Marsh, J, "intrinsically that of sale and purchase, rather than of exchange".

I accept that argument. Mr. Hylton correctly stated the principle which emerges from a line of cases commencing with ***W.T. Ramsay Ltd. v Inland Revenue Commissioners*** ("Ramsay") (supra). It is this: Where there has been a preordained series of transactions to achieve a commercial result, and steps have been inserted which have no commercial or business purpose apart from the avoidance of a liability to tax, the inserted steps are to be disregarded for fiscal purposes. The Court must look at the end result, view the transaction as a whole and assess the liability to tax on that basis.

The principle of the decision of the House of Lords in the earlier case of ***Inland Revenue Commissioners v Duke of Westminster*** [1935] All E.R. Rep. 259 on which Anderson J heavily relied, is distinguishable. Of that

case which concerned, be it noted, a single transaction and not a composite transaction, Lord Wilberforce delivering the leading speech in ***Ramsay*** had this to say at p. 871 d and e of the Report:

> "Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of ***Inland Revenue Comrs v Duke of Westminster.*** This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a *nexus* or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transactions to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."

And in equally felicitous language Lord Bridge of Harwich had this to say in distinguishing the ***Westminster*** case in a case subsequent to ***Ramsay:***

> "When one moves, however, from a single transaction to a series of interdependent transactions designed to produce a given result, it is, in my opinion, perfectly legitimate to draw a distinction between the substance and the form of the composite transaction without in any way suggesting that any of the single transactions which make up the whole are other than genuine. This has been the approach of the

> United States Federal Courts enabling them to develop a doctrine whereby the tax consequences of the composite transaction are dependent on its substance not its form... [The] distinction between form and substance is one which can usefully be drawn in determining the tax consequences of composite transactions and one which will help to free the courts from the shackles which have so long been thought to be imposed by the ***Westminster*** case" : ***Furniss (Inspector of Taxes) v Dawson*** [1984] 1 All ER 530 at 535 g and h.

The application of the ***Ramsay*** principle is, as Lord Brightman explained in the ***Dawson*** case, predicated on two findings of fact, namely:

> (1) that there was a pre-ordained series of transactions, i.e a single composite transaction, whether or not such a transaction included the achievement of a legitimate commercial purpose;
>
> (2) that the transaction contained steps which were inserted without any commercial or business purpose apart from a tax advantage.

While Anderson J did not expressly make those findings of fact, in the first place there clearly was on the undisputed evidence (which this court ought not to ignore) a pre-ordained series of transactions in the instant case. The companies agreed from the outset what the end result would be, and the intended result was achieved. Indeed, the learned judge acknowledged that that was the case, for at page 179 of the Record, after indicating that Carreras received the debenture, he said compendiously:

> "Naturally, the debenture has been redeemed by [Carreras]."

On the evidence it is plain as plain can be that Carreras intended to divest itself of its interest in Jamaica Biscuit Company Ltd. and to get out of the biscuit business. To that end a series of transactions was pre-ordained:

(a) Carreras and General Holdings Ltd. agreed that General Holdings would acquire the shares;

(b) General Holdings' subsidiary Caribbean Brands Ltd. gave a debenture to Carreras in exchange for the shares; and

(c) the debenture was redeemed and cash paid to Carreras.

In the second place, it is abundantly clear that the exchange of shares for a debenture was a step that was inserted without any commercial or business purpose apart from the avoidance of a liability to tax. And it is certainly not fortuitous that it was redeemed on the day after the tax was paid, albeit under protest. Again, as Mr. Hylton pointed out, the undisputed evidence was that:

(a) the debenture was unsecured. It did not create a charge over anything. It was no more than an "I.O.U".

(b) the debenture was interest free. Instead of shares which yielded dividends, Carreras received a debenture which yielded no income whatever.

So, the evidence shows beyond a peradventure that the second step, "the exchange", in the composite transaction had no commercial purpose except to secure a tax advantage. It is no answer to say, as Mr.

Mahfood argued, that "exchange" is a legal concept outside of the reach of the ***Ramsay*** principle. What was involved here was a composite commercial transaction in which the ***Ramsay*** principle was eminently applicable.

Mr. Mahfood also argued that a test for the applicability of paras. 4 and 6 of the Schedule to the facts of this case has been met by the fact that Caribbean Brands Ltd. did acquire control of Jamaica Biscuit Company Ltd. in consequence of the exchange and that that control was not a fleeting phenomenon.

While it is correct that Caribbean Brands acquired durable control of Jamaica Biscuit Company, the critical question here concerns the method by which control was acquired: was control acquired by a re-organization of share capital within the meaning of paras. 4 and 6 of the Schedule or, *in reality* by purchase of the shares of Carreras in Jamaica Biscuit Company Limited?

In ***Dawson*** the facts and the decision thereon are instructive. There, the taxpayers were the main shareholders in two manufacturing companies. They agreed in principle to sell their shareholding to a purchaser. Upon completion of the sale they would have been liable to pay capital gains tax. So, in order to avoid such tax liability they formed an Isle of Man company ("Greenjacket") and exchanged their shareholdings in the two manufacturing companies for an allotment of

shares in Greenjacket which in turn sold their shareholdings to the purchaser for cash. The taxpayers argued that by para. 6 of Sch. 7 to the Finance Act, 1965 (U.K) a transfer of their shares in the manufacturing companies to Greenjacket in exchange for an allotment of its shares (where Greenjacket thereby acquired control of the manufacturing companies) was treated as if the companies were the same and the exchange a re-organization of its share capital. Also, by para. 4 of the same Schedule a re-organization of a company's share capital should not be treated as a disposal for the purposes of capital gains tax. But the Revenue claimed that the effect of the arrangement was that the taxpayers rather than Greenjacket had disposed of the shares in the two manufacturing companies to the purchasers and therefore the taxpayers were liable to capital gains tax nothwithstanding the intervention of Greenjacket.

The House of Lords in upholding the claim of the Revenue applied the ***Ramsay*** principle to the construction of the relevant provisions of the taxing statute. The control by Greenjacket was but a fleeting phenomenon since that company in accordance with the pre-ordained scheme, simultaneously sold the shareholdings to the purchaser. The insertion of Greenjacket had to be disregarded and the end result looked at and taxed according to the statute in question.

As was pointed out by the Court of Final Appeal of Hong Kong in the case of ***Shui Wing Ltd. v the Commissioner of Estate Duty*** [2000] HKCFA 62, the *reality* of the transactions was that the taxpayer through their 100% control of Greenjacket, received the purchase price for the sale of their shares in the manufacturing companies. As Lord Fraser of Tullybelton put it in ***Dawson*** itself, it was a disposal by the taxpayers of their shares in the manufacturing companies to the purchaser for cash.

In my judgment, therefore, the court must not simply accept that since in this case the exchange of shares for a debenture genuinely took place and fell within the literal language of the exempting provisions of the taxing statute, that is the end of the matter. Once the court considers, as it must, what was the nature of the transaction as a whole, the ineluctable conclusion must be that the composite commercial transaction was *in reality* a sale whereby Carreras transferred its shares in Jamaica Biscuit Company Ltd. to Caribbean Brands Ltd. for US$37,700.000.00.

I conclude with a pertinent passage from the speech of Lord Wilberforce in ***Ramsay*** at page 873, cited by Mr. Hylton, and with which I respectfully agree, as it applies ***mutatis mutandis*** to the present case:

> "While the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still. Such immobility must result either in the loss of tax, to the prejudice of other taxpayers, or to a Parliamentary congestion or (most likely) to both. To force the courts to

> adopt, in relation to closely integrated situations a step by step, dissecting approach which the parties themselves may have negated would be a denial rather than an affirmation of the true judicial process. In each case the facts must be established; and a legal analysis made; legislation cannot be required or even be desirable to enable the court to arrive at a conclusion which corresponds with the parties' own intentions.
>
> The capital gains tax was created to operate in the real world, not that of make-believe".

The result of correctly applying the ***Ramsay*** principle to the facts of this case is that there was *in reality* a disposal of the shares by Carreras in favour of Caribbean Brands Ltd. in consideration of the aforesaid sum of money paid by the latter company to Carreras. Transfer Tax is accordingly payable. I would therefore allow the appeal.

ORDER

FORTE, P:

By a majority appeal allowed. Order of the court below set aside. Costs to the appellant to be taxed if not agreed.