The topic he chose for the lecture was 'Managing Tax Avoidance: Recent UK experience'. It involved an analysis of the position in the UK to that point, starting with the House of Lords decision in W T Ramsay Ltd v IRC,[6] *as well as setting out his preference for judicial development of anti-avoidance rules rather than the introduction of a statutory general anti-avoidance rule (a GAAR). Before his death John had agreed to revise the lecture to bring it up to 2013 with a view to publishing it. Based on those discussions, I have revised the lecture, divided it into 6 parts and included a postscript to cover the more immediate period. The 6 parts are:*

1. *Introduction*
2. *The development of the 'so-called' Ramsay doctrine*
3. *Other ways of dealing with avoidance*
4. *The 1997 GAAR proposal*
5. *Ramsay to Barclays*
6. *Conclusions*

Professor Tiley commenced his lecture with brief comments about the previous two Annual Tax Lectures and referred briefly to the 'US doctrines' that he had spent a year trying to understand. But, as John would say, more of that later.

A clue to his own views on the subject of dealing with tax avoidance can bTm2[(ews)] TJETy o

centred to employ - more than half its members would fail to fill their vacancies this year.[10]

It is a great pleasure to be back in Melbourne. My links began with Harold Ford and I spent two months here in 1979. Since then I have tended to spend some of my sabbatical leave in North America not least in 1985 86 when I had the pleasure of being in Case Western Reserve University Law School in Cleveland, Ohio. I spent the year with Leon Gabinet, Erik Jensen and Karen Moore (now a Federal Judge) trying to make sense of the American materials which had just been cited enigmatically by the House of Lords in *Furniss v Dawson.*[11] The overwhelming message I came away with was that the US system with its doctrines such as form and substance, step transactions, economic substance and sham were all very well in their natural habitat but I was not at all sure that they would fit well in the UK where, it seemed to me, we place great emphasis on finding rules that are justiciable. As Lord Scarman said in *Furniss v Dawson*: the determination of what does, and what does not, constitute unacceptable tax evasion is a subject suited to development by judicial process. [12]

thereby showing that he had not taken his basic course in taxation. However Lord Scarman was far too great a judge - and classical scholar[13] - to have done that without thought and a revisiting of the terminology is overdue but not this evening.

In Part 2 Professor Tiley outlined the judicial approach to tax avoidance in the UK starting with the House of Lords decision in Ramsay in 1981. Having made the point that he preferred the judicial approach, he took the view that the House of Lords in Ramsay adopted a novel approach but without overturning what had been accepted as the cardinal rule of the Duke of Westminster, and really this was all just a matter of VWDWXWRU\ LQWHUSUHWDWLRQ«

2 THE DEVELOPMENT OF TH E ¶SO-CALLED ¶RAMSAY DOCTRINE

I presented these views in a series of articles in the *British Tax Review*[14] which attracted interested comment from a variety of American scholars. Some suggested that I had over-dramatised the situation by presenting their doctrines as hard rules rather than as devices for use in interpreting statutes. I had not intended to do so but, as my purpose was precisely to prevent the House from turning them into hard rules, I should not complain. As it happened, the English courts did try to treat their own words as rules so my caution was justified. The articles formed part of the taxp paperwork in *Craven v White*[15] in 1988. Now in 2007 we have ended up with a situation not unlike the US in that we have now reduced our questions to ones of interpretation rather than hard rules. But that is simply clearing the decks for a new game. As I like to say, less chaos more uncertainty.

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[10] *The Association of Graduate Recruiters: http://www.agr.org.uk/*

[11] *[1984] 1 All ER 530, [1984] AC 474.*

[12] *[1984] AC 474 at 513.*

[13] Lord Scarman was a classical scholar at Radley College and then Brasenose College, Oxford University where he obtained First Class degrees in the two famous classical exams known as Mods and Greats.

[14] John Tiley, Judicial Anti-Avoidance Doctrines [1987] *British Tax Review* 180 and 220; [1988] *British Tax Review* 63 and 108.

[15] [1988] STC 479, [1989] AC 398.

My, rather large, brief is to talk about how we manage avoidance in the UK, our judicial/legislative responses, including recent UK developments and our rash of anti-avoidance legislation. It includes my views on the approach of the House of Lords as compared, say, to the use of a general anti-avoidance rule (GAAR) or detailed legislation countering specific tax schemes. I must also cover the UK approach to notification or registration of tax schemes and the role of the tax advisor, given your own promoter penalties legislation. We shall look at the work of a new player in our fiscal legislative process, the House of Lords Select Committee on the Finance Bill. This Committee brings the considerable financial expertise existing on all sides of the House to inform consideration of the Finance Bill during its passage through Parliament. However it must not encroach on the financial privileges of the House of

security, should not be recognised. Accepting a new line of argument based on treating a series of transactions such as these as one composite transaction, the House of Lords decided there was no relevant loss for CGT purposes. The House was surely right. No system can tolerate a situation in which taxpayers up and down the country have a choice   to pay the Revenue or pay a tax adviser. The scheme failed in the Court of Appeal and in the House of Lords.

The approach of the House of Lords in *Ramsay* was a novel one   it was novel because this was the first time that the composite transaction point had been put to one of our courts; it was put by Peter Millett QC, (later Lord Millett) counsel for the Revenue. The members of the House were very conscious of the novelty of the point and Lord Wilberforce was at pains to point out that their decision did not, in his view *Inland Revenue Comrs v Duke of Westminster*[18] that where a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. [19] I think Lord Wilberforce is right on this   we must not undermine the cardinal principle but we can be a little more realistic in our approach to the facts. The *Duke of Westminster* case and others from that era are rightly taken as examples of a strict approach to the interpretation of tax legislation. That was the nature of the judicial approach in many other areas. In 2007 we no longer believe in a strict approach; we prefer a purposive approach. As was said in the *Barclays* decision in 2004,[20] the old strict approach went hand in hand with a very formalist approach to the facts and gave rise to an insistence on the part of the court on treating every transaction which had an individual legal identity as having its own separate tax consequences. So the courts were both literal and blinkered. *Ramsay* liberated the court from both these vices.

So the composite transaction approach enabled the court to find a modern real commercial characterisation of the facts. As Lord Wilberforce had said in *Ramsay* the court
to attach a tax or a tax consequence and if that emerged from a series or combination of transactions, intended to operate as such, it is that series or combination which must be considered.[21] This did not upset the cardinal principle set out above but enables the court to be less blinkered in deciding what the genuine transaction is.

The story by which we moved from *Ramsay* in 1981 to *Barclays* in 2004 forms the last   and longest - part of this lecture. It can be seen as a story of judicial development in the traditional common law way - of development followed by doubts, of advance followed by circumspection. While Lord Wilberforce did not treat the case of *Ramsay* as creating a judicial GAAR, it clearly had the potential to do so if further and wider arguments were advanced in later cases or if judges left things less tidily than he had done. Lord Wilberforce does not appear in the later cases   he retired soon afterwards but virtually all the later cases take his comments in *Ramsay*

mean the lower courts, the legal and accounting professions and, above all, Her

After *Barclays* the question for HMRC will be whether they will be content to accept that approach indicated by the judges. It is not an approach which will stop all

GAAR but I think the temptation is going to be resisted. My feeling about this is that they are not yet willing to set up the sort of rulings system that practitioners think would be needed. The HMRC view of rulings in the context of a GAAR was spelt out

> ...I think there is a very significant issue that arises there: how sensible would it be to offer pre-transaction clearances for what were very clearly tax avoidance arrangements? Again, how sensible is it to offer arrangements like that which then enable planners to refine their product again and again and again, as we have seen with some of our existing clearance measures, until they have got something that they think works. So there are very difficult issues to be sorted out.[22]

In Part 3, Professor Tiley outlined some of the other ways in which tax avoidance was being dealt with in the UK. This included the use of targeted anti-avoidance rules, the possibility of retrospective legislation, imposition of penalties for tax advisers, as well as improved relationships with large business. He also discussed the recently introduced (at that time) disclosure of tax avoidance schemes (DOTAS).

3 OTHER WAYS OF DEALING WITH TAX AVOIDANCE

These remarks are of course directed to issues of rulings and avoidance. Elsewhere some progress has been made. In November 2006 the Varney Committee reviewed links with large businesses. The Chancellor announced that he would implement the review in full; hence HMRC has now agreed to bring in advance rulings.[23] However, as far as I can tell, it is not a general system. Its purpose is to give business certainty about the tax consequences of significant investments and corporate reorganisations. I note a) it is confined to business, b) it may b t0 0 1 28395(i)-4(te)9(sd)-32(t)-4(ho)-21(l)-4(e)9(r)-3(e)

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HMRC may also increase the price of abuse by retrospective or retroactive legislation. We had a spectacular example of this when we removed loss relief from commodity

advised on schemes which failed.[40] Since 1 January 2001 we have had an offence of being knowingly concerned in the fraudulent evasion of income tax.[41]

It is time to talk, briefly, about our notification powers.[42] We now have four separate regimes: direct taxes, stamp duties,[43] VAT and National Insurance.[44] I will concentrate on the direct taxes. The rules require a promoter[45] and sometimes the taxpayer (or client) to provide the Revenue with information about a) notifiable arrangements and b) proposals for notifiable arrangements.[46] For a scheme to be notifiable it must enable, or might be expected to enable, any person to obtain a tax advantage in relation to any tax so prescribed in relation to the arrangements. It is also necessary that the main benefit or one of the main benefits that might be expected to arise from the arrangements is the obtaining of that advantage. There is protection for legal privilege.[47] So, the key question is whether the tax advantage is the
The HMRC Guidance says:

> In our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve. Therefore we expect it will be obvious (with or without detailed explanation) to any potential client what they are buying and the relationship between the tax advantage and any other financial benefits. The test is objective and considers the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed.[48]

In the direct tax area the obligation to notify generally falls upon the promoter of the scheme. It falls on the user of the scheme if the promoter is resident outside the UK and no promoter is resident within the UK.[49] If there is no promoter (ie the scheme is designed in house) the duty to notify falls on thos62(f,rh)-173s q0.015 -0.090027Tf( )] (f)-900277

increasingly obtain evidence from enquiries into the tax returns of companies and individuals who have used schemes.[64]

Some defaulters tell HMRC nothing more than that they have systems in place to identify whether or not their products are notifiable and that they are satisfied that the particular scheme is not. Such promoters will generally re
they hold that the scheme is not notifiable, but do not explain why the scheme is not notifiable. The proposed new rules are designed to resolve disputes about what is and what is not notifiable. They may well include a power to get more information and a pre-disclosure enquiry to help HMRC get clearer reasons why a promoter thinks the scheme is not notifiable. Where there is a doubt about notifiability there may be a procedure by which HMRC can ask the [First-tier] Tribunal to order that scheme be treated as if it were notifiable you can imagine the problems of the burden of proof here. Even more dramatically, where there is such a doubt, there may be a procedure by which HMRC can ask the Tribunal to determine that the scheme is notifiable.[65]

In Part 4 Professor Tiley considered the proposal for a UK GAAR put forward by the Tax Law Review Committee of the Institute of Fiscal Studies. He is not a fan. Tellingly he said that in his view a GAAR is µn admission of failure ¶He does not say whose failure: he may be referring to the legislation or HMRC or the judges or the system as D ZKROH««

4 THE 1997GAAR PROPOSAL

We have had GAARs in the excess profits taxation rules introduced for the First and Second World Wars.[66] Similar powers were part of profits tax[67] and the special charge in 1967.[68] However, the impetus for the introduction of a GAAR with more general application was provided in the 1990s by the Institute for Fiscal Studies (IFS), our leading tax research organisation and a fiercely independent one. Under the

The TLRC GAAR had several elements. In broad terms it proposed a purpose clause to deter or counteract transactions designed to avoid tax in a way which conflicted -

with the normal transaction. Where, because the tax-driven transaction did not have a non-tax objective and so there is no normal transaction, tax was to be charged as if the

report by HMRC would be made to Parliament giving full details of the operation of the rule.

The tax elite of the nation had worked on the TLRC report so the Revenue had to consider it; they produced a consultative document with its own clause.[71] Opinion within the Revenue was divided. Opinion in the profession - - was

proposal.[72] The truth is probably that the GAAR would have worked only with a proper system of rulings. The government was not willing to pay the financial cost of such a system, nor was it willing to pay the political cost of trying to force such a system onto taxpayers.

As we have seen earlier the rejection of a GAAR has not stopped the extensive use of

corporation tax, has contained its

With all the activity, legislative and administrative, and with an objective of what HMRC would see as raising the level of taxpayer behaviour by informal means, it is not the right time to make the dramatic and politically demanding switch to a GAAR. I have to acknowledge that in so far as this activity is legislative, the effects on the length of our statute book have been dire. Some see a GAAR as a way of shortening the statute book. You can tell me whether it has that effect here. I believe we can do at least as well - and probably better - with our existing approach, especially as it seems to mesh in well with our schedular approach to the definition of income. We have neither a general definition of income nor a general system of deductions and we are systematically mean on loss reliefs across the schedules.

In Part 5 Professor Tiley charted the development of the judicial approach to tax avoidance in the UK from Ramsay in 1981 through to Barclays in 2004.

5 From Ramsay to Barclays

It is time to return to the story to what our judges have been up to. We left *Ramsay* (1981) as it had been expounded in *Barclays* (2004) where it was said:

> The modern approach to statutory construction is to have regard to the purpose of the particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. Until the *Ramsay* -
>
> formalist methods of interpretation. The particular vice of formalism in this area of law was the insistence of the courts on treating every transaction which had an individual legal identity (such as a payment of money, transfer of property, creation of debt etc) as having its own separate tax consequence, whatever might be the terms of the statute. The *Ramsay* case liberated the construction of revenue statutes from being both literal and

capital gains tax, saw the advent of marketed avoidance schemes. The Revenue continued to argue in traditional ways and so lost cases such as *IRC v Plummer*[79] or got the right answer by a slightly strained construction as in *Floor v Davis*[80] where the House divided 3-2 with Lords Diplock and Wilberforce on opposite sides

Ramsay the facts of which involved an artificial, circular, self-cancelling transaction: was there a chargeable gain or allowable loss? At the risk of quoting something very familiar to you I repeat *Ramsay* in the Court of Appeal:

> The facts as set out in the case stated by the Special Commissioners demonstrate yet another circular game in which the taxpayer and a few hired performers act out a play; nothing happens save that the Houdini taxpayer appears to escape from the manacles of tax.
>
> The game is recognisable by four rules. First, the play is devised and scripted prior to performance. Secondly, real money and real documents are circulated and exchanged. Thirdly, the money is returned by the end of the performance. Fourthly, the financial position of the actors is the same at the end as it was in the beginning save that the taxpayer in the course of the performance pays the hired actors for their services. The object of the performance is to create the illusion that something has happened, that Hamlet has been killed and that Bottom did don an asses head so that tax advantages can be claimed as if something had happened.
>
> The audience are informed that the actors reserve the right to walk out in the middle of the performance but in fact they are the creatures of the consultant who has sold and the taxpayer who has bought the play; the actors are never in a position to make a profit and there is no chance that they will go on strike. The critics are mistakenly informed that the play is based on a classic
>
> retainer entered the theatre with his salary and left with a genuine entitlement to his salary and to an additional annuity. [81]

After *Ramsay* in the House of Lords we had to ask ourselves what the House had done. Lord Wilberforce concluded that nothing the House was doing upset the cardinal principle about substance and form. However, it was not clear what the House would do next. The fact that we can now say, post-*Barclays* in 2004, that it was all a question of construction does not alter that fact that at the time very different views were held. Was the House just adopting a realistic up-to-date approach to questions of fact and law or, was it a watershed case, like *Donoghue v Stevenson*, rewriting the law and creating at least the opportunity for the development of a judicial GAAR? If the latter, what hedging doctrines or limits would the court develop? If it was less than a GAAR and more like a step transaction doctrine, when was it to be applied? Always or selectively? If selectively, then on what basis? Life was uncertain and, for an academic at least, great fun. For others things were more serious. What should the Revenue do with their success?

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[79] [1979] STC 793.
[80] [1979] STC 379.
[81] *W T Ramsay v IRC* [1979] STC 582 (Court of Appeal).

The year 1982 brought the decision in *Burmah Oil*.[82] The UK corporate reorganisation tax rules did not have a business purpose requirement until the *Finance Act 1978*. In *Burmah Oil,*

In 2007, with our new understanding that it is all a question of interpretation, that there is no doctrine or rule, just an approach, things seem different. The difference is shown by one of my favourite paragraphs. It comes from the speech of Lord Nicholls in the *MacNiven* case[88] in 2001. Anticipating what he was to say in the *Barclays* case in 2004, Lord Nicholls came down decisively in favour of simply applying the words of the legislation. I will quote it and comment (with interpolations and emphasis[89]) as I go:

> My Lords, I readily accept that the factual situation described by Lord Brightman is one where, typically, the *Ramsay* approach will be a valuable aid [JUST A VALUABLE AID, AND IF SO TO WHAT?]. In such a situation, when ascertaining the legal nature of the transaction and then relating this to the statute, application of the *Ramsay* approach may well have the effect stated by Lord Brightman. But, as I am sure Lord Brightman would be the first to acknowledge, the *Ramsay* approach is no more than a useful aid [CRUX]. This is not an area for absolutes [MORE CRUX]. The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.

I am not convinced that Lord Brightman would have made that acknowledgment but I think he would not have rejected it either. It was far more likely that he would have said that it was too early to say. But Lord Nicholls pushes his argument further:

> As I have sought to explain, *Ramsay* did not introduce a new legal principle. [AND SO] It would be wrong, therefore, to set bounds to the circumstances in which the *Ramsay* approach may be appropriate and helpful [NO HEDGING DEVICES NEEDED]. 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.[90]

You can decide whether it is breathtakingly brilliant or brilliantly breathtaking!

That is all very well but let us be practical - how should the Revenue have carried out their legal duty to collect tax in accordance with the law? Thankfully for us the Revenue carefully arranged for three appeals to be heard together in 1988.[91] Of the panel of five hearing the appeals, none had sat in the earlier cases at House of Lords level. These cases resolved the question whether the House of Lords had formulated a judicial GAAR or a more confined composite (or preordained) transaction doctrine [IT HAD NOT] and, by a majority, gave ra9 Tm(t)cnr(O)-4(T)] TJETBT/F2 11.04 Tf1 0 08C2( )

exchange had been tax driven. The House of Lords held, unanimously and without effort, first that the tax avoidance purpose was not enough to invalidate the exchange[93] and secondly that the eventual sale to someone else did not fit the composite transaction test.[94]

Craven v White[95] was more difficult; the House of Lords split 3-2. Once more there was a share for share exchange with an Isle of Man company. This time though the sale *did* go through to the intended purchaser, but only just. At the time of the share exchange (11 July) the prospects for the sale to a company called Oriel (O) did not look promising and an alternative disposal was considered. However, on the same day, O asked for a further meeting. The Commissioners had held that the primary objective of the share exchange was the sale to O and that the taxpayer company was keeping its options open. Following further negotiations, including one stormy meeting , the sale to O finally went through on 9 August of the same year. This time the House of Lords said no avoidance, but by a bare majority. The majority consisted of Lord Oliver and the two Scottish law lords Keith and Jauncey.

Lord Oliver refers to a series of transactions preordained in order to produce a given result and there being at that time no practical likelihood that the pre-planned events would not take place in the order ord141.86 5FTJrd141.86 5FTJrd141.86 5TAes

We move fast forward to late 1997 and *IRC v McGuckian*.[102] The importance of this

And so to 2004 and two decisions:

not being exercised simultaneously, therefore the scheme could not be regarded as a

be time to take a closer look at the American experience. They have developed at least three tests of interdependence for their step transaction doctrine; some may be worth looking at. We do not need to be trapped by the strictness of the practical certainty test in those situations where the approach can be used. As Lord Nicholls has told us: it is all a matter of interpretation and so anything can be considered.[120] What we need is for someone to do the work so that counsel can inform the court.

7 POSTSCRIPT: BEYOND 2007

As Professor Tiley predicted, Barclays was not the end of the story. By 2010 there were renewed calls for a GAAR in the UK. The reasons for this are complex ± a global financial crisis from 2008 and beyond, a new coalition government elected in the UK in 2010 imposing strict austerity measures and, perhaps most significantly, a number of high profile tax avoidance cases that made the payment of tax appear to be optional. Although Professor Tiley had articulated a preference for judicial construction of tax legislation over a