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# The United Kingdom's General Anti-Abuse Rule in Tax

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*The UK parliament has recently enacted a General Anti-Abuse Rule ("UK GAAR") to counter egregious tax avoidance. This article considers the impact of the UK GAAR on the frequent controversy arising from so-called Jersey Schemes. The conclusion is that the UK parliament will have delivered a conclusive moral judgment as to what is immoral avoidance, and such schemes will fail. In future, any Jersey institution involved in UK tax planning can be assured that there is no moral risk, as egregious schemes are doomed to fail. The question of whether Jersey ought to reform its own General Anti-Avoidance Rule to learn from the UK's example will be considered. It will be argued that following the approach taken by the UK GAAR would narrow the focus and effectiveness of the current Jersey provision, and add considerable bureaucracy.*

1 This article concerns the United Kingdom's soon to be introduced General Anti-Abuse Rule ("UK GAAR") against "egregious" tax avoidance. The aim is to consider two questions. First, whether the introduction of the GAAR has any consequences for Jersey in terms of its association in the public mind with tax avoidance, which frequently sees schemes designed by Britons for Britons styled as Jersey Schemes whenever the matter reaches the popular press. Secondly, whether there are any lessons which Jersey should take from the UK's new legislation as regards is own General Anti-Avoidance Rule ("Jersey GAAR") found in s 134A of the Income Tax (Jersey) Law.

2 What we shall see is that the UK parliament, assuming that it passes the UK GAAR in its current form,[1] chose to follow the minimalistic view of what a general anti-avoidance rule should achieve proposed by the Aaronson Report, more properly called the *GAAR Study*.[2] More

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[1] Finance Act 2013, ss 206–15.

[2] Aaronson, *GAAR Study—A Study to Consider whether a General Anti-Avoidance Rule should be Introduced into the UK Tax System*, 11 November 2011, at www.hm-treasury.gov.uk/d/gaar_final_report_111111. pdf (accessed 26 December 2012).

importantly from the Jersey perspective, the UK GAAR follows Graham Aaronson, QC in taking an approach which is one of moral objection but which also places most avoidance in the unobjectionable middle ground. It was recently asked in the States Assembly what "aggressive tax avoidance" is, and what Jersey is doing to fight it.[3] At least as regards UK taxation, the UK GAAR provides both the answer to the question of definition, and also tells Jersey what it needs to do against such avoidance. In future, it will in most contexts be impossible for Jersey to be involved in avoidance that the UK finds objectionable, for such avoidance will by definition fail. However, as regards the question of what Jersey can learn from the UK GAAR in terms of dealing with avoidance of its own direct taxes, the answer must be very little, if anything. The UK GAAR takes a moralized view of avoidance, and thus does not seek to achieve what all tax legislation should aim at: the accurate measurement of income and expenditure—or at the very least the creation of a realistic threat of achieving that aim in order to deter taxpayers from trying to exploit possible shortcomings in the legislation. When enacted, the UK GAAR will provide the UK parliament's *moral* blessing for much of what might popularly be called tax avoidance as being in "the centre ground of responsible tax planning".[4] It does not follow that this means that such planning works as a matter of law, just that any accusation of immorality is removed.[5]

## The UK GAAR

### *The history of thought*

3 It is useful to set out the immediate history of the UK GAAR, and in doing so to set out the legal backdrop to the tax avoidance debate in the UK.[6] All history, as Collingwood put it, is the history of thought.[7] This means that behind everything that happens in human affairs is the history of the thought processes behind the happening. This applies to the passing of legislation as it does to any other human event.

4 The question of creating a GAAR (whether targeted broadly at avoidance or narrowed to abuse) had been a common topic for debate

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[3] "Aggressive tax avoidance 'hard to define'", *Jersey Evening Post*, 3 July 2013, p.7.
[4] *GAAR Study*, *op cit*, 1.7(iii).
[5] Gauke, *Hansard*, House of Commons, 1 July 2013, col 705.
[6] The writer was an Inland Revenue lawyer conducting anti-avoidance litigation from 2002–2006 and 2008–2012.
[7] Collingwood, *The Idea of History*, Rev. ed. New York: Oxford University Press (1994), p 133.

in the tax world—and Aaronson himself had been involved in considering a GAAR in the field of indirect tax as long ago as 1996 when he was head of Tax Law Review Committee.[8] Although nothing came of the proposals back in the late 1990s, the question of a statutory GAAR did not go away, except in much of indirect tax where the European Court of Justice has developed the abuse of law doctrine in matters of VAT.[9]

5 Professor Freedman argues that, since the consideration of a GAAR in the late 1990s, much had changed and not in the Revenue's favour.[10] The famous (in tax circles) *Ramsay* doctrine, which had threatened to cause tax law to address the real world results of entire composite transactions,[11] had been firmly downgraded to a mere "approach", and then became just another form of statutory interpretation.[12] As a result, tax legislation had become even more complicated, particularly noting the proliferation of Targeted Anti-Avoidance Rules ("TAARS") designed to plug gaps in specific pieces of legislation. This was the background to the establishment of the Aaronson Committee to evaluate the question of introducing a GAAR. Finally, to complete the story, the *GAAR Study* somewhat melodramatically records that the very recommendation for any form of General Anti-Avoidance Rule hung in the balance until along came the Court of Appeal's decision upholding the SHIPS 2 scheme in the *Mayes Cas*e,[13] a scheme which united Aaronson and his distinguished advisory panel in outrage, demonstrating the pressing nature of the inadequacy of Britain approach to abusive tax avoidance.[14]

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[8] See Laydon, "Customs Plan to Ban Avoidance", *Accountancy Ag*e, 10 December 1996 at www.accountancyage.com/aa/news/1755860/customs-plans-ban-tax-avoidance (accessed 11 June 2013). See also, Freedman, "GAAR as a process and the process of discussing the GAAR", [2012] *British Tax Review* 22, at 23.

[9] *Halifax plc v HMCE* (Case C-255/02), [2006] STC 919.

[10] Freedman, *op cit*.

[11] *Ramsay (WT) Ltd v IRC* [1982] AC 300, *per* Lord Wilberforce at 326: "The capital gains tax was created to operate in the real world, not that of make-believe . . . [I]t is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences".

[12] Judith Freedman describes the journey from "doctrine" to "approach" as being one made over time, suggesting that it ended with *Barclays Mercantile Business Finance Ltd v Maswon* [2004] UKHL 51; [2005] STC 1 ("*BMBF*"), see Freedman, "GAAR as a process", *op cit*, p 23.

[13] *HMRC v Mayes* [2011] EWCA Civ 407; [2011] STC 1269.

[14] *GAAR Study*, *op cit*, 3.19–3.23 and 4.6.

6 But Professor Freedman presents too simple a narrative. As long ago as the late 1980s, the House of Lords had already turned *Ramsay* away from any potential to develop into a doctrine of economic equivalence when Lord Templeman found himself in a minority of two in *Craven v White*,[15] and the "statutory construction" hypothesis was affirmed in the Inland Revenue's important victory in *McGuckian*.[16] Lord Hoffmann muddied the waters in *MacNiven* (decided in 2000) by simultaneously affirming the "statutory construction" approach and contradicting himself by asking the courts to categorise terms in tax statutes as either "commercial" or "legal" in their meaning.[17] This problem was resolved in *Barclays Mercantile Business Finance v Mawson* ("*BMBF*") (decided in 2004),[18] when the House of Lords unanimously held that Lord Hoffmann's words on "commercial" and "legal" meanings had been misunderstood.

7 If *MacNiven* and *BMBF* had been the only major avoidance cases, then there might have been a crisis for HMRC. To this might have been added the Revenue's defeat in *Campbell*, where the taxpayer achieved a loss by the simple expedient of gifting 10-year securities in his own company to his wife[19]—but in truth that defeat in the relevant discounted securities legislation never gave the Revenue a moment's

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[15] *Craven v White* [1988] AC 398. As regards Lord Templeman's criticism of subsequent developments, see Templeman, "Tax and the Taxpayer", (2001) 117 *Law Quarterly Review* 575, in particular pp 584–587. See also Freedman, "Converging Tracks? Recent Developments in Canadian and UK Approaches to Tax Avoidance", (2005) 53 *Canadian Tax Journal* 1038, pp 1039–1040 as to the similar failure of any "business purpose" test to take a grip in British jurisprudence.

[16] *IRC v McGuckian* [1997] 1 WLR 991, *per* Lord Steyn at 1000—

> "The new Ramsay Principle . . . was not invented on a juristic basis independent of statute. That would have been indefensible since a court has no power to amend a tax statute. The principle was developed as a matter of statutory construction. That was made clear by Lord Wilberforce in the Ramsay case . . . The new development was not based on a linguistic analysis of the meaning of particular words in a statute. It was founded on a broad purposive interpretation, giving effect to the intention of Parliament. The principle enunciated in the Ramsay case was therefore based on an orthodox form of statutory interpretation."

[17] *MacNiven v Westmoreland Invs Ltd* [2001] UKHL 6, [2011] STC 237.

[18] *BMBF*, *op cit*.

[19] *Campbell v CIR* [2004] UK SPC 421.

doubt that it would win the far more significant battle in *Astall*.[20] Insofar as a casual observer might have thought that the jurisprudence was swinging against HMRC from the high point of the 1980s, any downward trajectory was very much arrested by the trilogy of 2004 cases: *Scottish Provident Institution*;[21] *Carreras*;[22] and *Arrowtown*.[23] These cases confirmed that there was no judicial *animus* in favour of tax avoidance. There were defeats such as *MacNiven* and *Campbell* where the Revenue had pushed the boundaries of statutory interpretation, and found that the words of the statute were against them. A bare majority of the Privy Council may have held in *Peterson* that the New Zealand GAAR failed to counteract a scheme where borrowed money was used to artificially inflate the amount spent on film production, but even this provided a substantial weapon to the Revenue's armoury: the majority described how the New Zealand Revenue could have sought findings of fact to demonstrate that certain expenditure was not on film production but related to the recycling of loan moneys, an argument that pointed the way to the landmark Revenue victory in *Tower MCashback*.[24] In terms of work at the coal face of Revenue anti-avoidance work, the defeat in *BMBF* was far less significant than the victory in *Scottish Provident Institution* which put

[20] *Astall v HMRC* [2009] EWCA Civ 1010. I was both the Revenue Solicitor's Office's lawyer in *Campbell*, *op cit*, and in *Astall*, giving the initial advice and instructing Counsel. It would not break client-lawyer confidentiality to say that *Campbell* was never an obstacle to the Revenue Solicitor's Office's confident and well-justified predictions of victory in the latter case.

[21] *Inland Revenue v Scottish Provident Institution* [2004] UKHL 52, [2005] STC 15.

[22] *Carreras Group Ltd v Stamp Commissioner (Jamaica)* [2004] UKPC 16, [2004] STC 1377. The question was whether there was "an issue of a debenture in exchange for shares", see at [6]. Viewing the entirety of the arrangements, it was inevitable that the debentures would be redeemed promptly. It followed that there was not an exchange of shares for debentures, but something different.

[23] *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46. Shares were created which outwards met the statutory conditions, but could be ignored for tax purposes. *Per* Lord Millett at 152,

> "[The shares] had no commercial content at all. They carried no rights to dividends or capital on a winding up. If shares are considered as a bundle of rights, they had barely even a shadowy existence."

[24] *Peterson v Inland Revenue* (New Zealand) [2005] UKPC 5, [2005] STC 448 at 47–53. *Tower MCashback LLP1 v HMRC* [2011] UKSC 19, [2011] STC 1143.

paid to "anti-*Ramsay*-devices" by inserting a "commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned".[25] It meant that tax planners could not claim that their schemes should not be viewed as a composite whole because the outcome was not wholly certain,[26] and that remote contingencies inserted into schemes in order to tick statutory boxes would be disregarded. The relevant discounted securities scheme that was thoroughly routed in *Astall* may have been devised by a Big Four accountancy firm, but cases such as *Scottish Provident Institution* made defeating it straightforward. And in *Prudential*, another Big Four scheme, the tax-efficient off market swaps scheme was calmly written off by the Revenue as a straightforward case of *Street v Mountford*—what was said to be "consideration for entering into a contract" was part of the contractual *quid pro quo* however it might be labeled—and a billion pound scheme vouched by many tax QCs was practically laughed out of the Court of Appeal.[27] Of course, given that schemes

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[25] *Scottish Provident Institution*, *op cit*, at 22. A limited exception to inserted contingencies was the artificial scheme in *Bayfine UK Products v HMRC* [2008] UKSPC 719. In that case, the options were arranged so that there was a 50/50 chance of money ending up in one of two group subsidiaries. It was held by the Special Commissioners that at the point the transactions were arranged, there had been no transfer of value because everything was in balance. The curious thing is that had the odds been 90/10, which would have produced a less drastic tax advantage, it would probably have been possible under *Scottish Provident* to dismiss the existence of the 10% chance as an artificially inserted contingency. HMRC won the case on other arguments and did not pursue the avoidance point on appeal.

[26] In *Furniss v Dawson* [1984] AC 474, A passed shares to B, who promptly passed the shares to C: held, A disposed of the shares to C. In *Craven*, *op cit*, A passed shares to B, desiring that the shares should be passed to C if a commercial deal were concluded. Much of tax avoidance post-*Craven v White* centred on inserting uncertainty into the final transaction to simulate the uncertainty that had existed in that case. Of course, such attempts would typically fail as the transactions that engineered the uncertainty became part of the composite whole.

[27] *Prudential plc v HMRC* [2009] EWCA Civ 622, [2009] STC 2459. The essence of the scheme is this. The exchange rate is £1.00=$1.50. The parties agree a forward currency exchange at £1.00 for $1.00 in three months time, but the party paying the $1.00 will also pay $0.50 today as consideration for entering into the contract. As I recall, Lord Justice Mummery said in court that it was impossible go more than five weeks in the Court of Appeal without hearing Lord Templeman's *dictum* in *Street v Mountford* [1985] AC 809, 819 ("The manufacture of a five-pronged implement for manual digging results in

inherently present factual scenarios that had not been considered, there will be the luck of the draw as to whether the semantics of different provisions will allow the Revenue to win the case—which it did not always do. The repo legislation caused particular problems to HMRC with the defeats in *Bank of Ireland Britain Holdings* ("*BOIBH*"),[28] and then in *First Nationwide*,[29] but these were more in the nature of consolation goals scored by the tax avoidance industry than evidence of a jurisprudential crisis for HMRC in the decade leading up to the *GAAR Study*.

8 Nor did the victory of the highly artificial SHIPS 2 Scheme in *Mayes* change the general flow of Revenue victories into such a crisis.[30] The SHIPS 2 scheme was exceedingly clever: the taxpayers invest a small amount of money by buying life insurance policies and thanks to seven well-coordinated steps including the borrowing of a large sum of money that never goes close to the taxpayers' possession, a massive income loss is manufactured. *Mayes* may be the *causus bellum* put forward by the *GAAR Study* as proving the case for recommending the UK GAAR, but if on one view *Mayes* encapsulated what could go wrong in the UK tax system, it can also be said to be a rare occurrence. Pinsent Masons claimed that it was "one of the only tax avoidance 'schemes' to succeed before the courts in recent times".[31] Pinsent Masons, being the victorious solicitors in the case,

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a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade"). As the first lawyer to advise on behalf of the Revenue, it always seemed to me that the case was unarguably as simple as that. And so it worked out.

[28] *Bank of Ireland Britain Holdings v HMRC* [2008] EWCA Civ 58, [2008] STC 38. A repo is economically a secured loan, but it takes the form of a pre-arranged sale and repurchase of securities. By creating a three party repo with the original purchaser based in Ireland, an economically non-existent tax loss was generated in one of the British based parties.

[29] *First Nationwide v HMRC* [2012] EWCA Civ 278. The capital repayment of a loss became an income expense—essentially claiming a business loss on repaying a short term loan. The alchemy worked because an economically capital transaction (*i.e.* a return of share premium) was effected by way of a preordained dividend paid out of share premium in a Cayman Island company.

[30] *Mayes*, *op cit*.

[31] To give the full quote from the Pinsent Masons website: "Acting for Mr Mayes (one of 70 participants in a tax scheme called SHIPS 2) in the Court of Appeal in *Mayes*, *op cit*, one of the only tax avoidance 'schemes' to succeed

may have cause to talk up the scale of the victory but, as one of the principal firms for high-end quality schemes, they hardly have cause to talk down the prospects of avoidance schemes working. In any case, they would hardly make the claim unless it had a significant basis in truth: *Mayes* was a rare defeat for the Revenue. It cannot explain why a GAAR became necessary.

9 If there were no particular jurisprudential crisis for HMRC in the measurement of income and expenditure, then what? The reason for the idea of a GAAR re-entering the political agenda was a decreased tolerance for the gap between reality and legal outcome. The very nature of income does not admit of wholly accurate definition, meaning that a set of rules will inevitably contain flaws that can be exploited, the classic Haig-Simons definition of income being "consumption, plus increase in net worth for any given period".[32] The problems of putting a monetary value to the sum are well understood, not least by Simons himself who said, "If one accepts our definition of income, one may be surprised that it has ever been proposed seriously as a basis for taxation".[33] But as it would be impossible in modern Britain (and almost the entirety of the modern world) to wholly abandon the taxation of income, it is inevitable that governments will look for means to either (a) define income so that it more precisely matched the economic reality, or (b) deter tax planners and taxpayers from seeking to identify and exploit mismatches. Many may hope that a GAAR will simplify the tax system but at its heart the main object for a GAAR is to reduce the times when tax statutes under-measure income or over-measure expenditure.

10 As the cry began to go up that something had been done,[34] Graham Aaronson, QC stepped forward and brought the idea to the Treasury

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before the courts in recent times." See www.pinsentmasons.com/en/expertise/services/tax/tax-litigation-disputes/ (accessed 3 July 2013).

32 Simons, *Personal Income Taxation: the Definition of Income as a Problem of Fiscal Policy*, Chicago: University of Chicago Press (1938), pp 49–50. See also Dodyk, 'The Tax Reform Act of 1969 and the Poor', (1971) 71 *Columbia Law Review*, 758, p 759.

33 Simons, *op cit*, p 103.

34 In particular, Liberal Democrat Manifesto 2010, p.9, promising new powers to HMRC to tackle tax avoidance, (network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf, accessed 17 July 2013). A GAAR was raised by Michael Meacher MP (Lab) and John Pugh MP (LibDem), in the debate for the Finance Bill 2009, see *Hansard*, House of Commons, 2 July 2009, Col. 849–851 (www.publications.parliament.uk/

that the question of a General Anti-Avoidance Rule should be considered in earnest to address the question of whether the existing system does enough to prevent "intolerable" avoidance.[35] So 14 years after, as head of the Tax Law Review Committee, he had promised that no General Anti-Avoidance Rule would be passed against the wishes of tax practitioners,[36] the Treasury commissioned Graham Aaronson, QC to enquire again into whether there should be such a rule.[37] What we shall see is that, if *Mayes* was the *causus bellum* of Graham Aaronson's *GAAR Study*, then war was declared on the *Mayes* case and everything like it. Which is to say, so-called egregious or abusive tax avoidance would be counteracted—but it would be quite possible to find reasonable and responsible ways of economic income being mismeasured by the Taxes Acts, even if no reasonable or responsible legislature would leave such routes open once alerted to their existence. The Adam Smith Institute deplored the motives behind the *GAAR Study*[38]—

> "Mr. Aaronson soon decided that the crucial question (for him) is whether current powers and legislation are effective enough to prevent 'the sort of tax-avoidance schemes which many citizens and taxpayers regard as intolerable'. This is populism at its worst . . ."

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pa/cm200809/cmhansrd/cm090707/debtext/90707-0006.htm, accessed 17 July 2013).

35 *GAAR Study*, *op cit*, 3.19, and see also 4.6–4.10 for the section, "Attitude to avoidance".

36 Laydon, *op cit*: "If we can come up with a consensus we will have done very well. But if we come out against a general avoidance provision, the Government, no matter what its majority, won't be able to pass such a law."

37 HMRC, "Study of a General Anti-Avoidance Rule: Terms of Reference", 6 December 2010 (www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf, accessed 13 June 2013)—

> "[1] Providing the Government with an effective means of deterring and countering tax avoidance. [2] Ensuring that the rules work fairly and would not erode the UK tax regime's attractiveness to business. [3] Ensuring that certainty about tax treatment of transactions could be provided without undue compliance costs for businesses and individuals. [4] Keeping any increase in resource costs for HMRC to an acceptable level and ensuring that there would be a minimal need for resource to be diverted from other priorities."

38 Arthur, "A Critique of the GAAR Report", *Adam Smith Institute*, 15 March 2012 (adamsmith.org/research/articles/a-critique-of-the-gaar-report, accessed 3 July 2013).

But the Institute was too busy deploring the idea of the GAAR to notice the narrowness of the proposals, nor that the proposals in fact protect much avoidance from being thought of as egregious.

*The GAAR Study of 2011*

11 The curious thing about the *GAAR Study* is that its central pre-occupation is the protection of those who enter into tax planning from HMRC, and not how best to narrow the gap between the statutory definition of income and the economic reality.

12 The *GAAR Study*, as we have said, railed against the SHIPS 2 Scheme. That Scheme was intricate, clever, and did not pretend to be anything other than avoidance. But any moral objection to the SHIPS 2 scheme working is no different from the objection to any avoidance scheme, which is to do with objectionability of what is achieved, something which must exist before we even consider whether we wish to boo or hiss at the taxpayer who uses the scheme.[39] As Milton Friedman put it[40]—

> "The effect has been to make the actual rates imposed far lower than the nominal rates and, perhaps more important, to make the incidence of the taxes capricious and unequal. People at the same economic level pay very different taxes depending on the accident of the source of their income and the opportunities they have to [avoid] tax."

13 It really does not matter whether a scheme works by one giant leap or seven well-choreographed pixie steps, or whether the avoidance can be embedded in a commercial enterprise or not, the reason why a taxpayer without a financial interest in the success of the scheme will prefer a scheme to fail will be the same:[41] the law should not create an

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[39] The difficulty of defining acceptability by virtue of the choices of the individual actor is summed up wittily by Joseph Heller: "'So I'm turning my bombsight in for the duration. From now on I'm thinking only of me.' Major Danby replied indulgently with a superior smile, 'But, Yossarian, suppose everyone felt that way.' 'Then I'd certainly be a fool to feel anything else.'" *Catch-22*, London: Vintage (1994), pp 510–11.

[40] Friedman, *Freedom and Capitalism*, Chicago: University of Chicago Press (2002), pp 172–173. Professor Friedman used the word "evade" not "avoid", but was addressing what we would term "avoidance", and indeed any opportunity within the law to receive income in an untaxed manner.

[41] In respect of looking beyond ones own financial interest to find whether a tax is arbitrary or not, it is useful to quote Philip Pettit, the political philosopher of republic theory ('Republican Freedom: Three Axioms, Four

unjustifiable gap between the measurement of income and legal reality. It will create justifiable albeit often controversial gaps when tax incentives are created, but the heart and soul of tax avoidance is in the discovery and exploitation of unjustifiable gaps. The success of SHIPS 2 in *Mayes* told us nothing that we did not know from the taxpayer victories in *MacNiven*, *BOIBH*, *Campbell* or *BMBF v Mawson*—facts can be contrived to give a tax advantage that cannot be justified on any basis other than the necessity to apply prior rules. The success of such schemes is justified by "the rule of law, in the sense of the individual's safety against unlawful deprivation of rights and property, as a value that overrides the fiscal interest in efficient taxation",[42] for certainly no one could justify deliberately creating rules with the intention that those schemes would achieve their goal.

14 The moralised approach is crucial to the route taken in the *GAAR Study*'s recommendation, and also crucial to the legislation that was introduced in the Finance Act 2013. The *GAAR Study* does not ask the question "what would a legislature wish to fix in its tax code?", but instead "when would we be angry with a taxpayer for trying to take advantage of the faults in that code?" As we shall soon see, the moralised approach is also crucial to what the UK GAAR means for Jersey—which is to absolve Jersey from any future moral responsibility for involvement in UK tax avoidance.

*GAAR Study recommendations*

15 Setting aside procedural safeguards to protect those who engage in high value tax planning, the basic legal structure of the UK GAAR as proposed by Graham Aaronson, QC was this[43]—

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Theorems', in Laborde and Maynor, *Republicanism and Political Theory*, Oxford: Blackwell (2008), p 117)—

> "I may have an interest in the state imposing certain taxes or in punishing certain offenders . . . [b]ut I may still not want the state to impose taxes on me—I may want to be an exception . . . In such a case, my relevant interests and ideas will be those that are shared in common with others, not those that treat me as exceptional, since the state is meant to serve others as well as me. And in these cases the interference of the state in taxing or punishing me will not be conducted on an arbitrary basis . . ."

[42] Muten, 'The Swedish Experiment with a General Anti-Avoidance Rule', in Cooper (ed), *Tax Avoidance and the Rule of Law*, Amsterdam: IBFD Publications (1997), p 319.

[43] *GAAR Study*, *op cit*, Appendix 1, cl 3(1).

"[A]n abusive tax result is an advantageous tax result . . . which would be achieved by an arrangement that is neither reasonable tax planning . . . nor an arrangement without tax intent . . ."

16 Disregarding the reference to "arrangements without tax intent", which was always irrelevant for real-world purposes and would be wholly dropped from the final UK GAAR, the definition can be unpacked as follows—

- there must be an abnormal arrangement,[44]
- giving rise to an "advantageous tax result",[45]
- which does not constitute "reasonable tax planning", in that it cannot "reasonably be regarded as a reasonable exercise of choices of conduct afforded by the provisions of the Acts",[46] and
- the arrangement must be contrived so as to achieve the advantageous tax result in that it has abnormal features whose sole or main purpose was to achieve an advantageous tax result.[47]

17 It is useful to state the component parts of the UK GAAR as conceived by its creator: if an arrangement were found to be abnormal, led to an advantageous tax result, and was found to have been created solely to achieve that result, the question of whether it was reasonable tax planning remained to be asked.

18 Whilst the question of anti-avoidance legislation is for the legislature to better define what falls in and out of the tax net, the focus of the *GAAR Study* is whether "such a step might erode the attractiveness of the UK's tax regime to business".[48] The central oddity of the *GAAR Study* is that having taken care to objectively identify "abnormal arrangements" and "advantageous tax results", these are in fact minor hurdles that are easily cleared. The same applies with the treatment of taxpayers' objectives for entering into he transactions. Usually with Targeted Anti-Avoidance Rules, the major hurdle is proving that tax avoidance was one of the main objects or purposes of the taxpayer,[49] but in the *GAAR Study* this hurdle is strangely lowered to what may "be reasonable to conclude" as being the taxpayer's

[44] *Op cit*, Appendix 1, cll 6 and 7.
[45] *Op cit*, Appendix 1, cl 15.
[46] *Op cit*, Appendix 1, cl 4.
[47] *Op cit*, Appendix 1, cl 3(2).
[48] *Op cit*, para 1.4.
[49] *Lloyds TSB Equipment Leasing (No. 1) Ltd v HMRC* [2012] UKFTT 47 (TC).

purpose,[50] as opposed to being decided on the balance of probabilities. Everything makes way for the central innovation of Aaronson's proposals: the double reasonableness test. The heart and soul of the Report was the "reasonably be regarded as reasonable" safeguard to protect those achieving advantageous results by way of abnormal arrangements from HMRC.[51] There is little doubt on reading the *GAAR Study* that, despite occasionally hauling up the *Mayes* case to serve as the tax avoidance equivalent of a pantomime villain, the true agent of mischief addressed by the *GAAR Study* was HMRC—the *GAAR Study* talked of "a palpable fear of 'mission creep' after the GAAR reached the statute book".[52] It is this fear which led to the proposal of many safeguards against HMRC,[53] whilst not giving as much as a thought as to how tax planners might try to "game" the system by presenting specious commercial explanation,[54] or

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[50] Finance Act 2013, s 206(1).

[51] HMRC, *GAAR Guidance* (approved by the Advisory Panel with effect from 15 April 2013), C5.1: "Determining whether tax arrangements are abusive is the core of the GAAR legislation." See also B1.2—

> "The broad definitions of 'arrangements' and 'tax arrangements' set a low threshold for initially considering the possible application of the GAAR. A much higher threshold is then set by confining the application of the GAAR to tax arrangements which are 'abusive'."

[52] *GAAR Study*, *op cit*, para 1.13(i).

[53] In order: Safeguard 1—reasonable tax planning exempted; Safeguard 2—arrangements without tax intent exempted; Safeguard 3—burden of proof on HMRC; and Safeguard 4—creation of a special advisory panel to vet cases before permitting HMRC to proceed on the basis of the GAAR. To which may be added a fifth—the need for approval of a senior HMRC officer before invoking the GAAR.

[54] *Land Securities v HMRC* [2011] UKFTT 599 (TC) at 45—

> "We should immediately record that Mr. Wood was an impressive and plainly honest witness. Indeed he was candid to the point that when Mr. Ghosh asked him to concede that particular points had been advanced in support of the commercial benefits suggested to be achieved by the scheme, and that on examination those benefits had emerged to be largely illusory, he repeatedly conceded that he accepted Mr. Ghosh's points. Many others in his position would have persisted in suggesting that there was some, if only minor, underlying validity to the particular points in issue."

Much as it was commendable that the witness conceded that much of his statement was wrong, it is somewhat worrying that Judge Nowlam, who has immense experience, seemed to think that honesty was not the usual course of action for witnesses before the Tribunal in such circumstances.

withholding documents relevant to motives by invoking legal privilege.[55] Indeed, by (unusually for tax appeals) placing the burden of proof on HMRC, the *GAAR Study* removed an often useful lever to oblige the well-advised taxpayers to be forthcoming.[56]

19 The approach taken in *GAAR Study* ultimately rests on the central conviction that certainty in tax is of absolute importance to business. The *GAAR Study* puts it thus—

> "1.2 In broad terms the purpose of the study was to consider whether the introduction of some type of general anti-avoidance rule would be beneficial for the UK tax system.
>
> 1.3 Beneficial does not mean simply providing another weapon in the armoury to challenge unappealing avoidance schemes. The issue is more complex, and a number of important factors have to be taken into account to determine whether, looked at overall, introducing a GAAR today would be a positive step.
>
> 1.4 Most critical among these factors is whether such a step might erode the attractiveness of the UK's tax regime to business. The continuing turbulence in financial markets and the fragility of the UK economy has kept this issue in the forefront of the Study Group's discussions.
>
> 1.5 I have concluded that introducing a broad spectrum general anti-avoidance rule would not be beneficial for the UK tax system. This would carry a real risk of undermining the ability of business and individuals to carry out sensible and responsible tax planning."

20 This conclusion, it is suggested here, comes from a mixture of parochialism and special pleading. The approach is parochial in that the tax experts behind the *GAAR Study* share the common human fault of imagining that their speciality is the centre of the world—the Adam Smith Institute found the "plethora of lawyers" on Graham Aaronson's Committee "unfathomable", but the position was much worse: there was a plethora of tax lawyers.[57] It can hardly be denied that British business suffers all sorts of uncertainty at the hands of our legal system: Lord Hope has asserted that anything in the common law of

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[55] *R (Prudential plc) v Special Commissioner* [2013] UKSC 1.

[56] In Jersey, the approach is embodied by the Income Tax (Jersey) Law 1961, art 24A which allows for assessments against taxpayers who are believed to be withholding information. Such a provision relies on the burden of proof being on the taxpayer to prove his or her appeal.

[57] Arthur, *op cit*, *Adam Smith Institute*.

contract might be changed retrospectively if found wanting;[58] where a business owes a duty of care in negligence can be re-written retrospectively if the courts decide that the public policy factors have changed;[59] British businesses have no "double reasonableness" test to protect them in employment law;[60] and health and safety law is so vague that its own practitioners throw up numerous misconceptions to the chagrin of the Health and Safety Executive.[61] But the conclusion of the *GAAR Study* was that business in Britain might bear all of this legal indeterminacy, but what businesses absolutely require is certainty as to when a plan for reducing the headline rate of corporation tax will work. Should tax planners discover an opportunity to achieve "actual rates . . . far lower than the nominal rates", with this opportunity "depending on the accident of the source of their income and the opportunities they have to [avoid] tax",[62] then (in the world according to *GAAR Study*) it is of fundamental economic importance that the taxpayer should be certain as to whether he will achieve that end. In the context of the present non-GAAR approach of a purposive construction of tax statutes, and a realistic appraisal of the facts engineered in schemes, Lord Walker in *Tower MCashback* dismissed fears of uncertainty as something those who engage in avoidance planning bring on themselves.[63] The *GAAR Study* implicitly rejects this approach, save for those who test the limits of the UK GAAR itself—after all, in its area of application the double-reasonableness test of the UK GAAR offers no more precision than the double-reasonableness

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[58] *Chartbrook Ltd v Persimmion Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, at 2:

> "Every so often the rule that prior negotiations are inadmissible comes under scrutiny. That is as it should be. One of the strengths of the common law is that it can take a fresh look at itself so that it can keep pace with changing circumstances."

[59] *Arthur JS Hall v Simons* [2002] 1 AC 615, at 682–683, the overturning of the rule against barristers and solicitors owing a duty of care as regards negligently conducted court litigation was not on the basis that the earlier decisions were wrong, just that the policy considerations had changed.

[60] *E.g.* the Disability Discrimination Act 1995, s 6(4).

[61] See the UK Health and Safety Executive's own webpage, "Busting the Health and Safety Myths" (www.hse.gov.uk/myth/, accessed 14 July 2013)

[62] Friedman, *op cit*, pp 172–173.

[63] *Tower MCashback*, *op cit*, at 80. See also Templeman, "Tax and the Taxpayer", (2001) 117 *Law Quarterly Review* 575, at 587, where Lord Templeman argued that broad anti-avoidance powers may have uncertainty *in outcome* but taxpayers will know with certainty when they are at risk of such powers applying.

test of classic British judicial review principles under *Wednesbury*.[64] The UK GAAR does not bring certainty through precision, but by deliberately vacating a significant part of the battleground between the Revenue and tax planners, which is henceforth declared to belong to responsible tax planning.

21 The result is that the UK GAAR is not a General Anti-*Avoidance* Rule, but rather a General Anti-*Abuse* Rule. This is not because of any semantic argument that avoiding a statute is a contradiction in terms,[65] but because the scope of the Report's proposals was not tax avoidance in general, but something much narrower, *i.e.* abuse. The *GAAR Study*, far from generally addressing tax avoidance, is very particular in its aim: "those highly abusive contrived and artificial schemes which are widely regarded as intolerable".[66] It is a moral judgment against certain types of avoidance that is delivered by the GAAR[67]—

> "There was unanimous disapproval, indeed distaste, for egregious tax avoidance schemes: schemes such as SHIPS 2 . . . should be deterred or, if undeterred, defeated."

And it is this moral judgment that is adopted in the Finance Act 2013, ss 206–215 which, with a bit of tidying up, has implemented the proposals set out in the *GAAR Study*.[68]

22 The Scheme of the UK GAAR as recommended by Graham Aaronson, QC has remained, however, unchanged. The most important feature of the UK GAAR, and the real hurdle to be cleared by HMRC, is found in the concept of "abuse" and the double-reasonableness test of whether there are "arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action".[69] Everything else is neither egregious nor abusive.[70]

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[64] *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223, 230: "if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it . . ."
[65] Hoffmann, "Tax Avoidance", [2005] *British Tax Review* 197, at 204.
[66] *GAAR Study*, *op cit*, 5.1.
[67] *GAAR Study*, *op cit*, 4.6.
[68] (1) The concept of a tax advantage and the taxpayer's main purpose in achieving such an advantage is now wrapped up together in the definition of "tax arrangements", see Finance Act 2013, s 207(1); and (2) the "abnormal" arrangements concept is now simply a part of the possible markers for a scheme being abusive, see Finance Act 2013, s 206(2)(b).
[69] Finance Act 2013, s 206(2).
[70] *GAAR Study*, *op cit*, 1.7(iii).

**Significance for Jersey**

23 The UK GAAR, as we have said, will create a moralised definition of the tax avoidance based on practical concerns for what is in the best interests for the wider UK economy. It is worth quoting Helen Lethaby of Freshfields where she summarises the key value judgments underlying the UK GAAR[71]—

> "A GAAR should nevertheless deter and counteract only 'contrived and artificial schemes which are widely regarded as an intolerable attack on the integrity of the UK's tax regime' and leave untrammelled the 'centre ground of responsible tax planning'."

24 The point for Jersey is this. The UK parliament will have made the decision that the vast majority of direct tax planning should be policed by the GAAR, and this will include "abusive arrangements which try to exploit particular provisions in a double tax treaty".[72] Some matters which deal with the division of the tax base in cross-border transactions are recognized as being inappropriate for a UK GAAR,[73] but essentially anything which is by definition abusive tax avoidance *will* fail. Everything else may succeed or fail—it may even fail by reason of a targeted anti-avoidance provision—but it *will* not be abusive tax avoidance. The UK parliament will have created a statute which will make a moral judgment in order to discover what tax planning is immoral, and such tax planning will be doomed from the start. David Gauke in the House of Commons noted that there would still be "tax avoidance" that the Revenue would rather did not succeed, but this will not be of the "abusive" variety.[74] The yin and the yang of the categorization recommended in the *GAAR Study*, and accepted by Parliament when passing ss 206–215 of the Finance Act 2013, is that whatever is not "contrived and artificial . . . an intolerable attack", is in the "centre ground of responsible tax planning".

25 The essence of the moral criticism of Jersey banks, trust companies and the like for being involved in UK tax avoidance schemes is the opinion that such entities ought not to hide behind the assertion, true as it might be, that the success of failure of the scheme is a matter for the legislature that passes the Taxes Acts and for the tribunals and courts who interpret and apply that legislation. Doubtless, if the Jersey

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[71] Lethaby, "Aaronson's GAAR", [2012] *British Tax Review* 27, p 27.
[72] *GAAR Guidance*, *op cit*, B.5.3.
[73] *GAAR Guidance*, *op cit*, B5.1–B5.2, and fn 5: "However, there is work underway in the OECD on the erosion of the tax base and on profit sharing."
[74] Gauke, *op cit*, col. 705.

institution had been told that the scheme does not work, then the institution would know that it was being invited to assist a fraud, which of course would be illegal under Jersey law. Indeed there are such schemes which are more frauds on the taxpayers than on the revenue, where sensible people who would not dream of purchasing the Tower of London or magic beans, somehow do the fiscal equivalent. But our problem is not how financial institutions can spot when they are being invited to have a walk-on role in what is (unknown to them) a fraud, but how they should respond where the invitation is to assist a tax scheme which is legal to try. In the world of legal tax avoidance, the truth is that some schemes work and some schemes fail, and few whether on the Revenue side or the taxpayer side will talk in terms of certainty of success or failure. When SG Hambros Bank & Trust Co (Jersey) Ltd was asked to lend money on a scheme involving the setting up of life insurance policies into which a massive sum of money would be temporarily invested, with a massive tax deduction coming out as if from thin air, those concerned may have thought that it sounded too good to be true, but were surely entitled to say that it was a matter for the British tax experts if it were worth a go. And, indeed, it was worth a go: the scheme was SHIPS 2, the fiendishly clever scheme that the *GAAR Study* went out of its way to condemn as immoral. But any moral criticism for the Jersey company's involvement in the scheme was that the scheme itself was immoral, and to assist the scheme was to assist immorality.

26 Such an accusation could not be run post-UK GAAR—it might be said that Code of Practice on Taxation for Banks takes a tougher line,[75] but now that statute has created a moralized approach to what is reasonable and responsible, such lesser forms of legal rules will surely be interpreted so as to fall into line. The moral issues will have become tax-technical issues. If the scheme is egregious, if it is abusive, if it is "intolerable attack" on the UK Revenue, then anyone who in the future finds themselves in SG Hambros' position in respect of the SHIPS 2 scheme will know that those moral issues must have been addressed by

[75] HMRC, "Consultation on Strengthening the Banking Code of Practice", 31 May 2013, para 1.21 (taxnews. lexisnexis.co.uk/TaxNewsLive/Members/BreakingNewsFullText.aspx?id=4481&css=1&xml=0, accessed 22 July 2013)—

> "In arriving at a view as to whether the transaction is contrary to the intentions of Parliament, the bank should not only consider a purposive construction of the legislation but should also consider whether Parliament can realistically have intended to give the proposed result in circumstances that are very different from those that prevailed at the time (e.g. are loopholes being used to arrive at an unexpected result."

UK tax experts just as they would have addressed other tax-technical issues. Such banks, trust companies and the like will not be participating in the world-view specifically condemned in the *GAAR Guidance*—"Taxation is not to be treated as a game where taxpayers can indulge in any ingenious scheme in order to eliminate or reduce their tax liability".[76] Rather, the Jersey body will be able to rest easy that issues of morality have been addressed. If, in fact, the scheme is egregious, that will be taken care of in the manner provided for by Parliament. Egregiousness is now just another way in which tax planning will fail and—unless the Jersey institution has taken on the role of tax planner, or somehow knows that a scheme is not designed to actually work—providing a service towards implementing a tax scheme that turns out not to work has never of itself been taken as a moral criticism.

27 We can see this in a recent tax avoidance scheme, that of *Vaccine Research*.[77] The scheme itself involved the taxpayers paying £28m of their own money, of which £14m eventually found into vaccine research, with the circulation of £86m in bank loans. It was argued that the taxpayers, who had formed a limited liability partnership, had incurred a first year loss of £193m. The scheme was one which is apt in the UK press to be described as a Jersey Scheme: the promoters were based in London SW1, the lawyers work out of Lincoln's Inn, the research company was in Britain, and taxpayers were of course British. But the taxpayers formed their limited partnership in Jersey, and a Jersey company acted as company secretary. The scheme failed in the First-tier Tribunal and is being optimistically appealed to the Upper Tribunal. The scheme, as analysed by the GAAR Advisory Committee's Guidance, would also have failed under the UK GAAR as being abusive tax avoidance. The reason it is abusive is precisely the same as the reason the scheme failed for tax technical reasons: the taxpayers only expended £14m on research because only £14m was consumed by the research, and it was abusive to try to argue that money that never reached research was spent on research. But no one would moralise over a Jersey company failing to appreciate that the provisions of the Capital Allowances Act 2001 did not allow the sort of fiscal alchemy claimed by the promoters—any moral criticism of the Jersey company will be based on the ethics of making such an attempt. And it is those ethics which the GAAR addresses.

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[76] *GAAR Guidance, op* cit, B.2.3

[77] *Vaccine Research LLP v HMRC* [2013] UKFTT 73 (TC) ("*Vaccine Research*").

28 What is true for the Jersey companies who participate is true for the Jersey authorities. It is nothing to do with the States of Jersey if, as in *Vaccine Research*, British taxpayers form an ordinary Jersey partnership and use it for the purposes of egregious tax avoidance. But if it were in the future argued that Jersey ought to prevent its regulated sector—its banks, trust companies and the like—from participating, then Jersey can reply that nothing in tax planning that is egregious can succeed. The UK parliament has chosen to address tax avoidance not by taking steps against the tax planners or against the taxpayers for participating in the schemes. In keeping with the *GAAR Study*'s central preoccupation, a distrust of HMRC, the conclusion was that creating a positive downside for participants in schemes would present "an irresistible temptation to HMRC to wield the GAAR as a weapon rather than to use it, as intended, as a shield".[78] Given this approach by the British Parliament, there is no logical reason for any other state or territory to take such a step against its own institutions for agreeing to take an ancillary role in implementation.

### Lessons for Jersey's own anti-avoidance legislation

29 A question for Jersey is whether there are any lessons from the UK GAAR that might be applied in respect of Jersey's own approach to anti-avoidance. The answer that we shall give here is, no. There are essentially two reasons. First, the UK GAAR does not seek to address avoidance, but rather abuse. A legislature is interested in the defining the tax base, anti-avoidance legislation should be a tool for doing so. The UK GAAR's chosen target is thus much narrower than the Jersey GAAR. Secondly, despite the aspiration expressed in the *GAAR Study* to simplify the UK tax code, the published Guidance on the operation of the UK GAAR makes it clear that it is easier to find schemes abusive when they are aimed at circumventing a round or two of targeted anti-avoidance legislation. The UK GAAR appears to presuppose complexity in the tax code. Thirdly, the bureaucracy of a GAAR Advisory Panel and written guidance deemed essential in the United Kingdom would be wholly inappropriate for a territory of about 100,000 people.

*The Jersey GAAR*

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[78] A deliberate choice of the *GAAR Study* is that there should be no penalties for failing the GAAR test unless the taxpayer or agents knew that the scheme would fail. See *GAAR Study* 5.47–5.48. However, the position may be revisited after "a bedding-in period to allow taxpayers and advisers to get to grips with it", see Gauke, *Hansard*, *op cit*.

30 Jersey's General Anti-Avoidance Rule, found in art 134A of the Income Tax (Jersey) Law, is brief and to the point in comparison to the UK GAAR. It is worth stating the principal provision in full—

> "(1) If the Comptroller is of the opinion that the main purpose, or one of the main purposes, of a transaction, or a combination or series of transactions, is the avoidance, or reduction, of the liability of any person to income tax, the Comptroller may, subject as hereinafter provided, make such assessment or additional assessment on that person as the Comptroller considers appropriate to counteract such avoidance or reduction of liability:
>
> Provided that no assessment or additional assessment shall be made under this Article if the person shows to the satisfaction of the Comptroller either—
>
> (a) that the purpose of avoiding or reducing liability to income tax was not the main purpose or one of the main purposes for which the transaction, or the combination or series of transactions was effected; or
>
> (b) that the transaction was a bona fide commercial transaction, or that the combination or series of transactions was a bona fide combination or series of transactions and was not designed for the purpose of avoiding or reducing liability to income tax."

31 The Jersey GAAR is not encumbered by any talk of "abnormal" arrangements, nor with explorations into the reasonableness of the taxpayer entering into the planning.

32 The Jersey GAAR is instantly recognizable to the present generation of tax practitioners as being based s 739 of the Income and Corporation Taxes Act 1988 ("ICTA")—the transfer of assets overseas legislation. First, the Jersey GAAR is similar in broadly addressing a transaction or a combination or series of transactions. Secondly, *prima facie* liability if there is a tax avoidance motive for entering into the transaction or series of transaction. Thirdly, as with s 739, there are two defences that the taxpayer can raise: (i) a lack of tax avoidance motive, and/or (ii) that the transaction (or transactions) were *bona fide* commercial and not designed for the purpose of avoiding tax. The principal difference is that the Jersey GAAR uses the broader language of "avoidance *or reduction*" taken from the transaction in securities legislation in ICTA, s 703–709, powerful anti-avoidance legislation which was always kept within well prescribed circumstances;[79] in the

[79] Set out in ICTA, s 704.

Jersey GAAR, the language of "tax reduction" (and not just avoidance) applies generally.

33 Section 739 has appropriately been described as "a potent piece of anti-avoidance legislation",[80] and the Jersey GAAR is at least as potent. The Jersey GAAR follows the approach to anti-avoidance provisions that the *GAAR Study* rejected when it raised the bar for counteraction by introducing the double-reasonableness test.

*Case-study—BMBF*

34 HMRC's GAAR Guidance has sought to demonstrate the strength and limits of the UK GAAR with a series of case studies explaining which examples of tax planning would fail the double-reasonable test, and thus be counteracted by the new legislation. It will be useful to test the potential strength of the Jersey GAAR against the tax planning in *BMBF v Mawson*[81]—a scheme which succeeded as a matter of purposive statutory construction, and is held up in the GAAR Guidance as a quintessential example of responsible tax planning notwithstanding this accurate description of the *BMBF* scheme from Helen Lethaby[82]—

> "No real finance was provided by the Barclays group to the counterparty group; rather the Barclays group simply shared the benefit generated by the tax savings made by the Barclays group with the counterparty group."

35 Essentially, contracts are drafted and signed, book entries are made, ownership changes, but the owner's ability to use the property is unchanged. However, a large fiscal gain is accrued by way of the capital gains legislation, which is supposed to provide an incentive to investment.[83] But achieving a fiscal gain through such book entries was all, we are told, in the spirit of the Taxes Acts.

36 The basic facts of *BMBF* were these. BGE owned a pipeline. It is common to raise finance by way of sale-and-leaseback with banks. The bank is able to claim capital allowances, which it can set against

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[80] Palmer, "Section 739 of the Income and Corporation Taxes Act 1988: Transfer of Assets Abroad", (2004) 11 *Journal of International Trust and Corporate Planning* 251, at 254.
[81] *Op cit*, at 41.
[82] Lethaby, *op cit*, p 32.
[83] Transactions such as that in *BMBF*, of course, create the economic equivalent a state subsidy. It would be interesting to know if this form of subsidy worked any better for the industries that tended to benefit than is usually the case with subsidies.

the profits that financial institutions commonly made. The capital allowances were valuable to the bank, and allowed for cheaper credit terms to be offered. What BGE did was to enter into a sale-and-leaseback transaction with BMBF. BMBF borrowed from Barclays Bank the money to buy the pipeline from BGE, and BGE (in a roundabout way) deposited the sale price with Barclays as security for the rental payments on the pipeline that it now leased from BMBF. The cashflows were such that everything netted off, except that BMBF was able to claim capital allowances of £91m, and mechanisms were included to share allow BGE to share in the bounty. The taxpayers failed before the Special Commissioners and Mr Justice Park in the High Court in that the transactions lacked reality, for essentially the reasons given by Helen Lethaby.[84] The Court of Appeal and House of Lords disagreed, as the only reality that mattered to the legislation was the change of ownership, and so the scheme succeeded. The legislation did not address any artificiality beyond the transfer of ownership in the course of a business addressed by the statute.

37 So, despite the objections that can readily be raised that a tax code ought not to allow a scheme such as *BMBF* to succeed, it did. *BMBF* is an example of how purposive construction of taxing statutes can demonstrate how a fiscal windfall can be achieved. Lethaby summarized it thus[85]—

> "Nevertheless the arrangements were found to be acceptable by the House of Lords, largely it seems because, looked at from the perspective of the Barclays company benefiting from the capital allowances, the transactions were not out of the ordinary."

38 The House of Lords stated[86]—

> "The finding of the special commissioners that the transaction 'had no commercial reality' depends entirely upon an examination of what happened to the purchase price after BMBF paid it to BGE. But these matters do not affect the reality of the expenditure by BMBF and its acquisition of the pipeline for the purposes of its finance leasing trade."

39 The official *GAAR Guidance* (as approved by the GAAR Advisory Committee) enthusiastically agrees. The *BMBF* scheme represents the "centre ground of responsible tax planning" precisely because the result is achieved by facts which addressed the core principle of the capital allowances legislation, *i.e.* capital allowances for expenditure

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[84] See Mr Justice Park, *BMBF* [2002] EWHC 1527 (Ch) at 40.
[85] Lethaby, *op cit*, at 32.
[86] *Op cit*, at 41.

on capital in the course of one's trade. But the truth behind almost every successful tax avoidance scheme is that Parliament did not consider the possibility of the entirety of the transactions concerned—so it is rather odd to analyse the abusiveness of tax planning by looking at whether the facts relevant to answering the statutory question naturally fit within the principles of the legislation.

40 This is, of course, the central conceptual dilemma of tax avoidance. Lord Hoffmann was right to say[87]—

> "There is only one way to know the intention of Parliament and that is to read the statute. So avoidance of tax assumes that you are not paying a tax which, on a fair reading of the statute, you ought to have paid. But why in that case are you not liable to pay it? How can the courts give the statute a construction which means that people do not pay the tax which the statute shows that Parliament intended them to pay?"

41 It thwarts the purpose of an anti-avoidance rule if we tend to collapse the key test for the application of the rule to the same sort of analysis which decides whether or not the scheme works according to the substantive taxing provisions. We can see the UK GAAR's tendency to reproduce the results of ordinary non-GAAR adjudication if we consider HMRC's *GAAR Guidance*. Frequently the reason for a scheme being held to be egregious is precisely the same reason for the scheme failing, *e.g. Vaccine Research*—as explained earlier, the scheme failed because only £14m and not £193m was spent on research, so only £14m could be deducted; and it was egregious to claim to have made a loss of £193m for the same reason.[88]

42 It should be noted that a version of the *BMBF* scheme—*The Queen v Canadian Trustco Mortgage Co*—was held by the Canadian

[87] Hoffmann, *op cit*, p 204.

[88] [2013] UKFTT 73 (TC). Apart from *Mayes* and *Vaccine Research*, the *GAAR Guidance* includes analysis of the following decided cases: (1) *BMBF*, *op cit*,—taxpayer victory in courts; taxpayer victory under the GAAR, see Guidance at D7; (2) *Huitson*—tax scheme litigation never due to retrospective legislation, but in the judicial review, Mr Justice Parker had "significant doubts" that HMRC would have won, see *R (Huitson) v HMRC* [2010] EWHC 97 (Admin), [2010] STC 715; HMRC victory under the GAAR, see at D12; *Astall*, *op cit*,—HMRC victory in the courts; HMRC victory under the GAAR; and *Blumenthal v HMRC* [2012] UKFTT 497 (TC)—HMRC victory in the courts; HMRC victory under the GAAR. In other words, apart from reaching a different result in *Mayes*, the case studies suggest that the UK GAAR will be adept at rushing to the aid of the victor.

Supreme Court not to fall within that country's GAAR.[89] The Canadian GAAR has essentially three hurdles—

(a) There needs to be a tax benefit—this is equivalent to the Jersey GAAR requirement that tax should be avoided or reduced.[90]

(b) The arrangements will fall outside the GAAR is they were "arranged primarily for *bona fide* purposes other than to obtain the tax benefit"—which means, as with the Jersey GAAR, that someone lacking a tax avoidance as one of the main purposes, or entering into bona fide commercial transactions will fall outside the GAAR. In fact, the Canadian GAAR is slightly more generous to taxpayers—if any non-tax reason is the primary purpose for the transactions, then the GAAR will not apply.[91]

(c) Finally, the Canadian GAAR "does not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act . . ."[92] This provision, minus the second use of the word "reasonable", is broadly equivalent to the test for abuse in the UK GAAR—and it is, of course, wholly without an equivalent in the Jersey GAAR.

43 The point from the Jersey GAAR perspective is that in *Canadian Trustco* the Canadian Revenue succeeded in demonstrating points "a" and "b" applied. Were the Comptroller of Taxes to succeed on those points when applying art 134A of the 1961 Law, then the counteraction would be successful. The Canadian Revenue failed to show "misuse" under point "c"—but the Comptroller of Taxes in Jersey would not need to do so.

44 This is not to say that if *BMBF* were fought in Jersey tomorrow that the scheme would fail. It would depend on the finding of fact by the first instance tribunal as to purpose. The leading case on commercial purpose is that of *Brebner v IRC*, where somewhat convoluted transactions were held by the Special Commissioners to have had such a purpose. That finding was upheld by the House of Lords as within the range of reasonable decisions—but it is also clear that they would have upheld the opposite finding had the first instance

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[89] *R v Canadian Trustco Mortgage Co* [2005] 2 SCR 601, applying the Income Tax (Canada) Act 1985, s 245.
[90] Section 245(2), *ibid*.
[91] Section 245(3), *ibid*. The point is that a taxpayer can have more than one main purpose. However, under s 245(3) it is not enough for tax avoidance to be a main purpose for entering transactions, it must be the primary purpose.
[92] Section 245(4), *ibid*.

tribunal ruled in favour of the Revenue.[93] This is the type of uncertainty that the *GAAR Study* found intolerable—although, of course, the question of what is egregious will often depend on whether the tribunal members' own experience leads them to believe that a particular scheme has aspects that are out of the ordinary. There may be many cases where there is no doubt about avoidance motive, but the reasonableness of the tax planning might be a live issue under the UK GAAR.[94] UK GAAR or Jersey GAAR, there will always be uncertainty at the point of application. The point is rather that the Jersey GAAR is a broad spectrum anti-avoidance rule—it may not be targeted so as to guarantee victory against all schemes, but (unlike the UK GAAR) it is not targeted so as to guarantee a Revenue defeat on many avoidance schemes.

45 The Jersey GAAR means that any avoidance schemes in Jersey face uncertainty—and it does so because it has the potential to close the gap between what the Income Tax (Jersey) Law achieves on its ordinary construction and the accurate measurement of income and expenditure. But even though it cannot achieve that goal with total certainty, such uncertainty has distinct advantages from the perspective of the Revenue authority. It is also what Lord Walker said in *Tower MCashback* is an occupational hazard for those who enter into clever tax planning.[95]

*The complicating tendency of the UK GAAR*

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[93] *IRC v Brebner* [1967] 2 AC 18, at 28, *per* Lord Pearce.

[94] To offer an anecdote from a sitting in open court during one recent avoidance case, in *Vocalspruce v HMR*C [2011] UKFTT 36 (TC), the scheme hinged on shares whose articles of association were altered so that the repayment of interest on a loan relationship would be taken to the share premium account. The scheme was undone by the short stay the interest made in the profit and loss account, but the two points of interest here are (1) that there was no doubt that the scheme was an avoidance scheme, but that (2) the Judges (Berner and Nowlam) during the hearing took different views on whether the shares concerned were usual or unusual. The disagreement on the second point was irrelevant to the case and is not recorded in the decision, but would have been a potentially crucial area of uncertainty under the GAAR. Except, of course, that the GAAR was entirely unnecessary to deliver an HMRC victory. The First-tier Tribunal has recently been upheld by the Upper Tribunal, see [2013] UKUT 276 (TCC).

[95] *Tower MCashback*, *op cit*, at 80.

46 The second reason for Jersey having little to learn from the UK GAAR is the tendency of the new British legislation to promote complexity and cost.

47 First, there are flaws in the stated aspiration of the *GAAR Study* that the UK GAAR should lead to a simplification in tax legislation as complex provisions designed to prevent avoidance prove to be unnecessary. One flaw has already been labored in this article—the UK GAAR does not purport to tackle avoidance in general, so for non-egregious avoidance, more traditional statutory methods will be necessary. Furthermore, the idea that the UK GAAR will promote simplicity in substantive taxing legislation is misguided: the UK GAAR is weakest in the face of simple legislation.[96] If an avoidance scheme is put together so as to take advantage of simple legislation (such as in *BMBF*) then such a scheme will most likely be held to be in the central ground of responsible tax planning.[97] By contrast, if the same legislation has been complicated by one or two attempts by the Revenue to counter such schemes, then it is likely that further attempts to circumvent the legislation will be found to be unreasonable. Such a finding will derive not just from the legislature having made clear the economic substance that the provision seeks to address, but also because, as the legislation becomes more complicated, so it will typically require more obviously artificial and contrived transactions to make schemes work. The UK GAAR will find its happiest hunting grounds where legislation is prescriptive.

48 Secondly, there is the bureaucracy created for the UK GAAR. If Jersey were to go down the double-reasonableness route, then the question would arise as to whether to bring into place similar guidance and a similar committee. It is common for Jersey statutes to enact the

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[96] Similar claims have been made at the highest level in respect of the ordinary construction of the Taxes Acts, Lord Hoffmann recommended that if the Revenue kept the legislation simple, the courts would ensure that sensible results will follow, although this claim was made at the same time he was party to the *BMBF* decision, where it was the simplicity of the principles that were the Revenue's undoing. See, Hoffmann, *op cit*, p 206—

> "To understand the general economic effect of transactions which one intends to tax is usually relatively easy. To understand the intricate and multifarious forms which some of them can take is often much more difficult. But the Revenue appear to have no faith in the ability or willingness of the courts to recognise the economic effect beneath the varied forms and often prefer to legislate by reference to form rather than substance."

[97] See the analysis in the *GAAR Guidance*, *op cit*, D7.

same general principles as their UK equivalents but to miss out the explanatory detail. An example is the Matrimonial Causes (Jersey) Law 1949—it follows the UK's Matrimonial Causes Act 1973 in making "fairness in all the circumstances" the guiding principle for ordering ancillary relief, but does not reproduce the long list of factors to be taken into account found in s 25(2) of the 1973 Act. This has not led to any difference in approach.[98] But such an approach would be harder to take with the United Kingdom's *GAAR Guidance* and any jurisprudence that were to emerge on the application of the GAAR. Jersey and the United Kingdom's tax legislation is too different in too many places for Jersey to do anything other than to find its way in many areas of tax. If the purpose of the UK GAAR is to deliver increased certainty to those who implement complex tax planning, and if that purpose requires *GAAR Guidance* and a GAAR Advisory Panel, then the appropriateness of the United Kingdom's approach to a small jurisdiction must be very much doubted.

[98] *O'H v B* 2007 JLR *N* [29].

## Conclusion

49 What this article has sought to show is that, from the perspective of the frequent criticisms of the role of Jersey companies in UK tax avoidance schemes, that the new UK GAAR will assist greatly. Up to now, it has been very easy for those in the United Kingdom to make a moral criticism of Jersey (and other offshore jurisdictions) for being involved in what were essentially British schemes, as if those outside the United Kingdom should refuse on moral grounds to work with those in Britain to do something that was perfectly legal in Britain. By enacting a level of "egregiousness" above which schemes must fail, Jersey companies are released from such criticism. The morality of the scheme, as defined in the UK GAAR, is now very much a matter for the expert UK tax planners, and those outside Britain can be involved in transactions in the secure knowledge that the egregiousness will have been addressed. This is not to say that UK tax planners will always come to the right conclusion as to whether the UK GAAR will apply or not—but from an outsider's perspective this is no different from any other issue of UK tax law. That has always been the approach for Jersey banks, trust companies and the like, it is just now that such an approach cannot be said to be amoral, for the appropriate level of morality is now wrapped up in the law.

50 The second conclusion in this article is that the Jersey GAAR is simpler and broader than the UK GAAR. It will apply to a larger number of schemes, and have a broader deterrent effect against those who might be tempted to adapt UK schemes to Jersey tax law. The Jersey GAAR comes without a bloated bureaucracy of lengthy *GAAR Guidance* and a GAAR Advisory Panel before a case comes anywhere near the tax tribunal. It is in short, much more appropriate to Jersey, and it is difficult to see what in the UK GAAR ought to be imported. Michael Meacher MP, proposing the introduction of a GAAR into the United Kingdom back in 2009, commented that such legislation existed in Jersey and seemed "to be working perfectly well"[99]—a comparison with the new UK GAAR shows it to be very much at the strong-end of such provisions.

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[99] *Hansard*, *op cit*, col. 850.